

Hospitality Industry Quarterly

Labor and Employment Law Report

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Waiter at George Town Club Not Required to Arbitrate Discrimination Claims

The U.S. District Court for the District of Columbia held that a waiter who was allegedly fired for discriminatory reasons from his job at the George Town Club at Suter's Tavern may pursue his claims under the District of Columbia Human Rights Act in local court rather than through arbitration. *George Town Club at Suter's Tavern v. Salamanca*, D.D.C., No. 06-2181 (EGS).

Judge Emmet G. Sullivan found that Gilberto Salamanca never signed a binding agreement to arbitrate or otherwise manifested his intention to be bound by arbitration clauses in the George Town Club's employee manual or an accompanying document. Thus, under D.C. law, Salamanca could not be compelled to arbitrate.

Salamanca was hired by the club in 1997 as a part-time parking valet. When he was hired, he received a copy of the club's employee manual, which contained a "Binding Arbitration" provision.

The provision stated that "Any controversy arising from this Manual or related to employment with the Club shall be resolved in arbitration in Washington, D.C. The agreement to arbitrate includes controversies based upon federal and DC equal employment opportunity laws, as well as other kinds of disputes." In addition a separate "Acknowledgement of Employee Manual" form provided "I further agree that any controversy arising out of, or related to, my employment with the Club, including but not limited to controversy concerning equal employment opportunity rights created by federal law and by the law of the District of Columbia, shall be resolved by arbitration, pursuant to the Federal Arbitration Act, and that the method of selecting arbitrators is that set forth in the Manual."

However, Salamanca never was asked to sign, and never signed either the manual or the form when he was hired. Similarly when he was promoted to a full-time water position in 1998, he was not asked to sign either arbitration agreements. In 2000, the club issued a new employee manual containing the *please see "Arbitration" on page 2*

Hotel Employees' Tort Claims Against Casino are Not Preempted by the LMRA, the Ninth Circuit Rules

In *Ward v. Circus Circus Casinos Inc.*, the U.S. Court of Appeals for the Ninth Circuit recently ruled that the tort claims of six employees of Circus Circus Casinos Inc. in Las Vegas were not preempted under federal labor law. The employees tort actions are based on alleged injuries by company security guards when they broke up a union meeting in the employee dining room. The employees alleged assault and battery, false imprisonment, intentional or negligent infliction of emotional distress, negligent entrustment, and negligent hiring, training, and supervision.

In the facts of this case, the effective union contract provided that union representatives could communicate with bargaining unit employees at work only if it did "not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours."

In May of 2002, union representatives and employees were distributing leaflets during a Circus employees' meeting in the employee dining room during a scheduled break. During the meeting one employee stood on a chair and spoke about the need for union members to defend their employment rights, and the Circus employees in response began chanting and shouting "union, yes" and "we want a contract."

Upon hearing this commotion, Circus security guards entered the dining room and told the employees to leave. The employees refused, formed a circle around the employee on the *please see "Casino" on page 2*

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same arbitration policy, but again, Salamanca was not asked to sign, and never signed the new manual or an acknowledgment form.

Salamanca continued to work at the club full-time as a waiter until he was discharged in September 2006. Two months later, he sued in D.C. Superior Court, asserting claims for race discrimination and retaliation under the DCHRA and violations of federal health insurance law. Although his complaint cited multiple provisions of the employee manual, alleging that the club failed to follow its own discharge and other policies, it did not argue that the manual was an employment agreement or assert a breach of contract claim.

The club demanded that Salamanca agree to arbitrate his claims, clarifying, at his request, that its position was based on the arbitration policy in the “Acknowledgment of Employee Manual” form. However, Salamanca refused to arbitrate, arguing that the policy set forth in the employee manual was not a valid agreement to arbitrate under the Federal Arbitration Act.

The court agreed with Salamanca, stating that “[c]ontrary to petitioner’s specific argument, however, the D.C. Circuit held in *Bailey [v. Federal Nat’l Mortgage Ass’n]*, 209 F.3d 740, 82 FEP Cases 1089 (D.C. Cir. 2000) that continued employment is *not* an indication to be bound by an arbitration policy,” Judge Sullivan wrote. “Therefore, respondent’s continued employment alone is insufficient to demonstrate his assent to the Employee Manual’s arbitration clause,” he concluded.

Salamanca’s failure to sign the form acknowledging receipt of the manual, which set forth a separate arbitrate pact, further undercut the club’s position, Judge Sullivan said. That some other employees signed the form was evidence that the club “itself did not intend for the manual alone to be a binding contract.”

Judge Sullivan stated that whether a party has agreed to arbitrate is a question of contract law. Under D.C. law, there must be evidence that the parties had a “meeting of the minds” on all material terms for a contract to be enforceable, he said.

“[C]ourts ‘should not assume that parties agreed to arbitrate unless there is ‘clear and unmistakable’ evidence that they did so,” Sullivan wrote. The burden of proof to show a binding agreement to arbitrate or other contract is on the party asserting its existence, he said.

The court also noted that the evidence supported the finding that Salamanca did not agree to be bound to arbitration. “In addition to the lack of evidence of respondent’s assent to the Employee Manual’s arbitration clause, there is evidence that petitioner itself did not intend for the manual alone to be a binding contract,” the court said.

Some of Salamanca’s co-workers signed the separate acknowledgment form, which provided that “nothing in the Manual may be construed to be an expressed or implied contract of employment, but [is] rather an overview of working policies and benefits, [and] that the policies and benefits may change from time-to-time as business necessitates” and included its own arbitration language, Sullivan noted. “The use of this form clearly demonstrates that petitioner intended that the ‘Acknowledgment of Employee Manual’ form, rather than the Employee Manual, create an arbitration agreement between employer and employee,” he stated.

Salamanca never signed the acknowledgement form either, the court said. Therefore, he could not be compelled to arbitrate his employment bias and insurance claims against the club.

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chair, and locked their arms together. The guards allegedly broke through the circle, pulled the employee off his chair, and handcuffed him. The other five employees involved in the suit allege that the guards pushed, grabbed, and knocked them down.

The six employees filed the tort suit against Circus in Nevada state court in September of 2003, but the company removed the case to the U.S. District Court for the District of Nevada. The

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district court denied the employees' motion to remand the case and granted summary judgment to Circus, holding that the tort claims were preempted by Section 301, that the employees failed to exhaust their contractual remedies by filing a grievance, and that the Nevada workers' compensation law provided the exclusive remedy for their alleged injuries. The employees appealed.

On appeal, Circus argued that pursuant to Section 301 the union contract must be interpreted to determine whether the employees' union activity interfered with company business. Circus stated that, "Section 301 preempts state law claims that require the court to interpret a [bargaining contract] provision that is reasonably relevant to the resolution of the dispute." Circus also argued that the contract provision protecting its right to direct and control its employees requires interpretation.

Reversing the lower court's grant of summary judgment to the casino, the court held that the claims contested "the restraint, physical force and threats used against them by Circus security guards" and these claims "do not depend on an interpretation of permissible union communications." Further, the court found that the casino's right to direct its employees cannot justify using any amount of physical force against them. Moreover, the court stated that "[e]ven if the employees' activities interfered with Circus' operations or were not permissible under the [contract], Circus may be liable under the state law if the facts surrounding the guards' behavior, as alleged by the employees, are proved." Moreover, the bargaining contract in this case did "not set forth procedures for employee control or authorize the use of threats, physical force or restraint." The court noted however that bargaining contracts "typically do not govern such conduct, and [that] state claims involving physical threats or force used against an employee usually are not preempted."

With regards to the negligence claims, the court found that the employees did not rely on any contract provision to determine the particular duties of care owed to them; rather, the employees relied on the duty of reasonable care owed to everyone. Accordingly, the court held that the employees' tort claims were not preempted by Section 301 of the Labor Management Relations Act because it was not necessary to consult the union bargaining contract in order to decide whether the casino is liable for the alleged torts.

Because the court lacked jurisdiction to consider whether the tort claims are preempted by the Nevada state workers' compensation law, it dismissed the state claims without prejudice, noting that it is up to the state court to determine whether the National Labor Relations Board has exclusive jurisdiction over the dispute.

BARGAINING DEVELOPMENTS

Employees at Las Vegas Hotel Casinos Accept Contract

Members of the UNITE HERE affiliates Culinary Workers Local 226 and Bartenders Union Local 165 voted overwhelmingly to accept a five-year master agreement covering about 21,000 employees at 10 hotel casinos operated by MGM Mirage in Las Vegas.

The contract, which is retroactive to June 1, 2007 and will expire on May 31, 2012, contains many of the features which were also included in collective bargaining agreements union members previously approved with Harrah's Entertainment and Riviera Hotel & Casino. Some of the notable features include a \$3.47 per hour wage, pension, and health and welfare increase over term, increases in guaranteed gratuities for tipped employees, participation in a housing trust fund, and contributions to a legal defense fund to help tipped employees being targeted by the Internal Revenue Service. As the contract maintains defined benefit pension plan contributions and fully employer-paid health insurance for both employees and their dependents, hourly increases each year can be divided between wages and benefits, depending on how much health and pension costs increase each year.

The contract covers employees at the Bellagio Resort and Casino, Mirage Casino-Hotel, Treasure Island Hotel & Casino, Mandalay Bay Resort & Casino, Monte Carlo Resort & Casino, Circus Hotel & Casino, Slots-A-Fun Casino, Excalibur Hotel-Casino, New York New York Hotel & Casino, and the Luxor Hotel & Casino.

If any of the properties close during the contract term, employees would receive priority in job placement opportunities at other company properties. Employees for whom jobs are not available would receive severance pay based on their length of service. Further, as MGM Mirage opens new hotel-casinos, hotels, and condo-hotels, it has agreed to support UNITE HERE through organizing neutrality and card-check recognition among new employees.

Similarly, employees of the Riviera Hotel & Casino overwhelmingly voted to ratify a five-year contract. Those contracts are likewise retroactive to June 1, and features substantially similar wage and benefit provisions.

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IN THE COURTS

Restaurant Cook's Immigration Status Does Not Bar Claim to Trial

The U.S. District Court for the District of Minnesota held that a restaurant cook's uncertain immigration status does not prevent the Equal Employment Opportunity Commission from taking her sexual harassment allegations against Perkins Restaurants to trial. *EEOC v. The Rest. Co. d/b/a Perkins Rests. & Bakery*, D. Minn., No. 05-1656.

The court rejected Perkins' argument that the plaintiff was prevented from bringing a Title VII of the 1964 Civil Rights Act claim because she was not a proper employee under the Immigration Reform and Control Act, and instead found that while the plaintiff's damages claims may be limited because of her immigration status, she was not barred from bringing a claim.

"Civil rights actions are necessary to forward the policies of Title VII, and ruling that undocumented employees could not pursue civil rights claims on their own behalf would likely chill these important actions," Judge John R. Tunheim ruled. In a footnote, the court said that it was assuming the plaintiff was undocumented, even though discovery on the issue had been barred.

The court explained that *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 169 LRRM 2769 (2002); 60 DLR AA-1, 3/28/02, did not limit the ability to bring employment claims, but instead limited some remedies available under the National Labor Relations Act. The court stated that if *Hoffman Plastic* was a bar to bringing claims, the implication would be problematic for employment law.

"The court also considers the need to reduce employer incentives to hire undocumented employees because of their inability to enforce their rights," Judge Tunheim said. "Every court that has considered the impact of *Hoffman Plastic* on Title VII either assumed or concluded that undocumented employees have standing in their own right to obtain relief."

The court emphasized that whether or not the plaintiff could bring an individual claim did not prevent the EEOC from bringing a claim on her behalf.

In 2000, the plaintiff began working for Perkins as a cook, and beginning in 2003, she alleged that her new supervisor began sexually harassing her. The plaintiff further alleged that her supervisor frequently made sexual comments about her body and her appearance generally, and also asked her to "go out."

In one incident, her supervisor allegedly appeared uninvited at her home during a baptismal celebration for her son, then

later commented at work that he wanted to take her out dancing in the same red dress she wore at the baptismal celebration.

When she refused her supervisor's alleged sexual advances, he allegedly began treating her differently than other cooks. He chastised her, and closely monitored her movement around the restaurant. The plaintiff further alleged that her supervisor threatened to report her to immigration authorities and told her that management would "surely believe him over her."

After her supervisor refused to stop the alleged harassment, the cook took her concerns to a shift leader who referred her to upper management. With the help of an interpreter, she reported her concerns and provided witnesses. The company received other reports from the witnesses, all in Spanish, laying out allegations of harassment by the employee's supervisor.

When the plaintiff met with company officials, she explained that she did not tell management about the harassment earlier because her supervisor had threatened to report her to immigration authorities for being an undocumented alien. Following the report, the supervisor was given a written warning. Perkins then began investigating the plaintiff's immigration status and learned that the plaintiff's name did not match her Social Security number.

"[A] plaintiff does not need to be actually harmed by the actions of a defendant to suffer an adverse employment action," the judge said, rejecting Perkins' argument that the plaintiff never experienced the cut in hours. "The proper analysis is whether the challenged action might dissuade a reasonable employee from engaging in protected activity."

The court also said that Perkins' action of advising the employee not to come to work until she resolved her immigration status was an adverse employment action even if it was not an actual termination.

"Regardless of whether defendant actually terminated [the plaintiff], the court concludes that a reasonable jury could find that defendant's action would deter a reasonable employee in [the employee's] situation from engaging in protected activity," Judge Tunheim said, adding that the question of whether the company was complying with IRCA or actually retaliating was best left to a jury.

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IN THE COURTS

State Court Blocks Los Angeles Living Wage Ordinance For Airport Hotels

A California Superior Court judge blocked enforcement of a living wage ordinance aimed at thousands of employees at 13 hotels near the Los Angeles International Airport (LAX), finding that it was not essentially different from an earlier measure the city council repealed. *Rubalcava v. Martinez*, Cal. Super. Ct., No. BS107624.

The Save Los Angeles Jobs Coalition, a group of hotel and business groups opposed to the measure, argued that the ordinance violated state law prohibiting the introduction of a new ordinance within a year of the revocation of a similar measure, unless it is “essentially different” from the first one.

In November 2006, the City Council passed, and the mayor signed, an ordinance requiring hotels near LAX to pay its employees the city’s “living wage” of at least \$9.39 per hour with health benefits, or \$10.64 per hour if health benefits were not included. However, the Save Los Angeles Jobs Coalition presented enough signatures in January to force the city to either rescind the ordinance, or put it to a vote of city residents.

Supporters of the ordinance, including several members of the City Council, said they thought they had a deal with the business groups on a replacement ordinance. No such agreement was ever struck, however, according to key participants. As a result, the City Council voted unanimously to rescind the original ordinance, and ordered the city attorney to draft a new version that included a “phase-in” of the living wage and other new language to address concerns raised by the business groups. However, at a City Council session to vote on that replacement ordinance, representatives of several business groups told council members that their members still opposed the measure.

Judge David P. Yaffe, granting a petition by the hotel and business groups opposed to the living wage ordinance for a writ

of mandate, also ruled that the law was enacted in bad faith by the City Council.

“The elected representatives who enacted the new ordinance tried to make it appear different from the old ordinance, but their purpose was to avoid the effect of the referendum petition, not to respect it,” Judge Yaffe wrote.

“As previously stated, it imposes the same minimum wage requirements on the same hotels in the same area as the old ordinance. Every requirement contained in the old ordinance is repeated in the new ordinance,” he added.

Judge Yaffe stated that the City’s contention that the two ordinances were “essentially different” had no merit, despite the City’s efforts to make it appear so by adding certain “enhancements” to the original measure. Noting that most of the enhancements amounted to nothing more than “vague commitments” for studies and reports on possible improvements to the LAX area, Judge Yaffe stated that “[s]uch enhancements are to a great extent illusory.”

Further, Judge Yaffe also rejected the City’s claim that the hotel and business groups could not establish “cognizable harm” sufficient to support writ relief.

“The legally cognizable harm here is the attempt to chill the right of referendum by requiring the opponents of the City’s proposed legislation to repeatedly undertake and finance another campaign to collect the requisite number of signatures for another referendum . . . If legislative bodies are permitted to do that, the power of referendum will become meaningless because the opposition to legislative action can be worn down by repeatedly enacting the same ordinance,” Judge Yaffe concluded.

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Turning to the issue of pretext, the court said it would be up to a jury to determine whether Perkins became concerned about the plaintiff’s immigration status only after she complained about harassment, but intentionally ignored her status when there was no need to terminate her.

“If a jury finds that defendant knew about [the plaintiff’s] immigration status prior to the harassment investigation, it could reasonably infer that defendant’s proffered reason for the adverse employment actions was pretextual,” the judge concluded.

IN THE COURTS

Restaurant Server Not Required to Arbitrate Claims Stemming From Manager's Alleged Rape

The Mississippi Supreme Court revived the negligent hiring, supervision, and retention claims of a teenage server at a Captain D's restaurant who alleged that a manager raped her, finding that the claims were not within the scope of the parties' employment arbitration agreement. *Smith v. Captain D's LLC*, Miss., No. 2006-CA-00024-SCT.

Tammy Smith started working at the Captain D's in Corinth, Miss., when she was 17 years old. Prior to her employment, Smith filled out the company's job application form, which included a one-page arbitration agreement. The manager who provided the teenager with the application was a friend of Smith's grandmother, and said that her grandmother had to sign the agreement because she was a minor. Therefore, Smith signed the agreement as the applicant, and her grandmother signed it on a line provided for guardians.

The agreement provided that Captain D's and its employees had to submit claims between them to binding arbitration, and that any claims pursued in court could be dismissed and sent to arbitration at the request of Captain D's.

Smith alleged that a male manager assaulted and raped her during working hours, and sued Captain D's and the manager in Alcorn County Circuit Court. Her complaint charged that Captain D's was negligent in its hiring, supervising, and retention of the manager.

Captain D's moved to dismiss the complaint and compel arbitration, and the trial court granted the motion. Finding that a final judgment had been entered as to Captain D's under Rule 54(b) of the Mississippi Rules of Civil Procedure, the state justices accepted her appeal.

Justice George C. Carlson Jr. said that the case "presents three issues to be decided in today's case: (1) whether a minor may disaffirm an arbitration agreement based on the infancy doctrine; (2) whether the arbitration agreement is unconscionable; and (3) whether the right to arbitration is precluded by the assertion of an alternative affirmative defense." Because the first issue was dispositive, he said, the other issues did not need to be addressed.

In its analysis, the court explained that whether parties agreed to arbitrate a dispute is determined by "two sub-factors: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." Noting that there was no "fervent ef-

fort to attack" the validity of the agreement itself, it turned to the question of "scope."

Justice Carlson explained that the question of scope is determined by whether the rape claim arises out of, or relates to, Smith's application for employment, so as to be subject to arbitration. "While recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment," he said.

The court found that the "any and all previously unasserted claims, disputes, or controversies" language in the parties' agreement constituted a broad arbitration provision. When faced with a broad arbitration clause, the court stated that it is only necessary that a dispute or claim "touch" on a matter covered by the clause for it to be arbitrable. According to *Black's Law Dictionary*, it added, "relate" is defined as standing in some relation to, have bearing or concern with, pertaining to, referring to, or bringing into association or connection with.

"[W]e find that Tammy's sexual assault claim against Captain D's and its employee is clearly not within the scope of the arbitration agreement," the court wrote. Remanding the Smith's claims for a trial on the merits "does not offend the Federal Arbitration Act," the court said.

In his dissenting opinion, Justice Jess H. Dickinson stated that the issue decided by the court was not actually before it. "[I]n its zeal to separate what it calls 'Tammy's rape claim' from the scope of her arbitration agreement, the majority fails to absorb the fact that [she] filed no 'rape claim' against Captain D's," he said, noting that she brought a rape claim against the manager but sued the restaurant for negligent hiring, supervision, and retention.

"[T]he majority today takes the unusual step of deciding an interlocutory appeal on an issue never raised or briefed by either party, and not discussed by the trial court," Dickinson wrote. "The majority correctly concludes that [the teenager] must submit her claims to arbitration if they 'arise out of or related to her employment.' However, the majority then decides (apparently as a matter of law) that Tammy's claims do not relate to her employment. It is my view that we don't know whether they do or not because the issue (which I believe to be fact-intensive) was never raised with the trial court, and was neither raised nor briefed here," he said.

NEWSWORTHY

Illinois Bans Smoking In Workplaces and Public Buildings

Illinois became the 22nd state to prohibit smoking in all enclosed public places and places of employment when Gov. Rod Blagojevich signed the Smoke-Free Illinois Act during a signing ceremony at Northwest University's Feinberg School of Medicine.

The governor said the measure will protect the health of millions of Illinois residents who are currently affected by secondhand smoke in offices and other workplaces, restaurants, and facilities used by the general public.

According to the Respiratory Health Association ("RHA") of metropolitan Chicago, the new law will save more lives in Illinois than seat belts.

In a statement, the RHA said that "based on the evidence in other smoke-free states, Illinois should see a drop in lung cancer rates of up to 20 percent and a 10 percent decline in all tobacco-related deaths . . . We commend the governor and the Illinois General Assembly for their leadership and commitment to improving and protecting the lung health of all Illinoisans."

Senate Bill 500 eliminates the previously controlling local laws and ordinances that place limitations on smoking, and prohibits smoking in all enclosed public places, workplaces, and government vehicles. The ban covers all restaurants, bars, and casinos, as well as dormitories and public areas of institutions of higher education. However, the law does not restrict smoking outdoors and smoking in private nursing home rooms, retail tobacco shops, homes, automobiles and some hotel rooms.

Although the new law essentially drives smokers outdoors, it also bars smoking within 15 feet of the entrances, exits, windows, and ventilation intakes that serve buildings where smoking is prohibited.

The new law, which becomes effective on Jan. 1, 2008, provides the Illinois Department of Public Health, local public health departments, and local law enforcement agencies with authority to enforce the prohibitions, and establishes a menu of fines for violations.

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SETTLEMENTS

EEOC and Caesars Casino Reach \$850,000 Settlement of Sexual Harassment and Retaliation Claims

Caesars Entertainment Inc., which operates the Caesars Palace hotel and casino in Las Vegas, agreed to pay \$850,000 to settle an Equal Employment Opportunity Commission suit claiming that some of its male supervisors forced Hispanic female kitchen employees who spoke little English to have sex with them. *EEOC v. Caesars Entm't Inc.*, D. Nev., No. 2:05-CV-0427-LRH-PAL.

Under a three-year consent decree, Caesars agreed to pay \$850,000 to the women identified by the EEOC as being victims of sexual harassment or unlawful retaliation. Caesars also agreed to provide anti-discrimination training to all its employees in English and Spanish, to report to the EEOC every six months on the casino's employment practices for the decree's three-year term, and to revise its employment policies and procedures to conform to Title VII.

In a suit filed in the federal district court in Nevada, the EEOC alleged that the Casino had violated Title VII of the 1964 Civil Rights Act by permitting the sexual harassment of female employees, mostly Spanish-speaking Hispanics, who were propositioned and allegedly forced to have sex by male supervisors. The commission contended that the supervisors also performed other lewd acts in front of the women, including unwelcome sexual touching.

The EEOC further alleged that Caesars management was aware of the harassing conduct, but failed to address or correct it. Further, when female employees complained to management, Caesars allegedly retaliated by demoting them, cutting their wages, engaging in further harassment, or by disciplining or firing the women. Five of the women intervened as plaintiffs in the Title VII suit.

In the agreement, Caesars "denies unlawful discrimination, harassment, or retaliation of any sort," and denies all of the EEOC's allegations. "This decree is not an adjudication or finding on the merits of this case and shall not be construed as an admission of liability on the part of Caesars Palace," the document states.

SETTLEMENTS

Cracker Barrel Settles Harassment Claims

The Cracker Barrel Old Country Store restaurant chain and the Equal Employment Opportunity Commission agreed on \$270,000 to settle a suit alleging that a male manager in a New Mexico store sexually harassed female employees and retaliated against those who complained of the harassment. *EEOC v. Cracker Barrel Old Country Store Inc.*, D.N.M., No. CIV-06-0920.

In a court complaint filed in September 2006, the EEOC alleged that a manager at a Cracker Barrel in Las Cruces, N.M., had sexually harassed female employees through "unwelcome conduct of a sexual nature." The Commission alleged that the manager repeatedly made offensive comments about women's "crotches," breasts, and buttocks, as well as "boning" female employees. The manager would allegedly place items between his legs to simulate himself, and when the female employees complained, Cracker Barrel retaliated by firing and/or constructively discharging the original charging parties.

Under a three-year consent decree approved by Judge Martha Vasquez of the U.S. District Court for the District of New Mexico, Cracker Barrel will pay five female former and current employees amounts ranging from \$35,000 to \$60,000, for compensatory damages, back pay, and attorneys' fees. The decree also required the company to send a written apology to each woman, expressing the company's "sincere apology" that "you found your experience while employed at Cracker Barrel to be objectionable." Further, within 15 days of entry of the decree, Cracker Barrel must ensure that employees at the Las Cruces store receive a copy of the company's anti-harassment policy, new hires must receive a copy of the policy within five days of employment, and copies of the policy must be provided in English or Spanish. The decree specified that the employer does not admit to any liability, and expressly denies any wrongdoing on the part of Cracker Barrel regarding the EEOC's claims.

As further part of the settlement, Cracker Barrel must designate one or more employee relations representatives to serve as an investigative source for sexual harassment or retaliation-related issues arising at the Las Cruces store. Within 30 days of entry of the decree, the company must certify that the employee relations representative has received at least eight hours of training within the preceding year regarding the investigation of discrimination, harassment, and retaliation claims. In addition, the company must certify that other employees who assume responsibility for handling sexual harassment or retaliation complaints have also received such training. Cracker Barrel must inform employees at the Las Cruces store who engage in sexual harass-

ment or related retaliation, or who refuse to cooperate with an investigation, that they may be "sanctioned severely" through suspension without pay or dismissal from employment.

A spokesperson for the company said the EEOC's suit involved "an isolated incident" in one of Cracker Barrel's myriad locations nationwide. According to the spokesperson, the manager accused of sexual harassment "is no longer with the company," and the EEOC and Cracker Barrel "share the same goal" of a workplace free of unlawful harassment or discrimination.

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AT THE BOARD

Judge Issues Section 10(j) Injunction Against New Owner of Holiday Inn Express in Minnesota

CMPJ Enterprises, the new owner of a Holiday Inn Express in Rochester, Minn., was ordered by a federal judge to offer jobs to 19 UNITE HERE members it refused to hire when it took over the hotel, to rescind all unilateral changes in terms and conditions of employment, and to recognize and bargain with the union. *Chester v. CMPJ Enterprises d/b/a Holiday Inn Express*, D. Minn., No. 07-2530.

Judge Michael Davis of the U.S. District Court for the District of Minnesota granted a petition filed by National Labor Relations Board Regional Director Robert W. Chester seeking interim injunctive relief under Section 10(j) of the National Labor Relations Act. The judge found that the union and its members would likely suffer irreparable injury without the injunctive relief, and that the NLRB general counsel is likely to succeed in proving that CMPJ Enterprises committed the alleged unfair labor practices.

Although prior to the sale, all the housekeeping and maintenance employees were represented by the union, the judge found that CMPJ did not retain any of the employees who were union members, but hired those who were not. CMPJ also allegedly refused to recognize and bargain with the union. The judge found that there is "substantial evidence demonstrating anti-union sentiment on the part of" the new owner.

The general counsel issued a complaint alleging that CMPJ violated the NLRA by refusing to hire housekeeping and main-
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tenance employees who had been employed by the previous owner, and were members of UNITE HERE Local 21, refusing to recognize and bargain with the union despite continuing to operate the hotel without significant changes, and unilaterally changing terms and conditions of employment for housekeeping and maintenance employees.

Section 10(j) allows the NLRB, after an unfair labor practice complaint has been issued, to petition a federal district court for temporary injunctive relief or a restraining order. The U.S. Court of Appeals for the Eighth Circuit, whose jurisdiction includes Minnesota, has held that Section 10(j) relief to restore the status quo is appropriate when there is a probability that the NLRA's purpose of protecting employees' rights to organize and collectively bargain will be frustrated during the time it takes the board to issue a final decision and remedy.

CMPJ argued that the petition for injunctive relief was not timely, but Judge Davis found that “there was no undue delay in bringing the petition.” Courts have granted injunctive relief “under circumstances similar to those in this case” and also in cases involving less egregious conduct, the judge said.

“Completely eradicating the housekeeping and maintenance employees' chosen labor representative, by what appears to be a successor employer, goes to the very heart of what the NLRA was enacted to protect,” Judge Davis said. The judge found that injunctive relief, including hiring of the former employees who are union members, is necessary because it will likely be months before the NLRB issues its final decision and the longer the new owner “keeps the Union at bay, the harder it will be for the Union to regain support.”

CMPJ argued that it is not a successor employer obligated to bargain with the union because there was a complete turnover of employees. The company also argued that it did not discriminate on the basis of union membership when it made hiring decisions and that the owner, who concededly made anti-union statements, did not coerce or intimidate any employees.

The company owner refused to meet with union representatives and refused to sign an agreement to take over the bargaining contract, Judge Davis said. He also cited evidence that before the sale was completed, the owner told the housekeeping supervisor that “we don't want the union here anymore,” and directed him not to hire any union members, and that the general manager told the union members that they no longer would have jobs.

The judge found that the evidence contradicted the company's contention that it did not know that the union members were interested in jobs at the hotel. The union members went to the union hall and signed statements, addressed to the owner, that they wanted to continue working at the hotel. Further, the union took actions, including picketing and leafleting, to demand that they be hired. The union members filled out job applications, but after the general manager told them they did not have jobs, they asked that the applications be shredded because they contained private information such as Social Security numbers.

CMPJ argued that requiring it to hire the union members and fire current employees is a drastic remedy that should be ordered only if the Board rules that the company violated the NLRA, but Judge Davis found that, given the General Counsel's likelihood of success, the harms posed to the members' rights outweigh any harm caused by displacement of other employees. Issuing injunctive relief also serves the public interest by sending “the important and public message that employers may not displace employees by refusing to hire them because of [their] union affiliation,” the judge said.

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BARGAINING DEVELOPMENTS

Employees at the Tropicana in Atlantic City Accept United Auto Workers

In an election conducted by the National Labor Relations Board, employees at the Tropicana Casino & Resort in Atlantic City, N.J., voted 626-157 for representation by the United Auto Workers.

The Tropicana election is part of a citywide UAW organizing drive in Atlantic City among dealers. The UAW previously won representation rights for some 2,293 dealers at Caesars Casino Atlantic City, Trump Plaza, and Bally's Atlantic City. Trump Plaza filed objections to that election, but an administrative law judge overruled the objections and recommended that UAW be certified to represent the dealers.

The union was rejected by dealers at two other Atlantic City casinos – Trump Marina, and the Hilton. The UAW has filed objections to both of those elections.

ARBITRATOR'S CORNER

Federal Court Finds Arbitrator Exceeded Authority by Reinstating "Troubled" Employee

The U.S. District Court for the District of Columbia found that an arbitrator exceeded his authority under a collective bargaining agreement with a UNITE HERE local when he ordered a Washington, D.C. hotel to reinstate an employee who was fired for calling hotel managers racists in the presence of hotel guests. *Hay Adams Hotel LLC v. Hotel & Rest. Employees, Local 25, UNITE HERE Int'l Union*, D.D.C., No. 06-968 (EGS).

Judge Emmet G. Sullivan said that the arbitrator's award of conditional reinstatement to an employee who violated the terms of a last-chance agreement was improper, even if the arbitrator correctly concluded that the employee's angry outburst in a hotel lobby was the result of a psychological "imbalance" that the employer and union failed to consider.

Granting Hay-Adams Hotel LLC's motion under Section 301 of the Labor-Management Relations Act to set aside the arbitration decision, Judge Sullivan said that the last-chance agreement signed by the parties modified the union contract and eliminated the arbitrator's authority to consider whether there was just cause for the firing.

Girdharry Merhai was employed as a bellman at the Hay-Adams, where he was covered by a collective bargaining agreement with UNITE HERE Local 25. In 2003, the Hay-Adams fired Merhai after he accused the hotel's general manager of stealing money from employees and called for the manager's discharge. Union representatives intervened on Merhai's behalf, and negotiated a "last-chance" agreement that was signed by Merhai, the hotel, and the union. The agreement allowed Merhai to resume work, but provided that if he was later fired for behavior that was "similar in nature" to his 2003 outburst, the union "shall waive its right to grieve such future incident."

In July 2005, Merhai called members of hotel management "racist" and accused the Hay-Adams controller of harassing him about absences from work. The second outburst was made in a public area of the hotel, where guests could have witnessed Merhai's conduct. In accordance with the last-chance agreement, the hotel terminated Merhai's employment.

The union filed a grievance over the discharge, and proceeded to arbitration, where the hotel argued that Merhai's conduct violated the last-chance agreement and precluded the union from pursuing a grievance on the employee's behalf.

At the arbitration hearing, Merhai testified that he called the Hay-Adams managers racists because he believed they made

him feel inferior. While Merhai admitted that none of the managers had ever mentioned his race, he testified that he felt that Hay-Adams managers "conspired" against him because of the color of his skin.

Finding Merhai's testimony "bizarre," the arbitrator asked the hotel and union whether there was a psychological explanation for Merhai's outburst at the hotel. However, neither party was aware of Merhai having any psychiatric disorder.

Although the arbitrator concluded that the hotel fired Merhai for conduct that was in violation of the last-chance agreement, he found that Merhai's behavior did not justify terminating his employment.

In a written decision, the arbitrator said that "during the hearings, it became apparent to this Arbitrator that Grievant is a troubled employee, who clearly displays symptoms of underlying psychological imbalance." The arbitrator found that the imbalance was not something that the hotel and union considered when they negotiated the last-chance agreement. Therefore, the arbitrator concluded that it would be "more appropriate" to provide for an inquiry into Merhai's psychological condition rather than "simply terminate this employee under the terms of the last-chance agreement, without further investigation."

The arbitrator ordered that if Merhai completed a psychological evaluation and nine-month course of counseling, at the union's expense, and obtained a certification of his fitness to work, the Hay-Adams would be required to reinstate him to employment, without back pay.

The hotel filed an action to vacate the arbitration award, and the court granted summary judgment in the hotel's favor.

In overruling the arbitrator's decision, the court stated that arbitrators are required to follow the plain language of collective bargaining agreements, and are not permitted to consider issues that the parties agreed would not be arbitrated. Citing *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688*, 959 F.2d 1438, 139 LRRM 2899 (8th Cir. 1992) and *Tootsie Roll Indus. Inc. v. Local Union No. 1*, 832 F.2d 81, 126 LRRM 2700 (7th Cir. 1987), the court said that where parties negotiate clear last-chance agreements, arbitrators are required to respect those agreements.

continued next page...

IN THE COURTS

Eleventh Circuit Says Cruise Worker Must Arbitrate Claim Based on Bargaining Pact

The U.S. Court of Appeals for the Eleventh Circuit found that a stateroom attendant for Celebrity Cruises must arbitrate his wage claim based on a collective bargaining agreement, even though the Seaman's Wage Act guarantees access to federal courts. *Lobo v. Celebrity Cruises Inc.*, 11th Cir., No. 06-12468.

Inacio Lobo worked as a stateroom attendant for Celebrity, where he was paired with an assistant to clean passenger cabins aboard ships. He was required to share gratuities with assistants by paying them \$1.20 per passenger per day from his own earnings.

In a class action filed in the U.S. District Court for the Southern District of Florida, Lobo argued that the pay scheme was imposed through duress and unequal bargaining power and that the policy violated the wage provisions of the collective bargaining agreement between Celebrity and Federazione Italiana Trasporti, Lobo's union.

Affirming a trial court decision, the court held that Lobo was required to arbitrate his wage claim because the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 202) superseded the Seaman's Wage Act.

"[T]he intent of the Convention is to promote the recognition and enforcement of arbitration provisions contained in international contracts, and that 'to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose,'" Judge Rosemary Barkett explained, quoting *Bautista v. Star Cruises*, 396 F.3d 1289 (2005).

The Eleventh Circuit rejected Lobo's contention that *U.S. Bulk Carriers Inc. v. Arguelles*, 400 U.S. 351 (1971) controlled the case. In *Arguelles*, the court explained, the Seaman's Wage Act's federal court right was found not to be superseded by the Labor Management Relations Act. However, in this case, the Foreign Arbitration Convention was enacted after *Arguelles*, and the convention specifically anticipated the kinds of conflicts raised by Lobo's case.

"[I]n ratifying the Convention, Congress explicitly agreed to 'recognize an agreement in writing under which parties undertake to submit to arbitration all or any differences which have arisen . . . between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration,'" Barkett said, quoting article II(1) of the Convention.

The Eleventh Circuit added that "the Convention compels federal courts to direct qualifying disputes to arbitration, while the Supreme Court found the LMRA to be silent on this matter."

In mandating arbitration, the Eleventh Circuit said it was backing congressional policy in favor of uniform enforcement of arbitration agreements, even if those agreements are signed somewhere else. The court stated that those agreements should be enforced even if they conflict with other federal laws.

"Thus, to nullify the arbitration provision here would hinder the purpose of the Convention and subvert congressional intent," Barkett concluded.

"Reinstating" from page 10

In Merhai's case, the court said, the last-chance agreement plainly provided that if he engaged in conduct "similar" to his earlier behavior, the union would not be able to pursue a grievance over his termination. "Therefore," Judge Sullivan said, "Once the arbitrator found that the triggering event occurred – that Merhai had violated the terms of the [last-chance agreement] – the arbitrator's inquiry had to end. The Union's grievance was no longer arbitrable."

The court stated that if Merhai's behavior in 2005 had not been similar to his earlier actions, then the arbitrator could have

evaluated the discharge under the just-cause provisions of the union agreement. But since the arbitrator found that Merhai's termination resulted from behavior that was similar to his earlier conduct, he "had no authority to determine whether Merhai's termination was inappropriate or to order his reinstatement," the court said.

Thus, the court concluded that the arbitrator's decision could not be enforced because it was inconsistent with the agreement which "was bargained for by the parties, and ratified by the Hotel, the Union and Merhai himself."

SETTLEMENTS

McDonald's Agrees to Pay Eight Food Employees \$550,000 to Settle Sexual Harassment Claims

GLC Restaurants Inc., an Arizona company that operates McDonald's restaurants, will pay eight young women \$550,000 to resolve claims that a male manager repeatedly grabbed and touched the teenagers, rubbed up against them, and made sexually suggestive comments. *EEOC v. GLC Rests. Inc. d/b/a McDonald's Rest.*, D. Ariz., No. CIV 05-618 PCT DGC.

Under the consent decree GLC will pay \$550,000 to eight women within 30 days, with four women receiving \$100,000 each and four others receiving individual payments of \$37,500. An attorney who represented four of the women also will be allowed to file a request for payment of attorneys' fees in an amount not to exceed \$400,000.

The settlement also requires GLC to (i) refrain from harassment, discrimination, and retaliation, (ii) post notices informing employees of their Title VII rights, and (iii) issue a written apology to the eight women named in the EEOC proceeding. It also provides that the court will retain jurisdiction of the case for three years, and that the company will be required to conduct training for both managers and non-supervisory employees and maintain records of the training and other remedial actions required by the decree.

The consent decree also provides that the employer denies liability for violating any law, but that GLC will not rehire the

manager in any capacity.

In a written statement announcing the settlement, EEOC said that GLC Restaurants Inc., doing business as McDonald's Restaurant, knew that the male manager harassed females at two restaurants but took no meaningful action for years until it fired him after an incident in which he touched an employee's breast.

The EEOC's lawsuit, filed in the U.S. District Court for the District of Arizona, alleged that an assistant manager at the company's Cordes Junction, Ariz., restaurant, repeatedly exhibited inappropriate behavior to 14-, 15- and 16-year-old girls who were part-time employees.

In an October 2006 ruling denying summary judgment on claims under Title VII of the 1964 Civil Rights Act, Judge David G. Campbell said that the allegations of sexual harassment were especially severe, given the wide disparity in age between the teenage employees and the manager, who was more than 40 years old. The EEOC also produced evidence suggesting that GLC had known for years that the manager engaged in sexual harassment in the workplace, and transferred him to Camp Verde from Cordes Junction, Ariz., because of similar complaints about his behavior.

In a separate filing in the lawsuit, the court approved a stipulated judgment of \$1 million against the manager and his wife.

Little Caesar's Pizza Pays \$110,800 For Youth Employment Law Violations

Caesars Utah has paid \$110,800 for alleged violations of the youth employment provisions of the Fair Labor Standards Act following an investigation by the Labor Department's Wage and Hour Division. The company, which does business as Little Caesar's Pizza in Sandy, Utah, also agreed to create a statewide youth employment educational campaign called, "Stop, Look and Listen."

The alleged youth employment violations included 14- to 17-year-olds working in violation of hours and time standards, and violations of occupational standards in baking operations. The FLSA identifies 17 hazardous occupations prohibited for employees under the age of 18, including operating dough mixers. The act also states that 14- and 15-year-olds may not work before 7 a.m., and later than 7

p.m. (9 p.m. from June 1 until Labor Day). The youths may also not be employed in cooking and baking according to the DOL.

A spokesman for Caesar's Utah explained that the company began cooperating fully with DOL as soon as it became aware of the situation. "We implemented immediate corrective action," he said. The overwhelming majority of the violations concerned youthful employees who clocked out "30 seconds, two minutes, or five minutes late," he said. The company will run a year-long youth employment education program encouraging teenage employees to look for posters and billboards spelling out the youth employment provisions of the FLSA. The company also agreed to run public service announcements on Utah radio stations.

SETTLEMENTS

Texas Restaurant Settles Religious Discrimination Claim with Server Who Refused to Sing “Happy Birthday”

Razzoo's Inc., a Texas restaurant chain, has agreed to pay \$38,750 to settle a religious discrimination lawsuit brought by the Equal Employment Opportunity Commission on behalf of a server who refused to sing “Happy Birthday” to customers, according to a consent decree filed in the U.S. District Court for the Northern District of Texas. *EEOC v. Razzoo's*, N.D. Tex., 3:06-CV-1781-L.

Sabrina Balentine, a Jehovah's Witness, worked as a server at Razzoo's in Mesquite, Texas. Razzoo servers are required to sing “Happy Birthday” to celebrating customers, and Balentine asked to be excused from participating because the activity is proscribed by her religion. However, the employer allegedly refused to accommodate Balentine and fired her instead. The EEOC filed a suit alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964.

Under the two-year consent decree approved by Judge Sam A. Lindsay, Razzoo's agreed to pay Balentine \$38,750, and also agreed to adopt an anti-discrimination policy and train managers and human resources personnel at the Mesquite location about religious discrimination.

In the consent decree, Razzoo's denied any wrongdoing. A spokeswoman for Razzoo's, stated that it was a “business

decision to settle the case” and that the “facts that the EEOC claimed were totally untrue.”

Razzoo's said that at orientation and new employee training, Balentine was told about the requirement to sing “Happy Birthday” to patrons, and she participated in singing exercises at her training with no objections. Further, Balentine did not voice any objections for at least a month. According to Razzoo's the issue only arose because other servers complained to management that Balentine was refusing to sing, and they had to cover for her and leave their own stations unattended.

In addition, Razzoo's did not refuse to accommodate Balentine and did not fire her. Instead, when the issue of birthday celebrations was brought to management, Balentine quit her job and never came back.

“Razzoo's has been and remains committed to equal opportunity employment, and takes discrimination very seriously,” the spokeswoman said. “The company will have no problem following the consent decree because the mandated training and antidiscrimination policies are already in place within the company,” she said.

BARGAINING DEVELOPMENTS

Boston Hotels and UNITE HERE Reach Tentative Contract for 5,000 Employees

Starwood Hotels and UNITE HERE Local 26, representing 5,000 Boston hotel employees reached a tentative agreement on a new citywide contract raising pay by \$3.50 an hour over six years and establishing a defined benefit pension plan for employees at 19 Boston area hotels. The new agreement would be retroactive to Dec. 1, 2006 and run through March 1, 2013.

Nontipped employees, whose pay averaged \$13.78 per hour at the end of the old contract, would receive hourly pay hikes of \$1, retroactive to Dec. 1, 2006, 50 cents in May 2008, 25 cents in May and November 2009, and also in May and November 2010, 30 cents in May and November 2011, and 40 cents in May 2012. Tipped employees would receive raises equal to half those amounts.

Boston is the only city where unionized hotel employees are not covered by a defined benefit pension plan. Thus, the hotels

agreed to contributions to the UNITE HERE plan, rising to 75 cents per hour over term.

The hotels agreed to contribute an additional \$2.60 per hour over term toward health insurance which will allow the union to rescind benefit cutbacks that took effect in 2001. According to the agreement, the hotels will contribute 40 cents per hour in the first year, 50 cents in the second and third years, and 40 cents in each of the next three years. The hotels currently contribute \$4 per hour toward health insurance.

The hotels also agreed to drop the room cleaning quota to 15 for its room attendants. In addition, the parties agreed to set up a diversity program and community outreach to address the small number of African Americans employed by the hotels, and to demonstrate “greater flexibility” in helping immigrants with documentation problems.

IN THE COURTS

Owner of Puerto Rico Hotel Personally Liable Under FLSA for Using Two Sets of Books

The U.S. Court of Appeals for the First Circuit affirmed a \$280,000 trial court judgment, finding that the owner of a hotel in Puerto Rico proper was personally liable for minimum wage and overtime violations after it was discovered that he kept two sets of timekeeping books. *Chao v. Hotel Oasis Inc., d/b/a Parador Oasis*, 1st Cir., No. 06-1021.

In a case that began in 1994, the First Circuit agreed with a trial court that the owner of the Parador Oasis in southwestern Puerto Rico could be held personally liable under the Fair Labor Standards Act for the wage violations. In 2005, the U.S. District Court for the District of Puerto Rico awarded 282 employees \$141,270 in back wages and an equal amount in liquidated damages.

“[I]t is undisputed that [the hotel owner] Lugo was the corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees’ wages and schedules,” Judge Juan R. Torruella ruled for the court. “He was thus instrumental in ‘causing’ the corporation to violate the FLSA.”

In 1994, the Department of Labor filed a complaint in federal court accusing Oasis of paying less than minimum wage, not paying for training time or meetings held during nonworking hours, paying in cash “off the books,” and not paying proper overtime wages. The DOL also alleged that Oasis maintained two sets of payroll records for the same employees, covering the same time periods, with one showing fewer hours at a higher rate, and the other showing more hours at a wage rate below the minimum wage. Oasis said that two sets of books were necessary, one for temporary employees, and one for permanent employees. The hotel had been investigated twice before for similar allegations.

Oasis raised an affirmative defense that the FLSA did not apply because Oasis’ “annual dollar value” was less than \$500,000. In 1996, during a pre-trial conference, Oasis had stipulated that the hotel had an annual dollar value of at least \$500,000 per year.

In 1997, after rejecting two attempts to renew the affirmative defense, the court began a bench trial. However, after only five days, the trial was continued for over two years. During that period, Oasis moved for summary judgment and again attacked previous stipulation, but the trial court refused to entertain the motion.

Once trial resumed, Oasis again tried to raise the affirmative defense, but the DOL objected, and the trial court refused to admit Oasis’ testimony, but allowed it to enter testimony to develop the record for appeal. In 2003, the trial court granted

summary judgment on the hotel owner’s personal liability and granted summary judgment on the FLSA violations. The court then awarded damages in 2005.

In affirming the trial court’s decision, the First Circuit rejected the hotel’s argument that the FLSA does not contemplate holding corporate officers individually liable for the corporation’s statutory violations. Referencing the definition of “employer” in the FLSA, which includes “any person acting directly or indirectly in the interest of an employer in relation to an employee” (29 U.S.C. § 203(d)), the court said that individuals could be held liable based on the economic realities of the corporate organization. The court further identified the factors considered to determine personal liability:

“Noting our concern . . . that not every corporate employee who exercised supervisory control should be held personally liable, we identified several factors that were important to the personal liability analysis, including the individual’s ownership interest, degree of control over the corporation’s financial affairs and compensation practices, and role in “caus[ing] the corporation to compensate (or not to compensate) employees in accordance with the FLSA,” Judge Torruella said in analyzing the First Circuit’s precedent on the issue.

The court further found that liquidated damages were appropriate because the actions of Oasis, through the owner, were “willful.”

“Oasis’ failure to keep adequate payroll records and its intentional manipulation of the records it did keep are sufficient grounds for concluding that Oasis did not act in good faith or with a reasonable belief that it was in compliance with the FLSA,” Judge Torruella said.

Acknowledging that the trial court had said the issue of “willfulness” was “close,” the First Circuit still found that there was enough evidence to support the ultimate damage award.

“[I]t is the employer’s burden to show good faith and objective reasonableness and therefore the Secretary’s alleged failure to offer evidence of willfulness is not an impediment to the court’s decision to refrain from awarding liquidated damages,” Judge Torruella said, pointing to evidence provided by Oasis that supported the trial court’s findings.

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IN THE COURTS

New York Restaurant To Pay \$700,000 In Tip Pool Money to Employees

A federal judge in New York ruled that 88 Palace, a restaurant in New York City's Chinatown, must pay almost \$700,000 to 11 employees who were denied tips and a minimum wage under both the Fair Labor Standards Act and state law. *Chan v. Sun Yue Tung Corp. dba 88 Palace*, S.D.N.Y., No 03-6048.

Under the FLSA's tip credit, employer are allowed to pay tipped employees \$2.13 per hour rather than the \$5.15 per hour required in other industries. However, the judge found that 88 Palace did not qualify for the FLSA's tip credit because it kept 25 percent of some tips, and also paid non-tipped employees out of the tip pool, and thus held that a group of waiters, busboys, and table captains were owed \$699,374 in damages.

Judge Gerald F. Lynch, ruling after a bench trial, acknowledged that the damages award had "an apparent irony" because the employees – all immigrants from China – were being awarded back pay to bring them up to the federal minimum wage despite the fact that the tips plus the wages the employees did receive brought their wage rate over the \$5.15 minimum wage rate. However, the judge explained that because 88 Palace lost the tip credit because of the violations, it was necessary to then pay the employees the minimum wage even though they did receive some of the tips. Describing tips as "gifts" from customers, Judge Lynch explained that the "FLSA permits such gifts to be deemed compensation satisfying a portion of the required minimum to be paid by the employer, but only if certain very specific requirements are met."

The 11 employees were paid in two ways: weekly paychecks based on hourly wages, and cash distribution of tips at the end of each night. The hourly wages were below minimum wage based on the use of the tip credit, which allows employers to combine base wages and tips to reach the federal minimum wage. The tip pool used at the restaurant included tips obtained from serving individual diners, as well as from banquets, where a 15 percent tip or service charge was added to the bill. The tip pool was then

divided, based on a specific scale, to tipped employees. In addition, non-tipped employees also were paid out of the tip pool.

A primary issue in the case was the use of the banquet tip. Although 88 Palace management was unclear about whether they considered the 15 percent charge on banquets checks as a tip, the judge said that the bill and information provided to customers made it clear that it was a tip. Further, the judge said that payroll and accounting records also demonstrated the payment was considered tips and part of compensation. The banquet tip was ultimately included in the tip pool, but only after the company took 25 percent of the payment.

Judge Lynch further stated that any confusion over how to classify the service charge under the FLSA was a non-issue under New York law because the language of the state laws clearly included any charge "purported to be a gratuity."

"[T]here is no doubt that the fee was 'purported' to be a tip or gratuity for the servers, and would be so understood by a customer," Lynch said. "The characterization of the charge on the menu and the representation to the customers, while significant facts under federal law, are absolutely dispositive under the New York standard."

The judge also found the employer violated other New York wage and labor laws relating to "spread of hours" and uniform expenses as the employees were often required to work 12-hour shifts with minimal breaks, and required to pay for, and launder, their own uniforms.

The judge awarded the employees \$97,466 in damages for tip credit violations, \$229,439 in damages for missing tips, \$28,226 for spread of hours damages, and \$8,256 for uniforms damages. The total compensatory damages of \$363,368 was then doubled for liquidated damages because the employer failed to show good faith in complying with the law.

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Finally, turning to the question of the stipulation and the affirmative defense, the court reiterated the trial court's finding that stipulations of attorneys made during a trial may not be disregarded or set aside at will.

"[S]tipulations are highly favored in our judicial system as

a means of 'expedit[ing] a trial and eliminat[ing] the necessity of much tedious proof,'" the court stated. "We have scoured the record, and, like the district court, we find no indication of any properly supported arguments that Oasis did not meet the ADV threshold."

BARGAINING DEVELOPMENTS

Harrah's Las Vegas and UNITE HERE Agree on Five-Year Contract

Members of two UNITE HERE locals – Culinary Workers Local 226 and Bartenders Union Local 165 – overwhelmingly ratified a new five-year contract with Harrah's Entertainment that covers some 15,000 employees at six Las Vegas mega resorts owned by Harrah's.

The agreement was the first reached in this year's round of bargaining between UNITE HERE and the major Las Vegas hotels/casinos. Contracts covering some 50,000 employees on the Las Vegas Strip and downtown Las Vegas expired at midnight on May 31. Most of the contracts were extended as talks continued.

The contract, which is retroactive to June 1, 2007, provides a wage and benefit package increase of \$3.47 an hour over term. Because the contract maintains fully employer-paid health insurance for both employees and their dependents, the hourly increase each year can be divided between wages and benefits depending on how much health and pension costs increase each year. The hourly increases are 66 cents in the first year, 67 cents in the second year, 69 cents in each of the third and fourth years, and 76 cents in the fifth year. In the first year, 53 cents of the increase will go to wages and 13 cents will go to health and welfare and pensions. The current average wage for bargaining unit employees at the six properties is \$13.34 an hour.

The contract also provides a significant increases in guaranteed gratuities for tipped employees. For example, both ban-

quet servers and waiters who serve parties of eight or more in a full service restaurant will receive a guaranteed gratuity of 18 percent, up from 17 percent under the prior contract.

The contract also provides for a "career ladder" that includes a "very well developed" apprentice program and training for employees so they have a pathway to "move up."

The pact calls for severance based on years of service for employees displaced due to the closure of any covered property during the life of the contract. An employee with more than 20 years service would receive \$10,000; one with 15 years to 20 years would receive \$7,500; one with 10 years to 15 years would receive \$5,000; one with five years to 10 years would receive \$3,000; and one with one to five years would receive \$1,000. Displaced employees would also receive a "preferential right" to jobs at other properties owned by Harrah's.

Further, Harrah's agreed to participate in the establishment of a legal defense fund to help tipped employees being targeted by the Internal Revenue Service.

The Harrah's contract covers employees at the Flamingo, Paris Hotel & Casino, Bally's, Caesars Palace, the Rio Hotel & Casino, and Harry's Las Vegas. Among the classifications covered by the agreement are cocktail waitresses, bell department, kitchen employees, cooks, housekeepers, and porters.

SETTLEMENTS

Applebee's in Illinois Agrees to Pay \$300,000 to Settle Sexual Harrasment Case

Judge Philip Reinhard of the U.S. District Court for the Northern District of Illinois approved a \$300,000 settlement between the Equal Employment Opportunity Commission and the Bloomin' Apple Rockford LLC, which owns and operates the Applebee's Neighborhood Grill and Bar in Rockford, Ill. *EEOC v. Bloomin' Apple Rockford LLC*, N.D. Ill., No. 04 C 50375.

Under the consent decree, the five women who originally filed the charge will each be awarded \$25,000. Seven additional women will be awarded \$15,000. The two remaining women will receive \$4,500 and \$500. Bloomin' Apple will also pay attorneys' fees of \$65,000. In addition, the company agreed to implement a range of training, recordkeeping, and reporting requirements.

The female employees alleged that the harassing behavior dated back to 1997 and continued for approximately five years. Allegedly the general manger of the restaurant was primarily responsible for the harassment, directing sexual comments, slurs, and banter at female co-workers, propositioning female employees, and engaging in groping, fondling, and other forms of inappropriate physical contact.

The employees further alleged that as the highest-ranking employee at the facility, the general manager set the tone for other male employees. They claimed that the manager joined in when male co-workers made crude comments and laughed at the physical and verbal abuse. When the women complained about the harassment, they were ignored and experienced retaliation in the form of less lucrative work assignments.

NEWSWORTHY

Court Rules that Starbucks Managers are not Entitled to Overtime Pay

In *Mims v. Starbucks Corp.*, the South District of Texas held that two Starbucks managers were not entitled to overtime pay under the Fair Labor Standards Act because they performed significant management functions that were critical to the success of their stores. The court, in granting partial summary judgment in favor of Starbucks, rejected the argument that these managers were only “glorified baristas.” Rather, even if these store managers spent a majority of their time on non-exempt duties such as pouring coffee, their most important duties were management functions which were critical to the success of the stores. The court concluded that the two salaried managers properly were considered exempt from the FLSA’s requirement of premium pay for overtime work.

The FLSA generally requires that employees working more than 40 hours in a workweek be paid overtime compensation. However, the statute exempts employees working in a “bonafide executive, administrative or professional capacity.” Starbucks claimed that the two plaintiff store managers were exempt executives, and had the burden of establishing that these employees fell within the FLSA exemption.

Labor Department regulations provide certain requirements an employee must meet to be considered an exempt executive. An employee must: be paid a weekly salary of at least \$455; have management as his primary duty; regularly supervise two or more employees; and exercise discretionary authority with at least some freedom from supervision.

In applying these requirements, the court noted that it was undisputed that the store managers were the highest-ranking employees in their stores, and that they supervised and “moti-

vated” staffs of up to 30 employees, including assistant managers and shift supervisors. The managers also testified that they were responsible for supervising employees, increasing revenues, controlling costs, ensuring compliance with corporate policies, and were generally responsible for “anything that was to go wrong” in a store as well as “anything that was done correctly.”

The two managers admitted they have some managerial responsibilities but claimed they were “glorified baristas” and should not be considered executive employees under the DOL regulations. The two managers estimated that they in fact spent 70 to 80 percent of their time waiting on customers, cleaning up, and performing many of the same tasks handled by non-manager employees.

The court held that even if the managers spent a majority of their time on “barista tasks,” management still was their primary duty. The managers stated that they led other employees by their example, and served as role models for non-supervisory employees, when they were performing non-managerial type tasks. Thus, the court found that the managers’ pouring coffee for customers not only assisted in the basic operation of a store, but also served to train other employees.

The court found it was also undisputed that the two store managers exercised discretion in their management duties, including: interviewing, hiring, training, and making disciplinary decisions, as well as deciding employee assignments and determining how much inventory to maintain in their stores.

Accordingly, the court held that Starbucks properly classified the two managers as exempt employees, and granted summary judgment in favor of Starbucks on Plaintiffs’ FLSA overtime claim.

SETTLEMENTS

Restaurant Chain Settles EEOC Sexual Harassment Charges

First Watch Restaurants Inc. recently agreed to a \$230,000 settlement regarding allegations of sexual harassment made by several female former employees, including a 16-year-old minor. (*EEOC v. First Watch Rests., Inc.*, N.D. Cal., No. C-06-6143 EMC). Allegedly, a regional manager/general manager regularly made offensive sexual comments to the female employees and engaged in inappropriate touching. The Restaurant denies these allegations in their entirety.

According to the terms of the settlement – a two-year consent decree – the restaurant chain is required to update its anti-discrimination policies and training programs and distribute the updated version to all of its employees. As part of this updating its anti-harassment policies, the Restaurant must provide convenient, confidential,

and reliable procedures for reporting incidents of harassment and retaliation. New employees will also receive anti-harassment training at the beginning of their employment, and training every six months over the term of the decree. New managers will receive at least one hour of anti-harassment training with 60 days of their hire or promotion to a management position. Moreover, the restaurant is required to train supervisors and/or managers who will assume responsibility for enforcing policies on appropriate techniques for documenting and investigating harassment complaints; provide neutral references to potential employers of all claimants; provide reports on complaints to EEOC every six months; and post notices of the settlement decree on a clearly visible location frequented by employees at each of the First Watch restaurants.

IN THE COURTS

Retiring HR Manager Gets Trial On Equal Pay Act Allegations

Recently, a district court in Arkansas allowed a retiring female human resources manager at a bakery to proceed to trial with claims that her employer engaged in discrimination in violation of the Equal Pay Act, Title VII of the 1964 Civil Rights Act, and the Arkansas Civil Rights Act, by paying a younger male successor at a higher rate during her final five months on the job. (*Burkett v. De Wafelbakkers Inc.*, E.D. Ark., No. 4:06-cv-00387).

In denying the bakery's motion for summary judgment, the court found that the plaintiff presented sufficient evidence to warrant a trial on her claims. Although the company argued that the position as performed by plaintiff's successor was significantly different than the job plaintiff had performed, "a reasonable jury could find that the jobs — despite their differences — were 'substantially equal.'"

Plaintiff was hired in 1996 as a payroll clerk, and her title was later changed to human resources manager as she assumed more responsibilities. In 2004, Plaintiff told the company that she planned to retire at the end of January 2006. During the middle of 2005 the bakery began considering who would replace plaintiff and decided that due to the company's future needs her replacement should assume "more professional level functions." In August of 2005, a younger male applicant was hired as plaintiff's successor at an annual salary of \$36,000, which was \$7,000 more than plaintiff was making.

Casino Employee Fails to Establish Reverse Discrimination

In *Serratore v. Harrah's Operating Co.*, the North District of Illinois dismissed a Harrah's Casino employee's reverse discrimination claims pursuant to the Equal Pay Act on summary judgment. The white male employee alleged that his female supervisor favored female employees with respect to promotions and salary raises.

The plaintiff worked in the casino's human resources department between November 2000 and September 2004. Plaintiff worked in various HR capacities during this time, and began serving as a senior employee relations consultant in October of 2003 for an annual salary of \$47,700. Around this time, the Casino also hired a female senior employee relations consultant with the same job description as Plaintiff at a salary of \$53,000.

In March 2004, the position of HR manager became available. Plaintiff applied for the position and was interviewed by Harrah's vice president of human resources, who is also female. She expressed reservations about Plaintiff, because he was not enthusiastic during the interview, and she was told by the general manager that Plaintiff "lacked initiatives."

Plaintiff and her successor worked together over the next five months, and during this time the company argued that Plaintiff's successor engaged in additional supervisory and managerial functions that Plaintiff did not perform. Plaintiff responded that these tasks were simple to perform and that she had performed them during her employment, although admittedly her role in these tasks was "less extensive," than her successor's.

In rejecting the bakery's motion for summary judgment, the court determined that a reasonable jury could find that the jobs were substantially equal despite their differences. Noting that an employer's burden of proof is greater in an Equal Pay Act case than under Title VII, the court held that the appropriate inquiry in an Equal Pay Act determination "depends not on job titles or classifications, but on the actual requirements and performance of the job."

The court further explained that "[u]nder the EPA, a defendant cannot escape liability by articulating a legitimate non-discriminatory reason for the employment action. Rather, the defendant must prove that the pay differential was based on a factor other than sex." The court concluded that the company failed to satisfy the burden of summary judgment, but noted that the employer "may raise the same legal issue by motion for a directed verdict" at trial.

A female senior employee relations consultant was eventually selected for the position, and the open senior employee relations consultant position was given to another female employee. The new senior employee relations consultant received an annual salary of \$53,000 plus a \$1,000 signing bonus.

Plaintiff resigned in September of 2004 and subsequently brought suit against the Casino for violation of the Equal Pay Act.

The court applied Seventh Circuit law which has repeatedly held that an employer may consider factors other than sex when making wage determinations under the Equal Pay Act. The court also explained that the undisputed evidence demonstrated that the reasons Harrah's paid the two female senior employee relations consultants more than Plaintiff for the same job was that they "had more experience, had made more money at their previous jobs and had asked for more money in their negotiations. . . [t]hese are 'factors other than sex within the meaning of the Equal Pay Act,'" he said.

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NEWSWORTHY

Court Reverses Employee's HIV Bias Claims

The Florida Court of Appeal held that a fast food employee can go to trial on her claim of HIV discrimination under the Florida Omnibus AIDS Act. *Byrd v. BT Foods Inc. dba Wendy's Coral Springs, Fla. Ct. App.*, No. 4D06-600.

An employee who has HIV claimed that she was discriminated against by her employer, BT Foods Inc., doing business as Wendy's Coral Springs, when the company did not accept a doctor's note explaining her absences, and gave her the "runaround," sending her to various restaurants, and never giving her the day shift she requested.

In reversing in part a lower court's grant of summary judgment for the defendant, Judge Robert M. Gross explained that the FCRA and the Florida Omnibus AIDS Act ("FOAA") "impose identical standards for evaluating employment discrimination," but the FOAA "does not require proof that a plaintiff's HIV condition amounts to a handicap or disability." Rather, it "prohibits discrimination based upon even the 'perceived results' of an HIV test, without reference to the physical condition of the employee," the court explained, reversing summary judgment on that claim as well as on the plaintiff's FCRA claim.

"Although the FCRA does not mention HIV discrimination, this court has recognized that HIV positive status may be a 'handicap' within the meaning of the statute," Judge Gross wrote, citing *McCaw Cellular Communications of Florida Inc. v. Kwiatek*, 763 So.2d 1063, 9 AD Cases 1293 (Fla. Ct. App. 1999). Because the FCRA does not define "handicap," the court looked to the Americans with Disabilities Act, which the FCRA parallels.

To support her argument that she was disabled under the FCRA, the plaintiff relied on *Bragdon v. Abbott*, 524 U.S. 624, 8 AD Cases 239 (1998), where the U.S. Supreme Court declined to create a bright-line rule that HIV is a "per se disability." How-

ever, the court ruled that the plaintiff's HIV status substantially limited her major life activity of reproduction.

Saying that each case requires an individualized inquiry, the court found that not only was the employee substantially limited in the major life activity of reproduction, but also in the major life activities of breathing and working.

The plaintiff requested accommodations related to her HIV status by asking for a shift change from nights to days, but BT Foods did not make the change, the court said. To establish a prima facie case of HIV discrimination under the FCRA, the plaintiff had to prove that: (1) she is a handicapped person within the meaning of the act; (2) she is a qualified individual; and (3) BT Foods discriminated against her on the basis of her disability.

The court held that the plaintiff satisfied the "handicap" prong and the "discrimination" prong. She claimed that she sent a doctor's note to her supervisor by way of her boyfriend. However, her supervisor argued that she saw "only a scrap of paper with a handwritten phone number on it."

Florida law places "a higher burden on a party moving for summary judgment in state court than federal rules require," Judge Gross observed. In Florida courts, the moving party has to "show conclusively that no material issues remain for trial," he wrote. Therefore, Judge Gross stated that a lie about receiving a valid doctor's note, when such notes were acceptable for other employees, "would be evidence of the employer's discriminatory motive."

The court affirmed summary judgment to BT Foods on the plaintiff's claim of intentional infliction of emotional distress, finding that the teasing of the plaintiff by other employees did not rise to the level of outrageous conduct required to sustain the tort. It also affirmed the dismissal of all claims against an individual manager.

"Discrimination" from page 18

Plaintiff based his discrimination in promotion claim in part on a number of statements by the vice president of human services allegedly indicating her favorable bias toward women. Plaintiff alleged that she once pointed to a photograph of Harrah's executives and commented that she was "going to make sure there are all women on that board." On another occasion, she told a male employee, "you just don't listen. It must be a guy thing." The court found that these comments could not be considered evidence of direct discrimination, and the court noted that none of the comments were made in the context of the decision not to promote Plaintiff to the human resources manager position.

Moreover, the court found that Plaintiff failed to establish a prima facie case because he was unable to demonstrate that he was better qualified than the female senior relations consultant who was promoted. Rather, the woman who was promoted had a master's degree in human resources management and more than eight years of experience in the field, while Plaintiff had only a bachelor of science degree and one and one half years of experience. The court explained that "[n]o reasonable juror" could conclude that Plaintiff was more qualified than the woman who was promoted. Accordingly, the court granted summary judgment in favor of the casino.

IN THE COURTS

Court Holds That Employee's Claim for Miscalculation of Benefits Is Time-Barred

In *Miller v. Fortis Benefits Ins. Co.*, the U.S. Court of Appeals for the Third Circuit held that the statute of limitations on an employee's disability benefits claim began to run when he began receiving miscalculated benefits, and not when he notified the plan administrator of the error.

Plaintiff was an employee of Resorts International Hotel until he became disabled in 1987. Plaintiff was supposed to receive 60 percent of his weekly salary under the hotel's long-term disability plan, which amounted to \$768. However, the plan administrator, Fortis Benefits Insurance Co., incorrectly calculated Plaintiff's benefits at a weekly salary of \$690. Plaintiff did not realize the calculation of his benefits was incorrect until fifteen years later. In 2002, Plaintiff filed a claim with the plan administrator seeking an adjustment of his benefits to \$768 per week. The plan administrator denied the claim because the hotel no longer had the personnel records to verify Plaintiff's salary as of 1987.

In 2003, Miller filed a lawsuit against Fortis, the plan administrator, and Resorts alleging he was unlawfully denied disability benefits. The U.S. District Court for the District of New Jersey dismissed the lawsuit as time-barred by the applicable six-year state statute of limitations for denial of benefit claims under the Employee Retirement Income Security Act.

Under ERISA, a cause of action accrues when there has been a "clear repudiation" by a plan administrator. On appeal, the Plaintiff argued that the clear repudiation in this case did not occur until March 2003, when his application for an upward adjustment of his benefits was formally denied.

In affirming a lower court's dismissal of the lawsuit as time-barred, the appellate court held that the Plaintiff's claim for additional benefits was "clearly repudiated" in 1987 when his benefits were initially miscalculated and that he had six years from that point to file a lawsuit challenging the calculation of his benefits. The court explained that an erroneously calculated award of benefits under an ERISA plan can serve as "an event other than a denial" that triggers the statute of limitations as long as it is a repudiation that is made clear and known to the beneficiary. As the court explained: "an underpayment can qualify as a repudiation because a plan's determination that a beneficiary receive less than his full entitlement is effectively a partial denial of benefits. Like a denial, an underpayment is adverse to the beneficiary and therefore repudiates his rights under a plan."

The court additionally noted that repudiation by underpayment "should ordinarily be made known to the beneficiary

when he receives his miscalculated benefit award," because at that point, the plan beneficiary "should be aware that he has been underpaid and that his right to a greater award has been repudiated" by the administrator. The court explained that "[t]he beneficiary should exercise reasonable diligence to ensure the accuracy of his award."

The court explained that its ruling was consistent with the broad, beneficiary-protective goals of ERISA since it was clear that the Plaintiff simply failed to investigate and discover his benefit miscalculations for 15 years. Further, the court held that requiring Plaintiff to discover the miscalculation of his benefits within six years of the first erroneous payment does not impose a "burdensome oversight role." Accordingly, the court dismissed Plaintiff's claims for miscalculation of benefits as time barred.

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AT THE BOARD

Brooklyn Kosher Bakery Pays \$3.5 Million For Unpaid Wages

One of the largest wholesale kosher bakeries in the New York metropolitan area, Korn's Bakery in Brooklyn, N.Y., will pay up to \$3.5 million in back pay and pension contributions to current and former employees, under an agreement with the National Labor Relations Board to settle unfair labor practice charges. *Korn's Bakery Inc.*, N.L.R.B., No. 29-CA-16976.

The settlement resolves a series of ULP charges dating back to 1997, alleging that the bakery failed to pay the wage rates set forth in a collective bargaining agreement with Bakery, Confectionery and Tobacco Workers union Local 3. A group of 118 current and former employees have been identified as eligible for the payments, and the Board is seeking other employees whose names are not listed in the employer's records. The settlement requires the unnamed employees to contact NLRB's Brooklyn, N.Y., regional office within 18 months to file a claim.

In September 1998, the Board had found that Korn's had committed unfair labor practices (326 N.L.R.B. 1083), and the decision was affirmed by the U.S. Court of Appeals for the Second Circuit in an unpublished decision in February 1999. The case then went back to the NLRB for compliance proceedings to determine the amount of back pay and benefits. The regional director issued a compliance specification in May 2006, and an administrative law judge approved the stipulation and submitted it to the Board for consideration.