



CLM 2019 Retail, Restaurant & Hospitality Conference  
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### **Color Blind: Restaurant and Retail Liability for Alleged Racial Discrimination**

#### Legal:

Customer profiling has been in existence since the dawn of the retail and hospitality industries. Merchants, servers, and clerks, make unconscious and snap judgments on most of their customers. Often these are innocent and simply motivated by raw economics. Is this person likely to leave a good tip? Are they going to buy that suit, or are they just window shopping? No business person wants to devote significant time and time and resources on a potential customer that will not provide a later financial reward.

However, those same decisions can often also cross the line into impermissible and discriminatory areas, such as where certain racial or ethnic groups are targeted for extra scrutiny, surveillance, or even accusations of fraud or theft. When this occurs, it can often develop into claims being asserted by the aggrieved party.

Racial discrimination. These claims, usually filed in Federal Court involve allegations that a person was singled out for disparate treatment based upon their race, ethnicity or other protected class. A recent Florida example is a 78-year-old African-American grandmother, who allegedly received intense scrutiny from Wells Fargo bank employees when she tried to cash a \$140 check for her son. She recently filed suit against the bank alleging racial discrimination and the intentional infliction of emotional distress.

False arrest and imprisonment. To be liable, the establishment must actively participate in the restraint of a person against their will. Generally arising in the context of suspected shoplifting, the merchant must actively participate in the detention of an individual based upon a suspicion that a theft was in progress. Generally, merely providing information that a violation of law may have occurred is not enough to support an action for false arrest. Moore v. Department of Corrections, State of Florida, 833 So. 2d 822 (Fla. 4<sup>th</sup> DCA 2002).

This can also give rise to a claim for malicious prosecution, but these claims require proof of malice and an absence of probable cause on the part of the retail actor, as well as that the criminal proceeding ended in favor of the alleged victim, *i.e.* a judgment of acquittal or a not guilty finding.

A relatively new cause of action has also appeared in certain settings. These are claims for “negligent reporting”. In addition to the usual damages, in Florida, it has been held that the conduct alleged will support a claim for punitive damages. Valladares v. Bank of America Corp., 197 So. 3d 1 (Fla. 2016). That case involved a bank teller who tripped a silent alarm as a customer entered the bank, in the mistaken belief that he was a bank robber who was actively being sought by the authorities. Despite the bank teller and her managers being presented with timely information that should have alerted them to the fact that the individual was not the wanted bank robber, they failed to cancel the silent alarm, and when the police arrived, the customer was assaulted by the police and injured. The Florida Supreme Court upheld this action for negligent reporting and went further indicating that punitive damages were available in this context.

For the protection of retailers and establishments, and to promote public policy, most states have versions of the “Shopkeepers Privilege” which protects them from civil liability for the arrest, or detention of a suspected shoplifter, providing that they have probable cause to believe that the person committed theft. Fla. Stat. Sect. 812.015(5).

In addition to this legal defense, business operators must carefully train their employees for proper and neutral interactions with the public and customers, with the emphasis on correctly identifying suspicious or prohibited behavior, providing clear and consistent guidelines for the investigation and interaction with the public, and most importantly, for the circumstances in which the incident will result in the business calling law enforcement to request their involvement in the matter. In addition to when to call, it is also paramount that there be clear protocols as to who is authorized to call on behalf of the store or business.

#### Insurance:

Like most businesses Retailers/Hospitality Employers face allegations of wrongful termination, hostile workplace, discrimination based on race/sex by their employees/contractors. These types of claims are generally trigger coverage under an Employment Practices Liability Policy.

However, due to the obvious nature of their business Retailers/Hospitality Companies generally have a higher rate of wrongful discriminatory allegations levied by customers and other 3<sup>rd</sup> parties. These allegations can involve personal injury, discrimination, slander, false arrest, false imprisonment and negligent reporting. These types of allegations can trigger coverage under multiple insurance policies and the potential for punitive damages should be considered in defense of these matters. These types of situations have continued to increase over the past 5 years and will take effort from all stakeholders to reduce the costs associated with investigating and defending such claims.

Our role as Insurance Brokers is to understand Retail/Hospitality’s specific exposure(s) related to potential Customer/Third Party claims. We look to either the General Liability Coverage Form to defend against allegations of Personal Injury (false arrest, detention or imprisonment, malicious prosecution, slander, libel and invasion of privacy) or to the 3<sup>rd</sup> Party

Employment Practices Liability Coverage Form to defend against allegations of discrimination (age, gender, religion, race, sex, sexual orientation, etc.)

Five (5) important factors in helping our clients (Retailer / Hospitality) prepare to respond to allegations of discrimination by customers and other 3<sup>rd</sup> parties.

- Appropriate General Liability Coverage Form and Endorsements
  - Selection of Defense Counsel
  - Awareness of Carrier Hotlines /Help available during incidents
- Intent of the Coverage (Defense vs Indemnification)
- Pre- loss internal policies and guidelines
  - How to handle customers suspected of stealing
  - Protocol surrounding stopping, searching, chasing, etc.
  - How /when to engage law enforcement /police
  - Using video surveillance (how /when to secure)
  - Investigation / Documentation
  - Protocol for potential “hot” public relation responses
- How local/upper management activity /decisions while responding to Customer/3<sup>rd</sup> Parties situations impact liability under the policy
- Duty to timely/properly notify the insurance carrier of potential claims and potential settlement discussions

Other exposures/loss that could be triggered as a result of Customer/3<sup>rd</sup> Party claims include:

Business Interruption  
Reputational Risk

Risk:

Racial discrimination and sexual harassment activity is on the rise; and that is from both the employer and third party perspective. Black Lives Matter, #MeToo and even our current political environment has changed the way organizations are looking at their current policies, training programs, diversity programs, etc. We are identifying opportunities for improvement in all these aspects.

From a Risk Management Perspective, I am of course looking to ensure insurance coverage is in place; but I’m also looking at how any incident or resolution of an incident may have on the reputation of our organization, both publicly and from an ability to continue to ensure we can maintain insurance.

It's not just associates that file claims and litigation against organizations these days, customers and other third party claims and litigation is on the rise.