

A pineapple is positioned on the right side of the image, standing upright in a field of vibrant green grass. The background is a clear blue sky with soft, white clouds. The overall scene is bright and natural. A white rectangular box with a dark teal border is centered on the image, containing the conference title and dates.

# THE HOSPITALITY LAW CONFERENCE

April 24 - 26, 2017 • Houston, Texas

# An Update on Discrimination, Harassment and Retaliation Case Law and Agency Matters and Practical Implications for Hospitality Employers

2017 HOSPITALITY  
LAW CONFERENCE

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APRIL 24 - 26



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- Laner Muchin, Ltd. is based in Chicago, Illinois and has 45 attorneys representing employers throughout the United States in all aspects of their labor and employment, employment litigation, employee benefits and immigration matters.
- My practice has been concentrated in defending employers in employment disputes throughout the country, counseling employers on their day-to-day labor and employment issues, drafting employment agreements and employee handbooks and conducting management training, as well as handling collective bargaining negotiations and arbitrations on behalf of employers.
- Advisory Council member for the Illinois Restaurant Association and an active member of the Illinois Hotel and Lodging Association.



# Notable Discrimination Case Law

- Sex Discrimination: Hively v. Ivy Tech Community College of Indiana, 7th Cir. 2017). Part-time adjunct professor brought action against community college, alleging she was denied full-time employment and promotions based on sexual orientation in violation of Title VII. The 7th Circuit Court of Appeals held that a person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes. Compare the *Hively* matter with the *Evans v. Georgia Regional Hospital* case (11th Cir. 2017); *Evans* held that discrimination based on sexual orientation was not actionable under Title VII.)



# Notable Discrimination Case Law (cont'd)

- Wrongful Termination Under the NLRA: *NLRB v. Pier Sixty, LLC*, 2017 BL 131230 (2nd Cir. No. 15-1841-ag-2017). After engaging in a vulgarity-laced Facebook post about a supervisor, the catering worker, Herman Perez, was terminated. Specifically, Perez became upset when the assistant banquet manager chided employees in a “raised, harsh tone” about talking among themselves as guests arrived at a catered event. Perez then stepped outside and used his mobile phone to post a message on Facebook that “Bob is such a nasty mxxx fxxx don’t know how to talk to people!!!!!! Fxxx his mother and entire fxxx family!!!! What a Loser!!!! Vote Yes for the Union!!!!!!” The posting – two days before employees voted for union representation – was visible to Perez’s Facebook friends and anyone else who visited his Facebook page. The NLRB found that Perez was illegally fired for a Facebook posting that was “distasteful” but legally protected. The 2nd Circuit Court of Appeals agreed with the NLRB, holding that Pier Sixty failed to show Perez’s online conduct was egregious enough to forfeit the protection of the National Labor Relations Act.



# Notable Discrimination Case Law (cont'd)

- Disability Discrimination: *Elmessaoudi v. Mark 2 Restaurant, LLC*, 2016 WL 4992582 (S.D. N.Y. 2016). Former food runner at the Mark, a restaurant owned and operated by Mark 2 Restaurant LLC in NYC, sued his employer for, among other things, disability discrimination for refusing to offer him a work schedule that would permit him to attend his therapy sessions. The employer did change the plaintiff's work schedule to allow him to report later to attend his therapy sessions. In granting summary judgment for the employer on the disability claim, the Court determined that if the plaintiff found the accommodation inadequate, the evidence showed that he never brought the alleged inadequacy to the employer's attention at the time.





# Notable Discrimination Case Law (cont'd)

- National Origin Discrimination (and Retaliation): *Mondal et al. v. DHG Management Co. LLC*, Case No. 1:15-cv-09607 (S.D. N.Y. 2015). In April 2017, the last of three workers at a bar in a boutique hotel in Midtown Manhattan who alleged that they were discriminated against because of their Bangladeshi origin – being called “Taliban,” “Bengali mafia” and other slurs – has settled suit with the hotel owner. The three men alleged that after working at the hotel’s bar for several years, discriminatory behavior against them because of their Bangladeshi origin began in 2013 and intensified in 2014. The workers included several examples of discriminatory behavior in their complaint, such as a co-worker writing on an order slip for one of the plaintiffs that he needed a coffee “black like you,” and another co-worker saying to one of the plaintiffs, “Hey Taliban the food is ready.” The three workers further alleged that after they complained to their supervisors and union representatives about the behavior, the discriminatory actions continued, their work status was threatened and their work assignments were changed in retaliation for their complaints.



# Notable Harassment Case Law

- *Andrade v. Arby's Restaurant Group Inc., Altamira Corp. And Pedro Moto*, 2016 WL 7211144 (N.D. Cal. 2016). Miriam Andrade started as a sandwich preparer and was subsequently promoted to cashier and then to shift lead, the position she held at the time of her termination. Andrade sued the Company, alleging, among other things, sexual harassment under the California Fair Employment and Housing Act (“FEHA”). She alleged her supervisor subjected her to sexual harassment by asking her out on dates, making comments about her body, sending personal text messages and trying to touch her and that despite telling the supervisor to stop asking her out and texting her, he persisted. Andrade also alleged that the Supervisor engaged in physical conduct toward her. Andrade reported the conduct of her supervisor to her Shift Supervisor. Subsequently, after Andrade participated in sending a notice to the Company that the employees intended to unionize and complaining of the “abusive work environment” caused by another manager’s physical abuse of employees in the workplace, she was confronted by this manager and then terminated shortly thereafter. The Court determined that Andrade sufficiently alleged elements of quid pro quo sexual harassment under FEHA. Under California law, where a supervisor is the harasser, the employer is strictly liable.





# Notable Harassment Case Law (cont'd)

- *Rosh v. The Gold Standard Café at Penn, Inc., et al.*, 2016 WL 7375014 (E.D. Penn. 2016). Unmy Rosh was a prep cook at Gold Standard Café. She reported to co-owners that she had been subjected to sexual assault and sexual harassment on multiple occasions by two co-workers. Although the co-owners told Rosh that they would talk to the two co-workers, the two co-workers continued to sexually harass Rosh. Despite further written and verbal complaints to the co-owners, the harassment persisted. After Rosh complained a final time, she alleges that one of the co-owners stopped speaking to her, reduced her work hours and told her to stop the harassment on her own. Rosh subsequently resigned her employment and sued the Company for sexual harassment, retaliation and constructive discharge. The Court determined that Rosh alleged sufficient facts that would lead to liability for the Gold Standard Café. The Court noted that Rosh notified the co-owners of the ongoing sexual harassment on at least four occasions, yet the co-owners' actions were not reasonably calculated to prevent further harassment. The Court also held that Rosh sufficiently pled facts to support constructive discharge and retaliation claims.



# Notable Retaliation Case Law

- *Meneske v. Harrah's Chester Casino & Racetrack*, 649 F. App'x 142 (3d Cir. 2016). Meneske worked at Harrah's as a beverage server. She is Turkish and Muslim. After she was terminated in July 2011 for making a threat to a co-worker, she sued the Company, alleging, among other things, that it unlawfully retaliated against her for complaining about harassment in violation of Title VII. The 3rd Circuit Court of Appeals affirmed summary judgment in favor of Harrah's. In doing so, it agreed with the district court that Meneske could not demonstrate a causal link between her complaints and termination – the time period between Meneske's most recent complaint (March or April 2011) and her termination (July 2011) did not, on its own, raise an inference of causation.



# Notable Retaliation Case Law (cont'd)

- *D'Aquin v. Giovani*, 2017 WL 319013 (E.D. La. 2017). D'Aquin filed a *pro se* lawsuit alleging that while he worked as a volunteer at the Ozanam Inn, an unidentified defendant or defendants sexually harassed and possibly sexually assaulted him. He further alleged that after he complained about the behavior of the defendants, another unidentified defendant retaliated against him by demoting him and eventually making him leave the Inn. The Court determined that although D'Aquin's complaint alleged actionable conduct under Title VII, he failed to establish that any of the defendant's were his "employer" under Title VII. Although D'Aquin stated that he "worked as a volunteer" at the Inn, the complaint did not allege that any of the defendants employed him and D'Aquin did not allege any facts suggesting a plausible employment relationship.



# Notable Agency Settlements

- Age Discrimination: *EEOC v. Texas Roadhouse*, Civil Action No. 1:11-cv-11232-DJC (D. Mass 2017). EEOC had filed lawsuit alleging that Texas Roadhouse had engaged in a nationwide pattern or practice of age discrimination in hiring hourly front-of-the-house employees. Case was scheduled for retrial in May, 2017 after it had previously resulted in a hung jury after nearly a four-week trial earlier this year. Case settled for \$12 million pursuant to a 3.5 year consent decree, which included the Company agreeing to change its hiring and recruiting practices.
- Disability Discrimination: *EEOC v. Diallo's Entertainment, Inc., d/b/a Diallo's of Houston*, Case No. 4:16-cv-02909 (S.D. Tex. Jan. 2017). EEOC sued Diallo's under the ADA, alleging that it forced an employee to provide medical documentation to prove she was not HIV-positive, and then fired her when she failed to provide such documentation. Default judgment was entered against Diallo's for \$139,366. The EEOC in its press release stated that "it is a violation of federal law to make a disability-related inquiry unrelated to an employee's job requirements or to any legitimate business necessity."



# Notable Agency Settlements (cont'd)

- Disability Discrimination: *EEOC v. OHM Concessions Group, LLC, d/b/a Dunkin Donuts*, Civil Action No. 1:15-cv-01946 (D. Md. 2015). This suit brought by the EEOC involved a former regional manager who was diagnosed with breast cancer and requested unpaid leave for surgery, chemotherapy and radiation treatment. She alleged that the Company refused to provide a reasonable accommodation and instead abruptly terminated her. Case settled for \$151,000 among other non-economic relief. The EEOC in its press release stated “Providing a leave of absence for an employee who needs medical treatment related to a disability is not only the decent thing to do – it is required by federal law unless the employer can show it would impose an undue hardship.”



# Notable Agency Settlements (cont'd)

- Pregnancy Discrimination: *EEOC v. D&S Shipley Donuts, d/b/a Shipley's Donuts*, Case No. 4:14-cv-03712 (S.D. Tex. 2015). The EEOC sued Shipley's, alleging that it forced an employee to take unpaid leave after Shipley's owner/general manager received information that the employee may be pregnant. According to the EEOC, Shipley's would not allow the employee to continue working unless she provided a doctor's release indicating that her pregnancy was not "high risk". The lawsuit further alleged that when the employee failed to provide such a release, and after she and her mother complained that Shipley's could not require her to do so, she was fired. The case settled for \$45,000 and significant non-monetary relief. In its press release, the EEOC stated that "The Supreme Court decided many years ago that a pregnant employee is solely responsible for making decisions that affect her ability to continue her job, and any duties associated with her job. An employer that imposes its own personal beliefs and concerns about an employee's pregnancy on her violates federal law and invites legal action."





# Notable Agency Settlements (cont'd)

- Sexual Harassment: EEOC v. R.V. Associates Ltd. d/b/a Windsor Inn, Case No. 1:16-cv-00197-RDB (D. Md. 2016). The EEOC filed suit, alleging that the restaurant owner sexually assaulted a female employee and that when others also harassed the employee, the Restaurant failed to stop the harassment. The female employee was forced to quit due to the intolerable abuse. The EEOC also alleged that the owner engaged in unwelcome sexual touching of other female employees and made sexually offensive comments, including requests for sexual favors, to female employees. The EEOC further alleged that the Restaurant suspended and later refused to increase the work hours of a female employee in retaliation for her rejection of the owner's sexual advances and filing of a charge of discrimination. The Restaurant settled the sexual harassment and retaliation case with the EEOC for \$200,000 and a variety of other non-economic relief.



# Practical Pointers

- Make sure your employment-related policies and job descriptions are legally compliant and drafted in a practical and effective way.
- Make sure your supervisors and managers are trained on your company's policies and that they understand the company's expectations and their obligations.
- Conduct prompt and thorough investigations before taking disciplinary or termination measures.
- Make sure that potentially sensitive discipline or termination decisions are vetted through Human Resources, in-house counsel and/or outside counsel.
- Prepare effective documentation memorializing the company's decisions.
- The manner in which employment actions are communicated to employees is very important in protecting the company.



# ANY QUESTIONS?

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