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Joint Employer Claims Survive Motions to Dismiss in the Western District of Pennsylvania and the Eastern District of Michigan

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Joint employer liability is not a dead letter as shown by two recent federal court decisions, *Harris v. Midas*, 2017 WL 5177668 (W.D. Pa. Nov. 8, 2017) and *Parrot v. Marriott International, Inc.*, 2017 WL 3891805 (E.D. Mich. Sept. 6, 2017). In each case, plaintiffs survived the franchisors' motion to dismiss. Although it is sometimes impossible to escape a case at the motion to dismiss stage, these cases are good reminders that franchisors should insulate themselves as much as possible from joint employer liability by careful attention to how their operation manuals and other system-wide documents are drafted.

In *Parrot*, the plaintiffs allege that Marriott is responsible for violations of the Fair Labor Standards Act (FSLA). Specifically, the plaintiffs allege that Marriot willfully misclassified certain franchisee employees, who were Food Managers, as "executives" so that they would be exempt from FSLA overtime pay. None of the parties to the dispute contested that the employees in question worked in franchised locations.

Marriott argued in its motion to dismiss that the plaintiffs failed to plead facts sufficient to establish joint employment liability. The Court disagreed. Noting that the Sixth Circuit "has not yet formulated a test" for joint employment claims under the FSLA, the Court looked to the three factors considered in Title VII claims: whether there is authority to hire, fire and discipline; whether there is control over pay and insurance; and whether there is supervision of employees. The Court further highlighted that past joint employment cases in that district focused on: the power to hire and fire; the supervision and control of employees' schedules and employment conditions; determination of rate and method of payment; and maintenance of employment records. Finally, the Court also specifically noted that in the franchise context, case law on this issue was inconsistent.

After analyzing past precedent, the Court ultimately focused on the degree of control exercised by Marriott over the franchisees' employees and concluded that the claim against Marriott could survive a motion to dismiss. The Court focused on the complaint's allegations regarding the ways in which Marriott exercised control over the Food Managers, including: providing Food Managers discount room rates at any Marriott hotel worldwide (which could be viewed as the ability to impact compensation and benefits); exercising a "substantial degree of supervision" over the Food Managers' work; Marriott's use of corporate managers and auditors who review and require

compliance with Marriott system directives (a form of control over operations); supervising and controlling the Food Managers' work schedules through the auditing of financial records and discussions regarding controlling labor costs; controlling workplace conditions by requiring the franchisees (and consequently the franchisees' Food Managers) to comply with ‘workplace rules', and identified service standards; requiring the franchisees to maintain employment records; and imposing standardized procedures pertaining to the hiring of Food Managers.

The Court also focused on ways in which the plaintiff Food Managers were able to allege the existence of a personal relationship with Marriott. In support of this purported relationship, the plaintiffs cited the training requirements (including attendance at daily meetings that included directives) from Marriott, alleged that they were required to purchase food and supplies from vendors designated by Marriott, and were admonished by Marriott's auditors for using "unauthorized" items as basic as printed and laminated table numbers. The plaintiffs allege that these examples all serve to demonstrate Marriott's "personal supervision and employment" of the Food Managers - who are employees of the franchisees. Based on the plaintiffs' arguments combined with Marriott's inability to cite any case, let alone a consistent body of cases from the 6th Circuit, which cases might otherwise demonstrate why the plaintiffs' allegations were insufficient, Marriott's motion to dismiss was denied.

In *Harris*, the plaintiff, who is an employee of the franchisee, seeks to hold the defendants, both the franchisor and the franchisee, liable for claims of sexual harassment, gender discrimination, and retaliation under Title VII. Ruling on the plaintiff's amended complaint, the Court found that while it was a "close call," the plaintiff had pled "sufficient facts to establish a plausible basis for imposing joint employer liability" on the defendants.

The *Harris* Court applied the three factors (none of which is dispositive) that district courts within the Third Circuit use to determine whether a joint employment relationship exists. These factors are: the alleged employer's authority to hire, fire, promulgate rules, assignments, and set conditions of employment (including compensation); the alleged employer's day-to-day supervision; and the alleged employer's control of employee records, such as payroll, taxes and insurance.

To escape dismissal, the plaintiff seized on the manner in which the franchisor's control reached into the franchisee's employment practices. To satisfy the first factor, the plaintiff relied on language in the franchise agreement that required the franchisee to "at all times" comply with the lawful and reasonable policies, regulations, and procedures required by the franchisor in connection with the franchisee's shop or business, which included "supervision and training of personnel." According to the plaintiff, this training included training and guidance provided in connection with an employee handbook and specifically the inclusion of a sexual harassment policy. Plaintiff argued she was "covered" by this sexual harassment policy. These examples demonstrated to the Court that the franchisor "had the authority (and in fact did) promulgate work rules" at the franchisee's place of business, even though the franchisor did not have direct control over hiring and firing decisions.

To meet the second factor, day-to-day supervision, the plaintiff provided some evidence that the franchisor had the authority to exercise day-to-day control over the franchisee's employees. The plaintiff again relied on the franchise agreement which provided that the franchisor, at its option, could provide training program(s) to franchisee and such of franchisee's employees as the franchisor may designate. The franchisee, and the franchisee's employees, in turn trained others in the "Midas System" including the plaintiff. The franchisor's visits to the franchisee's place of business to ensure compliance with system standards was another example of day-to-day supervision cited by the plaintiff. All in all, though a "weak showing," the Court found that these allegations were sufficient to meet the second factor.

For the third and final factor, the Court found that the allegations that the franchisor "assumed some degree of control over the [franchisee's] employee records" were enough to survive a motion to dismiss. Specifically, the Court thought the franchisor "exercise[d] some control over employee records." For this factor, the plaintiff again relied on standard franchise agreement language. The examples provided by the plaintiff included the franchisor's right to examine and audit the franchisee's books and records, whether at the franchised location or off premises. The plaintiff alleged that this provision was so broad as to include plaintiff's personnel file, payroll, tax, benefits and insurance information. While the Court said it would read this provision of the franchise agreement differently, the Court nonetheless agreed that reading the language in a light most favorable to the plaintiff, the language was sufficiently broad to support a finding that the franchisor exercised "some" control over employee records.

The lesson from these cases is three-fold. First, some courts may treat standard elements of the franchise relationship as evidence of a joint employment relationship. Second, franchisors should continue to take care of the design and implementation of policies to ensure that they are not over reaching into what should be the responsibilities of the franchisees. To that end, more focus should likely be paid to the desired output, such as profitability and satisfied customers, and less on the means and methods as to how the franchisee does (or does not) get there. Finally, a periodic review of contracts and policies emphasizing the independence of franchisors and franchisees remains sensible at this time.

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