



*The Commonwealth of Massachusetts*  
*Department of the State Treasurer*  
*Alcoholic Beverages Control Commission*  
*Boston, Massachusetts 02114*

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

**DECISION**

**ARK BOSTON RSS CORP.**  
**331-340 FANEUIL HALL MKT**  
**BOSTON, MA 02109**  
**LICENSE #: 011600366**  
**HEARD: 10/26/2011**

This is an appeal of the action of the Boston Licensing Board (the "Local Board") for suspending the M.G.L. c. 138, §12 license of Ark Boston RSS Corporation (the "Licensee" or "ARK") located at 331-340 Faneuil Hall Marketplace, Boston, MA for a period of two (2) days. The licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "ABCC") and a hearing was held on October 26, 2011.

The following exhibits are in evidence:

1. Pre-Joint Hearing Memorandum with attachments; *Demetrios Konstantopoulos vs. Town of Whatley et al.*, 384 Mass. 123, 424 N.E.2d 210 (1981) (10 pages); *Foster from Gloucester, Inc. et al vs. City Council of Gloucester et al.*, 10 Mass.App.Ct. 284, 407 N.E.2d 363 (1980) (8 pages); *Aristocratic Restaurant of MA, Inc. vs. ABCC*, 374 Mass.547, 374 N.E. 2d 1181 (1978) (14 pages); *Dolphino Corporation vs. ABCC*, 29 Mass.App.Ct. 954, 559 N.E. 2d 1261 (1990) (2 pages); *Griffin's Brant Rock Package Store, Inc. vs. ABCC*, 12 Mass.App.Ct 768, 429 N.E. 2d 62 (1981) (6 pages); *Embers of Salisbury, Inc. et al., vs. ABCC*, 401 Mass.526, 517 N.E. 2d 830 (1988) (8 pages); *Blue Cross and Blue Shield of MA, Inc. vs. Commissioner of Insurance*, 420 Mass.707, 652 N.E. 2d 135 (1995) (17 pages); *McDonald's Café, Inc. vs. John Mackey and others*, 1994 WL 879540 (Mass.Super.) (1994) (3 pages); *INTMB, Inc. vs. Town of Westborough*, 2004 WL 2345081 (Mass.Super.) (2004) (4 pages); *Shamar, LTD vs. Licensing Board for the City of Boston*, 2000 WL 576401 (Mass.Super.) (2000) (5 pages); and *Jane Doe vs. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2005 WL 1971036 (Mass.Super.) (2005) ( 5 pages);
2. Notice from the Local Board dated May 9, 2011 (1 page) and License Premises Inspection Notice dated May 8, 2011 (2 pages);
3. Transcript of the hearing on June 14, 2011 dated July 25, 2011 (24 pages);
4. Decision from the Local Board dated June 28, 2011 (3 pages);
5. Letter from Attorney Simao requesting an appeal hearing dated June 29, 2011(3 pages); and
6. ABCC Notice of hearing scheduled on September 14, 2011 dated July 8, 2011(2 pages).

There is one (1) audio recording of this hearing.

## FACTS

1. ARK Boston RSS Corporation does business as "Durgin Park" at 331- 340 Faneuil Hall Marketplace, Boston, Massachusetts.
2. The licensee is a Massachusetts corporation operating an establishment located at 331-340 Faneuil Hall Marketplace, Boston, Massachusetts known as Durgin Park and is a duly-licensed holder of a Common Victualler all alcoholic license issued by the licensing board.
3. Seanna Kelley Chase is the Manager of record for the licensee.
4. At approximately 12:50 p.m., the City of Boston Police Department responded to a radio call initiated by the alleged victim and employee of the licensee for an alleged employee on employee assault inside the licensed premises.
5. The call was made, allegedly, at the request of the manager.
6. As a result of that call, two (2) Boston police officers arrived at the scene and made a report after interviewing witnesses.
7. This report was introduced into evidence as Exhibit A.
8. The report states that the alleged victim was approached by the employee (the "Assailant") who grabbed her buttocks.
9. She in turn pushed him away and he then grabbed the victim's arms and pushed her, leaving marks, which an officer observed.
10. Following the interviews, the officers cited the establishment for several violations, those being:
  - assault and battery;
  - indecent assault and battery; and
  - failure of manager to call police.
11. Subsequent to this, the Local Board issued notice to the licensee that it would conduct a public hearing on June 14, 2011 regarding the licensee 's alleged violation of M.G.L. c. 138, §23 and §64 for assault and battery, indecent assault and battery, employee on employee, and failure of manager to call police.
12. Officer Lippolis, who reportedly observed the victim's marks on her arm, testified.
13. The victim did not testify and did not appear.
14. At that time, she was no longer under the employment of the licensee.
15. Officer Lippolis testified that he interviewed the victim and made the aforementioned observations of her arm (fingernail markings).
16. He also testified that the alleged victim told him that she ran downstairs following the incident and that she told the manager on duty. The manager informed her that it was "not a big deal" and stated that the employee-assailant was "hung-over."
17. She also stated that the manager made light of it telling her that "employees joke around all the time."
18. She informed the officer that she called the police because the manger would not do anything at the time.
19. The officer went on to state that he also interviewed other witnesses who stated that they corroborated the victim's version of the events.
20. One waitress at the licensed premise stated that the employee had a history of "grabbing ass" and that the manager had been put on notice of this by other employees.
21. She also stated that the manager told the employee-assailant to go home after the incident.
22. Two (2) other employees testified that they were also witnesses to the incident.
23. One testified that she heard the victim state to the assailant, "Don't grab my ass" and then observe the victim hit the assailant, and the assailant then push her.
24. The victim also stated in the police report that the assailant had a history of grabbing, although she could not remember making this statement at the Local Board hearing.

25. When asked if the employee assailant ever touched or grabbed her, she answered in the affirmative.
26. She stated that she informed the manager and he spoke with the assailant.
27. The other employee testified that she saw the assailant and victim together and heard the victim state, " I don't know how many times I've told him don't grab my ass. It's not okay."
28. The employee testified that she followed the victim downstairs and observed the marks on her arm.
29. The manager testified that the victim came to him to report the incident, but did not come to him immediately.
30. He stated that he noticed something going on in the vicinity of the ladies room in the establishment.
31. A male employee was standing outside of the ladies room and the victim was inside crying.
32. The manager then went upstairs, and the assailant called him over to tell him the victim hit him.
33. The victim then came over to the manager and told him that the assailant had "grabbed her ass."
34. The manager stated that the first thing he did, to diffuse the situation, was to send the assailant home.
35. He did not call the police at this time.
36. The licensee's manager testified at the hearing before the ABCC that she received a call from the manager and the victim, on the night in question, informing her about the assault that had taken place.
37. She testified that at some point, she had informed the victim to call the police "if she thought an assault had taken place."
38. When asked why she herself had not called the police, she stated that she thought the victim was going to and she felt she did not need to.
39. She also stated that she spoke with the manager and he informed her of the situation.
40. At that point, she did not inform him to call the police.

#### DISCUSSION

The Commission is persuaded that the Local Board proved that an assault and battery and indecent assault and battery occurred. The Commission is also persuaded that the licensee violated the Local Board's requirement to call the police. The licensee is responsible for these illegalities, including the employee on employee assault, based on the applicable law.

An employer may be vicariously liable if it failed to exercise reasonable care to prevent sexually harassing behavior. See Faragher v. Boca Raton, 524 U.S. 775, 807 (1998). In the case before us, it is clear that the employer, through its manager, knew because of repeated complaints by female employees of the assailant's prior behavior. The fact that he was not disciplined appropriately or terminated, put the other employees at greater risk for this type of behavior to re-occur.

In the current case, the manager had ample notice of the employee's behavior from other employee's. See Camillo - Robles v. Hoyos, 151 F. 3d at 7 [17]. If the evidence presented is such that the employee, manager had knowledge of the employee's prior conduct, which was the case in this situation, then there is a link between the indifference and the official's conduct which led to the ensuing violation. The Appeals Court has held that a license holder is "subject to an affirmative duty" to provide "supervision over its employees" [citation omitted]. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 798 (1981). A "lack of care" can lead to a finding that actions were authorized or permitted. *Id.* The Appeals Court has also held that "under the regulation [204 CMR 2.05(2)], the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is "bound at his own peril to keep within the conditions of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1983).

Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter." Rico's of the Berkshires, Inc. v. Alcoholic Beverages Control Commission, 19 Mass. App. Ct. 1026 (1985) (rescript).

In light of the complaints made by the employees, both present and past, the manager was clearly put on notice and is clearly responsible for the infractions.

The manager should have known when she spoke with her employee that the matter should have been reported to the police. The licensee's manager spoke to both the victim and the manager and learned of the allegations and did nothing. She did not call the police, nor did she direct any subordinate to do so. She, as the licensed manager should have ordered a manager to call the police at once if she was not going to. To tell the victim to call the police "if she thinks an assault took place" was improper and failed to comply with the Local Board's requirement. The licensee was aware of it because the licensee's manager was, and it was up to him to correct it once he was put on notice of it. This was not done.

The licensee has a duty to create and maintain a non-hostile working environment for all of its employees. A manager had prior knowledge that an employee had been assaulting other employees prior to this sexual assault on this date in question, and had not done anything to prevent this from happening. Furthermore, the manager, when told of this incident did not inform the police. Also, when told of the events that had taken place had the assailant leave the premises, so he was unable to be interviewed by the police on the night in question at the establishment. The licensee when informed should have immediately called the police and failed to do so. Instead this burden was placed on the victim. This conduct fails to comply with the law.

#### CONCLUSION

The Commission APPROVES the action of the Local Board in finding the three (3) violations. The Commission also APPROVES the action of the Local Board in suspending the license for two (2) days. This is a reasonable exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner *Susan Corcoran*

Kathleen McNally, Commissioner *Kathleen McNally*

Dated: June 20, 2012

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Karen Simao, Esq.  
Local Licensing Board  
Frederick G. Mahony, Chief Investigator

*File*