Hospitality Case Review: The Top 100+ Cases That Impacted Us This Past Year

Ninth Annual
Hospitality Law Conference
February 9-11, 2011
Houston, Texas

Karen Morris, Esq. Diana S. Barber, J.D., CHE

KAREN MORRIS
2670 Highland Avenue
Rochester, NY 14610
(585) 256-0160
Judgekaren@aol.com

Karen Morris is Town Justice in Brighton New York, a Professor of Law at Monroe Community College (MCC), and an author. She was recently elevated to the title of Distinguished Professor, awarded by the Chancellor of the State University of New York.

She has written several textbooks including Hotel, Restaurant and Travel Law and New York Cases in Business Law. She also co-authors Criminal Law in New York, a treatise for lawyers. She writes a column for Hotel and Motel Management Magazine entitled, *Legally Speaking*.

Among the courses she has taught are Hotel and Restaurant Law, Business Law I and II, Constitutional Law, Movies and the Law, "The Michael Jackson Trial" and "O.J. Simpson 101; Understanding Our Criminal Justice System." Her course offerings include some in traditional classroom settings and others online. She won the Excellence in Teaching Award in 1994, having been selected by her peers, and the Chancellor's Award for Teaching Excellence in 2002, conferred by the Chancellor of the State University of New York.

Judge Morris writes newspaper commentaries on various legal issues and penned a monthly column for the Greater Rochester Track Club entitled, "The View from the Back of the Pack."

Professor Morris is a past president of the Greater Rochester Association for Women Attorneys, Alternatives for Battered Women, Inc, the Northeast Academy of Legal Studies in Business, and Text and Academic Authors Association, a national organization that advances the interests of academic authors. She also is a past Dean of the Monroe County Bar Association Academy of Law and past president of Brighton Kiwanis. She was named Kiwanian of the year for 2008. In 2009, she won the Humanitarian Award, conferred by the Monroe County Bar Association.

Her favorite volunteer activities include being a Big Sister in the Big Brother program, which she has done for thirteen years, and a Girl Scout leader for an inner-city troop.

She received her Juris Doctor degree from St. John's University and earned a Masters of Law (LL.M.) in Trade Regulation from New York University. She was previously an Assistant District Attorney, an attorney in private practice and in-house counsel for Macy's Department Stores. She has participated in several Macy's Thanksgiving Day parades as a clown make-up artist, Captain of the Bugs Bunny and Tortoise-and-the-Hare Floats, and a balloon handler for Clifford, the Big Red Dog.

DIANA S. BARBER
5925 Masters Club Drive
Suwanee, GA 30024
(770) 813-9363
dsbarber@gsu.edu

Diana S. Barber, J.D., CHE, is a full-time Lecturer at the Cecil B. Day's School of Hospitality Administration in the J. Mack Robinson Business College at Georgia State University, Atlanta, Georgia; where she has taught since the summer of 2003. She teaches hospitality law and an introductory course in hospitality. She is also the Program Director of the School of Hospitality's Study Abroad program including a 3-week summer course on European Hospitality Experience to France, Monaco, Italy, Switzerland and Germany. Ms. Barber is the recipient of the 2010 Hospitality Faculty of the Year award, an award bestowed by the students of the School of Hospitality. In addition, Ms. Barber was recently inducted into Phi Beta Delta Honor Society for International Scholars.

Ms. Barber is also a hospitality legal consultant specializing in providing education to hospitality companies on preventative measures to reduce legal exposure, as well as a full range of legal services to hotels, motels, restaurants, event planning companies and clubs. She has over twenty-two years of legal hospitality experience.

Also, Ms. Barber began her law practice as an associate attorney at King & Spalding in Atlanta, Georgia after graduating cum laude from Walter F. George School of Law at Mercer University in Macon, Georgia. She then spent over fourteen years as vice president and associate general counsel for The Ritz-Carlton Hotel Company, LLC. She is a member of the State Bar of Georgia, The Florida Bar, Meeting Professionals International, G.A.H.A., and the Georgia Hotel & Lodging Association.

Ms. Barber has given numerous presentations for hospitality related associations and hotel companies and has written many articles for hotel/motel security periodicals, meeting planner periodicals, the Georgia Restaurant Forum, Hotel-Online and the American Hotel & Lodging Association. Since 2007, Ms. Barber has been on the editorial board of Hospitality Law monthly newsletter. In addition, she has served as a litigation industry expert. She also writes a monthly column for the Georgia Hotel & Lodging Association newsletter.

Diana Barber is "Of Counsel" with Berman Fink Van Horn, PC, a law firm in Atlanta, Georgia, which is also the general counsel to the Georgia Hotel & Lodging Association and continues to handle "hot-line" issues from members of GHLA.

Hospitality Case Review: The Top 100+ Cases That Impacted Us This Past Year

Ninth Annual Hospitality Law Conference
February 9-11, 2011
Houston, Texas

ADA/Facility

1. *Fiedler v. Ocean Properties, Ltd.*, No. CV-08-236-B-W (D. Me. 02/08/10). Plaintiff reserved a wheelchair accessible room and made inquiries about the accessibility of the room after he made his reservation. A manager sent him an e-mail with the requested information and Plaintiff cancelled his reservation. He filed a complaint against the hotel for ADA and state law violations. Defendant argued that Plaintiff did not have standing to proceed since he has not sustained an "injury-in-fact" proving that he personally encountered a barrier to access or had actual knowledge of the barrier. Plaintiff argued that the language of the ADA does not require a person to "engage in a futile gesture" by visiting a place where an individual with a disability will be discriminated against. The court found that the legal requirement is met when a disabled person "is currently deterred from attempting to gain access" to the establishment. The court said that Plaintiff's decision not to stay, if made because of the hotel's ADA violations, was sufficient to confer standing. The court said that Plaintiff survived summary judgment "by the very barest of margins."

2. *Antoninetti v. Chipotle Mexican Grill Inc.*, Nos. 08-55867, 08-55946, 09-55327, 09-55425 (9th Cir. 07/26/10). Plaintiff, a paraplegic, filed suit under ADA alleging that customers in wheelchairs cannot see the food prep because of the height of the counter. In 2007, Defendant created a "customers with disabilities policy" providing accommodations for disabled customers. A bench trial denied Plaintiff injunctive relief but awarded him attorney's fees and damages under California law. Plaintiff appealed. The circuit court reversed the district court's ruling denying Plaintiff injunctive relief because he failed to show irreparable injury since he did not return to either of the Chipotle restaurants after the adoption of the disability policy, and his "purported desire" to return was insincere. The court remanded the case and vacated the damages award.

3. *Brandt Stites v. Hilton Hotels Corp., et al.,* No. B209485 (App. Cal. 12/07/09). Plaintiff and his disabled brother arrived at the Hampton Inn in San Clemente accompanied by a service dog. Plaintiff argued that they were denied accommodations due to discrimination as the desk clerk said that Plaintiff needed to provide proof that the dog was medically necessary and refused to examine the dog's collar to see the service dog certificate. The desk clerk stated that Plaintiff and his brother were denied accommodations because they were inappropriately dressed, drunk and the dog was not leased. When asked to leash the dog, Plaintiff became angry and abusive. A trial court granted summary judgment to Defendant and Plaintiff appealed, arguing that the hotel chain was vicariously liable because the inn was

an agent. The court disagreed and denied Plaintiff's request for a continuance finding that he had ample time to question witnesses such as the front desk clerk, and that the testimony was not necessary to determine the merits of the case.

4. *Miller v. Justin Shade Ladd, et al*., No. CV 08-05595 NJV (N.D. Cal. 07/20/10). Plaintiff filed a suit alleging that it failed to accommodate her disability because it would not allow her entry with her service dog present. Plaintiff said she was prescribed a dog to treat her anxiety and post traumatic stress disorders. Defendant argued that Plaintiff's dog is not a service animal. Federal regulations do not have any standards or requirements specifying the amount or type of training an animal must receive to qualify as a service animal, nor the type or amount of work the animal must provide the disabled individual. The court found that the relevant issue is whether the animal helps the disabled person perform tasks to ameliorate the disability. Plaintiff said the dog is trained to alert her when she begins to suffer from panic attacks. The court denied the summary judgment stating that Plaintiff did present enough evidence to present a question as to whether her dog qualifies as a service animal.

5. *Access 4 All, Inc. v. Caesar's Atlantic City Hotel and Casino, and Bally's Park Place.* 2010 WL 48605 (N.J., 11/23/10). Plaintiff's predecessor visited Defendant casinos and found several ADA violations. He began this lawsuit and then died. Plaintiff, also disabled, sought to continue the lawsuit. He visited the hotel, noted the violations, and became the lead plaintiff for the lawsuit. The casino contested his standing and Plaintiff is required to show a real and immediate threat of future injury or ongoing harm. The court cited a four-factor test to determine if the required "injury in fact" existed. These include: 1) Plaintiff's proximity to Defendant's place of public accommodation; 2) Plaintiff's past patronage; 3) the definitiveness of Plaintiff's plan to return; and 4) the Plaintiff's frequency of nearby travel. Plaintiff lived a lengthy distance from the casinos; he had never previously patronized the properties; he rarely travelled to nearby places, and his plans to return were speculative. The court concluded that Plaintiff's standing was "questionable" and so ordered an evidentiary hearing.

Casino

6. *Alpha Holloway v. Ameristar Casino St. Charles Inc., et al*., No. 4:07 CV 218 DDN (E.D. Mo. 01/12/10). Plaintiff was arrested at Defendant's casino by a highway patrol trooper when Plaintiff began fighting with other patrons due to her causing a disturbance. Plaintiff filed a complaint against the casino claiming that she was subjected to physically abusive conduct and excessive force as part of the arrest. Defendant said that its employees did not touch, arrest, detain or deny Plaintiff's constitutional rights, and that probable cause supported the trooper's decision to arrest her. The court found that Plaintiff offered no testimony that the casino's security guards touched her or that she felt threatened by them. The court also dismissed claims that Defendant violated her civil rights and was guilty of malicious prosecution. Surveillance tapes confirmed that Plaintiff participated in a fight and that the trooper had probable cause to arrest her. The court granted summary judgment on all claims.

7. *Blackford v. Prairie Meadows Racetrack and Casino, Inc*., No. 08-0586 (Iowa 02/12/10). Plaintiff won more than $9,000 playing shot machines at Defendant's casino but the winnings were forfeited because it was discovered that he had previously been involuntarily and permanently banned from the casino. Plaintiff filed a complaint against the casino seeking to recover based on his claims of conversion, libel, false imprisonment and abuse of process. Only the claim of conversion survived summary judgment. A trial court declared that the casino had a right to confiscate his winnings, finding that once a person is banned from a facility, all "promises, agreements or contracts that arise from wagers or bets are void … the facility would not be required to pay winnings to such person" and a jury found in favor of the casino. Plaintiff appealed, and the appeals court declared that the trial court erred in its finding that the casino would not be required to pay winnings to a person involuntarily excluded from the property, and reversed and remanded the decision. Defendant asked the Supreme Court of Iowa to review the ruling and it declared that under the state's gambling laws, the casino had clear authority to ban Plaintiff from its casino. The law allows a casino to remove any person "deemed undesirable" without any excuse or reason given, so long as the decision was not based on any of the protected civil rights. The court also found that the casino had a right to take control over his winnings and the court vacated the ruling of the appeals court and affirmed the trial court's ruling in favor of Defendant.

Choice of Law/Jurisdiction

8. *Poulos v. Summit Hotel Properties, LLC*, 2010 WL 4879189 (S.D., 11/23/10). Plaintiff was a hotel employee and a whistleblower (the details of what he disclosed are not provided in the case). His employer thereafter retaliated with negative evaluations and ultimately termination. The case had connections with the two states of Georgia and South Dakota. Georgia law does not protect whistleblowers; South Dakota law does. Plaintiff claimed South Dakota law should apply; the employer argued for Georgia law. Plaintiff was hired in Georgia, lived and worked in Georgia, and his evaluations were delivered to him in Georgia. The employer is a South Dakota company. Plaintiff's boss worked in South Dakota, the company's employee handbook and code of ethics were issued from South Dakota, the decision to retaliate was made in South Dakota, and the call to Plaintiff telling him to resign or he would be terminated was made from South Dakota. Further, a restrictive covenant in Plaintiff's employment contract stated in the choice-of-law provision that South Dakota law was applicable. The court found South Dakota law applied and so denied the employer's motion for summary judgment.

9. *Orazi v. Hilton Hotels,* 2010 WL 4751728 (E.D.Pa., 11/22/10). Plaintiff lives in Pennsylvania. He tripped and fell in a hotel bathroom while a guest at a Hampton Inn in Allen, Texas. He sued the hotel in Pennsylvania. The Hampton Inn moved to dismiss for lack of personal jurisdiction. Plaintiff claimed the long arm statute applied. He had made his reservations via the Internet at Hilton's website. The court noted that the contacts with Pennsylvania would need to be continuous and systematic. Plaintiff's complaint contained only a conclusory assertion that Hampton Inn "regularly conducts and/or transacts business in the City and County of Philadelphia, Pennsylvania". This, the court said is "insufficient to support jurisdiction." Plaintiff noted that a Hampton Inn Hotel was located in downtown

Philadelphia and it provides a directory of other Hampton Inns around the country, including the one in Allen, Texas. The court noted that sharing a brand identity with the "in-forum" Hampton hotel is insufficient to support jurisdiction. Likewise, the advertising materials distributed by the Philadelphia Hampton Inn would not support jurisdiction. They were not sufficiently extensive and not targeted specifically to Pennsylvania residents. Therefore, the court lacked general jurisdiction over the Texas inn.

10. *Colbert v. McDonald's Restaurant*, 2010 WL 4340687 (D. D. C., 10/29/10). Plaintiff sued a McDonald's restaurant in federal court for food poisoning and harassment. Plaintiff was a resident of the District of Columbia and the eatery was located in the District of Columbia. Plaintiff sought $100,000 in damages. The court, on its own motion, dismissed the case for lack of subject matter jurisdiction. It noted that the complaint presented no federal question. Further, while the amount in controversy exceeded the threshold amount for diversity jurisdiction of $75,000, both the Plaintiff and Defendant were residents of the District of Columbia. Said the court, "Plaintiff's recourse lies, if at all, in the Superior Court of the District of Columbia."

Contracts

11. *James v. InterContinental Hotels Group Resources, Inc*., et al., No. 09-cv-781 (N.D. Ill. 02/10/10). Plaintiff, an employee with AT&T, stayed at Candlewood Suites while on a business trip. She made complaints during her stay to the hotel's manager and the hotel offered Plaintiff a free two-night stay, which was declined. Plaintiff asked for a formal apology and explanation for the incidents. She later received hotel vouchers for $150 from InterContinental, but said she did not request them. The hotel manager told Plaintiff's employer, whom the hotel had a relationship with that Plaintiff engaged in work-related misconduct, alleging that Plaintiff asked to be credited for the stay with travel vouchers for her personal use rather than having her corporate credit card reimbursed. AT&T commenced an investigation and took disciplinary action against Plaintiff and Plaintiff sued Defendant alleging tortious interference with business relations and prospective economic advantage claims. The court found that an at-will employment relationship may form the basis for a cause of action for tortious interference with business relations and therefore denied the Defendants' motion to dismiss. The court found that Plaintiff had an expectation of continued employment in her current position, based on her exemplary work record, positive performance evaluations and previous promotions.

12. *Wyndham Hotel Management, Inc. v. Dibble IV,* 2010 WL 4781892 (N.D. Ill., 11/10/10). Partners in the ownership of a hotel hired Wyndham to manage it. Additionally Wyndham loaned the partnership $1,750,000. Two years later the hotel failed and the management contract was terminated. Wyndham sought repayment of the loan. The partnership claimed as a defense that the cause of the hotel's failure was Wyndham's mismanagement. The court granted summary judgment for the franchisor. The court cited the well-known contract interpretation rule: "Where the terms of a contract are clear and unambiguous, a court must enforce those terms as they are written." The court found the following contract provision unambiguous: The obligation to repay the outstanding principal, upon termination of the

[management agreement] "for any reason" is "absolute and unconditional, and all payments shall be made without setoff, deduction, offset, recoupment or counterclaim."

13. *Shahata v. W Steak Waikiki LLC*, No. 09-00231 ACK-KSC (D. Hawaii 06/25/10). Plaintiff accepted the executive chef position at Defendant's restaurant and signed a contract, however, Plaintiff was removed from the executive chef position because he was "not aggressive enough" and Defendant terminated Plaintiff's employment before his one-year contract was to begin. The language of the contract provided for an annual salary and required Plaintiff to commit to one year, with the contract to be "reviewed and extended if both the company and employee agree" at the end of the one-year term. The contract also allowed for termination based on the employee's inability to perform the functions of the position. Defendant stated that once Plaintiff began working it was obvious that he couldn't perform in the executive chef position and they offered him a line position. The court found that the language in the contract led to questions of material fact as to whether the contract had a one-year agreement or if the employment was at-will, and whether Plaintiff was in breach of the contract. The court found that Defendant was entitled to summary judgment on Plaintiff's intentional infliction of emotional distress claim because he failed to show any physical injury or severe emotional distress as a result of his termination, or show that the restaurant was responsible for any "outrageous" conduct. The court dismissed Plaintiff's claims for wrongful discharge.

14. *National Service Industries, Inc.* v. *Here to Serve Restaurants, Inc.,* __S.E.2d__, 2010 WL 1946949 (Ga. App., 5/14/10). Plaintiff supplied linens to restaurants. Defendant owned six restaurants and contracted with Plaintiff for linen services. Plaintiff relocated its plant and experienced problems resulting in delivery shortages. In response, Defendant terminated its agreement with Plaintiff. Plaintiff claimed Defendant was in breach for failing to give Plaintiff notice and an opportunity to cure as required by contract. Plaintiff invoked the liquidated damage clause contained in the contract. It required payment of 40% of the average weekly fees times the number of weeks remaining in the unexpired term. The amount was close to half a million dollars. The court cited the classic rule for enforcement of liquidated damage clauses – they are enforceable only if the actual damages are difficult or impossible to estimate and the sum is a reasonable pre-estimate of the probable loss resulting from a breach. Here no evidence was offered as to how the sum sought was calculated or whether it was reasonably related to the probable loss. Therefore, the court declined to enforce it. Judgment was entered for the restaurants.

15. *Underwood Anderson & Associates v. Lilo's Italian Restaurant, Inc.* __So.3d__, 2010 WL 2219727 (Fla. App., 06/04/10). Defendant restaurant bought flood insurance from Fidelity National Insurance Company through insurance agent Underwood Anderson. Hurricane Ivan destroyed the restaurant in September 2004. The eatery made a claim for what it believed was the full amount of the policy, $275,600. Turns out the policy only covered $150,000. The restaurant filed a claim against the agent for negligent procurement. The agent claimed the restaurant asked to reduce its coverage, which the restaurant denied. A jury found the agent 90% negligent in reducing the flood coverage, which resulted in a loss to the restaurant

of $125,600 (the difference between the $275,600 coverage the restaurant believed it had and the $150,000 Fidelity paid).

16. *Madison 380 Broome Realty, Inc. v. Umberto's Clam House,* 26 Misc.3d 137(A), 2010 WL 447002 (NY Sup. App. Term, 02/09/10). Defendant restaurant's lease with Plaintiff landlord specified that tenant was to pay as additional rent 15% of any real estate tax increase. Plaintiff's taxes increased. Plaintiff delayed awhile in seeking the 15% increase from Defendant but eventually did. The restaurant argued that landlord's delay constituted laches and relieved the restaurant of its obligation to shoulder a portion of the cost. The court noted that escalation clauses are common in commercial leases and have been approved and enforced according to their terms. Additionally the lease contained a "no waiver" provision stating that delay in enforcement of any rights of landlord does not constitute a waiver to assert those rights at a later time. The court thus affirmed the grant of summary judgment in favor of the landlord.

17. *SUS, Inc. v. St. Paul Travelers Group,* __NYS2d__, 2010 WL 2606707 (App. Div., 07/01/10). Plaintiff SUS owned and operated a restaurant. It leased the property from Plaintiff New Prospect. In 2008, a fire totally destroyed the restaurant including the building and its contents. At the time, SUS had two insurance policies, one providing commercial general liability coverage, and the other business owners' property insurance. New Prospect was named as an additional insured on the former but not the latter. The Common Policy Declarations listed Charter Oak as the insuring company. Charter Oak is a wholly owned subsidiary of Travelers Insurance. The insurance company denied certain claims and this action resulted. SUS sued various Travelers companies as well as Charter Oak Fire Insurance Company. The Travelers companies denied liability. The court held that "It is well settled that liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary." Instead, there must be direction supervision and control by the parent in the management of the subsidiary to impose liability. No evidence existed here that such control was exercised. Therefore, the action against Travelers was dismissed. The court further dismissed SUS' claim for damage to the property, noting that, while the policy covered business personal property, coverage for real property was limited to the situation where SUS became legally obligated for property damage arising from a covered event. No such liability resulted in this situation (apparently, SUS was not responsible for the fire.) Hopefully New Prospect had its own insurance on the building. Read your policy!

18. *Fratelli's Pizza and Restaurant Corp., v. Kayzee Realty Corp.,* 74 AD3d 481, 902 NYS2d 534 (Sup. Crt. 06/08/10). Plaintiff entered into a 16-year lease with Defendant landlord. The lease contained a restrictive covenant barring the landlord from renting to any tenant that sells the same type of food sold by Plaintiff (pizza, etc.). The covenant further provides that if a tenant commences such sales, the landlord is required to take steps to "have the tenant cease and desist from those sales." Plaintiff's lawsuit alleged that a tenant was selling food similar to Plaintiff. The landlord defended on the ground that the other tenant's lease predated Plaintiff's. The court concluded that a restrictive covenant cannot be enforced against a competing tenant whose lease predates the covenant's execution. Two exceptions

exist which did not apply in this case – 1) the competing tenant's lease is falsely dated; or 2) the competing tenant, prior to entering its lease, had notice of the landlord's intention to enter into the covenant. The case was thus dismissed.

19. *Ramparts, Inc. d/b/a Luxor Hotel & Casino v. Fireman's Fund Insurance Co.,* 2010 WL 2326072 (US Dist. Crt, 06/07/10). The Luxor casino in Vegas, Baby Vegas, contracted with a developer to construct and operate a restaurant called the Cathouse Lounge. The developer gutted the space, made structural modifications, and installed new fixtures and equipment. One night while a large crowd was present, the floor collapsed, dropping almost a foot. The structure of the hotel and lounge were damaged. The county mandated the lounge be closed pending repairs. Both the Luxor and the developer paid to repair the damage to their respective property. The cause of the accident was determined to be insufficient renovations by the developer. The Cathouse reopened in three weeks and submitted a claim to its insurance company. The Luxor also sought compensation as an "additional insured." The lease between the casino and developer required that Luxor be so named on all insurance policies. The developer's insurance policy restricted the coverage of additional insured to indemnification for money it paid to people injured by the developer's acts or omissions. The policy did not provide for compensation to the casino for its own losses. However, the case does not end there. The casino invoked the Unfair Insurance Claims Practices Statute, a consumer protection law adopted by numerous state legislatures. It requires that insurance companies respond to claim letters within 30 days of receipt. The insurance company in this case waited months. The penalty for violation is mandatory payment of the claim; true even though the policy does not otherwise cover the loss. The Luxor thus received reimbursement for its expenses even though the policy did not cover the loss. Sometimes the back door can be a great alternative.

20. *Alafogianis v. Guffey*, 934 NE2d 1267, 2010 WL 3853300 (Ind. App., 10/04/10). Appellee performed various heating, air conditioning and refrigeration services at Appellant's three restaurants over a two-year period. For each service call, an invoice was provided before Defendant's employee left the premises. Defendant maintained an open account for each restaurant and periodically provided Plaintiff with account statements. In June 2008, Plaintiff refused to make any more payments. Appellee filed suit and was awarded a judgment in the amount of $20,652.67. At trial, for the first time, appellant claimed that Appellee's work was poorly done and the charges excessive. On appeal, the court found that an account stated existed. Said the court, an account stated is an agreement between the parties that all items of an account and the balance are correct, together with a promise, express or implied, to pay the balance. It operates as a new contract without the need for renewed consideration and without the need for the plaintiff to plead and prove the creation and performance of each contract underlying the account. Said the court, "An agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time." Here, Appellee provided appellant with invoices when each job was performed, and periodically sent statements of the open accounts, all without evoking any complaints from Appellant. This is sufficient evidence that an account stated exists. Judgment was therefore affirmed.

Discrimination/Racial

21. *Jones, et al., v. Indy 104, LLC d/b/a The Ram Restaurant and Brewery, et al*., No. 1:08-cv-01128-SEB-TAB (S.D. Ind. 06/02/10). Plaintiff and his two sons, all African Americans, joined a group of Caucasian friends at Defendant's restaurant during a very busy time just before the Indianapolis Colts playoff game. When the Plaintiffs attempted to order more food and beverage, the waiter told them that they could not place additional orders and needed to finish so that the restaurant could accommodate waiting guests. The Joneses and other guests asked why they were being kicked out, and the assistant manager explained that the restaurant was trying to serve as many guests as possible before the start of the game. Jones's son followed the manager into the kitchen area of the restaurant where he cursed at him and asked for further explanation. The manager again went to the table to explain, when Plaintiff asked if they were being removed because they were black. The manager left the table and returned with the restaurant's black executive chef, who also explained the request was not racially motivated. Plaintiffs filed a complaint alleging race discrimination, but the court found that none of the evidence constituted direct discrimination. The court granted summary judgment for Defendant.

Dram Shop

22. *Staffa v. Remvac Inc., et al*., No. A-5524-08T2 (N.J. Super. Ct. App. Div. 07/01/10). Plaintiff, severely injured in a car accident, won a jury verdict against Defendant. Staffa and his friend, John Buchalew, drank much of the day at the bar and Buchalew, who was driving Staffa's van, crashed and Staffa suffered severe injuries and is a paraplegic because of the accident. Staffa filed a complaint against Defendant claiming that the bar served Buchalew alcohol when he was visibly intoxicated. The jury found Defendant Moore's 20 percent at fault, Buchalew 45 percent at fault and Staffa 35 percent at fault, and awarded $3.25 million in damages, with $650,000 against Moore's for compensatory damages, plus interest and costs. Defendant appealed arguing that Staffa's attorneys made prejudicial comments in their closing argument meriting a new trial such as asking the jury to "send a message" by holding the bar liable for the accident. The court also said that while it disagrees with the remarks made by Staff's attorneys, directing the jury to "send a message," because Defendant's attorneys did not object to the comments during the argument, the court declared that the statement could not have been so egregious to affect the jury's verdict. The court affirmed the ruling and dismissed Defendant's request for a new trial.

23. *Christopher Wright v. Judson Weaver, et al.,* No. 4:07-CV-369 (E. D. Tex. 12/22/09). Plaintiff sued for negligently failing to provide security and under the Texas Dram Shop Act after Plaintiff was injured during a fight in the lounge parking lot. Defendant claimed it did not own the bar and the court found there to be a question of fact as to ownership of the lounge. Although the court found that Wright could not prevail on his claims of negligent activity, on the claims of premises liability, the court did find that criminal contact at the bar was in fact foreseeable. The bartender testified that she spoke to the management about the lack of security after three altercations that occurred in the months before the Plaintiff's incident, and two 911 calls in February, 2007, documented a criminal trespass incident along

with a request for an ambulance after an assault resulted in injury. The court found that these past assaults were sufficiently similar to place the owners on notice that disputes could lead to altercations and/or injuries, and that questions exist as to whether the Plaintiff's injury was foreseeable. Defendant's motion was denied.

24. *Hendrix v. Jinx-Proof LLC d/b/a Beauty Bar, et al*., No. 117015/07 (N.Y. 04/30/10). Plaintiff filed a complaint against Defendant for negligent hiring of a security guard and Dram Shop Act violations. Plaintiff claimed the security guard asked Plaintiff and her friends to leave the bar around 4 a.m. since the bar was closing. Plaintiff and her friends didn't want to leave, a fight broke out and Plaintiff allegedly threw her drink at the security guard who in turn threw a glass at Plaintiff causing a laceration on her cheek. The court found that Defendant did not have a duty to conduct a background check since the Defendant had no notice of the guard having dangerous propensities, and declared that Defendant was entitled to summary judgment on Plaintiff's negligent hiring and supervision claim. The court also found that Beauty Bar and the security guard were entitled to summary judgment on any Dram Shop claims related to the security guard because the bar provided uncontroverted evidence that he was not intoxicated on the evening of the incident. The court also found that Plaintiff failed to show she was injured as a result of her friends' intoxication. The court declared that it would not address whether the bar served Plaintiff's friends while they were intoxicated, because the bar sufficiently showed that their alleged intoxication did not cause Plaintiff's injuries.

25. *Tranquilino v. Tiffany's Restaurant,* 413 N.J. Super. 82, 992 A.2d 829 (N.J., 04/28/10). Plaintiff was injured when his motorcycle hit another vehicle. Prior to the accident he was a patron at Tiffany's Restaurant which served him alcohol after he became visibly intoxicated. His BAC at the time of the accident was .19; the legal limit was .08. Defendant restaurant claimed that it was not liable because the person injured was the wrongfully served patron. The court reviewed the history of the state's Dram Shop Act and decided in favor of the patron. In New Jersey, a Dram Shop action can be brought by the patron who was "negligently" served alcohol. In this context negligence is defined as serving a person who commits a perceptible act or series of acts which present clear signs of intoxication."

Employment/Arbitration

26. *Velaszuez v. S.B. Restaurant Co*., 2010 WL 4683720 (Nev., 11/09/10). Plaintiff was employed for 17 months as a food preparer at the Elephant Bar in Nevada. She filed a claim of sexual harassment with the EEOC, and then sued. Defendant moved to compel arbitration, which Plaintiff resisted. When she was hired, Plaintiff signed an arbitration clause agreeing to submit disputes to an arbitrator. The law in Nevada declares arbitration clauses to be valid and enforceable unless they are unconscionable, either substantively or procedurally. In this case, the clause was unconscionable on both grounds. Per the court, it was substantively unconscionable because it requires each party to bear its own costs for the arbitrator, court reporter "and incidental costs of arbitration." The court noted that the costs could be potentially significant, precluding a litigant such as Plaintiff from "effectively vindicating her rights in the arbitral forum." The clause was also procedurally

unconscionable because it required Plaintiff to waive her right to attorney's fees under Title VII and the waiver was not conspicuous. Additionally the language that immediately precedes the arbitration agreement is misleading because it is titled, "It's Not A Contract".

27. *Cornejo v. Spenger's Fresh Fish Grotto,* 2010 WL 1980236 (Ca., 05/17/10). Plaintiff was a busboy at Defendant restaurant. His native language was Spanish. He claimed he was harassed because of his race and disability, and filed a lawsuit. The restaurant moved to compel arbitration per an Agreement to Arbitrate Disputes. Defendant claimed Plaintiff signed both an English and Spanish version. Plaintiff denied signing the agreement. The parties agreed to hire a handwriting expert to determine if the signature on the agreement was Defendant's. The expert determined that it was, and Plaintiff then admitted that he had signed both versions of the agreement. Plaintiff thereafter argued that the agreement was not enforceable because it was an adhesion contract. The restaurant conceded that the contract was one of adhesion for the following reasons: all employees were required to sign it as a condition of employment, there was no opportunity for negotiating its terms, and the restaurant had superior bargaining power. The court ruled that the fact the contract is an adhesion one does not standing alone render the arbitration provision unenforceable. The court noted that adhesion contracts are an "inevitable fact of life for all citizens – businessmen and consumers alike." Also, it is inevitable that one contracting party will normally have superior bargaining power. The court commented that Defendant's arbitration agreement was a stand alone, clearly labeled document that provided Plaintiff with notice of its contents, plus a Spanish version was provided. Therefore, the court upheld the validity of the arbitration agreement and granted Defendant's motion to compel arbitration.

Employment/Discrimination/ADA

28. *Lois Trentham v. Hidden Mountain Resorts, Inc*., No. 3:08-cv-23 (E.D. Tenn. 01/13/10). Plaintiff filed a complaint alleging that her employer discriminated against her in violation of age discrimination, ERISA, the ADA and state laws. Plaintifff, a 62-year old housekeeper who was battling cancer, was terminated allegedly due to customer complaints and work performance issues. Plaintiff sued and the court ruled that she could proceed on her discrimination claims, but not under ERISA.

29. *Demetropoulos v. Derynda Foods, Inc.,* No. 08-C-0420 (E.D. Wis. 07/20/10). Plaintiff sued his employer alleging that he was fired as a result of disability discrimination. Defendant argued that Plaintiff is not a qualified individual with a disability and was terminated due to poor work performance. The court said that Plaintiff failed to show that major life activities are substantially limited and said that nothing in the record suggests that he cannot walk or stand. Plaintiff said he cannot hike or take long walks and the court said that was "a far cry from showing that he is substantially limited." Summary judgment was granted to Defendant and the complaint dismissed.

Employment/Discrimination/Age

30. *Sciacca v. Olympia Hotel Management*, No. 09-11293-RWZ (D. Mass. 10/29/10). Plaintiff worked as a night auditor for Defendant and requested that his employer reclassify him as an independent contractor. Plaintiff wanted to work seven days a week and delay paying taxes. When a new management company came on board, it decided that the classification was improper and began paying him as an employee and reduced his hours. Plaintiff claimed he was being discriminated against because of his age and sued. The court held that Plaintiff's claims could support a causal relationship between the two actions, but Plaintiff did not show that the reasons for termination were pretextual. The court granted summary judgment to Defendant on all claims.

31. *Syme v. Hawthorne Inn,* 2010 WL 1794933 (Conn. Super., 04/06/10). Plaintiff is a 62-year old woman and had been employed by defendant as a waitress for eight years. She alleged the following: her hours were reduced while hours of other, younger employees were increased; new wait staff was hired to perform some of her functions; she was repeatedly told by her supervisor that she could not perform her job due to her age; he and others began making derogatory statements concerning her age; while Defendant's management knew of these comments, no remedial action was taken. Among the causes of action referenced in the lawsuit was intentional infliction of emotional distress. Defendant moved to dismiss this charge. To prevail on this tort Plaintiff must show that the conduct was extreme and outrageous. The court noted, "There is no bright line rule to determine what constitutes extreme and outrageous conduct . . . However, a line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional acts wholly lacking in social utility. Excluded from coverage by this tort are "insults, verbal taunts, threats, indignities, annoyances, petty oppressions or conduct that displays bad manners or results in hurt feelings." While the court acknowledged that employment discrimination is "intolerable and illegal", the court determined the alleged conduct was neither extreme nor outrageous. The count of the complaint alleging intentional infliction of emotional distress was thus dismissed.

32. *Lutes v. Loni Corp., Inc.,* 2010 WL 1963170 (Ill., 05/17/10). Plaintiff was a waitress at Defendant's restaurant. She became the subject of harassment, sexual comments, and unwanted touching by many of her male coworkers. On a daily basis, they made sexually derogatory comments, slapped the female employees on their buttocks, and "generally demeaned their female counterparts." She filed a complaint with the Human Rights Commission and received a right-to-sue letter which resulted in this lawsuit for sexual harassment, both quid pro quo and hostile environment. The court dismissed the quid pro quo count, finding that only her coworkers, and not a supervisor, participated. Coworkers do not have the requisite power to make the harassment a term or condition of plaintiff's employment. Therefore, the conduct does not qualify as quid pro quo sexual harassment. Conversely, hostile work environment claims need not be premised upon harassment from a superior. An employer is liable if it knows, or should have known, of the conduct. The allegations in this case are sufficient on the hostile environment count.

Employment/Discrimination/Gender

33. *Rangel v. Omni Hotel Management Corp*., No. SA-09-CV-0811 OG (NN) (W.D. Tex. 10/04/10). Plaintiff sued her employer based on allegations of gender discrimination and retaliation. Plaintiff was terminated when she did not call police after an investigation determined that an employee was selling drugs on the hotel premises. Plaintiff claimed she was told by her GM not to call the police. Defendant terminated Plaintiff for lying about the decision not to call the police. Plaintiff claimed that the GM was not terminated for his actions, but she was so the employer clearly discriminated against her. The court disagreed. Summary judgment was granted to Defendant on all counts.

34. *El Apple I, Ltd. v. Olivas*, No. 08-07-00257-CV (Tex. Ct. App. 04/21/10). Plaintiff filed a complaint against her employer for gender discrimination and retalition. Plaintiff was pregnant and her work hours were cut due to her health and her physician's request. Defendant also lowered her salary due to the reduction in hours. After her maternity leave, she was written up for allegedly fabricated performance issues. She did not prevail on the gender discrimination claims, but an appellate court did confirm that there was enough evidence to support the jury's determination that Plaintiff was retaliated against for filing the gender discrimination charge.

Employment/Discrimination/National Origin

35. *Exantus v. Harbor Bar & Brasserie Restaurant*, 2010 WL 276861 (N.J., 07/14/10). Plaintiff worked as a waiter at Defendant's restaurant. He claimed he was the victim of a hostile work environment. Specifically, he testified that staff members of the eatery "at various times" called him "Haitian #@%*". The employer investigated Plaintiff's claims but could not corroborate them. The evidence does not establish that the conduct in question materially interfered with Plaintiff's ability to do his work, nor does he allege that he was physically threatened by the comments. In response to Plaintiff's claim, the company conducted racial sensitivity training for all employees. The court ruled that the circumstances were not sufficiently severe or pervasive to support a hostile work environment claim. The court did however note that the expression "Haitian #@%*" is "unpalatable and inappropriate".

Employment/Discrimination/Race

36. *Riley-Jackson, et al., v. Casino Queen Inc.,* No. 07-CV-0631-MJR (S.D. Ill. 11/05/10). Plaintiff, a woman of color, sued Defendant on the basis of racial discrimination, harassment and hostile work environment. Although Plaintiff had numerous verbal and written warnings, and was suspended 19 times for violating company policy, Plaintiff was able to produce enough evidence that similar violations made by white waitresses were not addressed in the same fashion. The court declared that there was a pattern of racial behavior sufficient to show a hostile work environment. The casino's motion for summary judgment was denied.

37. *Washington v. Dixie Restaurants, Inc.,* 2010 WL 426923 (E. D. Ark. 10/26/10). Plaintiff, a man of color, was a server at Defendant's restaurant. He was terminated for providing false

information regarding time worked and for failure to clock in. He sought unemployment benefits and was denied because of the basis for his termination. After pursuing the claim in court and losing, Plaintiff filed the discrimination suit claiming a racially hostile environment and retaliation. The complaint contained only the following generalized assertion, "[I was] harassed and berated by superiors." In his deposition, Plaintiff stated he was "nitpicked," criticized, and closely monitored. He also claimed his white supervisor sometimes used an African-American dialect and uttered phrases such as "you know what I'm saying" and "word, I'm down" (sic). Plaintiff also claimed another white manager, when seeing a black employee arriving at work in a new car, stated, "I wonder where he stole that from." And when Plaintiff attempted to take home left over pizza, she asked to see the contents of the container holding the pizza. Concerning the first supervisor, the court said his conduct amounts to "criticism of [Plaintiff's] job performance, not actionable harassment based on race." The second supervisor's comments were described by the court as "isolated." Summary judgment for the restaurant was therefore granted.

38. *Denny's v. NYS Division of Human Rights*, __NYS2d__, 2010 WL 4977947 (App.Div. 3rd Dept, 12/09/10). Employee Fuller was a part-time dishwasher at a Denny's restaurant. He also worked full time elsewhere. He was terminated from Denny's one month after being hired. He claimed discrimination based on disability. He had psoriasis and cellulitis, which affected the back of his head. The condition causes hair loss and scaring to the back of his head, not observable when viewing him head-on. The NYS Division of Human Rights determined that probable caused existed for a finding of unlawful discrimination. At the hearing, the employee was awarded lost pay, reimbursement for counseling in the amount of $4,776, and compensatory damages for pain and suffering in the amount of $10,000. Denny's sought to annul the determination. Fuller had never been disciplined or received any complaints concerning his condition or job performance, and had received positive feedback from management. When terminated he was advised by the manager that it was because of the scarring on the back of his head. This established a prima facie case. In opposition, Denny's asserted three claims: 1) customers and coworkers had complained about his appearance; 2) the condition might be contagious and therefore a violation of the health code; and 3) due to his full time job, Fuller's availability for his part-time job was constantly changing and "becoming a problem." The court rejected all three as follows. 1) Employers cannot discriminate on the basis of their customers' preferences. 2) Denny's never inquired about whether the condition was infectious, and the employee's doctor submitted evidence that it was not. 3) Defendant was never warned that he could be terminated due to the schedule shift, and a supervisor testified Fuller would have been dismissed because of the head condition regardless of the scheduling. The award of damages was thus affirmed.

Employment/Discrimination/Religion

39. *EEOC v. White Lodging Services Corp.*, No. 3:06CV-353-S (W.D. Ky. 03/31/10). Defendant retained a staffing company to provide applicants for the housekeeping staff. Four women of Muslim faith were interviewed for positions. The ladies each wore a hijab and would not remove them as requested by the staffing company. The hotel's dress code prohibited hats to

be worn unless a part of the uniform, but would make exceptions in certain circumstances. The women were told that they would not be working at the hotel and the EEOC brought suit on their behalf. Contrary to Defendant's argument that it was not the employer but that the staffing company was, the court ruled that they were joint employers and shared the duties of placement. The court denied summary judgment for Defendant.

40. *Jiglov v. Hotel Peabody, C.P., d/b/a Memphis Peabody*, No. 09-2319-STA-cgc (W.D. Tenn. 06/18/10). Plaintiff, a Russian Orthodox Christian, worked at the Peabody hotel and asked to have Easter Sunday off for religious reasons. His request was denied due to a scheduled maintenance project and it would create an undue burden on the hotel. Plaintiff called in sick on Easter Sunday and was terminated for gross misconduct. The court held that Plaintiff could establish a prima facie case for his religious accommodation claim and the hotel failed to show accommodating the request would create an undue hardship. Therefore, the court denied the hotel's motion for summary judgment.

Employment/FLSA

41. *Garcia, et al., v. Palomino, Inc., d/b/a La Mesa, et al*., No. 09-02115-EFM (D. Kan. 09/07/10). Three employees sued the restaurant for FLSA claims stating that the restaurant operated an invalid tip pool, had insufficient employment records and didn't pay minimum wage. The court denied summary judgment to the Plaintiffs on all three claims stating that material issues of fact did exist – a poster detailing minimum wage laws was displayed in the workplace, pay stubs did show hourly pay before addition of tips and that employees such as dishwashers and food preparers are regularly invited to share in the tip pool. The court also found that the record keeping was satisfactory.

42. *Tracy Holder v. MJDE Venture LLC, et al.,* No. 1:08-CV-2218-TWT (N.D. Ga. 12/01/09). Plaintiff sued her employer for failing to pay her for overtime work and for not paying full minimum wage. The court held that the law allows a tipped employee to be paid below minimum wage if the employee regularly received more than $30 per month, plus tips, and if the difference in the cash hourly wage plus tips adds up to the minimum wage. In that case, the employer may not claim the server's tips as wages without giving the employee proper notice. In this case, the employer did not provide a copy of its policy for paying tipped employees. Summary judgment for the restaurant on the FLSA claims was denied. The court also pointed out that the restaurant's record keeping was lacking.

43. *Cortes v. Skytop Restaurant, Inc*., 2010 WL 4910242 (S.D. N.Y., 11/17/10). Plaintiff filed a claim for unpaid wages against his restaurant employer. The parties reached a confidential settlement agreement. The district court nullified the stipulation because it was not presented to the court to review it for fairness. The rights granted in the FLSA cannot be abridged by contract or otherwise waived. There are only two exceptions to this rule, where unpaid wage claims can be settled or compromised by employees. One is for the Secretary of Labor to supervise payment of the owed back wages. The other is for an employee to present to the district court a proposed settlement, which the court may enter as a judgment only after scrutinizing it for fairness. In this case, the settlement was not submitted to the

court so it did not review or approve it. While the settlement stipulation indicates that the parties agree that the terms are fair, the parties are not free to substitute their view of fairness for judicial approval. Otherwise, FLSA rights could be disregarded by private contract.

44. *Nascembeni v. Quayside Place Partners, LLP, et al*., No. 09-23322-Civ-COOKE/BANDSTRA (S.D. Fla. 06/11/10). Plaintiff, a banquet server, sued her employer for violations of FLSA and state law claiming that the service charge on her paycheck was actually a gratuity and not a commission. The court found that the charge was properly classified by the hotel as a commission even though the pay stub said the service charge was a "banquet tip". Plaintiff also was not entitled to overtime wages since she was an exempt employee. Plaintiff's claims were denied.

45. *Garcia, et al., v. Lee, et al.*, No. 10-CV-1618 (JC) (E.D. N.Y. 05/26/10). Plaintiffs sued their employer for claims under the FLSA and retaliation. The court granted Plaintiffs an injunction stating that the workers presented sufficient evidence that the threat of retaliation may have in fact discouraged other employees from joining in on the lawsuit. It was reasonable to infer that the employer's actions against them so soon after filing their complaint may have deterred others from asserting their rights.

46. *Daprizio v. Harrah's Las Vegas*, No. 2:10-cv-00604-CMN-RJJ (D. Nev. 08/17/10). Plaintiff, a casino dealer, filed suit against her employer for violations of the FLSA and state law. She also asked the court to extend the suit to all employees under the Class Action Fairness Act. Plaintiff's complaint was that she was required to attend a 10 or 15 minutes meeting at the start of every shift without compensation. The court dismissed the collective state law class action claim, but said that the pre-shift meetings were not de minimis and Plaintiff is entitled to relief.

Employment/FMLA

47. *Washington v. Arby's Restaurant Group, Inc*., No. 3:09-0642 (M.D. Tenn. 04/30/10). Plaintiff, a black woman who worked as a GM of an Arby's restaurant, filed a claim for race and gender discrmination against Arby's stating that her rights under FMLA were not granted to her and that she was fired for allegedly altering time cards of employees. The court found that the evidence did not show who made changes to the time cards and that Plaintiff failed to establish a claim for race or gender discrimination. As for the FMLA claim, the court found that the company's actions were not pretexual.

Employment/Retaliation

48. *Brenna Lewis v. Heartland Inns of America, LLC, et al*., No. 08-3860 (8th Cir. 01/21/10). Plaintiff, a front desk clerk, sued Defendant for sex discrimination and retaliation when she believed her relocation to the overnight shift was based on the fact that Defendant described her as having a "slightly more masculine " look and that she lacked the "Midwestern girl look." The district court granted summary judgment to Defendant stating that sex-

stereotyping comments could be evidence of discrimination, but said that Plaintiff would have to prove that she was treated differently to prevail on a claim of sex discrimination. Rejecting this decision, the appellate court said that to make a prima facie showing of sex discrimination the consideration should be only about the individual Plaintiff's treatment, not the relative treatment of different employees within the workplace. Regarding the retaliation claim, the court said Plaintiff raised genuine issues of fact and the summary judgment was denied. The court reversed the judgment and remanded for further proceedings.

49. *Mojica, et al., v. El Conquistador Resort and Golden Door Spa*, No. 08-1797 (PG) (D. P.R. 05/13/10). Plaintiff, age 44, was a bartender at Defendant's resort and worked there for over 14 years. After a period of time, he was assigned to the lobby bar where his tips were lower and the physical demands of the job were harder. He said he was told that he would not be promoted to management because he was too old. Evidence also showed that Plaintiff made threatening remarks about killing his former supervisor and he was terminated for insubordination. He sought psychiatric help and was on medical leave. The court denied the summary judgment motion of Defendant stating that the derogatory statements, verified by three other employees, corroborated Plaintiff's statement and cannot be ignored. The Defendant failed to show how Plaintiff's alleged hostile behavior justified the adverse employment actions he allegedly suffered.

Employment/Sexual Harassment

50. *Cross v. Prairie Meadows Racetrack and Casino, Inc*., No. 09-3427 (8th Cir. 08/12/10). Plaintiff worked as a valet at the Defendant's casino and brought an action against Defendant for hostile work environment claiming that another valet pestered her and tugged her pony tail. The supervisor called a meeting with the valets and ordered them to cease the horseplay. Another valet allegedly told others that Plaintiff had performed sexual acts on him. Plaintiff resigned claiming poor working conditions created by her surpervisors. The district court granted summary judgment for Defendant stating that the behavior was not severe or pervasive enough and four discrete incidents over a two-year period was not enough to establish a hostile work environment. The appellate court agreed.

51. *Tekmitchov v. 61 St. & Park Ave. Corp., et al*., No. 09 Civ. 8564 (GBD) (S.D. N.Y. 07/28/10). Plaintiff complained about sexual harassment behavior of a co-worker (a server and the union delegate) when the co-worker made lewd comments, rubbed up against her, and pulled her on his lap before meetings. When she told her manager about the behavior, she was told that reporting the offending co-worker to HR would make things worse for her. Plaintiff sued for sexual harassment and was constructively discharged from her waitress position at the hotel's restaurant. A union arbitration hearing was held and the arbitrator found that Plaintiff's testimony was not credible and declared that the Defendant did not have cause to terminate the co-worker. Summary judgment for the hotel was denied, however, the court ruled that Plaintiff's complaint could proceed even in light of the arbitration decision.

52. *Guth v. Radha Corp., et al.,* No. CV-08-1909-PHX-GMS (D. Ariz. 03/09/10). Plaintiff, a breakfast room hostess, sued her employer for creating a hostile work environment. A co-

worker in the maintenance department, who spoke little English, allegedly pinned down the Plaintiff and put his hands on her multiple times. Defendant spoke with the offending employee and explained the hotel's anti-sexual harassment policy, issued a written warning and notified him that he could be terminated if he did not comply. The harassment continued and the offender was terminated after giving Plaintiff a "bear hug" from behind, biting her on the ear and neck, as well as pressing himself against her and touching her breasts; all witnessed on a surveillance camera. The court said a jury could conclude that the actions of Defendant were not enough to deal with the harassment situations and to permanently prevent the offensive conduct. Summary judgment for Defendant was denied.

53. *Ascension v. Thind Hotels LLC, et al*., No. H-09-792 (S.D. Tex. 02/08/10). Plaintiff signed an employment agreement containing an arbitration clause when Plaintiff began work as a night auditor at Defendant's hotel. He alleged that he was sexually harassed and touched inappropriately by his supervisor. Defendant argued that according to the arbitration provision, the case should be dismissed and arbitration compelled. The court agreed and stated that the Plaintiff did in fact sign the employment agreement even though Plaintiff claims he did not have a full copy of the agreement, which he claims was missing the arbitration clause. The court said that even though Plaintiff did not have the entire copy of the employment agreement, it does not invalidate the arbitration agreement.

Employment/Successor Liability

54. *EEOC v. 786 South LLC, et al*., No. 2:07-cv-02621-JMP-tmp (W. D. Tenn. 03/11/10). An employee of IHOP filed a complaint against the owners of the restaurant regarding discrimination and retaliation. The restaurant was sold to the Defendant and the Defendant argued that it cannot be held responsible as a successor because it did not have notice of the lawsuit. The court disagreed and denied the summary judgment based on that fact that a jury could conclude that the Defendant did have constructive notice of the litigation since it was a "sophisticated commercial party" with employment law experience. The discrimination and retaliation case was a matter of public record and Defendant's failure to do due diligence, which would have revealed the case, worked against them.

Employment/Wage & Hour/Class Actions

55. *Arenas, et al., v. El Torito Restaurants Inc., et al.,* No. B211301 (Cal. Ct. App. 03/15/10). Several employees filed a complaint seeking class action status on their claims that they were misclassified as exempt employees. The restaurant proved that the tasks assigned varied widely from one restaurant to another and stated that any misclassification cannot be determined on the job descriptions alone but that each employee could argue their cases separately. The court affirmed the district court's ruling denying the class action status certification.

56. *Hernandez v. Chipotle Mexican Grill, Inc*., B216004 (Cal. Ct. App. 09/30/10). Plaintiff attempted to establish a class action for several employees who complained that the Defendant violated labor laws by denying employees meal and rest breaks. The trial court

denied class certification on the grounds that the individual issues predominated over the common issues. The class action would only be appropriate if the California Supreme Court ruled that employers must ensure that all employees take their breaks. The appellate court affirmed. Employers must provide breaks, but do not have to ensure that all employees in fact take the breaks.

Employment/Wrongful Termination

57. *Linda Rovai-Pickett v. HMS Host Inc., et al*., No. C-08-1625 MMC (N.D. Cal. 01/15/10). Plaintiff, a restaurant server, was terminated for violating the restaurant's cash-handling policy by filling in a service charge on a credit card slip after the customer had signed the slip. On that same day, she was injured on the job. The union sent a grievance for wrongful termination and she was eventually reinstated. She received workers' compensation benefits during her time out of work due to the injury. Plaintiff sought additional relief and the court ruled that her loss of income was not attributable to her termination or grievance but from her injuries. Plaintiff failed to show she was terminated without just cause.

False Arrest

58. *Caradimitropoulo v. Borgata Hotel Casino & Spa,* No. A-4205-08T2 (N.J. Super. Ct. App. Div. 08/20/10). A patron of the hotel/casino filed a complaint against Defendant claiming he was falsely accused of groping a hostess and he was subsequently banned from the property. He argued that the security guards detained him and alleged defamation, intentional infliction of emotional harm, false arrest and invasion of privacy. The district court granted summary judgment to the hotel and the appellate court affirmed the ruling. Plaintiff offered no proof that the hotel defamed him. Plaintiff claimed that the security guards did not use the security camera resources at their disposal prior to detaining and ejecting him and the court disagreed stating that viewing the tapes would have likely restrained him for a longer period of time.

Fanatical

59. *Akinro v. King Castle Hotel*, et al, 2010 WL 2340230 (Md., 06/07/10). Plaintiff, appeared pro se and calling himself at various times Assistant Attorney General, US Solicitor General and Department of Justice employee. His complaint alleged only that, "Defendants have imposed death penalty on me and they are torture me daily even though they know that the law is against their action." Plaintiff seeks $497,000,000,000,000 plus life imprisonment and death penalty for the Defendants. Said the court, "Even when affording the pro se complaint and accompanying materials a generous construction, the Court finds no basis to allow the action to go forward or to require supplementation. The complaint allegations are incredible. The matter shall be summarily dismissed.

Franchise

60. *National Franchisee Association v. Burger King Corp*., No. 09-23435-CIV-MOORE/SIMONTON (S.D. Fla. 05/20/10). For over fifty years, Burger King has allowed its

franchisees to set prices on their menu items, but in 2002, Burger King created a new policy requiring franchisees to adhere to maximum price limits on certain items. Specifically, the double cheeseburger was to be sold on the $1 menu, and many of the franchisees objected claiming that it cost more than $1 to produce the item. The appellate court ruled that the franchise agreement does give Defendant the right to impose maximum prices, but remanded on whether Plaintiff had standing to bring the action on behalf of franchisees and whether Defendant violated its duty of good faith. The district court held that it would deny Plaintiff standing to bring a complaint against Defendant on behalf of the members at this stage of the lawsuit. Defendant admitted that the sale of double cheeseburgers at $1 could lead some of the franchises to financial ruin so Plaintiff could state a claim that Defendant violated it's duty of good faith and Plaintiff was allowed to proceed on that claim.

61. *Dunkin' Donuts Franchised Restaurants, LLC v. Sandip, Inc.,* __F.Supp.2d__, 2010 WL 1781344 (Ga., 05/03/10). Defendants were franchisees of Dunkin' Donuts (DD). They violated the franchise agreement by failing to do the following: remodel their shops; participate in mandatory system-wide programs; attend required training; and prepare immigration forms for new employees. DD sued to terminate the franchise agreement claiming breach of the franchise agreement and trademark infringement. A conditional settlement agreement was entered. It authorized Defendants to sell their shops if DD approved the sale with the stipulation that DD cold not "unreasonably" reject a proposed sale agreement. DD twice rejected a purchase proposed by Defendants who then claimed DD unreasonably withheld approval. Defendants claimed DD breached the settlement agreement because it acted unreasonably by failing to consider the buyer's financial condition. DD however followed what the court called its "firmly-established policy that is grounded in reasonable business considerations." That policy involved a two-step analysis. The first step was to evaluate whether the store is likely to break even the following year. If it appears the store will lose money, DD rejects the proposed sales agreement. If it appears the store will break even, DD then investigates and considers the financial condition of the buyer. The court determined this procedure was not unreasonable. Defendants also claimed DD unreasonably refused to approve the sale by using regional data to project the store's future profits and liabilities rather than store-specific data. The court, while recognizing store-specific data may yield a different result, held that use of regional data was not unreasonable. Accordingly, summary judgment for DD was entered. The court further held that Defendant's violation of the franchise agreement entitled DD to terminate it and awarded DD summary judgment on its trademark claims.

62. *In re Shubh Hotels Pittsburg, LLC,* 2010 WL 4780802 (Bkrtcy, Pa., 11/23/10). In this bankruptcy proceeding, debtor-hotel owner moved for authority to execute a 15-year franchise agreement with Wyndham Hotels and Resorts, following termination of debtor's franchise with Hilton. In the interim, the hotel had been operated as an independent. Court approval for the Wyndham franchise was granted following an assessment of the benefits of operating as a franchise. The advantages recognized by the court included: mitigating concerns of existing reservation holders and event sponsors; reassuring employees about the long-term viability of the hotel; inclusion in a national reservation system; enhanced positioning when competing for conference/convention business; benefits from a national

marketing campaign; a promised loan from Wyndham for property improvements; access to customer loyalty programs; and centralized franchise support systems such as management and personnel training, operational standards, procedures and techniques.

63. *Reid v. Timeless Restaurants, Inc.,* 2010 WL 4627873 (N.D. Tex., 11/05/10). Plaintiff restaurant employee sought conditional certification of a potential class of plaintiffs to sue a multi-restaurant franchisee of Denny's. The proposed class consisted of "all current and former table servers, wait staff or a title with similar duties who worked for Timeless Restaurants, Inc., d/b/a Denny's, in Texas" between December 31, 2006 to the present and claim they were not paid minimum wage or overtime pay. Plaintiff's certification motion contained allegations only of violations at one Denny's, located in Grapevine, Texas. The court granted provisional status for a smaller class – table servers and wait staff who worked at the Grapevine restaurant. Conditional certification allows for discovery to proceed focused on just one case.

Gambling

64. *Donovan v. Grand Victoria Casino & Resort*, No. 49S02-1003-CV-00124 (Ind. 09/30/10). Plaintiff, a self-described "advantage player" counts cards during blackjack. The casino banned him from the blackjack tables but welcomed him to play other games. He sued Defendant for breach of contract and sought a declaratory judgment that the casino could not exclude him from playing blackjack for simply counting cards. The trial court found in favor of Defendant, however, the Supreme Court of Indiana disagreed and said state law allows any property owners, including riverboat casino operators, to make decisions to ban patrons for counting cards or other strategies designed to give the patron an advantage over the casino.

Long Arm Statute/Personal Jurisdiction

65. *Day v. Harrah's Hotel & Casino Las Vegas*, 2010 WL 4568686 (S.D.Ca., 11/02/10). Plaintiff, a resident of California, was injured at Harrah's Hotel & Casino in Las Vegas. He suffered burns to his back while having a "Chocolate Hot Stone Massage". He sued the casino in California. It moved for dismissal claiming lack of general and specific personal jurisdiction. Concerning the former, Plaintiff claimed that Harrah's Rincon, a casino in San Diego, was part of the same umbrella corporation as Harrah's in Las Vegas, and thus the long arm statute could apply. The rejected this argument citing the "well-established general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other." Concerning specific personal jurisdiction, the court noted that, unlike general jurisdiction, specific jurisdiction is based on a connection between the forum and the Plaintiff's claim. Plaintiff argued that Harrah's Las Vegas solicited business at Harrah's Rincon by encouraging customers in San Diego to join the Total Rewards loyalty program and redeem points at Harrah's in Las Vegas. Additionally, Harrah's Rincon advertised the hot stone massage at Harrah's Las Vegas, which led to Plaintiff's injury. The court thus denied the casino's motion to dismiss for lack of personal jurisdiction.

Misrepresentation

66. *International Market and Restaurant, Inc. et al v. Belmont University,* 2010 WL 4514980 (Tenn. Ct. App., 11/09/10). Plaintiffs are various businesses located in the vicinity of Belmont University. They sued for one night's lost revenue. The University and members of the United States Secret Service had informed Plaintiff that the streets and sidewalks around Plaintiff's establishment would be closed for security purposes the evening of a Presidential debate at the University. Those closures were part of a security plan developed by the Secret Service. In response, Plaintiffs closed for business during that event. However, the sidewalks were never closed to pedestrian traffic. Plaintiffs appealed a grant of summary judgment for the university. On appeal, the court rejected Plaintiffs' claim of negligent misrepresentation because such a claim cannot be based on a representation of a future event. The court also rejected Plaintiffs' constructive fraud claim because the university did not owe any legal or equitable duty to the Plaintiffs, a prerequisite for such a cause of action. The court also rejected Plaintiffs' claim to third party beneficiary status because there was no manifested intent to benefit Plaintiffs in Belmont's contract with the Secret Service. Summary judgment was thus affirmed.

Negligence/Duty of Care

67. *Frank Sutton v. Roth LLC, et al*., No. 08-1914 (4th Cir. 01/21/10). Plaintiff was injured when he bit into a fried chicken sandwich at a truck stop McDonald's restaurant and "grease flew all over his mouth". One of the employees made a comment to another saying, "This is what happens to the sandwiches when they aren't drained completely." Plaintiff's lips continued to burn and he sought medical treatment. He sued and McDonald's successfully moved for summary judgment because the court held that McDonald's was not an agent of Defendant. On appeal, Plaintiff argued that the exclusion of the employee statement was in error and the statement was evidence of a standard of care owed to the Plaintiff. On appeal, the court reversed and remanded the trial court's decision. The court also ruled that the district court's decision in favor of McDonald's should also be vacated since McDonald's relied on an affidavit to show it had no control over the franchise, but failed to attach the franchise agreement.

68. *Brown v. Checker's Drive-In Restaurants, Inc.,* __So.3d__, 210 WL 2595229 (La. App., 06/29/10). Plaintiff worked at a fast-food restaurant. While she was working at the drive-through window, the manager was cleaning with an oven cleaner and placed the can on a shelf above the deep fryer, another employee accidentally knocked the can into the deep fryer of hot grease. It exploded causing Plaintiff burns from hot grease. She was paid workers' compensation and medical benefits. She sued for injuries; the employer moved for summary judgment claiming that workers compensation was her exclusive remedy. The court recognized that an exception existed for intentional injuries caused at work by an intentional act. The court determined that the circumstances here did not amount to an intentional act by the supervisor and dismissed the complaint.

Negligence/Open and Obvious

69. *Steigman v. Outrigger Enterprises, Inc.,* 2010 WL 4621838 (Ha. App., 11/16/10). Plaintiff fell when she stepped barefoot and wet onto a lanai with a smooth concrete floor that had just been exposed to wind and rain during a heavy rainstorm. A jury ruled in favor of the hotel, finding that the danger of the slippery floor was open and obvious. Plaintiff appealed claiming that the judge erred by not reading jury instructions on comparative negligence. The court affirmed stating, " . . . if the finder of fact determines that the hazard falls within the known or obvious doctrine, the question of comparative negligence is never reached as the defendant owed no duty to the plaintiff and accordingly, cannot be negligent as a matter of law. In the absence of a legal duty owed to the Plaintiff, there is no negligence to compare."

70. *Robbin v. Marriott Hotel Services, Inc*., No. 08-00061 BMK (D. Hawaii 08/18/10). Plaintiff fractured her ankle when she stepped onto the ledge of an infinity pool at Defendant's resort. She filed a complaint alleging negligence for Defendant's failure to warn her of the danger of stepping onto the ledge of the pool. Other guests were using this area as an entrance and exit even though there were signs posted that it was not a pool exit or entrance. Defendant argued that it was an open and obvious condition and the court said even if that is true, landowners may be liable for physical harm to guests by a known and obvious danger if the landowner can anticipate the harm. A majority of the lounge chairs were located near the ledge which lead the court to determine that it's possible that the advantages of stepping onto the ledge to enter the pool near the chairs would outweigh any apparent risk. The court denied summary judgment for the Defendant.

Negligence/Privacy

71. *Rasnick et al. v. Krishna Hospitality Inc.* No. 09A2259 (Ga. 02/10/10). The wife of a guest called the hotel to inquire about her husband, who later died of heart failure. Plaintiff sued the hotel under the theory of wrongful death and summary judgment was granted to Defendant as the court concluded that an innkeeper has no legal duty to respond to a telephone request to check on the condition of a guest.

Negligence/ Security

72. *Keller, et al., v. Monteleon Hotel, et al.,* No. 2009-CA-1327 (La. Ct. App. 06/23/10). A suicide victim jumped off the roof of the Defendant's hotel and landed on Plaintiff who suffered a broken leg, broken rib and scarring from the incident. Plaintiff filed a complaint against the hotel and the trial court found in favor of the Defendant. On appeal, the Plaintiff argued that the height of the guardrails was improper and pickets were missing from the guardrail. Also, Plaintiff claimed that another guest had jumped from the roof in the past. The court found that without proof by Plaintiff, there was not sufficient warning given to the hotel for them to anticipate that a guest would be committing suicide from the roof and thereby no constructive notice.

73. *Linnenbringer v. Casino One Corporation*, 2010 WL 4484009 (Mo., 2010). Plaintiff was a guest at Defendant Casino One Corporation. While in the casino, he was advised by an employee that he would need to retrieve his parking ticket, which was in his car, to have the ticket validated. Upon Plaintiff's attempted re-entry to the casino he did not have his casino entry card but informed the employees that he wanted only to validate his parking ticket, find his wife, and leave. The employees nonetheless refused to allow Plaintiff back into the casino and instead, per Plaintiff's testimony, removed him by force, grabbing him, forcing him outside, and throwing him to the ground, and then restraining Plaintiff against his will for two and a half hours. Plaintiff claimed Defendant was negligent for failing to validate his parking ticket, failing to follow reasonable security protocol to prevent an escalation of violence, failing to institute reasonable security rules that would have allowed Plaintiff back into the casino, and failing to avoid violence and an assault and battery. The court noted that Plaintiff's complaint alleged under the count "negligence", claims of both negligence and intentional conduct. The two are contradictory and mutually exclusive. The court referenced the rule that a pleading that contains inconsistent theories within the same count should be dismissed. The court did so but granted Plaintiff authorization to file an amended complaint.

74. *Morgan v. Williams,* 26 Misc.3d 1217(A), 2010 WL 348355 (N. Y. Sup., 01/21/10). Plaintiff was assaulted by his mother's boyfriend at a bar owned by his mom. Plaintiff called his mother prior to going there. She said her boyfriend was intoxicated and the son should not come. He nonetheless went to the bar. When he entered, his mother reiterated that the boyfriend was drunk, and warned him that she did not want any problems. The boyfriend had a criminal history that included an assault, a fact the mother might well have known because he was a former employee of hers as well as her then boyfriend. Further, the boyfriend had threatened the son previously. The court determined questions of fact existed about whether the mother knew or should have known about the boyfriend's propensities and thus whether she had a duty to protect patrons against foreseeable assaults. The mother's motion for summary judgment on behalf of the bar was thus denied.

Negligence/Ski Injury

75. *Brunsting, et al., v. Lutsen Mountains Corp*., No. 09-1075 (8th Cir. 04/13/10). Plaintiff was permanently injured during a ski run down the mountain when he lost control and crashed headfirst into a tree. A partially exposed tree stump was near the edge where Plaintiff fell. Plaintiff sued Defendant for negligent design, maintenance, operation and supervision of the ski facilities by failing to remove the tree stump that he claims caused him to crash. The trial court granted summary judgment to Defendant stating there was insufficient evidence, but the appellate court disagreed and said that circumstantial evidence of the tree stump was enough for Plaintiff to survive a summary judgment motion.

76. *Douglas Myers v. Lutsen* Mountains *Corp.,* No. 09-1184 (8th Cir. 11/25/09). Plaintiff was injured while skiing at Defendant's ski resort. He signed a waiver and release document when he purchased his lift ticket. The district court dismissed the complaint against Defendant. On appeal, Plaintiff argued that the release was ambiguous because it could be interpreted as waiving all types of claims and not just negligence. The appellate court

disagreed stating that the language expressly excluded claims arising from reckless or intentional acts. Plaintiff's argument that the release violated public policy was also denied as the court stated that the service of skiing is not a public or essential service.

Negligence/Superseding Cause

77. *Meade v. On the Ave Hotel*, __NYS2d_, 76 AD3d 470, 2010 WL 3304857 (A.D., 1st Dept, 08/24/10). Plaintiff was in an elevator that stalled midway between two floors in Defendant's hotel. Plaintiff sued the elevator service company and the hotel, both for negligence. The elevator company sought summary judgment. Plaintiff was not injured when the elevator stopped but was injured after he attempted to exit the elevator using a method he felt best accommodated his preexisting knee condition and his 360 pound frame. He slid backward out of the elevator even though hotel employees advised him to sit forward on the edge of the elevator floor and slide down onto the second-floor level. As he slid backward, he became fatigued, lost his grip, and slipped under the elevator car into the open shaftway below. The hotel employees who were there to assist Plaintiff's evacuation failed to block the open shaftway and failed to grab him as he fell. The court held that the injuries arose from a superseding cause, severing any potential liability on the part of the elevator repair company. Further, the company could not have foreseen Plaintiff's actions and injury.

Premises Liability/Duty of Care

78. *Padilla, et al., v. The El Rodeo, Inc., et al*., No. B211657 (Cal. Ct. App. 04/16/10). Three men were shot and killed outside of Defendant's club on hip-hop night at the club. Plaintiffs, the survivors of the three men, argued that hip-hop night attracted patrons with more "energy," who were more likely to engage in misbehavor and that the incident was foreseeable. The trial court disagreed and granted summary judgment for the Defendant. On appeal, Plaintiffs argued that the Defendant was negligent because it didn't have a security camera by the entrance and didn't follow it's dress code policy which would have stopped gang members from the club. The court disagreed stating that the lack of a camera or extra security guards would not have prevented the shooting from occuring as two of the men were shot execution style and the shooter was not dressed in typical gang attire.

79. *Del Lago Partners Inc., et al., v. Smith*, No. 06-1022 (Tex. 04/02/10). A bar fight involving 20 and 40 men broke out at a resort and lasted approximately 90 minutes. The resort staff didn't take any action during the 90 minutes. One of the patrons was intervening to help save a friend, who had a heart condition, in the middle of the fight and the patron ended up with a skull fracture and brain damage. The trial court allocated fault at 51-49 between the parties. On appeal, the resort argued it had no duty to protect the injured patron from being assaulted by another bar customer. The court stated generally that is true, unless the owner has a reason to believe there is a foreseeable risk of harm to the invitees. In this case, the resort observed but did nothing to reduce the verbal and physical hostility in the bar. The appellate court affirmed the trial court's ruling.

80. *Brock v. Grand Palace Hotel*, 27 Misc.3d 1210(A), 2010 WL 1507978 (NY, 04/08/10). Plaintiffs were injured when a hotel guest attempted to shut a window in her guest room and it fell out of the frame onto her head and on her daughter's leg. On the day before the accident, Plaintiff allegedly spoke to hotel staff about the air conditioning in the room not working, and the window being open and not closing. On the morning of the accident, she again allegedly spoke to a front desk attendant to complain about the window and air conditioner unit. The court noted that owners have a duty to maintain their property in a reasonably safe condition, but for a successful lawsuit, Plaintiff must establish that the owner had actual or constructive knowledge of the dangerous condition that caused the accident. Plaintiff's allegations of informing hotel staff of a problem with the window was sufficient to preclude summary judgment in favor of the hotel.

81. *Schwenke v. Outrigger Hotels Hawaii, LLP,* 2010 WL 972216 (Hawaii, 03/18/10). A person not registered as a guest at Defendant's hotel intentionally jumped to his death from the hotel's 44th floor. He landed on the roof of a car, seriously injuring the driver. The latter sued the hotel. It denied liability because it had no way of knowing of the risk presented by the deceased. A prerequisite to a negligence case is the existence of a duty. A duty to take precautions against a risk of injury exists where danger can be perceived. Here there were no telltale signs of an agitated patron. Indeed, the Defendant had no interaction with hotel personnel. Since the court could not anticipate the problem, it had no duty to protect the driver of the car. Case dismissed.

82. *Dooley, et al., v. Spirit of the North Resort, Inc*., No. 08-4759 (JNE/RLE) (D. Minn. 05/17/10). Plaintiff, an experienced diver and swimmer, swam out to a trampoline in the lake to dive into the lake as he had done numerous times before. He was not aware that Minnesota was suffering from a drought that season and the water level was the lowest it had been in 20 years. He dove off the trampoline into the lake and broke his neck. He is now a quadriplegic. The resort brought up that Plaintiff had consumed six beers before diving and his blood alcohol level was .076. The court stated that although the Plaintiff knew the water was shallow enough to require a shallow dive, he was not aware of the water level from his previous experience at this lake and he could not know the probability of striking his head. Summary judgment for the resort was denied because a trier of fact could conclude that the resort failed to warn him of potential injuries.

83. *Davis, et al., v. Accor North America, et al*, No. 1:08-CV-425 (S.D. Ohio 04/23/10). The Davis family went swimming in the hotel pool, which is 9 feet deep and the father drowned as he was attempting to save one of his younger children. The record showed several violations of the Ohio administrative code such as no safety floats to indicate the shallow from the deep sections of the pool; no signage showing the nearest phone for emergency calls for help, no 12-foot long pole and the water was too cloudy to see to the bottom. Plaintiff filed a complaint for negligence and the hotel moved for summary judgment. The court agreed that the pool was an open and obvious hazard and that it had no duty to warn or to protect the Plaintiff's family from the alleged conditions of the pool. The court said that even with the alleged violations of the local code, this does not bar application of the open and obvious doctrine.

84. *Chan Young Lee v. Choice Hotels International*, 2010 WL 1462448 (Del. Supr., 04/03/10). A seven-year old hotel guest suffered catastrophic permanent brain damage after he nearly drowned in the hotel swimming pool. While the case involved Indonesia law and thus has limited relevance to us, the issues concerning the maintenance of the pool identified by the Plaintiff are great reminders about pool safety. The complaint alleged there were no lifelines or separators between the shallow and deep areas to indicate a change in depth; the slope of the pool between the shallow and deep areas was steep; there were no depth markings or indicators alerting swimmers of the change in depth; no lifeguard was on duty; and no signs warned about the absence of a lifeguard.

Premises Liability/Slip and Fall

85. *Kleiman, et al., v. Craftsteak NYC LLC, et al.*, No. 102390/08 (N.Y. Sup. Ct. 09/21/10). Plaintiff suffered injury when he fell from the top landing on a stairwell. He said the stairwell was very dark and dimly lit. His friend said the stairs were a dark color and there were no markings indicating where the landing ended and the first steps began so it was a hazard. An expert also testified that the lack of markings was a violation of local building codes. The restaurant argued that the stairwell is well lit. Summary judgment for Defendant was denied as the court found that there were triable issues of fact as to whether Defendant created a dangerous condition by having inadequate lighting and failure to clearly demark the areas.

86. *Spahr, et al., v. Ferber Resorts, et al*., No. 2:08-cv-72-CW (D. Utah 02/04/10). Plaintiff became severely injured when he fell into a six-foot hole in Defendant's parking lot early one morning. The trial court awarded Plaintiff $393,000 and his wife $42,000 for loss of consortium. Defendant appealed claiming the award was excessive. The court said it was not excessive stating, it "can hardly be called a windfall" since Plaintiff can no longer participate in the many activities he had enjoyed prior to the fall. Defendant also argued that due to the darkness being so extreme at the time of the fall that early morning, any reasonable person would have taken that alone as danger and the court dismissed that argument. The loss of consortium award was also challenged and the court noted that Plaintiff's wife asserted that her husband had a "significant disfigurement" and the court rejected Defendant's request to reduce the award.

87. *Jung v. Marriott Hotel Services,* 2010 WL 4703543 (E. D. Pa., 11/19/10). Plaintiff fell on ice at Defendant's hotel. The latter moved for summary judgment claiming that land owners are not liable for generally slippery conditions resulting from ice and snow. Plaintiff acknowledged that rule but argued that she fell on a localized, isolated patch of ice, which is an exception. Deposition testimony from a valet and a security officer identified a patch of ice in the area where Plaintiff fell. A hotel engineer testified that there was an area where ice tends to form near the valet check-in area. The court thus denied Defendant's motion for summary judgment.

88. *Cottrell v. El Castillo Grande Mexican Restaurant,* 2010 WL 759234 (Ohio App., 03/08/10). Plaintiff tripped and fell on cracked and crumbled concrete step leading to the entrance of Defendant's restaurant. When the accident occurred, Plaintiff was exiting the facility after celebrating Cinco de Mayo. A crowd had gathered outside the entryway waiting for tables. Plaintiff had been to the restaurant about twice a month over the year prior to the accident and had always entered and exited by the same steps. On the night in question, he claimed to have been distracted by other patrons who were standing on the steps. He walked carefully trying not to bump them. Photographs in the record established that both the crack, which was located in the middle of the step, and the crumbled concrete around it were readily observable. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. Instead, the invitee is reasonably expected to discover the problem and protect himself against it. The court here concluded that the crack and deterioration of the steps was open and obvious, and therefore the restaurant was not liable.

89. *Watts v. Scottsdale Insurance Co.,* __So.3d__, 210 WL 2598267 (La. App., 06/03/10). Plaintiff, who was 82, tripped over a strip of metal while attempting to enter a restaurant. She suffered serious injuries to her mouth and teeth. The metal strip was a border around the flowerbed in an area that was not designated as a walkway. It is located four inches above the ground. The court affirmed the decision of the trial court that the metal was open and obvious, and therefore ruled for Defendant.

90. *Alpern v. Big Fish Restaurant*, 2010 WL 1077851 (Del. Super., 03/19/10). Plaintiff was delivering bread to a restaurant when he fell on a metal pole stuck in the ground outside a side door to property occupied by the Big Fish Grill restaurant and Neva's Café. Plaintiff sued the restaurant; it claimed the café was liable. Although the pole was located on the café's property, the restaurant owned the property and leased to the café. The pole had been installed by a previous owner. The lease did not state that the café was responsible for the condition and maintenance of the building's exterior, nor did it permit the café to make exterior changes. The court denied summary judgment to the restaurant.

91. *Babich v. R.G.T. Restaurant Corp*., __NYS2d__, 210 WL 2650483 (NY App. Div., 07/06/10). Plaintiff, a restaurant patron, fell down an interior staircase leading to a cellar where the restrooms were located. Plaintiff sued both the owner of the restaurant and the owner of the building. The court dismissed the action against the owner of the building. A landlord is not generally liable for negligence with respect to the condition of the property after possession and control are transferred to a tenant unless the landlord is contractually obligated to maintain the premises which is not the situation here. Further, the offending condition was not structural. Therefore, the landlord was not liable. Concerning the restaurant owner, an affidavit from an expert architect established that the non-slip finish on the nosing of each tread and top platform was "severely worn off creating an extremely slippery condition at the edge nosing at the top platform and at each stair tread." This raised a triable issue of fact as to whether the stairs complied with building code regulations, precluding summary judgment for Defendant.

92. *Zhizhen Fu v. Swansea Lounge, Inc.,* 76 Mass. App. Ct. 1110, 920 NE2d 326, 2010 WL 335578 (Mass. App., 02/01/10). Plaintiff slipped and fell while dancing at a banquet hall. She appeals from a grant of summary judgment to Defendant. Plaintiff was unable to produce evidence as to the cause of her fall. Although she alleged that she fell on grease or some other foreign substance, neither she nor anyone else saw a substance on the dance floor before or after her fall. The most Plaintiff could say was that she felt something "different" on the floor before her fall. After she fell, she did not look at the floor to find out whether a foreign substance caused her to fall but instead got up and continued dancing. The court noted that Plaintiff's case rests on mere speculation and affirmed the trial court's grant of summary judgment.

93. *Castore v. Tutto Bene Restaurant, Inc.,* 77 A.D.3d 599, 909 NYS2d 452 (App. Div. 1st Dept., 10/28/10). Plaintiff purportedly slipped and fell due to water or other liquid on stairs she was descending while at Defendant's restaurant. Defendant met its burden of showing, prima facie, that it did not have actual or constructive notice of the alleged dangerous condition. "Just moments before the accident" a waiter traversed the same stairs without observing the presence of any liquid. In an attempt to rebut the waiter's evidence, Plaintiff "conjectured" that restaurant employees might have spilled some liquid on the stairs when food was transported to the upper dinning floor. The court rejected this as "rank speculation" insufficient to establish a triable question of fact. Plaintiff's expert hypothesized that the accident likely was caused by the existence of a single step at the bottom of the landing and the absence of a handrail there. However, the court noted that Plaintiff stated in her deposition that she fell as the result of slipping on some liquid. Therefore, no evidence existed that the configuration of the landing contributed to the accident. Summary judgment for the restaurant was thus affirmed.

Tipping

94. *McCulllum, et al., v. McAlister's Corp.*, No. 08-5050 SECTION: "S" (3) (E.D. La. 04/13/10). Several employees of Defendant's deli filed a claim against Defendant because they were denied wages and tips when customers left cash tips in the "tip jar" or entered tip amounts on the credit card slips. The court allowed the employees to proceed with a charge of conversion since the workers' alleged that Defendant intentionally implemented a tip policy where managers and others employees either kept the tips or donated them to charity. Defendant's donations would create good press and tax benefits, thus benefiting Defendant. The court also stated that the employees could proceed against Defendant on a claim for unjust enrichment since Defendant was in possession of money that in good conscience belonged to the Plaintiffs.

95. *Cumbie v. Woody Woo, Inc., et al*., No. 08-35718 (9th Cir. 02/23/10). Plaintiff was a waitress in Defendant's café and was paid a cash wage over the state minimum wage which did not require tip credit to be used. Defendant required servers to contribute to the tip pool which was distributed to all employees; the kitchen staff getting the largest share. Plaintiff filed a class actin against Defendant arguing that the tip pool arrangement violated the FLSA. The trial court dismissed the case and the appellate court affirmed. Plaintiff argued that the company was required to pay her the minimum wage, plus tips. Defendant argued that this

requirement only applies to employers who take a tip credit toward their minimum wage obligations. The court agreed with Defendant.

Trademark Infringement

96. *Miller's Ale House, Inc., v. Boynton Carolina Ale House, LLC,* No. 09-80918-CIV-MARRA/JOHNSON (S.D. Fla. 10/05/10). Plaintiff has operated a chain of sports bars in Florida for more than 20 years. Defendant opened the Carolina Are house in Boynton Beach, Florida about one mile from Plaintiff's Boynton Beach Ale House. Both restaurants use red lettering in their logos and servers wear dark polo shirts and khaki shorts or pants. The restaurant décor is very similar as well. Plaintiff filed a complaint against Defendant accusing the company of trademark and trade dress infringement. Years prior, Plaintiff's predecessor filed a complaint alleging trademark infringement against another Carolina restaurant but the trial court (and confirmed on appeal) said that the term "ale house" was a generic term and could not be protected under federal trademark law. Plaintiff claimed that customers have confused the two restaurants, however, the district court in this action found that nothing much had changed since the previous suit and the Plaintiff failed to present sufficient evidence of a pervasive, prolonged presence in the national restaurant market to raise a question of whether the perception of the word "ale house" had changed such as to amount to a trademark infringement claim.

97. *Rib City Group, Inc. v. City Ale House and Francis C. Ryan*, 2010 WL 4739493 (Fla., 11/16/10). Plaintiff restaurant owned trademarks in the names Rib City, Rib City Grill, Rib City Barbeque and Rib City Real BBQ & Great Ribs. Defendant Ryan was the general manager of a Rib City restaurant. As such, he was provided access to the eatery's trade secrets, operation manuals, recipes, food preparation techniques, marketing information, and more. After working for six months, he resigned and signed a nondisclosure agreement covering a period of 10 years from separation. Fifteen months later he opened a restaurant named Rib City Ale House and launched a website using Rib City marks and Plaintiff's confidential information. Upon receipt of a cease and desist letter, Ryan admitted to the infringement and agreed to stop. However, the infringement remained ongoing. Patrons posted unfavorable reviews online of Defendant's restaurant, which Plaintiff worried would be attributed to its restaurants. The court determined Defendant's infringement was willful and awarded statutory damages in the amount of $600,000, plus an additional $100,000 for Defendant's use of the domain name www.ribcityalehouse.com. The court also found the necessary "exceptional circumstances" to justify awarding attorney's fees in the amount of $23,400. This amount was based on an hourly rate of $200.

98. *AFC Enterprises, Inc. v. The Restaurant Group, LLC*, 2010 WL 4537812 (N.D. Ga., 11/03/10). The franchisor of POPEYE'S restaurant system properly terminated Defendant's franchise. A preliminary injunction was entered in the franchisor's favor prohibiting the franchisee from "using the POPEYE'S marks or any trademark, service mark, or trade name confusingly similar". In response to the injunction, the franchisee promptly closed its restaurant but continued to display the POPEYE'S marks on signs at the location. In this lawsuit, the franchisor moved for an Order to Show Cause, seeking to stop the Defendant

from exhibiting the sign. The court denied the Order to Show Cause noting that the franchisee was not "using" the mark since the restaurant was closed. To the extent the terms "using the POPEYE'S marks" is ambiguous, the court resolved the ambiguity in favor of Defendants, the party charged with contempt. Further, the court noted that the preliminary injunction does not include an unequivocal command to remove the POPEYE'S signage.

Union

99. *520 S. Michigan Ave. Assoc. v. Unite Here, Local 1*, No. 10 C 1422 (N.D. Ill. 07/15/10). The hotel's complaint against the union stated that they violated the NLRA by aggressively harassing employees and customers. The hotel said that the union sent a heart-shaped package full of cow manure to scientists who were scheduled to attend a convention at the hotel. The court found that this incident could not be considered since it was outside the statute of limitations for tort actions in the state. The court dismissed the complaint stating that the hotel failed to prove that the union engaged in illegal secondary boycotting, which would be in violation of the NLRA.

Whistleblowing

100. *Kyle v. Circus Circus Mississippi Inc., d/b/a Gold Strike Casino Resort*, No. 2:09CV014-P-S (N.D. Miss. 06/15/10). A disgrunted employee of Defendant's casino/resort sent a letter to the Internal Revenue Service alleging that the casino was not reporting tip pool money from the poker tournaments and he was worried that Defendant was seeking to terminate his employment. Two months go by and Plaintiff was terminated for performance issues and he claimed retaliation in connection with the Mississippi whistleblower law. The court found that Plaintiff could not show willfulness by the casino, especially since the casino corrected its accounting procedures for the tip pool distribution once it became aware of the issue and the casino properly paid taxes. The court ruled that since Plaintiff could not show that Defendant's actions were "the imposition of criminal penalties," the claims were dismissed.

Workers Compensation

101. *Gibson v. Ribs & Reds Restaurant*, __So.3d__, 2010 WL 4679026 (Ala. App., 11/19/10). Plaintiff was an employee at Defendant's restaurant. He suffered an injury to his right hand and left knee while employed and filed a claim for workers' compensation. He was thereafter terminated and he sued for retaliatory discharge. While the case was pending, he died from causes unrelated to his work injury. The restaurant filed a motion to dismiss based on a statute which mandated dismissal of a workers' compensation claim when the worker dies from unrelated causes and the degree of disability from the injury had not been determined by a court or agreed upon by the parties. Plaintiff's representative argued that the statute did not apply to a retaliatory discharge claim. The court agreed that retaliatory discharge claim should be treated like any other tort claim which, unlike a worker' compensation claim, survives the claimant's death and can be pursued by his estate.

102. *Restaurant Management, Inc. v. Industrial Commission*, 2010 WL 4681887 (Ohio App., 11/18/10). The Ohio Industrial Commission granted temporary total disability compensation to respondent. Her employer sought a writ of mandamus ordering the Commission to vacate its ruling. Claimant sustained a work-related injury while a manager at Arby's. In due time she was authorized by her doctor to return to work but for no more than 30 hours a week. Sometimes she had to work more than 30 hours to properly manage the restaurant. At those times, she would carry over some of the extra hours to the next week, editing her time card to appear that she arrived at work before she actually did. She testified she had the authority of management to do so. Management denied the authorization and claimed to have a policy prohibiting time sheet editing although no written policy was produced. One of the company's officials however admitted a company rule that allowed editing of time sheets with a supervisor's approval. The company terminated claimant for a willful violation of a company rule prohibiting time card editing. Several weeks later, she was declared temporarily and totally disabled. The employer denied liability since she had been terminated for misconduct. The court upheld the commission's finding that the worker was credible when she said she had permission to edit the time card. Therefore, she should not have been terminated and was entitled to disability compensation.

Zoning

103. *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government,* __SW2d__, 2010 WL 1636975 (Ky. Sup Crt, 04/22/10). Appellants are adult entertainment businesses that operate in the Louisville Metro area. They challenge the constitutionality of a local ordinance that sought to combat adverse secondary effects of sexually oriented adult entertainment businesses, specifically provisions requiring a six foot buffer zone, an 18-inch stage height, and limited hours of operation (cannot operate from 1:00 a.m. to 9:a.m.); limiting touching, precluding direct tipping, prohibiting sale of alcohol, mandating a $1000 annual license fee, and requiring disclosure of information about principals. The court upheld the anti-nudity, buffer zone and 18-inch stage height and limited hours of operation based on precedent. The no-touch provision required that employees who regularly appear semi-nude in an adult entertainment establishment cannot knowingly or intentionally touch a customer or his clothing. While noting that touching during an erotic performance or while in a state of nudity is not protected expression, the court stated that handshakes and pats on the back as a "greeting or show of fellowship" is "a social custom and an integral part of our culture" and thus part of the right to free association. The court thus held this part of the ordinance was overbroad. The court upheld the prohibition on accepting tips while semi-nude in an adult entertainment establishment. The court noted that the prohibition works in conjunction with the staging requirement and proximity limit. The court also noted that tips can be given in a tip-jar placed at the edge of the six-foot buffer zone or given to the performer after the show when s/he is no longer semi-nude. The court upheld the alcohol sale prohibition, finding it was consistent with the Twenty-first Amendment to the Constitution and a proper exercise of the police power. The license provision required adult entertainment establishments to pay $1000 annually for a license and employees to pay $25 a year. The court upheld the amounts as reasonably related to the costs of dealing with adult entertainment businesses and their secondary effects. A provision in the ordinance required

the town to deny a license to someone who had been convicted of a designated crime including rape, falsifying business records and prostitution. The court appellants lacked standing to challenge this provision because they had not been convicted of any of the indicated crimes. Finally, the ordinance requires disclosure of personal information plus fingerprints of all principal owners, which by definition, includes anyone owning 20% or more of the business. The court declined to find this requirement overbroad, noting the state's interest in combating crime, particularly organized crime, associated with adult oriented businesses.