

Hospitality Industry Quarterly

Labor and Employment Law Report

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Denying Extra Leave for Pregnancy-Related Disabilities Is Found Not Discriminatory

An employer need not provide additional leave to employees with pregnancy related disabilities, the New Jersey Supreme Court recently held in a 4-3 decision. *Gerety v. Atlantic City Hilton Casino Resort*.

In 1997, an employee of the Hilton took 12 weeks of leave pursuant to the federal Family and Medical Leave Act. She then took an additional 14 weeks of unpaid leave pursuant to the Hilton's medical leave policy, for a total of 26 weeks away from the job. When she had exhausted this leave, the employee had not yet given birth. Because her medical leave was exhausted and she was not yet ready to return to work, the Hilton terminated her employment.

After she was terminated, the employee sued in the New Jersey Superior Court of Atlantic County. The Hilton moved for summary judgment on the claim, which was denied. The Hotel appealed the ruling.

On appeal, the state supreme court overturned the trial court, finding that the Hilton's policy was non-discriminatory. The court noted that the Hilton allowed the employee to take over twice the amount of leave required by law. Additionally, the Hilton's medical leave policy was "gender neutral: both male and female employees benefitted from the generous leave that Hilton permitted for its eligible employees who experienced a serious medical condition."

The court rejected the employee's argument that the policy discriminated against women because it did not allow for additional pregnancy leave simply because "only women can become pregnant and . . . only pregnant women can experience high risk pregnancies." The court noted that although policy arguments can be *please see "Denying" on page 2*

Board Finds That Employer Acted Legally in Firing Employee Who Used Profanity

The Board recently held that the Palms Hotel and Casino in Las Vegas did not violate federal labor law by firing a pro union buffet cook and maintaining a rule prohibiting offensive conduct. *Fiesta Hotel Corp. d/b/a Palms Hotel & Casino*.

On November 17, 2001, just 10 days after it first opened, the Palms hired employee Martin Perez as a cook in the Fantasy Market Buffet restaurant. Perez was a key participant in a union organizing rally in front of the facility on Dec. 3, 2001. The rally was arranged by Culinary Workers Local 226 and Bartenders Local 165, both of which are affiliates of UNITE HERE.

Throughout his employment, Perez had been criticized for not maintaining sufficient food at his buffet station, changing food recipes without permission, improperly slicing meat, failing to follow directions, and calling another chef derogatory names. Shortly after the rally, a coworker complained to Hotel management that Perez had asked her to support the union. Perez was then directed to meet with the executive chef and the director of human resources. The HR director asked Perez if he had talked to other employees about the union, ordered him not to engage in union solicitation during work time, said the company opposed the union, and informed him that the Hotel had already planned to improve the employees' pay and benefits.

About a week later, a supervisor gave Perez a written warning for telling the Hotel that he was too sick to work once he arrived for his shift. A company rule required at least four hours of notice for employee absences. Two weeks later, Perez was fired for not meeting standards and failing probation.

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He was among a total of 30 to 40 kitchen employees fired that month.

An NLRB administrative law judge found that the Palms committed unfair labor practices by interrogating Perez about his union activity, impliedly threatening him with discharge, issuing the warning notice, and firing him. The ALJ determined that the Palms knew about Perez’s union activity, and that its subsequent actions were motivated by an anti-union animus. The ALJ also found that the Hotel’s rule against offensive conduct unlawfully interfered with employees’ union rights.

On appeal, the Board held that the Hotel’s actions were motivated by legitimate business reasons. The Board found that the Hotel had hired a large staff for its grand opening and the holiday season, and that it was required to reduce its staff when business slowed in January. The Board noted that the executive chef had reviewed personnel files and talked to the chefs before selecting 30 to 40 kitchen employees to be laid off. Perez’s layoff was justifiable, in that he had previously “engaged in multiple incidents of misconduct and poor performance.” Additionally, there was no evidence that the other buffet cooks who were laid off were not union supporters.

The Board also held that the warning issued to Perez would have been issued regardless of union activity, as Perez had failed to provide sufficient notice that he would be absent on a very busy workday.

In regards to the rule against offensive conduct, the Board majority found that the rule did not explicitly restrict union activities, and that the rule had not been formulated in response to union activity. Neither had the rule been applied to restrict employees’ union activities. As such, the Board found that the general counsel failed to show that a reasonable employee reading the rule would interpret it to prohibit protected conduct.

In so finding, the Board pointed out that “ threatening and abusive language are not inherent aspects of union organizing or other [union] activities.” It also found that the language of the rule against offensive conduct is not “so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace.”

In its decision, the Board acknowledged that “there may be instances where protected conduct has an untowed effect on an employee (e.g., he/she is subjectively offended by a peaceful solicitation). However, the Hotel had never applied, nor intended to apply, its rule under such circumstances.”

Dissenting from the board majority’s decision on the conduct rule, Member Liebman asserted that “an employee reasonably would read the rule as covering unwanted or persistent solicitation” of coworkers to support a union, which is protected activity. As such, she would have struck down the rule as overbroad.

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advanced to support enhanced leave for pregnancy related illnesses, such arguments did not “justify this Court’s imposition of such a requirement on employers under the mantle of [state law].” The court held that “[t]o do so would constitute legislating a new minimum medical leave requirement.” Pursuant to New Jersey law, requiring such additional leave would, “carve out a special exception for pregnancy under the [law against discrimination], treating it differently from other medical conditions.” The court refused to create such an exception, noting that although pregnancy is unique to women, other medical conditions are unique to men.

As such, the court held that “because defendant’s leave policy was applied non-discriminatorily and not subject to exception, application of that policy to this employee does not create a violation of [state law].” The court found that it could “discern no requirement in [state law] that preferential leave treatment for pregnant employees is necessary for an employer to avoid the accusation of impacting women as a class unequally.”

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In the Courts

Judge in Hotel Sex Bias Case Ejects Attorney Who Solicited Corporate ‘Mole’

A plaintiff's attorney was recently disqualified by the U.S. District Court for the Eastern District of Pennsylvania from her sex discrimination case because of the attorney's secret contacts with a disgruntled employee who leaked inside information to the lawyer. *EEOC v. Hora, Inc.*

In the lawsuit, the Equal Employment Opportunity Commission and employee Manessta Beverly claimed that a supervisor at the Days Inn Hotel in Reading, PA, made unwanted sexual advances towards her and other women on the hotel staff. It was further asserted that the hotel's owner and manager made no effort to stop these advances. Beverly retained outside counsel to represent her on various state law claims.

Prior to the initiation of the EEOC's investigation, Beverly's attorney, Jana R. Barnett, began communicating with Deborah Richardson, the administrative assistant to the Hotel's top managers. Richardson was sympathetic to Beverly and hostile towards the Hotel's management. Barnett encouraged Richardson to provide her with information that might help her with Beverly's lawsuit. Richardson complied, and in a series of e-mails, gave Barnett proprietary and confidential information. Such information included: Beverly's time sheets, a supervisor's personnel file, the general manager's statement to the EEOC, and details that another employee learned while eavesdropping on a private attorney-client conversation.

The Hotel discovered the contracts and immediately moved to disqualify Barnett as Beverly's counsel. The court granted the motion, determining that Barnett had violated ethical duties to the Hotel during the prelitigation stage of the lawsuit. In making this finding, the court determined that Barnett had failed to dissuade Richardson from revealing inside information. Rather, she used the employee as a "mole" and took advantage of both her access to private information and her hostility toward hotel management.

The court also noted that Richardson herself had no personal knowledge of the events relevant to the lawsuit. Thus, Barnett violated ethical duties by using the secondhand information she received from Richardson, a potentially biased witness, in order to convince the EEOC to pursue Beverly's complaint. The court also found that Barnett violated the Hotel's legal rights by circumventing the discovery process.

Additionally, Barnett risked undermining the EEOC's investigatory role. Explaining its decision, the court noted that "Ms. Barnett is not permitted to pick and choose which ethical rules to ignore or misinterpret simply because avoidance or abuse of those rules seems conveniently more beneficial to her client."

Barnett was found to have violated Pennsylvania Rule of Professional Conduct 4.2, which bars direct communication with a represented person without the consent of that person's lawyer. Barnett claimed that this rule did not prevent her from speaking with Richardson because Richardson was not a Hotel manager. However, the court disagreed with Barnett's narrow reading of the rule, and scolded Barnett for trying to get around the rule in this way. The court noted that Richardson's position as an assistant to the Hotel's top executives put her in a position to impute liability to the Hotel, and thus brought her within the scope of the rule.

The court also determined that Barnett violated Pennsylvania Rule of Professional Conduct 4.4, which forbids lawyers from obtaining evidence in a way that violates the legal rights of third persons. The court found that Barnett violated this rule by acquiring confidential information belonging to the Hotel, including privileged attorney-client communications, without its knowledge and consent.

In finding that Barnett violated her ethical duties, the court also pointed to Rule 8.4(a) and Rule 8.4(c). Rule 8.4(a) prohibits lawyers from violating the rules of professional conduct through the acts of another. Rule 8.4(c) prohibits lawyers from engaging in conduct involving dishonesty or deceit. The court determined that Barnett violated both rules by soliciting Richardson to turn over privileged information without the Hotel's approval. The court also addressed Rule of Professional Conduct 3.4, which deals with fairness to opponents and their counsel. The court noted that Barnett's actions violated the spirit of this rule, if not the letter.

Having found that Barnett violated these ethical rules, the court went on to note that Barnett should have waited for formal discovery before speaking with Richardson. Within the context of formal discovery, Barnett could have either notified the Hotel of her interest in speaking with Richardson, or taken other steps to safeguard evidence and protect her client's legal rights. Although Barnett claimed that she was merely the lucky recipient of information from Richardson, the court determined that Barnett never discouraged Richardson from turning over information to which Barnett was not entitled.

The court concluded that the Hotel had been prejudiced by Barnett's actions because it was denied the chance to control communications between its management team and Beverly. As such, the court determined that Barnett should be disqualified from the case.

*Before the Board***Board Clears Aladdin Hotel of Unlawful Surveillance Charges**

The National Labor Relations Board has ruled that the Aladdin Hotel and Casino in Las Vegas did not conduct unlawful surveillance when two of its human resources managers interrupted employee conversations about union organizing and discussed management's view of the matter.

On June 4, 2003, two off-duty hotel employees were talking to other off duty employees about signing union authorization cards in the employee dining room. Aladdin's vice president of human resources approached the two employees, but stood by silently for two minutes. She then interrupted the employees' discussion and spoke for about eight minutes about the Casino's perspective on the possible unionization of the hotel, after which she left the dining room.

Two days later, another off-duty employee was in the dining room asking other employees to sign union authorization cards when the hotel's director of human resources approached them. Again, the human resources officer gave the hotel's view on union organization. The employee who was soliciting for the union translated the manager's comments into Spanish for the other employee, who did not speak English.

An Administrative Law Judge found that the hotel committed numerous unfair labor practices during the union's organizing drive. The hotel appealed only the ruling that interrupting employee discussions and giving the hotel's view on the organizing drive amounted to unlawful surveillance of the employees' union activities.

A divided National Labor Relations Board overturned the ALJ's ruling. The Board first noted that a "supervisor's routine observation of employees engaged in open [union] activity on company property does not constitute unlawful surveillance." Instead, an employer violates federal law only when it "surveils employees engaged in [union] activity by observing them in a way that is 'out of the ordinary' and therefore coercive." The Board explained that the indicia of coerciveness include "the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation."

Applying this standard, the Board found that the Hotel's managers' observations "were qualitatively different from those in other cases where the Board has found unlawful surveillance." These observations were "for an even shorter period of time than in other cases where the Board has not found unlawful surveillance." Additionally, the Board determined that the presence of the managers "in the dining room . . . was routine and their consequent observation of employees engaged in solicitations was unaccompanied by coercive conduct." Moreover, this activity was conducted out in the open. Thus, both hotel managers had the "right to assert their views regarding unionization." That the managers did so during an

employee conversation about union organizing, or that they waited a few minutes before speaking, does not mean that the supervisors' conduct was out of the ordinary.

In making this finding, the Board held that nothing in the National Labor Relations Act "even remotely suggests" that employer representatives may not express an antiunion opinion to employees if they are discussing union activity. "To the contrary, in order to have a free exchange of views in 'a market place of ideas,' that time would be a logical time for the employer representative to express his opinion." Although the employees may stop their discussion in order to listen to the employer representative, the employees are free to "respond, or ignore him and continue their conversation."

Dissenting, Member Wilma B. Liebman said "[i]t seems shockingly obvious that the Hotel committed an unfair labor practice when two of its high-level managers separately interrupted private employee conversations on union matters and injected themselves into the discussion." Member Liebman noted that the incidents took place during an organizing drive by the union.

On a separate issue, the Board upheld the Administrative Law Judge's blocking of a union subpoena seeking the names and contact information of customers who submitted written complaints about a Hotel employee who was later fired. In so finding, the Board noted that the "marginal relevance" of the evidence was outweighed by the "privacy and business interests" of the Hotel's employees and guests.

*Newsworthy***Illinois Enacts Hotel Rest and Meal Break Law**

Illinois Gov. Rod Blagojevich (D) has signed legislation designed to increase workplace protections for hotel room attendants in Cook County, which includes Chicago and many of its suburbs.

The law, which amends the Illinois One Day Rest in Seven Act, states that room attendants in Cook County must be provided with at least two 15 minute breaks during a workday of seven or more hours. These employees must also be given at least one meal break of at least 30 minutes during those shifts. Hotels are further required to provide such employees with a comfortable environment in which to take their breaks, including clean drinking water, at no cost.

The new law also prohibits hotels from retaliating against employees who assert their rights under the new law. Employees who are subject to such retaliation would be able to recover triple their normal daily compensation, plus damages and attorneys' fees.

Before the Board

NLRB Rules Hotel Employee's Profanity Provoked by Boss's Illegal Threat to Fire Him

The National Labor Relations Board ruled that a hotel maintenance engineer who cursed at his boss for ordering him to tell a union representative that he was a supervisor (and therefore ineligible for union representation) was protected by federal labor law, and was therefore unlawfully discharged. *Stanford New York LLC, d/b/a Stanford Hotel*.

In September 1999, Hotel & Allied Services Union Local 758 won an election to represent the service and maintenance employees at the Stanford Hotel in New York City. Joong Hyun Park, who was listed as an employee eligible to vote in the election, voted without challenge. On October 28, 2003, the union and the Hotel agreed to an initial collective bargaining agreement, effective on November 1.

On October 31, general manager Kevin Kim urged Park not to join the union and informed him that he was a supervisor who was not covered by the contract. Park disagreed, and expressed his desire to be included in the bargaining unit. Later that afternoon, Kim directed Park to come to a meeting and tell a union representative that he was a supervisor.

The meeting was located in the employee lunchroom in the basement of the Hotel. No other employees were present. Kim not only told union representative Leo Lanci that Park was a supervisor, he informed Park in Korean that he would be fired unless he said he was a supervisor. Park pointed at Kim and responded in Korean that he was a liar and a bitch. As Kim got up to leave the room, Park loudly called Kim a "f_____ son of a bitch" in English. An employee who entered the lunchroom overheard Park's remark. Kim then threatened to fire Park. Later that evening, Kim fired Park for "gross improprieties." The union filed unfair labor practice charges against the Hotel.

An Administrative Law Judge concluded that Park was not a supervisor and was engaged in protected concerted activity when he met with Kim and Union Agent Lanci and asserted his desire to be included in the bargaining unit. The ALJ held that "one, spontaneous, isolated, brief outburst made in the heat of the moment by Park, who was understandably frustrated by Kim's attempt to deny him union representation, did not cause him to lose the protection of the Act."

The Board agreed with the ALJ's findings and ordered Stanford New York LLC to reinstate Park and reimburse him for lost pay and benefits. The issue, the Board held, was whether Park's conduct was "sufficiently egregious to remove it from the protection of the Act."

Precedent called for the examination of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) "whether the outburst was, in any way, provoked by an employer's unfair labor practice."

The Board concluded that the first factor weighed in favor of Park retaining the protection of the Act. Because "Park's outburst occurred away from his normal working area," took place behind closed doors (which Park closed himself), and without any other employees present during most of the meeting, the Board held that "[t]he relatively secluded room and Park's efforts to maintain the privacy of the conversation minimized the potential that Park's outburst would impair Kim's ability to maintain discipline in the workplace."

Second, the Board found that the subject matter of the discussion "concerned [Park's] desire to be included in the collective-bargaining unit and his disagreement with Kim over his eligibility." Because Park reasonably believed that he was not a supervisor, the board determined that his "conduct occurred in the context of his attempted assertion of a fundamental right under the Act." Thus, the Board held that this factor weighed strongly in favor of a finding that Park's remarks were protected.

Third, the Board acknowledged that "Park's outburst was profane and offensive, which weighs against the remarks retaining the protection of the Act." Both Park and Kim agreed that profanity and cursing in the hotel is inappropriate.

Finally, the Board concluded that "Park's outburst was a direct and temporally immediate response to Kim's repeated insistence that Park declare himself ineligible for union representation, accompanied by threats of discharge." "While Kim may not have used profanity, he did unlawfully threaten to discharge Park, and that threat triggered Park's response."

While Chairman Robert J. Battista and Members Wilma B. Liebman and Peter C. Schaumber emphasized that they "do not condone insubordination," they found that Park "was engaged in protected concerted activity in expressing his desire to be included in the collective bargaining unit, and he did not lose the protection of the [National Labor Relations] Act because of his intemperate response while protesting [the general manager's] unlawful conduct." The Board further held that "Board precedent established that an employer generally may not provoke an employee through unlawful conduct to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee." As a result, the Board held that the hotel had engaged in unlawful conduct and ordered Stanford New York LLC to reinstate Park and reimburse him for lost pay and benefits.

In the Courts

Board Ruling That Casino's Speech Restrictions Were Too Broad Is Upheld

The United States Court of Appeals for the Tenth Circuit has held that a Colorado Casino violated federal labor law when it restricted employees from communicating with each other about wages, working conditions, and a tip sharing policy. *Double Eagle Hotel & Casino v. NLRB*.

The Double Eagle Hotel and Casino is located in Cripple Creek, Colorado. Its slot employees and security officers are required by the Casino to share tips that are received from customers. Under the old version of the policy, half of the tips were distributed among the slot employees and the other half were distributed among the security officers. Because there were more slot employees than security officers, individual security officers received a larger share of the tip pool than individual slot employees.

In May 2001, in response to complaints from the slot employees, the Casino changed its policy. Under the new policy each employee received an equal share of the tip pool. Subsequently, the Casino hired more security officers, and the slot employees sought a return to the old policy. As debate over the tip pool policy led to friction between the slot employees and the security officers, the Casino prohibited both groups from discussing the matter. The Casino later terminated a slot employee, and suspended two others, for discussing the policy on the Casino floor.

International Brotherhood of Electrical Workers Local 113 filed an unfair labor practice charge that challenged the prohibition on discussing the tip pool, as well as several rules in the employee handbook. One rule, entitled "customer service," stated: "Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard." Another rule, entitled "confidential information," prohibited the dissemination of certain information outside the employee's department, including information about discipline, grievances, complaints, performance evaluations, salaries, pay increases, and employees who had left the company. A third rule, entitled "communication," provided that employees were not, without prior approval from management, "permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non employee."

In March 2003, an Administrative Law Judge held that the tip discussion rule was illegal because it was overly broad but found that the handbook rules were legal. On appeal, the Board unanimously found that the tip pool discussion and customer service rules were overly broad, and ruled 2-1 that the confidential information and communication rules were also too broad. The Board held that the

Casino could prohibit employees from discussing working conditions in the gambling areas and other areas frequented by customers, but would not do so in other public areas such as its parking lots and restrooms.

On Appeal to the Tenth Circuit Court of Appeals, the Casino argued that its customer service rule was not overly broad because it allowed employees to discuss company issues and personal problems, even in public areas, if guests were not present. However, the Court of Appeals determined that the rule "contains nothing to limit the scope of its application." The court noted that "the presence of a single guest can transform an area in which employees have a right to discuss work conditions, such as the parking lot or break room, into a place where discussion is prohibited." The court went on to point out that "no court has interpreted the [National Labor Relations Act] to permit an employer to adopt a no discussion rule that follows each of its customers."

In regards to its tip pool discussion rule, Double Eagle argued that its rule was limited to the Casino floor, and that it was necessary to avoid disrupting customers. The Court of Appeals agreed with this, finding that "Double Eagle can maintain its [tip pool discussion] rule so long as it is limited to the Casino's gambling area, and adjacent aisles and corridors frequented by customers." However, the court found substantial evidence to support the ALJ's finding that the Casino applied the rule in other areas as well.

Double Eagle further argued that its confidential information and communication rules were permissible. The court acknowledged that the Casino "has a significant interest in protecting its confidential information," but found that the two rules "define confidential information too broadly." Pursuant to these rules, employees were not permitted to discuss such topics as salaries and pay increases. However, although it struck down the rules as overbroad, the court noted that the Casino "is free to modify its rules so that its interests are protected and the employees' . . . rights are not violated."

After upholding much of the Board's determination that the rules at issue were overbroad, the court went on to find that the Casino was required to revoke the discipline imposed on employees for violating the tip pool discussion rule. The Board had held that such a remedy was required, and the court determined that Board's view was a reasonable interpretation entitled to deference. As the court explained, "by adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling effect that results from imposition of overbroad rules."

In the Courts

Federal Court Rejects Casino Employees' Claims They Were Fired For Reporting Kickback Scheme

The U.S. Court of Appeals for the Fifth Circuit has rejected the wrongful discharge claims of two former employees of a Mississippi casino who alleged they were terminated in retaliation for reporting an allegedly illegal kickback scheme. *Wheeler and Moore v. BL Dev. Corp. d/b/a Grand Casino Tunica*.

Bayless Wheeler and Daniel Moore previously worked as the Grand Casino's director of transportation and transportation manager, respectively. They were suspended and later terminated for loaning the Casino's tire changing machine to an auto shop where Moore's son worked.

However, shortly before they were discharged, the Casino announced a plan that offered its executives up to \$120 of free dry cleaning services each month. Wheeler and Moore believed that the plan was an illegal kickback between the dry cleaner and the Casino, and reported this to the Casino's director of regulatory affairs. While on suspension, but prior to their termination, Wheeler and Moore also contacted the Mississippi Gaming Commission to report their concerns. The commission conducted an investigation and ultimately determined that the plan was not illegal.

Following their terminations, Wheeler and Moore sued Grand Casino, alleging that their terminations were in retaliation for questioning the legality of the plan, and therefore violated the state's public policy exception to its at-will employment doctrine. A district court judge granted the Casino's motion for summary judgment, concluding that the public policy exception did not apply unless the reported activity was criminal. The lower court also rejected the employees' race discrimination claim, finding they failed to provide sufficient evidence of bias.

On appeal, Wheeler and Moore argued that although the plan they reported was ultimately found to be neither illegal nor criminal, that the public policy exception applied so long as "they reasonably believed the activity to be criminally illegal." The Fifth Circuit found the argument unpersuasive, holding that the state's "narrow public policy exception" did not apply in their case.

In so finding, the court cited a 1997 decision in which the quality control manager at a Mississippi construction site alleged that he was fired after refusing an order not to include observed deficiencies in formal reports to the Army Corps of Engineers. The court noted that it was not sufficient that the employee "reasonably believed what he was asked to do by his superiors was criminal." Rather, the court in that case ordered that the matter be remanded to determine the legality of the action, thereby "lending credence to Grand Casino's position that the act itself must be criminal to implicate the exception and rendering the subjective intent or belief of the plaintiff irrelevant."

The court went on to point out that the kickback plan involved here was admittedly not illegal. Therefore, the "narrow public

Bargaining Developments

SEIU Members at Yosemite Resort Ratify Three-Year Contract for 750 Employees

Service Employees International Union Local 535 and DNC Parks & Resorts at Yosemite, Inc. in Yosemite National Park, California have ratified a new three-year contract for approximately 750 employees with 111 job classifications. The parties, who began negotiations in December 2004 with the help of a federal mediator, used modified interest-based bargaining to reach their agreement. Nearly 70 percent of the 385 union members voted to approve the agreement.

The three-year agreement maintains length-of-service step increases of up to 10 percent over the three-year contract term for employees with up to six years of service. Employees at the top of the wage scale receive a 3 percent signing bonus and wage increases of 2 percent in the second and third years of the contract. Employees' hourly earnings ranged from \$8.55 to \$18 under the previous contract.

Under the agreement, the Company also continues to pay 75 percent of health care premiums, while employees pay 25 percent of the premiums. Employees currently pay \$64 per month for individual health care coverage, \$175 per month for an employee plus one dependent, or \$200 per month for family coverage. Additionally, the agreement extends health care coverage to domestic partners—a first for both parties. New employees no longer have to wait one year to become eligible for dental and vision coverage and are now eligible after 150 cumulative days of employment. Employees' monthly health care premiums with dental and vision included are \$155 for individuals and \$200 for families.

The new collective bargaining agreement also changes benefit eligibility requirements and takes into consideration the two-hour commutes many employees make to reach the resort. Employees were previously eligible for full benefits if they worked at least 25 hours per week year round. Under the new contract, availability of work hours during off-season months and employee housing status are factors for eligibility.

Finally, the employer has increased contributions to the union's defined benefit pension plan from 40 cents per hour to 50 cents per hour per employee.

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policy exception" did not apply. The court argued that to recognize a claim pursuant to the public policy exception would "serve to envelop a much wider class of activities," which would be "at odds with the intent of the Mississippi Supreme Court when it first created the exception." Accordingly, Wheeler and Moore could not state a claim for wrongful termination because they had "failed to come forth with evidence establishing that the plan itself constituted criminal activity."

Verdicts and Settlements

Sodexo Agrees to Pay Black Managers \$80 Million to Settle Class Race Bias Claims

Sodexo Inc. has agreed to pay \$80 million and to improve its diversity programs in order to settle a nationwide class lawsuit in which a class of approximately 3,400 African American supervisory, upper-level managerial, and professional employees and candidates alleged that the company's promotion policies and practices were racially discriminatory. *McReynolds v. Sodexo Marriott Servs. Inc.*

Cynthia Carter McReynolds and nine other plaintiffs were frustrated in their efforts to seek promotion and sued Sodexo Marriott Services Inc., Sodexo Inc.'s predecessor, asserting Title VII and Section 1981 claims. The claims were made on the behalf of the plaintiffs themselves and a proposed class of current and former similarly situated black employees.

Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia certified the class for liability purposes on June 27, 2002. The class was defined as all African American salaried employees of the company who were employed at any time between March 27, 1998, and July 1, 2001, and held or sought to obtain an upper-level managerial, supervisory, or professional position (above-the-unit or comparable level of responsibility) or a job that would lead to such a position, and who were, continue to be, or may in the future be adversely impacted by the company's alleged racially discriminatory promotion and advancement policies and practices.

On Dec. 20, 2004, the court denied Sodexo's motion to preclude the class's statistical expert, denied its motion for decertification, and denied in part its motion for summary judgment. The court found triable issues warranting a jury's resolution on the class' Section 1981 disparate treatment claims and Title VII disparate treatment and disparate impact claims, and rejected the company's challenges to the reliability and importance of the class's statistical evidence. The court similarly rejected Sodexo's challenges to the class's ability to identify a specific employment practice causing the allegedly significant disparities in promotions. Nevertheless, the court dismissed the class's Section 1981 disparate impact claims as unsupported by law.

The parties' settlement gives eligible claimants who became salaried exempt employees between July 2, 2001, and June 1, 2004, \$2,000 each. Those who were salaried exempt employees sometime between March 27, 1998, and July 1, 2001, will receive the greater of \$5,000 or \$492 for each month of salaried exempt service before July 1 up to 120 months. In addition to their class interest, the named plaintiffs will each receive a service award payment of \$120,000 to compensate them for their "substantial time and energy" devoted to the litigation. Individual class members who

provided signed affidavits will receive service awards of \$40,000. Class members who are not named plaintiffs, were deposed in the lawsuit, but did not provide affidavits will each receive service awards of \$15,000. Two executive committee members will each receive \$120,000 service awards.

The agreement explains the proper procedures for filing a claim, opting out of the monetary settlement, and determining eligible claims. All eligible claimants will receive payments depending on when they first became salaried exempt employees. Roughly 950 to 1,000 employees became salaried exempt employees between July 2, 2001, and June 1, 2004. Approximately 2,433 became salaried exempt between March 27, 1998, and July 1, 2001. The total amount of such claims is capped at \$51,113,333. Finally, the agreement provides that no portion of the monetary settlement is attributable to punitive damages. Instead, 25 percent of the payments is attributed to lost back pay and/or front pay, and 75 percent is for compensatory damages.

In addition, Sodexo has also agreed to provide various non monetary relief to the class. Such relief includes: (i) various EEO, diversity, and other job training, (ii) enforcement and refinement of Sodexo's job posting requirements, (iii) bonus and other procedures to promote manager and executive accountability, (iv) maintenance of the company's Office of Employment Rights and dissemination of a description of its discrimination complaint process, and (v) compliance monitoring, record keeping, and reporting.

Sodexo is further mandated to adopt and publish a statement communicating its full commitment to being a leader in the field of diversity and equal employment opportunity, and to publish it annually for the five-year term of the agreement. In addition, the Company must develop a validated promotion selection process with new performance appraisal tools for salaried exempt employees. The new selection process must be created with the assistance of an industrial psychologist and employee focus groups.

Finally, the agreement calls on Sodexo to "take steps to ensure that placement of its managers in specific accounts or units, whether that occurs through promotion, transfer, reassignment, hiring or otherwise, are not influenced in any way by discrimination or racial preference initiated or requested by the client." Sodexo is required to insert language prohibiting discrimination in all future client contracts and to pledge support to all employee programs established to provide networking opportunities to minorities (including women) by providing them with \$5,000 and the reasonable use of office equipment and supplies.

In the Courts

Employees Fails to Assert Racial Issue by Opposing Music Charge

A federal district court in Pennsylvania recently ruled that the former advertising and promotions director of the Adam's Mark Hotel in Philadelphia failed to assert a claim for racial discrimination, because his claim was based primarily on his opposition to the cancellation of "Motown Mondays" – a weekly promotional event at the Hotel. *Pawlak v. Seven Seventeen HB Philadelphia Corp. No. 2.*

In 1992, the Adam's Mark hired Richard Pawlak as its director of advertising and promotion. Pawlak was put in charge of advertising and publicizing various components of the hotel, including its restaurants, bar, sales, and catering. In January 1994, he developed and promoted an event called "Motown Mondays" in an attempt to increase business at one of the Hotel's night clubs. The event, which featured Motown and classic R & B music, was aimed at attracting a predominantly African American audience. The event was successful, and increased revenue at the Hotel. As a result, Adam's Mark Hotels implemented similar promotional events in several other cities.

In March 1995, the owner of the hotel cancelled Motown Mondays. Pawlak wrote a lengthy memo protesting the event's cancellation. In the memo, he recounted the financial success of the event and argued that it attracted "an affluent, professional audience of African-American and Caucasian patrons." Pawlak further stated that "the alteration or suspension of Motown Monday would prove to be a public relations disaster from a political, cultural, ethnic, financial, and competitive standpoint." The following month, the Hotel kept the event, but moved it to Sunday, renaming it Philly Sound Sunday. Pawlak continued to express his dissatisfaction with the Hotel's decision to cancel Motown Monday.

A year later, in January 1996, on the advice of an outside consultant, the Hotel redesigned the nightclub format. Pawlak argued that the new format sought "to attract more white customers to [the night club] and to discourage black patrons." Over the next few months Pawlak argued with the consultant, who ultimately stopped speaking to him.

In May 1996, Pawlak was terminated based on the Hotel's poor performance in food and beverage revenues. He filed suit under state law, claiming that the Hotel had engaged in racial discrimination by terminating him in retaliation for opposing the changes to Motown Mondays and for refusing to cooperate with the outside consultant.

Granting the Hotel's motion for summary judgment, the district court held that Pawlak produced no evidence of race discrimination or illegal retaliation. The court determined that the memo regarding Motown Mondays did not amount to "protected conduct" under the state's antidiscrimination laws. The court pointed out that the memo "does not allege, either explicitly or implicitly, that [the Hotel] engaged in racially discriminatory con-

Bargaining Developments

Minneapolis Hotels Reach Agreement with UNITE HERE

UNITE-HERE has reached a five-year agreement with seven Minneapolis hotels. Under the agreement, the hotels will continue employer-paid health care benefits for over 900 employees. The contract, which expands pension coverage for part-time employees, also increases wages for all employees. Under the previous agreement, bartenders earned approximately \$13 per hour, cooks \$12 per hour, and room attendants about \$10 to \$12.50 per hour.

An increase in employer health-welfare contributions ensures that employees will not have to contribute to the premiums themselves. All employees who work a minimum of 75 hours per month are eligible for health care coverage. According to the union, the low threshold is important to many part-time employees working in the hotel industry.

The union also reported that part-time employees will vest in regards to retirement benefit coverage under a defined contribution plan with a 401(k) component. In other words, employees who work at least one day per week will vest in the plan after four years of service, and employees who work a minimum of 20 hours per week will vest after two years.

duct." Rather, the court noted that "the memorandum appears to be merely a complaint about the negative business ramifications of the 'alteration or suspension' of the event." The court further held that the comments in the memo regarding the "political, cultural, ethnic, financial, and competitive" impact of the cancellation were "too vague" to constitute a claim of racial discrimination.

The court further held that Pawlak's opposition to the programing changes proposed by the outside consultant did not constitute protected activity. The court stated that "[o]pposition to changes in a nightclub's music programming and selection cannot serve as the basis for a retaliation claim," and added that if such claims were permitted "the courts would be inundated."

Additionally, the Court noted that Pawlak failed to provide sufficient evidence of a causal connection between the memo and his subsequent termination more than a year later. Indeed, the court found that there was no evidence that the individuals who discharged Pawlak "were aware of or had ever seen" the memo.

In the Courts

Court Finds Employee Who Sabotaged Web Site May Still Be Owed Single Day of Damages

A federal court in Nebraska ruled that an employer may be required to pay a single day's worth of damages to an employee that it failed to rehire, even though the employee sabotaged its web site. The court found that the damages may be owed to the employee, an Army reservist, under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") because the employee was not rehired after his deployment to Iraq was cancelled. However, the court found that the employer was no longer required to rehire the employee following the sabotage. *Haight v. Katch d/b/a Luckie's Lounge & Grill*.

The employee, Jeffrey Haight, was a "bar manager" at Luckie's. Among his job duties, Haight was responsible for maintaining the Luckie's web site. Haight was also a member of the Army reserve, and in the summer of 2004 he received notice that he would be deployed to Iraq. Haight was called for duty in August of 2004.

Because of his scheduled deployment, Haight stopped working at Luckie's on August 13, 2004. Haight did not speak with his employer until Sept. 6, 2004, when he returned to work and announced that he was released from his deployment because of a roller blading injury. Haight then told the restaurant that he wanted to be returned to work. In response, Haight was told the only position available was a "cook position." Haight then asserted that federal law required that he be reinstated to his bar manager position.

In response to this, the restaurant's manager acknowledged that she was unclear about her "legal obligations." As it was Labor Day, she also could not get in touch with the restaurant's attorney. Haight responded angrily, saying that he would contact the Department of Army and Veterans Affairs if he was not reinstated. He then left the manager's office.

After he left the restaurant, Haight sent an e-mail to the manager explaining where she could get information about her legal obligations under USERRA. However, Haight also threatened to contact a lawyer and the press if he was not returned to his bar manager position. The following day, Haight accessed the company's web site and dismantled a series of links on the page. In their place, he posted a message saying the he had not been rehired and that the restaurant was "unpatriotic."

A few days later, Haight picketed in uniform outside the restaurant. He carried a sign saying that he had not been rehired. At that point, the restaurant told Haight that it would not rehire him, and he filed his claim.

The trial court denied summary judgment to Luckie's on the claim that Luckie's failed to reinstate Haight. However, the court noted that Haight's subsequent sabotage of Luckie's web site was a violation of company "Work Rules," and therefore justified the restaurant in not re-hiring Haight after that incident.

The court rejected Haight's claims that his behavior after he was not rehired was irrelevant to his lawsuit, and that he was free to engage in misconduct after being denied his rights under USERRA. The court explained that although USERRA requires employer to rehire employees who return from military duty, it allows for those employees to be discharged for reasons other than their military service. In this case, Haight knew that the destruction and alteration of the web site was a terminable offense. Therefore, at that point, Luckie's did not need to rehire Haight just to fire him.

However, the court found that Haight could go to trial to recover lost wages for one day, Sept. 6, 2004, on which he was denied re-employment. The court noted that the USERRA's "prompt reinstatement" requirement is somewhat unclear. Yet, the court found that the question of whether Haight should have been rehired on the spot was a triable issue because USERRA clearly requires that employees who return from active service be rehired.

The court went onto note that under USERRA the term "prompt reemployment" may mean anything from reinstatement during the next scheduled shift to reinstatement two weeks after the application for reemployment-or even later, depending on the circumstances." The court stated that although Luckie's was given no notice that Haight wanted to return to his job, it may not have been unrealistic to expect that he be reinstated immediately.

The court also rejected the argument that the employer's lack of familiarity with USERRA justified its decision not to rehire Haight immediately. The court explained that although "it may be true that [Luckie's] did not act unreasonably, I am not convinced that persons returning from service who seek to resume their former positions in employment must bear the costs and burdens of delay while employers research the USERRA." As such, Haight may have been justified in his original demand that he be immediately returned to his bar manager position.

*Bargaining Developments***Aladdin and Wynn Hotels Agree to New Contracts with Unions**

Members of Culinary Workers Union Local 226 and Bartenders Workers Local 165, affiliates of UNITE HERE, overwhelmingly ratified contracts at two Las Vegas hotels, just months after gaining representation rights through a card-check authorization.

At the Aladdin, the new agreement raises hourly wages in relation to the wages paid at other Las Vegas hotels. Aladdin employees who had earned 80 cents per hour less than the average "going rate" for similar employees on the Las Vegas Strip received a 70 cents per hour increase. In June of 2006, their wages will increase to the "going rate" plus 10 cents. The wage rate of employees who previously earned within 80 cents of the average going rate were also given a pay increase, so that they will now receive the going rate. Employees covered by this new contract are employed in a range of classifications, including cocktail servers, bartenders, food servers, cooks, guest room attendants, stewards, and porters.

Another feature of the contract is that all current employees were allowed to choose between the Hotel's and the union's health care plan. Subsequently, all new employees will be covered under the union's plan. The union health care plan covering Culinary employees requires no employee contributions to health care premiums for individuals or families. The plan includes a four-tier prescription drug plan that offers a free pharmacy for generic drugs. At other pharmacies, employees pay \$5 for generic drugs, \$13 for certain brand name drugs, and \$28 for brand name drugs that are not on a list of preferred drugs.

Aladdin's Section 401(k) retirement savings plan remained in effect for a short period of time after the ratification of the contract, after which union members were covered by the union's defined benefit pension plan. That plan provides retirees with a benefit of \$34.39 per month for each year worked. Employees are vested in the plan after five years.

Additionally, the Aladdin agreed to continue the hotel's practice of eight-hour shifts. The Aladdin is the only hotel on the Las Vegas Strip with such a provision. Six-hour shifts are typical at other hotels. The contract also includes a paid-time-off plan, which provides employees with 15 days per year for annual and sick leave. The contract also adopted the same seniority and bidding rights provisions as those in the MGM Mirage contract.

The parties' contract is set to expire May 31, 2007, which is the same date that the collective bargaining agreement at the MGM Mirage is set to expire. Once the contract expires, Aladdin employees covered by the agreement will automatically be subject to the terms and conditions of the next contract covering employees at the Mirage.

At the Wynn, the union agreed to a 10-year contract, which makes it unique among Las Vegas Hotels. Another first among

*Arbitrator's Corner***Court of Appeals Upholds Implied-In-Fact Arbitration Agreement**

The U.S. Court of Appeals for the Sixth Circuit recently held that a manager for a fast food restaurant who brought a collective action alleging violations of the Fair Labor Standards Act was bound by an implied-in-fact arbitration agreement under Missouri law. *Johnson v. Long John Silver's Rest. Inc.* The appeals court upheld a lower court's determination that the agreement was enforceable. It also upheld the validity of various clauses that the employee claimed were impermissible. Specifically, the employee had argued that the arbitration agreement was unconscionable because he had not voluntarily and knowingly waived his right to bring claims against his employer in court. The employee also argued that collective actions under the FLSA are outside the scope of the agreement, and that arbitration was inadequate because it would not allow him to bring a class action. However, the court disagreed and upheld the determinations of the trial court.

contracts in the city is that annual wage increases will be based on cost-of-living allowances. In the first year of the agreement, employees will earn \$1 more per hour than the going rate on the Las Vegas Strip.

Employees hired before Aug. 1 could choose the Wynn pension plan or the union plan, while those hired afterwards are covered under the union defined benefit plan. Wynn has stated that it will abide by the trust agreements for payments to the plans.

A unique provision in the contract addresses how the hotel will schedule employees if a major terrorist attack occurs. After Sept. 11, the hospitality industry in Las Vegas was devastated by a lack of business, and thousands of employees were laid off. As such, the contract provides that management and the union will meet to equalize employees' schedules in an attempt to avoid layoffs in the event of a terrorist attack. For up to three months, all employees would work fewer days per week so that all employees could remain employed

Additionally, the new contract requires that shop stewards and management receive joint training on how to resolve labor problems together at low levels, without the use of an arbitrator. The contract also provides for both parties to meet to renegotiate issues relating to any new technology that may affect employment at the Wynn over the course of the next ten years.

In the Courts

'Bland' and 'Boring' No Reason to Discharge White Man; His \$312,000 Verdict Is Affirmed

The U.S. Court of Appeals for the Fifth Circuit held that Douglas Clements, a former head of human resources for a Mississippi casino, may keep his \$312,000 verdict for reverse race discrimination. Clements, who is Caucasian, claimed he was fired and replaced by an unqualified black woman. *Clements v. Fitzgerald's Miss. Inc.* The court rejected Barden Mississippi Gaming LLC's contentions that its belief that Clements was "bland" and "boring" justified its decision to terminate him.

In 2001, Barden purchased Fitzgerald's Casino/Hotel Tunica. Part of the purchase agreement mandated that Barden's sole owner and shareholder, Don Barden, a black male, be able to hire certain Fitzgerald's employees, including Clements. However, Clements was replaced by Tami Tolliver, an African American female. While Clements had 14 years' experience in human resources and had worked for the casino for 2 years, Tolliver lacked the required experience. Tolliver's husband, who also had little to no experience, was hired as slot director of the casino.

Clements sued in the U.S. District Court for the Northern District of Mississippi, alleging reverse race bias under Title VII of the 1964 Civil Rights Act. The court ruled in his favor and found that Clements had been told in October 2001 that he would lose his job "because of Barden Gaming's desire to 'diversify.'" The court found Barden's statement, "if you look at our wall of managers here you'll see all white males ... so we're gonna [sic] have more women as managers and more African Americans as managers" as evidence to support its findings. Barden appealed the lower courts decision.

An appeals panel unanimously rejected Barden's contentions and held that Barden had clearly promised to retain Clements when it purchased the Casino. Nevertheless, Barden replaced him with someone who was not only objectively less qualified, but outside of his class.

The court further held that Barden's claims that Clements was "bland" and "boring" did not excuse its actions or shield it from punitive liability, regardless of whether the court reasonably believed its assessment to be true. The U.S. Supreme Court, it noted, has made clear that in the context of punitive damages, "reasonable belief" speaks not to whether it was reasonable to fire someone, but rather whether it is reasonable to discriminate in making an employment decision." The court concluded that Barden had failed to offer an explanation addressing the issue.

The award to Clements, based on a bench verdict, included roughly \$32,000 in back pay and \$20,000 in emotional damages.

In the Courts

Federal Court Allows Black Casino Employee To Sue For Race Bias, But Not Retaliation

The Fifth Circuit Court of Appeals has ruled that an African American poker dealer who claimed that a Mississippi casino refused to hire him more than 10 times may proceed with his claims of race bias, but not retaliation. *Jones v. Robinson Prop. Group LP d/b/a Horseshoe Casino & Hotel.*

For many years, Ralph Jones has worked in various casinos as a poker dealer and has dealt in several major poker tournaments, including one that was held at the Horseshoe. Jones alleged that he applied for a position at the Casino as far back as 1994, before it opened, and that he repeatedly sought and was refused permanent employment between then and 2002. In May 1995, after applying and being rejected for a position at the Horseshoe, he complained to the Hotel's human resources director about the lack of African American poker dealers at the casino. In response, that manager brought in the Hotel's room manager, Ken Lambert, to speak with Jones. Lambert allegedly told Jones that no African Americans had been hired because there were no qualified black dealers in the county, an assertion which Jones disputed.

Jones claimed that, in response to his allegations of discrimination, Lambert immediately hired three black poker dealers. However, Jones also claimed that the casino continued to hire far more white poker dealers than black ones.

In support of his allegations of discrimination, Jones claimed that Lambert often made racial slurs toward blacks. Lesley Mims, a former poker dealer and part time supervisor at the Hotel, claimed that Lambert used the "n" word "very often." At her deposition, she stated that he used it "without any qualms whatsoever," though not very often. She also testified that when a highly qualified black female was rejected for a dealer job in 1997 or 1998, Lambert said she had not been hired because "good old white boys don't want black people touching their cards." However, she later said she could not remember whether or not it was Lambert who made the statement.

Lambert's claim was that Jones had taken his explanation the wrong way. Further, he alleged that he had actually offered Jones a job as a poker dealer, but that Jones had turned the position down. He also said that Jones had been offered a job as a poker dealer in 1994, but had turned it down because he was seeking work as a supervisor. Jones denied having ever been offered a poker dealer position at the Hotel. As for his subsequent applications for poker dealer jobs, Lambert claimed that he did not hire Jones because Jones was not "well liked," was "pushy," and because his accusations of race discrimination in 1995 raised doubts about Jones's integrity.

Before trial, Jones sought to amend his complaint add a claim for retaliation, but the trial court determined that Jones did not have sufficient reason to make this delayed amendment and denied

continued next page...

the motion. The trial court subsequently granted summary judgment to the Hotel on Jones's discrimination claims, holding that he had produced no evidence of discrimination. Jones then appealed.

The Fifth Circuit Court of Appeals affirmed only part of this ruling. The court found that leave to amend the complaint to add a claim for retaliation was properly denied, but that summary judgment on Jones's discrimination claims was improperly granted.

In regards to the retaliation claim, the court determined that Jones did not establish his entitlement to add a claim at such a late date. It was noted that the short time lapse between Jones's complaint to HR and the denial of his applications—less than 60 days—provided all the basis he needed to bring a claim for retaliation much earlier in the case.

The court acknowledged that "Jones did not 'discover' direct evidence of retaliation until Lambert's deposition testimony, in which Lambert explicitly stated that he refused to hire Jones in part because of Jones' complaint in 1995, which made Lambert feel 'misjudged' and 'embarrassed.'" However, the court went on to find that "even though direct evidence of retaliation did not materialize until Lambert's deposition, there was sufficient evidence in the record prior to that time to raise a genuine issue of fact as to whether Jones' non-hire was retaliation." As such, the trial court's decision to deny Jones's motion to add a claim for retaliation was upheld.

However, the Court of Appeals found that the trial court was wrong in determining that Jones did not present enough evidence to support his race discrimination claims, given the testimony of Mims and another employee. In so finding, the court wrote that the testimony of these employees "clearly and explicitly indicates that decision maker(s) in the poker room used race as a factor in employment decisions, which is by definition direct evidence of discrimination." Thus, because Jones had presented direct evidence of his discrimination claims, summary judgment could not be granted in favor of the Hotel.

Verdicts & Settlements

Restaurant Settles Claim That Manager Sexually Harassed Teens

Bob Evans Farms, Inc. agreed to settle EEOC allegations that the general manager of its Bridgeton, MO, restaurant sexually harassed eight female servers, including three teenagers, in violation of Title VII of the 1964 Civil Rights Act. *EEOC v. Bob Evans Farms Inc.* Under the terms of settlement, the company will pay the eight female servers a total of \$250,000. The EEOC will determine how the money will be divided among the claimants. In addition, Bob Evans, which terminated the general manager and assistant general manager of the Bridgeton location, is prohibited from engaging in any violation of Title VII. It is further required to post notice of the agreement and comply with specified record keeping, reporting, and access requirements for two years. Bob Evans denied any liability or wrongdoing.

Verdicts & Settlements

Former Owners, Managers of Plaza Hotel Agree to Settle Post Sept. 11 Bias Case

The former owners and managers of New York City's Plaza Hotel have agreed to settle an Equal Employment Opportunity Commission lawsuit alleging that employees were mocked for their religion or national origin after the Sept. 11, 2001 terrorist attacks. *EEOC v. Plaza Operating Partners Ltd.*

In September 2003, the EEOC alleged that Plaza employees were subjected to a hostile work environment and to severe and pervasive harassment. The employees claimed they were called "offensive and derogatory names related to the 9/11 terrorist attacks based on their Muslim religion and/or their Arab and South Asian national origins."

The EEOC also charged that the Plaza's former managers, Fairmont Hotels and Resorts Inc. and Fairmont Hotel Management LP, carried out anti-discrimination policies at the Plaza as part of their human resources management for the hotel. In August 2004, the Fairmont defendants unsuccessfully attempted to have their case dismissed on summary judgment on jurisdictional grounds. The court ruled that the Fairmont's day-to-day management of the Plaza established that it had a permanent and continuous presence doing business in the state of New York.

According to the agreement, former owners Plaza Operating Partners Ltd. agreed to pay a total of \$525,000 on behalf of all the defendants to a class consisting of 12 Muslim, Arab, and South Asian employees.

The Fairmont defendants also agreed to a set of policy steps and training programs covering the 14 hotels they manage. The settlement requires that the Fairmont hire an EEOC approved outside consultant to carry out the decree's terms if the Fairmont is hired to manage the Plaza by its new owners. The Fairmont further adopted discrimination and harassment prevention policies and procedures that include provisions for complaints, anti-retaliation, management and supervisor responsibilities, employee responsibilities, complaint investigation, and disciplinary action.

Pursuant to the agreement, the defendants denied the allegations and made no admissions of liability. The Fairmont defendants also denied that they were employers under Title VII and that the claimants were Fairmont employees.

Before the Board

Employee's Harassment of Co-Workers Bars Unfair Labor Charge

A divided National Labor Relations Board has held that federal labor law did not protect an employee who was fired for engaging in a dispute with fellow employees about union matters while on the job. *Aramark Services, Inc.*

Leslie Lauria was a cashier at an Aramark-operated facility in Michigan. She was also a member of the United Catering, Restaurant, Bar and Hotel Workers Union Local 1064. The local is an affiliate of the Retail, Wholesale and Department Store Union, which is part of United Food and Commercial Workers.

In December 2000, Aramark and the union were just starting to negotiate a new collective bargaining agreement. On December 7, an employee in Lauria's section circulated a petition to hold an election in order to replace the current union steward. The petition charged that the steward was biased and causing animosity among union members. Lauria was opposed to holding such an election while the new collective bargaining agreement was being negotiated. As such, on January 19 she circulated a counter petition against the election. Several employees signed Lauria's petition. Others, however, reported to the food service director that Lauria had pressured them to sign by harassing and intimidating them.

Three days later, Aramark terminated Lauria for harassing and intimidating her fellow employees. The company noted that two other employee witnesses had corroborated the reports of harassment. Aramark also pointed out that "[i]t is the policy of Aramark that workplace harassment, in any form, is strictly prohibited and will not be tolerated." The union filed a grievance on Lauria's behalf. Additionally, Lauria filed an unfair labor practice charge with the National Labor Relations Board. The NLRB deferred action, pending the arbitration.

At arbitration, it was determined that Lauria violated work rules by exhibiting a "hostile and angry attitude." The arbitrator acknowledged that Lauria "certainly harassed co-workers who were on the other side of a union issue." However, he held that the

conduct at issue was not protected by federal labor law because it was harassing and took place during work time. Still, considering Lauria's 14 years at the company, the arbitrator held that termination was too severe a penalty, and determined that Lauria had to be reinstated without back pay.

An NLRB administrative law judge refused to defer to the arbitrator's decision. The ALJ found the decision to be "repugnant" to the National Labor Relations Act, as Lauria's conduct related solely to her union activities, which were protected under the Act. As such, the ALJ determined that Aramark violated the Act by discharging her, and ordered that she be reinstated with back pay and benefits. In so finding, the ALJ also concluded that Lauria's conduct did not constitute harassment.

On appeal, the National Labor Relations Board overturned the ALJ and held that Lauria's conduct was harassing, and therefore not protected by federal labor law. Therefore, it found that the arbitration award should be left standing. In so holding, the Board stated that "[w]ith respect to the issue of repugnancy, we note that, under Board law, an employee engaged in otherwise protected activity, such as union solicitation, may, in a variety of circumstances, lose the Act's protection." Whether or not this is the case is "based on the degree of offensiveness of the conduct and other factors."

Here, the arbitrator had determined that Lauria engaged in abusive conduct and "prohibited harassment." The Board also found it significant that the arbitrator found "that the harassment was so aggravated as to render Lauria's conduct unprotected." Thus, the Board determined that even if it was "to conclude that the instant conduct was protected, the arbitrator was acting reasonably and rationally to come out the other way." Therefore, it had not been shown that "the arbitrator was 'palpably wrong' in deciding the case as he did."

In a dissent, Member Liebman argued that Lauria was engaged in protected union activity, and that the allegations of harassment "came nowhere close to the line of extreme misconduct that would deprive an employee of protection under controlling [NLRB] authority." Therefore, because "the discharge was directed at Lauria's protected activity and she never lost the act's protection, her discharge violated" federal labor law. According to Member Liebman, Lauria should have been reinstated with back pay and full benefits.

In the Courts

Court Rejects Pattern, Practice Claims Brought Against Burger King Chain

The U.S. District Court for the Northern District of New York granted summary judgment to Carrols, the owner of approximately 350 Burger King restaurants in 16 states, holding that the Equal Employment Opportunity Commission (“EEOC”) failed to demonstrate a pattern or practice of sexual harassment and related misconduct at its Burger King restaurants. *EEOC v. Carrols Corp.*

The EEOC’s pattern and practice claims were the product of a nine-year investigation involving all of Carrols’ facilities. The investigation originated from a discrimination charge filed by a Glen Falls, N.Y. Burger King employee. In support of its claim, the EEOC submitted 427 affidavits and 160 unsworn statements from employees claiming they were victims of or witnesses to incidents of sexual harassment. The court reviewed all of the statements “to determine which ones set forth facts sufficient to constitute a claim of sexual harassment.” It concluded that “333 of the statements allege facts which, if proven, could constitute sexual harassment” and that those statements “allege events that occurred at 206 distinct restaurants.”

The court explained that a pattern or practice claim requires proof that an employer’s regular practice, policy or procedure amounts to unlawful discrimination. The EEOC had to prove that an objectively reasonable person would perceive that a hostile environment of sexual harassment and a Company policy of tolerating severe and pervasive sexual harassment exists.

Using a statistical approach to analyze the EEOC’s pattern or practice claim, the court concluded that the submitted affidavits and statements illustrated that “only 333 out of 90,835, or .367 [percent], of the women whom [Carrols] employed between 1993 and 2001 have alleged claims which, if proven, could constitute sexual harassment.”

Out of the 333 allegations, 69 involved alleged harassment by nonsupervisory employees and 53 involved harassment by low-level supervisors. The court also found there was insufficient evidence regarding the number of alleged harassers still employed by Carrols. Since 1990, Carrols had fired 42 alleged harassers, suspended 18, demoted two, and issued written warnings to 34 alleged harassers. In addition, alleged victims complained to an individual with supervisory authority in only 103 of the 333 alleged incidents of harassment. The court explained that “the failure to report raises doubts about the existence and seriousness of the alleged harassment” and “weakens [the EEOC’s] contention that [Carrols] created a permissive workplace by failing to respond properly to alleged sexual harassment.” It therefore concluded that, “[s]ince any potential retaliation or intimidation that these women might face from [Carrols] is relatively minor, there is no basis to conclude that the number of [the EEOC’s] submissions reflects a systematic under-reporting of sexual harassment in [the company’s] restaurants.”

The EEOC objected to the court’s statistical approach to its claims. It argued that such an analysis was misleading because victims systematically under-report sexual harassment, and multiple discrete incidents could result in a cumulative level of hostility at work greater than that indicated by merely counting incidents. While the court conceded that a statistical approach was “imperfect” and admitted that the court could not “articulate a specific threshold for the number of claims that is necessary to establish a pattern or practice of sexual harassment,” it rejected the EEOC’s arguments. The court held that there was insufficient evidence to prove that Carrols had a pattern or practice of failure to remedy sexual harassment, of retaliation against employees who complained about it, or of constructive discharge of employees by failing to remedy a hostile work environment. However, the court advised that the EEOC could proceed with the claims on behalf of the individual or current employees.

Newsworthy

Five States Raise the Minimum Wage

Five states have recently raised their minimum wage. In Wisconsin, Connecticut, Oregon, New Jersey and Minnesota, the applicable minimum wages were raised by anywhere between 25 cents and 2 dollars per hour.

In Wisconsin, the minimum wage was increased from \$5.15 to \$5.70 per hour, pursuant to emergency and permanent rules issued by Governor Jim Doyle (D). However, in raising the minimum wage, the governor also eliminated the ability of cities and counties in Wisconsin to enact their own minimum wage rates. The new minimum wage provisions also include various increases for specific groups of employees, including an increase from \$5.15 to \$5.30 per hour for minors.

In Connecticut, it was announced that the minimum wage will be raised by 55 cents per hour over the next two years, pursuant to legislation approved by the State Senate and signed by Governor M. Jodi Rell (R). The legislation calls for the minimum wage, which is currently \$7.10 per hour, to increase to \$7.40 per hour on Jan. 1, 2006; and then to \$7.65 on Jan. 1, 2007. At \$7.40 per hour, the Connecticut minimum wage will become one of the highest in the nation.

In Oregon, the minimum wage will be increased from \$7.25 per hour to \$7.50 per hour. The state's 2005 minimum wage was the second highest in the country, after Washington state at \$7.35 per hour. Since 2003, Oregon has raised the minimum wage each year pursuant to increases in the consumer price index. The index increased 3.6 percent over the past year, resulting in the 25 cents per hour increase to the state minimum wage.

In New Jersey, legislation was recently passed that will raise the state minimum wage by \$2.00, to \$7.15, by October 2006. The legislation was signed by Acting Governor Richard J. Codey (D). Under the new law, New Jersey's minimum wage was immediately increased from \$5.15 an hour to \$6.15 an hour. A second \$1.00 increase, to \$7.15 an hour, will take effect in October of 2006.

In Minnesota, the minimum wage was increased from \$5.15 to \$6.15 per hour. The increase was approved by Republican Governor Tim Pawlenty. The new rate does not apply to small employers, who the legislation defines as those earning \$625,000 or less each year. The law sets the minimum wage rate for employees of small employers at \$5.25 per hour. Previously, Minnesota law defined small employers as those earning \$500,000 or less each year, and required those employers to pay their employees only \$4.90 per hour.

Verdicts and Settlements

Four New York Restaurants Agree To Pay Over \$1 Million to Settle Wage and Hour Lawsuit

Four restaurant and catering establishments in Long Island have agreed to pay \$1,045,000 million in back wages, interest, and penalties to approximately 2,000 current and former employees, in order to settle a Labor Department lawsuit accusing them of violating the Fair Labor Standards Act. *Chao v. Scotto's Smithtown Restaurant Corp.*

The DOL alleged in its lawsuit that the restaurants repeatedly failed to pay employees the minimum wage, required employees to work more than 40 hours per week without being paid one and one half times their regular rate of pay, did not maintain accurate wage records, and improperly employed minors under the age of 16. Pursuant to a consent judgment, the restaurants will pay \$972,000 plus interest in back minimum wage and overtime wages to the employees, most of whom are kitchen and wait staff. They also will pay civil monetary penalties of \$69,000 to the DOL and \$4,000 to an employee who was allegedly retaliated against for cooperating with the DOL's investigation.

The settlement also requires the restaurants to retain an independent monitor at their own expense. That monitor will report to the DOL on the restaurants' compliance with federal law over the next two years. The restaurants also agreed not to discipline any employee who cooperates with the DOL.

The four establishments -- Scotto's Smithtown Restaurant Corp., Scotto Brothers Restaurant Westbury Inc., Scotto Brothers Woodbury Restaurant Inc., and DVVA Carle Place Restaurant Inc. -- did not admit to any wrongdoing as part of the settlement. The individual management employees named in the lawsuit also did not admit any wrongdoing.