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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

January 2009 Vol. 24, No. 1

New York City deliverymen awarded $4.6 million in back pay

Restaurant found liable for failing to pay minimum wage, overtime

By Carolyn D. Richmond and Eli Z. Freedberg

Failing to pay overtime wages can lead to major financial penalties. In *Ke, et al. v. Saigon Grill Inc, et al.*, 07-civ-2329 (MHD) (S.D.N.Y. 10/21/08), 35 deliverymen and one delivery packer alleged an array of wage and hour claims against their restaurant employer. Specifically, the deliverymen claimed that the restaurant, its owners — Simon and Michelle Nget — and two managers failed to pay minimum wage and overtime, failed to keep time records, took illegal deductions from the deliverymen's wages, and retaliated against them for inquiring about their rights pursuant to federal and New York State law. On Oct. 20, 2008, following a trial, a magistrate judge in the Southern District of New York ruled in favor of the deliverymen and awarded $4.6 million in back pay.

The court found the facts in this case are particularly egregious. For the most part, Saigon Grill did not maintain or preserve time records; instead, the records would be destroyed. Many of the deliverymen alleged that they worked upwards of 13 hours a day, six days a week. Moreover, while the workers acknowledged that they were less busy during the early afternoon because the restaurant received fewer delivery orders during this time, they claimed that they were always on call and often required to do "side work," such as cutting cardboard into pieces to line delivery bags, filling small containers with sauces, packing utensils with napkins and soy packets, and restocking drinks.

Saigon Grill denied these allegations, and testified that the restaurant only employed one deliveryman during the slower lunchtime shift. The court, however, did not credit the defendants' testimony. According to the court, the first step in determining whether the deliverymen were paid minimum wage and overtime is to examine the restaurant's wage records. Underscoring the

(See **DELIVERYMEN** on page 4)

Employer is liable for hourly manager's harassment of waitress

Employee's inability to hire, fire not enough to protect restaurant

Employers may believe they are protecting themselves from liability by creating thorough antiharassment policies and training supervisors on how to handle harassment complaints. However, employers also need to be sure that anyone with managerial duties be well-versed in what is appropriate, because like other supervisors, hotels and restaurants may be liable for their bad behavior. *Howington v. Quality Restaurant Concepts LLC and Tyler Kirk*, No. 08-5136 (6th Cir. 10/20/08).

Christina Howington began working at an Applebee's restaurant owned by Quality Restaurant Concepts LLC in January 2006. Tyler Kirk was a "key hourly manager" who occasionally served as a supervisor to Howington.

Howington alleged that Kirk began sexually harassing her by making sexually explicit comments, propositioning her for sex, and asking her why she didn't like sex, after she rejected his invitations. She said Kirk became increasingly aggressive toward her, screaming at her in front of other workers and customers, and sending her harassing text messages threatening her termination if she didn't have sex with him.

Howington said that in March 2006, she was written up by Kirk for using a cell phone, although she claimed he first granted her permission. The following day, Howington complained to Kirk's supervisor that she had been harassed, and that when she declined his advances, Kirk became mean and violent, and cussed at her.

She delivered a letter to the restaurant's general manager, Amber Leonard, informing her of the harassment, as well as her conversation with Kirk's supervisor. She also gave a letter

(See **HARASSMENT** on page 6)

Just because Jarek Molski and his attorney may no longer be the nuisance many restaurants have considered the duo to be, doesn't mean it's time to become complacent about eliminating barriers to the disabled.

Supreme Court will not review *Molski* case

'Vexatious' litigant must have court approval to file Title III ADA lawsuits

Hospitality companies in central California may rest easier knowing that the likelihood of being the subject of a "hit and run" lawsuit by Jarek Molski has been drastically reduced.

Recently, the U.S Supreme Court denied a petition for certiorari filed by Molski, a paraplegic who has filed hundreds of lawsuits alleging violations of Title III of the Americans with Disabilities Act.

By denying the petition, the Supreme Court leaves intact a ruling by the 9th U.S. Circuit Court of Appeals affirming orders declaring Molski, and his attorney, Thomas A. Frankovich, to be vexatious litigants. Molski and Frankovich's firm are now required to obtain leave of court before filing new Title III suits in Central California. *Molski v. Evergreen Dynasty Corp., d/b/a Mandarin Touch Restaurant* (U.S. 08-38 11/17/08), 9th Cir., 35 NDLR 144 (08/31/07).

Evidence in the case showed that Molski had filed 400 similar Title III lawsuits against various establishments, claiming nearly identical injuries while transferring himself to a toilet or negotiating doorways. His attorneys waited one year before suing, then sent letters to unrepresented defendants demanding $4,000 per day since the violation, and advising the restaurants, bowling alleys, wineries, and other places of public accommodation not to seek counsel, and instead pay a settlement to Molski.

It is estimated that Molski, who uses a wheelchair, has been profiting significantly each year from the filing of these cases. One estimate projected his annual income from his lawsuits to be as much as $800,000 a year.

Just because Jarek Molski and his attorney may no longer be the nuisance many restaurants have considered the duo to be, doesn't mean it's time to become complacent about eliminating barriers to the disabled. With recent changes to the ADA and others relating to the ADA Accessibility Guidelines on the horizon, it's crucial to make sure your facility is accessible, and that any changes that are readily achievable to make your hotel or restaurant more accessible are made now. Molski may not be filing any complaints anytime soon, but that doesn't mean others aren't exercising their legal rights to ensure they are property accommodated. ■

Make sure restrooms are compliant

In Jarek Molski's complaints against hospitality companies, restrooms were usually a target. To have an accessible restroom under the Americans with Disabilities Act Accessibility Guidelines, many requirements must be met, including:

- Bathroom stalls must be at least 60 inches wide.
- Lavatory sinks must have 27 inches of clear space under the sink bowl.
- Toilet grab bars must be 42 inches long, be horizontal, and mounted at correct heights. ■

Correction

On page 5 of the December issue of *Hospitality Law*, the HLAW contributor's personal information should have read: *Ravinder Sandhu is an associate in the labor and employment practice group of Seyfarth Shaw LLP. He can be reached at (202) 828-3547.* ■

HOSPITALITY LAW

LRP Publications

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Hospitality Law (ISSN 0889-5414) is published monthly for $245.00 per year by LRP Publications, 747 Dresher Road, P.O. Box 980, Horsham, PA 19044-0980, (215) 784-0860. Periodicals postage paid at Horsham, PA. POSTMASTER: Send address changes to *Hospitality Law*, 747 Dresher Road, P.O. Box 980, Horsham, PA 19044. Editorial offices at 360 Hiatt Drive, Palm Beach Gardens, FL 33418. Tel: (561) 622-6520, Ext. 8721, fax: (561) 622-9060.

Learn strategies to maintain morale in difficult economic times

Upcoming conference will provide tools for HR professionals

Tough economic times may be ahead, which means it's time for hotels and restaurants to work even harder to protect themselves with liability, learn how to better negotiate with their unions — or deal with possible unionization — and find creative ways to compete to stay ahead of the rest.

"Given the state of the economy and the new administration, human resource issues are going to be of paramount importance in the next year," said David Sherwyn, an associate professor of law at Cornell University's School of Hotel Administration and the academic director for the school's Center for Hospitality Research.

At the 3rd Annual National HR in Hospitality™ Conference, produced by Human Resource Executive Conferences and developed and co-sponsored by the Cornell School of Hotel Administration and Cornell Industrial Labor Relations School, HR experts will provide information sessions to help attendees through these difficult times. Held March 17-19 at Disney's Contemporary Resort in Lake Buena Vista, Fla., Sherwyn's session, "Managing conflict when realigning the workforce," presented with Sarah H. Norton, Hilton Hotels' vice president and senior council of employment and labor, is an issue pertinent for anyone in hospitality HR.

"In these economic times where employers are faced with mandatory reductions in force, the legal, operational, practical and emotional desires of management and the employees are not always aligned," said Sherwyn. "A reduction in force can result in a lot of negativity from both a morale and operational standpoint, as well as create legal liability."

Labor negotiations will be another key topic at the conference. Michael Lebowich, a partner in the New York City office of Proskauer Rose LLP, said all hospitality firms, even nonunionized companies, should pay special attention to labor issues right now.

"I think the next round of negotiations in the industry is going to be impacted drastically by what led to the election," Lebowich said.

With a Democratic House, Senate and Administration, the unions are that much closer to pushing through the Employee Free Choice Act, which could infinitely extend the reach of unions in all areas of the country, and have a major effect on hospitality companies, both big and small.

At the conference, L. Robert Batterman, a fellow partner at Proskauer, will discuss labor negotiations with UNITE-HERE general president Bruce Raynor, providing perspectives from both the management and labor sides and laying out their perspectives of labor negotiations in the year ahead.

"Obviously, people who are in markets that are already unionized have a keen interest, but I also think [labor negotiations] are of interest to those who aren't unionized yet, because that's where the union is heading next … as UNITE-HERE continues its push to organize the mid-level markets," he said. "You need to know how these people think — it's not just an issue of the unionized workforce."

Sessions include a panel discussion on the political, social and economic forces that will shape the industry — moderated by Mary Schell, the vice president of corporate and public affairs for Wendy's/Arby's Group Inc. — and a discussion on executing an integrated talent management strategy to help retain great employees and add value to your hotel or restaurant.

"This is an extremely good investment for hospitality HR professionals and will provide tools to help them through these turbulent times," Sherwyn said. ■

Are you protecting yourself?

Legal hurdles continue to abound in the hospitality industry. Employment policies may not be up-to-date and training materials don't include all of the necessary information. Do your policies and training materials include appropriate usage of technologies?

Other areas of major concern include complying with wage and hour laws. With uncertainty over whether employers could be responsible for their employees' failure to take breaks still being debated in California, and a drastic increase in the number of lawsuits filed in New York and other states, are you sure your restaurant's policies are up to date?

Learn how to make changes now to prevent problems later, at the HR in Hospitality™ Conference.

Pre-early bird savings are available through the first week of January. To view the full agenda or to register, visit the conference Web site at *www.hrinhospitality.com*. ■

Class action suit filed after police use hotel for bathroom sex sting

A federal class-action lawsuit was recently filed after a California man claimed his constitutional rights were violated when he was cited in a bathroom sex sting at an Embassy Suites Hotel.

Doane Atwood filed the lawsuit against the City of San Rafael, Calif., the chief of police, several police officers, and the hotel.

According to the suit, police officials decided to target the hotel after it was discovered that men were meeting in the facility's first-floor bathroom for sex. San Rafael police conducted a two-day sting where undercover officers sat in bathroom stalls and waited for solicitations.

Atwood said he was leaving a stall when he saw an individual smiling at him through the crack of the door. The undercover officer asked Atwood if he would like to go back to his room. When he agreed, Atwood and the man left the bathroom, where police made the arrest. In total, seven individuals were charged with suspicion of loitering around a public toilet for the purpose of engaging in or soliciting any lewd, lascivious or unlawful act.

According to the suit, filed in U.S. District Court, Atwood said the sting was sexually discriminatory, violated his protections against unreasonable search and seizure, and infringed his right to free association. ■

'This case underscores the importance of maintaining a system that accurately tracks the time worked by hourly employees, and of safeguarding those records in accordance with the law.' — Carolyn D. Richmond & Eli Z. Freedberg, attorneys

DELIVERYMEN (continued from page 1)

necessity for employers to maintain accurate records, the court then held that in the absence of such documentation, the employee may rely on his own recollection to establish that he was not paid for all hours worked, and that the burden then shifts onto the employer to proffer evidence sufficient to rebut the employee's recollection. The court further held that even if there were periods when the men were idle, they would still be entitled to receive wages because employers must pay employees for waiting time between tasks if they are expected to be ready to work when performance is required.

In addition to the failure to keep accurate time records, Saigon Grill's owners imposed fines on their deliverymen for "infractions," such as: failing to log deliveries into the computer system, letting a door slam too loudly, failing to make a delivery within an allotted amount of time, and forgetting to make customers sign credit card receipts. These fines ranged from $20 to $200. The court also found that the owners had forced deliverymen who could not complete their quota of side work to compensate kitchen workers for completing these tasks. The restaurant also required the deliverymen to pay for and maintain their own bicycles and motorbikes.

While Saigon Grill argued that these "fines" were used to pay for the deliverymen's meals, the court rejected this argument because the restaurant failed to properly document these alleged meal expenditures, and held that these deductions constituted illegal "kickbacks" for the employer's benefit.

The workers also sought reimbursement for expenses they incurred in connection with maintaining the bicycles and motorbikes they used to make deliveries. The court agreed with the deliverymen, and held that these bicycles and motorbikes constituted "tools of the trade," and that each employee was entitled to a credit for these expenses.

At some point in early 2007, the employees discovered that deliverymen at other restaurants in New York City had filed lawsuits against their employers that resulted in substantial settlements for the delivery staff. Once Saigon Grill's owners found out that the deliverymen learned of these lawsuits, they called a meeting and threatened to terminate all members of the delivery staff unless they agreed to stop "exploring" their rights under federal and state wage and hour laws. The deliverymen all refused to submit to management's intimidation, and on the following day, Saigon Grill terminated its delivery staff.

Following their dismissal, the Restaurant Workers Union filed a charge of unfair labor practices with the National Labor Relations Board, charging Saigon Grill with engaging in unfair labor practices. The board determined that the workers were improperly terminated, and ordered the restaurant to reinstate the employees.

Although it was not bound by the board's decision, the court similarly found that the deliverymen were engaging in protected activities by exploring their rights pursuant to applicable wage and hour laws, and that Saigon Grill's decision to terminate the delivery staff was retaliatory in nature. As a result, the court held that the employees were eligible for an award of reinstatement, promotion, back wages, liquidated damages, and possibly punitive damages.

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

This case underscores the importance of maintaining a system that accurately tracks the time worked by hourly employees, and of safeguarding those records in accordance with the law. The burden falls back on employers to maintain proper time records. If they fail to keep records, courts will credit the testimony of employees as to the number of hours they worked. Moreover, this court's decision tolls a warning bell to owners to audit business practices and ensure that improper fines and fees are not being imposed on employees.

Finally, this decision is an important reminder that owners and managers can be held personally liable for violation of federal and state wage and hour laws. Generally, determining liability includes an examination of factors, such as whether a defendant had the power to hire and fire employees, supervised employees, controlled work schedules, drafted performance evaluations, determined compensation rates, settled upon methods of payment, and maintained employment records. In these volatile economic times, individual executives and managers need to be more vigilant of enforcing proper wage and hour practices because liability does not stop at the corporation.

Carolyn D. Richmond is cochair of the Hospitality Practice Group of Fox Rothschild LLP. Eli Z. Freedberg is an associate at the firm. ■

Relationship sufficient to establish causation in bedbugs lawsuit

Accusation that hotel's bedbugs infested guest's house will proceed

Bedbugs are becoming increasingly troublesome for hotels. With a rise in the number of cases, hotel staff needs to diligently inspect rooms and exterminate any bugs to protect its guests and property. *Prell, et al. v. Columbia Sussex Corp., d/b/a Radisson Lake Buena Vista*, No. 07-CV-2189 (E.D. Pa. 10/20/08).

Gary Prell stayed at the Radisson Lake Buena Vista in Florida while on a business trip on April 4 8, 2005. On April 5, Prell noticed a reddish brown insect on the bed and believed it was alive. He complained to the front desk. The clerk said the room would be inspected while it was cleaned, and assured Prell that regular exterminations were done at the hotel. Over the next three days, Prell saw one or more of the reddish insects in his room and complained to the clerk each morning. When he checked out, he was given a discount on his room due to the complaints, and the clerk wrote "bugs in bed" on his receipt.

Within a few weeks of his return to Pennsylvania, Prell began to experience skin irritations, and welts also began to appear on his wife and his son Matthew. His son was prescribed allergy medications, but the welts continued. Shortly thereafter, Prell saw an insect identical to the ones he saw in his hotel in Florida, and began looking under the folds and stitching of his bed mattress and found hundreds of the insects. He also found them in the beds of his son and daughter, in bedspreads and pillows, and certain areas of carpeting, which he discarded. An exterminator confirmed that the infestation was due to bedbugs. After the exterminations and cleaning, his son's welts disappeared. Prell filed a lawsuit against the hotel for premises liability, negligence, and physical and property injury.

The hotel argued that it should be granted summary judgment because it did not notice a bedbug problem in Prell's hotel room, but only had reports of unspecified "bugs." The hotel said these generic reports did not show a dangerous condition necessary for liability on Prell's assertion of negligence.

The court found that an issue of fact exists as to whether the hotel had actual or constructive knowledge of the bedbugs, and denied the hotel summary judgment on the basis of lack of notice.

HLAW comment by Diana S. Barber

It's hard to believe that a hotelier today would be unaware of the recent rise in bedbug infestation in our country. There are numerous cases of bedbug infestation reported in newspapers, blogs and other media. Whether it is bedbugs or other types of infestation, a hotelier's knowledge about a problem in a hotel room cannot and should not be dismissed. The hotel owes a duty to its guests to investigate and remove the offensive bugs.

In the *Prell* case, both parents and their son allegedly suffered personal injuries and property damage as a result of multiple bug bites claimed to have happened at the defendant's property and in their home in Pennsylvania when the bugs were subsequently brought into their home after Prell's trip. Prell's claims for property damage include having to replace bedding, pillows, box springs and mattresses at their home due to the infestation of bedbugs, which Prell alleged came from the hotel.

On the property claims alleged by the parents, the defendant was not successful in disposing of these claims in the case. A jury will need to determine if the plaintiffs have successfully proven all the elements of the negligence claim for property damage.

The court said, "A prima facie negligence claim under Pennsylvania law requires a plaintiff to prove that: the defendant owed plaintiff a duty; it breached that duty; the breach caused any claimed injury; and the plaintiff suffered damages." Of the four elements, the hotel focused on the duty and the causation elements, and the court did not accept its arguments, denying a request for summary judgment on the property claims. Prell claimed to have informed the front desk numerous times throughout his stay about the small tick-like, reddish-brown insects. The court was justified in stating that a jury could very likely find that the defendant did in fact receive notice of a bedbug problem in the guest room occupied by Prell.

Diana S. Barber is an attorney and faculty member at Georgia State University. ■

The hotel also argued that without an expert, Prell cannot show that there were bedbugs in his room at the hotel, that they traveled with him to his home, or that the insects in his home were bedbugs. The court, however, found there to be "a sufficiently close relationship between the accident and the injury" to establish causation, and denied summary judgment to the hotel on Prell's claims of property damage. For physical injury, the court dismissed the claims made by him and his wife, but allowed claims by his minor son to proceed to court. ■

Judge enters decree to finalize harassment, retaliation lawsuit

A federal judge recently entered a consent decree to finalize a restaurant sexual harassment and retaliation lawsuit.

The Equal Employment Opportunity Commission charged Ken's Steaks and Ribs with unlawfully terminating a waitress after she had complained of sexual harassment by the owner. The suit was filed in the U.S. District Court, Western District of Oklahoma.

Amber Boevers worked as a waitress at the restaurant where she alleged she was sexually harassed by Ken Morrison, the owner of the establishment. The EEOC said Boevers was fired after she told Morrison that she didn't want him to make any more sexually suggestive comments.

According to the three-year consent decree, Boevers will receive $20,000 in monetary relief. In addition, Morrison will be required to undergo extensive antidiscrimination training, as well as provide training and education to employees about discrimination and their protections under federal civil rights.

The EEOC's district office in St. Louis, Mo., handled the enforcement actions in Oklahoma.

For more information, visit www.eeoc.gov. ■

'Since a supervisor's authority is delegated to him by the employer, the employer is usually liable when the supervisor uses that authority to harass an employee.' — James Zuehl, attorney

HARASSMENT (continued from page 1)

to Kirk, asking him to abstain from all contact with her.

According to QRC, the regional manager learned about the letters the day they were delivered and launched an investigation, visiting the location and interviewing the management team. Three days after Howington's first complaint of the harassment, she parked her car in the front of the restaurant, against policy. After she protested when Kirk told her to move it, he allegedly told her to leave and that she was "done." She left the restaurant, returning only to pick up her paycheck and return her uniform.

Kirk issued a signed written warning and a 30-day suspension to Howington. QRC maintained that Howington was not terminated because Kirk lacked the authority to fire employees.

A District Court granted summary judgment to QRC and Kirk regarding Howington's claims of sexual harassment and hostile work environment. An appeals court disagreed with this decision, noting that although Kirk lacked the authority to hire and fire employees, he did exercise significant control over personnel matters because of his authority to discipline subordinates. The court also found that Howington undoubtedly lost income from tips as a result of her discipline from Kirk, and found that a reasonable jury could infer that she was disciplined for refusing Kirk's advances.

On her claims of retaliation, the court noted that a two-day lapse in time between the delivery of the letters and the suspension could lead a jury to "infer a causal connection."

The court therefore reversed the District Court's grant of summary judgment to QRC and remanded the case for trial.

HLAW comment by James Zuehl

This case illustrates the different legal consequences that can result if a supervisor, rather than a line employee, engages in harassment. If a line employee engages in harassment, the employer can generally avoid liability if it has had in place a policy prohibiting harassment and takes prompt action to correct the problem. But the situation is different if a supervisor harasses a line employee. Since a supervisor's authority is delegated to him by the employer, the employer is usually liable when the supervisor uses that authority to harass an employee. In that case, the employer cannot undo the harassment simply by taking action to correct the situation. A quick response should be taken because it can limit damages and perhaps dissuade an employee from taking legal action, but it is not enough to eliminate liability, as this case illustrates.

Here, the appellate court overturned the trial court's grant of summary judgment to the employer. The plaintiff, a waitress in the employer's restaurant, complained that a manager, who occasionally supervised her, had harassed her. Shortly after she made her complaint, she was suspended for 30 days by her supervisor for parking her car in the wrong place.

The trial court granted the restaurant's motion for summary judgment primarily on the ground that the offending supervisor was not truly a supervisor under the law, because he lacked the authority to hire and fire, leading the court to decide that the employer was not strictly liable for his conduct. The appellate court reversed that conclusion, however, finding that he did exercise significant control over employees because he had the authority to discipline. Noting that the waitress's negative treatment followed her repeated refusals of the supervisor's sexual advances, the appellate court found that there was evidence of harassment. Since the 30-day suspension followed the waitress's complaints of harassment by just a few days, the court held that a jury could infer that retaliation had also taken place.

Restaurants should learn one important lesson from this case: that a supervisor need not have complete authority over employees in order to create liability for an employer. Here, the alleged harasser only supervised the waitress occasionally and he lacked authority to terminate her employment, but his ability to discipline her was sufficient for the court to consider him a supervisor. Because of this danger, employers would be well-advised to make sure that all supervisors are well-trained as to the consequences of harassment and their responsibility to model non-harassing conduct. It is also advisable for supervisors to be evaluated in part on their familiarity with the employer's harassment policies and on their compliance with such policies. Because harassment by supervisors has a direct impact on employers, it should not be tolerated.

James Zuehl is a partner at the Chicago law firm of Franczek Radelet & Rose PC. ■

Wynn Las Vegas tip policies did not violate state law, court said

Casino granted summary judgment on dealers' breach of contract claims

Tip pooling has become increasingly common in fine dining restaurants, and even casinos, as hospitality companies try to ensure service to customers is seamless. However, tip pooling policies aren't always popular, and can come with headaches if the company's policies aren't in accordance with state and federal wage and hour laws. *Baldonado and Cesarz, et al. v. Wynn Las Vegas LLC*, No. 48831 and No. 49241 (Nev. 10/09/08).

Daniel Baldonado and Joseph Cesarz are table game dealers at the Wynn Las Vegas. When the Wynn opened, its policy was to count all dealer tips every 24 hours and distribute the tips among dealers based on hours worked; the policy also allowed changes to take place via a vote that could be vetoed by management. In 2006, the casino modified its employment policy to require dealers to share customer tips with people in certain lower-level management positions, due to the fact that dealers were earning more than their supervisors. The new policy allowed the pit manager and floor supervisor to partake in the daily tip pool. Baldonado and Cesarz believed this policy violated Nevada law, and said the new policy decreased their tips by 10 percent to 15 percent. The two, along with other dealers, filed a class action complaint asserting that the modified policy was unlawful, and they sought compensatory and punitive damages and injunctive relief. A District Court found that no private cause of action existed to allow the men to pursue claims for violations, and found that their at-will employee status precluded challenge to the employment policy on the grounds of breach of contract. The court therefore ruled in favor of Wynn, but denied the casino's request for attorney's fees.

On appeal, the court noted that Nevada law prohibits employers from taking their employees' tips or applying them toward the statutory minimum wage, but does allow for tip pooling. The court also noted that under the statute, employers may pursue claims only if a private cause of action is implied. The court found that legislature did not intend to create a private remedy for the statutes. Therefore, the court said the employees had no right to obtain relief in District Court, and affirmed the grant of summary judgment to the Wynn. The court also found that the employees' breach of contract claim failed, and it agreed with the District Court's decision to grant summary judgment to the Wynn on that claim as well.

With regard to Wynn's request for attorney fees, the Wynn pointed out that Nevada law must be "liberally construed in favor of awarding attorney's fees whenever appropriate," and asserted that the employees brought their claims without reasonable grounds. The employees, however, stated that they had arguable grounds for asserting a breach of contract, and said their complaint raised the question of whether a cause of action existed under the state's labor laws.

The appeals court said the employees raised supportable arguments and found that the District Court did not abuse its discretion by denying Wynn's motion for attorney's fees. It affirmed the ruling. ■

Make sure tip pool is legal under law

In the past several years, tip pooling lawsuits have become more prevalent. For employers, tip pools are beneficial for several reasons:

- Employees who may not ordinarily qualify as tipped workers can receive a cut of the gratuity.
- A pooling program can help promote teamwork since everyone who qualifies for the pool will receive a portion of the tips.
- Service may improve because everyone has a stake in ensuring customers leave happy.

Knowing which employees are eligible to participate in a tip pool can be challenging for employers. Under the Fair Labor Standards Act, anyone classified as an employer, or a person who acts "directly or indirectly in the interest of an employer" is excluded from participating in a tip pool. In simpler terms, determining whether a worker should be classified as an employer can be determined by asking if the individual:

- Has the ability to hire and fire.
- Dictates work schedules and supervises.
- Chooses the amount employees are paid.
- Maintains records of employment.

Violating these tip pooling policies can be expensive. Last spring, Starbucks was ordered to pay out $105 million to baristas because it allowed supervisors to have a share of gratuities left in tip jars. Caribou Coffee has also been slapped with similar lawsuits. And various restaurants throughout the country have been accused of illegally managing tip pools.

Protect yourself by asking your attorney to review your company's tip pooling policies to ensure they are in compliance with the law. ■

Lawsuit targets Caesars over alleged racial practices

A Las Vegas nightclub and restaurant have filed a lawsuit against Caesars Palace and Simon Property Group over alleged racially motivated practices.

The suit by Poetry Nightclub and Wolfgang Puck's Chinois restaurant was filed earlier this year. Defendants' motions to dismiss the case are scheduled to be heard before a federal judge in Nevada in December.

The lawsuit, recently transferred from state to federal court, alleges that Caesars Palace's decision to close the primary entrance to its Forum Shops at 1 a.m. on weekends is racially motivated. Poetry officials said its patrons, who are mostly black, are directed outdoors, past trash bins, and into an empty service hallway frequently littered with garbage receptacles, where they must navigate in dim lighting until they emerge back at the Forum Shops.

"As it's been expressed to us, corporations are under the impression that too many black people on your property harms business," said Mike Goodwin, Poetry's managing partner.

The lawsuit alleges that the route imposed on Poetry's customers is a deliberate attempt by Caesars, Forum Shops owners, and Simon Property Group to drive the nightclub out of business because they believe that the large presence of black patrons does not fit well with the "brand" of the upscale Forum Shops. ■

Despite statute of limitations expiration, slip and fall case can proceed

Casino's repeated promises of settlement, excuses led court to overturn prior judgment

Stalling until the statute of limitations has run out for injured guests to file a complaint may seem like a good idea to some, but it could come back to bite you if a court finds your guest was equitably estopped. *Kaufman v. Robinson Property Group Limited Partnership, d/b/a Horseshoe Casino & Hotel*, No. 08-60018 (5th Cir. 10/15/08).

Glo Kaufman was eating at the Horseshoe Casino & Hotel in Tunica, Miss., when she slipped and fell to the floor while walking to the buffet. She suffered significant injuries and said she fell as the result of "some oily type of liquid" on the floor.

Kaufman complained to Robinson, and spent the next three years working with the casino to rectify the incident. With no resolution, Kaufman filed a lawsuit in Mississippi District Court in March 2007. The District Court said Kaufman failed to state a claim for tolling the statute of limitations due to fraudulent concealment. Therefore, the court granted Robinson's motion to dismiss, finding that the statute of limitations for Kaufman's claim had expired.

Under Mississippi law, the statute of limitations for a personal injury claim is three years. Kaufman's accident occurred on Jan. 31, 2003; she filed her complaint approximately 14 months after the statute of limitations ran out.

Kaufman said Robinson purposely misrepresented to her that it would enter into a settlement and that she relied on the company's word; and therefore, she did not file the lawsuit. Because of this deception, she argued that her claim should be allowed to proceed despite the statute of limitations.

The 5th Circuit Court of Appeals, however, agreed with the District Court's determination that Kaufman failed to state a claim, but found that Kaufman had pled an equitable estoppel claim, arguing that it should prevent Robinson from relying on the statute of limitations as its defense. The court considered Kaufman's testimony that she was repeatedly assured by Robinson that a settlement was forthcoming, and said the casino continued to ask for more time, citing changes in risk management companies and damage to its claim files from Hurricane Katrina.

"Kaufman … relied on [Robinson's] representations of an imminent settlement by not filing suit, counting on its good faith offer to settle ...," the court said. "…[A]s soon as the statute of limitations ran Robinson Property informed Kaufman that she no longer had a valid claim."

The court therefore vacated the District Court's dismissal and remanded the case for further proceedings. ■

HLaw Glossary

What is equitable estoppel?

If a party has not acted fairly, a court may deny that party relief as a result of their false representations, unfulfilled promises, etc. An equitable estoppel prevents a party from changing positions if it would unfairly harm the other party who relied upon their position, and as a result, suffered a loss. ■

Personalities influence rate of job burnout in hospitality

Researchers say depressed, insecure employees less engaged

Hospitality employees who are depressed, insecure, and show other signs of neuroticism are more likely to burn out on the job, according to a recent study. On the other hand, conscientiousness emerged as the primary trait related to job engagement.

Researchers from the Washington State University School of Hospitality Business Management said the findings provide some of the first glimpses into how personality traits influence the susceptibility of hotel and restaurant workers to burnout.

According to Hyun Jeong (Jenny) Kim, associate professor at the school, the hospitality industry — with its round-the-clock customer service demands — depends on employees who must perform their jobs in a frequently stressful environment. Although psychologists have long recognized that people respond to stress in different ways, Kim said little research has been done in the hospitality field correlating personality traits with burnout. Most studies have focused instead on factors in the work environment, such as organizational structure and job characteristics.

In 2006, Kim sent surveys to hospitality employees aged 16-57 throughout the Northwest. In addition to a personality test, her survey included questions to measure burnout (exhaustion, cynicism, and lack of professional efficacy) and engagement (vigor, dedication and job absorption).

Kim also studied another variable leading to burnout, called "emotional labor." In the hospitality and service sector, employees are expected to put on a happy face for their customers in accordance with "feeling rules" or "display rules." To accomplish this, Kim said employees can respond with genuine feeling, "surface acting" or "deep acting." Deep actors try very hard to feel the way they are supposed to feel — to play the happy host. Surface actors, on the other hand, basically fake the smile.

"Since deep acting requires more emotional effort, I thought it would be significantly related to burnout," Kim said. "But our findings show that surface acting was instead related more highly."

She also discovered that those who scored higher on the neuroticism scale did more surface acting, while extraverted workers tended to do more deep acting. It becomes a vicious cycle — neurotic workers do more surface acting, which leads to more burnout.

To prevent burnout among your hospitality employees, make sure to:

• **Provide praise for a job well done.** "It is important for employees to feel that their work is valued and appreciated," Kim said. "Even happy people may become unhappy if the organization has problems."

• **Provide opportunity for growth.** Employees will be less likely to burn out if they have the opportunity to advance within a company.

• **Value employee feedback.** Employees should have their voices heard. It will ensure they feel like part of the team.

For more information, visit www.business.wsu.edu/hospitality. ■

Many employees say they've encountered discrimination

With unemployment rising and competition in the workplace increasing, employees say it's tough to get a job — or get ahead — in today's market. Add to that the fact that more than one in four American adults (27 percent) say they have encountered employment discrimination, according to a recent survey by FindLaw.com.

The survey asked 1,000 individuals if they believe they have ever experienced discrimination by an employer in job interviews, hiring, pay or promotions. Among the survey's findings, researchers found that:

• 42 percent of African-Americans have experienced racial discrimination in the workplace.

• 10 percent of women claimed they had experienced gender discrimination in the workplace.

• 15 percent of people age 45 and older claimed they had experienced age discrimination in the workplace.

• 13 percent of people ages 18 to 24 said they had also experienced age discrimination.

Researchers said employers must make sure their work policies are applied to all employees in a nondiscriminatory manner. The study noted that policies and actions that do not appear discriminatory on their face may nonetheless be prohibited under the law if those practices have the effect of discriminating against people in a protected class.

For more information, visit www.findlaw.com. ■

Take steps to prevent injuries among seasonal workers

Seasonal workers are a key component to the success of employers in the hospitality industry. With winter weather approaching, many snow birds will be heading south. Hotels and restaurants in these popular warm weather locations may be in the process of hiring seasonal, temporary employees to keep up with the influx of visitors.

The Louisiana Workers' Compensation Corporation is reminding hospitality employers of the importance of safety in the workplace for all seasonal hires. Mike Page, director of safety and loss prevention at LWCC, said employers should identify job hazards and provide training to seasonal workers on slip and fall prevention, driver safety, proper lifting techniques, and other issues.

"Employers should ensure that seasonal hires have the proper training and safeguards needed to keep them healthy and reduce their risk of workplace injuries during their employment," he said. "It is important for employees to follow the safety guidelines provided by their employers and do their part to recognize and help eliminate workplace injuries."

For more information on workplace safety for seasonal hires, visit the LWCC Web site at www.lwcc.com. ■

Under Texas law, an independent contractor has sole control over the work accomplished, and the hiring party is not generally liable for the negligence of that person. But, the hiring party may owe a duty of case to the contractor's employees.

Arguments of duty of care, negligence not enough in murder case

Family could not adequately show franchise responsible for deaths

When more than one entity handles different portions of a business, for instance, a lessor who maintains the property, a contractor who hires the employees, and another who ensures its safety and security, it's important to clearly state in agreements each entity's responsibilities. Thoroughly defining these duties will not only shore up any confusion, it may protect in court. *Gilbert, et al. v. Outback Steakhouse of Florida Inc.* (5th Cir. 10/10/08).

Chrystal Newby Willis and Rebecca Shifflet worked at an Outback Steakhouse in Texarkana, Texas. On Sept. 1, 2003, two former employees who had recently been fired killed the women while robbing the restaurant. Matthew Hines, the managing partner, was also killed.

Sherrie Gilbert and Darcie Baggett, representatives of the women's estates, filed a suit against Outback Steakhouse of Florida, alleging that the restaurant intentionally caused their deaths, or that its negligence resulted in their murders. However, during discovery, Gilbert learned that Outback Steakhouse Restaurant Services had an agreement with OSF to manage personnel, while the restaurant was maintained by lessee Outback Steakhouse of Dallas-II Ltd.

Gilbert filed a motion to amend after the deadline, which was denied, and OSF filed a motion for summary judgment, arguing that Gilbert's claims failed because it was based on OSF's status as the employer of the decedents. Gilbert argued that while OSRS was the relevant employer, OSF still owed a duty of care as the premises owner. The District Court denied a second motion to amend made by Gilbert and granted summary judgment to OSF.

On appeal, the 5th Circuit Court of Appeals agreed with the District Court's ruling, finding that Gilbert did not correctly specify her liability theory in her complaint, and noted that Gilbert's claim should fail because the complaint contained no reference to OSF's position as the holder of the lease for the property, the existence of a dangerous condition on the premises, or the decedents' status as invitees.

"In fact, the complaint's consistent allegations that OSF was the employer of the decedents and the former employer of the assailants suggested that the negligence claim was brought against OSF as an employer rather than a premises owner," the court said. "Gilbert attempts to demonstrate that she provided 'fair notice' of the premises liability claim by noting that OSF denied being in control of the restaurant's premises. …" She further contended that her "broad negligence claim against OSF presented a premises liability theory of recovery."

The court disagreed with these assertions, finding that due to her failure to state a proper claim based on OSF's liability, the District Court's ruling should be affirmed.

Gilbert also challenged the District Court's ruling in favor of OSF on her allegations that OSF owed a duty to the deceased employees of its contractor, OSRS. Under Texas law, an independent contractor has sole control over the work accomplished and the hiring party is not generally liable for the negligence of that person. But, the hiring party may owe a duty of care to the contractor's employees.

Gilbert argued that OSF had retained sufficient control over OSRS to owe a duty of care to the contractors' employees, and contended that OSF was negligent because it retained control over the security and safety of the work space.

The appeals court, however, said she initially claimed OSF breached its duty by hiring and terminating employees with criminal backgrounds — the assailants — and that she failed to state a negligence claim based on the existence of a breach of duty by OSF to ensure a safe workplace.

The court affirmed the judgment of the District Court on OSF's duty to the decedents. ■

Lessee responsible for premises security

In *Gilbert v. Outback Steakhouse of Florida*, the 5th Circuit Court of Appeals noted that the lease between OSF and its lessee, Outback Steakhouse of Dallas II, provided that OSF would have "full responsibility for protecting the premise and the property located therein from theft and robbery."

Because of this language, OSF is clearly shown to have control over the Texarkana restaurant and any security issues. Whether the alleged security defects were attributable to a lack of training or supervision could not be considered because Gilbert did not raise it. ■

Resort may have breached its duty of care to 'licensee'

Swimmer's lawsuit alleging hotel was negligent will proceed

Beachfront resorts have the burden of protecting guests and others from the hazards of the ocean. Failing to warn guests of dangers can lead to lawsuits charging negligence if an incident occurs. *Campbell v. Starwood Hotels & Resorts Worldwide, Inc., et al.*, No. 07-61744-CIV-COHN/SELTZER (S.D. Fla. 10/14/08).

Colin Campbell was swimming in the ocean in front of the Westin Grand Bahama resort when he was struck by a motorboat operated by Ocean Motion Ltd, which provides water sports and beach activities to the public and guests of the resort through Grand Bahama's all-inclusive package.

Grand Bahama had established policies and procedures on pool and beach water safety, directing lifeguards to caution swimmers about unsafe areas, minimize accidents by working with water sports service providers, and calling back people swimming outside of designated swim zones.

Campbell, who was not staying at the hotel but rather was a guest of Discovery Cruise Line, which routinely transports its guests to the resort during their visit to the island, said he saw no warning signs and was not warned by a lifeguard when he swam past the buoys. Two lifeguards, however, said they attempted to warn Campbell to return to the designated zone. The resort's pool and beach manager said there were signs warning swimmers not to go past the buoys prior to the incident, but said they were washed away and have now been replaced.

Campbell alleged that the resort breached its duty to him by negligently failing to provide a safe swimming area or warn of a dangerous condition, and argued that Grand Bahama was also negligent for the acts of their agent, Ocean Motion.

The resort said it did not owe a duty to Campbell because, under Bahamian law, he would be considered a licensee, who merely enters a property with the owner's permission, not an invitee of the resort. Since Campbell was not a guest and did not purchase any goods or services from the resort, and was not charged for using the swimming area at the resort, Grand Bahama said he cannot be considered an invitee. The court agreed, and noted that the next requirement for a duty of care is whether the resort failed to warn of a "concealed danger or trap" it knew about. Although the resort argued that once Campbell swam past the buoys he left the resort's premises, the court said that innkeepers must take protective measures to reduce the risk of injury also on adjacent properties. Because the resort expressed an intent to control the swimming area by installing buoys and warning signs, and employing lifeguards, the court denied the resort summary judgment, with respect to Campbell's claim of direct negligence based on breach of duty.

However, with respect to Campbell's claim that the resort was vicariously liable for the negligence of Ocean Motion, the court disagreed. Despite a financial connection between Grand Bahama and Ocean Motion for all-inclusive packages and advertising, the court found that there are no facts that would allow a jury to conclude that the resort had any control over Ocean Motion's operation of watercraft, and therefore granted the resort summary judgment on this claim. ■

Duty changes based on type of visitor

Hotel and restaurant owners generally have a duty to exercise reasonable care for the safety of guests and others on the premises. In some states, the duty owed to an individual who may be injured on your property depends upon their classification. In these states, as in the case *Campbell v. Starwood Hotels*, individuals are classified in three categories:

- **Invitee.** For individuals who are classified as invitees, the highest duty of care is required. Invitees are individuals "invited" to the property. To be an invitee, the restaurant or hotel must have a material interest in the person's visit, such as to the sale of a meal or rental of a room.
- **Licensee.** These people are guests who can be there for their own reasons, such as a salesperson or someone who has permission to be on the property, but is not of interest to the restaurant or hotel.
- **Trespasser.** A trespasser is someone who is on the property unlawfully, which only implies duty if the hotel or restaurant purposely created dangerous conditions to the individual. However, a greater duty of care may be required if a child is the trespasser.

Make sure your premises are safe, and that reasonable care has been taken to protect the safety of any classification of individual. ■

Court upholds award to woman injured after eating sushi

A California court recently upheld a $3.2 million award to a woman who suffered permanent nerve damage after eating tainted sushi at a restaurant in Dana Point, Calif.

Alexis Sarti dined at the Salt Creek Grille in April 2005. One day after her meal, she became ill. According to the lawsuit, Sarti was made sick after eating raw ahi tuna that was contaminated by bacteria from raw poultry.

Sarti spent nearly 50 days in a hospital after contracting the illness, in which she suffered nerve damage and was temporarily paralyzed. According to the suit, Sarti was forced to drop out of school for nearly 18 months while she underwent treatment and therapy for her condition. In addition, she had to use a walker and wheelchair for eight months during that time period.

Attorney's representing the restaurant argued that, because of the time period between when she ate the tuna and fell ill, it would have been impossible for Sarti to have contracted the bacteria at the restaurant. The restaurant proposed that she may have contracted the illness from a number of sources, including handling chicken at the grocery store where she worked or from a child staying at her home.

However, a California appeals court ruled in favor of Sarti, upholding her initial $3.2 million award. ■

New administration may mean stronger OSHA, new ergo standard

With the election of Sen. Barack Obama, D-Ill., as the next president of the United States, hospitality employers and labor organizations are preparing for several potential changes in workplace safety and ergonomics regulation during the first term of his incoming administration.

And with Democrats capturing several seats and maintaining a majority in the House and Senate, many ergonomics experts believe lawmakers will take steps to strengthen the Occupational Safety and Health Administration and resurrect the failed Clinton Administration standard to regulate workplace exposure to musculoskeletal disorders.

Cindy Roth, CEO of Ergonomics Technologies Corporation in Syosset, N.Y., said there have been whispers within the Washington community about the possibility of new ergonomics regulations. In fact, the U.S. Chamber of Commerce recently hosted an ergonomics forum. According the chamber, the meeting served as a jumping off point to reform the National Coalition on Ergonomics, a pro-business lobbyist organization that helped challenge and take down the Clinton Administration's federal ergonomics standard in 2001. The group said that attempts to regulate ergonomics has been "kept in check" by Republican congressional majorities in recent years. However, the tide appears to be shifting, and chamber officials believe ergonomics will become a hot-button issue.

Peg Seminario, director of safety and health for the AFL-CIO, said despite support for new regulation, lawmakers may face an uphill battle. To overturn the Clinton standard, the Bush administration utilized the Congressional Review Act, which allows lawmakers to review every new federal regulation issued by the government agencies and, by passage of a joint resolution, overrule a regulation.

"Because the act was used, Congress would be required to expressly authorize any new regulation," she said. "We don't have a lot of history or experience in dealing with that. The legislation would need to be looked at very closely before lawmakers could move forward."

Seminario said even though musculoskeletal disorders remain a pressing concern, the labor organization would like to see improvements with OSHA.

"We would like to see OSHA getting back into the business of being a strong leader in safety and health," she said. "The agency must realize that its mission is to protect workers, not make cooperative arrangements with employers. The Bush administration has provided no leadership on the issues we are facing, and we find that troubling."

Roth said the previous ergonomics standard will have to be altered so that it is workable for businesses. However, employers who have an ergonomics process in place shouldn't be worried about regulation, she said.

"We have a fear of the unknown," she said. "However, if an employer has a process that is working, they will most likely be grandfathered in. The standard must make sense for employers and give them an understanding that it will save them, rather than cost them, money."

For more information, contact Cindy Roth at (516) 682-8558, or visit the AFL-CIO Web site at www.aflcio.org *or the ASSE Web site at* www.asse.org. ■

Comp claims may increase

Cindy Roth, CEO of Ergonomics Technologies Corporation in Syosset, N.Y., said employers should be on the lookout for the Occupational Safety and Health Administration, under a Barack Obama administration, to start paying much more attention to workplace safety, including attention to proper ergonomic setups, and to start levying fines against employers who aren't doing their best to create safer working conditions.

Add to that the fact the current challenging economic conditions are looking like they could linger on for a couple more years. Roth said companies are going to be doing more and more with less.

"We are going to be working with budget deficits like we have never seen for the next couple of years, so we've got to get smart," she said.

Roth said there are going to be layoffs of junior workers. That means older workers — who tend to get more seriously injured — may be left doing a lot of the work.

And according to Roth, the industry trend in challenging economic times is for workers' compensation claims to increase. Workers who are worried about losing their jobs tend to file more claims for work-related injuries and illnesses. ■