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## EMPLOYMENT LAW

# No Sexual Harassment, but Retaliation Claim Survives

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*Special to the Legal*

Just as the adage is that “the coverup is worse than the crime,” we know that in employment law, “the retaliation claim is more dangerous than the underlying discrimination.” The latest example of this is in the recent decision of *Austin v. Bloomin’ Brands*, 2:16-CV-06509-TR (Aug. 30).

### MOSTLY HISPANIC KITCHEN STAFF

Mark Austin began working as a cook in the kitchen of Bonefish Grill in April 2015. He was one of two African-Americans working full-time in the kitchen. The other eight kitchen employees were all Hispanic. Kevin Rothery was the restaurant’s on-site manager.

When Austin began working in Bonefish’s kitchen, he observed the Hispanic staff would routinely “rub, pinch or smack one another’s backsides as they moved past one another, massage one another’s shoulders and put their arms around one another.” The Hispanic staff also refused to answer Austin’s questions or assist him when he spoke in English. He reported these issues



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throughout the first few months of his employment without resolution.

A few months after beginning, Austin complained about the kitchen staff’s behavior in touching one another, claiming that both he and the other non-Hispanic employee felt “sexually harassed.” Rothery told Austin that he would “talk to the guys” about the harassment but the behavior did not stop. In fact, Austin’s co-workers began to “look at him and smile” while putting their hands into each other’s pants. Austin voiced his complaints to other managers throughout his employment. He found that “the

more he complained, the more vulgar the kitchen staff would get.” He alleged that Rothery was not only aware of the behavior but was “present while the employees mimicked sexual acts.”

### COMPLAINTS IGNORED

In September 2015, Austin put his complaints in writing, including the kitchen staff’s “inappropriate sexual games.” Rothery did not follow up on Austin’s written complaint. After Austin complained about a specific employee inappropriately pinching him, Rothery placed that particular employee directly next to Austin on the food prep line.

Not only was Austin’s complaint to Rothery not taken seriously, but when he complained to another manager, she laughed at his issues. In March 2016, Rothery told Austin to “get engaged” or “go home.” Austin chose the latter. Incredibly, even when Austin complained to Bonefish’s joint venture partner, who investigated the complaints and found them to be credible, he was told that not only would the behavior warrant discipline only if observed by a manager, but that he was no longer

allowed to leave his work station when witnessing offensive behavior.

Finally, on March 29, Austin spoke with Bonefish's corporate human resource department and was told to "deal with the work environment or

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quit." Austin, again, chose the latter and resigned on that date.

Austin sued and at the close of discovery, Bonefish moved for summary judgment on Austin's claims of sexual harassment, race discrimination and retaliation.

## **NO SEXUAL HARASSMENT**

Summary judgment was granted with respect to Austin's sexual harassment claim. Bonefish argued that Austin could not prove that the behavior that he experienced was "because of sex" regardless of whether it was "severe or pervasive." In granting summary judgment, the court found that because Austin observed the offensive behavior on his first day of work, he was unable to show that the harassment was either "motivated by sexual desire," directed at "only one sex" or intended to convey the belief that he did not adequately conform to gender stereotypes." The court found that even though the behavior was "sexually

explicit" in nature, it had "nothing to do with anybody's sexual gender."

In addition to the sexual harassment, Austin claimed that he was subjected to racial harassment, primarily by the kitchen staff. The court found that there was no evidence that the sexually suggestive behavior that Austin found so offensive was targeted toward him because of his race.

## **ENGLISH-SPEAKING IS NOT A PROTECTED CLASS**

Austin claimed that he was discriminated against on the basis of his race because he was unable to communicate effectively with his Spanish-speaking colleagues. The court rejected this argument, finding that "English-speaker is not a protected class and language is not interchangeable with race." The court found that the other non-Spanish-speaking member of the kitchen staff seemed only "annoyed" at the staff's language barrier. As such, summary judgment was granted to Bonefish on this claim as well.

With respect to the retaliation claim, there was no dispute that Austin's repeated complaints rose to the level of "protected activity." The court found that Austin had experienced two adverse actions: the exacerbation of the hostile work environment after his complaints and constructive discharge following his manager's failure to address the offensive behavior.

## **RETALIATION CLAIM SURVIVES**

Most importantly, while the offensive behavior went on both before and after Austin complained, the court found that he was "targeted" only after "his co-workers learned that he complained to management about their behavior." Specifically, the court found that the

Hispanic kitchen staff would stare and smile at him while engaging in the offensive behavior which carried an implicit message "that Austin was being harassed in retaliation for his complaints."

Finally, the court found that the failure of management, and particularly Rothery, to address the offensive behavior was sufficient to raise an issue as to whether Bonefish had taken actions "reasonably calculated to end the harassment."

The case raises a number of issues, but also provides clear direction to employers. Among the questions is whether the offensive behavior would have been found to rise to the level of sexual harassment if Austin had been a woman working in the same circumstances. In this matter, the court was faced with a clearly offensive work environment about which no one had previously complained. In that light, is the behavior simply "the way it is" making it impossible to state a claim regardless of how severe or pervasive it was?

The direction for employers is, of course, clear. An employer is required to take "prompt and effective remedial action" when confronted with allegations of sexual harassment. Even if Bonefish determined, as did the court, that the behavior was not targeted at Austin "because of his sex," it appears that a response was necessary once the harassment increased. While this may have meant discipline against valuable employees, it is almost self-evident that an employer needs to do more than advise an employee to "get engaged or go home." •