

AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

Re: 30 160 00663 09

AMY FORREST,

CLAIMANT,

AND

WAFFLE HOUSE, INC. and
GARY BRACKIN,

RESPONDENTS.

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual or employment agreement entered into by the above-named parties and dated March 31, 2002, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Interim Award dated October 20, 2010, giving the parties 20 days to address the issue of attorneys' fee, their entitlement and the amount. By stipulation, the parties have agreed that no attorney's fees are recoverable in this action and that none shall be sought or recovered, do hereby, AWARD, as follows:

The findings and determinations contained in the Interim Award dated October, 20, 2010 and attached hereto are hereby incorporated in this Final Award and made a part hereof.

Attachment D

The administrative fees and expenses of the American Arbitration Association totaling \$1,950.00, and the compensation and expenses of the arbitrator totaling \$20,196.23, shall be borne by Respondent.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration.

All claims not expressly granted herein are hereby, denied.

Date

Major B. Harding, Arbitrator

I, Justice Major B. Harding, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

November , 2010.

Major B. Harding, Arbitrator

**American Arbitration Association
Employment Arbitration Tribunal**

AMY FOREST,

CLAIMANT,

AND

Case 30 160 00663 09

**WAFFLE HOUSE, INC. and
GARY BRACKIN,**

RESPONDENTS.

INTERIM AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the personnel manual or employment agreement entered into between the above-named parties and dated March 31, 2002, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, INTERIM AWARD, as follows:

This arbitration hearing commenced at 9:00 AM on Monday, June 7, 2010 in Conference Room B of the Dothan Civic Center, Dothan, Alabama. The Claimant, Amy Forrest, and her attorneys, E. J. Saad and Yvonne V. Gabrielson; the Respondents, Gary Brackin, and corporate representative for Waffle House, Inc.,

Carol Fouser, and their attorneys, John Coleman and Gregory Newman were present. The arbitration hearing concluded on Wednesday, June 9, 2010, at 2:45 PM.

This arbitration involves Federal claims by the Claimant against Respondents for relief under Title VII and State claims for invasion of privacy under Alabama law, sexual conduct constituting the tort of outrage and a claim against the Respondent, Gary Bracken, for assault and battery. In the opening statement, Respondents' counsel acknowledged that the issues of hostile environment, harassment, outrage, invasion of privacy, and assault and battery were properly before the Arbitrator for consideration. Counsel for Respondents did not believe that the issue of tangible employment practice was properly before the Arbitrator for deliberation.

The Claimant called the Respondent, Gary Brackin, Glen A. Gabrielson, M.D., Hope Jackson, Stacey Harrison, Terry Parker, Joshua Shiver, Brian Fears, Amy Wilson Forrest, and Denny Wilson as witnesses. The Respondents called Jennifer Etheridge, Cindy Simon, Carol Fouser, Ramon Denis, and Gary Brackin as witnesses. For rebuttal, the Claimant called Bonnie Nell Bain, Amy Wilson Forrest, and Carol Fouser as witnesses.

The Respondents assert that Claimant cannot prevail on the Title VII claim because she did not file her EEOC charge within the 180 days of the "tangible

employment action” she alleges took place either on April 4 or April 8, 2004 when Gary Brackin called Claimant and took away one of her stores and requiring her to have daily counseling sessions with him. Claimant states that she filed a letter with the EEOC on September 24, 2004, which was within 180 days of the tangible employment action alleged. The evidence revealed that EEOC responded to Claimant on the same date of her letter that her letter was insufficient to support the EEOC charge and additional information was required or the charge would be dismissed. Additional information was received by the EEOC on October 21, 2004. Claimant declares that the initial letter of September 24, 2004 was sufficient to state a claim and was within the 180 day limit. Respondents assert that the date of the charge was actually December 6, 2004, the date it was formally filed and, therefore, outside the 180 day limitation.

The Arbitrator finds the law does not support either position. In Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989) the Court dealt with the issue of whether an informal intake questionnaire submitted by a claimant to EEOC before the 180 day limitation expired, but the formal charge not being filed until after the 180 day limitation had expired, was sufficient to satisfy the 180 day requirement. The court found that the intake questionnaire submitted to EEOC was sufficient. However, in making its ruling the Court made it clear that Congress intended “that the ‘charge’ requirement will be satisfied by the filing of a

written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.” The Court also stated that the basic purpose of the filing requirement is to provide EEOC with sufficient information so that it may notify prospective defendants and the opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. (*Id.* at 1241)

Also, in *Malone v. K-Mart Corp.*, 51 F.Supp.2d 1287, 1294 (M.D.Ala.1999), the court dealt with a similar issue and stated that while an EEOC letter by the plaintiff did not satisfy each separate provision of 29 C.F.R. sec. 1601.12(a) all the requisites of Sec. 1601.12(b) were met because the letter constituted a “written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of.” (*Id.* at 1299)

Here Claimant’s September 24, 2004 letter was submitted before the expiration of the 180 day limitation; yet, it did not initially provide EEOC “sufficient information” to notify prospective defendants of the actions it believed to be discriminatory nor did it specifically name Gary Brackin or anyone else in the letter. Also, EEOC determined that without more information the charge would be dismissed.

Claimant submitted a subsequent letter received by EEOC on October 21, 2004. That letter was sufficient to meet the requirements set forth in the above cited cases; however, it was more than 180 days after April 4 or 8, 2004. The

formal charge was filed on December 6, 2004. Thus, filing with EEOC was not timely, and the Arbitrator finds that the EEOC Title VII claims are barred and that the Claimant cannot recover there under.

In regard to the State claims of hostile environment, harassment, outrage, invasion of privacy, and assault and battery, the evidence, as one would expect, is conflicting. Likewise, counsel for both sides was able to impeach most witnesses on cross-examination with some evidence of interest in the outcome of the case or prior inconsistent statements. Thus, in determining a resolution of the factual issues on the State claims by the Claimant, the ultimate decision for the Arbitrator to make is whether the greater weight of the evidence supports the allegations of the Claimant or whether the greater weight of the evidence supports the assertions of the Respondents.

After carefully listening to and observing the witnesses in the course of the Arbitration hearing and then reviewing the transcripts of testimony and the post hearing briefs filed by counsel, the Arbitrator finds that the greater weight of the evidence supports the State claims of the Claimant and that she is the prevailing party in this matter as to the State claims.

The following gives a generalization of the testimony given by the witnesses. The transcript of this proceeding consists of over 1,130 pages so time and space does not present the opportunity to give detailed descriptions of each

person's testimony. Claimant's first witness was Respondent, Gary Brackin. Mr. Brackin denied ever making an inappropriate sexual comment or touching the Claimant in an inappropriate manner. Yet, generally, he acknowledged that the conduct asserted by the Claimant, if true, would be a violation of the anti-harassment policy of Waffle House.

Following Gary Brackin's testimony, the Claimant brought in a succession of witnesses who testified as to conduct that was inappropriate and a violation of Waffle House's anti-harassment policy. The testimony ranged from witnesses hearing Gary Brackin's direct sexual comments to Amy Forrest, observing inappropriate touching of Amy Forrest by Gary Brackin constituting assault and battery, creating a hostile work environment, and harassment.

Hope Jackson, a former Waffle House employee, testified, among other things, that she heard Gary Brackin talk about Amy Forrest's relationship with her husband who was suffering from a brain tumor and comment that her husband "is not giving her what she wants." Ms. Jackson, an African American, also related that she heard Gary Brackin talk about chocolate milk coming from black women and that "black girls don't do what white girls do" all of which is a violation of Waffle House Policy. On cross-examination Ms. Jackson testified that she had filed an action against Waffle House and terminated her employment at the direction of her attorney. She also testified that she had reported to Amy Forrest,

her supervisor, that another employee had used the "N" word and that Amy Forrest had defended the other employee. In fact, she testified that when Gary Brackin heard of the reported use of the "N" word the employee who used it was terminated. She denied that she had ever used the "N" word while an employee at Waffle House and that, contrary to what Gary Brackin is supposed to have said, she had never made a comment to Gary Brackin regarding her being from Gordon, Alabama, driving a BMW automobile, and being a crack dealer. She also acknowledged that Waffle House's Area Vice President, Bill Frazier, would come into the store smelling strongly of alcohol.

Stacey Harrison, testified that on numerous occasions, while a Waffle House employee and a District Manager, at Waffle House stores he heard Gary Brackin make sexual comments, tell racial jokes, and use the "N" word. He testified that he heard Gary Brackin talk about the founders of Waffle House who would tell managers to have sex with the employees to keep them happy and coming to work. He also testified that he observed a text message from Gary Brackin's phone to Amy Forrest inquiring if she had been shaved "down there" when she had surgery. Stacey Harrison also testified that Gary Brackin would joke about the telephone Hotline for Waffle House employees to report violations of its anti-harassment policy as being ineffective and that calling the Hotline would be career suicide. He testified that on one occasion that he made a report to the

Hotline about things not being done properly. While an investigation was done, Gary Brackin came into Harrison's office and threw the paper down on his desk and said he knew about the complaint and that nothing would be done about it. He testified that during the investigation of his complaint Gary Brackin sat in on the interview with him. He also related incidents where an employee had called the Hotline to report improper conduct on the part of an Area Vice-President of Waffle House and that no investigation followed. He further acknowledged that the Area Vice President, Bill Frazier, would come into the store and smell strongly of alcohol. He testified that Bill Frazier was reported at least twice on the Hotline and that nothing was ever investigated. On cross-examination the witness did acknowledge that he had been written up by Gary Brackin for playing golf when he should have been working.

Witness, Terry Parker, also a former employee of Waffle House, testified that she shared Amy Forrest's home for a period of time and that both in the home and at work she heard and observed inappropriate comments and behavior on the part of Gary Brackin. She testified that Gary Brackin told her he wanted her to paddle him. She also testified, as did other witnesses, that she heard Gary Brackin make comments about the Hotline telephone number emphasizing that it contained the numbers "69" and that calling it was a waste of time. She testified that she saw

and heard sexually suggestive text and voice messages from Gary Brackin's phone on Amy Forrest's phone.

Witness, Joshua Shiver, also a former Waffle House employee, had a romantic relationship with Amy Forrest in the past. He testified that he had observed Gary Brackin touch Amy Forrest's bottom and heard him tell offensive sexual jokes in front of Amy Forrest. He testified that he saw a text message from Gary Brackin's phone in which he expressed to Amy Forrest that he hoped that she had gotten shaved when she had surgery. On cross-examination the witness acknowledged prior criminal conduct as a youthful offender.

Another witness, Brian Fears, was also a former employee of Waffle House. He testified that he heard Gary Brackin repeatedly tell sexual jokes and make sexual comments in front of female employees of Waffle House. He specifically testified that he heard Gary Brackin say that Amy Forrest had gotten her job "on her back" and that he would be willing to give her what she needed. He testified also that Gary Brackin told employees that any complaint should go through him instead of the Hotline because he would get the complaint and determine if it was sexual harassment or not.

Amy Forrest's brother, Denny Wilson, was called for the isolated purpose of testifying that he had made no report concerning a shortage in one of Amy

Forrest's stores. This evidently was to counter the evidence that Gary Brackin has stated that a shortage was the basis of taking an employment action against Forrest.

Amy Forrest testified for approximately 4 ½ hours. Her testimony is contained in over 240 pages of the transcript. She was examined extensively by both attorneys. She testified of the many times Gary Brackin used inappropriate sexual innuendoes and comments to her or in her presence and touched her in an inappropriate manner. For example, she relayed his use of the numbers "69" in the Hotline telephone number at staff meetings. She told of receiving either voice or text messages from Gary Brackin's phone saying things like he was coming over and hoping she had on nothing but the radio or that he was driving naked down the road. Amy Forrest testified that he made comments regarding her hysterectomy asking whether she had been shaved or that she had taken out a playpen and replaced it with a playground. She further testified that Gary Brackin would joke that at Waffle House sexual harassment was not tolerated, it was graded!

She testified that when she approached Area Vice President, Bill Frazier to complain of Gary Brackin's conduct that he offered to take her to get a drink. He also told her that she didn't get to choose for whom she worked and that Waffle House basically had her in "golden handcuffs" because there was no other place she could make the same amount of money. She told of making calls to Waffle

House Hotline in February, 2004 and about 30 days later to complain of the sexual harassment and that she received no response from those calls. She testified that approximately one month after the last call, Respondent, Gary Brackin, gave her a reprimand and took one of her stores away from her. He required her to submit to daily "counseling" sessions and after 90 days, restored the store to her.

The Respondent put on witnesses who testified they had never seen any of the behavior or witnessed any of the incidents relayed by the Claimant's witnesses. Jennifer Etheridge, a former Waffle House employee, testified that she worked under Amy Forrest, a district manager. She testified that she had observed Gary Brackin on numerous occasions at Smart Start staff meetings where Amy Forrest was present and that she never heard any statements that were inappropriate or in violation of the anti-harassment policy. She never heard him make light of the numbers "69" in the Hotline telephone number. In addition, she testified that Amy Forrest told her she had sent text messages to Gary Brackin containing references to sex acts. Gary Brackin later testified and denied receiving an email containing sexual language that Ms. Ethridge said Amy Forrest said she had sent to him.

Ms. Ethridge also testified that she had observed Amy Forrest engage in a sex act with Josh Shiver at a Waffle House store. She also testified that she had engaged in sexual relations with a grill operator while she was employed at Waffle House. She testified that she had worked under Amy Forrest and that she left

employment at Waffle House because Amy Forrest had written her up a number of times for deficiencies. Ms. Etheridge also testified that she was scared to use the Waffle House Hotline to report Amy Forrest because "she was over my unit and they always got to the upper management people first." She further indicated that calling the Hotline would cause her more grief than she already had.

Respondents next called Cindy Simon who had trained under Amy Forrest for about three weeks and that during that time she had never heard Gary Brackin say or do anything that would have been a violation of the Waffle House anti-harassment rules. Cindy Simon also testified that Amy Forrest was currently married to her ex-husband.

Respondents called Carol Fouser, Waffle House corporate representative. She is also a Case Manager for Waffle House and testified regarding the anti-harassment procedures Waffle House had in effect and that she had reviewed the records of the Waffle House Hotline and could not find any record of a Hotline call from the area code in which Amy Forrest lived.

Ramon Denis, a Waffle House Case Manager, testified that he had investigated harassment related Hotline calls and the discipline resulting from those calls.

Gary Brackin testified as the Respondents' last witness. He denied having done any of the things Claimant's witnesses testified that he did. He attributed to

the Claimant statements to the effect that sexual harassment was not reported but graded. He attributed to her statements she made regarding her hysterectomy and the removal of a baby pen and a playpen put in.

On rebuttal, the Claimant called Bonnie Nell Bain, Amy Forrest's mother, who testified that she had called the Waffle House where her daughter worked and Gary Brackin answered the phone. He identified himself and when Ms. Bain asked to speak to Amy he replied something to the effect that he had her on her knees and that she would call when he was through with her. She also testified that Amy Forrest was under great stress and had lost a great deal of weight.

Amy Forrest was recalled to state agreement with Gary Brackin's statement that she had never sent a text message describing a certain sex act to him. She also denied that she had ever had sex with Josh Shiver at a Waffle House store.

Claimant's last rebuttal witness was Carol Fouser who confirmed that the Waffle House phone bills were paid by check out of the main office and that there would be a record of an 800 number call being received.

The Respondents assert that Amy Forrest did not call the Hotline and that if she had she could have produced phone records of the calls. Likewise, Amy Forrest asserts that Waffle House could have produced its phone records testified to by Carol Fouser to support its claim that no calls were made by Amy Forrest to the Hotline but did not do so. Respondents state that failure to call the Hotline is

fatal to the Claimant's claim. There is conflicting testimony as to whether the Claimant made the calls or not, there is also conflicting testimony regarding whether such a Hotline call results in appropriate response from Waffle House if it is made regarding one's superior. There was evidence, even from one of Respondents' own witnesses that she refused to make a call to the Hotline because she considered it was useless if you complained about a superior.

The Arbitrator is also confronted with the undisputed testimony that Claimant tried to complain about Gary Brackin's conduct to the Area Vice President, Bill Frazier, and that her efforts resulted in his offer to buy her a drink and a comment about golden handcuffs. The Arbitrator finds from the greater weight of the evidence that the Claimant made reasonable efforts asking Gary Brackin to stop his conduct and also to complain about the conduct of Gary Brackin through other channels and that those efforts went for naught with the management of the Respondent, Waffle House.

Respondents have raised issues relating to the timeliness of the action asserting laches and Statute of Limitations. The Arbitrator, after carefully reading the briefs of the parties and the arguments relating to each of these issues, determines that the claims of the Claimant are not barred by either. While there was a delay of almost 4 years for the Claimant to file a demand for arbitration after arbitration was compelled by the Court, the evidence revealed that Claimant's

initial attorney became mentally ill and ultimately committed suicide, thus explaining, at least in part, the delay. This arbitration was not stopped by the Court, and the Arbitrator finds no evidence of prejudice and that witnesses were unavailable to Respondents because of the delay. Thus, the Respondents' claim of laches is denied. The Arbitrator also finds that the action was filed within the time limits prescribed by law. Many of the acts of sexual harassment testified within the time provided by the Statute of Limitations.

Having previously determined that Claimant cannot recover under Title VII EEOC claims, the Arbitrator turns his attention to the State claims of Claimant, to-wit: invasion of privacy, outrage, and assault and battery. The Arbitrator finds from the greater weight of all the evidence that Claimant suffered mental distress, shame, and humiliation from the Respondent, Gary Brackin's, conduct during her employment. The Arbitrator also finds that Gary Brackin touched the Claimant in such a manner that amounts to assault and battery. The Arbitrator also finds that Respondent's conduct was so outrageous that it cannot be tolerated in a civilized society. Baldwin v. Blue Cross/Blue Shield of Alabama, 480 F.3d 1287, 1308 (11th Cir. 2007). The Arbitrator finds that the conduct of the Respondents was, in fact, the reason Claimant could no longer work at Waffle House. While she has been effectively unemployed since her termination from Waffle House, there is evidence that she suffers from a condition her physician says surgery would correct

and that she would be able to return to good health and pursue regular employment thereafter. The condition from which she presently suffers is not related to her employment at Waffle House.

Having made the above determination, the Arbitrator is confronted with the issue of damages. For the State claims, Claimant seeks \$2,368,491 in economic damages, \$1,684,000 for emotional distress for a total of \$4,052,491. Respondents respond that it would be a travesty to award the Claimant anything and, furthermore, to do so would be grounds to set aside the award. Nonetheless, the Arbitrator finds the Claimant, Amy Forrest, shall have and recover from the Respondents, Waffle House, Inc. and Gary Brackin, the sum of \$250,000 for economic damages and \$250,000 for emotional distress, for which sums let execution issue.

The parties shall have 20 days from the date hereof to address the issue of attorneys' fee, their entitlement and the amount.

This Award shall remain in full force and effect until such time as a Final Award is rendered.

DATED this 14 day of October, 2010.