SEYFARTH SHAW

Management Alert

California Supreme Court Serves Slice of Advice on Franchisor FEHA Liability

By David D. Kadue, Daniel C. Whang and Justin T. Curley

Franchisors often face claims that they, along with their franchisees, jointly employ the individuals who work in the franchisees' independently operated locations. Indeed, the General Counsel of the National Labor Relations Board recently authorized complaints against a restaurant franchisor as a joint employer to answer for violations of the National Labor Relations Act allegedly committed by the franchisor's independently owned franchises.

Good news for franchisors has now arrived from an unlikely source: the California Supreme Court. In *Patterson v. Domino's Pizza, LLC*, the Supreme Court held that the uniform marketing and operational plans that a franchisor imposes on its franchisees do not themselves create any employment or agency relationship under the Fair Employment and Housing Act ("FEHA"). Instead, a franchisor would face exposure to FEHA liability only if it has retained or assumed general control over the day-to-day supervision and management of the franchisee's employees.

The Facts

Sui Juris, LLC owned and operated a Domino's pizza franchise in California. The parties to the franchise agreement were Sui Juris and Domino's Pizza Franchising, LLC ("Domino's").

The Plaintiff, Taylor Patterson, was an hourly employee at the Sui Juris store. The assistant store manager allegedly made lewd comments and gestures to Patterson and inappropriately touched her. She reported this behavior to Sui Juris's owner, and her father reported the behavior to the police and Domino's corporate human resources department. Patterson believed that her hours were then reduced for reporting the assistant manager's behavior.

When the owner of Sui Juris informed an area leader for Domino's about these allegations the area leader said, "You've got [to] get rid of this guy." The area leader also asked if Sui Juris had training procedures and materials on harassment and employee retraining.

Patterson sued Sui Juris, the assistant manager, and Domino's, alleging sexual harassment, failure to take reasonable steps to avoid harassment, and retaliation for reporting harassment. She alleged that she and the assistant manager were both employees of Domino's, and that Sui Juris and Domino's had an agency relationship such that Domino's was responsible for Sui Juris's conduct.

The Decisions Below

Domino's moved for summary judgment, arguing that it had neither an agency relationship with Sui Juris nor an employment relationship with the assistant manager. The trial court granted summary judgment for Domino's, finding that, because Domino's did not control the day-to-day operations or employment practices of Sui Juris, neither an agency nor employment relationship was created that could subject Domino's to any liability for the assistant manager's misconduct.

The Court of Appeal reversed the trial court's decision. The Court of Appeal held that the operational standards and procedures imposed by Domino's exerted the type of day-to-day control that could subject Domino's to vicarious liability for the acts of Sui Juris's assistant manager. Furthermore, the Court of Appeal cited the comment of the Domino's area leader as evidence that raised a triable issue of fact as to whether the assistant manager was an employee of Domino's and whether Sui Juris was an agent of Domino's.

The Supreme Court's Opinion

The Supreme Court reversed the Court of Appeal decision, concluding that "Domino's lacked the general control of an 'employer' or 'principal' over relevant day-to-day aspects of the employment and workplace behavior of Sui Juris's employees." The Supreme Court held that uniform marketing and operational plans cannot *automatically* impose liability on the franchisor for the actions of a franchisee's employees. Rather, to be potentially liable, the franchisor must retain or assume "a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

In concluding that Domino's lacked the requisite level of control to be subject to liability, the Supreme Court relied primarily on language from the franchise agreement and Sui Juris's day-to-day control over its employees, including the establishment of its own anti-harassment policy and training.

The franchise agreement disclaimed responsibility for employment matters. The franchise agreement expressly stated that there was no principal-agent relationship between Domino's and Sui Juris, and that Sui Juris was an independent contractor. The franchise agreement also stated that all persons who worked for Sui Juris were employees of Sui Juris, not Domino's. The franchise agreement also disclaimed any responsibility by Domino's for Sui Juris's employees. Under the terms of the agreement, the rights and duties regarding recruiting, hiring, training, scheduling, supervising, and paying for persons who worked at the Sui Juris store belonged to Sui Juris alone. The franchise agreement also stated that Domino's had no duty to operate the Sui Juris store or the right to direct Sui Juris's employees, and that Domino's disclaimed all liability for any damages arising out of store operations. The Supreme Court found it significant that the franchise agreement did not address sexual harassment, did not authorize Domino's to establish a sexual harassment policy or anti-harassment training program, and did not provide a procedure for franchisee employees to report sexual harassment to Domino's.

The franchisee hired its own employees and established its own anti-harassment policy and training. Sui Juris's owner testified that he alone had exclusive control over hiring the individuals who worked in his store. Domino's was not involved in the hiring process at all. As for training, Domino's did provide training on the store's computer system, which covered store operations, safety and security, and driving instructions. In addition, Domino's provided orientation materials to new employees hired by franchisees. But these materials did not cover sexual harassment training or policies. Instead, Sui Juris implemented its own training programs and policies on sexual harassment, without any guidance from Domino's. Further, Sui Juris retained sole authority to discipline its employees for any violations of its sexual harassment policy. Domino's did not have any such authority.

What *Patterson* Means for Franchisors

In *Patterson*, the Supreme Court expressly recognized the benefits of the franchise business model—a proven business plan and the reputation of an established brand that gives franchisees advantages over other small businesses. While the Supreme Court held that the franchisor was not automatically liable for the misconduct of the franchisee's employee, the Supreme Court's analysis in *Patterson* is factually driven.

Accordingly, franchisors should review their franchise agreements to ensure that they contain terms similar to those relied upon by the Supreme Court in *Patterson*. Franchisors should also confirm that they do not retain or assume control over the hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of their franchisees' employees. Likewise, franchisors should carefully review what, if any, training they provide directly to employees of franchisees, and, to the extent possible, they should limit any training to franchisee owners, who would then have the discretion and responsibility to train their own employees.

Since *Patterson* involved FEHA claims and whether Domino's was an "employer" under FEHA, it remains to be seen how courts will apply the decision in the wage and hour context. The Supreme Court stated that "uniform workplace standards" alone will not impose liability on the franchisor for conduct by "one of the franchisee's employees toward another," but *Patterson* is silent on whether uniform operational standards could support a claim for franchisor liability with respect to a franchisee's wage and hour violations.

Patterson thus provides a helpful framework for franchisors who strive to achieve an acceptable balance between protecting their brand and giving operational control to their franchisees.

David D. Kadue is a partner in Seyfarth's Los Angeles office, *Daniel C. Whang* is an associate in the firm's Los Angeles office and *Justin T. Curley* is an associate in the firm's San Francisco office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, David D. Kadue at *dkadue@seyfarth.com*, Daniel C. Whang at *dwhang@seyfarth.com* or Justin T. Curley at *jcurley@seyfarth.com.*