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Former fast-food worker loses sexual harassment appeal

Employee's supervisor at Wendy's testified that he paid woman for sex

By A. Michael Weber, Esq.

A Tennessee Court of Appeals upheld the bench trial decision against an employee at a Nashville Wendy's, ruling that the former worker had not shown that the sexual conduct between her and her supervisor was unwelcome. *Barnett v. B.F. Nashville, Inc.*, No. M2016-00672-COA-R3-CV, 2017 WL2334229 (Tenn. Ct. App. 06/18/2017). The judgement dismissed her claims of sexual harassment.

The former employee, Tysheka Barnett, worked for B.F. Nashville, Inc., the owner of a Wendy's restaurant located near Tennessee State University in Nashville, Tenn. Barnett alleged that her manager, William Rogers, made repeated sexual advances and comments, and groped her on several occasions. She also alleged that Rogers threatened to cut her hours if she continued to rebuff his advances.

Barnett worked at the restaurant during her freshman year at the university, and claims that she could not find work elsewhere because she was on probation for marijuana possession.

Although Rogers denied the allegations that he harassed Barnett at the workplace, he did admit to paying her \$260 to have sex with him in a nearby hotel. Barnett did not deny that she traded sex for money, but suggested that it was not a simple exchange. Rather, she alleged that she felt compelled to go through with the affair out of fear for reduced hours.

Barnett's hours remained steady during the months that immediately followed the encounter, but decreased in June of 2014. While she claimed the reduction was due to her denying the advances of her manager, other witnesses testified that her hours dropped because she took a second job that required her to leave early. This was corroborated by records from her employment at a nearby Arby's during the same time period.

Make sure fraternization policies are not overbroad

Employers will often include policies regarding the relationships that can exist between employees. These so-called anti-fraternization policies may forbid supervisors from engaging in relationships with subordinates, and may include clauses to prevent employees within the same departments from marrying, or requiring that relationships be disclosed to human resources.

A 2013 study conducted by the Society for Human Resources Managers found that more than 40 percent of employers had some sort of policy relating to dating in the workplace — up from just a quarter a decade ago. Employers are increasingly including these policies in employee handbooks as a way to reduce exposure to sexual harassment and retaliation lawsuits that may arise — like in *Barnett v. B.F. Nashville*.

While it is within an employer's right to have such policies, employers need to be careful that they are not overbroad and could be perceived to quell an employee's rights under the National Labor Relations Act. Section 7 of the NLRA prohibits employers from restricting "protected concerted activity for mutual aid and benefit." While this is most often challenged as it relates to employees engaging in union organizing activities, it also protects "fraternization," such as employees meeting up after work to complain about management and the workplace. This activity may be as simple as meeting to complain about management or working conditions. These types of "fraternization" are protected by the act.

Employers also need to ensure that these policies are evenly applied to everyone, and be careful that any actions taken — such as a transfer or termination — does not give rise to a disparate treatment claim. Finally, make sure employees are aware of the policy and how to comply, and that training is regularly conducted regarding workplace sexual harassment.

In July of that year, Barnett recorded a conversation in which Rogers asked her to strip for him in the bathroom for \$40. Shortly thereafter, Barnett brought suit.

After receiving the complaint, company executives immediately conducted an investigation. Rogers eventually admitted that he exchanged money with Barnett for the two encounters, and he was fired.

The circuit court conducted a four-day bench trial in early 2016, then issued a marathon oral decision lasting more than seven hours and filing 185 pages of transcript. The court held that Barnett had failed to prove that the alleged sexual conduct was unwelcome, and therefore could not constitute harassment. The court cited the fact that not one of the employee witnesses, who worked in close proximity to the employee and her manager, corroborated her claims of constant harassment.

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The judge was unmoved by Barnett's explanation that the harassment often occurred early in the day before others arrived. She typically started her shift at 10 a.m., and other employees who started at 7 a.m. said she was never in the restaurant with Rogers before they arrived.

The court also noted that Barnett often shared personal matters with coworkers, including the story of her sexual encounter with Rogers, but somehow did not tell them about the harassment that allegedly occurred at the restaurant. The trial court cited incidents where Barnett's trial testimony was shown to be materially at odds with her prior deposition testimony. And although she claimed that her hours were reduced, they generally stayed between 25 and 35 hours per week during her entire employment, with the exception of periods when the college students were on break.

The appeals court held that the lower court ruling was "inescapably dependent" on its observations and assessments of the credibility of the witnesses, and that the evidence did not preponderate against the final decision. The appeals court also upheld the finding that the employer had proven its affirmative defense that it exercised reasonable care to prevent and correct any incidents of harassment, and that Barnett failed to take advantage of corrective opportunities or avoid harm.

The trial court found that the restaurant had a robust anti-harassment policy, and conducted a full investigation of the allegations as soon as it learned of them. When Rogers admitted to the sexual encounters with Barnett, the restaurant fired him immediately. The restaurant also transferred Barnett to an alternate location at her request, where she remained until she resigned.

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