

***Nittinger v. Holman*, 69 P.3d 688 (Nev. 2003).¹**

CORPORATE LAW – PUNITIVE DAMAGES – TORT – AGENCY

Summary

Respondents, Dedric Holman and Christina Edwards, were gambling at the Gold Coast Hotel when a physical confrontation arose between John Nittinger, a security guard, and Holman. When Holman tried to run, security officers pursued him and held him to the ground. According to Holman’s testimony, the guards made racial slurs, punched, kicked and beat him. The security shift supervisor was present during part of the incident. The district court instructed the jury that it could find the Gold Coast liable for punitive damages if a “managerial agent” authorized or ratified the guards’ conduct. The jury awarded respondents \$198,000 in compensatory damages from the security guards and the Gold Coast. The jury also awarded the respondents \$371,000 in punitive damages from the Gold Coast.

On appeal, appellant Gold Coast argued that because the security shift supervisor was not a managerial agent, it could not be liable for punitive damages. The Nevada Supreme Court agreed, therefore reversing the imposition of punitive damages on the Gold Coast.

Issue and Disposition

Issue

Is a corporation is liable for punitive damages based on the actions of its employee when the employee is a supervisor?

Disposition

Yes, but a corporation is only liable for punitive damages based on its employees actions when the employee is a managerial agent of the corporation. The fact that an employee is a supervisor is not enough to establish that the employee is a managerial agent. An employee is considered a managerial agent of a corporation if he or she has control, discretion and independent judgment over a certain area of the corporation with the power to set policy for the corporation.

Commentary

State of the Law Before *Nittinger*

Prior to *Nittinger*, the Supreme Court of Nevada adopted the punitive damages standard set forth in the Restatement (Second) of Torts.² Under section 909 of the Restatement of Torts, punitive damages can be awarded against a master or other

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principal because of an act by an agent only if the corporation or managerial agent of the corporation ratified or approved the act.³

In *Bellegarde*, the court determined that the Restatement approach, otherwise known as the “complicity theory,” strikes the appropriate balance between protecting the public and ensuring that punitive damages are awarded “because of an employer’s own wrongful conduct.”⁴ The defendant corporation in *Bellegarde* employed a store manager who supervised store security guards while they tortiously mistreated a suspected shoplifter.⁵ In upholding the jury’s punitive damage award against the corporation, the court looked at what the manager was authorized to do by the corporation and whether the manager had discretion as to what was done and how it was done.⁶

The *Bellegarde* court established a guideline for determining whether an agent is acting in a managerial capacity by stating, “[The key] is to look to what the individual is authorized to do by the principal and to whether the agent has discretion as to what is done and how it is done. Job titles . . . should be of little importance.”⁷

Because the manager in *Bellegarde* lacked training, was unaware of any policies or guidelines regarding shoplifters, and was given the discretion to determine “what is done and how it is done,” it was reasonable to conclude that the store manager was a “managerial agent” and that she ratified or approved the acts of the security guards.⁸

Effect of *Nittinger* on Current Law

In *Nittinger*, the court applied the rule it previously pronounced in *Bellegarde*, but construed the meaning of “managerial agent” narrowly. The fact that the security supervisor was a supervisor is not enough to grant him the status of a “managerial agent.” In considering who qualifies as a managerial agent, the court placed particular emphasis on the discretion or policy-making authority that the corporation granted the supervisor. The court reasoned that “the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.”⁹ Relying on its holding from *Bellegarde*, Supreme Court opinions from California, New Mexico, and the 10th Circuit Court of Appeals, the Nevada Supreme Court articulated the criteria for charging an employer with punitive liability for the conduct of a managerial agent: “The managerial agent must be of sufficient stature and authority to have some control and discretion and independent judgment over a certain area of the business with some power to set policy for the company.”¹⁰

Of particular importance was the fact that the Gold Coast had a progressive-force policy and charged the security supervisor with the responsibility of implementing the policy. There was no evidence that the security supervisor had the authority to deviate

² See *Smith’s Food & Drug Centers, Inc., v. Bellegarde*, 114 Nev. 602, 958 P.2d 1208 (1998).

³ RESTATEMENT (SECOND) OF TORTS § 909 (1979).

⁴ *Smith’s Food & Drug Centers*, 114 Nev. at 611.

⁵ *Id.* at 604.

⁶ *Id.* at 611.

⁷ *Id.*

⁸ *Id.*

⁹ See *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 148 (Cal. 1979).

¹⁰ See *Steinhoff v. Upriver Rest. Joint Venture*, 177 F. Supp. 2d 598, 604-05 (E.D. Ky. 2000) (quoting *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 46 F.3d 1034, 1045 n.24 (10th Cir. 1995)).

from the established policy or that he had discretion or could exercise his independent judgment. Rather, the supervisor only had authority to implement the corporation's policy and ensure that the guards enforced it. Therefore, the court's holding limited a corporation's scope of liability for the actions of its employees, including supervisors, by narrowing the meaning of the term "managerial agent."

Unanswered Questions

Even though the court determined that an employee must have control, discretion and independent judgment to qualify as a "managerial agent," the court did not explain how much control, discretion or judgment is necessary. The court discussed the importance of the employee's "power to set policy for the company," but did not define how much power is necessary or what type of policies are sufficient. One could argue that every employee, regardless of position or stature, is influential in setting policy for the company. Additionally, there are few management or supervisory positions that do not entail discretion or independent judgment at some point. The court did not indicate whether punitive damages could be awarded against a corporation under such circumstances. Finally, while the court noted the importance of the Gold Coast's "established" progressive-force policy, the court did not state whether a particular policy was necessary and if so, how "established" the policy must be.

Survey of the Law in Other Jurisdictions

The court's conclusion is well-supported by holdings in other jurisdictions. However, as the dissent stated, there are certainly courts that have interpreted the term "managerial agent" to include employees who manage or are in supervisory positions and are charged with enforcing a corporation's rules and policies.¹¹

In *Albuquerque Concrete*, the New Mexico Supreme Court explained that in today's corporate world, corporate control must be delegated to managing agents, who may not possess the level of authority that was traditionally considered necessary to trigger imposing punitive damages on the corporation.¹² The New Mexico Court reasoned that if misconduct by managing agents who control daily operations is not sufficient to trigger corporate liability for punitive damages, large corporations could unfairly escape liability for punitive damages.¹³ Therefore, although well-supported, the court's holding is not uniform among all jurisdictions.

Conclusion

Corporations are not liable for punitive damages based on the actions of its employees unless the employee is a "managerial agent" of the corporation. The fact that an employee is labeled a manager or supervisor is not enough to establish that the employee is a managerial agent. An employee is considered a managerial agent if he or

¹¹ See *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 67, 669 (Tex. 1990); *Albuquerque Concrete v. Pan Am Services*, 879 P.2d 772, 778 (N.M. 1994).

¹² 879 P.2d at 778.

¹³ *Id.*

she has the authority to have control, discretion and independent judgment over a certain area of the corporation with the power to set policy for the corporation.