

***Hospitality Case Review:  
The Top 100+ Cases  
That  
Impacted Us in 2016***

**Fifteenth Annual  
Hospitality Law Conference  
April 24-26, 2017  
Houston, Texas**

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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 Hotel, Restaurant and Travel Law and New York Cases in Business Law. 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 behind the news. Her current book-writing project is *Law Made Fun through Downton Abbey*.

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 thirteen 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 and Tortoise-and-the-Hare Floats, 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 an Assistant Professor at the Michael A. Leven School of Culinary Sustainability and Hospitality at Kennesaw State University, in Georgia. Prior to working at Kennesaw, Diana was a Senior Lecturer at the Cecil B. Day's School of Hospitality Administration in the J. Mack Robinson Business College at Georgia State University, Atlanta, Georgia; where she taught for over twelve years. She teaches hospitality law, intro to hospitality, professional development and culinary services management; an internship course.

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 in the summer of 2014 earning her CWP designation.

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.

# ***Hospitality Case Review: The Top 100+ Cases That Impacted Us in 2016***

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## **ADA/Facility**

1. *Bray v. Marriott International, d/b/a Springhill Suites, et al.*, No. PWG-14-3645 (D. Md. 01/27/2016). A wheelchair bound guest at a Marriott hotel, who suffered injuries in the roll-in shower, sued in the state of Maryland claiming the hotel was negligent in not complying with the Americans with Disabilities Act allegedly due to the loose and shaky shower seat and shower. Defendant argued that a claim for Title III under the ADA only provides injunctive relief and not money damages so defendant moved for summary judgment. The court denied defendant's motion for summary judgement agreeing that money damages are not available under the ADA, but Maryland is one of few states that allows a violation under the Americans with Disabilities Act Accessibility Guidelines to show evidence of negligence for a negligence claim based on a statutory violation.
2. *Brooke v. Choice Hotels*, 2016 WL 2594070 (S.D. Ca., 05/05/2016). Plaintiff is wheelchair bound due to loss of a leg. She contacted defendant hotel for the purpose of booking a room in the San Diego area. She asked whether the hotel pool had a lift or other means of access for disabled people. She was advised the pool did not. Plaintiff's agent independently verified that the pool had no lift. Plaintiff sued based on the Americans with Disabilities Act (ADA), claiming she was denied equal enjoyment of the facility. The hotel challenged plaintiff's standing. For an ADA plaintiff to have standing, more than a vague intention to visit an area is needed. Instead, a firm intention to visit is required. Here, plaintiff resides 400 miles from defendant's hotel, she states she intends and wishes to travel to San Diego in the future. She does not identify any planned trip or specify definitive plans for a future trip. Instead, her travel itinerary is speculative. Plaintiff thus lacks standing. Her case was dismissed with prejudice.
3. *LaCaria, Jr. v. Aurora Borealis Motor Inn, Inc.*, 2016 WL 6638848 (Crt. Appls. MI, 11/08/2016). Plaintiff claimed to be blind in one eye and have diminished vision in the other. He had no restrictions on his driver's license and his testimony about his sight was vague. Plaintiff sought lodging at defendant motel, a facility with a clearly posted "no pets" policy. When the receptionist saw plaintiff's dog, she questioned the owner's disability and refused to provide him a room. Plaintiff left but later sued. Referencing Michigan state law, the court differentiated between a service dog, which the hotel must

accommodate, and an emotional support animal, which the hotel need not permit. Also, per state law, if damages are limited to being offended and humiliated, no recovery is permitted. However, plaintiff also alleged inability to sleep, function or eat for a time after the claimed discrimination, and his medical provider increased his medication to further combat depression and anxiety. Such damages would be recoverable. The court denied summary judgment and remanded the case for trial.

### **Antitrust/Sherman Act**

4. *Concord Associates, LP et al v. Entertainment Properties Trust, et al*, 2016 WL 1075947 (2<sup>nd</sup> Cir., 03/18/2016). Plaintiffs are seven entities collectively attempting to develop a casino-resort complex in the Catskills region of NY. Defendants are three groups of investors with a current interest in the casino industry and horse racing in the Catskills. Plaintiffs claim defendants entered an anti-competitive scheme to obstruct plaintiffs' resort development project. Plaintiffs sued claiming violations of sections one and two of the Sherman Act. To survive a motion to dismiss, a Sherman Act claim must define the relevant geographic market. The relevant market is the "area of effective competition" within which the defendant operates. Here the court held plaintiffs provided no basis to justify their proposed geographic market definition. The court affirmed the lower court ruling that plaintiffs' proposed geographic market definition was not plausible. Therefore, the complaint was dismissed.

### **Attorney Fees**

5. *US Grant Hotel Ventures v. American Property Management Corp.*, 2016 WL 2842298 (Crt. App., CA, 05/11/2016). Plaintiff owned a hotel and signed a management contract with defendant. Thereafter plaintiff claimed defendant mismanaged the hotel, misappropriated funds, and breached its fiduciary duty. Plaintiff sued for breach of contract, conversion of funds, and breach of the fiduciary duty. The jury held for defendant on the breach of contract claim, and for plaintiff on the breach of fiduciary duty and conversion claims. Plaintiff was awarded \$1.35 million in damages. The management contract provided that, in the event of a legal action arising from the agreement, the "prevailing party" would be entitled to "attorneys' fees and expenses." Both parties claimed to be the prevailing party. The court held that in circumstances where neither party obtains a complete victory, the trial court has the discretion to determine which party prevailed. The appeals court affirmed the trial court's determination that plaintiff was the prevailing party.

### **Casinos/Misrepresentation**

6. *Master v. Red River Entertainment, LLC*, 188 So.3d 284 (La, 2016). In an odd set of facts, a casino was sued for misrepresentation by stating a particular slot machine "had to hit the jackpot soon." It was part of a progressive jackpot. A casino patron sought and received exclusive use for 16 months of that machine. He played 12-14 hours a day and spent approximately \$500,000. When the jackpot payoff did not occur, he sued for

breach of contract. The court dismissed the case, noting, “A gaming device is understood by all as a game of chance with random outcomes. . . . casino management could not affect the random outcome of the machine in the customer’s favor.”

7. *Borgata Hotel v. Ivey*, 2016 WL 7246074 (NJ, 2016). While playing Baccarat at plaintiff’s casino, defendants knowingly engaged in a scheme called “edge-sorting” which included creating a set of marked cards and then placing bets based on the markings. Such actions violate an implied contract, imposed by the New Jersey Casino Control Act, requiring players to gamble lawfully. As a remedy, the court returned the parties to status quo ante, their position prior to the formation of the contract. Thus, the casino is entitled to the return of all of defendants’ winnings, including the sum won at craps following their Baccarat play. However, the casino was not entitled to the value of the “comps” (goods and/or services provided to players by casinos seeking to entice them to gamble at their establishment) given to defendants.

### **Contracts/Breach**

8. *Energy Smart Industry, LLC, v. Morning Views Hotels – Beverly Hills, LLC*, 2016 WL 4698944 (11<sup>th</sup> Cir., 2016). The parties had a contract requiring plaintiff to retrofit defendant hotel’s light bulbs with energy-efficient ones. The work was divided into five phases. Plaintiff completed the first part and sought payment for the finished work. The hotel declined to pay and so Energy Smart stopped work and sued. The terms of the contract connect payment to the completion of the work. It reads, “Morning View shall pay Energy Smart [a specified amount] following the completion of the Work.” Said the court, “The plain language of the retrofit agreement controls. Morning View did not breach its obligations under the contract because payment was not owed until all the Work was complete, even if the Work was divided into phases.” Summary judgment for the hotel was thus upheld upon appeal.

### **Contracts/Forum Selection Clause**

9. *Faggstad v. Island Hotel Co. v. Kerzner International Bahamas, Ltd.*, 843 F.3d 915 (11<sup>th</sup> Cir., 12/13/2016). Plaintiff and his wife were guests at the defendant’s resort on Paradise Island in the Bahamas. While at the facility, plaintiff fell on a wet sidewalk and suffered serious injuries. Plaintiff sued for damages in a Florida court; the hotel moved to dismiss based on a forum selection clause. Plaintiff had made the reservations on line, received a confirmation email that contained a section titled, “Terms and Conditions”, and included a hyperlink advising guests to view the other terms and conditions. The link provided notice that any dispute between the guest and hotel must be litigated exclusively in the Bahamas. Additionally, plaintiff’s link advised they would be required to sign a registration form upon arrival that included a Bahamian forum selection clause. The clause was in plain English. This constitutes reasonable communication of the clause rendering it valid and enforceable. Case dismissed.

## **Class Action Certification**

10. *Williams, et al., v. Omainsky, et al.*, No. 15-0123-WS-N (S.D. Ala. 01/21/2016). Many servers at defendant's three restaurants in Alabama asked the court to conditionally certify their status for claims arising under their employment and the question of whether they are allowed to file claims under the FLSA for violation of tip pooling issues or must go through arbitration as set forth in the employment agreement which was not signed by many of the servers. The court found because of the uniformly administered wages, rules and tip pools at all three restaurants, the servers made a compelling showing that they were similarly situated. Seven of the servers had signed the arbitration agreement allegedly forced upon them and the court stated that they had to submit their claim to arbitration and stayed their complaints.

## **Cyber Security/Hacking**

11. *Dugas v. Starwood Hotels*, 2016 WL 6523428 (S.D. Ca., 11/03/2016). Defendant Starwood Hotels was attacked by criminal hackers who took customers' names, credit card numbers, security codes and expiration dates. Starwood did not disclose the information until seven months after the attack occurred. Plaintiff, a prior customer of the hotel, alleged the data breach adversely affected him and hundreds of thousands of customers. His credit card was used for unauthorized purchases, presumably by the hackers. He sought economic damages and an injunction based on numerous causes of action. The court denied injunctive relief because plaintiff could not sufficiently allege he was "realistically threatened by a repetition of his experience." Additionally, plaintiff's violation of privacy claim was dismissed because in California the cause of action requires an intentional act by the defendant and the court determined proof of that element was missing. The court likewise dismissed the negligence cause of action because liability for negligence is limited primarily to damages for physical injuries and property damage; recovery of purely economic loss alone is not allowed. Plaintiff here alleged only economic loss – no personal injury or property damage.

## **Employment/Accrued Vacation**

12. *Soto v. Motel 6 Operating L.P.*, No. D069403 (Cal. Ct. App. 10/20/2016). A former employee of defendant's motel filed a claim against defendant under California's Labor Code alleging that defendant failed to include the monetary amount of accrued vacation in employee's wage statements. Defendant argued that the monetary amount of accrued vacation did not need to be itemized before the termination of an employment relationship. The court held that a wage statement must include nine separate items, but not vacation accrual amounts. The district court agreed with the defendant and the decision was affirmed on appeal.

## Employment/Arbitration

13. *Esparza v. Sand & Sea, Inc., et al.*, No. B268420 (Cal. Ct. App. 08/22/2016). Plaintiff, a former employee of defendant's hotel sued defendant for multiple claims of discrimination and harassment. Defendant moved to compel arbitration as per a provision in the employee handbook that contained a section on an employee's agreement to arbitrate disputes. The employment manual expressly stated that "...the handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees." The court denied defendant's petition to compel arbitration and the decision was affirmed on appeal. Since the employee handbook did not create an enforceable agreement, it cannot be read to create a legally enforceable obligation to arbitrate.
14. *Schnaudt, et al., v. Johncol, Inc., et al.*, No. 2:15-cv-2619 (S.D. Ohio 09/27/2016). A number of employees working for Papa John's restaurants filed a complaint alleging unfair pay practices in that defendant paid the workers a driver's rate of pay (less than minimum wage due to tips) when an order for delivery was placed with the store rather than when the worker left the restaurant to deliver the pizza. This resulted in a 20-minute difference between minimum wage when working in the restaurant and the less than minimum wage- tipped employee who delivers the pizzas. Defendant moved to compel arbitration as required in the employment booklet. The court dismissed plaintiffs' claims that they were not bound by the arbitration provision as the format was presented in a hurried manner. The court did agree to hold off until it was determined that a class action would be certified. The 7<sup>th</sup> and 9<sup>th</sup> Circuit Courts have held that a collective arbitration violates the NLRA's right to self-organization and the 5<sup>th</sup> and 8<sup>th</sup> Circuit Courts have held that arbitration agreements stating that all arbitrations must be done on an individual basis is not a violation of the NLRA. To be continued.
15. *Palmer v. Omni Hotel Management*, 2015 WL 816017 (S.D.Ca., 03/01/2016). Plaintiff claims defendant failed to pay him and other similarly situated employees proper overtime wages for hours worked. Plaintiff filed a class action lawsuit, and then moved to stay the case pending arbitration. Defendant hotel claims plaintiff waived his right to arbitrate by starting litigation. The court granted plaintiff's motion notwithstanding plaintiff had commenced the lawsuit and plaintiff thereafter conducted a deposition and class-related discovery. The court held plaintiff acted with sufficient due diligence in commencing the arbitration proceedings, and defendant will not be substantially prejudiced thereby. The court noted the case is still in early stages of litigation, and the discovery already completed would be necessary for the arbitration as well.

## Employment/Discrimination/ADA

16. *Cervantes v. International Hospitality Associates, et al*, 2016 WL 3080774 (D. PR, 05/31/2016). Plaintiff was a night bartender in the lobby bar. She developed a medical condition and could only work days. There were no openings for daytime bartenders and an employer has no duty to remove another employee to create a vacancy for a worker

with a disability. As an accommodation, the hotel offered her a breakfast and lunch server position. She accepted but earned less tips and requested to be transferred to a daytime bartender position. The employer recruited and hired others for that job. She sued claiming disability discrimination. The court dismissed the case. Once an employer accommodates a disabled employee, the employer's legal duty is satisfied. No further attempt to match an employee with a desired job is required.

17. *Clark v. Boyd Tunica, Inc., d/b/a Sam's Town Hotel and Gambling Hall*, 2016 WL 7187390 (Fifth Cir., 12/09/2016). Plaintiff tripped over a drainage pipe in the defendant's kitchen while working and due to defendant's substance abuse and testing policy, plaintiff's urine and blood were tested for alcohol. The results showed that plaintiff's blood alcohol content was 0.12 percent, above the legal limit in the state. Plaintiff's employment was terminated and plaintiff sued alleging defendant discriminated against plaintiff due to plaintiff's ankle injury which plaintiff claimed was a disability under the ADA. Plaintiff claimed that she did not drink alcohol but was not able to provide evidence that her blood alcohol concentration was the result of her diabetic medication. The court said it wasn't about the alcohol in plaintiff's urine, but the reasonable belief it was and defendant acted on that basis and not as a pretext for discrimination. The court granted defendant's motion for summary judgment, which was affirmed on appeal. Note: the casino had a clear record of repeatedly and consistently enforcing its policy.
18. *Telemaque v. Marriott International, Inc., et al.*, No. 14 Civ. 6336 (ER) (S.D. N.Y. 02/02/2016). A loss prevention officer filed a complaint against his former employer stating that he had been discriminated against based on his disability, which he claimed was arthritis and high blood pressure. A district court dismissed his claims stating that he failed to exhaust his administrative remedies with the New York State Department of Human Rights, which found that plaintiff had alleged a claim for retaliation but not a claim for disability discrimination. The court said that even if plaintiff had exhausted his remedies, ailments such as arthritis and high blood pressure are not conditions which substantially limit major life activities. Running is not considered a major life activity. Sleep is considered a major life activity, however, plaintiff failed to show the frequency, duration and severity of his lack of sleep.
19. *Demarce v. Robinson Property Group Corporation, d/b/a Horseshoe Casino*, No. 14-60011 (5th Cir. 03/21/2016). Plaintiff, a former long-term card game dealer at defendant's casino was terminated for performance issues related to violations of defendant's attendance policy. Plaintiff filed a claim against defendant for disability discrimination and FMLA interference alleging defendant discriminated based on plaintiff's osteoarthritis condition. The court granted defendant's motion for summary judgment and the decision was affirmed on appeal. The court found that defendant did in fact accommodate plaintiff's request for a sit-down table job when provided with a doctor's note requesting same, however, plaintiff consistently violated defendant's attendance policy. The court said defendant's actions were not a pretext for

discrimination and no reasonable juror would find that defendant did not reasonably accommodate plaintiff's needs.

20. *Casanova v. Wyndham Grand Rio Mar Beach Resort and Spa*, No. 13-1945 (PG) (D. P.R. 09/09/2016). A long-term resort employee sued defendant alleging that she was discriminated against because of her disability. Plaintiff claimed she was disabled and diagnosed with numerous disorders, including hyperactive bladder. Due to her bladder condition, she had to use the bathroom frequently. Defendant accommodated her requests, however, defendant's manager counseled plaintiff on her tardiness and allegedly told her she was being inconsiderate and unprofessional. Plaintiff was not fired nor did she suffer any economic harm. She sued her employer and the district court dismissed her claims. She was looking for the court to allow her to "receive absolute immunity shielding her from all disciplinary measures based on workplace misconduct that may, or may not be related to a potentially qualifying disability under the ADA." The court said she produced no evidence that she was disabled and dismissed her claims.
21. *Sessin v. Thistledown Racetrack, LLC, et al.*, No. 1:15-CV-01691 (N.D. Ohio (05/04/2016). Plaintiff was an employee of defendant's racetrack, restaurant and nightclub. Plaintiff was hired as an accounting supervisor and suffered from an impaired hearing condition. The director of finance made some comments to plaintiff that plaintiff found offensive such as "I can never tell if you are hearing me." And "if you read lips, why are you not looking at me?" Plaintiff resigned and sued for disability discrimination and hostile work environment, and then defendant filed for a summary judgment verdict. The court dismissed the claim of hostile work environment stating that the statements were neither sufficiently severe nor pervasive to create a hostile work environment. The court did not grant the defendant relief on the disability discrimination claim stating that the plaintiff did present evidence that created an issue of material fact as to whether his hearing disability resulted in him being demoted to no longer having supervisory responsibilities, even though his pay and title did not change.
22. *Ewing v. Doubletree, LLC*, 2016 WL 7228804 (10<sup>th</sup> Cir., 12/14/2016). Plaintiff was a housekeeper at defendant's Salt Lake City hotel for several decades until she was terminated in 2011. Defendant hotel attributed the termination to poor job performance documented over three years with warnings and disciplinary action. Plaintiff alleges she was mistreated and ultimately fired because she has a mental impairment that makes her a "bit slow." She sued for violations of the Americans with Disability Act including wrongful termination, failing to accommodate, and hostile environment. Plaintiff was unable to prove that DoubleTree knew of her mental disability. This fact is fatal to all three of her ADA claims. Further, plaintiff admitted that her performance at work was poor and she had trouble meeting expectations. This negates her ability to prove that DoubleTree's nondiscriminatory explanation for the termination is unworthy of belief. The failure to accommodate claim also fails because, even if the employer knew of the disability, it must also know of the employee's interest in an accommodation, which comes from the employee making an "adequate request." In this case, plaintiff never indicated to DoubleTree that she required or desired an accommodation. The hostile

environment claim also fails because plaintiff asserts only one incident of disability – based hostility and a single instance is not enough.

### **Employment/Discrimination/ADEA**

23. *Equal Employment Opportunity Commission v. Texas Roadhouse, Inc., et al.*, No. 11-11732-DJC (D. Mass. 10/19/2016). The EEOC filed a charge against defendant alleging age discrimination in Texas Roadhouse’s hiring practices. Training materials for hiring managers included images of young looking people and written language such as hiring hosts who are attractive and happy including bartenders and servers who are great looking. Texas Roadhouse filed a summary judgement motion which was denied by the court. Over the period from 2007 to 2014, there were 180,000+ front of house hires and only 1.62 percent were over age 40. Defendant stated that it has anti-discrimination policies in place and presented testimony from workers over the age of 40 who said they never witnessed or experienced any age discrimination. The court said a jury can decide if defendant is engaged in discriminatory practices through its corporate-wide hiring materials.

24. *Pennington v. Athens Hotel*, 2016 WL 7103909 (12/0/2016). Plaintiff, over age 65, was a housekeeper at defendant hotel. She was denied promotions and then terminated. She sued under the Age Discrimination in Employment Act (ADEA) and defendant moved for summary judgment. The hotel employed approximately 15 workers. The ADEA applies only to entities that employ twenty or more employees. The court therefore granted defendant’s motion for summary judgment.

### **Employment/Discrimination/Constructive Discharge**

25. *Berrios, et al v. Marcus Hotels, Inc.*, 2016 WL 1060258 (E.D. Wisc., 03/15/2016). Plaintiffs are Hispanic employees in the Housekeeping Department of the Madison, Wisconsin Hilton. Plaintiffs claim constructive discharge. The alleged intolerable working conditions include that the supervisor was disrespectful and condescending toward them, she was insensitive to their requests for time off, plaintiffs frequently did not have all the supplies needed to do their job, they were given a heavier workload than other employees, the rooms they cleaned were inspected more often; and if they were late to work they were forced to dance to Latin music or pay \$20. The court recognized the discriminatory double standard for Hispanic employees, and that the working conditions for plaintiffs were “unpleasant.” Still, the court dismissed the constructive discharge claim because the record contains no evidence of slurs or references to race, ethnicity or national origin, or evidence of actual or threatened violence, and the hotel took reasonable steps to address the harassment. Those measures included mandatory review and approval for all discipline, a behavior study of the manager, training him to improve employee relations, and a bilingual human resources representative in the hotel during established hours.

## **Employment/Discrimination/Gender**

26. *Benefield v. M Street Entertainment, LLC, et al.*, No. 3:13-cv-1000 (M.D. Tenn. 07/01/2016). Plaintiff, a chef, was the only female of four chefs in defendant's four restaurants. Plaintiff filed a complaint against defendant alleging gender discrimination and retaliation. The court granted defendant's summary judgment motion on the gender discrimination claim stating that a few inappropriate comments made about women in the workplace by the director didn't alter the conditions of plaintiff's employment. The court allowed the claim for retaliation to proceed because plaintiff's termination came within mere hours of plaintiff sending a complaint via email to the human resource office.

## **Employment/Discrimination/National Origin**

27. *Lee v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 14 Civ. 5278(KPF) (S.D. N.Y. 06/22/2016). Plaintiff, a union employee of Jamaican heritage in defendant's hotel claimed he had been discriminated against based on his national origin. A prized shift opened up in the scheduling and plaintiff along with others wanted to take the shift as it was a preferred shift. Defendant delayed in assigning the open position and plaintiff sued. The district court dismissed plaintiff's claims stating that the six-week delay in changing plaintiff's work schedule was not due to discrimination but had everything to do with a union grievance filed by another employee who also wanted the open shift.

## **Employment/Discrimination/Pregnancy**

28. *Alger, et al., v. Prime Restaurant Management, LLC*, No. 1:15-cv-567-WSD (N.D. Ga. 07/13/2016). Two employees filed a complaint alleging pregnancy discrimination, violation of FMLA rights and ADA discrimination. Defendant failed to file an answer and a default judgment was entered. Monetary award was given and defendant appealed. Defendant's manager told one of the plaintiffs that although she was a good employee, defendant could not build a business if she was going to be gone. Another plaintiff was denied a larger uniform due to her pregnancy and the defendant told her it was on backorder. Plaintiff called the uniform company and found out that the larger size had never been ordered. The court held that the restaurant did discriminate against the plaintiffs based on their pregnancies. Defendant also did violate the plaintiffs' FMLA rights as they failed to notify the women of their eligibility to take FMLA leave. The court dismissed the ADA claim, as the plaintiffs didn't show they were entitled to protection under the ADA.

## **Employment/Discrimination/Race**

29. *Lang v. Bloomin' Brands, Inc., et al.*, No. CV414-196 (S.D. Ga. 02/09/2016). An employee at an Outback Steakhouse filed a claim for racial discrimination and retaliation against defendant. Plaintiff, a black man, bussed tables at the restaurant. He claimed that there were blatant anti-black statements and practices occurring at the workplace. An

investigation revealed that one white employee did refer to plaintiff as “boy”. The investigation also revealed that some of the women in the restaurant complained that plaintiff behaved in inappropriate ways by calling one of the employees “Next Top Model” and “Miss Pretty Feet”, as well as commenting on another employee’s lips. Plaintiff refused to cooperate with the sexual harassment investigation and he was subsequently terminated. The claim for racial discrimination was dismissed, as he didn’t prove that the comments made in the restaurant were severe or pervasive. Plaintiff also failed to show he was terminated based on retaliation and plaintiff did admit he had engaged in some sexual harassment activity while in the workplace.

### **Employment/Discrimination/Retaliation**

30. *Cervantes v. International Hospitality Associates, et al*, 2016 WL 3080774 (D. PR, 05/31/2016). A bartender employee of defendant hotel quit after 16 months, and later was rehired. In the process, the employer learned that she had lied about her social security number on her first application but not on her second (she resolved the issue in the interim). The worker became disabled, was accommodated by the employer with another job, she did not like the reassignment, and sued for disability discrimination. Soon thereafter, she was terminated. Plaintiff claimed her termination was retaliation for disability discrimination lawsuit. The hotel attributed her firing to the false information on her original application. The court rejected this argument because the discrepancy was discovered by the employer 21 months prior to the termination, but she was not terminated until she filed her lawsuit. The court therefore denied the hotel’s motion for summary judgment.
31. *Turpin v. Tropicana Las Vegas Hotel*, 2016 WL 2993601 (D. NV, 05/23/2016). Plaintiff’s fiancée filed a discrimination charge against the Tropicana where both worked. Plaintiff assisted the EEOC in its investigation, and also filed his own discrimination charge. Plaintiff was soon thereafter terminated. He claimed retaliation. The court dismissed the charge noting that, while plaintiff engaged in protected activity, his evidence fails to demonstrate that the protected activities were even casually related to his termination. Without that connection, plaintiff lacks proof of retaliation.
32. *Lee v. Starwood Hotels*, 2016 WL 3542454 (06/22/2016). Plaintiff was a house attendant at the Westin New York in Times Square. He sued for various alleged employment violations and lost on all claims. His allegations were overstated and unverified by the evidence. The case however includes instructive comments on what constitutes an adverse employment action, a necessary element in a retaliation case. Denial of overtime can constitute an adverse employment action but only if accompanied by a “material detriment as a result of being denied overtime, such as opportunities for career advancement.” Also, denial of a lateral transfer may constitute an adverse employment action but only if the denial results in a material and negative change in the terms and conditions of the worker’s employment, such as reduction in pay. Subjective disappointment is not enough.

## Employment/ERISA/ACA

33. *Marin v. Dave & Buster's, Inc., et al.*, No. 1:15-cv-03608-AKH (S.D. N.Y. 02/09/2016). Plaintiff, an employee of defendant filed suit claiming discrimination against her in violation of the Employee Retirement Income Security Act because defendant cut plaintiff's hours from full time to part time which made plaintiff ineligible to participate in the health care benefit plan in order to avoid the cost to the company of \$2 million dollars as a result of the Affordable Care Act compliance regulations. Defendant argued that plaintiff wasn't entitled to benefits not yet accrued but the court disagreed. Defendant's motion to dismiss was denied because plaintiff stated a plausible and legally sufficient claim for lost wages and reinstatement of benefits. The restaurant cannot act deliberately to interfere with benefits.

## Employment/FLSA

34. *Graham v. Hathaway Lodge, Inc., et al.*, No. 14-3420 (JBS/AMD) (D. N.J. 12/09/2015). Plaintiff, a server at defendant's restaurant signed an employment contract that stated her pay structure would change upon a promotion to that of a salaried employee compensated at \$750 per week for a 50 to 60-hour workweek. And if she worked less than 50 hours, her pay would be reduced. Plaintiff sued for violation of the FLSA and New Jersey wage and hour laws and the court granted defendant's summary judgment motion. The court said the contract contained a clause noting that plaintiff would be working overtime every week and even though it did not state specifically that she would be paid additional overtime premiums, the court said that the contract suggested that the \$750 weekly pay did intend to include all compensation, including overtime premiums.
35. *Robinson v. Roberts Hotels Management Detroit*, 2016 WL 48220 (E.D.MI, 01/05/2016). Plaintiff was a maintenance worker at the Roberts Riverwalk Hotel. He sued his employer for nonpayment of overtime. His salary was \$30,000/year. At no time did he receive one and a half times his regular rate for pay worked in excess of 40 hours a week. Because he was a salaried employee and not required to punch in, defendant did not keep track of plaintiff's hours. Plaintiff kept a private log of the time he arrived at work each day and the tasks he performed but not when he left. Before filing the suit, plaintiff never made a claim or complaint to the hotel concerning overtime. At the trial, the parties stipulated that plaintiff is not exempt from the Fair Labor Standards Act requirement of overtime pay for hours exceeding 40 per week. Plaintiff testified he worked an average of 52 hours/week, and several co-workers would have regularly seen him work overtime. However, he failed to call any of them as witnesses. The court noted that employers subject to overtime requirements have the responsibility to maintain records of employee hours worked. If an employer fails to keep records, the employee has the opportunity to prove the amount of uncompensated work. The burden of proof is preponderance of the evidence. While a plaintiff's testimony alone may be sufficient, here the court found plaintiff's testimony to be "simply not credible." Therefore, the court dismissed the case.

36. *Diaz, et al., v. Amedeo Hotels Limited Partnership, et al.*, No. 12-CV-4418 (JMA) (E.D. N.Y. 03/29/2016). A group of servers and captains filed a complaint alleging violations of the FLSA and the New York Labor Law. Plaintiffs contend that defendant violated the collective bargaining agreement and insisted on overtime pay. Defendant argued plaintiffs were exempt under the FLSA because they qualify for the FLSA's commissioned salesperson exemption as mandatory service charges for servers and captains are calculated as a percentage of a total banquet bill, which qualifies as commissions. Defendant moved for summary judgment and a district court agreed with defendant on the FLSA claim.
37. *Bitner, et al., v. Wyndham Vacation Resorts, Inc.*, No. 13-cv-451-wmc (W.D. Wis. 12/29/2016). Plaintiffs were employees of the timeshare division of defendant's company and claimed there was an unofficial policy that required them to perform unpaid off-the-clock work. Plaintiff's sought class action status to pursue a claim under the FLSA. Defendant argued plaintiffs should not be certified and the district court disagreed. The court stated that it might be difficult for the plaintiff employees to prove that there was an unofficial policy to work without pay but there was enough sufficient evidence to proceed to trial. Class certification was granted to all in-house sales representatives.
38. *Steele, et al. v. Leasing Enterprises, Ltd.*, No. 15-20139 (5th Cir. 06/14/2016). Plaintiffs, a group of servers working at defendant's restaurants, sued defendant for wrongfully deducting money from the servers' tips to offset not only credit card fees, but also for other expenses including the swipe fees, charge backs, void fees, manual entry fees and hiring vans to deliver cash weekly so defendant could pay the servers in cash for the credit card tips. The court held for plaintiffs stating that defendant's tip policy was a violation of the FLSA but was not willful. The court noted that including costs in excess of credit card issuer fees was improper behavior on behalf of defendant. Defendant was, however, responsible for paying plaintiffs' reasonable attorney fees.
39. *Langlands, et al., v. JK & T Wings, Inc.*, No. 15-13551 (E.D. Mich. 05/11/2016). Plaintiffs are a group of servers, bartenders and hosts employed by defendant, which owns Buffalo Wild Wing and Smashburger restaurants. Plaintiffs claimed that defendant violated the FLSA dual occupation requirements since they do maintenance work more than 20% of their time but were paid below minimum wage. The court denied defendant's motion to dismiss claiming that plaintiffs plausibly stated a dual occupation FLSA claim.
40. *Schaeffer, et al., v. Walker Bros. Enterprises, Inc., et al.*, No. 15-1058 (7th Cir. 07/15/2016). Plaintiffs were servers at Walker Bros. Original Pancake House restaurants and sued defendant for failing to notify servers of the tip-credit wage, and failing to pay the servers the full minimum wage for performing non-tipped duties. The trial court found in favor of defendant which decision was confirmed on appeal. The court found that the servers were not performing dual jobs but merely duties related to their job, and that the work was well under the 20 percent mark for an eight-hour shift. The court also

said that proper notice was given due to posters and notations on paychecks about the tip credit arrangement.

41. *Stokes v. Consolidated Wings Investment, LLC d/b/a Buffalo Wild Wings*, No. 1:15-cv-01932-RLY-DKL (S.D. Ind. 09/30/2016). Plaintiff, a former bartender and server at a Buffalo Wild Wings restaurant claimed that defendant violated the FLSA. Defendant required servers and bartenders to reimburse the restaurant through their tips in the event of a dine and dash by a customer or if there is a cash drawer shortage. Plaintiff also claimed that she and others spent more than 20 percent of their time performing non-tipped work. The court held that although the case is thin, the court dismissed defendant's motion to dismiss holding that all of the server's charges together would allow her complaint to proceed against the defendant.
42. *Walsh v. Bril-Jil Enterprises, Inc., et al.*, No. 15-0872 (JLL) (D. N.J. 10/24/2016). Plaintiff, a manager of an IHOP restaurant sued for wrongful termination and violation of FLSA. Plaintiff was correctly classified as an executive employee and not entitled to overtime, however, the owner failed to pay him on a salary basis and when an employer makes improper deductions from salary such as for missing silverware and broken dishes, the employer loses the exemption if the facts show that the employer did not intend to pay the employee on a salary basis. The court said that since defendant had a practice of docking the manager's pay, the court held he was not a salaried employee and was entitled to overtime pay.

### **Employment/Hostile Work Environment**

43. *Bowles v. Romulus Incorporated*, No. CV-15-00077-PHX-DGC (D. Ariz. 01/20/2016). Plaintiff, a line cook at an IHOP restaurant filed a complaint alleging a hostile work environment due to a co-worker who used the N-word at work. The co-worker was reprimanded; however, plaintiff wanted the co-worker fired. The court held for defendant stating that the incident was merely an isolated one and not sufficiently severe or pervasive to give rise to a hostile work environment claim. Even if the court had found a hostile work environment, defendant worked quickly and sufficiently to address the racist remarks.

### **Employment/NLRB/Unfair Practices**

44. *MikLin d/b/a Jimmy John's v. National Labor Relations Board, et al.*, Nos. 14-3099, 14-3211 (8th Cir. 03/25/2016). Employees at Jimmy John's restaurant were trying to organize a union campaign based on the defendant's sick leave policy or lack of effective sick leave policy. The policy required employees who were sick to find a replacement or be disciplined. In many cases, employees came to work sick. Some employees posted notices on Facebook and at the restaurants protesting the non-sick leave policy. Defendant fired the employees for being the leaders of the sandwich poster campaign. The NLRB held in favor of the employees stating that it was protected activity, with one

dissenting judge who said the distribution of the posters was maliciously motivated. The appellate court affirmed the NLRB decision.

45. *In-N-Out Burger, Inc.*, Nos. 16-CA-156147, 16-CA-163251 (NLRB AJ 07/11/16). The restaurant had a long-standing uniform policy that employees are not allowed to wear any type of pin or sticker on their uniform. Management prohibited employees from wearing a button arguing for a mandatory \$15 minimum wage. The employees complained to the NLRB and filed an unfair labor charge against the restaurant and the administrative law judge held that this prohibition of the Fight for \$15 button was not justified due to special circumstances. The ALJ stated that even though the buttons were not related to a particular labor organization, it supported a movement to increase minimum wage and that the NLRA applies. The ALJ said the buttons were not vulgar or obscene. Defendant responded that for 65 years there been no menu or logo changes. The ALJ did note that two times a year, at Christmas and for a nonprofit foundation, employees are required to wear buttons, and therefore it casts a doubt on any claim that special circumstances require the employee's clothing to be without buttons.

### **Employment/National Origin Harassment**

46. *Entrada v. Marriott Hotel Services, Inc.*, No. CIV-15-322-C (W.D. Okla. 11/01/2016). Plaintiff, a cashier at a conference center filed a complaint alleging national origin discrimination and retaliation due to alleged sexual advances and harassment by her coworkers and supervisors. Plaintiff was terminated based on three separate incidences and written reprimands of poor performance within a one-year period. Defendant moved for summary judgment which was denied stating that since the employee raised the "cat's paw argument" claiming the reprimands were issued in response to her complaints of harassment, the lower-level managers were behind her termination. The court held there were existing questions of fact relating to at least two of the reprimands.

### **Employment Non-Compete**

47. *Golden Road Motor Inn, Inc., d/b/a Atlantis Casino Resort Spa, et al., v. Islam, et al.*, Nos. 64349, 64452, 65497 (Nev. 07/21/2016). A dissatisfied casino host worker at Atlantis Casino Resort, who had previously signed a non-compete agreement, altered contact information of clients, and when she began working at Grand Sierra Resort, she copied the information for use at the resort. Grand Sierra used the information to market to its customers but claimed it was unaware that the information was wrongfully obtained. The district court held in favor of Atlantis for the breach of contract claims and violations of the Nevada Uniform Trade Secrets Act. A permanent injunction was issued. The court, however, found that the non-compete agreement was unenforceable since it was overbroad and unreasonable thereby severely restricting the host's ability to be gainfully employed. The court therefore denied claims for conversion and liability for tortious interference of contractual relations.

## **Employment/Rest Breaks/Class Certification**

48. *Rosas, et al., v. Capital Grille Holdings, Inc., et al.*, No. B268959 (Cal. Ct. App. 12/21/2016). Plaintiffs unsuccessfully attempted to be certified as a class in connection with their claims of alleged unlawful rest breaks. In 2012, the California Supreme Court determined the labor code requirement that 10-minute rest periods are provided every 4 hours worked, or a “major fraction thereof” (except for working less than 3.5 hours, who don’t get a break), defined as meaning a 10-minute break any time over 2 hours. This means 10-minutes of rest for shifts between 3.5 and 6 hours, 20-minutes for shifts of 6-10 hours and 30-minutes for shifts more than 10 hours. The trial court found that the employees failed to demonstrate sufficient evidence of a “uniform policy that was consistently applied to the putative class” and so they didn’t meet their burden to be class certified.
49. *Marshall v. Pollin Hotels*, 2016 WL 1065814 (D. OR, 03/16/2016). Plaintiff, an Assistant General Manager at defendant Sheraton hotel, quit her job out of safety fears involving a violent ex-boyfriend. While working, she had been instructed to take an unpaid 30-minute lunch break on any shift over five hours long. When she quit, she sued the hotel for numerous causes of action including nonpayment of overtime wages. Plaintiff claimed her meal breaks were “frequently and substantially” interrupted for needed work duties and she was not paid for that time. The hotel asserts that there was always someone to cover for plaintiff during her break. The law requires payment for rest periods but not bona fide meal periods. To qualify as a meal period, the employee must be completely relieved of work responsibilities. Work-related interruptions are permissible if they are sporadic and minimal. Both sides sued for summary judgment. A genuine factual dispute exists whether plaintiff was completely relieved from duty during her breaks and the frequency with which she may have been interrupted. Therefore, summary judgment denied to both.

## **Employment/Retaliation/Workers Compensation**

50. *Witham v. Intown Suites Louisville Northeast, LLC*, No. 15-5734 (6th Cir. 03/10/2016). The general manager was working the front desk when she got into an altercation with a man who claimed he received the wrong product from the vending machine. The man was not a guest and the GM accused the man of being a trespasser. The video surveillance showed the GM egging the man on, he eventually jumped on the counter, and after a while he slammed the GM on the floor. She suffered injuries and went to the hospital, subsequently filing for workers’ compensation. The defendant’s CEO and general counsel viewed the video tape and determined that the GM had acted unprofessionally putting her on leave and subsequently terminating her employment. Plaintiff sued for retaliation for filing a workers’ compensation claim but the lower court dismissed her claim. She lost on appeal when the court said the GM failed to show her termination was based on pretext. She transformed a minor incident into a violent physical altercation, violating numerous company policies.

51. *Menekse v. Harrah's Chester Casino & Racetrack*, No. 14-3326 (3d. Cir. 05/05/2016). Plaintiff, a beverage server at defendant's casino, claimed she was unlawfully retaliated against for taking FMLA leave and that she was harassed based on her national origin and religion. Plaintiff was terminated due to numerous documented disciplinary incidents. Defendant moved for summary judgment, which was granted and affirmed, on appeal. Plaintiff failed to show a causal connection between her complaints and her termination date.
52. *Graham v. The Mirage Casino Hotel, et al.*, No. 2:14-cv-01949-MMD-NJK (D. Nev. 09/22/2016). A former facilities manager at defendant's casino was terminated for not improving his performance pursuant to a 90-day performance improvement plan. Before plaintiff was placed on the 90-day plan, plaintiff filed a charge of discrimination claiming he was being mistreated due to his race, disability and age. The charge was filed before the improvement plan went into effect and defendant did not become aware of the charge until after the plan went into effect. A district court granted summary judgement for defendant stating that the plaintiff did not produce any evidence whereby a reasonable juror could be able to conclude that the termination was linked to any protected activity or class.

### **Employment/Sexual Harassment**

53. *King v. Interstate Hotels and Resort*, 2016 WL 1735881 (M. D. La., 05/02/2016). Plaintiff was a front office supervisor for defendant hotel. He attended a concert with his female supervisor and claims sexual advances were made by her. Additionally, she allegedly sent him texts with hearts and called him honey, baby and love. After rebuffing her, she allegedly slandered him to the staff. He sued for sexual harassment. The court found the alleged actions were not sufficiently "severe or pervasive" to constitute sexual harassment. The retaliation claim was likewise dismissed because there was no statutorily protected conduct alleged by defendant (such as reporting discrimination or other wrongdoing by the employer), nor did plaintiff suffer any adverse employment action.
54. *Entrada v. Marriott Hotel Services, Inc.*, 2016 WL 6471236 (W.D. Ok, 11/01/2016). Plaintiff, a food and beverage cashier at defendant Norman, Oklahoma hotel was subjected to continuous sexually charged conduct and explicit comments by her supervisor and co-workers. When she complained to a human resources supervisor, she was told to "get over it." No investigation or corrective action was taken. That same supervisor filed reprimands against plaintiff and ultimately fired her. She sued for sexual harassment. The court denied defendant's motion for summary judgment.

### **Employment/Unjust Enrichment**

55. *Connaughton v. Chipotle Mexican Grill, Inc.*, No. 14837 115106/13 (N.Y. App. Div. 01/09/2016). Plaintiff, a chef, entered into an agreement with Chipotle Mexican Grill to open a chain of restaurants serving ramen cuisine. His employment was at-will with a contract that provided a base salary and a promise that after three years he would receive

equity in the form of company stock. In the second year, plaintiff learned that defendant had entered into a contract with David Chang to develop a ramen concept. Plaintiff and defendant ended their agreement, and plaintiff sued defendant arguing that defendant fraudulently induced plaintiff to work by withholding the existence of an earlier agreement with Chang. Plaintiff's complaint was dismissed and the dismissal was affirmed on appeal. Two dissenting state justices claimed that defendant's actions might have caused plaintiff to suffer injury to his professional reputation.

## **Employment/Whistleblowers**

56. *Pippen v. Boulevard Motel Corp., d/b/a Comfort Inn South Portland*, Nos. 15-2011, 15-2012 (1st Cir. 08/31/2016). Plaintiffs were the former executive housekeeper and assistant executive housekeeper at defendant's inn. They filed a complaint against defendant alleging they were terminated in violation of the state's whistleblower act. Both women reported that a maintenance worker allegedly made graphic sexual comments and the incident was reported. A month later after the investigation concluded a written reprimand was given to the maintenance worker. Plaintiffs said they heard that an HR person had been pressured to protect the maintenance worker during the investigation. Within the next six months, plaintiffs were terminated. Both stated they were fired for speaking up about the harassment. Defendant moved for summary judgment, which was granted. On appeal, the circuit court reversed the decision. The lower court relied on a jobs duty exception stating the plaintiffs were merely carrying out their job duties by reporting harassment. A reasonable jury needs to decide this case.

## **False Imprisonment**

57. *Berg, et al., v. San Juan Marriott Hotel & Stellaris Casino, et al.*, No. 14-1746 (BJM) (D. P.R. 07/06/2016). A hotel guest was accused of using counterfeit \$100 bills in the casino/hotel. When a server at the hotel was paid in a \$100 bill, the bill was run through the machine and it flagged the bill as a counterfeit. The police were called. Hotel security approached the guest in the parking lot and asked the man to return to the lobby. The man was not arrested and the issue was dropped. The man and two of his friends sued the hotel for false imprisonment. Defendant moved for summary judgment, which was denied. The court held that the hotel could not show that it was entitled to summary judgment as a matter of law. The guests believed they were being falsely detained. The court said that the defendant security department could have verified that the bills were actually counterfeit before making any move to confront the guests.

58. *May v. California Hotel & Casino*, 2016 WL 7409693 (Nev., 12/21/16). Plaintiff sued defendant hotel and casino for false imprisonment. The claim was based on actions of a particular security guard who engaged in what plaintiff labeled "threatening behavior." A video taken of the incident refutes this allegation. An essential element of false imprisonment is intent to confine. While plaintiff subjectively believed he was confined, he had no evidence to demonstrate that defendant's employees intended to confine him or

that they took any steps to confine him. Therefore, summary judgment in favor of the hotel was affirmed on appeal.

### **Forum Non Conveniens**

59. *Jane Doe v. Ritz-Carlton Hotel*, 2016 WL 6440376 (3<sup>rd</sup> Cir., 09/13/2016). Appellants are residents of Pennsylvania who vacationed at The Ritz-Carlton, Grand Cayman hotel. A bellman allegedly twice sexually assaulted their minor daughter. The parents sued claiming negligence in failing to screen and conduct an adequate background check on the bellman, and failing to provide security to its guests. The hotel moved for dismissal based on forum non conveniens, and the district court granted the motion. Appellants appealed noting that Ritz-Carlton's principal place of business is in Maryland, adjacent to Pennsylvania. The Third Circuit affirmed the dismissal noting that the "operative facts" occurred in the Cayman Islands, Ritz-Carlton is amenable to service of process there, the tort of negligence is recognized there, and the applicable statute of limitations had not expired. Further, Pennsylvania lacks compulsory process for attendance of unwilling witnesses from the Cayman Islands, the cost of obtaining willing witnesses would be significant, and "sources of proof" were in the Cayman Islands.

### **Franchise**

60. *Steak N Shake, Inc., et al., v. Globex Company, LLC, et al.*, No. 16-1010 (10th Cir. 09/12/2016). Two franchisees whose agreements were terminated sued Steak N Shake alleging breach of contract. The franchise agreements required that all franchisees must maintain uniformity in every aspect of the operation of the restaurant system, including menu prices and promotions. The two franchisees failed to offer the mandatory promotions, were given two days to correct the breach and the agreements were subsequently terminated. Steak N Shake sued the two franchisees to stop them from continuing to operate as franchises. They counterclaimed for breach of contract and the district court found that the two franchisees were in breach of contract and the termination was proper. The appellate court affirmed the lower court's decision.

61. *Choice Hotels International v. Kolath Hotels and Casinos, Inc.*, 2016 WL 225690 (N.D. NY, 01/19/2016). The parties had a franchise agreement permitting defendants to operate a Quality Inn hotel using plaintiff's trademark. Defendants defaulted on obligations to pay various fees, service charges and membership dues. Choice Hotels issued multiple notices of default. Defendants failed to cure. Choice Hotels sent a notice of termination instructing defendants to immediately cease use of the trademark, and sued for trademark infringement. Defendant failed to serve an answer, failed to respond to plaintiff's motion for default judgment, and continued to use the trademark owned by Choice Hotels, creating a likelihood of confusion. The court granted the motion noting that defendant's default was willful, defendant presented no meritorious defense, and the complaint sufficiently stated a claim for relief. Additionally, the court found defendant liable for

unfair competition under New York law, which requires a showing that the infringement was in bad faith.

62. *Super 8 Motels, Inc. v. Nova Scotia, Ltd*, 2016 WL 118497 (03/22/2016). The parties had a franchise contract. Defendants (a corporation, a partnership, and a limited liability partnership) failed to pay reoccurring fees. Super 8 sued to terminate the contract. Defendant failed to respond. The court granted plaintiff's motion for default judgment noting that plaintiff pleaded a good breach of contract case, service was properly made, and no evidence was presented of a provable defense. As a remedy, plaintiff is entitled to the unpaid recurring fees and interest, liquidated damages per a formula included in the franchise agreement plus interest, and attorney's fees and costs as the prevailing party per the contract. The court noted Super 8 adequately documented the attorney's fees and, per the court, the amount sought was reasonable. Default judgment was denied against one defendant where the only proof of service was a USPS tracking ticket, which said, "Attempted Delivery – Item being held; addressee being notified."

### **Franchisor Liability**

63. *Hughes v. The Westin Richmond et al*, 2016 WL 6573960 (E.D. Va., 11/04/2016). Plaintiff was hired as a front desk associate and promoted to front desk supervisor and again to guest services manager. For years, plaintiff suffered from an anxiety disorder for which he receives ongoing treatment. He suffered an anxiety attack at work in 2012 and 2015. Plaintiff was at work during the latter attack. He called an ambulance, which responded with police. Plaintiff's supervisor criticized plaintiff for calling 911 suggesting plaintiff embarrassed the hotel. Plaintiff took a FLMA Act leave. The hotel required him to submit to a psychological and personality test before returning to work. Soon thereafter plaintiff was demoted, his work hours were reduced, and he was required to attend regular psychotherapy sessions. Plaintiff sued, among others, the law firm advising the franchisee, claiming retaliation for taking FMLA leave. Essential to a viable FMLA claim is proof that defendant is plaintiff's employer. The accounting firm did not determine plaintiff's rate and method of payment nor maintain plaintiff's employment records; nor did it have the power to hire and fire plaintiff nor supervise and control plaintiff's work schedule or conditions of employment. Therefore, the motion to dismiss was granted. Merely acting as an outside consultant without more is not sufficient. Here, the accounting firm is not the company's response,
64. *Salazar v. McDonald's Corp.*, 2016 WL 4394165 (ND Ca, 08/16/2016). In this class action, plaintiffs are McDonald's crewmembers suing the franchisee and the franchisor for wages allegedly owed to the workers. Allegations included that manages edited or deleted time records, required off-the-clock work, and failed to pay meal periods, rest periods, and mandated overtime pay. The court held the franchisor did not retain or exert direct or indirect control over the franchisee's hiring, firing, wages, hours, or material working conditions. Nor did McDonald's "suffer or permit" plaintiffs to work, participate in a conspiracy, or aid and abet the alleged wage and hour violations. Summary judgment for the franchisor on those legal theories was therefore warranted and

granted. However, the summary judgment motion was denied on the theory of joint employer by virtue of an ostensible agency relationship. The decision provides significant detail on the court's assessment of the franchisor/franchisee relationship.

65. *HYC, a minor v. Hyatt Hotels, Corp.*, 2016 WL 7411522 (D. De, 12/22/2016). Plaintiff suffered injuries in a pool at a Hyatt Regency in Vietnam. The hotel was managed by Hyatt-Asia Pacific. The parents of the injured minor sued the hotel and Hyatt Hotels, Corp. (Hyatt), the US franchisor. Hyatt moved to dismiss, arguing that the Hyatt entity that controlled the standards, employee training requirements, and guest safety protocols, and had the right to investigate the hotel to ensure ongoing compliance with rules, was Hyatt Asia-Pacific. Hyatt did not own the hotel or control its day-to-day operations. The court held that a US parent is not liable for its foreign subsidiaries actions absent an agency or alter ego relationship. The court denied Hyatt's motion to dismiss and ordered the parties to engage in limited discovery regarding whether Hyatt had an actual or apparent agency relationship with the Vietnam hotel.

## **Jurisdiction**

66. *Desert Rock Entertainment II, LLC v. D. Hotel and Suites, Inc.*, 2016 WL 1732724 (D. NV, 05/02/16). In 2011, Plaintiff remodeled an old downtown Las Vegas casino and reopened it as "The D Casino & Hotel." Plaintiff registered "The D" as a trademark and also "The D Casino & Hotel" and "D Las Vegas". Plaintiff also owns several website domains using combinations of "D," "Casino," and "Las Vegas. Defendant owns a hotel called "D. Hotel & Suites" in Holyoke, Massachusetts. Defendant advertises in local papers in Massachusetts and Connecticut, and does not target Nevada. In a two-year time period, defendant had 10 reservations from guests with a Nevada address. Defendant maintains an interactive website enabling customers from Nevada to book rooms directly, and also uses third party booking websites like Expedia." Plaintiff commenced this trademark infringement case in Nevada; defendant sought to move it to Massachusetts. Because defendant did not advertise or solicit in Nevada or otherwise engage in transactions there. The court granted without prejudice defendant's motion to dismiss for lack of personal jurisdiction.
67. *Barone v. Intercontinental Hotels Group, PLC*, 2016 WL 2937502 (N.D.Ca., 05/20/2016). Plaintiff is a Florida citizen. She vacationed in Ireland and stayed at an InterContinental Hotel, operated by defendant. While there, she booked a spa appointment. During a steam treatment, an employee "splashed boiling or near-boiling water on [her] right shoulder from the device was creating the steam for the treatment." Plaintiff suffered second-degree burns causing intense pain and permanent disfigurement. She sued in California where defendant manages several hotels. Defendant moved to dismiss for lack of jurisdiction. The court granted the motion without prejudice because plaintiff's injury did not arise out of, or have any significant relation to, California. Further, no management or marketing decisions relevant to plaintiff's injury occurred in California.

## Montreal Convention

68. *AIG Property and Casualty Co. v. Fed Ex and Il Pellicano Hotel*. 2016 WL 305053 (SDNY, 01/25/2016). While a guest at defendant hotel in Italy, plaintiff, who is a resident of New York, entrusted her luggage and other goods, worth \$41,628, to defendants. All the property was lost. Plaintiff's insurance company was subrogated to the plaintiff and sued for negligence more than two years after the incident but within the New York three-year statute of limitations for negligence. FedEx sought dismissal claiming the two-year statute of limitations in the Montreal Convention applied. The Montreal Convention governs liability of air carriers in the international carriage of people, baggage and cargo. The Convention preempts claims under state law. Therefore, the case against FedEx was dismissed with prejudice because the two-year statute of limitations period had passed before the lawsuit was begun.

## Negligence/Intervening Cause

69. *Estate of Morgana v. Staten Island Hotel*, 2016 WL 3533587 (App Crt, 2<sup>nd</sup> Dept., 06/29/2016). Nineteen-year old Lina Morgana fell to her death from the roof of defendant hotel, a ten-story building. Her mother sued the hotel for wrongful death. Plaintiff failed to prove a necessary element – that the defendant's negligence was a substantial cause of the events that produced the injury. Here, an intervening act occurred, deemed a superseding cause that relieves defendant of liability. Decedent apparently intended to commit suicide. Decedent climbed a parapet wall and jumped from the roof of the hotel. The court therefore granted the hotel's motion to dismiss.

## Negligence/Open and Obvious

70. *White v. Renaissance Hotel Management Co*, 2016 WL 234987 (D.SC, 01/20/2016). Plaintiffs, husband and wife, were guests at defendant hotel for two weeks. At Mrs. White's insistence, the couple was assigned a room with a balcony. When she inspected the balcony, she slipped on a "fairly large patch of green slimy mold." She called the front desk to request it be removed. She reported it two additional times but the hotel never cleaned it up. During her stay, she spent every day on the balcony, moving a table over the moldy area. Each day housekeeping returned the furniture to its original position. On the eleventh day of her stay, she tripped on the mold and was injured. She sued for negligence and Mr. White sued for loss of consortium. The hotel moved to dismiss, arguing that the mold was open and obvious, and Mrs. White was on notice of its existence. The court refused to dismiss noting that the hotel was aware of the puddle for ten days but did nothing to clean it up despite continuous requests.

71. *Marshall v. Harrah's Hotel*, 2016 WL3562079 (Crt. Appls., 06/29/2016). Plaintiff, a frequent patron of defendant casino, regularly borrowed from the casino a small wheelchair she used as a walker. On one of her trips, she intended to use an elevator but it was out of order. Instead, she used the escalator and held onto the wheelchair as a walker. She lost her balance and fell to the floor. The wheelchair fell down the escalator

also and landed on her. She sued for negligence, claiming the casino had a duty to warn her of the risks associated with using the escalator with the chair. The hotel defended on grounds that the risk was open and obvious. A defendant does not have a duty to protect against dangerous conditions that are obvious and apparent. To qualify, the hazard must be obvious to everyone who may potentially encounter it. The court was not convinced that riding an escalator holding a wheelchair was a risk of harm immediately apparent to all. The court determined a question of fact existed and therefore denied the casino's motion for summary judgment.

72. *Graves v. Disney* (Florida 2016). Pending. A two-year old boy was snatched by an alligator while the boy was playing on a lagoon beach area near the Grand Floridian resort. The area had "No Swimming" signage but there was no warning about alligators. Since the incident, both fencing and warning signs with drawings of alligators have been installed. Disney had employees who patrolled all water areas in the park and routinely removed alligators. The Seven Seas Lagoon is connected to a series of canals that feed into larger bodies of water that are part of the park. Videos from park visitors show alligators in the nearby waters of the Seven Seas lagoon. No child had been bitten by a 'gator at the park for over 30 years. The inevitable lawsuit will explore the issue -- Were the signs and other precautions sufficient?

#### **Negligence/Premises Liability/Open and Obvious**

73. *Cowan v. Creole Restaurant a/k/a La Pachanga, Inc., et al.*, No. 150731/2013 (N.Y. 05/26/2016). Defendant restaurant had security guards pat down restaurant guests prior to entering the establishment. Some guests were not patted down. Plaintiff and his friends were celebrating a birthday at the restaurant when an altercation broke out and a gun went off. Plaintiff was shot in the leg by another patron, and sued defendant for failing to maintain a reasonably safe premises. Defendant filed a motion for summary judgment, which was granted. The court said that prior incidents (a few alleged assaults) did not involve a gun so the incident was not foreseeable. Plaintiff argued that having to pat down patrons indicated that incidents causing injury are foreseeable. The court disagreed. The court mentioned that to deny the defendant's summary judgment motion would encourage restaurants and other venues to avoid implementing reasonable security provisions in their establishments.
74. *Novak v. LaQuinta Inns, Inc.*, 2016 Il. App. 160429 (Ill. App. Crt. 12/22/16). Plaintiff was a guest at defendant hotel. After finishing breakfast in the dining area, she started to walk to the garbage can to dispose of her trash. Of two possible paths, she opted for the narrower aisle, which was partially obstructed by a highchair. Also on the aisle was a mounted television with arms that could be extended. It had been extended when plaintiff was heading to the wastebasket. As she maneuvered around both the highchair and TV, her right foot caught on the highchair and she fell forward. She suffered injuries and seeks \$50,000. The hotel claimed the highchair was open and obvious, and therefore sought dismissal. Plaintiff, referring to the TV, argued the distraction exception applied.

The court concurred that the high chair was open and obvious, and ruled that the exception was not applicable. The lower court's dismissal was thus affirmed.

75. *Fontenette-Wilson v. Driftwood Hospitality Management, et al.*, No. 2:13-cv-832-JNP (D. Utah 10/19/2016). Plaintiff was injured when a soap dish in the shower of the guest room fell from the shower wall and injured her ankle. She sued the hotel for negligently providing unsafe conditions by renovating the rooms improperly and using unsafe adhesives in the installation of the soap dishes. Defendant's motion for summary judgment was granted. The court said defendant could not be held responsible because there was no evidence indicating that any soap dishes were installed or renovated from the time defendant acquired the hotel. Defendant also did not have knowledge (actual or constructive) of the unsafe condition.
76. *IOC-Luna, Inc., v. Smartt*, No. 2014-CA-01459-COA (Miss. Ct. App. 07/26/2016). Plaintiff, a frequent customer of the casino restaurant, slipped and fell by the buffet causing injuries moments before the restaurant closed for lunch set up. Surveillance tapes show that an employee placed a wet floor sign in the buffet area moments before plaintiff entered the area and showed plaintiff walked within six inches of the sign four times. Two additional signs were placed near the buffet and an employee began mopping the floor. Plaintiff was taken to the hospital and subsequently filed a complaint against defendant casino. Defendant's motion for summary judgment was denied and a jury returned a verdict for plaintiff in the amount of \$251,000. The decision was affirmed on appeal despite defendant's contention that the jury verdict was against the weight of the evidence. A jury found that the multiple warning signs were not adequate to warn guests about the potential danger of the floor. The court said plaintiff did not walk past the second or third signs and that the defendant did not have a wet floor sign at the entrance to the buffet. Placing the first sign 20 minutes before the area was mopped undercut the value of the sign and that a guest might have concluded that the mopping was finished and that any hazardous condition had been resolved.

### **Negligence/Security**

77. *Magers v. Diamondhead Resort, LLC*, No. 2015-CA-01330-COA (Miss. Ct. App. 12/13/2016). Plaintiff was a patron of the nightclub at defendant's resort. Early in the morning, she used the hotel lobby bathroom and was raped by an undocumented worker who was on a construction crew doing work and staying at the resort. Defendant did not register the man as staying in the resort; however, he was located in his room, convicted and sentenced to 25 years in the Mississippi Dept. of Corrections. Plaintiff sued the resort and the court found that defendant did not breach a duty to plaintiff. She appealed claiming the lower court erred by not mentioning in jury instructions that the man was undocumented. The decision was affirmed on appeal stating that the resort acknowledged that it owed a duty to plaintiff but that the incident was unforeseeable. Even though allowing the man to stay on the property without registering him was against the resort policies, the court said the man's illegal immigrant status was irrelevant

and therefore not an abuse of discretion in excluding the information from being told to the jury.

78. *Charleston Station, LLC, d/b/a Red Rock Resort Spa Casino, v. Stephens, et al.*, No. 63943 (Nev. 12/23/2015). A guest at the resort had a heart attack and the security officer ordered the casino to call 9-1-1 but did not perform CPR or use an AED. Paramedics arrived six minutes later, but the man suffered brain injuries from the incident. Plaintiffs (injured man and wife) filed a complaint against defendant resort alleging that failure to provide CPR or use an AED caused the brain injuries. A jury agreed and awarded the plaintiffs \$1.605 million dollars. On appeal, the Supreme Court of Nevada affirmed the decision as the resort failed to show that it was entitled to judgment as a matter of law or a new trial. In 2012, Nevada courts expanded the duty of care consistent with the Restatement (Third) of Torts stating that in a special relationship one owes a duty of reasonable care with regard to risks that arise within the scope of the relationship. In that regard, the resort is responsible stating that the resort had the same duty of care to the man as if the man was a guest. Since the resort trains its employees on how to use AED devices and since the security guard didn't use an AED and did nothing other than calling 9-1-1, the resort is responsible. Worthy to note: three of the seven justices dissented from the majority decision holding that the law does not support imposing liability for negligence in the cases and that decision was at odds with the legislative intent to encourage businesses to voluntarily train employees in CPR and AEDs.
79. *Lee v. MGM Resorts Mississippi, Inc., et al.*, No. 2014-CA-00475-COA (Miss. Ct. App. 02/09/2016). Plaintiff was injured at defendant's casino due to an altercation with another guest. Defendant moved for a directed verdict, which was granted and affirmed, on appeal. Plaintiff was visiting the casino to see a band who was performing at defendant's resort when the fight began. Plaintiff was asked to leave and was subsequently arrested for disorderly conduct and disturbing the peace. The charges were later dropped and plaintiff sued the casino for negligence. The court held that the incident was not foreseeable and that the plaintiff ceased to be an invitee when he was asked to leave the property.
80. *Ghaffarpour, et al., v. Commerce Plaza Hotel*, No. B256798 (Cal. Ct. App. 03/17/2016). Plaintiff was injured in a scuffle with security guards hired by the hotel as independent contractors by the hotel. Hotel staff did not assist the plaintiff or call for an ambulance. Plaintiff sued claiming the hotel violated a duty owed to him. The court held that hotels have a duty to call for medical assistance for their guests. The court therefore refused to dismiss plaintiff's claim. Plaintiff also alleged that the hotel violated a duty to render medical assistance to guests since the hotel staff did not assist the plaintiff or call for an ambulance once plaintiff was injured. The court held that hotels do have a duty to call for medical assistance for their guests, and therefore, the court refused to dismiss that claim.
81. *Alwerfalli v. Livho d/b/a/ Holiday Inn Detroit et al*, 2016 WL 1578901 (Crt. Appls, MI, 04/19/2016). Plaintiff attended a Champagne Explosion event at defendant hotel. The

event promoter hired security guards to police the event. Plaintiff alleges he was repeatedly struck on the head with glass bottles by several of the guards. Defendant hotel denied liability for actions of the guards since they were not hired by the hotel and were independent contractors. The court stated that when a hotel has notice that acts of a third party create a risk of imminent harm to an invitee, the hotel has a duty to reasonably expedite police involvement. Notice to the hotel is critical to triggering this duty. Here, the hotel promptly called law enforcement, and officers interceded between the guard and plaintiff. An officer handcuffed one of the guards and helped plaintiff into an ambulance. The court concluded the Holiday Inn satisfied its duty of care.

82. *Sims, et al., v. Tropicana Entertainment, Inc., et al.*, No. 13-1981 (D. N.J. 09/12/2016). Plaintiff and his wife sued the defendant casino after the husband was punched in the face by a police officer who was working special security detail at the casino. After numerous drinks, plaintiff became disorderly and an argument ensued. A single punch knocked out plaintiff. Defendant filed a motion for summary judgment, which was granted. The question before the court was whether the police officer was deemed an employee of the casino bringing into play the doctrine of respondeat superior and the court said no. The court found that defendant had little control over the details of the officer's work as a security detail officer.

### **Negligent Entrustment**

83. *Verduzco v. American Valet*, 2016 WL 3463323 (Crt. App. AZ, 06/21/2016). The owner of a Porsche parked the car with defendant American Valet and received in return a claim ticket. Later that day, an American Valet employee gave the car to a man who was not the owner and did not have a ticket. The employee noted that the man "was high on drugs and behaving erratically." The man crashed the car into one driven by plaintiff with five family members in it. One was killed; several seriously injured. The family sued American Valet claiming negligent entrustment and general negligence. Defendant denied that it knew the man was incompetent to drive. The complaint alleged that defendant should have known the driver was unfit by virtue of his physical and mental condition. The court ruled the allegations properly stated a claim for negligent entrustment and denied defendant's motion for summary judgment.

### **Private Nuisance**

84. *Mendez, et al. v. Rancho Valencia Resort Partners, LLC*, No. D067899 (Cal. Ct. App. 08/26/2016). Plaintiffs purchased a large home approximately 600 feet from the resort's crochet lawn in 2000. The neighbors began complaining about noise from the resort's outdoor activities in 2004. Defendant purchased the resort in 2010 and commenced a renovation in 2012. Defendant made substantial changes to lessen the noise emitting from their property. In late 2012, a preliminary injunction was issued against the resort prohibiting them from generating any noise whatsoever in excess of the county's statutory limits. Five months later, the resort began outdoor activities again and plaintiffs sued for negligence and intentional emotional distress. The court said the injunction was

not warranted, that defendant's outdoor events did not generate noise exceeding the statutory limit and the noise was not so unreasonable as to create a private nuisance. The decision was affirmed on appeal. The court said the noise levels by defendant were not disturbing, excessive nor offensive.

## **Procedure**

85. *Super 8 Worldwide, Inc. et seq. v. Sarwan Investments, LLC.*, 2016 WL 6398514 (NJ, 10/27/16). Plaintiff entered a franchise agreement with defendant and six individuals who provided a guaranty. Plaintiff alleges defendant failed to pay certain fees totaling \$119,193.32. Defendant corporation and most of the six failed to respond to plaintiff's complaint. A default judgment was entered. Thereafter defendants hired counsel who sought to vacate the default. The court identified as required factors - a meritorious defense (a specific defense must be alleged; specific facts beyond simple denials), and no bad faith. Here the record clearly established that once defendants were threatened with default they retained an attorney and took appropriate action within a reasonable amount of time. Therefore, there was no bad faith and so defendant's motion to vacate the default was granted.
86. *Sibley v. Choice Hotels International, Inc.*, 2016 WL 868208 (E.D. NY, 03/07/2016). Plaintiff was injured by bed bugs while staying at defendant hotel. Plaintiff moved for sanctions due to defendant's failure to attend a deposition. Defendant adjourned the deposition once and sought to adjourn it a second time when the plaintiff gave defendant only six days-notice. Defendant's witness needs to travel for the deposition from Maryland to New York. Defendant proposed to plaintiff's counsel numerous alternate dates when defendant's witness would be available. Plaintiff refused to grant the adjournment and "staged" the deposition knowing that defendant would not attend. Plaintiff moved for sanctions for defendant's absence. The Federal Rules of Civil Procedure require that attorneys attempt to work amicably to resolve discovery issues, and if disputes occur, to call the court for assistance. Since plaintiff was obstructionist and staged a deposition to which it knew defendant would not appear rather than calling the court, the motion for sanctions was denied. Said the court, "To hold otherwise would encourage gamesmanship between counsel instead of a willingness to work together to resolve the case."

## **Public Accommodation/Discrimination**

87. *Levy v. Cancun Inn Restaurant.* (NY Post) Long-time patron at the restaurant was ejected. She said it was because she wore a pin supporting Donald Trump and a hat reading, "Make America Great Again." Per the patron, she was told, "We don't serve Trump supporters here. Get out and never come back." The restaurant claims Levy was rude to the staff and rowdy due to intoxication, and that was the basis for the eviction. Either way, the ejection was not illegal. Political preferences are not protected. A restaurateur can legally remove a disruptive diner.

## **RICO (Unfair Practices)**

88. *Simchon, et al., v. Highgate Hotels, L.P., et al.*, No. 3:15-CV-1434 (M.D. Pa. 09/13/2016). Five guests of defendant hotel filed a complaint against the owners and operators of the resort claiming that they were wrongfully billed in advance for resort fees and gratuities that were supposed to go to employees, but instead were kept by the owners/operators of the resort. Plaintiffs were told that the fees were to cover tips so guests would not have to pay when they arrived and they alleged that defendant engaged in a scheme to mislead guests into prepaying tips in violation of the unfair and deceptive practices laws in Pennsylvania and New York. The court granted defendant's motion for summary judgment in part by stating that the defendant would only be responsible for liability that could be solely attributed to the owner/operator at the time of the alleged fraud. As for the RICO claims, they will go to trial as a reasonable factfinder could find that the defendant engaged in a scheme to mislead customers.

## **Sovereign Immunity**

89. *Start Tickets v. Chumash Casino Resort*, 2015 WL 6438110 (Mi. 2015). Plaintiff sold tickets for events at defendant Native American casino's venues. Over six years, the volume of sales exceeded a million dollars. There came a time the casino terminated the agreement and the ticketing company sued for breach of contract. The casino argued sovereign immunity and moved to dismiss. The court denied the dismissal based on wording of the contract which states, "Each party agrees that this Agreement, and each of its terms and provisions, may be enforced against any party hereto in any court of competent jurisdiction within the County of Kent, Michigan. Each party hereto fully consents to and submits to the personal jurisdiction of the State of Michigan for that purpose." The court determined this constituted a waiver of sovereign immunity. The casino also denied that the party who signed on behalf of the tribe lacked authorization from the tribal elders to waive sovereign immunity. The court rejected this argument as well, noting that the casino effectively ratified the agreement given the many years of accepting the benefits of the contract, indicating that defendant must have had full knowledge of the facts and agreement.

## **Standing**

90. *Ellis v. Burlington Planning Board*, 2016 WL 2986055 (Mass. Land Court, 05/20/16). A town ordinance permitted hotels to be built on a designated site but not residence hotels. A Marriott Hotel sought approval from the local Zoning Board to build a 170 room Residence Inn by Marriott on the site. The design plans for each room included a two-burner cooktop. The building inspector ruled that the facility was a permissible hotel and not a residence hotel. Plaintiffs, townspeople who objected to the project, sought to appeal the building inspector's ruling. The court dismissed the case, finding the plaintiffs lacked standing. None owned property that abutted the Marriott, none owned property directly opposite the project, nor did any assert an individual injury. The geographically

closest plaintiff to the Marriott lived more than three quarters of a mile and many streets away.

### **Tipping/Tip Pooling**

91. *Kirchgessner, et al., v. CHLN, Inc. d/b/a Chart House and Landry's Restaurants, Inc.*, No. CV-15-1048-PHX-SMM (D. Ariz. 01/04/2016). Plaintiff is made up of four servers in defendant's Chart House restaurant. The servers filed a complaint against defendant alleging a violation of the Fair Standards Labor Act, as they were required to perform non-tipped duties more than 20 percent of the time each shift when they were only getting paid a reduced tip credit hourly rate for those hours worked. Due to lack of evidence, the court said plaintiffs were not performing dual jobs as they were doing work related to serving. Defendant's motion to dismiss was granted. The court said that the U.S. Supreme Court made it clear that "an employment practice does not violate the FLSA unless the FLSA prohibits it" and the court noted that the Dept. of Labor has taken an inconsistent approach regarding dual jobs regulation.
92. *Oregon Restaurant and Lodging Association, et al., v. Perez, et al.*, Nos. 13-35765, 14-15243 (9th Cir. 02/23/2016). The restaurant association filed a complaint against the Dept. of Labor arguing that tips pools are not subject to the same restrictions outlined under the FLSA where employer did not take a tip credit. In 2011, the DOL extended tip pool restrictions to all employers, not just those employers who were involved in taking a tip credit. Bottom line: the DOL may regulate tip-pooling practices of employers who choose not to take a tip credit.
93. *Dumitrescu v. Walt Disney World*, Pending. Plaintiff, a server at a restaurant in Disney World in Florida, claims that she was paid the minimum wage for tipped workers (\$5.03) for untipped work (\$8.05). Servers are often required to do work that does not generate tips – cleaning up, setting tables, acting as hostess, rolling silverware, making coffee, etc. An employer legally can pay the tipped wage for non-tipped work related to the tipped work *provided* the time spent on such tasks does not exceed 20% of the employee's time at work. If more than that is spent on untipped work, the employer must pay the full minimum wage for the time so spent.

### **Trademarks/Lanham Act**

94. *Setai Hotel Acquisitions, LLC v. Luxury Rentals Miami Beach, Inc.*, 2016 WL 7217730 (S.D. Fla, 12/12/16). A hotel owner sued a real estate brokerage firm for trademark infringement and tortious interference. Defendant manages privately owned properties in luxury hotels, including units for rent at plaintiff hotel. When promoting the units, defendant uses the name of plaintiff hotel to describe the location. The court held this is fair use and dismissed the trademark case.
95. *Lucky 13 Unlimited, LLC d/b/a The Union Tap House v. Comly Road Holdings, LLC d/b/a Union Tap, et al.*, No. 15-5946 (E.D. Pa. 01/15/2016). Lucky 13, plaintiff,

purchased restaurant and bar and changed the name to The Union Tap House. Four months later, defendant opened a restaurant called the Union Tap and claimed they were not aware of Lucky 13's restaurant. Each restaurant had different logos and signage, although both served craft beer. There were only a couple of times when the public was confused between each restaurant due to the name. Plaintiff sued under the Lanham Act and the district court denied plaintiff's petition stating that the word "union" is common throughout the Philadelphia area for restaurants. Customers who see the name Union Tap House would assume the business is a restaurant so the name is a descriptive mark. To receive protection, plaintiff would need to convince the court that there is a secondary meaning, which plaintiff was not able to do. In addition, the court said that the two restaurants are in geographically distinct regions of Philadelphia and that plaintiff's mark had not been diluted.

96. *Dickey's Barbecue Pit, Inc. v. Celebrated Affairs Catering, Inc.*, 2017 WL 1079431 (E.D. Tex., 03/22/2017). The parties had a franchise agreement pursuant to which the restaurant was authorized to use plaintiff's trademarks including Dickey's Barbecue Pit. Defendant failed to pay certain franchise fees and failed to cure the default within the time permitted by contract. Plaintiff therefore terminated the franchise agreement. Per the agreement's terms, defendant was directed to discontinue use of plaintiff's trademarks. Nonetheless, defendant continued to do business under the name Dickey's Barbecue Pit. Plaintiff sued for trademark infringement and sought a temporary restraining order. The court found substantial threat of immediate and irreparable injury to the franchisor's goodwill and reputation, and granted the order.

### **Unemployment Insurance**

97. *Las Vegas Club Hotel & Casino v. State of Nevada Employment Security Division*, 2016 WL 2957134 (Sup. Ct. NV, 5/19/2016). Plaintiff was employed by defendant as a surveillance technician. After nine years of employment, plaintiff began using medical marijuana to treat a disability. A year later, he filed an industrial injury claim and was required to take a drug test. He tested positive for marijuana and was terminated. He applied for unemployment benefits and the employer opposed the claim, arguing plaintiff was discharged for misconduct because the employer's drug policy prohibits marijuana use. The court awarded plaintiff unemployment benefits based on the specific facts of this case. The employer failed to provide the drug policy to the court or to provide evidence that plaintiff was aware that his conduct constituted a policy violation. Thus, the court was unable to determine the specific details of the policy or whether plaintiff knowingly or willfully violated it.

### **Union Activities**

98. *Ameristar Casino East Chicago, LLC, et al., v. Unite Here Local 1*, No. 16 CV 5379 (N.D. Ill. 12/19/2016). Unite Here Local 1 began boycotting the casino in connection with a labor dispute. The union represents about 200 of the casino employees. Unite Here began targeting customers of the casino individually and asking them to boycott the

casino. The customers, plaintiffs in this case brought claims against the union for secondary boycott activities and state law claims of invasion of privacy. The court held that the actions the union members took were coercive and threatening to the individuals as union members would enter the customer's businesses and made repeated phone calls to the customers. The union argued that their conduct was protected speech by urging a customer boycott but the court disagreed. The court said that by making repeated phone calls and repeated leaflet distribution to casino customers' homes and businesses raised an inference that the activity was basically designed to harass and coerce rather than to simply persuade customer to boycott. The customers were allowed to proceed with their claims. The court dismissed the invasion of privacy claim by the customers stating that their activity of being a customer of the casino was a public activity and not a violation of privacy laws.

99. Beginning July 1, 2016, Local 54 of Unite Here went on strike against the Trump Taj Mahal in Atlantic City. The union includes waiters, cooks, bartenders, dishwashers, porters, and room attendants. Dealers and gaming staff were not on strike. The purpose is to win back concessions given during the 2014 significant downturn in business in Atlantic City. Benefits the workers seek include health insurance, pension, sick pay, and increases in salary. The average rate of pay for the union members is less than \$12/hour. Workers' right to strike is legally protected by the National Labor Relations Act, provided the existing contract does not include a no-strike clause, and provided the strikers do not threaten or engage in violence, and do not block entry or exit to/from the place of employment.

## **Wages**

100. *Marshall v. Pollin Hotels*, 2016 WL 1065814 (Or. 03/16/2016). Plaintiff, an assistant manager at defendant Sheraton Hotel, was subject to four wage garnishments. She quit her job and sued claiming unlawful wage deduction. She disputes the deductions for one of the garnishments because the writ of garnishment did not include the address for the garnishor (the judgment creditor). The law requires that garnishees (such as employers) who receive a writ of garnishment and hold garnishable property of the debtor (for example, wages) retain that property for the garnishor. A writ of garnishment that lacks the judgment creditor's address does not obligate the employer to garnish the employee's wages. Indeed, deductions made pursuant to such an order are unlawful wage deductions. The plaintiff here is entitled to summary judgment on her unlawful wage deduction claim. The garnishors' addresses were included on the other three writs covering plaintiff's wages. She does not dispute their validity. The deductions from plaintiff's wages to satisfy those garnishments were proper. Additionally, after she quit, she claimed she had not been paid for 0.14 hours of logged time (approximately 8 minutes). The court noted that the Department of Labor's Wage and Hour Division permits employers to round hours worked to the nearest 5 minutes or to the nearest one-tenth or quarter of an hour. "Presumably this arrangement averages out so that employees are fully compensated for all time worked." The court determined the amount unpaid could have

been the result of permissible rounding, and regardless, the uncompensated logged time was de minimis, and as such did not require compensation.

### **Workers' Compensation**

101. *Delp v. Greenbrier Hotel Corp.*, 2015 WL 9097806 (12/11/2015). Plaintiff alleges she injured both knees and hips in the course of her employment with defendant hotel when she slipped and fell on a wet floor. A hotel rule requires that injuries be reported immediately and an accident report be created. Plaintiff did not request an accident report be prepared at the time of the injury. Management did not learn of plaintiff's injury until a disciplinary meeting held five days later. Following the meeting, plaintiff sought medical care and was diagnosed with a bilateral knee and leg sprain. Two weeks later the workers' compensation claims administrator rejected the claim based on there being no witnesses and the failure by plaintiff to immediately report the accident. Two internal appeals within the workers' compensation board upheld the ruling. The court affirmed, noting the evidence fails to establish that plaintiff sustained an injury in the course of and resulting from her employment.