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COVER STORY

# Franchisor isn't liable as employer

*State high court rules Domino's won't face trial on sexual harassment claims against franchisee*

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Domino's Pizza LLC cannot be held liable for alleged sexual harassment at one of its franchise stores, the California Supreme Court ruled in a split decision Thursday.

The decision was the high court's first to touch on the employment relationship between franchisor companies like Domino's and the burger flippers and pizza slingers who work at stores run by its franchisees. It's also the latest development in a shifting relationship between franchisors and franchisees.

In this case, the court — divided 4 to 3 — ruled Domino's was not a vicarious employer of the manager who allegedly harassed a co-worker.

"The uncontradicted evidence showed that the franchisee imposed discipline consistent with his own personnel policies," wrote Justice Marvin R. Baxter in the majority opinion.

To reach this conclusion, the court looked at the details of the contract as well as how the franchisee and Domino's dealt with the complaint of sexual harassment, rather than broadly ruling on whether any franchisor could be held liable.

Ventura County Superior Court Judge Barbara A. Lane threw the case out rather than send it to trial, ruling on summary judgment that Domino's was not an employer. The 2nd District Court of Appeal reversed her decision, and Domino's appealed to the state Supreme Court.

The high court made it clear that franchisors like Domino's aren't employers simply because they set out rules for every franchisee to follow in their contracts. *Patterson v. Domino's Pizza LLC*, 2014 DJDAR 12005 (Cal. Supreme Ct., August 28, 2014).

"The imposition and enforcement of a uniform marketing and operation plan cannot automatically saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job," Baxter wrote.

Justice Kathryn M. Werdegar wrote a dissenting opinion, joined by Justice Goodwin Liu and 2nd District Court of Appeal Justice Victoria G. Chaney, sitting pro tem, saying a jury should have decided the issue.

"The majority finds that Domino's successfully walked this tightrope betweeen enforcing contractual standards and becoming an employer," Werdegar wrote. "Because the case has not been tried, we will never know whether Domino's succeeded or not."

Mary-Christine Sungaila, a Costa Mesa-based partner at Snell & Wilmer, said the decision opens the door for other franchisors to get employment cases thrown out before going to a jury.

"It is clear that you can get summary judgment on this," Sungaila said.

She noted the high court looked at whether Domino's had control over the specific employment policies at issue: sexual harassment training and discipline.

After finding the franchise contract didn't give Domino's control over these policies, Sungaila said, the court looked at whether the company took control of the situation and told the franchisee what to do regarding these policies.

"The legal standard requires you to have a holistic view of the franchise relationship," she said. "It requires you to look at that universe of facts."

But plaintiffs' lawyers said Wednesday's decision only applies to the employment relationship in the specific case at hand, and called the decision narrow.

"They didn't announce some bright-line new rule," said A. Charles Dell'Ario, a sole practitioner who argued the case for the plaintiff at the state Supreme Court. "They just said, 'We didn't like the way the Court of Appeal decided the case.'"

Michael Rubin, a plaintiffs' attorney at Altshuler Berzon LLP in San Francisco who was not involved in the case, agreed.

"The decision perhaps shaded too much in the direction of accepting Domino's characterization of its limited role, rather than allowing the jury to look at the evidence to determine what actually happened," Rubin said.

The question of whether franchisors are employers has arisen in multiple court cases. Three lawsuits in California state courts name McDonald's as a joint employer of workers who allege they've been cheated out of pay by systematic wage and hour law violations.

So far, state courts haven't ruled on whether McDonald's is a joint employer in those cases, but the National Labor Relations Board recently held that the giant burger chain is a joint employer of workers at franchisee restaurants under a federal labor law.

What's more, a pending bill would lessen franchisors' power in enforcing franchise contracts, which Rubin said would allow franchisees to improve employee pay and working conditions without the fear of losing their contracts.

The bill — AB 610 — has passed both houses of the state Legislature but hasn't yet been signed into law by Gov. Jerry Brown.