Route to:

HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Federal court denies race track's motion for summary judgment

Determining whether supervisor is tipped employee is intensive issue

By Carolyn D. Richmond & Eli Z. Freedberg

One of the most contentious issues facing employers in the hospitality industry is determining where to draw the line between subordinate employee and supervisor, and the eligibility to receive tips pursuant to the Fair Labor Standards Act or applicable state laws. If an employee is, in fact, eligible to receive tips, then the employer may potentially decrease payroll significantly by taking advantage of the tip credit or by reducing the rate of pay. On the other hand, as the recent surge of wage and hour class-action lawsuits demonstrates, employers face significant litigation exposure by misclassifying an employee as a "tipped employee." As these wage and hour cases are quickly becoming ubiquitous, it is supremely important for employers to carefully evaluate job responsibilities for each employee who receives tips — particularly in positions more prone to litigation, such as maitre d's, floor managers, bar backs and service bartenders.

To avoid liability and mitigate litigation risks, employers should take measures to ensure that the only employees receiving tips are those who work in positions that "customarily and regularly" receive tips from customers, and that those tips are not shared with agents of the owner or with any employee who does not interact with customers.

A recent decision out of the Southern District of Florida highlights how fact-specific the analysis is in determining whether "working supervisors" are entitled to tips. It is becoming increasingly difficult to draw the line for accepting tips, particularly where the employee has a "hybrid" role and exercises some combination of supervisory and guest-service responsibilities. While the court acknowledged that tipped employees can have some managerial and administrative responsibilities, it held that the categorization of a particular employee as a

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Prepare now for possibility of Employee Free Choice Act

Educate supervisors on signs, consequences of organizing

By Charles F. Walters & Danny Sikka

The federal legislation known as the Employee Free Choice Act, which was passed by the House of Representatives and had majority support in the Senate in 2007, threatens to drastically increase union representation and alter the collective process throughout the private sector. EFCA, commonly referred to as the "card check" law, first creates a mandatory process requiring an employer to recognize a union as its employees' bargaining representative merely by the union obtaining signed authorization cards from a majority of the employees it seeks to represent. In so doing, EFCA would fundamentally change the way in which employees decide on union representation. Employers would lose their right under the National Labor Relations Act to insist upon a secret ballot election as the vehicle through which employees make this important decision and, in turn, effectively lose their ability to provide their side of the story to employees before they decide on union representation.

Second, EFCA replaces the collective bargaining process established by Congress more than 70 years ago with a completely new process. Presently, the parties are required only to bargain in good faith under the act. Neither side is required to agree with the other's proposals, and no one can force such agreement. Rather, the outcome of collective bargaining is left up to the parties. In marked contrast, EFCA puts the ultimate power to decide the outcome of collective bargaining in the hands of government-appointed arbitrators through an undefined arbitration process. Specifically, this bill allows

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'But there are ample avenues for addressing any concerns raised by this case — avenues that do not involve one judge, acting alone, imposing a pre-filing order that covers an entire district.'
— Dissenting judges, 9th U.S. Circuit Court of Appeals

Appeals court denies Molski's rehearing request

Dissenting judges argue that order blocks access to courts

A U.S. Circuit Court of Appeals denied a serial litigant a rehearing on a prior decision that requires the disabled man to prefile grievances in the Central District of California. Many public establishments in that district are surely breathing a sigh of relief, especially if they know others who have been served a complaint by Jarek Molski and his attorney, Thomas Frankovich, for lack of compliance with the Americans with Disabilities Act Standards for Accessible Design. *Molski v. Evergreen Dynasty Corp., d/b/a Mandarin Touch Restaurant*, No. 05-56452 (9th Cir. 04/07/08).

Serial litigant and paraplegic attorney Molski filed a lawsuit against Mandarin Touch Restaurant for failing to accommodate his disabilities, and the District Court judge who heard the case declared that Molski would now be required to prefile any cases in his district.

The 9th U.S. Circuit Court of Appeals upheld the decision last fall. The court agreed with the District Court's assertion that it was "very unlikely that Molski suffered the same injuries, often multiple times in one day, performing the same activities. … Common sense dictates that Molski would have figured out some way to avoid repetitive injury-causing activity; even a young child who touches a hot stove quickly learns to avoid pain by not repeating the conduct."

Regarding the request for a rehearing, the appeals court narrowly denied Molski's petition for rehearing en banc, and declared it would not rehear any further petitions from him or his attorney.

However, several justices dissented with the denial of the rehearing en banc. In their dissent, the justices declared that the District Court judge's prefiling orders "infringe the fundamental right to access the courts," and they noted that the judge did not specify any standards he used to decide which cases may be filed and which may not. The dissenting justices further said that the District Court and panel relied solely on the similarity and magnitude of Molski's injuries. In fact, Molski has filed hundreds and hundreds of lawsuits alleging nearly identical injuries, including that he suffered physical injuries while attempting to access non-ADA-compliant facilities.

Yet the dissenting justices said that even if Molski's allegations were meritless, the court could not justify the necessity of a prefiling order. The court said it recognizes that some of the tactics used by Molski and his attorney's firm, The Frankovich Group, are cause for concern.

"But there are ample avenues for addressing any concerns raised by this case — avenues that do not involve one judge, acting alone, imposing a pre-filing order that covers an entire district." ■

Who is Jarek Molski?

Jarek Molski is well-known for filing Americans with Disabilities Act discrimination lawsuits up and down the California coast. Legal experts have said Molski could potentially be making as much as $800,000 per year through ADA litigation. ■

HOSPITALITY LAW

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Quizno's franchise class action allowed to proceed

Franchisees provided plausible evidence of fraud, breach of contract

Franchise contracts can involve a fair amount of trust by both parties in an agreement. When one party doesn't hold up its end, a lawsuit is likely. A Colorado court determined that a class-action lawsuit filed by franchisees against Quizno's should proceed because they showed sufficient evidence that the company may have failed to honor its obligations under the franchise agreement. *Bonanno, et al., v. The Quizno's Franchise Company LLC, et al.*, No. 06-cv-02358-WYD-KLM (D. Colo. 03/05/08).

Raymond Bonanno and others who entered into agreements with Quizno's filed a complaint for fraudulent inducement of franchise agreements, breach of contract, breach of the implied covenant of good faith, and unjust enrichment. The group also asked the court to declare their franchise agreements with the company procedurally and substantively unconscionable.

The group alleged that Quizno's induced them to purchase franchises for $20,000 to $25,000 per franchise when it knew that they would never receive anything in return for their franchise fees. They also claimed that Quizno's took the franchise fee from more than 3,000 franchisees and failed to provide a store, resold trade areas, concealed the fact that many franchises would not open, and collected $75 million in fees without providing anything in return.

The court found that the plaintiffs showed when, where and who made misrepresentations, as well as how those people furthered the alleged fraudulent scheme. The court denied Quizno's request to dismiss the claim. The court also determined that the plaintiffs asserted sufficient facts to state a claim for breach of contract, and that they pleaded allegations to plausibly state a claim for breach of the implied covenant of good faith and fair dealing.

Finally, the court also found that the franchisees provided plausible evidence of unjust enrichment and economic duress, and denied Quizno's request to dismiss on all counts. ■

Disgruntled franchisees survived first hurdle, but case far from over

By Diana S. Barber

The court in the Quizno's case refused to grant Quizno's motion to dismiss on the eight claims for relief that the plaintiffs alleged in their complaint. This doesn't mean that they will win; it just means that the court will allow the case to proceed on all counts, and the plaintiffs will get their day in court.

The standard of review the court used in denying the motion to dismiss requires that the plaintiffs provide enough facts in the complaint to "'nudge [their] claims across the line from conceivable to plausible' in order to survive a motion to dismiss." The court looked closely at the reasons provided by the franchisees to support each allegation, not just the possibility that they can prove some of the facts in support of the claims, and found that they stated sufficient facts to support their claims. Surviving a motion to dismiss the claims is the first step for the plaintiffs and puts the defendants on the defensive.

One of the eight claims against the defendants is breach of the implied covenant of good faith and fair dealing. Under Colorado law, there is a duty of good faith and fair dealing in every contract, and a violation of such duty will give rise to a claim for breach of contract. The reason behind the enforceability of such a law is to effectuate the intentions of the parties and to honor the reasonable expectations of the parties in a contractual relationship. Many states have similar laws, and all parties to a contract should take heed to use good faith in performing under a contract.

The court found that the plaintiffs stated sufficient facts to state this claim; specifically that the defendants failed to honor the plaintiffs' reasonable expectations expressed in the franchise agreements through the defendants' abuse in the exercise of their discretion.

The plaintiffs stated that their reasonable expectations included: 1) that the restaurants would become operational within 12 months; 2) that the location of the proposed restaurants would be approved by the defendants; 3) that the "trade areas" were viable; and 4) that the defendants would help with site selection, including providing experienced real estate personnel to help with lease negotiation. The plaintiffs' complaint stated that the defendants failed to disclose the franchise opportunity as required by law, resold trade areas, and intentionally concealed the fact that many of the franchises sold would never be open for business.

The court found that these reasons support a claim for breach of implied covenant of good faith and fair dealing, and will allow the plaintiffs to proceed against the defendants. The final outcome of this case will depend on how well the plaintiffs' proof supports the eight claims that have survived this first hurdle of a motion to dismiss.

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

Florida employers can't ban guns at workplace under law

Hospitality employers in Florida are prohibited from barring most workers from bringing guns to the workplace under legislation recently signed into law by Gov. Charlie Crist.

The controversial measure passed after similar legislation was introduced during the last three legislative sessions. Under the bill, employees, customers and other individuals who are invited to a workplace are permitted to keep guns in their vehicles, so long as they have a permit to carry the weapon.

Similar laws have been enacted in Kentucky, Alaska, Georgia and Mississippi. However, an appellate court in Oklahoma recently ruled that the state couldn't enforce its "take your guns to work" legislation on the grounds that it is unconstitutional.

Supporters of the bill, which include the National Rifle Association and some labor unions, argue that the law upholds the U.S. Constitution's Bill of Rights. However, opponents of the measure say it takes away employers' property rights and increases the risk of workplace violence.

The law will go into effect July 1.

Employer groups filed for an injunction. Shortly after the bill was signed into law, the Florida Chamber of Commerce, along with the Florida Retail Federation, filed an injunction in federal court to prevent the legislation from going into effect.

For more information on the law, visit www.flgov.com. ■

'The financial penalties under the Fair Labor Standards Act and applicable state law are significant. Loss of the tip credit is just the start.' — Carolyn D. Richmond and Eli Z. Freedberg, attorneys

TIPPED (continued from page 1)

tipped employee under the FLSA ultimately depends on balancing the quantity and quality of the employee's supervisory responsibilities vs. his customer service roles. *Wajcman and Ashmore v. Investment Corp. of Palm Beach d/b/a Palm Beach Kennel Club,* No. 07-80912-CIV-HURLEY/HOPKINS (JL) (S.D. Fla. 03/20/08).

In that case, John Wajcman and Charles Ashmore were former poker dealers employed in the card room at the Palm Beach Kennel Club between 2004-07. Patrons of the club regularly tipped the poker dealers. They frequently received tips in excess of $30 per month, which is the FLSA minimum for tipped employees when the employer takes advantage of the tip credit allowance, as the Kennel Club did by paying poker dealers a direct hourly wage of $2.25 between October 2004 and May 2005, and $3.13 between May 2005 and December 2005.

The employees at the Kennel Club operated a tip pool whereby poker dealers contributed 5 percent of their total tips into the pool. The pooled tips were later distributed to participating employees (aside from the dealers), according to the number of hours each participating employee worked each week. The employees that shared in the pool included other classes of employees who worked on the card room floor, including cashiers, head cashiers, hostesses/hosts, and floor supervisors.

Wajcman and Ashmore alleged that the floor supervisors did not qualify as "tipped employees" under the FLSA and consequently were not entitled to participate in the tip pool. They further alleged that the Kennel Club was not entitled to take advantage of the FLSA's tip credit allowance because supervisory employees were receiving tips.

Both parties acknowledged that the card room supervisors were responsible for overseeing dealers, attending to customer complaints, maintaining paperwork pertaining to the opening and closing of the games, giving direction to dealers, authorizing dealer breaks, functioning as decision-makers in poker games, recording daily drop counts, and intervening in and resolving disputes between customers and dealers. Card room supervisors also spent about 90 percent of their shift on the floor, had no authority to hire or fire employees or advise management on hiring or firing practices, had no payroll or budgeting responsibilities, and did not determine any employee's rate of payment.

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

The *Wajcman* case highlights the very detailed factual analysis approach that reviewing courts and agencies typically apply on a case-by-case basis. Employers, however, can decrease litigation risks and potential exposure in a wage and hour lawsuit by maximizing best practices. For example, employers with multiunits should audit each property and make sure that job descriptions and responsibilities are consistent with practice. Clear distinctions should be maintained between managing the business and managing service. Those who manage or supervise service and receive tips should not be engaging in management functions such as hiring and firing, determining rate of pay, or conducting employee evaluations. The financial penalties under the Fair Labor Standards Act and applicable state law are significant. Loss of the tip credit is just the start. ■

The Kennel Club moved for summary judgment and argued that the card room supervisors' primary responsibilities were related to customer relations, and that only those employees who do not have any customer contact are ineligible to receive tips. The court rejected both arguments and denied the Kennel Club's motion for summary judgment.

The court held that to determine whether an employee customarily receives tips, the focus should be drawn to the question of whether the employee performs important service-related functions, and whether the employee has more than de minimis service interaction with customers.

The court denied the club's motion for summary judgment in part because it failed to produce affidavits from current card room supervisors reinforcing their position that they provided important customer service functions. The court stated that the record was "devoid of any competent evidence tending to suggest a quality interchange between supervisors and customers ... to enhance the customer's card room experience." Contrasting the supervisors to maitre d's, the court noted that these supervisors were not employed to "serve and interact socially" with the customers. Instead the court compared them to security detail who may have significant customer interaction but do not customarily generate tips for service.

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 the law firm's New York office. ■

Global growth presents various legal hurdles for restaurants

Local regulations, tort laws can make franchising a challenge

By Matt Brodsky

The new and continuously expanding global economy presents unique challenges to those in the hospitality industry.

Major portions of revenue for the largest restaurant chains now come from international expansion. About 55 percent of McDonald's revenue comes from its Europe and Asia, Pacific, Middle East and Africa divisions. Yum! Brands Inc., another huge chain with the likes of Taco Bell, Pizza Hut and KFC as its brands, opened more than 850 new restaurants in its international unit, not including the 425 its China Division expects to open annually as part of its "ongoing earnings growth model."

Some might say it's a goldmine. When going abroad, however, risk managers encounter the other kind of mine, the proverbial landmine, simply because regulations, operations, customers and insurance are different the world over. And it appears that risk managers and their companies are still trying to figure out how to sidestep or defuse these exposures and potential for litigation in foreign courts.

Stephen Levene, executive vice president at the brokerage firm Lockton, mentioned one of his clients opening a restaurant in China. The client's U.S. buildings are typically 3,000 square feet and one story, whereas a Chinese location will typically be 10,000 square feet with multiple stories, and deliveries are done by someone on the back of a motorcycle. Not only are there worries about liability from that delivery person getting hurt or running somebody over, but what about preventing slips and falls in the new facility, and uncovering the "blind spots" where tort-issuing people collisions could lurk.

If restaurants serve local flavor on their menus, said Greg Benefield, food and beverage practice leader for Willis Insurance, they might have to change their prep work and cooking procedures in the kitchen, and even alter the equipment that individual international locations will need. A different menu could even open them to different claims based on dietary issues or nutrition labeling issues.

Jan Schnabel, who leads Marsh USA Inc.'s hospitality practice and oversees its work with restaurants, mentions one issue with a steep learning curve: A patron ordering rum and cola, not just a cola — something that might happen in the Caribbean or Europe.

"When liquor becomes an issue, they don't know how big an issue it becomes," Schnabel says about fast-food companies.

Behind these operational differences, it is easy to peel away at the other issues that emerge involving local insurance, customs, regulations and laws. It's a lot to get your arms around.

One way is going beyond the typical global general liability and property policies. Levene said he's putting together programs that are almost customized by the country for clients. "Now that we're getting line of sight, we're seeing different types of liability exposures."

But local issues can also cause issues, especially with a variety of vague, contradictory or nonexistent local regulations that can vary widely from the numerous and concrete regulations these restaurant groups may be accustomed to in the United States. "You just couldn't imagine the tort liability in China or Australia," Levene said.

A franchise agreement could be one of the most powerful tools that restaurant risk managers could use to "set the bar" where it might not be set in the local law, says Schnabel.

"They have to be very, very aware of the rules and regulations of where they're going and any vicarious liability ... before they put together a franchise agreement," she says. "The agreements have to be structured around the product offerings no matter where they are."

Matt Brodsky is the Web editor/senior editor of LRP Publications' Risk & Insurance Magazine®, *where this article first appeared.* ■

Consider risk early in process

A hurdle for risk managers is that they often are not brought in early enough in the global expansion process, and have little time to investigate the possible legal issues that could arise.

According to Greg Benefield, food and beverage practice leader for Willis Insurance, this seems to be how it goes down with international developments: Risk management gets brought in after this "development agreement" is put together by corporate management. Then risk managers have to become intimately aware of the development agreement, he said, and advise management about hurdles and issues. ■

ICE raid results in 11 arrests in Mexican restaurants

U.S. Immigration and Customs Enforcement special agents recently arrested 11 individuals for conspiring to harbor illegal aliens who were smuggled into the country to work in Mexican restaurants.

The suspects include:

- Jorge Delarco of Depew, N.Y. Delarco is the owner of all seven restaurants.
- Javier Banda of Depew, N.Y., restaurant manager.
- Sergio Resendiz of Salamanca, N.Y., restaurant manager.
- Maurilio Feria of Alleghany, N.Y., restaurant manager.
- Jesus Escalante of Dunkirk, N.Y., restaurant manager.
- Honorio Banda of Bradford, Pa., restaurant manager.
- Alberto Antimo of New Martinsville, W.V., restaurant manager.
- Miguel Antimo of Dunkirk, N.Y., restaurant manager.
- Alejandro Garcia of Wheeling, W.V., restaurant manager.
- Alvaro Soto of Willoughby, Ohio, restaurant manager.

"Employers who exploit illegal alien labor to reap greater profits for themselves can expect to pay a high price for their greed," said Julie Myers, assistant secretary of ICE. "Whether the violator is a multinational corporation or a small business, ICE is aggressively targeting employers who use illegal alien workers to gain an unfair business advantage and take jobs away from legal workers." ■

'If an employer does not have strong and lawful policies that address these issues, then it will be much easier for a union to organize.'
— Charles Walters and Danny Sikka, attorneys

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the parties only 120 days to agree on a first collective bargaining agreement, after which either party may insist on final and binding arbitration to decide the terms of the parties' first collective bargaining agreement. This means that the government-appointed arbitrators, not the parties, will decide the governing wages, health benefits, retirement benefits, work hours, management rights, and all other terms and conditions of employment.

Given the drastic changes threatened by EFCA, its already strong congressional support, and the looming presidential election, the question becomes: What can and should employers do? From a legislative perspective, employers can work with their congressional representatives, industry groups, and organizations such as the Society for Human Resource Management and the U.S. Chamber of Commerce. In doing so, employers should make sure to highlight the following issues regarding EFCA:

1. EFCA would eliminate employees' right to vote in a secret ballot election.

2. EFCA does not allow employees to hear both sides and make an informed decision about whether they want union representation.

3. EFCA potentially denies employees the right to bargain collectively and allows a third party to impose a CBA.

In the workplace, employers should already be considering how best to prepare for increased unionization efforts, because even if EFCA becomes law, it does not mean that an employer will automatically become unionized. To the contrary, it merely means that those employees who are unhappy and not treated properly will find it much easier to choose union representation. Employees who are concerned about the financial stability of the company, those who feel underappreciated, and those who believe that management is not applying policies consistently, are especially likely to look to unions for help. Therefore, understanding the issues that concern employees is crucial.

Employers can better understand their employees through initiatives such as:

1. Daily lineups in which employees have the opportunity to voice their concerns.

2. Open-door policies for human resources, department heads and general managers.

3. Employee satisfaction surveys.

4. Focus groups.

Of course, while the use of these tools is effective in determining what is important to your employees, a quick managerial response and follow-up is equally important. If employees are asked for their opinion and feedback and do not see a response, they will be even more discouraged with management and more likely to support unionization.

In addition to the above steps, employers may want to consider educating their employees about EFCA and the ramifications of unionization even before it appears that EFCA will become law or that there are signs of a union organizing in the workplace. Although some employers are reluctant to even broach the subject of unionization with their employees for fear of spurring organizing activity, the publicity surrounding EFCA, as well as its strong support thus far, make it risky for employers to take a wait-and-see approach on this issue. Employers should at least consider letting their employees know their philosophy on unions sooner rather than later.

Employers should also educate their managers and supervisors on EFCA and its potential consequences, the signs of organizing activity, and the legal dos and don'ts of organizing. Managers and supervisors not only are in the best position to alert their employer of union organizing activity, but their day-to-day contact with employees often puts them in the best position to prevent employees from feeling the need to unionize. Therefore, arming managers and supervisors now with the tools to do the above can only help employers in the future.

Employers should also review, develop and/or strengthen their general "preventative policies" in accordance with the National Labor Relations Act's requirements for such policies. These policies typically include solicitation and distribution, bulletin boards, e-mail and Internet use, and access to the premises.

If an employer does not have strong and lawful policies that address these issues, then it will be much easier for a union to organize. There is still plenty of time for employers to impact the potential passage of this legislation. And there still is plenty of time to institute workplace initiatives and policies that will benefit employers, whether or not EFCA ever becomes law.

Charles F. Walters is a partner in Seyfarth Shaw LLP's Washington, D.C. office. Danny Sikka is an associate, also at the firm's D.C. office. ■

Restaurant's documentation helps protect it from ADA claim

Court said company made effort to accommodate disability

A fast-food restaurant's setting of explicit goals to be met by a flailing manager with a disability helped the company obtain summary judgment on most of the employee's claims. *Stodola v. Finley & Co., Inc. et al.*, No. 2:05-CV-464-PRC (N.D. Ind. 03/24/08).

Madeleine Stodola worked as a cook and manager at several restaurants. She suffers from nystagmus, a congenital eye condition from a lack of pigment in the retina and iris. The condition impairs Stodola's vision and causes her eye to move in frequent rapid movement in an effort to capture images.

Finley owned and operated 12 Wendy's restaurants in Indiana. Dennis Gill, who worked for International Management Company, an entity contracted by Finley to handle management services, hired Stodola as a restaurant manager. Prior to the start of the position, Stodola told Gill about her condition and showed him the telescopic glasses she wore and her concerns about not being able to read the computerized order screens. Gill assured her that reading monitors was not an essential function of her job as a manager. Stodola claimed Gill also promised to install screens with larger type and paper ticket printers so she could review orders without monitors.

Stodola was assigned to a restaurant in Griffith, Ind., for training, which lasted approximately 10 weeks, but spent 14 weeks in the program due to poor performance. She claimed she encountered problems because she could not read the screens and said she never received the third phase of training.

After five months of managing a Michigan City location, Stodola received five notices of "needs improvement," primarily for slow drive-thru service times. Several months later, management told Stodola her performance needed to improve or she would face termination. She attributed her record to her poor eyesight, and her supervisors agreed to look into installing a larger type screen for her.

A week after the meeting, she filed a charge of discrimination, alleging that Finley failed to accommodate her disability and had written her up for reasons associated with her disability.

Several weeks later, Stodola received a letter informing her that she would be reassigned to work under a general manager in Merrillville and that a larger monitor would be installed at the restaurant. She also received notice that she would be required to perform at a comanager level within 60 days.

After two months, the general manager said that Stodola had improved on the goals set for her, but said she was still not operating at a comanager level and had demonstrated instances of insubordination and failure to complete tasks. As a result, she was terminated.

Stodola promptly filed another charge of discrimination. Finley argued that the company accommodated her because it complied with her request for a larger screen, and said its decisions regarding Stodola's employment were made for legitimate, nondiscriminatory reasons and that reading the order screen wasn't an essential function of her job.

Although Finley did not provide a job description for the position, testimony from Gill and others convinced the court that reading the screen was not an essential function of Stodola's job, and granted Finley summary judgment for failing to accommodate her disability.

With respect to Stodola's charge of retaliation, the court dismissed Stodola's claim that Finley retaliated against her regarding the adverse employment action because she couldn't show she satisfactorily performed her job.

The court also dismissed Stodola's claim of fraud. ■

Truthfulness of company questioned

The court in *Stodola v. Finley* sided with the employer in most claims, but did find that the employee presented evidence showing she was subjected to disparate treatment. The court found that because Finley presented conflicting reasons for her termination, it raised a question about the company's truthfulness.

The court also noted that although Stodola had a history of inadequate performance, just 14 days after she filed a charge with the Equal Employment Opportunity Commission, she was given a 60-day ultimatum and was transferred to a restaurant 46 miles from her home. The court said that the timing of the events and the discrepancies in the company's reasons for termination raised issues that could not be resolved, and the court denied Finley summary judgment on that charge. ■

Hotel association urges lawmakers to bring H-2B relief

The American Hotel & Lodging Association is urging federal lawmakers to bring relief legislation to the floor for the H-2B temporary seasonal worker program.

A House of Representatives' subcommittee recently held a hearing on the program. The annual cap of 66,000 permitted visas was reached at the beginning of the year — much earlier than usual and before many hospitality employers could file their applications. Under a 2005 law, returning workers were exempt from being counted for the cap. However, the law has expired and the AH&LA is pushing for a new measure to be enacted.

"The H-2B program has become crucial to the sustainability of our 10,000 property members and 1.8 million employees at hotels, inns, lodges and resorts throughout the United States," said Marlene M. Colucci, AH&LA executive vice president for public policy. "Without access to these temporary, non-immigrant workers, many properties are forced to scale back operations, lay off full-time staff, and deprive guests and customers of the amenities and services they have come to expect and enjoy."

Due to an increasing scarcity of available labor for temporary positions, Colucci said many seasonal employers in the hospitality industry are forced to use the H-2B program to provide them with access to international workers for jobs that last only a few months out of the year. ■

McDonald's chain to pay out $505,000 to sexually harassed teen workers

Franchise also required to train workers on sex discrimination, post notices

Protecting young employees should be a priority for restaurants and hotels. A Durango, Colo.-based McDonald's restaurant franchise will pay $505,000 and provide significant remedial relief to settle a sexual harassment lawsuit brought by the Equal Employment Opportunity Commission on behalf of a class of young female employees, including teens, who said they were harassed by a male supervisor at work. *EEOC v. JOBEC, Inc.*, Civil Action No. 06-cv-01871-MSK-CBS (D. Colo. 04/03/08).

The lawsuit against JOBEC Inc., a management company, and the interrelated corporations Colorado Hamburger Company Inc. and Farmington Hamburger Company Inc., which operate McDonald's franchises in Durango and Cortez, Colo., and Farmington and Aztec, N.M., alleged that Tiawna Shenefield, Brandi Michal, and a class of females, many of whom were 15 to 17 years old at the time, were subjected to egregious sexual harassment in the workplace by their male supervisor. The harassment allegedly included the supervisor physically touching and grabbing the girls, making numerous sexual comments, and making offers of favors in exchange for sex.

Under the terms of the consent decree resolving the case, the defendants will pay the two named victims and their attorney, Lynne Sholler, of Durango, a total of $450,000 for compensatory damages and attorney's fees. An additional $55,000 will be distributed to two other class members represented by the EEOC.

The decree also provides for significant nonmonetary relief, including letters of apology to the victims; training on sex discrimination in the defendants' Colorado and New Mexico facilities; posting notices of nondiscrimination in all of the defendants' workplaces; and an injunction prohibiting discrimination and retaliation.

"Employers must recognize their responsibility to assure that young workers — one of the most vulnerable segments of the labor force — are not harassed at work," said Chester V. Bailey, district director of the EEOC's Phoenix office. "That's why the commission has a national initiative to address this important issue."

Attorney Lynne Sholler, who represented two of the alleged victims, said her clients were glad to have the case resolved.

"I am particularly pleased that this employer will be required to put in place training and procedures to prevent and address workplace harassment." ■

Initiative still reaching teens

In September 2004, the Equal Employment Opportunity Commission launched the federal agency's national Youth@Work Initiative, a comprehensive outreach and education campaign designed to inform teens about their employment rights and responsibilities, and to help employers create positive experiences for young adults entering the workforce for the first time.

The EEOC has held more than 3,400 Youth@Work events nationwide since the program was launched, reaching more than 212,000 students, education professionals and employers. ■

Prompt investigation led court to grant summary judgment

Restaurant's policies provided protection in sexual assault case

Unpleasant instances will occur at the workplace no matter what precautions your company has in place. But even if an employee is assaulted by another worker, by responding promptly and following protocol, you can protect your restaurant or hotel in the event of a lawsuit.

A District Court granted summary judgment to a Denny's restaurant, finding that the restaurant's quick response and investigation helped the company succeed in a case filed by an employee who said she was sexually assaulted by her superior at the workplace. *Puebla v. Denny's Restaurant*, No. 06-3189 Section "T" (2) (E.D. La. 03/10/08).

Deanna Puebla worked at Denny's Restaurant and claimed that she was sexually battered by her manager, Joel Sotelo, during a morning shift in the alley behind the store, and again in the storage room. Sotelo claimed that the incidents were consensual, but Puebla said the incidents caused her to become disabled and unable to return to work for several months. Denny's promptly fired Sotelo after the incident.

When Puebla returned to work, she said her new manager subjected her to hostile comments regarding the incident and caused her emotional distress and lost wages. She filed a complaint against Denny's, seeking punitive damages and attorney's fees and costs for charges of sexual battery, retaliation and sexual harassment.

Regarding Puebla's hostile work environment claim, the U.S. District Court, Eastern District of Louisiana found that Denny's demonstrated reasonable care to prevent and promptly remedy the harassment, and that Puebla failed to use the preventative and remedial opportunities provided by the restaurant. Both parties agreed that Puebla went to another Denny's location the day after the incidents and told someone what happened, and that the manager immediately called the corporate office and initiated an investigation, resulting in Sotelo's termination within two days. No prior complaints about Sotelo had been reported before the incidents with Puebla.

Denny's also had a training program prohibiting sexual harassment, and the restaurant allowed Puebla to take a few weeks off and return without incident. Puebla also admitted that all harassment stopped after her complaint.

The court found that the record showed that Denny's took immediate and permanent corrective action to promptly remedy any harassment.

The court also considered Puebla's sexual harassment claim. Denny's argued that Puebla's harassment claim could not prevail because her employment was not threatened as part of the encounter with Sotelo and said she could not establish a quid pro quo cause of action for harassment, and the court agreed.

With respect to punitive damages, the court agreed with Denny's that damages were not merited because Puebla could not prove malice or reckless disregard of her rights by the restaurant. The court granted summary judgment to Denny's on all counts. ■

Properly investigate all complaints

When an employee has a complaint, it's crucial that your hotel, restaurant or casino's human resources personnel are well-trained on how to respond.

Attorneys Shelley M. Greenwald and Susan W. Brecher believe that a prompt and thorough investigation is a key practice in protecting your entity if an employee has a valid complaint.

To start an investigation, HR should:

• Be empathetic. Start the meeting off by explaining the process to the employee, and assure impartiality and explain the limits of confidentiality. Also, be sure to ask the employee to remain confidential and to not discuss the case with others while you investigate the incident.

• Carefully probe for details. Avoid asking the employee yes or no questions; use open-ended questions. Make sure specific statements made by others are reviewed.

• Find out who else has knowledge of the incident. Get sufficient details on the event or incident, including the who, what, where, when, why, dates, times, places, alleged victim's response, etc.

• Avoid using a tape recorder of the meeting. Rather, take good notes by paraphrasing the alleged victim's account of the incident.

• Don't commit to specific actions. Reassure the employee that you will continue to investigate the incident and will contact her at the conclusion of the process.

• Thank the employee and assure her that your office door is open if she has any additional information to share with you on the case. ■

EEOC files class action suit against restaurant chain

The Equal Employment Opportunity Commission recently filed a class action lawsuit against McCormick & Schmick's Seafood Restaurant Inc. for alleged race discrimination against applicants and employees at the company's two locations in Baltimore.

According to the lawsuit, the management at the two restaurant locations has refused to hire blacks for publicly visible positions since 1998. Those positions include cocktail waitresses, servers, bartenders and hosts/hostesses. In addition, the EEOC alleges that since 2003, McCormick & Schmick's segregated front-of-the-house black applicants and employees by disproportionately assigning them to positions at one of the restaurants rather than the other because of their race.

The lawsuit also alleges that the management of both facilities made table assignments by race by assigning black employees to smaller tables, which would be less lucrative. In addition, the EEOC said black employees were also assigned to customers of the same race.

The company, which is based in Portland, Ore., would not comment on the details of the pending lawsuit. ■

'While the majority may harbor doubts about the wisdom of imposing personal liability on individuals who retaliate, such policy concerns are directed at, and by, the Legislature, not this court.'
— Carlos Moreno, California Supreme Court Justice

Supervisor cannot be personally liable for retaliation, court says

California court overturns ruling awarding damages against boss

A California appeals court has reversed a prior decision allowing an employee who was allegedly subjected to harassment, discrimination and retaliation to recover from the harassing supervisor, finding that exposing managers to personal liability for personnel decisions could have a "chilling effect." *Jones v. The Lodge at Torrey Pines Partnership, et al.*, No. S151022 (Cal. 03/03/08).

Scott Jones sued his employer, The Lodge at Torrey Pines in La Jolla, Calif., and his supervisor, food and beverage director Jean Weiss, under the California Fair Employment and Housing Act for sexual orientation harassment, discrimination and retaliation. A trial court granted summary adjudication to The Lodge and Weiss on some counts, but ultimately awarded Jones compensatory damages of $1,395,000 against The Lodge and $155,000 against Weiss, but found that Weiss did not act with malice or oppression.

A jury returned a verdict for Jones, and a trial court granted judgment notwithstanding the verdict, holding that an individual cannot be held liable for retaliation. A California appeals court reversed that judgment and reinstated the jury's verdict.

The California Supreme Court reversed that judgment and remanded, finding that non-employer individuals are not personally liable for their roles in retaliation.

The court looked to *Reno v. Baird (1998)*, 18 Cal. 4th 640, where it held that although an employer may be liable for unlawful discrimination, individuals working for the employer, including supervisors, are not personally liable for that discrimination. The court reviewed the question of whether language differences between those laws concerning "discrimination" and those referring "retaliation" should apply.

Under California state law, it's an unlawful employment practice for "an employer" to discriminate under the "discrimination" section. However, under the section for "retaliation," it's an unlawful employment practice for "any employer, labor organization, employment agency, or person" to retaliate.

Although Jones argued that this language made it possible for him to prevail in his complaints against Weiss, the court rejected that argument, finding that the language in the California code likely included the word "person" for reasons other than individual retaliation claims. The court said that the law describes who may not retaliate, and compels a reader to believe that anyone who engages in retaliation can be personally liable.

The court therefore concluded that the same laws that apply to discrimination should also apply to incidents of retaliation: that the employer, not non-employer individuals, may be held liable. The court found that holding the judgment of the appeals court could have a "chilling effect" on management, in that supervisors face the threat of a lawsuit with every personnel decision, and reversed and remanded the decision. ■

Justices argue against majority opinion

Two of the California Supreme Court justices dissented from the majority opinion, finding that it was well settled under the California Department of Fair Employment and Housing that Scott Jones' supervisor in *Jones v. The Lodge at Torrey Pines Partnership, et al.*, could be held individually liable for harassment, as well as retaliation.

Justice Carlos R. Moreno argued that the language of the law, including liability on a "person" who retaliates, is clear under Fair Employment and Housing Act's retaliation provision.

"Such an interpretation is consistent with established canons of statutory construction — when a statute's language is clear, our inquiry ends," he said. "While the majority may harbor doubts about the wisdom of imposing personal liability on individuals who retaliate, such policy concerns are properly directed at, and resolved by, the Legislature, not this court … The Legislature could not have intended to expose a supervisor to individual liability for harassing an employee on the one hand, while, on the other hand, shielding that supervisor from liability for retaliating against the employee for opposing that very same harassment. Yet that is precisely the effect of the majority's holding."

Justice Kathryn M. Werdegar agreed with Moreno, and said she believed that the court strayed far from its duty of effectuating and implementing the intent of the Legislature.

"In analyzing the FEHA, the majority finely parses the statutory language and engages in intricate deductions of legislative intent," she said. "In so doing, the majority has lost sight of both our proper role and the basic meaning of the FEHA." ■

Court considers role of supervisor in punitive damages case

Security supervisor's role was to follow policy, not dictate it

Drawing the line between who is a bona fide supervisor and one who just implements orders on a shift can make a difference in some state courts when it comes to punitive damages. A Las Vegas casino made that distinction for a Nevada court and subsequently obtained partial summary judgment on a hotel guest's request for punitive damages after an incident with security guards. *Izquierdo v. Circus Circus Casinos Inc. and MGM Mirage,* No. 2:06-cv-01093-RCJ-RJJ (D. Nev. 03/19/08).

Ed Izquierdo was a guest at Circus Circus. When he was on his way to his room early one morning, the hotel's security received a call that an individual, later identified as Izquierdo, was bothering guests on the promenade, and personnel attempted to escort Izquierdo back to his room. After an incident, the security shift supervisor advised personnel to evict Izquierdo. He then ran Izquierdo for warrants and discovered that he was wanted by the law. Security then placed him in restraints and escorted him to a holding room in the security office.

Izquierdo claimed incidents occurred while he was being held and filed a suit against Circus Circus for assault, battery, false imprisonment, intentional infliction of emotional distress, and negligently hiring, training and retaining unfit employees. He also asked the court for punitive damages, arguing that the security shift supervisor who made the decision on the evening of his arrest was a managerial agent who authorized the conduct of the other personnel that evening.

Circus Circus alleged that Izquierdo could not collect punitive damages for the actions of the other security guards because the shift supervisor did not have managerial authority to ratify the guards' conduct, which is required to hold the hotel liable for punitive damages.

Although the security supervisor was acting as a managerial agent on the night in question, because he had the authority to approve the acts of the security guards, the court found that he was not a managerial agent for the purposes of imposing punitive damages. The court noted that under Nevada law, to be considered a managerial agent, one must have policymaking authority, the discretion to make corporate decisions.

By referring to the hotel and casino's security manual, the court found that the responsibilities of the security shift supervisor were subject to established policies, meaning that the supervisor had no control over policies, but merely followed them and insured others did the same. The court also found that Izquierdo presented no proof that Circus Circus ratified the alleged conduct by the security personnel on the evening in question.

Therefore, the court granted the hotel/casino partial summary judgment on the question of punitive damages, meaning that Circus Circus cannot be held liable for punitive damages in this case. ■

Review policies regularly

Lawsuits alleging false imprisonment or arrest are common for casinos and hotels. To help ward off complaints regarding the detainment of guests, hotels and casinos should:

- Make sure security policies are reviewed by a consultant or attorney on a regular basis.
- Provide regular training to staff members to ensure they know the policies and procedures.
- Require that policies be followed exactly by staff members at all times. ■

Guest could not meet punitive standard

To hold a company liable for punitive damages based on the actions of an employee, the Nevada Supreme Court adopted the standard set forth in Restatement (Second) of Torts Section 909:

Punitive damages can properly be awarded against a master or other principle because of an act by an agent if, but only if:

a) a principle or a managerial agent authorized the doing and the manner of the act.

b) the agent was unfit and the principle or managerial agent was reckless in employing or retaining him.

c) the agent was employed in a managerial capacity and was acting in the scope of employment.

d) the principle or managerial agent of the principle ratified or approved the act.

In *Izquierdo v. Circus Circus*, the court found that Ed Izquierdo presented no evidence to prevail under the first three standards, and also found that the security shift supervisor could not be considered a managerial agent. ■

Greek restaurants accused of failing to pay overtime

A Greek food restaurant chain in Nebraska has been accused of failing to pay employees overtime wages since 2006.

The lawsuit was filed by the office of Labor Secretary Elaine Chao in the U.S. District Court in Omaha. The complaint alleges that King Kong restaurants, which has restaurants in Omaha and Lincoln, Neb., failed to pay more than 100 current and former employees overtime for working more than 40 hours a week. According to the Fair Labor Standards Act, employees must be paid 1½ times their regular hourly wage for all working hours beyond 40 each week.

The Labor Department suit also alleges that Nick Triantafillou, the owner of the restaurant chain, and the corporations that run the restaurants failed to keep adequate and accurate records of employees' hours, wages and other working conditions.

More than 130 employees were underpaid, according to the suit, for a total of $119,000. The Labor Department is seeking to have the restaurant chain pay the back wages and another $119,000 in liquidated damages. It is also asking that the court order the restaurant chain to stop its practice of not paying its employees overtime. ■

Prepare for possible changes to ADA, experts warn

Hotel and restaurant owners should start preparing for potential changes to the nearly 20-year-old Americans with Disabilities Act.

In recent years, disability organizations have argued that protection under the act has been eroded over the past two decades through adverse court rulings and contradictory federal policies. They are hoping legislators will correct those problems by passing the ADA Restoration Act, H.R. 3195. Supporters of the bill, introduced last summer by Sen. Tom Harkin, D-Iowa, say it would restore the original intent of the ADA by protecting all persons with disabilities without regard to mitigating circumstances, such as taking medication or using an assistive device.

Employer groups fear the proposed changes will bankrupt businesses. However, Richard Pimentel, a nationally known speaker and disability management expert with Milt Wright and Associates in Granada Hills, Calif., said hospitality employers shouldn't listen to the cries of doom and gloom. He compared the proposed ADA Restoration Act to the Y2K computer bug — a lot of hype over something that requires only a few technical changes.

"Employers who don't have problems with the ADA now won't have them if the ADA Restoration Act passes," he said. "The proposed definition of disability will mean employees with less substantial impairments can request reasonable accommodations. However, as impairments become less substantial, so does the need to accommodate them."

Milt Wright, founder of Milt Wright and Associates consulting firm, said both proponents and opponents of the legislation have indicated a willingness to tweak the current bill. Pimentel and Wright expect some form of the ADA Restoration Act to pass, but only after both sides propose changes. They expect the legislation to concentrate on employment issues and shift the focus of disability employment complaints from defining disability to combating discrimination.

What would legislation do?

The Americans with Disabilities Restoration Act, sponsored by Sen. Tom Harkin, D-Iowa, would:

- Redefine and clarify the terms used in the definition of disability, such as "physical impairment" and "mental impairment."
- Ensure that a person who uses mitigating measures, such as those with epilepsy or diabetes, will be protected under the law.
- Define "mitigating measures." The term is not currently defined in the ADA or in the Equal Employment Opportunity Commission regulations.

Harkin said the act will clarify that adverse treatment based on the mitigating measure itself or a side effect of the mitigating measure (e.g., a person's prosthetic limb or a person's fatigue due to medicine) may constitute discrimination. ■

Hospitality employers, particularly human resources departments, should look at their current compliance, Pimentel advised. If the hotel or restaurant relies on complaining employees not meeting the ADA's definition of disability, they should treat the proposed legislation as a wake-up call, he said. If the company follows good nondiscrimination and accommodation policies, it will be prepared if the ADA Restoration Act becomes law.

But good ADA policies go beyond Equal Employment Opportunity concerns, Pimentel said. He recommends that companies take a good look at their workers' compensation, disability management, and post-offer medical examination policies to make sure they comply with the current ADA.

"If you have problems now, don't wait to fix them," he said. "Look at your return-to-work and disability management programs and find a consultant or someone who knows this stuff, so that when the law comes down, they can look at your program models and say, 'This is what you need to do, modify this or tweak that.'"

Comprehensive return-to-work programs will become essential under the proposed changes. Cindy Roth, president of Ergonomic Technologies Corp. in Syosset, N.Y., said hospitality employers should consider merging the return-to-work and reasonable accommodation processes, since disabled employees may be entitled to both under the proposed changes.

For more information, contact Richard Pimentel or Milt Wright at (800) 626-3939. ■