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

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Karen Morris is 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*. She also co-authors Criminal Law in New York, a treatise for lawyers. She writes a column for Hotel and Motel Management Magazine entitled, *Legally Speaking*, and a blog for Cengage Publishing Company explaining the law behind the news.

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 is current president of Brighton Kiwanis. 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 sixteen years, and a Girl Scout leader for an inner-city troop.

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

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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. Ms. Barber also serves as the faculty advisor to the GSU student chapter of the AH&LA.

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-four 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., American Hotel & Lodging Association 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 online newsletter.

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ADA/Facility

1. *Harty v. Mal-Motels, Inc.*, 2012 WL 6541873 (M.D. Fla., 11/26/12). Plaintiff uses a wheelchair for mobility. He visited Defendant motel and encountered numerous architectural barriers. Plaintiff seeks injunctive relief ordering Defendant to make all readily achievable alterations. Defendant disputes that the modifications would be readily achievable given anticipated costs of $141,300. The court concluded that changes estimated at $11,675 were readily achievable, while other changes projected to cost $113,000 were not. Plaintiff sought attorney's fees. Since part of the judgment was in Plaintiff's favor, he qualified as a "prevailing party", entitling him to recover lawyers' fees. The US Magistrate recommended a billing rate of $300/ hour (v. $350 requested), and for paralegals, $95/hour (v. $115 requested). Defendant argued that the fee should be adjusted downward since Defendant obtained minimal results. The magistrate rejected this argument. Additionally, he recommended reducing expert witness fees from $200 to $150.

2. *Davis v. Dale Ma, et al.*, 848 F. Supp.2d 1105 (C.D. Cal. 01/24/12). Plaintiff attempted to bring a 13 week old Great Dane puppy into a Burger King restaurant as a service animal and was denied service. The manager informed Plaintiff about the "no dogs" policy and asked to see the puppy's identification. Plaintiff told the manager that the puppy had received his service dog tag, but was still in training. Plaintiff also told the manager that he needed the service animal to help him with his walking and balancing. The manager refused to provide service to Plaintiff and told him to remove the puppy. An expert testified that the puppy was still too young, had a playful streak, didn't have complete control over its bladder or bowels for an extended time and the puppy had not been vaccinated for rabies. The puppy was too small to assist Plaintiff's disability and Plaintiff may have injured himself or the puppy if he leaned on the puppy for balance. The court found that the puppy was not a service animal within the meaning of the ADA and dismissed Plaintiff's complaint with prejudice. Just having service tags is not sufficient to show the animal is trained to perform services.

3. *Cohen v. City of Culver City and Culver Hotel*, 2012 WL 2390914 (Ca. 6/25/12). Plaintiff was in Culver City, California to attend his grandson's wedding, held at the Culver Hotel. The date coincided with the city's annual "Back to the 50's Car Show" which was held on the public streets. A participating vendor arranged its booth so that it straddled the pedestrian crosswalk, curb ramp and sidewalk leading to the hotel. Plaintiff walks with a cane for mobility. He saw no accessible route to the hotel's entrance. He tried to step over the curb but slipped and fell onto the concrete sidewalk, resulting in injuries. He also claimed emotional distress for being covered with bandages in the photos taken at the grandson's

wedding. Plaintiff sued for a violation of the Americans with Disabilities Act (ADA). The hotel was dismissed from the case on motion. The vendor defended on the ground that Plaintiff was careless. The court dismissed this defense noting that a plaintiff's negligence is not an affirmative defense for the ADA. Instead, the ADA imposes strict liability to any institution that does not provide access to public accommodations.

4. *McGuire v. Peabody Hotel Group*, 2012 WL 4748147 (Fla.App. 10/5/12). Plaintiff uses a wheelchair for mobility. He made a reservation at the Peabody Orlando Hotel for a wheelchair-accessible room. When he arrived to check in, the registration counter was not accessible. He was shown three different rooms but alleged that none of them had an accessible bathroom so he went elsewhere. He sued based on Florida statute titled "Discrimination in places of public accommodation" which includes "handicap" as a protected class. The Florida Commission on Human Relations dismissed the case, holding that the case was governed by the Americans with Disabilities Act. On appeal the court determined that the case was covered by the Florida Civil Rights Act and so reversed and remanded.

Alcohol Issues/Liquor Licenses

5. *Biggs v. City of Birmingham*, 2012 WL 762998 (Ala., 3/9/2012). City Council's denial of a liquor license was not arbitrary or capricious where the bed-and-breakfast seeking the license was located in a residential area across the street from a park used by families.

Alcohol Issues/Underage

6. *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, 271 P.3d 363 (2/28/12). Washington State Liquor Control Board determined that a nightclub had allowed an underage person into an area off limits to persons under age 21. The liquor enforcement officers sent an underage investigative aide to attempt to enter the club using his own identification card. The club contested the finding asserting the compliance check was a search requiring a warrant, and that the Board entrapped the club. The court rejected the club's claim of a search noting that the club did not have privacy interests that were violated by the Board. The court also rejected the club's claim of an entrapment defense because that defense exists in criminal proceedings only, and not in administrative hearings.

Casino/False Arrest

7. *Gil v. Atlantic City Hilton Casino Resort*, 2012 WL 2357503 (NJ, 2012). Probable cause existed where a gambler was taken into custody at a casino because, in his previous visit, he had wrongfully received $7,500 after cashing in only $6,500 worth of chips. This circumstance was not discovered until after the patron had left with the extra money. Upon his return visit he was charged with the crime of theft. The case was eventually withdrawn by the prosecutor. The customer sued the casino for false arrest. A state law authorizes casinos to "question any individual in the casino who is reasonably suspected of recovering

money by trick or fraud." The court ruled that the casino had legal justification for the detention and so dismissed the false arrest claim.

Class Action/Effects of Smoking

8. *Bevrotte v. Caesar's Entertainment Corp.,* 2012 WL 2861375 (La, 7/11/12). Plaintiff's son was a dealer at Harrah's Casino for 15 years and died of leukemia. Plaintiff claimed the cause of his illness was second-hand tobacco smoke on the gaming room floor and Defendant's negligence in failing to provide health and safety measures to reduce risks associated with second-hand smoke. In this wrongful death lawsuit the court held that workers compensation was the exclusive remedy for injury or illness contracted at work.

Condominium Hotels

9. *Begualg Investment Management, Inc. v. Four Seasons Hotel, Ltd,* 2012 WL 1155128 (S.D. Fla., 4/5/2012). Plaintiff purchased six units in a Four Seasons condominium hotel as an investment. Prior to the sale an agent for the development allegedly made false promises that the units would be marketed and rented in the same manner as the regular hotel units in the building. In fact, the hotel promoted its own units over Plaintiff's. Plaintiff sued Four Seasons and its sales agent for fraud. The court denied the Defendants' motion to dismiss.

10. *Chao-Cheng Teng v. Shore Club Hotel Condominiums,* 2012 WL 1231955 (D.N.H., 4/12/12). A buyer sought to purchase a condominium from the Shore Club Hotel Condominiums. The units were advertised and offered for sale. Plaintiff, who identifies herself as a "minority," and an agent for the developer entered into a purchase and sale agreement for the full asking price for one of the units. Thereafter the agent refused to close the transaction and instead sold it to a Caucasian buyer for less than the original asking price. Plaintiff and the agent then entered a second agreement for the sale of a different unit but seller failed to attend the closing or otherwise finalize the sale. Plaintiff sued for violation of the Fair Housing Act and 42 USC 1982 plus breach of contract. The agent moved for dismissal of the lawsuit; the court denied the motion.

11. *Beaver v. Tarsadia Hotels,* 2012 WL 1564535 (S.D. Ca. 5/2/12). Plaintiffs purchased units at the Hard Rock Hotel & Condominium project in San Diego, Plaintiffs claimed the developer and realtor acted unfairly in violation of a state statute prohibiting unfair business acts and practices by misrepresenting a buyer's right to rescind and rental income splits between unit owner and developer. The court denied the Defendants' motion to dismiss.

Constitutional Rights

12. *Williams v. Horseshoe Hammond, LLC,* No. 2:10-CV-317 (N.D. Ind. 03/07/12). Plaintiff filed a complaint against Defendant casino and the Indiana Gaming Commission alleging that her Fourth and Fourteenth Amendment constitutional rights were violated when she was questioned about the theft of a wallet on the casino floor which turned up later with $35 missing. Defendant viewed security tapes which appeared to show that Plaintiff was the thief

but the film was inconclusive so Plaintiff was not arrested, although she was questioned. The court noted that for Plaintiff to prevail on her charges against the casino, she has to show that Defendant acted under the color of state law. The court found Plaintiff's argument that the casino was acting under color of state law by videotaping her to be without merit, noting that just because casinos are regulated by the state does not make them state actors. The court further said that the casino complied with the law and that surveillance cameras did not render its action under color of state law. The court thus granted summary judgment to Defendant.

Contracts/Breach

13. *Sparks v. HRHH Hotel,* 2012 WL 1970020 (D. Nev., 2012). Plaintiff was a resident DJ for Defendant's nightclub. He had a one-year contract to work every Saturday. The Defendant reserved the right to "cancel individual engagement dates." The contract also provided, "In the event of any such cancellation, there will not be any compensation." Defendant cancelled the contract in April, with eight months remaining. Plaintiff sued for lost income; Defendant denied liability based on the contract terms. The court held that the contract's reference to "individual engagement dates" referred to a night now and then but did not include cancellation of the bulk of the contract. The court therefore denied summary judgment to the hotel.

14. *Pauly v. Houlihan's Restaurants, Inc.,* 2012 WL 6652754 (D.N.J., 12/20/2012). Plaintiff bought several beers and mixed drinks at the Houlihan's Restaurant in Brick, NJ. The prices were not listed on the menu. After consuming the beverages, Plaintiff received a bill and paid it in full. He now sues the franchisor and the franchisee for breach of contract, claiming the drink prices were unreasonably high, seeking as damages the different between a reasonable price and the amount charged. He proposed a class action. Plaintiff cited UCC 2-305(1) which provides that if a contract is silent on price, the price will be a reasonable price at the time of delivery. The court rejected Defendants' argument that Plaintiff waived any objection by paying the bill, noting that had Plaintiff not paid, criminal penalties could have been imposed for theft of services. The court also held that Plaintiff's alternative claim for unjust enrichment should proceed and denied Defendant's motion to dismiss. Finally, the court refused to grant summary judgment to the franchisor noting allegations in the complaint that it not only "owns, operates and/or controls" the Houlihan's restaurant in question, it also creates the menus used by the Defendant restaurant.

Copyright Infringement

15. Zuffa, LLC v. Miller, 2012 WL 1810610 (SD, 5/17/2012). A corporation that owned the copyright on the broadcast of a heavyweight boxing championship aired it on closed circuit television and encrypted satellite signal. The company successfully sued for copyright infringement a casino that aired the fight without first obtaining a license from Plaintiff.

16. *Ultimate Fighting Championship v. Jake's Pub,* 2012 WL 1810610 (SD, 5/17/12). Plaintiff is the owner of a championship fighting broadcast. It aired via closed circuit television and

encrypted satellite signal. Plaintiff sued Defendant for copyright infringement for airing the broadcast without first obtaining a license from Plaintiff. Defendant defaulted in the lawsuit and Plaintiff sought damages. The copyright law provides that damages can be calculated by any of the following three methods: 1) the actual damages suffered by the plaintiff; 2) statutory damages of not less than $1,000 and not more than $10,000, "as the court considers just"; or 3) if the violation was committed willfully and for purposes of commercial gain the court can increase the award of damages by not more than $100,000 for each violation; or if the violator did not have reason to believe that his acts were wrong, the court can reduce the damages to not less than $250. Without explanation the court awarded $20,000 plus $3,940.05 for attorney's fees.

17. *J&J Sports Products, Inc. v. El Rancho Restaurant & Bar, Corp.*, 2012 WL 6608991 (D.S.C., 12/19/2012), and *J&J Sports Productions, Inc. v. Guadalajara Mexican Restaurant*, 2012 WL 6608995 (D.S.C., 12/19/2012). Plaintiff owed the exclusive, nationwide commercial television distribution rights to Manny Pacquiao v. Joshua Clottery, WBO Welterweight Championship Fight Program (hereinafter "the program"). Both Defendants exhibited the program without paying the required licensing fee to Plaintiff. The Communications Act prohibits the unauthorized interception and publication of interstate wire communications. In both cases the court awarded statutory damages, plus enhanced damages for willful violation, and attorneys' fees and costs. The cases explain how each was calculated.

Defamation

18. *Seaton, d/b/a Grand Resort Hotel & Convention Center v. TripAdvisor*, 2012 WL 3637394 (E.D. Tenn. 08/22/12). TripAdvisor, a website that offers a variety of travel information and hotel reviews, publishes an annual list of the Dirtiest Hotels in America. The determination of which facilities are so dubbed is based solely on reviews written by the site's readers. The number one hotel on a recent list sued TripAdvisor for defamation. The court determined that the readers' reviews were opinions which constitute protected speech. Since TripAdvisor based its ratings on opinions, it too was protected. Case dismissed.

Discovery

19. *DeGersdorff v. Ritz-Carlton Hotel Co., LLC*, 2012 WL 6084776 (E.D. La, 12/6/12). Plaintiff, a female general manager of three Ritz-Carlton hotels, sued for gender discrimination following her termination. She claimed disparate treatment was systemic in the Ritz-Carlton hotel operations. She noted that while 55% of hotel management schools are female, and over 30% of luxury hotels are led by woman, only 7% of Ritz-Carlton hotels have a female GM. During discovery Plaintiff sought copies of files of male "comparators". The court denied Ritz-Carlton's order for reconsideration of the court's ruling to compel disclosure and sanctions.

Discrimination/Racial

20. *Childs, et al., v. Extended Stay of America Hotels, et al*., No. 10-3781 (SRN/JJK) (D. Minn. 06/12/12). Plaintiff claims she was denied a room at Defendant's motel when she tried to book a room late at night and was told there were no rooms available. A month later, Plaintiff complained to the hotel and the hotel attempted to satisfy the guest by offering a free stay which was declined. During the time Plaintiff attempted to book a room, the night auditor was running reports and was not able to access the system to make reservations. Plaintiff sued and the court said that Plaintiff did not present any evidence of racial discrimination. The court also said that the hotel attendant could not access the computer system at the time of Plaintiff's request for a room, made no racial remarks, and showed no racial hostility. In addition, no evidence suggested that Defendant rented a room to a customer of a different race on that night.

21. *NAACP, et al., v. Darcy, Inc., et al*., 2012 WL 4473138 (SC 2012). Four African American patrons along with the NAACP sued Defendant restaurant because the restaurant closed during Black Bike Week, which is a motorcycle festival attended by mostly African American bikers. Plaintiffs allege that the restaurant was open during Harley Week which is a festival attended by mostly white patrons. Defendant filed a motion to dismiss which was denied by the court. The court said that the attendees adequately stated a claim with their assertion that Defendant's decision to close during Black Bike Week was allegedly "undertaken with racially discriminatory animus for the purpose of denying African Americans access to a place of public accommodation." The court also said that Plaintiff's allegation of intentional discrimination was supported by Defendant's decision to close during Black Bike Week, which impacted black customers, when the restaurant remained open for business the week prior, during the predominantly white Harley Week.

22. *Ross, et al., v. Choice Hotels International, Inc., et al.,* 2012 WL 3132650 (S.D. Ohio 08/01/12). Plaintiff, a black guest of Defendant's hotel, a franchise of Choice Hotels, sued the hotel alleging that she and several of her friends were discriminated against because of their race at Defendant's hotel stating that the front desk employee told them the hotel had a "no party" policy and that there was a limit of five people per room. Plaintiff claims that a large group of Caucasian female volleyball players were allowed to hang out in the hallways and were drinking alcohol. Plaintiff left the hotel and demanded a refund, which was not given to her. The court held that a reasonable jury could find a question of racial discrimination to allow Plaintiff to proceed with her claims. Choice, as franchisor, was not dismissed from the suit as the court found a jury could find that Choice exercised a significant amount of control over the franchisee.

Dram Shop

23. *Olle v. C House Corp. d/b/a Coach House,* No. 1-11-0427 (Ill. Ct. App. 03/23/12). Plaintiff, an off-duty police officer, was injured when he helped break up a fight at a bar. Defendant bar owner said that he never asked Plaintiff to get involved in the scuffle, just to "watch his

back". Plaintiff filed a complaint against Defendant for dram shop violations, premises liability, and battery against the two patrons who attacked him outside. Defendant's motion for summary judgment was granted as the trial court held that Plaintiff's claim was barred by the inherent risk doctrine. Plaintiff appealed arguing that the trial court erred by failing to hold that the dram shop act's strict liability takes precedence over the application of inherent risk doctrine. Plaintiff was successful on appeal when the court held that the inherent risk doctrine did not preclude the filing of a dram shop act claim. The court said that the inherent risk doctrine is not an affirmative defense. The court reversed and remanded the case.

24. *Davis v. Barkaszi, et al*., No. A-2345-10T1 ((N.J. Super. Ct. App. Div. 02/09/12). Plaintiff filed a complaint against Defendant KC's Korner alleging that Defendant negligently served Justin Barkaszi alcohol, which Plaintiff said was the proximate cause of the car accident, where Barkaszi, and Plaintiff as a passenger, were injured. One witness said Barkaszi consumed multiple shots of vodka, another said he did not do shots but had Red Bull and vodka, but did not appear drunk. The bartender said Barkaszi was at the bar for about 90 minutes and drank blackberry liquor, and he denied serving Barkaszi shots of vodka, and said he did not notice any drunken behavior by Barkaszi. A jury found in favor of Plaintiff awarding him $420,000 for pain and suffering, and $17,000 for lost wages, attributing 30 percent of the liability to Barkaszi and the remaining 70 percent to Defendant. Defendant appealed, arguing that the trial judge improperly interpreted the issue of proximate cause, and prevented defense counsel from exploring Barkaszi's past drinking habits. The appellate court held that the trial judge erred in declining to allow defense counsel to explore the issue of Barkaszi's tolerance to alcohol. The court also said the judge should have instructed the jury that the negligently served alcohol must have had sufficient time to negatively affect the driver's ability to drive. As a result, the court reversed and remanded the case for a new trial.

Employment/Arbitration

25. *Munoz v. Luby's Inc.*, 2011 WL 6291966 (S.D. Tex. 12/14/11). Plaintiff alleged that he was denied a promotion by Defendant, a Fuddrucker's Restaurant, his employer because of discrimination based on his national origin and race. Defendant sought to compel arbitration as was agreed upon by Plaintiff in furtherance of the company's Employment Dispute Resolution Policy ("EDRP"). Defendant argued that Plaintiff had been provided with a copy of the policy and an opportunity to ask questions about the policy. The employee handbook also contained information about the company's EDRP, and language stating: "I understand that this agreement is effective from the date of my employment, or it is effective within five days of receiving this agreement or signing it (whichever is earlier)." Defendant also communicated to those employees who chose not to sign the form that to demonstrate a refusal to sign, they needed to hand write that they refused the terms of the EDRP on the form and sign their name. Plaintiff did not sign or return the form. Defendant contended that Plaintiff "unequivocally accepted the terms of the arbitration policy" through his continued employment. Plaintiff argued that he never agreed to arbitrate as evidenced by the fact that he never signed and returned the form, and therefore there was no mutual assent to arbitrate disputes. The court held that the arbitration provision was valid stating that Defendant did

give clear notice to the mandatory arbitration provision and Plaintiff consented by his continued employment with Defendant. The court granted Defendant's motion to compel arbitration and dismissed Plaintiff's claims.

26. *Torres-Rosario v. Marriott International, d/b/a Ritz-Carlton Hotel,* 2012 WL 2583368 (Puerto Rico, 7/5/12). Plaintiff was terminated from a Head Waitress position she held for six years at Defendant hotel over a discrepancy in payment by a mystery shopper. Plaintiff claimed discrimination based on sex. Defendant moved to compel arbitration pursuant to an "Employee Agreement" signed by Plaintiff and all employees requiring resolution by arbitration "if the employee wishes to challenge her termination for any reason. . . that the employee believes is discriminatory or retaliatory."

27. *Gorlach v. The Sports Club Company, et al*., 148 Cal. Rptr. 3d 71 (Cal Ct. App. 10/16/12). Plaintiff, a former HR executive with Defendant's company, filed a complaint alleging wrongful termination, retaliation, sexual harassment, intentional infliction of emotional distress, breach of contract, and negligence against Defendant. Defendant had just rolled out a new handbook which included an arbitration agreement and Defendant moved to compel arbitration. The court found that although most of the employees had signed the new arbitration provision, Plaintiff had not signed it and there was no implied agreement to arbitrate between the two parties. The ruling was confirmed on appeal.

Employment/Discrimination/ADA

28. *Kenneth Rankin v. Loews Annapolis Hotel Corp.*, 2012 WL 1632792 (Md., 2012). Plaintiff claims that his hotel employer required that he sign an agreement prohibiting him from recording hours worked in excess of 40 per week (overtime). The hotel claimed the two year statute of limitations barred Plaintiff's case. The court rejected this defense finding that the allegations in the complaint alleged a willful, knowingly and purposeful violations of the FLSA which extends the statute of limitations.

29. *Torres v. Hilton International of Puerto Rico, Inc*., No. 10-1190 (SEC) (D. P.R. 07/02/12). Defendant hotel terminated Plaintiff, a hotel restaurant employee at Defendant's hotel, due to numerous instances of tardiness and for being intoxicated on the property. Prior to the termination, Plaintiff informed the human resources department that she suffered from bipolar disorder and asked that she be able to return to work when cleared by her doctor. Defendant claimed that the collective bargaining agreement covering Plaintiff's employment did not provide information on how to handle ADA reasonable accommodation requests. The court dismissed Defendant's motion for summary judgment stating that Plaintiff never received reasonable accommodations in connection with her disorder diagnosis. Even though the record showed that Plaintiff frequently missed work, there was no evidence that that her lack of attendance would have continued had she received reasonable accommodation. The court said that Plaintiff was reprimanded for the absences but not terminated until she told Defendant about her disorder and that created a temporal proximity between the request and the adverse employment action.

30. *Graves v. Brookfield Suites Hotel & Convention Center,* 2012 WL 3941774 (E.D.Wis., 2012). Plaintiff was employed by Defendant hotel as a maintenance repair worker. He called in sick because his leg was bothering him. He had "ongoing problems" with that leg. When he returned he was advised that he had been terminated. He claimed discrimination based on the ADA. The court dismissed the case saying, "While plaintiff alleges that he had hurt leg and that he was under medical care at the time he was fired, these allegations are not sufficient to establish that he has a disability."

Employment/Discrimination/Age

31. *Walker, et al. v. Venetian Casino Resort, LLC, et al*., No. 2:10-CV-00195-LRH-VCF (D. Nev. 10/09/12). Four women who were cocktail servers at Defendant's resort claimed they were discriminated against due to their age and that they suffered retaliation. The resort created a rotation schedule which altered Plaintiffs' schedules and work stations. The Plaintiffs alleged that new managers were intending to deprive Plaintiffs of their former lucrative stations due to their age. Defendant claimed that three of the claims were time barred. The court held that a jury should decide whether Defendant discriminated against the Plaintiffs due to age and held that Plaintiffs could proceed with their claims of negligent supervision and negligent training of the managers. The court did dismiss the Plaintiffs' claims for breach of contract and negligent infliction of emotional distress.

32. *Trainor v. HEI Hospitality LLC, et al*., No. 12-1152 (1st Cir. 10/31/12). Plaintiff, a 59 year old vice president for Defendant's company, sued Defendant for age discrimination and retaliation when he was given the choice for a senior vice president position which would require him to move from his home area to another location or accept a demotion to a general manager's job in the local area. Upon receiving the offer, Plaintiff filed an EEOC charge for age discrimination and subsequently Defendant revoked the offer for the general manager's position. Plaintiff was successful in his suit and the jury awarded him $500,000 in back pay, $750, 000 in front pay and $1 million dollars for emotional distress. On appeal the court reduced the award for emotional distress because of lack of evidence.

33. *Blikas v. Restaurants, Unlimited*, 2012 WL 5505776 (9th Cir. 11/14/2012). Five plaintiffs, all chefs, claimed they were terminated in violation of the Age Discrimination in Employment Act. The claims were dismissed because Defendant was able to introduce evidence sufficient to demonstrate that each Plaintiff was fired for legitimate, nondiscriminatory reasons. In response the chefs failed to introduce evidence that raised a genuine material factual question about whether the proffered reasons were pretextual.

Employment/Discrimination/Gender

34. *Rosario v. Hilton Hotels Corp.*, 2012 WL 1292881 (2nd Cir. 4/17/12). Plaintiff, a terminated male housekeeping manager at Defendant's hotel, claimed gender discrimination in compensation. Specifically, he asserted that female managers earned more than he, and

received greater wage increases. The court dismissed his claim noting that, of eleven housekeeping managers, he was one of the highest paid. Only two females earned more than he. Concerning differences in pay raises, the court noted some Hilton employees did receive a greater wage increase but plaintiff was not similarly situated because he had disciplinary issues and infractions in his record which they did not.

35. *Bundschuh v. The Inn on the Lake Hudson Hotels, LLC*, 2012 WL 5402303 (NY, 11/02/12). Plaintiff worked as Defendant hotel's Director of Sales and Marketing for fourteen months. She sued alleging hostile work environment sexual harassment. Plaintiff, the only female director employed at the facility, claimed her boss belittled and humiliated her, but admitted he did the same with the other Directors. Plaintiff failed to identify any sex-based comments or conduct by her boss. Summary judgment was thus granted in favor of the hotel.

Employment/Discrimination/National Origin

36. *Arafi v. Mandarin Oriental*, 867 F. Supp. 2d 66 (DC, 2012). Plaintiff, a Moroccan born Muslim working at Defendant's hotel, filed a complaint alleging that Defendant discriminated against him on the basis of his race, religion, and national origin. An Israeli delegation stayed on two floors of the hotel for two days in December 2010 and Plaintiff said he was ordered not to provide service for the guests on those floors, claiming that his supervisor told him, "You know how the Israelis are with Arabs and Muslims." Plaintiff obeyed the rules but complained he was deprived of tips from not being able to work those two floors. Plaintiff was a dry cleaning valet who delivered items to guest rooms. Plaintiff complained to human resources and was told that the decision to keep him and ten other Muslim employees from working those two floors was due to instructions by the U.S. Department of State. Plaintiff claimed his scheduled was cut back after he complained in retaliation for speaking up. The court denied the claim for discrimination and said the deprivation of tips was de minimus. Plaintiff is, however, allowed to pursue a claim for retaliation and that the national security exemption did not protect the hotel from liability regarding Plaintiff's claims of retaliation.

Employment/Discrimination/Pregnancy

37. *Habe v. 333 Bayville Avenue Restaurant Corp.*, No. 09-CV-1071(JS) (ETB) (E.D. N.Y. 01/13/12). Plaintiff, a restaurant manager at Defendant's Beach Club for four years was terminated less than two weeks after she informed Defendant about her pregnancy, despite previous favorable performance reviews. Defendant said she often came in late to meetings and fell short of meeting sales goals for her restaurant and that was why she was terminated. Plaintiff filed a complaint alleging that Defendant discriminated against her because of her pregnancy in violation of Title VII and state human rights laws. The court held that Plaintiff presented enough evidence to survive a summary judgment motion because it was an issue for the jury to decide if the Defendant's termination decision was made before or after the Defendant learned of Plaintiff's pregnancy.

38. *Monson v. Jazz Casino Company, LLC,* No. 11-2716 SECTION: J (5) (E.D. La. 08/01/12). Plaintiff took a pregnancy leave of absence for three months and prior to her return she learned that a new position had been created which included some job duties that Plaintiff previously did for the casino, so Plaintiff filed an action against Defendant alleging the casino discriminated against her on account of her pregnancy, failed to post the open position and constructively discharging her. The court dismissed the second two counts stating that failure to post the open position would affect all employees and not just the Plaintiff and Plaintiff failed to allege she was subjected to working conditions so intolerable that she felt compelled to resign. The court allowed the accusation of discrimination to continue since Defendant did not contest the allegation.

Employment/Discrimination/Race

39. *Hardin v. J&S Restaurants, Inc., d/b/a Hardee's,* No. 1:10-CV-235 (E.D. Tenn. 05/02/12). Plaintiff, a black shift manager at a Hardee's restaurant filed a complaint against Defendant alleging she had been transferred to another restaurant because she was black and ultimately fired because of her race. Plaintiff was unable to provide evidence that she was discriminated against on the basis of her race and the court found that Plaintiff was transferred and fired due to poor performance and an uncooperative attitude. Plaintiff also failed to show that she was treated differently based on her race or that her termination was pretext for discrimination because Defendant provided legitimate, nondiscriminatory reasons for her demotion and subsequent termination.

Employment/FLSA

40. *Akaosugi, et al., No. Benihana National Corp.*, No. C 11-01272 WHA (N.D. Cal. 03/30/12). Two salaried managers from a California Benihana restaurant are requesting the court to certify three classes, persons employed as exempt restaurant managers in California Benihana locations; persons employed at California Benihanas for more than year and terminated after Nov. 1, 2009, resulting in a forfeiture of vacation; and persons currently employed by California Benihana locations whose rights to vacation benefits are determined by the 2011 policy, seeking injunctive and declaratory relief. The first class was denied because it would require a complete individual analysis on each manager and the time spent on managerial tasks. On the proposed two vacation classes, the court conditionally certified both classes, pending clarification of the class definitions and additional details on representation of the classes.

41. *Dorsey, et al., v. TGT Consulting, LLC, et al.,* No. CCB-10-92 (D. Md. 08/20/12). Plaintiff, a server at the Greene Turtle bar and restaurant at the Baltimore Washington International Airport, filed a complaint against Defendant alleging that the company violated the Fair Labor Standards Act by failing to disclose to employees that the employer took at tip credit. A class action case was certified and sixty current and former employees joined the class action. Defendant filed for summary judgment but was denied its motion since not all employees were told how they would be paid when they were hired. The information about the tip credit was not in the employment manual or discussed with new hires. The company

handbook has since been revised to include pay structure information, and the company also purchased FLSA posters in 2010 notifying employees of the tip credit. The court held that Plaintiff could proceed with his claims.

42. *Jatupornchaisri, et al., v. Wyndham Vacation Ownership, Inc., d/b/a Wyndham Bonnet Creek Resort,* No. 6:12-cv-59-Orl-31GJK (M.D. Fla. 05/07/12). Six Southeast Asians working as housekeepers at Defendant's resort filed a complaint alleging that Defendant violated the Fair Labor Standards Act and Florida Minimum Wage Act. Plaintiffs entered the United States under the Mutual Educational and Cultural Exchange Act on J-1 visas. Plaintiffs argued that Defendant violated the FLSA by failing to reimburse them for the expenses they occurred in obtaining their J-1 visas, as well as travel expenses, and also alleged that the resort improperly deducted rent from their wages. Defendant filed a motion to dismiss stating that because the purpose of the Exchange Visitor Act is education, not labor, that the workers fell outside of the purview of the FLSA because they are effectively interns, not employees. The court disagreed with Defendant and denied its motion to dismiss stating that Plaintiffs sufficiently alleged that they were treated as employees of the resort regardless of their immigration status, and that the manner in which the workers were actually treated, not simply the goals of the Exchange Visitor Act, must be determined by a trial. The court also stated that the FLSA is a broad statute designed to "aid the unprotected, unorganized, and lowest paid of the nation's working population" who lack bargaining power to secure a minimum wage.

43. *Koellhoffer v. Plotke-Giordani, et al.,* 885 F. Supp. 2d 1181 (Co., 2012). Plaintiff, a server at Defendant's restaurant filed a complaint alleging that Defendants violated the Fair Labor Standards Act. All servers at the restaurant pooled their tips. Pursuant to a U.S. Department of Labor random audit, Defendant's tip-pooling policy was deemed acceptable under the FLSA. Plaintiff filed a complaint alleging that the tip pooling policy under the wage and hour laws was violated. His position was that while managers did perform the duties of some servers, that they also created weekly schedules for employees. They were in charge of interviewing as well as hiring and firing decisions and other managerial duties. The court denied Defendants' summary judgment motion stating that issues of material fact still remain as to whether Defendants' managers were considered the employer under the economic realities test of the FLSA. The court also held that there are still issues as to whether Defendant acted willfully in violating the FLSA. The court stated that a reasonable jury could find from the evidence that Defendants were not completely honest to the DOL about the true role of the managers and the level of their control over the employees at the restaurant. The court did grant summary judgment to Defendant on Plaintiff's claim that he did not receive notice of the tip-pooling policy, as the evidence showed he did.

44. *Gray, et al., v. Powers,* No. 10-20808 (5tth Cir. 02/29/12). Plaintiff, a bartender and later a general manager, filed a complaint against his employer, Pasha Entertainment Group, LLC, and one of its owners, Michael Powers, alleging violations of the FLSA for failure to pay its employees minimum wage during the 17 months of operation of the club. A district court granted summary judgment to Powers, and Plaintiff appealed. The 5th Circuit Court of Appeals affirmed the decision finding that Powers was not an employer as defined under

the FLSA. The court noted that while employer status may be appropriate where operational control coincides with one's position as an officer, merely being an officer or shareholder does not subject an individual to FLSA liability.

45. *Marroquin v. GMRI, Inc., d/b/a Olive Garden,* No. 11-21804-CIV-ALTONGA/Simonton (S.D. Fla. 12/16/11). Plaintiff, a tipped server in Defendant's restaurant, filed a complaint alleging that Defendant violated the FLSA by failing to pay him minimum and overtime wages, and wrongly terminating him in retaliation for his complaints about the violations. Plaintiff alleged he did not know he was a tipped employee and therefore was paid a reduced minimum wage. The court rejected that argument since Plaintiff received a company handbook explaining his status as a tipped employee and the related credits. Plaintiff also sued for retaliation and Defendant argued that Plaintiff was terminated for violating company policy rather than his complaints. Defendant claimed Plaintiff was terminated for violating company policy when a customer asked how much they should leave as gratuity and Plaintiff wrote down 18% and should have told the customer that it was up to their discretion. The court granted summary judgment to Defendant on Plaintiff's overtime claims. On Plaintiff's allegations that he was required to attend meetings off the clock, the court denied summary judgment to Defendant. The court also denied Defendant's motion for summary judgment on the charge that it deducted the cost of a meal from a server's wages in the event of a walk-out, finding that although Plaintiff's payroll history showed no deductions, that his contrary testimony created an issue of fact for a jury.

46. *Phillips v. Tacala, LLC,* No. CV-10-S-477-NE (N.D. Ala. 08/10/12). Plaintiff, a manager at Defendant's restaurant, sued Defendant, an owner/operator of 162 Taco Bell restaurants, alleging that her employer failed to pay her regular wages and overtime wages in accordance with FLSA regulations during shifts when she was performing non-exempt duties. The court dismissed her claims stating that even when she was performing non-managerial duties, she was still acting in a managerial capacity and she was earning significantly more than non-exempt employees in the restaurant.

47. *Giuffre, et al., v. Marys Lake Lodge, LLC, et al.,* Nos. 11-cv-0028-PAB-KLM and 12-cv-00377-PAB (D. Colo. 09/28/12). Plaintiff, a former server at Defendant's restaurant, sued Defendant claiming that he was being required to share his tips with a person who was often a manager during the time when that person was performing duties as an expeditor. Defendant claimed the expeditor is a front of the house employee entitled to tips and Defendant argued the expeditor is a back of the house position not entitled to tip sharing. The court held that Defendant was entitled to summary judgment since Plaintiff failed to present any evidence that the expeditor exercised any managerial duties. Plaintiff's claims for breach of contract and an FLSA claim did survive.

48. *Benavidez v. Plaza Mexico, Inc.,* 2012 WL 500428 (NY, 2/15/12). In this class action, employees of three restaurants with the same owner successfully sued for nonpayment of minimum wage, overtime, spread-of-hours pay, and uniform-related pay. Concerning minimum wage, an employer is entitled to utilize the tip credit but only if employees are informed of the minimum wage laws, their relation to the tip credit, and the employer's

intention to take the credit. Failure to so notify employees renders the employer ineligible for the credit. Here Defendant employer took the credit without informing the employees of the required information. The FLSA also requires pay at the rate of one and a half times hourly rate for hours worked over forty in a workweek. The employer failed to keep records of hours worked and failed to pay overtime. New York law requires that employees receive an extra hour pay for every work day that exceeds ten hours. Defendant failed to pay the extra hour. Likewise, New York law requires employers to promptly reimburse employees for the cost of uniforms and to defray cleaning costs. Defendant did neither. Nor did Defendant ever seek advice from counsel or otherwise on wage laws. An employer who willfully violates the FLSA is liable to pay employees twice the amount of wages underpaid. The court determined Defendant acted willfully and imposed an award in favor of Plaintiffs in the amount of double their underpayment.

Employment/FMLA

49. *Sadeh v. Venetian Casino Resort, LLC*, No. 2:10-CV-02224-KJD-GWF (D. Nev. 07/27/12). Plaintiff, a front desk agent at Defendant's resort, sued Defendant alleging violations of FMLA because Plaintiff had to care for his mother who had cancer. Defendant argued that its policy of providing four hour notice of work absences was violated numerous times by Plaintiff and that Plaintiff was fired for violating policy when he was seen yelling at hotel guests. The court denied Defendant's summary judgment motion stating that there was a question of material fact as to whether unusual circumstances on the day of Plaintiff's recent absence prior to termination prevented him from providing the proper and timely notice to Defendant.

50. *Sarker v. Trump Entertainment Resorts Inc., d/b/a Trump Plaza Hotel and Casino*, No. 10-4243 (D. N.J. 10/01/12). Plaintiff a bar helper at Defendant's hotel sued Defendant alleging he was denied his rights under the FMLA. Plaintiff went to Bangladesh and after two and a half months, requested an extension of leave under the FMLA. Defendant sent a notice to Plaintiff's home in New Jersey for Plaintiff to complete the proper certification and Plaintiff didn't get the notice as he was out of the country. Defendant terminated Plaintiff for not completing the proper paperwork for the FMLA extension and claimed that Plaintiff's request for an FMLA extension was fraudulent. The court stated that this was a question of fact for the jury. The court said there is no question that Plaintiff requested an extension of time. The court denied Defendant's request for summary judgment.

Employment/Negligent Hiring

51. *Harris, et al. v. KFC U.S. Properties, Inc.*, 2012 WL 2327748 (E.D. Pa. 06/18/12). While Plaintiff was ordering a bucket of chicken from a KFC restaurant and because Plaintiff was taking too long to decide on his side dishes, Defendant's employee struck Plaintiff with a pistol causing a concussion and requiring stitches on Plaintiff's lip. Defendant's employee, an entry-level employee, was not subject to a background check prior to hiring as Defendant only did such checks on management employees. Prior to working at the restaurant, Defendant's employee who struck Plaintiff had been convicted of two criminal charges (both

nonviolent crimes). Plaintiff alleged that Defendant negligently failed to properly investigate, train and supervise its employee. Plaintiff failed to convince the court that the employee was acting within the scope of his employment when he pistol whipped him, or that Defendant knew, or should have known, that the employee had a propensity for violence. The court found the actions of the employee to be outrageous and outside the scope of employment, and that Defendant did not have a duty to conduct a criminal background check. The court dismissed Plaintiff's complaint.

Employment/Pay Disparity

52. *Dawson v. Wheeling Island Gaming, Inc., d/b/a Wheeling Island Hotel Casino Racetrack,* 2012 WL 1268303 (W.Va. 04/16/12). Plaintiff was hired by Defendant hotel. She had worked in the industry for 30 years prior to working for Defendant. After just less than a year of employment, she was terminated by Defendant for inappropriate behavior and repeated absenteeism. She sued for breach of contract claiming the hotel was obligated to retain her for at least a year based on an agreement that she would return $2,500 in moving expenses she received from defendant if she did not maintain her employment for one year. The hotel argues this provision did not obligate the hotel to hire Plaintiff for a year. The hotel referenced language at the end of the agreement just above Plaintiff's signature stating, "This Agreement does not constitute an employment contract for a definite term. [Either party] may, at any time, terminate the employment relationship with or without cause and with or without notice." The court dismissed Plaintiff's claim, finding the quoted provision to be unambiguous and clear, and Plaintiff to be an employee at-will. She also sued for intentional infliction of emotional distress, alleging that she "had never been treated as poorly as by defendant", and as a result she does not "really want to be a manager anymore, does not want to train anymore, and defendant "broke her spirit for the job that she loved so long." The court concluded these allegations do not rise to the necessary "severe emotional distress." Said the court, "Mere insults, indignities and hurt feelings cannot lead to liability."

Employment/Retaliatory Discharge

53. *Hom v. Culinary Institute of America,* No. A132499 (Cal. Ct. App. 04/03/12). Plaintiff, a restaurant manager at Defendant's school, was terminated due to economic downsizing and she sued Defendant alleging that her termination was based on the complaints she raised about the many alleged safety violations and therefore her termination was based on retaliation. The court agreed with Defendant when Plaintiff failed to link her complaints about the safety issues with her termination.

Employment/Sexual Harassment

54. *Guthrie v. Waffle House, Inc., et al.,* No. 10-15090 (11th Cir. 02/03/12). Plaintiff, a Caucasian waitress at a Waffle House in Georgia claimed she endured severe and pervasive harassment from two black employees, a cook and a supervisor. She also alleged that Defendant was aware of the harassment and negligently retained the cook and supervisor. Plaintiff said the cook grabbed her buttocks on several occasions and made sexual comments

on a regular basis. Video evidence showed Plaintiff kissing and joking around with the cook on at least one occasion. The trial court found for the Defendant and the appellate court agreed stating that Plaintiff did not support her claim that the perceived harassment was sufficiently severe enough. The harassment began just a month after she stared working but she didn't avail herself of the employee hotline for almost ten months. Plaintiff failed to show that Defendant negligently retained the two black employees or that Plaintiff suffered any emotional distress by them staying on at work.

55. *Ward v. Casual Restaurant Concepts, Inc. d/b/a Applebee's*, No. 8:10-CV-2640-EAK-TGW (M.D. Fla. 03/01/12). Plaintiff, a restaurant hostess filed a complaint against the Applebee's location owned by Defendant alleging that a manager she regularly worked with made inappropriate comments and gestures toward her and said on one occasion that the harassing manager forwarded one of her personal photos (semi-nude) which she had on her phone to his phone, and then sent it around to others at the restaurant claiming that the two were engaged in a sexual relationship. The trial court held that Plaintiff showed that she endured a hostile work environment. Defendant argued that it exercised reasonable care to prevent sexual harassment by maintaining an anti-harassment policy and explaining it to all new employees, however, the court held that there are genuine issues of material fact as to whether Defendant handled the problem correctly. The court also denied Defendant's motion for summary judgment on Plaintiff's constructive discharge claims finding that the question of the reasonableness of her resignation must be determined by a jury because Plaintiff has presented evidence as to whether the harassment caused her working conditions to be so intolerable that a reasonable person would have been compelled to quit. Summary judgment was given to Defendant on the claim of retaliation because Plaintiff did not show how she suffered an adverse employment action.

56. *Caravantes, et al., v. 53rd Street Partners LLC d/b/a Remi Restaurant, et al*., No. 09 Civ. 7821 (RPP) (S.D. N.Y. 01/12/12). Two employees, one a coffee station operator and the other a busboy/food runner filed a complaint against Defendant and an assistant manager alleging sexual harassment. One of the Plaintiff's alleged that the assistant manager had been sexually harassing him for the past three years and forced him to perform oral sex on him regularly, but he said he didn't complain for fear that he would have been fired or had his work hours decreased. The other Plaintiff filed a charge with the Equal Employment Opportunity Commission claiming that he was discriminated against and that the assistant manager sexually harassed him, made gross sexual comments, inappropriately touched his genitals and tried to coerce him into engaging in sex acts. Although the restaurant claimed that they were not placed on notice of the harassment, the court dismissed this argument as being without merit. The court noted that while the adverse treatment was not overtly sexual in nature, in the circumstances, a reasonable jury could find that it was on account of sex. Therefore, the court held that the employees' hostile work environment charges may proceed.

57. *Hooker v. Hilton Hotels Corp*., No. ELH-10-3019 (D. Md. 07/06/12). Plaintiff, an assistant executive steward at Defendant's hotel, was terminated for sexual harassment conduct against another worker after an investigation showed substantial corroboration with the

woman's allegations. Plaintiff filed a complaint against Defendant alleging that by terminating him on the basis of a female worker's accounting of the alleged events that the hotel did not conduct a fair and adequate investigation into the events, therefore discriminating against Plaintiff on the basis of his gender. The court held that Plaintiff failed to show that Defendant discriminated against him on the basis of his gender and that the hotel investigators provided sufficient documentation that they only relied on the woman's accounting of the events with substantial corroboration. Summary judgment was awarded to Defendant.

58. *Cramer v. Bojangles' Restaurants, Inc.*, 2012 WL5869384 (11th Cir. 11/20/2012). Plaintiff, a former employee of Defendant, claimed she was sexually harassed by a co-worker. The court concluded that once Defendant became aware of the harassing conduct it took immediate corrective action. Defendant has an antidiscrimination policy that requires employees to report any alleged sexual harassment to the Area Director. Although Plaintiff signed a copy of the policy she failed to use the designated channels and complained to an assistant manager instead. When Plaintiff finally utilized the designated procedure, the area director attempted to contact Plaintiff within three hours, the restaurant suspended the co-worker and, following an investigation, fired him. This reaction constituted prompt remedial action, saving the restaurant from liability. The court also dismissed Plaintiff's constructive discharge claim because she resigned before reporting to the Bojangles' harassment hotline. Thus the employer was not given sufficient time to remedy the situation. Further, following her resignation Plaintiff refused to participate in Bojangles' investigation and never responded to the restaurant's unconditional offer of reemployment.

59. *Williams v. Ocean Beach Club, LLC d/b/a Gold Key Resorts*, No. 2:11cv639 (E.D. Va. 09/25/12). Plaintiff complained when her supervisor slapped her on her behind after closing a difficult sale in the timeshare resort business. Plaintiff alleged it was not sexual in nature nor intended to hurt her but she was embarrassed and offended. After an investigation, Defendant determined it was not actionable and admonished the supervisor. Plaintiff was subsequently fired for absences at work. She then filed a claim with the EEOC. The court held that Plaintiff didn't show retaliation and granted summary judgment for Defendant. The court continued by saying even if Plaintiff had alleged sexual harassment, which she didn't, the court found the supervisor's actions not so serve or pervasive to alter the conditions of employment. In addition, Plaintiff was terminated for performance issues not retaliation. Summary judgment for Defendant.

Employment/Union Activity

60. *New York, NY LLC v. NLRB*, 676 F.3d 193 (DC Cir. 4/17/12). On a question of first impression, the court ruled that a property owner may not bar employees of an onsite contractor from distributing union-related handbills on the property. New York-New York Hotel and Casino in Las Vegas contracts with Ark Las Vegas Restaurant Corporation to operate restaurants in the hotel complex. On a few occasions off-duty employees of Ark passed out union handbills to Ark and the hotel's customers on the sidewalk outside the hotel's main entrance and in the hallways outside Ark's onsite restaurants. The fliers asked

customers to urge Ark to sign a union contract. Hotel management asked the hand billing employees to leave. They refused so the hotel called the police who cited the hand billers for trespassing. The union filed unfair labor practice charges.

Employment/Wage and Hour

61. *Dang v. Sutter's Place, Inc. a/b/a Bay 101 Casino, et al.*, No. C-10-02181 RMW (N.D. Cal. 07/19/12). Defendant casino filed a summary judgment motion against Plaintiff, a food server at Defendant's casino because Plaintiff filed a complaint against Defendant claiming that Defendant failed to provide meal and rest periods and failed to pay overtime. Defendant argued that Plaintiff used daily tracking sheets and time cards to show the breaks she took, however, Plaintiff alleged the sheets and cards were not accurate. She stated that she was frequently denied rest breaks because there was too much work and not enough workers. She claimed she estimated her breaks to avoid being terminated. The court denied Defendant's motion and dismissed the casino's argument because the court said Plaintiff alleged the time records were not accurate and the Defendant could not show contradictory evidence.

62. *Hayden-Tidd v. The Cliff House & Motels, Inc., et al.*, No. Yor-111-550 (Maine 09/11/12). Plaintiff, a banquet server, filed a class-action complaint against her employer, The Cliff House & Motels, alleging that it violated state wage and hour laws by failing to distribute the entire "service charge" added to banquet customer's bills to banquet servers. Plaintiff claimed that Defendant's actions invalidated the tip credit it took against servers' wages, and that the servers, therefore, are entitled to the full minimum wage. The court found in favor of Defendant but the appellate court disagreed stating that the language in the Maine statutes did not prohibit Defendant from treating only a portion of its service charge as a tip. The state has since amended its tip credit language allowing banquet or private club facilities to add a service charge and distribute only a portion of such charge to service workers, so long as it meets its tip credit hourly wage minimums and informs customers that the service charge does not represent a tip. Although the legislation did not indicate that this change would apply retroactively, the court noted that the legislative record suggests that lawmakers did not intend to use the term "service charge" interchangeably with the word "tip." Therefore, the court affirmed the prior court's decision that Defendant did not violate state wage and hour laws by not treating the entire service charge as a tip.

Federal Jurisdiction

63. *Harper v. Marriott Hotel Services, Inc*., 2012 WL 6061726 (M.D. Fla. 12/6/12). Plaintiff sued Defendant Marriott Hotel for damages sustained in a fall when the handrail in his hotel bathroom became dislodged as he was exiting the bathtub. The complaint alleged $43,000 in medical bills and lost wages. Plaintiff's settlement demand sought $175,000. No information was provided on how future medical expenses or other damages were estimated. The court determined that the complaint did not reach the $75,000 in controversy requirement for federal court jurisdiction. Concerning the settlement demand, the court said it should be viewed as "puffing or posturing and not sufficient to establish" that Plaintiff's claim more likely than not would exceed $75,000. The case was thus returned to state court.

The court declined to impose sanctions noting that it declined to find that Defendant lacked an objectively reasonable basis for removal.

Forum Selection Clauses

64. *Immobiliaria Buenaventuras, SA v. KOR Hotel Group*, 2012 WL 6062860 (Cal, 12/7/12). This lawsuit arises from a purchase agreement between two Mexican corporations for a beach lot in Cancun, Mexico. It contained a forum selection clause identifying Mexico as the venue for any lawsuits. Presumably Plaintiff intended to build a hotel on it. The sale never occurred because Defendant was unable to secure title insurance. Plaintiff sued for breach of contract and sought to move the action from Mexico to California. The court determined that the forum selection clause was mandatory and as such is presumed to be valid unless its enforcement would be unreasonable under the circumstances. The court rejected Defendant's argument that inconvenience constituted unreasonableness, and so upheld the clause requiring the case be pursued in Mexico. While the Plaintiff established that Mexico was an inconvenient forum, inconvenience is insufficient to meet Plaintiff's burden of showing unreasonableness.

Franchise

65. *KFC Corporation v. JRN, Inc.,* 2012 WL 170196 (W.D. Ky. 01/19/12). KFC sued JRN, one of KFC's largest franchisees which operates 180 KFC restaurants for JRN's failure to meet its contractual obligations to make certain renovations and upgrades to some of its restaurants. KFC claimed JRN defaulted and therefore was in breach of contract. KFC asked for an injunction to prevent JRN from continuing to use KFC's trademarks without KFC's permission. JRN argued that it did not breach its contracts and that KFC's termination of its franchise agreements was without basis. For many years, there were multiple amendments and changes to the franchise agreements concerning renovations and upgrades, so many that the court held that determining all the material items of the agreement in order to grant an injunction would be too difficult and therefore the court was prevented from finding a strong likelihood that KFC would be able to prove a breach of contract claim. The court said the various agreements between the parties were ambiguous. The court denied KFC's motion for a preliminary injunction.

66. *KFC Corp. v. Kazi*, 2012 WL 6645701 (W. D. KY, 12/20/12). Defendants were delinquent KFC franchisees. They entered a settlement agreement with Plaintiff, the franchisor. The agreement authorized Defendants to sell their franchises provided franchisor consented which consent could not be unreasonably withheld. Deadline dates were specified, and necessary financial qualifications for any buyer were identified. Defendants proposed several buyers, none of whom met the financial specs or were proposed timely. The franchisor rejected all proffered purchasers and Defendants objected. Given the noncompliance with the settlement agreement, the court determined KFC's withholding of approval was not unreasonable. Further, continued communications and negations between

the franchisor and Defendants did not constitute a waiver of Defendants' breaches regarding timeliness and financial qualifications of buyer. Additionally, while every contract includes an implied covenant of good faith and fair dealing, a contract's express terms control. Good faith does not preclude a party from enforcing a contract's terms.

67. *Wingate Inns International, Inc. v. Cypress Centre Hotels, LLC,* 2012 WL 6625753 (D.N.J., 12/1912). Defendant was the guarantor of a limited liability company that signed a franchise agreement with Wingate Inns. The LLC failed and the franchisor sought to enforce the guaranty. In defense, the guarantor claimed Wingate provided false information to induce the guarantor to invest in a Wingate Inns franchise. Specifically, the guarantor claimed Wingate knew at the time the franchise agreement was signed that Wingate had been sold to Windham. The building specs provided to the guarantor by Wingate would not be accepted by Windham, necessitating a much greater expense for the LLC than originally planned. The guarantor alleged that a "material inducement to him becoming involved was the approved set of construction plans and specifications" provided by Wingate. He alleged this "radical change" "seriously prejudiced the LLC's ability to survive in the depressed commercial market. The court determined the guarantor had standing to sue but dismissed the complaint on technical grounds without prejudice. The federal civil procedure rules require that pleadings referencing a contract must identify the portions of the contract that were allegedly breached.

68. *Patterson v. Domino's Pizza, LLC, et al*., No. B235099 (Cal. Ct. App. 06/04/12). Plaintiff filed a complaint against Defendant alleging that the parent company franchisor, Domino's was vicariously liable for the sexual harassment and assault she endured while employed for one of Domino's franchisees. Plaintiff also filed causes of action for infliction of emotional distress, assault, battery, and constructive wrongful termination, and claimed that Domino's, as the assistant manager's employer, was vicariously liable. The trial court granted summary judgment in favor of Defendant stating that the franchise agreement between Domino's and the franchisee provided that the franchisee was responsible for "supervising and paying" employees, and found that Domino's had no role with respect to the franchisee's employment decisions. An appeals court reversed, holding that provisions in the franchise agreement control areas that "go beyond food preparation standards." Franchisees do not have exclusive control of their computer systems, and must allow the franchisor to determine franchisee hours, advertising, the handling of customer complaints, signage, email capabilities, equipment, furniture, décor, pricing, and the method and manner of payment by customers. The franchisor also requires liability insurance policies to name Domino's as "additional insureds," determines bookkeeping and record keeping, conducts audits, inspects sales reports weekly, and determines location or re-location. The court noted that even if Domino's was correct in its interpretation of the franchise agreement, Plaintiff presented evidence that Domino's employees do make some employment decisions and enforce guidelines about the employees franchisees could hire.

69. *Chambers-Johnson v. Applebee's Restaurant, et al.,* 2012 WL 3968913 (La. Ct. App. 09/11/12). Plaintiff alleged she found the tip of a human finger in a salad she purchased from an Applebee's restaurant. She said the operators of the restaurant were liable as they failed

to provide sanitary food products, to provide safeguards against contaminated food and to properly train employees. Defendant Applebee's filed for summary judgment stating that Plaintiff did not prove that Defendant was liable because it had no employees in the restaurant on the day of the incident and it did not train, monitor or control the employees of its franchisee. The appellate court affirmed the trial court's ruling that Defendant Applebee's, as the franchisor, did not provide, prepare or cook the food at issue nor did it own or operate the restaurant. Summary judgment was granted in favor of Applebee's.

70. *Choice Hotels International, Inc. v. Kusum Vali, Inc.*, 2012 WL 2838183 (Ca. 7/9/12). Plaintiff Choice Hotels terminated an Econo Lodge franchise agreement with Defendants for failure to pay various franchise fees. Defendants nonetheless continued to use the trademark for 15 months. Plaintiff sued for injunctive relief, treble damages, and attorney's fees. Defendants defaulted in the lawsuit. Although Defendant defaulted, Plaintiff is required to prove its entitlement to the remedies it seeks. The court issued a permanent injunction even though Defendants no longer own or operate the hotel in question. The court noted that Defendants are still engaged in the hotel business and so a risk remains that they might continue to use the mark. Plaintiff also sought recovery of the hotel's gross revenue during the period of infringement (!). The court ruled the appropriate measure was the amount of royalties plaintiff would have received per the franchise agreement. The contract entitled Plaintiff to 8% of the monthly gross room revenues. Since Defendants stopped reporting their revenue to Plaintiff, and the records were sketchy, the parties disagreed on the gross income. The court considered the downtown in the economy and utilized Defendant's figure and awarded Plaintiff 8% of that. Plaintiff requested treble damages, authorized by statute at the court's discretion, provided the money constitutes compensation and not penalty. To avoid a penalty the court declined to grant treble damages, noting that lost royalties was adequate compensation. Said the court, "Plaintiff has not provided non-punitive reasons for the award of treble damages." Plaintiff also sought attorney's fees, recoverable in a trademark infringement case in "exceptional circumstances." The court determined that Defendant's actions were willful and continued for 15 months rendering an award of reasonable attorney's fees appropriate. The court reviewed the amount sought and the work performed, and reduced compensable hours from 25 to 20 and authorized payment at the rate of $300/hour.

71. *Fournier v. Starwood Hotels & Resorts Worldwide, Inc*., __F.Supp.2d__, 2012 WL 6194199 (S.D.N.Y., 12/12/12). Plaintiff was injured when a fellow guest allegedly assaulted her at a hotel in Helsinki, Finland. The other guest had falsely claimed to the front desk clerk that he was Plaintiff's husband. He requested "and promptly received" a key to her room. Plaintiff commenced the case against the hotel and the franchisor in New York. The franchisor denied liability and sought dismissal on the ground of *forum non conveniens*. The court denied the motion based on the following. The sources of proof relevant to Starwood's relationship with its franchises exist at its corporate headquarters in Stamford Connecticut, not Finland. Of eleven witnesses Starwood identified in its initial disclosures, seven are in the US. Five of those are within the NY court's 100 mile power to compel attendance, including witnesses that Starwood does not control and thus cold not compel to appear in a Finnish

forum. Most of Plaintiff's witnesses, including treating mental health professionals and coworkers are also located in New York.

72. *AMTX Hotel Corp. v. Holiday Hospitality Franchising, Inc.*, 2012 WL 2053359 (Tex., 2012). Plaintiff was a Holiday Inn licensee in Amarillo, Texas and spent more than $2.2 million to renovate the hotel to meet Holiday Inn's requirements. Much to Plaintiff's chagrin, during its ten year license term Holiday Inn authorized seven other facilities in the area. Plaintiff sued for encroachment. The contract stated that the license did not limit licensor's right to license another business at any other location. This was fatal to Plaintiff's encroachment case. But, Plaintiff also sued for fraud in the inducement. During negotiations the licensor had told Plaintiff no other Holiday Inn branded properties were in the pipeline in Plaintiff's vicinity and if others were considered, Plaintiff's input would be sought and fully considered. Yet at the time plaintiff was negotiating with Holiday Inn, the latter was already considering another license in Amarillo. The court thus denied summary judgment on the fraud claim.

73. *Accor Franchising North America, LLC v. Gemini Hotels, Inc.*, 2012 WL 5258834 (E.D. Mo., 10/23/12). Plaintiff is the owner of Motel 6 trademarks. It authorized Defendant to use the name in conjunction with the operation of a motel. Plaintiff sues for various alleged breaches of the franchise agreement, and claims Defendant is violating Plaintiff's trademark by Defendant's continued use of the name. Defendant asserted a counter claim alleging that Plaintiff, through its "representative or salesperson" misled the Defendant by false assertions regarding the increase in business Defendant could expect based on its affiliation with Motel 6. The counterclaim with dismissed for lack of details – it did not contain a designation of specific persons who made the alleged statements, nor information about how Defendant was injured, the contents, time or circumstances surrounding the alleged statements. Plaintiff's motion to dismiss for vagueness was granted.

74. *Days Inn Worldwide, Inc. v. May & Young Hotel – New Orleans, LLC*, 2012 WL 6625627 (D.N.J., 2012). Defendant franchisees breached their franchise licensing agreement by failing to maintain quality assurance obligations and defaulting on various financial obligations. Franchisor Days Inn sent seven notices of default over a 22 month period, threatening to terminate the license agreement. Eventually Defendants ceased operating as a Days Inn. The franchisor sued for unpaid fees and liquidated damages. The court awarded unpaid fees in the amount $196,453 plus liquidated damages calculated per the Agreement as follows: $2,000 multiplied by the number of rooms defendant was authorized to operate which was106, for a total of $212,000. The court also awarded reasonable attorney's fees plus interest in the amount of $97,846 calculated at 1.5% per month (18% per year) from the date Defendant ceased operating as a Days Inn.

Insurance

75. *HM Hotel Properties v. Peerless Indemnity Insurance Co.*, 2012 WL 2300615 (Az., 6/18/12). Plaintiff, a limited liability company, owns a hotel. It had insured the facility for property damage with Defendant. A high wind and hail storm severely damaged Plaintiff's property. Plaintiff filed a claim for the damage. Plaintiff disagreed with the insurance company on the

compensation due and sued for various causes of action including negligent infliction of emotional distress. An element of that cause of action is severe emotional distress. Defendant argued that since Plaintiff is a limited liability company it is incapable of emotion and therefore unable to suffer emotional distress. The court noted that other states have found that a corporate plaintiff cannot suffer emotional distress. The court determined that a limited liability company is akin to a corporation and so dismissed Plaintiff's claim for intentional infliction of emotional distress.

76. *Westport Insurance Corp. v. VN Hotel Group, LLC,* 2012 WL 5262886 (10/25/12). Insurance company brought action for declaratory judgment to determine whether it had a duty to defend and indemnify wrongful death claims relating to guest who contracted Legionnaire's Disease through water in an outdoor spa while at Defendant hotel. The hotel sought to have Plaintiff indemnify it and defend against the suit. The policy excludes from coverage both pollutants and fungi, but includes within the coverage bodily injuries resulting from bacteria. The parties concur that the disease is caused by inhaling the legionella bacteria. The insurance company argued the disease was caused by a pollutant and therefore excluded. The court denied this argument finding it was caused by bacteria which is covered.

Licensing

77. *Club XS, Inc. v. Pennsylvania Liquor Control Board,* No. 1023 C.D. 2011 (Pa. Commw. Ct. 02/01/12). Plaintiff, Club XS, filed for a liquor license renewal application in early 2010 and Defendant, the Pennsylvania Liquor Control Board, denied the renewal due to two adjudicated citations and 37 incidents of disturbance at the club or on nearby property. The disturbances included public intoxication, assaults, drugs, weapons and other illegal activities. The citations included finding insects and debris in eleven bottles of liquor during an inspection. After the denial, Plaintiff appealed, and the court held that Plaintiff did take substantial and timely steps in response to the problems taking place at the club. Defendant appealed and the court held that Plaintiff did not make timely remedial measures, and stated that the trial court erred in reversing the denial of a liquor license, and reversed the decision in favor of Defendant.

Long Arm Jurisdiction

78. *Kawamura v. Boyd Gaming Corp.*, 2012 WL 6047728 (D. Hawai'i, 12/5/12). Plaintiff, a Hawaii resident, suffered injuries when he was attacked and robbed in a bathroom a Defendant casino, Station Casino in Las Vegas, Nevada. Plaintiff sued the casino in Hawaii. It has no employees in that state, nor does it own or rent any real or personal property there. It is not registered to do business in Hawaii, and has no bank accounts in the state. Nonetheless the court upheld jurisdiction because Defendant casino had nurtured and developed a niche of customers from Hawaii. The casino focuses its marketing on gaming enthusiasts from that state and has captured a "significant share" of the Hawaiian tourist trade in the gambling capital. Approximately 60% of the hotel's occupied room nights are comprised of Hawaiian guests. Since the facility deliberately solicits Hawaii residents and

does so successfully, exercise of jurisdiction in Hawaii is permissible. The court thus denied Defendants' motion to dismiss.

Negligence/Assumption of Risk

79. *Close v. Darien Lake Theme Park*, 2012 WL 2053841 (NY, 6/8/12). Plaintiff sustained injuries on a water ride at Defendant amusement park. The lower court properly granted summary judgment to the park. Said the court, "By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Stated differently, Plaintiff assumed the risks inherent in the activity.

Negligence/Open and Obvious

80. *Donley v. Dost, Inc., et al.*, No. 1:10 CV 2756 (N.D. Ohio 12/27/11). Plaintiff filed a complaint against the Defendant hotel alleging that she was injured when she tripped over a defective or unreasonably dangerous threshold while walking into the hotel. The Defendant argued that there was no history or any record of any other person having tripped, stumbled or fallen when crossing the threshold of the hotel. The court held that Plaintiff failed to show that Defendant breached its duty to keep the hotel lobby in a reasonably safe condition, or that it failed to warn of a danger. The testimony provided by Plaintiff contradicted the testimony from Plaintiff's friend. She admitted that she may have tripped on the steps leading to the entry during her deposition, and no witnesses saw her trip, or could indicate what caused her to fall. The court held that even if the threshold could be considered dangerous, Plaintiff failed to present sufficient evidence that the alleged dangerous threshold was foreseeable and therefore the proximate cause of her injuries.

81. *Dille v. Renaissance Hotel Management Co., LLC*, 2012 WL 2396666 (Mo., 6/25/12). Plaintiff was a guest at Defendant hotel. She fell in the bathtub and sustained injuries. She sued claiming negligence for failing to place grab bars in the bathtub, failing to place anti-slip measures inside the tub, and failing to warn guests of the slippery conditions. The court held that the "inherent slippery nature of a wet bathtub" is an open and obvious condition and so an innkeeper "has no duty to warn or otherwise address." The hotel's motion for summary judgment was therefore granted. Plaintiff's husband had sued for loss of consortium. The right to recover for loss of consortium is derivative to the spouse's right to recovery. Here, since Plaintiff does not have a valid claim. Her spouse cannot recover.

Negligence/Premises Liability

82. *Karnauskas v. Columbia Sussex Corp., et al.*, 2012 WL 234377 (S.D. N.Y. 01/24/12). Plaintiff filed a complaint against Columbia Sussex Corp., the operator of the hotel, and Marriott International Inc., the franchisor, for injuries he sustained while renting a hotel room in Phoenix. Plaintiff injured his hand when he tried to use the coffee maker in his guest room and the glass coffee carafe shattered causing severe injuries to his hand. The manager said he was unaware of any past incidents in which guests or employees were injured by carafes.

Plaintiff wanted the franchisor, Marriott International, to be held vicariously liable because of its licensing agreement with Columbia. The court disagreed, finding that the franchisor did not have a duty of care to Plaintiff because it did not have day-to-day control over the hotel operations, and did not select, recommend, or inspect the coffee carafe. The licensing agreement specifically stated that the operator of the hotel would retain and exercise full operating control of the hotel, and have the exclusive authority for day-to-day management. Summary judgment for Marriott. On Plaintiff's charges against Columbia, the operator, the court held that Columbia did owe a duty of care to Plaintiff. The court held that summary judgment for Columbia was inappropriate stating that there could be enough evidence for a jury to conclude that Columbia was liable for the accident.

83. *McFadden v. New Castle Hotel, LLC*, __NYS2d__, 2012 WL 6721022 (NY, 12/28/12). Plaintiff broke his shoulder when he tripped and fell in Defendant's hotel. In the complaint Plaintiff claimed the cause of the fall was a grate over a floor drain that was lower than the floor. This allegation was supported by a statement from an employee saying there was a "lip on the drain." The court denied Defendant's motion for summary judgment, ruling that Plaintiff had raised an issue of fact concerning the cause of the fall.

Negligence/Security

84. *Yearwood v. Club Miami, Inc., et al.*, 728 SE2d 790 (Ga. Ct. App. 06/08/12). Plaintiff, a patron at Defendant's nightclub, was on the dance floor when a fight broke out and a gun went off. Plaintiff was shot and filed suit against Defendant for negligence. A jury awarded Plaintiff $500,000 but the judge granted Defendant's request for a directed verdict and Plaintiff appealed. Defendant used a two-step security procedure involving four to eight security guards and uniformed police. Customers were patted down and scanned with a metal-detecting wand before admission, and Defendant used additional security personnel inside the club. Plaintiff argued that Defendant's procedures should have prevented weapons from being brought into the club and therefore they were negligent. The court held that under Georgia law, a proprietor does not become an "insurer of safety by taking some precautions on behalf of invitees." The appeals court held that Plaintiff presented no evidence that the security measures undertaken by Defendant were performed in a negligent manner or that they worsened the situation, so the directed verdict for Defendant stands.

85. *Smock v. Peppermill Casinos, Inc.*, No. 3:11-cv-00094-RCJ-VPC (D. Nev. 05/14/12). Plaintiff filed a complaint against Defendant casino alleging assault, battery, intentional infliction of emotional distress, false imprisonment, defamation, and negligence stemming from Plaintiff's removal from the casino. Plaintiff, who had been drinking, began harassing a woman and was asked to leave the casino. Plaintiff left after being told that he would be arrested. Plaintiff attempted to reenter the casino and was taken outside and the 10 seconds altercation was recorded on Defendant's security video tape and showed that a security guard pushed him to the ground and cuffed him while waiting on law enforcement to arrive. The court noted that on the security tape, Plaintiff appeared to flinch when a guard reached toward him and the guards tackled Plaintiff, which are both grounds to prevent summary judgment on a battery claim. The court found, however, that Defendant was entitled to

summary judgment on these claims because the guards used only reasonable force in performing a citizen's arrest. The court dismissed all claims noting that Plaintiff was a trespasser.

86. *Doe v. O.C. Seacrets, Inc., et al.,* 2012 WL 3257581 (Md., 2012). Plaintiff, a patron at Defendant's bar, was allowed to proceed with her claim for Defendant's failure to exercise reasonable care when Defendant ejected Plaintiff from the bar for intoxication. Plaintiff attempted to reenter the bar to retrieve her purse and be with her friends, but Defendant allegedly would not let her reenter. Shortly after ejection, Plaintiff was assaulted and raped in a nearby parking lot which the court said a reasonable jury could conclude that the bar was responsible for monitoring the area. Defendant claimed that its' policy is to exhaust every option to make sure ejected patrons get home safely and Plaintiff argued that the bar is liable for not following its' own policy.

87. *Johnson, et al., v. HWCC-Tunica Inc. d/b/a Hollywood Casino*, 2012 WL 4762217 (5th Cir. 10/08/12). Plaintiff, a 71-year old woman, alleged that Defendant neglected to provide reasonably safe premises when she was mugged in the casino parking lot. A thief stole her purse which caused minor injuries to Plaintiff. The court looked at a four mile radius of the casino to determine if the Defendant's property was an atmosphere of violence. Plaintiff urged the court to look at a wider area; a ten mile radius. The court looked at both and concluded that Defendant's property was not an atmosphere of violence since there were only 55 crimes in a four-year period in the 10 mile radius. The court dismissed Plaintiff's claims.

88. *Blanco v. Circus Circus Casinos, Inc.,* 2012 WL 1900942 (5/24/12). Two patrons unknown to each other and both of whom had been drinking brushed against each other while walking in opposite directions. Within seconds one punched the other as the latter was backing away. The one who was hit later stabbed the initial aggressor with a knife in the casino parking lot. The stab victim sued the casino claiming negligent security. The court dismissed the case for the following reasons: no similar stabbings had occurred on the premises within the last three years; and surveillance tapes evidenced that casino security personnel arrived on the scene within seconds following the initial punch.

Negligence/Ski Injury

89. *Dearnley, et al., v. Mountain Creek,* 2012 WL 762150 (N.J. Super. Ct. App. Div. 03/12/12). Plaintiff suffered injuries at Defendant's ski resort when he had a snowboarding accident. Plaintiff's wife worked at the resort and received family member passes entitling her to obtain free seasons passes to use the ski facilities. When obtaining the free pass for her husband, the Plaintiff, she signed a release of liability and indemnity agreement which released Defendant for negligence relating to conditions on or about the premises. Plaintiff filed a complaint for negligence due to his injuries. Several months after the accident, the wife applied again for season passes for her husband and signed the waiver again. The judge dismissed Plaintiff's complaint based on the conditions outlined in the season pass (the waiver) which were agreed to by Plaintiff months after filing the lawsuit. On

appeal, Plaintiff argued that the release and waiver was unconscionable and contrary to public policy. The appeals court disagreed affirming the decision of the trial judge.

90. *Johnson, et al., v. Vail Summit Resorts, Inc., et al*., No. 10-cv-00341-WJM-KMT (D. Colo. 12/19/11). A 9-year old skier was injured during a ski lesson when the ski instructor allegedly struck and injured the boy. Plaintiffs, the boy's parents, sued for negligence alleging that since the boy was skiing in a controlled manner by skiing slowly, and he was readily visible to uphill skiers, however the instructor, employed by Defendant Vail Summit Resorts, was skiing unreasonably fast which caused the collision, then Plaintiff should prevail. Defendant argued that the claim should fail due to the Colorado Ski Safety Act, which provides immunity to ski area operators for injuries resulting from a collision between skiers, and includes language that the act covers "any skier-skier collision." The court agreed finding that the Act did apply to this incident, since the Defendant's ski instructor and the boy were both skiers under the statute, and therefore the claim was barred.

Sovereign Immunity

91. *Santana v. Muscogee Nation and Spirit Casino*, 2012 WL 896243 (Okla., 2012). Plaintiff was a gambling addict. He spent more than $60,000 of student loan money for gambling. He sued the casino claiming in effect that it unfairly and illegally took advantage of his addiction. The casino asserted the defense of sovereign immunity. To waive the defense requires clear and unequivocal statement by the tribe. Such a waiver was not present. Case dismissed.

Telephone Customer Protection Act

92. *Connelly, et al., v. Hilton Grand Vacations Company, LLC*, No. 12CV599 JLS (KSC) (S.D. Cal. 06/11/12). Plaintiff and two others attempted to file a class action complaint against Defendant for violations of the Telephone Consumer Protection Act. Plaintiff claimed that Defendant negligently and/or willfully placed calls to himself and others on their cell phones without their prior express consent and not for emergency purposes, in violation of the act. Defendant filed a motion for summary judgment, claiming that class certification is not warranted because of the need for individualized determinations of each class member's prior express consent, and that the class action is not the superior method to litigate the complaint. The court held that there is a genuine issue of material fact whether the plaintiffs consented to receive the phone calls since the three named plaintiffs registered their cell phone numbers with Hilton by either applying for the hotel's honors program or while booking a reservation. Even assuming that the honors program's application sufficed as "prior express consent," the court found that Defendant failed to present evidence that Plaintiff actually signed and submitted an enrollment application. The court also found that Defendant failed to explain how registering a cell number at the time of booking a hotel constituted prior express consent for the calls in question.

Time Share Fraud

93. *Sirmon, et al., v. Wyndham Vacation Resorts, Inc., et al.*, No. 7:10-cv-2717-LSC (N.D. Ala. 09/18/12). Plaintiff purchased a timeshare through Defendant's subsidiary, Wyndham Vacation Ownership. Plaintiff filed a complaint alleging that Defendant engaged in deceptive sales practices, changed its benefits, and devalued the ownership of Plaintiff's timeshare. The complaint included allegations of fraud, breach of contract, negligent and wanton hiring, training, supervision, and retention, unjust enrichment, conspiracy to commit fraud, and other claims. Defendant moved to dismiss all claims and the court denied Defendant's motion finding questions of fact on all counts.

Trademark

94. *Morgans Group LLC, et al., v. John Doe Company, et al.*, 2012 WL 1098276 (S.D. N.Y. 03/31/12). Plaintiff, Morgans Hotel Group operated a rooftop bar and lounge called the Sky Terrace since 2000 that overlooks the Hudson River and is sometimes referred to as the Hudson's Sky Terrace or Sky Terrace at the Hudson. One mile away, as of 2008 Defendant John Doe Company operates the Hudson Terrace, an indoor/outdoor bar and lounge. Both the Sky Terrace and Hudson Terrace have received substantial national media coverage and had celebrity appearances. Morgans filed a complaint to enjoin John Doe from the use of the name on the grounds that it is confusingly similar to Hudson Sky Terrace and Sky Terrace at Hudson. Both parties moved for summary judgment and the court noted both names are geographically descriptive of their views of the Hudson River, finding that the mark was geographically descriptive (*Sky* meaning elevated above ground, and *terrace* meaning open air), and no secondary meaning had been acquired. The court held that these names did not acquire a secondary meaning in order to be entitled to trademark protection therefore the court denied Morgan's motion for summary judgment and granted John Doe's motion for summary judgment.

95. *Lebewohl, d/b/a Second Ave. Deli, et al. v. Heart Attack Grill LLC, et al.*, 2012 WL 1098276 (NY, 2012). Plaintiff, Second Avenue Deli in Manhattan wanted to offer its patrons a sandwich called the Instant Heart Attack Sandwich and wanted to add an item called the Triple Bypass Sandwich. Defendant, the Heart Attack Grill in Las Vegas, had previously registered a trademark for The Heart Attack Grill and the Triple Bypass Burger. Plaintiff's application for trademark registrations were denied and after receiving a cease-and-desist letter from Heart Attack Grill, the deli filed a declaratory judgment action arguing that neither the use of its name Instant Heart Attack Sandwich nor its proposed Triple Bypass Sandwich infringe on Heart Attack Grill's trademarks. The court noted that Plaintiff and Defendant do not compete in the same geographic market and that they market to different customers. Neither Plaintiff nor Defendant offered any evidence of actual customer confusion so the court granted Plaintiff's request and declared no infringement on the Instant Heart Attack Sandwich mark. Regarding the Triple Bypass Sandwich trademark dispute, the court said that there is a greater likelihood of confusion; however, it found that the two sandwiches could coexist under certain conditions. The court held that the deli could use the Triple Bypass Sandwich in its restaurant, and on its hard-copy and online menu, but that the deli could not market the sandwich on any signage within or about its restaurants.

96. *BLT Restaurant Group, LLC v. Laurent Tourondel and LT Burger, Inc.*, 2012 WL 592499 (S.D. NY, 2/22/12). Defendant was an accomplished French chef on contract with Plaintiff to assist in the development of numerous restaurants. Defendant did so and then, consistent with the contract, left. He opened a restaurant with many similarities to Plaintiff's including name, dishes offered, and décor. Per the parties' contract, Plaintiff assigned the name and goodwill to Defendant in the event of his departure, and Plaintiff reserved the right to use the name on existing and in-progress restaurants. Defendant claimed this assignment prevented Plaintiff from suing for trade dress. The court however found goodwill and trade dress to be separate concepts. Therefore, the assignment by Plaintiff of goodwill did not preclude the lawsuit for infringement of trade dress. Additionally, although the contract prohibited Defendant from using confidential information, the menu was shared with the public and so the information thereon was not confidential. However, information used to create the menu – such as nonpublic marketing or other studies – may have been used which may violate the prohibition against use of confidential information. Therefore the court denied Plaintiff's motion for summary judgment and Defendant's motion to dismiss.

Trespass

97. *Riverwalk Cy Hotel Partners, LTD v. Akin Gump Strauss Hauer & Feld, LLP*, 2012 WL 5503891 (11/14/12, Tex). The underlying facts of this legal malpractice case are of interest to Hospitality lawyers. The case involved the construction of a hotel along the Riverwalk in San Antonio, Texas. An adjacent hotel was impacted by dust, debris and noise generated by the construction. It sued for trespass, tortuous interference with prospective relations and nuisance. The case was ultimately settled.

98. *Tsao v. Desert Palace, Inc., et al*., Nos. 09-16233, 09-17535 (9th Cir. 10/23/12). Plaintiff who is an advantage player and also a member of a blackjack team for math geniuses was banned from Defendant's casino for counting cards. She received several promotional mailers from Defendant sent to her home offering a free stay for VIPs. Plaintiff went to the casino and was recognized and asked to leave. Plaintiff refused and was restrained. She was eventually allowed to leave and subsequently filed a complaint against the owners of Caesars Palace arguing that her arrest on the property was unconstitutional. Plaintiff also sued for unreasonable search and seizure, battery, false imprisonment defamation, assault, premises liability and abuse of process and asked for compensatory and punitive damages. The trial court held for Defendant and was affirmed on appeal as to the claim about constitutional rights violations and abuse of process claims. Summary judgment was vacated on the remainder of the claims, noting that they hinge on the promotional offers and whether she was an invitee of the casino, and therefore affecting whether casino security had probable cause to detain her.

Union/NLRB

99. *New York-New York, LLC d/b/a New York-New York Hotel and Casino v. National Labor Relations Board, et al.,* No. 1-1098 consolidated with 11-1138 (D. D.C. 04/17/12). The

Plaintiff hotel contracted with Defendant restaurant operator to run several restaurants in Plaintiff's casino complex. The restaurant employees were passing out union-related materials just outside the main entrance to the casino. Plaintiff called the police and had them arrested for trespassing when they wouldn't cease and desist and the union filed an unfair labor practice charge with the NLRB. On appeal, the court said that the protections of the NLRA specifically state that an employee includes "any employee, and shall not be limited to the employees of a particular employer."

100. *Trump Plaza Associates, d/b/a Trump Plaza Hotel and Casino v. National Labor Relations Board, et al.*, No. 10-1412 (D.C. Cir. 05/11/12). Trump appealed a decision by the NLRB which held that Trump had violated the National Labor Relations Act by refusing to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America union. Appellant Trump said it refused to bargain with the union because the NLRB erred in certifying the union in the first place. The union had previously engaged in numerous activities urging dealers to vote for union representation. Local news affiliates reported that card-check had determined that a majority of the dealers approved unionization. Trump challenged the union's certification, but the NLRB rejected the attempt to set aside the election, finding that "reasonable voters would not have concluded that the letters and resolutions [from government officials], either individually or in the aggregate, reflected the Board's endorsement of the union or otherwise raised doubts about the Board's neutrality." The circuit court disagreed with the NLRB and vacated its decision stating that the NLRB was "plainly wrong" in its conclusion that there was an absence of evidence that the union disseminated the results of its mock card-check to dealers. The court said that the NLRB ignored the substantial circumstantial evidence of dissemination and relied almost entirely on the wide margin of victory in its determination. The court vacated the NLRB's order, remanding the case to the Board to assess the severity of the challenged conduct, and to reassess the extent of the mock card-check dissemination.

101. *MGM Grand Detroit, LLC v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al*., No. 11-1915 (6th Cir. 08/20/12). Plaintiff, a craps dealer at a casino who was a member of the local union, was terminated due to performance issues. Plaintiff was not given a chance to correct such performance violations in contravention of the collective bargaining agreement. Arbitrators decided that Plaintiff was terminated in violation of the "just cause" provision of the collective bargaining agreement and reinstated him. On appeal, the court reversed the arbitrator's decision and Plaintiff appealed. The final result was that the court said that the extraordinary deferential standard allotted to arbitrators was plainly met because the arbitrator "arguably" interpreted the contract to mean that Defendant was required to provide employees with an opportunity to contest charges before termination under the CBA's "just cause" standard. Plaintiff prevailed.

102. *Frankl, et al., v. HTH Corporation, et al.*, 650 FR.3d 1334 (9th Cir. 2011). Plaintiff, the Director of Region 20 of the NLRB, filed a complaint alleging that Defendant, the owners of the Pacific Beach Hotel in Waikiki, engaged in a "litany of violations" of the NLRA. Plaintiff claimed that the hotel was being difficult in many areas and ignored a court

injunction requiring it to comply with the Act. Plaintiff argued that compensatory contempt sanctions should be imposed on the Defendant. After the union was certified, Plaintiff alleged that Defendant continued to commit NLRA violations by refusing to bargain in good faith with respect to rates of pay, hours of employment, discharging employees in order to discourage union activities and membership, unilaterally changing the terms and conditions of employment bargaining unit employees without notice, and otherwise interfering with employees exercising their rights under the NLRA. The trial court ordered Defendant to recognize the union, bargain in good faith with the union, reinstate several employees, and rescind unilateral changes made to the terms and conditions. The appellate court affirmed. The court held that there was no dispute between the two parties that Defendant must furnish, upon request, all information that is relevant and necessary for the union to carry out collective bargaining. The court said it is "inexplicable" how Defendant could contend that its explanations were sufficient to excuse its failure to promptly produce the requested information and held that compensatory sanctions would be imposed on Defendant.

Workers Compensation

103. *Pfohl v. Illinois Workers' Compensation Commission, et al.*, No. 2:10-1166WC (Ill. Ct. App. 01/23/12). Plaintiff, who worked as a cook at The Gold Room died when he fell down a set of stairs leading to the basement after his shift ended. He had been drinking with some friends for several hours before going down to the basement. His blood alcohol level was measured at 0.185 percent. The autopsy declared that the trauma was the primary cause of death, but that his alcohol use contributed to the death. However, witnesses said Plaintiff did not appear to have any balance problems before going to the basement, and he did not slur his words or act tipsy. His wife filed an application for workers' compensation claims, but an arbitrator found that because Plaintiff was intoxicated at the time of the fall, there was no evidence that he was capable of safely performing his job duties as a cook, and therefore the injuries that resulted in his death did not arise out of and in the course of his employment. The Illinois Workers' Compensation Commission affirmed the ruling and the wife appealed and was awarded benefits of $497 per week for up to 20 years, and burial expenses. Defendant appealed and prevailed on appeal when the court noted that although intoxication "is not a per se bar to workers' compensation benefits," it noted that courts assess whether an employee was capable of properly performing his duties in making that determination. The court concluded that the trial court erred as a matter of law in finding for Plaintiff's wife, reversed the judgment of the county court, and reinstated the commission decision.

104. *Erickson v. SDI of Oak Ridge Turnpike, LLC*, No. E2011-02427-WC-R3-WC (Tenn. 09/04/12). Plaintiff was injured while he was fixing a heating element located in the kitchen at the Sonic Drive-In restaurant. While working on the unit, another worker plugged in the heating element and it sent a 220-volt shock into Plaintiff causing injury. A doctor declared he was 10 percent impaired because of the incident. Plaintiff was allegedly repeatedly told that his medical bills would be taken care of, but they weren't so Plaintiff filed for workers compensation. Plaintiff was subsequently fired for performance issues but the trial court ruled that he had been retaliated against; which ruling was affirmed on appeal. The court

allowed a multiplier when affirming the decision of awarding Plaintiff permanent partial disability befits of six times the medical impairment rating of ten (10) percent.

105. *Price v. Unite Here Local 25, et al.*, 2012 WL 3255063 (Ha. 2012). Plaintiff, a cook at Defendant's hotel, was terminated 67 days into his 90 day probationary period. As such, he was not yet entitled to the collective bargaining agreement's grievance and arbitration procedures. He sued the hotel and the union alleging that the hotel breached the collective bargaining agreement and the union breached its duty of fair representation by failing to represent Plaintiff. The court held for Defendant stating that the charges against both the hotel and union were dismissed since the grievance procedure was not available to new employees during their probationary period.

106. *Rafol, et al. v. Mateo, et al.*, 2012 WL 2505510 (Ha. Ct. App. 06/29/12). An employee of the Waikoloa Beach Marriott Resort shot and killed another employee on property as a result of an extramarital affair. The wife of the deceased filed a claim under workers' compensation which was denied as there was no work-connected motive for the shooting. The widow then filed a complaint against Marriott claiming that Marriott knew about the affair but failed to warn the victim. The court dismissed the case and the appeals court affirmed stating that there was no reason to believe that the employee would cause harm to the victim on the property or that the aggressor had violent tendencies. Marriott had no duty to control the perpetrator. The lawsuit could proceed in court.

107. *Colon v. Ashford Bucks County, LLC d/b/a Sheraton Bucks County Hotel*, 2012 WL 5426766 (E.D. Pa., 11/7/12). Plaintiff, a hotel maintenance employee, was injured when a service elevator door closed on his arm. Plaintiff received workers compensation payments from Remington Hotel Corporation, and sued Remington L&H LLC for negligence. The later moved to dismiss, claiming it was Plaintiff's employer and per workers compensation law Plaintiff could not sue it. The court determined that Remington Hotel Corporation served the limited function of being a title holder of certain properties and a check-writer for workers compensation payments for various related "Remington entities." The record established that one of those entities, Remington L&H, LLC functioned as a hotel maintenance company and performed day to day maintenance pursuant to contracts with hotels. The court thus determined that Plaintiff's negligence case was barred by the workers compensation laws.