

C.R. v. Tenet Healthcare Corporation, recent decision on judicial notice and ratification

In C.R. v. Tenet Healthcare Corporation (Jan. 5, 2009) 08 C.D.O.S. 129, defendant Tenet successfully argued to the trial court in a demurrer to plaintiff's first amended complaint that it could not be held liable for the sexual misconduct of a nursing assistant employed by Encino Tarzana Medical Center. The trial court sustained the demurrer without leave to amend and entered dismissal and judgment in favor of Tenet. First, Tenet argued it could not be liable because Tenet did not employ the nursing assistant because the medical center was operated by a joint venture. In support of this position, Tenet asked the trial court to take judicial notice of DHS licenses for the medical center for the years 2004 through 2006, which stated the medical center was operated by a joint venture, but which did not identify any of the joint venturers. In addition, Tenet successfully argued on demurrer that it could not be held liable for sexual harassment under Civil Code section 51.9 because 1) it was a hospital and not a "person" under the code section; 2) it had no business, service or professional relationship with the plaintiff as required by the code and therefore should not be held vicariously liable for the employee's sexual misconduct; 3) it had no fiduciary relationship with the plaintiff; and, 4) as a corporation, it cannot engage in sexual abuse. Division Five of the Second Appellate District disagreed with each of these positions and reversed the trial court's dismissal order.

Plaintiff C.R. alleged in her first amended complaint that she was sexually molested by Ramon Eduardo Gaspar, a nursing assistant employed by Tenet Healthcare while she was a patient at Encino Tarzana Medical Center. The first amended complaint contained five causes of action: Sexual Harassment in violation of Civil Code section 51.9; negligent hiring; negligent retention; negligent supervision; and intentional infliction of emotional distress. The complaint was replete with details of the alleged sexual molestation of plaintiff and other patients by Gaspar, Tenet's alleged awareness of these incidents and its alleged refusal to acknowledge the sexual misconduct, properly supervise or discipline Gaspar. Plaintiff also alleged Tenet continued to employ Gaspar despite Tenet's alleged knowledge of the sexual misconduct. The first amended complaint also contained standard allegations of liability arising out of agency, employment and ratification.

Tenet demurred to the first amended complaint on the grounds that it did not employ Gaspar, an entity named "AMI\HTI Tarzana Encino Joint Venture" actually operated the medical center. In support of this position, Tenet asked the court to take judicial notice of licenses issued by the State of California to the medical center which showed it was operated by the entity entitled AMI\HTI Tarzana Encino Joint Venture from January 1, 2004, through December 31, 2006. None of these licenses, however, identified who the joint venturers were. The trial court granted the request for judicial notice and apparently placed great weight in these licenses because it sustained the demurrer without leave to amend.

The appellate court disagreed with this ruling and said "the judicial notice order in this case does not permit the demurrer to be sustained." In so finding, the court explained that at the demurrer stage

the truth of a document's contents will not be considered unless it is a judgment, statement of decision, or order (Cite); the truth of statements may be accepted when made by a party but not those of third parties or an opponent (Cite); and the contents of a document may only be accepted 'where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.' (Cite) And the general rule is that the truthfulness and interpretation of a document's contents are disputable."

The court observed that plaintiff's complaint "does not merely allege defendant owned the medical center. Rather the first amended complaint alleges: defendant employed Mr. Gaspar; defendant was a partner or joint venturer with other defendants; all defendants were agents acting within the course and scope of their agency; every defendant 'directly or indirectly' employed Mr. Gaspar; and all defendants ratified the acts of one another." (Emphasis added.) In the opinion of the court, the documents judicially noticed did not conclusively negate the plaintiff's allegations and could not, as a matter of law, provide a basis for sustaining the demurrer without leave to amend.

Tenet also argued there was no legal basis for plaintiff's allegations of liability for sexual harassment under Civil Code section 51.9. Separate and apart from its contention that it had "nothing to do with the medical center," Tenet said it had no "business, service or professional relationship" with plaintiff as required by section 51.9 (a)(1) and therefore it could not be held vicariously liable for Gaspar's sexual misconduct. Tenet also argued that section 51.9 provides for a claim by a plaintiff against a "person" and that a hospital is not a person; that in order for liability to arise, there must be a fiduciary relationship between a plaintiff and a defendant under section 51.9; and, that a corporation cannot engage in sexual abuse. The court ruled that defendant's "arguments that a section 51.9 claim has not been sufficiently alleged to withstand a challenge at the demurrer stage are unpersuasive."

First, the court held Tenet fell within the scope of 51.9(a)(1) which requires there be a "business, service, or professional relationship between the plaintiff and defendant." Even though a "hospital" and its employee are not specifically listed among those professionals or service providers specifically enumerated in section 51.9, it observed

Mr. Gaspar is alleged to be a certified nursing assistant. As can be noted, section 51.9 applies when a service or professional relationship exists; a certified nursing assistant is either a service or professional relationship. Moreover, an entity providing health care services who hires and supervises a certified nursing assistant to care for patients as alleged in the first amended complaint is either a service or falls within the ambit of a profession.

Next, the court rejected Tenet's argument that there must be a fiduciary relationship between plaintiff and defendant for section 51.9 to apply and said "the language of section 51.9 does not require the defendant have a fiduciary relationship with the plaintiff." The court held there is no requirement that a plaintiff who alleges a violation of section 51.9 must also allege the existence of a fiduciary relationship, and the "demurrer

dismissal may not be upheld because plaintiff failed to allege the existence of a fiduciary relationship.”

The court also rejected Tenet’s argument that as a “business, as opposed to an individual, it cannot be liable for the sexual abuse of plaintiff. Defendant relies on the language in section 51.9, subdivision (a) which states ‘a person is liable’ for sexual harassment. Thus, defendant argues, because it is a corporation, it cannot be liable under the provisions of section 51.9 for sexual abuse. We need not discuss the issue of respondeat superior. This contention has no merit. ...[T]he word “person” includes a corporation as well as a natural person.... Thus, a corporation may be civilly liable for violating section 51.9.”

The court said typically corporations may be held “liable for employee misconduct under a respondeat superior theory. (Cite) We need not address the respondeat superior issue here. Rather, there are sufficient allegations of ratification to withstand a challenge at the demurrer stage.” It held the “[p]rinciples of ratification apply to a section 51.9 cause of action,” and as an alternative theory to respondeat superior, a plaintiff may allege the employer ratified the tortious conduct of its employee, thereby creating liability as a result of the ratification of the agent’s actions after the fact, rather than vicarious liability imposed under the respondeat superior doctrine.

The court explained the “failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citations.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery. [Citations.] Whether an employer has ratified an employee’s conduct is generally a factual question.... A principal may be liable when it ratifies an originally unauthorized tort.” An employer may “ratify” the tortious acts of an employee “when an employer learns of misconduct and fails to discharge an agent or employee.” Here, in the opinion of the court, plaintiff’s allegations that defendant Tenet ratified Gaspar’s misconduct were sufficient to survive demurrer, and that “the demurrer to the section 51.9 cause of action should have been overruled.”

This decision should be of interest to anyone who does law and motion work and exemplifies the downside of getting a demurrer sustained without leave to amend. The extent to which judicially noticed documents may be used and considered in support of a demurrer (and presumably motions to strike and for judgment on the pleadings) is important to bear in mind when making motions that are based on the face of the pleadings and matters upon which judicial notice may be taken.

The court also made clear that a cause of action for sexual harassment under CC section 51.9 may be pled against a corporate health care employer. It found that allegations the defendant provided health care services and employed a nursing assistant who cared for patients brought it within the realm of “business, service or professional relationship between the plaintiff and the defendant.”

With respect to its ruling on the ratification issue, on the face of things, the court seems to take a course different from other courts which have held, as a matter of law, there is no vicarious liability on the part of employers for the sexual misconduct of employees.¹ The focus on ratification rather than vicarious liability under a respondeat superior theory may have been a by-product of the defendant's position that it was not Gaspar's employer, and that the generic ratification allegations by plaintiff were broad enough to reach Tenet and defeat a demurrer even if the question of Tenet's legal relationship with Gaspar was unclear. The court specifically said it "need not discuss the issue of respondeat superior," but rather focused its attention on the creation of an agency relationship by virtue of the defendant's alleged ratification of Gaspar's misconduct after the fact.

The court said "ratification is a permeation [sic—I think they meant permutation] of the law of agency" and that an "actual agency also may be created by ratification" In other words, for purposes of deciding whether a demurrer was or was not properly sustained without leave to amend, the court seemed to take a broad view of the allegations and used the ratification argument to allow plaintiff to maintain her case against Tenet even though Tenet denied being Gaspar's "employer" and perhaps beyond the reach of liability under a respondeat superior theory. "The [plaintiff's] allegations that defendant, with knowledge of Mr. Gaspar's misconduct, continued to employ him and destroyed documents was sufficient to state a claim that it ratified his sexual misconduct." An agency relationship—even in the possible absence of a true employer/employee relationship—was arguably created by ratification given the allegations that Tenet "refused to take any action" even though it knew Gaspar was molesting patients; that Tenet "hid" information about Gaspar's sexual misconduct; that no disciplinary action was taken against him; and, among other things, that Tenet intentionally or negligently "spoiled evidence" including the destruction of documents that pertained to other sexual assaults in order to keep them from plaintiff.

Along with the court's ruling on the judicial notice order, the plaintiff's allegation that Tenet ratified the conduct of Gaspar was a fundamental basis for the court's reversal of the dismissal order.

¹ For example, in Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal. 4th 291, the court found defendant hospital was not, as a matter of law, vicariously liable for the sexual misconduct of its employee. See also, John R. v. Oakland Unified School Dist. (1989) 48 Cal.3d 438, in which the court held that as a matter of law the school district could not be vicariously liable for the sexual misconduct of one of its teachers (though the court did permit the student to continue his lawsuit against the school district for negligent hiring and supervision of the teacher).