

PUBLICATION

Franchisor Escapes Franchisee Food Fight

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After an allegedly racially motivated fight over a free hamburger between a franchisee's employee and his supervisor in which the employee was knocked unconscious, the franchisor, McDonald's, was sued in U.S. District Court in Memphis along with the franchisee and the supervisor. The employee's theories against McDonald's included (1) negligent hiring/supervision; (2) racial discrimination under state and federal civil rights statutes (Tennessee Human Rights Act and 42 U.S.C. § 1981); (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) negligent training; and (6) premises liability.

The free hamburger that prompted the fight and litigation had been promised to the employee by another supervisor in exchange for the employee agreeing to work a previously unscheduled overnight shift. The morning shift supervisor was not aware of the informal arrangement and actually slapped several hamburgers out of the employee's hand each time the employee picked one up and attempted to leave.

In granting summary judgment for McDonald's, Judge Jon McCalla carefully analyzed the franchise agreement and the operating manual in ruling that there was insufficient proof that McDonald's was the employee's statutory employer under THRA or § 1981 cited above. Similarly, the court ruled that there was insufficient proof to survive summary judgment as to whether McDonald's retained and/or exercised control over the restaurant or the supervisor who knocked out the employee.

Readers may recall other cases where this franchisor has had mixed results on the question of whether the control over franchisee operations in the operations manual and its level of detail was sufficient to render the franchisor liable for franchisee misconduct as a joint employer in the labor law context or joint tortfeasor in the tort context. The transaction structure typically found involving McDonald's ownership of the real estate and lease to the franchisee engenders more complex analysis than a conventional franchise case.

Interestingly, the decision turned on certain deferential language in the operating manual – for example, instructing franchisees as to how "you can effectively execute your training program" or "through an analysis of your restaurant's process using specially designed tools you can identify areas where additional crew training may be useful." The court found that McDonald's only retained minimal control over such matters and granted summary judgment.

The premises liability theory was more easily dismissed as there was no proof that McDonald's, which leased the premises to the franchisee, had notice of the dangerous condition, i.e., the fist-throwing supervisor.

The McDonald's operation and training manual includes a section on discrimination and harassment training. But, as noted above, the court was persuaded by the deferential language which "encouraged" rather than required the franchisee to develop and implement its own policy against discrimination. The one directive from McDonald's training manual along these lines was that the franchisee operator had to "make sure all employees understand McDonald's Policy Against Discrimination and Harassment, including how to bring concerns to the owner/operator's attention or the appropriate person under [the franchisee's] policy."

Franchisors wrestle with the question of how to promote sound personnel practices and appropriate human resources approaches by franchisees without exposure to joint employer or principal liability for an agent's

actions. This court did not penalize the franchisor for encouraging proper management rather than commanding it, recognizing that encouragement is the right tone and balance in the operations manual.