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In Brockington v. Circus Circus Mississippi, a federal district court in Mississippi has held that when determining whether a claim for unlawful harassment is sufficiently severe or pervasive, the court will consider the context of the plaintiff's workplace (in this case a casino bar room), as well as the plaintiff's own conduct in the workplace.

Hospitality

A Littler Mendelson Newsletter

Court Holds that Workplace Context Is Relevant to Sexual Harassment Claims in the Gaming Industry

By Patrick H. Hicks and Sandra Ketner

On May 15, 2008, the United States District Court for the Northern District of Mississippi granted partial summary to Circus Circus, Mississippi, Inc. d/b/a Gold Strike Casino Resort having concluded that the plaintiff Debra Brockington's allegations of sexual harassment were not so severe or pervasive as to alter the terms and conditions of her employment. In making its decision, the court considered the context of Brockington's employment as a casino bartender. The court, however, denied Gold Strike's motion for summary judgment on Brockington's retaliation claim. See *Brockington v. Circus Circus Mississippi, Inc. dba Gold Strike Casino Resort*, No. 2:07cv1 (N.D. Miss. May 15, 2008).

Factual Background

Brockington was a bartender at Gold Strike's casino bar in Tunica County, Mississippi. Brockington alleged that she was subjected to sexual harassment by her female supervisor as well as her former boyfriend, who also worked at Gold Strike. Specifically, Brockington alleged that her supervisor, who Brockington believed was bisexual, grabbed her buttocks and breasts, popped her on the buttocks with a towel, and made sexually suggestive remarks to others about Brockington's breasts. Brockington further alleged that when she reported her supervisor's alleged harassment, she was subjected to retaliation in violation of Title VII of the Civil Rights Act of 1964. Brockington claimed that less than a week after reporting the alleged harassment, she was suspended for a period of one

month for a violation of Gold Strike's free drink policy. Brockington further claimed that after being reinstated following her suspension, she was suspended again and subsequently terminated for violating Gold Strike's attendance policy. Brockington alleged that others who committed the same or similar attendance policy violations were not terminated. Brockington asserted that the disciplinary action and her subsequent termination actually resulted from her reports of sexual harassment against the two Gold Strike employees.

In seeking to have Brockington's harassment claim regarding her supervisor's conduct dismissed before trial, Gold Strike argued that, within the context of this particular casino bar, the alleged harassment was not sufficiently severe or pervasive to alter the terms and conditions of Brockington's employment. In seeking summary judgment on Brockington's harassment claim regarding her former boyfriend, Gold Strike argued that the alleged harassment occurred off duty and nevertheless, it acted reasonably in response to Brockington's report. Further, in seeking to dismiss Brockington's retaliation claim, Gold Strike denied that the disciplinary action imposed against Brockington as well as Brockington's termination were causally connected to her reports of sexual harassment.

The Court's Analysis

The court noted that the supervisor's alleged behavior was reprehensible. Nevertheless, the court agreed with Gold Strike that the context in which the

alleged harassment arose was a relevant consideration in determining whether the alleged harassment was so severe or pervasive as to alter the terms and conditions of Brockington's employment. The court, however, was not prepared to say as a matter of law that the alleged harassment was not severe or pervasive merely because it occurred in a casino bar-room and further noted that casino bartenders have the same right as other employees to expect that they will not be subjected to unlawful harassment.

Instead, the court took into consideration Brockington's conduct. Specifically, Brockington conceded that she had off-color conversations with her female coworkers in the workplace. Brockington also conceded that she and her female coworkers sometimes patted each other on the buttocks – a fact corroborated by Brockington's coworkers. Gold Strike offered evidence that Brockington frequently joked and talked about sex in the workplace. One of Brockington's coworkers testified in her deposition that the "bar was not like 'church'" and added that the "people at the bar were 'more uninhibited, use[d] a little more spicier language' than most work locations." She further indicated that people who were offended by conversations of a sexual manner would not be able to work in the bar for very long. Brockington's coworker also testified that Brockington had given one of her male supervisors sexually related gifts such as sex toys.

The court emphasized that "[f]or harassment to affect a 'term, condition, or privilege of employment,' it must be, both objectively and subjectively, so 'severe or pervasive as to alter the conditions of employment and create an abusive working environment.'" The court concluded that Brockington, who made off-color remarks, repeatedly grabbed the rear end of a female coworker, gave sexually suggestive gifts to a coworker, and who made sexually suggestive gestures in order to 'entertain customers' can not validly contend that similar actions by a supervisor were either 'physically threatening or humiliating' nor that such conduct 'unreasonably interfered' with her work performance." The court further noted that Brockington, who initiated similar conduct in the furtherance

of her work performance, cannot establish liability against Gold Strike upon the mere fact that a coworker who engaged in similar conduct with her happened to be her supervisor. Accordingly, the court dismissed Brockington's sexual harassment claim. However, the court allowed Brockington to proceed with her retaliation claim based primarily upon the temporal proximity between her report of harassment and the imposition of her disciplinary action by Gold Strike as well as evidence that other bartenders who committed similar policy violations were not subjected to the same discipline as Brockington.

Practical Recommendations

The court's decision is significant in that it recognizes that not all workplaces are alike. While it was unwilling to make a per se rule that casino bartenders cannot sustain a claim of harassment based upon these facts, it was willing to consider the context of the plaintiff's workplace as well as the plaintiff's own conduct in the workplace. Nevertheless, employers should be mindful to take all complaints of sexual harassment or any type of harassment for that matter seriously and investigate the complaints in good faith.

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