



## **Fight! Fight! Are you liable when your employees and customers mix it up?**

*August 8, 2011 | **Curtis Smolar***

**A reader asks:** I am starting a company that will put my employees in contact with customers in social situations. Hopefully this will never become relevant, but if there is a physical altercation between my employee and a customer, can the company potentially be liable?

**Answer:** Any altercation between an employee and a customer is, obviously, an unmitigated public relations disaster. It may be a legal one as well.

Although an employer may only be liable if the company had actual knowledge of the circumstances in specific case, it is better to be proactive and institute protections. Ultimately, this often comes down to the foreseeability of the wrongful conduct – whether it's by the employee or the customer.

If the bad acts by the employee are anticipated or expected, your company may be held liable. And any bad acts by the customer that were somehow ratified or condoned by the company, may also land you in hot water.

In instances like these, you are generally looking at a situation in which an employee is working in an industry where the relationship with the customer is informal (such as a nightclub or restaurant). In these situations, the employer may have very little direct oversight of the day-to-day interactions between the employees and the customers.

Additionally, if the altercation takes place at an activity sanctioned or put on by the company (such as an **office party**), it may create additional liability.

Here are a few suggestions to protect you and your employees:

**Have a broad-based policy against sexual harassment** – Many businesses are based on implied or overt sexuality at their establishment. Take, for example, the restaurant chain Hooters. In Minnesota, a group of Hooters waitresses filed lawsuits against the franchise based upon the allegation that patrons of the restaurant harassed them. Although Hooters claimed that there was a sexual harassment policy, the waitresses asserted that the policy did not address harassment by customers.

**Take employees' complaints seriously** – If you have employees who have complaints about customers harassing them, make sure these matters are dealt with seriously and promptly. Many courts have ruled that an employer may be held liable for the actionable third-party harassment of its employees when it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.

This is based on the traditional idea of a hostile environment theory of employer liability, which is grounded in negligence and ratification rather than intentional discrimination. Because of this, you should have a separate policy for investigating claims of harassment by employees.

**Actually supervise your employees** - In some cases it's your employee doing the harassing or performing the bad acts. A few years ago a group of Dominos employees made a YouTube video of them defiling food. This video led to their termination and ultimate arrest. Of far greater importance, the acts of the employees could have become a problem for Dominos if the employees actually served the tainted food to customers. (Thankfully it was not.)

A policy of supervision and actually following through on it can help avoid these headaches. With well-established (and evenly enforced) guidelines, such problems can be avoided.

**Do your due diligence** - Having an employee attack another employee or a customer can be a nightmare. Not only that, it is almost a guaranteed lawsuit. In many cases if an employee is violent, she may have had problems in the past too. Therefore, you should have your employees agree to background checks and actually perform them on all employees.

Doing so will cut down on the assertions that your company should have known about any violent propensities of the employees. Please note, however, that you should be careful and have a professional familiar with state and federal privacy draft your guidelines for any background checks.

**Be smart about security** - It makes sense to have reasonable protections for your employees. This can include a key fob security or in some cases **video surveillance** – as long as it is done with considerations to protect the employees privacy as well. In some cases employers can argue that they are not responsible unless intrusions are reasonably foreseeable. That said, it may be short-sighted to take such a position.

**Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming “Ask the Attorney” column.**

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