Joint Employer Liability and the Bern

By Jesse L. Roth

This is hardly the place for political discourse. But at the risk of Harvey giving me the hook before I even start my opening act, I wish only to comment on one of the less emotional issues on the political table. It's an issue that's addressed in one fashion by a bipartisan bill that was recently introduced in the Senate and in another by Bernie Sanders' presidential campaign, but in the meantime we practitioners in the Sixth Circuit look to case law for guidance.

Historically, the view was that a franchisor was not the employer of employees of a franchisee for purposes of Title VII liability. The Sixth Circuit, however, has recognized a test for determining employer status relevant to the consideration of whether a franchisor can be considered a joint employer of its franchisee's employees. That test has courts look at such factors as interrelation of operations, common management and/or ownership, and centralized control over labor relations. Under that test, courts have held that actions taken by a franchisor to maintain brand standards can support a finding that the franchisor is a joint employer. But other courts in this circuit have applied quite a different test and held that the primary issue in determining whether an entity is a joint employer under Title VII is whether the entity exercises control over the manner and means of the plaintiff's work, including whether the entity has authority to make employment decisions. Under this version of the test, the franchisor's actions to maintain brand standards would not seem much to matter.

Last month, senators from Oklahoma and Maine introduced a bipartisan bill designed to uniformly help shield franchisors from joint-employer liability for Title VII violations. The bill would amend the federal Lanham Act to provide that when franchisors take steps to ensure brand uniformity and quality, that cannot be used as a factor to determine whether there is a joint-employer relationship. Bernie Sanders, on the other hand, recently announced a "Workplace Democracy Plan," that includes among other things an effort to codify a uniform employee-friendly joint-employer standard. I'll leave it to the pundits to speculate how this will play out. Lawyers are better at talking about what the law is than what it will be.

Relatedly, here is a story about what the law is, at least according to one district

judge. We recently represented a franchisor in a Title VII action. The plaintiff was an employee of a franchisee and alleged that she was subjected to racial harassment by a coworker and then was wrongfully terminated when she complained to the franchisee. She brought claims against the coworker, her supervisor, the franchisee and our client the franchisor. As against our client, she alleged that it was a joint employer because the franchise agreement described our client as a “joint operator” of the franchisee, because our client granted the franchisee a license to use its brand name, and because our client provided training to the franchisee’s employees. We moved to dismiss the complaint, arguing that the plaintiff’s allegations were not sufficient to support a joint employer relationship. The court agreed with our argument and dismissed our client, finding that the plaintiff had made no allegation that our client had any control over the franchisee’s employment decisions, and she therefore failed to state a claim for joint employer liability.

This certainly is the more intuitive result. Why should our client granting a license to use its brand name mean that it has an employment relationship with its licensee’s employees? I’ll leave it to Bernie Sanders and the other politicians to explain this non sequitur or otherwise clarify this issue. In the meantime, we’ll keep arguing that joint employer liability should be narrowly construed.