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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

March 2008 Vol. 23, No. 3

Court backs hotel's right to make personnel decisions

Good policies, procedures save hotel in age discrimination lawsuit

By Carolyn D. Richmond & Eli Z. Freedberg

It often seems as though an employer has a thousand eyes looking over its shoulder every time a personnel decision is made — eyes ready to file a lawsuit or another type of grievance. However, every so often a court decision comes down reminding us that personnel decisions are still the province of the employer, so long as "best practices" are followed.

A recent federal court decision out of the Western District of Arkansas highlights that good, consistent human resources policies will go a long way in withstanding a discrimination lawsuit. The court acknowledged that employers have the right to fire at-will employees for good reasons, bad reasons, or no reasons at all, provided that there was no discriminatory intent involved in the decision to terminate the employment. As the Arkansas court demonstrates, employers are provided with the opportunity to articulate a legitimate, nondiscriminatory reason for the adverse employment action, and courts will not question the wisdom of the decision. *Roeben v. BG Excelsior LP d/b/a The Peabody Little Rock*, No. 4:06-cv-01643 (JLH) (W.D. Ark. 01 / 03 / 08).

In this case, Richard Roeben, a former director of purchasing at BG Excelsior LP d / b / a The Peabody Little Rock, brought an action against The Peabody and two of its officers. Roeben primarily alleged that The Peabody violated his rights under Age Discrimination in Employment Act.

The Peabody hired Roeben in 2002 when he was 67. On Jan. 12, 2006, when Roeben was 70 years old, Jessica Hillman, a Peabody employee, received a call from Brenda Tutor, who stated that she worked at a company called AKB Property Preservation. Tutor informed Hillman that Roeben had been evicted from his home and that AKB's employees had gone into Roeben's home

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Clerk's case dismissed for failure to identify owner

Lawsuit charges wrong owner with negligence for worker's injuries

By James J. Zuehl and Kyle B. Johansen

Two recent National Labor Relations Board decisions may change how unions are recognized and the way "employee" is defined under the National Labor Relations Act. Both decisions could have a significant impact on union-organizing efforts in the hospitality industry, and may prevent aggressive organizing tactics employed by some unions.

In *Dana Corp.*, 351 NLRB No. 28 (2007), the NLRB considered whether neutrality and card check agreements should act as bars to election petitions. In this case, two separate employers had entered into neutrality and card check agreements with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL–CIO. Under those agreements, the employers voluntarily recognized the UAW after a majority of eligible employees signed union authorization cards. Shortly after the employers recognized the UAW, employees filed petitions seeking to decertify the UAW. The NLRB dismissed both petitions based upon its recognition bar doctrine, which prohibits the filing of an election petition by employees for a reasonable period of time after an employer voluntarily recognizes a union based upon a card check majority.

The NLRB made a significant change to its previous recognition bar doctrine, however. It held that employees now have 45 days to file a decertification petition after they learn that their employer voluntarily recognized a union based upon a card check majority. The NLRB made a similar change to the contract bar doctrine, finding that a collective bargaining agreement executed on or after the date an employer voluntar-

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Efforts to make an operation more 'green' can also result in improved safety and health for workers involved and for the general public. Greening efforts eliminate or reduce some traditional risks, but may increase existing risks or introduce new ones.
— David Natalizia, American Society of Safety Engineers

ASSE to help hospitality industry go 'green' safely

Throughout the country, every business is discussing plans to become more "green," touting their commitment to the environment and improving conditions for guests and workers. Hospitality properties that adhere to greener business practices are not only benefiting the Earth, but their reputations, since reports estimate that 43 million travelers prefer to do business with hotels that share their concerns about the environment. However, there can be some safety implications for going green.

The American Society of Safety Engineers' Hospitality Branch recently released a white paper, *Safety Implications of Greening* that provides a framework to help hospitality firms go green while explaining the risks and benefits of some greening programs.

"Safety, health and environmental professionals must understand the implications of this increased focus on environmental concerns," said ASSE Hospitality Branch chairman David Natalizia. "Efforts to make an operation more 'green' can also result in improved safety and health for workers involved and for the general public. Greening efforts eliminate or reduce some traditional risks, but may increase existing risks or introduce new ones."

The ASSE said the first step hospitality firms should make in a bid to become more environmentally friendly is to evaluate their current greening status by looking at key performance indicators such as energy and water use, safety metrics, equipment energy efficiency, construction practices, hazardous chemical use, waste disposal practices, environmental and safety training, and legal and regulatory compliance.

Going 'green' can save some green

Installing "green" lighting can really make a difference, not just in helping protect the environment but in energy savings. The American Society of Safety Engineers said that Philadelphia's Sheraton Rittenhouse Square saved 78 percent in energy costs with a payback in two years when it installed compact fluorescent lights, and a hotel in California changed 4,400 incandescent light bulbs, resulting in a savings of $61,000 a year in electricity costs equaling 203,000 kilowatt hours and 300,000 pounds of carbon dioxide in the atmosphere. ■

The ASSE recommends:

- Using more energy-efficient equipment in heating, cooling and lighting and in construction materials for remodeling or expansions.
- Reducing the use of hazardous products or materials.
- Encouraging employees and guests to recycle.
- Using energy-efficient or alternative fuel vehicles and encouraging employees to participate in ride-share programs.
- Promoting water and natural resource conservation, through educating customers and employees on being environmentally conscientious.

The ASSE also said it's imperative for hotels to have the support of management and create a team designated to create a successful green program.

For a complete copy of this report, go to www.asse.org/practicespecialties/hospitality/docs/HospitalityNewsletter1-15-08.pdf. ■

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Bellmen fail to show hotel violated bargaining agreement

Union could not prove hotel implemented new service standards

When service standards are modified at your hotel or restaurant, it's crucial to ensure that any changes in staff expectations are in compliance with any applicable collective bargaining agreements. Union workers at a New York hotel failed to prove that the hotel violated its agreement by instituting new service standards, which they claimed resulted in a loss of tip profits. *Bishop, et al. v. Hotel and Allied Services Union Local 758, et al.*, No. 04 Civ. 10074 (CSH) (S.D.N.Y. 01 / 14 / 08).

Robert Bishop, along with other bellmen and doormen at the New York Palace Hotel, were members of the Hotel and Allied Services Union. The group alleged that the hotel breached its collective bargaining contract with the union and that the union breached its duty by failing to press a grievance on their behalf.

The bellmen and doormen claimed that after the hotel lost one of its diamonds from the American Automobile Association that managers began evaluating and disciplining them based on the AAA standards, which caused a unilateral change of work practices in violation of the CBA and subjected the group to improper disciplinary sanctions. The group also argued that the AAA standards reduced tip income because it required the bellmen and doormen to spend more time with each guest.

The union, on behalf of the doormen and bellmen, filed a formal grievance against the hotel to contest its implementation of the disciplinary system in violation of the CBA. The arbitrator found that the standards were not new and that the union's grievance be denied. The bellmen and doormen moved to vacate the award and claimed they were dissatisfied with the union's representation during the arbitration award, as well as the result. The union claimed that its testimony was disregarded by the arbitrator.

The U.S. District Court, Southern District of New York looked to decisions made by the 2d U.S. Circuit Court of Appeals, finding that the workers' complaints regarding the arbitrator's fact-finding cannot justify vacatur of the award. The court granted the hotel's motion to confirm the arbitration award and dismissed the workers' complaint. ■

Make sure new standards don't violate bargaining agreement

By Elisabeth Moriarty-Ambrozaitis

A recent case in New York, *Bishop v. Hotel and Allied Services Union Local 758*, illustrates that hotels which implement outside standards of service may open themselves up to claims from their unionized employees. In this case, the bellmen and doormen at a hotel brought action against a hotel alleging violations stemming from the hotel's implementation of service standards promulgated by the American Automobile Association. Specifically, the bellmen and doormen alleged that the hotel improperly used AAA service standards to evaluate and discipline them, in violation of the collective bargaining agreement.

The AAA issues ratings for hotels based upon the hotel's service, décor and amenities. The ratings are based on a number of "diamonds." As part of this process, AAA distributes detailed written "standards of service" to hotel managers to determine a hotel's rating. The "standards of service" include the services that bellmen and doormen are expected to render to guests.

The hotel alleged that it incorporated the AAA standards into the hotel's own standards of service and instructed the bellmen and doormen to comply as early as 2000. The bellmen and doormen, however, argued that it was only after the hotel's AAA rating was reduced that the hotel began evaluating them using AAA standards. The bellmen and doormen contended that the hotel's imposition of the AAA standards constituted a unilateral change of established work standards. They argued that the standards resulted in improper disciplinary sanctions and a reduction of tip income.

At arbitration, the union, on behalf of the bellmen and doormen, argued that the hotel unilaterally created and implemented new and additional guest service standards, resulting in an unjust and otherwise improper disciplinary system. The arbitrator rejected the union's arguments. The arbitrator found that the hotel's standards had been in fact for a number of years and that no loss of tip income was suffered as a result of the hotel's usage of AAA standards. The court affirmed the arbitrator's denial of the union's claims.

While the arbitrator and court ultimately ruled in the hotel's favor — the case demonstrates that hotels should take care in instituting new standards of service to ensure that they do not conflict with any applicable collective bargaining agreement.

Elisabeth Moriarty-Ambrozaitis practices at the law firm of Seyfarth Shaw LLP. ■

Bouncer awarded $300K after fight led to facial scarring

A male bouncer at a McKeesport, Pa., bar was awarded $300,000 in a personal injury verdict for the facial scarring he suffered after he tried to break up a fight between two nonparty women at the tavern where he was employed. The bouncer alleged that he suffered a nose fracture, multiple contusions, and lacerations to his face that led to permanent scarring when he was struck by the codefendant.

At the time of the incident, the bouncer was off-duty and Beemer's had dismissed its other security personnel for the evening. The bouncer contended that the tavern failed to properly hire, train and supervise its employees, failed to provide adequate security, and failed to provide a safe environment for its patrons. The bouncer also said that the tavern's negligence was the cause of his injuries. He said that the codefendant intentionally struck him in the face with brass knuckles, that the attack was malicious with the intent to harm, and that it was unprovoked. Beemer's and the codefendant denied liability, and the tavern contended that it had no duty to the bouncer.

The case is *Evanovich v. Beemer's Inc.*; Molinari (Common Pleas 05018872). This case appeared in the January 2008 issue of LRP Publications' *Personal Injury Verdict Reviews*®. For ordering information, please call (800) 341-7874. ■

So long as the decision is not based on unlawful discrimination, the employer is free to use whatever factor it wants to terminate an employee — fair or unfair.
—Carolyn D. Richmond and Eli Z. Freedberg, attorneys

AGE (continued from page 1)

to salvage his personal items. Tutor then informed Hillman that during the course of the investigation, AKB's employees came across items that they believed belonged to The Peabody. Tutor elaborated that AKB's employees found commercial steaks, commercial cleaning supplies, blankets, gold box frames, lobby furniture, washcloths and towels with The Peabody's logo, and toiletries such as shampoo and conditioner labeled with The Peabody's logo.

Almost immediately after this phone call, The Peabody commenced an investigation into these allegations. The team conducting the investigation met AKB's owner at the storage units where the items taken from Roeben's home were being stored. The investigation team viewed the contents of the storage units and interviewed the AKB employees who had collected the items from Roeben's home. The team drafted a memo, itemizing the property belonging to The Peabody that was found at the storage facility, specifying the people interviewed during the investigation and noting whether the items belonging to the Peabody were discarded or maintained. The Peabody's officers gave Roeben the opportunity to respond to the report, and Roeben vigorously denied the allegations. Nevertheless, The Peabody terminated Roeben's employment on the same day that the memorandum was distributed.

Shortly afterward, Roeben sued The Peabody for violating the ADEA, which states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

In a disparate treatment case based on indirect evidence, the parties proceed under the traditional burden-shifting framework. This framework requires that a plaintiff first make out a prima facie case of age discrimination by showing: 1) that the plaintiff is at least 40 years old; 2) that he suffered an adverse employment action; 3) that he was meeting the employer's reasonable expectations; and 4) that he was replaced by a substantially younger employee. If the plaintiff is able to make out the prima facie case, then the burden shifts onto the employer to provide a legitimate, nondiscriminatory reason for the adverse employment action. If the employer offers such a reason, then the burden shifts back to the employee to provide evidence to imply that the reason stated by the employer is pretextual.

Upon motion for summary judgment, the District Court held that Roeben failed to present any evidence supporting the allegation that The Peabody terminated his employment for any reason other than the telephone call from AKB. The court held that it did not matter whether Roeben in fact stole from The Peabody; rather all that matters in the context of an age discrimination lawsuit is whether age played any role in the employer's decision to terminate the employee. The court determined that age was not a factor in The Peabody's decision to fire Roeben and refused to examine the validity of their true motive to fire Roeben. The court relied on a long line of cases for the proposition that employers are free to make employment decisions based upon mistaken evaluations, personal conflicts between employees, or even unsound business practices. So long as the decision is not based on unlawful discrimination, the employer is free to use whatever factor it wants to terminate an employee — fair or unfair. Consequently, the District Court awarded summary judgment in favor of The Peabody.

Carolyn D. Richmond is cochair of the Hospitality Practice Group and partner at the law firm of Fox Rothschild LLP. Eli Z. Freedberg is an associate in Fox Rothschild's New York office. ■

HLAW comment by Carolyn D. Richmond and Eli Z. Freedberg

Not every case will be as straightforward as *Roeben*. However, employers can decrease anticipated litigation costs by maximizing "best practices." First, employers must make sure that the at-will employment relationship is protected. An at-will statement should be highlighted in employment applications, offer letters, employee handbooks, training manuals and related materials.

Second, employers should make sure that they have well-articulated policies and procedures that are consistently followed by management and employees. Third, as The Peabody did in *Roeben*, employers should make sure that a potentially adverse employment decision is thoroughly investigated and planned out before the decision is made. Confirm that the decision is based on legitimate business interests, and not on an unlawful or discriminatory basis. ■

Court upholds arbitrator's decision to certify class

Restaurant chain's mandatory arbitration didn't protect it from class

Instituting a mandatory arbitration can be a helpful way for companies to handle disputes with employees. However, an arbitration policy should not be implemented in a bid to avoid class certification of employees. A Circuit Court affirmed an arbitrator's award of class certification to employees who claimed their restaurant chain violated the Fair Labor Standards Act. *Long John Silver's Restaurants v. Cole, Kaufman and McWhorter,* No. 06-1259 (4th Cir. 01/28/08).

Erin Cole, Nick Kaufman and Victoria McWhorter were all employees of Long John Silver's Restaurants. The three said the company violated the FLSA by failing to pay them and other employees overtime wages. The three held managerial roles and said the restaurant engaged in unlawful employment practices that included payroll deductions and salary givebacks to cover losses in the company's restaurant operations.

In 1995, the restaurant chain implemented a mandatory arbitration policy, and in January 2004, Cole and Kaufman initiated arbitration proceedings on behalf of themselves and others similarly situated. An arbitrator ruled that the arbitration agreement did not preclude a class arbitration proceeding and later issued a class award to the employees.

The arbitrator ruled that the employees could serve as representative plaintiffs in an "opt-out" class arbitration proceeding, with current and former managerial employees with potential FLSA claims comprising the class.

Long John Silver's filed a request to vacate the award, but the U.S. District Court, District of South Carolina denied Long John Silver's request for relief. The restaurant chain appealed to the 4th U.S. Circuit Court of Appeals, contending that the District Court should have vacated the class award to the employees. Long John Silver's argued that the arbitrator manifestly disregarded controlling legal principles and exceeded the scope of his authority by certifying the class under the "opt-out" provision.

The court stated, "LJS asserts, as a threshold matter, that an employee cannot be made a party to an FLSA-related civil proceeding without his consent, and that this statutory right, being both fundamental and substantive, is not waivable … although LJS's references to the text and legislative history of the FLSA reassure us of Congress' intention that the 'opt-in' procedure should apply in arbitration as in court proceedings, they fail to also convince us that Congress expressly intended that the 'opt-in' procedure could not be waived by the parties' agreement to an alternate procedure."

The court found that because the FLSA does not explicitly overrule the opt-out feature of the arbitration agreement, that the arbitrator did not ignore the FLSA or other legal principles by certifying the class. ■

Revisit reasons for arbitration policies

Several large restaurant chains, including Ryan's Restaurants and Waffle House, have at one time instituted arbitration policies similar to the one used by Long John Silver's, and these policies have been challenged by employees in the courts.

Paul Mollica, a partner with the Chicago law firm of Meites, Mulder, Mollica and Glink, said this case shows the importance of keeping abreast of the law and how it might affect a company's arbitration policy.

"Any company that has an arbitration policy need[s] to keep constant watch on the state of case law," he said.

Mollica said that companies that intend to implement an arbitration policy in the hopes of avoiding any class action lawsuits could end up surprised. He also said that in his experience, employees fare just as well as employers or better in arbitration compared with the results in litigation.

"Arbitrators try to reach sensible decisions; … overall [this decision] struck me as a sensible result; it affirmed the arbitrator's decision, which was well within his discretion," he said.

If your restaurant is considering implementing a mandatory arbitration policy, Mollica cautions restaurants to think twice or consider using a voluntary arbitration policy.

"In general, employers are finding that if they set up mandatory arbitration policies, employees are more likely to raise claims and the arbitrators are more likely to try to reach in between, reasonable outcomes for employees and employers," he said. "If the goal is to minimize claims or the expense of litigating them, I don't know that either of those things has really panned out."

For more information, contact Paul Mollica at (312) 263-0272. ■

Class action lawsuit filed by stockholders of Panera restaurants

A class action lawsuit was recently filed by stockholders of Panera Bread Co., alleging that the restaurant chain's officers and directors violated federal securities laws.

The suit was filed by Schatz Nobel Izard PC in the U.S. District Court, Eastern District of Missouri on behalf of individuals who purchased Panera stock between Nov. 1, 2005, and July 26, 2006. The complaint alleges that company leaders violated federal securities laws by issuing a series of materially false and misleading statements. Specifically, attorneys said the company highlighted its increasing systemwide sales and, as a result, continuously increased its earnings guidance.

Wayne T. Boulton, attorney with the firm, said the company was also rapidly opening new locations throughout the United States. Unbeknownst to investors, the complaint alleges, Panera's aggressive growth strategy was causing the company to experience declining sales at its existing stores.

On July 26, 2006, Panera announced its financial results for the second quarter of 2006. On this news, the price of Panera common stock fell $7.34 per share, or approximately 12 percent, to close at $51.93 per share.

Contact Wayne T. Boulton at (800) 797-5499 or by e-mail at firm@snilaw.com. ■

Anyone who has a genuine desire to gain employment, despite the fact that they want to be hired so they can organize the workforce, continue to be considered employees under the NLRA and are protected from antiunion discrimination. — James J. Zuehl & Kyle B. Johansen, attorneys

UNION (continued from page 1)

ily recognizes a union will not bar a decertification petition, unless notice of recognition has been given and 45 days have passed without the filing of a valid petition. The NLRB made these changes because it found that a card check is not as reliable an indicator of employee preferences as an NLRB-conducted election.

Based on this decision, the NLRB now requires that the parties to neutrality and card check agreements notify the appropriate NLRB regional office in writing of any voluntary recognition that has been granted and provide a dated copy of the agreement, including a description of the bargaining agreement. The employer also must post an official NLRB notice in conspicuous places for 45 days.

For unions like UNITE HERE, neutrality and card check agreements have become a major organizing tool. *Dana Corp.* may impact union willingness to aggressively pursue these agreements. Significantly, one of the primary reasons unions such as UNITE HERE pursue card check agreements with employers is to avoid the NLRB and its procedural requirements. Following *Dana Corp.*, the NLRB's increased role in monitoring and policing card check agreements could make such agreements less attractive to unions seeking alternatives to the NLRB election process to organize employees. Under *Dana Corp.*, the parties likely will experience some delay in negotiations until the window period for filing decertification petitions has passed, thereby undercutting one of the very reasons for the popularity of neutrality and card check agreements.

There are also questions regarding the NLRB's ability to monitor and enforce compliance with this decision. It is unclear what action the NLRB will take if an employer fails to notify the NLRB when it has voluntarily recognized a union or what penalties, if any, the NLRB could impose if the employer declines to post the NLRB notice or the parties desire to post their own notice.

In another recent decision, the NLRB modified the scope of job applicants who qualify as employees under the NLRA and therefore are protected from antiunion discrimination. Under *Toering Electric Co.*, 351 NLRB No. 18 (2007), a job applicant is considered to be a statutory employee only if he submits an employment application and evidences a "genuine interest" in establishing an employment relationship with the hiring employer.

The issue of whether an applicant is an employee under the NLRA normally arises when an employer refuses to hire union "salts." These individuals are union members normally sent by a union to an unorganized workplace first to obtain employment and then later to organize employees. Prior to *Toering Electric Co.*, all applicants, regardless of their true intentions or actions during the interview process, were presumed to be employees and protected from discrimination on the basis of their union activity.

While *Toering* narrows the group of applicants who are protected from antiunion discrimination, it does not leave all salts unprotected. Anyone who has a genuine desire to gain employment, despite the fact that they want to be hired so they can organize the workforce, continue to be considered employees under the NLRA and are protected from antiunion discrimination.

These two decisions are likely to have a significant impact on the hospitality industry because unions are aggressively trying to organize employees. Questions remain about how the decisions will be implemented, but generally, they represent good news for hotels and other hospitality employers.

James J. Zuehl is a partner at Franczek Sullivan P.C. Kyle B. Johansen is an associate at the same firm. Jennifer Niemiec also contributed to this article. ■

Employees must show genuine interest

Under *Toering*, the National Labor Relations Board's Office of the General Counsel, which prosecutes all unfair labor practice charges, including those alleging discrimination on the basis of their union activity, must prove: 1) that the applicant submitted an employment application personally or through someone authorized to act on his behalf; and 2) that the applicant retained a genuine interest in becoming employed by the employer. The employer may challenge the applicant's "genuine interest" by submitting evidence of: 1) the applicant's refusal of similar jobs with the employer in the recent past; 2) belligerent or offensive comments included on the application; 3) the applicant's disruptive, insulting or antagonistic behavior during the hiring process; 4) other conduct by the applicant that is inconsistent with a genuine interest in employment; or 5) the applicant's submission of a stale or incomplete resume. The NLRB specifically noted that a union's mass submission of applications does not demonstrate genuine intent to gain employment. ■

Marriott loses battle over accessible golf carts

Court says failing to provide carts for disabled golfers violates ADA

Golf courses may now be required to make golf carts accessible for disabled golfers. In a recent case against Marriott International, a judge stated that the hotel chain is required to provide single-rider carts for golfers with disabilities. *Celano, Thesing and Hefferon v. Marriott International*, No. C 05-04004 PJH (N.D. Cal. 01/28/08).

Lawrence Celano, Richard Thesing and William Hefferon all suffer from disabilities that make playing golf with a standard golf cart impossible. The three filed a complaint against Marriott because the golf course did not provide "accessible" or "single-rider" golf carts to allow them to play golf at Marriott courses in violation of the Americans with Disabilities Act.

Judge Phyllis J. Hamilton said that Marriott's failure to provide accessible golf carts violated the Americans with Disabilities Act by "failing to provide accessible golf carts as a reasonable accommodation for plaintiffs' mobility impairments." Marriott currently operates 26 golf courses throughout the United States through its business division Marriott Golf, the world's largest golf resort management organization.

Marriott argued that it was entitled to summary judgment because it had accessible golf carts at four of its course locations and contended that the antidiscrimination provisions of the ADA do not require courses to purchase these carts. Marriott said it did not discriminate against the golfers because it allowed disabled golfers to bring their own accessible carts to any of the courses. The company argued that carts are considered "personal devices" and do not constitute auxiliary aids under the law. Marriott also argued that the three men lacked standing because they did not attempt to visit all 26 of Marriott's golf courses for a round of golf.

According to Marriott, the only course the plaintiffs attempted to play was Marriott-owned Camelback in Arizona, which the company states now does have accessible golf carts available for use.

Judge Hamilton found that it was unnecessary for the plaintiffs to actually visit each of the 26 golf courses to have been deterred from playing there. The three men did arrange tee times at several different Marriott courses but said they were informed that those courses did not provide accessible carts in advance. Hamilton said because the men play golf regularly with the use of accessible carts on non-Marriott owned properties and have shown sufficient interest in playing on Marriott's courses, they had standing to pursue the case.

Although the judge declined to enter injunctive relief immediately, Disability Rights Advocates, the firm representing the plaintiffs, is hopeful that individuals with disabilities will have the carts necessary to enjoy the golf course. "This suit is not only about providing an accommodation that allows a person to play a game, it is also about providing access to the unique social, economic and professional opportunities that golf provides," said Sid Wolinsky, director of litigation at Disability Rights Advocates. "Everybody knows that business deals are formed and nurtured on the golf course. People with disabilities should have an equal chance to initiate these types of professional relationships." ■

What are accessible golf carts?

Accessible golf carts, also known as single-rider carts, are used by individuals with mobility impairments. The carts are operated with hand controls and have seats that swivel to get the golfer into a hitting position. The carts are designed to avoid injury to the course and can be driven up onto tees and greens.

About 400 golf courses currently provide the carts. Disability Rights Advocates had asked that Marriott provide one or two accessible carts for each course that it operates or owns. ■

Government to provide accessible carts

While this is the first court ruling addressing access to golf courses in the private sector, the federal government has recently acknowledged that it must make its recreational activities, such as golf, available to disabled veterans returning from Iraq and Afghanistan.

This past September, the Department of Defense announced its plans to acquire two accessible golf carts for each of the 174 courses operated on U.S. military bases. The Department of the Interior has similarly opined that the Americans with Disabilities Act requires that accessible carts be provided at municipal golf courses. The Department of Justice has taken the same position. ■

Hotel labor union threatens to picket new Trump hotel

Officials from a hotel employee labor union are considering picketing the recently opened Trump International Hotel & Tower in Chicago.

Local 1 of UNITE HERE — a union representing more than 400,000 needletrade, industrial and textile, hotel and restaurant employees — is threatening to demonstrate in front of the hotel to express frustrations over the inability to strike a deal with the Trump Organization. Labor officials said discussions between the union and hotel broke down several months ago after the Trump Organization wanted to exclude food and beverage employees from the potential bargaining unit. UNITE HERE said it could not allow the workers to be left out.

The union is hoping to reach an agreement with hotel officials. UNITE HERE currently holds contracts for hotel employees at Trump locations in New York City and Atlantic City, N.J.

More than 300 employees are expected to work at the hotel, which is only partially opened while crews finish construction on the tower's 92 floors.

For more information, visit the UNITE HERE Web site at www.unitehere.org. ■

Resort security officer could not show company discriminated against her

Court orders employee to pay company's legal fees after finding charges were unfounded

Employees angered by a termination can find many different ways to allege unfair treatment. However, employers who maintain good records and conduct fair and prompt investigations after incidents can protect themselves from employees who may file a claim of discrimination after they've been fired.

A security officer for a resort management company was ordered to pay the legal costs of her employer after a District Court found her claims of gender discrimination and hostile work environment to be unfounded. *Schoenfeld v. U.S. Resort Management Inc. and Strategic Outsourcing Inc.*, No. 05-4368-CV-C-NKL (W.D. Mo. 01/03/08).

Amanda Schoenfeld worked for 3½ months as a dispatcher in a security office for U.S. Resort Management when she applied for a position as a road officer. Schoenfeld said her supervisor, Roger Strope, told her women do not make good road officers and said he planned to hire a male. He also told Schoenfeld that she would have to climb up and down a hill for a physical fitness test. She was given the job of road officer but claims Strope told her that she would be fired if she messed up.

Schoenfeld said she was subjected to inappropriate comments about her weight and gender, and she said that when her personal photos were taken by a male employee, she was disciplined for statements she made during the investigation, even though the coworker received no discipline.

An arbitrator hired to end the dispute found that Schoenfeld presented insufficient evidence that she endured a hostile work environment and said that she could not establish a prima facie case for gender discrimination because she did not present evidence that she was treated differently than male employees. Schoenfeld said the arbitrator's order should be vacated because he disregarded the law applicable to her claims.

The U.S. District Court, Western District of Missouri found that the arbitrator correctly stated that Schoenfeld was not engaged in a statutorily protected activity when she was involved in the picture-removal incident, which led to her discipline and subsequent termination.

With regards to the claim of gender discrimination, the court also found that the arbitrator erred by taking into account the fact that Schoenfeld lied during the investigation of the picture incident in his dismissal of her gender discrimination claim; the court did say that the result would have been the same if the arbitrator had applied the proper legal analysis.

The court denied Schoenfeld's request to vacate the arbitrator's decision and confirmed the arbitrator's judgment for the employer. The court also granted U.S. Resort $3,485.65 in costs. ■

Thoroughly record investigations

In *Schoenfeld v. U.S. Resort Management*, the company easily showed that its termination of the plaintiff was due to an investigation after an incident. Had the company not thoroughly recorded its prompt investigation, the lawsuit may have had a different outcome. ■

Class certification granted to waiter alleging discrimination

Worker says restaurant discriminated based on religion, ethnicity

Treating all employees fairly should always be a management goal. Failure to provide the same opportunities to all employees could lead to charges of discrimination. A District Court approved class certification requested by a Muslim man of South Asian descent who said a Smith & Wollensky restaurant discriminated against him and other employees on the basis of their religion and ethnicity. *Rahman v. Smith & Wollensky Restaurant Group, et al.*, No. 06 Civ. 6198 (LAK) (JCF) (S.D. N.Y. 01/16/08).

Mohammed Muhibur worked as a waiter at the Park Avenue Café, owned by Smith & Wollensky. Muhibur claimed that he was subjected to hostility in violation of Title VII of the Civil Rights Act from managers, chefs and supervisory personnel because he was a South Asian Muslim. He also said other Muslim waiters were discriminated against by being denied the opportunity to serve VIP parties where tips were typically more generous, and he said when he worked as a captain, he was denied the 6 percent bonus routinely given to white and non-Muslim captains. Rahman said he was terminated in retaliation for objecting to a racist comment made by managerial employees and claimed his employer falsely accused him of stealing by misusing a gift certificate.

Rahman filed a charge of discrimination with the Equal Employment Opportunity Commission. After an investigation, the EEOC found that there was reasonable cause to believe Rahman was subjected to harassment and that he may have been terminated based on his race, national origin or religion, and said other similarly situated employees may have suffered from the same type of harassment. The EEOC did say that there was no reason to believe Rahman had been harassed based on his sex.

Rahman moved to represent a class of all past, present and future employees of defendants who are Muslim, nonwhites and/or of South Asian descent working at any of the 16 Smith & Wollensky restaurants.

Smith & Wollensky argued that class certification should not be awarded for numerous reasons, including that remedies had not been exhausted. The U.S. District Court, Southern District of New York found that because the EEOC did not investigate any of the defendant's restaurants other than Park Avenue Café, that claims concerning those restaurants have not been exhausted and that class allegations must be limited to the Park Avenue Café. The court, however, awarded class certification for all employees at the Park Avenue location.

The court also found that Rahman's class certification should not be merely confined to Muslims of South Asian descent, but said because he specified that Caucasian waiters received preferential treatment that the class should extend to other ethnic minorities and not be restricted to his particular ethnic group. The court did however deny Rahman's request for costs and fees. ■

Provide religious accommodations

More and more lawsuits have been cropping up asserting discrimination based on religion. Muslim men from various hospitality companies have filed lawsuits, claiming that they were harassed because of their religious beliefs, such as not drinking alcohol, or claiming that they were treated unfairly. Some have argued that they have been treated differently for their inability to handle pork products in accordance with Islamic law.

Muslim women, too, have been filing more lawsuits for being asked to violate their religious beliefs by removing head scarves to comply with company dress codes.

Under Title VII of the Civil Rights Act, employers are required to accommodate religious practices unless they can prove that doing so would pose an undue burden to the company. To ensure your hotel or restaurant is not violating Title VII, think twice before denying an accommodation. Some common modifications could include allowing:

- Employees flex time or space for worship during work breaks.
- Modified uniforms, such as allowing women to wear a long-sleeved T-shirt under short-sleeved uniforms to cover their arms or allowing head coverings in accordance with their religion.
- Floating holidays or optional holidays.
- An employee to refrain from handling pork products or other items that may go against their religion.
- An opportunity for employees who miss work due to a religious observance to make up the lost time. ■

U.S. Supreme Court to hear arguments in restaurant case

The U.S. Supreme Court is preparing to hear arguments in a case involving an employee of a Cracker Barrel restaurant who allegedly was terminated in retaliation for race discrimination complaints he made. The court will determine whether retaliation claims can continue to be brought under statute 1981 under the Civil Rights Act of 1866 — one of the country's oldest statutes and the legislation that gave further rights to the freed slaves after the end of the Civil War.

Legal representatives for the restaurant chain said that such claims, which have been permitted under the law for years, should not be allowed because the statute doesn't contain specific provisions prohibiting retaliation. However, civil rights experts argue that if the court fails to permit retaliation suits under the statute, many victims of racial discrimination would be left without any recourse.

Several groups, including the U.S. Chamber of Commerce and the National Federation of Independent Businesses Legal Foundation, support Cracker Barrel's argument. The groups claim that by allowing retaliation claims to move forward under statute 1981, it will undermine Title VII of the Civil Rights Act of 1964. Section 1981, unlike Title VII, does not have caps for damages.

Cracker Barrel has denied any wrongdoing and said it is seeking clarification of the laws. ■

Restaurant ordered to honor contract with janitor

The court rejected Copeland's argument, stating that although Hurricane Rita was unquestionably a fortuitous event, it did not have any bearing on the contract because the restaurant had been put in default more than one month before the hurricane struck Lake Charles.

Hurricane Rita did not dissolve 3-year contract for cleaning services

Entering into long-term contracts for services can be dangerous, especially if they fail to contain any clauses to release services if your hospitality business closes. With industry experts estimating that 90 percent of restaurants fail in the first year, it's a good idea to be cautious when entering into business arrangements for services to ensure that your restaurant is protected. *Guillard v. Copeland's of New Orleans, Inc.*, No. 07-0867 (App. La. 12/5/07).

Copeland's of New Orleans appealed a trial court's judgment awarding Alex Guillard $46,500 in damages for Copeland's breach of a three-year employment contract with him. At the end of 2004, Guillard entered into a three-year employment contract to provide janitorial services to Copeland's Lake Charles, La., restaurant for $1,500 per month. In May 2005, Copeland's closed the restaurant because it was not meeting its performance expectations and said it no longer needed Guillard's services.

Contractor not entitled to fees, penalties

The trial court in *Guillard v. Copeland's* also considered whether Alex Guillard was an independent contractor or an employee of the restaurant. Guillard argued that as an employee, he should be entitled to fees and penalties. To determine his work status, the appeals court considered whether:

1. There was a contract between the parties.
2. The work being done was of an independent nature such that the contractor could employ nonexclusive means to accomplish it.
3. The contract called for specific piecework as a unit to be done according to the independent contractor's own methods, without being subject to the control and direction of the principal, except as to the result of the services to be rendered.
4. There was a specific price for the overall undertaking agreed upon.
5. The duration of the work was for a specific time and not subject to termination or discontinuance at the will of either side without a corresponding liability for its breach.

The court found that Guillard was an independent contractor because the restaurant did not control the method and means by which he performed his cleaning services. The court said Guillard's status as a contractor precluded him from recovering fees and penalties. ■

HLaw Glossary

What is a fortuitous event?

In plain English, a fortuitous event is an event that happens by chance; a risk against which an individual or entity can be insured.

Legally it's an event that neither party could foresee or prevent. Fortuitous events are generally characterized as accidents or incidents caused by weather, such as damages or losses from storms, lightning, floods, earthquakes, etc. They also may be characterized by sudden deaths or illnesses. Some consider there to be a difference between a fortuitous event and an inevitable accident, which is an accident that is absolutely uncontrollable and not caused by human negligence. ■

In August, Guillard filed a lawsuit for damages against Copeland's for breach of contract. The following month, Hurricane Rita struck the Lake Charles area and caused $400,000 in damages to the Copeland's-owned building that had housed the restaurant.

The trial court found that Copeland's had breached its contract with Guillard and awarded him $46,500, or what would have been due to Guillard had the contract remained in effect. The trial court declined to award attorney's fees and penalties to Guillard, however. Copeland's filed an appeal, and Guillard contested the trial court's decision not to award him fees and penalties.

The Court of Appeal of Louisiana affirmed the trial court's decision. In its appeal, Copeland's said the trial court erred in not finding that Hurricane Rita was a fortuitous event, making the restaurant's performance impossible and allowing it to dissolve the contract pursuant to Louisiana law. Copeland's also argued that Guillard's recovery should have been lower because he failed to mitigate his damages as required by Louisiana code.

The court rejected Copeland's argument, stating that although Hurricane Rita was unquestionably a fortuitous event, it did not have any bearing on the contract because the restaurant had been put in default more than one month before the hurricane struck Lake Charles.

The court also affirmed the trial court's rejection of Guillard's request for penalties and attorney's fees. ■

Employee granted workers' comp after assault by guest

Appeals board finds that injuries suffered should be compensable

It can be difficult for a hotel to protect its employees from guests. But failure to do so could lead to injuries, illnesses, and expensive workers' compensation claims. A workers' compensation appeals board confirmed an award of benefits to a hotel worker who was harassed and accosted more than once by a guest. *M&B Inn Partners Inc. v Workers' Compensation Appeal Board*, No. 121 C.D. 2007 (Pa. 01/18/08).

Barbara Petriga worked as an administrative assistant at the M&B Inn-owned Host Inn. While on the job, a customer physically and verbally accosted her, placing his hands on her buttocks and abdomen. Petriga complained to her manager and was told that the guest would be removed from the premises. However, on the next morning, the same guest grabbed Petriga again; police were summoned and criminal charges were filed against the guest.

Shortly thereafter, Petriga went to her doctor for a sedative to help her sleep and was referred to a psychologist for treatment. She asked about workers' compensation benefits and was sent to her employer's physicians, who removed her from work but told her to receive treatment from her psychologist. Petriga began taking antianxiety and antidepressant medications, suffered from insomnia and fatigue, and could not return to work after the assault. She was diagnosed with chronic post-traumatic stress disorder, which brought on panic attacks that prevented her from working in any capacity.

A workers' comp judge ruled that Petriga was entitled to workers' compensation benefits as a result of the incidents. The Host Inn argued that Petriga's claim for benefits should be dismissed under the "personal animus" exception of the Workers' Compensation Act, because her injuries were the result of a guest's alleged harassment.

On appeal, the Host Inn said benefits should have been denied to Petriga because her injuries were the result of a guest's alleged harassment for reasons personal to him. The Workers' Compensation Appeal Board disagreed, looking to the statute in the act that states, "The terms 'injury' and 'personal injury,' as used in this act, shall be construed to mean an injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto. ... The term 'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment ... But shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer."

The appeals board noted that the guest testified that he had not intended to harass or hurt Petriga and determined that the Host Inn could not use this argument, affirming the award of benefits to Petriga. ■

Guidelines address mental health

Many employers have sharply criticized the health care community for huge inconsistencies in treating mental health problems of workers and failing to grasp the importance of early return-to-work. This has resulted, in the eyes of many, in prolonged disability, lower productivity, and higher insurance costs. However, experts hope that this will soon be changing.

Last summer, the American Psychiatric Association presented its new guide for managing return-to-work for employees with mental-health problems. The APA guide is a packet of clinical tools to expedite early and safe return-to-work for employees with depression, anxiety, phobias and other conditions. The authors are now facing the formidable task of placing the guide into use. Officials said that will involve correcting flaws in how the health care community as a whole often treats mental-health problems as incompatible with work.

Workers' compensation experts said the guide arrived not a moment too soon, given widespread unrest among employers and insurers about the toll of mental-health problems within the workforce.

"Psychiatric disorders are recognized as the primary cause of occupational disability in at least 10 percent of private disability insurance claims and about 30 percent of Social Security disability claims," the guide noted. "We estimate that in the private disability arena, an additional 20 percent to 40 percent of all claims involve comorbid or secondary psychiatric problems that contribute directly to disability or impede rehabilitation and return-to-work."

For more information on the guidelines, visit the APA Web site at http://psych.org. ■

Hotel association commends plan to stimulate economy

The American Hotel & Lodging Association is praising federal lawmakers for developing a plan to stimulate the economy. The Bush administration and the U.S. House of Representatives reached an agreement in principal on the legislative package, totaling some $150 billion in taxpayer rebates and corporate incentives. The measure is designed to bring immediate, short-term relief to the economy.

"The provisions we have seen in the early summary of this bill will provide a much-needed boost to both the lodging industry and to millions of American families and businesses, and we look forward to working with members of Congress to ensure the stimulus package provides as much help as possible for those who need it most," said Marlene Colucci, AH&LA executive vice president for public policy.

The legislation includes a 50 percent bonus depreciation on equipment purchases by businesses, which was one of five proposals requested by the AH&LA in a letter recently sent to congressional leadership. Additionally, lawmakers were asked to include immediate relief for the H-2B temporary seasonal worker program, an expanded Work Opportunity Tax Credit, travel promotion funding, and an extension of the carryforward or carryback periods for Net Operating Losses.

For more information, visit the AH&LA Web site at www.ahla.com. ■

Avoid costly safety mistakes at your hotel

Safety should always be a priority at your hotel. But even the most diligent managers can make mistakes, leading to security gaps that could be costly. Diana S. Barber, a professor at the Cecil B. Day Hospitality School at Georgia State University, offers this list of common safety mistakes made by hotel managers and tips to avoid them:

• **Never cut back on security personnel.** "In these times of cost containment and budget controls, security is the one area of your budget that should never be cut," Barber said. "The financial impact of reducing or eliminating your security staff would be tremendous should a guest or employee be injured or damage to property occur."

• **Post evacuation routes in your meeting room space. "**Meeting rooms serve as gathering places for large groups of people who will most likely panic in the event of an emergency such as a hurricane, earthquake, and bomb threat and so on," Barber said. "Have evacuation routes posted in meeting rooms for group attendees to see, and ask your sales and catering personnel to have detailed discussions with the meeting planners about evacuation procedures."

• **Increase lighting. "**Look for physical areas on or around the property that do not have adequate lighting or are not secure, and address these issues immediately," she said. "Check your parking lots for areas where lighting needs improvement." Barber also recommends that hotel managers ask local law enforcement agencies to conduct a security audit on the premises.

Perform background checks

Diana S. Barber, a hospitality law professor at Georgia State University, urges hotel administrators to conduct background checks on all managers, front desk personnel and security officers to eliminate or minimize any unknown and undesirable discoveries once employed. "An Internet search can assist in accomplishing this task very quickly," she said. "Check driving records on employees hired to transfer guests to and from the airport or surrounding areas. Select the best employees now and avoid future trouble." ■

• **Continuously train employees.** "When it rains or snows and a guest slips and falls on your property, do your employees know the proper steps to take to protect the injured guest, not to make casual comments admitting liability, and how to handle the situation?" Barber asked. "Make it your objective to ensure that your employees receive adequate training on procedures for handling guest injuries. Keep detailed records of the procedures and training, which can be used in your efforts to convince a litigious opposing party, and a judge, of your due diligence in safety training."

• **Comply with Occupational Safety and Health Administration standards. "**Make sure all OSHA requirements and standards are met," she said. "Visually inspect to see that all necessary notices and posters are current and displayed appropriately, and not stuck behind other notices on the bulletin board."

• **Back up data off-site.** "Keep a copy of all property operations data stored off-site in a safe and secure location," Barber said. "It is imperative to have access to guest records at all times—especially in the event of an emergency."

• **Install phones in fitness centers.** "All exercise or fitness rooms need to have a phone available to all guests that will dial immediately to the front desk," she said. "A security camera should also be installed so that injuries and problems that occur within the fitness facility can be immediately detected and addressed." Barber also said that if security cameras are in use, hotels should have written procedures for their use that include information about whether trained professionals are viewing the scenes, how often the tapes should be reused, and whether they are in good working order.

• **Check detection devices regularly**. Barber said hotel staff should ensure that sprinkler systems and smoke detectors are working in all guest rooms and public spaces, and should have an emergency lighting system in place along with an emergency generator. She also recommends hotels check and record inspections each month and have a backup plan in place in case these devices fail.

• **Check on emergency equipment periodically**. "Make sure you conduct monthly inspections on external defibrillators and oxygen tanks, and have at least one CPR-trained employee on staff at all times."

For more information, contact Diana S. Barber at dsbarber@gsu.edu. ■