# HOSPITALITY LAW

Route to:

Helping the Lodging Industry Face Today's Legal Challenges

February 2010 Vol. 25, No. 2


## Expect increased government enforcement of employment laws

### Hospitality industry must adapt to recent employment legislation

*By Charles F. Walters and Paul H. Kehoe*

After a full year in office, the Obama administration has moved away from the compliance assistance model prominent during the prior administration and has rededicated government agencies to enforcing federal employment laws. This pronounced shift in focus will require increased employer awareness and vigilance in 2010 and beyond.

In 2009, the Equal Employment Opportunity Commission reported a 15 percent increase in discrimination charges filed during FY 2008 — a trend that is expected to accelerate in 2010. This significant increase in discrimination charges may be the consequence of numerous factors, including economic conditions, increased diversity, and the EEOC's focus on systemic litigation, which are expected to continue in 2010.

The government's compliance assistance has also given way to enforcement at the U.S. Department of Labor, which is expected to continue hiring attorneys, increase enforcement of the recently amended Family and Medical Leave Act, and carefully scrutinize employers' use of purported independent contractors. The DOL's Wage and Hour Division will hire 250 new investigators and expects to make "wage theft" (which includes failure to pay minimum wage and required overtime, requiring "off the clock" work, and misclassification of employees as independent contractors) a primary focus. The Office of Federal Contact Compliance Programs will hire 50 new employees to investigate systemic compensation discrimination. And the Occupational Safety and Health Administration has hired additional inspectors with a renewed emphasis on recordkeeping and enforcement.

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## Court questions whether sushi chefs are properly tipped employees

### Issues of fact preclude dismissal of wage and hour complaint

*By Carolyn D. Richmond & Eli Z. Freedberg*

In *Ash v. Sambodromo, LLC*, No. 09-20406, (S.D. Fla. 11/17/09), Lorna Ash, a former server and host at a Sushi Samba restaurant in Florida, sued the restaurant for violating the Fair Labor Standards Act. The restaurant moved for summary judgment on five grounds. In ruling against Sushi Samba on all but the retaliation issue, the court once again highlights why tip cases have become such an albatross for restaurant owners: They require a very fact-specific analysis.

Ash alleged that Sushi Samba was obligated to pay her the full minimum wage for the side work that she performed at the beginning and end of each shift. This side work, which Ash said took between 10 and 45 minutes, included putting trays together, moving chairs, cleaning up the bar and stocking utensils. The court disagreed with Ash and held that an employer may pay the tipped minimum wage, rather than regular minimum wage, for time that an employee works in a tip-producing activity, or for work that is incidental to an employee's tip producing activities provided that this work does not exceed 20 percent of the employee's overall duties. However, whether the restaurant could take the tip credit still depended on several other issues.

Ash claimed that Sushi Samba forfeited the right to pay her the tipped minimum wage because it allowed non-customarily tipped employees, namely sushi chefs, to receive tips. The court found that an employer is only entitled to claim the tip credit if it is claimed for qualified tipped employees, the employees are provided with proper notice of Section 203 (m) of the FLSA, and the tips received by the employees are retained by them and other customarily tipped employees by way of a tip-pooling arrangement. In other words, if a nonqualified employee is

(See **TIPPED** on page 6)

# Prolonged standing can lead to expensive workers' comp claims

*The commission agreed that the employee established that her accident arose out of and in the course of employment, and that a causal relationship existed between the accidental injury and her current back condition.*

## Casino dealer had compensable back injury, commission rules

Many employees at casinos, which often include hotel and restaurant workers, face a seemingly hidden safety risk — prolonged standing. According to the Canadian Center for Occupational Health and Safety, while standing is a natural human posture and by itself poses no particular health hazard, working in this position on a regular, prolonged basis can result in a variety of musculoskeletal disorders. These problems can include sore feet, swelling of the legs, varicose veins, general muscular fatigue, low back pain, stiffness in the neck and shoulders, and other health problems. Failing to address these issues can lead to expensive workers' compensation claims.

In *Britton v. Harrah's Metropolis Casino*, 17 ILWCLB 132 (Ill. W.C. Comm. 2009), a state workers' compensation commission held that a casino employee successfully proved a compensable back injury due to her repetitive work duties.

A casino dealer alleged that she sustained a compensable back injury while dealing a stand-up card game. She testified that the game required her to twist her upper torso in order to take the cards in her left hand from the card dispenser located on her right side. The employee's doctor opined that she aggravated a prior back injury that was caused by repetitive bending and twisting as a card dealer.

However, the casino's expert argued that the work incident was a minor contributing factor. The Illinois Workers' Compensation Commission affirmed and adopted the arbitrator's decision regarding compensability and remanded to reconsider the medical expenses and penalties to be assessed. The commission agreed that the employee established that her accident arose out of and in the course of employment, and that a causal relationship existed between the accidental injury and her current back condition. She was awarded medical expenses, temporary total disability, penalties and attorney's fees. ■

### Emphasize good posture

The Canadian Center for Occupational Health and Safety said there are several strategies employers can use to prevent these injuries among standing employees, including:

- Emphasizing posture when standing. When standing, it is important that employees try to avoid making movements that will increase pressure and stress on the lower back. To maintain good posture while standing, employees should keep their ears, shoulders and hips in a straight line, with stomachs pulled in.
- Providing footrests or sit/stand stools. If employees must stand for long periods, provide them with a footrest. Encourage individuals to rest one foot on the stool to relieve pressure on their backs. Every five to 15 minutes, the person should switch the foot that he is resting on the stool.
- Encouraging frequent rest breaks. As with any job where the employee assumes a static posture for long periods, rest breaks are essential to alleviating stress.
- Consider job rotation. While not always an option, job rotation can distribute tasks among a group of workers, thereby shortening the time each individual spends standing. However, it must be a rotation where the worker does something completely different at the next job.

*Source:* www.ccohs.ca. ■

HOSPITALITY LAW

LRP Publications

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*Hospitality Law* (ISSN 0889-5414) is published monthly for $265.00 per year by LRP Publications, 747 Dresher Road, P.O. Box 980, Horsham, PA 19044-0980, (215) 784-0860. Periodicals postage paid at Horsham, PA. POSTMASTER: Send address changes to *Hospitality Law*, 747 Dresher Road, P.O. Box 980, Horsham, PA 19044. Editorial offices at 360 Hiatt Drive, Palm Beach Gardens, FL 33418. Tel: (561) 622-6520, Ext. 8721, fax: (561) 622-9060.

# Court affirms decision in McDonald's hoax caller lawsuit

## Award for manager's emotional distress charge reduced on appeal

*By Joseph Holland*

Between 1994 and 2004, an unknown person made hoax calls to various McDonald's and other fast-food restaurants. The caller would convince restaurant employees, managers and others, to conduct strip searches and even sexual assaults by representing himself as a police officer. The evidence in *McDonald's Corp. v. Ogborn, et al.*, No. 2008-CA-000024-MR (App. Ky. 11/20/09) clearly supported that McDonald's legal team was aware of these calls, but made a decision not to notify individual restaurants or provide training to managers and employees in order to protect the company's reputation. The evidence also supported a conclusion that proper training could have prevented successful repetition of the hoax calls.

In April 2004, 18-year-old Louise Ogborn agreed to work a second shift at McDonald's after completing her afternoon shift. Shortly after beginning her second shift, manager Donna Summers received a hoax call from a person identifying himself as a police officer investigating a previous theft and described a female employee that Summers recognized as Ogborn. Ogborn was put on the phone with the caller who offered her two choices: submit to a search in the manager's office or be searched at the police station after her arrest. She agreed to a search in the manager's office.

Ogborn was methodically searched while she was asked to disrobe. Summers took her clothes, cell phone and other belongings, leaving Ogborn in the office with no clothes. About that time, Summers' replacement, Kim Dockery, arrived, and when she learned of the situation, she provided Ogborn with an apron to cover herself, but then returned to her management duties outside of the office. The caller then convinced Summers to call her fiancé and have him come to her office to assist with the investigation. When he arrived, he was left alone in the office with Ogborn, who was still naked but for the apron, for a long period of time, and was encouraged by the hoax caller to conduct a body cavity search. Ultimately, he sexually assaulted her and several hours later left the restaurant. There was no evidence presented that Summers was aware of the assault.

When Summers eventually determined the call was a hoax, she called her supervisor, who assessed the situation and called the police.

McDonald's terminated Summers, and her fiancé was convicted of three felonies. Both Ogborn and Summers underwent counseling, and the impact of the incident on Ogborn manifested itself in significant physical and behavioral changes.

Ogborn filed suit against McDonald's, Summers and others, and Summers filed a cross-complaint against McDonald's. The jury found for Ogborn and against McDonald's on her claims of sexual harassment, false imprisonment, premises liability and negligence, awarding Ogborn $1,111,312 in compensatory damages and $5 million in punitive damages. The jury also found against McDonald's for Summers' claim for intentional infliction of emotional distress, awarding her $100,000 in compensatory damages and $1 million in punitive damages.

McDonald's appealed on several grounds, but the court upheld the judgment. However, the court did modify the punitive damages for Summers by reducing the amount to $400,000 based upon a determination that punitive damages should not exceed four times the compensatory damages award in cases where there is no physical injury based upon previous decisions in that jurisdiction.

*Joseph Holland is a professor of hospitality at the University of Wisconsin-Stout.* ■

### Training, communication crucial

***By Joseph Holland***

The facts in this case are a nightmare for any employer. This case demonstrates how important proper training and efficient and thorough communication are to avoid exposing yourself to liability for employee safety and well-being.

The lesson here is that a company must be aware that when they possess information that can affect employee safety or security, they have an obligation to make decisions on how to use and distribute that information to protect their employees rather than their company's reputation. The key pieces of evidence in this trial were that the company knew and had documented these hoax calls over a long period of time. That they chose not to share that information with the individual restaurants or employees, and that they did not conduct training that would have helped to prevent this type of occurrence, ended in an expensive suit. ■

### Men who fell ill after stay at Miami hotel retain counsel

Two Danish businessmen who became ill because of contaminated water at the EPIC Hotel in Miami have retained counsel and are contemplating filing a complaint against the hotel.

The men believe they contracted Legionnaires' disease because the hotel's water supply removed too much chlorine, which is used to kill bacteria, from the water. In October, a former EPIC guest died because of complications from a similar illness.

"The hotel guests who we represent are very concerned about their health, as Legionnaires' disease is a very serious illness with a high fatality rate that has already claimed the life of one recent guest at the hotel and made several others very sick," said Jim Hannon, the attorney for the victims. "From our initial investigation, it appears that the Epic Hotel, as well as the manufacturer and distributor of the water filtration system, failed in their duty to protect the public from unsafe drinking water."

EPIC has been working with the Miami-Dade Health Department to address its water issues. The hotel, which has been temporarily closed to its customers, relocated more than 300 hotel guests to area hotels. The health department is conducting thorough inspections of the hotel's water system and the department. The hotel said that it has "proceeded with all remedial procedures in conjunction with the health department to restore full system operations." ■

*Employers who do not adapt to this new legal environment will face even greater challenges in these already tough economic times.*
*— Charles Walters and Paul Kehoe, attorneys*

**LAWS** (continued from page 1)

U.S. Immigration and Customs Enforcement announced a substantial increase in inspections, stating in November that Notices of Inspection were issued to 1,000 employers who can expect to have their I-9 Forms audited by ICE.

Finally, while the Obama administration intends to address comprehensive immigration reform in 2010, it has in the interim suspended modifications to the H-2A and H-2B guest worker programs.

### Legislative developments

The Lilly Ledbetter Fair Pay Act changed the statute of limitations under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, by restarting the statute of limitations clock each time an allegedly aggrieved employee receives a paycheck. The breadth of the Fair Pay Act has likely changed the statutes of limitations for any challenged employment decision impacting compensation. As a result, employers should, at a minimum, create appropriate documentation supporting compensation decisions and retain these documents for as long as the employer can be sued by an employee regarding that compensation decision.

The ADA Amendments Act broadly expanded the definition of "disability" to protect employees and applicants with substantially limiting physical or mental impairments. "Substantially limits" now means something less than the "significantly restricts" standard formerly used by courts and the EEOC. The ADAAA also provides that "mitigating measures," such as medication, prosthetics and hearing aids, cannot be taken into consideration in determining whether an individual is disabled, except for ordinary eyeglasses and contact lenses. Although the final ADAAA regulations likely will not be implemented until mid-2010, it is already clear that millions of workers with conditions that formerly did not constitute a disability under the ADA will now be protected under the ADAAA.

As part of the FY 2010 National Defense Authorization Act, FMLA was amended to expand exigency and military caregiver leave. The FMLA now allows for Qualified Exigency Leave for employees who are the parent, child or spouse of active duty service members who are deployed overseas. The Military Caregiver portion of the law was clarified to allow for leave to care for an employee's qualifying family member who is undergoing medical treatment, recuperation or therapy for a serious illness or injury that occurred anytime during the five years preceding the date of treatment.

The Genetic Information Nondiscrimination Act, which took effect Nov. 21, 2009, makes it unlawful for employers or health insurers to discriminate based on a person's genetic information or test results. GINA grants an exemption for voluntary wellness programs, but the EEOC may well define "voluntary" so narrowly as to effectively eliminate the exemption. Although final GINA regulations have not been issued, employers should audit their health data-collection policies to ensure compliance not only with GINA, but also with HIPAA and all applicable state laws regarding treatment of health data.

In all, the employment law regulatory and legislative landscape has already changed dramatically, and it will undoubtedly change even more in 2010 and beyond as Congress, the White House, and recently enlarged and empowered government agencies push for increased employee rights and protections. Employers who do not adapt to this new legal environment will face even greater challenges in these already tough economic times.

*Charles F. Walters is a partner in Seyfarth Shaw LLP's Washington, D.C. office. Paul H. Kehoe is an associate in that office.* ■

### Be proactive about policies

Hospitality employers need to be proactive to protect themselves during this time of change. Charles Walters and Paul Kehoe of Seyfarth Shaw recommend that employers:

- Review I-9 policies and internal records to ensure compliance with federal employment verification laws.
- Audit wage and hour practices and make changes accordingly.
- Ensure you fully understand the Americans with Disabilities Act's interactive reasonable accommodation process, document compliance, and ensure reasonable accommodations are made for individuals who may be deemed disabled under the new statute.
- Modify Family Medical Leave Act policies and forms to reflect changes, and use the new FMLA workplace poster once it is issued.
- Review and revise nondiscrimination policies to include protections for employee genetic information. ■

# Recovering alcoholic found not disabled in discrimination lawsuit

## Restaurant did not regard worker as disabled after treatment

*By Benjamin J. Court*

A recovering alcoholic who failed to report to work following news that he had not yet obtained a promotion he desired could not establish a claim for disability discrimination under the Americans with Disabilities Act, according to a federal judge in *Marvin v. Dakota Restaurants, Inc.*, No. 08-14030 (E.D. Mich. 11/23/09).

Dakota Restaurants, the owner and operator of nine Checkers fast-food restaurants in Detroit, hired Shaun Marvin as a crew member in 1999. Between 1999 and 2005, Marvin regularly failed to report to work about twice a month. He developed a drinking problem and would drink beer in his car during work hours.

In spring 2005, Marvin informed Paul Battey, Dakota's general manager, that he was checking himself into an alcohol rehabilitation center and needed time off. Battey supported Marvin and offered to hold his job until he returned.

When Marvin returned to work, he received good performance reviews and his attendance improved significantly. In less than two years, he received three raises and a promotion.

In 2007, he was promoted to general manager on a trial basis. Within six weeks, however, Marvin was written up for violating Dakota's cash-handling policy and other operational problems. As a result, the promotion stalled.

Marvin claimed that when he questioned the status of the promotion, Battey told him that because of "skeletons" in his closet, Dakota's owner was still considering the decision. Marvin expressed frustration, and he failed to show up for work the next day and did not call in.

Marvin was taken off the work schedule due to the unexcused absence. When he spoke to Battey, Marvin claimed that Battey asked him to come to the restaurant and bring his keys and uniforms. At the meeting, Marvin claimed that Battey said he took him off the schedule because he believed that he had "fallen off the wagon." Marvin never returned to work. The parties disputed whether he was fired or abandoned his position.

Marvin filed a lawsuit against Dakota, claiming that his former employer discriminated against him in violation of the ADA based upon his status as a recovering alcoholic. Dakota moved for summary judgment.

The court first considered whether Marvin's alcoholism was, in fact, a disability. Without evidence that his alcoholism substantially limited one or more of his major life activities, either in 2005 or at the time he was being considered for the general manager promotion, the court determined that Marvin was not disabled unless he could show a record of disability or was regarded as having a disability. To support those claims, Marvin presented a return-to-work slip prepared by his doctor as a record of disability. However, the slip did not refer to Marvin's alcoholism, and it did not indicate that he had any impairment.

Marvin also argued that Dakota knew of his treatment for alcoholism and therefore regarded him as disabled. The court disagreed, finding that even if Dakota had knowledge of Marvin's treatment and had concerns about his ability to perform as general manager, it did not follow that it regarded him as disabled, especially in light of his post-treatment record of service, including his raises and promotion.

Therefore, the court held that Marvin was unable to establish a disability under the ADA and it dismissed his suit.

*Benjamin J. Court is a commercial litigator at the Minneapolis law firm Krass Monroe, P.A.* ■

### Consider reasonable accommodations

***By Benjamin J. Court***

Since the Americans with Disabilities Act's inception, there has been considerable litigation regarding how alcohol abusers and recovering alcoholics should be treated under the act. Generally speaking, alcoholism is considered an impairment, and few plaintiffs have met the high evidentiary burden to establish alcoholism as a disability under the ADA. However, employers should think twice before denying requests for reasonable accommodations from recovering alcoholics who can perform the essential functions of the job. Reasonable accommodations may include allowing the employee time to participate in rehabilitation programs, or providing a flexible work schedule.

Reasonable accommodations notwithstanding, the ADA plainly allows employers to prohibit alcohol consumption at work, require that employees not be under the influence of alcohol at work, and demand the same job performance and behavior from alcohol abusers and recovering alcoholics as other employees, even if their behavior is related to their addiction. ■

### Michigan smoking ban provides exemption for Detroit casinos

A smoking ban recently passed by the Michigan Legislature would make the state's bars, restaurants and workplaces smoke free by May when the bill is signed by Gov. Jennifer Granholm.

The Michigan House made an exception to the legislation that had been passed by the Senate to provide an exception that will continue to allow smoking in three Detroit casinos to enable them to compete with tribal casinos that are not subject to the ban. Similar to smoking bans in other states, smokers may continue to light up in their own homes and personal vehicles, as well as at cigar bars and specialty tobacco shops.

Granholm has said she will sign the bill making Michigan the 38th state to ban smoking in bars and restaurants.

Although many state legislators also pushed for a smoking ban in the casinos, the MGM Grand Detroit, MotorCity Casino-Hotel, and Greektown Casino Hotel appealed to the Michigan Senate and House, arguing that they projected they would lose 30 percent of their annual revenues if smoking was banned. The casinos said smoker gamblers would chose to patronize tribal casinos in Michigan or drive to Indiana, where casinos are exempt from that state's smoking ban, rather than be restricted.

The majority of Michigan residents responding to a poll conducted last spring, however, said they would like to see smoking banned from all workplaces. ■

**TIPPED** (continued from page 1)

permitted to receive tips, then the employer loses the right to pay all of its employees the tipped minimum wage.

To determine whether any particular employee is a "customarily tipped employee," the court examined the amount of customer interaction the sushi chefs had. Sushi Samba argued that its sushi chefs work at a sushi bar that is located in the center of the dining area, interact with guests, and perform a "show" for guests. Ash countered that the sushi chefs never took orders from guests, did not receive more than $30 per month in tips directly from customers, performed only food preparation duties, and had very limited customer interaction. The court concluded that it could not determine, as a matter of law, whether sushi chefs constituted "customarily tipped employees" and certified this issue for trial.

Ash also alleged that Sushi Samba compelled her to attend food and handling classes and mandatory food and beverage classes without compensation. Sushi Samba was unable to produce payroll records demonstrating that it paid Ash for these training sessions. Accordingly, the court held that Ash was entitled to proceed to trial in order to determine whether Sushi Samba paid her for participating in these classes. Moreover, the court implied that Sushi Samba would be required to pay employees the regular minimum wage for time spent attending training classes.

The court also held, as a matter of law, that an employer may subtract a sum from an employees' charged tips to cover the credit card processing fee of converting tips to cash, so long as the deduction does not exceed the actual fee. Ash, however, argued that the credit card companies had actually refunded these fees to Sushi Samba and that the restaurant was required to pass along the refund to the tipped employees. The court agreed that if true, the restaurant would have to pass along this refund to its tipped employees, and the court certified this issue for trial.

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

## Work with counsel to limit liability under FLSA

***By Carolyn D. Richmond & Eli Z. Freedberg***

As this case demonstrates, restaurants continue to face significant exposure resulting from an active plaintiffs' bar that continues to file suit over tip pools. Aside from legal defense costs, which can be substantial, some of the penalties that employers may face if found to maintain an improper tipping system include the loss of the tip credit for every hour in which every tipped employee worked. Additionally, in some jurisdictions, employers might also be required to disgorge the tips received by the improperly tipped employees. Finally, employers may be required to pay up to 100 percent liquidated damages and/or prejudgment interest on the damages owed to the employees.

Complying with the requirements of FLSA and applicable state law is imperative for a restaurant to limit liability. Work with legal counsel, operations and human resources management to audit all tipped categories to ensure that "guest contact" and other appropriate indicia of a "customarily tipped employee" are present. Make sure that wherever the tip credit is taken, written notice to the employee is provided and acknowledgements are retained. Auditing tipping practices now and remedying even borderline practices can be the difference between business survival and failure. ■

# Case may proceed because of question of sales lead quality

## Time-share sales employee claims white males received better leads

Employers strive to treat all employees fairly. But it's also important to be able to show that some workers of a particular sex and race don't receive a competitive advantage if all employees are held to the same standard. In *Taylor v. Fairfield Resorts Inc., et al.*, No. 2:07-cr-01602-RCJ-GWF (D. Nev. 11/10/09), a court found that questions of fact exist whether a resort provided fresher time-share sales leads to white and/or male employees.

Shari Taylor filed a complaint against Fairfield Resorts, alleging that the company discriminated against her based on her race and gender and retaliated against her. Taylor was hired as a time-share sales representative in August 2005 and was transferred to training in April 2006. She said that it was the company's policy to promote telemarketers from the training department to referrals once they completed certain performance requirements. Taylor alleged that although she met the requirements, she was not transferred, but a white male who had not met the requirements was promoted. She complained to the Nevada Equal Rights Commission in July and claimed she was immediately placed on suspension in retaliation for her complaint. She said after the suspension that she was moved to referrals, but that the company failed to provide her with training and created a hostile work environment, causing her to resign.

Fairfield claimed that Taylor had not met the transfer requirements and that her poor sales performance and attendance were documented. The company also said a black female who did meet the requirements was transferred by Taylor's supervisor within months of her claims. Fairfield argued that a causal connection could not be established between the suspension and her complaint because the suspension predated the protected activity.

The company agreed that for an individual to be transferred to referrals, the employee must have 36 sales over a three-week period with 70 percent to 80 percent closed without assistance, but this was not documented. Fairfield said Taylor never sold more than 35 in a period and was counseled for lack of consistency and low sales and warned that she would be suspended if she did not achieve 12 deals per week for the last two days of her 90-day probationary period.

The court found that Fairfield's policy reflected a concern about consistency of sales over time, and that its policy accounted for workweeks of varying length and indicated a good-faith attempt to be fair.

However, the court found evidence to question whether black and/or female employees were provided older sales leads to work with than their white and/or male coworkers, making it more difficult to meet the required 36 sales in a three-week period. Therefore, the court denied Fairfield summary judgment on Taylor's gender and race discrimination claims. The court did, however, grant Fairfield summary judgment on Taylor's hostile work environment claims. ■

### Did white males receive better leads?

***By Diana S. Barber***

In *Taylor v. Fairfield Resorts, Inc.*, the Fairfield Resorts did provide the court with evidence showing that its decision for not promoting Shari Taylor was based on a legitimate, nondiscriminatory reason. Basically, Taylor failed to meet her quota. Once Fairfield established its position in the case, the burden shifted back to Taylor, and it was then up to her to show that the resort's actions and reason for not promoting her were a pretext for unlawful discrimination.

Taylor can show that the pretext was directly related, by showing that the unlawful discrimination likely motivated the defendant, or indirectly, by showing how unbelievable the resort's reasons are for not promoting her. Taylor successfully provided enough evidence for the court to reject Fairfield's summary judgment motion on the issue of gender and race discrimination. The court stated that Taylor did meet her burden because there was a genuine issue of material fact as to whether black and/or female employees were given more antiquated sales leads than her white and/or male colleagues. Because of the age of the leads, it could make it substantially more difficult for Taylor to reach her sales goals over the allotted time period. The court acknowledged that the evidence presented by Taylor was not very strong, but was enough to allow her to proceed with her claim of discrimination. The record did not show specifics as to which managers gave better leads to certain people, but to defeat a summary judgment motion, the court said it is not necessary to provide these particular details.

*Diana S. Barber is an attorney and faculty member at the Cecil B. Day School of Hospitality at Georgia State University.* ■

## Class action status granted to patrons who paid service fees

A Circuit judge granted class action status to thousands of former Kahala Hotel & Resort customers who claim that the hotel charged them service fees that they believed were gratuities to be paid to service staff.

The lawsuit, filed by Hawaii resident Jason Kawakami, claims that the Kahala charged him $4,800 in service fees for an event, but that it failed to inform him that just a part of the money was paid as a tip to the hotel's workers.

The lawsuit argues that the hotel wrongly retained tips that Kawakami intended for the employees providing service at his wedding reception in July 2007. Kawakami said that just a portion of the 19 percent service charge added to his total bill for the event was given to employees. Kawakami's attorneys claim that more than 4,300 former customers have been charged service fees and were not told that it was not a gratuity.

Under Hawaii state law, hotels and restaurants are required to pay service charges to food and beverage workers as gratuities or else clearly explain to customers that only a portion of the fee is provided to service employees. Customers who feel that they have been deceived could recover damages up to triple the service fee.

A similar lawsuit filed by the same attorneys is pending against the Hilton Hawaiian Village Resort & Spa. ■

# Hospitality employers must prepare for stronger OSHA

Changes are afoot at the Occupational Safety and Health Administration, and many experts are warning hospitality employers that stronger enforcement and more stringent regulations are moving closer to reality.

In December, the Senate confirmed David Michaels, a research professor at the George Washington University, to head up the agency. Michaels, who is a believer in metrics measurement and the creation of an enforceable ergonomics standard, is expected to strongly push for the prevention of musculoskeletal disorders in all workplaces. With a 10 percent increase in OSHA's budget for the coming year, including the addition of 210 personnel, companies should expect enforcement and penalties to increase.

With the pro-labor and pro-enforcement positions of Michaels and Secretary of Labor Hilda Solis, Cindy Roth, CEO of Ergonomic Technologies Corp. in Syosset, N.Y., said companies should expect to encounter a "strong, enforceable OSHA — something we haven't had in the past eight years."

## Is the standard being resurrected?

In addition to the confirmation of David Michaels, Occupational Safety and Health Administration officials released the agency's upcoming regulatory agenda. Jordan Barab, acting assistant secretary for OSHA, said the agency will issue a proposed rule in early 2010 to revise its regulation on recordkeeping to restore a column on the OSHA 300 Injury and Illness Log that would require employers to separately list work-related MSDs from other conditions. The MSD column was removed from the log in 2003 under the Bush administration.

Although Barab strongly emphasized that the move was not the first step toward resurrecting a national ergonomics standard, many safety experts feel otherwise. Cindy Roth, CEO of Ergonomic Technologies Corp., said that by specifically tracking MSDs, it may signal that the agency is collecting data to provide a cost justification for such a standard. ■

Regardless of the government changes, Roth said hospitality employers need to recognize that focusing on safety and ergonomics is cost-effective and prevents workers' comp claims.

"It's a proactive, not reactive approach, and the money goes right to the bottom line," she said. "Ergonomics can reduce and assist in the management of workers' comp costs."

Roth said research has shown repeatedly that MSDs are the most expensive of all claims when productivity is factored into the cost. "Can you imagine an employee with a sore shoulder, back aching, feet aching — how much can you concentrate?" she asked.

Roth said hospitality employers should take a hard look at the source of its most frequent and costly claims — slips, trips and falls. This issue, she said, has become even more critical in recent years because of the growing number of aging workers employed by hotels and restaurants.

"You can't simply put down a mat to absorb spills in the kitchen," Roth said. "Hospitality employees need to focus on training and redesigning tasks to minimize risks. In addition, any solution must take into consideration accommodations for older employees."

Roth offered the following tips to make work environments safer for employees:

- Address housekeeping risks. Hotels should be providing comprehensive and thorough ergonomics training on proper lifting techniques and the importance of maintaining good posture.
- Limit weight that employees can carry. Many hotel housekeepers and bellhops lift much more than the 51-pound weight limit set by the National Institute for Occupational Safety and Health. Instruct workers to get help from colleagues when lifting heavy and bulky items.
- Keep carts light. Take a look at the carts housekeepers use to transport cleaning products and soiled linens. Make sure the wheels are maintained properly to prevent workers from using too much force to move the carts. In addition, Roth said employees should always push carts, never pull, which can lead to strain injuries.
- Start an office ergonomics program. Roth said companies first need to identify all moderate and intensive computer users and train employees on how to make simplistic changes, both at the workplace and in their personal lives.
- Keep the workplace clean. A regularly cleaned and maintained work environment will go a long way in preventing slips, trips and falls.

*For more information, contact Cindy Roth at (516) 682-8558.* ■