“IN THE SCOPE OF EMPLOYMENT / DUTIES” – WHAT EXACTLY DOES THAT MEAN?

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Attorney Remzy D. Bitar
rbitar@ammr.net

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THE LAW OFFICES OF
ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C.

720 N. East Ave., Waukesha, WI 53187
(262) 548-1340

I. WHAT DOES "SCOPE OF EMPLOYMENT" MEAN?

A. **"Scope of employment":** conduct "of the kind [a servant] is employed to perform," occurring "substantially within the authorized time and space limits," and "actuated, at least in part, by a purpose to serve the master." *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998).

B. **Genesis in Respondeat Superior:** The concept of "scope of employment" has its genesis in the doctrine of *respondeat superior*. *See Cameron v. City of Milwaukee*, 102 Wis. 2d 448, 456, 307 N.W.2d 164 (1981)

1. The doctrine of *respondeat superior* provides that an employee's conduct is imputed to the employer when the employee is acting within the scope of his or her employment. This makes the employer vicariously liable based on the agency relationship even where there is no wrongful conduct by the employer. *James Cape & Sons Co. ex rel. Polsky v. Streu Const. Co*., 2009 WI App 144, ¶ 1, 321 Wis. 2d 522, 525, 775 N.W.2d 277.

2. These common-law rules date back for centuries. In *Zulkee v. Wing*, 20 Wis. 429, 431-432 (1866), our supreme court explained: "[a]s between the master and a stranger, the servant represents the master, and the master is responsible; but as between the master and the servant who has committed the wrong or violated his duty no less to the master than to the stranger, no such rule prevails. A servant is directly liable to his [or her] master for any damage occasioned by his [or her] negligence or misconduct, whether such damage be direct to the property of the master, or arise from the compensation which the master has been obliged to make to third persons for injuries sustained by them.… It would be strange if the servant, in answer to such an action, could say: 'Respondeat superior. I was your servant at the time of the injury; my act was your act, my negligence your negligence; and therefore you cannot recover.'"

3. Courts impose this type of liability only where the principal has control or the right to control the physical conduct of the agent such that a master/servant relationship exists. *See Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶4, 273 Wis. 2d 106, 682 N.W.2d 328. See also *Brown v. Acuity*, 2013 WI 60, ¶ 28, 348 Wis. 2d 603, 833 N.W.2d 96 (the "'touchstone of scope-of-employment issues ... is employer control over the employee.'") (quoted source omitted).

4. **The Test of Control:** The "test" is whether the employer has a right to control the details of the work. Four secondary factors are considered: (1) direct evidence of the exercise of the right of control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the employment relationship. *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 177, 212 N.W.2d 97 (1973).

C. Public policy justifications:

1. The policy is to place liability on the employer because, in the promotion of its work, it has control over the mode and manner of its employees' performance and therefore ought to be liable for injuries caused by its employees' conduct. *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 653, 121 N.W.2d 249 (1963).

2. Providing the injured party with an alternate source for recovery. This liability provides injured parties an alternative, and in some cases a more lucrative, source from which to recover damages. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 126, 403 N.W.2d 747 (1987).

3. These policy justifications also spring from centuries of common law flowing from the concept of in *pari delicto*. See *Evans v. Cameron*, 121 Wis.2d 421, 426-427, 360 N.W.2d 25 (1985) ("*pari delicto potior est conditio defendentis*" means that when the parties are in equal fault, the defendant's position is stronger. The public policy reason is when parties have very different degrees of guilt due to oppression, imposition, hardship, undue influence, or great inequality of condition or age, the public interest may necessitate that the court decide the case..).

D. Worker's Compensation:

1. In general, an employee is defined as any person "in the service of another under any contract of hire, express or implied ... if employed with the knowledge, actual or constructive, of the employer...." WIS. STAT. § 102.07(4)(a).

2. Under Wis. Stat. an employee is covered when performing service growing out of and incidental to her employment.

3. As to matters involving travel, trips and the like, worker's compensation coverage will occur where the employee is required to travel for her job function and would be covered at all times of the trip, *except when engaged in a deviation for a private or personal purpose*. § 102.03(1)(f). Further, "acts reasonably necessary for living or incidental thereto" like eating, sleeping, and reasonable recreation are not considered "deviations" such that coverage is defeated. See *City of Phillips v. DILHR*, 56 Wis. 2d 569 (1972). There is a presumption that a travelling employee performs services incidental to employment at all times on a trip. The burden of proving a personal deviation on the trip is on the party asserting the deviation. Recreational activities may be considered a usual and proper part of the trip but do not always fit the presumption. See, e.g., *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 579 N.W.2d 668 (1998) (a ski injury of a traveling employee was compensable); *Wisconsin Electric Power Co. v. LIRC*, 226 Wis. 2d 778, 595 N.W.2d 23 (1999) (Subsection (1)(f) does not establish a bright line rule that if a travelling employee stays over past the conclusion of a business part of a trip, there is a personal deviation. An employee is not required to seek immediate seclusion in a hotel and

to remain away from human beings at the risk of being charged with deviating from employment.).

E. **"Color of Law" Different:** A finding that a public employee acted under "color of law" for purposes of 42 U.S.C. § 1983 does not automatically establish that the employee acted within the "scope of employment" under the Wisconsin indemnity statute. The "under color of law" category is broader than the "scope of employment" category. *Graham v. Sauk Prairie Police Comm.*, 915 F.2d 1085, 1093 (7th Cir. 1990).

II. HOW DO COURTS DETERMINE IF AN EMPLOYEE IS ACTING IN THE SCOPE OF THEIR EMPLOYMENT?

A. Legal Standards:

1. The legal standards governing scope of employment have been given expansive reading by the courts including when interpreting the public employee indemnification statute, Wis. Stat. § 895.46(1).

2. When scope is the issue, the focus is on the employee's intent. *Olson v. Connerly*, 156 Wis. 2d 488, 498-99, 457 N.W.2d 479 (1990).

3. Wisconsin follows the Second Restatement of Agency with respect to this question. It uses the following factors to assess scope:

   (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 unexpectable 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. *Olson*, 156 Wis.2d at 498-499 n.10 (citing Restatement (Second) of Agency § 228 (1958)).

4. **Employee's Mixed Purposes:** "There is no requirement that serving the employer must be the employee's only purpose or even the employee's primary purpose." *Id*.

5. More recent interpretations even broader: "An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Javier v. City of Milwaukee*, 670 F.3d 823, 831 n. 6 (7th Cir. 2012) (citing Restatement (Third) of Agency § 7.07(2) (2006)).

6. An employee does not act within the scope of employment when the employee's conduct 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." *Olson*, 457 N.W.2d at 483.

7. Where an employee "fully steps aside from conducting the employer's business to procure a predominantly personal benefit, the conduct falls outside the scope of employment." *Block v. Gomez*, 549 N.W.2d 783, 788 (Wis. Ct. App. 1996).

B. Bottom Line – "Scope of Employment" *Can be* Interpreted Broadly:

1. **Employee's intent:** courts consider the employee's intent when determining whether his or her conduct was within the scope of employment. *Olson*, 457 N.W.2d at 498-499.

2. **Motivated in Part to Serve:** An employee acts within the scope of employment if at least partially motivated to serve the employer. *Id.* So long as the employee was not entirely motivated by his or her own purposes, but intended, at least in part, to serve his or her employer, the employee's conduct is imputed to the employer. *Id*. at 499-500.

3. **Even if improper:** It includes those acts which are "so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.'" *Cameron*, 307 N.W.2d at 168–69.

4. **Even if disregard's employer's instructions:** "A master is liable for the tortious act of the servant done in the scope of his employment, though the master did not sanction it, or even though he forbade it." *Johnston v. Chicago, St. P., M. & O. R Co.*, 130 Wis. 492, 499 (1097). "[C]onduct is not outside the scope of employment merely because an employee disregards the employer's instructions." Restatement (Third) of Agency § 7.07 cmt. c (2006). "An act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency § 230 (1958).

5. **Even if intentional:** An intentional act producing harm is not necessarily outside the scope of employment. See, e.g., *Bergman v. Hendrickson*, 106 Wis. 434, 82 N.W. 304 (1900); *Craker v. C.& N.W. Ry. Co*., 36 Wis. 657 (1875).

6. **Even if criminal:** "An act may be within the scope of employment although consciously criminal or tortious." Restatement (Second) of Agency § 231 (1958).

7. **Criminal, Excessive and Outside Authority:** Thus, an employee's conduct could be criminal, excessive, and outside his authority and still be within the scope of his employment. *Javier*, 670 F.3d at 832.

C. Often a Jury Question Concerning Employee's Intent and Purpose:

WIS J I-CIVIL 4035 –

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.

III. HOW DOES SCOPE OF EMPLOYMENT INTERPLAY WITH INDEMNIFICATION OF MUNICIPAL EMPLOYEES?

A. Pursuant to Wis. Stat § 895.46(1)(a), municipalities are obligated to pay any judgment against an employee stemming from acts performed while carrying out their duties and within the scope of their employment, and they must also provide such employees with legal counsel and/or reasonable defense fees and costs.

B. Though often referred to as an indemnity statute, by its terms § 895.46 requires the local government to directly satisfy a judgment against its employee if the "scope of employment" condition is met.

C. History

1. In its original form, the statute required the State and subordinate local governments to pay judgments assessed against their employees if the employee was sued for acts in his official capacity and was found to have acted in good faith. *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1091 (7th Cir.1990). The "good faith" and "official capacity" requirements were later seen as providing too little protection for public employees. *Id*.

2. The "good faith" and "official capacity" requirements were later seen as providing too little protection for public employees. Wisconsin amended the statute in 1973, borrowing the scope-of-employment concept from the common law.

IV. WHAT DOES § 895.46(1)(A) MEAN AND WHAT ARE ITS REQUIREMENTS?

A. Purpose is to shield employees from monetary loss in tort suits. See *Ware v. Percy*, 468 F. Supp. 1266 (1979).

B. In practical terms, most public employee actions occur in the scope of their employment for which they would be entitled to indemnification for any judgment against them, including claims for: property damage; decision-making on land use, alcohol licensing, permits; public records and public meetings; motor vehicle accidents; operating municipal equipment, machinery and property; civil rights claims; and most police actions.

C. Once the determination is made that the official or employee was acting in the scope of employment, indemnification may apply even if the act taken is outside what the employer may have desired. *Graham*, 915 F.2d. 1085.

D. The employee must give notice of a claim against them: failure of an employee or officer to give notice to the municipality of an action commenced against them as soon as reasonably possible can be a bar to recovery of the costs of defending the action by the employee or officer.

E. The municipality must provide legal counsel or pay reasonable defense fees and costs.

F. Claim are often made (indirectly) under § 895.46 alleging the statute that requires the local unit of government to pay judgments imposed against their employees for acts committed within the scope of their employment.

G. **Defense and indemnification to the extent that applicable insurance does not provide it:** The duty to indemnify applies to any judgment amount which exceeds applicable insurance. An insurer cannot recover against a governmental unit after paying a judgment against a public employee which fell within insurance coverage limits, because the right of recovery from the employer is limited to that portion of a judgment in excess of insurance coverage. *Horace Mann Ins. Co. v. Wauwatosa Bd. Of Ed*., 88 Wis.2d 385, 276 N.W.2d 761 (1979).

H. In a litigated matter, the municipal employer and/or insurer may seek a ruling that an employee's actions were outside the scope of his employment, which means that they do not need to indemnify the employee as would otherwise be required pursuant to Wisconsin law. See Wis. Stat. § 895.46(1). For the insurer, in particular, it means that the employee would not qualify as an "insured" under the policy they issued to the municipality, and thus the employee would not be entitled to coverage.

I. The courts have cautioned against deciding whether an officer acted within the scope of employment before the facts bearing on the issue have been determined. For example, the Seventh Circuit has "warned repeatedly against trying to resolve indemnity before liability." *Doe v. City of Chicago*, 360 F.3d 667, 672–73 (7th Cir.2004).

J. **Punitive Damages:** Indemnification may also extend to cases where punitive damages are assessed. The Seventh Circuit has interpreted Wis. Stat. § 846.95 as authorizing the payment of punitive damages by a municipality when it is required to indemnify its

employee. *Graham*, 915 F.2d at 1088-1093 (discussing the court's reasoning for finding that Wis. Stat. § 895.46 requires municipalities to indemnify even punitive damages).

V. HOW DO COURTS CONSIDER ISSUES INVOLVING SCOPE OF EMPLOYMENT AND THE INDEMNIFICATION STATUTE?

A. MOTOR VEHICLE ISSUES AND ACCIDENTS

1. *DeRuyter v. Wis. Elec. Power Co.*, 200 Wis.2d 349, 546 N.W.2d 534 (Ct.App.1996):

a. In that case, an individual was driving from his home to a vocational training session at his employer's central training center. While traveling, he lost control of his vehicle and caused a tanker filled with jet fuel to jackknife, roll down an embankment, and burst into flames, killing its driver.

b. Two civil actions were commenced after the accident, and both alleged that the driver was acting within the scope of his employment with Wisconsin Electric when the accident occurred. The allegations were advanced in order to render Wisconsin Electric vicariously liable through the doctrine of respondeat superior.

c. The court of appeals, in concluding that the driver was not acting within the scope of his employment, noted that the "touchstone of scope-of-employment issues ... is employer control over the employee." *Id*. at 360.

d. It set forth as a "general maxim" in commuter cases that 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 the relation of master and servant does not exist while he is going between his home and place of employment." *Id*. at 361.

e. Therefore, under those circumstances, 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." *Id*.

f. The *DeRuyter* court focused on employer control in the commuting context because "without such control, the employee is not actuated by a purpose to serve the employer ... but is solely promoting the employee's 'own convenience.'" *Id*. at 361–362.

2. *Brown v. Acuity*, 2013 WI 60, 348 Wis. 2d 603, 833 N.W.2d 96:

a. A volunteer firefighter ran a red light responding to a fire station's emergency call and struck another vehicle. The firefighter was responding to a dispatch in his personal vehicle. The vehicle was equipped with emergency lights, but no

siren. The firefighter looked for vehicles approaching as he entered the intersection. He did not see any and proceeded to the middle of the intersection. He looked again and saw a car approaching. He waited until that car pulled over. The firefighter then pulled across the intersection and struck the plaintiff's car.

b. The plaintiffs argued the volunteer firefighter was not acting within the scope of his employment as a firefighter while he was responding to the station in his personally owned vehicle (POV) and thus was not entitled to public officer immunity under §893.80(4)

c. The circuit court, Court of Appeals and Supreme Court all found that the firefighter was acting within the scope of his employment while in route to the firehouse.

d. The plaintiffs' first argument was essentially that a volunteer firefighter responding to the fire station for an alarm is nothing more than an employee commuting to work. They pointed to a line of cases that said commuters are not employees until they arrive at work. From this they argued that a firefighter driving to the fire station is outside the scope of employment and not entitled to immunity protection.

e. The Wisconsin Supreme Court distinguished the commuter cases finding that a firefighter responding to the fire station is within the scope of employment as soon as he/she receives the alarm and makes the decision to respond. The court pointed to the fact that unlike a commuter, once a firefighter starts responding to an alarm he is subject to the orders and commands of his superiors. The court concluded that volunteer firefighters responding to alarms are acting within the scope of their employment for purposes of §893.80(4).

B. LAW ENFORCEMENT

1. *Javier v. City of Milwaukee,* 670 F.3d 823 (7th Cir. 2012):

a. In the context of police officer misconduct, the Seventh Circuit has held that "a police officer can grossly exceed his authority to use force and still be found to have acted within the scope of his employment," even when, while off-duty, shooting more than a dozen bullets at an unarmed suspect after merely being tailgated by the suspect.

b. The Javier case involved excessive use-of-force and loss-of-life claims against an off-duty Milwaukee Police Officer for shooting the decedent 8 times (19 total shots were fired) during a late-night encounter.

c. An inquest jury found the officer's actions were justified. Some evidence revealed the off-duty police gave officers responsibilities under "always on

duty" type rules and that in this incident the suspect tried to run the officer over and point a gun at the officer. The District Attorney, however, charged the officer with first degree intentional homicide. The City also had other evidence showing the inconsistencies in the officer's version of events. On the day of his arraignment, the officer committed suicide.

d. The decedent's family brought a § 1983 suit. The jury found the officer used excessive force, awarded over a million in damages and found that the officer was not acting within the scope of his employment. The plaintiffs asked for a new trial due to instructional error on the City's liability. The Court agreed, finding that the jury should have been instructed "that Glover's conduct could be criminal, excessive, and outside his authority and still be within the scope of his employment." *Id.* at 832. The court remanded for retrial on § 895.46 claims.

2. *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085 (7th Cir.1990):

a. This case involved a case where a DNR conservation warden informed an off-duty, patrolling officer that a suspect was carrying controlled substances in his vehicle. The officer went to the suspect's home, found him in a truck in the driveway, ordered him out, placed him lying down on the driveway, handcuffed him and then drew his service revolver and fired two shots into the suspect's head, killing him. 915 F.2d at 1087-1088.

b. Even if the officer's use of deadly force had been improper and unconnected to any department objective, the Seventh Circuit held that "the only reasonable inferences that can be drawn from the undisputed facts lead to the conclusion that Mueller was acting within the scope of his employment when he shot Graham." *Id*. at 1095-1096. As the Seventh Circuit explained:

> However, the facts do not suggest any private connection between Mueller and Graham. Likewise, if Mueller shot Graham while he was off-duty cruising the streets and instigating fights with motorists and pedestrians (like the defendants in Cameron), a jury might reasonably conclude that he acted outside the scope of his employment. However, at the time Mueller shot and killed Graham, he was an on-duty, uniformed police officer. Moments prior to the fateful event, he was operating a patrol car in his jurisdiction. Mueller pursued Graham only as a result of a call for assistance he received over his patrol car radio. Arriving at Graham's residence, Mueller and a conservation warden assisted each other in handcuffing Graham moments before Mueller shot him in the head.

3. *Bell v. City of Milwaukee*, 536 F.Supp. 462 (E.D.Wis.1982):

a. In *Bell*, the City of Milwaukee contended that it was not required to indemnify a police officer who shot and killed a fleeing victim and subsequently covered up facts pertaining to the shooting. The city argued that the officer acted outside

the scope of employment because he knowingly lied to police officials during the investigation of the shooting and perjured himself during the inquest. Id. at 477. Without submitting the "scope of employment" issue to a jury, the district court held that the city was required to indemnify the officer. The court stated that the officer's actions during the chase and shooting of the plaintiff and during the subsequent investigation were unquestionably within the scope of his employment because the duties of a police officer include participation in investigations, reporting to superiors, and giving testimony at court hearings. Id. …[T]he court concluded that the officer unquestionably acted within the scope of his employment because he merely used improper methods of carrying out his duties as a police officer. Id. at 478.

4. *Cameron v. City of Milwaukee*, 102 Wis.2d 448, 307 N.W.2d 164 (1981):

a. Two off-duty police officers and an off-duty fireman (defendants) were cruising the streets of Milwaukee during the early morning hours. All three were dressed in civilian clothes. Although they were off-duty, the two police officers were subject to a Milwaukee Police Department regulation requiring them to take "required police action in any manner ... at any time." The plaintiffs, all of whom were black, were in a car traveling behind the defendants' automobile. The defendants started to heckle the plaintiffs and continuously referred to them as "niggers." Upon reaching an intersection, one of the defendants said, "so you niggers caught us, do you want to fight?" The defendants then got out of their vehicle and became involved in a street fight. After the fight ensued, two of the defendants identified themselves as police officers; one of them then produced his gun and ordered the plaintiffs not to move. Uniformed police officers arrived on the scene and took the plaintiffs into custody. None of the three defendants were taken into custody. 102 Wis.2d at 452.

b. In the plaintiffs' § 1983 suit against the defendants, a federal court found that the defendants acted under color of law and thus, they violated the plaintiffs' constitutional rights. Id. at 452-54.

c. The defendants subsequently filed a suit for indemnity in a Wisconsin court. The trial court granted summary judgment in favor of the city holding that the defendants clearly were not acting within the scope of their employment at the time of the altercation. Id. The Wisconsin Supreme Court reversed. The Supreme Court held that summary judgment was improper because a trier of fact could reasonably conclude that the defendants were acting within the scope of their employment – or that they were not. Id. at 459-60.

5. *Jude v. City of Milwaukee*, 2010 WL 2643383 (E.D. Wis. 2010):

a. In the Frank Jude case, involving excessive force through kicks to the head and other punching and "torture," by off-duty and on-duty officers, the plaintiffs

and principal offending officer (Schabel) were aligned on the scope of employment issue:

> In the present case, plaintiff and Schabel argue that the issue of indemnity is amenable to summary judgment because the undisputed facts establish that when Schabel violated Jude's civil rights, he was acting within the scope of his employment. They stress that at all relevant times, Schabel was on duty and in uniform and that he was engaging in acts, including arresting Jude, searching Jude's car and filing an incident report, that were actuated, at least in part, by a purpose to serve his employer. Nevertheless, for two reasons, I cannot resolve the indemnification issue at the present stage of the case. *Id*. at *3.

b. Frank Jude's claims against Officer Schabel, who was on-duty, were (1) failure to intervene; and (2) excessive force by stomping on his head. Officer Schabel conceded the latter, but not the former.

c. The court granted Jude's motion for judgment on the pleadings against Schabel, yet denied Jude's motion for summary judgment against the City on whether it must indemnify Schabel for damages. The court found it "conceivable" a jury could find Schabel acted within the scope of his employment on one or both claims. *Id*. at *3. Even on the excessive force claim alone, the court found triable issues because Schabel testified that he went into "police mode" and "attempted to effectuate an arrest" when he learned that Jude may have stolen a badge, yet admitted that he momentarily "got extremely upset" and stomped on Jude's head due to "outrage." *Id*. at *4-5.

C. OTHER MATTERS:

1. Sexual Misconduct:

a. Some cases find that such activity is outside the scope by characterizing the conduct as clearly prohibited by employer policy, *Doe v. St. Francis School Dist*., 834 F.Supp.2d 889, 901 (E.D. Wis. 2011), having nothing to do with the employer's interests, *Doe v. Time Warner Cable of S.E. Wisconsin, L.P*., No. 07–CV–781–WCG, 2007 WL 4143226 (E.D. Wis. Nov. 19, 2007), or being too different from the employee's authorized duties, *S.V. v. Kratz*, No. 10–CV–919–WCG, 2012 WL 5833185 (E.D. Wis. Nov. 16, 2012).

b. Other courts have found that sexual misconduct is not necessarily outside the scope. See, e.g., *Estate of Watts v. Heine et al*., No. 07–CV–644–JPS, 2008 WL 4058032 (E.D. Wis. Aug. 26, 2008) (a reasonable factfinder could conclude that "Heine's sexual misconduct was not wholly disconnected from the scope of his employment." Specifically, the jury could infer that "his supervision of and interaction with inmates, both inside and outside of their cells, was part of his job and the sexual assault was only made possible

by virtue of his status as a deputy sheriff." Because of the competing inferences relating to scope, this Court found that summary judgment for the County was not proper.); *Lemons v. City of Milwaukee*, No. 13–CV–331–CNC, 2016 WL 3746571 *1 (E.D. Wis. July 8, 2016) (a police officer raped a person in her home while responding to her 9–1–1 call. Court held a reasonable inference could be made that the officer acted within the scope, even though the assailant admitted that he had acted for his own sexual pleasure. However, the officer's intrusion into the plaintiff's home was part of his job duties, the officer was on-duty, in uniform, and carrying his department-issued firearm, and from those facts a jury could find that "Cates used his power as a police officer and possession of a weapon to gain control over Lemons.").

2. **Elected and Appointed Officials:** Generally speaking, members of all municipal boards, commissions and committees are public officers within the meaning of § 895.46. Section 62.09(1), lists the city's officers to include "such other officers or boards as are created by law or by the council." See also 74 Op. Att'y Gen. 208 (1985) (members of joint commissions created under sec. 66.30 (now sec. 66.0301), are public officers for purposes of § 895.46.). However, there are exceptions. In *Wilson v. Price*, 624 F. 3d 389 (7th Cir. 2010), an alderman who physically attacked a man over illegally parked cars not "under color of law." Moreover, Wis. Stat. §§ 895.35 and 895.46 apply to actions for open meetings law violations to the same extent that they apply to other actions against public officers and employees, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. *See* 77 Atty. Gen. 177.