

# Hospitality Industry Quarterly

## Labor and Employment Law Report

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### D.C. Circuit Remands New York, New York Handbilling Case

The United States Court of Appeals for the D.C. Circuit recently remanded the two National Labor Relations Board decisions in *New York New York Hotel & Casino*, 334 NLRB No. 87 and 334 NLRB No. 89 (collectively referred to as the “NYNY decisions”) to the Board for further proceedings, finding that the Board did not support its position that employees of an independent contractor of the Casino have organizing rights equal to that of the Las Vegas Casino’s employees. *New York New York LLC d/b/a New York New York Hotel & Casino v. NLRB*.

The underlying NYNY decisions involved employees of Ark Restaurants, the operator of several restaurants within the New York New York Hotel & Casino. The employees at issue worked exclusively at Ark’s properties located within the Casino. The dispute arose when several off-duty Ark employees went to the Casino and passed out handbills to guests. In one of the cases, the employees passed out the handbills in the Casino’s porte-cochere area; in the other they were in the porte-cochere and in front of two of Ark’s restaurants, America and Gonzalez y Gonzalez. In response, the Casino asked the employees to cease their activity and, when they refused, called the police and had the employees cited for trespass.

The NLRB concluded in both cases that even though the employees worked for an independent contractor of the Casino and did not work *for* the Casino, they had a legally protected right to be on the Casino’s private property because they worked on that property.

The Board reached its holding by relying on prior Board precedent in *Southern Services* and *Gayfers Dept. Store* which required employers to allow employees of subcontractors the same access rights enjoyed by their own employees, which meant the property owners had to allow the subcontractor employees to distribute handbills in non-work areas during non-working time. Thus, the implication of the NYNY decisions was that an employer/property owner must permit tenant/subcontractor employees the same access rights as those granted to its own employees.

On petition for review and a cross-application for enforcement of the Orders of the NLRB, the United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board’s Orders and remanded the NYNY decisions to the Board to consider the following issues, namely:

- 1) Does the fact that the Ark employees work on the Casino’s premises give them the right to engage in solicitation and distribution in non-working areas of the Casino on non-working time?
- 2) Are Ark employees invitees of some sort whose rights are inferior to those held by employees of the Casino?
- 3) Should Ark employees be treated as nonemployees when they distribute literature on the Casino property outside of the Ark leasehold?

4) Because the Ark employees in question returned to the premises after work, could they therefore be considered guests of the Casino?

5) Is it significant that Ark employees were communicating to guests and customers of the Casino, and possibly the Ark restaurants, rather than to fellow Ark employees?

Additionally, the Circuit Court denounced the Board’s reliance on *Southern* and *Gayfer’s* in the NYNY decisions, finding that neither case considered the well-established principle that the scope of Section 7 rights is determined by an individual’s status as an employee or nonemployee.

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The Court determined that the critical issue on appeal was “whether individuals working for a contractor on another’s premises should be considered employees or nonemployees of the property owner.” Concluding that the Supreme Court opinions provide no clear answer as to whether employees of independent contractors are entitled to the same rights to solicit and distribute as employees of the property owner, and that the Board reasoning in the NYNY decisions was flawed, the Court remanded the cases to the Board for further proceedings in which it directed the Board to answer the above questions by considering “the policy implications of any accommodation between the Section 7 rights of Ark’s employees and the rights of [the Casino] to control the use of its premises, and to manage its business and property.”

In The Courts

## Arbitration Pact In Employee Handbook Dismissed as Unenforceable

The Tenth Circuit Court of Appeals recently held that a mandatory arbitration agreement contained in the Paradise Hills Golf Club’s employee handbook is unenforceable, because the language could be interpreted to permit employer modification of the agreement without notice. *Dumais v. American Golf Corp. dba Paradise Hills Golf Club*.

The employee handbook in question had two contradictory provisions dealing with the power of American Golf, the course operator, to amend the arbitration agreement at will. Therefore, the court opined that plaintiff was not obligated to arbitrate her discrimination claims.

American Golf’s handbook contained a statement which authorized the employer to amend anything in the handbook, except for an employee’s at-will status and the mandatory arbitration agreement. Similar language was used in the arbitration agreement. Employees were, however, required to sign a form authorizing American Golf to amend any portion of the agreement except for an employee’s at-will status. Conspicuously absent was any reference to the arbitration agreement.

Teresita Dumais was a three-year employee of Paradise Hills. She resigned and filed a discrimination charge with the EEOC, and then a claim in federal court. The U.S. District Court for the District of New Mexico rejected a motion

by American Golf to compel arbitration, holding that the employment contract was illusory, was not supported by consideration, and lacked mutuality.

The Circuit Court pointed out that ambiguities in contracts are generally construed against the drafter, and agreed that this case should be treated no differently. Judge Monroe McKay stated the “contract at issue is a form contract effectively written by American Golf without Appellee’s input or any negotiations with her. The power American Golf enjoyed in constructing the Handbook in the manner it preferred justifiably includes the burden of the document’s shortcoming in each instance.”

Additionally, the court stated that, where, as here, “an arbitration agreement allow[s] one party the unfettered right to alter the arbitration agreement’s existence or scope,” that agreement is illusory and will be unenforceable.

The court rejected American Golf’s assertion that it should apply the presumption in favor of arbitration. The court declared that such a presumption disappears when the crux of the matter is “the existence of a valid arbitration agreement,” and since the court concluded the agreement to arbitrate was illusory, “the presumption in favor of arbitration is inapplicable.”

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*In The Courts*

## Forty-Year Employee Has Age And Race Discrimination Claims Reinstated

The U.S. Court of Appeals for the Tenth Circuit has decided that Arcenio Garcia, a forty-year employee of Pueblo Country Club (PCC) in Colorado, has presented evidence sufficient to create a material fact as to whether the club committed age and race/ethnicity discrimination by either eliminating his position or renaming it and replacing him with another employee. *Garcia v. Pueblo Country Club*.

In reinstating Garcia's claim, the Tenth Circuit reasoned that Garcia presented sufficient evidence disputing the Club's position that Garcia's job had been eliminated and he had not applied for the new position. The district court had previously granted summary judgment for the employer, finding that Garcia's failure to apply for the newly created position was fatal to his claims under the Age Discrimination in Employment Act and the Civil Rights Act of 1866.

The district court also stated that Garcia did not show any "adverse action" even if PCC eliminated his position, pointing out that he was offered another position at the club as a repair/maintenance manager. Garcia declined the position and resigned. The Court concluded that the "adverse action" requirement under both the ADEA and the Civil Rights Act is liberally construed to include detrimental changes in employment benefits or status. The Tenth Circuit noted that whether Garcia quit or was discharged was a disputed fact, but that Garcia "can likely demonstrate, at the very least, 'a decision causing a significant change in benefits,' i.e., his eventual termination."

Garcia, who had worked for PCC for more than forty years, was working as a grounds maintenance superintendent in June 1998. This lawsuit contends that he had always received positive job performance reviews and had been praised by both Club members and the PCC Board of Directors.

The Club made a decision in 1997 to spend \$2.5 million to modernize its irriga-

tion system. A new person was also hired by the Board of Directors to run the golf course. The board drafted and finalized a job description for "golf course superintendent" in March 1998 and hired a 41-year-old individual to fill the job three months later.

Garcia's job description shared many functions with the new "golf course superintendent," and he was subsequently told that his job was being eliminated. Garcia was offered a lower-level position as repair/maintenance manager, but declined, leaving the Club's employment.

The lower court reasoned that the elimination of Garcia's position was a crucial issue to his discrimination claim because if the golf course superintendent was a new job, then to establish a prima facie case, Garcia would have to show he applied for the position and was rejected. However, if the position of golf course superintendent was merely a renaming of Garcia's position, he could proceed with his claim whether or not he applied for the new position.

The district court earlier concluded that PCC eliminated Garcia's job based on the new position's distinct job description and a salary that was 40 percent higher than Garcia was earning. The court reasoned that Garcia's failure to apply for the position precluded him from establishing a prima facie case of discrimination based on the Club's failure to consider him for the superintendent's position.

Garcia appealed, and the Tenth Circuit agreed that the two key issues in the suit were whether Garcia's job had been eliminated and whether the golf course superintendent's job was a new position. The appeals panel stated that the evidence was ambiguous, and a jury should determine whether Garcia's job was eliminated or whether, under the pretext of redefining Garcia's job as golf course superintendent, PCC discharged an over 60 Hispanic employee in favor of a younger, non-Hispanic new hire.

"We acknowledge that PCC may alter or upgrade the responsibilities of its employees, and that courts should 'refrain from intruding into an employer's policy apparatus or second-guessing a business's decision-making process,'" the Tenth Circuit said, but "on the other hand, we also recognize that an employer should not 'be allowed to accomplish an adverse [employment action] with invidious intent through layoff and rehiring when the same action would be impermissible if done in the course of employment.'"

The Tenth Circuit further opined that the fact-finder should examine "whether there exists a meaningful, qualitative change in the contractual relationship" in determining if "a new or distinct contractual relationship was formed" by PCC's announcement of the job of golf course superintendent. Because it found the evidence on whether the new position differed from Garcia's to be mixed, the appeals court ruled that the jury must determine the answer.

The court stated that salary and employee duties were factors to be considered. "Although no bright-line test exists for evaluating a qualitative change in an employment relationship, we may consider whether a position that was previously non-supervisory became supervisory, or whether one position was hourly and one salaried...Here, the record indicates that both positions were supervisory, both were salaried, and both had analogous levels of responsibility and duties, the primary language change appears to focus on the capacity to operate an irrigation system and the ability to act as a turf specialist. Garcia believed himself qualified to perform each task delineated in the 'new' job description, and he presented testimony from his supervisor in support of that assertion."

For this reason, the Tenth Circuit "disagree[d] with the district court that the evidence of job elimination is 'uncontroverted.'"

### Bargaining Developments

## Chicago Hotel Employees Ratify New Four-Year Contract

Members of the Hotel Employees and Restaurant Employees union ratified a new four-year contract covering nearly 7,300 employees at 27 hotels in the Chicago area. Locals 1 and 450 approved the agreement by a vote of 892-153. The new contract runs from Sept. 1, 2002, through August 31, 2006.

The new agreement was reached after Illinois Governor George Ryan intervened and mediated intense negotiations between HERE and the hotels for five days, averting a strike. Had the hotel employees gone on strike, it would have interfered with the International Manufacturing Technology Show, which brings in approximately 120,000 visitors annually and more than \$221 million to the city of Chicago.

The new contract provides increases in hourly wages for nontipped employees by \$3.37 over the length of the agreement, while employee costs for family medical coverage costs will decrease by 65 percent over the four-year period.

Nontipped employees will receive an hourly raise of \$1.17 during the first year

of the agreement, and annual increases of 70 cents per hour for each of the three remaining years. Tipped employees receive an hourly increase of 50 cents per hour in the first year, and 30 cents for each of the three remaining years. The new contract also reclassifies the bus staff as nontipped employees.

Banquet employees will also benefit under the new agreement. They will get a 20 cent per hour raise in the second and fourth years of the contract, and during the first and third years of the agreement, a .25 percent increase in their portion of the service charge. Currently, minimum service charges range from 17 percent to 19 percent.

The new contract provides for employee monthly family medical premiums to decrease from a current cost of \$85 to \$65 during the second year of the contract, and then to \$45 and \$30 in the third and fourth year, respectively. Medical coverage was crucial in negotiations; hotel employees in certain other cities, including New York, do not have to pay any monthly premiums for family medical

coverage.

The new agreement is the first Chicago contract to provide hotel employees with paid sick leave. One sick day is granted during the first year, two more days are added during the second year, and a fourth day is added during the final year of the agreement. Also, for the first time, the agreement provides employees with a paid 15-minute rest break each day.

The Chicago pact further restricts hotel subcontracting; a newly negotiated proviso requires employers to first negotiate with the union prior to subcontracting. If work is subcontracted, employees of subcontractors must be paid according to union scale.

The contract also contains language dealing with immigration status issues. Under the terms of the agreement, employees having immigration disputes with the Immigration and Naturalization Service will have a year to correct their documentation problems. City hotels further agreed to provide employees with a paid holiday if they were being sworn in as U.S. citizens.

### Verdicts and Settlements

## \$500,000 In Overtime Payments to Bagel Chain Assistant Store Managers

The New World Restaurant Group has agreed to pay approximately \$500,000 in back pay to assistant store managers who were erroneously treated as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA).

The settlement covers over 400 employees working in 27 different states for New World Restaurant Group chains operating as Noah's New York Bagels and Einstein Bros. Besides compensating the employees for lost wages, New World was required to perform a nationwide audit to determine the number of hours worked by its assistant managers.

The results of the audit showed that assistant store managers were averag-

ing about 50 to 51 hours per week. The FLSA requires that hours worked by a non-exempt employee in excess of 40 a week be compensated at a rate of one and one-half times the employee's regular rate of pay.

The investigation into New World's operations began in March of this year, and in April, the company switched the managers from a salary to an hourly income. The back pay award covers the period from June 2001, when New World acquired the shops, to March 2002, when New World discontinued its practice of classifying the assistant store managers as exempt.

### Newsworthy

## Bill Proposed To Ban IRS Practice Of Estimating Tips For Tax Liability

In response to the recent Supreme Court decision in *United States v. Fior D'Italia Inc.* (see Summer 2002 HIQ), Representatives Wally Herger (R-Calif.) and John Tanner (D-Tenn.) introduced the Tip Tax Fairness Act. The new bill aims to prohibit the Internal Revenue Service's practice of estimating tips to calculate restaurant employment tax liability on unreported tips. The Supreme Court declared this IRS practice to be legally authorized by the Internal Revenue Code in the *Fior D'Italia* decision.

Under the new bill, an employer would still be liable for Social Security taxes on unreported tips paid to an employee, but only after the IRS has established the *actual* amount of tips received by that employee.

At The Board

## NLRB Rejects Ballot Challenge By Union In Engineers' Election

The National Labor Relations Board rejected the International Union of Operating Engineers' challenge to an engineering coordinator's ballot at Caesars' Tahoe, finding that the employee performed "plant clerical" duties, engaged in bargaining unit work, and shared a community of interest with other bargaining unit members. *Desert Palace, Inc. dba Caesars' Tahoe and Int'l Union of Operating Engineers, Local 39.*

Caesars' operates a Hotel and gaming casino in Stateline, Nevada. The union filed a petition to represent certain engineering employees, and the parties stipulated which classifications would comprise the unit. The results of the election were 19 ballots in favor and 18 against the union, with one challenged ballot belonging to the engineering coordinator.

The union contended that the coordinator should be excluded from the bargaining unit because he performed clerical work, did not share a community of interest with other bargaining unit employees, and because he was a supervisor. Conversely, Caesars' maintained that the coordinator was a dual-function, non-supervisory employee who shared the interests of the bargaining unit.

The hearing officer recommending sustaining the challenge, finding that the pre-election stipulation regarding bargaining unit classifications evidenced an intent to exclude the engineering coordinator position. He further concluded that the coordinator was not a supervisor, nor was he a dual-function employee.

On review, the Board rejected these findings, holding that the stipulation was ambiguous and the parties' intent could not be clearly discerned from extrinsic evidence. However, based on a community-of-interest standard, the Board determined that the engineering coordinator position should be part of the unit.

The unit stipulation excluded "office clerical employees," and the hearing officer had categorized the coordinator's primary duties as "office and/or plant clerical work." The Board concluded that the hearing officer "failed to make a crucial distinction between office and plant clericals," and questioned the hearing officer's characterization of certain clerical tasks as the coordinator's primary duties. The Board found that the engineering coordinator's clerical duties were plant clerical in nature, and thus he did not fall under the unit exclusion.

Since the parties' intent was not clear, the Board utilized a community-of-interest standard, weighing a number of factors. These included "distinctions in the skills and function of particular employee groups, their separate supervision, the employer's organizational structure, differences in wages and hours, integration of operations, interchange and contacts."

After weighing the factors, the Board concluded that the engineering coordinator shared a community of interest with other bargaining unit employees. He possessed the same skills and performed the same duties as many other maintenance engineers. Like other engineers, he also owned his own tools. He reported to the same Engineering Manager as all the other employees in Caesars' engineering department, and received approximately the same pay and benefits as engineering technicians.

On this basis, the Board overruled the union's challenge, concluding that the engineering coordinator position should be included in the bargaining unit. The Board issued an order directing the coordinator's vote to be counted and tallied, with the appropriate certification of the election issuing thereafter.

Verdicts & Settlements

## Country Kitchen Settles Gender and Race Discrimination Claims For \$75,000

Country Kitchen Restaurants reached a settlement with the EEOC following allegations that five employees were subject to sexual harassment and gender discrimination which resulted in their constructive discharge. *EEOC v. C.K. Family Restaurants of Globe Inc., d/b/a Country Kitchen Restaurant.*

Two male teenage employees of Country Kitchen were purportedly verbally and sexually harassed, while three

female employees allegedly endured sexual innuendo and touching. Despite agreeing to the settlement, Country Kitchen denied the allegations.

Each individual will be paid \$15,000 in installments pursuant to the terms of a four-year consent decree. Also, Country Kitchen must schedule annual training sessions on sexual harassment and gender-based harassment and retaliation. The company also agreed to prevent employ-

ees from discussing sexual conduct and making sexual jokes while at work, or bringing sexual objects and sexually oriented materials to work. The consent decree also requires the company to inform its vendors, suppliers, and clients of its new anti-harassment policy, and sever business relations with parties that will not adhere to similar practices.

### In The Courts

## Tip-Sharing Policy At Restaurant Violates Fair Labor Standards Act

U.S. District Court Judge Alvin Hellerstein ruled that the New Silver Palace Restaurant violated the Fair Labor Standards Act when it forced servers to share their tips with other employees who had an ownership interest in the restaurant. *Chung v. New Silver Palace Restaurant, Inc.*

The restaurant's policy had previously been declared illegal by a New York state court and the National Labor Relations Board under the restaurant's previous owner. An injunction had also been issued against the same practice in 1995 by a New York State Supreme Court justice who found the practice illegal under state law. A short while later, an NLRB administrative law judge directed the restaurant to bargain with the union and to cease discrimination against union members.

At the time of these two decisions, the restaurant was in bankruptcy; after failing to reach a new contract with the union, the restaurant closed in 1997. An auction was held, the restaurant's assets were

purchased, and it reopened under new ownership.

The new owners began utilizing the previous tip pooling policy, wherein waiters pooled their tips with busboys and members of management who worked on the restaurant floor. The members of management were referred to as "black jackets," because they wore business suits at the restaurant. The black jackets all had an ownership interest in the restaurant and served as officers or directors of the corporation. Further, the black jackets could set employee work schedules and hire and fire employees.

When the new owners began the tip sharing practice, the union again filed charges with the NLRB. The Board went to court seeking an injunction to bar tip pooling. Judge Hellerstein issued a temporary injunction, but the owners of the New Silver Palace had already ceased the practice in November 1999.

The servers filed suit under federal and state laws seeking to recover tips from August 1997 through November

1999 when the restaurant ended the tip sharing practice. This past July, New Silver Palace again filed for reorganization under Chapter 11. Judge Hellerstein declared that four individual black jackets who were shareholders in the restaurant were not insulated from suit. He found these individuals to be employers under the FLSA, and held them liable for damages in an amount to be determined at a later proceeding.

The New Silver Palace claimed the tip-sharing procedure complied with FLSA regulations, and that the black jackets could take part since they regularly received tips and performed common service functions such as delivering food and clearing tables. The court disagreed, declaring that "[D]efendants cannot ascribe to 'tradition' that which has been adjudged to be illegal." The court stated that the forced sharing of tips with members of management is illegal, irrespective of whether management staff helps with service functions.

### Bargaining Developments

## First Contract Approved At San Francisco Marriott

A first contract at the San Francisco Marriott has been ratified by nearly 900 employees who are members of the Hotel Employees and Restaurant Employees Union. Negotiations between HERE Local 2 and the Hotel had been conducted for nearly six years.

The contract runs from September 12, 2002 through August 14, 2006, and covers housekeeping, restaurant, bar, kitchen, banquet, PBX, and bell stand employees. It contains a successorship clause which provides that a subsequent operator of the Hotel must retain the bargaining unit employees and adhere to the union contract.

The contract prohibits food and beverage jobs from being outsourced, and limits the workload of housekeeping by requiring that cots, rollaway beds, cribs, number of room checkouts, and floor

travel be considered with regard to work assignments.

Additionally, the terms of the agreement grants employees 24 months to rectify any immigration problems. Seniority and grievance procedures are also established in the first contract.

Under the new contract, Marriott will continue to pay for its employees' entire health premiums. All employees who work at least 14 hours per week will receive benefits after the first quarter of employment. In accordance with other Local 2 contracts, Marriott agreed to pay additional costs for medical coverage if they increase.

Also, the contract has child care and elder care benefits, and commencing in September 2004, employees will be eligible for a legal fund and an HIV Fund. Vision benefits for Marriott employees

begin in September 2004.

New hires will earn six days of personal time off in their first year of employment. This PTO can be used for sick time, days off, or for cash value. Paid leave increases to seven days in the second year, and eight in the third and fourth years. Additionally, the agreement provides eight paid holidays a year. Double vacation pay will be credited to tipped employees, including bell staff, servers, banquets, coffee and back aisle employees. Part-time employees will receive full vacation, holiday, and leave benefits. However, employees can only accrue 320 hours of vacation pay.

Lastly, employees may choose whether to participate in a profit-sharing plan, or have the Hotel make a contribution to the union pension plan on their behalf.

### In the Courts

## Ninth Circuit Rules Homosexual Male Can Proceed With Title VII Sex Harassment Claim

The Ninth Circuit reversed a prior panel decision and concluded in a 7-4 decision that a gay butler at the MGM Grand Hotel in Las Vegas can proceed with his sexual harassment claim under Title VII. *Rene v. MGM Grand Hotel Inc.*

Plaintiff Medina Rene worked at the MGM Grand as a butler who catered to the Hotel's wealthy and high-profile clientele from 1993 to 1996. All the butlers Rene worked with were male. In his complaint, he alleged that his male supervisor and co-workers subjected him to verbal and physical harassment over a two-year period that was sexual in nature. That conduct included grabbing Rene in the crotch, poking him in the buttocks with their fingers, whistling at Rene, calling him "sweetheart," and showing him pictures of men engaged in sexual encounters. Rene claimed he was harassed because he is gay.

The U.S. District Court for the District of Nevada granted summary judgment in favor of MGM, holding that Rene failed to state a claim because Title VII did not extend to sexual orientation discrimination. In 2001, a split panel of the Ninth Circuit affirmed the holding of the district court, reasoning that Rene could not prove that the harassment occurred because of his sex. Subsequently, the *en banc* court agreed to rehear the case.

Following a rehearing, the full Ninth Circuit reversed. The Court stated that the sexual orientation of an employee is "irrelevant for the purposes of Title VII. It neither provides nor precludes a cause

of action for sexual harassment." The Court considered that in Title VII cases where a woman was subjected to sexually offensive touching, relief was never denied based on her actual or perceived sexual orientation. Thus, the Court reasoned that "if sexual orientation is irrelevant for a female victim, we see no reason why it is also not irrelevant for a male victim." Additionally, the majority concluded that Rene was harassed because of sex, as the offensive touching of Rene "targeted body parts clearly linked to his sexuality."

The Ninth Circuit relied on the Supreme Court decision in *Oncale v. Sundowner Offshore Servs. Inc.* which held that Title VII forbids all severe or pervasive offensive touching, regardless of whether the victim and perpetrator are of the same gender. The Court also cited *Oncale* in concluding that although Rene essentially worked in a single-sex environment, that did not prevent the conduct he endured from being actionable discrimination.

There were three concurrences in the seven-justice majority. In a separate concurrence, Judge Pregerson wrote that in addition to qualifying as sexual harassment, the conduct also constituted actionable gender stereotyping harassment. The concurrence cited *Nichols v. Azteca Restaurants* (See Summer/Fall 2001 HIQ), a Ninth Circuit decision following the Court's earlier decision in *Rene*, where a gay male employee was mocked for his effeminate mannerisms and the

Court allowed him to proceed on a Title VII claim.

Four justices dissented, contending that while "degrading and humiliating," Rene was treated poorly based on his sexual orientation and not discriminated against based on sex. Therefore, his claim was not actionable under Title VII, as sexual orientation is not a protected classification. Judge Proctor Hug Jr., who authored the majority in the 2001 split panel decision that rejected Rene's claim, wrote for the dissent. Hug stated that the majority was misinterpreting *Oncale*, which provided that conduct was actionable only if Title VII's statutory requirements were met. Hug stated that under *Oncale*, a plaintiff needed to show that he or she was harassed (1) because the harasser was motivated by sexual desire; (2) because the harasser was motivated by animosity towards the challenged gender in the workplace; or (3) because the harasser treated one gender differently than the other. Since Rene's claim was based on the argument that he was treated differently due to his homosexuality, the dissent argued that Rene failed to satisfy any of these requirements.

Hug distinguished *Rene* from the *Nichols* decision, noting that *Nichols* alleged in his complaint that he was harassed due to effeminate characteristics. Rene, on the other hand, never alleged harassment on any basis other than sexual orientation, which, according to the dissent, is "not actionable under Title VII."

### Verdicts & Settlements

## Mirage Settles EEOC Race Discrimination Suit For \$1.1 Million

The Las Vegas Mirage Hotel and Casino reached a \$1.1 million settlement with the EEOC regarding a lawsuit alleging discrimination against Hispanic and black applicants in 1996 and 1997. *EEOC v. Mirage Casino-Hotel*.

Minority individuals who applied for service jobs at the Hotel between January 1, 1996 and May 31, 1997, will share in approximately \$840,000 of the settlement. The remain-

ing \$250,000 will be used for training programs at the Hotel. Additionally, the Hotel must establish an internal complaint procedure and keep records in accordance with the terms of the settlement.

In reaching the settlement agreement, the Hotel denied all liability.

*In The Courts*

## Union Cannot Leaflet or Rally In Lincoln Center's Fountain Plaza

The Court of Appeals for the Second Circuit recently held that the fountain plaza in Lincoln Center is not a traditional public forum for First Amendment purposes, thus Hotel Employees and Restaurant Employees Local 100 does not have a constitutional right to distribute leaflets and hold an organizing rally in the plaza. *HERE Local 100 v. New York City Dep't of Parks & Recreation*.

Although the plaza area is owned by the City of New York and under the jurisdiction of the New York City Department of Parks and Recreation, Lincoln Center is the licensed manager and maintains a policy of limiting expression in the fountain plaza to events which have a "performance, entertainment, or artistic component."

HERE Local 100 applied in 1999 to hold a 40-person organizing rally and to distribute leaflets in the fountain plaza area in support of food service employees at the Metropolitan Opera House, which is part of Lincoln Center. The application was rejected.

The Union sued Lincoln Center and the Parks Department in federal court, alleging that its constitutional right of free speech was violated. The U.S. District Court for the Southern District of New York denied the Union's request for a preliminary injunction, concluding that the plaza was a limited public forum, and that Lincoln Center's policy of restricting the permissible forms of expression to those that center on performance, entertainment, and artistic endeavors is viewpoint neutral and reasonable given the plaza's purpose. Summary judgment was later granted in favor of the City and Lincoln Center. On appeal, the Second Circuit affirmed, holding that the fountain plaza was not a tra-

ditional public forum for purposes of the First Amendment.

The Fountain Plaza is bound by Avery Fisher Hall, the Metropolitan Opera House, the New York State Theatre, and Columbus Avenue. The three buildings are all part of Lincoln Center. There is a public park, Damrosch Park, located in Lincoln Center, and another park, Dante Park, located across the street from the Center. The Parks Department is responsible for expressive use permits with regard to those parks and the sidewalks surrounding Lincoln Center. However, Lincoln Center is responsible for managing and maintaining the fountain plaza under a licensing agreement with the City, which includes the authority to schedule events in the plaza. Although the Second Circuit stated that "the Plaza's design clearly invites passers-by to stroll through or linger, the Plaza was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression."

The Union claimed the plaza is a traditional public forum, and accordingly, any restrictions which are content-based must serve a compelling government interest and be narrowly tailored to achieve that interest. Examples of traditional public fora include streets, sidewalks, and parks. The City and Lincoln Center, on the other hand, maintained that the plaza was a nonpublic forum, or at least a limited public forum. In these fora, the government may impose speech restrictions so long as they are reasonable and viewpoint neutral.

The Court rejected the Union's argument that the fountain plaza was a traditional public forum, but declined to reach the issue of whether the plaza was a nonpublic forum or a limited public forum, because in either case, the policy

advanced by the City was both viewpoint neutral and reasonable. Despite the fact that the Parks Department was responsible for the plaza, the Union could not show that the City treated the plaza area as a public park, particularly since scheduling authority over the plaza area was delegated to Lincoln Center, while authority over expressive uses for the nearby Dante and Damrosch Parks was retained by the City.

Further, the Court opined that "by restricting organized expression to arts-related presentations, the City has evidenced an intent to conserve the Plaza's function as an extension of the performing arts complex." The Court declared Lincoln Center's policy regarding plaza events "viewpoint neutral on its face and as applied to the Union's proposed activities," and given that the "Lincoln Center complex was created as an enclave for the cultural arts," the Court viewed the restriction against political rallies, demonstrations, and leafleting as "reasonably further[ing] the City's intentions."

Although the Court conceded that leafleting is "less disruptive" than demonstrations and rallies, the Second Circuit distinguished the fountain plaza from sports complexes and airports where bans on leafleting have been rejected. The Court stated that "the City has created a fountain plaza that serves as the centerpiece of a prominent performing arts complex, and has sought to preserve the plaza as an area singularly dedicated to Lincoln Center events and other artistic performances." Because the neighboring parks and sidewalks were available for the Union to publically express their position, the Court also considered the ban on leafleting at Lincoln Center's fountain plaza reasonable.

In The Courts

## Front Pay Not Considered In Determining Liquidated Damages Under FMLA

The South Carolina Supreme Court held that a Waffle House restaurant manager who took authorized medical leave following a work injury and was subsequently terminated for absenteeism should not have her award of 19 years of front pay considered in calculating liquidated damages pursuant to the Family and Medical Leave Act. *Drew v. Waffle House Inc.*

The FMLA mandates that employers are liable for damages in the amount of lost pay plus benefits, or actual monetary losses plus interest for violations of the Act. Additionally, an employer is liable for an equal amount in liquidated damages. However, following a Fourth Circuit ruling the Court held that front pay is actually equitable relief and not damages, and accordingly should not be included in calculating liquidated damages pursuant to the FMLA.

The lower court had initially awarded Plaintiff Norma Drew 19 years of front pay, but the state Court of Appeals reduced the award to four years, calling it "highly speculative." On appeal, the Supreme Court concluded that Waffle House did not demonstrate a reason unrelated to Drew's medical leave which would have justified her termination, nor did it show any reason she could not continue working until age 65, the age the lower court had estimated. As such, the Court reversed the Court of Appeals decision.

Drew's award totaled \$136,030 in back pay and prejudgment interest, and an equal amount in liquidated damages. The front pay award totaled \$304,846, for a total award of \$576,906.

At the Polls

## Santa Monica Living Wage Defeated By Voters

A majority of voters in Santa Monica, California, voted against a referendum which would have required targeted businesses and companies with city contracts to pay a "living wage" significantly higher than either state or federal minimum wage. Just over 51% of the voters rejected the measure, which would have required a "living wage" of \$10.50 per hour with health care benefits, or \$12.25 without benefits, for large private businesses in the coastal zone and employers with city contracts. The Santa Monica ordinance was the first of its kind to extend a "living wage" ordinance to purely private sector employers.

The defeat at the polls was particularly surprising given that the Santa Monica

City Council passed a virtually identical law in 2001. However, opponents of the bill gathered enough signatures to place a referendum on the ballot.

Besides applying to city contractors, the living wage measure targeted private employers in the coastal and downtown areas with gross annual receipts of \$5 million. The employers most significantly impacted were the beach front luxury hotels and restaurants. Had the measure passed, over 2,000 hotel employees working in coastal zone hotels would have been affected.

The results of the referendum are non-appealable, and a proposal for a similar law cannot be brought for at least a year.

Bargaining Developments

## Disney Recognizes Union, Agrees To Bargain With Part-Time Employees

Disney has agreed to recognize the Service Trades Council as the bargaining representative for nearly 5,800 part-time employees at Walt Disney World in Buena Vista, Florida, following a check of signed authorization cards. The Council already represents nearly 25,000 service employees at Disney. As part of an earlier agreement, Disney agreed to remain neutral while the Council sought to organize its part-time employees, and further agreed to recognize the Council if majority support were demonstrated through a card check.

The new unit consists of Disney employees who ordinarily work less than 25 hours a week, or those who work more than 25 hours a week, but for less than seven months out of the year. The part-time employees are seeking job security and higher wages. A majority of the unit members currently make \$6.50 to \$6.89 an hour. Benefits are not a significant concern to the unit, since the Disney job is a second job for many part-timers.

Preliminary discussions between the parties are currently underway.

Verdicts and Settlements

## Quality Inn Settles Sex Harassment Claim

A Quality Inn/Econo Lodge in Texas has settled EEOC allegations that the owner and general manager sexually harassed a female employee. The settlement amounted to \$19,650. *EEOC v. Rest Well Corp., d/b/a Quality Inn/Econo Lodge.*

The suit was filed by the EEOC on

behalf of Lillian Rueda, a housekeeper for the hotel, who alleged a hostile work environment and constructive discharge. Rueda purportedly endured offensive touching and groping, requests for sexual favors by the owner and general manager, and other sexist remarks and comments.

Bargaining Developments

## HERE Local 5 and Hawaii Hotels Reach Four-Year Agreement Covering 4,000 Employees

Hotel Employees and Restaurant Employees Local 5 recently reached new four-year contracts with five Sheraton and Hilton hotels covering approximately 4,000 employees in Honolulu, Hawaii. Four Sheraton properties are covered by the new contract: Sheraton Royal Hawaiian, Sheraton Waikiki, Sheraton Mona Surfrider, and Sheraton Princess Kailulani. The Hilton Hawaiian Village agreed to an identical contract.

Under the new agreements, employee wages will increase by \$1.60 over the four-year period. The new agreements also continue to provide the current level of health care benefits to employees without any premium cost. The Hotels agreed to increase their contributions to the health and welfare fund from \$2.60 per hour to \$3.20 per hour by January 2006, and to make additional contributions to the pension fund. The new contracts also have successorship language imposing the contract terms and conditions on any purchaser in the event of a sale of the property.

The terms of the new agreements were ratified by a vote of 1,174 to 4.

In The Courts

## Labor Department Targets Chinese Buffets For FLSA Violations

The owners of 11 buffet-style Chinese restaurants in Chicago have been sued by the Department of Labor for over \$1.5 million in back wages and liquidated damages allegedly due employees. *Chao v. New China Buffet of Chicago, Inc.* The Wage and Hour Division alleges that the restaurants violated the Fair Labor Standards Act, and seeks damages on behalf of 150 cooks, busboys, and servers, as well as an injunction to prevent

In the Courts

## Court Holds Hotel Need Not Disclose Manner of Dividing Service Charge

The California Court of Appeals recently held that the Wyndham Plaza Hotel in San Diego did not commit deceptive business practices by failing to disclose to Hotel patrons that a portion of the 17 percent service charge on room service deliveries went to the servers. The Court affirmed a lower court's demurrer in favor of Defendant, holding that the Hotel could distribute the service charge at its own discretion, since Hotel guests were free to provide whatever gratuity they desired or refrain from patronizing room service altogether. *Searle v. Wyndham Int'l Inc.*

Plaintiff Linda Searle stayed at the Hotel, and ordered room service off a Hotel menu which read: "A 17% service Charge and Applicable State Tax will be added. In Room Delivery Charge \$3." However, in addition to the service and delivery charges, the bill that Searle received had a blank line for the customer to add a gratuity.

Searle filed suit against the Hotel, alleging that the Hotel violated Business and Professions Code Section 17200 by failing to inform patrons that a portion of the service charge is paid to the server. Searle further asserted that the service charge unfairly forces Hotel guests to pay the server a gratuity which should be entirely voluntary.

In rejecting Searle's claim, the Court

stated that "Searle has not cited any law which Wyndham's room service practice violates." Therefore, the complaint could not be maintained on the grounds that the Hotel engaged in an unfair or deceptive business practice.

With regard to Searle's claim that the service charge compels patrons to leave a gratuity, the court stated that neither logic nor custom and usage support the contention that the service charge paid to the servers must be treated as a gratuity. The Court went on to say that the service charge is a mandatory charge which the Hotel is free to disburse at its discretion, and the manner of distribution is "of no direct concern to [H]otel guests."

The Court further opined that the Hotel's decision to compensate room service servers with the service charge did not interfere with the custom of tipping. Tipping is entirely at the discretion of the customer, but the server's compensation by the Hotel was deemed of "no legitimate interest" by the Court.

The Court stated that the Hotel's practice of not informing patrons that the servers share in the service charge is not deceptive, because Hotel guests do not have a right to know how the Hotel apportions any revenue whatsoever, including its service charges.

future violations.

The suits allege that the restaurants' owners often paid their employees less than the federal minimum wage of \$5.15 an hour and required them to work overtime without additional compensation. The owners of the restaurants were also accused of failing to keep accurate records of time worked by their staff.

The actions were filed by the Department following a three-year inves-

tigation into the wage and hour practices of buffet-style Chinese restaurants in the Chicago area. Some of the restaurants had previously been warned by the Department to correct unlawful wage practices, but violations purportedly continued, leading the Department to commence its investigation, and ultimately bring suit.

In The Courts**ERISA Preempts Retired Hotel Employees' Claims**

A claim brought in state court by former employees alleging that the Greenbrier Hotel breached its promise to provide post-retirement life insurance benefits is preempted by the Employee Retirement Income Security Act (ERISA), according to the U.S. District Court for the Southern District of West Virginia. *Arnold v. CSX Hotels Inc.*

The Greenbrier is a West Virginia resort hotel. The plaintiffs were all former employees retired from the Hotel, and in their complaint they allege that the resort promised them post-retirement life insurance benefits equal to twice their annual salary as an incentive to work for Greenbrier. However, in October 2001, the employees received a letter stating that the Hotel had mistakenly paid the employ-

ees' life insurance premiums, and that the provision of such benefits had not been approved by the company.

The employees subsequently filed suit in West Virginia state court, alleging that the Hotel breached an agreement to provide life insurance benefits to former employees after retirement, and negligent failure to provide coverage. The Hotel removed the case to federal court, citing ERISA preemption, while the employees sought to have the case remanded to state court, arguing that ERISA did not preempt their claims. Moreover, they contended that removal was defective because the employees' attorney was not served with timely notice of the removal.

Although the employees' attorney did not receive timely notice, the court

found the Hotel acted in good faith and mailed the notice to the proper address. Therefore, the notice deficiencies did not cause the removal to be invalidated.

The court further stated that the employees' claims were ERISA preempted because a promise to provide post-retirement life insurance benefits fits squarely within ERISA as a "plan, fund, or program." According to the court, "If the Greenbrier did in fact make such a promise as part of the consideration for obtaining plaintiffs' services, the promised life insurance is...an employee benefit which is subject to ERISA."

Newsworthy**California Enacts State WARN Law**

Beginning January 1, 2003, California employers must comply with new state notification requirements for plant closings. The new laws are modeled on the federal Worker Adjustment and Retraining Notification (WARN) Act, and bear some of the same provisions, including a 60-day notice requirement in the event of a layoff or plant closing.

The California WARN Act applies to commercial and industrial facilities that employ at least 75 individuals. Appropriate notice must be given regarding a plant closing, relocation or mass layoff (a layoff of 50 employees during any 30-day period at a covered business), in addition to providing notice to the employees, the employer must notify the local workforce investment board, the state Employment Development Department, and local elected officials.

Newsworthy**Overtime Awarded To Undocumented Employee**

The United States Department of Labor recently reached an agreement with an Oregon restaurant regarding overtime compensation due an undocumented former employee of the restaurant. *Chao v. Corno*. This is the first case interpreting the Supreme Court's recent decision in *Hoffman Plastic Compounds Inc. v. NLRB*, where an employer was not required to pay backpay to an illegal immigrant, despite committing an unfair labor practice by terminating the employee for engaging in protected union activity.

The restaurant, Ye Olde Pancake House,

unsuccessfully tried to apply *Hoffman Plastics*, contending it was not required to pay the undocumented employee overtime. The Labor Department disagreed, taking the position that undocumented employees have rights under labor laws other than the National Labor Relations Act, which was the statute at issue in *Hoffman Plastics*.

Ye Olde Pancake House agreed to pay former employee Juan Murillo \$3,000 in back wages for hours worked in excess of 40 per week.

Verdicts and Settlements

## Waitress With Hepatitis States Claim Under FMLA

The United States District Court for the District of Minnesota has ruled that a waitress who has hepatitis C can sue her former employer for violations of the Family and Medical Leave Act (FMLA) and retaliation in violation of the Americans with Disabilities Act (ADA) where she was fired a short while after telling her employer that sudden and severe attacks due to her hepatitis would necessitate periodic sick leave. *Johnson v. Moundsvista Inc. dba Mermaid Supper Club*.

Plaintiff Charlene Johnson was an employee at the Mermaid from November 1999 until May 2001. An employment policy by the company required six hours notice to take sick leave so that management could reschedule another employee for the shift. Johnson discovered that she was suffering from hepatitis C in July of 2000, and told her employer the following month. She told the company that due to her symptoms, including occasional attacks of severe fatigue, stomach pain, and diarrhea, she might need occasional sick leave.

From August 2000 until May 2001, Johnson missed approximately 9 shifts as a result of her illness. Due to the quick onset of the attacks, on many of those occasions Johnson was unable to give the requisite six hours notice of her absence.

In April of 2001, the hours that Johnson normally worked on the lunch shift were reduced. The Mermaid stated that the schedule modification was actually an accommodation, since it made reschedul-

ing easier if Johnson fell ill. It was undetermined whether her overall hours were reduced. Johnson also alleged that she was disciplined twice in April for missing shifts due to illness.

Johnson was ultimately terminated on May 5<sup>th</sup> for allegedly failing to show up to work on the 3<sup>rd</sup> and 4<sup>th</sup>. She contends that the May 3<sup>rd</sup> shift had been added to the schedule after she checked it, and that when she called on the 4<sup>th</sup> to say she would be late, she was directed not to report to work at all.

Following her termination, Johnson sued. The court rejected Johnson's claims that defendant discriminated against her under the ADA and the Minnesota Human Rights Act (MHRA) by reducing her hours and terminating her employment. It agreed with the employer's contention that because Johnson was unable to meet the attendance requirements of the restaurant, she was not a qualified individual with a disability. Similarly, the court rejected claims by Johnson alleging violations by the employer of the ADA, FMLA, and the MHRA for sharing private medical information about Johnson with her colleagues. Here, the court concluded that Johnson could not demonstrate the necessary tangible injury resulting from the disclosure.

With regard to disciplining Johnson for her absences, the court stated that an employee cannot be punished for taking leave in accordance with the FMLA, but an employee can be disciplined for absences that do not fall within the

scope of the FMLA. The court found that Johnson raised a triable issue as to whether the reduction in work hours and termination were a result of FMLA absences or other absences, but the court also concluded that there was a genuine question of fact as to whether Johnson gave adequate notice of her absences.

Summary judgment was granted on the ADA claim because Mermaid established and Johnson failed to dispute that regular attendance was an essential function of her job. The court rejected Johnson's claim as a result, holding that her hepatitis C rendered her incapable of "regularly and reliably showing up for her job."

Still, the court refused to dismiss Johnson's ADA retaliation claim. To state a claim, plaintiff needed to show that she engaged in protected conduct, that an adverse employment action was taken against her, and that there was a causal nexus between the two. In the present case, Johnson's attorney contacted Mermaid following the shift reduction and the two written warnings, asserting that the restaurant was acting in a discriminatory fashion proscribed by law. Given that other Mermaid employees had similar or worse attendance records and had not been fired, the court concluded Johnson's termination could be considered pretextual by a trier of fact. Therefore, the court did not dismiss this claim despite the Mermaid's assertion that Johnson's absences were a legitimate reason for the termination.

Verdicts and Settlements

## Church's Chicken Settles Sexual Harassment Suit For \$150,000

A \$150,000 settlement of a sexual harassment lawsuit on behalf of a fourteen-year-old former employee was reached with BK Inc., the corporate owner of four Church's Chicken franchises. *EEOC v. BK Inc.*

The settlement was reached after the EEOC filed a lawsuit charging BK Inc. with failing to provide its employees and supervisors with sexual harassment train-

ing and failing to inform employees of their right to a harassment-free workplace. Under Kansas law, the EEOC also filed a constructive discharge claim.

The female employee was offered a ride home after work by her former manager at Church's, who allegedly lured her into his home and sexually assaulted her. The manager was convicted in connection with his attack on the employee, and was

sentenced to eight years in prison.

In addition to the financial settlement, BK Inc. will institute sexual harassment training for all employees and post notices with regard to employee rights. The EEOC will monitor BK Inc. to ensure compliance with the terms of the settlement.