

PUBLICATION

Six Lessons for Franchisors on Avoiding Liability Under Title VII

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Restaurant franchisor Buffalo Wild Wings, Inc. (BWW) and Buffalo Wild Wings International Inc. were sued in Arizona on charges of Title VII violations. Angela Courtland, who worked as a bartender and server at a Buffalo Wild Wings restaurant in Surprise, Arizona, asserted that she was subjected to sexual harassment. The franchised location was owned by GCEP-Surprise, LLC. Ms. Courtland alleged that she was subject to sexual discrimination, harassment and retaliation by the restaurant's general manager and an assistant manager.

BWW maintains a franchising program that includes more than 470 Buffalo Wild Wings restaurants located across the country, and it also separately owns and operates more than 250 restaurants as corporate-owned locations. In 2007, GCEP entered into a Franchise Agreement with BWW to operate the restaurant where Ms. Courtland was employed, and BWW granted GCEP the right to establish the restaurant and a license to use the Buffalo Wild Wings brand and trademarks in exchange for royalty fees. The agreement stated that GCEP and BWW were independent contractors and that GCEP was an independent business responsible for the control and management of the restaurant. GCEP's responsibilities included the hiring, training, discipline, compensation and termination of all restaurant employees. Finally, BWW performed periodic evaluations of the restaurant to ensure compliance with franchise agreement guidelines. The evaluators did not review employee management and had minimal interaction with non-managerial staff.

Ms. Courtland alleged that franchisor BWW was liable because BWW was a joint employer and/or its franchisee was its agent and thus vicariously liable to the plaintiff. Ms. Courtland stated she believed she was employed by BWW based upon the fact that restaurant employees were provided uniforms bearing Buffalo Wild Wings trademarks and logos. She also testified to receiving on-the-job training by persons who were identified to her as trainers from BWW's corporate office, and that she was given an employee handbook that contained the BWW logo.

BWW asked the court to dismiss the case, which it did. The court found that BWW was not liable for employment discrimination because BWW was not the plaintiff's employer. Second, the court found that the franchisee, GCEP, was not deemed to be BWW's agent for purposes of establishing vicarious liability.

It also found BWW was not a joint employer with its franchisee GCEP. "Two or more employers may be considered 'joint employers' if both employers control the terms and conditions of employment of the employee." According to the court, a franchisor is not a joint employer unless it has "significant control" over the employment relationship. The court found BWW did not possess such control because the franchise agreement did not provide BWW with the right to hire, supervise or fire employees such as the plaintiff and/or her supervisor. GCEP independently provided all HR training and had sole discretion to determine how its employees were reviewed, promoted and disciplined. Further, the employee agreed that BWW did not compensate restaurant employees and that GCEP was responsible for payroll, scheduling and employee recordkeeping as well as workers' compensation claims and unemployment insurance.

BWW was not vicariously liable under agency theory. To hold a franchisor vicariously liable for the wrongful acts of its franchisee, the franchisor must control or have the right to control the daily conduct or operation. In this case, the restaurant's general manager demoted Ms. Courtland from bartender to server because of her

pregnancy and ultimately terminated her in retaliation for reporting sexual harassment by an assistant manager.

The court found that even though BWW required GCEP to maintain the restaurant's plant and signage in a specific manner; use authorized products, ingredients and vendors; and meet health and safety standards on a daily basis with the right of periodic expectations to ensure compliance with the franchise agreement, it did not control the daily conduct of the managerial staff. The court drew a bright line between maintaining strict guidelines as to the presentation and operation of the restaurant versus control over the conduct of the restaurant's employees and staff.

Thus, without any evidence indicating to the court that the franchisor had any control over the hiring, firing or discipline of the store manager, BWW could not be held vicariously responsible for the store manager's conduct.

Takeaways From This Case

This case presents several teaching points. First, franchisors must resist the temptation to assert control over the employment decisions of franchisees as they review and revise their form franchise agreements. In light of the Buffalo Wild Wings ruling, they should also ask these questions:

1. Is the franchisor involved in paying any salary or withholding, or providing benefits or insurance (such as workers' compensation or unemployment) for workers employed by the franchisee?
2. Does the franchisor provide employee training materials to franchisees?
3. Does the franchisor provide any training materials that cover human resources functions?
4. Does the form franchise agreement allow for the franchisor to influence or command the removal of any of the franchisee's executives, managers or staff?
5. Does the franchisor furnish any form of employee handbook or work rules that cover discrimination, harassment or compliance with any state or federal labor laws?
6. When the franchisor does a site inspection of the franchisee's business, does the evaluation include assessment of the quality of management's supervision or employee conduct?

If the answer to any of the questions above is yes, the franchisor should consider consulting a trusted legal advisor for further advice.