

Restaurant Newsletter

[Presented by the Law Offices of Ashley A. Baron]

Legal News for the Restaurant Ind.

Preventing Slip & Fall Liability

Most restaurant owners are constantly checking for spills, dropped food, dropped ice and anything else that might be on the floor that would cause a patron to slip and fall. But did you know that the California Supreme Court made it more difficult for the owner to prove that he was properly inspecting the premises if a patron falls and gets hurt?

It is true, the Supreme Court in Ortega v. Kmart, Inc. (2001) 26 Cal 4th 1200, dealt with a customer at a Kmart who slipped and fell on spilt milk and could not prove when the spill occurred. As you are probably aware, the owner of the premises has a duty to exercise ordinary care in keeping the premises reasonably safe.

The owner, in order to fulfill that duty must make reasonable inspections of the areas of the premises that are open to the public i.e. the front of the house and restrooms. To show the owner had liability the injured party must prove that the owner had actual or constructive knowledge of the dangerous condition in sufficient time to correct it.

The Supreme Court of California held that the injured party may prove that the restaurant failed in its duty by

using evidence that an inspection was not made within a particular period of time prior to the accident.

What does that mean to the restaurant owner? It means that you must set up a procedure for inspections. The procedure must include three items: accountability, frequency and verifiability.

Accountability means to identify the named individual who is to perform the inspection each shift. Frequency is setting up a policy (in writing and given to all employees) that details where and how often the designated person is to perform the inspection. Verifiability means having a written record or log or some other tangible record that is presented to management on each shift and is kept for two years (the time someone has to file a personal injury action in California). By setting up the inspection and keeping the "sweep sheets" the owner can show that someone had at reasonable intervals inspected and cleaned up any spills, dropped items or other dangerous conditions.

By taking the time to set this process up, diligently making sure the responsible employee follows the procedure and maintaining the records you will be able to defend slip and fall accidents should they occur by being able to show you have done everything possible to prevent them. If the owner has taken care in the inspection of the premises in a reasonable manner then no breach of duty will be found even if the person is injured.

Legal Fees for Employee Sued for Sexual Harassment

Sexual Harassment is bad for business in more ways than any employer can imagine. Most employers dread a lawsuit for sexual harassment worse than a trip to the dentist for a root canal. Here is one more little known reason for heading the lawsuit off before it is ever filed.

[Continued on page two.]

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CONTENTS

Preventing Slip & Fall Liability	1
Legal Fees for Employee Sued For Sexual Harassment	1-2

Employers are liable for the legal fees of an employee who is sued along with the employer as part of a sexual harassment complaint, unless the employee is proved to have acted wrongfully. California Labor Code Section 2802 provides that “an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”

The term “necessary expenditures or losses” as used in the statute includes but is not limited to all reasonable costs and attorney’s fees incurred in defending the lawsuit. Placarte v. Guardsmark, LLC, (2004) 13 Cal. App.4th 640 and Jacobus v. Krambo Corp., (2003) 78 Cal. App.4th 1096. The Statute also provides that “the term ‘necessary expenditure or losses’ shall include all reasonable costs, including, but not limited to, attorney’s fees incurred by the employee enforcing the rights granted by this section.” Labor Code Section 2802(c). This means that if the employer refuses to provide a legal defense to the employee they can sue the owner and not only recover what they spent in legal fees to defend the action but also the fees necessary to recover what they spent.

Likewise, California Corporations Code Section 317(d) mandates indemnification by corporations for all “expenses, judgments, fines, settlements and other amounts actually and reasonably incurred” by corporate officers, directors and agents. Agents would include employees.

In the sexual harassment context most employers routinely indemnify

employees pending the conclusion of the litigation unless they believe the employee acted outside the scope of his or her employment. Employers do this to insure the employee’s cooperation in the defense of the lawsuit.

What is unique to the restaurant industry is the movement of employees very rapidly from one restaurant to another. This leads to situations where a former employee is named tangentially to the lawsuit as a defendant (i.e. the manager who the party suing allegedly reported the sexual harassment to) and they seek indemnity for their attorney’s fees from their former employer. Often the alleged sexual harassment victim’s attorney will do this to increase the cost of defense and to create a rift between the restaurant and the employee witnesses.

Most times, the attorney for the restaurant will step in and represent the restaurant corporation and the individual defendants, however, if a current or former employee demands separate counsel because of a conflict of interest with the corporation, the employer may have to pay a separate lawyer, especially if the attorney for the corporation determines that there is a potential or actual conflict of interest. The lawyer is required under the California Rule of Professional Responsibility 3-310(c)(1) and (2) to avoid such conflicts. In fact where there is a likelihood that the employee did in fact engage in misconduct then the employer may be better off from a defense standpoint to separate itself from the employee by using separate counsel.

Unfortunately, the separate counsel will cost the employer more in legal fees and may set the employer up to take the fall because separate counsel may attempt to enter into a favorable settlement on behalf of the individual

defendant (who generally is not the deep pocket) in exchange for favorable testimony against the restaurant (who is perceived to be the defendant with the assets).

So what is an employer to do about sexual harassment claims? The best thing is to prevent them from happening at all. Our next Newsletter will discuss the latest Court requirements that employers of 50 or more employees provide sexual harassment training to all of their employees. This is a good idea for all restaurant owners regardless of the number of employees they have. The best way to avoid the high cost of sexual harassment litigation, including the potential for hiring separate counsel for the employees sued individually, is to prevent the complaint from happening in the first place. Proper training can do that and, even if it fails, act as a defense if the lawsuit nonetheless gets filed.

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