Hospitality Industry Quarterly

Labor and Employment Law Report

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Interruption By HR Managers Not Improper Surveillance Of Union Activity Under The NLRA

The Ninth Circuit Court of Appeals ruled that two human resources managers for the Aladdin hotel and casino in Las Vegas did not engage in improper surveillance of union activity in violation of the National Labor Relations Act by interrupting employees who were asking others to sign union authorization cards in the employee dining room. *Local Joint Executive Bd. of Las Vegas v. NLRB*, 9th Cir., No. 05-75515.

Beginning in late May 2003, the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165 began organizing employees in the Aladdin's housekeeping, food, and beverage departments. The first incident occurred on June 4, 2003 when the vice president of human resources observed two pro-union employees asking several buffet servers eating at the next table if they would like to sign union cards. The vice president then informed the buffet servers that she wanted to be certain they had all the facts before signing the union card. She told them that signing the card would be "legal and binding" and that if the union became their bargaining representative, it would authorize the deduction of union dues from their paychecks. The conversation lasted approximately eight minutes.

The second incident occurred on June 6, 2003, when an employee on the union organizing committee was speaking to a group of housekeepers sitting at a table in the dining room. The hotel's director of human resources approached

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Disney Did Not Discriminate By Removing Restaurant Server For Being "Culturally Inauthentic"

Anesh Gupta, an Asian male, was a college intern at Walt Disneyworld's Epcot Center. He became a server on the breakfast shift at the Norwegian restaurant. Originally, breakfast was served before the opening of the larger "World Showcase" and regarded as an American meal. The breakfast was later changed to an "all-day dining experience" with a Norwegian theme, and Gupta was "discontinued." He sued in federal court, claiming violations of Title VII of the 1964 Civil Rights Act and the Civil Rights Act of 1866.

The U.S. Court of Appeals for the Eleventh Circuit held that Gupta was not subjected to unlawful discrimination by Disneyworld when he was removed as a server in the Norwegian-themed restaurant on the grounds that he was not "culturally authentic." *Gupta v. Walt Disney World Co.*, 11th Cir., No. 07-11409. Many employees, including servers at the Norway Pavilion Management at Disney's World Showcase, were required to be "cultural representatives," interacting with guests and explaining the country's history, culture, and traditions, the court found. Based on their first-hand experience, these employees were required to speak the language and possess an adequate command of English to communicate with visitors.

The court ruled that Gupta failed to meet his initial burden of showing discrimination for at least two reasons. First, he did not establish that he was qualified to be a server at the

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an employee as she was signing a union card and told her that what she was signing was like a contract and unless she was clear on what it entailed, she should not be signing it.

The appeals court upheld a 2-1 NLRB decision in favor of the Aladdin by finding that the three-factor test adopted by the board for determining when surveillance becomes coercive, and therefore illegal, is rational and consistent with the statute and is entitled to deference. The court also deferred to the board's conclusion that the brief and spontaneous interruptions by the HR managers were not coercive, and that the duration of the observation was short and not out of the ordinary.

The board has interpreted the NLRA to make employer observations of open union activity unlawful if it becomes unduly coercive or company officials do something out of the ordinary. An objective test has been applied by the board that considers whether the employer's conduct, under the circumstances, would tend to interfere with, restrain, or coerce employees in the exercise of their rights.

The board reasoned that the provision of the NLRA which protects employer communications that contain "no threat of reprisal or force or promise of benefit," protected the views expressed by the two HR managers. The court found that there was no evidence that either of the HR managers used threats, force, or promises of benefits that would strip their speech of the protections of the NLRA.

The court deferred to the board's rational conclusion that the Aladdin HR managers' "brief, spontaneous interruptions" were not coercive and that "verbally interrupting organizing activity" does not necessarily violate the NLRA.

The Aladdin was renamed Planet Hollywood Resort & Casino in late 2006, and is now owned by a joint partnership of Planet Hollywood International Inc., Bay Harbour Management LLC, and Starwood Hotels & Resorts Worldwide Inc.

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Norwegian restaurant under Walt Disney's guidelines. Disney required that servers at the Norwegian restaurant be culturally authentic to Norway, and Gupta admitted that he had only visited Norway for one or two days and did not have first-hand knowledge of Norwegian culture.

Second, the panel found that Gupta failed to establish that he was treated differently from other similarly situated employees. In fact, Walt Disney presented evidence of individuals of Asian descent who qualified to work as cultural representatives in the Norway Pavilion because they were culturally authentic. Evidence was also presented that there are Asian, Middle Eastern and black cultural representatives in the Canada Pavilion.

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UNION ORGANIZING DEVELOPMENTS

Dealers At Caesars Palace In Las Vegas Vote For Representation By Transport Workers

Casino dealers at Caesars Palace in Las Vegas voted overwhelmingly for representation by Transport Workers Union Local 721. The vote was 380-128 for union representation in a unit of approximately 557 dealers. Two votes were challenged and one vote was voided.

This was the second recent TWU organizing victory among Las Vegas casino dealers. In May 2007, a unit of approximately 634 dealers at Wynn Casino voted for representation by TWU.

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IN THE COURTS

Teenage Employee Allowed To Proceed With Sex Harassment Claim Due To Employer's Confusing Complaint Process

Samekiea Merriweather, a 16-year-old high school student, was hired to work at a Milwaukee Burger King after school and on weekends. She claimed that the restaurant general manager made suggestive comments, rubbed against her, attempted to kiss her and offered to pay her to go with him to a hotel. The same manager was purportedly having sexual relations with several of the female employees.

The 16-year-old resisted her manager's advances. He allegedly became hostile and fired her based upon an unexcused absence. Merriweather was later rehired, but the harassment continued despite her complaints to management. An assistant manager eventually gave her an incorrect company telephone number to use for sexual harassment complaints, but provided no other assistance.

Merriweather's mother went to the restaurant to complain to the shift supervisor about the harassment of her daughter. However, Merriweather was again fired as a result of her mother's involvement.

The U.S. Court of Appeals for the Seventh Circuit ruled that the EEOC was entitled to proceed to trial on behalf of Merriweather on claims of sexual harassment and retaliation under Title VII of the 1964 Civil Rights Act. *EEOC v. V & J Foods Inc.*, 7th Cir., No. 07-1009. The court rejected the employer's argument that Merriweather acted unreasonably by failing to use company procedures to report the harassment.

Whether a complaint procedure is reasonable depends on the circumstances of employment. The court concluded that the company's complaint procedure was unreasonable, particularly since it was not tailored for teenage employees. V&J was obligated to use policies and procedures tailored to the understanding of the average teenager since it was part of their business plan to employ teenagers who are often working for the first time.

The court also ruled that the complaint procedure was confusing and ineffective. The company's employee handbook informed employees that harassment complaints should be directed to the employee's district manager, but the identities of the district managers were not given, nor were instructions given on how to contact them. This resulted in a complaint procedure that was likely to confuse even adult employees.

ERISA Does Not Preempt Claim That Employer Maintained Unsafe Workplace

Le Ann McAteer was a landscaper for Silverleaf Resorts Inc. Although she was injured in her employer's parking lot, she did not inform Silverleaf of the injury until more than one month after her employment was terminated.

McAteer requested benefits from Silverleaf's injury benefit plan which was governed by ERISA. Her claim was denied by the plan administrator on grounds that she had not timely reported her injury to Silverleaf.

After having her claim denied, McAteer filed a lawsuit in a Texas state court against Silverleaf contending it acted negligently by failing to maintain a safe workplace. Silverleaf removed the case to federal court, asserting that McAteer's claims related to its injury benefit plan.

McAteer moved unsuccessfully to have the case remanded to state court. However, the U.S. Court of Appeals for the Fifth Circuit reversed, ruling that ERISA does not preempt an employee's state law claim that her employer maintained an unsafe workplace. *McAteer v. Silverleaf Resorts Inc.*, 5th Cir., No. 06-41725. Thus, the matter was sent back to state court.

IN THE COURTS

Ex-KFC Class Members Cannot Arbitrate Claims After Decertification

A federal judge in Minnesota ruled that some claims in a now-gutted nationwide overtime collective action involving 1,000 assistant managers for KFC Corporation must now be pursued individually and cannot be arbitrated. *Parler v. KFC Corp*., D. Minn., No. 05-2198.

The current and former assistant managers at Kentucky Fried Chicken restaurants who sought arbitration alleged that they were wrongly classified as salaried managers. They claimed they should have been paid hourly with overtime. They filed class actions under various state laws and also filed for a collective action under the Fair Labor Standards Act .

In March 2006, approximately 1,000 assistant managers filed consent forms to opt into the collective action, which was given provisional certification. Seven months later, the assistant managers moved to decertify the collective action. Instead, they wished to pursue class actions in the individual states. Although the decertification was approved in June 2007, the judge refused to transfer the state-law class actions to federal district courts in the appropriate states.

New lawsuits were filed in 27 states by many of the plaintiffs, but 324 of the former collective action class members chose to not join the new litigation and requested arbitration under their employment agreements.

Judge Patrick J. Schlitz of the U.S. District Court for the District of Minnesota said that 324 assistant managers could not arbitrate their claims after pursuing a collective action and therefore must proceed individually. The assistant managers had waived their right to arbitrate claims when they pursued litigation of federal and state law claims.

The court found that KFC was prejudiced when the assistant managers filed the collective action, and therefore it would be unfair now to let the employees arbitrate. The judge said that although it was a "close question, individual class members bear collective responsibility for the actions of the entire class" and therefore it was the actions of the class – not just the actions of the 324 individuals – that was used to determine prejudice. Further, the judge rejected the employees' previous argument that they did not know they had signed arbitration agreements when they initiated litigation. Schlitz stated, "Filing a case in federal court and seeking arbitration only after the litigation goes badly is acting inconsistently with the right to arbitrate."

Food Services Employees Allowed Share Of Diner Service Charges

New York's highest court ruled that a cruise boat operator that requires customers to pay service charges for banquet and meal services may have to share those payments with its food service employees, according to New York's Labor Law. *Samiento v. World Yacht Inc*., N.Y., No. 17.

Customers paid World Yacht a mandatory 20 percent "service charge" on banquet cruises, none of which was paid to employees. On public dining and special event cruises, the employees alleged that the company told customers that employee gratuities were included in the cruise tickets they bought, but World Yacht actually paid the wait staff between 4 and 7 percent of the ticket price.

The court of appeal held that Labor Law § 196-d bars employers from withholding from employees any customer charge that "purported to be a gratuity for an employee." The court rejected World Yacht's argument that a mandatory customer charge was not a "gratuity" and said the employees have the right to pursue a claim for compensation under section 196-d based on the wait staff allegations that customers were led to believe that they were paying a service charge in place of a gratuity.

Due to the remedial nature of section 196-d, the court found that the statutory language, "any charge purported to be a gratuity," should be liberally construed in favor of the employees. Further, when a complaint asserts that a service charge has been represented to the consumer as compensation to defendant's wait staff in lieu of the gratuity, such allegation is covered within the statutory language of Labor Law § 196-d, even if the charge is mandatory, and not subject to negotiation.

IN THE COURTS

Employer Entitled To Affirmative Defense Against Harassment Claim

Christine Brenneman, an assistant manager of a Famous Dave's restaurant in Iowa, complained to management of harassment by her supervisor, including offensive touching and humiliating comments. She claimed management responded by telling her that her supervisor may have been looking for attention in the wrong place because she was "nice-looking," "fun-loving," and her supervisor's wife had just had a baby. Brenneman quit her position and sued.

Brenneman claimed that she was forced to resign and that she had been subjected to sexual harassment under Title VII of the 1964 Civil Rights Act and the Iowa Civil Rights Act. While the court found that Brenneman met her initial burden of establishing that she had been subjected to harassment, Brenneman failed to establish that she was constructively discharged. The court said that she left before giving the restaurant an opportunity to work out the problem. Normally, a person in her position would not have found the working conditions so intolerable that she was compelled to resign.

The U.S. Court of Appeals for the Eight Circuit ruled that a restaurant company could invoke the affirmative defense to a hostile work environment claim because it responded quickly when notified, and that the employee who sued failed to take advantage of the corrective opportunities offered to her. *Brenneman v. Famous Dave's of Am. Inc*., 8th Cir., No,. 06-1851.

Because Brenneman was not constructively discharged, she did not suffer a tangible employment action. Therefore, the court held that Famous Dave's may assert the so-called *Ellerth-Faragher* affirmative defense, which has two elements (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventable or corrective opportunities provided by the employer or to otherwise avoid harm.

The court ruled that management of Famous Dave's met the requirements for the *Ellerth-Faragher* affirmative defense. Famous Dave's showed that it used reasonable care to prevent sexual harassment. It had a facially valid anti-harassment policy with a non-retaliation provision and a flexible reporting procedure that listed four persons to whom employees could complain. Although having an anti-harassment policy is not in itself enough to show that the employer exercised reasonable care in preventing sexual harassment, the distribution of it provides compelling proof of that effort. Most importantly, specific training about the policy had been provided for Brenneman. The court said that while the manager's response to Brenneman's complaints were not ideal, the manager did tell her about the company hotline, and she received an immediate response when she utilized that.

Further, when Brenneman reported the harassment to an appropriate person, management sent a human resources officer to investigate and stop the harassment. The human resources officer attempted to work out a new schedule and offered to relocate Brenneman. These actions met the correction prong. The court added that a discrimination complainant does not have the right to choose her remedy to the situation, even if unsatisfied with the resolution. Thus, Famous Dave's also satisfied the second element of the defense because Brenneman unreasonably failed to take advantage of corrective opportunities offered by the human resources officer.

IN THE COURTS

Fourth Circuit Allows Opt-Out Class Arbitration Of FLSA Claims Against Long John Silver's

Three former Long John Silver's restaurant managers alleged that their employer had violated the FLSA's overtime and minimum wage requirements by subjecting them to payroll deductions and salary givebacks to cover losses in restaurant operations. All three had signed arbitration agreements, requiring arbitration of any claims under the American Arbitration Association (AAA) commercial arbitration rules.

In January of 2004, the three employees initiated an arbitration proceeding. In March 2005, they sought class certification under the AAA rules. These rules authorize the arbitrator to determine whether the arbitration agreement allows class arbitration and whether it would be appropriate under the circumstances. The rules also state that the arbitrator must define the class "with specificity," including "those who have elected to opt out of the class."

An arbitrator ruled that the Long John Silver's arbitration agreement does not prohibit class arbitrations. This ruling was challenged by the company in court, but the U.S. District Court for the District of South Carolina dismissed the suit for lack of subject matter jurisdiction. The arbitrator then ruled that the three employees could serve as representative plaintiffs in an opt-out class arbitration on behalf of current and former restaurant managers and managerial assistants.

The U.S. Court of Appeals for the Fourth Circuit held that the arbitrator had properly ruled that the former restaurant managers may proceed with an opt-out class arbitration of their Fair Labor Standards Act claims. *Long John Silver's Rests. Inc. v. Cole*, 4th Cir., No. 06-1259.

Long John Silver's argued unsuccessfully that it is an employee's fundamental and substantive right under the FLSA not to be made a party to an FLSA proceeding without his or her consent, and that this right cannot be waived in an arbitration agreement. The court found that the United States Supreme Court has ruled that parties who agree to arbitrate a statutory claim do not give up any substantive rights provided by the statute, and that if an arbitration agreement waives judicial remedies that Congress intended to be nonwaivable, it is unenforceable. The court further found that the company did not succeed in showing that Congress intended to forbid parties from agreeing to waive the opt-in procedures.

The court rejected the restaurant chain's argument that the arbitrator disregarded the FLSA's controlling legal opt-in procedure. The court also disagreed that the arbitrator had exceeded the scope of his authority to interpret the arbitration agreement.

UNION ORGANIZING DEVELOPMENTS

Indian Casino Employees Reject Union In Michigan, Vote For Representation In Indiana

The housekeeping staff of the Soaring Eagle Casino and Resort in Mt. Pleasant, Michigan, voted overwhelmingly against representation by International Brotherhood of Teamsters Local 486. The vote was 192-88 against union representation in a unit of approximately 309 employees. Three votes were challenged, but were not determinative of the outcome.

Dealers and other gaming workers at Casino Aztar in Evansville, Indiana, voted for representation by United Auto Workers. The vote was 106-59. Release of the count had been delayed pending a National Labor Relations Board review of an appeal by Columbia Sussex Corp., the casino's management company, of an NLRB regional director's decision ordering the election. The NLRB denied the company's request, issuing a one-sentence unpublished order stating that the request for review of the regional director's decision "raises no substantial issues warranting review."

NEWSWORTHY

Ninth Circuit Stays District Court Decision Barring San Francisco Health Care Ordinance

The U.S. Court of Appeals for the Ninth Circuit stayed an injunction against implementation of a San Francisco city ordinance requiring employers to make certain health care expenditures on behalf of their employees. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 9th Cir., No. 07-17370.

The San Francisco Health Care Security Ordinance, which was scheduled to take effect Jan. 1, 2008, requires private businesses with at least 20 employees and nonprofit businesses with at least 50 employees to pay for health care coverage or pay into a fund to provide health insurance. The restaurant association filed suit against the city and county of San Francisco in November 2006, claiming that the "pay-or-play" provision for health care coverage violates ERISA by imposing conditions on the provision of employee welfare plans.

The ordinance contains two key components related to the regulation of health care: an employer health spending requirement and government health care program partially funded by those employer contributions. The ordinance provides that the spending requirement is the only provision at issue and can be satisfied in several different ways, including through contributions to health savings accounts, direct reimbursement to employees, payments to third parties for provided health care services, and direct payments to the city "to be used on behalf of covered employees."

Additionally, employers subject to the ordinance would be required to keep accurate records and proof of health care expenditures and allow city officials "reasonable access" to the records, and to annually report other information required by the city. Penalties and presumptions against employers are provided for violation of these requirements.

On December 26, 2007, the district court ruled that ERISA preempted the San Francisco Health Care Security Ordinance, at least insofar as the latter requires employers to make minimum health care expenditures on behalf of covered employees. Judge Jeffrey S. White granted summary judgment to the Golden Gate Restaurant Association, which filed suit challenging the ordinance and seeking injunctive and declaratory relief. He determined that the ordinance was "related to" an ERISA plan because its "requirements directly and indirectly affect the relationship between private employers and the provision of health care coverage, a relationship that has traditionally been governed by ERISA."

The district court also denied the city's cross motion for summary judgment and a summary judgment motion filed by intervenors in support of the city, including the San Francisco Central Labor Council, Service Employees International Union Local 1021, United Healthcare Workers-West, and UNITE HERE Local 2.

Following the district court's decision, the city and several intervenor unions immediately appealed the decision to the Ninth Circuit and concurrently requested an emergency stay in both that court and in the district court. The district court denied the motion, holding that a stay was not necessary to preserve the status quo in the case.

The Ninth Circuit disagreed. In evaluating the ordinance the court concluded that it does not require employers to establish ERISA plans or to make changes to any existing ERISA plans, and does not require that employers provide certain health care benefits to their employees, through an ERISA plan or otherwise.

Since the Ninth Circuit was not asked to rule on the merits of the appeal at this time, but only to assess whether to stay the district court's ruling and allow the ordinance to take effect, its standard of review was limited to determining whether the city had shown a substantial likelihood that it would succeed in having the district court's decision overturned on appeal, whether the balance of hardships favored the stay, and whether the public interest favored the stay. The court held that the city met its burden on all factors.

The Ninth Circuit held oral argument on the merits of the appeal on April 17, 2008.

NEWSWORTHY

Tropicana Casino License Renewal Denied By New Jersey Panel

By a 4-1 vote, New Jersey's Casino Control Commission refused to renew the casino license of the Tropicana Casino Hotel in Atlantic City, N.J., and transferred control of the property to a trustee, citing many of the same issues UNITE HERE Local 54 had raised in a filing with the commission.

The commission ruled that Tropicana's owners "failed to meet strict state licensing requirements, including a lack of business ability, a lack of financial responsibility and a lack of good character, honesty and integrity." The selection of former state supreme court justice Gary Stein as the trustee was approved by the commission. Stein will keep the hotel/casino open and immediately direct its operation until the hotel/casino is sold to a third party.

The commission said in a statement that only once before in the Casino Control Commission's history has it refused to renew a license. This occurred in 1989 when an owner was in financial trouble.

On January 3, 2007, Columbia Sussex Corp. acquired Tropicana's parent company and began work-force reductions. By the end of October, the hotel/casino, which had employed more than 4,000 employees, had terminated 1,319 employees and hired 422 more, for a difference of 897 fewer employees or a 20 percent workforce reduction. By March, Tropicana had reduced its cleaning staff for public areas to the point of a "cleanliness crisis," according to the commission.

The commission stated that the primary concerns were staff reductions in the security and slot departments and failure to have an independent audit committee. The commission also imposed civil penalties of $750,000 on the owner.

SETTLEMENTS

Seven McDonald's Restaurants In California To Pay $1.16 Million To Settle Overtime And Breaks Case

The owner of seven McDonald's restaurants in Sonoma County, California will pay nearly $1.16 million to settle charges of failure to provide overtime pay and rest breaks. *Herrera v. DCT Inc*., Cal. Super. Ct., No. CV 237497.

Employees alleged that their employer failed to reimburse employees for required material purchases and mileage; altered timecards to reduce the record of actual hours worked; forced employees to work off the clock; failed to maintain accurate wage records; failed to pay minimum wages for all hours worked; and retaliated against employees.

California Superior Court Judge Gary Nadler granted tentative approval to the settlement of $1,155,407, which covers approximately 1,000 hourly employees who worked as cooks, maintenance employees, and shift supervisors at the restaurants in Santa Rosa, Sebastopol, and Windsor between Sept. 29, 2001 and April 4, 2007.

According to the settlement, checks will be sent to all class members. Funds from checks not cashed within 60 days will be redistributed to the class, and recoveries will be based on length of service and pay.

The franchise owner said in a joint statement with plaintiffs that they believed their company complied in good faith with California's labor laws.

IN THE COURTS

Harassment By Ex-Boyfriend Is Covered By Title VII, But Employer Acted Properly

Alison Forrest, a server/bartender at a Chili's Bar & Grill in Maine, dated one of the restaurant's line cooks for approximately one year before she broke off the relationship. According to Forrest, she and her former boyfriend argued about money he owed her after the relationship ended. Later, she was threatened in the restaurant's parking lot by four women at his instigation. Forrest claimed that he began to call her "whore," "bitch," and other names. She also claimed he refused to cooperate with her at work when she started dating another man.

Chili's anti-harassment policy prohibits sexual and derogatory comments, sexual threats, and other inappropriate physical conduct, and provides:

> Any employee found to have violated the policy on discrimination and/or harassment will be subject to disciplinary action, which may include reprimand, suspension, or termination if warranted.

Forrest had been given a copy of the anti-harassment policy when she started with Chili's. She reported the parking lot incident to the restaurant's general manager the next day. She also complained about the name-calling, but said she did not want her former boyfriend to be fired. After the manager investigated her complaint, the line cook received an oral warning to "stop, and behave as a professional" or "circumstances will take place."

Forrest contended that her former boyfriend continued to verbally abuse her, and the abuse was witnessed by coworkers. She complained to the kitchen manager about the name-calling, discussions with other employees about her, and handling of her food orders. The kitchen manager then issued the line cook a final written warning, telling him to "stop all negative confrontations with other employees," adding this his failure to correct the problem would result in his "immediate termination." Both managers asked Forrest to let them know if the cook failed to comply with the final warning.

Forrest's former boyfriend later squirted Forrest with hot water while she was making a personal phone call, was rude to her, cornered her in a walk-in cooler, and called her a "whore" and other names. He also told her she was fat and needed to go to the gym. Forrest reported this conduct to Chili's general manager, who fired the cook.

Forrest obtained a restraining order against her ex-boyfriend after he was fired and was told by Chili's area director that the former cook would not be allowed on the premises while she was working. However, the area director added that Chili's could not prevent him from coming to the restaurant when she was not there.

Forrest resigned and sued for sexual harassment under Title VII and the Maine Human Rights Act. The U.S. Court of Appeals for the First Circuit held that the employer's prompt response to Forrest's complaint warranted summary judgment in favor of the restaurant. The court found that an employee could claim sexual harassment under Title VII of the 1964 Civil Rights Act for the workplace actions of a former boyfriend, but concluded that the employer acted properly to prevent and end harassment. *Forrest v. Brinker Int'l Payroll Co. d/b/a Chili's Bar & Grill*, 1st Cir., No. 07-1714.

NEWSWORTHY

New Mexico Living Wage Expanded

In Santa Fe, New Mexico, the City Council voted unanimously to extend the city's $9.50-an-hour minimum wage to cover all employees of businesses that require city business licenses effective January 2008.

The so-called living wage had previously applied only to businesses in New Mexico's capital city employing 25 or more employees. Santa Fe now has one of the highest minimum wages applied across the board.

The ordinance also will implement annual increases to the minimum wage beginning in January 2009. The increases are to be based on adjustments in the consumer price index.

IN THE COURTS

Employer's Vague Reasons For Firing Manager Not Enough To Overcome Retaliation Claim

Michael Bruno began working at Bally's in 1995 as a director of hotel operations. He was promoted to regional director of hospitality by late April 2006. At that time, he had a disagreement with the executive regional director of hospitality, his immediate supervisor. Bruno claimed that his supervisor called a 50-year-old buffet manager applicant "too old" for the position. Bruno disagreed and said that the applicant was qualified for the position, and was the type of person the company had been looking for. Bally's did not hire the applicant. Bruno was fired about two weeks later for allegedly poor performance.

Bruno sued under the ADEA, alleging retaliation for his opposition to his supervisor's age bias in rejecting the applicant. He also sued under Mississippi law for retaliatory discharge based on the supervisor's alleged order to dump grease in a lake in violation of state and federal environmental laws.

The court, in partially denying summary judgment to Bally's Resorts, said that both "temporal proximity" and the company's vague explanation of its reasons for firing him could support a reasonable jury conclusion that Bruno's complaint about his supervisor's alleged bias actually motivated the discharge decision. Although the company alleged that Bruno was fired for alleged deficiencies in his job performance, he was never warned of the deficiencies, nor given an opportunity to improve, despite his 11-year tenure with Bally's. *Bruno v. RIH Acquisition MS I LLC d/b/a Bally's Resorts*, N.D. Miss., No. 2:06-CV-163.

The court stated that the reluctance of Bally's to provide specifics as to why Bruno was fired could lead a trier of fact to conclude that the employer was hiding something. The court noted that the executive regional director of hospitality described the conference where the employer decided to fire Bruno as more suited to a game of charades than an employee termination conference, that Bruno was never cited for poor performance prior to his discharge, and that he was let go less than two weeks after his disagreement with his supervisor over whether to hire the 50-year-old applicant.

The court granted summary judgment to Bally's on Bruno's state law retaliatory discharge claim, stating that Bruno's somewhat mild objection to dumping grease into a lake that fed the Mississippi River did not constitute a protected refusal to participate in an illegal act.

BARGAINING DEVELOPMENTS

Mission Industries Employees Ratify Five-Year Contract

Members of UNITE HERE Culinary Workers Union Local 226 ratified a five-year collective bargaining agreement covering 1,600 employees of Mission Industries, a supplier of laundry services for about 50 Las Vegas casino hotels.

Highlights of the new agreement, which expires March 31, 2012, include health care coverage for employees and their families under the joint union management health and welfare fund with no employee contribution required for premiums. Under the previous contract, employees at the six industrial laundry plants had a health care plan that did not cover their families and required high deductibles and co-payments.

Under the agreement, employees will not receive a wage increase in the first year of the term, and wage increases in subsequent years are dependent on the amount of money going into the health and welfare fund. Any increase in wages in subsequent years will be determined later if payments can be shifted from the health and welfare fund to wages.

The new contract specifies that employees will be laid off and recalled according to their length of service with Mission Industries.

Employees will receive training about grievance and arbitration procedures, which were expanded under the new agreement. Additionally, the union and company will establish joint committees on health and safety and on grievance and arbitration.

NEWSWORTHY

LAX Hotels Living Wage Allowed To Move Forward

A California Court of Appeal held that an ordinance requiring hotels near Los Angeles International Airport (LAX) to pay their employees the city's living wage rate does not violate the California Constitutional ban on cities enacting laws that have been rescinded or defeated. *Rubalcava v. Martinez*, Cal. Ct. App., No. B199993.

The three-judge panel stated that the ordinance differed enough from an earlier, repealed version of the law to avoid any violation. Their decision vacated an order issued in May 2007 by a superior court judge that effectively blocked enactment of the ordinance.

The Century Boulevard corridor hotels affected by the ordinance asked the court to block the Airport Hospitality Enhancement Zone Ordinance because they claimed that the City Council's vote approving the Zone Ordinance violated a 1911 constitutional amendment prohibiting cities from enacting an ordinance that is essentially similar to one the council had earlier repealed.

In November 2006, the City Council passed the Hotel Worker Living Wage Ordinance, which would have required 13 hotels in the Century Boulevard corridor to pay employees the Los Angeles "living wage" – a minimum $9.39/hour if health benefits were included, and $10.64/hour without benefits. The hotels and their supporters obtained enough signatures to certify a petition against the wage ordinance, forcing the city either to rescind the ordinance, or put it to a vote of city residents.

The City Council voted on January 31, 2007 to repeal the Wage Ordinance. Three weeks later, the council approved The Zone Ordinance. This ordinance included a "phase-in" of the living wage for LAX hotel employees, a pledge of financial resources for area improvements, and other provisions for addressing concerns of the hotels and other business groups such as the Los Angeles Chamber of Commerce.

The corridor hotels sought a court order enjoining the publishing of the ordinance, which is the first step towards enactment of the measure. The petition was granted by California Superior Court Judge David P. Yaffe, who ruled that the Zone Ordinance was not "essentially different" from the repealed Wage Ordinance. He said the city acted in bad faith in enacting the replacement measure, and characterized the "enhancements" contained in the second ordinance as "to a great extent illusory."

The appellate court disagreed, noting that two important concerns of the hotels and other business groups were addressed by the replacement ordinance. Namely, the economic burden of the higher minimum wage and the prospect that similar requirements could be imposed elsewhere. The court stated that the Zone Ordinance calls for a phasing in of the wage requirements, and prohibits the imposition of such measures outside the LAX corridor without first studying the effects on the region and industry affected, followed by public hearings.

Although the hotels appealed the court of appeal decision to the California Supreme Court, the high court refused to hear the appeal.

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IN THE COURTS

EEOC Class Suit Against Outback Steakhouse Limited To Three-State Region

The U.S. District Court for the District of Columbia held that the Equal Employment Opportunity Commission's sex discrimination lawsuit against the Outback Steakhouse restaurant chain may not proceed as a nationwide class suit, but rather is limited to the employer's operations in a three-state Rocky Mountain region. *EEOC v. Outback Steakhouse of Fla., Inc*., D. Colo., No. 06-cv01935.

In 2003-04, two female ex-employees of Outback restaurants in Westminster, Colo., and Thornton, Colo., filed separate sex discrimination charges with the EEOC. Both women alleged that in terms and conditions of employment, including hiring, firing, job assignments, promotions, and pay, Outback had engaged in a pattern and practice of sex discrimination against women. Both focused on the company's alleged sex discrimination in the three-state region that included Colorado and particularly on alleged sexist remarks by Outback's joint-venture partner for that region.

In September 2006 the EEOC sued, alleging that Outback had engaged in a pattern or practice of sex discrimination in hiring, promotion, training, and terms and conditions of employment since at least 2000. In March 2007, a federal magistrate judge ruled that the EEOC could seek nationwide discovery, reasoning that the commission's investigation and conciliation efforts had not been limited to a three-state region but were national in scope.

Outback challenged the magistrate's ruling, and asked the district court to dismiss the EEOC's class claims alleging nationwide discrimination by the employer. The court granted Outback's motion, and said that nothing in the EEOC's charge, investigation, conciliation efforts, or discovery requests put Outback on notice that a nationwide class action was contemplated. The court found that in this case, the EEOC had not adequately notified Outback it was facing a nationwide sex bias suit.

The court stressed that the original charges were filed by two female former employees of Outback restaurants in Colorado complaining about the alleged sexist conduct of a male manager who oversaw operations in Colorado, Wyoming, and Montana. Outback reasonably believed, based on the charge and EEOC's inquiries, the classwide sex bias claims related only to that three-state region.

The court concluded that, based on a review of the EEOC's reasonable cause determination as well as its conciliation efforts, the commission failed to adequately notify Outback of the potential national scope of the Title VII claims.