

NEWS

Animal House

Vet's vulgarities just part of the territory, attorney argues

After the owner of four Banfield Pet Hospital units in South Florida was terminated for alleged sexual harassment, his attorney successfully argued the earthy aspects of the veterinarian's job explain the raunch.

By Jonathan Maze

It's probably safe to say no franchise attorney has ever won a court decision by arguing that his client's potty mouth is the result of spending a large part of his day expressing dogs' anal glands.

But the case involving the owner of four veterinary clinic franchises in South Florida who was terminated over complaints of sexual harassment may well establish a new legal precedent over how a franchise can terminate its operators.

The issue centers on the actions of Barry Goldberg, who owns four Banfield Pet Hospital locations near Miami and Fort Lauderdale. Goldberg is in his mid-60s, heavysset with thinning white hair and a white goatee. He is a highly regarded veterinarian, according to many in the field, and one of Banfield's most successful operators who makes more than \$1

million in profits. He also has a potty mouth.

Goldberg has been a veterinarian since 1974. In 2001, he bought a Banfield franchise in a strip center in Fountainbleau, Florida, just west of Miami that, like most Banfields, is located in a PetSmart retail store. Banfield was started in Portland, Oregon, in 1955 and has since grown to nearly 800 units, largely thanks to the PetSmart partnership. Its holding company is Charter Practices International, a subsidiary of Mars Inc.—the same Mars that owns M&Ms and Uncle Ben's rice.

Goldberg is a member of the President's Circle at the University of Florida Veterinary School, and the teaching hospital there has a conference room named in his honor. In 2011, a former employee complained that Goldberg made "sexually inappropriate" comments about his wife. Goldberg denied the accusation, Banfield sent a letter saying that such comments are inappropriate, and the issue ended.

According to Goldberg's response to Banfield's later

termination suit, Goldberg indicated to Charter officials that, given his age, he'd consider selling his hospitals for the right price.

Banfield, according to legal documents, was interested. The company was in the process of buying back franchisees to go to an all-company-owned system. And by all accounts, Goldberg's hospitals would have been a great buy for the company. They took in \$8 million in revenue a year combined and earned \$1.2 million in net profits.

During a visit to Florida, Vincent Bradley, a senior vice president at Charter, offered 40 percent of revenue, or \$3.2 million, and according to Goldberg, would pay a top price of \$4 million. Goldberg turned it down. Franchisees typically sell for a multiple of earnings. At 5 times earnings—a common multiple for a franchisee—his company would be worth at least \$6 million or more.

Around the same time, however, two former employees complained to Banfield about some of Goldberg's remarks. In one, a former PetSmart associate who later went to work for a company-



owned Banfield Pet Hospital claimed Goldberg told her she must be sleeping with two corporate employees. He later allegedly asked her how those employees were in bed.

The company investigated over the subsequent weeks and got allegations from six more former employees or Charter employees, who alleged that Goldberg went overboard with his off-color jokes. Allegations included rude hand gestures. He allegedly told one employee he likes Asian prostitutes because they call him "big boy."

According to the complaint, he made a similar reference to another employee, after meeting her African-American boyfriend. Another worker complained that he told her to wear scrub tops that show off her breasts so more people would come to the hospital.

Banfield terminated Goldberg's franchise agreements in November and then filed a lawsuit in a U.S. District Court in December, but he continued to operate the hospitals using the company's name. The franchisor then sought an injunction to get him to stop operating the businesses.

Goldberg denied the allegations in his response. He noted that most of the comments

were misconstrued or not made at all, though in some he simply couldn't remember making them. But his attorney, Miami-based Robert Zarco of Zarco Einhorn Salkowski & Brito, also argued the comments didn't rise to the level of sexual harassment. Goldberg directed his comments, which were clearly jokes, Zarco said, at both men and women; none of the allegations involved touching of any kind; and nobody was kept from a promotion or fired.

He also claims Charter had an ulterior motive: to take over the hospitals for free. Rather than let the hospitals close, which is more common in a termination, the company would have stepped in to run them. Goldberg argued in filings that the questions of sexual harassment didn't come up until after he turned down the \$4 million purchase offer. One Charter employee acknowledged under oath that he was only testifying against Goldberg because "I do what I'm told."

While arguing against the injunction, Zarco also argued Goldberg's job of handling animals' nether regions, brought out his, er, edgy sense of humor.

"It's not an accounting firm. It's not a law firm. It's a veterinary hospital," Zarco argued,

according to the transcript.

The judge ultimately ruled in Goldberg's favor, saying his alleged offensive and inappropriate comments "do not rise to the level of actionable sexual harassment," at least based on the broad legal definition. The judge also ruled that the franchisor's alleged motives for terminating Goldberg's hospitals was relevant. Prior case law indicated that a franchisor's motives were irrelevant in termination cases so long as the reason for the termination was sound. In this situation, however, Zarco argued that Charter's motives for termination influenced its investigation, causing it to skew the results. The judge agreed.

In addition, the judge ruled that failing to pay royalties does not constitute "irreparable harm" to a franchisee's reputation because it's easily remedied through a court order. And the judge ruled that a noncompete clause in a franchise agreement is rendered moot when the franchisor breaches the contract.

The case is not over, of course. Attorneys for Charter didn't return calls, but Zarco indicated the two sides "have maintained open doors" to discuss a resolution. He also said the case "screams out for a fair settlement." [ET](#)