4035 SERVANT: SCOPE OF EMPLOYMENT

Question _____ inquires whether, at the times material hereto, _____ was acting within the scope of his or her employment as a servant of _____.

This question, in effect, asks you to determine whether, at the times material hereto, _____ was within the field of action of his or her employment or whether he or she deviated or departed therefrom, for personal or other reasons.

A servant is within the scope of his or her employment when he or she is performing work or rendering services he or she was engaged to perform and render within the time and space limits of his or her authority and is actuated by a purpose to serve his or her master in doing what he or she is doing. He or she is within the scope of his or her employment when he or she is performing work or rendering services in obedience to the express orders or direction of his or her master, or doing that which is warranted within the terms of his or her express or implied authority, considering the nature of the services required, the instructions which he or she has received, and the circumstances under which his or her work is being done or the services are being rendered.

A servant is outside the scope of employment when he or she deviates or steps aside from the prosecution of his or her master's business for the purpose of doing an act or rendering a service intended to accomplish an independent purpose of his or her own, or for some other reason or purpose, not related to the business of the master.

Such deviation or stepping aside must be sufficient to amount to a departure from the master's services for purposes entirely personal to him or her or for some person other than the master.

Such deviation or stepping aside from the master's business may be momentary and slight, measured in terms of space of time, but if it involves a change of mental attitude or purpose in serving his or her personal interests, or the interests of another, instead of his or her master's, his or her conduct falls outside the scope of his or her employment.

You will carefully consider and weigh all the credible evidence and the reasonable inferences from the evidence bearing on this inquiry, and, if you are satisfied that the servant _____ was within the scope of his or her employment, as here defined for you, you will answer the question "yes"; otherwise you will answer it "no."

COMMENT

This instruction and comment were published in 1966. The comment was updated in 1997, 2013, 2016, and 2020.

The Restatement of the Law on Agency and the cases cited do not contain a very clear or satisfactory definition of scope of employment. This instruction has been prepared with a view of incorporating the essential ingredients of the definitions of scope of employment from the Restatement and the cases.

Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941); Mittleman v. Nash Sales, Inc., 202 Wis. 577, 232 N.W. 527 (1930); Geldnick v. Burg, 202 Wis. 209, 231 N.W. 624 (1930); Johnson v. Holmen Canning Co., 191 Wis. 457, 211 N.W. 157 (1926); Eckel v. Richter, 191 Wis. 409, 211 N.W. 158 (1926); Kleeman v. Chicago & N.W.R. Co., 186 Wis. 482, 202 N.W. 295 (1925); Miller v. Epstein, 185 Wis. 112, 200 N.W. 645 (1924); Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N.W. 841 (1921); Seidl v. Knop, 174 Wis. 397, 182 N.W. 980 (1921); Gewanski v. Ellsworth, 166 Wis. 250, 164 N.W. 996 (1917); Firemen's Fund Ins. Co. v. Schrieber, 150 Wis. 42, 135 N.W. 507 (1912); Steffen v. McNaughton, 142 Wis. 49, 124 N.W. 1016 (1910); Sample v. United States, 178 Fed. Supp. 259 (1959); 12 Callaghan's Wis. Digest Master and Servant §§ 442-453 (1950); Restatement, second, Agency §§ 228-237 (1958); Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

Normally, the scope of employment issue is presented to the jury because it entails factual questions. Desotelle v. Continental Casualty Co., 136 Wis.2d 13, 26-28, 400 N.W.2d 524 (Ct. App. 1986). But see DeRuyter v. Wisconsin Electric Power Co., 200 Wis.2d 349, 546 N.W. 2d 534, (Ct. App. 1995) and Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc., 2013 WI App 124, 351 Wis.2d 170, 840 N.W.2d 132.

Under the doctrine of respondeat superior, employers can be held vicariously liable for the negligent acts of their employees while they are acting within the scope of their employment. Shannon v. City of Milwaukee, 94 Wis.2d 364, 370, 289 N.W. 2d 564 (1980). The court of appeals in DeRuyter said this doctrine is a "bedrock of American tort law."

The touchstone of scope of employment issues is employer control over the employee. See Olsen v. Moore, 56 Wis.2d 340, 353-54, 202 N.W.2d 236 (1972). This employer control test is firmly entrenched in Wisconsin law. The general maxim is:
Where an employee works for another at a given place of employment, and lives at home or boards himself, it is the business of the employee to present himself at the place of employment, and relation of master and servant does not exist while he is going between his home and place of employment. Geldnich v. Burg, 202 Wis.2d 209, 231 N.W.2d 624 (1930). Thus, only when the employer exercises control over the method or route of the employee's travel to or from work can the employee be said to be acting within his or her employment. See Kamp v. Curtis, 46 Wis.2d 423, 175 N.W. 2d 267 (1970).

Special Circumstances. In DeRuyter, the plaintiff contended that "special circumstances" can exist that except an employee from the employer control rule. The plaintiff pointed to other jurisdictions that have adopted a "special mission" exception to the general rule that an employee is not acting within the scope of employment while traveling to and from work. Under this exception, a special mission exists when an employee is not simply traveling from his home to his normal place of employment, or returning from his normal place of employment to his home for his own purposes, but is traveling from his home or returning to it on a special errand either as part of his regular duties or at the specific order or request of his employer. In DeRuyter, the court said that the law in Wisconsin is clear that the mere payment of an employee's travel costs vests no right of control with the employer, unless the employer exercises such control or retains the right to control the employee's route or method of travel. Also, the fact that the employer provided an employee with a map depicting the layout of a training center and provided general directions for employees unfamiliar with its location did not establish that the employer controlled the route. Further, the fact that the employer has a "fitness for duty policy" which prohibits employees from consuming or being under the influence of alcohol during the four hours preceding their duty time was insufficient to trigger an employer's liability under respondeat superior.

Wis. Stat. § 102.03(1)(c) (1963) enlarges scope of employment to include the performance of services "growing out of and incidental to" a servant's employment. It is not considered that this expanded definition of scope of employment would apply in cases other than worker compensation cases. This paragraph also provides that an employee injured on the premises of his or her employer while going to and from his or her employment is performing service incidental to his or her employment. J. F. McNamara Corp. v. Industrial Comm'n, 24 Wis.2d 300, 128 N.W.2d 635 (1964), interpreted this paragraph so that the term "premises of his or her employer" includes the premises of any other person on whose premises service is being performed and also that portion of premises controlled by the employer (even though there may be a tenant in possession) over which his or her employees travel in the ordinary and usual way.

"Personal comfort doctrine" as it related to Wis. Stat. § 102.03(1)(f): First recognized in Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N.W. 998 (1915), the personal comfort doctrine is devised to:

> Cover the situation where an employee is injured while taking a brief pause from his labors to minister to the various necessities of life. Although technically the employee

> is performing no services for his employer in the sense that his actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form or better work from a happy and rested workman, and on the theory that such a minor deviation does not take the employee out of his employment. Marmolejo v. DILHR, 92 Wis. 2d 674, 678, 285 N.W.2d 650 (1979) (quoting Comment, Workmen's Compensation: The Personal Comfort Doctrine, 1960 WIS.L.REV.91, 91).

See also the unpublished decision (three-judge) Brown v. Muskego Norway School Dist. Group Health Plan, 389 Wis.2d 377, 936 N.W.2d 418 (Table), 2019 WI App 65.