Hospitality Case Review: The Top 100+ Cases That Impacted Us in 2017

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CO-RECIPIENT OF THE 2013 ANTHONY G. MARSHALL HOSPITALITY LAW AWARD

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

She has written several textbooks including numerous editions of Hotel, Restaurant and Travel Law, the latest of which was published in 2017 by Kendall Hunt and won a Textbook Excellence Award from Text and Academic Authors Association. She also wrote two editions of New York Cases in Business Law for Cengage Publishing. In 2011, she published *Law Made Fun through Harry Potter's Adventures,* and in 2017*, Law Made Fun through Downton Abbey*. She also co-authors Criminal Law in New York, a treatise for lawyers. She writes a column for Hotel Management Magazine entitled, *Legally Speaking*, and a blog for Cengage Publishing Company on the law underpinning the news. Her current book-writing project is *Law Made Fun through Game of Thrones*

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. In 2016, she was awarded the Lawyer of the Year Award, conferred by fellow lawyers. In 2009, she won the Humanitarian Award, conferred by the Monroe County Bar Association, and was named a Woman of Distinction in 2011.

Her favorite volunteer activities include being a Big Sister in the Big Brother program, which she has done for more than twenty years, and serving food weekly at a soup kitchen.

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 Float, and Tortoise-and-the-Hare Float, and a balloon handler for Clifford, the Big Red Dog. Her newest hobby is magic. She performs for youngsters at not-for-profit agencies, and the soup kitchen.

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Diana S. Barber, J.D., CHE, CWP is currently an adjunct professor teaching hospitality law, introduction to hospitality and hospitality human resource management at Georgia State University in Atlanta, GA. In addition, she teaches an introduction to paralegal studies at the ABA approved paralegal program located at University of North Georgia in Gainesville, GA. She most recently created a one-day workshop on contracting and risk management for the Events and Meeting Planning Certificate offered by The University of Georgia in Athens, Georgia.

In 2017, Diana became a co-author of *Hospitality Law, Managing Legal Issues in the Hospitality Industry* (5th Edition), along with Stephen Barth.

Ms. Barber is a recipient of the J. Mack Robinson College of Business Teaching Excellence Award in 2011 and was awarded 2011 Study Abroad Program Director of the Year by Georgia State University. In addition, Ms. Barber is the recipient of the 2010 Hospitality Faculty of the Year award and in 2012, received a Certificate of Recognition from the Career Management Center for the J. Mack Robinson College of Business. Ms. Barber is a member of Phi Beta Delta, an honor society for international scholars. Diana also completed her certification as a Certified Wedding Planner through the nationally recognized [the] Bridal Society.

Ms. Barber continues to be 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-five years of legal hospitality experience. Diana 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 with The Ritz-Carlton Hotel Company, LLC serving as vice president and associate general counsel. She is a member of the State Bar of Georgia, G.A.H.A., and the Georgia Hotel & Lodging Association ("GHLA").

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. She also writes a monthly legal Q&A column for the GHLA 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 for members of GHLA.

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ADA/Website Accessibility

1. *Markett, et al., v. Five Guys Enterprises, LLC,* No. 17-cv-788 (KBF) (S.D. N.Y. 07/21/2017). A legally blind woman filed a complaint against Five Guys burger restaurants on behalf of herself and all blind individuals who attempted to access the Five Guys website but encountered accessibility website barriers. She claimed that these barriers or software malfunctions denied her full and equal access to, and the enjoyment of, the goods, benefits, and services of Five Guys in violation of Title III of the Americans with Disabilities Act and New York City Human Rights Law. She asked the court for declaratory and injunctive relief, as well as compensatory damages. Five Guys filed a motion to dismiss which was denied as the court found that the breadth of federal appellate decisions suggests that the Five Guys' website is covered under the Americans with Disabilities Act.

ADA/Disability

2. *Smith v. Boyfield, Inc.,* No. 2:17-cv-00666 (D. Utah 10/23/2017). Plaintiff had previously undergone lap-band surgery and while he was eating alone at a restaurant, he began regurgitating his food in front of other diners. The server asked him to use the bathroom and the plaintiff claimed that the server made an unnecessarily loud spectacle out of the whole ordeal while embarrassing plaintiff. The manager of the restaurant refused to speak with him and the server asked plaintiff to leave the restaurant. Plaintiff argued that his inability to properly eat and digest constituted a disability under the ADA and that defendant restaurant and the owner discriminated against him because of his disability, retaliated against him by asking him to leave, and intentionally inflicted emotional distress because of the embarrassment he suffered. The defendant owner moved for summary judgment, but a district court held that plaintiff could proceed with his claims of discrimination and retaliation. The court dismissed the emotional distress claim stating that asking the plaintiff to leave the restaurant did "not rise to the level of offending generally accepted standards of decency and morality." Defendant owner argued that Title III of the ADA only provides for a cause of action against an entity, and not an individual. The court disagreed and said that any person who owns, leases, or operates a place of public accommodation can be liable under Title III of the ADA.

3. *Kennedy v. Melo's Italian Restaurant,* 2017 WL 2600789 (M.D. Fl., 06/15/17). Plaintiff uses a wheelchair to ambulate. She claims she was unable to access the following areas in defendant's restaurant: parking lot, path of travel from the lot to the main entrance, and the bathroom. Plaintiff argues defendant is required to remove architectural barriers to the extent removal is readily achievable. The complaint also alleges that the listed barriers "may not be an exclusive list of defendant's ADA violations because plaintiff was unable to access and assess all areas of the property due to the

architectural barriers encountered." Plaintiff thus seeks to leave open the possibility that her claims may include additional barriers not yet known to her. Defendant moved to dismiss that part of the claim relating to unknown barriers, and the court granted the motion. The court held architectural barriers alleged in an ADA complaint must be limited to those that plaintiff experienced or was aware of at the time of the filing of the complaint. Without actual knowledge of the barriers, a plaintiff has not suffered an "injury in fact" and therefore lacks standing. Speculation about possible violations is not sufficient to establish standing.

Class Actions

4. *In Re: Subway Footlong Sandwich Marketing and Sales Practice Litigation*, 869 F.3d 551 (08/25/2017). A class action litigation was commenced against Subway restaurant franchises for damages and injunctive relief under state consumer protection laws when a customer measured the sub and it was 11 inches instead of the advertised 12 inches. Subway showed that the majority of its sandwiches are at least 12 inches long, and that the shortfalls are a natural consequence in the baking process. Subway also provided evidence that all of its raw dough sticks weigh exactly the same. Subway and class counsel agreed to settle the case, and the district judge preliminarily approved the settlement. One of the plaintiffs objected to the settlement, arguing that the proposed injunction didn't benefit the class in any meaningful way, and that therefore, the settlement was worthless. The Circuit Court of Appeals reversed the district court's decision approving the settlement, holding that a class action that "seeks only worthless benefits for the class" and yields only fees for class counsel is "no better than a racket" and should be dismissed. The class should not have been certified and the settlement should not have been approved, so the court reversed and remanded the case.

5. *Hoffman, et al., v. Poulsen Pizza, LLC,* et al., No. 15-2640-DDC-KGG (D. Kan. 01/03/2017). A class of 137 delivery drivers for Domino's franchisees filed a complaint against their employer, alleging violations of the FLSA due to the way the company calculated reimbursement for drivers using their personal vehicles. The drivers alleged that defendant, which operated 33 pizza franchise locations, used a flawed method to determine reasonably approximate costs of personal vehicle use, and that this caused delivery drivers to incur unreimbursed expenses and reduced their wages below the federal minimum wage during some workweeks. A district court approved the settlement agreement, finding that the delivery drivers were sufficiently similarly situated and that they were reimbursed for the use of their vehicles at a rate below the IRS safe harbor rate, and that the employees alleged that they were the victims of a uniform and employer-based compensation policy that violated the FLSA. Although defendant argues that it did adequately compensate drivers, the court found that the agreed upon settlement was fair, reasonable and adequate since it removed a confidentiality provision.

6. *Drake v. Steak N Shake Operations, Inc*., No. 4:14-cv-01535-JAR (E.D. Mo. 12/22/2017). A group of 46 salaried managers at Steak N Shake restaurants filed a class action complaint alleging that the company failed to properly pay them overtime wages in violation of the FLSA and Missouri law. Plaintiff employees moved to formally certify the class as "all persons who worked as Steak N Shake managers at corporate-owned restaurants in Missouri from Sept. 8, 2012 to present." Steak N Shake moved to decertify the class stating that they were not similarly situated. A district court denied defendant's motion and certified the class. Defendant argued that the plaintiff's experiences differed significantly from store-to-store, supervisor-to-supervisor, and shift-to-shift, and that those differences outweighed

the similarities. The court disagreed with defendant and found that while defendant could identify several factual differences, the court found that the similarities among the plaintiff employees outweighed the differences, particularly as it related to whether the managers' primary job duties were executive or administrative.

7. *Pataky, et al., v. The Brigantine, Inc.*, No. 3:17-cv-00352-GPC-AGS (S.D. Cal. 05/08/2017). Servers in defendant's restaurant group claimed that defendant's tip pooling policy is unlawful, and they were required to tip out significant portions of their earned tip income to employees who do not provide direct table service to patrons in violation of the FLSA and unfair business practices in California. The servers seek conditional certification of an FLSA collective class action. Defendant argued that the tip pooling arrangement is only a suggestion and not all the servers in each and every restaurant in defendant's restaurant group are similarly situated. The district court granted the conditional certification for all of defendant's restaurants since defendant's policies are uniform across all its restaurants, thus plaintiffs have met their burden for a collective certification.

8. *Koenig v. Granite City Food & Brewery, Ltd.*, No. 16-1396 (W.D. Pa. 05/11/2017). Plaintiff alleges that defendant restaurant, Cadillac Ranch All American Bar & Grill in Pennsylvania, is in violation of the FLSA and Pennsylvania's Minimum Wage Act due to its failure to meet tip credit notification requirements and its failure to inform other workers of its use of a tip credit. Plaintiff also alleges that defendant forced tipped employees to forfeit tips when customers walked, or the restaurant had a shortage. Plaintiff moved to certify a collective action for said violations and defendant argued that its five restaurants utilized the tip credit provisions and that all employees are provided with oral notification from local management. The district court granted plaintiff's motion to certify the collective action. The court also certified a class for bartender's state wage and hour claims.

Code Enforcement Lien

9. *City of Riviera Beach, Fl v. J & B Motel, Corp.,* 2017 WL 1018521 (Dist. Crt. Fl., 03/15/2017). Defendant motel committed a building code violation and was fined. The motel failed to pay the fine. The city recorded its lien in the public records in 2003. The law authorizes the municipality to foreclose on the lien or sue to recover a money judgment for the amount of the lien and accrued interest. Twelve years after recording, the city sought to foreclose the lien. The motel argued the case was barred by a five-year statute of limitations. The court agreed and dismissed the case. The city appealed and convinced the court that the applicable statute of limitations was twenty years from the date a code enforcement lien is recorded. (The question of which statute applied was not clear). Therefore, the foreclosure action was reinstated.

Contracts/Breach

10. *Deauville Beach Resort v. Ward*, 2017 WL 2348626 (05/31/2017). Appellees planned their wedding reception at appellant hotel. Nine days before the wedding the city of Miami Beach red-tagged the hotel's three ballrooms as unsafe and in violation of building codes. The specific grounds for the shutdown were not provided in the court's decision. Efforts to remedy the problems prior to the wedding were unsuccessful. The hotel informed the couple a few hours before the ceremony that the reception would be moved to the lobby. The couple sued the hotel for breach of contract claiming the

space was too small, the tables were crammed, there was no privacy, hotel guests continually walked through the reception, some in bathing suits, and the disc jockey was told numerous times to lower the volume. A jury awarded compensatory damages of $25,500 and the hotel appealed. The court reduced the damages to the amount the couple paid for the food and beverage contract - $12,985.65. Damages for emotional distress are not recoverable in a breach of contract case. The court also dismissed the newlyweds' claim for intentional infliction of emotional distress, finding the hotel's actions to be "wrong and tortuous" but not sufficiently outrageous to support this claim.

11. *Daniels v. Dover Downs Hotel & Casino Valet Parking*, 2017 WL 1929654 (Del., 05/09/2017). Plaintiff is a platinum card member of Dover Downs Hotel & Casino. As a benefit of membership, he was entitled to free valet parking. However, when plaintiff attempted to utilize the valet service at the hotel he was denied. An employee informed plaintiff that the reason was because he had abused the privilege by not tipping the valets and being argumentative. Plaintiff alleged injuries of emotional distress manifesting itself by headaches and inability to sleep. The valet service moved to dismiss the case. An essential element of a breach of contract case is resultant damage to the plaintiff. The complaint seeks $70,000 for pain and suffering. However, damages for emotional distress are not available for breach of contract absent physical injury. The court therefore dismissed the case.

Copyright

12. *J & J Sports Productions, Inc. v. El Rincon Cuban Restaurant*, 2017 WL 2389409 (W.D. Kent., 06/01/2017). Plaintiff is a distributor of closed-circuit sports and entertainment programming. Plaintiff purchases commercial exhibition rights to such programming, and then sublicenses those rights to commercial establishments for a fee which is determined based on the capacity of the location involved. There are many businesses that seek to exhibit popular sports programming but are unwilling to pay to do so. Plaintiff dispatches investigators to local bars and restaurants on the nights of major shows. An investigator visited defendant restaurant and observed it was exhibiting middleweight championship fight programs without having paid the $1,200 cost for a license to do so. Plaintiff sued for conversion. The court ruled for plaintiff noting that the interception was not done mistakenly, innocently, or accidentally, but instead for private financial gain. The court awarded plaintiff $2,400 in damages.

Defamation

13. *Burton v. Fountainhead Development, Inc.,* 393 P.3d 387(Alaska 03/17/2017). A former employee of defendant's hotel worked for a tour company used by defendant. The tour company wanted to place plaintiff, the former employee, at the hotel and the hotel did not want the former employee on hotel property. According to the complaint, defendant claimed that plaintiff was not allowed on hotel property and had previously been in an altercation with a guest and subsequently defaced hotel property. The tour company tried to place the hotel's former employee at another property, but plaintiff said he couldn't get transportation to any other hotels so his employment with the tour company was terminated. He sued the hotel for defamation and tortious interference with his prospective business relationship. Defendant wrote a letter asking the tour company to correct its termination paperwork to state that plaintiff was never "banned" from the property and outlined that it did not want him to work at the property because of many complaints during his employment at the hotel. The letter was done at the request of the court to provide clarification. The court rejected plaintiff's tortious interference claim but

found that several of the defendant's statements were defamatory per se, justifying an award of $15,000 in general damages. Plaintiff appealed stating he was entitled to an award of special or punitive damages. The Supreme Court of Alaska affirmed the superior court's ruling noting that plaintiff's employment ended with the tour company because of his refusal to work at any other hotel locations, not because of what the hotel said to the tour company. Plaintiff argued that defendant's decision to keep plaintiff from working on the hotel property was "motivated by animus, malice, and a desire to injure" him. The court noted that the hotel was motivated to protect its legitimate business interests.

Dram Shop

14. *Henson v. Uptown Drink, LLC,* No. A17-1066 (Minn. Ct. App. 12/26/2017). Two men were drinking at defendant's bar when an altercation broke out involving the bar's security guard. One of the men jumped on the guard and another patron at the bar voluntarily intervened to help the security guard. The patron, while helping to get the drunken man off the guard, fell, hit his head, suffered a traumatic brain injury and later died. The estate of the patron sued defendant bar under the dram shop act. The district court granted defendant's summary judgement motion which was later reversed on appeal. The bar argued that the doctrine of primary assumption of risk precluded recovery by the estate. The appellate court said a summary judgment motion was granted in error as there were genuine issues of material fact to be decided by the jury such as whether the deceased had actual knowledge of the risks associated with his coming to the aid of the guard. The court also said that the deceased's assistance may have been secondary assumption of the risk whereby the defendant is not relieved of his duty of care with respect to the hazard. Disposing of the dram shop claim on summary judgement was in error because questions remain as to whether the deceased's intoxication was the proximate cause of his own injury.

15. *Schriefer v. EJJ, Inc., et al.,* 2017 IL App (4th) 160733-U, No. 4-16-0733 (Ill. Ct. App. 07/13/2017). Two men were intoxicated and fighting in the parking lot of defendant's tavern. Plaintiff, a member of a rival motorcycle club who knew the two men was hit by one of them in the back of the head and punched in the face. Plaintiff suffered a broken jaw and had to undergo corrective surgery. Both the plaintiff and his friend testified that there had not been bad blood between the two attackers and the victim, and that they didn't believe the assault would have happened had the men been sober. Plaintiff's friend said he saw the two aggressive men drinking at another bar earlier that day. Both the victim and the tavern filed for summary judgment and the trial court granted plaintiff's motion. Defendant appealed, and the appellate court affirmed the lower court's ruling. The court noted that the bar did not dispute that it provided liquor to the two men, or that the victim suffered an injury because of the incident. Defendant failed to introduce affidavits or depositions to prove that a genuine issue of material fact existed as to the two men's level of intoxication. The court disagreed stating that the "only conclusion to draw from these undisputed facts is the five or six alcoholic beverages served by" the defendant bar was "a material and substantial factor in producing or contributing to produce the intoxication." The court further said that even if a motorcycle club rivalry was one of the causes of the incident, it does not preclude intoxication from also being a cause of the attack.

16. *Bellamy v. TGI Friday's, Inc.,* 2017 NY Slip Op 30047 (U), No. 161870/2013 (N.Y. 01/09/2017). Plaintiff and her cousin were having drinks at defendant's bar when plaintiff spotted a frenemy across the bar. The two immediately exchanged words, which lasted about two minutes. A bartender asked if everything was alright and plaintiff said she didn't get along with the former friend and there were no more words. Plaintiff was concerned that the former friend was going outside to get a weapon and that

she might need help. A security guard was summoned and stood behind plaintiff during her stay at the bar. An hour or so later, plaintiff and her cousin left the restaurant and forgot about the previous feeling of a possible threat. As plaintiff was opening her car door, the former friend wacked plaintiff in the head from behind. Plaintiff did not ask to be escorted to her car and said she had forgotten about the earlier conflict. Defendant moved for summary judgment, arguing that it had no duty to protect plaintiff from the unforeseeable criminal assault, and had no indication that the former friend was threatening or planning an attack any time after the bartender interceded and the verbal altercation ended. A district court granted defendant's motion. The court found no evidence that plaintiff told the restaurant that she was being threatened and plaintiff didn't ask for help nor did she call the police. Further, the court noted that there was no pattern of criminal activity or even a single similar incident to put defendant on notice of the potential for violent acts.

Employment/Arbitration

17. *Jones, et al., v. Waffle House, Inc., et al.,* No. 16-15574 (11th Cir. 08/07/2017). Plaintiff, a disgruntled ex-employee filed a claim against Waffle House in connection with alleged violations of the Fair Credit Reporting Act. Meanwhile, plaintiff obtained employment at a different Waffle House in a different state. Upon accepting the new employment, plaintiff signed an arbitration agreement; agreeing to arbitrate all claims and controversies past, present or future. The previous Waffle House restaurant sought to compel plaintiff to arbitrate the FCRA claim. The district court denied defendant's motion to compel arbitration and on appeal the circuit court vacated and remanded the case as defendant's motion to compel should have been granted. The court found no merit to plaintiff's arguments and said that the agreement was not unconscionable. The language in the arbitration provision "clearly and unmistakably" showed that both sides intended to arbitrate all gateway issues.

18. *Kutluca, et al., v. PQ New York Inc., et al.,* No. 16-cv-3070 (VSB) (D. S.D. 07/10/2017). Employees of defendant filed a claim alleging violations of the Fair Labor Standards Act and New York Labor Law by failing to pay the federal and New York minimum and overtime wages, failing to pay "spread of hours" pay, unlawfully retaining tips, failing to provide required notices, and failing to pay for the cost of laundering uniforms. Defendant restaurant outsourced its human resources, benefits, payroll and compliance support to a company called TriNet Group, Inc., but retained the day-to-day responsibilities of directing the employees. TriNet used an online, password protected software for employees and required all employees to read and accept the terms. One of the terms provided for arbitration of disputes. Defendant filed a motion to compel arbitration of the FLSA and NY claims and three employees argued that they forgot or were not aware what they were signing. The court wasn't convinced and said that the plaintiffs' failing memories were irrelevant and dismissed their arguments. The court also said the site was clear and that the plaintiffs' failure to read and understand what they were signing before clicking "I Accept" does not render the arbitration clause unenforceable.

19. *Waffle House, Inc., v. Pavesi*, No. A17A1281 (Ga. Ct. App. 10/04/2017). A Waffle House employee sought a claim against his employer alleging negligent hiring, supervision and retention, as well as a failure to keep the work place safe, after another employee added drugs to plaintiff's drink causing plaintiff to go into a coma and subsequently became disabled. The co-worker was convicted and is serving a 20-year sentence. Waffle House moved to compel arbitration and the trial court denied the motion. The trial court said that the agreement specifically said it was covered by Georgia law and

didn't mention the Federal Arbitration Act and therefore the plaintiff's claims did not fall under the arbitration clause. On appeal, Waffle House prevailed, and the court found that the arbitration agreement covered claims arising out of any aspect of employment including tort claims. The appellate court reversed the trial court's decision.

Employment/Child Labor Law

20. *Massachusetts Attorney General v. Northeast Foods, LLC*, (12/232017). The second largest Burger King franchisee in the country, Northeast Foods, LLC, was accused of 843 child labor law violations. The claims included allowing young employees to work too many hours in a day, too late at night and without work permits. The franchisee settled the case by paying $250,000 and updating its practices to ensure compliance. The case began with a single complaint about one young employee working too late at one location. A six-month investigation followed, leading to the charges. Northeast Foods owns 43 Burger King outlets in Massachusetts, and another 500 nationwide.

Employment/Discrimination/ADA

21. *Jiménez-Jiménez v. International Hospitality Group, Inc./Casino del Sol*, No. 15-1461 (SCC) (D. P.R. 11/30/2017). A dealer at a casino claimed he had a disability as he was ultra-sensitive to perfumes and chemicals. His doctor recommended that he be offered a reasonable accommodation in an allergen-low environment. He had some work performance issues and continued to complain about perfumes and wanted the casino to enforce its dress code policy on "soft" colognes and perfumes; which the casino did. The dealer was also given a separate break room in case he needed to use it to get away from the scents. He subsequently resigned and filed a charge with the EEOC for disability discrimination and retaliation. Defendant casino sought a summary judgment from the district court and it was granted. The court stated that a number of courts have concluded that an individual does not suffer from a disability under the ADA when the impairment only manifests when the alleged disabled person is exposed to an allergen at work. The ADA didn't apply to plaintiff since he didn't suffer from his condition outside of the workplace and the plaintiff wasn't able to identify the allergen. Plaintiff did not offer any evidence as to how the casino could accommodate by policing the scents that employees and clients use. Judgment for the casino.

22. *Malagon v. Crescent Hotel and Resorts*, 2917 WL 2536995 (N.D. Texas, 06/12/17). Plaintiff worked at defendant hotel as a parking garage manager and valet supervisor. He suffered from anxiety and depression. His doctor recommended that he switch to Monday through Thursday shifts which were viewed as lower volume and therefore less stressful. Plaintiff claimed he gave to his boss a letter from his doctor so stating. The boss denies receiving such a letter. Plaintiff resigned and filed a charge of disability discrimination with the EEOC. It denied his claim. Plaintiff nonetheless filed a lawsuit. The hotel argued that presence by a supervisor during high volumes of business to monitor garage traffic and supervise valet drivers is an essential function of his job. The job description did not identify presence during peak business hours as an essential element. The court therefore found a genuine issue of fact precluding summary judgment.

23. *Worthington v. Chester Downs and Marina, LLC, et al.,* No. 17-1360 (E.D. Pa. 08/11/2017). Plaintiff, a dealer at Harrah's casino, filed suit against the casino for discrimination based on his alleged disability

and retaliation based on his FMLA request. Plaintiff was out on FMLA leave when he was terminated based on an altercation plaintiff had with another employee which prompted plaintiff's FMLA leave. Defendant moved for summary judgment which was granted as to the disability discrimination claim but plaintiff could pursue his retaliation claim as questions of fact remain as to whether his FMLA leave time and employment termination were sufficiently proximate to his impairment and leave request to be suggestive of retaliation.

24. *Gradek v. Horseshoe Cincinnati Management, LLC*, No. 1: 16-cv-270 (S.D. Ohio 06/14/2017). Plaintiff worked at defendant's casino as a craps game supervisor and became disabled due to a knee injury. Plaintiff asked for an accommodation to work in the sit "box" where a supervisor could sit above the tables. Defendant accommodated plaintiff's request for a while, but scheduling became an issue, so she was terminated because she could not stand more than 10 minutes at a time. Defendant offered her another position, but plaintiff declined as it was a pay cut. Defendant moved for summary judgment and the court denied its' request. Plaintiff said that moving around and standing was not an essential job function as the written job description made no mention of a requirement to either stand or rotate among tables for a long period of time. The court agreed and said there are questions remaining as to whether the casino provided a reasonable accommodation; and rejected defendant's argument that scheduling plaintiff in the "box" would be an undue hardship.

25. *Kelly v. Starwood Hotels & Resorts Worldwide, Inc*., No. 15cv6309 (DLC) (S.D. N.Y. 03/24/2017). A hotel employee filed a suit against Westin for failure to reasonably accommodate her disabilities; hypertension, hyperthyroidism, osteoarthritis, chronic elbow pain and cardiac arrhythmia. Plaintiff asked to not work overnight shifts and double shifts. Her request was denied because it would violate the collective bargaining agreement, which assigned shifts by seniority. The hotel said they would not require her to work double shifts and she could put up a sign-up sheet to switch shifts with another employee when she was scheduled for overnight shifts and she could take FLMA leave when she couldn't get a replacement. This worked, however, plaintiff still wanted defendant to fully accommodate her request and she sued. The district court granted defendant's motion for summary judgment stating that the measures offered by defendant were reasonable and that defendant is not required to provide plaintiff with the specific accommodation that she preferred but rather any reasonable accommodation.

26. *Lambdin v. Marriott Resorts Hospitality Corp*., No. 16-00004- HG-KJM (D. Hawaii 09/14/2017. Plaintiff, a landscape pesticide applicator for a Marriott resort, had numerous hip replacements due to a serious injury and requested an accommodation for his inability to work. He asked for a hoist or lift as his accommodation, which was denied by defendant. Plaintiff filed an EEOC charge against defendant for failure to reasonably accommodate his disability. Plaintiff had been given a medical marijuana certificate for his pain. Soon thereafter, plaintiff suffered a panic attack while working and was taken to the hospital. Pursuant to hotel policy, he was given a post-accident drug test which came back positive for marijuana use He was terminated and sued for retaliation. The court held in favor of defendant by granting a summary judgment motion, noting that plaintiff was terminated for a legitimate, nondiscriminatory reason because he failed the post-accident drug test, not in retaliation for filing the EEOC charge for disability discrimination. Defendant was clear that use of marijuana, even if prescribed, still violates federal law and is therefore prohibited under the company's drug policy.

Employment/Discrimination/ADEA

27. *Wilson v. Blue Sky Casino, LLC,* No. 4:16-cv-00070-SEB-TAB (S.D. Ind. 12/29/2017). Plaintiff, a table games floor supervisor at defendant's casino, filed a charge with the EEOC claiming defendant casino discriminated by not promoting him to a table shift management position due to his age, which was 55 years old. The hiring manager, new to the position, discovered that a policy of anti-nepotism was not being enforced, updated the policy and began enforcing it. Plaintiff and other employees were disqualified from the open position because family members were among the workers to be supervised. Plaintiff alleged that the enforcement of the anti-nepotism policy was a pretext for age discrimination as supervising family members was still ongoing. The court granted a summary judgment motion in favor of defendant as plaintiff failed to provide evidence that the hiring manager was aware of the ongoing policy violations and found that strict enforcement by a new member of management of an existing policy was not evidence of a pretext or discrimination.

28. *Merrick v. Hilton Worldwide, Inc*., 867 F.3d 1139 (9th Cir., 08/16/2017). Plaintiff is a 60-year old Director of Property Operations at the Hilton La Jolla California Torrey Pines Hotel. He was laid off and sued claiming age discrimination. His salary plus annual bonus totaled in excess of $130,000. He was the oldest management level employee after the General Manager, age 61. Due to declining revenues, the hotel underwent several RIFs beginning in 2008. In 2012, Hilton Worldwide ordered a number of properties, including defendant, to reduce payroll by 7-10%. The hotel set its priorities: Avoid eliminating the following positions: those with direct guest contact; those with significant team member impact; and those that directly generate additional revenue for the hotel. Also, given earlier RIFS, preference was to achieve the revenue savings by eliminating a single position only. The 29 managers all met performance standards; none had experienced disciplinary action. No obvious candidate surfaced for termination. The only two positions that could alone meet the needed savings were plaintiff's and the GM. Since a GM is needed, plaintiff was selected. To avoid liability for age discrimination, the hotel must give a legitimate, nondiscriminatory reason for his selection. The need for downsizing alone is not sufficient. An individualized reason for laying off that employee is required. The reason need not be wise or correct as long as it is not discriminatory. Hilton provided sufficient business justification – single employee, not much guest contact, not revenue-generating, and other departments understaffed from previous layoffs.

29. *Henry v. Outback Steakhouse of Florida, LLC, et al*., No. 15-cv-10755 (E.D. Mich. 04/18/2017). A 17-year employee of defendant Outback Steakhouses, aged 48, filed a complaint against defendant alleging age discrimination. She stated that she was treated differently than younger employees and that management made "old people jokes." She was a licensed medical marijuana caregiver and defendant believed, after an investigation, that she was selling marijuana at the restaurant to co-workers. Plaintiff denied that she had sold pot at the restaurant but did admit she has clients that work at the restaurant. Summary judgment for defendant was granted and plaintiff argued that her firing was a pretext for discrimination. The court disagreed and denied her discrimination claim. The restaurant had conducted 15 interviews and had more than 3 reports that plaintiff was selling at the restaurant. The court said that even though plaintiff may have a license to grow pot and may supply up to 4 patients, state laws do not trump federal laws that criminalize the possession of marijuana. Plaintiff also claimed defamation by defendant, but since the employees who are responsible for hiring and firing employees are entitled to

hear accusations of employee misconduct, a qualified privilege applies. Therefore, the court said there is no defamation.

Employment/Discrimination/Gender

30. *Gidley v. Renaissance Montgomery Hotel & Spa*, 2017 WL 3573817 (N.D. Ala, 2017). Plaintiff was a bartender at defendant hotel and spa. She placed a bag containing bar money next to the register and allowed a janitorial employee to clean behind the bar. He stole $3,000 while plaintiff stood at the end of the bar. She was terminated based on violation of rules concerning handling of cash but was hired back on an "on call" basis. The same janitorial worker stole a television on the same day from an unlocked office belonging to a male board member. He was not punished for the theft or for leaving his door unlocked. Plaintiff sued, claiming sex discrimination under Title VII. The court dismissed the case noting that the board member was not on the premises when the TV was stolen, and plaintiff did not allege that having an unlocked door violated any rules or procedures. Therefore, while both were connected to thefts by the same individual, the circumstances surrounding each was different. Additionally, the positions of bartender and board member are very different and so the two were not similarly situated.

31. *Valdes v. Whataburger Restaurants*, LLC, 2017 WL 2602728 (Tex. Crt. Appls, 06/16/2017). Plaintiff was hired at defendant restaurant as a team member and was terminated the next year for an incident that began by his failure to count his register's cash drawer prior to beginning his shift. The supervisor required that all team members count the register before starting a shift. At the end of his shift, plaintiff's register was $20 short, resulting in a written warning. Plaintiff became upset, yelled an obscenity at his supervisor and "stormed" out of the room. The encounter was witnessed by other employees and customers. The case was submitted to arbitration and the arbitrator ruled against the plaintiff because plaintiff failed to prove that he was qualified for his position or that female employees situated similarly to him were treated more favorably for similar infractions with respect to both the cash-handling and anti-profanity policies. On appeal the decision was affirmed.

Employment/Discrimination/Pregnancy

32. *Frey v. Hotel Coleman,* 2017 WL 2215013 (N.D. Ill., 05/18/2017). Plaintiff is a guest services representative at an Illinois Holiday Inn Express. She was sexually harassed by her supervisor consisting of incessant, sexually-charged comments and invitations to a hotel room. Plaintiff became pregnant and told her supervisor. Her hours were cut, requests for additional hours were denied, she was precluded from applying for a promotion, reassigned from a day shift to a night shift, forced to stand and engage in other physical work despite complaining that this caused her pain, and endured abusive comments. While on pregnancy leave she filed a complaint with the EEOC. A week after returning she was terminated for allegedly stealing a cell phone and gift card. Plaintiff won summary judgment plus $45,000 on each of her two claims – pregnancy discrimination and retaliation. She was also awarded backpay. The court denied plaintiff's claim for punitive damages, noting "the absence of any persuasive argument" in plaintiff's brief.

33. *U.S. Equal Employment Opportunity Commission v. Bob Evans Farms, LLC*, No. 2:15-cv-1237 (W.D. Pa. 08/17/2017). This case is one of those that we rarely see; a decision based on a summary judgment

in favor of plaintiff. Plaintiff was a server at defendant's restaurant. Plaintiff worked right up to the time of her first birth and told management that she intended to do the same for her second pregnancy. Defendant, without plaintiff's consent, removed her from the automatic scheduling software beginning in August prior to the mid-September birth of her second child without her requesting to being removed. Defendant intended to schedule her when she called in for shifts or when the restaurant needed her based on the restaurant's needs. Defendant argued that she was removed from the automated scheduling system because her manager believed her availability would be unpredictable, not because of her pregnancy. The court said that this is just the type of stereotypical judgment that our legislators intended to eliminate by enacting the Pregnancy Discrimination Act. Defendant had written anti-discrimination policies, but the policy was silent on pregnancy discrimination; training, I'm sure, had ensued thereafter. The court remanded the case for a jury to decide compensatory and punitive damages, as well as back pay for plaintiff.

34. *Everts v. Sushi Brokers, LLC*, No. CV-15-02066-PHX-JJT (D. Ariz. 03/27/2017). Another summary judgment in favor of plaintiff decision. A pregnant sushi server at defendant's restaurant was asked to be reassigned to a less lucrative hostess position to provide a reasonable accommodation designed to protect her health and safety during her pregnancy; and the safety of the fetus. Plaintiff did not ask for the accommodation. Prior to the requested reassignment, the owner of the restaurant left a voice mail for the shift supervisor stating that he could not have "big fat pregnant women working at the restaurant." Plaintiff sued for pregnancy discrimination and the court held that the defendant restaurant overtly discriminated against plaintiff based on her pregnancy. Defendant argued that it had an unwritten policy to reassign overweight, regardless of pregnancy, employees who could be injured behind the bar. No evidence of the enforcement of such policy was presented for oversized people. Also, defendant's argument that the weight of plates, sharp knives and other conditions are inappropriate for a pregnant server was not compelling to the court; very arbitrary.

Employment/Discrimination/Race

35. *Davis v. Wings Twenty-Six, Inc*., No. 16-11769 (E.D. Mich. 12/19/2017). Plaintiff, a server and bartender at Buffalo Wild Wings, alleged that he was terminated for race discrimination because his manager had said the "n-word" and turned him in for taking a "to-go" beer against company policy. Three other employees had been terminated for engaging in the same behavior – taking alcohol out of the restaurant. Defendant restaurant moved for summary judgment which was granted by the district court. Plaintiff didn't offer any direct evidence of discrimination as no one had made any discriminatory comments in connection with the termination. Defendant had a legitimate, nondiscriminatory reason for terminating plaintiff's employment.

Employment/FLSA

36. *Feuer v. Cornerstone Hotels, Corp*., 2017 WL 3842350 (E.D. NY, 08/04/2017). Plaintiffs, a married couple, worked at defendant motel. Their jobs included changing and cleaning guest rooms, minor maintenance, and landscaping. The motel's owner, also a defendant, supervised all employees and determined their rates of pay. Plaintiffs were not provided a wage statement on each payday, a statement of the number of hours for which they were being paid, nor a statement of the total amount of

pay they were receiving. Further, plaintiffs did not receive a wage notice at time of hire explaining their rates of pay, deductions, or pay days. Plaintiffs believed they were underpaid and sued based on violations of the Fair Labor Standard Act (FLSA) and the New York Labor Law (NYLL). The court granted summary judgment and imposed personal liability on the owner and awarded statutory damages for defendants' failure to provide wage notices and statements. The court rejected the defense of good faith, legitimate and lawful business reasons, noting that defendant has been in the hotel business for 25 years and yet he failed to consult an attorney or the Department of Labor to determine his obligations.

37. *Acosta v. CPS Foods, Ltd.*, No. 5:14CV490 (N.D. Ohio 11/03/2017). The U.S. Department of Labor sued CPS Foods, the owner of the Brown Derby Restaurant, and individually, the owner and the restaurant manager for violations of the FLSA. The owner had concocted a plan to have servers as independent contractors who rent tables for $1. The servers clocked in and out, but the manager would alter the payroll system and change hours to zero, so they wouldn't get a paycheck. Five months later, an attorney informed the manager that the scheme was illegal. The manager conceded that they unknowingly violated the FLSA minimum wage provisions but that she should not be held individually liable as an employer. The district court disagreed and held that she was liable and must pay $47,045 for negligently misclassifying the servers.

38. *Galicia v. Tobiko Restaurant, Inc.,* 2017 WL 2437260 (E.D. NY, 06/03/2017). Plaintiff filed a complaint alleging violation of minimum wage laws, overtime pay, "spread of hours" pay, and failure to maintain required documentation under the Fair Labor Standards Act. Defendant restaurant denied that plaintiff ever worked for it (!) and counterclaimed for injurious falsehood. The court dismissed the counterclaim noting that the tort of injurious falsehood consists of publication of false derogatory claims "of a kind calculated to prevent others from dealing with the business ... unlike the tort of defamation, injurious falsehood is confined to denigrating the quality of the plaintiff's business' goods or services." The court observed that while plaintiff's claims are derogatory, there is no nexus between plaintiff's claims and the quality of defendant's goods and services.

39. *Chapman v. Fertitta Entertainment, Inc., et al.*, No. 2:15-cv-01944-JAD-GWF (D. Nev. 08/31/2017). Plaintiff, a casino marketing executive at the Golden Nugget in Nevada, filed a claim against defendant alleging her position was misclassified as exempt from overtime requirements of the FLSA and she requested unpaid overtime wages. Defendant filed a summary judgment motion which the court denied stating that there are issues of material fact as to whether her duties allowed her the discretion and independent judgment in matters of significant importance to the casino.

40. *Gomez, et al., v. Mi Cocina Ltd., et al.*, No. 3:14-CV-2934-L (N.D. Tex. 08/04/2017). A group of servers alleged against Mi Cocina restaurant, on behalf of themselves and those similarly situated employees, numerous alleged violations under the provisions of the FLSA. The court authorized a notice to potential opt-in plaintiffs, and a total of 354 individuals opted-in. Defendant filed a motion to decertify the conditional class because the opted-in plaintiffs are not similarly situated, and the court agreed. The court found that the plaintiffs "have not provided the court with any feasible ways to have a trial of a case with so many factual dissimilarities."

41. *Tamayo, et al. v. DHR Restaurant Co., LLC, d/b/a Rare Bar & Grill,* No. 14 Civ. 9633 (GBD) (S.D. N.Y. 02/03/2017). Two chefs filed a complaint against defendant restaurant group alleging violations

under the FLSA claiming they were both wrongfully classified as exempt employees. Defendant filed a summary judgment motion which the court granted in part. The court dismissed one of the chef's claims but allowed the other to continue. Factual issues remained as to one of the chefs and whether the classification as exempt was properly designated.

42. *Masoud v. 1285 Bakery Inc., d/b/a Pulse Restaurant, et al.,* No. 15 Civ. 7414 (CM) (S.D. N.Y. 01/26/2017). A banquet server at defendant's restaurant alleged violations of the FLSA and NY labor law on behalf of a proposed class of banquet servers for failing to pay overtime and that a 20 percent service charge was intended to be a gratuity therefore the banquet servers were entitled to receive those proceeds in full. The court granted the plaintiff's request that defendant provide all known telephone numbers, email addresses, social security numbers and employment dates for all banquet servers beginning in September 2009 and thereafter, and to post a notice of the collective action at the workplace.

43. *Ortega v. Jr. Primos 2 Restaurant Corp.,* 2017 WL 2634172 (S.D. NY, 06/16/2017). Plaintiff, a deliveryman and dishwasher at defendant restaurant, claimed it did not pay him minimum wage and overtime compensation. Concerning minimum wage, plaintiff was paid $350/week and worked between 40 and 70 hours. The result per hour is $8.75. Minimum wage in NY did not exceed this amount. Plaintiff proved he was not paid overtime, and was required to purchase a bicycle, bike lights, helmet and jacket. Under the FLSA, an employer must underwrite the costs of "tools of the trade" if the cost cuts into the minimum wages required to be paid. The court concluded that plaintiff is entitled to 100% of unpaid overtime wages, and costs for the equipment necessary to do his job. Plaintiff also sought interest. The court noted that NY sets the rate at nine percent per year. The calculation could be difficult because the damages were incurred at various times, but the court permits computation "upon all the damages for a single reasonable intermediate date."

44. *Ortega v. Jr. Primos 2 Restaurant Corp.,* 2017 WL 2634172 (S.D. NY, 06/16/2017). The plaintiff was successful in winning compensation for overtime pay and reimbursement for purchasing tools of the trade. The court awarded attorney's fees in the amount of $425/hour for the firm's managing partner who had 30 plus years of experience and taught employment discrimination law at Fordham University School of Law. The court also determined that the paralegal's billing rate of $100 was reasonable.

45. *Tarazona v. Rotana Café & Restaurant,* 2017 WL 2788787 (E.D. NY, 06/27/2017). Plaintiff won a Fair Labor Standards Act case against defendant restaurant. Plaintiff moved for attorneys' fees. The court sought to award reasonable fees and costs. The fee applicant (plaintiff) has the burden of justifying the requested rate as reasonable. Plaintiff provided information about her attorney's professional biography, evidence of prevailing market rate, attorney time sheets, and supporting documentation of costs. Among the factors the court considered are the attorney's experience and expertise, and the overall success achieved. The court determined an attorney's fee of $200/hour, rather than the requested $250, was reasonable for a recent law school graduate working in a firm. The reasonable amount for the paralegal was ruled to be $75/hour rather than the requested $125 per hour. Additionally, the court awarded $1,915 in costs, all documented by plaintiff. These costs include the filing fee of $400, service of the summons and complaint ($100), transcripts of deposition testimony ($815), and a Spanish language translator for trial ($600).

Employment/FMLA

46. *Sylvestor v. Resorts Casino Hotel*, 2017 WL 3894964 (D. N.J., 09/06/2017). Plaintiff was a dealer at defendant casino hotel. She received satisfactory performance evaluations. She developed back pain and sought medical treatment. She obtained an application from her employer for a FMLA leave but did not pursue it. Plaintiff was accused of being uncooperative and rude at a training session and was fired. She disputed this assessment claiming she was cooperative and participatory. In the lawsuit she claimed disability discrimination and interference with her FMLA rights. The court held a question of fact exists. If evidence proves plaintiff was unprofessional, rude and insubordinate, her disability is irrelevant; the employer is entitled to terminate her employment. Her pain and disability do not give her license to act disrespectfully or unprofessionally. Concerning the FMLA claim, since plaintiff never advised defendant of her disability, defendant never was aware and therefore could not have interfered. That claim was dismissed.

Employment/Hostile Work Environment/Retaliation

47. *Austin v. Bloomin' Brands, Inc., et al.*, No. 16-6509 (E.D. Pa. 08/30/2017). Plaintiff, a sauté cook for defendant's Bonefish restaurant, filed suit against defendant alleging sex and race discrimination, as well as retaliation. Plaintiff was one of two black men in the kitchen and the rest of the employees in the kitchen were Hispanic. Plaintiff complained of inappropriate behavior such as rubbing, pinching and smacking each other's backsides. The more plaintiff complained to management, the more the behavior continued. Plaintiff claimed the other employees targeted him. Plaintiff resigned. Defendant moved for summary judgment and the court agreed with the restaurant to dismiss the sex and race discrimination claims, but not the retaliation claim. Plaintiff didn't offer any evidence to suggest that he was subjected to discrimination based on sex or race. The court said that the behavior was sophomoric and childish and extended to sexually suggestive, crude and offensive but had nothing to do with plaintiff's race or sex. Plaintiff was allowed to pursue his claim for retaliation because he showed enough evidence to convince a jury that the environment was hostile and that his employer did not take measures to end the harassment.

Employment/NLRB

48. *MEI-GSR Holdings, LLC d/b/a Grand Sierra Resort & Casino/HG Staffing, LLC, et al*., No. 32–CA–134057 (N.L.R.B. 05/16/2017). A former beverage supervisor at defendant's casino was barred from attending a public event at the casino allegedly based on a lawsuit she filed, along with others, as to alleged violations of the FLSA and Nevada law. Although the long-standing practice of the casino was to allow former employees to attend social functions at the casino, defendant attempted to prevent her from being on the property by sending a notice about the anticipated trespass. The NLRB stated that the casino's exclusion of a former employee because of her lawsuit expressly retaliated against her for engaging in the protected concerted activity of filing a class action against defendant. One of the board members dissented (several good arguments that were not accepted by the majority of the board can be found in the opinion). Interesting that the plaintiff had only been employed for less than a month.

49. *Scomas of Sausalito, LLC v. NLRB*, No. 15-1412, 15-1476 (D.C. Ct. App. 03/07/2017). For 13 years the seafood restaurant in northern California recognized the local union. Once the collective bargaining

agreement expired and waiting one year after, the restaurant, in good faith, then obtained a decertification petition from a majority of its' employees to decertify and withdrew its recognition of the union. Once the restaurant filed its petition, the union filed an unfair labor practice charge with the NLRB. The NLRB sided with the union. Upon gaining evidence that a union no longer has the backing of the majority of employees, the NLRB says the employer has three options: 1) request a formal, NLRB-supervised election; 2) withdraw and refuse to bargain; or 3) conduct an internal poll of employees' support for the union. The court stated that the restaurant violated the NLRA and was not shielded by relying on its good-faith certainty on a petition signed by a majority of employees. The court said that the restaurant failed to show that the union actually lacked majority support when it withdrew its recognition, thus violating the NLRA. The NLRB authorized a bargaining order as the remedy for such violation. The court continued to note that this remedy rewards the union for its inaction; for doing nothing. The NLRB thus abused its own discretion by choosing the bargaining order as the remedy and the court remanded the case to the NLRB for a new remedy.

Employment/Negligent Hiring

50. *Benninghoven v. Hawkeye Hotels, Inc.,* 2017 WL 2648351 (Crt. Appls, Iowa, 2017). Plaintiffs were guests at defendant hotel. They befriended a desk clerk at a Residence Inn. After a night of drinking the plaintiffs encountered the then off-duty clerk while walking back to the hotel and willingly interacted with him. The encounter ended in a violent assault by the clerk and a group he was with. It turns out the clerk had a criminal history that included two assault convictions not discovered by the hotel before hiring him. Plaintiffs sued the inn for negligent hiring. The court dismissed the case noting that a hotel has no duty over conduct of an off-duty and off-premises employee.

51. *Court v. Loews Philadelphia Hotel, Inc.,* 2017 WL 6406458 (Penn., 12/15/17). Plaintiff was a guest a defendant Loew's Hotel. She was assaulted by a massage therapist during a massage session at a spa-gym located on the hotel premises. The spa, named 12Fit, hired the massage therapist without conducting a criminal background check. He lost his prior job due to an accusation of sexual assault and had previous complaints against him for sexual crimes. Plaintiff sued both the spa and the hotel, both of which moved for summary judgment. The court granted the hotel's motion, noting that the hotel had no reason to anticipate the assault, the spa owner had extensive experience in the hospitality industry and his team had massage experience. The hotel did not represent that 12Fit was an agent of the hotel. Loews was never mentioned in the spa, and the spa's intake form was labeled "12Fit Gym and Spa." Although three sexual assaults had occurred at Loews in the months prior to the massage incident, the court found those not relevant because they occurred in guest rooms, not at the spa.

Employment/Retaliation

52. *Dunbar v. Johnson and Hilton Hotel*, 217 WL 6387694 (E.D. Mo., 12/14/17). Plaintiff was an employee at defendant hotel. Plaintiff complained to her employer that her supervisor subjected her to unwarranted disciplinary actions and scrutinized her work. Thereafter, plaintiff's pay raise was withheld, her complaints were not addressed, and her hours reduced. Plaintiff claimed these actions were retaliation. She sued under Title VII of the Civil Rights Act of 1964. The court dismissed the case noting that Title VII, as amended, prohibits employers from retaliating against an employee engaged in a "protected activity." Retaliation in response to an activity that is not protected does not support a

retaliation claim. A protected activity includes a complaint to one's employer about harassment or discrimination based on race, religion, national origin, color, gender, disability, or age. Plaintiff did not complain about retaliation based on any of the protected classes. Therefore, the complaint was dismissed. The dismissal however was "without prejudice" to file an amended complaint because plaintiff's claims are "serious in nature."

53. *Villa v. Cavamezze Grill, LLC, et al*., No. 15-2543 (4th Cir. 06/07/2017). Plaintiff, an assistant manager at defendant's restaurant, was allegedly told by two employees that the general manager was propositioning employees for sex. An investigation revealed that both employees (no longer employed with defendant) denied making the statements to plaintiff. Defendant terminated plaintiff's employment based on her making false statements and she sued defendant for retaliation. The district court granted defendant's summary judgment motion and plaintiff appealed. The appellate court affirmed the trial court stating that the employer must act out of "the desire to retaliate" in order to incur liability. Since the investigation led defendant to believe that plaintiff had simply made up the conversations, defendant made a good faith mistake which is not actionable under Title VII.

54. *Johnson v. Interstate Management Company, LLC*, No. 14-7164 (D.C. Ct. App. 03/03/2017). Plaintiff, a cook at defendant's Hamilton Plaza Crowne Hotel, had filed numerous EEOC and OSHA complaints during his employment. The EEOC claims were unsuccessful and the OSHA complaints led to a $34,000 fine against defendant. According to defendant, plaintiff had a history of food safety performance issues in connection with the kitchen work he did. He was previously suspended for undercooking chicken at a banquet and the hotel terminated plaintiff's employment when defendant learned that plaintiff cooked a piece of breaded chicken with plastic melting under the breading. Once terminated, plaintiff filed an action against defendant for retaliation alleging that he was fired for all the complaints he had made in the past. The district court granted summary judgment for defendant hotel; which was affirmed on appeal. The court said that the Occupational Safety and Health Act does not provide a private cause of action for retaliation. The court said that plaintiff was terminated because of his numerous infractions and a reasonable jury could not say that the firing was pretextual. The court also said the record suggests that defendant was exceedingly patient with plaintiff's workplace errors.

Employment/Sexual Harassment

55. *Charest v. Sunny-Aakash, LLC, Holiday Inn Express, and J. Panjabi,* 2017 WL 4169701 (M.D. Fl, 9/20/17). Plaintiffs were employed as housekeepers at a Holiday Inn Express Hotel in Spring Hill, Florida. Their boss, J. Panjabi, was the owner and general manager. He insisted they give him oral sex, intercourse and then group sex with his friends. He threatened to terminate them if they failed to participate. One plaintiff was from the Philippines. On three occasions he told her that Indians were superior to Filipinos and so she should be willing to provide him sex. The other plaintiff was white. Panjabi repeatedly referred to her as white trash, and said white women are stupid, garbage, and lazy. Eventually both refused to continue accommodating his sexual appetite and both were fired. They sued for national origin discrimination and sexual harassment. The court granted summary judgment to the hotel on the national origin claim, finding neither was severe or pervasive. Further, the adverse employment action taken (the terminations) was unrelated to their national origin or race. The court denied summary judgment on the sexual harassment claim. The hotel argued that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. The court rejected that defense

saying it does not apply when the offender holds a high position in the company such that he is the equivalent (alter ego) of the employer. Likewise, the court refused summary judgment for plaintiff's retaliation claim.

56. *M.F. v. Pacific Pearl Hotel Management, LLC*, No. D070150 (Cal. Ct. App. 10/26/2017). Plaintiff, a housekeeper at defendant's hotel, was sexually assaulted in a hotel room by a trespasser. The perpetrator appeared to be drunk and soliciting the housekeepers for sex, as noticed by the defendant's maintenance worker. Due to her injuries, plaintiff was transported to the hospital where she remained for several weeks. Plaintiff sued defendant under the Fair Employment and Housing Act (FEHA) claiming that defendant allowed the trespasser to sexually assault her by failing to take reasonable steps to prevent the harassment from happening. The hotel argued that the plaintiff failed to show that defendant knew about the trespasser's conduct and that her claims would be barred by the workers' compensation exclusivity doctrine. The district court agreed with defendant and dismissed plaintiff's claims. On appeal, the court reversed and remanded the decision. The court stated that generally workers' compensation is the exclusive remedy for an employee against an employer for a workplace injury, but if plaintiff is able to state a viable claim against defendant under FEHA, the worker's comp exclusivity doctrine will not bar her claims. Let the jury decide.

57. *Barnett v. B.F. Nashville, Inc., d/b/a Wendy's of Nashville*, No. M2016-00762-COA-R3-CV (Tenn. Ct. App. 05/30/2017). Plaintiff, a college freshman, alleged that she had been sexually harassed since she began working at defendant Wendy's restaurant. She admitted sleeping with the GM to pay her bills. None of the other employees witnessed any sexual harassment by the GM. The GM admitted asking plaintiff to strip in the bathroom for $40 and he was terminated. Plaintiff claimed that the GM threatened to cut her hours if she didn't sleep with him. Testimony revealed that plaintiff worked less hours because she had a second job. The trial court granted summary judgment for defendant and it was affirmed on appeal. The court said that Wendy's had a sexual harassment policy that was uniformly communicated and when defendant learned of the GM's behavior, defendant took swift action to terminate his employment. Plaintiff failed to meet her burden of proof.

58. *Vazquez v. One, Inc., et al*., No. 14-1394 (MEL) (D. P.R. 09/11/2017). Plaintiff, a server at defendant's restaurant, alleged sexual harassment against her supervisor as he would walk by her and rub up against her. He also made inappropriate sexual comments for nearly a year. Her supervisor was a co-owner of the restaurant. Defendant had a written anti-harassment policy, which included the steps employees should take if they believed their rights had been violated. The supervisor allegedly called plaintiff into his office, grabbed her, pulled her pants down and touched her private areas. Plaintiff left the restaurant after that incident and filed a police report. The district court denied defendant's motion for summary judgment and the court said that a reasonable jury could find that the harassment was severe and pervasive. The court also said that it was "no stretch" that the supervisor's conduct interfered with plaintiff's work. Defendant argued that plaintiff did not take advantage of the corrective opportunities available to her in the policy (alerting HR) and plaintiff replied that she couldn't because HR only came to the restaurant once or twice a month. The court said that plaintiff's complaints were told to the supervisor's other two co-owners and that was sufficient for defendant to take remedial action, which didn't happen.

Expert Witness

59. *Jorgensen v. Ritz-Carlton Hotel Co., LLC.,* 2017 WL 3390582 (D. Co., 08/08/2017). Plaintiff, a guest at defendant hotel, sued defendant hotel located in Denver, Colorado, for negligence for permitting water to accumulate on the floor causing her to fall resulting in serious injuries. Plaintiff sought to call an expert witness named Josh Bauer to testify regarding the plumbing in the hotel, the cause of drain backups, and proper hotel management of a plumbing problem. Bauer has over 21 years of experience as a commercial plumber, installing and maintaining plumbing systems at hotels and restaurants similar to defendant. He is a licensed Colorado journeyman. He was never employed by a hotel or restaurant, never worked in a maintenance and engineering department, and has no formal training or education on how to manage department employees. The court ruled Bauer qualified as an expert on the cause of the drain issues within defendant's hotel, but he does not qualify to testify as an expert concerning management issues.

False Imprisonment

60. *Wong, et al., v. Detroit Entertainment, LLC, et al.,* No. 14-cv-13798 (E.D. Mich. 02/13/2017). Plaintiff, Jenny Wong was a licensed poker dealer at defendant's casino in Michigan. Defendant noticed that her table was $100 short one day and after watching in-house security tapes, concluded that Wong had placed the $100 chip up her sleeve. The police agreed that plaintiff had stolen the chip and she was summoned to the office of the Michigan Gaming Control Board. Plaintiff was detained, allegedly forced to sign a document which provided that she surrender her gaming license and was subsequently terminated from her employment with the casino due to her failure to have a license. She filed claims against defendant for conspiracy to deny her a protected property right (her license), false imprisonment, and emotional distress. Defendant moved for summary judgement which the court granted. Plaintiff did not put forth any evidence that defendant took away her gaming license; the Gaming Control Board did. Her claim of false imprisonment was dismissed because it was the police that arrested her, and not defendant. Her claim for emotional distress was also denied because there was no evidence that defendant's conduct could be seen as extreme or outrageous in order to impose liability.

Food Borne Illness

61. *Horan and Vachon v. Windrift Hotel,* 2017 WL 1807560 (N.J., 2017). Plaintiffs became ill from a vibrio infection contracted from clams they ate at defendant's hotel. They sued claiming unsanitary conditions at defendant's facility was the cause of the clams being unhealthy. To prove this, the court held plaintiffs must first present sufficient and reliable evidence that the clams when delivered to the hotel contained no appreciable vibrio. Finding that plaintiff's evidence in this regard was "built upon a working hypothesis or assumption only – an opinion that falls far short," the court granted summary judgment to the defendant.

Forum Non Conveniens

62. *St. Aubin v. Island Hotel Co., Ltd.,* 2017 WL 998298 (S.D. FL, 03/15/17). Plaintiff slipped on a substance near the lazy river at defendant's waterpark located in Nassau, Bahamas. She suffered serious injuries which required surgery. She sued for negligence; defendant moved to dismiss based on forum

non conveniens. The court identified the factors to consider as the following: adequate and available alternative forum, ease of access to sources of proof, availability of compulsory process, possibility to view the premises where the incident occurred, ease and efficiency of trial, court congestion, and conflict of laws issues. Based on the facts of this case, the court denied the motion to dismiss on forum non conveniens grounds.

Franchise

63. *Red Lions Hotels Franchising, Inc*. v. *Khan*, 2017 WL 1758085 (E.D. Wash., 05/04/2017). Plaintiff Red Lion Hotels owns several trademarks. Defendants had a license to use the trademarks subject to compliance with the franchise agreement. Defendant failed to pay substantial amounts due resulting in termination of defendant's rights to use the trademarks. Nonetheless, defendant continued to use the marks. Plaintiff seeks a preliminary injunction and presented proof that customers gave defendant negative reviews and readers connected the hotel with plaintiff. The court held the negative impression of customers of defendants' hotels will likely impact those guests' future purchasing choices, to plaintiff's detriment. This constitutes a demonstration of irreparable harm for which financial recovery will not adequately compensate. In addition, further customers are being deceived into believing defendant's hotel is affiliated with Red Lion. The court thus issued a preliminary injunction and required defendant to serve a declaration confirming compliance with the injunction within 30 days.

64. *Choice Hotels International, Inc. v. Sandhu Hospitality, Inc.,* 2017 WL 3835678 (D. Md., 08/31/2017). Defendant is a franchisee of plaintiff. The franchise contract requires that any lawsuits be resolved through arbitration, and further provides that failing to pass an assurance review and correct deficiencies is grounds for termination of the Franchise Agreement. Defendant failed to pass a required quality assurance review and failed to correct deficiencies. Plaintiff pursued the case in arbitration as per the contract. Defendant defaulted, and the arbitrator awarded Choice Hotels $85,135.08, including liquidated damages, specified franchise fees, and arbitration expenses. Defendant failed to pay so plaintiff filed an application in court to confirm the arbitration award. The franchisee defaulted again; the court granted confirmation of the arbitrator's award. Further, the court granted Choice Hotels request for $400 in costs expended in filing the motion to confirm the arbitrator's award.

65. *Whataburger, Inc. v. Whataburger of Alice, Ltd.,* 2017 WL 2664437 (Tex. Crt. Appls., 06/21/2017). The parties have had a franchise relationship since 1953. The franchisee has, by contract, an exclusive geographical area. Litigation resulted in 1993 and was settled while the jury was deliberating. The parties signed a Settlement Agreement, the wording of which is the subject of the current litigation. The terms gave the franchisee the "exclusive right to . . . develop Whataburger restaurants" in its exclusive area. The parties now disagree on whether the franchisee has the right to open new franchise restaurants at locations chosen by the franchisee within the exclusive territory without the franchisor's prior approval. The court noted the industry practice is for a franchisor to select site locations of new restaurants but acknowledged that parties can agree to terms different than the industry practice. The court found the terms of the 1993 Settlement Agreement to be "unambiguous" in granting the right to designate site locations of new restaurants to the franchisee, not the franchisor.

66. *Choice Hotels International, Inc. v. Grewal Properties,* LLC, 2017 WL 877218 (D. Md., 03/03/17). Plaintiff franchisor issued a franchise to defendant. The latter was delinquent on fees. The franchisor

pursued its claim for payment in an arbitration proceeding per the franchise agreement which mandated arbitration as its dispute resolution mechanism for breach of contract. The arbitrator issued a decision in favor of the franchisor in the amount of $82,347.02. The franchisee failed to pay and so the franchisor moved to confirm the arbitration award. Defendant franchisee did not respond to the complaint. The court noted that the arbitration clause in the franchise agreement "specifically provides for final and binding arbitration for any controversy or claim arising out of or relating to the franchise agreement." The court therefore confirmed the arbitration award and entered a default judgment.

67. *Lenexa Hotel v. Holiday Hospitality Franchising, Inc.,* 2017 WL 2264358 (D. Kansas, 05/24/2017). Plaintiff hotel operated as a Radisson and converted to a Crowne Plaza after much negotiation with Holiday Franchising which owns the Crowne Plaza name. Plaintiff entered a License Agreement with Holiday Franchising because of its commitment to market and promote plaintiff hotel through its call centers, websites and reservation system. Plaintiff spent millions of dollars in upgrades as required by defendant. Very little business resulted from defendant's marketing system. Turns out, unknown to plaintiff, defendant committed to a nearby Crowne Plaza that it would refrain from identifying plaintiff as a hotel in the Kansas City market although plaintiff was located in the area defendant defined as Kansas City. The court denied the franchisor's motion to dismiss noting that the complaint sufficiently alleges an action for breach of the License Agreement, and breach of an implied duty of good faith and fair dealing.

68. *Choice Hotels, International v. Key Hotels of Atmore*, 2017 WL 1745555 (S.D. Ala, 05/03/2017). Defendant was a franchisee of plaintiff. Defendant violated the franchise agreement. Plaintiff terminated the franchise and defendant's right to use the name Quality Inn. Defendant nonetheless persisted. Plaintiff successfully sued for, inter alia, trademark infringement. The court permanently enjoined defendant from using the name. Defendant nonetheless continued to carry on business as a Quality Inn, failing to remove branded material. The court granted plaintiff's motion to hold defendant in civil contempt, and directed a US Marshal, accompanied by Choice Hotels' attorney, to seize and impound all the items at defendant's motel that bear any of plaintiff's trademarks.

Franchisor Liability

69. *eTeam, Inc., v. Hilton Worldwide Holdings, Inc., et al*., No. 15-5057 (WHW)(CLW) (D.N.J. 06/12/2017). Plaintiff, an employment firm specializing in staffing, filed a complaint against Hilton Worldwide based on negligence, fraud, negligent misrepresentation and unjust enrichment for allowing an ex-employee of eTeam to charge her stay at a franchise property, that being the Hilton Garden Inn located in San Francisco, to plaintiff's corporate account. The former employee had authorization to stay for five days but continued to stay for an extended time thereafter (approximately14 months); resulting in $82,883.68 worth of unauthorized charges. Defendant moved for summary judgement which was denied by the district court. Defendant argued that it does not own nor operate the hotel and is not involved in the day-to-day operations of the hotel. Defendant also argued that the franchise agreement with the Hilton Garden Inn states that they are independent contractors and not agents. The court disagreed and denied the summary judgment stating that defendant's control over the franchise extended beyond which would ordinarily be necessary for a franchisor to protect its brand. The court also said that there is a genuine issue of fact as to vicarious liability by defendant.

Fraud

70. *Luca v. Wyndham Hotels and Resorts*, 2017 WL 623579 (W.D. Pa., 02/15/17). Plaintiff complained that defendant's website advertised the cost for rooms but failed to disclose that taxes would be imposed on defendant's resort fee until the final invoice issued after his hotel stay. Plaintiff sued based on the New Jersey Consumer Fraud Act. Defendant Wyndham moved to dismiss the complaint on the grounds that plaintiff failed to plead an ascertainable loss, and further, the disclosures on the website were adequate. The court denied the motion, stating the allegations are sufficient to assert a quantifiable loss for purposes of the New Jersey Consumer Fraud Act.

Insurance

71. *Siloam Springs Hotel v. Century Surety Co.,* 2017 WL 696815 (02/22/17). Plaintiff hotel purchased insurance from defendant. The policy excluded coverage for injury resulting from "any toxic, hazardous, noxious, irritating pathogenic or allergen qualities or characteristics of indoor air regardless of cause." Several guests inside the hotel suffered injury due to carbon monoxide poisoning that resulted from a leakage from the hotel's indoor swimming pool heater. The hotel argued the exclusion in the insurance policy violated public policy. The court, while noting the importance of freedom of individuals to contract as they see fit, stated freedom of contract is limited where it conflicts with public policy. Nonetheless, the court determined there is no public policy that requires insurance companies to cover air quality. By so ruling, the court noted, injured individuals will still have a remedy against the hotel as the contract limits only what the insurance company must pay, not the hotel's potential liability. The exclusion thus does not tend to injure public health, morals or confidence in the administration of law.

72. *Depositors Insurance Co. v. Hall's Restaurant, Inc.,* 2017 WL 2403727 (E.D. Mo., 6/2/17). A fire occurred at the restaurant owned by defendant corporation. The owner presented an insurance claim seeking insurance benefits for the fire damage. Plaintiff investigated and then denied the claim on the grounds the fire was intentionally set by, or at the direction of, the restaurant owner. She sued the insurance company which resulted in a verdict in favor of the insurance company. That company now seeks attorneys' fees in the amount of $109,049 for the cost of defending that litigation. The restaurant has not paid nor, does it have sufficient assets. The insurance company seeks to pierce the corporate veil. The court sided with the insurance company noting that Carolyn Hall is the sole owner, officer, director and manager of the defendant corporation. She was adjudged to have intentionally set the fire. Said the court, retention of the corporate form here would result in an injustice.

Jurisdiction

73. *Simmons v. Boyd Gaming Corp*., 2017 WL 3298233 (Tex. Crt. Appls., 03/29/17). Plaintiff was injured in a car accident in Texas with an intoxicated motorist who was coming from a casino in Louisiana. The facility served him alcohol after he became visually intoxicated. Plaintiff sued the casino in Texas based on dram shop. It contested jurisdiction. The court noted that the casino's principal place of business is Louisiana, it was not registered to do business in Texas, did not maintain offices in Texas, did not have an address or phone number in that state, did not pay taxes there, nor did it have a bank account or own property there. Although the casino spent $2.5 million on advertising in Texas during the twenty-seven

months immediately before the accident, and $6 million on goods purchased in Texas during approximately the same time - a purchasing pattern the court found "continuous, systematic, and substantial" - the court held Texas lacked jurisdiction based on an appraisal of the defendant corporation's "activities in their entirety."

Jurisdiction/Long Arm

74. *Leonard v. Shield Hotel Management, LLC*, 2017 WL 3085323 (D. Vt., 07/19/2017). Plaintiff, resident of Vermont, was a guest with her family at defendant Hampton Inn located in Greenfield, Massachusetts. Plaintiff's husband was there on business. The hotel had negotiated a corporate discount with his employer to encourage the company to utilize the Hampton Inn. Plaintiff's children discovered a used hypodermic needle in the room. While attempting to dispose of it, plaintiff "stuck" herself with it. On a prior stay plaintiff's husband had complained about a smoky smell in his room and expressed displeasure in a survey sent by the hotel. Hotel staff responded with an apologetic email and a promise of "extra care" on future visits. Plaintiff sued in Vermont for negligence relating to the needle incident. The hotel challenged that state's jurisdiction. The court found sufficient minimum contacts given the hotel's "intentional act to advance its commercial interest by directing its marketing activities" at employees who are residents of Vermont, plus the inn's creation of a "personal relationship" with plaintiff's husband by encouraging him to return to the facility.

Negligence/Assumption of Risk

75. *Bertolazzi v. Baltimore Hotel Corp.,* 2017 WL 2569913 (4th Cir., 05/31/2017). Plaintiff stepped onto an inoperable escalator and was injured. Plaintiff's evidence indicated that defendant hotel knew about the inoperable escalator, it had not been roped off, the hotel had previously cordoned off a different inoperable escalator, Hilton's maintenance company recommended stationing an employee nearby to warn guests of the problem until the area could be roped off. Defendant argued plaintiff assumed the risk. The court rejected this argument since no one warned her that it was not working, no sign alerted her, and she was in the midst of a group of people. Therefore, the court reversed a grant of summary judgment to the hotel.

Negligence/Constructive Notice

76. *Martin v. Omni Hotels*, 2017 WL 2465043 (DC, 06/07/2017. Plaintiff hotel guest sued defendant Omni Shoreham Hotel in Washington DC for injuries she sustained after tripping on a wrinkled floor mat in the lobby. The mats were used in the lobby on rainy days to help prevent wet slippery floors. The wrinkles present when plaintiff fell were recorded by the hotel's video system. Plaintiff argued the mat was either laid with the wrinkle or the fold was present for a long enough time prior to plaintiff's fall that the hotel had constructive knowledge of the wrinkle. Plaintiff's expert was unable to substantiate his opinion concerning how the thickness of the mat would have impacted the timing of forming wrinkles. Plaintiff's assertion about the origin and duration of the wrinkles was thus speculation. Summary judgment was granted in favor of the hotel.

Negligence/Duty of Care

77. *Riverside Hotel v. Demella*, 2017 WL 3085239 (Crt. Appls Fl, 07/19/2017). A pregnant woman was killed while sitting in a cabana at the Riverside Hotel swimming pool. A speeding and heavily intoxicated driver missed a nearby curve in the road and drove into a wall of the cabana. The structure, located 15 feet from the road, collapsed from the collision, trapping and killing plaintiff's wife. To reach the cabana the car had to jump a three-inch curb, cross a sidewalk, drive through a wall of bushes, and avoid hitting both a utility pole and a palm tree. The cabana structure followed all applicable building and zoning codes. Its foundation columns were heavily fortified with solid concrete. The road was clearly marked, and the curve was easily visible. There had never previously been a crash at that location. The court concluded the accident was not foreseeable, and even if it was, the hotel took necessary precautions. The court thus dismissed the case.

78. *Benninghoven, et al., v. Hawkeye Hotels, Inc., et al*., 902 N.W.2d 593 (2017) and No. 16-1374 (Iowa Ct. App. 06/21/2017). Plaintiffs, guests of defendant's Residence Inn hotel in Des Moines, Iowa, were assaulted by an employee of the hotel who was off duty and off premises and they seek to obtain a judgment against defendant for general negligence and negligent hiring of the perpetrator/employee. Defendant filed a motion for summary judgment. The court concluded that as a matter of law, defendant's lack of control over the employee's off duty and off premises behavior prohibits plaintiffs' claims. The employee's past criminal history only included misdemeanor offenses and not felonious assault, so the negligent hiring claim also was barred. The decision was affirmed on appeal.

79. *Simas v. Starwood Hotels & Resorts*, 91 Mass.App.Ct. 1109 (Mass.App. Crt., 030/7/2017). Plaintiff fell in the shower of his hotel bathroom at a Starwood Hotel in Lexington, Massachusetts. Plaintiff determined the cause of his fall was a defective soap dispenser in the shower of his room, leaking soap into the tub. The court granted summary judgment to Starwood because there was no dispute that it lacked knowledge and reason to know prior to the plaintiff's fall of any leaking soap dispensers in their showers. Without such knowledge, defendant owed no duty to repair or warn about leaking soap in the showers.

Negligence/Open and Obvious

80. *Lawrence v. Darden Restaurants; Olive Garden*, 2017 WL 2562867 (NY App. Div., 06/14/17). Plaintiff slipped and fell outside of an Olive Garden located in a mall. The restaurant used small decorative stones as part of its landscaping. Per plaintiff, two or three of the stones were in the parking lot and caused plaintiff's fall. The Olive Garden argued that the stones were open and obvious, "readily observable by those employing the reasonable use of their senses," and not inherently dangerous. The restaurant's motion to dismiss was therefore granted.

81. *Martin v. Delta Downs Racetrack Casino & Hotel*, 2017 WL 1031283 (5th Cir. Crt. Of Appls., 03/15/17). Plaintiff fell on the ground in the parking lot of defendant casino and hotel. Plaintiff testified she was "looking straight up to see where to go" and "didn't pay attention." She admitted she would have seen the algae had she looked down. An employee of defendant who responded to her cry for help testified that the algae were "very visible." Photographs submitted as evidence "plainly depict algae on the ground." The court granted summary judgment to the casino because the algae was "obvious and

apparent", and therefore the hotel did not permit an unreasonably dangerous condition to exist and did not owe a duty to its guests to warn of the condition.

Negligence/Per Se

82. *Weinbach v. Starwood Hotels & Resorts Worldwide, Inc.,* 2017 WL 3621459 (E.D. Mo., 08/23/17). Plaintiff inherited stock in defendant's company from her parents. During their lives the defendant reported the shares as abandoned to the state (escheat). As a result, plaintiff lost the benefit of the shares and sued defendant for negligence per se for violation of a state statute requiring certain requirements of notice to the shares' last listed owners before property can be escheated. The court granted Starwood's motion to dismiss noting that negligence per se applies to safety statute and covers cases seeking personal injury or property damage, and not to cases involving damage to economic interests.

Negligence/Premises Liability

83. *Thomas v. Omni Hotels*, 2017 WL 913814 (W.D. Va, 03/07/2017). Plaintiff, a guest at defendant's Hot Springs, Virginia hotel, fell by a decorative fountain on November 13, 2013. The fountain, located in an outdoor area, was partially covered and partially screened in. Plaintiff alleged she slipped on ice but neither she nor her husband saw any ice in the area of the fall. A half hour later, Omni employees went to inspect the fountain and observed clear ice on a portion of the walkway around the fountain. Plaintiff sued claiming defendant was negligent for failing to remove ice from the area surrounding the fountain, and asserted defendant should have turned the water off when the weather became cool. The court granted defendant's motion for summary judgment, noting that no evidence was presented that the fountain could cause water or ice to accumulate on the surrounding walkway. Furthermore, Omni employees testified that they had never received complaints of ice or water around the fountain.

84. *Page v. Portofino Hotel Partners, LP,* 2017 WL 3475168 (CA, 08/14/2017). Plaintiff attended a chamber of commerce leadership banquet at defendant's hotel. During the event, she was to be installed as the chamber's chairperson-elect. As she stood on the stage with other honorees and posed for pictures, she stepped backwards to make room for the others and fell into a gap between the stage and the wall. She suffered numerous broken bones in her foot and sued the hotel for negligent installation of the stage and failure to warn. The hotel's expert testified that the stage complied with all applicable building codes and OSHA requirements. Additionally, the same event had occurred at the hotel for three years and no one had previously fallen from the back of the stage. The trial court granted the hotel's motion for summary judgment. On appeal, the court reversed, noting a triable issue of fact existed on whether the placement of the stage on a diagonal with a significant gap in the back satisfied industry standards, and whether the gap created a dangerous condition. Said the court, "The fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts."

85. *Gonzalez v. HMC Times Square Hotel*, 56 Misc.3d 1222 (Sup. Crt, NY, 08/28/2017). Plaintiff and her sisters were guests at a Days Inn Hotel in Horsham, Pennsylvania. Plaintiff slipped and fell down a stairwell, suffering injuries. She claimed the cause of the fall was a slippery substance on the step. The next day she reported the incident to hotel management and an incident report was created. Thereafter she sued, claiming the hotel had constructive notice of the dangerous step and was negligent for not

discovering the problem and warning her about it. The court granted summary judgment to the hotel and plaintiff appealed. The evidence established that the maintenance staff walked around the property twice per day, and the daily checklist included checking the stairwells. The cleaning staff cleaned the stairwell once per day. Further, plaintiff had failed to report the presence of a slippery substance in the incident report. Plaintiff did not produce any evidence as to how long the alleged slippery substance had been on the step or that the hotel should have had constructive notice. Plaintiff was thus unable to prove negligence, and the court confirmed the summary judgment ruling in favor of plaintiff.

86. *Patsoureas v. Choice Hotels International, et al,* 2017 WL 3412252 (M.D. Penn., 08/09/2017). Plaintiff, an Ohio resident, was a guest at a Comfort Suites hotel in Cincinnati, Ohio. Comfort Suites is one of the brand names of Choice Hotels. Plaintiff slipped and fell while using the shower, suffering severe injuries. Plaintiff sued the hotel in Pennsylvania for negligence claiming the hotel failed to install or maintain a safety bar for the shower in his hotel room. The hotel does not conduct business in Pennsylvania, have offices or employees there, own property nor solicit business in the Commonwealth. Plaintiff argues that the fact that defendant hotel operates as part of Choice Hotels, which provides services within Pennsylvania, is sufficient. The court disagreed and dismissed the case.

Negligence/Punitive Damages

87. *Parker v. Four Seasons Hotel, Ltd.,* 2017 WL 65827 (7th Cir., 01/05/2017). On the day after check-in at defendant's hotel, plaintiff was exiting the shower area by opening the glass door. As she slid open the door it exploded suddenly, breaking into shards of glass that fell on her naked body. A hotel engineer arrived soon thereafter to investigate. He made numerous comments about other rooms having similar problems with the sliding glass doors and said plaintiff's room was on the "do not sell" list because of the shower door. Plaintiff sought punitive damages; defendant moved to dismiss that part of plaintiff's claim. The court determined that a fact-finder could conclude that the hotel acted with gross negligence and so denied defendant's motion.

Negligence/Res Ipsa

88. *Rojas v. New York Elevator & Electric Corp.,* 2017 WL 2173898 (NY, 05/18/17). Plaintiff is employed by nonparty, Hotel Metro. While plaintiff was in the hotel's service elevator it mis-leveled. Plaintiff was injured when she attempted to remove a cart from the lift. The hotel had a repair contract with defendant. The elevator company moved for summary judgment. The court denied the motion saying the case could proceed on a theory of res ipsa loquitur. Said the court, mis-leveling of an elevator does not ordinarily occur absent negligence. The mis-leveling was caused by an instrumentality within defendant's exclusive control and was not provoked by plaintiff.

Negligence/Security

89. *Mitchell v. Long Acre Hotel,* 46 NYS3d 785 (NY App. Div., 02/16/2017). Plaintiff was a resident at a homeless shelter housed in defendant hotel. She was injured during an attack by another resident. She sued the hotel for her damages. The hotel moved to dismiss on the ground that it cannot predict the actions of third parties. The court denied the motion noting that the attacker had been involved with altercations with two other residents in the weeks before he attacked plaintiff. Further, plaintiff had

recently complained to management about the perpetrator's propensity for violence. Also, on the night plaintiff was accosted, the night manager observed the resident in a drunk and belligerent state in the hallway. Thus, the hotel cannot prove that it had no reason to know of the likelihood of aggressive conduct by the perpetrator.

90. *Williams v. El Camino Properties I, LLC, et al.,* C.A.No. L-16-1174 (Ohio Ct. App. 03/31/2017). Plaintiff Annette Williams, a patron at defendant's restaurant, was accidentally hit by a security guard's baton when the security guard, employed by defendant, attempted to break up a fight that broke out on the dining patio. The employee apologized, and plaintiff didn't file an incident report until the next day. Plaintiff sued the restaurant for negligence by allowing employees to carry deadly weapons at work on the premises. Plaintiff claimed that defendant is vicariously liable for plaintiff's injuries. The lower court granted defendant's motion for summary judgment, but the appeals court reversed the ruling claiming that there are genuine issues of material fact as to whether the security guard was acting within his scope of employment and whether defendant was negligent in hiring, training and supervising the guard. Defendant has a "no-weapons" policy and the question remained as to whether the guard had been informed about the policy.

91. *Humphries, et al., v. New York-New York Hotel & Casino, et al*., No. 65316 (Nev. 10/05/2017). Plaintiffs were severely injured by another patron at around 3:50 a.m. on a casino floor due to a verbal disagreement between two women. Punches flew, and the female plaintiff ended up with a skull fracture and the male plaintiff, who tried to intervene, had injuries to his face and head. Summary judgment was granted for the defendant casino and plaintiffs appealed. The Supreme Court of Nevada reversed the district court stating that the lower court failed to consider the foreseeability of the incident based on a history of fights near the casino floor and bar areas. The record showed that the casino guards dealt with two to three fights per week on the casino floor and that the battery against plaintiffs was foreseeable based on the casino's notice or knowledge of prior incidents of similar wrongful acts on the premises.

92. *Daniel v. Clarion Inn & Suites,* 2017 WL 696067 (4th Cir., 02/22/2017). Plaintiff was a guest at defendant hotel on Canal Street in New Orleans. While exiting the hotel he walked into an unmarked automatic glass sliding door that allegedly failed to open properly. Plaintiff suffered a broken nose and sued for negligence. The hotel moved for summary judgment. A hotel surveillance video contradicted plaintiff's claim, showing that the doors were sliding open as plaintiff approached but he walked into the door before it had time to open completely. Affidavits from the hotel owner, a manager, and a front desk clerk established that the hotel had not experienced any other reported problems with the doors. The court thus rejected the argument of a defective door. Plaintiff also complained that the doors were not properly marked to indicate their presence. The court was unconvinced on this argument as well, noting that defendant had passed through the door approximately eight times before the accident, and further, surveillance video showed plaintiff was sitting "for some time" in the lobby close to the door and could "clearly observe" others entering and exiting the automatic doors. The court thus affirmed the trial court's summary judgment in favor of the hotel.

Negligence/ Swimming Pool

93. *Wallace v. M&C Hotel Interests, Inc.,* 2017 WL 1822441 (NY App. Div. 05/05/2017**).** Plaintiff's son suffered a near-drowning in defendant hotel's swimming pool. The complaint alleges defendant was

negligent for failing to provide lifeguards or otherwise adequately supervise bathers using the hotel pool, allowing the pool to be overcrowded, and allowing a dangerous condition to exist on the premise - children playing games in and round the pool. In its defense, the hotel submitted the relevant NY statute which states that hotels with pools are not required to have on-premises CPR certified staff. The court thus held the hotel had no duty to provide lifeguards or poolside supervision and granted the hotel's motion to dismiss.

Public Accommodation/Racial Discrimination

94. *Holmes, et al., v. Toledo Gaming Ventures, LLC, et al.*, No. 2:16 CV 464 (N.D. Ohio 06/05/2017). Plaintiff, a black customer at defendant's casino, alleged that she was treated disrespectfully by a white casino security guard when the guard used language including the word "piss" when speaking to her and didn't use the word when speaking with white guests. Guests were playing the slot machines and several guests had leaned their chairs up against the machines they had been playing so as to discourage others for playing them while they took a break; most likely to use the restroom. Three white patrons asked the guard if that was allowed and the guard said she didn't know and would have to inquire with a manager. When plaintiff asked the guard whether the practice of "reserving" machines was allowed, the guard said, "You wouldn't want them to piss on themselves, would you?" Plaintiff was offended by the language and accused the guard of being racist. Plaintiff and her friends were asked to leave the casino as they were vocal about being discriminated against because of their race. The district court granted the casino's summary judgment motion on the alleged racial discrimination claim stating that use of the word "piss" was an example of poor customer service but the court did not see anything racially motivated. On the claim of retaliation, defendant's motion for summary judgment was denied because there are questions that remain as to whether plaintiff and her family were ejected from the casino by the guard who said, "since you're going to make it racial, get out" which could in fact support a finding of pretext.

Sex Trafficking

95. *Benson v. Portland, Oregon Hilton Doubletree*, Case Pending, 12/2017. Plaintiff's deceased was the victim of sex trafficking and was murdered by a customer. Her family is suing the hotel claiming it should have recognized indicia of sex trafficking and assisted her. Several similar cases have been brought against other hotels. None has yet been resolved. A federal law imposes criminal and civil liability on hotels for knowingly renting a room to a perpetrator of sex trafficking or doing so with reckless disregard of the fact that the room will be used for that purpose. Hotels should be aware of known cues that trafficking is occurring and train workers concerning them.

Terrorism

96. *DiFederico, et al., v. Marriott International, Inc.,* No. 15-2179 (4th Cir. 02/02/2017). On September 20, 2008, a terrorist attack caused 56 casualties at the Marriott Hotel in Pakistan, including Albert DiFederico, a former naval commander serving as a civilian contractor for the State Department in Pakistan. The incident also wounded 265 others. Plaintiffs, the wife and children of Mr. DiFederico, sued Marriott claiming that Marriott exercised sufficient control over the Islamabad franchise property's security protocols to make it liable for his death. Marriott filed for summary judgment which was

granted and affirmed on appeal. The court said that Marriott did not exercise sufficient control over the hotel's security protocols to rend it liable for Mr. DiFederico's death. Marriott's corporate office inspects its franchised properties twice a year and had just checked the hotel one month prior to the 2008 attack and found it to be 100 percent compliant with Marriott's required safety and security standards. A crisis plan was developed by Marriott and distributed to all franchised properties to use as a guide in developing their own crisis management plan. The hotel also received a copy of Marriott's international lodging crisis plan; however, the franchise hotel was not required to meet all the requirements. Under Marriott's plan, there are required minimum security standards necessary to establish a comprehensive local crisis management plan that is intended to address foreseeable natural and man-made disasters locally. Marriott did not take on the obligation of reviewing and approving franchisee crisis plans. Judgment for Marriott.

Tipping/Tip Pooling

97. *Texas Roadhouse Management Corp., et al., v. Department of Labor*, No. N15C-08-215 CLS (Del. Super. Ct. 03/30/2017). The Department of Labor filed a charge against Texas Roadhouse for improperly treating hosts and bus persons as tipped employees and failing to pay them full minimum wage. Texas Roadhouse filed a complaint for a declaratory judgment, and the Justice of the Peace Court found for the DOL; Texas Roadhouse appealed the ruling to the Superior Court of Delaware. Both parties filed for summary judgment and the court ruled in favor of Texas Roadhouse. The court found that the statute states that an employer may apply a tip credit to an employee's hourly wage if the employee is "engaged in an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities," but does not require that one be considered a primary direct service employee in order to be included in a tip pooling arrangement. Texas Roadhouse argued that hosts are direct service employees by greeting the guests, getting them drink orders, bringing them bread and better, providing menu, etc. Since the hosts provide personal direct service, they can be in the tip pool.

98. *Wilkes v. Benihana, Inc., et al*., No. 16cv2219 JM (DHB) (S.D. Cal. 02/28/2017). Plaintiff, a former server at defendant's restaurant, alleged that defendant's tip policy was improper and in violation of the California labor code and other regulations. Plaintiff argued that the policy was improper because it allowed defendant to pay non-servers' wages using servers' tips. Summary judgment for defendant was granted by the district court which said that other courts in California have consistently held that tip pooling is lawful and that the employer has a right to require employees to contribute a portion of tips received to a tip pool shared by other employees. The court did not find any evidence that defendant paid any of its employees under minimum wage to meet its obligations.

Trademarks/Lanham Act

99. *District Brewing Co. v. CBC Restaurant, LLC,* No. 2:15-CV-3114 (S.D. Ohio 11/07/2017). The Columbus Brewing Company filed a lawsuit claiming that a restaurant, now known as CBC, is unlawfully using its trademarks. In the beginning, the craft brewery had leased space to the restaurant and through a 20-year relationship, they jointly advertised, and the restaurant was the brewery's biggest customer. When the brewery got too big, it relocated its space and decided to disassociate with the restaurant. The restaurant ceased using Columbus Brewing Company intellectual property and used the mark "CBC" instead. The restaurant has also educated its employees that they are now separate from

the brewery. CBC restaurant sought injunctive relief stating that there is a genuine issue of material fact as to whether the rebranding of the restaurant has eliminated public confusion about the affiliation between the two parties. The court said that the restaurant's new trademarks and logos are "confusingly similar" to those used by the brewery. The fact-intensive inquiry must be decided at trial.

Union/Protected Activities

100. *Bellagio, LLC d/b/a Bellagio Las Vegas, et al., v. National Labor Relations Board*, Nos. 16-1191, 16-1192, 16-1256, 16-1258 (D. D.C. 07/18/2017). Plaintiff Bellagio filed a complaint against the NLRB stating that its technicians who control the casino's video surveillance, access and alarm systems should be considered "guards" and therefore are precluded from representation by the union under the collective bargaining arrangement. The technicians often participate in targeted investigations of their fellow employees who are suspected of wrongdoing. The union sought to represent a bargaining unit of non-guards at each of the casinos and wanted to include the casino techs. The NLRB held that both the Bellagio and the Mirage violated NLRB regulations and the district court denied the NLRB's request. The court held that the term "guard" is a factual question that can only be answered by looking carefully at all the tech's duties. The court stated that under the Nevada gaming regulations, technicians are called "key employees" being those who have "… the power to exercise a significant influence over decisions concerning any part of the operation of a gaming licensee." The court ruled in favor of the casinos and stated that Congress' purpose in passing the law was "to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member" and that "monitoring one's fellow union member can result in conflicts of interest". The court concluded that technicians are guards under the NLRA and can only be represented by an all guard union and not a union for non-guards such as the one that was the subject of this litigation.

101. *Trotta v. Cajun Conti, LLC, et al.,* No. 15-1186 SECTION "R" (2) (E.D. La. 01/13/2017). Plaintiff's employment with two restaurants owned by defendants in New Orleans was terminated and plaintiff alleges the termination was a result of retaliation for protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended. Plaintiff stated that he was fired for giving a statement to the EEOC in connection with defendants' termination of another employee. Defendants allege that plaintiff had been reprimanded multiple times for performance issues. Defendants moved for summary judgment; which the court granted. The court found no evidence of a causal connection between the protected activity and plaintiff's termination.

Workers' Compensation

102. *Mangham v. Westin Hotel Management, LP*, 2017 WL 4540712 (N.D. Ga. 10/11/2017). In March 2016, a female employee of the Westin was found dead and partially frozen in a walk-in freezer. The woman, who was employed by Starwood Hotels, the hotel's parent company, had entered the freezer alone during her normal evening shift. After an investigation, it was found that the woman died because the door release mechanism failed to function properly causing her to become trapped in the freezer. Her husband filed a complaint against SLC, which owns the hotel and fixtures and is wholly owned and controlled by Starwood, and Westin Hotel Management, asserting claims of negligence related to premises liability and wrongful death. SLC moved for summary judgment on the grounds that the husband's claims on behalf of his deceased wife were barred by the Georgia Workers Compensation Act, and Westin moved for summary judgment, stating that it owed no duty to the woman because it

"had absolutely nothing to do with the hotel." A district court granted the motions and dismissed the case. The court noted that the husband's response to the defendants' motions for summary judgment was untimely, and that therefore they were deemed unopposed. Even if his response had been timely, the court agreed with SLC that the husband's claims were barred by the state's Workers Compensation Act. The court noted that the WCA states that when an employee's injuries are compensable, that "the employee is absolutely barred from pursuing a common law tort action to recover for such injuries, even if they resulted from intentional misconduct on the part of the employer," and that this applies equally to an employee's personal representatives, next of kin, etc. The court held that the woman — and her family — is eligible for workers' compensation benefits because she died during her normal evening shift at work and because her death arose out of and in the course of her employment. Therefore, it also bars her husband from suing Starwood or SLC. The court also found that Westin does not own, operate, maintain or otherwise control the hotel or its fixtures — including the hotel freezer — and that therefore, no reasonable jury could find it liable for the woman's death.

103. *Tow v. Starwood Hotels & Resorts Worldwide, Inc.,* 2017 WL 6376171 (Crt. Appls, Ariz., 12/14/2017). Plaintiff sought compensation for a work-related injury. Plaintiff worked as a banquet bartender at defendant Starwood Hotels. While preparing for an event, a beverage container fell and made, per plaintiff, a loud noise causing pain in plaintiff's right ear. For several weeks thereafter, he continued to experience hearing loss. He filed a claim with the workers compensation insurance company, but it denied the claim. At a subsequent hearing, plaintiff proved through an audiologist that his hearing had decreased to the point of being recommended for hearing aids. A board-certified otolaryngologist found that the type of hearing loss plaintiff experienced was consistent with genetic causes. He further stated it was not within medical probability that the incident plaintiff described could have caused his hearing loss, and the loss was not consistent with the amount of noise that would be produced by a plastic item hitting the ground. The court thus determined that plaintiff did not suffer a work-related injury.