

PUBLICATION

Officer of Franchisor Held Liable as an “Employer” Under the Employee Polygraph Protection Act

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What happens when circumstances mix franchising and the family business? Odd results that expand the notion of when a franchisor or its officer is an employer under federal employment statutes. In a case of first impression interpreting the Employee Polygraph Protection Act (EPPA) in the context of a franchisor/franchisee relationship, the District Court for the Northern District of Illinois granted the employee-plaintiff's motion for partial summary judgment, holding that the president of a restaurant franchisor could be held liable as an "employer" under the EPPA for his actions during a sexual harassment investigation meeting at which he indirectly solicited a franchisee employee to take a polygraph test. *Juana Sanchez, v. Prudential Pizza, Inc. and John Apostolou*, Civil Action No. 10-CV-6289, 2011 U.S. Dist. LEXIS 128349 (N.D. Ill. Nov. 2, 2011).

Plaintiff Juana Sanchez was an hourly employee for the Giordano's Pizza franchise at Prudential Plaza. Defendant John Apostolou (Father) is the primary shareholder of Giordano's Enterprises, Inc. (Franchisor). Basil Apostolou, son of John Apostolou, is the sole owner of Defendant Prudential Pizza, Inc. (Franchisee), who owns and operates the Giordano's Pizza franchise at Prudential Plaza. Basil Apostolou had worked for a number of years for the Franchisor, and the Franchisee's workspace/designated work area was located within the Franchisor's corporate offices.

Ms. Sanchez reported to the Franchisee that her manager, Alex Marquez, sexually harassed her by making comments about his lascivious intentions. Basil Apostolou met with Mr. Marquez to discuss the plaintiff's allegations. During this meeting, Mr. Marquez denied any misconduct and offered to take a lie detector test to prove that he was telling the truth.

Basil Apostolou later held a meeting with Sanchez at the Franchisor's corporate offices. The Franchisor's in-house counsel was present for the meeting. Father arrived some time during the course of the meeting but did not stay for the duration. The evidence showed that, during this meeting, Father told Ms. Sanchez that Mr. Marquez was willing to take a lie detector test to prove his innocence, and asked Ms. Sanchez whether she was willing to do the same. Ms. Sanchez's employment was ultimately terminated.

Ms. Sanchez filed a lawsuit alleging she was unlawfully terminated in retaliation for complaining about Marquez's sexual harassment. The defendants contended that Ms. Sanchez was terminated because she had nine written counseling events for policy violations ranging from being tardy to being out of uniform.

Ms. Sanchez also asserted a claim under the EPPA, claiming that Father violated section 2002(1) of this statute, which forbids an employer from "directly or indirectly, require[ing], request[ing], suggest[ing], or cause[ing] any employee to take or submit to [a] lie detector test." See 29 U.S.C. §2002(1). Ms. Sanchez argued that Father's statement at their meeting constituted incontrovertible evidence that he "requested or suggested" that she take a lie detector test in violation of the EPPA. The defendants responded that Father was merely reiterating Mr. Marquez's offer to Ms. Sanchez, and that Ms. Sanchez could not show that Father was acting as an "employer" within the meaning of the EPPA.

The court first examined whether Father's statement to Ms. Sanchez violated section 2002(1) of the EPPA. Noting that where courts have been asked to apply the EPPA, they have interpreted it quite broadly, the court held that Father's admissions show that he questioned the veracity of Ms. Sanchez's claim and then made the statement that her alleged harasser was willing to take a polygraph. Thus, even when viewed in the light most favorable to Father, the court held that his statements constituted, at very least, an "indirect suggestion that Sanchez take a polygraph test." The court, however, noted that Father's statements cannot violate the EPPA unless he is an "employer" within the meaning of the statute.

Turning next to the question of whether an officer of the franchisor can be held liable as an "employer" under the EPPA, the court first looked to case law interpreting the EPPA's definition of "employer." See 29 U.S.C. §2001(2) (defining "employer" as "including any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee."). The court noted that a number of courts have found this definition to be "unclear" and "ambiguous," and that these courts have looked to other federal employment statutes such as the Fair Labor Standards Act to determine the scope of the EPPA. Adopting the definition set forth in these cases, the court held that "any person or entity [that] acts in the interest of an employer in relation to an employee or prospective employee," is subject to suit as an "employer" under 29 U.S.C. §2005(c)(1) if, "as a matter of economic reality, that person or entity exerts some degree of control over the employer's compliance with EPPA." *Citing Rubin v. Tourneau, Inc.*, 797 F. Supp. 247 (S.D.N.Y. 1992); *James v. Professionals' Detective Agency*, 876 F. Supp. 1013, 1016 (N.D. Ill. 1995).

Applying this definition to the facts in this case, the court held that, given the undisputed facts that: (1) the meeting took place at the Franchisor's corporate office; (2) the owner of the Franchisee/employer, Father, and the Franchisor's in-house counsel were all present during this meeting; and (3) the meeting was conducted in order to investigate a complaint of sexual harassment involving the Franchisee's manager and hourly employee, Father was acting "in the interest of the employer" in relation to Ms. Sanchez. Therefore, the court held that, because Father was acting in the interest of Ms. Sanchez's direct employer, he acted as an "employer" within the meaning of the EPPA when he made an indirect suggestion that she submit to a polygraph examination. The court granted Ms. Sanchez's motion for partial summary judgment on her EPPA claims against the Franchisor.

Conventional wisdom recommends that franchisors distance themselves from employment issues at the franchise level, and avoid direct or even indirect entanglements with franchisee decision-making on sensitive issues involving discrimination. This case is one more example of why conventional wisdom trumps the natural inclination to provide assistance to franchisees, even family members.