

# PUBLICATION

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## 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's federal district court on charges of Title VII violations. The plaintiff was Angela Courtland, who worked as a bartender and server at a Buffalo Wild Wings in Surprise, Arizona. The location was a franchised restaurant owned by GCEP-Surprise, LLC. Ms. Courtland's suit 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 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 in question, granting 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.

In her suit, the plaintiff alleged that franchisor BWW was liable under the theories that BWW was a joint-employer and/or its franchisee was its agent and thus vicariously liable to plaintiff. The plaintiff testified that 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 filed a motion for summary judgment that was granted by the district court. The trial court's decision included two important findings: First, 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.

**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." *E.E.O.C. v. Pac. Mar. Ass'n*, 351 F.3d 1270, 1275 (9th Cir. 2003) According to the district 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, it was undisputed that BWW did not compensate restaurant employees and that GCEP was responsible for payroll, scheduling and employee record keeping as well as workers' compensation claims and unemployment insurance.

**BWW was not vicariously liable under agency theory.** The predominant test for holding a franchisor vicariously liable for the wrongful acts of its franchisee is whether the franchisor "controls or has the right to control the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm."

In the Title VII context, the alleged "instrumentality of harm" was properly characterized as the restaurant's general manager, who demoted the plaintiff from bartender to server because of her pregnancy and ultimately terminated her in retaliation for reporting sexual harassment by an assistant manager.

The trial 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 district 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 tortious conduct.

**Six best practices that franchisors can learn from this case:** This case presents several teaching points. First, franchisors must review their form franchise agreements at least annually. Some questions to ask yourself in light of the *Buffalo Wild Wings* ruling are the following:

1. Is my franchise involved in paying any salary or withholding, or provide benefits or insurance (such as workers compensation or unemployment) for workers employed by the franchisee?
2. Does my franchise provide employee training materials to franchisees?
3. Does my franchise provide any training materials that cover Human Resources functions?
4. Do my agreements allow for the removal of any of the franchisee's executives, managers or staff?
5. Do my standard franchising materials include an employee handbook or work rules that cover discrimination, harassment or compliance with any state or federal labor laws?
6. When I (as a franchisor) conduct a site inspection of my franchisee, does the evaluation include assessment of the quality of service, management or employee conduct?

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