

Hospitality Industry Quarterly

Labor and Employment Law Report

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Missouri Court Strikes Down Living Wage Ordinance

In a landmark decision, a Missouri state court struck down a living wage ordinance approved just recently by St. Louis voters. In an action sought by trade groups who were challenging the municipal law, Judge Robert Dierker of the Missouri Circuit Court found several portions of the ordinance illegal or "unconstitutionally vague" and permanently enjoined the city from implementing or enforcing the ordinance. *Missouri Hotel and Motel Ass'n v. St. Louis*.

Dierker held that a portion of the ordinance applying to subcontractors and leaseholders of companies that receive grants of financial assistance was invalid, but he declared that Missouri cities have the authority to enact such laws if they apply only to employers who directly receive contracts or grants of financial assistance from the local government. Now that the judge has explained how the ordinance could be altered to satisfy legal standards, an attempt will be made by the St. Louis City Council to craft a lawful ordinance.

The initial ordinance was approved by St. Louis voters in August 2000. The initiative requires city contractors, their subcontractors, leaseholders, and companies receiving tax breaks or assistance from the city to pay their employees a living wage starting at \$8.67 an hour with health care benefits or \$9.92 an hour without health care benefits. Since the wage is based on federal poverty guidelines that are updated annually, the current dollar amounts would be \$8.84 with health care benefits and \$10.76 without such benefits, according to the judge's opinion.

The city notified companies with city contracts that it would begin enforcing

the ordinance. At that point, several trade groups, including the Missouri Hotel and Motel Association, sought and were granted a temporary injunction against its implementation. One of their arguments was that the living wage ordinance was preempted by a state law that barred cities in Missouri from enacting minimum wage laws.

Judge Dierker rejected that argument, finding that Section 18 (67.1571) of the law, which prohibits municipalities from requiring a "minimum wage that exceeds the state minimum wage," is unconstitutional because it has no relationship to the core purpose of the bill.

The title indicated that the original purpose of the legislation (H.B. 1636) that resulted in the law was the "organization and operation of community improvement districts." Facially, Section 18 "has nothing to do with community improvement districts; it has everything to do with prohibiting municipalities from adopting minimum wage ordinances," Dierker declared. As a result, he concluded the "minimum wage provision of H.B.1636 does not come within the title of H.B. 1636 and has absolutely nothing to do with the original purpose of H.B. 1636."

Plaintiffs' argument that the St. Louis ordinance directly conflicts with the state minimum wage statute was upheld. Judge Dierker held that the ordinance conflicts with the state statute by attempting to apply living wage standards to contractors, subcontractors, and lessees of grantholders without regard to time and "regardless of whether they derive any benefits from the [C]ity" in the form of financial assistance, or whether they play a role in the economic development contemplated by the assistance.

Dierker found that the living wage ordinance attempts to control wages paid by private enterprises that have little or no direct connection to the city's grants or subsidies. He said that under the terms of the ordinance, contractors and lessees are compelled to pay the specified minimum wage. Moreover, since the ordinance seeks to define minimum wage differently than state law, it is not in conformity with the state minimum wage law.

However, the Judge pointed out that where the ordinance applies to contractors and recipients of city financial assistance, "there surely is no conflict between the ordinance and the state minimum wage statute. A constitutional charter city indubitably has the authority to regulate the terms of its contracts, in the absence of a direct conflict with statute," he said.

The Court further found the measure vague in that fully paid "comprehensive family medical coverage" is inadequately defined.

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In the Courts

Ninth Circuit Holds That Taunting Of Male By Co-Workers For Effeminate Behavior Is Sexual Harassment

The Ninth Circuit held that Azteca Restaurant Enterprises, Inc., which operates a chain of restaurants in Washington and Oregon, violated Title VII and is liable for the sexual harassment of former employee Antonio Sanchez by co-workers and a supervisor who taunted him incessantly for being "too effeminate." *Nichols v. Azteca Restaurants Enter., Inc.* This decision found that a hostile work environment did in fact exist, reversing the United States District Court for the Western District of Washington's holding in favor of Azteca on Sanchez's sexual harassment claim. Sanchez's assertion that he was fired in retaliation for reporting the harassing behavior was affirmed by the Court in favor of the employer.

Sanchez was repeatedly subject to insults and name calling, often several times a day. This conduct violated the company's anti-harassment policy and he reported it to the general manager and the HR Director. Azteca's remedial action consisted of directing Sanchez to report any further incidents to the general manager so he could follow up on them, while the HR Director would conduct spot checks for the next two weeks to ensure the harassment ceased. The conduct appeared to cease after this discussion.

A few months later, Sanchez walked off the job during his shift following an intense confrontation with an assistant manager, for which he was fired. He subsequently filed a charge with the EEOC and initiated this lawsuit. Under Title VII, to show that a hostile work environment exists, one has to establish that the harassment was both objectively and subjectively "severe

and pervasive" so that it altered the conditions of employment.

After a bench trial, the District Court found that a hostile work environment did not exist because the workplace was neither objectively nor subjectively hostile, and the alleged conduct did not occur because of sex. The Ninth Circuit reversed, saying that constant taunts of carrying a tray "like a woman," and calling the plaintiff sexually derogatory names would be considered objectively offensive. The Court further declared that if Sanchez indicated that the conduct was unwelcome, then the work environment was subjectively hostile. Sanchez's numerous complaints to the General Manager were in great detail, and the Ninth Circuit stated that it was "clearly erroneous" for the District Court to find that he had not complained about the harassment. The teasing directed at Sanchez by his co-workers was based on the belief that he did not act "manly," or in conformity with their gender stereotypes, and the disparaging comments were primarily directed at his gender. The Court cited *Price Waterhouse v. Hopkins* for the proposition that discrimination on the basis of sex stereotypes is clearly barred.

Although Azteca had an anti-harassment policy in place, the Court held that its attempt to remedy the situation here fell short since it merely asked the victim to report any future incidents, rather than targeting the situation with the harassers. By not meeting the remedial obligations in this instance, the employer was liable for the co-workers' harassing behavior. Additionally, Azteca was vicariously liable for the hostile environment created by the supervisor for the same reasons, according to the Court.

Bargaining Developments

Here Local 814 to Represent Airport's Duty-Free Shop Employees

A recent check of union authorization cards by a neutral arbitrator demonstrated that Hotel Employees and Restaurant Employees Local 814 obtained sufficient signatures to become the bargaining representative for duty-free shop employees at Los Angeles International Airport. San Francisco-based DFS Group Ltd. operates all the duty free stores at LAX, and this unit is currently the only union-represented group at a DFS shop

anywhere in the United States.

HERE Local 814, which signed a card check neutrality agreement with DFS in 1999, is part of Respect at LAX, a multi-union effort aimed at organizing retail, security and ground service workers at the airport. Contract negotiations for the DFS employees will start as soon as they can be scheduled.

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At the Boat

Failure To Demand Recognition Results In Denial Of Election Petition

The National Labor Relations Board deadlocked 2-2 in their review of a dismissal of the Metropolitan Opera House's petition for an election. The dismissal was based on the determination that the Hotel Employees and Restaurant Employees, Local 100 had not demanded union recognition. Members Liebman and Walsh would affirm the judge's dismissal, finding that the union had not claimed representation of the Met's nearly one hundred food and beverage employees, nor demanded immediate recognition. Then-chairman Truesdale and Member Hurtgen would reverse and reinstate the employer's petition for an election. *Rapera, Inc.* Since the Board is deadlocked and there is no majority, the dismissal is affirmed.

As reported in the Spring Issue of HIQ, The Met has been at the center of a union organizing campaign by HERE, Local 100. The campaign by the local included picketing outside of performances and contacting patrons and urging them to boycott the Met and withhold donations.

Truesdale and Hurtgen considered the court affidavit of the union declaring that it had authorization cards from 80 percent of the Met's employees in combination with the Local's insistence that the Met sign a neutrality/card check agreement to be the equivalent of asking for immediate recognition. This contradicted the case of *New Otani Hotel*, where the Board held that a 4-year picketing and boycotting campaign aimed at coercing an employer into signing a neutrality/card check agree-

ment did not constitute a present demand for recognition.

Members Liebman and Walsh cited the *New Otani* case in reaching their conclusion that the union's conduct did not qualify as a demand for recognition. Section 9(c)(1)(B) provides that a union must directly demand recognition from the employer. Liebman and Walsh declared that the union's statement that it had a majority of signed authorization cards to third parties does not equal a demand for union recognition, and no evidence was presented by the Met that a demand for recognition was communicated to it directly.

Bargaining Developments

Slot Attendants at Caesars' Atlantic City Approve 39-Month Contract

The International Brotherhood of Teamsters, Local 331 recently ratified a 39-month contract following a one-month strike at Caesars' Atlantic City. The union represents approximately 180-190 slot attendants who went on strike following the expiration of their prior contract. During the strike, as many as half of the union members crossed the picket line, and Park Place Entertainment, the parent company of Caesars', hired permanent replacements for the remaining strikers, who have since been placed on a preferential hiring list and will be re-employed as vacancies become available.

The new contract provides for an increase in wages and benefits of 35 cents per hour for each year of the contract, with 30 cents going to wages and 5 cents going into pension benefits for union members. Prior to the institution of any increases, slot attendants at the Casino were earning between \$9 and \$10 per hour. The only other significant contract change was that Park Place agreed to direct deposits into each employee's 401(k) plan as opposed to making payments to the union, which previously made payments to the plan.

Newswothy

Gill Re-Elected To Head Local 5, Trusteeship Ended By Here International Union

Eric Gill was once again elected to head the Hotel Employees and Restaurant Employees, Local 5 in Honolulu, defeating Tony Rutledge who served as the local's secretary-treasurer for 11 years prior to losing his post to Gill in an election in the Spring of 2000. According to Local 5's website, the margin of victory was a mere 21 votes, with over 5,000 ballots cast. Orlando Soriano was elected President and Hernando Ramas Tan was elected Senior Vice President. Gill's slate now occupies 12 of 15 seats on the local's executive board, a stark contrast to the spring of last year, when the vast majority of the elected board had run with Rutledge.

The trusteeship of Local 5 began in late February of this year because friction between Gill and the prior executive board left the local unable to negotiate major Honolulu hotel contracts. A new master contract was negotiated for the hotels in May of this year by the International Union's western regional director, who served as trustee for the local. The only goal of the trusteeship was to negotiate the master contract; thus, the trusteeship was lifted by the international union following Gill's re-election.

At the Boat

New Three-Year Contract Approved For 25,000 Walt Disney World Employees

A three-year contract covering some 25,000 employees at Walt Disney World in Orlando, Florida was recently approved by almost a 2-1 ratio after an earlier contract proposal was rejected in June. Members of six union locals bargained jointly in negotiating the new contract, which runs retroactively from the April 29th expiration of the previous contract until May 1, 2004. The new agreement increased the new hire rate by 35 cents to \$6.70, and gives a two percent rate increase to top-scale hourly employees. A lump sum payment to top-scale employees of \$1,000 the first year and \$1,500 for each of the next two years will be paid each October. The agreement

also limits the amount of health care premium increases that can be assessed to the employees and enhances pension benefits for long-term employees. Disney additionally agreed to remain neutral in union organizing efforts among part-time employees, and beginning in 2002, to recognize Martin Luther King, Jr.'s birthday as a paid holiday.

Disney employees can still choose from six different health coverage plans with varying premium costs. However, the new contract limits the annual increase to the employee for premium hikes to \$2 per week for single coverage, \$4 per week for an employee with one dependent, and \$6 per week for family coverage. Under the

prior agreement, pension benefits were \$530 a month for a maximum 25 years of service. Beginning January 1, 2001, employees will be credited for up to 30 years of employment for a benefit of \$630 per month, and in 2004, that figure will rise again to \$730 per month. Also, beginning on January 1, 2002, employees with five-plus years of service will receive \$1 per hour bonus for each hour of vacation time earned, and with respect to overtime, the seventh day worked will be paid at double time, as of October 5, 2002.

Newswothy

Trustee Of Local 1 Elected President, Wilhelm Cleared Of Allegations Of Changing Election Rules

In an election to determine who would preside over HERE's 13,000 members of Local 1, former trustee Henry Tamarin beat out Terry Maloney, who served as president prior to the trusteeship, and Pablo Garcia. Tamarin had over 700 more votes than Garcia and double the amount of votes of Maloney.

Previously, Tamarin led Local 217 in Connecticut in the early 1990's and served as a trustee for locals in Atlantic City, New Jersey and New York. Since 1994, Tamarin has been president of Local 100 in New York. At the time of his candidacy, Tamarin was still serving as president of the New York local.

Shortly after the election, both Maloney and Garcia filed separate post-election protests. They alleged that John Wilhelm, HERE's International Union President, tinkered with the local's bylaws in order for Tamarin, his favored candidate, to be eligible to run for the presidency. Specifically, Wilhelm allegedly changed Local 1's bylaws and eliminated a provision requiring that a candidate be a member of that local for at least 24 months prior to the election. Without the modification of this rule, Tamarin would have been ineligible for office. Wilhelm was also

accused of inappropriately using resources earmarked for the international union by allowing six international union employees to transfer to Chicago or take vacation time in Chicago shortly before the election. According to the protesters, such practices violate a policy forbidding representatives of the international union from contributing time or money to influence local elections. Concern was similarly expressed over whether Tamarin ever transferred his membership from Local 100 to Local 1. The other candidates maintained that if he did not, he should not have been allowed to run.

An election officer appointed by the union dismissed these allegations against Wilhelm. Barbara Zack Quindel acted as an independent election supervisor. The Milwaukee-based attorney denied the protests, but refrained from giving a justification for her denial. While Tamarin maintained that the protests were groundless, Maloney and Garcia have indicated an intent to appeal Quindel's decision to Wilhelm.

At the Boat

Handbilling By Off-Duty Employees Cannot Be Prohibited In Non-Work Areas Of a Casino

In two separate decisions issued the same day, the National Labor Relations Board ruled that the New York New York Hotel & Casino in Las Vegas committed unfair labor practices by prohibiting off-duty employees from handbilling outside the casino's main entrance and in front of two restaurants inside the Casino. *New York New York Hotel LLC*.

Two unions affiliated with Hotel Employees and Restaurant Employees International Union were attempting to organize employees of Ark Las Vegas Restaurant Corp., which operates the Casino's restaurants. Ark employees distributed handbills declaring they were paid less than union employees and urging customers to encourage the Casino to negotiate with the union. The handbills explicitly disclaimed any conflict with the New York New York itself. The Casino owner had the employees escorted off the premises.

In the first decision, NLRB Chairman Peter J. Hurtgen and Members Wilma B. Liebman and John C. Truesdale affirmed an administrative law judge's decision that off-duty Ark employees had the right to distribute handbills to customers in the porte-cochere area just outside the Casino's entrance. The Board declared that "employees of...a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty." Further, the Board determined that the Casino failed to show that a ban on handbilling was necessary to ensure discipline and work production.

Despite some Casino employees working in the porte-cochere area, the Board unanimously agreed that it was a non-work area, following the same reasoning articulated in *Sante Fe Hotel & Casino*. The Board stated that although bellmen, valet parking attendants, security, maintenance, and gardening personnel per-

formed job duties around the entrance area, this was really just incidental to the Casino's main function of providing lodging and gaming accommodations.

New York New York's argument that barring handbillers was necessary to ensure proper service to guests and to protect guests, employees and the property was rejected by the Board, which found that "the handbilling did not adversely affect either the customers' ability to enter or leave the facility or the [hotel-casino's] employees' ability to perform their customary work in the porte-cochere area."

Liebman and Truesdale rejected the Casino's contention that illegal union activities were aided by the handbilling. Hurtgen concurred that the handbilling was legal, but stated that union picketing occurring at the same time in a different area "may well have been unlawful" because a goal of the picketing may have been to pressure the Casino to cease doing business with Ark.

The second decision concerned off-duty Ark employees who distributed handbills to customers in the porte-cochere area and in front of two restaurants operated by Ark within the Casino who were ejected from the property. In that decision, the Board affirmed the decision of the administrative law judge that the Casino committed unfair labor practices by barring off-duty Ark employees from distributing handbills to customers in the porte-cochere area outside the Casino's main entrance and outside two restaurants operated by Ark inside the Casino area. For the same reasons advanced in the first decision, the Board found that the porte-cochere area was a non-work area and that the Ark employees were engaged in a protected activity.

The Casino argued that because employees cleaned and maintained the passageway in front of the two restaurants in question, those areas constituted working areas of the employer. In discounting

that argument, the Board again pointed to the performance of these duties as incidental to the Casino's primary function of providing lodging and gaming facilities, and stated that "it would be a rare portion of such a facility which no employees used in that fashion." Further, "to hold that such passageways constitute work areas would effectively deny employees the right to engage in protected distribution anywhere on the property."

Chairman Hurtgen partially dissented, saying that the area outside one of the restaurants should be considered a work area due to its proximity to a service bar, slot machines, and public restrooms serviced by Casino employees.

New York New York also tried to argue that the area in front of the restaurant was equivalent to aisles and corridors in retail stores. This was an attempt to invoke the *Marshall Field* case, which stated that union solicitation could be forbidden in aisles and corridors of retail stores as it impeded customer progress to selling areas and negatively impacted sales. In a pivotal decision, the Board concluded that *Marshall Field* does not "stand for the proposition that a Casino owner may prohibit solicitation and distribution in passageways that are not part of the gaming area, regardless of the circumstances." The Board stated that the rationale in *Marshall Field* was intended to apply to the rather narrow aisles near selling areas of retail stores. The passageway at New York New York is nearly 25 feet wide. No evidence established that customers were impeded in their progress in or out of the restaurant, nor were employees prevented from performing their duties. The employee handbilling had not been shown to interfere with work production or discipline. Resultingly, the Board stated that *Marshall Field* was not "good authority" under these circumstances.

Newsworthy

City Council Passes Santa Monica Living Wage Ordinance, Opponents Force Repeal Referendum

The Santa Monica California living wage ordinance was recently passed by its City Council, but less than twenty-four hours later, opponents of the controversial measure launched a successful effort to gather enough signatures to place a referendum before voters. Those who supported the ordinance, including labor unions, church groups, and community organizations combated the drive with a "decline to sign" campaign urging residents not to sign the petition to repeal the measure. Now that opponents have gathered the necessary signatures, the City Council must decide whether to repeal the measure, or set an election date for the referendum.

The new law would raise employee wages in large businesses operating in designated Coastal Zone areas and downtown to \$10.50 an hour beginning July 1, 2002, or \$12.25 if the employ-

er does not offer health benefits. Opponents of the law had 30 days from the "second reading" of the statute on July 24 to collect the necessary 6,026 signatures. According to the city clerk, 7, 145 signatures were collected by those opposed to the ordinance.

Luxury hotels in the area are those most opposed to the law, and they have strongly criticized the way this law was designed. It applies only to businesses with gross annual revenues in excess of five million dollars, and the geographic zone in which the ordinance applies appears to specifically target coastal luxury hotels, where Hotel Employees and Restaurant Employees Local 814 has been mounting intense organizing efforts.

Newsworthy

Wilhelm Re-Elected President Of HERE; Other Convention News

At the 43rd general convention of the Hotel Employees and Restaurant Employees International Union in Los Angeles, John Wilhelm was recently re-elected to serve as President for a second term. Sherri Chiesa was named by the general executive board to replace Ted T. Hansen, the retiring Secretary-Treasurer. Executive Vice-President Ron Richardson was also re-elected.

Convention delegates approved the creation of six new elected general vice-president positions and the position of a Canadian director. The creation of an executive committee consisting of the union's president, the executive vice-president, the secretary-treasurer, the Canadian director, and the new general vice-presidents was also approved.

While at the convention, the delegates voted to eliminate the director of organization as an elected position, conforming HERE procedures to be consistent with other international unions in which the position is appointed. The union's general executive board was also expanded to include the ten-member executive com-

mittee, the 14 district vice-presidents, and 26 at-large vice-presidents, 13 of which are brand new positions. This executive board will determine what salaries, if any, will be paid to the new general vice presidents and the Canadian director.

Those elected as general vice presidents included Maria Elena Durazo, president of Los Angeles' Local 11, Peter Ward, business manager of Local 6 in New York, Matthew Walker, former director of strategic campaigns, D. Taylor, staff director of Local 226 in Las Vegas, and Henry Tamarin, former trustee and newly-elected president of Local 1 in Chicago. HERE's former 10th District vice-president in Montreal was elected as the first Canadian director.

Delegates also approved boosting the minimum monthly dues that a local can charge members by \$1 per year for the next five years. Beginning January 1, 2002, the minimum dues will increase to \$33.46, and in \$1 increments each year thereafter through 2006.

While in Los Angeles, the delegates voted to create a strike and defense fund.

As of January 1, 2002, 50 cents per union member each month of the per capita dues payment sent by each local to the international union will go into this strike and defense fund. This payment will increase to \$1 per member in January 2003, \$1.25 in 2004, \$1.50 in 2005, and \$1.75 in 2006.

On a similar note, the per capita payment to the political/legislative fund will be increased by twelve cents to 52 cents as of January 1, 2002, and will increase in ten-cent increments each year thereafter through 2006.

Several constitutional amendments were approved by the convention delegation. Among those were one prohibiting the president, the executive vice-president, or the secretary-treasurer from receiving any compensation from a HERE local or other HERE-related entity. Another amendment grants the president the power to delegate authority to the general vice-presidents or the Canadian director, as well as the secretary-treasurer and executive vice-president.

Newswothy

Phoenix Restaurant Settles Female Food Servers Sexual Harassment Claim For \$160,000

Nine female food servers settled sexual harassment claims for \$160,000 with the Dallas-based Metromedia Restaurant Services Inc., which operates the Bennigan's Grill & Tavern in Phoenix, Arizona where the conduct allegedly occurred. Besides a financial settlement, the president of Bennigan's will send each of the women a letter of apology. *EEOC v. Metromedia Restaurant Svcs. Inc. dba Bennigan's Grill & Tavern.*

The Equal Employment Opportunity Commission filed a lawsuit alleging that Bennigan's violated Title VII of the 1964 Civil Rights Act by creating a sexually hostile work environment. The lawsuit maintained that a male manager shoved ice down the shirts and up the shorts of the waitresses, making contact with their genitals, and that he grabbed and rubbed his genitals up against them. The lawsuit

also alleged that lewd comments were constantly made about the women's breasts and buttocks, and male managers and co-workers openly expressed a desire to have sex with the female food servers.

The EEOC suit also charged that Metromedia, which owns, operates, and franchises the Bennigan's chain, retaliated against the employees who complained about harassment, and that in doing so, a specific class of female employees was constructively discharged or unlawfully terminated from their employment.

Judge John W. Sedwick of the U.S. District Court for the District of Arizona approved the consent decree, under which Metromedia will issue a total of \$160,000 in payments to the nine women, with individual sums ranging from \$7,000 to \$74,000. An Internal Revenue Service Form 1099 will be issued by Metromedia

to each class member for the payments.

The consent decree provided for certain injunctive relief over the next three years, and any new Metromedia-owned or operated restaurants in Arizona will be subject to that decree. It requires, among other things, that a posted notice explain that workplace sexual harassment is illegal, that Metromedia train its Arizona employees on anti-discrimination laws, that future complaints of sexual harassment and workplace bias be reported directly to the EEOC, which would evaluate its managers' enforcement of sexual harassment policies, and that copies of the consent decree be posted by Arizona franchisees which would be encouraged to follow the guidelines of this decree.

In The Courts

\$2.9 Million In Overtime Pay Awarded To Waffle House Managers For Non-Exempt Work

A federal district court for the Middle District of Tennessee recently held that 125 current and former managers at several Waffle House franchises are owed about \$2.9 million in overtime pay for non-management tasks they performed. *Cowan v. Treetop Enterprises Inc.*

According to the lawsuit filed against Treetop Enterprises, which owns several Waffle Houses, the managers regularly worked an average of between 80 and 100 hours per week, without overtime pay.

Judge Williams J. Haynes Jr. summarily rejected Treetop's argument that the managers were executive employees and therefore exempt from the Fair Labor Standards Act's overtime requirements. The court found that the managers who were the subject of the lawsuit often performed standard tasks such as operating grills and waiting tables. The court fur-

ther pointed out that Treetop's own manager training manual states that the "primary objective" is to become "a proficient grill operator," and the second objective is to perform daily management duties and responsibilities.

The court concluded that the average number of hours these managers worked per week was approximately 89. In reaching this conclusion, Haynes rejected the company's contention that it was "a physical impossibility" to work such hours. Besides working 10 hours a day on a weekly schedule of six days on and two days off, the court found that double and triple shifts by these managers were not uncommon.

Judge Haynes found that the managers had agreed to work an annual average of 53 hours per week by accepting a job which mandated 10-hour work days for

six days, followed by two days off. To calculate the overtime award, Haynes therefore divided the managers' weekly salary of \$579 by 53 to determine that their hourly pay rate was \$10.92, despite Treetop's assertion that the hourly pay rate should have been calculated by dividing the \$579 weekly salary by the actual number of hours worked - 89 as opposed to 53.

Based on this rate, Haynes declared that Treetop owed the plaintiffs time-and-a-half, or \$16.38, for all overtime hours over 53 per week. This amounted to an average of 36.2 hours per plaintiff per week. The class-action plaintiffs had amassed 4,321 weeks of total employment and were accordingly owed a total of about \$2.87 million, plus interest and attorneys fees.

Newsworthy

Gay Butler's Title VII Case To Be Reheard

The Ninth Circuit Court of Appeals has agreed to rehear a homosexual butler's case alleging that his employer violated Title VII of the 1964 Civil Rights Act by failing to take action against co-workers who harassed him on account of his sexual orientation. *Rene v MGM Grand Hotel, Inc.*

In March of this year, the Ninth Circuit in a 2-1 decision affirmed summary judgment in favor of the employer, holding that Title VII does not apply to sexual orientation discrimination. Rene's suit had contended that management of the hotel ignored

harassing conduct by Rene's supervisor and other male co-workers. Rene claims they physically assaulted him, forced him to look at sexually explicit pictures, whistled at him, caressed him, blew kisses at him, and called him "sweetheart."

Judge Dorothy W. Nelson dissented in that decision, declaring that while she concurred with the majority that "gay-baiting insults and teasing are not actionable under Title VII," "a line is crossed when the abuse is physical and sexual."

Bargaining Developments

Pacific Shore Signs Initial Accord With Local 814 In Santa Monica

With the recent signing of an agreement with HERE Local 814, the waterfront Pacific Shore Hotel in Santa Monica became the second coastal-zone luxury hotel to sign an agreement with the union, following the Fairmont Miramar Hotel, which signed a contract in April of 2000. Seventy-five employees are covered by the Pacific Shore contract, which is retroactive to July 1, 2001 and runs through December of 2003.

The new agreement provides for raises of between \$3.55 and \$4.40 an hour over

the length of the agreement, which represents a large pay hike for most classifications. The contract also creates a new pension plan and provides employer-paid family health insurance for full and part-time employees. Additionally, because the workforce is largely Latino, a provision was added to the agreement's immigration article establishing a one-year grace period for hotel employees to get their immigration documentation in order.

This new contract arose out of negotiations that were the result of a

neutrality/card check agreed to by Kor Realty Group last August right before it purchased the Pacific Shore Hotel. The chief financial officer for Los Angeles-based Kor Realty stated that the union recognition situation here was distinct because the Hotel is on land leased from the City of Santa Monica. Therefore, the Santa Monica City Council conditioned its approval for the sale of the Hotel on Kor Realty entering into a neutrality agreement.

At the Boat

Valet Company Cannot Discharge Employee For Supporting Union

In a recent decision, a unanimous Board held that Metro Detroit Valet Parking, Inc. violated Sections 8(a)(3) and (1) of the act when it discharged an employee for his support of and activities on behalf of the union. The Board found that the alleged discrimination was intended to discourage employees from engaging in protected union activity. Metro, which provides valet automobile parking services to Greektown Casino

LLC, was ordered to cease and desist from all unfair labor practices and to take certain affirmative action, including reinstating the discharged employee with backpay, removing any references to the discharge from his personnel file, and posting a notice for sixty days assuring employees that they will not be discriminated or retaliated against for supporting or engaging in union activities.

At the Boat

Refusal To Hire Former Owner's Qualified Union Employees Violates The National Labor Relations Act

The National Labor Relations Board recently adopted an administrative law judge's findings that New Silver Palace Restaurant's reasons for not hiring 23 employees of the former owner were pretextual and that its refusal to hire the employees was in violation of Section 8(a)(1) and (3) of the Act. *New Silver Palace Restaurant and 318 Restaurant Worker's Union*. New Silver Palace stated a number of reasons for refusing to hire the individuals, including failure to submit applications, failure to complete the application forms in English, or to list prior employment, and inability to speak English, as New Silver Palace desired.

New Silver Palace Restaurant purchased the assets of the Silver Palace Restaurant at a bankruptcy auction in 1997. The former owner's employees were represented by 318 Restaurant Workers Union, so after the auction, the union sent the new owners a letter seeking employment for the former Silver Palace Restaurant employees. One of the owners informed a union advisor that only a minority of the union's people would be hired, but if there was no demand for the union, "any number of former employees" would be hired.

Chairman Hurtgen and Members Liebman and Truesdale ultimately

agreed with the judge's finding that the New Silver Palace Restaurant deliberately averted unionization in its restaurant by utilizing employment applications to avoid hiring union supporters and to make its refusal to hire the employees appear lawful. The Board held that New Silver Palace refused to hire the former employees during its hiring period, that the former employees had experience and training relevant to the job requirements for the positions, and that anti-union sentiment was a significant motivating factor in New Silver Palace's decision not to employ the former employees.

As a result, the Board issued an order requiring New Silver Palace to cease and desist from its refusal to recognize and bargain collectively with 318 Restaurant Workers Union. They also required New Silver Palace to offer positions to the 23 employees on whose behalf the union filed its charge, and to cease all anti-union activity, including threatening union officials and union employees, promising jobs on termination of union membership, making disparaging comments to union employees regarding the union, and surveillance of employees' union activities.

At the Boat

Grouse Mountain Lodge's Statements Intended To Discourage Union Support

A Board majority of Chairman Truesdale and Member Walsh adopted the administrative law judge's finding that statements by the employer's hotel manager to an employee that "this Union movement thing wasn't happening" and that he could "get these things for [her]" was an unlawful promise of benefits to discourage employees from supporting the union. Chairman Hurtgen dissented on the issue, pointing out that the manager's comment "either as intended or understood" was unclear. He declared that "an employer is free to speak about a union campaign." *Grouse Mountain Lodge*.

The majority also affirmed the administrative law judge's finding that the Lodge violated Section 8(a)(1) with a statement in a 1996 memorandum from the Lodge's controller, in which the Lodge's delay in implementing increased benefits was

blamed on the union's organizing campaign. Hurtgen, in his dissent, said that Grouse Mountain blamed the law and not the union. "The Respondent simply explained that the union could not take credit for the ultimate grant of the benefits," he stated.

The Board Members unanimously disagreed with the judge's finding that Grouse Mountain Lodge created an impression that it was engaging in surveillance of the union activities of its employees. This perception was created by the controller's statement that the Lodge had "recently concluded those organizing activities had failed from lack of employee interest and support." The Board felt that without more, the above quote did not demonstrate that Grouse Mountain was engaged in any form of unlawful surveillance.

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Missouri Court Strikes...

Since this coverage must be provided unless the contractor is willing to pay a higher hourly rate, the lack of a definition "leaves affected employers wholly at sea." Dierker noted that the individual who spearheaded the living wage campaign testified that there is no guidance on whether vision and dental benefits must be included or whether employee co-payments are contemplated. Since a reasonable person must therefore surmise what is or is not included in a "comprehensive medical coverage" package, Dierker declared the ordinance "fatally vague."

Judge Dierker also held that the enforcement provision of the ordinance was illegal because it contravenes the state's constitution. The state constitution vests the local municipal court with primary jurisdiction over cases alleging violations of municipal ordinances. However, Section 4(c) of the ordinance calls for enforcement of the ordinance by the Circuit Court.

Proponents of the living wage ordinance attempted to retain portions of the ordinance based on a clause which establishes that if any portion is declared unenforceable, the remaining provisions shall remain in effect. The Court ruled, however, that there is no way to sever the illegal portions and somehow retain portions of the ordinance and still be consistent with the voters' intent to require a living wage to be paid. "The court cannot infer that the voters would have adopted Ordinance 65045 without the 'health benefits' options," Dierker stated. Consequently, lack of an acceptable definition for health benefits irreparably harmed the purpose of the ordinance, preventing salvage efforts of any portion of the ordinance. Moreover, Dierker opined that it is not certain that the ordinance would have passed into law without any or all of the provisions dismissed in this opinion as unlawful or unconstitutional.

Newsworthy

Hampton Inn Settles Religious Discrimination Claim

The Hampton Inn in Clemson, South Carolina settled EEOC allegations that it unlawfully discriminated against an employee on the basis of her religion by denying her request for unpaid leave on Sundays and forcing her to quit her job. *EEOC v. Nirman Enter.* The suit, which settled for \$3,000, was filed by the EEOC under Title VII and claimed that the Hampton Inn unlawfully discriminated against Pamela Blessingame

on the basis of her Christian beliefs.

Additionally, under the terms of the consent decree from the District Court of South Carolina, the Hampton Inn will train its managers, notify employees of the discrimination and retaliation laws, and expunge any record of disciplinary action in 1999 from Blessingame's file.

Newsworthy

Hotel Industry Hard Hit By Terrorist Attacks, Job Cuts Appear Inevitable

As a result of the September 11 terrorist attacks, occupancy at hotels throughout the country has decreased significantly, as much as 50 percent in some regions. The occupancy rates in New York and Washington, D.C. for the week of Sept. 9-15 were down 22 percent and 26 percent respectively from last year's figures. Layoffs may be unavoidable for a number of hotel companies, but those numbers depend in large part on how well the airline industry recovers in the coming weeks.

The Hotel Employees and Restaurant Employees Union has suffered a significant loss in the wake of this tragedy. Forty-seven members of the union who worked on the 106th floor of the World Trade Center at Windows on the World restaurant are missing. Moreover, over 3,000 union employees lost their jobs due to damaged, destroyed, and closed hotels in the vicinity of the World Trade Center.

Likewise, the effects of the Sept. 11 attacks on the industry were felt throughout the country. The MGM Mirage Hotels in Las Vegas were running at 50 percent occupancy following the inci-

dent, which has been attributed to the airport shutdown and a subsequent slowdown in travel. The MGM however, is waiting to see if travel and occupancy rates surge upwards in the immediate future before making any long-term decisions regarding layoffs. Instead, the MGM has cut back work hours and asked employees to voluntarily take accumulated vacation time. The Ritz-Carlton and other hotel companies are making staffing assessments on an individual basis according to the particular needs of the individual hotel, since hotels in some areas will undoubtedly be harder hit than others.

Peter Chatilovicz, labor council for the Hotel Industry Association of Washington D.C. stated that the extended suspension of air travel was the "number-one cause of the downturn in the hotel industry." Still, throughout the industry, there is hope that as new security measures are established and travelers feel safe flying, the airline industry will rebound and give the hotel industry the necessary boost to avoid layoffs.

In The Courts**Starbucks' Managers Intitute Class Action Suit For Overtime**

A lawsuit was recently filed in California on behalf of nearly 1,500 current and former managers, assistant managers, and management trainees employed at Starbucks coffee houses, alleging they were misclassified as exempt employees and denied overtime pay. Class status is being sought for these employees, who allegedly worked more than eight hours per day and forty hours per week on a routine basis, performing the same work as regular hourly employees. *Shields v. Starbucks Corp.*

According to California law, an exempt management employee is one who spends at least fifty percent of his or her time on management duties and regularly exercises discretion and independent judgment. The complaint contends that Starbucks managers consistently worked more than eight hours per day and

averaged 50-60 hours per week, mostly performing the same tasks as hourly employees, but were not paid overtime since the company classified them as salaried management employees exempt from California overtime requirements. The plaintiffs are seeking class certification, payment of the unpaid overtime with interest, punitive damages, attorneys' fees, and a permanent injunction against Starbucks' classification practices.

This suit against Starbucks is just the most recent in a line of cases asserting that California employers are misclassifying employees as exempt from overtime requirements. U-Haul recently settled overtime claims with 475 managers for \$7.5 million, and a California jury recently returned a \$90 million dollar verdict for 2,400 insurance adjusters at Farmers' Insurance who were allegedly misclassified.

Bargaining Developments**Racetrack Employees Gain The Right To Organize In California**

California Governor Gray Davis recently signed into law A.B. 471, which allows employees who work for racetrack and horse-racing businesses to organize and bargain collectively. This bill requires the California Horse Racing Board to establish an orderly organizing procedure for "backstretch" employees who work for horse trainers or handlers at racetracks, fairs, and training facilities. Under A.B. 471, if 125 backstretch workers sign a petition and submit it to CHRFB, the board must then provide the appropriate labor organization with a list of backstretch workers, their location, and other information. The new measure also calls on the board to adopt standards for employee housing at racetracks. This measure will take effect January 1, 2002.

CHRFB must also provide union representatives reasonable access to meet with workers during working and non-working hours. The measure further bars employers and labor unions

from coercion or retaliation against workers in respect to organizing activities.

Labor organizations need at least 30 percent of employees to sign union authorization cards in one of four geographic election units under the new law. If less than one-half of a trainer's employees elect to join, the union must wait one year before attempting to organize the workers again. All union elections will be supervised by the California State Mediation and Conciliation Services.

Any employers negotiating contracts with employees on their own behalf have 90 days to reach an agreement before CHRFB will require mediation and conciliation. If no agreement is reached, an impasse can be declared by either party, and CHRFB will appoint an arbitrator. The arbitrator will then issue a binding decision which establishes the terms of the collective bargaining agreement.

At the Boat**Ridgewells Must Recognize and Bargain With Union**

The National Labor Relations Board, in agreement with the administrative law judge, ordered Ridgewell's, as a successor employer, to recognize and bargain with Hotel Employees and Restaurant Employees, Local 25 and to refrain from making unilateral changes to the contract. *Ridgewell's, Inc.* Ridgewell's took over the catering functions for the House of Representatives in January 1998. As a successor, an employer is generally allowed to set the initial terms and conditions of employment prior to bargaining, unless it is made absolutely clear that the employees will be retained by the employer under their prior conditions. *NLRB v. Burns Security Services.* Ridgewell's President announced the company's intention to hire its predecessor's employees as independent contractors before any hiring or operations were begun by Ridgewell's in January

1998. In doing this, the company effectively put the union on notice that there would be a new set of employment conditions from those agreed to with the predecessor. Therefore, there was no violation of Section 8(a)(5) of the Act when Ridgewell's discontinued employees' fringe benefit contributions that existed in the predecessor's collective bargaining agreement without first bargaining with the Union.

Ridgewell's did make certain unilateral modifications to the employment agreement seven months after operations began in the House of Representatives without bargaining with the union. The Administrative Law Judge found these unilateral changes to violate Section 8(a)(5), and the Board affirmed that finding. Ridgewell's was ordered to cease unilateral changes and to recognize and bargain collectively with Local 25.

*Bargaining Developments***Pittsburgh Hotel Disputes Card Check, Claims Coercion By City And Union**

A legal dispute based on the city of Pittsburgh's 1999 "labor peace ordinance" has arisen between the developer of the Pittsburgh Fulton Renaissance Hotel and the Hotel Employees and Restaurant Employees Union. Recently the hotel filed charges of coercion and intimidation against the union and the Pittsburgh City Council.

The charges of unfair labor practices spring from an agreement brokered by Pittsburgh Mayor Tom Murphy early this year in which hotel developer Sage Hospitality Resources of Denver, Colorado agreed to voluntarily recognize HERE Local 57 if the union could demonstrate majority support through signed authorization cards once the newly renovated facility opened in early March.

Sage had previously accepted approximately \$3.5 million in city tax incentive funds as part of the multi-million dollar hotel renovation project. City ordinance No. 22 declared that as a condition of receiving public funds, Sage would agree to remain neutral in any organizing drive and attempt to bargain collectively if the union demonstrated that it had majority support.

Local 57 began collecting authorization cards last spring and

in June determined it had authorization cards from more than fifty percent of the 160 hotel employees. However, several cards were allegedly revoked at the urging of management, and by the time the city official verified the cards, the union no longer had majority support. The union initially contested the card check via arbitration, but since that time has chosen to gather more authorization cards instead.

Meanwhile, the hotel pled unfair labor practices challenging the legality of the city's tax incentive ordinance, contending that it is invalid because the hotel was coerced into accepting it. The hotel's complaint further claimed Local 57 conspired with city council members to force the employees to unionize without a secret ballot election.

The Pittsburgh City Council maintains that the ordinance was passed in an effort to avoid labor unrest in development projects where the city had a financial investment. The union asserts that there was no coercion or intimidation on the part of the union or the city council, and further insists that the charges against the city will fail because NLRB jurisdiction extends only to labor organizations and employers, and not a municipality.