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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Events imply employer may have regarded manager as disabled

Termination's proximity to disclosure may be evidence of discrimination

When an employee discloses a serious health condition, it can be difficult not to overreact. However, it's crucial that the employee is not treated as disabled and that laws are followed to prevent legal entanglements. (*Mendiola v. Vision Hospitality, et al.*, No. 2:07-CV-469-MEF (M.D. Ala. 12/08/08).)

Mario Mendiola managed the Quality Inn & Suites in Montgomery, Ala., for John Tampa, who owns and operates several hotels under J.T. Hotels LLC. Mendiola started in April 2005 and lived in a suite on the premises.

In early December 2005, Mendiola was tentatively diagnosed with leukemia. He had been under the treatment of a physician for diabetes, and an irregular blood count indicated that he might have leukemia. He scheduled additional testing, including a bone marrow biopsy, to determine how advanced the leukemia was, and informed Tampa of his diagnosis.

Mendiola alleged that he also told Tampa that if it was found that he was in a late stage of the disease, that he would want to return to Texas, where he was from, for additional treatment, but said he made it clear that no action would be taken prior to the additional testing. He said Tampa gave him a $2,000 advance to cover medical expenses and offered encouraging words.

Tampa, however, argued that Mendiola said he had a problem with his health and that he would return to Texas and could no longer manage the property.

Five days later, Tampa sent a fax to Mendiola informing him that a replacement general manager had been hired and would start in about two weeks. Mendiola said he called Tampa numerous times after he received this information, but that his calls were not returned. As a result, Mendiola faxed a letter to Tampa stating that he had not resigned, but Tampa said he never received the letter.

(See **DISABILITY** on page 4)

Manager failed to show he was treated differently by restaurant

Employee's termination was result of violations, not discrimination

By Carolyn D. Richmond & Eli Z. Freedberg

A federal District Court in the Northern District of Illinois reaffirmed the value of consistent and comprehensive human resources policies and procedures that are coupled with prompt and effective investigations. In *Fluckes v. The Johnny Rockets Group, Inc.*, No. 07 C 3050 (N.D. Ill. 12/10/08), the court granted The Johnny Rockets Group Inc.'s motion for summary judgment, dismissing the Title VII discrimination claims and retaliation claim brought by Alexander Fluckes, one of Johnny Rockets' former general managers.

Fluckes was employed as a general manager at Johnny Rockets' Skokie, Ill., location. Danielle Gonzales, a subordinate employee at the Skokie location, contacted Fluckes' direct supervisor, William Hart, to report that Fluckes was violating several of Johnny Rockets' policies, including its prohibitions on: fraternizing with subordinate employees, forging time records, sexual harassment, overtime staffing, and leaving the diner unattended.

Hart commenced an investigation and first interviewed Gonzales and had her memorialize her allegations against Fluckes in writing. Hart then asked Fluckes to address Gonzales' allegations. During this interview, Fluckes admitted that he was married to a subordinate who had worked at the Skokie location. However, he denied the sexual harassment allegation. Following this interview, Hart suspended Fluckes pending the conclusion of the investigation. Ultimately, Hart interviewed 10 additional employees of the restaurant who confirmed many of Gonzales' allegations and also uncovered other viola-

(See **DISCRIMINATION** on page 6)

The court found that because of the unusual injury suffered by Graves, there was material issue of fact with respect to whether the door and door closer were functioning properly, and denied the restaurant's motion for summary judgment.

Restaurant responsible for fixing improperly functioning door

Patron whose finger was severed in door will have his day in court

When contractors or other laborers are hired to make modifications to your hotel or restaurant, it's crucial for owners to inspect the work to ensure the premises are safe for guests. After a guest had part of his finger sliced off as a result of a faulty bathroom door, a District Court denied summary judgment to the restaurant, finding that a question remained whether the restaurant was responsible for the injury. (*Graves v. The Krystal Company v. Kemp, d/b/a Kemp Construction*, No. CV207-141 (S.D. Ga. 12/11/08).)

Charles Graves visited the Krystal Restaurant and went to use the restroom, which had recently been remodeled to comply with the Americans with Disabilities Act. He entered the restroom as the door shut, and it severed his index finger. Graves said the bathroom door was designed to shut abruptly because the bathroom design left customers using the commode exposed to public view. Although Graves was taken to the hospital, the treating physician recommended against reattaching his finger. Employees at the restaurant said that the door appeared to work properly and stated that they had not heard of any complaints after the remodeling.

Graves filed a lawsuit against Krystal based on premises liability and negligence; Krystal, in turn, moved for summary judgment on Graves' complaint and filed a lawsuit against Tom Kemp, the contractor that completed the remodeling, for negligence.

Graves said Krystal had a duty to inspect and warn against the inherent risks of the bathroom door. Graves also said that the door closer, located on the outside, sped up the closure of the door rather than slowing it down, and was put there to improve privacy for restroom users. He accused the restaurant of moving the closer inside after the accident. Krystal and Kemp disagreed, stating the closer was on the interior at all times after the bathroom renovations.

The court found that because of the unusual injury suffered by Graves, there was material issue of fact with respect to whether the door and door closer were functioning properly, and denied the restaurant's motion for summary judgment. However, regarding Graves' assertion of negligence per se, the court found that he failed to cite any statutes that were violated, and granted summary judgment to the restaurant on that claim.

Krystal also claimed that it is entitled to indemnification from Kemp for any alleged defects in the door.

Kemp argued that the closing mechanisms contain two or three adjustments, and that the phases of the door closer are preset but can be sped up or slowed down. The court decided that depending on evidence produced at trial, Krystal may be entitled to indemnification, but because that is premature, denied Krystal's request for declaratory judgment. ■

'Exclusive control'

In his case against Krystal Restaurant, Charles Graves argued that the heavy and defective door closer was in Krystal's exclusive control and that the accident would not have occurred had it not been for the restaurant's negligence. ■

HOSPITALITY LAW

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Muslim with hotel voucher not discriminated against by employee

Marriott had nondiscriminatory reason for denying room to woman

Providing equal service to all customers is part of the training curricula for any hotel or restaurant, and ensuring that all employees uphold that requirement is crucial for ensuring the good reputation of your establishment and preventing complaints from customers. In *Fahim v. Marriott Hotel Services Inc.*, No. 08-20349 (5th Cir. 12/08/08), an appeals court found that a hotel did not discriminate against a Muslim customer by turning her away when it had no rooms.

Sanaa Fahim, 66, is a Muslim Egyptian-American citizen. After spending a three-week vacation in Egypt, she missed her connecting Air France flight and was given a voucher for a hotel room, dinner and breakfast. She and another passenger, a young woman wearing a hijab who did not speak English, went to the airport's Marriott, where the flight attendant said two rooms were available. Individuals were lined up at the front desk awaiting a room. Fahim said she presented her voucher. She said that when she asked for a room for the woman in the hijab, the front desk clerk told her to go back to the airport and stated that the Marriott was no longer accepting Air France vouchers. Fahim said after she offered to pay for a room, the clerk asserted that he didn't have any rooms; he said those standing in line had reservations. Fahim and the woman in the hijab parted ways, and the Air France agent said that a room had been booked for her at the Marriott, but nevertheless issued her a new voucher for a Quality Inn. An hour after the incident at the Marriott, the woman in the hijab went back to the Marriott and received a room. The Marriott said by that time rooms had been made available because of cancellations.

Fahim alleged that Marriott violated Title II of the Civil Rights Act by discriminating against her on the basis of her race and religion when it denied her a room. Marriott countered that it did not discriminate against Fahim when it denied her a room, but rather that it did not have a room available at the time she presented her voucher.

A District Court dismissed Fahim's claims because damages are unavailable under Title II. It denied her motion to amend and, finding that no discrimination occurred, granted summary judgment to Marriott.

Relying on the test for establishing a prima facie case under Title VII, since no appropriate test existed in the court under Title II, the court noted that Fahim did not show that Marriott made its services available to similarly situated persons outside her protected class. The court also noted that even if she had established a case of discrimination, she did not effectively rebut Marriott's legitimate, nondiscriminatory reason for not providing her with a room. A hotel report for that day indicated that it had projected full occupancy and could not accommodate those without a reservation. Although Fahim argued that her voucher constituted a reservation, the hotel explained that it merely guarantees payment by the airline, but that reservations are made through the company's reservation system, require a credit card, and provide guests with a confirmation number. Despite Fahim's argument that Air France said it made her a reservation, she did not offer any evidence other than her voucher.

The court, therefore, affirmed the ruling of the District Court. ■

Provide nondiscrimination training

By electing its first African-American president, America may have come a long way toward creating a society of tolerance and understanding, but discrimination complaints by customers of restaurants and hotels persist. Complaints are regularly filed by people in various protected groups alleging that they were treated unfairly or differently because of their race, religion or disability.

Although most restaurants and hotels have thorough policies forbidding employees to discriminate against customers, it never hurts to review these talking points to ensure everyone is in compliance. Hospitality companies should:

- Adopt a thorough nondiscrimination policy to avoid discriminating against customers based on such things as race, color and disability.
- Regularly review this policy with company managers and employees.
- Provide training to managers on how to recognize discrimination by employees.
- Create a system for investigating complaints of discrimination against customers.
- Consider bringing in an outside expert periodically to review the hotel or restaurant's procedures and to ensure that everyone is complying with company policies. ■

Judge admonishes attorneys in hotel wrongful death case

Attorneys representing both sides of a $30 million hotel wrongful death case were scolded by a U.S. District Court judge for moving to slow.

Judge Susan K. Gauvey is presiding over a case filed by the family of two Pennsylvania tourists who died from carbon monoxide poisoning while staying at the Days Inn Hotel in Ocean City, Md. Gauvey recently sent a letter to the attorneys representing the plaintiffs and the defendants that admonished them for the slow progress in the case that required her to cancel a mediation session that was scheduled for December. According to the letter, Gauvey said countless delays have held up the case, which was filed more than a year ago.

In June 2006, Patrick Boughter and Kelly Boughter, his daughter, died from exposure to carbon monoxide at the hotel. The 24 counts in the federal suit include negligence and breach of warranty and strict liability. In addition, Yvonne and Morgan Boughter, the surviving family members, are seeking personal injury damages.

The lawsuit named several defendants, including the Bay Shore Development Corporation, which owned the hotel, and Heat Transfer Products Inc., the manufacturer of the faulty water heater that led to the carbon monoxide leak. In addition, the local company that distributed the water heater and the company that installed it in the hotel were named in the suit. ■

It is simply not practical to think that summary judgment will be appropriate when there was no documentation and the employment decision was based on a he said/he said situation.
— David Sherwyn, attorney

Documentation could have prevented case from proceeding

By David Sherwyn

There is nothing more annoying than listening to an employment lawyer preach that the three keys to all discrimination cases are documentation, documentation and documentation. The case of *Mendiola v. Vision Hospitality* is a prime example of this mantra. Here, the employee alleges that after he informed his employer of a diagnosis of leukemia, the employer hired a replacement.

The employer contends that the employee stated that he was returning to Texas for treatment and therefore had to hire a replacement. This dispute of fact makes summary judgment virtually impossible and means that the case will either be settled for more than nuisance or result in large fees to defend at trial. Could this have been avoided? It depends on whom you believe. If the employer is telling the truth, then yes, this whole case could have been avoided.

After being told that his general manager had leukemia and may need to go to Texas for treatment, the employer should have contacted counsel. Counsel would have drafted a letter confirming the conversation and commenced the Americans with Disabilities Act's required "interactive process," whereby the company would have asked what type of accommodations the employee needed and would have been in a position to determine if the GM could perform the essential functions of the job. The employee would have been required to state, in writing, exactly what he needed, and the company would have been in a terrific position to analyze the situation to determine how to make a business decision that would not violate the law. Instead, the company, based on the conversation with an employee who had just been informed that he may have a deadly disease, made an employment decision that could violate the statute. It is simply not practical to think that summary judgment will be appropriate when there is no documentation and the employment decision is based on a he said/he said situation.

Another concern from this case is that the court states that cases where the employee alleges a perceived disability are more appropriate for a jury to decide than a judge. This is a signal to plaintiffs' lawyers: Allege a perceived disability, and the court will deny summary judgment.

The key is documentation. If the employer can prove that its decisions were based on anything other than the disability, it can defeat this presumption. The employer could have documentation stating that it does not know what the effects of the impairment are and thus, will not consider it in its employment decisions. Again, documentation is a summary judgment motion's best friend.

David Sherwyn is an associate professor of law at Cornell University's School of Hotel Administration. ■

DISABILITY (continued from page 1)

The two offered conflicting views of a discussion about a week later: Mendiola said he asked for an explanation and said he didn't resign; Tampa claimed Mendiola said he was fine with leaving.

Mendiola and Tampa never discussed how the leukemia might affect Mendiola's ability to work, but Tampa claimed that he was not on the property much during those last few weeks.

At the end of December, Mendiola was told his illness was in remission and would not need treatment.

Mendiola filed a charge of discrimination with the Equal Opportunity Employment Commission for violations of the Americans with Disabilities Act. Mendiola claims Tampa regarded him as having a disability. The hotel argued that Tampa could not have regarded Mendiola as disabled because Mendiola did not tell Tampa how his leukemia diagnosis would affect his ability to work.

Mendiola said Tampa's stark change in behavior toward him was evidence enough that Tampa regarded him as unable to perform his job, and said that the only reason Tampa would have ignored Mendiola's repeated attempts to tell him that he was not making any decisions yet was because of his diagnosis. Tampa also made a statement to the Alabama Department of Industrial Relations Unemployment Compensation Agency, stating that he would consider Mendiola for rehire once he "recovered" from leukemia. Finally, Mendiola points to Tampa's statements that Mendiola's illness affected his job performance and memos expressing the same sentiment as evidence that Tampa regarded Mendiola as unable to work.

The court found that these arguments were persuasive, and found that the temporal proximity of five days between Mendiola's disclosure of his diagnosis and Tampa's decision to find a replacement is evidence of discrimination.

The court further said that if Mendiola's version of Tampa's actions following the diagnosis were true, it created an inference that Tampa thought Mendiola was unable to perform his job. The court therefore denied the defendants' motion for summary judgment and will allow the case to proceed. ■

Chef, restaurant will go to court over alleged contract violation

Both parties may have waived rights detailed in separation agreement

Chefs part ways from successful eateries all the time, and separation agreements with various terms are expected to be upheld by both the restaurant and its owners and the former star chef. But when both parties violate different terms of the agreement, it can turn into a complicated legal battle that plays out not only in the courtroom, but the media as well. (*Conant v. Alto 53 LLC*, No. 602408/2008 (N.Y. 12/10/08).)

Scott Conant worked as the executive chef of two Manhattan restaurants, L'Impero and Alto, which are both owned and operated by Alto 53 and Christopher Cannon. Conant also had a financial interest in the two restaurants.

In March 2007, Conant and Alto 53 parted ways and signed a separation agreement, which contained a broad non-disparagement clause.

The agreement also compensated Conant, paying him $104,440 in monthly installments over a two-year period beginning April 15, 2008, and repaying a loan for $18,000 he had made.

On April 25, 2008, Conant received a payment of $961 — 10 days later than agreed and far less than the $4,300 he was expecting. Alto made 12 weekly payments in that same amount, adding to $11,500 by mid-July, not the $17,400 as delineated in the agreement.

Meanwhile, Conant opened restaurant Scarpetta in Manhattan and was interviewed by the *New York Restaurant Insider*. Alto claims that he made remarks that violated the terms of the non-disparagement provision in the separation agreement and sent a letter to Conant terminating the agreement and stopped making payments to Conant. The story included a statement implying that the Alto group was incompetent and that the environment in the Alto restaurants was "frenetic and almost spastic."

Conant denied the claims, stating that he did not violate the agreement, and that it was Cannon who was making disparaging remarks, and that Alto violated the agreement by failing to make the requisite payments. Each party filed a complaint against the other, and the media wrote about the contentious relationship between Conant and Alto, dubbing it a "feud."

In reviewing the case, the court found that neither Cannon nor Conant met their respective burdens to prove a breach of contract.

"Reviewed in light of these principles, the court concludes that neither the counterclaim plaintiffs nor Conant met their respective burdens." The court noted that Conant properly pleaded breach of the separation agreement by showing the existence of the contract and Alto's breach by refusing to make payments due for deferred compensation. The court also noted that a letter sent to Conant by Alto and Cannon showed that the latter intended to breach the contract, and found that Conant rightfully stated a claim for an anticipatory breach of contract.

The court noted that failing to make specified payments at the specified time is generally considered a material breach of contract, justifying termination. It noted that Alto failed to comply with the terms and that Conant accepted the nonconforming payments for three months and only alerted Alto of the discrepancy after Alto sent a letter accusing him of breach of the non-disparaging provision. While Alto breached the separation agreement, the court found that Conant waived his right to terminate the agreement on the basis of such a breach.

However, the court noted that a question exists as to whether Conant, by not objecting to past breaches, waived the separation agreement's payment provisions regarding future payments.

The court found that Alto could not sufficiently show that it suffered damages as a result of statements made by Conant, as is necessary to state a claim for breach of a non-disparagement clause. The restaurant group submitted no proof that it suffered economically as a result of the comments, or that Conant was responsible for the articles in which the alleged disparaging comments were printed. ■

Court questions breach of contract

In *Conant v. Alto*, the court questioned whether:

- Alto's failure to comply with payment terms in the agreement constituted a material breach of contract;
- Whether Scott Conant waived his right to sue for breach of contract by failing to object to Alto's nonconforming payments; and
- Whether Alto was relieved of its obligations by Conant's breach of a material term. ■

Suit alleges hotel denied employees meal, rest breaks

A group of employees recently filed a class action lawsuit against a California hotel, alleging that management violated state labor law.

According to the suit, the Hilton Los Angeles Airport hotel broke the California Labor Code by denying employees the right to take rest and meal breaks. Specifically, employees said that the hotel threatened to reprimand workers if they did not clock out for their breaks. In addition, some of the employees alleged that they did not take their breaks on occasion because they were afraid of being disciplined by management.

According to Hadsell, Stormer, Keeny, Richardson and Renick LLP, the law firm representing the employees, this isn't the first time that the hotel has been accused of violating the rights of its workers. In 2007, the California Occupational Safety and Health Appeals Board issued a citation to the hotel for violating state law by failing to take steps to reduce ergonomic-related injuries among its housekeeping employees. The hotel appealed the citation.

In addition, an administrative law judge for the National Labor Relations Board issued a proposed ruling in October that found that the hotel had violated various federal labor laws in 2006. According to the judge, hotel management wrongfully suspended workers for engaging in a protected work stoppage, as well as committed other violations. ■

Clear policies, procedures on harassment spared restaurant of liability

By Carolyn D. Richmond & Eli Z. Freedberg

In *Fluckes v. The Johnny Rockets Group, Inc.*, Johnny Rockets was spared liability because it maintained well articulated and clear policies. When these policies were allegedly violated, a thorough investigation commenced and decisions were made based on the restaurant's legitimate business interests.

An important factor in avoiding liability here was that employee Alexander Fluckes could not point to any examples of "similarly situated" employees being treated more favorably by Johnny Rockets than himself. Therefore, employers should be careful to make sure that pathways to reporting violations of company policies remain open and accessible. Second, once a report comes in, management must conduct investigations promptly and effectively. This includes speaking to all possible witnesses, leaving no stone unturned, and providing the accused with every opportunity to respond. Finally, when concluding the investigation and deciding on whether or not to take adverse action, hospitality companies are advised to look to past incidents and investigations and make sure the approach is consistent.

Take the time now to audit your human resource practices and prior disciplines (particularly if you operate multiple locations) and ensure that there is no discriminatory pattern emerging. Diligence now saves time and money in the long run.

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. ■

DISCRIMINATION (continued from page 1)

tions of Johnny Rockets' policies that were occurring at the restaurant under Fluckes' watch. After Hart concluded his investigation, he provided Fluckes with another opportunity to respond, and he again denied any wrongdoing and called the investigation unfair and "discriminatory." Hart concluded that Fluckes falsified time records by clocking in for his wife while she was not working, violated the non-fraternization policy by employing his wife as a subordinate, violated overtime policies by letting another supervisor clock in under his spouse's name, and violated antiharassment policies by touching Gonzales' posterior. The company's vice president reviewed and approved the termination.

In addressing Fluckes' claim for race discrimination, the court found that he could not state a prima facie case for race discrimination. While he was African-American and did suffer an adverse employment action when terminated, he could not demonstrate that he was meeting Johnny Rockets' legitimate job expectations.

The court found it persuasive that Fluckes had violated "numerous company policies," and that Johnny Rockets' handbook made clear that violating any one of those policies could result in disciplinary action up to and including termination. The court noted that because it does not sit as "super-personnel" who question the judgment of the employer, the inquiry ended there. The court concluded that Fluckes failed to introduce any evidence that Johnny Rockets treated any similarly situated employee more favorably than Fluckes and dismissed his Title VII claims. The court also found that Fluckes could not prove sufficient causation between the alleged protected activity and Johnny Rockets' employment decision to sustain his retaliation claim. ■

Dramshop case will proceed against resort group

Court questions whether patron appeared intoxicated when served

With the plethora of drunk driving accidents that occur each year, restaurateurs need to ensure their wait staff is fully trained on identifying patrons who have had too much to drink. A Connecticut court will allow a case to proceed against a resort chain, finding that questions remained whether a woman who dined at the hotel's restaurant was noticeably intoxicated when she was served alcohol by a waitress. (*Matos v. Allstate Insurance Co., et al.*, X08CV055002298S (Conn. Super. 11/18/08).)

Teresa Matos sustained injuries as a passenger in a car operated by Esther Geib in Stamford, Conn., that was rear-ended by a BMW driven by Ann Drescher. Matos and Geib allege that Drescher, who was driving under the influence, was served alcohol while intoxicated at a restaurant in the Sheraton Stamford Hotel, owned by Starwood Hotels and Resorts Worldwide. Matos argued that her injuries were a result of Drescher's intoxication and filed a complaint against the Starwood under the Dram Shop Act.

Starwood said that Matos and Geib have failed to establish that Drescher was at the Sheraton on Dec. 8, 2004, the night of the accident, or that she was visibly intoxicated.

According to her deposition, Drescher ate lunch at the Sheraton around 1:30 p.m. and consumed two Manhattans and a hamburger before paying cash and driving off, when the accident occurred. Starwood said Drescher never dined at the restaurant on Dec. 8 and presented as evidence the fact that the earliest sale of alcohol on that day was at 5:37 p.m. and that the hotel bar didn't open until 4 p.m., which would have required a server to ask the food and beverage director for a key to the liquor cabinet to make a drink for the guest. The only waitress working at the time did not recall serving Drescher.

Matos argued that the waitress's testimony was provided more than two years after the day in question, on a day when she served 55 patrons.

The court noted that although Starwood claimed that all receipts for that day were provided, the absence of a receipt showing the purchase of a hamburger and two Manhattans does not exclude the possibility that the receipt could have been lost or removed. Starwood also noted that there were no alcohol sales made by the waitress, but her shift ended at 2 p.m., which would have been when Drescher placed her order. The court also noted that the testimony provided by Drescher, first in 2005 and again in 2007, provides specific information about her travel patterns and the description and layout of the restaurant.

"Her testimony cannot be disregarded as merely conclusory … she knew the Stamford Sheraton very well."

The court, therefore, concluded that a fair and reasonable juror could only conclude that there was an issue of record reliability on the part of Starwood, and therefore denied its motion for summary judgment on this claim.

Matos alleged that Drescher was sold and served alcohol by Starwood while she was intoxicated. Starwood argued that if Drescher was present at the hotel, there was no evidence that she was visibly intoxicated, and asked the court for summary judgment based on the insufficiency of evidence produced by Matos to show otherwise.

Drescher said she consumed a bottle of red wine before leaving her house to buy more plugs for her Christmas tree and after shopping, went to the Sheraton's restaurant, where she said she became drunk. A police report following the accident corroborated Drescher's assertion that she was intoxicated because of her failure to walk in a straight line and her slurred speech, leading the court to infer that Drescher was visibly intoxicated at the time she was served the second Manhattan. The court, therefore, denied summary judgment to the Starwood. ■

States have different dramshop laws

Only eight states do not have dramshop laws: Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota and Virginia. The rest of the states have varying degrees of penalties for establishments that violate the law and use different guidelines to determine whether an establishment should be responsible for the act of a patron.

Under Connecticut's Dram Shop Act, a plaintiff need not prove that the defendant knew a customer was intoxicated when it served the person liquor, merely that liquor was sold to the customer. ■

UNITE HERE board attempts to seize control of local union

Officials from UNITE HERE, a labor group that represents hotel, casino and food service workers, were accused of attempting to seize control of a local union outpost in Detroit.

According to officials from UNITE HERE Local 24, the labor organization's Chicago & Midwest Regional Joint Board physically removed officers who had recently been elected by its members. Local 24 is made up of more than 7,500 casino, hotel, airport and food service workers in Detroit.

Joe Daugherty, chairman of Local 24, said the board abruptly replaced him with a New York union official who, he said, has little experience organizing hospitality workers. Daugherty said board officials physically intimidated Local 24 officers and staff, and called on building security and Detroit police officers to eject all Local 24 officers, members and staff.

In addition, Daugherty alleged that board representatives intensively harassed him in the office, interfering with phone calls and shouting at him through a bullhorn.

According to the board, Daugherty was replaced because of member complaints about his slow response to requests for grievances and other assistance. However, Daugherty said the board has produced no evidence of negligence or wrongdoing on the part of the Local 24 leadership. ■

Use progressive discipline for dealing with bad employees

With fewer employees and budgets even tighter, hospitality companies need to do even more to ensure that employees are pulling their weight and abiding by policies. Keisha-Ann G. Gray, senior counsel in the Labor & Employment Law Department of Proskauer Rose in New York, provides the answer to the proper way to write someone up for not doing her job.

There are a number of recommended best practices that employers should follow when disciplining employees for poor performance. While employers remain free to customize disciplinary procedures in a way that is best suited to further the goals of the particular organization, the most widely used approach is called "progressive discipline," commonly referred to as the "three strikes, you're out" approach.

Progressive discipline is a disciplinary program that requires employers to "progress through" each step of corrective action before proceeding to the next. Substantively, the contours of progressive discipline can be summed up in four steps: 1) a verbal warning; 2) a first written warning; 3) a second written warning; and 4) termination of employment.

Generally, the progressive disciplinary process remains constant as to the form the write-up takes, while the level of disciplinary action fluctuates proportionately, based upon the nature of the infraction.

At its core, the goal of progressive discipline is not to embarrass employees or expose them to judgment by coworkers; rather, it is designed to apprise employees of their performance deficiencies so they may modify their behavior.

4 tips for disciplining employees

By Keisha-Ann G. Gray

Once a policy is in place, application issues often arise, but can be avoided by adhering to the following helpful tips:

- Conduct a thorough investigation (within a reasonable amount of time), gathering all of the facts, including the employee's rebuttal, before drafting an incident description;
- After settling on the level of discipline to be imposed, explain to the employee the consequences or his actions and why the level of discipline is warranted;
- Thereafter, communicate the likely next step in the disciplinary process should the undesirable behavior persist;
- Finally, and most importantly, document everything — including the verbal warning — and capture the employee's signature on such documentation as proof that the employee received notice of his unprofessional conduct. ■

In large part, employers wishing to employ progressive discipline should begin by first providing each employee with a comprehensive job description discussing, among other things, job duties, expectations and performance goals. From there, the employer should draft a model progressive disciplinary policy to be included in its employee handbook, which links substandard job performance to the progressive disciplinary process. The following is an example of suggested language:

All employees are expected to meet XYZ's standards of work performance. Work performance encompasses many factors, including attendance, punctuality, personal conduct, job proficiency, and general compliance with the Company's policies and procedures.

If the employee does not meet these standards, the Company may, under appropriate circumstances, take corrective action, other than immediate dismissal. The intent of corrective action is to formally document problems, while providing the employee with a reasonable time within which to improve. The process is designed to encourage development by providing guidance in the areas that need improvement.

In the event of more serious misconduct, employers may wish to bypass all or several steps in the progressive disciplinary process, jumping straight to immediate termination.

Immediate termination may be warranted when the employee engaged in acts of insubordination, failed to report to work or deliberately refused to perform her work, to name a few.

To preserve the immediate-termination option, employers should make sure a disclaimer is included in the employee handbook, explaining that the employer reserves the right to depart from standard progressive disciplinary procedures without warning. This ensures that the at-will employment relationship is preserved and no contractual rights to the progressive disciplinary process are implied or expressly created.

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