

Hospitality Industry Quarterly

Labor and Employment Law Report

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Administrative Overtime Exemption Extended to Sales Manager Position

In the first published decision of its kind, the U.S. District Court for the Southern District of New York ruled that the Director of Conference Services for the Omni Berkshire Place Hotel was an administrative employee under the Fair Labor Standards Act, who, as such, is exempt from the maximum hours and overtime requirements in the Fair Labor Standards Act and therefore not entitled to overtime compensation. *O'Neill-Marino v. Omni Hotels Mgmt. Corp.* The only previous court decision involving the exempt status of sales managers was a 1995 unpublished federal court decision, also favorable to hospitality employers. That case involved the national sales manager for a destination resort.

In granting summary judgement for the Omni, O'Neill-Marino's contention that she was merely a liaison with no decision-making authority was summarily rejected. As Director of Conference Services, O'Neill-Marino negotiated contract terms with clients. It was insignificant that she negotiated within a pre-set price range and that her contracts were subject to supervisory approval. Additionally, she often assisted clients during their meetings, and coordinated departmental services within the Hotel to provide better client services. She also authored the Hotel's conference services manual, and her role with Omni extended to participation in management meetings

See *Overtime Exemption* - Page 4

Injured Waitress Who Exaggerated Injuries In Workers Compensation Claim Is Ordered to Pay Restitution to Insurance Carrier

In a recent California case, an Appeals Court upheld an order requiring an injured employee to pay restitution to an insurance carrier she had defrauded in a Workers' Compensation action. *People v. Amin.*

Amin was a waitress at a Hilton Hotel and was injured when she slipped on a lemon peel and fell while at work. Although she was injured, the extent of her injuries was unclear. Fireman's Fund, the insurance carrier for the hotel, paid over \$43,000 to Amin for temporary and permanent disability, rehabilitation, and medical expenses. The agreed medical examiner suspected "symptom magnification" and concluded that Amin's complaints were far in excess of what would be expected given the injuries she sustained. A psychiatrist agreed. However, Amin's personal physician concluded that she was worse than ever before, had severe pain, and was unable to walk, drive or to function at home. Fireman's Fund investigated and obtained a surveillance video showing Amin driving her children to school, walking in heels, driving home, leaving her home with a briefcase, and walking without any apparent restrictions. It also showed her driving to a friend's apartment. The friend then drove Amin to a medical appointment. When arriving at the medical appointment, Amin suddenly appeared severely injured, unable to walk without the use of a walker or without assistance of her friend, both upon entering and exiting the doctor's office. Less than one hour later, upon arriving at the friend's apartment,

Amin was suddenly able to walk again with no assistance, going down the staircase of the apartment without even using the handrail. She was also been observed driving away in her own vehicle.

Based on these facts, a criminal complaint was filed listing 12 violations. The case was resolved through negotiations in which Amin pleaded guilty to a single count of violating the California Insurance Code – presenting a false or fraudulent statement in support of a claim for Workers Compensation insurance. She was given probation and as part of the plea bargain she expressly agreed to pay restitution on all counts. The court ordered her to pay \$29,983 in restitution, \$9,822 of which was repayment for monies received, and the balance of which covered attorney fees, investigation costs, and court reporter fees.

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On the Inside

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In the Courts**Court Rejects Hotel's RICO Claim Prompted by Union Organizing Drive**

The Ninth Circuit Court of Appeal recently held that a hotel in Monterey, California failed to establish that a union violated federal law by engaging in a pattern of alleged illegal acts, including mail and wire fraud, aimed at harming the Hotel's business. *Monterey Plaza Hotel Ltd. Partnership v. Local 483 of the Hotel Employees and Restaurant Employees Union.*

Affirming a lower court's dismissal of the suit, which was brought under the Racketeer Influenced and Corrupt Organizations Act, the Court further ruled the action was barred because the issues at stake had already been litigated in two prior lawsuits brought in California state court by the Hotel against the Union, Hotel Employees and Restaurant Employees Local 483.

The parties have a charged history. In 1995, the Union filed an unfair labor practice charge with the National Labor Relations Board, alleging that the Hotel had threatened employees about their desire to support the Union. Meanwhile, the Hotel sued the Union in state court, seeking damages and injunctive relief against violent picketing by the Union in front of the Hotel. That suit was resolved when the parties agreed to time, place, and manner restrictions on the picketing.

In early 1997, the Hotel filed a second suit against the Union claiming it defamed the Hotel on a television broadcast, resulting in a loss of potential business. The California courts reject-

ed the defamation suit as meritless, finding that it fell within a California statute aimed at preventing vexatious lawsuits designed to thwart the exercise of political rights.

While the defamation suit was pending, the Hotel filed the RICO suit in federal court. The Hotel contended that the union engaged in a "corporate campaign" designed to put the Hotel out of business rather than to advance any legitimate organizational agenda. The suit alleged that the Union engaged in "a pattern of illegal acts, including violence, extortion, illegitimate economic coercion, mail and wire fraud and intimidation, that amounted to racketeering activity."

The district court held that the Hotel did not establish that the Union committed mail and wire fraud, as those laws protect only property interests, not misrepresentations made to a business's customers. The court also held that this case was merely an attempt to re-litigate the same issues previously litigated in the state court system – the Hotel's customer relations and business interests.

On appeal, the Hotel argued that the Union's acts harmed its goodwill, which is a property interest in California. In upholding the lower court, the Ninth Circuit found that the "union did not obtain property by deceiving the Hotel or its customers; the Union was simply carrying on a strategy in a protracted labor dispute."

In the Courts**Caesars to Pay \$500,000 Family Leave Verdict to Former Dealer**

Caesars Atlantic City Hotel/Casino ended litigation by agreeing to pay \$552,424 to a former blackjack dealer whose termination for excessive absenteeism after 18 years allegedly violated the Family and Medical Leave Act. *Armstead v. Caesars Atlantic City Hotel/Casino.* Michelle Armstead claimed that a number of her absences were to receive treatment for a herniated disk, and were therefore protected by the

FMLA. Under the settlement agreement, the casino's appeal and Armstead's cross-appeal will be dismissed.

Armstead was awarded \$175,000 in back pay and \$300,000 in front pay by the jury after U.S. District Court Judge Joseph E. Irenas for the District of New Jersey ruled that her termination violated the FMLA. On a motion by the casino, the court reduced these awards to \$120,000 in back pay and \$185,900 in

front pay. The court had also granted \$120,000 in liquidated damages, attorneys fees and costs of \$126,525, and prejudgment interest, bringing the final judgement to \$552,400. Caesars agreed to pay the full amount of the final judgement and to expunge from Armstead's personnel record the dismissal for excessive absenteeism.

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Newsworthy

Court Rejects Muslim Waiter's Claim That Union's Hiring Roll Call Conflicts With Prayer

A federal judge in New York City ruled that a Hotel Employees and Restaurant Employees local did not discriminate against a Muslim waiter who claimed that the union's Friday afternoon hiring roll call prevented him from participating in a weekly congregational prayer. *Hussein v. Hotel Employees & Restaurant Employees Union, Local 6*.

The court rejected plaintiff Mamdouh Hussein's religious discrimination claims against HERE Local 6, holding that, "given the plaintiff can perform his Jum'ah prayer at a number of mosques within traveling distance from the location of roll call, he has not shown a bona fide religious belief that conflicts with an employment requirement." The court relied on evidence Local 6 obtained from the Council of American-Islamic Relations which said that a Muslim employee should be able to complete Friday prayers "during a slightly extended lunch break."

The union conducts "roll calls" at 3:30 p.m. every weekday. Restaurants and hotels that need waiters for that evening contact the union and the union agrees to send a certain number of wait-

ers to the establishment. Hussein sued Local 6 under Title VII, claiming that having to attend a roll call on Fridays to get referrals prevented him from following his faith. He charged that missing a roll call would put him at an economic disadvantage because he would have to wait until his name came up again in the rotation, which might not be the following day. Hussein also argued that he needed to attend a mosque near his home in New Jersey and that prayers encompassed the whole afternoon, thereby making it impossible for him to attend the Friday roll calls. Hussein sought an accommodation whereby if his number was called, he would be able to take the job on Friday night despite not being present at the roll call.

The court predicted that if Hussein were given this accommodation, there would be a "landslide of lawsuits charging unfair preferential treatment." Accordingly, the court held that "an employer need not accommodate an employee's need for time off for religious observance when such an accommodation would compromise the rights of co-employees."

Newsworthy

Federal District Courts in Adjoining States Reach Opposite Conclusion On Whether Riverboat Casino Employees Are Seamen Under Maritime Law

In two cases involving employees who worked on the same riverboat casino plying the Missouri River between Iowa and Nebraska, federal courts in Nebraska and Iowa have reached contrary results as to whether the casino employees are considered "seamen" under the Jones Act and maritime law.

The District Court of Nebraska held that a casino blackjack dealer cannot sue her employer, Harvey's Iowa Management Co., under the Jones Act and general U.S. maritime and admiralty law to recover for personal injuries she sustained while at work. *Biering v. Harvey's Iowa Mgmt. Co.*

In contrast, the U. S. District Court for the Southern District of Iowa held that a cocktail server and bartender on a riverboat casino can sue Harvey's under the Jones Act to recover the injuries sustained while working on the riverboat. *Lara v. Harveys Iowa Mgmt. Co.*

The sole issue in both cases was whether the employees are considered "seamen."

Both plaintiffs worked at Harvey's Casino on the M/V Kanesville Queen, a 272-foot excursion vessel operating on the Missouri River. During the excursion season, from April 1 to Oct 31, the boat makes about 100 cruises in the early morning hours. When not cruising, it is moored in a slip. The riverboat has officers, mates, deck hands, and security personnel in addition to gaming employees.

In the Nebraska case, Plaintiff Biering worked as a casino dealer, working seven to eight hour shifts starting at about 8 p.m. She never worked on the vessel while it was cruising. In 1997

while returning from a break, Biering tripped while walking down one of the vessel's interior staircases and was injured. She then filed a complaint alleging jurisdiction under the Jones Act and general U.S. maritime law. Harvey's moved for summary judgment, claiming that Biering was not a seaman as contemplated by those laws.

In the Iowa case, Plaintiff Lara was a cocktail server and bartender. She worked from 2:00 p.m. to 10:00 p.m., five days per week, and also did not work on the vessel while it was cruising. In 1998, Lara injured her arms, shoulders, and neck when her foot fell into an open floor drain behind the bar where she was working. The casino terminated her in August 1998. She then filed suit against the casino seeking damages under the Jones Act.

Under federal precedent, two essential requirements must be met for seaman status to exist. First, the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, the seaman must have a connection to the vessel that is substantial in terms of both its duration and its nature. Thus, the inquiry into the nature of the employee's connection concentrates on whether the employee's duties take him or her to sea.

In the Nebraska case, the court found that the M/V Kanesville Queen is a "vessel in navigation" for Jones Act purposes and that Biering's employment advanced its "gaming mission."

In the Courts**Seventh Circuit Reverses Board, No ULPs Committed by Chicago Restaurant**

The U.S. Court of Appeals for the Seventh Circuit recently ruled that the owners of Chicago's Tucci Milan did not violate federal labor law when they fired a pro-union employee suspected of stealing a manager's logbook entries for use in a union organizing drive. *6 West Ltd. Corp. v. National Labor Relations Board*.

In the early Fall of 1994, the restaurant's general manager discovered that several pages were missing from the manager's log. He then questioned several employees and managers about the missing pages but was unable to discover what happened.

Copies of a document called "Constructive Criticism" were later distributed to restaurant employees at a union organizing meeting hosted by HERE Local 1. The document purportedly consisted of a cut-and-paste compilation of criticisms of the employees and

customers taken from the manager's log. According to Court records, the document was distributed by the later-fired employee, identified as the culprit by others in attendance. Although the employee denied distributing the logbook excerpts, he was subsequently fired for "disloyalty". In a split decision, the NLRB upheld an administrative law judge's finding that the server's termination violated the National Labor Relations Act.

Vacating the NLRB decision and in writing for the Court, Judge John Coffey held that 6 West Limited Corp. and Lettuce Entertain You Enterprises, the restaurant's joint owners, did not violate federal labor laws by firing the employee, a server in the restaurant. Rejecting as flawed the NLRB's reasoning that the server's termination was unlawful because the restaurant did not have a policy for dealing with such employee misdeeds,

Coffey said that "the Board's reliance on the absence of any formal policy requiring honesty is not only misplaced legally, but divorced from the real world, and an example of skewed and position-oriented decision-making without the application of logical reasoning and common sense....It is also obvious that at a bare minimum, companies must be able to trust their employees and be assured that no one is stealing documents from offices or private files."

The Court also vacated the Board's decision that Tucci Milan violated the Act by hiring increased security, discriminatorily enforcing a no-solicitation rule during the union organizing drive, and telling employees that a co-worker had received a bomb threat from the union and had fled the city in fear.

Judges Richard Posner and Michael Kanne joined in the opinion.

From Page One...**Injured Waitress...**

On appeal, Amin asserted the trial court abused its discretion by ordering her to pay restitution when she in fact did suffer a legitimate industrial injury. This argument was rejected because she had agreed to pay restitution as part of her plea bargain. She also asserted the issue of restitution had been "reserved" for determination at a later hearing; this argument was also rejected because the only thing reserved was the amount she would be required to pay, not whether she would be required to pay restitution. The court concluded that the trial court did not abuse its discretion as to the amount that was ordered to be repaid.

Amin also asserted that the trial court could not order her to pay restitution because the Workers Compensation Appeals Board has sole jurisdiction to decide those claims. The court rejected this argument because the Insurance Code provision she violated specifically stated the trial court had authorization to order a defendant to pay restitution.

From Page One...**Overtime Exemption...**

and budget forecasting. The Court evaluated all these factors before declaring O'Neill-Marino an administratively exempt employee who was the "primary point of contact between conference clients."

In order to establish that an employee is administratively exempt from overtime, an employer must show that 1) the employee's primary duty is non-manual or office work that directly relates to management or the general business operations of the employer or employer's customers, and 2) that the duties performed require the exercise of discretion and independent judgement.

The court articulated that tasks such as advising management, purchasing, planning, negotiating, representing the company, promoting sales, and business research and control qualify as administrative responsibilities under the first prong of this test. The second prong is satisfied by establishing that an employee had authority to weigh the options for a proposed course of conduct and make the ultimate choice in significant matters without immediate supervision or oversight. Making recommendations to supervisors and making decisions that are subject to a supervisor's approval satisfy this prerequisite.

The O'Neill-Marino decision is of significant importance to hospitality industry employers. During the Clinton administration, the Department of Labor's Wage-Hour Division targeted the industry practice of classifying Hotel sales managers (including catering sales, conventions services, and conference managers) as administratively exempt. A number of these actions are in various stages of both administrative proceedings before the Department of Labor and in active litigation. HIQ will continue to closely monitor developments surrounding this crucial issue.

At the Board

NLRB Affirms Dismissal Of Employer's Election Petition

In a 2-2 decision, the NLRB let stand a regional director's dismissal of an election petition filed by Rapera, Inc., a food service contractor for the Metropolitan Opera House at Lincoln Center in New York City. Rapera, the subject of organizing efforts by Local 100 of the Hotel Employees and Restaurant Employees Union, had refused requests for a neutrality/card check agreement by the union.

The NLRB regional director in New York dismissed the election petition filed by Rapera in November 1999, finding that Local 100 did not make the required formal demand for recognition. The union has been trying since March 1999 to organize Rapera's 95 food and beverage employees employed by the Company in various facilities at the Met.

While most NLRB cases are heard by three-member panels, any member can request that a case be heard by the full board, or by all four members if one seat is vacant. The fifth seat on the Board has been vacant for more than 10 months. Because the Board ruling was equally divided, the Regional Director's earlier ruling stands. Members Wilma Liebman and Dennis Walsh

voted to affirm dismissal of the election petition; Member John Truesdale and Chairman Peter Hurtgen voted to reinstate the election petition.

The vote to affirm dismissal of the petition was based on Section 9(c)(1)(B) of a National Labor Relations Act, which has been held to require that a union demand for recognition can only be made in a direct communication to the employer. In arguing that the petition should be reinstated, Truesdale and Hurtgen claimed that the union's requests for a neutrality/card check agreement, combined with a union representative's sworn affidavit in a related court case that about 80 percent of the employees had signed union authorization cards was "tantamount to a request for immediate recognition." However, Liebman and Walsh held that the requirement that a present claim of majority status or demand for recognition be made to the employer is critical pursuant to Section 9(c)(1)(B). Accordingly, they concluded that a union's statement to a third party that a majority of employees have signed union authorization cards does not constitute a demand for recognition.

In the Courts

Ninth Circuit Reverses \$364,000 Jury Award, Rules That Trial Judge Gave Wrong Jury Instruction

A federal appeals court recently reversed a \$364,000 jury award to a former employee of Caesars' Palace Hotel & Casino. The Court ruled that the trial judge should not have given a mixed-motive jury instruction because there was no substantial evidence of discriminatory intent in the Casino's treatment of the female warehouse employee, Catharina Costa. *Costa v. Desert Palace Inc.*

Vacating a lower court judgment in favor of Costa's discrimination suit, the U.S. Court of Appeals for the Ninth Circuit held that by giving a mixed-motive jury instruction rather than a pretext instruction, the lower court prejudiced the Casino because it erroneously shifted the burden of proof to the employer. Costa had not presented substantial evidence of discriminatory animus, according to Judge William W. Schwarzer, writing for the Court. Schwarzer also reversed the lower court's ruling on Costa's wrongful termination claim, granting Caesars' motion for judgment as a matter of law.

Costa had worked for Caesars' as a warehouse employee from 1987 to 1994. She was the only female in a bargaining unit represented by the International Brotherhood of Teamsters Local 995. Costa had a long history of disciplinary infractions and suspensions. In 1994, she was terminated after a verbal and physical altercation with a co-worker. The co-worker, who had a long tenure and a clean disciplinary record, received only a 5 day suspension. An arbitrator subsequently upheld both disciplinary actions.

Thereafter, Costa filed a federal lawsuit claiming gender discrimination in violation of Title VII of the 1964 Civil Rights Act in connection with her discharge and her conditions of employ-

ment. Following trial, the district court instructed the jury that:

"If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason."

The trial court judge also told the jury that if it found that the Casino's treatment of Costa was motivated by both gender and lawful reasons, it must decide whether Costa is entitled to damages. Costa is entitled to damages, the court continued, unless Caesars' "proves by a preponderance of the evidence" that it would have treated her the same even if her "gender had played no role in the employment decision."

The jury found in favor of Costa, awarding her \$364,377, including \$64,377 for financial loss, \$200,000 in compensatory damages, and \$100,000 in punitive damages. Costa was also awarded \$56,298 for attorneys' fees. Although denying Caesars' motion for judgment as a matter of law, the court granted the Casino's motion for a new trial. Caesars' appealed.

In finding for Caesars' on appeal, the Ninth Circuit ruled that: "Costa's case comes down to the fact that she was the only woman in her bargaining unit and was treated differently from her male colleagues, but the anecdotes she presents are not substantial evidence that she was treated differently or terminated because she was a woman. Accordingly, the district court erred in giving the jury a mixed-motive instruction. Because the effect of the instruction was to shift the burden of proof to Caesars', the error was not harmless."

Judges Alex Kozinski and Andrew Kleinfeld joined in the decision.

In the Courts**Kansas Supreme Court Vacates \$1.1 Million Verdict to Fired Restaurant Mgr**

The Kansas Supreme Court dismissed a \$1.1 million verdict for a former Shoney's Restaurant manager whose claim for unemployment compensation was challenged by the company on the grounds that he had been terminated because of alleged sexual harassment. *Wilkinson v. Shoney's Inc.*

A jury in Wyandotte County had awarded the former manager, Wilkinson, \$800,000 in punitive damages and \$300,000 in actual damages on his malicious prosecution claim against Shoney's Inc., and \$75,000 in actual damages against National Employment Council Inc. (NEC), which represented Shoney's in the unemployment compensation action.

The court held that because a malicious prosecution action cannot be maintained against a party who defends against or appeals a claim initiated by a plaintiff, the jury's damage award was improper.

In December 1993, while employed as a Shoney's manager, Wilkinson was accused of sexual harassment by a waitress. During the ensuing investigation, Shoney's executives learned that Wilkinson had been demoted from another management position in a different Shoney's region, and that his previous supervisor would not have recommended rehiring him if he had been contacted for a reference.

Upon learning of the prior demotion, Shoney's fired Wilkinson for "management loss of confidence." This occurred even before the harassment investigation was finished. He immediately filed for unemployment compensation. In his application, he stated that he had been fired because a female employee claimed that he made an "offensive" comment, which he denied.

Shoney's, through NEC, challenged Wilkinson's application

for the benefits, arguing that sexual harassment represented "just cause" for the termination. The Kansas Department of Human Resources (KDHR) found there was insufficient evidence to support the allegations, and cleared his benefits claim.

The restaurant appealed the KDHR decision. It argued that even if Wilkinson did not violate federal sexual harassment law, Shoney's "zero tolerance" harassment policy was stricter, and that Wilkinson violated that policy. The agency affirmed; there were no further appeals.

Wilkinson then sued Shoney's and NEC in September 1994, alleging various tort claims. In addition to the \$1,175,000 it awarded on his malicious prosecution claim, the jury awarded Wilkinson \$158,271 for wrongful discharge/breach of an implied contract and negligent misrepresentation.

Wilkinson argued that because the defendants continued to fight his unemployment claims in the absence of probable cause, they became "liable as if [they] had initiated the proceeding." On appeal, the defendants contended that the claim of malicious prosecution should never have been tried because the tort has not been recognized in Kansas, or in most states. Agreeing with the defendants, the court acknowledged that an action exists for malicious prosecution based on filing a cross-complaint or counterclaim because those cross pleadings begin a separate, independent action. However, it found that a purely defensive response cannot impose liability.

However, the court upheld the award on Wilkinson's wrongful discharge claim, finding that a reasonable jury could have concluded that Shoney's violated its progressive discipline guidelines, which called for termination only after a fourth offense.

In the Courts**Eleventh Circuit Affirms Front Pay Award Despite Elimination of Plaintiff's Job**

The U. S. Court of Appeals for the 11th Circuit upheld a front pay award for a 64-year-old hotel room service waiter who claimed he was terminated because of his age. *Muñoz v. Oceanside Resorts, Inc.*

Even though the Hotel had eliminated all of its waiters, the court found there was no proof that Muñoz would not have been eligible for another position at the hotel. It upheld a \$290,125 jury verdict for Muñoz on his claims under the Age Discrimination in Employment Act and the Florida Civil Rights Act.

Muñoz, who is Cuban, had worked at the Holiday Inn Oceanside Resort in Miami for 27 years before he was terminated in 1995. A few days before his termination, the Hotel reprimanded him for kissing a fellow employee on the cheek, something Muñoz said he had been doing for many years without complaint as part of a traditional Cuban greeting. The reprimand was based on a supervisor's observation of the incident, not on a complaint from a fellow employee or a guest. The

Hotel terminated him for insubordination because he had discussed the reprimand with another employee, even though he had been instructed not to do so.

After a three-day trial, a jury awarded Muñoz \$58,838 in back pay and \$150,000 in compensatory damages for emotional distress. The judge granted an additional \$58,838 in liquidated damages and \$22,449 in front pay.

On appeal, the Hotel argued that front pay was inappropriate because Muñoz's position no longer existed at the time of trial. It also contended that the likelihood Muñoz would work until 70 was remote, despite Muñoz's statements that he planned to work until 70.

Disagreeing, the court found that the Hotel "failed to introduce any evidence demonstrating either that Muñoz was unqualified for another available position or that, for some other reason, reassignment would have been infeasible." The court found that the Hotel had the burden of showing with particularity that it actually would have terminated the plaintiff.

In the Courts**D.C. Court Upholds \$5 Million Verdict For Chef Harassed by Male Supervisor**

The District of Columbia Superior Court upheld a \$5 million jury verdict for a former chef who claimed he was sexually harassed by a male supervisor and then fired in retaliation for his complaints.

McCrae v. Daka.

The court found that not only was the conduct of the manager "especially egregious," "outrageous," and "out of control," but that a jury could reasonably conclude "that the company's conduct was as outrageous."

In 1996, Plaintiff McCrae began working as a chef for Daka, a food service contractor, when it provided catering service for Howard University in Washington. The manager allegedly asked McCrae out, frequently commented on how McCrae's pants fit, made gestures as if to touch McCrae's buttocks, and once asked McCrae to get on his knees to look

for something, while standing behind him "moaning and groaning." After McCrae complained to several supervisors, the employer reduced his hours and ultimately fired him. He sued Daka for negligent supervision and violations of the D.C. Human Rights Act. After a trial, a jury awarded McCrae \$187,000 in compensatory damages and \$4,812,500 in punitive damages.

Declining to reduce the award, the court found that the amount was "not out of proportion to the extreme nature of the conduct," and would not bankrupt the company. The court determined that "overwhelming evidence" existed that Daka flagrantly ignored McCrae's complaints and that the wrongdoing inflicted upon McCrae was severe.

The court noted evidence indicating that Daka intentionally ignored McCrae's

complaints and that it destroyed documents necessary to McCrae's case. Evidence also showed that in 1993, Daka entered into a consent decree with the Equal Employment Opportunity Commission, agreeing to pay \$100,000 to a complaining employee and post written anti-discrimination policies. Further, in 1996, a jury found Daka liable for \$390,000 in punitive damages for age discrimination in a case involving supervisory harassment, where the company was found to have ignored the employee's complaints.

The court was disturbed that despite its history of harassment complaints, Daka continued to allow a pervasively discriminatory and hostile environment to exist at one of its local contract sites managed by an "out of control supervisor."

In the Courts**Restaurant's Good-Faith Defense Eliminates Punitive Damages Award**

A Chicago bartender's \$10,000 punitive damages award has been struck down by a federal appeals court. *Cooke v. Stefani Management Services, Inc.* The Seventh Circuit Court of Appeal ruled that because Stefani Management – the management entity of Tuscan Restaurant – was never made aware of the alleged harassment, it could not therefore be held vicariously liable.

In his lawsuit, plaintiff Kenneth Cooke alleged that immediately after beginning work, his supervisor – who was gay – began making sexual propositions and nonverbal gestures of a sexual nature. Cooke was terminated after the manager allegedly again propositioned him and Cooke finally responded angrily to his advances.

At trial in the lower court, the employer presented witnesses who said they had witnessed no harassment of Cooke. In addition, the company argued that

Cooke's claims of an oppressive work environment were undermined by his repeated visits to the restaurant when he was not scheduled to work and a card he had sent to his manager thanking him for all he had done on Cooke's behalf.

While upholding Cooke's award of compensatory damages and attorneys' fees, the Appeals Court found that Stefani was unaware that the manager was sexually harassing Cooke and therefore should be able to use a good-faith defense.

"[T]he law against sexual harassment is not self enforcing, and without knowledge of [the manager's] conduct, there is nothing Stefani could have done – beyond the general policies and training it did provide – to ensure compliance with Title VII [of the 1964 Civil Rights Act]," Judge Terence Evans said in writing for the Court. The Appeals Court also stated that given the limited success and the "run-of-

the-mill" nature of the case "with no broad social impact, Cooke's attorneys should be happy to receive fees of nearly seven times the amount of their client's recovery."

Cooke had been awarded \$10,000 in punitive damages and \$7,500 in back pay and lost benefits, as well as \$50,355 in attorneys' fees and costs, for the harassment that occurred at Tuscan.

Late last year, a jury had awarded \$3.25 million to four female employees of the Tuscan who claimed they had been subjected to sexual harassment over a four-year period by male employees and managers, including the executive chef, the sous chef, and the restaurant's general manager.

Judge Joel Flaum and Richard Posner joined in the decision.

Bargaining Developments**HERE, Hawaii Hotels Agree on Two-Year Contract for 5,000 Employees**

A new two-year master contract with the Council of Hawaii Hotels was recently ratified by members of Hotel Employees and Restaurant Employees Local 5 in an overwhelming vote. The agreement is retroactive to the prior contract's expiration date of March 1, 2000, and runs through Feb. 28, 2002.

The agreement provides for a wage increase of 3 percent in the first year of the agreement or 40 cents an hour, whichever is greater, for non-tipped employees. In the second year of the contract, wages will be increased by a flat rate of 45 cents an hour. Hourly increases will be provided to tipped employees of 10 cents in the first year and 15 cents in the second. The contract also extends the new hire period to two and one-half years. In the first twelve months, new hires will be compensated at 80 percent of the rate for regular employees, while in the second twelve months that compensation will increase to 87.5 percent. The last six months will be compensated at 90 per-

cent. The agreement also bans subcontracting for the life of the contract, as well as prohibits the hotels from leasing food or beverage space to another operator which provides the same services. The hotels can still lease out available food and beverage space, but only for use as a different type of facility, such as a gift shop.

Local 5 was placed into trusteeship by the international office of HERE after contract negotiations covering approximately 8,000 hotel employees were impeded by a conflict between the executive board and a top officer. Sherri Chiesa, the international's western regional director, was appointed by HERE President John Wilhelm to temporarily run the 11,000 member Local. The goal of placing the Local in trusteeship was to try to get new contracts in place as soon as possible.

The controversy arose when Local 5's longtime incumbent Secretary-Treasurer Tony Rutledge was defeated by Eric Gill,

a kitchen steward at the Hilton Hawaiian Village. An overwhelming majority of the elected executive board had run with Rutledge, and Gill found himself at odds with the board. Due to the contentious atmosphere, the Local was unable to negotiate the contract that expired a year earlier for over 5,000 hotel employees. The affected employees were working at hotel members of the Council of Hawaii Hotels, including the Hyatt Regency Waikiki, the Sheraton Princess Kaiulani, the Sheraton Moana SurfRider, the Sheraton Royal Hawaiian, the Sheraton Waikiki, and the Hilton Hawaiian.

Negotiations are presently underway between the Local and a number of other facilities in the hopes of reaching agreements. The trusteeship of Local 5 is slated to end sometime this summer, and an election of delegates for the international union's Los Angeles convention in late July is planned. It is expected that Gill and Rutledge will again compete for the Local's top office.

Bargaining Developments**Detroit's MotorCity Casino Recognizes Four Unions to Represent 2,800 Employees**

Detroit's MotorCity Casino recently granted recognition to the Detroit Casino Council, a group of four independent unions, as the collective bargaining agent for approximately 2,800 employees. The unions' majority support was verified by a card check. MotorCity is a joint venture between Mandalay Resort Group and Artwater Casino Group. The four unions are the Hotel Employees and Restaurant Employees Union, the International Brotherhood of Teamsters, the International Union of Operating Engineers, and the United Auto Workers. The bargaining unit consists of all

employees at the casino, including dealers, but excludes office employees, managers, and guards. This is the second group of casino employees in Detroit to become unionized. Last year, the MGM Grand Detroit granted recognition to the Council for its 2,200 employees. The owners of both casinos had previously entered into "neutrality card-check" agreements with the unions because of the Council's political support for legalized gaming in the city, in the wake of a 1996 Michigan ballot initiative repealing a statewide ban on gambling.

Newsworthy**HERE Local 217 Must Be Allowed to Bargain, Wear Buttons**

The National Labor Relations Board recently affirmed an administrative law judge's findings that Waterbury Hotel Management LLC's refusal to hire its predecessor's employees and termination of employees who wore union buttons to work was in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. A violation of Sections 8(a)(5) and (1) of the Act for unilaterally setting terms and conditions of employment for new hires without bargaining with the Hotel Employees and Restaurant Employees Local 217 of Hartford, Connecticut, was also affirmed. Waterbury's request for de novo review of the unfair labor practice issues was denied.

In the Courts**Parties Not Named In EEOC Charge May Still Be Sued in Court**

Judge Hector Laffitte of the U.S. District Court for the District Court of Puerto Rico ruled that a housekeeping employee may proceed with her sexual harassment lawsuit against Hyatt Hotels of Puerto Rico Inc. and Hyatt Vacation Ownership Inc., despite the fact that neither entity was named in her original charge filed with the Equal Opportunity Employment Commission. *Vasquez v. Hyatt Hotels of Puerto Rico*. While Nayda Vasquez had only named the Hyatt Hacienda del Mar, it was a Hyatt entity under which defendants conducted business, and Judge Laffitte ruled that there was "substantial identity" among the three entities.

Plaintiffs are generally required to accurately name the defendant in an EEOC charge to ensure that the defendant has notice of the charge and to further voluntary compliance with Title VII of the 1964 Civil Rights Act. Hyatt argued that Vasquez' failure to name the two entities in her EEOC charge required a dismissal

of the sexual harassment claims against them, an argument rejected by the court.

The court noted several recognized exceptions to the rule requiring all defendants to be named in the charge, as enunciated by the U.S. Court of Appeals for the First Circuit in *McKinnon v. Kwong Wah Restaurant*. The exceptions are where "substantial identity" exists between the defendants in the lawsuit and the named respondent in the EEOC charge, where the named respondent to the EEOC charge was acting as an agent of the defendant, or where the defendant is held to be an indispensable party to the action.

Vasquez argued that a "substantial identity" existed between the three Hyatt entities. In reaching its conclusion, the court considered the following factors: whether the unnamed party's absence from EEOC pleadings caused prejudice; whether a complainant, through reasonable effort, could determine the role of an unnamed party at the time of the filing; whether the

similarity of the names of the parties makes it unnecessary to include the unnamed party in the EEOC charge; and whether the unnamed party has represented to the complainant that its relations with the complainant are to be through the named party.

Judge Laffitte pointed to a number of factors in denying Hyatt's motion for a dismissal, namely the numerous times that Hyatt Hotel and Hyatt Vacation represented themselves to Vasquez as Hyatt Hacienda del Mar and the fact that defendants were not prejudiced by their absence from EEOC proceedings. They were notified of the EEOC proceedings at the proper address, merely under the name Hyatt Hacienda del Mar. The court also indicated that Vasquez was probably not represented by a lawyer when she filed the EEOC charge, and thus it was reasonable for her to name Hyatt Hacienda del Mar based on the representations by the defendants.

Bargaining Developments**Trusteeship to end at HERE Local 1 After Filing of Federal Suit**

The trusteeship of Hotel Employees and Restaurant Employees Local 1 in Chicago is slated to end shortly and an election of new officers is planned for mid-summer. The decision to lift the trusteeship was made by the HERE general executive board two months after the international union attempted to extend the trusteeship, and shortly after the initiating of a federal lawsuit by members of the Local seeking an end to the trusteeship.

Members of Local 1 filed suit in U.S. District Court for the Northern District of Illinois to compel the international office of HERE to dissolve their trusteeship over the Chicago-based local. This follows the termination of the Local's President, Treasurer and Secretary in just the last

eighteen months and indications from HERE International President John Wilhelm and the Local 1 Trustee that the trusteeship was going to be extended for at least 17 more months.

The suit alleges that under the Labor-Management Reporting and Disclosure Act, the international union has no authority to hold a local labor union in trusteeship for a period longer than 18 months. Therefore, the trusteeship which was initiated on Nov. 29, 1999 would not be valid after May 29, 2001. The suit seeks an injunction ordering the trusteeship to be dismantled and election procedures to be set in motion so that Local 1 may elect delegates to represent the Local at the international union's convention in Los

Angeles July 15-19.

The filing of the suit came at the conclusion of a three-day hearing ordered by the Department of Labor's Office of Labor Management Standards (OLMS) to inform members of the Local as to why trusteeship had been imposed the first time. OLMS concluded at the end of the hearing that while there was "an allowable purpose for imposing the trusteeship," HERE failed to sufficiently explain its actions to members of Local 1.

At the Board

Las Vegas Dealers Vote On Representation by Transport Workers Union

In its ongoing effort to organize dealers in major Las Vegas hotels and casinos, the Transport Workers Union lost three NLRB-supervised elections at Bally's, the Riviera Hotel & Casino, and New York-New York. Bally's employees declined union representation by a vote of 212-62, the Riviera's by a vote of 107-61, and New York-New York's employees rejected the union by a vote of 251-57. In a fourth election, the New Frontier Hotel dealers voted to accept union representation by a vote of 48-42.

To date, the Transport Workers Union has won three elections and lost six others. Besides the New Frontier Hotel, representation by TWU has been accepted at the Stratosphere and the Tropicana by votes of 116-48 and 112-51, respectively. The additional casino dealers that rejected union representation were the MGM Grand, the Las Vegas Hilton, and the Monte Carlo. Dealers at Excalibur and Treasure Island are scheduled to vote on union representation shortly. The Transport Workers Union is continuing their efforts to unionize Vegas dealers, with campaigns ongoing at over 20 other Nevada casinos.

In the Courts

Second Circuit Vacates Labor Dispute Injunction Barring HERE From Harassing Metropolitan Opera

The U.S. Court of Appeals for the Second Circuit recently vacated a preliminary injunction preventing the Metropolitan Opera Association, Inc. from being publicly implicated by Hotel Employees and Restaurant Employees Local 100 in a labor dispute between the union and Rapera Inc., the Met's food service provider. *Metropolitan Opera Ass'n Inc. v. Local 100*. (See related story, page 5.)

The Met alleged that the dispute was solely between the union and Rapera, which holds an exclusive contract to provide concessions during performances at the Met. In January 1999, Local 100 began an organizing campaign among Rapera's concession employees at the Met. When Local 100 was rebuffed by Rapera, the Met declined the union's plea to help sway the contractor to accept a neutrality/card check agreement, preferring not to get involved. Union members then began to wage a public battle against the Met, including rallying before performances and chanting pro-union slogans, distributing union literature at performances, and sending letters to Met directors and donors asking that they cease contributions to the Met.

Last year, the Met sought and was granted a temporary restraining order against Local 100 in New York State Supreme Court. The union removed the case to the U.S. District Court for the Southern District of New York and sought dissolution of the restraining order. The judge rejected the union's motion and continued the restraining order as a preliminary injunction barring the union and its members from "threatening or harassing" and "engaging in fraudulent or defamatory representations" concerning the Met, or any of its directors, officers,

donors, or patrons. The judge also held the union in contempt for violation of the initial restraining order and fined it \$10,000 to be paid to the Met for its "damaged reputation and good will." The union appealed this ruling to the Second Circuit.

On appeal, Judge John M. Walker Jr. agreed that the injunction "presents serious questions under the First Amendment and libel law," but he ruled that it was unnecessary to rule on the merits of such arguments because the injunction is "impermissibly vague" and "fails to provide the Union with adequate notice of what conduct is being enjoined." Walker elaborated, saying "the injunction is vague as to what the Union may say and what statements might lead to a contempt of court," therefore "it puts the Union at risk of punishment for good faith efforts to advocate publicly its position that the Met bears some responsibility to help resolve this labor conflict by exerting economic pressure on the contractor operating its restaurants."

Walker also explained that it is the practice of the Second Circuit not to issue injunctions in defamation cases, barring extraordinary circumstances. Walker felt such circumstances were not present here and that an adequate remedy at law was present in the form of damages. Moreover, the Supreme Court has long provided extra protection to union efforts to publicize ongoing labor conflicts. Thus, according to the court, even though the Met may have found Local 100's methods harassing, upsetting, and coercive, unions have a constitutionally protected right to exert social pressure on an employer.

In the Courts

Supreme Court and Eighth Circuit Disagree on Validity of Pre-Hire Arbitration Agreements

The United States Supreme Court upheld a Sixth Circuit decision that employees of Ryan's Family Steak House in Kentucky and Tennessee did not validly waive their right to sue the company in federal court by signing a pre-hire arbitration agreement with Employment Dispute Services Inc., a third-party arbitration service provider. *Ryan's Family Steak Houses Inc. v. Floss*.

The Sixth Circuit decision affirmed a U.S. District Court order from the Eastern District of Tennessee that Kyle Daniels was not required to arbitrate an Americans with Disabilities Act claim since Daniels was not provided with any consideration for agreeing to arbitrate any dispute that might arise. Furthermore, the agreement gave EDSI the right to revise the rules of the arbitration proceeding without notifying Daniels. The Sixth Circuit's holding also reversed a holding from the U.S. District Court for the Eastern District of Kentucky that Sharon Floss had to arbitrate her claims under the Fair Labor Standards Act.

Ryan's sought Supreme Court review after conflicting rulings regarding their pre-employment agreement, which were

first reported on in the Summer 2000 edition of Hospitality Industry Quarterly. In Mississippi last year, a federal district court concluded the arbitration clause was valid, holding that a restaurant manager who sued for race discrimination and retaliation must arbitrate the dispute. *Campbell v. Ryan's Family Steak Houses, Inc.* Similarly, the Alabama Supreme Court ruled in a 6-3 decision that employees of Ryan's had to arbitrate their sexual harassment-based tort claims. *Ryan's Family Steak Houses, Inc. v. Regelin*.

Ryan's charged the Sixth Circuit with displaying "poorly-disguised hostility to arbitration," but produced no actual evidence of this bias to the Court. The company further argued that the court of appeals was ignoring the covenant of good faith and fair dealing that should be implied under the Federal Arbitration Act.

Daniels claimed that the issue was one of contract law and not federal arbitration law. His position was that the Federal Arbitration Act does not require an arbitration agreement to be enforced where there are grounds in state contract law for revoking the contract.

Shortly after the Supreme Court deci-

sion, the Eighth Circuit ruled that a former employee of Ryan's Family Steak Houses in Missouri must arbitrate her sexual harassment claims against the company based on the same pre-employment agreement, despite the fact that she left employment with Ryan's and the employment agreement had been terminated prior to her filing charges with the EEOC and the state agency.

Kathy Lyster contended that the arbitration agreement she was required to sign with Employment Dispute Services, Inc. was an unfair contract of adhesion. A unanimous panel said that this claim lacked merit, explaining that it "recognized the potential that substantial arbitration fees may make an arbitration agreement unconscionable," but went on to say that "Lyster has not established on the record before us that undue harshness exists in the terms of the Agreement." Further, the court held that the restaurant was clear and unambiguous regarding her duty to arbitrate all claims, including Title VII claims, before bringing suit in state or federal court.

At the Board

NLRB Issues Affirmative Bargaining Order

NLRB Members John Truesdale and Wilma Liebman agreed with an administrative law judge that an affirmative bargaining order was justified to remedy New York's *Inn Credible Caterers, Ltd.*'s improper refusal to recognize and bargain with Hotel and Restaurant Employees Local 100. *Inn Credible Caterers, Ltd.*'s. The majority agreed with the judge's findings that company was a successor

employer of Aramark. When the Union demanded recognition and bargaining, the Inn was required to recognize the Union since they had hired of a substantial and representative complement of Aramark's employees on April 18, 1999. The majority further concluded that the Inn did not have a good-faith doubt as to the Union's majority status based on a May 6, 1999 petition allegedly signed by a number of

unit employees. The Board's decision declared that a successor employer is in violation of Sec. 8(a)(5) of the National Labor Relations Act if that employer withdraws recognition before a reasonable bargaining period has passed, regardless of whether that withdrawal is based the union's actual loss of majority status, or simply a good-faith doubt.

Arbitrator's Corner**Arbitrator Rules that Walt Disney World Committed Unfair Labor Practices**

Arbitrator J. Gale Chumley recently ruled that Walt Disney World Company committed unfair labor practices when it deliberately changed the wording in a 1994-1998 collective bargaining agreement with the Services Trade Council Union to allow Disney to unilaterally eliminate "dress and travel time" for employees who had to change into costume as part of their workday. Disney also failed to bargain in good faith for a revision of that clause in the 1998-2001 agreement, as well as failed to notify the Union about planned changes in employment conditions, according to the arbitrator. *In re Walt Disney World Co. and the Services Trades Council Union.*

The 1991-1994 agreement between Disney and the Union had provided that the Resort Division of Disney could eliminate dress and travel time if it did not require dressing on the premises and allowed employees to wear clothing off of Disney property. The slight modifications to the 1994-1998 agreement were not caught by the Union during a proofread-

ing session of the contract, but they altered the meaning of the clause significantly. The new clause stated that the Company could eliminate dress and travel time by not requiring employees to dress on the property and/or allowing employees to wear Company issued clothing off of Disney property.

The Union discovered the disparity between the two clauses after signing the 1994-1998 agreement, but did not file a grievance until 1999, after dress and travel time was eliminated at EPCOT, Magic Kingdom, and Fort Wilderness without Union notification or permission. A new park, Animal Kingdom, was opened during this time, and it did not provide dress and travel time for employees. Numerous other properties also had dress and travel time abolished.

The altered version of the clause appeared in a different format from the final company draft, indicating that the change was attributable to someone at the company. After hearing all the evidence, the arbitrator declared that the "question-

able change in the wording...had clearly been accomplished through some internal and intentional deception," which he likened to fraud. In ruling in the Union's favor, Chumley was careful to point out that an ordinary member of management would not initiate such conduct without ratification from a higher authority, nor would one have had access to modify the statement.

Having found that the clause was deliberately altered, the arbitrator ordered it restored to its 1991-1994 language. Similarly, Disney World's elimination of dress and travel time in reliance on the altered clause was incorrect, and the eliminations at EPCOT, Magic Kingdom, and Fort Wilderness were declared void. The arbitrator further provided that the parties jointly establish a committee to determine which employees may have been adversely affected by the loss of dress and travel time. Adversely affected employees might be entitled to back pay, according to Chumley.

From Page Three...**Opposite Conclusion...**

However, the court found that no rational jury could ever conclude that Plaintiff Biering has sufficient connection to a vessel in navigation and the "perils attendant thereon."

In this vein, the court held that, "the undisputed evidence establishes that at all relevant times the plaintiff worked the night shift, during which time the vessel did not cruise. As such, her employment did not require her to transverse the navigable waterways of the Missouri River. She therefore was not exposed to the "perils of sea," according to the Court. Because the court found that Biering did not attain seaman status, it granted summary judgment for Harvey's.

In the Iowa case, the court found the opposite, holding that "although one who

is injured while 'out to sea' will most likely qualify for recovery against the ship's owner under the Jones Act . . . it does not necessarily follow that only seafaring employees can enjoy Jones Act protection." The court ultimately held that a reasonable jury could conclude Lara was a "sea-based, Jones Act employee" because she "routinely worked on the Casino's fully operational ship located on the Missouri River."

In reaching this holding, the court also noted that the record indicated that the Casino treated Lara as a Jones Act employee. For example, the employee handbook stated that employees who spend 30% or more of their working time on a boat (as Lara did) were covered by the Jones Act, and the Casino's benefits

representative checked the box labeled "Employee Injury Boat/J.A. - pending" on Lara's return-to-work form. In addition, the court noted that the Iowa Workers' Compensation Commissioner consistently refuses to accept jurisdiction over claims by employees of riverboat casinos. Finding that Lara lacks a state law remedy, the court concluded that Lara would also be barred from a federal remedy unless she is considered a seaman.