

# Hospitality Industry Quarterly

## Labor and Employment Law Report

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### Collective Class Action Under FLSA Cannot be Joined With State Law

A federal judge has ruled that a server at a Chicago-area pizza chain cannot bring a state law class action alleging improper wage deductions in his federal collective action under the Fair Labor Standards Act (FLSA). *McClain v. Leona's Pizzeria, Inc.* The district court found that combining a state-law class action requiring proposed class members to "opt-out" with an approved FLSA collective action which required proposed class members to "opt-in" would "undermine Congress's intent to limit these types of claims to collective actions."

Plaintiff Shamus McClain's lawsuit challenged two company policies of Leona's Pizzeria, which operates 17 restaurants in and around Chicago, Illinois. McClain contended that Leona's was unlawfully using the maximum tip credit allowed under the FLSA to pay its tipped employees less than minimum wage while deducting three percent of each customer tip paid with a credit card. He also alleged that the company illegally deducts 45 cents per hour from each employee's pay because employees are permitted to consume certain food and drinks during working hours, thereby resulting in employees receiving less than minimum wage.

The district court judge authorized McClain to send a notice to all employees of Leona's so that the employees could exercise their right to opt into the FLSA collective action, since under the FLSA scheme, a party must take affirmative steps to become a member of a class seeking to redress his or her claims in federal court.

However, McClain also moved for class certification of state law claims under the Illinois Minimum Wage Act and the Illinois Wage Payment and Collection Act, and common law claims for conversion, which were based on the same alleged wage practices by the company. He contended that the requirements for class certification were met in that common questions of law and fact pertained to proposed class members, and therefore, a class action was the superior method for adjudicating the state law claims. McClain claimed that certifying the state law claims and combining them with the FLSA claims would promote judicial economy and prevent any unfair prejudice to potential class members.

In opposing McClain's request for class certification, Leona's asserted that class certification of the state law claims in conjunction with the FLSA collective action was inappropriate.

*(Please see "Collective" on page 2)*

### Replacement of "Key Employee" Does Not Violate the FMLA

A Louisiana District Court held that the Baton Rouge Marriott did not violate the Family and Medical Leave Act (FMLA) by permanently replacing a housekeeping manager while she was on medical leave since she was offered an equivalent job upon her return, which she declined to take. *Oby v. Baton Rouge Marriott.*

Before taking leave, Plaintiff Earnestine Oby earned \$41,000 a year as the housekeeping manager at the Marriott. In late March 2002, she requested and began one month of FMLA leave to care for an ill parent. That leave was extended at Oby's request. After Oby had been on leave for almost six weeks, the Hotel advised her in writing that if she did not return by May 10, she would be replaced as housekeeping manager. The Hotel followed up verbally with Oby to determine if she would return by May 10. She indicated she would not return, and that she did not have any definitive return date at that time. The hotel subsequently sent Oby a letter indicating that she no longer had a position at the Hotel.

Oby ultimately returned to the Hotel on June 21 seeking a position, but was told that her position had been filled. Oby was offered several positions in which she would make less money, but she was also offered a position as the Hotel's food and beverage manager at her previous rate of compensation. She declined the position, stating that it was not equivalent to her old position and would require her to undergo training.

Oby alleged that the Hotel's refusal to reinstate her to her housekeeping manager position on June 21 was unlawful because her replacement was not scheduled to start until June 24. However, the newly hired housekeeping manager was relocating from New *(Please see "Replacement" on page 2)*

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In agreeing with Leona’s, the district court discussed the differences between an “opt-out” class as proposed for the state law claims and an “opt-in” collective action of the FLSA claims. An “opt-out” class as proposed by McClain for the state law claims would require individuals to file a consent to be excluded from the action. The FLSA collective action, however, requires class members to consent in writing, and thus “opt-in,” in order to seek relief.

The court found that class certification “directly contrasts” with the provisions of the FLSA, and declared that “the inherently contrasting nature of opt-in versus opt-out actions would create challenges were these actions to proceed simultaneously in federal court.” Although a federal court is permitted to exercise supplemental jurisdiction over state law claims, the district court declared that such jurisdiction should not be manipulated “to drag as many members as possible into what would otherwise be a federal collective action.” For this reason, the court rejected McClain’s judicial economy argument.

In rejecting McClain’s argument that proposed class members would be unfairly prejudiced if the state law claims were not joined, the court noted that there was a longer statute of limitations for the state claims, and therefore, a separate action could timely be filed in state court.

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*In the Courts*

### Title VII Does Not Protect the Male Ponytail

**A** New Jersey district court has held that Harrah’s policy forbidding its male employees from wearing ponytails while permitting such hair styles for female employees did not amount to sex discrimination under Title VII of the Civil Rights Act, since Harrah’s grooming policy contained other sex-specific standards that applied only to women. However, the court ruled that the plaintiff could proceed on his claims that the ponytail policy was disparately applied to Caucasian males. *Wiseley v. Harrah’s Entertainment Inc.*

Plaintiff Michael Wiseley, a room service waiter at Harrah’s, contended that the hair length requirement was facially discriminatory in that it did not apply to women with ponytails. He also alleged disparate application against long-haired Caucasian males

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Orleans, and had already given two weeks notice and resigned his current employment.

In seeking summary judgment, the Hotel contended that Oby was a “key employee” whose job was filled to “prevent substantial and grievous economic injury” to the company. It also argued that it would have been unfair to force it to reinstate Oby and pay two housekeeping managers’ salaries.

Under the provisions of the FMLA, an employer does not have to reinstate a “key employee” to his or her old job if timely notice is provided to that employee that his or her medical leave is causing “substantial and grievous economic injury” to the employer’s operations. To qualify as a “key employee,” an employee must receive a salary equal to or greater than the top ten percent of his or her co-employees.

The district court granted Marriott’s motion, finding that Oby, who received the third highest salary of any employee at the Hotel, failed to dispute evidence that she was a “key employee.” The court further found that the Hotel had complied with the notice requirements of the FMLA regarding key employees and their right to reinstatement, and stated that it was Oby’s status as a key employee and her inability to return that forced Marriott to hire a replacement. The court discounted the fact that Oby’s replacement had not begun working as irrelevant, since he had already been hired by the time Oby returned from FMLA leave.

Lastly, the court stated that it did not perceive the FMLA regulations as preventing an employer from requiring an employee returning from FMLA leave to undergo additional training in order to fill a position.

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because African-American men could circumvent the policy by claiming that their hair length was motivated by religion.

Harrah’s sought and was granted dismissal on the claim that the policy was discriminatory on the basis of sex. The district court stated that “hair length is not such a fundamental aspect of one’s identity to warrant Title VII protection,” and furthermore, as long as the policies are “enforced evenhandedly,” sex-specific grooming standards are permissible under Title VII. The court pointed out that Harrah’s policy expressly prohibited women from wearing beards or moustaches, which was also a sex-specific grooming standard, yet men were not prohibited in this regard.



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*At the Board***Pre-Election Memo to Employees Was Not Unlawful**

The National Labor Relations Board certified a union's election loss and held that a Hotel memorandum sent to security employees eight days before a representation election describing how two other New York hotels had recently outsourced security services after unionization was not objectionable conduct. Manhattan Crowne Plaza Town Park Hotel Corp.

Eight days before a representation election, the Security Director for the Manhattan Crowne Plaza provided hotel security guards with a memo explaining that two other New York hotels contracted out their security services after negotiating unsuccessfully for a full year with the same union that was seeking to represent the Crowne Plaza employees. That memo contained the following statement: "So, in the final analysis, the majority who voted for this union (as well as the minority who voted against it) gained NOTHING, and LOST EVERYTHING! They lost all their medical benefits, their 401K plans, and most importantly, they lost their jobs!" The memo did state that all negotiations are "different," but it urged Hotel employees to weigh what they currently received against what the union was promising. It also reminded employees to "remember what happened at the two other hotels." When the election was held eight days later, the union lost by a vote of 13-5.

The Regional Director concluded that the Manhattan Crowne Plaza's memo "clearly implied" that the union was responsible for the job losses at the other New York hotels and suggested that it could happen at the Crowne Plaza if the union was selected as the employee representative. He stated that this implicit threat interfered with employee free choice and constituted objectionable conduct.

*Newsworthy***Massachusetts Legislature Clarifies Law Protecting Employee Tips**

The Massachusetts state legislature recently passed House Bill 4431, entitled "An Act to Protect Tipped Employees," which clarifies and reinforces a Massachusetts tip pooling statute originally enacted in the 1950's. This legislation is viewed as a safeguard for tipped employees, who can be paid a sub-minimum wage of \$2.63 an hour by their employer, despite the fact that the minimum wage in Massachusetts is \$6.75 an hour.

The new statute prohibits employers from requiring service employees to surrender their tips into a "tip pool" in which owners or managers participate. This protects tipped employees for whom gratuities comprise a significant portion of their income, including restaurant staff, bartenders, valets, cab drivers, hairdressers, and baggage handlers. The law also provides for civil and criminal penalties for violations of the new statute. An employer who violates the statute could be fined up to \$25,000 and face jail time up to two years. Aggrieved employees may bring a private civil action within three years of the most recent violation.

The Board issued a 2-1 decision reversing this finding, calling it a "close case." The majority reasoned that the Crowne Plaza's memorandum was "a recent, concrete example of a negative outcome for employees" who were represented by the same union seeking to represent them. It stated that Board law permits employers to communicate to employees general views about unionizing, or specific views about a particular union, so long as the communication does not include a threat of reprisal if the union is elected, or a promise of benefits if the union is rejected. The Board concluded that the memo "made no prediction at all" regarding what would happen at the Crowne Plaza if the union prevailed in the representation election, and in fact noted that every negotiation is different. Rather, it described what *could* happen. Thus, it held that the memorandum in question constituted "permissible campaign conduct."

Dissenting member Walsh agreed with the Regional Director, concluding that the memo contained an implicit threat of loss of employee jobs and benefits. He saw the memo as blaming the union for the job loss at the other two hotels, and found that it strongly suggested that unionizing would result in job loss at the Crowne Plaza. In dissenting, Walsh did not find the statement that each set of negotiations was "different" sufficiently strong to neutralize the message created by the Crowne Plaza's reference to the security personnel outsourcing. Instead, he found that the Crowne Plaza suggested that unionization would cause its employees to "suffer the same fate as those at the other two hotels," and he therefore would recommend that a new election be held.

*Bargaining Developments***MGM Grand Culinary Workers Approve New Five-Year Contract**

A new five-year collective bargaining agreement covering approximately 3,800 employees at the MGM Grand was approved in a near-unanimous vote by members of Culinary Workers Local 226. The new agreement, which was ratified by a vote of 443-1, provides for wage and benefit increases of 65 cents per hour in each of the first three years under the new contract. The wage and benefit increases in the last two years under the contract will match the increases the union is able to negotiate at other area hotel/casinos in the near future.

The new MGM contract retained language limiting the daily workload for housekeeping staff, which had been an important point in negotiations. The agreement also affords unit employees who are participating in the MGM health and retirement plans the opportunity to elect to participate in the union's plans. Additionally, the contract established training programs and opportunities for the employees which are funded by the MGM.

*In the Courts***\$50,000 Awarded to Waitress Who Was Sexually Harassed by Manager**

A former waitress at the Annex Lounge in Mundelein, Illinois was awarded \$50,000 in punitive damages for enduring three years of "repeated instances of sexual harassment" by a manager who was already working under a "last chance" agreement due to previous charged acts of sexual harassment. *Koerber v. Journey's End Inc.*

Plaintiff Karen Koerber filed suit in federal court in the Northern District of Illinois, alleging that she was subject to a hostile work environment and constructively discharged. Koerber began working at the Annex Lounge, a restaurant/bar, in August 1993. She was hired by the restaurant's bar manager, Ernie Young. In April 1994, another waitress alleged that Young had sexually ha-

arrassed her, and the employer settled that claim for \$20,000. Young was required to reimburse the employer, and he also signed a "last chance" agreement which called for his immediate termination if there were any further instances of harassment.

Young, who had been harassing Koerber prior to signing the agreement, continued to do so, despite the "last chance" agreement. The harassing conduct consisted of sexual comments and inappropriate touching. In May 1995, Koerber quit her job at the restaurant, but after meeting with the owners to discuss Young's behavior, she returned. Young continued to verbally and physically harass her until she finally quit in January 1997. In that two-year period, the owners did not intervene on Koerber's behalf, nor did they enforce Young's "last chance" agreement. Koerber subsequently filed a charge with the EEOC and then a civil suit.

Judge Darrah of the Northern District of Illinois concluded that Koerber had shown her environment to be subjectively hostile. He also rejected the employer's contention that it had sufficient policies in place to deal with hostile work environment claims. Darrah stated that posting an EEOC notice and maintaining an "informal, open door policy" to report problems was not effective, particularly where, as here, it was not communicated to employees. Lastly, the Court stated that the last chance agreement was never enforced. The owners were aware of Young's conduct, and in Darrah's opinion, they "did nothing to protect female employees from harassment." Accordingly, the Court awarded Koerber \$50,000 in punitive damages - the maximum amount that could be assessed against a small employer under the applicable statute.

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*Newsworthy***Cracker Barrel to Take Anti-Discrimination Measures**

Cracker Barrel Old Country Store Inc. has agreed to resolve allegations that its employees racially discriminated against African-American patrons. As part of the settlement, Cracker Barrel has agreed to implement new training and investigation methods. *U.S. v. Cracker Barrel Old Country Store Inc.*

The federal government filed a lawsuit against Cracker Barrel in district court in the Northern District of Georgia, alleging the restaurant chain had violated Title VII of the Civil Rights Act by denying African-American customers equal use and enjoyment of its facilities, services and accommodations that were provided to individuals of other racial backgrounds.

The United States government specifically contended that customers were segregated according to race and Caucasian servers refused to wait on African-American customers. It was also alleged that Caucasian customers were seated or served more quickly, and complaints about food quality or service were received and handled more favorably when they were made by a Caucasian customer as opposed to an African-American customer. It was further alleged that Cracker Barrel's managers either directed, participated in, or condoned the purported discriminatory conduct in several instances.

Cracker Barrel denied any liability or wrongdoing relating to this lawsuit.

The consent order requires Cracker Barrel to revise its customer service policies within thirty days, communicate those changes and post a notice to its employees in each of its restaurants. The company also agreed to create an investigation department to handle patron complaints, and to implement a complaint filing system. Cracker Barrel is also required to provide Title VII training by a government-approved training provider to its headquarters and regional operations employees and managers within varying time periods ranging up to ninety days from the date of the consent order.

*Verdicts & Settlements***Restaurant Chain Agrees to Pay \$950,000 in Back Wages**

A chain of El Rancherito Mexican restaurants in Illinois has reached an agreement with the Department of Labor to pay close to \$950,000 in back wages to 331 employees for alleged violations of the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). *Chao v. El Rancherito of Charleston Inc.*

The 331 employees that will share in the \$950,000 settlement worked for nineteen different El Rancherito restaurants as cooks, dishwashers, busboys, and waiters. In addition to compensating the employees for back wages and unpaid overtime, the settlement agreement also enjoins the restaurant chain from any further violations of the FLSA.

*Verdicts & Settlements*

## Jillian's Settles EEOC Suit Alleging Gender Discrimination Against Males

Jillian's Entertainment Corp., which operates thirty-six billion-themed restaurants in twenty-three states, has agreed to pay \$350,000 to male class members in the Indianapolis, Indiana area in order to resolve charges filed by the EEOC alleging unlawful discrimination against male employees and applicants who applied for or were rejected for server positions. *EEOC v. Jillian's of Indianapolis Inc.*

The lawsuit, which was filed by the EEOC in 1999, initially sought nationwide class certification, but the district court judge limited the scope of the suit to the Indianapolis area based on the narrow geographic location of the EEOC investigation. The EEOC initially sought \$20 million on behalf of 100 to 150 class members before agreeing to the \$350,000 settlement. Under the consent decree, the four charging parties will split \$25,000, and the remaining \$325,000 of the settlement will be divided among the class members.

The consent decree requires Jillian's to advertise to locate additional class members, post non-discrimination notices at all of its facilities, and provide managers with anti-discrimination training. Jillian's must also provide regular progress reports to the EEOC regarding its compliance with the terms of the consent decree.

Jillian's has also agreed that certain job titles and job descriptions will be revised to be "sex neutral." For instance, the job title of "beer tub girl" will be replaced with "beer tub server," and the job descriptions for "server" and "door host" will be revised such that they are gender neutral. Before the consent decree, the "server" job description contained a mandate to "help other waitresses," while the "door host" job description including "cleaning the men's room" as a job duty.

## Palm Restaurants Agrees to Settle EEOC Allegations for \$500,000

Palm Restaurants has agreed to a \$500,000 pre-litigation settlement with the EEOC to resolve allegations that the Palm's hiring practices discriminated against women. The class fund will be shared by those who apply as aggrieved parties. Palm Restaurants employs approximately 1,600 people at 29 high-end restaurants in 23 cities.

The EEOC charge was filed in 2001 after it received a complaint that the Palm Restaurant in Las Vegas did not have any female servers. The Palm then cooperated with an EEOC investigation that explored two years of hiring practices by the corporation.

As part of the settlement, Palm also agreed to implement EEO training for all supervisors, as well as a record keeping system on its applicants. The EEOC will continue to monitor Palm's hiring activity and progress for the next three years to ensure that it remains gender-neutral.

## Forty Fired Hotel Employees Share in \$400,000 EEOC Settlement

The former operator of the Dai-Ichi Hotel Saipan Beach has agreed to a \$400,000 settlement with the EEOC regarding allegations of national origin discrimination and retaliation by 40 Filipino employees who were terminated by the Hotel. *EEOC v. Pacific Micronesia Corp.*

Judge Alex Munson of the U.S. District Court for the Commonwealth of the Northern Mariana Islands approved the settlement, which resolved charges that Pacific Micronesia terminated the Filipino employees in 1998 and 1999 after a union organizing drive. According to the EEOC, the Filipino employees who were terminated were replaced by employees from other countries which were less pro-union.

As a part of the settlement agreement, Pacific Micronesia agreed not to retaliate against any current or former employees, or to discriminate against any employee on the basis of national origin. However, the company did not admit to any legal violations.

Additionally, although the current owners of the Dai-Ichi Hotel (Asia Pacific Hotels Inc. and Tan Holdings Corp.) were dismissed as defendants in the EEOC action, Asia Pacific also agreed to refrain from any discriminatory treatment or retaliation, and further consented to renewing the employment contracts of the Filipino employees at least one more time.

## Jack In The Box to Pay \$300,000 Pursuant to EEOC Consent Decree

The Jack in the Box fast food restaurant chain has agreed to pay \$300,000 to resolve an EEOC lawsuit filed in federal court in Washington which alleged that five female employees were subject to regular sexual overtures and lewd remarks by their supervisor. *EEOC v. Jack in the Box, Inc.*

Although the lawsuit alleged that Jack in the Box violated Title VII of the Civil Rights Act by subjecting the five women to retaliation and sexual harassment based on sex, the Company denied any liability and wrongdoing.

As part of the consent decree, the Company agreed to post copies of the decree in English and Spanish and to comply with certain reporting requirements for a period of three years. The Company also agreed to provide neutral employment references for the alleged victims. Jack in the Box also agreed to retain an outside consultant to develop and implement a sexual harassment policy, as well as to provide discrimination and anti-retaliation training to all employees at specific restaurants and to all new employees.

*In the Courts*

## Sixth Circuit Rejects Red Lobster's Arbitration Policy

The Sixth Circuit Court of Appeals reversed a 1999 district court decision granting Red Lobster Inns of America Inc.'s motion to compel arbitration, holding that the plaintiff did not have to arbitrate her claims because she never signed an arbitration agreement and objected to the company's unilaterally adopted policy. *Lee v. Red Lobster Inns of Am. Inc.*

Plaintiff Tami Lee started working at Red Lobster in 1994, and in 1996, was promoted to culinary manager at the Oak Ridge, Tennessee restaurant. The following year, Red Lobster provided its employees with a notice stating that a new four-step dispute resolution process would take effect on October 27, 1997. The policy provided for binding arbitration, and a provision was added to Red Lobster's employee handbook which declared that the new policy was "the exclusive way to address and resolve most workplace problems or concerns." The employee handbook also stated that its policies were binding during employment. A separate handbook explaining the dispute resolution policy was issued to all employees, and it stated that "the Company has adopted" the procedure and further provided that "neither the Company nor the Employee may litigate such claims against each other in a court."

Lee told her supervisor in September 1997 that she would not agree to the dispute resolution procedure. She claims that she was threatened with termination if she did not accept the policy. That same month, Lee filed a discrimination charge with the Tennessee Human Rights Commission alleging sexual harassment by her supervisor. Her supervisor was fired within a month, and Lee was fired one month later in November 1997, after the dispute resolution procedure had taken effect.

In February 1998, Lee filed suit under Title VII, alleging sex discrimination, harassment, and retaliation. Red Lobster moved to compel arbitration and submitted an information sheet on its dispute resolution procedure that was purportedly signed by Lee, but there was no evidence that Lee ever signed a document agreeing to submit to the company's dispute resolution policy.

The district court for the Eastern District of Tennessee granted Red Lobster's motion to compel arbitration and stayed the pending lawsuit. The district court reasoned that Lee impliedly agreed to the company's dispute resolution procedure when she did not continue to object after she was threatened with termination. The matter proceeded to arbitration, and the arbitrator ruled in favor of Red Lobster. In January 2002, the district court granted final judgment in favor of the company.

On appeal, the Sixth Circuit reversed, stating that Red Lobster's dispute resolution procedure did not constitute a binding contract between the company and Lee. Judge Julia Smith Gibbons, in writing for the majority, stated that "the company cannot just adopt a policy that it cannot be sued by its employees and thereby make it so. For an arbitration agreement to be binding, it must be an agreement, not merely a company policy." The Court noted that Lee had told her supervisor she did not agree to the policy and did not sign a form agreeing to handle disputes under the company's new policy.

The Court cited the Federal Arbitration Act (FAA) as the basis for its ruling. The FAA requires that an enforceable arbitration agreement be in writing and constitute a validly formed contract under applicable state law. The Court stated that although Red Lobster introduced its handbook and other various documents which identify and explain the company's dispute resolution policy, this evidence only documented the policy and did not amount to a written contract as required by the FAA.

Judge Gibbons also declared that although the signed information sheet introduced by Red Lobster stated that the employee agrees to submit any disputes to the company's dispute resolution procedure, the sheet does not advise the employee that he or she is waiving the right to bring a claim in court if the matter is not resolved to his or her satisfaction.

The Court found insufficient evidence that Lee actually signed the document, and pointed out that her verbal refusal to abide by this procedure substantiated her position that she did not intend to be bound by the company's new policy. The Court further stated that the district court's expectation that Lee should continue to object in the face of her employer's threat to terminate her "places the burden on the employee to repeatedly object to a company's unilaterally adopted arbitration policy or risk being found to have agreed to it."

Last, in assessing Tennessee common law, the Court concluded that an implied-in-fact contract could only be established if the course of dealing and common understanding showed a mutual intent to enter into a contract. The Court found that Lee's actions and express statement rejecting the new policy showed that she did not have any intent to accept Red Lobster's policy as a binding contract.

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*At the Board*

## Colorado Casino's Handbook Provisions Violate Employee Rights

The National Labor Relations Board held that the Double Eagle Hotel & Casino violated federal labor law with its handbook policies which prohibited employees from communicating with each other about terms and conditions of employment. Double Eagle Hotel & Casino.

Around May 2001, Double Eagle, which is located in Cripple Creek, Colorado, implemented a change in the distribution of tips that were collectively pooled from slot employees and security officers. The changes to the Casino's tip pooling policy led to employee discussion, despite the fact that such discussion was expressly prohibited by the Casino's handbook provisions. Several employees were disciplined for engaging in such discussions. As a result, the union challenged several provisions of the Casino's handbook including provisions relations to confidential information, communication, press relations, and customer service.

An administrative law judge concluded that Double Eagle violated the National Labor Relations Act when it barred off-duty employees from the property and prohibited hand billing by union members on the sidewalks adjacent to the Casino. The judge also found a verbal admonition to employees not to discuss the Casino's tip policy on the property and the resulting discipline of three employees for violating this directive to be unlawful. These findings were not contested by Double Eagle when the matter reached the Board.

However, the Board reversed the finding of the judge and held that a Double Eagle rule prohibiting employees from discussing company issues, other employees, or personal problems in "public

areas" of the property other than the Casino floor was an unfair labor practice. The Board likened the Casino environment to a retail store selling floor, stating that while employees could be prohibited from discussing working conditions in gaming areas and the surrounding corridors, a general ban could not lawfully be maintained on activity "beyond that area."

The Board also reversed the judge's finding and held unlawful a ban on employee discussion of terms and conditions of employment with non-employees or employees outside the respective department. Double Eagle promulgated a rule which prohibited discussion of "confidential information," which was defined to include the following: salary information, pay increases, disciplinary information, complaints, grievances, and information regarding any employee terminations. Employees were not to discuss these matters with non-employees unless they had "a valid need to know," and were not to discuss such matters with co-employees in their department unless required by a business need.

Additionally, another communication rule prohibiting the disclosure of confidential or sensitive information about Double Eagle to the media or any non-employee without management approval was struck down as unlawful by the Board.

The Board reasoned that the Casino's communication rule was violative of Section 8(a)(1) in its reference to "confidential information." Because the "confidential information" rule proscribed discussion on permissible topics, the communication rule was likewise flawed.

The General Counsel appealed the judge's finding that these two provisions did not infringe upon employees' Section 7 rights to discuss terms and conditions of employment. The Board cited *Lafayette Hotel*, 326 NLRB 324, and stated that the employer's mere maintenance of a rule which has a chilling effect on employees' exercise of their Section 7 rights is unlawful. The Board stated that Double Eagle's "confidential information" rule "plainly infringes upon Section 7 rights."

Chairman Battista partially dissented, finding that the confidentiality and communication rules did not clearly prohibit Section 7 activity. He stated that the confidentiality rule still allowed employees to discuss matters within their department and with others on a "need to know" basis. Battista noted that in the absence of evidence that the rule was interpreted or applied unlawfully, he would not presume such a provision to be unlawful. He employed the same reasoning with respect to the communication rule and stated that absent evidence of unlawful interpretation or application, he would not hold such a rule presumptively illegal.

In his dissent, Battista wrote that Double Eagle had a lawful basis for prohibiting employee discussion of tip policy in gaming areas, but the three employees disciplined by the Casino had not been discussing the Casino's tip policy in that area. Still, Battista stated that he "would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful."

*Arbitrator's Corner*

## Six Flags' Attendance Policy Violates Collective Bargaining Agreement

Arbitrator Joseph Gentile recently found that Six Flags Magic Mountain's unilateral implementation of portions of a new attendance policy violated its collective bargaining agreement with the Machinists District Lodge 947. According to the arbitrator, the new policy, which assessed "points" for absences, punished employees for using bona fide sick leave pursuant to the terms of the contract. While the management rights clause permitted the employer to implement the new attendance policy, the arbitrator found that absent negotiations, the employer could not enforce its "point" system or mete out any discipline or discharge on the basis of those points, since legitimate absences improperly formed the basis for any employment action.

Six Flags Magic Mountain entered into a two-year collective bargaining agreement with the union that covered regular full-time employees in the theme park's maintenance and operations department for the period of January 1, 2003 through December 31, 2005.

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*At the Board***Board Holds KFC Operator Unlawfully Undermined Employee Support for Union**

The National Labor Relations Board held that the operator of three Kentucky Fried Chicken restaurants in the Virgin Islands violated the National Labor Relations Act by soliciting employees to withdraw union support and then withdrawing union recognition in the absence of a good-faith doubt as to the union's majority status. Kentucky Fried Chicken, Caribbean Holdings Inc.

The Board held that it was an unfair labor practice for the employer to tell employees they did not need the union to receive a raise and to imply that the union caused the delay in wage increases. However, the Board also found that the employer did not act unlawfully when it suggested that wage increases could be retroactive regardless of the union.

The union had represented employees at three KFC restaurants owned by Caribbean Holdings for approximately ten years. The last contract between the parties expired in March 1997. Nearly two years later, in February 1999, the parties had agreed on all terms for a new contract except for a wage increase.

By September 1999, no new contract had been finalized. The employer spoke to its employees at each restaurant and stated that a planned wage increase had been blocked by union opposition, that a majority of employees did not support the union, that the union did not have an active interest in the employees and was experiencing financial problems, and that any bargained wage increase would be retroactive to March 1999. The employer also implied that majority support could be determined by the employees if a decertification petition were filed.

The Board affirmed the finding of an administrative law judge and held that the employer's statements were intended to solicit em-

ployee disaffection with the union and therefore violated Section 8(a)(1) of the National Labor Relations Act. The Board noted that the employer failed to state that there would be no benefits or reprisals for signing a petition, and further implied that the union was an obstacle to the employees' receipt of a wage increase.

Contrary to the administrative law judge, however, the Board found the employer's statement regarding the retroactivity of a pay increase permissible. According to the Board, the employer stated that a "bargained" raise would have a retroactive effect, and nowhere in this statement was there any implication that a union was not necessary for the employees to receive retroactive pay.

The Board also found that Caribbean Holdings violated Section 8(a)(5) of the Act when it withdrew union recognition based on employee statements submitted after the company's speeches in September 1999. According to the Board, the speeches "tended to undermine the Union's support among unit employees." Therefore, withdrawal of recognition was "not based on a good faith uncertainty concerning the Union's continued majority status in light of the unfair labor practices committed by the employer prior to its withdrawal of recognition."

All three Board members agreed that the appropriate remedy for the employer's refusal to bargain in this situation was an affirmative bargaining order. The Board stated that the employee disaffection here was "artificially engineered" by the employer, and it was therefore necessary to require bargaining for a reasonable period so that the union could attempt to regain its position as the exclusive bargaining representative of the employees.

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*"Six Flags" Continued from Page 7*

In approximately July 2003, Six Flags unilaterally implemented the new attendance policy in question. The union demanded that the company cease implementation and negotiate with respect to this policy, and sought to grieve the policy's implementation by Six Flags. Six Flags denied the union's grievance, and the matter proceeded to arbitration.

The attendance policy at issue assesses an absent employee "points" for each absence, irrespective of the reason for the absence. When an employee accumulates a certain number of points, he or she is subject to progressive levels of discipline as called for by the policy, up to and including discharge. Six Flags' policy did not expressly provide that an employee absence due to illness would not count as a "point," despite the fact that employees were contractually entitled to such sick leave.

At arbitration, the union argued that the effect of this new policy was to chill employees use of contractually allotted sick leave. Six Flags contended that it was entitled to enact and implement the policy pursuant to the management rights clause of the contract.

The sick leave plan in the collective bargaining agreement was comprehensive, discussing the manner and rate of accrual, carry over of unused sick time, and the administration of sick leave. The policy also provided that "taking compensated sick time off when there is neither illness or injury is not condoned and will subject the employee to disciplinary action up to and including termination."

The contract's management rights clause contained a proviso which provided "it is understood and agreed that the Company possesses all rights, powers and authorities that it had prior to the signing of this agreement *except* those specifically abridged, delegated, granted or modified by this Agreement. . ."

In ruling for the union, the arbitrator noted that the parties' inclusion of the detailed sick leave policy in the parties' contract "specifically abridged. . .or modified" Six Flags' right to implement its attendance policy in this manner, and therefore, discipline could not be imposed on an employee who simply used his or her sick leave benefits pursuant to the collective bargaining agreement.

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