STATE OF VERMONT

SUPERIOR COURT
Windsor

CIVIL DIVISION
Docket No. 604-10-14 Wrcv

Lynn Turco
Plaintiff

v.

Coco Mart, Inc., Champlain Oil Company, Inc., and Doctor's Associates, Inc.
Defendants

DECISION
DAI's Motion for Summary Judgment

Plaintiff Lynn Turco alleges that she was sexually harassed by a supervisor, an employee of Defendants Coco Mart, Inc. and Champlain Oil Company, Inc. (collectively, Coco), while working at a Subway restaurant in Quechee and then retaliated against when she complained. Coco is the owner, operator, and franchisee of the Subway at which she worked. Ms. Turco has sued Coco and Defendant Doctor's Associates, Inc. (DAI), the franchisor of Subway restaurants. She claims that any liability arising out of the conduct of Coco's employees should be attributed to DAI due to its control over Coco's operations, Count 4, because DAI and Coco are a "single employer," Count 5, and based on DAI's representations that it protects all Subway employees from harassment, Count 6.[1] DAI has filed a motion for summary judgment arguing that, as mere franchisor, liability for the conduct of Coco's employees cannot be attributed to it. Whether underlying liability for sexual harassment and retaliation may exist at all is not now at issue.

Ms. Turco principally seeks to hold DAI vicariously liable (without direct fault) for the conduct of Coco's employees under the doctrine of respondeat superior. "The policy underlying *respondeat superior* is that of requiring the master [principal], who normally profits by the act of his servant [agent], to stand as surety for damages to innocent third parties caused by the servant in the course of his employment." *Daniels v. Parker*, 119 Vt. 348, 354 (1956) (citation omitted). This form of liability "is imposed only where the principal has control or the right to control the physical conduct of the agent such that a master/servant relationship can be said to exist." *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 331 (Wis. 2004). As numerous courts and commentators have observed, contemporary franchise business models do not necessarily fit together neatly with these and related traditional agency law principles and their purposes.

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[1] In its summary judgment motion, DAI asks the court to rule that it was not Ms. Turco's actual employer for purposes of her employment discrimination claim. The court declines to do so because there appears to be no controversy on that issue except insofar as Ms. Turco claims that DAI and Coco functioned as a "single employer." It also asks the court to rule that Ms. Turco cannot satisfy the single employer test. It is unclear whether that analysis applies in this case, and the parties devoted little briefing to the matter. The court is denying summary judgment on Ms. Turco's claim for indirect liability against DAI. It appears that an ultimate ruling on indirect liability will make any ruling on the single employer test unnecessary. For those reasons, the court declines to further address Ms. Turco's single employer theory at this time.

DAI urges the court to adopt some version of what has become known as the instrumentality test. Under that test, DAI's vicarious liability would depend, more or less strictly, on its day-to-day control over the specific instrumentality of harm. In this case, that would be having or exercising operational control over Coco employees (hiring, firing, discipline, etc.).

The Vermont Supreme Court has not squarely addressed the instrumentality test. DAI cites *Carrick v. Franchise Associates, Inc.*, 164 Vt. 418 (1995), but it is tangential at best. The *Carrick* plaintiff argued that a franchisor should have liability for "furnishing" alcoholic beverages under the Dram Shop Act. As a matter of dram shop law, to "furnish" one need only have "control over the service of alcoholic beverages." *Id.* at 420. The plaintiff claimed that the franchisor had that control by operation of the terms of the franchise agreement. However, the Court ruled that the evidence did not support that claim. The *Carrick* decision arose directly out of dram shop law and the breadth of the term "furnishing." The Court was not addressing the larger question of indirect franchisor liability such as is raised in this case.

The first case to comprehensively address the broader matter of indirect franchisor liability and distill the authorities into the instrumentality test was *Kerl* in 2004. Since then, a number of jurisdictions have adopted the instrumentality test and proponents have addressed the history of franchise models, how they fit with agency law, and why (in their view) the instrumentality test reflects a wise evolution of that law. See generally William L. Killion, *Franchisor Vicarious Liability-the Proverbial Assault on the Citadel*, 24 Franchise L. J. 162 (2005); Jeffrey H. Wolf, Aaron C. Schepler, *Caught Between Scylla and Charybdis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?*, 33 Franchise L. J. 195 (2013), Mary-Christine Sungaila, Martin M. Ellison, *Joint Employer Liability in the Franchise Context: One Year After Patterson v. Domino's*, 35 Franchise L. J. 339 (2016).

Other commentators fear that there may have been a rush to judgment. See, e.g., Harvey Gelb, *A Rush to (Summary) Judgment in Franchisor Liability Cases?*, 13 Wyo. L. Rev. 215 (2013).

While many courts have adopted the instrumentality test, they have not been monolithic. California has gone down its own path. See generally *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 738 (Cal. 2014); Sungaila, *supra*, 35 Franchise L. J. at 341 (noting that *Patterson* "left the full scope of this new test largely unexplored"). Massachusetts adopted the test, but with some emphasis on "policies" that raises a question about the focus on day-to-day operational control. *Depianti v. Jan-Pro Franchising Intern., Inc.*, 990 N.E.2d 1054, 1064 (Mass. 2013). Maine purports to have rejected the test entirely. *Rainey v. Langen*, 998 A.2d 342, 349 (Me. 2010).

It is a nuanced question that may be complicated in the circumstances of any particular case by related doctrines, such as liability for the voluntary assumption of a duty, Restatement (Second) of Torts §§ 323, 324A, implied authority, Restatement (Third) of Agency § 2.03, agency by estoppel, *id.* § 2.05, and related concepts. Contrast *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166 (4th Cir. 1988); *Miller v. McDonald's Corp.*, 945 P.2d 1107, 1111–1113 (Or. Ct.

App. 1997) (both emphasizing brand advertising and reasonable beliefs about an agency relationship) with *In re Motor Fuel Temperature Sales Practices Litig.*, No. 06-2582-KHV, 2012 WL 1536161 (D. Kan. Apr. 30, 2012) (exhibiting substantial skepticism about such an argument though not deconstructing it in relation to the instrumentality test); *Gray v. McDonald's USA, LLC*, 874 F.Supp.2d 743, 751–52 (W.D. Tenn. 2012) ("Furthermore, the cases that Plaintiffs cite involve third-party plaintiffs who have no previous relationship with the defendant. Those cases therefore focus on appearances as an indicator of agency because they involve plaintiffs who relied on the appearance of agency arguably because they had no other knowledge of the actual relationship between the franchisee and the franchisor.").

In this case, the factual record is limited. There is substantial evidence that DAI retains the right to control much of Coco's conduct with regard to Subway operations as, to some extent, it must to protect its marks. There is evidence, such as provisions of the franchise agreement, that appear to ensure that Coco is exclusively responsible for its employees. However, there also is evidence of harassment trainings for Coco employees conducted by DAI and little to explain the content of those trainings. There is evidence of public representations by DAI implying that it exerts control over harassment issues among its franchisees' employees, yet neither party submitted the franchisee operations manual into the record or other evidence detailing whether any such control actually is exerted and can be exerted.

In short, DAI asks the court to wade into a complicated area of law, adopt in Vermont for the first time a test that has not uniformly been accepted in other jurisdictions, and which substantially advances the state of agency law with regard to franchisor liability, all based on a factual record that raises more questions than it answers.

This is a complicated case dealing with an important public issue. On the summary judgment record, the court is unable to conclude as a matter of law whether the instrumentality test should be adopted, and if so, what its contours should be as applicable to this case. See Wright & Miller, et al., 10B Federal Practice and Procedure: Civil 4th § 2732 (4th ed.) (sometimes the facts must be better developed "in order to clarify the application of new legal principles or complex issues of law"). This matter will be better resolved on the evidence as presented at trial.

ORDER

For the foregoing reasons, DAI's motion for summary judgment (MPR #1) is *denied*.

Dated at this 30th day of October 2016.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge