

# Hospitality Industry Quarterly

## Labor and Employment Law Report

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### **Pittsburgh Lawfully Requires Hotel Developer to Adopt Union Agreement**

The city of Pittsburgh can require a hotel developer to adopt a labor neutrality agreement in exchange for the establishment of a construction tax financing scheme, the U.S. Court of Appeals for the Third Circuit ruled recently. *Hotel Employees & Restaurant Employees Union v. Sage Hospitality Resource*.

In 1998, Sage Hospitality began a hotel construction project in Pittsburgh. Sage approached the city's Urban Development Authority in order to obtain funding for the project. In response, the city established a tax increment financing scheme. Under this scheme, the city issued bonds to finance the hotel. The city agreed to the financing scheme because it expected to benefit from the greater tax revenues generated by the increased property values in the area. After approving the scheme, the city passed a resolution which required Sage to enter into a labor agreement with HERE. The city later passed an ordinance that set requirements for a collective bargaining agreement between the parties. Faced with a possible loss of the financing plan for failing to comply with the city's requirements, Sage agreed to a neutrality agreement with HERE that permitted a card check procedure to be used to determine union representation. That agreement also included no-strike and arbitration clauses.

The card count eventually showed that HERE lacked majority support. HERE then challenged the results of a card count. HERE sought to arbitrate this outcome, but Sage refused, claiming that the neutrality agreement was void. The union responded by filing a complaint with the NLRB and filing a claim in federal court. The U.S. District Court for the Western District of Pennsylvania found that the agreement was valid and that Sage was bound by it.

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

### **Court Approves Nationwide Action Against Starbucks for Overtime Pay**

A federal court in Florida has approved sending a collective action notice to thousands of Starbucks managers nationwide. The action is based on a claim that Starbucks has wrongfully treated its managers as exempt from federal overtime rules. *Pendlebury v. Starbucks Coffee Co.*

Sean Pendlebury and Laurel Overton claimed that less than 10% of the time they spent as Starbucks' managers was actually spent on managerial tasks. Starbucks' managers are paid a flat salary that is higher than regular wages for hourly employees, but hourly employees earn overtime pay if they work more than 40 hours per week. The pair allege they had to work additional hours without pay to order supplies and perform other tasks.

Judge Kenneth A. Marra said the allegations, while early in discovery, were sufficient to support issuing a collective action notice. He found Starbucks' arguments that the managers were clearly exempt to be unpersuasive. He further held that Starbucks' description of these employees' job duties did not sufficiently rebut the uniform testimony of the Plaintiffs and other Starbucks' managers that most of their work was similar to work performed by the Company's hourly employees.

Starbucks' settled a similar claim in California in 2002, agreeing to pay \$18 million to managers and assistant managers throughout the state who claimed they were misclassified and denied overtime. However, that settlement was limited to California because the claim included allegations of state law violations in addition to federal overtime claims. In approving the notice in this case, Judge Marra noted that only "minimal evidence" is necessary at the notice stage.

## On the Inside

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The Third Circuit found that the neutrality requirement bound Sage to arbitrate its disputes with the union. The court said that the city was not regulating the relationship between Sage and HERE, but rather was simply protecting its own interests in the project. If the city had been deemed a regulator, then its requirement that Sage agree to the neutrality agreement would have been preempted by the NLRA. However, because the city was deemed to be a market participant, the neutrality agreement requirement was permitted. The court determined that the city was acting as a market participant in this case because it provided some the funding to refurbish a hotel and therefore had a financial interest in its being built.

The court rejected the argument that Pittsburgh was only interested in tax money, and was acting more like a regulator because its financial stake was limited to increasing tax revenues. The court held that beyond tax revenue, the city had a legitimate interest in the hotel becoming successful and reimbursing the city for its investment. Thus, the court determined that the city was merely acting like a “reasonable investor” in protecting its “multimillion dollar investment.”

### Verdicts & Settlements

## Burger King Settles Teen Sexual Harassment Claims

Owners of a Burger King franchise in St. Louis have agreed to pay \$400,000 to seven female former employees to settle a sexual harassment lawsuit filed by the Equal Employment Opportunity Commission. *EEOC v. Midamerica Hotels Corp.*

The seven former employees claimed that a manager at the franchise had subjected them to repeated groping, vulgar sexual comments, and demands for sex. Six of the seven women were in high school at the time. The women claimed that they had complained about the manager’s behavior to their assistant managers and to a district manager, but that Burger King took no action in response. The women then filed internal complaints with Burger King’s corporate office. An investigation followed, which led to the manager’s resignation, and a reprimand for one of the assistant managers. However, that assistant manager was later promoted to the manager position.

### In the Courts

## Fourth Circuit Finds that Hotel’s Police Complaint Against Union Picketing Was Lawful

The Fourth Circuit Court of Appeals has overturned a National Labor Relations Board decision holding that a hotel employer violated federal labor law by filing a police complaint regarding a union’s picketing along a busy highway outside of the employer’s property. *CSX Hotels d/b/a The Greenbrier v. NLRB*. The court held that the Hotel’s actions were justified given that the union’s conduct “posed, at a minimum, a potentially dangerous traffic condition.” The court noted that there had been numerous traffic fatalities on the stretch of highway in question, and that union pickets were stationed just inches off the roadway and just a few feet from the Hotel’s entrance. The court also recognized that cars traveling at the 55 mph speed limit would almost certainly be distracted by looking at the union’s picket signs. The court determined that it was “irrelevant” that the police ultimately allowed the union to continue with the picketing.

Under a consent decree, Midamerica Hotels Corp. and Northwest Development Co., which own the franchise, will pay the women \$400,000 in damages and attorneys’ fees. The companies will also institute “extensive” training in sexual harassment prevention for management personnel, and will distribute a revised sexual harassment policy to all employees. Additionally, the companies agreed to prominently post information about how to report sexual harassment complaints. Further, under the agreement, the companies will be required to report to the EEOC all internal complaints of sexual harassment at the franchise where the harassment took place.



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*In the Courts*

## Ninth Circuit Says Firing Female Employee For Not Wearing Makeup is Not Discrimination

The Ninth Circuit has ruled that Harrah's Casino did not violate federal anti-discrimination law by firing a bartender who refused to comply with its rule requiring female beverage servers to wear makeup. *Jespersen v. Harrah's Operating Co.*, 9th Cir., No. 03-15045. In a 2-1 decision, the court determined that employers may adopt different appearance standards based on sex so long as those standards do not create an unequal burden on employees of one sex. Here, the majority found that the employee failed to demonstrate that the Casino's policy placed additional cost or time restraints on women that it did not place on men.

Prior to 2000, Harrah's encouraged its female beverage servers to wear makeup. However, the Casino had never formally required them to do so. In February 2000, the company instituted a "beverage department image transformation" program, under which employees in guest services were required to meet specific appearance standards. The program called for beverage servers to be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." The program included other requirements as well. For example, women were required to wear stockings, colored nail polish, and make sure their hair was "teased, curled, or styled," while men were required to maintain short haircuts and neatly trimmed fingernails. Harrah's subsequently amended these standards to add a makeup requirement for all female beverage servers, including bartenders. The policy was applied at all 20 Harrah's locations, including the Reno location where Darlene Jespersen worked.

Jespersen had been a bartender in the sports bar at Harrah's for 20 years. She acknowledged receipt of the new standards and agreed to adhere to them, although she refused to comply with the makeup requirement. She had tried wearing makeup in the 1980's but found that it "made her feel sick, degraded, exposed, and violated," "forced her to be feminine," and "dolloed up like a sexual object." She also argued that it interfered with her ability to handle unruly or intoxicated patrons, because it "took away [her] credibility."

Jespersen was told that the makeup requirement was mandatory for female bartenders, and was given 30 days to apply for a job that did not require female employees to wear makeup. She did not do this and was subsequently fired. She sued in federal district court in Nevada, alleging that Harrah's makeup rule constituted disparate treatment under Title VII.

A lower court granted Harrah's motion for summary judgment. It had ruled that the policy imposed equal burdens on both sexes. On appeal, the Ninth Circuit rejected the argument that the claim should be analyzed as discriminatory sex stereotyping pursuant to the theory set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The court indicated that cases such as *Price Waterhouse* have not "invalidated the 'unequal burdens' test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex."

Instead, the Ninth Circuit relied on a series of cases that balanced the burdens created by weight requirements that treated women more harshly than men. The court noted that "an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only 'mutable' characteristics such as weight." Here, however, the majority opinion determined that Harrah's policy imposed an equal burden on both sexes.

In dissent, Judge Sidney R. Thomas argued that Jespersen established her claim under both *Price Waterhouse* and the "unequal burdens" test. He noted that "[f]irst, Harrah's fired Jespersen because of her failure to conform to sex stereotypes, which is discrimination based on sex and is therefore impermissible under Title VII." "Second," he stated, "Jespersen created a triable issue of fact as to whether the policy imposed unequal burdens on men and women that is not only time-consuming and expensive, but burdensome for its requirement that women conform to outdated and impermissible sex stereotypes." Thomas also accused the majority of creating an exception to federal anti-discrimination laws for guest-services business.

**Editor's Note:** The Ninth Circuit has recently granted en banc review of this decision. HIQ will continue to follow and report on this case.

*In the Courts***Cook With Stuttering Disorder Can Proceed With Disability Claim Against Fuddruckers**

A federal district court found that a longtime cook with a severe stuttering disorder could proceed to trial with a discrimination claim under the Americans with Disabilities Act against a Fuddruckers restaurant in Minnesota. *Andresen v. Fuddruckers Inc.* Judge Donovan Frank of the U.S. District Court for the District of Minnesota held that stuttering could constitute a disability under the ADA, especially where it “is severe and substantially limits [an individual’s] ability to speak.”

Barbara Andresen worked at the St. Louis Park, Minnesota Fuddruckers in various capacities, including expediter, baker, and bartender. She has had a lifelong stuttering disorder that sometimes causes a saliva buildup. For most of her career, Andresen had received good performance ratings. Her condition had not caused any significant problems or customer complaints. In the fall of 2001, when Andresen was working as a preparatory cook, two new managers were assigned to the restaurant. Over the next nine months, Andresen claimed that these managers began to unfairly find fault with her performance. She also alleged that she overheard a manager say he was “going to find a way to get rid of Barb.” Fuddruckers claimed that Andresen had performance deficiencies, as well as “an issue with excessive salivation.” They noted that she had drooled or spit into food she had prepared. In June 2002, Andresen was told to wear a surgical mask at all times. Fuddruckers terminated Andresen when she failed to wear the mask. Andresen claimed that she wore the mask as instructed.

Andresen sued Fuddruckers under the ADA and Minnesota law, claiming she was fired for her speech impediment. Fuddruckers moved for summary judgment, arguing that Andresen was not disabled and that she was terminated “because she drooled and spit into food that she prepared and served to customers,” failed to wear the mask, and failed to meet various performance standards.

The court rejected the restaurant’s motion. It found that Andresen presented enough evidence to warrant a trial on her claim. The court noted that Andresen’s condition had led to “significant problems with communication throughout her life and significantly impacted her life activities.” Further, the court noted that Fuddruckers management “acknowledged the impact Andresen’s stuttering had on her ability to communicate.” As such, the court found that Andresen had submitted sufficient evidence “to create a genuine issue of fact” as to “whether her stuttering constitutes a disability under the ADA.” Additionally, Andresen had submitted evidence that she was qualified to do her job. The court noted that even if Andresen could not continue her duties in food preparation, Fuddruckers could have accommodated her by giving her other work in the restaurant. Fuddruckers did not submit any evidence “demonstrating that it was unable to make such an accommodation.”

*Before the Board***Hotel Unlawfully Terminated Employee Who Clocked In Improperly**

Midnight Rose Hotel & Casino, Inc. unlawfully terminated an employee for her union activities, a National Labor Relations Board majority recently ruled 2-1. The Board found that management’s argument that she committed theft was pretextual. *Midnight Rose Hotel & Casino Inc.*

Employee April Hendricks was a cocktail server at the Cripple Creek, Colorado, Casino. She asked a co-worker, bartender Maureen Ostler, about the possibility of switching shifts. A supervisor approved the arrangement, but warned the employees to clock in using the correct classification. The Hotel paid waitresses \$5.50 an hour and bartenders \$6.75 an hour, although customer tips generally constituted the bulk of compensation for both jobs.

Meanwhile, Teamsters Local 37 had launched a union organizing campaign, despite two previous unsuccessful efforts. During the organizing campaign, Ostler approached another bartender about supporting the union. Word of employee involvement in the organizing campaign eventually got back to Rebecca Vandiver, a supervisor. Vandiver investigated and discovered that Ostler was soliciting support for the union.

During a payroll audit performed around that time, management discovered that on several occasions, Ostler had not properly clocked in as a cocktail server, and was therefore still being paid as a bartender. When this was discovered, Vandiver and the Casino’s general manager agreed that Ostler should be terminated.

Board members Wilma B. Liebman and Dennis Walsh found that the Casino had targeted Ostler once it became aware of her organizing activities. Upholding an NLRB administrative law judge’s ruling, they did not agree that Ostler was fired for clocking in as a bartender. Instead, they stated that Ostler may not have been aware of her error and that management failed to conduct a proper investigation. Particularly, they noted that Ostler was discharged for theft, an offense that commonly involves knowingly obtaining something of value without authorization. In order to show that it would have fired Ostler regardless of her union activity, the Casino would have had to show that Ostler was knowingly clocking in as a bartender in order to increase her pay.

In his dissent, Member Peter C. Schaumber said Ostler was aware that she was being overpaid but made no effort to correct the situation. He asserted that the majority improperly substituted their judgment for that of the employer. Specifically, he noted that Ostler did not change her payment classification during the several occasions on which she worked as a bartender. Schaumber believed her failure to do so was evidence that the Casino reasonably believed that Ostler knowingly accepted the overpayments.

*In the Courts*

## Montana High Court Says Prostitution Proposal to 16-year-old Applicant Was Job Related

The Montana state supreme court revived a 16-year-old applicant's sex discrimination claim, finding that a motel manager's prostitution proposal was job-related. *Schmidt v. Cook*. Nina Schmidt had inquired at Triple Crown Motor Inn about a job as a "live-in maid" on the recommendation of a friend who had previously worked at the motel. During her initial job interview, manager Elvin Cook told Schmidt that he would hire her but that, as part of her job duties, she would be required to have sex with him and motel customers. Schmidt, who was 16 at the time, was also married, but was separated from her husband and living with her mother. After the interview, she told her mother that the job included prostitution, which led her mother to call the police.

The Great Falls Police Department had already been investigating Cook based on an earlier complaint. They convinced Schmidt to carry a concealed recording device and return to the motel. Schmidt struck up a conversation with Cook, who repeated his earlier statement that sex was part of the job. He then pulled down Schmidt's underwear and hit her on the buttocks with a ping pong paddle. Cook was arrested and pled guilty to a misdemeanor for promotion of prostitution and sexual assault on Schmidt.

Subsequently, Schmidt filed a complaint with the state, charging Cook with sex discrimination. A hearing examiner ruled in her favor, concluding that Cook and his brother, the owner of the motel, had discriminated against Schmidt by requiring her to have sex with customers as a condition of being hired. The examiner ordered that she be paid \$35,000 for emotional distress.

The Montana Human Rights Commission reversed the decision. It concluded that the sexual harassment "did not occur in an employment context." Additionally, the Commission determined that Schmidt had been aware of the nature of the employment prior to her interview with Cook. The Commission noted that the exchange between Schmidt and Cook that was ultimately caught on tape occurred in the context of a police investigation. Later, when a lower court issued an order affirming the Commission's decision, Schmidt appealed to the state supreme court.

Reversing the lower court and the Commission, the supreme court held that the undisputed evidence showed that Cook violated state human rights laws during the course of a job interview by telling Schmidt that her job as a maid would include having sex with him and motel customers. The court explained that "[Cook's] offer of employment contained a quid pro quo exchange and occurred when he was interviewing Schmidt." Therefore, Schmidt's claim was necessarily job-related.

The court went on to find that Schmidt was not aware of the nature of the job before applying for it. Although Schmidt acknowledged knowing that her friend, who referred her to the job, was having a sexual relationship with Cook, she did not believe that the relationship was "part of her job." Schmidt testified that she was not aware of the sexual elements of the job until her interview with Cook. As the court noted, even if the sexual nature of the position might have been somewhat apparent, Schmidt, "was a 16-year old girl with an eighth-grade education and no prior employment experience." Thus, the court held that "blaming her for [Cook's] behavior" would make "no sense."

One Justice, John Warner, dissented on the grounds that he saw "no possible employment relationship" between the parties. Although he did not approve of Cook's "reptilian conduct," he argued that finding for Schmidt would permit "recovery by a willing participant in criminal conduct [who was] only foiled when her mother called the cops forcing her to turn in her accomplice."

*Arbitrator's Corner*

### Arbitrator Finds Employees Were Improperly Denied Two Vacation Days

An arbitrator recently held that Sodexho Corporate Services violated its collective bargaining agreement with UNITE HERE by not recognizing New Year's Eve and the day after Christmas as holidays. The collective bargaining agreement at issue dealt with cafeteria employees at a General Mills facility. The agreement recognizes seven holidays and states that holidays will be recognized on "the day on which they are observed by General Mills . . . ." The employer, however, did not recognize New Year's Eve or the day after Christmas as holidays, even though General Mills was closed on those days. The arbitrator determined that the employer misinterpreted the meaning of the contract language. Under the contract, when holidays fall on a weekend, the day nearest that holiday on which General Mills is closed is considered to be a holiday under the contract. As such, cafeteria employees were to be given paid holidays on the days in question. J. Daly, *Sodexho Corporate Services, Inc. and Hotel & Restaurant Employees*.

*Bargaining Developments*

## UNITE HERE Reaches Five-Year Settlement With Atlantic City Hotels

UNITE HERE Local 54 has reached an agreement on a five-year contract covering 11,000 employees at seven Casinos in Atlantic City, N.J., where employees had been on strike.

Members of UNITE HERE employed at Harrah's Atlantic City, Showboat Atlantic City, Resorts Atlantic City, Bally's Park Place, Caesars Atlantic City, Tropicana Casino & Resort, and the Atlantic City Hilton are covered by the agreement. The top issues over which the union and company negotiators disagreed were wages, health care, subcontracting, and contract duration.

Under the new agreement, the Casinos will continue to provide employees with full health care coverage. The Casinos will also provide employees with additional payments if needed for health care increases in the fourth and fifth years of the contract, up to a capped amount. Employer payments for health care coverage will continue when employees are on vacation, covering all paid hours.

The agreement retains the step system for wage progression, except for the first year of the agreement, during which there are no wage increases of any kind. In the second through the fifth years, employees in steps one through seven will not receive general wage increases, but will receive step increases. In the fourth and fifth years of the contract, employees in the step progression wage system will receive half the value of the wage step increase at the beginning of the contract year on September 15, 2007, and September 15, 2008, respectively, and the other half on March 15, 2008, and March 15, 2009, respectively.

In the second and third years of the contract, employees at the top rate with at least eight years of seniority will receive a bonus at the end of the contract year of 25¢ times the number of hours worked during the previous 12 months. Employees at the top rate will receive a wage increase of 25¢ per hour in the fourth year of the contract and a wage increase of 30¢ per hour in the fifth contract year.

The new contract allows two additional restaurant subcontracts, one at Resorts and one at the Tropicana. At those casinos, all union restaurants will remain open. Also, the contract prohibits any reduction of any employee wages, benefits, seniority, hours of work, or classification because of subcontracted work on the Casinos' premises. Additionally, the agreement includes language requiring the Casinos to post job promotion opportunities internally and consider bargaining unit employees for the positions prior to hiring outside the job applicants.

Under the new agreement, employer contributions to the union pension fund will increase 10¢ in each year of the contract, from the existing 47¢ per hour worked to 57¢ in the first year, 67¢ in the second year, 77¢ in the third year, 87¢ in the fourth year, and 97¢ per hour worked in the fifth contract year. The Casinos' contribution to the severance fund will be lowered to 5¢ per hour until September 15, 2008, when it will go back to the previous rates of 10¢, 14¢, or 19¢ per hour, depending on an employees' length of service.

The contract further requires that employees have eight hours of non-working time between the end of an overtime shift and the beginning of the next regularly scheduled shift. The previous contract only required the Casinos to make a best effort to provide such time.

In agreeing to the five-year contract, UNITE HERE backed off its demands for a three-year contract that would have aligned the expiration dates of the contracts with those of other hotels and casinos around the nation. Union leaders said that UNITE HERE had thought it could reach its goals only with a three-year contract, but that the Casinos' agreement to provide health care coverage through the fifth year of the contract met its goals and made the longer contract term acceptable.

*In the Courts*

## Hooters Waitress Wins \$275,000 On Claim That Male Employees Invaded Her Privacy

A former waitress at a Chicago Hooters restaurant has won \$275,000 in damages following a sexual harassment trial in which she alleged that male employees spied on her from a peephole in the women's dressing room. *Ciesielski v. Hooters on Higgins Inc.*

Joanna Ciesielski worked as a Hooters waitress between 1999 and 2002. During that period, she claimed she was solicited for dates and subjected to unwanted touching and vulgar comments from several male employees, including management staff. In addition, she said that male employees created a series of peepholes in a wall dividing a break room and a dressing room used by female employees.

Ciesielski further claimed that she had complained about the harassment, but that her supervisors failed to fully address the problem. For example, she claimed that on some occasions management repaired the peephole, but that it just reappeared later. Ciesielski stated that she eventually quit in frustration.

A jury awarded Ciesielski \$25,000 in compensatory damages and \$250,000 in punitive damages pursuant to her claim for hos-

tile work environment sexual harassment under Title VII of the 1964 Civil Rights Act. The jury denied any back pay and rejected Ciesielski's constructive discharge allegations.

Judge Amy St. Eve of the U.S. District Court for the Northern District of Illinois upheld the jury verdict, finding the punitive damages award to be appropriate. She ruled that a reasonable jury could have found that Hooters ignored the harassment endured by Ciesielski and was therefore liable for punitive damages. Additionally, St. Eve found that Hooters management acted with knowledge that their actions might constitute a violation of federal law. She noted that because Hooters managers "were familiar with Hooters' non-harassment policy and attended annual sexual harassment training seminars, a reasonable jury could have concluded that these managers were familiar with Title VII and must have been aware of the possibility that Ciesielski's complaints concerning comments and touching by managers and fellow employees, plus the appearance and recurrence of holes in the changing room wall, would violate Title VII." As such, St. Eve held that Hooters was liable for the entire \$275,000 awarded by the jury.

*Bargaining Developments*

## Four Northwest Indiana Riverboat Casinos Agree to Contract with UNITE HERE

Four Northwest Indiana Riverboat Casinos have agreed to five-year contracts with UNITE HERE Local 1. Together, the agreements cover 685 employees at the casinos.

Local 1 represents 220 employees at Harrah's East Chicago, 140 employees at Trump Casino, 75 employees at Majestic Star Casino, all in Gary, Ind., as well as 250 employees at Blue Chip Casino in Michigan City, Ind. Employees at each casino voted by large majorities to approve the contract settlements. Prior to the agreements, employees at each of the Casinos had authorized a strike if necessary.

Under the agreements, non-tipped employees will receive a raise of 40¢ per hour during each contract year, while tipped employees will receive 20¢. Wage increases are retroactive to the expiration of the previous contract, under which non-tipped employees earned between \$7 and \$11 per hour.

Although negotiated separately, the contracts with the four casinos are similar. Health care was a major focus of the negotiations. Under the contracts, employee health care coverage will shift from the employers' plans to a union health and welfare plan. Employees will not have to make any contributions under this plan, which includes coverage for prescriptions, doctor visits, and hospitalization.

The new contracts also include successorship language so that they will continue to apply even if the Casinos are sold, and also restrict employers from subcontracting union jobs or reducing employee hours due to subcontracted work. Pursuant to the agreements, only limited-service fast food outlets may subcontract work out. Even in those locations, the contracts require that bus service and cleaning staff positions be union-represented jobs.

## *Bargaining Developments*

### **Hilton in Houston Agrees to First Union Contract with Members of UNITE HERE**

**H**ilton Americas-Houston recently agreed with UNITE HERE Local 251 to a new five-year contract. Under the agreement, employees at the Hotel will become the highest-paid hotel employees in the city. The bargaining unit includes housekeepers, bartenders, laundry employees, food service employees, dishwashers, servers and buspersons. Excluded from the unit are maintenance employees, engineers, clerical employees, security guards, and supervisors.

The Hilton is the city's largest convention hotel. It also became the city's first unionized hotel in 2004, when it recognized UNITE HERE following a card-check authorization process. Prior to the 2003 construction of the Hotel, the Harris County AFL-CIO and UNITE HERE had signed a neutrality agreement with the Hilton. The Union now claims that it has close to 70% membership among the Hotel's employees. Union dues are \$6 per week.

Under the contract, non-tipped employees will receive an immediate 25¢ per-hour wage increase, as well as identical increases during each year of the contract. The employees' first wage increase was made retroactive to the date that their three month probationary period ended. Tipped employees will receive a raise of 10¢ per hour in each year of the first three years and 15¢ in each of the contract's last two years. Under the contract, employees who report for work will be entitled to a minimum of four hours of pay, even if they are not given work that day.

The contract also calls for the Hotel to provide employees with health insurance. Under the agreement, employees will contribute \$40 per month for single coverage and \$180 per month for family coverage for the duration of the pact. The contract reduces the annual deductible for hospital visits from \$500 to \$400. The health plan also pays 80% of costs for emergency room visits, 100% of the cost for doctor visits after the employee makes a \$20 copayment, and 70% the cost of outpatient visits for mental health care up to 30 visits per year.

The agreement also requires that the Hotel contribute 15¢ per hour to the union pension fund beginning January 1, 2008. Employees will be vested in the pension plan after five years of employment with Hilton, but will begin earning credits toward vesting as of their date of hire.

The contract provides employees with other perks as well. Thus, employees will receive free parking in the Hotel's parking lot, and will be entitled to discounts on meals purchased from the Hotel. The contract expires December 31, 2009.

### **On Second Try, Disney World and Union Reach New Agreement**

**W**alt Disney World and its largest union finally agreed on a three-year contract. The agreement between Disney and the Service Trades Council, which covers more than 40% of Disney World's work force, came after nearly eight months of talks on wage hikes, health and retirement benefits, and other issues. The agreement was approved by a 3,771 to 2,669 vote, just one week after union members unexpectedly voted down an almost identical offer from the employer.

The agreement provides for 4% raises to some employees, and bonuses and smaller raises to others, with first year increases retroactive to expiration of the parties' prior agreement. Employees at the top of the wage scale will receive an increase of 20¢ per hour, plus an immediate bonus, ranging from \$1,500 to \$1,700. In the second year, these employees will receive bonuses ranging from \$1,000 to \$1,200. In the third year, they will receive a wage increase of 25¢ per hour.

Under the new agreement, Disney will no longer offer comprehensive health coverage. Instead, employees will be offered a choice of five health care plans. Under the least expensive plan, employees must pay between \$3 to \$15 per week for coverage. That amount could increase by up to \$10 a week during each year of the contract.

Previously, union leaders had threatened to ask their members for the authority to strike. However, although union leaders thought that a strike would be the only way to force Disney to make larger concessions, they did not believe that enough union members would strike to make one effective. Under Florida law, not everyone represented by a union has to be a member. Of the roughly 22,000 employees represented by the trades council, slightly more than half are members.

After union members rejected the first agreement, Disney threatened not to extend the parties' previous agreement, and to impose higher health care premiums without enacting raises and bonuses. The threat of higher health care premiums, combined with the difficulty of conducting an effective strike, led many union members to change their minds and approve the new agreement. While some union members referred to those who favored the contract as "sellouts," employees' unwillingness to strike ultimately led to approval of the new deal. The contract expires April 28, 2007.

*In the Courts*

## Appeals Court Finds Arbitration Pact in Restaurant Applications Unenforceable

The U.S. Court of Appeals for the Sixth Circuit held that an arbitration agreement that applicants were required to sign during the job application process was unenforceable. *Walker v. Ryan's Family Steak Houses Inc.* In 2002, former employees Eric Walker, Steve Ricketts, and Vickie Atchley filed a lawsuit alleging that Ryan's, which owns 300 restaurants in 22 states, committed numerous minimum wage and overtime pay violations. Later, 18 other current and former Ryan's employees filed a consent to join the collective action. Ryan's moved to dismiss the suit and compel arbitration. The U.S. District Court for the Middle District of Tennessee denied Ryan's motion, finding that its arbitration agreements were unenforceable. The arbitration agreements had been included in the employees' job application packets, and the plaintiffs had been required to sign the agreements in order to be considered for employment at Ryan's.

According to the plaintiff, managers at Ryan's either did not describe the arbitration agreement or described it in a misleading fashion. Additionally, the employees claimed they did not have the opportunity to review the documents before signing them, and did not receive copies of the arbitration agreement or arbitration rules. Some of the plaintiffs alleged that they had been hired and had worked several days before being asked to sign the agreement. Some plaintiffs also claimed that they had not completed high school and were desperate to find a job.

An unusual feature of the arbitration agreement was that it was not between the employees and Ryan's, but between the applicants and an entity called Employment Dispute Services, Inc. EDSI has a separate contract with Ryan's to provide dispute resolution services. EDSI's arbitration rules allow for requests for production of documents, but limit each party to one deposition.

In finding the agreements unenforceable, the court noted that the Federal Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Although some of the plaintiffs worked in other states, the court applied the contract law of Tennessee.

Under Tennessee law, the court found that Ryan's, which was a third-party beneficiary of the arbitration agreements between EDSI and the employees, failed to provide adequate consideration in return for the employees' agreements to arbitrate.

Under the agreements, Ryan's was not bound to arbitrate its claims against the employees. The court determined that Ryan's promise to consider for employment applicants who agreed to arbitration was inadequate to constitute consideration.

The court also held that the employees did not knowingly and voluntarily consent to arbitration. The plaintiffs did not have the experience, background, or education to fully understand the agreement, and Ryan's managers failed to provide them with a proper explanation of what they were signing. Additionally, employees had no opportunity to study the agreement, consult with an attorney, or later revoke consent. The court went on to find that the agreement did not "result from a meeting of the minds in mutual assent to the terms," which is a requirement for all contracts.

Finally, the court determined that the arbitration agreements were unenforceable because the EDSI rules did not provide for a neutral arbitral forum. The court stated that "[g]iven the symbiotic relationship between Ryan's and EDSI, Ryan's effectively determines the three pools of arbitrators, thereby rendering the arbitral forum unfair to claimants who are applicants or employees." Further, the agreement contained limited discovery rules, which had the potential to "significantly prejudice employees or applicants." Thus, the court determined that the agreements did not constitute valid contracts because employees received nothing of value in return for giving up their right to a jury trial, did not knowingly and voluntarily waive their rights, there was no mutual assent to arbitrate employment disputes, and the agreement contained fundamentally unfair provisions regarding discovery and the selection of arbitrators.

*Unfair Labor Practices***NLRB Reaffirms Finding that Las Vegas Restaurant's Handbook Rules were Illegal**

Provisions in the employee handbook of a Las Vegas hotel/casino-based restaurant that restricted the ability of employees to visit the Casino during their off-hours violated federal labor law, the National Labor Relations Board held recently. Among other provisions, Rule 30 of the Ark's employee handbook said that employees were prohibited from "reporting to property" more than 30 minutes before the start of their shifts start or after their shifts ended. Rule 45 prohibited employees from "returning to the Company's premises, other than as a guest," when they were not scheduled to work. *Ark Las Vegas Restaurant Corp.*

In 1997, Culinary Workers Union Local 226 and Bartenders Union Local 165 - both affiliated with what is now UNITE HERE - began a campaign to organize Ark's employees. In a 2001 decision, the Board determined that Ark committed numerous violations of federal labor law during the organizing campaign, including disciplining and terminating employees for supporting the union. The Board had also noted that Rules 30 and 45 violated the National Labor Relations Act, which prohibits employers from interfering with, restraining, or coercing employees who are exercising their right to engage in protected activity.

On appeal, the Circuit Court of Appeals for the District of Columbia sent the case back to the NLRB, raising questions as to the scope of Rules 30 and 45. In its latest decision, the NLRB said Rules 30 and 45 could be reasonably interpreted to prohibit employees from entering sections of the hotel and casino complex that were not leased by Ark, meaning that the "rules would reasonably tend to chill employees in the exercise of their Section 7 rights." The majority reasoned that employees could be confused by the use of the terms "property" and "premises," and might therefore believe that they could not enter onto hotel property. The Board thus adopted the administrative law judge's original ruling that the terms "premises" and "property" were unacceptably ambiguous and appeared to refer to the entire hotel and casino, and accordingly, the rules violated the National Labor Relations Act.

In a dissent, Member Battista said there was no evidence that Rules 30 and 45 had been unlawfully applied, and it had not been shown that the rule could be reasonably read as prohibiting Section 7 activity. Thus, he would have found the rules to be permissible.

*Before the Board***Divided NLRB Overturns Union Election Win**

A divided National Labor Relations Board overturned a union election win based on a finding that marked sample ballots distributed by the Service Employees International Union misled voters. *French Redwood Inc. d/b/a Sofitel San Francisco Bay*, 343 N.L.R.B. No. 82. In the week before an election that would determine whether SEIU Local 265 would represent housekeepers at Sofitel San Francisco Bay, at least nine employees were mailed a copy of a printed Spanish-language sample ballot that was part of an official NLRB notice. The union denied sending the copies, but one envelope that was saved included the union's return address. The sample ballots included a large handwritten "X" in the "yes" box, as well as each recipient's first name and a handwritten message that said "Por Favor-Si Se Puede." This phrase was interpreted as "Please-Yes it can be done" or "Please-It can be yes if you can."

The union ultimately won the election, 27-24. However, the Board overturned this result and ordered a new election. Members Schaumber and Meisberg determined that the handwritten markings on the ballot were not clearly attributable to the union, and that the ballots likely mislead employees into believing that the Board favored the union in the election. Although the ballots would not have been objectionable if they clearly indicated that they were sent by the union, these ballots did not clearly identify their source. Particularly, the Board noted that the ballots "contained no clearly partisan slogans or cartoons" to indicate the source of the document, and the handwritten markings were not clearly attributable to the union. Further, the Board found that the union's return address on the envelope did not "establish that the Board did not prepare it, because distribution by a party, without more, does not establish the source of the document."

Dissenting, Member Walsh asserted that the altered ballots were "obviously campaign propaganda." He argued that it would be unreasonable "for the employees to believe upon receipt of the mailing, with its handwritten personal first-name salutation and strident closing appeal across the bottom of the page, and the oversized handwritten 'X,' that the theretofore totally silent [NLRB] was, out of the blue and with only a few days left before the election, suddenly and enthusiastically jumping into the contest and imploring the employees individually and personally to please vote for the Union." Thus, he argued that the ballots were "sufficiently distinct from the Board's preprinted standard ballots so as to preclude a reasonable impression that the markings emanated from the Board."

## *Bargaining Developments*

### **UNITE HERE Members Ratify Master Pact with Washington, D.C. Hotel Association**

The Hotel Association of Washington, D.C. has reached a three-year agreement with members of UNITE HERE Local 25 on behalf of the 14 hotels that it represents. Seven other hotels have reached “me-too” agreements with the union. The agreement came four months after the previous contract expired; the union had threatened to strike if agreement was not reached.

The master contract covers employees at the Best Western Skyline, Capital Hilton, Washington Hilton & Towers, Hilton Washington Embassy Row, Holiday Inn Downtown, Holiday Inn on the Hill, Hotel Washington, Hyatt Regency Capitol Hill, Loews L’Enfant Plaza, Marriott Wardman Park, Mayflower Hotel, Omni Shoreham Hotel, the Jefferson Hotel, and Westin Embassy Row.

Me-too contracts were ratified by employees at the Washington Court Hotel, Swissotel Washington-Watergate, St. Regis Washington, Sheraton Four Points, Madison Hotel, Hay-Adams Hotel, and Governor’s House Hotel.

UNITE HERE had initially been seeking a two-year contract as part of its national strategy to have contracts expire at the same time in major cities, but determined that the three year agreement met most of its other objectives.

Under the contract, non-tipped employees will receive retroactive raises of 50¢ per hour during the first year, while tipped employees will receive 25¢ increases. Bus employees are scheduled to receive 37.5¢ more per hour. The contract provides for two raises each year during the second and third years of the agreement. Non-

tipped employees will receive four increases of 20¢ for a total of 80¢; tipped employees will receive increases of 10¢ for a total of 40¢ and bus employees will receive increases of 15¢ for a total of 60¢. Under the previous contract, tipped employees generally earned about \$7.20 an hour while non-tipped employees earned about \$13 on average.

The contract also required the Hotels to continue to pay all health insurance premium costs for employees and their families. The Hotels dropped their proposal for new employees to pay some portion of health care premiums. However, the amount employees will pay for brand name prescription drugs out of network will increase to \$32. Still, the copayment for out-of-network generic prescription drugs will be reduced to \$16.

The Hotels also agreed to increase their contributions to the union pension plan from 61¢ per hour worked to \$1 by the end of the contract. Under the old agreement, the maximum pension benefit was \$525 per month; the maximum benefit may now go as high as \$780 by the end of the three year period.

The contract also contains numerous language provisions, including a requirement that management meet and discuss any significant increase in workload with the union prior to its implementation. The contract also provides for housekeepers with at least 30 years of service to have the number of rooms they are required to clean reduced by one. Another new provision calls for “workplace dignity.” Under this provision, the union may grieve claims related to alleged harassment of employees.

## *Newsworthy*

### **EEOC Issues Guidance on Restaurant Disability Rules**

The Equal Employment Opportunity Commission, with help from the Food and Drug Administration, has issued a new question-and-answer guide in an attempt to help restaurants and other food service employers comply with Title I of the Americans with Disabilities Act. The guide deals with problems that are unique to the food service industry, such as how the FDA Food Code rules restricting the use of sick employees interact with ADA rules regarding the accommodation of disabled employees by food service employers.

The guide provides examples of circumstances in which the accommodation of a disabled employee might outweigh health and safety concerns. As the EEOC explains, although employers must rely on the FDA Food Code provisions in making employment decisions, they also must take into consideration the rules established by the ADA.

The ADA says that an employer may refuse to assign or continue to assign an employee to a food handling position if the employee is disabled by one of the so-called “big four” pathogens on

the Center for Disease Control and Prevention’s list. This is because “the risk of transmitting the disease cannot be eliminated by a reasonable accommodation,” the EEOC said. The “big four” are salmonella typhi, shigella spp.; shiga toxin-producing escherichia coli; and hepatitis A virus, all of which are easily transmittable through food.

The EEOC noted that most employees “who have a disease due to one of the big four pathogens are not disabled by that disease.” Still, “if a person is disabled by one of the diseases caused by a big four pathogen, the employer must consider the ADA in addition to the provisions in the FDA Food Code” by reasonably accommodating the employee.

The commission hopes that the new guide will answer the questions of food service employers, who “frequently contact EEOC with questions about how the ADA interacts with the Food and Drug Administration’s safety and health provisions for employees who work around food.”

*Newsworthy*

## States Institute Dramatic Minimum Wage Increases

Recent votes have led to minimum wage increases in New York, Florida, Nevada, Oregon, and the District of Columbia.

In New York, the State Senate recently voted 50-8 to override Governor George E. Pataki's (R) veto and approve a bill that will raise the state's minimum wage by two dollars over the next two years. The bill provides for the current \$5.15 minimum wage to be raised immediately to \$6.00 per hour, to \$6.75 an hour on January 1, 2006, and to \$7.15 an hour on January 1, 2007. The law also provides that the state's minimum tip wage will increase from \$3.30 per hour to \$4.35 per hour on January 1, 2006, and to \$4.60 per hour on January 1, 2007.

In Florida, voters passed a constitutional amendment that will increase the minimum wage paid in the state to \$6.15 per hour. The measure – approved by 71 % of the voters – will take effect in April and will affect all employees in Florida who are covered by the \$5.15 federal minimum wage. Thereafter, the state minimum wage will be indexed each January 1 for inflation, thus requiring yearly increases in the wage rate.

The Florida measure also provides employees additional remedies for violation of state wage and hour laws, including full back wages, liquidated damages, attorneys' fees and costs, reinstatement and injunctive relief. Employers will be subject to fines of \$1,000 per violation of the new minimum wage requirement, as well as being subject to civil enforcement litigation, including class actions.

Nevada voters approved a bill that calls for raising the state's minimum wage by \$1 an hour, to \$6.15. However, under Nevada's Constitution, the measure requires voter approval once more in 2006. If the measure is passed again, it will take effect in 2007.

If approved, the new law would apply only to companies that do not offer health insurance benefits to their employees and dependents. The bill also exempts employees younger than 18. Once instituted, the minimum wage would increase each year by an amount equal to the increase in the consumer price index.

Washington, D.C. has raised its minimum wage by 45¢ to \$6.60 per hour. Under a bill passed by the District of Columbia Council, this rate will increase by another 40¢ to \$7.00 per hour in January 2006.

Additionally, the Oregon Bureau of Labor and Industries has announced an increase in the state's minimum wage from \$7.05 per hour to \$7.25 per hour. Since 2003, Oregon has increased its minimum wage each year based on changes in the consumer price index. Oregon began the yearly minimum wage increases as the result of a voter-approved ballot initiative in November 2002.

## Department of Labor Issues New Rules on Child Labor For Restaurants

The Labor Department has released final rules on child labor in food service establishments, restricting the types of cooking duties that may be performed by minors. However, the rules do not contain all of the prohibitions on kitchen work sought by organized labor and safety advocates. The final rules, proposed in 1999, modify existing regulations and are designed to be more applicable to the modern workplace.

As they relate to restaurant employees, the rules establish restrictions on the type of cooking and cooking-related work that 14- and 15-year-olds may perform as employees of retail, food service, and gasoline service establishments. They are currently found at 29 C.F.R. § 570.34. The rules do, however, eliminate the "in plain view" interpretation that required minor employees working in "soda fountains" and "snack bars" to work in positions where the customers could see them at all times. This regulation had been created under the theory that employees being watched by the customers are performing less hazardous work. As it reads now, the new rule simply prohibits 14- and 15-year-olds from cooking with any device except for electric grills, gas grills, and automated deep fryers where "baskets" are lowered and raised through devices, as in many fast food restaurants.

Prior to the enactment of these rules, several safety groups and labor unions opposed allowing minor employees to operate grills or deep fryers, claiming that allowing minors to perform this work made them susceptible to burns. However, the Labor Department rejected those concerns and asserted that further restrictions would cut young people off from employment opportunities that constitute an "extremely important 'first job' experience." The Department noted that it was "sensitive to the concerns of commenters who recommended that 14- and 15-year-olds should no longer be permitted to perform any cooking duties whatsoever, due to the possibility of accidents in the workplace," but that it believed that "such a rule would be unnecessarily broad."

The Department also noted that the new rule is more restrictive than the position taken by the Council of Chain Restaurants, which had argued that the Department should allow young employees to use automated broilers or any type of deep fryer. Instead, the Department said it would continue to prohibit such activities.