



Affair At Chili's Grill Sizzles – Restaurant Almost Gets Burned

By John Fletcher (New Orleans)

A recent decision by a federal appeals court should make employers, especially within the hospitality industry, take a look at their approach to office romances. Over the years, some courts have been hesitant to hold an employer liable for sexual discrimination when the harassment at issue is predicated solely upon an acrimonious breakup of an office romance. But this case illustrates a shift in this philosophy, recognizing that the focus in a harassment claim must be on the conduct at issue and that the motivating factor behind the harassment is irrelevant. *Forrest v. Brinker Int'l Payroll Co., d/b/a Chili's Grill and Bar*.

Office Romance Was Tumultuous

Allison Forrest, a server and bartender, began dating Mike Vashaw, a line cook, shortly after she began working for Chili's in 2003. Their relationship proved to be volatile, with arguments often spilling over into the workplace. For instance, during one breakup, Vashaw allegedly instigated an incident whereby Forrest was accosted by four women in the Chili's parking lot. Forrest reported the incident to the general manager, Claude Hadjaissa, who took corrective measures. Still, Forrest and Vashaw remained intimately involved until the relationship finally disintegrated in March of 2005 when Forrest began dating another man.

Within a month of their bitter breakup, Forrest lodged three separate complaints with Chili's concerning Vashaw's inappropriate behavior, alleging that Vashaw called her derogatory names (such as wh**e and bi**h), refused to handle her food orders, talked about her to other employees, squirted her with hot water, and told her that she was fat and needed to go to the gym. Chili's investigated each complaint and took remedial measures.

The first investigation resulted in an oral warning to Vashaw to "stop, and behave as a professional" or "circumstances will take place." The second inquiry resulted in a final written warning, directing Vashaw to "stop all negative confrontations with other employees," instructing him that he must correct the problem "immediately; there will be no other warnings on this matter," and informing him that failure to comply would result in "immediate termination." Vashaw was terminated during the third investigation after he admitted that he told Forrest that she was fat and needed to go to the gym.

Blaming the Company

Shortly after terminating her consensual office romance with Vashaw, Ms. Forrest sued Chili's in federal court, alleging that the restaurant exposed her to a hostile work environment created by the sexually harassing behavior of her ex-boyfriend. The court dismissed the claims, finding that Mr. Vashaw's actions did not constitute sexual harassment because they were not "based upon [Forrest's] sex."

To prove a claim of hostile work environment sexual harassment, an employee must demonstrate that the harassment was based upon sex. Many courts have found that a claim for sexual discrimination cannot be predicated upon behavior ultimately motivated by the breakup of an office romance.



A Shift in Philosophy

But on appeal, the U.S. Court of Appeals for the First Circuit, disagreed with the court's reasoning. Recognizing that the motivating factor is irrelevant, the First Circuit noted that "whether a harasser picks his or her targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention should not be the focus of the Title VII analysis." The Court further reasoned that, "presumably the prior relationship would never have occurred if the victim were not a member of the sex preferred by the harasser, and thus the victim's sex is inextricably linked to the harasser's decision to harass."

Still, the Appellate Court affirmed the dismissal of the claims against Chili's because Forrest did not establish that Chili's failed to take "prompt and appropriate action" in response to her complaints. In order to establish employer liability in a hostile work environment case stemming from a co-workers' harassment, an employee must demonstrate that the employer "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action."

Chili's was smart, and ultimately insulated itself from liability by educating its employees concerning its policy prohibiting sexual harassment; training supervisors to take disciplinary action against offenders; investigating Forrest's complaints; and taking prompt remedial action against Vashaw three times, ultimately terminating him – actions other prudent hospitality employers will want to emulate.

Cooling Off Fiery Problems

This case illustrates that employers can be held liable in a hostile work environment lawsuit even when the sole motivating factor behind the harassment is the dissolution of an office romance. While all employers face this problem daily, some hospitality employers, such as hotels, can be uniquely troubled by office romances due to their unique workplaces. The long hours, confined work space, fast pace, availability of beds, and other environmental factors can help foster such relationships. But of course it

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doesn't have to be that way. Our advice: evaluate your approach to office romances and take positive steps to insulate your company from the liability that can arise from such relationships.

Some steps that you should consider include:

- Make sure your harassment policy is up to date and distributed to all employees upon hire. Include an acknowledgment form that is signed by the employees and kept in their file.

- Consider discouraging dating between co-workers, and forbid it between supervisors and subordinates – at least those with a direct reporting relationship.
- Consider using “love contracts” as a mechanism for documenting the disclosures and acknowledgments from the employees involved in the workplace romance, as soon as an affair comes to your attention.

Protecting your company from the liability that can arise from office romances is a uniquely challenging task in the hospitality industry but it's as important today as ever.

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Hotel's “Refusal” To Arbitrate Does Not Breach Arbitration Agreement

By John McLachlan (San Francisco)

Employers with currently valid arbitration agreements should keep in mind that nothing lasts forever. Just as the world is constantly changing, so too are court decisions relating to implementation and enforcement of arbitration agreements always evolving. The case at issue involves the U.S. Court of Appeals for the Ninth Circuit, which covers ten states in the western United States. But circuits read each others' cases and the principles established by one are frequently applied elsewhere. This case points up the need to always be aware of any binding arbitration agreements and their details when dealing with employee issues. *Cox v. Ocean View Hotel.*

Background

A few facts to set the stage: Thomas Cox was hired by the Ocean View Hotel Corporation in 2001 as the Director of Finance. Like other Ocean View employees, he signed an agreement to arbitrate future disputes with his employer. This agreement specified that “the validity, interpretation, enforceability, and the performance of this Agreement shall be governed by and construed in accordance with the laws of the State of California.”

By October, 2003 relations had soured between Cox and the hotel when his supervisor raised allegations that Cox was engaged in a sexual relationship with a subordinate employee. A year later, in October, 2004, the supervisor sent a memorandum to Cox demanding that he end his personal relationship with his subordinate, claiming that the relationship was disrupting the department's performance.

This letter ended with the warning that failure to change his behavior and maintain expected work responsibilities was a serious disciplinary matter and continued failure to work within the organization to resolve this situation could ultimately be deemed an act of insubordination and grounds for immediate termination.

Cox objected to this warning and wrote a letter to his boss's supervisor, Clyde Guinn, claiming that the warning letter amounted to “sex discrimination, harassment, intimidation, interference with others in the performance of their jobs, threatening, making maliciously false and/or

defamatory statements concerning an associate, and retaliation. . . .” Cox's letter asked for arbitration and ended with a request that the hotel “provide the date and time of the arbitration hearing and any questions” to his attorney at a listed address.

Guinn responded two weeks later, on October 27, 2004 disagreeing with Cox's characterization of the warning letter as accusing Cox of having a romantic or sexual relationship with the subordinate and stating that Guinn did not consider this a case for arbitration. Guinn offered to further investigate the facts concerning the claims of harassment as well as the claimed improper relationship.

Whether or not any investigation was actually begun became of lesser moment when Ocean View terminated Cox some two months later. Cox then filed a charge of discrimination with the Hawaii Civil Rights Commission, received a notice of right to sue, and then filed a civil suit in state court. Ocean View removed the action to federal court and asked the court to stay the proceedings and require Cox to submit all his claims to final and binding arbitration in accordance with his signed agreement.

Cox argued that the hotel had breached its agreement by refusing arbitration in Guinn's October 27, 2004 letter. The district court sided with Cox and found that the hotel had breached its agreement to arbitrate and had thereby waived its right to enforce the arbitration agreement. But on appeal the 9th Circuit decided the hotel had *not* waived its right to enforce the arbitration agreement and reversed the district court's ruling.

There are several portions of the circuit court's analysis which are important to keep in mind: follow the arbitration procedures you have set up; be aware of instances where arbitration may be waived; pay attention to choice of law issues.

Know Your Own Arbitration Procedures

The Hotel's arbitration agreement provided that the AAA (American Arbitration Association) Model Employment Arbitration Procedures would be followed. Those procedures specified that the initiating party had to file a written notice of its intent to arbitrate, provide a copy of the demand to the other party and pay the applicable filing fee to the AAA. Cox failed to comply with any of these requirements in making his original demand for arbitration. Failure to follow this procedure was a key factor in the court's

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Disney Defends Against Lawsuit Under New Gun Law

By Tiffany Harlow (Atlanta)

If the National Rifle Association didn't know who Edwin Sotomayer was before, it probably does now. The former security guard for Disney's Animal Kingdom theme park could soon be a part of one of the biggest cases to address a citizen's right to keep and bear arms that the nation has ever seen.

Background

On July 7, Disney World fired Sotomayer for toting his .45 caliber handgun to work. Apparently Disney knew that Sotomayer planned to bring his gun to work and asked for permission to search his vehicle when he arrived on the property. When Sotomayer refused the search, Disney immediately suspended him and barred him from the premises. A week later, Sotomayer filed a lawsuit against Disney in a Florida state court.

Sotomayer's lawsuit is the first brought under the recently enacted Florida law allowing employees to bring firearms to work. The law requires that employees possess a permit for their weapons and keep them locked inside their vehicles. The Florida law does not require a company to allow firearms in company vehicles but does prohibit employers from questioning employees about gun ownership, conditioning employment on ownership, and searching employees' vehicles.

Laws have recently been passed in Georgia and Louisiana as well, with similar implications on employers' rights to control their workplaces. For example, individuals in Georgia are allowed to carry concealed weapons in restaurants, public transit, state parks, and other public areas, and employers are not allowed to implement "No Weapons" rules or require searches unless they meet certain criteria. Similar to Georgia and Florida, the law in Louisiana covers not only employees, but guests, business invitees, strangers and trespassers.

Shooting Holes in the Law

After years of lobbying, the NRA and others succeeded in getting these laws passed, but that was just the opening shot. Their stated goal is to have such laws enacted nationwide. But there is no one template, and many of the laws have holes in them.

For example, Louisiana employers who already restrict access to parking areas and provide facilities for storage of firearms or alternative parking reasonably close to the main parking area are exempt from the state's new law. The Georgia law contains a private property owner exception that allows such owner or person to control access to those properties without violating the law. By carving out these and other numerous exemptions to their state's laws, lawmakers may soon find that they haphazardly loaded their guns with blanks because challenges by employers and other business entities claiming exempt status are on the rise.¹

The search for that magical exemption wasn't a burdensome one for Disney. The company maintains that it is exempt from the new Florida law

and justified in its decision to fire Sotomayer because of a provision that makes exceptions for companies that hold a federal permit to use explosives. Disney holds such a permit for the extensive fireworks used in its theme parks.

Other exemptions, standard across most states with these laws, include most schools; correctional institutions; property where a nuclear-powered electricity generation facility is located; and property upon which a public or private employer conducts activities involving national defense, aerospace or homeland security. The Florida legislature and the NRA contend that its exemptions were not intended to apply to a theme park and call Disney's argument absurd, but Disney is showing no signs of backing down.



Following Disney's lead, hospitality employers concerned about workplace violence may be well served to fit themselves within one of the exemptions to their state's new gun law. For example, employers in Louisiana could avoid their state's new law by putting up signage or erecting a fence, gate, or security station to restrict parking lot access. At the end of the day, simple awareness is still key. Employers should educate themselves on what any new law does and does not allow. While a review of company policies never hurts, a complete policy overhaul is probably an unnecessary precaution.

Creating a company policy to clarify that cars and trucks with guns in them must remain locked would make good business sense under any circumstances. It might also be useful to implement an action plan with respect to when and how to search an employee's vehicle for firearms, drugs, or stolen property, to the extent these types of searches are authorized by law. You should also look carefully at any existing "No Weapons" or "Zero Tolerance" policies your company may have. Revise these policies if the law forbids blanket prohibitions.

Providing a safe work environment is always a concern for employers, particularly those dependent on the good will of the public. Fortunately, under all of these laws (so far) employers still have the right to discipline or discharge an employee who removes a weapon from a locked vehicle for any reason other than self defense, or uses that weapon to threaten, intimidate, or harm other employees. But before taking any action, you may want to consult legal counsel for guidance.

Hitting the Bull's-eye

In light of the fact that many of these laws contain exemptions of one sort or another, in addition to some limitations of liability for businesses who comply with them, there is no need to press the panic button just yet. Finding a way to work within these laws may prove easier for employers than they initially expected. It just requires a little thing called Imagination – something Mickey and his pals taught us about a long time ago. And if all else fails, take another lesson from Disney and just look for the loophole.

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¹ In fact, some of these laws are already being challenged in federal court. Recently, a federal district court found Florida's new gun law partially unconstitutional on the grounds that it prevented businesses with "employees" from allowing customers to keep weapons in locked vehicles but did not impose the same requirement on businesses without "employees." The court found that there was no rational basis for such a distinction.

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reasoning that the Hotel had not waived its right to arbitrate because arbitration had never been properly invoked in the first place.

In this regard employers can expect that courts will require the parties to an arbitration agreement to follow the provisions of the agreement, which is hardly a novel proposition. Failure to comply with the steps outlined in your agreement can make the agreement unenforceable. Be sure you are aware of the procedures you have adopted for the implementation of the arbitration process, follow them yourself, and require they be followed by employees in each instance.

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Don't Inadvertently Waive Your Rights

Certainly no employer can foresee all of the twists and turns which will occur in a future employee dispute. But ensure that any actions taken are consistent with the obligation to arbitrate. The court concluded that Guinn's October 27 letter to Cox in which he expressed his opinion "I do not consider this a case for arbitration . . ." was not a waiver. Even so, the court still conducted a careful analysis of the waiver issue under California law, which was the law the parties agreed would apply to their arbitration agreement, noting that waiver was still possible, even in light of Cox's failure to file a claim with the AAA.

California has adopted a six part test to evaluate the existence of waiver. This precise inquiry is not uniform in every state, but this test is representative of the thinking other state courts would apply in addressing whether either party had waived its rights to enforce an arbitration agreement. The inquiry was:

- are the party's actions inconsistent with the right to arbitrate?
- has litigation been substantially invoked before one party made a demand for arbitration?
- did a party request arbitration close to the trial date or delay for a long period before demanding a change from court to arbitration?
- did a defendant seeking arbitration file a counterclaim against the other party without asking for a stay of court proceedings in favor of arbitration?
- had important intervening steps been taken (such as discovery procedures not available in arbitration)? and
- had the delay affected, misled or prejudiced the opposing party.

Delay can complicate a demand for arbitration and it's generally important to invoke arbitration as soon as an issue which could be covered by the arbitration agreement arises. Every single delay is not necessarily fatal, but any delay provides the other side with additional bases upon which to argue that the arbitration agreement should not be enforced in a particular situation. Since the employer is usually the one seeking arbitration, it is not prudent to provide an employee with any grounds to avoid the agreed-upon process.

Choice Of Law Does Matter

An agreement to arbitrate is a contract and is enforceable primarily under the laws of the state involved. An employer who has only one location where all employees work has very little choice in the selection of a forum to resolve disputes concerning arbitration agreements. But hotels that have operations in a number of different states do have possible options in designating which state's law will apply in the interpretation of an arbitration agreement. When drafting or reviewing an arbitration agreement, consider whether the laws of one state are more supportive of arbitration than another state's law. And, of course, check with your legal counsel if you're not sure.

To Sum It All Up

Court and legislative pronouncements relating to arbitration agreements, like everything else in life, are neither eternal nor immovable. We advise clients not to allow an arbitration agreement to get long in the tooth before reviewing it. Audit such agreements from time to time to ensure that all sides are complying with the agreement's procedural steps and that there are no developments in the jurisdiction which have a bearing on the agreement's continuing validity.

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