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Give tipped employees proper notice if taking tip credit

Question of whether server was paid for meetings will proceed

By Carolyn D. Richmond & Eli Z. Freedberg

It is imperative that employers comply with all of the Fair Labor Standards Act's requirements, and be able to provide proof of adherence to protect themselves in court. In *Marroquin v. GMRI, Inc., d/b/a Olive Garden*, No. 11-21804-CIV-ALTONGA/Simonton (S.D. Fla. 12/16/11), the court held that an employer satisfied the FLSA's tip credit provision in response to a server's complaint that he was owed more compensation and retaliated against for complaints. Nevertheless, the employer could not prevail on the employee's allegations that he was required to attend shift meetings off-the-clock.

Former Olive Garden server Roberto Marroquin filed a complaint against his employer, GMRI, Inc., alleging that the company violated the FLSA by improperly taking a tip credit; failing to pay him for time spent attending pre-shift meetings; charging him for walk-outs and breakages; and allegedly terminating him after he filed a complaint that he lodged with the restaurant's general manager in violation of the FLSA's anti-retaliation provisions.

The FLSA allows employers to take a "tip credit" and pay a reduced minimum wage to employees who customarily and regularly receive tips provided that the following conditions are met:

(1) The tip credit must be claimed only for qualified tipped employees;

(2) The employees must receive notice of the FLSA's tip credit provisions; and

(3) All tips received by the employees must be retained by them.

GMRI applied a tip credit towards Marroquin's wages, but Marroquin claimed that his employer never notified him of the FLSA's tip credit provision. GMRI argued that it complied

See **TIP** on page 4

Clear notice of arbitration led to dismissal of challenge

Restaurant provided employee with opportunity to reject new provision

By Diana S. Barber

Strong federal policies favor arbitration in employment disputes, and courts often push to resolve ambiguities in favor of arbitration. But companies need to ensure they provide clear notice to employees to protect themselves in the event of a challenge to the arbitration agreement. *Munoz v. Luby's Inc.*, No. H-11-2984 (S.D. Tex. 12/14/11)

Chris Munoz alleged that he was denied a promotion by his employer, Luby's Fuddruckers Restaurant LLC, because of his national origin and race. Luby's filed a motion to compel arbitration, alleging that Munoz and all other employees had agreed to resolve employment-related disputes by arbitration pursuant to the company's Employment Dispute Resolution Policy. The company said Munoz had been provided with a copy of the EDRP, a "mutual agreement to arbitrate form to sign, and was given an opportunity to ask questions about the policy. The employee handbook also contained information about the company's EDRP, along with language stating: "I understand that this agreement is effective from the date of my employment, or it is effective within five days of receiving this agreement or signing it (whichever is earlier)." The company also told employees who chose not to sign the form that to demonstrate a refusal to sign, they needed to handwrite that they refused the terms of the EDRP on the form and sign their name. Munoz did not sign or return the form.

Luby's argued that because Munoz was provided notice in many different forms, that he "unequivocally accepted the terms of the arbitration policy" through his continued employment.

See **ARBITRATION** on page 6

Although the court noted that the fact that the employee was replaced by a substantially younger individual outside her protected class can give rise to an inference of age discrimination, the court held that Trump set out legitimate, nondiscriminatory reasons for her termination.

Housekeeper fails to show hotel discriminated against her

90-day performance review showed employee failed to meet standards

Using a strict evaluation process for all employees helped Trump International prove that its termination of a housekeeping manager was based on performance, not age. *Colon v. Trump International Hotel & Tower, et al.*, No. 10 Civ. 4794 (JGK) (S.D. N.Y. 12/07/11).

Dulce Colon filed a complaint against her former employer, Trump International Hotel & Tower, and her former supervisor, Laura Conahan, alleging that she was terminated from her position of assistant housekeeping manager at Trump Hotel because of her age. She claimed that when she interviewed for the position in 2008 at the age of 49, that Conahan was unaware of her age. Conahan recommended Colon for hire, and she began in the position, working as one of six full-time assistant housekeeping managers, who were responsible for inspecting guest rooms for occupancy to ensure the rooms met Trump's standards for quality and cleanliness, and that the rooms were ready at check-in time. Two of the other five managers were in their 50s, two were in their 40s and one was age 35. Not long after Colon's promotion, a 26-year-old woman was hired as a temporary assistant housekeeping manager.

Trump claimed that Colon exhibited serious performance deficiencies that led to her termination. Colon said that although she made a few mistakes and understood Trump's standards, that she was denied training opportunities provided to younger coworkers, such as the new temporary assistant housekeeping manager.

During her three months in the position, Trump said that a VIP guest had to wait more than an hour for a room under Colon's supervision, that she caused another guest to wait more than 2.5 hours because she was late in preparing a room for occupancy, and that during a VIP tour in one room that Colon had approved for occupancy, a manager found a long black hair in the sink, coffee grinds in the coffee maker, and a disheveled bedspread. Trump said a guest also complained about finding underwear from a prior guest left in the room inspected by Colon. Colon said the error occurred because another assistant housekeeping manager was absent and the others had to take on his work for the day.

At her 90-day evaluation, Conahan ranked Colon's performance at 1.4 on a 4-point scale, and recommended her termination. The 26-year-old temporary assistant housekeeping manager was the only internal applicant for the position, and she was hired as the replacement at the same salary.

Although the court noted that the fact that Colon was replaced by a substantially younger individual outside her protected class can give rise to an inference of age discrimination, the court held that Trump set out legitimate, nondiscriminatory reasons for Colon's termination. The court also noted that the age distribution of the assistant housekeeping managers undermines Colon's age discrimination claims that "age was the determinative factor" in her termination, since two were older than her, and a total of four were in Colon's protected age group and remained employed. The court, therefore, dismissed her claims. ■

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Injured skier could not state a claim of negligence against resort

State statutes provided immunity despite injury from ski instructor

By Joseph Holland

If your resort offers a range of activities, it's crucial that your attorneys understand your state's laws and draft necessary protection releases to protect your company in the event of an accident. *Johnson, et al., v. Vail Summit Resorts, Inc., d/b/a Breckenridge, et al.*, No. 10-cv-00341-WJM-KMT (D. Colo. 12/19/11).

The parents of Kane Johnson filed a complaint on his behalf against Breckenridge after 9-year-old Johnson was injured when a Breckenridge ski instructor allegedly struck and injured him. Johnson stated that he was skiing slowly and in a controlled manner on the runs at the resort, and was readily visible to uphill skiers, but that the instructor was skiing unreasonably fast and caused the collision between the two. Johnson claimed he suffered injuries as a result of the accident.

He alleged negligence on the part of the instructor and Breckenridge, arguing that the instructor was skiing within the course and scope of his employment at the time of the skiing accident.

Breckenridge argued that Johnson's claims against it must fail because of statutes in the Colorado Ski Safety Act, which provides immunity to ski area operators for injuries resulting from a collision between skiers, and includes language that the act covers "any skier-skier collision."

In making its decision, the court reviewed Colorado Revised Statute Section 33-44-112, which provides: "Notwithstanding any judicial decision or any other law or statute to the contrary ... no skier may make any claims against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing." The statute also defines dangerous conditions that are part of the sport to include collisions with other skiers.

The court noted that even if Johnson's allegations were true, there was no dispute that he was a skier as defined by the statute.

The court also declared that regardless of the ski instructor's status as an employee of the resort, he was also merely a skier as defined by the statutes. Therefore, the court said that the Act did apply to the incident. Since both the ski instructor and Johnson were considered skiers under the statute, the court held that Johnson was statutorily barred from bringing an action against Breckenridge to recover for his injuries, and dismissed his complaint for failure to state a cause of action.

Joseph Holland is the Service Management Program Director in the Department of Hospitality and Tourism at the University of Wisconsin-Stout. ■

Know your state's statutes

By Joseph Holland

The *Johnson* case is an example of how the Negligence Doctrine of Assumption of Risk may be applied. In order to permit activities that may be inherently dangerous — but that individuals choose to perform — common law developed the concept of Assumption of Risk. When a person is aware of the danger, has the capability of recognizing the danger, and voluntarily engages in the activity, he "assumes the risk" for that activity. Many states have codified this concept, including Colorado, into their statutes. It is important for an owner or manager of a hospitality operation that includes activities that may be inherently dangerous to become familiar with the statutes, ordinances, and regulations in their jurisdiction to develop policies and practices to protect themselves and their guests.

State statutes relating to recreational use apply to many more activities than just skiing. For example, Wis. Stat. § 895.52(1)(g) "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting, and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place. This applies only to Wisconsin.

It should also be noted that often limits to liability for recreational activities do not apply to children. However, another common law principle, "Attractive Nuisance" often applies to the activities of young or very young children who are not legally held to the same standards as adults. ■

Italian eatery settles sexual harassment lawsuit with EEOC

A Tennessee restaurant chain has agreed to pay $25,000 to settle a sexual harassment lawsuit filed by the Equal Employment Opportunity Commission.

The EEOC charged Rafael's Italian Restaurant of violating federal law by subjecting a class of female employees, including some teenagers, to sexual harassment. The EEOC alleged that as far back as 2005, male kitchen workers at a Rafael's repeatedly subjected female employees, two of whom were teens at the time, to egregious acts of sexual harassment including crude comments, requests for sex, and physical touching — which included using vegetables to simulate sodomy and to hit the victims between their legs. The EEOC alleged that, despite repeated complaints from several of the women, management ignored the problem.

In addition to monetary relief, the two-year consent decree settling the lawsuit enjoins Rafael's Italian Restaurant from further discriminating against female employees. Rafael's Italian Restaurant will provide annual training on employee rights under Title VII, must maintain records of sexual harassment complaints and prepare annual reports for the EEOC. The decree also requires Rafael's to establish and enforce a written policy that will protect employees from discrimination in the workplace.

The case is *EEOC v. Rafael's*, No. 4:10-CV-00070 (E.D. Tenn). ■

"... [A]n employer satisfies its obligation to notify tipped employees of the tip credit by merely providing tipped employees with materials describing the tip credit." — Carolyn D. Richmond & Eli Z. Freedberg, attorneys

TIP (continued from page 1)

with the FLSA because it provided Marroquin with an employee handbook that contained a section entitled "Notice to Tipped Employees of Tip Credit." In response, Marroquin countered that the handbook did not constitute sufficient notice since it did not specify that servers, such as himself, are tipped employees. During depositions, however, Marroquin acknowledged that he was aware that part of his compensation included tips from guests and that he received GMRI's handbook.

The district court looked to Sixth Circuit Court of Appeals, which held in *Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 298 (6th Cir. 1998) that an employer satisfies its obligation to notify tipped employees of the tip credit by merely providing tipped employees with materials describing the tip credit. It is not required to ensure that employees understand the concept of the tip credit. Applying *Kilgore*, the district court dismissed Marroquin's tip credit claims.

Marroquin also claimed that he was forced to attend several pre-shift meetings but was forbidden to clock-in prior to these meetings, and alleged that GMRI took deductions from his wages any time a customer left the restaurant without paying his bill.

GMRI produced clock-in reports and payroll records which the company argued contradicted Marroquin's allegations. The court refused to grant GMRI's motion for summary judgment on these issues, holding that a credibility determination would need to be made at trial to decide whether to believe GMRI's payroll records or Marroquin's version of events.

Employer did not retaliate

On Feb. 14, 2011, one of Marroquin's customers asked Marroquin, by writing on his check, "what was a good tip[?]" In response, Marroquin wrote "good? 18 percent" on the guest's check and, as a result, one of GMRI's managers processed the check with an 18 percent gratuity. The following day, GMRI terminated Marroquin for violating company policy which prohibits employees from embarrassing guests by, for example, returning tips or adding tips to guests' bills.

Marroquin alleged that GMRI's proffered reason for the termination was pretextual and claimed that he was really terminated in retaliation for complaining, three months earlier in September or October 2010, to a manager at the restaurant about having to, allegedly, work off the clock.

The district court granted GMRI's motion for summary judgment on the retaliation claim, holding that Marroquin failed to establish that he was fired because of his complaint since more than three months passed between the alleged complaint and the day he was terminated.

The district court also found that Marroquin failed to present evidence that GMRI's reason for his termination was pretextual. Indeed, Marroquin acknowledged that he knew about GMRI's policy regarding embarrassing guests and that his conduct could have violated the policy. Based on this evidence, the district court held that GMRI had a good faith belief that Marroquin violated company policy, and as a result, the district court dismissed Marroquin's retaliation claims.

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. ■

Comply with tip credit requirements

By Carolyn D. Richmond & Eli Z. Freedberg

As *Marroquin* demonstrates, it is crucial that employers comply with all of the Fair Labor Standards Act's requirements for taking the tip credit. Even a technical violation can cause an employer to forfeit the tip credit, for all employees, for each hour worked over a three-year period. These penalties can be substantial, particularly when factoring in the penalties provided by the FLSA, which include 100 percent liquidated damages and plaintiffs' attorneys' fees. In addition, employers must review the actual job functions performed by each employee who receives tips to ensure that all employees who receive tips qualify as "customarily and regularly" tipped employees.

Employers must also have clearly defined policies that are consistently enforced by management. The employer in this case clearly benefited from identifying conduct that violated company policy and from immediately enforcing that policy by terminating Marroquin after it learned that he violated the policy.

Finally, in those states where employers can take the tip credit, it is essential to make sure written notice is provided. As done by the employer in this case, the employee handbook is a convenient avenue for providing employees with notice of the tip credit as required by the FLSA. ■

Court imposes sanctions on hotel for ignoring injunction

Union argued that hotel violated numerous provisions of NLRA

Working with unions can sometimes be a tricky and challenging business for hospitality companies, but when a court steps in, failing to comply with any injunctions may lead to an even bigger fight. In *Frankl, et al., v. HTH Corporation, et al.*, No. 10-00014JMS/RLP (D. Hawaii 11/29/11), a court imposed compensatory sanctions and other fees on a Hawaii hotel after it determined that the hotel ignored a prior court injunction.

Joseph Frankl, the Director of Region 20 of the National Labor Relations Board, filed a complaint alleging that the owners of the Pacific Beach Hotel in Waikiki engaged in a "litany of violations" of the National Labor Relations Act. Frankl claims that the hotel failed to recognize the union, International Longshore and Warehouse Union, Local 142, and ignored a court injunction in March 2010 requiring the hotel to comply with the NLRA.

According to Frankl, since employees at the hotel began a drive to unionize in 2002, the hotel has engaged in coercive interrogation of its employees, and maintained an overly broad no-solicitation policy. After the union was certified in 2004, Frankl said the hotel continued to commit NLRA violations by refusing to bargain in good faith with respect to rates of pay and hours of employment, allegedly discharged employees in order to discourage union activities and membership, and interfered with employees exercising their rights under the NLRA.

He said that in 2007, the hotel changed the number of guest rooms that housekeepers were required to clean from 15 to 17 per day in one tower, and from 16 to 18 rooms in the other tower, without notice, and that although the injunction in March 2010 rescinded this decision, the hotel again increased the cleaning requirements to the 2007 levels in June 2010. The hotel argued that this change was di minimis and not subject to mandatory bargaining because the number of rooms housekeepers cleaned fluctuated.

Frankl also claimed that two union representatives were banned from the hotel, and the hotel failed to produce information related to collective bargaining. The union had requested information about scheduling and benefits, including a seniority list with departmental work schedules going back several years, daily room assignments for housekeepers, disciplinary actions, and the number of days off each employee received. The hotel claimed that it did not have access to anything beyond current departmental work schedules, that it was against hotel policy to release disciplinary records.

In 2010, the U.S. District Court for the District of Hawaii ordered the hotel to recognize the union, bargain in good faith with the union, reinstate several employees, including housekeeper Rhandy Villanueva, and rescind unilateral changes made to the terms and conditions of employment. The 9th Circuit Court of Appeals affirmed the decision.

Regarding the injunction enforcement, there was no dispute between the two parties that the hotel must furnish, upon request, information that is relevant and necessary for the union to carry out collective bargaining. Therefore, the court said, it is "inexplicable" how the hotel could contend that its explanations were sufficient to excuse its failure to promptly produce the requested information.

The court also dismissed the hotel's argument that it had no obligation to provide grievance information in the case of Villanueva because there was no collective bargaining agreement in place, and therefore no grievance process.

As a result, the court held that compensatory sanctions would be imposed on the hotel, including back pay for Villanueva, and the union's costs and fees in seeking contempt sanctions. ■

Termination of housekeeper

In *Frankl*, the union alleged that day-shift housekeeper Rhandy Villanueva was terminated in retaliation for serving on the union's negotiating committee. The court injunction in 2010 ordered the hotel to reinstate him, but they did so on the night shift and added duties, including restocking the housekeepers' supply closet and cleaning rooms.

Shortly after reinstatement, he was disciplined for failure to follow various unwritten rules, including failure to properly store a case of toilet paper, and was ultimately terminated for entering the housekeeping office without permission to retrieve insecticide to kill a roach in a guest room. The union said the hotel refused to provide details about his discipline and termination, but did provide his termination letter. ■

Woman claimed hotel negligence led to sexual assault in room

A New York woman claims that a Finnish Starwood Hotel property employee gave a man access to her room.

Alison Fournier, who retained women's rights lawyer Gloria Allred and New York firm Cuti Hecker Wang LLP, as her counsel, filed a complaint against Starwood claiming that the hotel chain's negligent acts led to her sexual assault in her room while staying at a Starwood Hotel on business in Helsinki. Fournier said a heavily intoxicated American man had been making sexual advances toward her earlier in the evening. He allegedly told the front desk clerk that he was Fournier's husband to obtain her room key. Fournier said that he then entered her room, took off his clothes, and got into bed with her, where she claimed he fondled her until she managed to escape from her room.

Fournier said she immediately reported the incident to the hotel staff, but claims that the staff failed to take action, but instead repeated the man's lie that he was her spouse back to her when she told them what had happened.

She claimed that the incident has traumatized her, and forced her to leave her investment banking job because she no longer feels safe traveling alone.

She has asked the court for lost wages, compensation for emotional distress, damages, and legal fees. ■

ARBITRATION (continued from page 1)

Munoz argued that he never agreed to arbitrate, and that the company's EDRP was unenforceable since he never signed and returned the form because he said he felt it "abridged his lawful rights." He claimed that the agreement lacked mutual assent, as well as mutuality of obligation and consideration.

The court held that the EDRP was valid. The court said that Luby's did give clear notice of the company's change to mandatory binding arbitration of employment disputes, and that Munoz consented to the change by his continued employment with Luby's. The court also noted that Munoz's claims were specifically included within the company's EDRP. Therefore, the court granted Luby's motion to compel arbitration and dismissed Munoz's claims.

Clearly spell out arbitration provisions

In the *Munoz* case, Luby's was careful in the wording of the mutual agreement to arbitrate by providing clear notice to its employees in a bold and conspicuous format. The restaurant made sure to spell out that the provision to arbitrate was mutually binding for both the employee and the employer. Luby's even sent a memo to the employees stating that if any employees did not want to sign the provision, that they could handwrite their refusal to sign on each of the forms and sign their names to show that they refuse the agreement. This would have been deemed their rejection of the obligations of the arbitration provision. The restaurant also included language in the provision which specifically covered the type of claim that Munoz was seeking relief from the court — a Title VII of the Civil Rights Act of 1964 claim.

In this case, Munoz thought that by not signing the form, the arbitration provision would not apply to him. He was wrong. Since Munoz continued to work at the restaurant and was provided adequate notice of the new provision, the court ruled that the arbitration provision was enforceable and Munoz's claims would need to be dismissed in litigation.

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

Keep arbitration agreements out of the handbook

Employers can require pre-dispute mandatory arbitration. But if the employer wishes to construct an enforceable policy, it may not be the best strategy to put it in the company handbook. Most employee handbooks expressly state that the document is not a contract. This benefits employers, preventing them from locking themselves into the promises made to employees in a handbook down the road. But if the handbook is the sole location of an arbitration provision, the employers cannot claim that a handbook is not a contract and then try to enforce it as such.

Enforceable arbitration agreements should be contained in separate documents, and the agreements must clearly state that the parties intend for them to be contracts. The employers should also make sure that the employees read and sign the agreement, and keep the forms in a safe place.

Don't forget to have your legal counsel review your arbitration provision on a regular basis, as both state and federal laws regarding arbitration enforceability and provisions do change frequently. ■

Court overturns jury ruling on deceptive trade practices

Desk clerk, guard never made false statements about inn's security

Employing a security guard and providing guests with a room key is not enough to falsely imply that the premises are secure, according to a Texas appeals court. *Red Roof Inns, Inc. v. Jolly, et al*., No. 14-10-00344-CV (Tex. Ct. App. 12/15/11).

Red Roof Inns appealed a trial court's judgment in favor of guests Donna Jolly and James Glick that the motel owner violated the Texas Deceptive Trade Practices Act by representing that the motel was secure.

The guests claim that after traveling to Houston to visit a relative in a hospital, that they rented a room at the Red Roof Inn. A security guard was on duty when the guests checked in around 2:30 a.m. They claim that during their stay, their room was burglarized and an intruder took jewelry valued at $50,000.

The guests said that the motel engaged in deceptive practices, and that the evidence was legally sufficient to support a finding that the motel represented its premises as "a safe, secure, and monitored property," when it was actually "a crime-affected property that was not operated or monitored in a secure manner."

A jury declared that the motel had been negligent, assigning 5 percent responsibility to the motel for the incident. The jury also awarded the guests $25,000 in damages, pre-judgment interest, and $25,000 in attorney's fees, and court costs.

The motel appealed, arguing that the guests failed to present legally sufficient evidence to support the jury's finding that it violated the DTPA.

The court held that the guests did not present sufficient evidence to state a DTPA claim. Although the guests concede that the motel did not make express representation as to its safety, they argued that Glick's inquiry about safes (and the clerk's explanation that they were not available except for the one at the front desk for motel property), as well as the presence of the security guard, inferred that the premises were secure. The court found that the fact that safes were not available for guest use was not evidence that would allow a reasonable person to find that the motel represented that its premises were secure. The court noted that Texas courts had never concluded "that an actionable representation under the DTPA may be implied based solely upon a defendant's conduct."

The court noted that the front desk worker made no comments about the safety or security of the motel, and that the guests did not inquire about any criminal activity in the area. Although the guests said the presence of a security guard implied security, the court held that any alleged representation would have to be based on the guests' assumptions, rather than any unambiguous meaning conveyed by the motel's choice to employ a security guard at 2:30 a.m.

The guests allege that the motel failed to disclose that 152 calls had been made to local law enforcement in the prior two years, did not notify them that the electronic key lock on the outside door of the property was inoperable, could not generate an accurate electronic key report indicating who had been in their rooms, had no hallway security cameras, had a history of housekeepers propping open doors with towels while they worked in other rooms, and did not have a security guard on duty at all times.

The court said, however, that the guests failed to show that the motel withheld this information, known or otherwise, with the intention of inducing them to lease a room. The court noted that the record did not indicate that anyone employed at the property was aware of any room break-ins or thefts of guest property from their rooms in the recent past.

The court, therefore, reversed the trial court's judgment. ■

Dissenting on misrepresentation

Judge Sharon McCally dissented from the majority opinion in *Red Roof Inns*, finding that the guests did show implied misrepresentation of the Texas Deceptive Trade Practices Act. McCally noted that the jury heard evidence that Red Roof Inns had a security guard stationed in the lobby when the guests checked in and that the guests were provided with a "secure" key card.

The guest said he felt secure and "a bit more at ease" knowing that a security guard was in the lobby. He also said that when provided a key card to access his room and the building, he assumed that all the perimeter doors were also secure and working correctly. McCally said that those assertions were enough to support an implied misrepresentation. ■

Lesbian couple files suit for room denial at bed and breakfast

Lambda Legal filed a complaint on behalf of a lesbian couple who said they were refused a room at a bed and breakfast in Hawaii.

According to the complaint, Diana Cervelli and Taeko Bufford were visiting a friend and her newborn when they contacted the Aloha Bed & Breakfast to lease a room near their friend's house in Honolulu. After the proprietor, Phyllis Young, acknowledged that she had lodging available during their requested time frame and took down their names, she asked Cervelli if the two women were lesbians. When Cervelli answered truthfully, Young declined to rent them a room, stating that due to her religious beliefs, she had personal discomfort with lesbian and gay couples, alleged the complaint. According to Lambda, the owner claims that Hawaii's law prohibiting discrimination in public accommodations does not and cannot constrain the actions of her business.

The couple complained to the Hawaii Human Rights Commission and argue that the bed and breakfast proprietor violated their rights in violation of anti-discrimination laws. They also claim that Young's actions have led them to suffer from emotional distress, and asked the court for declaratory and injunctive relief, compensatory and punitive damages, and legal fees.

The lawsuit was filed in the First Circuit Court of Hawaii. ■

Chamber of Commerce files suit to block union election change

In December 2011, the National Labor Relations Board approved sweeping reforms that will help union organizers ratify elections more quickly, and may make it easier for employees to unionize, particularly at smaller companies. But the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace have filed a lawsuit challenging what they call the NLRB's new "ambush election rule."

The rule change, which the NLRB says was made to "reduce unnecessary litigation and delays" in union elections, will affect procedures in disputes where two parties can't agree on issues such as whether the employees covered by the election petition are an appropriate voting group. Rather than going to litigation, the matter will now go to a hearing in a regional office, with the NLRB regional director making the decision and setting the election. These regional hearings are limited to issues relevant to whether an election should be conducted, and the hearing officer will have the authority to limit testimony, and to decide whether or not to accept post-hearing briefs. The change also strikes the current recommendation that elections should be scheduled at least 25 days after the decision and direction of election to allow the board a chance to take pre-election review requests.

The change will also affect appeals, which will now be consolidated into a single post-election request for review. The rule makes the board review of regional directors' decisions discretionary, "leaving more final decisions in the hands of career civil servants with long experience supervising election," says the NLRB.

While the changes, which could shorten the time between a union petition and the actual election by a few weeks, may not seem drastic, most companies use this typically six-to-eight week period to explain the impact a union may have on the company and its employees.

The Chamber of Commerce argues that the NLRB's rule change imposes unprecedented changes to procedures for conducting workplace elections to determine whether employees do or do not wish to unionize, and will result in depriving employers of a fair opportunity to explain the costs of unionizing, as well as curbing employers' opportunities to bring legal challenges to the proposed representation elections.

"When Congress wisely declined to take up the check card bill, it quickly became clear that the NLRB would work to accomplish the priorities of organized labor through whatever means necessary," said Randy Johnson, the chamber's senior vice president of labor, immigration, and employee benefits. "This rule has no conceivable purpose but to make it easier for unions to win elections. Given that 95 percent of all elections are now conducted within two months, and unions win more than 67 percent of those elections, there is clearly no rational justification for this regulation."

In its complaint, the chamber states that the NLRB's new rule violates the National Labor Relations Act, the Administrative Procedure Act, the Regulatory Flexibility Act, and free speech and due process constitutional rights. The lawsuit, *Chamber of Commerce, et al., v. NLRB*, was filed in the U.S. District Court for the District of Columbia.

The new rule is slated to take effect April 30, 2012. ■

Arbitration agreement violated law

The National Labor Relations Board has ruled that it is a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court.

The board found that home builder D.R. Horton's arbitration agreement unlawfully barred employees from engaging in "concerted activity" protected by the National Labor Relations Act. Employees who signed the agreement waived their right to a judicial forum and agreed to bring all claims to an arbitrator on an individual basis. The agreement prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class of employees.

The board emphasized that the ruling does not require class arbitration as long as the agreement leaves open a judicial forum for group claims.

The decision requires Horton to rescind the agreement or revise it to make clear to employees that they are not waiving their right to pursue a class or collective action in all forums. ■