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DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM MOON, C.J., JOINS

Although I find the words used by Wallace in this case reprehensible, I am mindful of my duty to apply the law in a dispassionate manner. Therefore, I must respectfully dissent. The majority concludes, under the theories of express and implied actual authority, that because the handbook expressly gave Wallace authority to perform various duties for the basketball team, he was an agent of UH. In applying the theory of respondeat superior, the majority then concludes that Wallace was acting within the scope of authority based on Restatement (Second) of Agency § 228 (1958) [hereinafter, "Restatement"]. I disagree with the majority's conclusions, inasmuch as (1) the record does not support a reasonable belief by Wallace that UH desired him, as student manager, to control the crowd at basketball games, and (2) yelling racial slurs at White was not the kind of conduct Wallace was employed to perform.

1. Wallace was not acting as an agent of UH when he yelled racial slurs at a spectator.

The majority correctly cites to the following law regarding agency:

An agency relationship may be created through actual or apparent authority. Actual authority exists "only if there has been a manifestation by the principal to the agent that the agent may act on his account and consent by the agent to so act, and may be created by express agreement or implied from the conduct of the parties or surrounding circumstances. Express actual authority requires an oral or written agreement between the parties that the principal has delegated authority that the agent has accepted and that authorizes the agent to do certain acts. Implied actual authority "may arise as a necessary or reasonable implication required to effectuate some other authority expressly conferred by the principal."

Cho Mark Oriental Food, Ltd. v. K & K Intern., 73 Haw. 509, 515-16, 836 P.2d 1057, 1061-62 (1992) (citations and brackets

*** FOR PUBLICATION ***

omitted). The majority, however, leaves out the following significant and germane language regarding implied actual authority: Where implied actual authority is asserted, "the focus is on the agent's understanding of his authority inasmuch as the relevant inquiry is 'whether the agent reasonably believes, because of the conduct of the principal (including acquiescence) communicated directly or indirectly to him, that the principal desired him so to act.'" Id.

In this case, the majority concludes that because the handbook "expressly gave Wallace authority to perform various duties for the basketball team[,] he was an agent of UH. It is undisputed, however, that UH did not give Wallace express actual authority to control the crowd at basketball games, as neither the language in the handbook nor any oral agreement provided such authority. As Wallace was not given express actual authority, UH can only be held liable for Wallace's inappropriate racial slurs if Wallace had the implied actual authority to control the crowd at basketball games. Whether this authority existed requires focusing on Wallace's reasonable understanding of his authority - something that the majority fails to address.

In focusing on Wallace's understanding of his authority, there is no possibility that he reasonably believed that UH desired him to control the crowd at basketball games. Wallace's "job description" as a student manager provided that he was to do the following during regular season¹:

¹ Regular season, according to Wallace's job description, was from October 15th - March 14th. This incident occurred during regular season on February 18, 1995. During pre-season, which was from August - October 14th, Wallace's job description provided him with the following duties:

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*** FOR PUBLICATION ***

1. Issue practice uniforms and other gear for season practices
2. Keep a log of all issued equipment
3. Sweep all floors two hours before practice time
4. Be ready to assist players one hour before practice
5. Set-up the arena or the gym with water and other equipment
6. Work with various drills during practice
7. Keep all players' equipment in proper working order during practice
8. Keep the water filled and ready to be served
9. Keep the floors dry of sweat and other water
10. Keep the locker room clean throughout the year
11. Set-up gym for the visiting teams
12. Work with all visiting teams during their practices
13. Help the visiting teams' managers with their laundry
14. Set-up locker rooms in the arena on game day
15. Set-up equipment for both teams on game day
16. Work on the bench during the game
17. Keep the players' equipment in working order at half time
18. Give the players water and oranges at half time
19. Give the visiting team their copy of the game (VHS)
20. Pack the travel bags for the players containing their equipment for road trips
21. Travel with the team on road trips to other schools, usually six days
22. Make all wake-up calls
23. Put away all equipment upon arrival in Honolulu and prepare it for the next practice
24. Work with the equipment room manager on designated tasks

Wallace's express authority to "[w]ork on the bench during the game" does not require, as a necessary and reasonable implication, that Wallace control the crowd at basketball games.

¹(...continued)

1. Basketball committee golf tournament - help with set-up and work different stations
2. Issue equipment for preseason workouts, including running shoes
3. Keep a record of all equipment
4. Sweep floors for workouts, one hour before start time
5. Prepare water and essential equipment for workouts
6. Be present at every practice
7. Be present at least one hour before and one hour after workouts

Any express authority to assist with the golf fundraiser, and consequently, any implied authority to interact with the public at the fundraiser, was limited to pre-season. The record does not support a reasonable inference of any crossover of this authority into regular season game time duties to control the crowd at basketball games.

*** FOR PUBLICATION ***

It is clear, from these job descriptions, that Wallace was to focus his attention "on the bench" at the players, in making sure their technical needs were met. It is not reasonable to believe that this extends to getting "off the bench" to control the conduct of the crowd. Furthermore, it is apparent that Wallace understood that authority to control the crowd lay outside his authority, inasmuch as he initially notified the arena manager so that the arena manager could control White's comments. As the record is not supportive of any reasonable belief by Wallace that UH desired him to control the crowd at basketball games, Wallace did not have implied actual authority to do so. Accordingly, I would hold that Wallace was not an agent of UH at the time he yelled racial slurs at White.

2. Wallace was not acting within the scope of authority when he yelled racial slurs at a spectator.

In applying the theory of respondeat superior to the present case, the majority cites to Restatement § 228, which provides in relevant part:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

The majority then concludes that Wallace was acting within the scope of authority because his action of yelling racial slurs at

*** FOR PUBLICATION ***

a spectator was the kind he was authorized to perform.² For support, the majority points to the handbook and concludes that UH envisioned public interaction during basketball games. I respectfully disagree, inasmuch as Wallace's yelling racial slurs was a considerable departure from the kind of conduct that UH authorized him to perform.

Restatement § 229, which defines when conduct is of the kind within the scope of employment, generally provides that "[t]o be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Thus, "a servant is authorized to do anything which is reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work." Restatement § 229 comment a; see also Restatement § 230 comment c ("Conduct is not within the scope of employment if it has no connection with the act which the employee is required to perform."); Osborne v. Lyles, 587 N.E.2d 825, 829 (Ohio 1992) ("In general, 'an intentional and wilful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefor.'") (Citation omitted.).

With respect to unauthorized incidental conduct, Restatement § 229 provides:

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of

² The majority's conclusion that Wallace's yelling racial slurs occurred within authorized time and space limits is not addressed, inasmuch as there is no dispute that Wallace, as a student manager, was required to attend basketball games and that this incident occurred during a basketball game.

*** FOR PUBLICATION ***

employment, the following matters of fact are to be considered:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

Comments to Restatement § 229 indicate that "[a]lthough an act is a means of accomplishing an authorized result, it may be done in so outrageous or whimsical a manner that it is not within the scope of employment." Restatement § 229 comment b; see also Restatement § 235 comment c ("The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business."); Restatement § 245 comment f ("The fact that the servant acts in an outrageous manner or inflicts a punishment out of all proportion to the necessities of his master's business is evidence indicating that the servant has departed from the scope of employment in performing the act."); Grozdanich v. Leisure Hills Health Center, Inc., 25 F. Supp. 2d 953, 979 (D. Minn. 1998) ("Naturally, the more outrageous the employee's tortious act should be, the less likely it could be described as foreseeable, and the less likely that the employer could be required to assume responsibility for the act, as a general risk of the employer's business."); Luna v. Meinke, 844 F. Supp. 1284,

*** FOR PUBLICATION ***

1287-88 (N.D. Ill. 1994) ("An agent . . . is deemed to have acted outside the scope of his or her employment if the employee commits certain acts 'that could not possibly be interpreted as the merely overzealous or ill-judged performance of his duties as agent.'" (Citation omitted.); Sawyer v. Humphries, 587 A.2d 467, 471 (Md. 1991) ("'[W]here the conduct of the servant is unprovoked, highly unusual, and quite outrageous,' courts tend to hold 'that this in itself is sufficient to indicate that the motive was a purely personal one' and the conduct outside the scope of employment.") (Citations omitted.); Bryant v. Brannen, 446 N.W.2d 847, 855 (Mich. Ct. App. 1989) (holding that a building manager's outrageous conduct in shooting a tenant was not within the scope of employment, despite the manager's authority to protect the building); Bates v. Doria, 502 N.E.2d 454, 457 (Ill. App. Ct. 1986) (holding that a sheriff's outrageous conduct of shooting and raping the plaintiff was outside the scope of employment).

In Atlanta Baseball Co. v. Lawrence, 144 S.E. 351, 352 (Ga. Ct. App. 1928), the court was faced with whether a professional baseball company could be held liable under the theory of respondeat superior for the actions of a pitcher it employed. In that case, several spectators began heckling the pitcher at a game, whom they felt was responsible for the poor showing of the team. Id. at 351. One of the spectators in particular said, "Give us another pitcher." Id. Thereafter, the pitcher left the field during the game and proceeded to attack the spectator. Id. In analyzing the issue of respondeat superior, the court stated,

The conduct of [the pitcher] in leaving his place upon the

*** FOR PUBLICATION ***

grounds and coming into the grandstand, and assaulting the plaintiff, was not within the scope of his employment, nor in the prosecution of his master's business, but was his own personal affair in resenting a real or fancied insult. "If a servant steps aside from his master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be held liable, but the master is not liable."

Id. at 352 (citations omitted). The court noted the unusualness of such a sudden outburst and concluded that the baseball company could not be held liable under the theory of respondeat superior. Id.

Based on the considerations in Restatement § 229, which must be read in conjunction with Restatement § 228, as well as the outrageousness of such action, Wallace's yelling racial slurs was not the kind of conduct that UH authorized him to perform.³ As previously discussed, Wallace was not authorized, either expressly or impliedly, to control the crowd at basketball games. Instead, this authority was entrusted to the arena manager. As such, Wallace's conduct in yelling racial slurs at White, to vent his own anger, was not incidental to or even remotely connected to his duties as student manager. Even assuming that UH contemplated some kind of contact with spectators, Wallace's conduct, similar to that in Atlanta Baseball Co., was a considerable departure from any usual method of engaging in contact with spectators or quieting the crowd. After hearing White's heckling for most of the game, Wallace got "off the bench," "lost it," and yelled, "Shut up you fucking nigger! I'm tired of hearing your shit! Shut your mouth or I'll kick your

³ Under the considerations outlined in Restatement § 229, the hypothetical presented by the majority in footnote 29 is not germane.

***** FOR PUBLICATION *****

ass!" It is not common, nor would it be expected, that a student manager would yell "Shut up you fucking nigger!" to a spectator of African American descent in an attempt to control a crowd. Accordingly, I would hold that Wallace's conduct in yelling racial slurs was not of the kind he was authorized to perform. For these reasons, I respectfully dissent.