

# Hospitality Industry Quarterly

## Labor and Employment Law Report

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### Hotel's Initial Refusal To Arbitrate Prevents Enforcement of Arbitration Agreement

A hotel that initially refused to arbitrate an employee's discrimination claim was prevented from subsequently seeking to enforce its arbitration agreement against that employee. *Cox v. Ocean View Hotel Corp.*

Thomas Cox was hired to serve as the director of finance for a hotel run by Ocean View in 2001. When he was hired, Cox signed a letter of agreement with Ocean View that contained an arbitration clause. That clause stated that any disputes between the employer and employee arising out of the employment relationship were to be settled by arbitration.

On October 9, 2003, Cox was told to meet with his supervisor, Gary Jutz, a subordinate, Rae Takahashi, and another employee. At that meeting, Cox was told about a letter addressed to Jutz that accused Cox of having a "secret relationship" with Takahashi in violation of company policy. The letter was neither signed nor dated. Cox denied having any romantic or sexual relationship with Takahashi, but Jutz still instructed both Cox and Takahashi to stop the offending behavior.

The next year, on October 5, 2004, Jutz sent Cox a letter in which he said that Cox's relationship with Takahashi had led to a "perception of favoritism." The letter told Cox to break off his "relationship with a subordinate," and that a "continued failure to work within the organization to resolve this situation in a manner beneficial to all may ultimately be deemed an act of insubordination and grounds for immediate termination of employment."

The following week, Cox wrote a letter to Clyde Guinn, the Hotel's Senior Vice President of Operations, stating "It is with much regret that I must file this request to enter into arbitration." Cox went on to accuse the Hotel of discriminating against him, harassing him, and retaliating against him by issuing him the October 5 letter. Cox concluded the letter by asking Guinn to contact Cox's attorney with the date, time, and location of the arbitration hearing.

*please see "Arbitration" on page 2*

### Disability Discrimination Claim By Employee With Low IQ Allowed To Proceed

A federal district court in Arizona has found that a restaurant employee who alleged she was harassed and discriminated against because of her developmental disabilities could proceed to trial with her disability discrimination claim. *EEOC v. Luby's, Inc.*

Sally Case began working as a floor attendant for Luby's Restaurant in August 1998. Although it was undisputed that Case performed her job adequately, she resigned in December of 2000 and filed a discrimination charge with EEOC. Case, who has an IQ of 70, claimed that the restaurant's general manager, a Ms. Nye, told her to "shut up" on numerous occasions, called her a "retard," and slapped her in the face. Case also claimed that on various occasions her co-workers intentionally hid her bicycle in the men's restroom, blocked her way out of the kitchen, and threatened to cut her arm with a bread slicer.

Case's sister complained about this treatment to Nye, as well as to Luby's management via a telephone hotline. Case's sister requested that Luby's use a "softer management" approach with Case. However, Case claimed that the harassment continued, and that Luby's retaliated against her for her sister's complaints.

Both the EEOC and Luby's moved for summary judgment of the matter. In its motion for summary judgment, the EEOC argued that Luby's could not dispute that Case is "disabled" as a *please see "Disability" on page 3*

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*“Arbitration” from page 1*

Guinn denied Cox’s request for arbitration on the grounds that no adverse action had been taken against Cox. In a letter dated October 27, he informed Cox “if you continue to pursue the activities which Gary Jutz has complained of, you run the risk of being terminated. At that point, assuming you then consider it a wrongful termination, arbitration may be in order.” In response, Cox filed a lawsuit in federal court alleging discrimination, retaliation, and harassment. The Hotel moved to compel Cox to arbitrate his claims, pursuant to the arbitration agreement he signed when he was hired.

The court denied the Hotel’s motion to compel arbitration. The court rejected the argument that Cox failed to properly initiate arbitration. The court noted that the letter of agreement signed by Cox was vague as to how arbitration proceedings were to be initiated. Thus, because the Hotel should have resolved any uncertainty in favor of arbitrating Cox’s claims, the court held that Cox’s letter was sufficient to initiate arbitration. The court also stated that because Guinn’s letter did not identify insufficient notice as one of the reasons Cox’s request for arbitration was denied, the Hotel could not make this claim in court. The court reasoned that if the Hotel was truly concerned with the manner in which Cox attempted to initiate arbitration, it would have said so to Cox in its response to his letter.

Instead, the Hotel’s letter stated only that it was denying the request for arbitration because Cox’s claims had not yet “matured.” The Hotel claimed that this was also a valid reason for denying Cox’s request because, unless some disciplinary action was taken against Cox, there was nothing to arbitrate. The court disagreed. It found that the disagreement between Cox and the Hotel at the time of the request for arbitration was serious. At that point, Cox had alleged discrimination, harassment, and retaliation, and had been threatened with termination. According to the court, the fact that no adverse action had yet been taken against Cox simply went to the merits of his allegations. Cox was not required to wait until after his impending termination to seek resolution of his dispute.

The court therefore determined that the Hotel had waived its right to enforce the arbitration agreement by denying Cox’s request for arbitration. The Hotel knew of its right to arbitrate Cox’s claims, but initially refused to do so. When the Hotel refused to arbitrate, it breached its agreement with Cox, and therefore waived its right to subsequently enforce the arbitration agreement against him. As such, Cox was entitled to proceed with his lawsuit based on these claims.

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*Verdicts and Settlements*

**Hotel Settles Claim Arising From Its “English Fluency” Policy**

**I**nterstate Management Co., doing business as the Sheraton National Hotel, has agreed to pay \$80,000 to a former dishwasher, pursuant to a consent decree with the EEOC. The EEOC claimed that the Hotel denied rehire to the Salvadoran employee under a newly-adopted “English fluency” policy. The Sheraton National denied any liability or wrongdoing, *EEOC v. Interstate Mgmt. Co. d/b/a Sheraton National Hotel*.

Under the terms of the consent decree, the Hotel agreed to pay former employee Jesus Romero \$10,000 in back wages, \$40,000 in compensatory damages, and \$30,000 in attorneys’ fees. As a part of the settlement, Sheraton National also agreed to remove any reference to Romero’s EEOC charge from his personnel file, and to otherwise comply with state and federal anti-discrimination laws.



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*“Disability” from page 1*

matter of law because she has the mental impairments of mental retardation, impaired cognitive functioning, and organic brain syndrome. However, the EEOC and Luby’s had presented conflicting expert testimony about Case’s mental impairment and whether her condition “substantially limited” her performance of any major life activity. Luby’s noted that Case lived alone, owned a house, and could care for herself. Additionally, it was undisputed that Case was adequately performing the essential functions of her job.

Thus, the court rejected the EEOC’s arguments on this point. In doing so, the court said that a factual dispute remained on the issue of whether Case was “disabled” within the meaning of the Americans with Disabilities Act. The court found that Case’s IQ of 70, by itself, did not necessarily mean she was disabled as a matter of law. It went on to note that the experts disagreed as to whether Case was “mentally retarded.” Although EEOC emphasized that Case required assistance from her family in housekeeping, shopping, personal finance, and taking medications, the court acknowledged that Case lived independently and was capable of writing checks, counting change, cooking, and participating in a variety of household chores. The court found that this conflicting evidence raised a jury issue as to whether Case’s mental impairment rendered her “disabled” under the ADA.

In Luby’s motion for summary judgment, it sought dismissal of Case’s hostile environment claim, arguing that Case’s allegations did not establish “severe and pervasive” harassment. The court disagreed, and found that Case’s claims, which included alleged verbal and physical abuse by her supervisor and co-workers, were sufficient for a jury to find “severe and pervasive” harassment based on Case’s disability. Additionally, the court found that Case’s sister put Luby’s on notice of the alleged harassment by meeting with Nye on at least 20 occasions to complain about Case’s treatment, and by calling the company’s free hotline on two or three occasions.

Luby’s also sought dismissal of Case’s claim that the company failed to accommodate her disability, on the grounds that it was unaware that Case required accommodation. Again, the court disagreed. It held that Case’s sister’s request for a “softer approach” to management and discipline was a recognizable request for accommodation under the ADA. Thus, although Case was performing her job adequately, Luby’s knew that Case required special assistance.

However, the court did grant summary judgment to Luby’s on Case’s claim that she was retaliated against when her sister complained about retaliation. The court found that the EEOC failed to produce evidence that any alleged acts of discrimination or harassment occurred soon after her sister’s complaints. The court explained, “[p]laintiffs have not produced sufficient evidence from which a jury could conclude that ‘there was a causal link between the protected activity and the adverse [actions].’” Thus, Case’s claim for retaliation was dismissed.

Luby’s also argued that EEOC’s suit should be dismissed under the equitable doctrine of laches, which prevents a party from taking legal action after an unreasonable delay. In this instance, the EEOC did not file suit against Luby’s until 42 months after Case filed a complaint of discrimination. Luby’s contended that this delay caused unreasonable prejudice to its defense.

The court held that the doctrine of laches might bar the EEOC’s claim. However, it declined to grant summary judgment to Luby’s on these grounds because the EEOC alleged that Luby’s caused much of this delay. The court said that a jury should determine whether the EEOC’s delay was reasonable, and whether it justified dismissing the lawsuit.

Subsequent to the Court’s decision, Luby’s entered into a consent decree with the EEOC to resolve Case’s allegations. Pursuant to the decree, Luby’s will pay Case \$90,000 in compensatory damages and \$60,000 in attorneys’ fees. The settlement agreement also requires Luby’s to provide Case with a letter of apology and a neutral employment reference, and to comply with certain posting and training requirements. Under the consent decree, Luby’s denied any liability or wrongdoing.

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*In the Courts***Ninth Circuit Upholds Harrah's Makeup Rule**

**B**y a 7-4 vote, the Ninth Circuit Court of Appeals has affirmed a finding that Harrah's Casino's rule that female bartenders must wear makeup is not discriminatory against women. *Jespersen v. Harrah's Operating Co.*

As HIQ previously reported, Harrah's has had a policy of encouraging female beverage servers to wear makeup for over 20 years. However, it did not enforce that policy until 2000. In that year, as a part of Harrah's new "Beverage Department Image Transformation" program, implemented at 20 of its locations, the Casino adopted a "Personal Best" program. This program established new grooming and appearance standards for all of its employees.

Pursuant to this program, all servers (male or female) are required to wear black pants, a white shirt, a black vest, and a black bow tie. However, the program also includes some sex-differentiated grooming requirements. In regards to makeup, female servers are required to wear it, while male servers are prohibited from doing so.

Bartender Darlene Jespersen worked at Harrah's Casino in Reno, Nevada, which adopted the "Personal Best" program. She did not have a problem with the Casino's gender-neutral uniform requirements, but objected to the new makeup rule. Jespersen, who had worked at Harrah's for 20 years, alleged that the Casino's new makeup policy discriminates against women in violation of Title VII of the 1964 Civil Rights Act. Jespersen claimed that the makeup policy is discriminatory because it subjects women to terms of employment to which men are not subject, and it requires women to conform to "gender stereotypes." Jespersen said she did not wear makeup on or off the job, and that wearing makeup would conflict with her self-image. In her deposition, she said that her efforts to comply with the makeup rule made her feel "very degraded and very demeaned." She also claimed that wearing makeup interfered with her ability to do her job because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person."

The trial court granted summary judgment to Harrah's. The court held that the "Personal Best" program imposed equal burdens on male and female bartenders, and determined that "sex stereotyping" prohibitions do not apply to grooming and appearance standards. On appeal, a Ninth Circuit panel affirmed on slightly different grounds. However, that opinion was va-

cated, and it was determined that the case would be heard before the entire Ninth Circuit. In its 7-4 ruling, the majority of the full Ninth Circuit upheld the prior two rulings, finding once again that the rule is permissible.

In so ruling, the Ninth Circuit held that settled law did not "support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects," demonstrates that those standards are discriminatory. Instead, the court said that it was clear that "companies may differentiate between men and women in appearance and grooming policies." In making this determination, the court referred to cases from the U.S. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth, and District of Columbia circuits that reached the same conclusion. As those cases explained, the key issue when a grooming standards policy is alleged to be discriminatory "is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender."

The Ninth Circuit therefore determined that Jespersen's failure to show that Harrah's makeup rule created an unequal burden for women doomed her claim. As the court noted, Jespersen presented no "evidence to establish that complying with the 'Personal Best' standards caused burdens to fall unequally on men or women." The court also declined to take notice, without evidence, of the relative time and expense incurred in using makeup, finding that this information was not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The court went on to disagree with the trial court, and find that sex-based grooming policies can potentially violate Title VII if they impermissibly stereotype employees based on sex. However, in this instance the court rejected Jespersen's claim that "the makeup requirement, without more, [would] give rise to a claim of sex stereotyping under Title VII." The court stated that, were it to hold otherwise, "every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, [would] create a triable issue of sex discrimination." Yet, the court warned employers that "[i]f a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement" under Title VII.

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*In The Courts*

## Employer's Gift of Flowers Raises FMLA Notice Issue

A federal court denied summary judgment to an Ohio hotel on a former supervisor's FMLA claim, finding that although the employee did not abide by company procedures in notifying the Hotel of her need for FMLA leave, the employer's knowledge of her need for leave, as evidenced by the fact that it sent her flowers while she was in the hospital, was sufficient to trigger its responsibilities under the FMLA. *Robinson v. Hilton Hospitality, Inc.*

Tascha Robinson sued her former employer, an Embassy Suites hotel, alleging that she was denied FMLA leave and was wrongfully discharged. Robinson had repeatedly received "write-ups" for attendance problems, but was otherwise considered to be a good employee. On March 18, 2002, Robinson did not arrive for work. Another employee, Robinson's relative and subordinate, informed Hotel management that Robinson had suffered a "nervous breakdown," and was in the hospital. Later that day, the Hotel found out which hospital Robinson had been taken to, and sent flowers to her there.

Despite receiving this gift of flowers, Robinson did not call her employer to tell her when she would be returning to work. Robinson alleged that she had family members contact Hotel management to update them on her condition, but the Hotel denied that it was ever contacted. Eventually, on March 25, the Hotel received a doctor's note from Robinson stating that she could not return to work until April 1. Yet, Robinson did not return to work on April 1. Robinson again claimed that she

called the Hotel to notify it that she needed to extend her leave, but this allegation was disputed by the Hotel. On April 4, the Hotel called Robinson and told her she was suspended due to her unexcused absence from work. Upon being notified of the suspension, Robinson angrily responded "I quit."

The U.S. District Court for the Southern District of Ohio held that Robinson's claims were sufficient to proceed to trial. The court found that even though Robinson failed to abide by the Hotel's notification procedures, the information provided to the Hotel by Robinson's relative was sufficient to place the Hotel on notice that she needed medical leave. The Hotel's knowledge of Robinson's need for leave was further evidenced by the fact that it sent her flowers on the day she went to the hospital.

Because the Hotel was aware of Robinson's need for leave on the day she was taken to the hospital, Robinson could accordingly move forward with her claim that the Hotel retaliated against her for taking FMLA leave by suspending her. In making this determination, the court made particular note of the short period of time between Robinson's request for FMLA leave and her suspension. The court pointed out that while temporal proximity alone is insufficient to support an employee's claim for retaliation, the questions raised when the Hotel suspended Robinson so soon after she went on leave made it imprudent to dismiss the case on summary judgment.

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### *"Harrah's" from page 4*

Among the four justices who dissented from this ruling, two dissents were filed. In one dissent, Judge Harry Pregerson argued that "gender must be irrelevant to an employment decision" unless it is a "bona fide occupational qualification." In this instance, Harrah's did not show that it was necessary to the job for the employer to take its employees' genders into consideration when formulating its grooming and appearance standards. Therefore,

Pregerson would have found Jespersen's evidence of impermissible sex stereotyping sufficient to strike down the policy.

In a separate dissent, Judge Alex Kozinski argued that Jespersen's evidence also was sufficient to establish that she was subjected to an unequal burden because of her sex. Judges Susan P. Graber and William A. Fletcher joined both dissents.

*Newsworthy*

## **Eight States Raise Minimum Wage**

State governments in Michigan, Maine, Maryland, West Virginia, Arkansas, North Carolina, Pennsylvania, and Delaware have all raised their minimum wages in recent months.

In Michigan, Governor Jennifer Granholm (D) signed a bill raising the minimum wage from \$5.15 to \$7.40 per hour. The measure will go into effect in three phases. The bill raises the hourly minimum wage to \$6.95 on October 1, 2006, to \$7.15 on July 1, 2007, and to \$7.40 on July 1, 2008. The approval of this bill follows a surprise move that was made in March, in which the Republican-controlled state senate unanimously approved the legislation. Michigan Republicans had long fought raises to the minimum wage, but passed the bill in response to an alternative proposal that would have tied increases in the minimum wage to the annual rate of inflation.

In Maine, Gov. John E. Baldacci (D) signed into law a two-step increase in the state minimum wage. The statute raises the state's minimum wage by 25 cents per hour, from \$6.50 to \$6.75, on October 1, 2006. Another 25 cent increase will go into effect on October 1, 2007, resulting in a minimum wage of \$7.00 per hour. The bill was narrowly passed on a first vote by the Maine House and Senate. Two years ago, the Maine Legislature rejected a bid to raise the minimum wage to \$7 per hour, instead approving a two-step increase that raised the minimum wage to the current rate of \$6.50 per hour.

In Maryland, the State Senate voted 30-17 to override Governor Robert Ehrlich's (R) veto of a bill raising the state's minimum wage from \$5.15 to \$6.15 per hour. Previously, the House of Delegates voted 91-48 to override the veto. With both votes to override the veto, the legislation will go into effect. In vetoing the bill, Governor Ehrlich noted its adverse effects on small businesses, which will have to pay an estimated additional \$61 million in wages and payroll taxes annually as a result of the wage increase. The measure increases the minimum wage for tipped employees to \$3.08 an hour.

In West Virginia, the state minimum wage will climb to \$7.25 an hour over the next two years pursuant to a bill recently signed by Governor Joe Manchin (D). The bill has raised the

state's minimum wage to \$5.85. A second increase will go into effect on July 1, 2007, when the minimum wage will be increased to \$6.55 an hour. On July 1, 2008, the minimum wage will again be raised, this time to \$7.25. However, the new law applies only to businesses with six or more employees that have at least \$500,000 in annual gross income, and it does not apply to any business involved in interstate commerce, to any training positions, or to any tipped employees. At the bill's signing, Governor Manchin admitted that the measure is chiefly symbolic.

In Arkansas, a bill was signed by Governor Mike Huckabee (R) raising the state minimum wage by \$1.10 an hour. Arkansas's minimum wage, currently \$5.15 per hour, will be raised to \$6.25 an hour. The enactment was spurred by efforts from organized labor organizations to add a proposed constitutional amendment on the November ballot, which would have raised the minimum wage to \$6.15 per hour, and would have automatically adjusted this rate each year to account for inflation. The legislation signed by the governor allows employers to reduce the actual wages paid to tipped employees by up to 58 percent, provided that the employees are paid at least \$6.25 per hour including tips.

In North Carolina, Governor Mike Easley (D) signed legislation that will increase the state minimum wage by \$1, to \$6.15 per hour, beginning January 1, 2007. In approving the legislation, the governor said the increase was designed to help employees "cope with the rising costs of transportation, housing, health care, and other basic needs." The measure received approval in the Senate by a 37-12 vote. An estimated 139,000 employees will be affected by the wage increase.

In Pennsylvania, Governor Edward G. Rendell (D) approved legislation that will raise the state minimum wage by \$2.00 over the next year. The legislation will raise the minimum wage from \$5.15 per hour to \$6.25 per hour on January 1, 2007. On July 1, 2007, the minimum wage will again be raised, this time to \$7.15 per hour. The measure also contains a delayed implementation for small employers. Employers with 10 or fewer

*continued next page...*

*Verdicts and Settlements*

### Red Robin Settles Claim By Employee Who Was Told To Cover His Tattoos

Red Robin Gourmet Burgers, Inc. has settled a claim brought by a server who alleged he was terminated for not covering up his Egyptian religious tattoos. Pursuant to a consent decree entered into by Red Robin and the EEOC, Red Robin agreed to pay the employee \$150,000. *EEOC v. Red Robin Gourmet Burgers, Inc.*

Employee Edward Rangel, Jr. claimed that Red Robin discriminated against him based on his religion when it terminated him for not covering up his religious tattoos. Rangel also claimed that Red Robin failed to accommodate his religious needs. Red Robin denied any liability or wrongdoing.

Under the terms of the consent decree, Red Robin reaffirmed its commitment to comply with anti-discrimination laws. It also agreed to provide Rangel with neutral employment references, and to institute new anti-discrimination policies.



#### *“Minimum Wage” from page 6*

full-time employees will be required to pay employees at least \$5.65 by January 1, 2007, \$6.65 by July 1, 2007, and \$7.15 by July 1, 2008. The new law also permits employers to pay a 60-day training wage of \$5.15 per hour to employees who are under 20 years of age.

In Delaware, Governor Ruth Ann Minner (D) signed a bill to raise the state minimum wage to \$7.15 an hour by January 2008. The measure provides for two 50-cent increases in Delaware’s \$6.15 hourly minimum wage. The first increase will take effect January 1, 2007, while the second will go into effect on January 1, 2008. Delaware’s minimum wage was previously raised to \$6.15 per hour on October 1, 2000.

*Bargaining Developments*

### New York City Hotel Trades Members Agree To Six-Year Pact with Hotel Association

Members of the New York Hotel Trades Council voted 1,955 to 75 to ratify a new six-year contract with the Hotel Association of New York City. The new agreement, which covers about 24,000 employees at 134 hotels in the city, is the first to be reached among major U.S. cities where collective bargaining agreements are expiring this year. The contract expires on June 30, 2012.

Under the new contract, Hotel employees will receive hourly wage increases of 4 percent in each of the first three years of the agreement, and of 3.5 percent in each of the last three years. The new contract also increases wages for room attendants from \$20.41 per hour to \$25.22 per hour in the last year of the agreement.

Under the agreement, the Hotels will continue to provide family health care benefits to employees with no premium cost-sharing or co-payments. The hotels also agreed to increase their contribution to the employee pension fund from 7 percent to 9 percent of payroll. Additionally, the agreement provides that employees will receive an additional day of sick leave and additional vacation leave. Employees with over 20 years of service will receive an additional week of vacation leave. However, although union leaders had previously identified employee workload as an important issue during this year’s contract bargaining, no changes were made to the contract’s provisions on this issue.

When the tentative settlement was reached, both Hotel Trades Council President Peter Ward and Hotel Association President Joseph E. Spinnato commended each others’ organizations for the good faith, cooperation, and mutual respect demonstrated during bargaining.

“Me too” agreements have been signed by 112 other association hotels. By signing these agreements, the association hotels have agreed to the terms of the contract negotiated with the Trades Council.



*In the Courts*

## Judge Issues Injunction Against Hotel Accused By Union Of Multiple Violations of Law

A federal judge has issued an injunction against the State Plaza Hotel in Washington, D.C., pursuant to Section 10(j) of the National Labor Relations Act. The injunction was based on UNITE HERE's allegation that the hotel committed multiple unfair labor practices after an election in which UNITE HERE was chosen to represent the hotel's employees. *Gold v. State Plaza, Inc.*

UNITE HERE claimed that, after it was elected as the employees' bargaining representative, the Hotel violated federal labor law by dealing directly with employees regarding wages, asking employees to sign anti-union petitions, and by withdrawing its recognition of the union without evidence that a majority of employees no longer supported the union. The union also claimed that the Hotel engaged in surface bargaining, maintained an overly broad no-solicitation rule, created the impression that it was surveilling union activity, interrogated employees about their union views, threatened to terminate employees who supported the union, told employees that it would get rid of the union, and promised employees a pay raise if a majority of them signed a petition to decertify the union.

The NLRB general counsel issued a complaint against the Hotel based on these allegations. The regional director then filed a petition in federal district court seeking Section 10(j) injunctive relief. In issuing the injunction, the U.S. District Court for the District of Columbia relied solely on the transcript of a hearing held before an administrative law judge, who had yet to rule on the post-election allegations.

Section 10(j) authorizes the Board to petition a federal district court for temporary injunctive relief in a pending unfair labor practice case. Additionally, it authorizes the district court to grant "such temporary relief or restraining order as it deems just and proper." Here, the District Court found that a "substantial

case has been made . . . regarding the existence of employer misconduct to warrant both injunctive relief against the continuation of such misconduct and intervention to ensure the employees' legal bargaining representative . . . is able, upon request, to bargain on their behalf pending a decision by the Board."

The court held that the regional director demonstrated a substantial likelihood of success on the merits on the claims that the Hotel directed employees to circulate a decertification petition, interrogated employees about their union views, maintained an overly broad no-distribution rule, created the impression of surveillance of union activity, unilaterally increased wages for some employees who signed the petition, and withdrew union recognition based on decertification efforts that were tainted by apparent unfair labor practices.

Pursuant to this determination, the court ordered the Hotel to cease and desist from committing the specified unfair labor practices, to recognize and bargain in good faith with the union, and to rescind the wage increases and other unilateral changes it had made if requested by the union. Additionally, the court ordered the Hotel to post copies of the court's decision and order in the workplace in both in English and Spanish.

Prior to this proceeding, an administrative law judge had found that the Hotel also committed a number of unfair labor practices on the dates leading up to the election. Specifically, it was found that, prior to the election, the Hotel solicited employee grievances and promised to remedy them, threatened to sell the Hotel if the union won the election, and discharged an employee for his pro-union activity. The Hotel appealed that decision, which is currently before the Board. These pre-election allegations were not at issue during the injunction proceedings in federal court.

*Newsworthy*

## UNITE HERE Launches Hotel Information Clearinghouse

UNITE HERE has announced the formation of the Informed Meetings Exchange (“INMEX”), a clearinghouse of information about hotels that the union says is designed to encourage event and convention planners to spend meeting dollars in such a way as to support those employers that UNITE HERE considers to support its institutional values.

Organizations that are INMEX members will be able to obtain information about labor disputes at hotels, analyses of various hotels’ meeting contracts, and each hotel’s record on discrimination. UNITE HERE is sponsoring INMEX as a stand-alone nonprofit membership organization. INMEX will retain a full-time staff and board of directors separate from the union. INMEX already has over 100 member organizations, which together spend about \$200 million annually at meetings and events at hotels, according to the union.

The hotel industry is viewing INMEX warily. Many in the hospitality industry are concerned with the connection of INMEX to UNITE HERE. Hotel employers believe it likely that this connection will prevent INMEX from providing its members with any sort of objective perspective on labor matters. Joseph McNerney, president and CEO of the American Hotel & Lodging Association, said that he believes INMEX will do a disservice to hotels and meeting planners. McNerney has said that the primary agenda of INMEX is to add union employees in the hospitality industry. Additionally, INMEX has a separate agenda to tarnish the reputation of the hotel industry, and to place financial burdens on it. While McNerney acknowledges that it is too soon to know exactly what role INMEX will play, he said he believes it will “use meeting planners as a pawn and act as a vehicle to steer them away from nonunion hotels or those involved in contract negotiations.” One specific concern is that INMEX might provide negative information about a hotel to event planners, even if it has a positive relationship with the union that represents its employees, if employees at other hotels in the hotel chain are nonunion or on strike.

Yet, UNITE HERE denies that INMEX is designed to increase union membership among hotel employers. Rather, it claims that it is designed solely to provide its members with information about whether or not specific hotels are union-friendly. The union believes that providing INMEX members with this information will lead to increased benefits for union employees and employers. For example, UNITE HERE wants its member

organizations to know which hotels are union and which are non-union, so that business is diverted away from non-union hotels. Membership in INMEX is advertised on its web site as “a way to ensure your meeting dollars are spent responsibly.”

Current members of INMEX include the American Studies Association, the National Council of La Raza, the National Association for the Advancement of Colored People, the National Gay and Lesbian Task Force, the Sierra Club, Amnesty International, the Hispanic National Bar Association, the National Council of Churches, the Jewish Fund for Justice, and the Black Leadership Forum.

### *Verdicts and Settlements*

## Three Cracker Barrel Restaurants To Pay \$2 Million To Settle Harassment Claims

Cracker Barrel Old Country Store Inc. has agreed to pay \$2 million to settle a lawsuit filed by the Equal Employment Opportunity Commission, which alleged sexual and racial harassment at three of the national chain’s Illinois restaurants. *EEOC v. Cracker Barrel Old Country Store, Inc.*

The agreement settles a 2004 lawsuit which alleged that 51 female and African-American employees were subjected to a hostile work environment, including verbal and physical harassment. Additionally, it was alleged that the African-American employees were subject to different terms or conditions of employment based on race. Cracker Barrel, which employs some 70,000 employees in more than 500 restaurants nationwide, denied any liability in signing the consent decree.

Under the terms of the agreement, Cracker Barrel will be required to train all employees at the three facilities on harassment issues, and to post a notice regarding the outcome of the lawsuit. Cracker Barrel will also have to report any complaints about sex or race discrimination to the EEOC during the two-year term of the consent decree.

*In the Courts*

## Federal Court Finds No Absolute Right to Job Restoration Following FMLA Leave

A federal court has found that an employee relations manager, whose position was eliminated in a company reorganization, was not entitled to reinstatement at the end of his leave under the Family and Medical Leave Act, since he would have been discharged even if he not taken the leave. *Yashenko v. Harrah's NC Casino Co.*

In 1994, Harrah's hired Edward Yashenko, who in 1999 was promoted to the position of manager of employee relations. He held this position until the date of his termination. During his employment with the Casino, Yashenko took several medical leaves of absence. Harrah's granted each of Yashenko's leave requests, most of which Yashenko was entitled to take under the FMLA.

In 2003, Yashenko took another one of his many leaves of absence. While he was away from work, Harrah's informed Yashenko that the Casino was reorganizing, and that his position was being eliminated. Harrah's encouraged Yashenko to apply for an alternative position, but he declined. Yashenko said that he was taking medication, that he did not feel physically able to perform another job, and that his doctors had recommended against applying for an alternative position. As such, when Yashenko returned to work in July of 2003, he no longer had a position with the Casino and was terminated.

The Sixth Circuit Court of Appeals upheld a previous grant of summary judgment to Harrah's. The court held that the FMLA does not establish an absolute right for an employee to be restored to his previous position after taking an approved leave. Rather, "an employer may deny restoration when it can

show that it would have discharged the employee in any event regardless of the leave." The court rejected Yashenko's arguments to the contrary, finding that they contradicted the language of the FMLA, as well as Congress's intent not to provide an employee on leave with any greater rights than other employees. The court also pointed to federal regulations that establish limits on an employee's right to reinstatement following leave. The court explained that these federal regulations demonstrated clearly that an employee's right to reinstatement after FMLA leave is not absolute, and reinstatement may be denied in certain limited circumstances.

The court also stated that various courts have disagreed about whether, in a situation such as this one, the employee or the employer bears the burden of proof on the issue of whether the employee would have been discharged if he had not taken leave. Here, however, the issue did not need to be resolved, because Yashenko could not dispute that his position was eliminated in a legitimate reorganization.

The court also rejected Yashenko's claim that he was retaliated against for taking FMLA leave. The court acknowledged that Yashenko engaged in the protected activity of taking FMLA leave, that he was terminated, and that the elimination of his job occurred during his leave. Yet, Yashenko could not demonstrate that Harrah's legitimate nondiscriminatory reason for eliminating his position was pretextual. Accordingly, because Harrah's elimination of Yashenko's position was based on its legitimate reorganization, Yashenko could not assert a retaliation claim against Harrah's.

*In the Courts*

## Court Allows Age Discrimination Claim By 67-Year-Old Waitress To Proceed

A federal district court in Michigan has refused to dismiss the EEOC's claim that the International House of Pancakes violated the federal Age Discrimination in Employment Act by denying a 67-year-old waitress with 40 years of experience employment as a server in one of its restaurants. In arguing for dismissal, IHOP contended that the woman was actually hired, and was terminated for not showing up to her first day on the job. *EEOC v. International House of Pancakes*.

In May of 2003, IHOP assistant manager Melanie Brown told waitress Becky Ruiz that the restaurant needed more servers. Ruiz then informed her friend Jinks Greiner that IHOP was looking for waitresses. Greiner, who was 67 at the time, was interested in the vacancy.

However, when Ruiz mentioned Greiner to Brown, the assistant manager allegedly replied that Greiner was too old and the restaurant did not want her. Nevertheless, Greiner submitted an application, and manager Dan White told Greiner that a slot might open up the following Monday. Ruiz claimed that after Greiner departed, White said that he could not hire Greiner because she was too old. White did not call Greiner back the following week.

When Ruiz questioned White about the status of Greiner's application, White allegedly replied that "we had all these young people in here and he didn't know if [Greiner] would fit into the harmony." However, in early July, 2003, Brown called Greiner to tell her she was hired, and to schedule an introductory meeting with White. However, when Greiner arrived on the appointed day, White emerged from the kitchen and asked why she was there. Greiner explained that Brown had set up the appointment. In response, White gruffly replied that "it was not a good day," and the meeting was rescheduled for July 11. On July 11, Greiner met with White for approximately 90 minutes and gave her an "orientation," which included her receipt of tax

forms and an employee handbook. White had to cut the meeting short, and Greiner told a waitress that she would call back on Monday for her schedule.

Greiner alleged that when she called back that Monday, White told her she had "walked out in the middle of orientation" and that she had "messed up his whole day." He told her to call the following day. When Greiner called in the following day, she was placed on hold for 20 minutes, only to be told that neither Brown nor White was available. Greiner called again the following day, but was unable to find out any information about her schedule.

In arguing for dismissal, IHOP contended that Greiner had been hired, and that when she failed to arrive for her first day of work, she was terminated. IHOP claimed that even if Greiner never received a work schedule, it had an "honest belief" that she knew her scheduled start time.

The court disagreed, and found that the EEOC had established a "prima facie" case of age bias. The court reasoned the commission produced evidence that an "adverse action" had been taken against Greiner, regardless of whether or not she was hired. The court stated "[w]hether couched in terms of a 'failure or refusal to hire,' or a 'termination,' either is actionable under the ADEA if motivated by age." The court went on to note that the EEOC had "come forward with sufficient evidence to allow a reasonable jury to conclude that Greiner was treated differently because of her age, and that Greiner's age was at least a motivating factor behind the adverse action taken against her by IHOP."

The court also found that the EEOC had presented evidence that IHOP's asserted reason for ending Greiner's employment was a pretext for age discrimination. The court found that a reasonable jury could find there was no reason for White or Brown to believe that anyone ever told Greiner her work schedule.

*In the Courts*

## Court Says Hotel Did Not Withdraw From Fund When It Had Bargaining Impasse With Union

A federal court has ruled that a hotel did not withdraw from a collectively bargained pension fund, and thereby did not owe the fund withdrawal liability, when it was unable to reach an agreement on a new collective bargaining agreement with a union representing its employees. *Hotel Employees and Restaurant Employees International Union Pension Fund v. 520 S. Michigan Ave.*

The Congress Plaza Hotel and Convention Center, also known as 520 South Michigan Avenue Associates Ltd., made contributions to the Hotel Employees and Restaurant Employees International Union Pension Fund pursuant to its collective bargaining agreement with HERE, Local 1. The bargaining agreement expired December 31, 2002, but the Hotel continued to pay contributions to the fund each month as it negotiated a new agreement with the union.

In December of 2003, the fund sent the Hotel notice that it would stop accepting contributions from the Hotel if it had not agreed to a new collective bargaining agreement with the union by December 31, 2003. When no agreement was reached by that date, the fund terminated the Hotel's participation in the fund and assessed it withdrawal liability in the amount of nearly \$2.7 million.

The fund stopped accepting payments from the Hotel based on a provision in the fund's trust agreement. That provision, known as the "One-Year Resolution" provision, stated that the fund would continue to accept the Hotel's contributions after the collective bargaining agreement expired for only 12 months, unless the Hotel agreed to a new collective bargaining agreement with the union prior to that time. The fund argued that this provision gave it the authority to end the Hotel's participation in the fund and assess it withdrawal liability when the Hotel did not agree to a new collective bargaining agreement with the union within 12 months after the previous contract expired.

As required by ERISA, the Hotel paid the \$2.7 million withdrawal liability assessment and challenged the assessment via arbitration. In arbitration, the Hotel asserted that ERISA's "labor dispute" exception prevented the fund from assessing this withdrawal liability against it. The arbitrator agreed with the Hotel, and rescinded the fund's assessment of withdrawal liability. The fund then sued in federal court, and asked the district court to vacate the arbitrator's decision. The fund claimed that the Hotel waived the labor dispute exception when it agreed to the "One Year Resolution" provision in the trust agreement.

The district court disagreed. It stated that it was a "close question" whether employers can waive ERISA's statutory protections, like the labor dispute exception. However, the court found it unnecessary to decide this issue. Instead, the court determined that the arbitrator reasonably rejected the fund's claim that the One Year Resolution provision acted as a waiver of the labor dispute exception. It explained that the One-Year Resolution provision "states that the employer's obligation to contribute shall continue until the end of the 12th month [period] following the expiration of a collective bargaining agreement. This language does not refer to a labor dispute or [the labor dispute exception], which exempts from withdrawal liability employers who suspend contributions solely based on a labor dispute." Thus, by signing the trust agreement, the Hotel did not explicitly waive the protection of the labor dispute exception.

Additionally, the court agreed with the arbitrator that the Hotel only temporarily withdrew from the plan. In this regard, the court noted "Congress Plaza would not have stopped paying its contributions to the fund absent the fund's rejection of future contributions and notice of withdrawal liability." Additionally, Congress Plaza had not shut down any covered operations. The possibility of "resumed participation by the employer in the pension fund" remained an option." Therefore, the fund's assessment of liability to the Hotel based on a complete withdrawal was inappropriate.

*Verdicts and Settlements*

### **Restaurants Settle Claims of Sex Harassment Against Teens**

Recently, two restaurants entered into sizeable consent decrees with the EEOC to settle claims that their employees were sexually harassed. In each case, a number of the employees who claimed they were harassed were teenagers.

In Las Vegas, Italian restaurant Valentino agreed to pay \$600,000 pursuant to a consent decree to settle claims that five of its female hostesses and food servers were persistently subjected to unwanted sexual touching, propositions, and lewd remarks. The employees claimed that these actions constituted unlawful sexual harassment. Valentino denied any liability or wrongdoing.

Under the terms of the consent decree, Valentino will pay the five employees a total of \$600,000. The consent decree allows the EEOC to determine the specific amount to be awarded to each claimant. The consent decree also requires Valentino to provide neutral employment references to the employees, to retain an EEOC consultant to assist it in implementing anti-discrimination policies, to evaluate each supervisor's and manager's compliance with its new anti-discrimination policies, and to otherwise comply with state and federal anti-discrimination laws.

In Santa Fe, New Mexico, Restaurant Concepts II, LLC, doing business as Applebee's Neighborhood Grill and Bar, agreed to pay \$310,000 to settle allegations of sexual harassment pursuant to an EEOC consent decree. There, seven female employees alleged that they were sexually harassed. Applebee's denied any liability or wrongdoing.

Under the terms of the consent decree, Applebee's agreed to pay the seven employees a total of \$310,000. Again, it was agreed that the EEOC would determine the specific amounts to be paid to each individual employee. The consent decree also required Applebee's to implement certain employment policies and complaint procedures, and to otherwise comply with state and federal anti-harassment and anti-discrimination laws.



*Verdicts and Settlements*

### **Taco Bell Settles Teenage Male's Claim He Was Harassed by Female Boss**

Taco Bell has reached a consent decree with the EEOC to settle allegations that a teenage male employee at an Indiana Taco Bell franchise was sexually harassed by his female boss. *EEOC v. Taco Bell Corp.*

The lawsuit filed by the EEOC alleged that Shawn Keown was sexually harassed by a female trainer in her 40's. Keown claimed that the woman made "graphic and pervasive sexual comments and innuendos" to him over a one-year time period. Taco Bell denied any liability or wrongdoing.

Under the terms of the consent decree, the company will pay \$38,250 to Keown and \$30,000 to his attorneys. Taco Bell also agreed to provide Title VII training to its area coach, as well as personnel at the Plainfield, Indiana facility where the alleged harassment occurred. The training will put particular emphasis on discrimination issues that may affect youth. The two-year decree also calls for Taco Bell to make periodic reports to EEOC's Indianapolis office, which handled the initial investigation and the subsequent litigation.



*At the Board*

## Starbucks, IWW Settle Dispute Over Unfair Labor Practice Allegations

Starbucks Coffee Co., and Industrial Union 660 of the Industrial Workers of the World reached a settlement resolving pending allegations of unfair labor practices filed by the National Labor Relations Board against Starbucks. *Starbucks Corp.*

The Board's complaint was first issued against Starbucks on November 18, 2005. In the complaint, the regional director asserted that Starbucks managers, including several high-ranking officials, committed various unfair labor practices during an organizing drive at a Starbucks coffee shop on New York's Madison Avenue. The complaint alleged that two district managers interrogated employees about their union support, and that a regional director of operations and another district manager interfered with the employees' ability to engage in union activities. It was also claimed that the company refused to allow employees to wear pro-union buttons, and said employees could lose their rights to transfer to other stores if they supported unionization. Additionally, the complaint alleged that following the filing of a representation petition, Starbucks increased supervision at the Madison Avenue store, and provided employees with free pizza, gym passes, and baseball tickets in an effort to convince them to reject the union.

The complaint also made allegations involving two individual employees. The complaint claimed that Starbucks effectively discharged one employee due to his union activities by issuing him a written warning, and by later refusing to allow him to revoke his resignation. It was also alleged another employee was disciplined and eventually fired for her organizing activities.

Pursuant to the settlement, Starbucks agreed to withdraw various disciplinary notices that had been issued to employees involved in the organizing campaign. It also agreed to post notices at the three covered stores saying, among other things, that the company would not interrogate its employees concerning their union activities or provide them with benefits as a means of encouraging them to withdraw their support for the union. Starbucks also agreed to reinstate the two disciplined employees, and to pay nearly \$2,000 in back pay to those individuals, as well as to an employee who was allegedly denied a pay increase because of her union activities. Under the settlement, Starbucks denied any liability or wrongdoing.

Subsequent to the settlement, an issue has arisen between Starbucks and the IWW over the termination of Daniel Gross. Gross, who was employed by Starbucks as a barista, was also the co-founder of IWW Starbucks Workers Union, a branch of the IWW that sought to unionize six Starbucks locations. He had led union organizing efforts at Starbucks for the past three years. Gross was terminated following a company investigation into an allegation that he made a threatening remark to a district manager during a union rally. Gross has claimed that he was fired for engaging in union activities. Starbucks has yet to comment publicly on Gross's termination.

*At the Board*

### **Board Finds Interruption of Breakroom Conversation Not Illegal Surveillance**

The National Labor Relations Board has upheld the ruling of an Administrative Law Judge that an airport concessionaire violated the National Labor Relations Act during a UNITE HERE Local organizational campaign at Baltimore/Washington International Airport. The employees at issue worked on Pier B of the airport, where the employer maintained a Charley's Steakery and a combined Caribou Coffee/Mamma Ilardo's Pizza restaurant. *Airport 2000 Concessions, LLC.*

While the Board upheld the bulk of the judge's decision, Chairman Battista and Member Schaumber reversed the judge on two points. First, they disagreed with the judge and dismissed the allegation that one of Airport 2000's supervisors unlawfully surveilled an employee when she interrupted a conversation between that employee and a union organizer in an employee breakroom. However, the Board upheld the judge's finding that

the supervisor's subsequent conduct, which included telling employees not to speak with union organizers, violated the Act. Second, the Board reversed the judge's finding that the employer violated the Act when its secretary/treasurer solicited grievances from employees during the union's organizational campaign.

Member Liebman dissented from the majority opinion, asserting that the Board should have upheld the judge's original findings in their entirety. She would have found that the supervisor's interruption of the breakroom conversation constituted unlawful surveillance because it led to the employer's subsequent prohibition on conversations with union organizers. Member Liebman would have also found that the company's secretary/treasurer violated the Act by soliciting grievances from employees he had never met.

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*Verdicts and Settlements*

### **Italian Restaurant Settles Male-on-Male Sex Harassment Allegations For \$210,000**

An upscale Italian restaurant in Chicago settled sexual and racial harassment claims by eleven current and former employees for a total of \$210,000. Bice Restaurant in Chicago's Gold Coast neighborhood reached the settlement agreement with the EEOC, and entered into a consent decree. Under the terms of the consent decree, Bice denied any liability or wrongdoing.

The settlement relates to a suit filed by the EEOC in 2004, which alleged that a male manager sexually harassed male bussers and runners. Specifically, it was alleged that the manager grabbed the genitals of the restaurant's male employees, and repeatedly spoke to them in a lewd manner. The lawsuit also alleged that two other managers verbally harassed a group of

Hispanic bussers and runners. According to the EEOC, Bice's management ignored the groping allegations, and claimed that the incidents were the result of "cultural differences."

Pursuant to the consent decree, eight current and former Bice employees will each receive \$22,500. Three other individuals will receive \$10,000 each. Additionally, as part of the settlement, Bice agreed to conduct harassment training for its employees, and to adopt an anti-harassment policy. Bice also agreed to submit periodic reports to the EEOC detailing the actions it was taking to prevent harassment.

*In the Courts*

## Female Casino Employee Who Sexually Harassed Male Co-Worker Cannot Show That Her Termination Was Retaliatory

A federal court in Louisiana has found that a female casino employee, who was fired for sexually harassing a male employee, failed to show that her termination was in retaliation for previously making complaints that she had been sexually harassed at work. *Imbornone v. Treasure Chest Casino*.

Sylvia Imbornone was a surveillance agent for the Treasure Chest Casino. After her termination, she sued her former employer, claiming that she was sexually harassed, and that her termination was retaliatory. According to Imbornone, she was sexually harassed for most of the seven years she worked at the Casino. However, she did not first complain about this harassment until 2002. At that time, she filed two written complaints in which she asserted that a female co-worker was engaging in inappropriate and harassing behavior at work. The Casino investigated the claim, and fired the female co-worker. Subsequently, the Casino called a meeting of its surveillance department and reiterated the company's harassment policy, pursuant to which employees could receive discipline, up to and including termination, for engaging in unlawful harassment. Imbornone attended the meeting. At the time, Imbornone did not object to any of the Casino's actions in response to her complaint.

Then, in 2003, a male surveillance agent complained to the Casino's human resources department that Imbornone was sexually harassing him. He wrote: "I have serious concerns about the way Sylvia Imbornone talks about parts of my body. I am constantly looked up and down and treated like I am her personal vent to the male sex." According to the male employee, Imbornone made "many sexual references" about him, and frequently asked "if I could turn around so she could look at my ass." The human resources manager confronted Imbornone about the allegations. Imbornone admitted en-

gaging in the alleged behavior, but claimed it was "reciprocal." Imbornone was then suspended and, at the conclusion of the Casino's investigation, terminated.

Imbornone claimed that she was fired in retaliation for advising the Casino about sexual harassment by the female employee in 2002. The Casino contended that Imbornone was terminated for sexually harassing her male co-worker. The court agreed with the Casino, and found that Imbornone presented no evidence to contradict the Casino's proffered reason for her termination.

In dismissing Imbornone's claims, the court noted that "Imbornone has admitted that she engaged in the inappropriate behavior detailed in the sexual harassment complaint." The court also went on to point out that Imbornone "attended the sexual harassment training course, "and "presumably knew such behavior was strictly in violation of the company's sexual harassment policy and could result in her termination." Additionally, the court observed that she "must have been acutely aware of the consequences of inappropriate and harassing behavior because her prior complaints against her co-employee" led directly to that employee's termination.

Thus, Imbornone's claims against the Casino for wrongful termination were dismissed. As the court explained, an employer "cannot be rendered powerless to discipline or discharge" an employee for inappropriate behavior "simply because she complains of sexual harassment." The mere fact that Imbornone had at one time complained of harassing behavior did not prevent the Casino from terminating her, as "Title VII was not intended to immunize insubordinate or disruptive behavior at work."