

Insights, News & Events

THE CUSTOMER IS NOT ALWAYS RIGHT: THE DANGERS OF THIRD-PARTY HARASSMENT CLAIMS

Publication
Jun 2, 2016

Like most in the hospitality industry, you are constantly balancing many competing demands. At any given moment, you could be focusing on managing staff performance. Or perhaps you are reviewing your employment policies to see if they are legal, or checking your website to ensure it complies with accessibility requirements. All the while, you are maintaining your laser focus on guest service and satisfaction. But what happens when the very guests whose demands you are satisfying without hesitation or question take an inappropriate interest in your employees, or worse, harass them? Do you have to be the one to address the harassment?

A recent decision in a case from Michigan is a cautionary tale about these situations, commonly known as “third-party harassment” in the legal world. Hospitality employers would do well to review the allegations raised in this case, and the ultimate outcome, in order to avoid a similar fate at your own establishment.

LOVE-SICK GUEST COULDN'T KEEP HIS HANDS TO HIMSELF

Red Olive is a chain of family restaurants with 14 locations throughout Michigan. In January 2013, the St.

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Clair Shores location (in a Detroit suburb) hired a new waitress named Olivia Thompson. The following allegations are all taken from Ms. Thompson's lawsuit and her testimony during the discovery process. Shortly after she began working at the restaurant, she claims that a male diner in his late 60s or early 70s named "Lee" began to frequent the restaurant and express his unwelcome affection for Ms. Thompson.

Lee knew Ms. Thompson from her prior service at another restaurant in the area, where he was a "persistent problem" for her. At that prior restaurant, he made comments to her about her "great body" and how he wanted to please her, and even touched her once on her behind. At that time, Ms. Thompson reported the conduct to her then-supervisor, who informed the customer that his behavior was inappropriate. That supervisor told Lee that he would be asked to leave and not return if he could not control himself.

When Lee found out Ms. Thompson was now working at Red Olive, he began visiting her there. At first he was cordial and friendly, but his conduct soon became problematic for her. Just as before, Lee brought her flowers and cards and even began making inappropriate comments about her body and his lustful interest in her. When his behavior finally escalated to inappropriate and unwelcomed touching, Ms. Thompson went straight to her new manager and asked for help. Unfortunately for her, the restaurant manager simply laughed in her face and refused to take any action against the older male diner.

The final straw for Ms. Thompson came one day in July 2013 when, in front of the manager, the love-sick diner approached her from behind, biting her and kissing her on the neck. What did the manager do? Nothing but laugh at the older man. Seeing that her manager was not going to protect her from him, the young waitress resorted to complaining to the restaurant's owners. Shortly thereafter, she was fired from Red Olive.

JUDGE: THE JURY WILL SORT THIS OUT

Ms. Thompson sued Red Olive and claimed that she was the victim of a hostile work environment because of the customer's conduct. She also alleged that she was fired in retaliation for complaining about it. Red Olive denied that the conduct alleged by Ms. Thompson occurred the way she claims, and after two years of litigating the matter, the employer asked the judge to toss the case. The federal judge who heard the arguments made short work of denying the restaurant's attempt to get the case thrown out and scheduled the case for a jury trial.

In his decision, issued on April 22, 2016, the judge touched upon the fact that the harassing diner had previously harassed the young waitress at her prior employer. But, he pointed out, unlike her manager at Red Olive, her former supervisor handled the situation appropriately. The judge contrasted the management exhibited at the prior restaurant – actually confronting the diner, telling him that his behavior was inappropriate, and explaining that he would be banned from the restaurant if he could not control himself – with the irresponsible conduct displayed by the managers at Red Olive.

THIRD-PARTY HARASSMENT: JUST AS IMPORTANT AS COWORKER HARASSMENT

Most employers are aware that they must prevent workplace harassment by coworkers and supervisors, and that harassment is a form of employment discrimination in violation of federal and state laws. But what the Red Olive case reminds us is that federal law also requires employers to prevent harassment at work from nonemployees, or third parties.

The kinds of harassment prohibited by federal law can be based on the employee's sex, race, religion, national origin, age, or disability. And, in a growing number of state and local jurisdictions, it can be based on sexual orientation, gender identity, or a number of other protected categories.

Prohibited conduct can include offensive jokes, touching, slurs, threats, ridicule, and other bad behavior that is offensive and interferes with the employee's ability to perform his or her job. This is not a new standard, and most employers have sound policies warning supervisors and coworkers that this kind of behavior is inappropriate. Many legally compliant policies also include descriptions explaining to workers how they should identify and report this behavior.

However, most policies do not encompass circumstances where the harasser is not an employee. This can be a particular problem for hospitality employers, especially because federal law does not care whether the harasser is your employee or some third party.

HOW YOU CAN AVOID THIS SAME FATE

So how do you guard against liability for third-party harassment? The first step is easy and you probably already do it: recognize that you have an obligation to prevent harassment in the workplace from *any* source. This is not new; in fact, the Equal Employment Opportunity Commission (EEOC) has issued regulations regarding third-party harassment going as far back as 1997.

Since it started being tracked, third-party harassment is almost as common as harassment caused by employees. And so are the lawsuits. Over the years, plaintiffs have brought cases alleging third-party harassment by customers, agents, contractors, relatives, inmates, and even, in one particular unique circumstance, a foul-mouthed parrot who repeatedly shouted vulgarities in a long-term care facility. Given the current focus on gender identity and transgender bathroom use, you would be wise to be on the lookout for harassment against employees in these categories, including in your public restrooms.

The second step is to review your employment policies and training on harassment prevention to make sure that they are not limited to your employees. You should include information in your policies and train your staff on how to report and address harassment from any source, specifically indicating that you prohibit third-party harassment and want to hear about it if it occurs.

The third and final step, as with any occurrence of harassment, is to follow the well-worn path you should know very well by now: take all complaints seriously, do not retaliate against anyone who makes a complaint, investigate complaints fully, and take reasonable and timely action to correct any harassment. And once you have done this, follow up with your employee to make sure your action worked and actually stopped the harassment.

A TALE OF TWO SUPERVISORS

If you are in a third-party harassment situation and you are not sure how to react, just remember the lesson taught by Red Olive, the tale of two supervisors. The first one listened to the waitress' concern and took immediate and firm action to prevent any further harassment. Although that supervisor may have been concerned about confronting a guest, his response solved the problem with little cost or effort.

The second supervisor, however, listened to the waitress' concern, but simply laughed it off. As a result, Red Olive was slapped with a lawsuit. Instead of being able to focus solely on serving its diners, the restaurant is now distracted by litigation and all that comes with it – disruptions to management and staff, negative publicity, and the cost of attorneys' fees. To make matters worse, the restaurant is now facing a jury trial. The choice is clear about which path you should take to avoid liability and maintain your focus on guest service and satisfaction.

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