Hospitality Case Review: The Top 101 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 recently elevated to the title of Distinguished Professor, awarded by the Chancellor of the State University of New York.

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

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

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

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

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

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

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

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

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

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Her hobbies include active participation in the Boys Scouts of America program as a Cub Scout Assistant Pack Committee Chairperson and a Webelos II den leader.

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ADA/Facility

1. *Miguel Castaneda v. Burger King Corp., et al*., No. C 08-04262 WHA (N.D. Cal. 02/18/09). Plaintiff, a quadriplegic who uses a wheelchair, sued Burger King for violations of the Americans with Disabilities Act on behalf of a class of individuals with mobility disabilities who were denied access due to architectural or design barriers... Defendant moved to dismiss the claims on the grounds that the class claims do not create standing to challenge barriers at all 90 of the chain's leased restaurants in the state, but that Plaintiff should be limited to challenging barriers at the restaurants he personally visited. In denying the Defendant's motion, the court held that although no Ninth Circuit decision regarding the scope of ADA injury in the context of class standing has been found, most district courts have allowed a plaintiff to challenge discrimination on behalf of a class when it arises from a common policy, architectural design or affiliated locations, therefore making ADA standing not necessarily site specific.

2. *Stites v. Hilton Hotels,* 2009 WL 4548351 (Ca. App., 12/7/09). Appellant claimed he was denied a hotel room because he was accompanied by a disabled person with a service dog. The franchisee denied the facts. Appellee is the franchisor and it sought summary judgment. The court granted the motion noting that the franchisee hires, trains, supervises and disciplines its employees, including its desk clerk. The franchisor has no control over the day-to-day activities of the Inn, nor did it train any employees at the Inn. Per the terms of the franchise agreement, the franchisee is an independent contractor and not an agent. For all of these reasons, the franchisor is not liable.

Casino

3. *Florida Eash v. Imperial Palace of Mississippi, LLC*, No. 2007-SA-02063-SCT (Miss. 02/12/09). Plaintiff sued the Defendant after she believed she had one a million dollar jackpot on a $5 Double Top Dollar slot machine at the Imperial Palace when she hit a winning combination. The machine displayed winnings of $1 million, but on the front of the machine, the permanent rules were displayed indicating that the maximum award on the machine was $8,000. The Commission's Enforcement Division ran tests on the machine, finding that the programmer who set it up mistakenly entered $1 million as the jackpot, rather than $8,000. The commission issued a decision finding that Plaintiff was entitled to $1 million. The Supreme Court ruled that although there was some

confusion, there was no indication from anything on the machine before Plaintiff began playing that indicated that a patron could win more than $8,000. Because the machine clearly stated that the maximum award was $8,000, despite the programming error, the court found that she was entitled only to that amount, and confirmed the circuit court's decision.

4. *Nancy E. Rokos v. Marina Associates d/b/a Harrah's Casino Hotel Atlantic City.* 2009 WL 1766696 (N.J. Super, 6/24/09). While playing slot machines at defendant's casino, plaintiff noticed a man sitting at a slot machine mumbling loudly to himself and glaring at her as she he became passed. Plaintiff sat down at a machine three down from the man. When she won a few coins furious yelling that the money was his, "you're stealing my money, that's my money." He approached her and held her hand down then banged it against the machine seeking to secure the coins. Plaintiff did not yell or call out for help. Plaintiff threatened to report the man to security and he left. Later plaintiff's arm was throbbing so she went to security. No surveillance cameras covered the area where the incident occurred. She sued the casino claiming negligence for insufficient security and inadequate monitoring devices. Following a 13-minute deliberation the jury found for plaintiff, a decision that was upheld on appeal.

Concealment/Pain and Suffering Damages

5. *Tim Emberton v. GMRI, Inc.*, __SW3d__, 2009 WL 3517562 (Sup. Crt. Ky., 10/29/09). Plaintiff was a patron at defendant Red Lobster restaurant. One of its employees was unknowingly ill with hepatitis A. Thirteen customers including plaintiff became ill with the disease. The restaurant had a policy inhibiting public notification of on-site hepatitis A infections. The restaurant's management directed all the employees not to discuss the infection with anyone and denied the illness to the health department's epidemiology team that came to investigate the outbreak. On appeal the court found that the restaurant's efforts to cover up the infected employee's illness constituted an affirmative act of concealment and intentional deception. As a result the court tolled the statute of limitations until the restaurant's concealment was revealed, or until plaintiff should reasonably have discovered that the restaurant was the cause of his hepatitis. Additionally the court upheld an award for pain and suffering in the amount of $225,000 noting that plaintiff ran a high fever, suffered severe fatigue and diarrhea, became jaundiced, vomited every 15-20 minutes on an empty stomach, and spent more than a week in the hospital enduring the symptoms. He has a wife and two children and worried that his illness would adversely affect his family's financial stability. He continued to suffer fatigue from the illness for more than six months.

Condemnation

6. *State of Texas v. Bristol Hotel Asset Co.,* 2009 WL 1383717 (Tex., 5/15/09). To widen a part of Loop 410 in San Antonio, the state condemned 0.107 acres of a 5 acre hotel property near the airport. Before the taking the hotel had three entrance driveways. After the taking, two of the three were too steep to be usable. The remaining driveway

had to be reconstructed. During four months of reconstruction, one-fifth of the parking spaces at the hotel would not be usable. A jury awarded the hotel $1.26 million and the state appealed. The court ordered a new trial finding the trial judge had admitted evidence of matters that are not compensable in a condemnation case. The measure of damages is the diminution in value of the property after the taking. Temporary loss of business from temporary loss of parking spaces is not compensable. Further, damages to a condemnee's business that results from traffic being required to travel a more circuitous route to reach the condemnee's property are not compensable. Moral: If a public works project will impact your business, attend all public hearings and argue against it.

Contracts

7. *Mina v. Hotel on the Cay Timesharing Association, Inc.,* 2009 WL 1117303 (Virgin Islands, 4/22/09). The Minas bought a time share unit located in a hotel condominium. They failed to pay annual common charges and assessments in the total amount of $33,543. The Cay Timeshare Association sued to collect the money and also sought termination of buyers' interest in the unit. The association claimed that nonpayment was a material breach of the Minas' contract with the Association and also that bylaws of the time share project authorized termination for nonpayment of fees. The court granted summary judgment to the association.

8. *Robinson v. Wal-Mart Stores East,* 2009 WL 127029 (S.D. Ind., 1/20/09). Plaintiff was injured at a Wal-Mart store when she tried on a pair of sunglasses. She felt significant pain and her eye began to bleed. Some object on the glass struck plaintiff's eye, removing a "pyramid-shape chunk of her eye." Employees of the store tried unsuccessfully to locate the in-store optometrist, accompanied her to the restroom, and identified an optometrist's office nearby. She asked store employees to drive her there but that did not happen. She paid for her merchandise and drove to the doctor. She suffered permanent injury to the eye and sued the store claiming it was negligent for failing to transport her to a medical provider. The court noted that a business that invites the public onto its premise has a duty to provide reasonable assistance to those who become ill or injured on the premises. The court found that the store acted reasonably and provided assistance. The court ruled that, for plaintiff to succeed in the lawsuit, she would have to prove that Wal-Mart's actions aggravated her condition or caused additional injury beyond that initially sustained from the sunglasses. Plaintiff failed to present any such evidence that her injury was exacerbated by the actions of the store's employees, so the court dismissed plaintiff's claim.

9. *Husky Rose, Inc. v. Allstate Insurance Co.,* __So.3d__, 2009 WL 3189181 (Fla. App., 11/17/09). Appellant was a restaurant that was a tenant in a mall. Per the lease, the restaurant was required to maintain fire insurance listing the landlord as an insured under the policy. A fire occurred and the restaurant was totally destroyed. The restaurant recovered its loss and the landlord received nothing from the tenant's policy. The restaurant owner signed an affidavit stating the landlord's property manager had

orally agreed that the restaurant did not need to add the landlord until the restaurant's policy was up for renewal six months hence. The landlord disputed the affidavit and assigned the claim to its insurance company, Allstate. The lease contained a provision prohibiting oral modifications. The court identified two circumstances when written contracts can be modified by a subsequent oral agreement of the parties notwithstanding a contract term purporting to prohibit such modifications. Two applicable situations are: 1) where it would be a fraud on one party to refuse to perform the oral modification; and 2) where subsequent conduct of the parties indicates the acceptance of the oral modification. The court stated that either situation might apply in this case but issues of fact remain. The case was thus remanded for further fact-finding.

10. *Nancy Palano v. Bellagio Corp*., No. 08-ADMS-40040 (Mass. App. Div. 06/24/09). The Plaintiffs, Nancy and Dominic Palano checked into the Bellagio, and after two days, discovered a white powdery substance in a plastic sandwich bag and some money on the armoire in their room. Plaintiffs were concerned that their luggage might have become contaminated by the powder and that the owners of the drugs might return to the room. Plaintiffs wanted a new room or a thorough cleaning and wanted their whole stay paid for by the hotel. The Plaintiffs stayed four more nights but were only giving one night's stay by the hotel comped. They demanded a full rebate of the hotel charges for their emotional distress, attorney's fees and costs. A district court granted summary judgment to the Bellagio. On appeal, the court found that the Plaintiffs asserted enough evidence of emotional distress to proceed. Plaintiffs were extremely upset and affected by the stress placed on them, especially since Ms. Palano was recovering from surgery. Regarding the couple's breach of contract claim, the court said also found that the Bellagio was not entitled to summary judgment on this claim because a contract between an innkeeper and guest is not merely for the use of the room and entertainment, but "immunity from rudeness, personal abuse and unjustifiable interference …" The court of appeals vacated the award of summary judgment to the Bellagio and reversed and remanded the case.

11. *Preble Hotel v. Dryden Mutual Insurance Co.*, 2009 WL 929332 (N.Y., 3/31/09). After heavy drinking, a verbal altercation in a tavern led to a fight on the front porch. Plaintiff was either pushed down the stairs, or was bullied so he backed up and, in doing so, fell down the stairs. The bottom step was in a state of disrepair such that plaintiff was unable to stop his fall before being injured. Plaintiff sued the hotel which in turn sought coverage from its insurance company. All agreed the facility's general liability policy did not include dram shop liability. That coverage requires a separate policy. The general liability policy included an exclusion for assault and battery. The court determined that both versions of the circumstances leading to the accident were within the language of the exclusion and thus the insurance company was not obligated to defend. Concerning the unsafe step, while an accident caused by it would have been covered by the insurance policy, the primary cause of the accident here was the assault and battery which fell within the exclusion. The insurance company was thus relieved from liability to defend or indemnify the tavern.

12. *Chick-Fil-A, Inc. v. Panda Restaurant Group,* 2009 WL 1754058 (Fla. Fed. Dist. Crt. 6/18/09). In this action plaintiff chick-Fil-A seeks a declaratory judgment that construction and operation of a nearby Panda Express restaurant violated a restrictive covenant barring from the property a quick-service restaurant that derives 25% or more of its gross sales from the sale of chicken. Both sides moved for summary judgment. Defendant denied that Panda Express is a quick-service restaurant, claiming it should be classified as a "fast casual" eatery. Each side presented expert witnesses. The court determined that the classification of Panda Express was a disputed issue and could not be decided by summary judgment. The parties also disputed whether Panda Express would derive more than 25% of its gross sales from the sale of chicken. Each expert proffered a different method of calculating revenue from the sale of combo meals which include chicken and other entrees and side orders. This too was a disputed fact requiring denial of each side's summary judgment motion. The case includes discussion of the admissibility of expert witnesses' testimony.

13. *Illinois Casualty Co. v. Toor's, Inc.*, 2009 WL 1322873 (S.D. Ind., 5/12/09). Defendant Toor's was a closed corporation whose stock was owned by one person. The corporation owned property that the stock owner intended to develop as a restaurant. The corporation also owned an insurance policy on the property that was issued by plaintiff. After the property was purchased, the corporation's owner learned that he would not be able to open the restaurant until he made expensive changes to the existing septic system. Several months later, and before renovations for the restaurant and to the septic system had begun, a fire occurred resulting in complete destruction of the structure and contents. Defendant filed an insurance claim with plaintiff which was denied, in part because of alleged concealment, misrepresentation or fraud in the application process. Particularly, the insurance company claimed the values of the building and property were significantly inflated in the application. The restaurant owner established that he used valuations from a commercial estimator and relied on the latter's expertise. The court thus denied the insurance company's motion for summary judgment.

Defamation

14. *David Webb v. Olive Garden Restaurant/Darden Restaurants, et al.,* No. C08-04913 PVT (N.D. Cal. 03/19/09). Plaintiff was having dinner at an Olive Garden in Palo Alto, CA, when he alleged that Defendant's on-duty floor supervisor made advances toward him. The following night, he returned and asked for the supervisor allegedly to extend to her an invitation. The sales manager told Plaintiff that the supervisor was not welcome at the restaurant. Plaintiff claimed that the sales manager came toward him making a pushing motion with his hands, and that another employee also approached him in an aggressive manner. A manager ordered the employees inside. Plaintiff sued the restaurant alleging that he was a victim of simple assault, battery and defamation, and asked the court for compensatory and punitive damages in the amount of $1.340 million. The court denied the defamation and battery claims finding that Plaintiff failed to allege any facts to support his claim. No statements made were alleged to be false,

nor were they heard by any third parties. The court also dismissed the assault claim because the Plaintiff failed to plead facts that led to a fear of imminent bodily harm.

Discrimination/Racial

15. *Kleck v. Graham Hotel Systems, Inc.*, __F.3d__, 2009 WL 1406502 (6th Cir, 5/21/09). Defendant hotel failed to consummate a contract for a wedding and reception with an African-American couple, despite their three months of attempts to meet with the wedding specialist, pay the deposit, and commit to the $12,000 food and beverage minimum. The couple sued claiming discrimination. The hotel explained that the wedding specialist was on vacation and then quit leaving several weeks uncovered, plus the corporate ownership of the facility changed during the time in question. The EEOC sent four sets of testers, each consisting of a Caucasian couple and an African-American couple. In three of the four encounters, evidence of discrimination was found. The court denied the hotel's motion for summary judgment finding a question of fact whether the hotel's explanation was a pretext.

16. *Lovie Carney, et al., v. Caesar's Riverboat Casino LLC*, No. 4:07-cv-0032-DFH-WGH and No. 4:07-cv-0145-DFH-WCH (S.D. Ind. 02/11/09). Plaintiff and her daughter were ejected from a casino and Plaintiff sued on the basis of race discrimination and retaliation. The security personnel at the casino said the Plaintiff and her daughter were removed from the premises not because of their race, but because they were disruptive and their refusal to stop using profane language on the casino floor jeopardizing the safety and comfort of casino employees and patrons. Plaintiff admitted that she had visited the casino at least once per week since its opening, and during those several years she had not encountered a problem with the casino employees. The court found that Defendant offered a legitimate, non-discriminatory reason for ejecting the Plaintiff and her daughter and that the women provided no direct evidence of discrimination or segregation by the casino because of their race. The court also dismissed the women's claim of emotional distress, granting summary judgment to Defendant on all claims.

Dram Shop

17. *Kathleen Ann O'Gara v. Gladys Alacci, et al.*, No. 2008-05841 (N.Y., App. Div. 2d. Dept. 09/22/09). Mathew Alacci was driving a car owned by Gladys Alacci in the early morning and struck Plaintiff who was walking across the street. Plaintiff was impaired by having consumed alcohol at a bar owned by Katonah Bar & Grill. Defendant filed a third-party action against Katonah seeking contribution for the incident. Defendant claimed that Katonah's employees' were negligent in serving alcohol to Plaintiff "in such quantities and over a long period of time" and that the employees knew or should have known she was intoxicated. Katonah moved to dismiss, claiming that Defendant failed to state a cause of action for which relief could be granted, and said Defendant also could not seek contribution pursuant to a "negligent intoxication" theory because common law "does not recognize a cause of action in favor of a party injured by reason of the intoxication of a person against the seller of alcohol." The Supreme Court of

New concluded that a fact finder could conclude that the accident occurred as a result of three separate breach's of duty: the bar's breach of duty under the Dram Shop Act; Plaintiff's breach of duty to exercise her own reasonable care; and Defendant's breach of duty to exercise care to avoid colliding with Plaintiff. Accordingly, the court found that the Defendant can seek contribution from Katonah based on its alleged violation of the Dram Shop Act.

18. *Sherry Allison Eason v. Cleveland Draft House LLC and Baldies Restaurant Group LLC*, No. COA08-684 (App. N.C. 03/17/09). Plaintiff became intoxicated after drinking at Cleveland Draft House Bar left the bar and she drove her car from the parking lot to the front of the bar and exited the car. The car moved and struck her and she was confined to a wheelchair. Her blood alcohol level indicated .22 two hours after the incident. She filed a complaint against the bar alleging negligence, products liability and unfair and deceptive practices, and requested punitive damages. She claimed that the bar served her alcoholic beverages that contained more than one serving of alcohol and allowed her to leave while severely intoxicated. A trial court awarded summary judgment to the bar. On appeal, Plaintiff claimed that the dram shop statute allows intoxicated persons to recover for injuries "proximately caused by their intoxication." The court disagreed. Although the language of the state's dram shop statute prohibits establishments from serving alcohol to intoxicated persons, and even if Plaintiff's claim that the bar negligently continued to serve her is accurate, the court declared that dismissal of the case was proper because contributory negligence barred her claim from proceeding. "Even if her drinks were stronger than she expected, she was fully aware that she was consuming alcoholic beverages and that she could become intoxicated," the court said. Therefore, the court concluded that Plaintiff's contributory negligence in operating her vehicle while impaired rises to the same negligence as the bar in serving an intoxicated patron, and therefore barred her claim from proceeding.

19. *L.D.G. Inc. v. Robert Brown*, No. S-12409, No. S-12430, No. 6390 (Ala. 07/10/09). Tracy Eason was shot and killed by Freeman, who was intoxicated at the time of the incident and Eason's representative, Brown, filed a complaint for wrongful death against L.D.G. Inc., d/b/a The J Bar B, and the corporation's owner for serving Freeman alcohol just prior to the shooting. He is serving time for first-degree murder. A superior court found in favor of Brown after a jury trial and imposed dram shop liability, but dismissed the single shareholder of the bar's corporate owner from the suit and applied a single damages cap to non-economic awards to Eason's dependants. Both parties appealed. On appeal, the Supreme Court found that the trial court did not err in granting Brown's JNOV after the original trial, agreeing with Brown that the jury had been given an improper instruction on legal causation in the case. Since the jury found that the bartender acted with criminal negligence when she allowed the intoxicated Freeman to continue consuming alcohol, the Supreme Court found that the superior court was correct to find that the jury's legal conclusions did not support its findings, therefore making the final verdict unreasonable. The court also affirmed the superior court's decision to apply a single damages cap to non-economic awards to Eason's surviving dependants, dismissing Brown's argument that the cap was unconstitutional.

However, the Alaska Supreme Court did find that the superior court erred in granting the owner's motion for a directed verdict, finding there was sufficient evidence to support an argument for "piercing the corporate veil" and L.D.G.'s sole shareholder should be held personally liable. The court found that Brown presented sufficient evidence to create a jury question and remanded this question for jury trial.

20. *JMH, Inc. v. NYS Liquor Authority,* 877 NYS2d 737, 2009 WL 1077927 (3rd Dept, 4/23/09). Liquor l licensee appealed the revocation of its liquor license. The court held the evidence was sufficient and the penalty was not unduly harsh. During an unscheduled inspection of the premises representatives of the liquor Authority and the Department of Motor Vehicles observed 18 underage patrons drinking and other customers being served while intoxicated. Additionally the security guards were unlicensed, required business records were not maintained, smoking was permitted inside the premises, and a disc jockey was playing music although the licensee in violation of the license terms. The licensee had previously been cited for similar violations.

21. *Manoloules v. Tent Restaurant,* 2009 WL 1683513 (6/16/09). Tennessee's dram shop act requires that a driver be "obviously intoxicated". A lesser state of impairment is not sufficient. An injured motorist alleged that defendant restaurant owner served an obviously intoxicated patron who later collided with the injured motorist. Defendant admitted that the patron was impaired by alcohol but not "obviously intoxicated". The injured motorist was not able to prove obvious intoxication. Therefore the dram shop claim was dismissed. Said the court, "The Court takes no great pleasure in reaching this conclusion . . . It is not within the province of this Court to dispute or overturn what has been adopted as the public policy of this State."

22. *Owens v. Hooters Restaurant,* __So.3d__, 2009 WL 2997515 (Ala. Sup. Ct., 09). Plaintiff was driving his car when it was hit by a patron of defendant restaurant. The patron had been celebrating a promotion in his job with coworkers. His BAC after the accident was .16. The officer reported the patron smelled of alcohol, was slurring his speech and staggering after the accident. Plaintiff sued the restaurant for dram shop violation. The Alabama version forbids service to a person who "appears, considering the totality of the circumstances, to be intoxicated." Ala. Admin. Code, Rule 20-X-6-.02(4). The court affirmed summary judgment in favor of Hooters noting that the evidence "strongly" supports the conclusion that the patron was intoxicated at the scene of the accident and "might even be inferable that [he] was intoxicated when he left Hooters restaurant." Nonetheless, the court found no evidence to support an inference that the patron was served alcohol at Hooters while he was visibly intoxicated.

23. *Millentree v. Tent Restaurant Operations, Inc.,* 618 F.Supp.2d 1072 (W.D. Mo., (5/14/09). A bar patron was leaving the establishment in his truck when he hit another customer who was walking in the establishment's parking lot. The injured customer settled his claim against the driver for the maximum limits of his insurance policy, and then sued the bar based on dram shop. The bar moved to join the driver. The court

denied the motion because the settlement barred the tavern from seeking damages in the form of contribution or indemnity from the driver. Said the court, "A settling defendant is dismissed from the action for all purposes, including allocation of fault."

24. *Christopher Oursler, Indiv. and as Admin. of the Estate of Julie Oursler v. Robert E. Brennan and Malbeat, Inc., d/b/a Mallwitz's Island Lanes*, 2009 NY Slip Op 06357 (8/28/09). Decedent attended a Halloween party dressed all in black as a witch and Plaintiff bought her two beers. Decedent had at least two "Jell-O shots" and other drinks during the party. An altercation erupted in the parking lot and Plaintiff was injured. The police were called and Decedent was taken to her mother's home. After a while, Decedent went looking for Plaintiff and was injured while walking along the side of the road at night, dressed all in black. Later a police vehicle ran over Decedent in his police vehicle fatally killing Decedent. Plaintiff sued Defendant under the NY Dram Shop Act and the court denied summary judgment for Defendant. Defendant argued that under the theory of "guilty participation in the intoxication," Plaintiff contributed to the Decedent's state of intoxication and should be denied the right to sue under the Act. The court said Plaintiff is not precluded from pursuing his claim since it cannot be determined as a matter of law whether Plaintiff's purchase of two drinks caused the Decedent's intoxication thereby causing Plaintiff to have participated in her intoxication.

Eminent Domain

25. *State v. Dunn,* 888 NE2d 858 (Ind. App., 3/4/09). The state constructed a roadway median that cut off direct access to a hotel entrance from the southbound lane of the highway. To reach the hotel required a circuitous route that resulted in loss of business. The hotel sued the state and won a jury verdict of $3,650,000 based on eminent domain. However, on appeal the court reversed, holding that the construction of a median that makes access to a property inconvenient does not constitute a taking under eminent domain law because the property owner does not have a right to the flow of traffic past his land.

Employment/ADA

26. *Suzanna Sensing v. Outback Steakhouse of Florida, LLC, et al*., No. 08-1865 (1st Cir. 08/11/09). Plaintiff, a former employee of an Outback Steakhouse in Peabody, Mass., worked as a "takeaway" employee and received two "Employee of the Month" awards during the course of employment. Plaintiff began to manifest symptions of multiple sclerosis, and during flare-ups, she could experience numbness in the extremities, difficulty with muscular control affecting activities such as walking, grasping and balancing. Plaintiff told her employer about her condition. After being out for some time and ready to come back to work, Plaintiff's supervisor told her not to report for work, stating that he was "not comfortable" with her coming back to work because of the liability. When Plaintiff objected, the supervisor offered to schedule her for light duty work while setting up an exam to see if she was capable of returning to full time

work, but at a reduced pay. She contacted an attorney who sent a letter several weeks later requesting that she be returned to work and the supervisor responded that he thought the Plaintiff had quit her job. Plaintiff sued for disability discrimination. Defendant was granted a summary judgment since Plaintiff could not establish her case. On appeal, the court found that Plaintiff had established a prima facie case and was a member of a protected class - "regarded as" having an impairment by her employer. The court also found that Plaintiff was able to perform the essential fucntions of her take-away job—at least with reasonable accommodation, and the record indicated that she did so for at least a year after her diagnosis. The court also found that conflicting evidence regarding whether Plaintiff abandoned her position or was constructively discharged is best left for a jury to decide.

27. *Shaun Marvin v. Dakota Restaurants Inc*., No. 08-14030 (E.D. Mich. 11/23/09) Plaintiff's promotion was delayed and when asked why he was told there were too many skeletons in his closet due to a drinking problem so the company was considering whether to promote or not. He was frustrated so he didn't show up to work the next day and was subsequently fired. Plaintiff sued for disability discrimination based on alcoholism. The court first considered whether Plaintiff's alcoholism was, in fact, a disability, and found that he failed to provide evidence that his alcoholism substantially limited one or more of his major life activities. Plaintiff was also not successful in his argument that the restaurant "regarded" him as being disabled. The court granted summary judgment to the restaurant.

Employment/Arbitration

28. *Carlos Olvera et al., v. El Pollo Loco, Inc*., No. B205343 (Cal. App. 04/27/09). Plaintiff, the GM of the El Pollo restaurant, filed a class action complaint with another GM who accused the restaurant of treating GMs as exempt managerial workers, even though they spent the majority of their time performing non-managerial tasks. The complaint accused the company of wrongfully denying them overtime and breaks. In 2004, Plaintiff and other employees signed an acknowledgment of the company's new policies, including a new dispute resolution process. The court noted that company's materials regarding the new dispute resolution policy made no mention of arbitration, but of using a mediator to assist in reaching a resolution. Later, however, the policy said all disputes would be resolved through binding arbitration, and stated that parties may agree to mediation, but that arbitration was the sole means to resolve a dispute. The policy also had an acknowledgement page, stated in English and Spanish followed by a signature line. Defendant filed a motion to compel arbitration pursuant to its employment arbitration agreement. Plaintiff said the agreement was presented as a nonnegotiable policy change applicable to all employees, and the materials misrepresented the company's dispute resolution policy as required mediation rather than arbitration, and said the class arbitration waiver was one-sided. The court denied the motion to compel arbitration, finding the agreement unconscionable. The appeals court agreed, finding that Defendant presented misleading explanatory materials and put pressure on employees to sign the agreement.

29. *Ramon Rodriguez v. Four Seasons Hotels Ltd., et al*., No. 09 Civ. 2864 (DLC) (S.D. N.Y. 07/10/09). Plaintiff, an assistant manager at the Four Seasons Hotel in New York, claimed the hotel discriminated against him on the basis of his race, color, sex and national origin when it passed him over for promotions and required him to train Caucasian female employees who were promoted over him. Three years earlier, Plaintiff and the GM signed an agreement for exclusive dispute resolution by means of mediation/arbitration relating to termination, discrimination, harassment or wage/hour violations. Plaintiff argued that he was not required to abide by the arbitration agreement because, he said, clauses are only enforced in the context of a discrimination dispute if it's part of a negotiated collective bargaining agreement. The court disagreed with Plaintiff's arguments. The court noted that the employment provision for dispute resolution was signed by both parties and contained an arbitration clause that clearly encompassed Plaintiff's claims, and the signature page presented with the booklet clearly conveyed that the document to be signed was an employment contract. In addition, Plaintiff argued that the provision was unenforceable because he was not from this country and so he was not sophisticated enough to understand what he signed. The court didn't agree with Plaintiff in light of the fact that Plaintiff holds a bachelor's degree in hospitality management and a master's degree in education. Therefore, the court granted the Defendant's motion to compel.

Employment/At-Will

30. *Fuller v. Hynes*, 2009 WL 3210946 (Tex. App., 10/8/09). Plaintiff was an employee at a resort who was terminated after several months. Her contract read as follows, "For the coming 12 months you will be paid $75,000 a year. . . We should review this arrangement at this time next year. . ." This language was determined insufficient to defeat the presumption of at-will employment.

Employment/Casino

31. *Robert Swan and Lois Swan v. Boardwalk Regency Corp., d/b/a Caesar's Atlantic City, et al.*, No. A-6229-07T1 (N.J. 05/07/09). Plaintiff, a security employee at the Defendant's casino was terminated because he operated closed-circuit cameras throughout the premises and improperly used the cameras to zoom in on the anatomy of several females, both patrons and employees, which is not permitted by the Casino Control Act. The other surveillance officers on duty that night were terminated, and Plaintiff was put on investigative suspension and later terminated. Plaintiff claimed that Defendant created the false impression that he was a pervert. The court found that Plaintiff was not fired in violation of a "clearly enunciated public policy" but was fired because the casino believed he was not properly performing his job and/or because of the bad publicity to the casino surrounding the charges of improper use of surveillance by employees who worked the night shift. Being an at-will employee, the court found that Defendant had the right to terminate him with or without cause.

Employment/Discrimination/Age

32. *Richard Pfeffer v. Hilton Grand Vacations Company, LLC, et al*., Cv. No. 07-00492 DAE-BAK (D. Hawaii 01/07/09). Plaintiff, age 56, began working at the Hilton Waikoloa Hotel and was subsequently terminated after HR determined that he made a false claim for damage to his car while at the hotel. He was terminated for falsifying a record, gross misconduct and attempted theft by trying to get paid on a false claim. Plaintiff filed a claim for age and disability discrimination as well as retaliation for requesting a work accommodation. Defendant argued that there was no direct evidence of age discrimination. Plaintiff claimed he heard three different people from the management team make age-related comments less than three months before his termination and that supports the inference of discrimination based on age. Plaintiff did produce enough evidence to sustain the disability claim and created a genuine issue of material fact. Defendant did not offer evidence showing that Plaintiff was not performing his duties adequately and Defendant was aware of Plaintiff's back pain. The court said that there is a question of fact as to whether he was terminated for his accommodation rather than his alleged false report. On the claims of retaliation, the court also determined that despite the hotel's contention that Plaintiff was terminated for making a false claim, the court found that Plaintiff presented enough evidence to create a question as to whether that reason was pretext.

33. *Dominick Giarratano v. Edison Hotel*, No. 08 Civ. 1849 (SAS) (S.D. N.Y. 02/24/09). Plaintiff, 57, was hired as a part time security guard at the Edison Hotel. Sometime later, Defendant began to convert its part-time employees into a small group of full-time workers and told Plaintiff he was being discharged with all other part-time employees who worked one shift per week. He was eventually re-hired as a full-time security guard. The district court found that Plaintiff established a prima facie case of age discrimination. He and the other two guards in their 60s were the three oldest loss prevention employees in the department, and substantially younger officers were hired in their place. The court also found that Defendant failed to show a legitimate, nondiscriminatory reason for terminating Plaintiff. The court held that a genuine issue of material fact remained regarding the Defendant's reason for terminating Plaintiff.

34. *Weitzel v. Mirage Casino Hotel,* 2009 WL 1106523 (D. Nev., 4/22/09). Plaintiff had been a craps dealer with defendant Mirage Casino for over 20 years. Occasionally he was directed to work as a blackjack dealer although he had not been official trained for that position. While acting as such he made an "error" (the case provides no details) and was terminated. He filed a claim of age discrimination with the EEOC. Thereafter he went through bankruptcy. When preparing his list of assets for the bankruptcy court, he was asked about "Other contingent and unliquidated claims of every nature". He placed an "x" in the none column. Several months later he received a letter from the EEOC authorizing him to file a lawsuit based on the age discrimination charge. Pursuant to that letter he filed this lawsuit. The Mirage moved for summary judgment claiming plaintiff is stopped from bringing this lawsuit because he failed to disclose his claim in the bankruptcy proceeding. In response plaintiff sought to re-open the

bankruptcy proceeding. The court granted summary judgment to the Mirage rejecting plaintiff's claim that the oversight was inadvertent, and finding the attempt to reopen the bankruptcy claim did not correct the failure to disclose. Said the court, "Judicial estoppel ensures that debtors make a full and honest disclosure of their assets in the original bankruptcy."

35. *Bowman v. Wendy's Restaurants,* 2009 WL 1421015 (W.D. Ky., 5/20/09). Plaintiff, an employee of Wendy's, claimed that she was the victim of age and sex discrimination. She commenced the lawsuit without the advice of counsel. She filed her complaint the same day that the incidents giving rise to her claims occurred. A condition precedent to a lawsuit under Title VII or the Age Discrimination in Employment Act (ADEA) is that plaintiff must first exhaust her administrative remedies before the EEOC. When a charge is filed, that agency investigates the complaint. If it finds reasonable cause to believe the charge is true, the EEOC issues a right-to-sue letter within 180 days. A plaintiff must possess a right-to-sue letter in order to file suit under Title VII or the ADEA, failure to submit the case to the EEOC results in dismissal in deference to the administrative process. In this case plaintiff did not submit the case to the agency. Therefore her claim was dismissed without prejudice.

36. *Liles v. Bojangles' Restaurants,* 2009 WL 1586561 (M.D. NC, 6/5/09). Plaintiff was an employee of Bojangles Restaurant who was terminated for the stated reason of insubordination. He claimed that he was discriminated on the basis of age and sex, claiming his supervisor showed him pictures of naked men and then began harassing him by "hollering about bringing out biscuits," taunting him, and telling him he was insubordinate. Plaintiff brought his case before the EEOC and received a Notice of Rights letter. He began the lawsuit 104 days thereafter. Title VII and the Age Discrimination in Employment Act cases must be brought within 90 days after receipt of a Notice of Rights or they are time barred. The court dismissed the case with prejudice because it was filed "several days out-of-time."

37. *EEOC v. Fire Mountain Restaurants,* 2009 WL 2166928 (W.D. Ky., 6/8/09). This citation is for a consent decree settling a Title VII and Civil Rights Act lawsuit authorized by the EEOC. It requires the defendant to: categorize the offending employees as "ineligible for rehire;" provide the EEOC copies of any complaints of alleged discrimination or retaliation made by any employee of defendant; institute training on sex and race discrimination and on avoiding unlawful retaliation; compensate the plaintiffs agreed-upon amounts; establish a settlement fund of $50,000 for alleged compensatory and punitive damages; submit to monitoring by the EEOC of the restaurant's compliance with the consent decree; and agree that the terms apply to any successor in interest of the restaurant.

Employment/Discrimination/Bankruptcy

38. *Eric Myers v. TooJay's Management Corp*., No. 5:08-cv-365-Oc-10GRJ (M.D. Fla. 10/21/09). Plaintiff was offered a job from Defendant's manager and there is a dispute

as to whether or not the offer was conditional on a satisfactory background check, including a credit check. Plaintiff authorized the background check but did not realize that by signing the form he would waive his right to sue for bankruptcy discrimination. Plaintiff received a notice from Defendant rescinding its offer of employment based on information provided by the credit report. When he contacted the human resources department he was informed that Defendant's policy provides that individuals with bankruptcy on their credit report cannot be hired as a matter of corporate policy and a complaint for bankruptcy discrimination followed. The court stated that except for one decision, all courts ruling on allegations of bankruptcy discrimination have held that federal bankruptcy statues do not encompass hiring decisions of private employers. Plaintiff also argued that he had an employment agreement with Defendant since he had worked two days and been paid for two days work, and that he was fired because of his previous bankruptcy—the court declared that there are material issues of fact in dispute denying Defendant's motion for summary judgment.

Employment Discrimination/National Origin

39. *Parra v. Four Seasons Hotel*, __F.Supp.2d__, 2009 WL 774091 (Mass., 3/23/09). In a lawsuit for discrimination in employment, the hotel has an opportunity to present a legitimate, nondiscriminatory basis for the plaintiff's termination. If such an explanation is established, the employee's case will be dismissed unless he can show that the reason proffered by the employer is a pretext for discrimination. A Mexican room-service waiter at a Four Seasons Hotel was fired after 20 years of employment. He claimed the termination was due to his national origin (Mexican), color or age following a poor review of the hotel by the American Automobile Association. The hotel claimed the termination was based on disciplinary reasons related to poor job performance including uncooperativeness, resistance and rudeness. The employee was unable to rebut the poor performance claims and therefore was unable to establish that the hotel's explanation was a pretext.

Employment/Discrimination/Pay

40. *Caroline B. Emswiler v. Great Eastern Resort Corp., et al*., No. 5:08CV00011 (W.D. Va. 03/17/09). Plaintiff worked as a GM for a large time-share community resort. Plaintiff informed her employer that she wanted to retire from her position but work part time on special projects. During her part time employment various employment changes occurred. Plaintiff resigned and filed a complaint under the Equal Pay Act of 1963, alleging that she was compensated at a lower rate of pay than her three male successors as GM of the resort because of her sex. The court found that the behavior of senior managers was not particularly relevant, it did declare that if a jury found the company to be in violation of the act that it could declare that the violation was willful, and decided to apply the three-year statute of limitations to Plaintiff's claims. The court found that because the restructuring of employees at Defendant's resort began in response to Plaintiff's retirement and that the new responsibilities assigned to the men were core responsibilities resulting in the reorganization of employment

responsibilities; this indicates that the jobs performed were not substantially equal to the work Plaintiff performed. The court, therefore, determined that Plaintiff failed to establish a prima facie case under the act and granted the Defendant's motion for summary judgment.

Employment/ Discrimination/Pregnancy

41. *Kelly Armstrong v. Greenwood Gaming and Entertainment, Inc., et a*l., No. 09-1321 (E.D. Pa. 10/22/09). Plaintiff worked at Defendant's casino as a cage cashier and claimed she was subject to offensive and discriminatory comments and that an adverse employment action was taken against her because of her pregnancy. Plaintiff was discharged after returning from maternity leave for an alleged violation of workplace rules. The court noted that there was no merit in Defendant's argument that Plaintiff must show she was pregnant "at the time" of discharge, and found that she established a prima facie case of discrimination. Defendant also asked the court to dismiss Plaintiff's claim for punitive damages, but the court found that Plaintiff's complaint that the manager allegedly made hostile statements could lead a jury to infer that the employer engaged in a discriminatory practice with malice or reckless indifference, and denied the motion.

Employment/Discrimination/Race

42. *John Dunlap v. Merritt Hospitality*, No. 08-2019 (E.D. Pa. 03/19/09). Plaintiff worked as a banquet house attendant at the Westin Hotel in Philadelphia and was terminated because while on the job he acted in a violent and offensive manner in violation of corporate policies. Plaintiff asserted that he was terminated because of his race since another employee acted similarly and was not terminated. The court disagreed, finding that his acts were not comparable. While the other employee may have violated the company's workplace violence policy by using aggressive physical contact, he acted in self-defense. Plaintiff, however, used profanity, made threats and after being attacked and retrieved a metal rod. The court said that whether "this was done for defensive or offensive purposes is immaterial." The court found that Plaintiff was an active aggressor who used a dangerous weapon to hit a person, and found that he failed to establish his prima facie case of racial discrimination. The court granted Defendant's motion for summary judgment.

43. *Gold Coast Restaurant, Corp. v. Gibson*, __NYS2d__, 2009 WL 3766294 (NY App. Div., 11/10/09). Plaintiff was an employee at defendant restaurant. The New York State Division of Human Rights (hereinafter DHR) found that plaintiff was subjected to a hostile work environment and that the employer condoned the discriminatory acts of its employees. On appeal the court upheld the finding of hostile work environment but dismissed a constructive discharge count, noting that the employer took some measures to end the discrimination, although they were unsuccessful. Further, the conditions were not so intolerable that a reasonable person would have felt compelled to resign. Indeed, plaintiff stayed for year after the harassment began. The appeals court also

reduced the DHR's award for mental anguish and humiliation from $68,422 to $25,000. In making the reduction the court noted plaintiff did not experience any physical manifestations from the anguish, and did not seek medical or professional assistance.

44. *Shari Taylor v. Fairfield Resorts Inc., et al.,* No. 2:07-cr-01602-RCJ-GWF (D. Nev. 11/10/09). Plaintiff worked as a timeshare sales representative and was not promoted since she didn't meet the skill requirements. Plaintiff alleged that white male co-worker, who also didn't meet the skill requirements were promoted. She complained and was terminated. The court found evidence to question whether older sales leads were given to black and/or female employees and not to white and/or male workers, therefore the court denied Defendant's summary judgment on Plaintiff's gender and race discrimination claims.

Employment/Discrimination/Union

45. *NLRB v. JLL Restaurant, Inc.*, 2009 WL 1311852 (9th Cir. 5/12/09). The court granted enforcement of an NLRB order that found that defendant restaurant violated the NLRA by telling job applicants that the restaurant would operate as a nonunion enterprise, by refusing to recognize the certified union, by directing employees to vote for decertification, and by refusing to hire certain employees because they had engaged in picketing. A successor to the defendant restaurant was jointly and severally liable for remedying the unlawful conduct because it was aware of the conduct that the NLRB found unlawful.

Employment/FLSA

46. *Cristoforo Bustamante a/k/a Jesus Bustamante a/k/a Angel Bustamante v. El Palenque Mexican Restaurant and Cantina, Inc.*, No. H-07-2506 (S.D. Tex. 02/03/09). Plaintiff filed suit against his employer for violating the Fair Labor Standards Act. Plaintiff alleged that he was told he could use false documents to work in Defendant's restaurant so he used his relative's documentation. The court decided that based on Plaintiff's "lies, half-truths and failures to explain," he failed to show he worked under the correct name to prevail on the suit. The court found in favor of the restaurant, but denied its request for attorney's fees because the court said that the FLSA only permits awards of fees to prevailing plaintiffs.

47. *Godoy v. Restaurant Opportunity Center of NY,* 615 F.Supp.2d 186 (Dist. Crt. NY, 5/1/09). Plaintiffs are former restaurant workers at Windows of the World, a restaurant that had been located on the top floors of One World Trade Center. A relief fund for surviving and displaced workers of the restaurant was established and $3 million was raised. An organization formed to direct the money. It decided to develop a worker-owned restaurant. All would-be owners were required to contribute 100's of hours of work in furtherance of the venture. Due to alleged fraud and misrepresentation, plaintiffs abandoned the project after completing much "sweat equity", and sought payment for their donated services per the Fair Labor Standards Act. The court

dismissed the claim, determining that plaintiffs' labor was provided not as employees but rather as putative co-owners of a restaurant they were working to create.

48. *Daniel Castellanos-Contreras, et al., v. Decatur Hotels LLC, et al*., No. 07-30942 (5th Cir. 09/21/09). Defendant hired foreign workers and compensated them for participating in an orientation session. Plaintiffs sued the hotel contending that Defendant violated the Fair Labor Standards Act by paying them less than minimum wage and refusing to reimburse them for recruitment, transportation and visa expenses. The Court of Appeals found that the law does not specifically address an employer's obligation to reimburse guest workers for these expenses. On the issue of transportation expenses, the court declared that past Department of Labor interpretations requiring employers to bear the guest workers' inbound transportation expenses was inappropriate. Since the regulations did not specify who was responsible for these costs, the court declared that the legislature's silence on the issue could lead one to infer that it did not intend for employers to bear the inbound transportation expense. Regarding reimbursement for recruitment, the court held that the expenses the workers incurred could not be deemed "kick-backs" under the FLSA.

49. *Thelma Boucher, et al., vs. Dan Shaw, et al.*, No. 05-15454 and No. 05-15702 (9th Cir. 07/27/09). Three employees of the Castaways Hotel, Casino and Bowling Center filed suit against their employer seeking unpaid wages. They alleged that Castaways, which ceased operations after a Chapter 7 liquidation, failed to compensate employees for their last pay period and had not paid out accrued vacation and holiday pay. The local union also sought to recover withheld wages of union employees. The Supreme Court held that individual managers cannot be held liable as "employers" and therefore the union's claim was dismissed. The court explained that the common law definition of "employer" could not be expanded without a clear expression of legislative intent. The state's definition of employer does not include managers, agents or officers in its list of employers, as is the case in other states so ambiguity exists. The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee …" The court found that an individual who exercises control over the nature and structure of the employment relationship or has economic control over the relationship can be considered an employer. Since two of the three had an ownership stake in the resort and a third controlled labor and employment decisions, the court found that the three had "control" as defined by the Act. The court reversed the district court's decision dismissing the employees' FLSA claim against the managers, and remanded the case for further proceedings.

50. *Lorna Ash v. Sambodromo, LLC*, No. 09-20406-Civ-O'Sullivan (S.D. Fla. 11/17/09). Plaintiff, a server and hostess for Defendant's restaurant alleged she was not compensated for training courses and sued under the FLSA. She also alleged wrongful tip pooling by Defendant. The court agreed with the restaurant that the FLSA "allows for the tip credit being applied to time spent on duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips" unless they exceed 20 percent of her shift., which is didn't. Due to contradictory payrolls

records concerning Plaintiff's compensation for her training, the court denied the restaurant summary judgment.

51. *Diaz v. Jaguar Restaurant Group, LLC,* 2009 WL 1758709 (S.D. Fla., 6/22/09). Plaintiff claimed she worked for defendant restaurant for three and a half years averaging 60 hours per week but was never paid overtime wages. Defendants claim plaintiff failed to produce sufficient evidence that she worked the hours she claimed. The parties dispute who has the burden of proving the hours. The court held the employee has the burden of proving that he performed work for which he was not properly paid. Yet the employer has a duty to keep proper records of wages, hours and other conditions of employment. Where the employer's records are inadequate, as here, the employee carries his burden if he "produces sufficient evidence to show the amount and extent of work as a matter of just and reasonable inference." Further, an employer should not benefit in a FLSA case from its own purposeful disregard of federal law. Here, although the employee's version of her schedule was unsubstantiated through others' testimony or documentary evidence, the court denied summary judgment. It did however offer the following, "Frankly, we doubt whether a reasonable jury could believe some of plaintiff's version of events."

Employment/FMLA

52. *Michael Markos v. Mount Brighton Inc.,* No. 08-cv-12599 (E.D. Mich. 08/24/09). Plaintiff, an executive chef at the Bauery Bar & Grill at the Mt. Brighton ski and golf resort, filed a complaint against Defendant for retaliation and interference claims when Plaintiff requested time off from work after suffering a knee injury at work but was terminated for allegedly drinking alcohol on the job. Defendant argued that there is no evidence of retaliation under the FMLA because there was no causal connection between his request for leave and the decision to terminate his employment, and claimed that it has legitimate, nondiscriminatory reasons for firing Plaintiff. The court disagreed finding that Plaintiff's purported request occurred the same day as the adverse employment action, finding that there was a question of fact regarding a causal connection between the two. The court, therefore, denied the resort's request for summary judgment on the retaliation claim.

53. *Bonilla v. Plaza Hotel & Casino,* 2009 WL 691941 (Nev., 3/10/09). An employer is barred from limiting an employee's exercise of rights under the FMLA, and from using FMLA-protected leave as a negative factor in an employment decision. A dealer at defendant hotel and casino had been "written up" five times for work-related misconduct including insubordination, failing to communicate pertinent information to the proper personnel, continual mistakes, dereliction of duty, and leaving his assigned work station without authority. Plaintiff thereafter was granted FMLA leave to enable him to undergo surgery. Two days before his scheduled leave he miscounted chips resulting in a $25,560 discrepancy and was terminated. The reason cited was "progressive discipline for job performance." The manager who terminated him did not know of the pending leave. Plaintiff sued claiming interference with the exercise of

his FMLA rights. Judgment was entered in favor of the hotel, the court finding that plaintiff's leave request did not play any role in the termination decision.

Employment/Negligent Supervision

54. *Rex Joseph Leo v. Waffle House, Inc*., No. A09A0332 (App. Ga., 07/09/09). Plaintiff, a homeless man, was dared by one of Defendant's worker and offered $5 to drink an unknown concoction of juice, water, lemons, sugar, Ivory soap and Score dishwashing detergent. One of the managers warned Plaintiff not to drink the mix. Plaintiff drank it, collapsed on the floor and began foaming at the mouth. Plaintiff filed a complaint against Defendant for negligence, negligent supervision and failure to intervene. Defendant was granted a summary judgment, and Plaintiff appealed. The court found that a jury should decide whether the manager's warning to Plaintiff was sufficient to fulfill the Waffle House's duty to keep its customers safe. The court reversed the grant of summary judgment to Waffle House on this charge. The court chose not to reverse the trial court's decision on Plaintiff's claims of negligent supervision, or that the employee was acting within the scope of his employment. On the first charge, the court found that there was no evidence that Waffle House knew or should have known that the employee had engaged in reckless behavior. The court also found that the employee's act was "clearly committed for purely personal reasons unconnected with his job." The court, therefore, affirmed the grant of summary judgment on these counts.

Employment/Retaliation

55. *Mary Snow v. Khosrow Khazeni, Cardinal Crossing Subway, Inc., et al*., No. 1:08CV0070 (M.D. N.C. 06/19/09). Plaintiff worked at Defendant's Subway restaurant and was relocated to another Subway restaurant owned by Defendant. Plaintiff didn't like the schedule and subsequently filed a complaint with the EEOC alleging that she was discriminated against on the basis of her national origin, religion and disability, and for retaliation. The court first looked at whether any of the separate Subway franchise corporations qualified as an employer for the purposes of discrimination under Title VII. The court found that sufficient evidence existed for a jury to find that the three corporations were interrelated enough to constitute a single employer since, among other things, employees routinely shifted between restaurants. The court also found that material fact existed as to whether Plaintiff was retaliated against for making a complaint with the EEOC, finding that a reasonable worker might have been dissuaded from filing a charge of discrimination if she had known she would face a written warning or a verbal and physical confrontation with the owner less than three weeks after her complaint. The court, therefore denied summary judgment to all three Subway franchise corporations.

56. *Thu Thanh Bui v. Horseshoe Entertainment*, No. 07-1712 (W.D. La. 03/05/09). Plaintiff was terminated from Defendant's employment as she failed to pass her audition to become a poker dealer after Defendant worked with her for an extended period of time

to help her obtain the skills necessary to pass the audition. There were other issues of improper behavior at work by Plaintiff. Plaintiff filed a charge with the Equal Employment Opportunity Commission alleging discrimination on the basis of her race, national origin, sex and age. Defendant argued that her termination was for valid reasons and that Plaintiff failed to exhaust administrative remedies. The court disagreed finding that although retaliation was not expressly claimed in the EEOC charge, it could "reasonably be expected to grow out of the initial charges of discrimination" and should not be dismissed for failure to exhaust administrative remedies. The court therefore awarded summary judgment to Defendant on all claims as Plaintiff did not show evidence to support the allegations.

Employment/Sexual Harassment

57. *Kathleen Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, No. 0968, (Md. App. 12/2/08). Plaintiff, an assistant GM at the Courtyard by Marriott Gaithersburg-Lakeforest, which is owned by Defendant, was fired from her job subsequent to an incident involving alleged sexual harassment by an employee. The employee was terminated due to inappropriate behavior at work. Plaintiff believed that the GM was continuously hostile to her and began excluding her from meetings. Plaintiff sent a letter to the GM's supervisor to tell him that the GM was retaliating against her, and the GM fired her the next day. At trial, the jury returned a verdict in favor of Defendant on Plaintiff's claims of sexual harassment and retaliation. Plaintiff appealed, arguing that the circuit court erred by instructing the jury that Plaintiff was required to prove that her protected activity was "determining factor" rather than a "motivating factor" for her retaliatory termination, thereby erroneously elevating her burden of proof. The court agreed, finding that "determining factor" and "motivating factor" were not synonymous, and found that "instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the 'determining' factor in the discharge from employment is a misstatement of the law, and erroneous."

58. *Shannon Laymon v. Lobby House Inc.*, C.A. No. 07-129-MPT (D. Del. 05/01/09). Plaintiff worked as a waitress/bartender at Defendant's restaurant, and was known to drink at the bar regularly and showed her body piercings to other employees. Several regular customers jointly complained about Plaintiff's attitude and she was terminated. Plaintiff filed a complaint against Defendant and a district court awarded her compensatory damages of $500 for her hostile environment sexual harassment claim, $1,000 for her retaliation claim and $100,000 in punitive damages. Defendant appealed arguing that the punitive damages were excessive. The court analyzed the degree of reprehensible conduct finding that the Defendant's conduct was not sufficiently offensive to warrant an award of $100,000 in punitive damages. The court also noted that evidence mitigated the severity of the conduct since Plaintiff regularly socialized at the bar during her off hours and exposed her piercings to employees. She also only complained of harassment on one occasion, and the facts show that she was terminated after customer complaints. The court reduced the punitive damages fee to $25,000, which it believed was adequate. The court rejected Defendant's motion for a new trial.

59. *Richard Robinson v. Hyatt Corp*., No. 07-3682 (JAP) (07/23/09). Plaintiff worked as a banquet server at Hyatt's New Brunswick, N.J., hotel and his manager conducted a performance review of Plaintiff stating that he continued to be a leader among his peers, but that needed to work on "keeping his composure during the challenging times" and improve communication with supervisors when he feels stressed. Plaintiff suffered a panic attack at work and left the hotel. The HR director assumed he quit, but when contacted, Plaintiff said he had not quit. During an investigation prior to termination, HR noted several disciplinary infractions for insubordination and behaving disrespectfully toward managers and coworkers. Plaintiff claimed to suffer from ADHA, bipolar disorder, PTS disorder and several physical impairments and his request for accommodations was denied due to his failure to medical documentation. Plaintiff sued alleging disability discrimination, intentional infliction of emotional distress and retaliation. The court found that Plaintiff could not establish a prima facie case and the court found that Defendant had a legitimate, non-discriminatory reason to terminate his employment. Summary judgment for Defendant on all counts.

60. *Lockett v. Choice Hotels International/Clarion Hotel*, 2009 WL 468298 (11th Cir. 2/26/09). A female employee in the reservations department of a Choice Hotel was friendly with a male worker at the hotel café. She ate there regularly. He began making sexual comments to her such as talking about sexual positions, stated he wanted to lick her "p-u-s-s-y", that he would "go down on her good", and that her boyfriend "ain't F'ing you right". The male employee also stuck his tongue out at her two or three times. The female complained to several supervisors; the action nonetheless continued for about three months. She avoided the café for three weeks and then returned to dining there. She did not seek medical treatment or counseling. There was no evidence that her work performance suffered. She sued for hostile environment sexual harassment. To establish a hostile environment the plaintiff must show that the conduct rose to the level of being severe, physically threatening or humiliating. In a somewhat surprising decision, the court found the sexual remarks in this case "fell below the minimum level of severity or humiliation needed to establish sexual harassment**."**

61. *McDonald's Corporation v. Louise Ogborn, et al*., No. 2008-CA-000024-MR (App. Ky. 11/20/09). An unknown individual placed a series of prank calls to McDonald's and other fast-food restaurants pretending to be a police officer. He convinced restaurant managers to conduct strip searches on employees. The assistant manager did a search on one employee and the manager was terminated. The employee sued and was awarded compensatory and punitive damages. McDonald's appealed. The court said that McDonald's knew of the hoax and could be held liable for foreseeable tortious acts committed against the employee. The punitive damages award was reduced.

Employment/Wage & Hour

62. *Kazi Ahmed v. Good Nite Management Inc. et al*., No. A120400 (App. Cal. 03/19/09). Plaintiff worked in various management positions for 12 years with Defendant, which operated 12 economy-class hotels in California. Plaintiff was placed on probation

when he complained about spending too much time performing non-management tasks. Plaintiff sued for non-payment of overtime wages and after a bench trial, he was awarded $293,999.55 for overtime wages n violation of the California Unfair Competition Law, as well as attorney fees totaling $235,760. Defendant appealed claiming that Plaintiff was not exempt as he was responsible for staffing and supervising. Defendant argued that overtime laws were inapplicable because Plaintiff was a managerial employee who scheduled his own hours. The court found that although that was true, he had to keep his budget within the amount determined by the corporate office, which may have "compelled" him to work longer hours. The court said that Defendant's assertion "that overtime laws can never apply to employees classified as managers is simply incorrect" and found that the exclusion depends on actual job duties. The court determined that Plaintiff was not an exempt employee. On review of the trial court's decision, the appellate court found that the lower court used a correct standard of proof in determining compensation awards and affirmed the court's decision to award Plaintiff restitution for overtime wages.

Employment/Workers Compensation/Disability Discrimination

63. *Mazie Green v. CSX Hotels Inc.*, No. 5:07-cv-00369 (S.D. W.Va. 01/15/09). Plaintiff, a waitress at Defendant's restaurant injured her back during work. She filed a claim with the West Virginia Workers' Compensation Division claiming total disability and was awarded benefits. Plaintiff returned to work and continued to experience pain and stopped working again. Because Plaintiff was not medically authorized to return to work, Defendant could not permit her to do so. Plaintiff then filed a complaint with the EEOC alleging racial and disability discrimination and retaliation for her previously filed complaints. A magistrate judge recommended that the court grant Defendant's summary judgment on all claims except for disability. The court discounted Defendant's reasons for termination. In the collective bargaining agreement, it states that an employee who does not return to work within two years of an injury may be terminated. But, the court found that Plaintiff presented evidence showing that she was prevented from returning to work based on her employer's discrimination. The court also found that Plaintiff presented no evidence that she was treated differently based on her race, but with respect to her claim of retaliation, the court declared that there was an issue of fact as to the amount of time that passed between her protected activity of complaining to the human rights commission and her termination.

64. *Restaurant Development Group v. Hee Suk Oh*, No. 1-08-2143WC (App. Ill. 06/16/09). Hee Suk Oh filed a workers' compensation claim against her employer, Restaurant Development Group, for injuries she sustained after being hit by a stray bullet while bartending. According to a member of the Chicago Police Department, the area where the restaurant was located had "probably the largest collection of multiple gangs within the city" at the time and the violent crime rate in the area was high. An arbitrator found that her injuries arose in the course of her employment and she was awarded permanent total disability benefits for life. The decision was affirmed and a circuit court confirmed the commission's decision. RDG appealed, arguing that the commission's decision was

erroneous as a matter of law. The Appellate Court of Illinois disagreed finding that the evidence established because Oh bartended near the restaurant's floor-to-ceiling windows, on nights and weekends when violent crimes are more likely to take place, she was exposed to a higher risk for random gunfire. Therefore, the court affirmed the prior decision.

Franchise

65. *Alfred Viado, et al., v. Domino's Pizza LLC, et al*. No. A136842 (App. Ore. 09/02/09). Plaintiff was driving his motorcycle when it collided with a car driven by Scott Mathias, a pizza delivery driver working for a franchise of Domino's Pizza. Plaintiff filed a claim of negligence against the driver and Defendant. A trial court granted summary judgment to Defendant. Defendant does not argue whether Mathias was negligent, but rather that the facts were insufficient to establish that the company was vicariously liable for the actions of its franchisee's employees. Under the terms of the franchise agreement, Domino's requires that all franchisee employees strictly comply with all laws, regulations and rules of the road and exercise due care and caution while operating delivery vehicles. The company also provides a list of criteria that must be met by drivers, and the agreement states that the relationship between Domino's and its franchisees is not fiduciary or one of "principal and agent." Plaintiff contended that Domino's established stringent controls regarding drivers, their vehicles and delivery times. Although the court found that Domino's maintains a non-employee agency relationship with its franchisees, it concluded that Plaintiff failed to present enough evidence to show Domino's was vicariously liable for the incident. The franchise agreement provides controls for the delivery process, but does not give Domino's the right to control "the physical details of the manner of driving" and maintains that the franchisee is responsible for the conduct of its employees. The agreement outlines general safety requirements required by the franchisor, but day-to-day control over driving operations such as determining routes and hiring drivers lies with the franchisee, the court said. Therefore, the court affirmed the trial court's grant of summary judgment to Defendant.

66. *Dunkin' Donuts Franchised Restaurants v. Elkhatib,* 2009 WL 2192753 (N.D. Ill., 7/17/09). Defendant is an Arab-American Muslim franchisee of Dunkin' Donuts. He refused to carry the full breakfast sandwich product line which includes bacon, ham and sausage, maintaining that his religion forbids him from handling pork products. The franchisor sued to enforce the franchise agreement. A jury verdict issued in favor of the franchisor. Defendant refused to stop using the franchisor's name, signage, products, and distinctive decorative colors. Dunkin' Donuts obtained a temporary restraining order (TRO) directing defendant to cease all uses of Dunkin' Donuts proprietary names, signs and foods but defendant continued to violate it. In this lawsuit the court granted a preliminary injunction, noting that Dunkin' Donuts has expended considerable resources in creating and promoting its trademarks and trade dress, and in enforcing standards. Actions of holdover franchisees such as defendant cause irreparable harm including customer diversion and the possibility of dilution of the

trademarks. Dunkin' Donuts also sought attorney's fees. The court, although noting defendant's violation of the TRO, said it was not yet convinced that defendant's infringement was malicious or deliberate, and so declined to grant an award of lawyers' costs.

67. *Dunkin' Donuts Franchised Restaurants v. Panzer*, 2009 WL 188397 (D. NJ, 6/30/09). This case is a great example of a question of fact. Defendant was a franchisee of Dunkin' Donuts (DD). In this lawsuit DD seeks to end defendant's franchise because DD claims defendant offered a DD manager a bribe. At the time the franchisee was seeking authorization to open a new restaurant. A prior similar request by defendant for a different location had been declined by DD. In his testimony the manager identified the date, time, location and conversation relating to the alleged bribe. Defendant denied that the incident ever took place and denied that two parties were even together on the day in question. Summary judgment is precluded when a material question of fact exists. The court thus referred the matter to trial for determination of the factual issue.

68. *Dunkin' Donuts Franchised Restaurants LLC v. KEV Enterprises, Inc*., __F.Supp.2d__, 2009 WL 1587983 (Fed. Dist. Crt. Fl, 6/5/09). Plaintiff franchisor seeks a preliminary injunction against its former franchisee and termination of the franchise. Plaintiff claimed defendant breached the franchise contract as follows: defendant failed to offer any ice cream for sale despite a contract provision requiring it to maintain a sufficient supply of Baskin-Robins ice cream products; defendant failed to devote her best efforts to manage and operate the shops given that she moved out of town; defendant failed to take required training courses; and failed to pay required franchise and advertising fees. The court was satisfied that plaintiffs proved a likelihood of success on the merits for the following claims: breach of contract, trademark infringement, trade dress infringement, and unfair competition. The court further ruled that "By its very nature, trademark infringement results in irreparable harm." The court thus granted plaintiff's motion for summary judgment.

69. *Mueller v. Sunshine Restaurant Merger Sub, LLC*, 2009 WL 1107263 (M.D. Pa., 4/23/09). Plaintiff was injured at an IHOP restaurant in Daytona Beach, Florida when an employee, attempting to lift a large wooden highchair over her head, dropped it on her neck and shoulder. She sued in Pennsylvania. Defendant contested jurisdiction and filed a motion to dismiss. The court granted the motion finding that it lacked personal jurisdiction over defendant. The court noted that defendant corporation was formed in Delaware, was licensed to do business in Florida and Georgia, had its principal place of business in Florida, and does not own any property nor conduct any business in Pennsylvania. The court rejected plaintiff's claim that IHOP franchisor's nationwide toll-free customer feedback number and its website were sufficient contacts with the state on which to base jurisdiction.

Limited Liability Companies

70. *Dover Phila Heating & Cooling, Inc. v. SJS Restaurants, Ltd.*, 2009 WL 4023246 (Ohio App., 11/20/09). Plaintiff is a business that does various repair work. Plaintiff's

owner installed a ventilation system in defendant's restaurant to assist in removing cigarette smoke from the smoking area, and also repaired ductwork that had fallen from the ceiling. The total bill was $3,022. Defendant restaurant, which was operated as a limited liability company (LLC), failed to pay. Plaintiff's owner had negotiated the contracts with one of defendant's members. In plaintiff's small claims action, judgment was granted in plaintiff's favor against the restaurant and also against the LLC member who had negotiated the contracts. On appeal the restaurant claimed the judgment against the member was improper. The appeals court concurred, noting that members of LLCs are not personally liable for satisfaction of judgments against an LLC. Therefore the judgment against the member was vacated.

Negligence/ Bugs

71. *Katrena Jean Mills, et al., v. Best Western Springdale*, No. 08AP 1022 (App. Ohio 06/18/09). Plaintiff alleged that she contracted scabies, a skin condition caused by itch mites, during her hotel stay. Plaintiff sued Defendant arguing that Defendant breached its duty to provide a clean, habitable hotel room and engaged in unfair and deceptive business practices. The trial court granted Defendant's motion for summary judgment finding that the record contained no evidence that there were mites in the hotel room or that the hotel stay led to the scabies outbreak. The court noted that there was no evidence describing scabies, how it is contracted or whether it can be contracted through contact with hotel bedding. Plaintiff failed to produce evidence that the hotel room was infested with mites. The appeals court, therefore, affirmed the decision.

72. *Gass v. Marriott Hotel Services, Inc.*, 558 F.3d 419 (3/3/09). Plaintiffs were guests at a Marriott Hotel in Maui, Hawaii. They discovered a dead cockroach in the room and reported it to management. The next day, while plaintiffs were away from the room, the hotel's exterminator entered plaintiffs' room and sprayed it with pesticides. Plaintiffs discovered the workers when they returned to the room to retrieve lunch money. The men were wearing metal tanks on their backs and masks on their face, spraying a chemical from the tanks. Plaintiffs testified to a "thick, horrid, acrid putrid odor" in the room and cloudy air. The men continued to spray until plaintiff summoned the manager. Plaintiffs were immediately given a new room. Plaintiffs became ill with various neurological symptoms including brain fog, memory loss and mood swings, muscle spasms and blurred vision. They sued the hotel for negligence. The appeals court reversed the lower court's ruling in favor of the hotel, finding, "[I]t is unacceptable to enter a place where another is residing and fill that place with airborne poison, without providing for evacuation of the inhabitants, appropriate ventilation, or taking other precautions." A reasonable person would understand that he could seriously injure another by filling an occupied hotel room with a cloud of toxic or hazardous chemicals.

Negligence/Duty

73. *Janette Thompson v. McDonald's Corporation*, No. B206000 (App. Cal. 06/15/09). Plaintiff, a drive-thru cashier at McDonald's in Los Angeles was shot by a man who walked up to the window asking for change. Defendant held a franchise agreement and operator's lease with McDonald's, which controlled how the restaurant was built, managed and maintained. McDonald's controlled the design of the restaurant, including the type of drive-through window, and chose a self-closing model by Ready Access for the location. Plaintiff filed a complaint against McDonald's, arguing that the company was negligent and owed her a duty of care to adopt safety measures to protect her from the shooting that occurred, and that the company caused her injury by failing to use and maintain a drive-through window that provided adequate security. The court found that Plaintiff failed to present evidence of a causal link between McDonald's alleged negligence and her injury, and granted summary judgment to McDonald's. Plaintiff appealed stating that McDonald's negligently failed to install a security drawer, rather than a window, which would have prevented the incident from occurring. The appeals court agreed and reversed the trial court's judgment. The court found that a jury could find that the design of the cashier's window allowed the assailant to commit the crime and reversed the trial court's judgment.

Negligence/Ingesting cleaning fluid

74. *Katherine Hanna Everhart v. O'Charley's Inc.*, No. COA08-1454 (App. N.C. 10/06/09). Plaintiff drank cleaning solution which appeared in her water glass. Defendant's manager would not comment on what the solution was and insisted on completing an incident report. Plaintiff's husband took his wife to the hospital where it was discovered that she had ingested Auto-Chlor System Solution-QA Sanitizer. Plaintiff filed a complaint against the restaurant for negligence and breach of the implied warranty of merchantability. A trial court awarded Everhart $10,000 in compensatory damages and $250,000 in punitive damages. O'Charley's appealed, arguing that the trial court erred in denying its motion for JNOV and its motion for a new trial on the punitive damages award, arguing that there was insufficient evidence that Plaintiff's injuries were related to willful or wanton conduct attributable to O'Charley's. The court noted that the manager made no effort to identify what had been served to Plaintiff and did not attempt to check the Auto-Chlor label for its first aid instructions. The court found that a jury could conclude that the Defendant's manager, choosing to protect Defendant from possible litigation over providing assistance to a customer who had been served a possibly toxic substance, acted with "conscious and intentional disregard of and indifference to" Plaintiff's safety, supporting a finding of willful or wanton conduct. The court, therefore, affirmed the ruling.

Negligence/Insurance

75. *Mauna Kea Beach Hotel v. Affiliated FM Insurance Co.*, 2009 WL 1227850 (D. Hawaii, 5/1/09). Two earthquakes struck off the coast of the island of Hawaii on

October 15, 2006. The epicenter was approximately 11 miles from the plaintiff hotels. Both suffered major damages and sought recovery from various umbrella policies. The hotels claimed $100 million in damages. The defendant insurance company that covered $20 million dollars in excess of damages in the amount of $30 million denied liability; the hotels sued for bad faith. The case was before the court on a procedural matter. Moral: Investigate your insurance company before buying.

Negligence/Proximate Cause

76. *Blagio Restaurant, Inc. v. C.E. Properties, Inc., et al*, __NYS2d__, 2009 WL 4068590 (N.Y. App. Div., 11/24/09). Plaintiff restaurant was a tenant at a mall. The eatery was damaged by a fire that was started when a vehicle belonging to an individual defendant spontaneously burst into flames. At the time the car was parked in property leased by the restaurant from defendant landlord C.E. Properties, Inc. The car owner was using the parking space while shopping at another tenant in the mall, Direct Buy. Plaintiff sued the landlord and Direct Buy claiming negligence in permitting the car owner to park where he did. The court dismissed the complaint, noting that defendants' actions in permitting the vehicles of Consumers' customers to park in the area designated for the restaurant was not the proximate cause of the fire.

Negligence/Security

77. *Basile v. Borgata Hotel Casino & Spa, Inc.*, 2009 WL 1286583 (N.J. App., 5/12/09). A hotel security guard who arranged for a comped room for three intoxicated women entered the room uninvited. He forcibly tried to kiss one of the women who was seated in the bathroom, and attempted to remove a towel she was wearing while yelling, "I want to see boobs." Following the incident the security guard was fired. The woman sued the hotel claiming insufficient supervision, negligent hiring, and inadequate training. The guard had received only one day of training but had served as a security guard at another hotel for three years without incident. The court granted the casino's motion for summary judgment and plaintiff appealed. The appeals court affirmed saying the plaintiff failed to prove that the training was "improper", or that the incident was caused by insufficient training. The court also determined the guard was not acting within the scope of his employment and therefore the hotel was not vicariously liable. Further, the hotel was not negligent in hiring the guard given his clean record.

Premises Liability/Duty of Care

78. *Dominic Novak v. Capital Management and Development Corp., et al.*, No. 08-7135 (D.C. Cir. 06/26/09). Plaintiff was suffered brain damage after being brutally beaten when leaving Defendant's bar at 2:30 a.m. in March 1998. The club's patrons were required to exit through a single door that led into an alley. Plaintiff filed a complaint against the club, and a district court initially granted summary judgment to Defendant finding that the club owed no duty of care to Plaintiff because the attack occurred in a

public alley and the criminal assault was not foreseeable. However, that decision was reversed, the case proceeded to trial and a jury found in favor of Plaintiff and awarded him damages of $4.1 million. On appeal, the club claims that it was entitled to judgment as a matter of law based on insufficient evidence presented by Plaintiff that the club has special use of the alley, that the crime was foreseeable, or that it violated a standard of care. Since patrons entered and exited the club through an alley that was not used by any other businesses, the court found that the club did make substantial special use of the alley. Based on the testimony of security guards, the court found that "the club cannot now seriously contend that an assault at its exit was not legally foreseeable." Since the attack ended immediately after the arrival of the officers, the court noted that a jury could conclude that security personnel stationed outside the exit could have deterred the attack. The court further declared that Defendant violated a national standard of nightclub security by failing to post security outside its exit at closing time until patrons dispersed. The court, therefore, affirmed the judgment of the district court.

Premises Liability/Negligence

79. *Jillian Tyler v. Dewey's Incorporated d/b/a Dewey's Flatiron, et al.*, No. 117213/06 (N.Y. 03/04/09). On Sept. 5, 2006, Jillian Tyler got into an altercation at Dewey's Flatiron with Keisha Morrison and sustained injuries. Defendant said it typically employed three bouncers on a given night, with two working the doors and a third roaming the club. In the event of an altercation, they were instructed to remove those involved from the club to avoid damage to the people or property inside. For private parties, the club said those renting out the bar were responsible for providing their own security, but that Defendant would provide one or two additional bouncers depending on the size of the crowd. On the night of the party in question, because it was Labor Day weekend, the bar had trouble staffing, and the party host was told to provide two additional bouncers and a metal detector. Plaintiff claimed that the club had inadequate security on the night she was injured. No one could testify to seeing the unidentified third bouncer—just the two stationed at the front door. Plaintiff argued that if a metal detector was necessary there still remains an issue about adequate security on the premises. The court agreed, finding that a jury question exists as to whether the number and location of bouncers was reasonable, and therefore denied Defendant's motion for summary judgment.

80. *Allen v. Boyd Tunica, Inc.* 2009 WL 1162618 (N.D. Miss, 4/28/09). A six year old was being bathed by her mother in the hotel shower/bath. The mother left the girl alone to rinse her hair. The girl slipped and fell on the "shower diverter knob that was engaged in a vertical position on top of the water faucet." The fall resulted in "her rectum being impaled" by the diverter knob, requiring a temporary colonoscopy. The tub had an anti-slip mat; the type of faucet was the most common design in existence; no prior such injuries had occurred at the hotel; the shower and tub were working properly at the time of the accident. The court found no evidence that the bath/shower unit was unreasonably dangerous and dismissed the case.

81. *Bass v. Gopal, Inc.*, ___SE2d ___, 2009 WL 1917283 (S. C. App., 7/1/09). Plaintiff and co-workers stayed at a Super 8 Motel for several months while performing refrigeration work out of town. One night a man followed one of the workers home from a convenience store and knocked on the hotel door. At first plaintiff ignored the locks, having identified the man through the window. Eventually plaintiff stepped out to direct the man to leave. He asked for money. When plaintiff refused the man shot plaintiff in the leg and ran off. He was never apprehended. Evidence established that while minor property crimes had occurred in the area, none involved attacks against a person. The motel's perimeter lighting was appropriate and the room doors were appropriate and met statutory requirements. The court noted Plaintiff should have stayed in his room and called security. For these reasons the court found that the hotel provided reasonable protection for its guests. Summary judgment in favor of the hotel was upheld on appeal.

82. *Lisa O'Brien v. Hilton Hotels Corp*., 66 AD3d 577, 886 NYS2d 594 (App. Div., 10/22/09). Plaintiff was injured at defendant hotel when a desk fell on and injured her. No evidence existed that defendant had actual notice of any defective condition in the desk. Defendant denied that it had received any complaints about the desk prior to plaintiff's injury, leading the court to conclude the hotel lacked constructive notice. As a result, the lower court's ruling denying the defendant hotel's motion for summary judgment was reversed and the motion granted.

Premises Liability/Open and Obvious

83. *Kimberly Iden v. Mondrian Hotel-Los Angeles*, No. B207387 (Cal. App. 01/07/09). Plaintiff sued the Defendant hotel after she broke her wrist from tripping over baggage which was left in a hallway in the guest room by the bellman. Plaintiff alleged that the bellman negligently set her bags in a walkway creating a dangerous condition. A district court granted summary judgment to the hotel, finding that the condition was open and obvious and that the hotel could not be found liable for the injury. On appeal, Plaintiff argued that the trial court erred by granting the hotel summary judgment by concluding that the placement of the luggage constituted an open and obvious danger. She contended that as a result of the bellman's negligence, the hotel was liable under the theory of respondeat superior. The court noted that it was not unreasonable to expect that several pieces of luggage partially blocking a doorway could constitute a tripping hazard that might go unseen by a guest. The court declared that a jury could find both the hotel and Plaintiff at fault. The court also declined to decide whether the condition created by the bellman was, in fact, an open and obvious hazard, and declared that it was best for a jury to decide that fact. The court therefore reversed the decision of the trial court.

84. *Rhoda Faller v. Endicott-Mayflower, LLC,* __SW3d__, 2009 WL 3878062 (Ky. App., 11/20/09). Plaintiff tripped and fell at defendant restaurant when she stepped up into the eatery's vestibule. She sued for negligent design of the doorway. The elevation of the walking surface changed at the threshold of the restaurant. Plaintiff had eaten there

three times before the accident, meaning that she had crossed the threshold at least seven times prior to falling. She stated in her testimony that she knew the elevation changed at the threshold. Based on the open and obvious doctrine, the trial court granted summary judgment to the restaurant. The ruling was affirmed on appeal.

85. *Shattuck v. Hotel Baronette, Inc.*, 2009 WL 3233390 (Mich. App., 2/10/09). If a guest is injured from a condition that is *open and obvious* (readily apparent to the guest), the hotel will likely not be liable. Instead, since the guest can perceive the danger, he should take precautions to protect himself. The Hotel Baronette in Novi, Michigan had installed a tile step abutting the exterior of the "extra-deep" bathtubs to aid entry and exit. A guest, while climbing out, tripped and fell, breaking her wrist. She sued the hotel and lost. Said the court, "A reasonable person in plaintiff's position would foresee the danger posed by stepping out of a bathtub of water with wet feet onto a hard tile step or floor." The court suggested several ways plaintiff could have avoided the accident including waiting for the tub to fully drain, drying herself off before exiting, or placing a towel or "other apparatus" to absorb the water.

86. *Bye v. Ritz-Carlton Hotel*, 2009 WL 456151 (Cal. App., 2/25/09). Plaintiff was a guest at the Ritz-Carlton Hotel in Pasadena. He ran the shower water for about three minutes to warm it prior to entering the tub. As he stepped in with one foot and attempted to bring in the other, he began to slip and ultimately fell. He sued the hotel. It proved that it had installed an anti-slip high-traction granulated coating to the tub three years prior and it was still in place at the time of the accident. The hotel engaged a slip and fall expert who opined that the "granulated coating is a safe and acceptable treatment for bathtub surfaces, and exceeds industry custom and practice for traction wet and dry." The court noted that surfaces of tubs are frequently slippery which is an open and obvious fact. Therefore the court decided the case in favor of the hotel.

Premises Liability/Slip and Fall

87. *Lela Ciciora v. CCAA, Inc*., et al., No. 08-1099 (7th Cir. 09/04/09). Plaintiff slipped on ice outside Defendant's restaurant when she was on her way to pick up her takeout order. Earlier that day, a restaurant employee cleared the snow on the sidewalk. Plaintiff filed a complaint against the restaurant's owners arguing that the restaurant failed to provide a reasonably safe means of ingress into its property and that it was negligent in its removal of snow and ice outside its entrance. A district court granted summary judgment to the Defendants on all charges and Plaintiff appealed. The 7th Circuit Court of Appeals noted that Plaintiff produced evidence that Defendant voluntarily removed the snow and ice from the walkway on a regular basis and that there was an informal, unwritten agreement between the restaurant and the owner that the restaurant would clear the sidewalks. Plaintiff failed to show her injury was a result of Defendant's failure to remove the ice. The court noted that Plaintiff stated that the sidewalk was clear and dry and that ice was not visible when she began to walk on it, and that she presented no evidence that the ice on the walk was anything other than a

natural formation. The court affirmed the district court's grant of summary judgment to Defendants.

Service Mark Infringement

88. *Dominic's Restaurant of Dayton, Inc., v. Mantia,* 2009 WL 1838282 (S.D. Oh. 6/24/09). The court issued a preliminary injunction barring use by defendant of the restaurant name "Dominic's". The name's owner had been in business for 50 years. Although the restaurant had closed two years earlier, the owners still marketed various products – including sauces, dressings, and other Italian foods – using the Dominic's mark. The court determined the name had acquired a secondary meaning. It also found that the alleged infringer was causing a likelihood of customer confusion, and had probably chosen the name intending to divert some business from the mark's owner. Defendant claimed to have cured the problem by changing its name to Duke's and its menu from an Italian eatery to a steak house. The court nonetheless found lingering damages and mandated in the preliminary injunction that defendant use only the steak house menu.

Statute of Limitations

89. *Bertucci's Corp. v. Viny T's Restaurant,* 2009 WL 3839011 (Superior Crt, Mass; 10/20/09). Plaintiff slipped and fell on a wet floor at defendant's restaurant, sustaining injuries. She incorrectly sued the restaurant in the name of its trademark which is not a legal entity. Six months later, and after the statute of limitations had passed, plaintiff moved to file an amended complaint to include the correct defendant's name; the court granted the motion. Defendant objected because of the timing issue. The court held that a plaintiff can, in the court's discretion, and even after the passage of the statute of limitations, substitute a new defendant for the one named in the original complaint provided the claims in the amended complaint arise out of the same conduct as that alleged in the original complaint, and the original complaint was timely-served and valid. Further, there must be no evidence that the newly added defendants were prejudiced.

Suspension of Entertainment License

90. *Gainsboro Restaurant, Inc. v. City of Boston,* 913 NE2d 932, 913 NE2d 932, 2009 WL 3047499 (Mass. App. Ct., 9/25/09). Petitioner operates a restaurant. Its entertainment license was suspended for one day because a patron was found dead at the bottom of cellar stairs which are accessible from the kitchen. Per the restaurant's entertainment license, only three rooms had been designated for patrons and certified as safe; the kitchen was not among them. The licensing board found that an employee should have monitored patrons so they did not enter private areas of the establishment not open to the public. On appeal the court ruled that a license suspension must be supported by violation of a law, rule or regulation. Here, no claim was asserted that any law, rule or regulation had been violated. In reversing the licensing board's decision and finding

for the restaurant, the court noted that an eatery's interest in its entertainment license is constitutionally protected.

Tipping

91. *Aaron Budrow v. Dave & Buster's of California, Inc*., No. B205026 (Cal. App. 2d. 03/02/09). Plaintiff sued it's employer in connection with a tip pooling policy which provided tips to those who do not provide "direct" table service. A district court granted Defendant's motion for summary judgment and Plaintiff appealed. In its review of the statutes, the California appeals court found that there is no distinction between "direct" and "indirect" table service, nor does it require that tip pools be limited to those providing "direct" table service. "Tip pools exist to minimize friction between employees and to enable the employer to manage the potential confusion about gratuities in a way that is fair to the employees," the court noted. The court said that the ultimate decision as to who should participate in the tip pool must be based on a reasonable assessment of the patrons' intentions. The court held that bartenders may participate in tip pools under the law.

92. *Jou Chau v. Starbucks Corp*., No. D053491 (App. Cal. 06/02/09). A California appeals court reversed a ruling that had ordered Starbucks to pay more than $100 million in restitution for allowing shift supervisors to share tips with baristas. The class action lawsuit on behalf of more than 100,000 former and current employees complained that shift supervisors were illegally taking employee tips, and a court awarded $86 million in restitution and $20 million in interest to the baristas. The appeals court, however, found that the original decision was improperly based and that the shift supervisors perform essentially the same job as the baristas. The court, therefore, concluded that the trial court erred by finding that Starbuck's tip policy violated California law.

Unemployment Insurance

93. *Amico v. Review Board of Indiana Department of Workforce Development*, 2009 WL 3878072 (Ind. App., 11/19/09). Plaintiff was terminated from her employment at a hotel and filed a claim for unemployment benefits. The Indiana Department of Workforce Development (hereinafter DWD) concluded that plaintiff was terminated for just cause and denied benefits. The decision was issued March 20, 2009. Plaintiff issued a notice of appeal on April 28, 2009, more than a month later. The relevant state statute requires that a notice of appeal of a worker's compensation matter be mailed within ten days of delivery of the DWD's decision. The appeals court noted that "It is well settled" that a time requirement concerning appeals is a condition precedent to the court acquiring jurisdiction. Non-compliance with the requirement results in dismissal of the appeal. Since plaintiff's notice of appeal was untimely, the lower DWD's decision in favor of the hotel was upheld.

Whistleblowing

94. *Mary Cooney v. Bob Evans Farms, Inc*., No. 08-10337 (E.D. Mich. 08/17/09). Plaintiff, worked as a server at a Bob Evans and Defendant claimed she made untrue and

malicious comments about coworkers and customers concerning the smoking of marijuana and was disciplined in accordance with the employee handbook. The GM found that no one could corroborate Plaintiff's allegations. Plaintiff sued under the Michigan Whistleblowers' Protection Act and civil rights laws for opposing discrimination based on her sex. Although there was sufficient evidence that Plaintiff was engaged in a protected activity since she stated that she was going to file a complaint, the court declared that she failed to show a causal connection between her threat and her termination. Plaintiff could not show that her discharge was retaliatory. Therefore, Defendant's motion for summary judgment was granted.

Wiretap Act Violation

95. *Brian Pietrylo, et al., v. Hillstone Restaurant Group d/b/a Houston's,* No. 06-5754 (D. N.J. 09/25/09). Plaintiffs alleged that Defendant violated the federal Wiretap Act, state surveillance laws, state and federal stored communications laws and terminated their employment in violation of public policy and invaded their privacy. The employees voluntarily dismissed their wiretapping claims after Defendant showed during discovery that it did not intercept any electronic communications. A jury trial found that Defendant did violate federal and state stored communications laws by accessing Spec-Tator, an invitation-only chat group on MySpace.com, without authorization on at last five occasions, and that the restaurant acted maliciously. The jury, however, found that Defendant did not violate the employees' privacy. The court also found that the employees presented evidence that Defendant's managers accessed the Spec-Tator account on several different occasions, knowing that they were not authorized to access the contents but did so anyway.

Workers Compensation

96. *Batiste v. Interstate Hotels & Resorts*, __So.3d__, 2009 WL 3177044 (La. App., (10/5/09). Plaintiff was injured at work when a pipe connected to an overhead door fell and struck him on his left shoulder and neck. Nine months later he developed neck pain and right arm pain, and claimed injury to his cervical spine. He sought unemployment benefits but was denied. He therefore appealed. When he was being treated soon after the accident the doctor's examination of his cervical spine revealed no abnormalities. Given the totality of the circumstances the court determined that plaintiff was not entitled to the presumption of causal connection between the accident and plaintiff's cervical problem. The lower court's decision was affirmed.

97. *Golden Nugget Hotel and Casino,* 2009 WL 3711621 (Sup. Crt., Nev., 11/2/09). Respondent slipped and fell while working as a cook. The hearing officer found both injury to respondent and the necessary causal connection between injury and employment. On appeal the court concurred noting respondent's credible testimony, the medical reports in evidence from several doctors, and respondent's treating physician. Appellant hospitality facility claimed the injury was preexisting. Respondent was able to prove that, while he did have "substantial preexisting conditions", the accident resulted in entirely new injuries.

98. *Slusher v. Wonderful House Chinese Restaurant, Inc.*, 217 P.3d 11 (Sup Crt. Kan., 10/9/09). Plaintiff was employed by defendant restaurant. While working he fell and shattered his elbow. The restaurant opened December 6, 2007; the accident occurred twenty days later – December 26, 2007. The restaurant did not have workers compensation insurance coverage on that date. Plaintiff filed a claim. The Kansas workers compensation law exempts from coverage businesses with a gross payroll of $20,000 or less for the calendar year when the injury occurred. Because the restaurant did not open until December, 2007, its payroll for 2007 - the year plaintiff was injured - was substantially less than $20,000. Plaintiff claimed that denial of benefits was contrary to the intention of the workers compensation system. The court nonetheless denied benefits. While recognizing the "harsh result," the court said it was "powerless to change" the outcome "without rewriting the statute," a role for the legislature.

99. *Babineaux v. L'Auberge Du Lac Hotel*, __So.2d__, 2009 WL 530102 (La.App. 3/4/09). A cocktail waitress at the L'Auberge du Lac Hotel & Casino in Louisiana was injured when she was hit by a limousine driven by the hotel's chauffeur while walking from her car in the casino's outside parking lot. She sued for negligence; the hotel claimed her remedy was limited to workers compensation and so sought dismissal of the lawsuit. The case was referred for further consideration. Facts that will bear on the outcome include whether the parking lot was for employees only; and whether the entrance she was intending to use was an employee entrance. If so, workers compensation will likely apply.

100. *Simmons v. Comfort Suites Hotel*, __A2d __, 2009 WL 886930 (Md. App., 3/31/09). A night auditor at a Comfort Suites Hotel in Chestertown, Maryland was attacked with a baseball bat during an attempted robbery. She suffered severe traumatic brain injury and multiple skull fractures. The hotel did not contest the compensability of her claim and paid for her medical treatments. The hotel contested her request for a home security system. The court noted that a home security system is not typically viewed as a form of medical treatment covered by workers compensation. Nonetheless, in this case the employee's treating neuropsychologist recommended it to reduce fear and anxiety which caused the employee insomnia. In these "unique circumstance" the cost of the security system may be covered.

Zoning

101. Dhillan *d/b/a/ Maxim's Restaurant v. City of Stockton, Ca*. 2009 WL 1617779 (E.D.Ca, 6/9/09). Plaintiff restaurant wanted to institute live entertainment but the municipal code required a use permit. Plaintiff claimed the ordinance violated the First Amendment by giving "unfettered discretion" to town officials and thus imposes an impermissible prior restraint. The court granted a preliminary injunction barring enforcement of the statute saying, "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional.