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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Angela M. Courtland,

10 Plaintiff,

11 v.

12 GCEP-Surprise, LLC, an Arizona limited
13 liability company; Buffalo Wild Wings
International, Inc., a corporation; and
14 Buffalo Wild Wings, Inc., a corporation,

15 Defendants.
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No. CV-12-00349-PHX-GMS

ORDER

18 Pending before the Court is Defendants Buffalo Wild Wings, Inc.’s and Buffalo
19 Wild Wings International Inc.’s Motion for Summary Judgment. (Doc. 53.) For the
20 reasons discussed below, Defendants’ Motion is granted.¹

21 **BACKGROUND**

22 Plaintiff Angela Courtland worked as a bartender and server at a franchised
23 Buffalo Wild Wings restaurant located in Surprise, Arizona (the “Restaurant”) from
24 December 2007 until her termination in November 2009. (Doc. 54, BWWI SOF ¶ 59;
25 Doc. 1 ¶ 6.) Courtland alleges that she was subject to sexual discrimination, harassment,
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27 ¹ Defendant’s request for oral argument is denied because the parties have had an
28 adequate opportunity to discuss the law and evidence, and oral argument will not aid the
Court’s decision. See *Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*, 933 F.2d
724, 729 (9th Cir. 1991).

1 and retaliation by the Restaurant's general manager, Mike Marley, and an assistant
2 manager, Josh Buckaloo. (Doc. 1 at 7-9.) She brings Title VII claims against the
3 Restaurant's franchisor, Buffalo Wild Wings, Inc. and Buffalo Wild Wings International
4 Inc. (collectively, "BWVI"), and the franchisee, GCEP-Surprise, LLC ("GCEP").

5 BWVI maintains a franchising program which includes more than 470 Buffalo
6 Wild Wings restaurants located across the country. (Doc. 54, BWVI SOF ¶ 1.) BWVI
7 also separately owns and operates over 250 restaurants as corporate-owned locations. (*Id.*
8 ¶ 2.) BWVI owns the trademarks and proprietary systems associated with its franchised
9 and corporate-owned restaurants. (*Id.* ¶ 3.) On October 11, 2007, GCEP entered into a
10 Franchise Agreement (the "FA") with BWVI to operate the Restaurant. (*Id.* ¶ 4.) BWVI
11 terminated the FA with GCEP on May 23, 2011. (*Id.* ¶ 92.)

12 The FA granted GCEP the right to establish the Restaurant and a license to use the
13 Buffalo Wild Wings brand and trademarks in exchange for royalty fees. (Doc. 54-1, Ex. 4
14 §§ 9(B), (C).) The FA stated that GCEP and BWVI were independent contractors and
15 that GCEP was an independent business responsible for the control and management of
16 the Restaurant. (*Id.* §§ 6(M), 15(L).) GCEP's responsibilities included the hire, training,
17 discipline, compensation, and termination of all Restaurant employees. (*Id.* § 6(M).) The
18 FA set forth guidelines regarding plant maintenance, product presentation and service,
19 insurance, and use of the BWVI trademark, among other items. (*See* Doc. 54-1, Ex. 4.)
20 BWVI mandated training for the Restaurant's general manager, operational manager,
21 and assistant manager. (*Id.* § 7(B).) The training was directed towards product
22 presentation and service and did not address human resources ("HR") or employment
23 matters. (Doc. 54-2, Ex. 7, Skowronski Depo. at 77-78.) Any supplemental materials
24 regarding employment matters provided by BWVI was merely advisory. (Doc. 54,
25 BWVI SOF ¶ 54.) BWVI performed periodic evaluations of the Restaurant to ensure
26 compliance with the FA guidelines. (Doc. 54-1, Ex. 4 § 6(G).) The evaluators did not
27 review employee management and had minimal interaction with non-managerial staff.
28 (Doc. 54-2, Ex.7, Skowronski Depo. at 80; Doc. 54-2, Ex. 13, Courtland Depo. at 18-20.)

1 While working at the Restaurant, Courtland believed she was an employee of
2 BWWI. She attests that she was given on-the-job training by persons who were identified
3 to her as trainers from BWWI's corporate office, and was given an employee handbook
4 that contained the BWWI logo. (Doc. 57, Ex. 1 ¶ 10.) She further states that she was told
5 by her superiors that she was an employee of BWWI. (*Id.* ¶ 3.) Her belief was also based
6 on the fact that the Restaurant was dressed with Buffalo Wild Wings trademarks. (Doc.
7 54-2, Ex. 13, Courtland Depo. at 22, 39.) However, Courtland was hired, trained on
8 employment matters, supervised, and terminated by Marley. (*Id.* at 18, 22-23, 38-39.)

9 BWWI moves for summary judgment on all claims. BWWI argues that it cannot
10 be held liable for Courtland's allegations of employment discrimination because BWWI
11 was not Courtland's employer nor was GCEP its agent for purposes of vicarious liability.

12 DISCUSSION

13 I. LEGAL STANDARD

14 Summary judgment is appropriate if the evidence, viewed in the light most
15 favorable to the nonmoving party, shows "that there is no genuine issue as to any material
16 fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
17 Substantive law determines which facts are material and "[o]nly disputes over facts that
18 might affect the outcome of the suit under the governing law will properly preclude the
19 entry of summary judgment." In addition, the dispute must be genuine, that is, the
20 evidence must be "such that a reasonable jury could return a verdict for the nonmoving
21 party." *Anderson*, 477 U.S. at 248. "[A] party seeking summary judgment always bears
22 the initial responsibility of informing the district court of the basis for its motion, and
23 identifying those portions of [the record] which it believes demonstrate the absence of a
24 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

25 Because "[c]redibility determinations, the weighing of the evidence, and the
26 drawing of legitimate inferences from the facts are jury functions, not those of a judge, . .
27 . [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be
28 drawn in his favor" at the summary judgment stage. *Id.* at 255 (citing *Adickes v. S.H.*

1 *Kress & Co.*, 398 U.S. 144, 158–59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th
2 Cir. 1999) (“Issues of credibility, including questions of intent, should be left to the
3 jury.”) (internal citations omitted).

4 Further, the party opposing summary judgment “may not rest upon the mere
5 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts
6 showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *see also* LRCiv.
7 1.10(l)(1) (“Any party opposing a motion for summary judgment must . . . set[] forth the
8 specific facts, which the opposing party asserts, including those facts which establish a
9 genuine issue of material fact precluding summary judgment in favor of the moving
10 party.”). If the nonmoving party’s opposition fails to specifically cite to materials either
11 in the court’s record or not in the record, the court is not required to either search the
12 entire record for evidence establishing a genuine issue of material fact or obtain the
13 missing materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028–29 (9th
14 Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417–18 (9th Cir. 1988).

15 **II. ANALYSIS**

16 **A. Joint employer**

17 “Two or more employers may be considered ‘joint employers’ if both employers
18 control the terms and conditions of employment of the employee.” *E.E.O.C. v. Pac. Mar.*
19 *Ass’n*, 351 F.3d 1270, 1275 (9th Cir. 2003) (internal citations omitted). “[B]efore a
20 person or entity can be a joint employer, it must possess the attributes of an employer to
21 some degree.” *Id.* at 1277. The Ninth Circuit applies an “economic reality” test to
22 determine the existence of a joint employment relationship. *Brown v. Arizona*, CV-09-
23 2272-PHX-GMS, 2011 WL 2911054 at *2 (D. Ariz. July 20, 2011) (citing *Torres–Lopez*
24 *v. May*, 111 F.3d 633, 639 (9th Cir. 1997)). All factors relevant to the particular situation
25 must be considered in evaluating the economic reality of an alleged joint employment
26 relationship. *Moreau v. Air Fr.*, 356 F.3d 942, 947 (9th Cir. 2004) (internal quotation
27 marks and citations omitted). For example, the following factors are relevant to this
28 analysis:

1 (A) The nature and degree of control of the workers; (B) The degree of
2 supervision, direct or indirect, of the work; (C) The power to determine the
3 pay rates [or] the methods of payment of the workers; (D) The right,
4 directly or indirectly, to hire, fire, or modify the employment conditions of
5 the workers; and (E) Preparation of payroll and the payment of wages.

6 *Pac. Mar. Ass’n*, 351 F.3d at 1275 (citing *Torres–Lopez*, 111 F.3d at 646).² The Supreme
7 Court and several lower courts have considered “the *sine qua non* of determining whether
8 one is an employer [to be] that an ‘employer can hire and fire employees, can assign tasks
9 to employees and supervise their performance.’” *Id.* (citing *Clackamas Gastroenterology*
10 *Assocs., P. C. v. Wells*, 538 U.S. 440, 449-50 (2003) and collecting cases). In other
11 words, “[t]he ‘joint employer’ concept recognizes that the business entities involved are
12 in fact separate but that they *share* or co-determine those matters governing the essential
13 terms and conditions of employment.” *Id.* at 1276-77 (alterations in original and internal
14 citations omitted).

15 BWWI contends that it was not a joint employer of Courtland because it did not
16 exert control over her employment with the Restaurant.³ A franchisor is not a joint
17 employer unless it has significant control over the employment relationship. For example,
18 in *Singh v. 7–Eleven, Inc.*, an employee sought to hold liable a franchisor for FLSA
19 violations. No. C–05–04534, 2007 WL 715488 at *3-6 (N.D. Cal. March 8, 2007). The
20 court held that the franchisor was not a joint employer because pursuant to the franchise
21 agreement, the franchisee had “exclusive right and responsibility to control the hiring and
22 firing decision.” *Id.* at *4. Further, the franchisor did not compensate employees or
23 exercise control over the terms of employment, including training, assigning job duties,

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25 ² “Because there are no reported cases of this Circuit holding that there is a
26 distinction between joint employment in the FLSA and FMLA contexts and joint
employment under anti-discrimination statutes like the ADA and Rehabilitation Act, the
Court will apply the same legal framework here.” *Brown*, 2011 WL 2911054 at *3.

27 ³ The Parties agree that BWWI was not Courtland’s direct or sole employer. (Doc.
28 58 at 8.) Courtland also does not argue that BWWI was an indirect employer that
performed the alleged discriminatory acts. *See, e.g., Pac. Mar. Ass’n*, 351 F.3d at 1273.

1 and scheduling. *Id.*; see also *Reese v. Coastal Restoration and Cleaning Services, Inc.*,
2 No. 1:10cv36, 2010 WL 5184841 at *3 (S.D. Miss. Dec. 15, 2010); *Donovan v. Breaker*
3 *of America, Inc.*, 566 F. Supp. 1016, 1019, 1021 (E.D. Ark. 1983); *Howell v. Chick-Fil-A,*
4 *Inc.*, No. 92–30188, 1993 WL 603296 at *4-5 (N.D. Fla. Nov. 1, 1993).⁴

5 Employee and operational supervision does not equate joint employment if the
6 franchisor exercises it for a specific purpose and it is different than the control exercised
7 by an employer. In *Moreau v. Air France*, a franchisor was not found to be the joint
8 employer of ground crew members, despite extensive supervision, specific performance
9 requirements, and rigid quality control. 356 F.3d 942, 951 (9th Cir. 2004). The court
10 found it relevant that the control was exercised to ensure passenger safety and not to
11 control the employment relationship. *Id.*; see also *Zhao v. Bebe Stores, Inc.*, 247 F. Supp.
12 2d 1154, 1160 (C.D. Cal. 2003) (franchisor’s employees monitored franchisee’s
13 employees for quality control but franchisor did not schedule or control shifts, or assign
14 duties); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 688 (D. Md. 2010) (not finding
15 joint employment although franchisor had power to hire and fire technicians, and set
16 schedules and performance standards because it was for quality control). Where courts
17 have found joint employer liability, the franchisor or putative owner has had significant
18 involvement in day-to-day employee management. See *Miller v. D.F. Zee’s, Inc.*, 31 F.
19 Supp. 2d 792, 806 (D. Or. 1998); *Torres-Lopez*, 111 F.3d at 637.

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21 ⁴ BWVI relies heavily on *Alberter v. McDonald’s Corp.*, 70 F. Supp. 2d 1138 (D.
22 Nev. 1999) to support its argument against joint employer liability. However, the court in
23 that case applied the “single employer” test to determine if two business entities were a
24 single employer. That test is relevant when “separate corporations are not what they
25 appear to be, that in truth they are but divisions or departments of single enterprise.”
26 *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960). In contrast, the “joint employer”
27 test assumes that the two businesses are separate legal entities and analyzes whether they
28 “co-determine important matters governing the employer-employee relationship.” *U.S.*
Football League Players Ass’n, AFL-CIO v. U.S. Football League, 650 F. Supp. 12, 15
(D. Or. 1986). Courtland admits that BWVI was not her direct employer and does not
argue that BWVI and GCEP are a single enterprise. (Doc. 58 at 8.) As such, the Court
will not apply the *Alberter* framework to this case.

1 BWWI contends that it did not have the right to hire, supervise and fire employees
2 such as Courtland. Courtland does not contest that GCEP was responsible for those
3 decisions regarding non-managerial staff. (Doc. 54, BWWI SOF ¶ 45; Doc. 57, Courtland
4 SOF ¶ 45.) Further, it is undisputed that BWWI did not compensate Restaurant
5 employees and that GCEP was responsible for payroll, scheduling, and employee record-
6 keeping as well as worker's compensation claims and unemployment insurance. (Doc.
7 54, BWWI SOF ¶¶ 38-43; Doc. 57, Courtland SOF ¶¶ 38-43.) GCEP independently
8 determined how its employees were reviewed, promoted and disciplined. (Doc. 54,
9 BWWI SOF ¶ 46.)

10 Training was also GCEP's responsibility; BWWI did not train non-managerial
11 staff. (Doc. 54-1, Ex. 4 § 7(A), (B), (C); Doc. 54, BWWI SOF ¶ 44.) In the declaration
12 filed with her Response, Courtland states that she "was given on-the-job training by
13 persons who were identified to [her] as trainers from the [BWVI] corporate office, and
14 was given an employee handbook that had the [BWVI] logo and stated on its cover that
15 it was a [BWVI] 'employee handbook.'" (Doc. 57, Ex. 1 ¶ 10.) However, at her sworn
16 deposition, Courtland repeatedly testified that she never met anyone that she could
17 identify as having worked at BWVI's corporate headquarters and that her supervisor
18 Mike Marley trained her on all HR issues. (Doc. 54-2, Ex. 13 at 18-20, 25-26, 31.)
19 Courtland's controverting declaration does not create a genuine issue of fact as to
20 BWVI's involvement in employee training. *See Kennedy v. Allied Mut. Ins. Co.*, 952
21 F.2d 262, 266 (9th Cir. 1991) ("The general rule in the Ninth Circuit is that a party cannot
22 create an issue of fact by an affidavit contradicting [her] prior deposition testimony.")

23 BWVI asserts that it was not involved with HR matters. It is undisputed that
24 BWVI did not provide assistance with respect to HR issues, mandate HR training, or
25 monitor the Restaurant's HR policies. (Doc. 54, BWVI SOF ¶¶ 50-53, 55; Doc. 57,
26 Courtland SOF ¶¶ 50-53, 55.) To the extent that BWVI provided managerial staff with
27 HR training material, it was provided on an advisory basis. (Doc. 54, BWVI SOF ¶ 54.)

28 Finally, BWVI contends that it did not influence GCEP's conduct of the

1 Restaurant's daily operations nor did it share profits with GCEP. The FA states, in
2 relevant part:

3 You acknowledge that you are an independent business and responsible for
4 control and management of your Restaurant, including, but not limited to,
5 the hiring and discharging of your employees and setting and paying wages
6 and benefits of your employees. You acknowledge that we have no power,
7 responsibility or liability in respect to the hiring, discharging, setting and
8 paying of wages or related matters.

9 (Doc. 54-1, Ex. 4 § 6(M).) Although the FA provision is not dispositive, it indicates that
10 GCEP was independently responsible for operations. In the FA, BWVI set forth
11 guidelines regarding plant maintenance, products and operations, liability insurance,
12 indemnification, periodic inspection, and use of the BWVI logo in order to maintain and
13 develop the good will behind its franchise. (*See, e.g.*, Doc. 54-1, Ex. 4 § 5(C), (E), (F),
14 6(B), (C), (F), (I).) BWVI also had the power to terminate GCEP as a franchisee.
15 However, that supervision "alone is not sufficient to create a joint employment
16 relationship." *Singh*, 2007 WL 715488 at *4 (citing *Evans v. McDonald's Corp.*, 936
17 F.2d 1087, 1090 (10th Cir. 1991)); *see Zhao*, 247 F. Supp. 2d at 1160; *Jacobson*, 740 F.
18 Supp. 2d at 688; *Moreau*, 356 F.3d at 951. It is further undisputed that GCEP solely
19 managed all investment, financial, and compensation matters. (Doc. 54, BWVI SOF ¶¶
20 25-29, 38; Doc. 57, Courtland SOF ¶¶ 25-29, 38.) GCEP was the sole owner and BWVI
21 did not have a financial interest in the Restaurant besides receiving royalty fees for the
22 use of its brand name. (Doc. 54, BWVI SOF ¶¶ 5, 11, 12.)

23 There is no genuine issue of material fact GCEP had independence in making
24 employment decisions related to Courtland and other staff. The Court concludes as a
25 matter of law that BWVI may not be held liable as a joint employer.

26 **B. Vicarious Liability**

27 **1. Agency Relationship**

28 The Ninth Circuit has adopted the agency test for determining when two entities
are jointly liable for Title VII violations, under which the determination of whether one

1 entity is an agent for another is determined based upon traditional rules of agency. *Miller*,
2 31 F. Supp. 2d at 806 (citing *Kaplan v. Int’l Alliance of Theatrical and Stage Employees*
3 *of the U.S. and Can.*, 525 F.2d 1354, 1360 (9th Cir. 1975)). “Agency is susceptible of
4 proof as is any other fact and may be established from the circumstances, such as the
5 relation of the parties to each other and to the subject matter, their acts and conduct.”
6 *State Farm Mut. Auto. Ins. Co. v. Mendoza*, CIV-02-1141-PHX-ROS, 2006 WL 44376 at
7 *17 (D. Ariz. Jan. 5, 2006) (citing *Phoenix W. Holding Corp. v. Gleeson*, 18 Ariz. 60, 65-
8 66, 500 P.2d 320, 325-26 (App. 1972)). In the franchise context, “an essential element of
9 agency” is the franchisor’s right to control the franchisee’s actions. See Restatement
10 (Third) of Agency § 1.01 cmt. f (2006). “Control is a concept that embraces a wide
11 spectrum of meanings,” but within any relationship of agency the principal initially states
12 what the agent shall and shall not do, and has the right to give interim instructions or
13 directions to the agent once their relationship is established. *Id.*

14 The “predominant test” for holding a franchisor vicariously liable is whether it
15 “controls or has the right to control the daily conduct or operation of the particular
16 ‘instrumentality’ or aspect of the franchisee’s business that is alleged to have caused the
17 harm.” *Gray v. McDonald’s USA, LLC*, 874 F. Supp. 2d 743, 752 (W.D. Tenn. 2012)
18 (citing *Kerl v. Dennis Rasmussen, Inc.*, 273 Wis. 2d 106, 129 (2004)); see, e.g., *Triplett v.*
19 *Soleil Grp., Inc.*, 664 F. Supp. 2d 645, 648 (D.S.C. 2009) (internal citation omitted);
20 *Hong Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83 (E.D.N.Y. 2000). This test has
21 been applied in the context of tortious actions committed by a franchisee or its
22 employees. See *Viches v. MLT, Inc.*, 127 F. Supp. 2d 828, 832 (E.D. Mich. 2000) (hotel
23 franchisor not liable for franchisee’s negligent use of pesticides); *Viado v. Domino’s*
24 *Pizza, LLC*, 217 P.3d 199, 201, 207 (Or. Ct. App. 2009) (restaurant franchisor not liable
25 for negligent driving of franchisee’s employee because franchisor did not have right to
26 control that conduct); *Papasthatis v. Beall*, 150 Ariz. 279, 723 P.2d 97 (App. 1986)
27 (franchisor could be held negligent because franchisor owned the franchisee’s property
28 and also selected, recommended, and inspected the soda machine alleged to have caused

1 the harm). The alleged “instrumentality of harm” in this case is properly characterized as
2 the Restaurant’s managerial staff. Courtland bases her Title VII claims on allegations that
3 Mike Marley, the Restaurant’s general manager, demoted her from bartender to server
4 because of her pregnancy and ultimately terminated her in retaliation for reporting sexual
5 harassment by an assistant manager, Josh Buckaloo.

6 Franchisor supervision does not necessarily extend to control over an
7 instrumentality of franchisee harm. In *Kerl*, the Wisconsin Supreme Court explained the
8 significance of operational requirements imposed by a franchisor on a franchisee:

9 [B]ecause many franchise relationships include a license to use the
10 franchisor’s trade or service mark, the detailed quality and operational
11 standards and inspection rights specified in the franchise agreement are
12 integral to the protection of the franchisor’s trade or service mark under the
13 Lanham Act The premises of vicarious liability weaken when applied
14 to a claim that a franchisor should be held strictly liable for the torts of its
franchise[e] [because t]he “control” of a franchisor does not consist of
routine, daily supervision and management of the franchisee’s business.

15 273 Wis. 2d at 126. The court sided with the majority view in other jurisdictions that:

16 The standardized provisions commonly included in franchise agreements
17 specifying uniform quality, marketing, and operational requirements and a
18 right of inspection do not establish a franchisor’s control or right to control
the daily operations of the franchisee sufficient to give rise to vicarious
liability for all purposes or as a general matter.

19 *Id.* at 131-32; *see id.* at 127-29 (collecting cases); Restatement (Third) of Agency § 1.01
20 cmt. f (2006) (stating that the fact that a franchisor “imposes constraints” on a franchisee
21 and sets “standards in an agreement for acceptable service quality” does not of itself
22 create a right of control); *see, e.g., Viches*, 127 F. Supp. 2d at 832 (franchise agreement
23 does nothing more than insure “uniformity and standardization . . . of services”); *Perry v.*
24 *Burger King Corp.*, 924 F. Supp. 548, 554 (S.D.N.Y. 1996) (restaurant franchisor not
25 vicariously liable for racial discrimination by franchisee because franchise agreement did
26 not provide that franchisor had control over employment matters).

27 BWWI set out guidelines in the FA in order to promote uniformity among
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1 franchisees and protect its good will. BWWI required GCEP to maintain the Restaurant's
2 plant and signage in a specific manner, use authorized products, ingredients, and vendors,
3 and meet health and safety standards. (Doc. 54-1, Ex. 4 § 5(C), (E), (F), 6(B), (C), (F),
4 (I).) BWWI further reserved the right to perform periodic evaluations and send mystery
5 shoppers to ensure that GCEP was following the FA guidelines. (*Id.* § 6(G).) Courtland
6 testified that representatives from BWWI's corporate office would visit the Restaurant to
7 meet with her managers and that on such occasions: "our managers would make us clean
8 up, get ready, be on your best behavior, and everybody was always nervous to be the
9 person who got chosen to serve that table, because we knew that those were important
10 people." (Doc. 54-2, Ex. 13 at 18-20.) The fact that BWWI maintained strict guidelines
11 as to the presentation and operation of the Restaurant does not establish, without more,
12 that BWWI had control over the Restaurant's managerial staff. *See Kerl*, 273 Wis. 2d at
13 126 ("The imposition of vicarious liability [on a franchisor] has less effectiveness as an
14 incentive for . . . the exercise of care in the absence of the sort of daily managerial
15 supervision and control of the franchise that could actually bring about improvements.").

16 Rather, vicarious liability attaches for employment discrimination if the franchisor
17 exerts daily control over the hiring, firing, and supervision of franchisee employees. *See*
18 *Gray*, 874 F. Supp. 2d at 752 ("No evidence indicates that [the franchisor] had any
19 control over the hiring, firing, or discipline of [the store manager]. [The franchisor] is
20 therefore not vicariously responsible for [the store manager's] tortious conduct."). The
21 facts in *Alberter*, a case involving Title VII claims, are instructive here. As in the present
22 case, plaintiff alleged that the restaurant manager did not take action when a supervisor
23 subjected her to sexual harassment. 70 F. Supp. 2d at 1140. However, the franchisor "did
24 not control day-to-day operations" and "did not have control over employment matters
25 with respect to workers there." *Id.* at 1145. The court further noted that the fact that the
26 franchisor set operational standards and non-binding personnel policies, and could
27 terminate the franchise agreement, "does not establish the requisite degree of control to
28 demonstrate that an agency relationship existed." *Id.* The court concluded that "the

1 argument that [the franchisor] may be held liable to [plaintiff] for employment
2 discrimination because [the owner] acted as the corporation's agent must . . . fail." *Id.*

3 BWWI did not have control over the daily conduct of the Restaurant's managerial
4 staff. As discussed *supra* in Section II.A., the FA is indicative of GCEP's independence
5 in employee matters. (Doc. 54-1, Ex. 4 § 6(M).) Although such avowals in a franchise
6 agreement are not dispositive of the agency question, see Restatement (Third) of Agency
7 § 1.02 cmt. a (2006), they are relevant to determine the parties' intentions, see *Alberter*,
8 70 F. Supp. 2d at 1146. In practice, GCEP had sole responsibility for hiring, training,
9 supervising, scheduling, compensating, reviewing, and terminating employees as well as
10 addressing HR issues or grievances. BWWI's Director of Management Development,
11 Nicole Fuchs, attested that any employment guidance that BWWI provided through
12 training materials was merely advisory and franchisees were not bound to follow it. (Doc.
13 54-2, Ex. 9, Fuchs Decl. ¶¶ 4-8.) In fact, it is undisputed that if a franchisee or employee
14 contacted BWWI with an HR question, BWWI would refer that person back to the
15 franchisee's HR personnel. (Doc. 54, BWWI SOF ¶ 55; Doc. 57, Courtland SOF ¶ 55.)

16 Although BWWI provided training to the Restaurant's managerial staff, that
17 training did not pertain to employment matters. Pursuant to the FA, BWWI mandated
18 training for the Restaurant's general manager, operational manager, and assistant
19 manager, based on their experience level. (Doc. 54-1, Ex. 4 § 7(B).) The FA further
20 required such training to be completed by replacement managers. (*Id.*) The FA also
21 reserved BWWI's right to require "ongoing training" as needed. (*Id.* § 7(C).) BWWI's
22 franchise consultant assigned to the Restaurant, Conrad Skowronski, testified that the
23 training covered:

24 [E]verything about the Buffalo Wild Wings system as pertains to products
25 that we serve, how to serve it, how to store it, how to present it on a—on
26 our dinnerware, . . . what is involved with our gift card program, what we
27 go over for standards for services times and so forth. They would cover
28 what fears that—alcohol that—is a mandate that we would ask the
franchisees to use. They could be covered into how we would like our
environment set up in terms of television and sporting events and what

1 would go on each channels. [sic]
2 (Doc. 54-2, Ex.7, Skowronski Depo. at 77-78.) Importantly, no training was provided
3 regarding the hire, retention, discipline, compensation, training, or recordkeeping for
4 employees. (*Id.* at 78.) BWWI’s employee relations consultant, Megan Lunsford, testified
5 that BWWI “does not dictate any policies, procedures, or behavior of our franchisees” in
6 relation to employment matters. (Doc. 54-2, Ex. 6, Lunsford Depo. at 26.) The extent of
7 BWWI’s guidance to franchisees on employment discrimination, including sexual
8 harassment, was to tell them “to follow all federal, state, local regulations and rules.” (*Id.*
9 at 79.)

10 BWWI did not monitor whether Restaurant’s managerial staff complied with
11 employment laws or how they supervised their employees. Although the FA allowed for
12 periodic evaluations, they were to ensure compliance with plant maintenance, customer
13 service, and sanitation guidelines. (Doc. 54-2, Ex. 4, FA ¶ 6(G); Doc. 54-2, Ex.7,
14 Skowronski Depo. at 80.) BWWI retained the right to require GCEP to replace the
15 general manager or operational manager if their actions failed “to meet our standards and
16 qualifications” or brought “any of the Trademarks into disrepute . . . or impair . . . your
17 Restaurant’s reputation or the goodwill of the Trademarks, your Restaurant or the
18 [BWVI] system.” (Doc. 54-1, Ex. 4 § 7(A).) This right must be viewed in the context of
19 BWWI’s attention to product presentation and service, and GCEP’s independence in
20 employment matters. Moreover, BWWI was not empowered to choose the replacements
21 for those positions. The right did not rise to the level of control over managerial staff.
22 Skowronski testified that if he had witnessed sexual harassment during one of his
23 evaluations, he would have done no more than alert the franchise owner “that something
24 occurred in his restaurant and he needs to investigate and possibly talk to his employment
25 lawyer.”⁵ (Doc. 54-2, Ex.7, Skowronski Depo. at 80.)

26
27 ⁵ Courtland alleges that when Marley did not address her sexual harassment
28 complaints regarding Buckaloo, she met with two BWWI executives, Carolyn Vangelos
and Andrew Bayless. (Doc. 1 ¶ 11.) They then conducted an investigation and determined
that harassment had occurred, and terminated Buckaloo but did not take action against

1
2 The undisputed facts show that BWWI worked with and trained the Restaurant's
3 managerial staff only to the extent necessary to protect its brand name and dictate product
4 presentation. BWWI did not mandate employee-related policies, was not involved in the
5 daily staff management, and did not address employee grievances. Courtland has not
6 created a genuine issue of material fact as to whether Marley, Buckaloo, and other
7 managers had independence in supervising Restaurant employees. Thus, BWWI cannot
8 be held vicariously liable under an agency theory because it did not have control over the
9 "instrumentality of harm" in this case. Summary judgment is granted on this ground.

10 **2. Apparent Authority**

11 "Apparent authority is created by a person's manifestation that another has
12 authority to act with legal consequences for the person who makes the manifestation,
13 when a third party reasonably believes the actor to be authorized and the belief is
14 traceable to the manifestation." Restatement (Third) of Agency § 3.03 (2006); *See*
15 *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 597, 161 P.3d 1253, 1261
16 (App. 2007). In other words, apparent authority can never be derived from the acts of the
17 agent alone; the evidence must show that the alleged principal represented another as his
18 agent and that the person who relied upon the manifestation was reasonably justified in
19 doing so. *Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989); *Koven v.*
20 *Saberdyne Sys., Inc.*, 128 Ariz. 318, 322-23, 625 P.2d 907, 911-12 (App. 1980). "It is
21 firmly established that if the principal's conduct creates apparent authority, the principal
22 is subject to liability for the agent's actions even if the agent was acting for his own
23 purposes." *Miller v. Mason-McDuffie Co. of S. California*, 153 Ariz. 585, 589, 739 P.2d
24 806, 810 (1987).

25
26 Marley for ignoring Courtland's complaints. (*Id.* ¶ 12.) However, the evidence shows
27 that the investigation was not conducted by BWWI employees. Courtland testified that
28 Vangelos and Bayless did not tell her nor imply that they were employed by BWWI,
(Doc. 54-2, Ex. 13, Courtland Depo. at 27-28) and in fact, Lunsford attested that they
were not and have never been employed by BWWI. (Doc. 54-2., Ex. 5, Lunsford Aff. ¶
3).

1 BWWI argues that Courtland has not produced evidence that BWWI made any
2 manifestations to led her to believe that it was her employer. Courtland first asserts that
3 BWWI's logos, signage and marketing material at the Restaurant made her believe that
4 she was an employee of BWWI. In her deposition, Courtland testified that she observed
5 that "everything around us [was] Buffalo Wild Wings," and that her understanding of
6 BWWI was "based on the name itself and the buffalo with the wings" and on nothing
7 else. (Doc. 54-2, Ex. 13, Courtland Depo. at 36.) Although the use of a brand name
8 demonstrates a franchise relationship, the existence of a franchise alone does not create
9 an agency. *See Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979).
10 Further, signage and advertising, without more, is not sufficient manifestation by the
11 franchisor to establish apparent agency in this case. *Colson v. Maghami*, CV 08-2150-
12 PHX-MHM, 2010 WL 2744682 at *13 (D. Ariz. July 9, 2010) ("Colson's reliance on . . .
13 brand signage as a means of establishing apparent agency . . . fails to account for the
14 Arizona cases holding that a franchisor's corporate identity does not provide a basis for a
15 finding of apparent agency."); *Am. Motor Sales Corp. v. Sup.Ct.*, 16 Ariz. 494, 494 P.2d
16 394, 396 (App. 1972) (automobile dealer agreements, advertising and stationary not
17 indicia of agency). It would not be reasonable for Courtland to have relied on signage to
18 infer that BWWI was in fact, her employer.⁶

19 Courtland points to other representations that led her to believe BWWI was her
20 employer; they are not substantiated by the evidence in the record. She attests that she
21 was provided an "employee handbook" that contained BWWI's logo on the cover. (Doc.
22 57, Ex. 1 ¶ 10.) However, Courtland has not produced that handbook and even if she had,
23 the presence of the logo would not establish that the handbook was provided by BWWI.
24 The Ninth Circuit has "refused to find a 'genuine issue' where the only evidence
25 presented is 'uncorroborated and self-serving' testimony." *Villiarimo v. Aloha Island Air*,

26
27 ⁶ Although it is disputed whether there was a sign in the Restaurant identifying it
28 as a franchisee and acknowledging that GCEP independently owned and operated it,
(Doc. 54, BWWI SOF ¶ 19; Doc. 57, Courtland SOF ¶ 19), the lack of such notice would
not create apparent authority.

1 *Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (citing *Kennedy v. Applause, Inc.*, 90 F.3d
2 1477, 1481 (9th Cir. 1996) and *Johnson v. Washington Metro. Transit Auth.*, 883 F.2d
3 125, 128 (D.C. Cir. 1989)). Courtland attests: “I was always told by my superiors that I
4 was an employee of [BWWI], and was never told or given any reason to suspect that my
5 actual employer might be some party other than [BWWI].” (Doc. 57, Ex. 1 ¶ 3.) This
6 uncorroborated statement is not sufficient to create a genuine issue of fact. Courtland
7 does not identify which “superiors” told her that she was a BWWI employee and in what
8 context the statements were made. Further, even if her superiors had made such
9 statements, Courtland does not establish that they are traceable to manifestations by
10 BWWI. Courtland also attests that she was trained at the Restaurant by “persons who
11 were identified to [her] as trainers from the [BWWI] corporate office.” (Doc. 57, Ex. 1 ¶
12 10.) However, as discussed *supra*, that attestation is contradicted by her earlier testimony,
13 (Doc. 54-2, Ex. 13 at 18-20, 25-26, 31), and thus does not create a genuine issue of fact.
14 *See Kennedy*, 952 F.2d at 266.

15 To establish apparent authority, Courtland must show not only that she
16 subjectively believed she was employed by BWWI but that her belief was objectively
17 reasonable and based on BWWI’s manifestations. *See Myers v. Bennett Law Offices*, 238
18 F.3d 1068, 1073 (9th Cir. 2001). Courtland attests that she always thought her employer
19 was “the well known established national restaurant chain known as [BWWI]” and she
20 “did not know what a franchise was, and only learned that BWWI might not be the only
21 party liable to me for damages when [she] met with [her] attorney of record, just prior to
22 the filing of this lawsuit.” (Doc. 57, Ex. 1 ¶¶ 3-4.) Courtland does not produce evidence
23 that BWWI “intentionally or inadvertently induced” that belief. *See Curran v. Indus.*
24 *Comm’n of Arizona*, 156 Ariz. 434, 437, 752 P.2d 523, 526 (App. 1988) (internal citation
25 omitted). In fact, the record shows that she ignored indicators that she was employed by
26 GCEP and not BWWI. For example, Courtland provided an employee information card
27 to Amcheck, the payroll services provider for GCEP, and the heading of that card listed
28 “GCEP-Surprise LLC.” (Doc. 54-2, Ex. 12.) Courtland’s W-2 forms listed “GCEP-

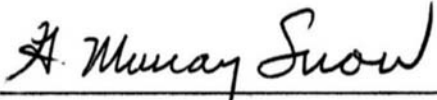
1 Surprise LLC” as the name of her employer and did not mention BWWI. (Doc. 54-2,
2 Exs. 14, 15.) It is undisputed that she did not inquire regarding the ownership of the
3 Restaurant before her employment was terminated. (Doc. 54, BWWI SOF ¶ 80; Doc. 57,
4 Courtland SOF ¶ 80.) There is no evidence that Courtland reasonably relied upon
5 manifestations by BWWI that it was her employer. Summary judgment is granted on this
6 point.⁷

7 CONCLUSION

8 Courtland has not shown that there is a genuine issue of material fact as to whether
9 BWWI was her joint employer. There is also no evidence that BWWI may be held
10 vicariously liable for employment discrimination under either a theory of agency or
11 apparent authority.

12 **IT IS THEREFORE ORDERED** that Defendants’ Motion for Summary
13 Judgment (Doc. 53) is **GRANTED**. The Clerk of Court is directed to terminate
14 Defendants Buffalo Wild Wings, Inc. and Buffalo Wild Wings International Inc. from
15 this action.

16 Dated this 29th day of July, 2013.

17
18 
19 _____
20 G. Murray Snow
21 United States District Judge
22
23

24 ⁷ Courtland points to evidence of BWWI manifestations that she received upon or
25 after the termination of her employment with the Restaurant. She refers to a “Buffalo
26 Wild Wings Performance Counseling Record” containing the BWWI logo in the heading
27 that she was provided upon termination (Doc. 57, Ex. 3), her last paycheck from
28 Amcheck payroll services listing the company name as “BWW Surprise” (*Id.*, Ex. 4), and
a response from the Restaurant to her EEOC charge of discrimination containing the
BWWI logo and listing the company name as “Buffalo Wild Wings, Surprise” (*Id.*, Ex.
5). However, Courtland may not rely upon this evidence to show apparent authority
during her employment because she received the documents after termination.