S204543

SUPREME COURT
FILED

APR 25 2013

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Taylor Patterson,

Plaintiff and Appellant,

v.

Domino's Pizza LLC, et al.,

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Six, Case No. B235099
Ventura County Superior Court
Case No. 56-2009-00347668-CU-OE-SIM
Honorable Barbara Lane

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In the Answer Brief, Taylor Patterson claims that upholding summary judgment in Domino's favor and adopting a clear standard for franchisor vicarious liability would undermine vicarious liability policy and sexual harassment law in this state. As explained below, nothing could be further from the truth.

This Court should affirm the summary judgment and, in so doing, make clear that, before vicarious liability will be imposed on a franchisor, the franchisor must control the daily conduct or operation of the particular "instrumentality" or aspect of the franchisee's business that allegedly caused the harm (here, training and reprimands for sexual harassment). (See *Kerl v. Dennis Rasmussen, Inc.* (Wis. 2004) 682 N.W.2d 328, 340.) Such a bright line standard, focused on day-to-day operational control of the type of conduct at issue in the case, will provide certainty for both franchisees and franchisors, comport with the policy underlying vicarious liability, and acknowledge both the unique franchise business model and the need for franchisor control of trademark and brand-related aspects of the franchise without entangling the franchisor in day-to-day franchisee operations.

At the very least, this Court should remand to the Court of Appeal to decide the remaining alternative grounds for summary judgment relied on by the trial court.

LEGAL DISCUSSION[1]

I

NOTHING IN THE ANSWER BRIEF EXPLAINS WHY A FRANCHISOR SHOULD BE VICARIOUSLY LIABLE FOR A FRANCHISEE EMPLOYEE'S CONDUCT WHEN THE FRANCHISEE, NOT THE FRANCHISOR, MAINTAINS DAY-TO-DAY CONTROL OF THAT TYPE OF CONDUCT.

A. Modern cases in other jurisdictions overwhelmingly recognize an "instrumentality test" for franchisor vicarious liability that focuses on substantial control over the instrumentality of the harm, instead of on unrelated areas of control.

As we explained in the Opening Brief, many states have resolved the tension between franchisors' need to protect their trademark, trade name and goodwill and, at the same time, preserve the independent contractor relationship with franchisees, by focusing on day-to-day operational control in the vicarious liability context. (OBOM 26-27.) Other jurisdictions have gone further, and required the franchisor to "control or have the right to control the daily conduct or operation of the

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[1] As a threshold matter, Patterson reasserts a claim she originally raised (unsuccessfully) in response to Domino's petition for review: that review should be dismissed because Domino's did not frame the vicarious liability issue in the Court of Appeal in a manner identical to its petition to this Court. (ABOM 16, fn.11.) Nonsense. As Domino's explained in its reply at the petition stage, "[t]here is no requirement that a party urge a statewide refinement or change in the law in the appellate court in order to do so in the Supreme Court. . . . After all, it is the role of this Court to secure uniformity of the law and determine issues of statewide importance; the Court of Appeal's role, in contrast, is to determine whether prejudicial error occurred." (Reply to Answer to PFR 4, fn.3.)

particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct." (OBOM 27-28.) Every court that has considered adopting this "instrumentality test" has done so, with one exception: the Supreme Judicial Court of Maine which, although recognizing the need to permit a certain amount of franchisor control without risking liability, determined that a more refined test was unnecessary because the day-to-day operational control test, as applied by Maine courts, sufficiently cabined franchisor liability. (See cases collected at OBOM 28-29 & fn.11.)

Patterson ignores this larger trend, and focuses instead on immaterial variations among the individual cases in the jurisdictions that have adopted the instrumentality rule. (ABOM 24-30.)

For example, she urges that, unlike Wisconsin, California's vicarious liability standards are codified. (ABOM 25.) This is a distinction without a difference: while California's Civil Code does include a provision acknowledging the potential for principal/agent liability in the business context, the contours and test for determining whether there is vicarious liability in a particular situation remain a creature of the common law. (See Cal. Civil Code § 2338 [recognizing that a principal is liable for the "wrongful acts" of his agent committed "in and as a part of" the principal's business]; *Fields v. Sanders* (1947) 29 Cal.2d 834, 838-839 [acknowledging Section 2338 but then proceeding to

analyze whether the assault in question occurred as part of employee business]; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447-452 [analyzing whether various judicially-acknowledged policy considerations merit respondeat superior liability].)

Patterson also distinguishes Wisconsin vicarious liability law on the ground that it focuses on the master/servant relationship. (ABOM 25.) This, too, is a distinction of no moment: California's vicarious liability doctrine, as does vicarious liability generally, has its roots in a master/servant analysis as well. (See *Smith v. Pickwick Stages Sys.* (1931) 113 Cal.App. 118, 127; *Nussbaum v. Traung Label & Lithograph Co.* (1920) 46 Cal.App. 561, 565; see generally Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors* (2009) 15 Fordham J. Corp. & Fin. L. 179, 182-184 [describing the master/servant origins of vicarious liability].) Moreover, as some courts have observed, whether a master/servant or other relationship is involved, the test for vicarious liability fundamentally focuses on the same factors: whether the conduct was committed within the scope of that relationship and whether the principal controlled the means and manner of the work. (See *Roethke v. Sanger* (Ky. 2001) 68 S.W.3d 352, 360-361; *Allen v. Choice Hotels Intl.* (Miss. Ct. App. 2006) 942 So.2d 817, 821.) Indeed, both California and Wisconsin focus on the degree of or right to control the principal has over the conduct of the agent to determine vicarious liability. (Compare *Petzel v. Valley Orthopedics Ltd.* (Wisc. App. 2009) 770 N.W.2d

787, 792 with *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284.)

Finally, Patterson contends that many of the cases are distinguishable because they appear to focus exclusively on the franchise agreement language, and do not pay attention to other indicia of day-to-day control beyond the agreement's language. (ABOM 26-27.) But any difference in evidentiary approach has no bearing on the underlying vicarious liability standard that is applied; it sheds light only on what evidence may be considered in applying the chosen test.

In sum, nothing in the Answer Brief changes the fact that every court to consider applying the instrumentality test to a franchisor has expressed alignment with the principles underlying it, and every court except one has adopted it. This Court should do so as well.

B. Consistent with this trend, California case law, too, reflects a narrowing of the control inquiry for vicarious liability in the franchise context.

Patterson asserts that California case law on vicarious liability in the franchise context has remained static. (ABOM 19.) In the broadest sense, Patterson is correct. The fundamental touchstones for determining vicarious liability remain: (1) substantial control over the franchisee's conduct and (2) the acknowledged need of franchisors to protect their trademark, brand image, and goodwill, without exposing themselves to broader liability. (See *Cislaw, supra,* 4 Cal.App.4th at 1295 ["[a]

franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and goodwill, without the risk of creating an agency relationship with its franchisees"].)

But that is not to say that the test for franchisor vicarious liability has failed to evolve. It has, moving from a higher-level examination of general operational control by a franchisor of the franchisee's operation, to a more focused examination of control over the means and manner of day-to-day operations.[2] (See OBOM 22-25. See also *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1239-1243, petition for review filed February 25, 2013 ["mindful" of the franchise context in which it was conducting its agency analysis, appellate court focused its examination on whether the level of control exerted over the pertinent instrumentality (advertising) was "consistent" with the perceived scope of the franchisor's need to maintain its mark].) This refinement is consistent with the evolution towards the instrumentality test in other jurisdictions.

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[2] Indeed, in the case of the fastest growing type of franchise, business format franchises like fast food restaurants, where the franchise encompasses "not only the product, service, and trademark, but the entire business format itself – a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication," there is an increased need for vigilance in policing the line between high-level franchisor control that is an ordinary part of the business model and control over the day-to-day running of the operation that can lead to increased liability for the acts of a franchisee or its employees. (LaFontaine and Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States* (2009) 3 Entrepreneurial Bus. L.J. 381, 385.)

As we now explain, the recognized policy underlying vicarious liability in the traditional employer/employee context does not preclude this Court from evolving California law further and adopting the instrumentality test.

C. The policy underlying vicarious liability further supports adopting the instrumentality test in California.

Patterson alternately contends either that the Opening Brief provided no policy rationale for adopting the instrumentality test, or that the policy underlying traditional employer vicarious liability in California undermines adoption of the test. (See ABOM 17, 21.) Both points are in error.

In the Opening Brief, Domino's discussed why the instrumentality test makes sense as a matter of sound policy. (OBOM 30-31.) The instrumentality approach offers predictability and better allows franchisors and franchisees to structure their business relationships. It also simplifies the liability analysis: courts need only focus on indicia of franchisor control over the day-to-day operation of the specific aspect of the franchisee's business that allegedly caused the harm, without conducting an exhaustive survey of other areas in which the franchisor may have exercised control. (See *Ketterling v. Burger King Corp.* (Idaho 2012) 272 P.3d 527, 533.)

The instrumentality test also furthers the policy underlying the doctrine of vicarious liability, by allocating liability to those who are in a position to control the tortfeasor's behavior. Holding

a franchisor liable for the tortious acts of its franchisee's employee in an area where the franchisor has no control over the employee does not further the policy behind imposing vicarious liability. (See generally *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 238; *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 451 (Baxter, J., concurring); Schwartz, *Corporate Tort Liability Symposium: The Hidden and Fundamental Issue of Employer Vicarious Liability* ("Employer Vicarious Liability") (1996) 69 S. Cal. L. Rev. 1739 .)

Nonetheless, Patterson asserts that the enterprise liability rationale used in the employer vicarious liability context favors imposing liability here. (OBOM 17, 21.) Not so.

The respondeat superior doctrine, under which "an employer is vicariously liable for the torts of his employees committed within the scope of the employment," departs from the normal tort principle that liability follows fault. (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 617-618.) "Respondeat superior has long been a rule in search of a guiding rationale;" indeed, "its scope and stated rationale have varied widely from period to period." (*Id.* at p. 618 (italics omitted).) Earlier authorities sought to justify the doctrine based on "'control' by the master of the servant," but "'the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a

required cost of doing business." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960.) This does not mean, however, that "respondeat superior is merely a justification for reaching a 'deep pocket' or that it is based only upon an elaborate economic theory regarding optimal resource allocation."(*Rodgers, supra,* 50 Cal.App.3d at p. 618.)

Three policy underpinnings have been suggested for enterprise liability: "(1) [I]t tends to provide a spur toward accident prevention, (2) it tends to provide greater assurance of compensation for accident victims, and (3) at the same time it tends to provide reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the beneficiaries of the enterprise that entail them." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967; see also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1013 [same].) We will analyze each of these policy rationales in turn, both in the context of this case and franchising more generally, to show why vicarious liability should not be imposed.

Prevention. The first justification recognizes that "'imposing liability on the employer may prevent recurrence of the tortious conduct,' because it 'creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" (*Farmers Ins. Group, supra,* 11 Cal.4th at p. 1013; see also Schwartz, *Employer Vicarious Liability* [noting that vicarious liability "gives employers strong incentives to shrewdly select employees and effectively supervise employees"

as well as discipline them].) Imposing liability on the franchisor is not the most efficient, and perhaps not even the most effective, method of preventing a reoccurrence: in the hybrid model of franchising, the franchisee runs day-to-day operations (not the franchisor). (King, *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees* (2005) 62 Wash. & Lee L.Rev. 417, 480 (*"Limiting Vacarious Liability"*) ; see also *Ira S. Bushey & Sons, Inc. v. U.S.* (2d Cir. 1968) 398 F.2d 167, 170 ["It is not at all clear . . . that expansion of liability . . . will lead to a more efficient allocation of resources. . . . [A] more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident"].)

"[F]ranchising is sui generis, neither fish nor fowl. A franchise relationship is neither inherently an agency relationship . . ., nor a relationship between classically independent contractors. Rather, 'the franchise relationship sets out a detailed scheme of control between two autonomous businesses.'" (King, *Limiting Vicarious Liability*, *supra*, 62 Wash. & Lee L.Rev. at p. 467.) "The problem with making franchisors vicariously liable for the torts of their franchisees is that it restructures the essential nature of the parties' relationship from a franchise relationship to that of an employer-employee, at least for the purposes of tort law." [3] (*Id.* at pp. 482-483.) Imposing

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3 Some commentators have found vicarious liability so ill-suited to the franchise context that they have advocated for the

liability based on such a radically restructured view of the relationship makes no sense if, in actuality, prevention of future conduct is unlikely. (See *id.* at pp. 470-471 ["[T]he supposed incentive to the franchisor is an empty vessel if the franchisor has no realistic opportunity to control the details of the franchisee operations meaningfully. While the franchisor can select its franchisees, adopt some safety-oriented requirements in the franchise agreement, offer training programs, monitor franchisees, and impose contract sanctions, whether these measures add anything in the way of effective day-to-day operational 'control' is doubtful."].)

Compensation. A plaintiff is likely to be able to recover just as well from a franchisee as a franchisor.[4] Today, franchisees have a greater capacity to bear and redistribute the costs of tortious accidents because business format franchisors require less capital investment, and there are "more affluent franchisees." (King, *Limiting Vicarious Liability, supra,* 62 Wash.

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outright rejection of the vicarious liability analysis for franchises, so long as (1) the franchisee makes clear to customers that it is an independently owned franchise and (2) the franchisor requires the franchisee to purchase sufficient liability insurance. (See King, *Limiting Vicarious Liability, supra,* 62 Wash. & Lee L.Rev. at pp. 461-464, 469 ["It quickly becomes manifest that traditional rules for vicarious liability—elusive and moving targets in their own right—are ill-suited for the franchisor-franchisee relationship."]; Conn, *Limits on Vicarious Liability for the Independent Contractor, supra,* 15 Fordham J. Corp. & Fin. L. 179.)

[4] Here, unfortunately, the franchisee has filed for bankruptcy.

& Lee L.Rev. at p. 467.) "Not only are franchisees increasingly well capitalized, but the ready availability of liability insurance for franchisees makes them suitable" to bear any losses from their employees' conduct. (*Id.* at p. 473.) In any event, the fact that the franchisor may be wealthier than a franchisee does not mean that liability should be imposed on the wealthier of the two. (See *Ira S. Bushey & Sons, Inc. v. U.S.* (2d Cir. 1968) 398 F.2d 167, 171 ["It is true, of course, that in many cases . . . expansion of liability will, at the very least, serve respondeat superior's loss spreading function. But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility" (citations omitted)]; *Mary M. v. City of Los Angeles*, *supra,* 54 Cal.3d at p. 228 (Baxter, J., concurring) ["This court's proper function, however, is not to search for deep financial pockets regardless of the law or practical consequences"].)

Loss Allocation and Spreading. "A franchisor is not well positioned to redistribute the losses from tortious operations of a franchisee. . . . The franchisor is not situated where it can assess the operational risks of injuries and nimbly recapture those costs in its revenues. Typically, the franchisor charges its franchisee a one-time front-end fee, a recurring periodic royalty based on a percentage of sales, and a periodic advertising fee often based on a percentage of sales." (King, *Limiting Vicarious Liability, supra,* 62 Wash. & Lee L.Rev. at p. 476; see 2 JA134, 2 JA405 [similar royalty arrangement in this case].) It would be impractical to "have royalty percentages or other payments fluctuate not only

from one franchisee to another, but also from day to day based on the franchisor's distant perception of the vicarious liability risks of the operations of a particular franchise." (*Id.*)[5] Instead, "[t]he availability of liability insurance for franchisees, when coupled with the obvious advantages of local franchisees in assessing the risks of the operation, militates in favor of focusing risk allocation on franchisees for their torts and the torts of their own employees." (*Id.* at p. 475.)[6]

D. It should make no difference to the policy analysis that sexual harassment under the Fair Employment and Housing Act (FEHA) is one of the claims at issue.

Patterson urges that her sexual harassment claims under FEHA, which she claims impose strict liability on employers for supervisor harassment of an employee, taken together with FEHA's "goal" of eliminating harassment in the workplace,

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[5] The potential for indemnity under the franchise agreement may at first appear to be an option for reallocating risk. But the potential for reallocation of risk from the franchisor to the franchisee may be illusory. (See Schwartz, *Employer Vicarious Liability, supra,* 69 S. Cal. L. Rev. at p. 1753 [while an employee may theoretically "remain[] exposed to an indemnification action brought against him by the employer, . . . this indemnification action has meaning only to the extent that the employee is solvent, and this solvency will sometimes be lacking"].)

[6] In the instant case, there is an additional reason to decline to allocate losses to Domino's: the connection between Miranda's duties as an assistant manager and the sexual harassment is "'simply too attenuated' to be deemed as falling within the range of risks allocable to the community in this case." (*Farmers Ins. Group, supra,* 11 Cal.4th at p. 1017.)

militate in favor of a relaxed vicarious liability standard in this case. (ABOM 22-23.) The approach she proposes is flawed.

First, no case involving employer liability for sexual misconduct or harassment takes such a categorical approach to vicarious liability based on the type of underlying conduct involved; there is no reason that sexual harassment claims against a franchisor should receive stricter treatment.[7] Moreover, the proposed approach skips over a crucial step (indeed, the key issue being reviewed in this case): whether Domino's exercised sufficient control over the franchisee to give rise to liability, including whether it constitutes an "employer" which can be held liable under FEHA. Whether an entity constitutes an employer depends on a test that echoes the instrumentality test for vicarious liability: whether the entity had "the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed;" a "finding of the right to control employment requires . . . a comprehensive and immediate level of 'day-to-day' authority over the employment decisions." (*Doe v. Wal-Mart Stores, Inc.* (9th Cir. 2009) 572 F.3d 677, 683; see also *Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 500 [when a "statute

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[7] The policy approach Patterson proposes here mirrors the "deep pocket" rationale rejected in the vicarious liability context: just because there may be a laudable overarching goal of eradicating sexual harassment in the workplace, that should not drive liability any more than perceived wealth or ability to pay a judgment. In any event, any legislative policy evidenced by FEHA should not drive the approach to the common law, non-FEHA claims at issue here.

refer[s] to employees without defining that term[,] courts have generally applied the common law test of employment"].)[8] Contrary to plaintiff's assertion, Domino's is not automatically liable for harassment committed by a supervisor like Miranda, who was employed by the franchisee, Sui Juris.

II

HERE, THERE IS NO VICARIOUS LIABILITY BECAUSE THE FRANCHISEE, NOT DOMINO'S, HAD THE RESPONSIBILITY TO TRAIN AND REPRIMAND EMPLOYEES CONCERNING SEXUAL HARASSMENT.

Patterson contends that, even under the instrumentality test, Domino's cannot prevail on summary judgment because she disputes that Sui Juris was responsible for hiring, firing, and training employees at the store. (ABOM 31.) To the contrary, the record shows that, as to sexual harassment, Sui Juris had exclusive responsibility for training and reprimanding its employees. (See OBOM 13, 15-17; 1 JA 204, 235-236, 241; 2 JA 614-615.)

Under the instrumentality test, this Court should affirm the trial court's grant of summary judgment in this case. While

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[8] In the Title VII context as well, franchisor liability for sex discrimination by the employee of a franchisee also depends on whether the franchisor exercised sufficient day-to-day control to constitute an "employer." See, e.g., *Reese v. Dunkin Brands, Inc.* (W.D. Tenn. 2009) 2009 WL 1884010 *9-10; *Lockard v. Pizza Hut, Inc.* (10th Cir. 1998) 162 F.3d 1062 (reversing judgment in favor of employee against franchisor and concluding that franchisor did not exercise sufficient control to be considered an employer).

Domino's established certain standards for its franchisees' businesses in order to protect its trademark, trade name, goodwill, and franchise systems, it did not control the day-to-day training, hiring, and firing of franchisee employees, and it specifically did not train or discipline employees concerning sexual harassment.[9] The franchise agreement declared the franchisee to be an independent contractor and made clear that the franchisee Sui Juris, and not Domino's, was responsible for hiring, training, and firing employees. (1 JA 202-203, 204; 2 JA 438.) Indeed, Poff himself testified that he was solely responsible for making these decisions for his staff and, as to Miranda, he independently decided to fire him in response to the allegations of sexual harassment by Patterson even before consulting with his Domino's area leader. (See 1 JA 233-234, 235-236, 240-241; 3 JA 617.) Because Domino's had no right to control the "instrumentality of the harm" in this case – sexual harassment by a franchisee's employee – it cannot, as a matter of law, be held liable for the actions of that employee.[10]

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[9] Patterson claims that Domino's either "provided" or "approved" all training material. (ABOM 31.) But the record is clear that Poff prepared his own training on sexual harassment for his employees with no input from Domino's. See 1 JA 235-236. Nor can the fact that Domino's may have provided Poff with some brief high level training concerning sexual harassment be used to support a determination that Domino's was somehow engaged in day-to-day control or training of the franchisee's employees on sexual harassment.

[10] Agency determinations can be made as a matter of law where, as here, "the essential facts are not in conflict," and "the evidence is susceptible to a single inference." *Emery v. Visa*

Indeed, even properly applying the current "control test" for franchisor liability, this Court should affirm the summary judgment. Despite the general indicia of control in the franchise agreement pertaining to the protection of Domino's trademark, trade name, and goodwill, Sui Juris still retained the power (and in the case of Miranda and Patterson exercised that power), to control day-to-day operations at the store, including hiring, firing, and training Sui Juris employees.

III

AT THE VERY LEAST, THIS COURT SHOULD REMAND TO THE COURT OF APPEAL TO DETERMINE WHETHER SUMMARY JUDGMENT IS WARRANTED ON THE ALTERNATIVE GROUNDS RULED ON BY THE TRIAL COURT.

The trial court granted summary judgment in favor of Domino's on the claims against it on various alternative grounds beyond vicarious liability. (See 4 JA 835-840.) Domino's briefed these alternative grounds before the Court of Appeal. (See RB 36-41.) The appellate court, having reversed the summary judgment on vicarious liability grounds, expressly addressed the merits of only one of these grounds, and dismissed the remainder of the arguments in a single throwaway line. (Typed opn., pp. 8-9.)

If this Court affirms the Court of Appeal's determination on the vicarious liability aspect of the summary judgment motion,

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Internat. Service Assn. (2002) 95 Cal.App.4th 952, 960. Indeed, summary judgment is frequently the vehicle for resolving franchisor vicarious liability cases such as this. See cases collected at OBOM 32-33, fn.11.

Domino's respectfully requests that the Court remand to the Court of Appeal to review each of the additional grounds for summary judgment relied on by the trial court. (See *Leone v. Medical Board* (2000) 22 Cal.4th 660, 670; *Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1030.)

CONCLUSION

For the foregoing reasons, and the reasons expressed in the opening brief, this Court should affirm the trial court's grant of summary judgment on vicarious liability grounds or, at the very least, remand for a determination whether summary judgment is required on alternate grounds.

April 24, 2013

Respectfully submitted,

SNELL & WILMER L.L.P.

By:

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Franchising, and
Domino's Pizza, Inc.

Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 3,545 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

APRIL 24, 2013

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Online Unpublished Cases Provided Pursuant to Cal. Rules of Court 8.1115(c)

Cited
As of: Mar 27, 2013

SANDRA REESE, Plaintiff, vs. DUNKIN' BRANDS, INC., Defendant.

No. 08-1179-JDB

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION

2009 U.S. Dist. LEXIS 55325

June 26, 2009, Decided
June 26, 2009, Filed

COUNSEL: **[*1]** Sandra Reese, Plaintiff, Pro se, Jackson, TN.

For Dunkin' Brands, Inc., Defendant: Jonathan O. Steen, LEAD ATTORNEY, REDDING STEEN & STATON, PC, Jackson, TN.

JUDGES: J. DANIEL BREEN, UNITED STATES DISTRICT JUDGE.

OPINION BY: J. DANIEL BREEN

OPINION

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ORDER OF DISMISSAL AND ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

On July 28, 2008, Plaintiff Sandra Reese, a resident of Jackson, Tennessee, filed a *pro se* complaint against Defendant, Dunkin' Brands, Inc., pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000e et seq.*, alleging sexual harassment, discrimination, and wrongful termination. (Docket Entry ("D.E.") 1.) On November 6, 2008, the Court entered an order in which it liberally construed Plaintiff's complaint to assert a claim against Defendant. (D.E. 4.) On December 23, 2008, Dunkin' Brands, Inc. filed a motion to dismiss, which the Court construed as a motion for summary judgment, under *Rule 56, Federal Rules of Civil Procedure*, asserting that it is not Plaintiff's employer, but merely a franchisor, and cannot be liable for employment-related acts. (D.E. 7.) On May 14, 2009, the Court entered an order directing Reese to respond to the motion for **[*2]** summary judgment and to show cause why summary judgment should not be granted. (D.E. 9.) Plaintiff was advised that "failure to time comply with this order will result in the Court deciding the motion for summary judgment on the present record". (*Id.*) Plaintiff has not filed a response to the motion for summary judgment or the Court's May 14, 2009 order [1], and the time for a response has expired.

1 The Court's task in evaluating Defendant's motion for summary judgment is complicated by Plaintiff's failure to comply with Local Rule 7.2(d)(3), which provides,

> the opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied pursuant to subsection (2) above shall respond to the proponent's numbered designations, using the corresponding serial numbering, both in the response and by affixing to the response copies of the precise portions of the record re-

> lied upon to evidence the opponent's contention that the proponent's designated material facts are at issue.

Summary judgment is appropriate "if . . . there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* **[*3]** As the United States Supreme Court has explained:

> In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citation omitted).

Under *Fed. R. Civ. P. 56(e)(2)*, "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine **[*4]** issue for trial." In considering a motion for summary judgment, "the evidence as well as the inferences drawn therefrom must be read in the light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (same).[2]

> 2 *Rule 56(e)(1)* sets forth in detail the evidentiary requirements applicable to a summary judgment motion:
>
> A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

A genuine issue of material fact exists "if the evidence [presented by the non-moving party] is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *see also id. at 252* ("The mere existence **[*5]** of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict[.]"); *Matsushita, 475 U.S. at 586* ("When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (footnote omitted). The Court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter. *Liberty Lobby, 477 U.S. at 249*. Rather, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id. at 251-52*.

Moreover, *Fed. R. Civ. P. 56(f)* provides as follows:

> If a party when opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be **[*6]** obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

"Beyond the procedural requirement of filing an affidavit, *Rule 56(f)* has been interpreted as requiring that a party making such a filing indicate to the district court its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir. 2000)*; *see also Good v. Ohio Edison Co., 149 F.3d 413, 422 (6th Cir. 1998)*; *Plott v. General Motors Corp., 71 F.3d 1190, 1196-97 (6th Cir. 1995).*

Defendant provided the sworn declaration of Jack Laudermilk, Associate General Counsel for Dunkin' Brands, Inc, to provide background factual information about the relationship of the Dunkin' Donuts store in Jackson, Tennessee where Plaintiff was employed and Dunkin' Brands, Inc. (*See* D.E. 7-2.) Defendant asserts that it is "engaged in the business of franchising independent business persons to operate Dunkin' Donuts shops throughout the United States". (*Id.* at 2.) The franchisees are licensed to use the trade names, service marks, and trademarks of Dunkin' Donuts and to operate under the Dunkin' **[*7]** Donuts system. (*Id.*) Each Dunkin' Donuts shop is independently owned and operated by individual franchisees, and Defendant has no right to exercise control of the day-to-day operations of a franchised shop. (*Id.*) Dunkin' Brands, Inc. has no control over any aspect of "hiring, firing, scheduling, supervising, paying, and otherwise directing and dealing with employees in the performance of their job duties". (*Id.*) These actions and responsibilities are within the sole discretion of the franchisee. (*Id.*)

Defendant asserts that the Jackson, Tennessee Dunkin' Donuts shop at issue in this case is owned by Robert H. Kilburn, Janice W. Kilburn, and J. Woody Forbes, who are solely responsible for the day-to-day operations including, but not limited to, the hiring, supervision and firing of all employees. (*Id.* at 2-3.) At no time has Defendant held an ownership interest in this Dunkin' Donuts facility. (*Id.* at 3.) Pursuant to the franchise agreement, the franchisees are independent contractors, not agents of Defendant. (*Id.*)

Dunkin' Brands, Inc. argues that it was never Plaintiff's employer, and the existence of the franchisor-franchisee relationship alone is not sufficient to establish vicarious **[*8]** liability. (D.E. 7-3 at 3.) Defendant relies on the decisions of *Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1066 (5th Cir. 1995)*, *Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008)*, *Kerl v. Dennis Rasmussen, Inc., 2004 WI 86, 273 Wis. 2d 106, 682 N.W.2d 328, 338 (Wis. 2004)*, *McGuire v. Radisson Hotels Int'l Inc., 209 Ga. App. 740, 435 S.E.2d 51 (Ga. Ct. App. 1993)*, and *Goldberg v. Casanave, 513 So. 2d 751 (Fla. Dist. Ct. App. 1987)*, for the proposition that a franchisor may be vicariously liable for its franchisee's actions only if it controls or has the right to control the day-to-day operations of the specific aspect of the franchisee's business that is alleged to have caused the harm. (*Id.* at 4.) Defendant also cites to a ruling by a federal district court sitting in New York which held that Dunkin' Donuts, Inc. was not liable for sexual assault on a franchisee's employee because it did not have sufficient control over the security aspect of the franchisee's business. (*Id.* at 4-5.) *See Wu v. Dunkin' Donuts, Inc., 105 F. Supp. 2d 83, 87 (E.D.N.Y. 2000).* Likewise, Defendant argues that it does not have such a duty to Plaintiff, an employee of its franchisee. (*Id.* at 6.)

The Sixth Circuit has adopted a four-part test **[*9]** for determining when parent companies may be considered employers of a subsidiary's employees. *Baetzel v. Home Instead Senior Care, 370 F. Supp. 2d 631, 639 (N.D. Ohio 2005)*(citing *Radio Union v. Broadcast Service, 380 U.S. 255, 85 S. Ct. 876, 13 L. Ed. 2d 789 (1965).* Two entities will be treated as a single employer where a court finds: (1) interrelation of operations, (2) common management, (3) centralized control over labor relations, and (4) common ownership or financial control. *See Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir.1983)*; *Radio Union, 308 U.S. at 256.* Courts adopting the single employer approach have emphasized that a broad interpretation should be given to the employer and employee provisions of Title VII to effect its remedial purpose. *Armbruster, 711 F.2d at 1336.* As one court observed, "the critical question is, 'What entity made the final decisions regarding employment matters related to the person claiming discrimination?'" *Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1070 (10th Cir. 1998)*(quoting *Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983).*

In *Lockard,* as in this case, the undisputed facts established that the franchisor did not participate in the hiring, promotion, retention, **[*10]** discipline or discharge decisions of franchisee employers, compelling the court to conclude that the franchisor was not an employer for discrimination purposes. *162 F.3d at 1071*; *see also Matthews v. Int'l House of Pancakes, Inc., 597 F.Supp.2d 663, 671 (E.D. La. 2009)*(franchisor could not be liable as an employer under Title VII where franchisee was solely responsible for the day-to-day operations and the management of personnel).

In *Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990 (6th Cir. 1997)*, employees of a bookstore operated by an independent contractor Barnes & Noble Bookstores, Inc. ("B&N") at Tennessee Technology

University ("TTU") sued alleging that their terminations violated the Age Discrimination in Employment Act and the Americans with Disabilities Act. Pursuant to the agreement between B&N and TTU, B&N was to act as an independent contractor responsible for the operation and management of the bookstore. *Id. at 991*. Plaintiffs settled with B&N and attempted to hold TTU liable as an employer based on the theories that TTU and B&N should be considered a single employer and under agency principles. *Id. at 991-993*. The court found that there was no evidence that **[*11]** TTU controlled the decision to fire employees or make other final decisions with regard to employment and thus could not be held liable under either of the plaintiffs' positions. *Id. at 995-996*.

In the instant case, Reese does not assert that Dunkin' Brands, Inc. is her employer, nor has she provided any evidence that would impose liability on Defendant for the franchisee's actions. As there is no genuine issue as to any material fact, Defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment is GRANTED, and the case is DISMISSED.

The Court must also consider whether Plaintiff should be allowed to appeal this decision *in forma pauperis,* should she seek to do so. The Sixth Circuit Court of Appeals requires that district courts in this Circuit determine, in all cases where the appellant seeks to proceed *in forma pauperis,* whether the appeal is frivolous. *Floyd v. United States Postal Serv., 105 F.3d 274, 277 (6th Cir. 1997)*.

Pursuant to the Federal Rules of Appellate Procedure, a non-prisoner desiring to proceed on appeal *in forma pauperis* must obtain pauper status under *Fed. R. App. P. 24(a)*. *See Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999)*. **[*12]** *Rule 24(a)(3)* provides that if a party was permitted to proceed *in forma pauperis* in the district court, she may also proceed on appeal *in forma pauperis* without further authorization unless the district court "certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis." If the district court denies pauper status, the party may file a motion to proceed *in forma pauperis* in the Court of Appeals. *Fed. R. App. P. 24(a)(4)-(5)*.

The good faith standard is an objective one. *Coppedge v. United States, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)*. The test under *28 U.S.C. § 1915(a)* for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any non-frivolous issue. *Id. at 445-46*. The same considerations that lead the Court to dismiss this case compels the conclusion that an appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to *28 U.S.C. § 1915(a)(3)*, that any appeal in this matter by Plaintiff would not be taken in good faith and Plaintiff may not proceed on appeal *in forma pauperis*. Leave to proceed on appeal *in forma pauperis* is, therefore, DENIED. If Plaintiff files a notice **[*13]** of appeal, she must also pay the full $ 455 appellate filing fee or file a motion to proceed *in* forma *pauperis* and supporting affidavit in the United States Court of Appeals for the Sixth Circuit within thirty (30) days.

IT IS SO ORDERED this 26th day of June, 2009.

/s/ J. DANIEL BREEN

UNITED STATES DISTRICT JUDGE

Taylor Patterson v. Domino's Pizza LLC
California Supreme Court, Case No. S204543

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On April 24, 2013, I served, in the manner indicated below, the foregoing document described as **Reply Brief on the Merits** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)), as indicated on the service list.

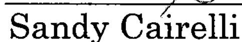
☐ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

☐ BY OVERNIGHT DELIVERY: I caused such envelopes to be delivered by courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 24, 2013, at Costa Mesa, California.



Sandy Cairelli

Taylor Patterson v. Domino's Pizza LLC
California Supreme Court, Case No. S204543

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