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

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February 8-10, 2012
Houston, Texas

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

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

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

She has written several textbooks including Hotel, Restaurant and Travel Law and New York Cases in Business Law. In 2011, she published *Law Made Fun through Harry Potter's Adventures*. She also co-authors Criminal Law in New York, a treatise for lawyers. She writes a column for Hotel and Motel Management Magazine entitled, *Legally Speaking*, and a blog for Cengage Publishing Company on the law behind the news.

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

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

Professor Morris is a past president of the Greater Rochester Association for Women Attorneys, Alternatives for Battered Women, Inc, the Northeast Academy of Legal Studies in Business, and Text and Academic Authors Association, a national organization that advances the interests of academic authors. She also is a past Dean of the Monroe County Bar Association Academy of Law and past president of Brighton Kiwanis. In 2009, she won the Humanitarian Award, conferred by the Monroe County Bar Association and was named a Woman of Distinction in 2011.

Her favorite volunteer activities include being a Big Sister in the Big Brother program, which she has done for 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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DIANA S. BARBER
5925 Masters Club Drive
Suwanee, GA 30024
(770) 813-9363
dsbarber@gsu.edu

Diana S. Barber, J.D., CHE, is a Lecturer at the Cecil B. Day's School of Hospitality Administration in the J. Mack Robinson Business College at Georgia State University, Atlanta, Georgia; where she has taught since the summer of 2003. She teaches hospitality law and an introductory course in hospitality. She is also the Program Director of the School of Hospitality's Study Abroad program including a 3-week summer course on European Hospitality Experience to Spain, France, Monaco, Italy and Switzerland.

Ms. Barber is a recipient of the J. Mack Robinson College of Business Teaching Excellence Award in 2011 and was recently awarded 2011 Study Abroad Program Director of the Year by Georgia State University. In addition, Ms. Barber is the recipient of the 2010 Hospitality Faculty of the Year award. Ms. Barber is a member of Phi Beta Delta, an honor society for international scholars. Ms. Barber also serves as the faculty advisor to the GSU student chapters of the AH&LA and the Global Soap Project.

Ms. Barber continues to be a hospitality legal consultant specializing in providing education to hospitality companies on preventative measures to reduce legal exposure, as well as a full range of legal services to hotels, motels, restaurants, event planning companies and clubs. She has over twenty-four years of legal hospitality experience. Diana began her law practice as an associate attorney at King & Spalding in Atlanta, Georgia after graduating cum laude from Walter F. George School of Law at Mercer University in Macon, Georgia. She then spent over fourteen years with The Ritz-Carlton Hotel Company, LLC serving as vice president and associate general counsel. She is a member of the State Bar of Georgia, G.A.H.A., American Hotel & Lodging Association and the Georgia Hotel & Lodging Association.

Ms. Barber has given numerous presentations for hospitality related associations and hotel companies and has written many articles for hotel/motel security periodicals, meeting planner periodicals, the Georgia Restaurant Forum, Hotel-Online and the American Hotel & Lodging Association. Since 2007, Ms. Barber has been on the editorial board of Hospitality Law monthly newsletter. She also writes a monthly legal Q&A column for the Georgia Hotel & Lodging ("GHLA") Association newsletter.

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

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ADA/Facility

1. *Morton's of Chicago/North Miami Beach, LLC, v. Bermudez, et al.,* 53 So.3d 369 (Fla. Ct. App. 12/26/11). Bermudez was injured in a fall at Morton's Miami Beach restaurant and subsequently filed a complaint against the restaurant for violations of the Americans with Disabilities Act and the Uniform Fire Code and Life Safety Code. A jury returned a verdict in favor of the restaurant, but the trial court granted him a new trial based on his claims that he was precluded from allowing several experts to testify about the ADA deficiencies in the restaurant. Bermudez retained two experts to testify on temporary deviations he observed during his visit to Morton's in the aisle where Bermudez fell and ADA violations. The court concluded that expert testimony on possible violations of the Life Safety Code was irrelevant, because there were no temporary obstacles in the aisle when Bermudez fell. The court also found that the testimony of the ADA expert was false. The booth where Bermudez fell was produced at trial and an inspection of the booth showed that the leg did not protrude past the tabletop. The appellate court declared that the trial court abused its discretion and reinstated the jury's verdict of no liability.

2. *Fox v. Morreale Hotels, LLC,* 2011 WL 5439789 (D. Colo., 11/9/11). Defendant owns a hotel building and rents first floor space to a Mexican restaurant. The space was renovated before the restaurant opened. Some booths and tables are raised about one-step from street level. Those elevated areas, totaling 840 square feet out of 3,390, were installed during renovations. They are not accessible to wheelchairs. Plaintiffs are members of a disability rights advocacy organization. Accessibility standards of the Department of Justice required that no alternation be made that decreases accessibility. Here, the alterations created a new barrier to wheelchairs. Partial summary judgment for Plaintiff was thus granted.

Casino

3. *Miller, et al., v. PNK d/b/a L'Auberge du Lac Casino and Hotel,* __So.3d__, 2011 WL 4578588 (La. App., 10/5/11). Plaintiffs were gambling at the L'Auberge when a casino employee informed one of the Plaintiffs to stop drinking, and requested that she leave the casino. After cashing out, the couple began arguing with the casino staff. A security guard tried to remove Plaintiff's cell phone to stop him from taking pictures and he was tackled to the floor. He claimed the guard placed his knee in the back of his leg and

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punched him in the face, causing personal injuries. The videotape did not support the allegation. and the security supervisor concluded that the officers acted in accordance with casino policy in their attempt to subdue the Plaintiffs. A jury ruled in favor of Defendant, and Plaintiff filed a motion for judgment notwithstanding the verdict, which the court denied. On appeal, Plaintiff argued that the trial court erred by refusing to grant his JNOV. The court said that Plaintiff never stated which instructions the jury failed to follow. Nevertheless, in reviewing the jury's findings, the appellate court noted that a "determination of excessive or unnecessary force is a finding of fact which may not be disturbed unless: (1) the record evidence does not furnish a sufficient basis for the finding; or (2) that finding is clearly wrong." The appellate court held that in reviewing the evidence, reasonable people could conclude that Defendant exercised reasonable care and did not use excessive force in removing Plaintiff from the casino. The appellate court dismissed Plaintiff's arguments and affirmed the ruling in favor of Defendant.

4. *Adamar of New Jersey, Inc., et al., v. Luber*, 2011 WL 1325978 (D. N.J. 03/30/11). Tropicana Casino & Resort filed a complaint seeking compensation from a high-end customer, Defendant, for breach of contract as Defendant executed three counter checks during one evening. Defendant signed the checks for a total of $220,000. When the casino attempted to collect from his bank, the request was denied due to insufficient funds in the account. Defendant argued that the casino employees continued to serve him alcohol despite the fact that he was already visibly intoxicated. He claimed that he was legally incapable of entering into a contract with Plaintiff, making the purported agreement null and void. The court found that questions remain with respect to the casino's claim for breach of contract and as to the level of intoxication. The court found that a fact-finder could find that Defendant was intoxicated at the time that he executed the counter checks, and that a jury should decide whether Defendant was intoxicated to such a degree to make Defendant incapable of entering into a valid contract.

Class Action

5. *Bevrotte v. Harrah's New Orleans Hotel & Casino,* 2011 WL 4634174 (E.D.La., 10/4/11). Plaintiff's son, a non-smoker, died of cancer allegedly from exposure to second-hand smoke during his 15 years employment as a poker dealer at Harrah's Casino. Plaintiff seeks certification of a class action to include all employees at the casino who "were, are or in the future will be exposed to unsafe levels of second-hand smoke." The court rejected the class. While finding that common questions exist concerning the existence of a duty and its breach, the court also determined that issues of causation and damages were unique to each plaintiff and would require a mini-trial. Thus the efficiencies achieved by forming a class would be frustrated with the "endless series of time-intensive factual inquiries about each plaintiff. . . ".

Constitutional Rights

6. *Steptoe v. City of Syracuse,* 2011 WL 6012941 (N.D.NY, 11/1/11). Plaintiff continually wandered around Defendant hotel although not a guest. He was directed to stay away but nonetheless returned repeatedly. Plaintiff was charged with trespass and the case was eventually dismissed. Plaintiff sued pro se for violation of constitutional rights and

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sought $30 million in damages. A claim of unreasonable search and seizure rested on the hotel's alleged seizure of his driver's license when he ordered alcohol. The court dismissed this cause of action noting that examination of identification is "entirely lawful" to confirm that a customer is eligible to purchase alcohol. Plaintiff also claimed a due process violation.based on his arrest for trespass. The court rejected this claim also, finding that the arrest was based on a lawfully filed criminal complaint and a resulting arrest warrant. Finally, Plaintiff claimed an equal protection violation alleging racial profiling and differential treatment based on his being African-American. This claim too was dismissed because Plaintiff presented no evidence that he was treated differently from non-minority individuals.

Contracts/Breach

7. *Solid Concepts, LLC v. Fallen Soldiers, Inc.*, 2011 WL 1375578 (D. Md., 4/12/11). Plaintiff affiliated with a group of organizations that planned to host The African and International Friends Inaugural Ball to commemorate the inauguration of President Barack Obama. They contracted with Defendant Gaylord National Resort and Convention Center where the Ball was to be held. Plaintiff signed a block contract to reserve 576 rooms and prepaid a nonrefundable deposit of $1,155,875.44, which represented the full cost of all the rooms reserved. Ultimately, none of the block was reserved and Gaylord National sold some of the rooms to other guests. Plaintiff sues for breach of contract and unjust enrichment, seeking reimbursement for the rooms Gaylord rented. Gaylord defended that none of Plaintiff's guest was denied a room. The court held that Plaintiff stated a claim for breach of contract that can proceed.

Contracts/Non-Compete

8. *Inland American Winston Hotels, Inc. v. Crockett*, 712 SE2d 366 (Crt App, NC, 6/7/11). Plaintiff, owner/operator of many hospitality properties throughout the United States, employed Defendants. Following a merger, Defendants quit and opened a competing company. They had signed a non-compete agreement with Plaintiffs precluding them from "soliciting, recruiting or inducing" Plaintiff's employees to work for them without Plaintiff's express permission. Soon after the merger, both Plaintiff's chief accounting officer and the director of development went to work for Defendants. Plaintiff sued for breach of contract. Defendant proved that one of the two former employees was terminated by Plaintiff and the other quit before contacting Defendants for employment. Contrary to Plaintiff's assertion, the mere hiring of Plaintiff's former employees did not constitute "soliciting, recruiting or inducing".

Copyright Infringement

9. *Nova Design Build, Inc. v. Modi*, __F.3d__, 2011 WL 3084929 (7th Cir., 10/27/11). Plaintiff architectural firm prepared designs for the construction of a Holiday Inn Express in Waukegan, Illinois. The parties had a falling out. Defendant hotel owner paid Plaintiff money owed and proceeded to build the facility per Plaintiff's designs. Plaintiff sued claiming copyright infringement. The court determined that the designs were not sufficiently original to qualify for copyright protection. Instead, they were "for the most part, based on the Holiday Inn Express prototype." Features added by Plaintiff, including

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an extra floor, larger meeting area, different closet and door placements in the room, and different pool, exercise and laundry areas, were determined by the court to be "devoid of originality." The additional floor was identical to the floor layout of the prototype. The other features were specifically requested by the hotel owner, mostly through written requests accompanied by graphic designs.

Discrimination/Racial

10. *Admiral, et al., v. Hilton Scranton & Conference Center, et al*., 2010 WL 5300808 (M.D. Pa. 12/20/10). Getaway Weekend Vacations sold ski trip packages to 118 people to take place at Defendant's hotel. A group of black purchasers, contended that they were subjected to discrimination at the hotel on the basis of their race. Defendant said that although the ski trip participants may have had a bad trip, the black guests were treated no differently from white guests and that the hotel did not violate any federal laws. The court found that the guests could proceed with their charges of racial discrimination under § 1981. The court declared that the guests established a prima facie case because they are a racial minority, and were allegedly treated worse than white guests at the hotel. The court, therefore, denied the hotel's motion for summary judgment.

Dram Shop

11. *Built It and They Will Drink, Inc., et al., v. Strauch*, 253 P3d 302 (Colo. 06/06/11). Plaintiff was stabbed by an intoxicated patron a block or so away from a nightclub on New Year's Eve. Plaintiff's complaint against the nightclub alleged negligence, premises liability and dram shop liability based on his belief that the club continued to serve alcohol to the visibly intoxicated assailant while the assailant was in the nightclub. Based on the conclusion that the assault was not foreseeable and that the nightclub's duty to Plaintiff ended when Plaintiff left the nightclub, the trial court dismissed all claims. The court of appeals reversed on the dram shop liability claim, declaring that it did not require or permit consideration of foreseeability when assessing liability under the statute. The nightclub petitioned the Colorado Supreme Court for certiorari to determine whether foreseeability was appropriate in determining liability under the state's dram shop laws. The Supreme Court declared that the plain language of the statute defines the criteria for proximate cause and liability but makes no mention of foreseeability. The court said that the law defines proximate cause in terms of the circumstances, which eliminates foreseeability from the analysis and the lack of foreseeability in the law does not transform it into a strict liability statute. A Plaintiff must still prove that the liquor licensee had "willfully and knowingly" served a visibly intoxicated person. The Supreme Court affirmed the judgment of the appellate court in determining that liability under dram shop laws does not require that the Plaintiff's injury be a foreseeable consequence of the sale or service of alcohol.

12. *Komoroski v. Deciccio,* 2011 WL 1565869 (Conn. Super. Ct. 04/01/11). Plaintiff was injured when an intoxicated driver, Deciccio rear-ended his vehicle and he filed a complaint against Danny O's Bar and Grill, alleging violations of Connecticut's Dram Shop law. Prior to the accident, Deciccio had been drinking at Danny O's but later went to another bar, The Copper Tavern, for more drinks. Danny O's moved for summary

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judgment arguing that Deciccio was not intoxicated when he was served alcohol at the bar. The court declared that Plaintiff's own testimony demonstrated that Deciccio did not appear visibly intoxicated while he was served alcohol at Danny O's, and presented no evidence that he was "so affected in his acts or conduct that the public" could readily know that he was intoxicated. The court declared that Plaintiff could not state a claim against Danny O's bar and granted the bar's motion for summary judgment.

13. *Mancision v. Hyatt Hotel Corp., et al.*, 2011 WL 5101565 (S.D. N.Y. 10/26/11). Plaintiff filed a complaint against Defendant, alleging that while dancing at a wedding reception at Hyatt's Morristown, N.J., location, another guest grabbed her arm without consent and tossed her to the floor, causing her significant personal injuries. Plaintiff claimed that the guest was visibly intoxicated, and that the hotel staff continued to serve him drinks despite his intoxicated state. She claimed that she was entitled to $1 million in damages for Defendant's violation of the New Jersey Dram Shop Act. Plaintiff argued that the severity of her injuries provided evidence that the guest engaged in reckless conduct during his encounter with her. However, Plaintiff acknowledged that she had no firsthand knowledge of how intoxicated the guest was, or that Defendant served alcohol to him while he was in a visibly intoxicated state. Plaintiff argued that the perpetrator's conduct on the dance floor evidenced his intoxication. The court noted that to establish liability under New Jersey's Dram Shop Act, Plaintiff would have to establish that the hotel served alcohol to the guest while he was visibly intoxicated. Plaintiff failed to submit evidence that the guest was intoxicated, or that the hotel employees served him alcohol while he was in a visibly intoxicated state. Photographs of the wedding and reception did not show the guest drinking alcohol. The court held that Plaintiff's circumstantial evidence was insufficient and dismissed the complaint.

14. *Nokes, et al., v. HMS Host USA, et al.* __SW3d__, 2011 WL 4025405 (Mo. Ct. App. 09/13/11). The families of two individuals who were killed by a drunk driver filed a complaint against Defendants, alleging that the restaurant's employees knowingly served alcohol to a visibly intoxicated person. The drunk driver had been in Missouri earlier that evening drinking at a restaurant at the airport. Before boarding his flight, he consumed four "double" bourbon cocktails with soda between 4:30 pm and 6:30 pm, and he drank another cocktail while on the plane. The officers who arrested him stated that he had slurred speech, smelled of alcohol, had bloodshot eyes and a blood alcohol level of 0.169 percent. A county circuit court granted summary judgment to the Defendants. The victims' families appealed, arguing that the drunk driver's impairment from the alcohol would have been evident at the airport restaurant. The defense argued that since no one observed the impairment, there was insufficient evidence to demonstrate that he was visibly intoxicated. The court noted that the statue requires only that impairment be "shown," not that someone must literally observe a visibly intoxicated person. The court declared that given the facts and expert testimony, the drunk driver was in fact intoxicated while at the restaurant. Therefore, the court held that a genuine dispute existed concerning whether the drunk driver was visibly intoxicated. The court reversed and remanded the case.

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Employment/Arbitration

15. *Clark v. Ritz-Carlton New Orleans*, 2011 WL 2649981 (E.D. La. 07/06/11). An employee of the hotel hired as a cook filed a claim against the hotel for alleged illegal discriminatory behavior when the employee was suspended for insubordination. The employee claimed the suspension was racially motivated. The hotel filed a motion to dismiss arguing that the employee was bound to arbitrate the dispute because she signed an agreement to be bound by the hotel company's arbitration procedure for disputes of this nature. The hotel could not show where the employee agreed to arbitration, therefore the hotel's motion to dismiss was denied by the court.

16. *Peterson v. Excalibur Hotel Casino,* 2011 WL 5117884 (D. Nev., 10/27/11). Plaintiff worked at Excalibur Hotel Casino for 21 years. He aspired to become a locksmith and applied for various positions in the casino's locksmith shop. Several openings occurred and were filled by European-American employees, some with less seniority than Plaintiff. He sued for race discrimination. Soon thereafter he was terminated for alleged misconduct. The casino moved to dismiss because the applicable collective bargaining agreement required that two of Plaintiff's six causes of action be submitted to arbitration. The court dismissed those two claims (negligent infliction of emotional distress and negligent training and supervision) for failure to arbitrate; the remaining claims (Title VII race discrimination, retaliation, 1981 race discrimination) continued in court.

Employment/Discrimination/Age

17. *Ehrhardt v. Haddad Restaurant Group, Inc.*, 2011 WL 5117884 (11th Cir. 10/18/11). Plaintiff filed a complaint against his employer, alleging breach of contract, fraud, and that he was terminated in violation of the Age Discrimination in Employment Act. A district court granted summary judgment to Defendant and Plaintiff appealed arguing that the district court erred because it failed to consider the evidence he presented that age was the "but for" reason for his termination, that his compensation contract was binding even if he was an at-will employee. Plaintiff had been demoted to beverage manager and later terminated. Defendant said that it demoted Plaintiff because of poor sales and profits at his restaurant and poor management of the restaurant employees. Plaintiff failed to rebut the restaurant's decision to demote him over sales and profits so the court held that Plaintiff failed to establish that his demotion was pretext for age discrimination. The court also held that Plaintiff failed to show that he would not have been demoted or terminated "but for" his age because he failed to show that age was the reason for the restaurant's actions. The court also dismissed his breach of contract and fraud claims. Plaintiff was an at-will employee with no contract between himself and his employer and the court affirmed the lower ruling.

18. *Tam v. Harrah's Tunica Corp. Inc., et al.*, 2011 WL 5216969 (W.D. Tenn. 10/31/11). Plaintiffs filed a complaint against Harrah's Entertainment, Inc., alleging that the company discriminated against them on the basis of their age, in violation of the Age Discrimination in Employment Act. Defendant found Plaintiffs to be deficient in a number of performance areas. Plaintiff Williams, age 56, alleged that the supervisor mentioned on two occasions that a younger person should be doing her job. Plaintiff

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Tam, age 53, received two disciplinary write-ups, and was placed on a 90-day performance improvement plan. On Williams' claims, the court held that while Williams met the age requirement and suffered an adverse employment action, she failed to prove that she was qualified for the position she held or that she was replaced by a younger worker. The court also noted that Defendant offered her another position that would allow her to improve her leadership skills in a lower-pressure environment, and only terminated her employment when she declined that opportunity. On Tam's ADEA claims, the court held that she failed to show she was qualified for her position or replaced by a younger worker. The court noted that in the eight months leading to her termination, Tam's personnel records documented numerous concerns related to her job performance. The court granted summary judgment to Defendant on all claims.

19. *Colon v. Trump International Hotel & Tower,* 2011 WL 6092299 (S.D.N.Y., 12/7/11). Plaintiff, age 49, was terminated from her position as an Assistant Housekeeping Manager at the end of her 90-day probationary period. She claimed discrimination based on age. Her replacement was 29 years old. Plaintiff established a prima facie case. Defendant then presented evidence of several serious incidents of poor performance. Plaintiff did not offer any evidence to show that the Defendant's proffered explanation was false. Additionally, other employees in the Plaintiff's protected age group remained on the job after her termination. Further, Plaintiff did not complain of any age-related comments. Plaintiff's complaint was thus dismissed.

20. *Claus v. Intrigue Hotels, LLC,* 328 SW3d 777 (Mo. Ct. App. 12/28/10). The hotel appealed a trial court's award to a former housekeeper of damages in the amount of $200,000 for her claim of age discrimination. The court dismissed Defendant's argument that the trial court erred by excluding several pieces of evidence, and further noted that Claus's supervisor had years of human resources experience and was aware that terminating an employee because of age was illegal, justifying the award of punitive damages. The court affirmed the decision and award to Plaintiff.

Employment/Discrimination/Gender

21. *Rosario v. Hilton Worldwide Inc., et al., 2011 WL 336394* (E.D. N.Y. 01/24/11). Plaintiff, 54, filed a complaint for age and gender discrimination against Defendant, his former employer. He alleged that he was terminated from his position as housekeeping manager because of his age, and that his salary was less than that of female housekeeping managers. Defendant claimed that Plaintiff was terminated for repeated disciplinary problems and poor job performance. The court found that Plaintiff could not state a claim for discrimination under New York City Human Rights Laws, Title VII or the Age Discrimination in Employment Act. The court found that Defendant articulated a nondiscriminatory reason for terminating Plaintiff, and that his failure to satisfactorily complete a performance improvement plan was a legitimate reason for termination. The court granted summary judgment to Defendant on all claims.

22. *Sencherey v. Stout Road Associates, Inc.*, 2011 WL 499961 (E.D. Pa. 02/11/11). Plaintiff, a black native of Ghana, worked as a night auditor at the Defendant's hotel and

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claimed she was subjected to a pervasive and regular pattern of harassment and discrimination by the front office manager and human resources director. Plaintiff also was continuously denied a performance evaluation and believed the hotel denied her requests because of her gender, race, and origin, as well as to avoid giving her a salary increase. While on maternity leave, Plaintiff was told that she had to return to work immediately or be fired even though her doctor said she was not ready to return to work. She claimed she was fired for not returning at their request. The court, however, found that Plaintiff's claims were not supported by the facts. While she alleges that she was discharged while on maternity leave despite providing documentation that she was under medical care, the Defendant said Plaintiff failed to return to work after her 12 weeks of protected FMLA leave so her failure to return resulted in her voluntary resignation. Defendant also claimed that it applied its leave policies consistently to all employees. The court found Defendant provided evidence of a legitimate, non-discriminatory reason for terminating Plaintiff, and therefore held that Defendant was entitled to summary judgment on all claims.

23. *Bissett v. Beau Rivage Resorts, Inc.*, 2011 WL 4396135 (5th Cir. 09/22/11). Plaintiff filed a complaint with the Defendant's HR department alleging that she was subjected to a hostile work environment because another employee made sexually demeaning comments about her. After an investigation, HR found that the employee had violated the casino's policies, but also declared that Plaintiff, who is Caucasian, contributed to the environment by initiating sexual conversations with co-workers. Two years later, a black male subordinate of Plaintiff complained about her behavior stating that she regularly made inappropriate age, sex, and race-related comments to and about other employees. HR suspended Plaintiff. A district court granted summary judgment to the Defendant on all of Plaintiff's claims. She appealed the decision as to the race, and sex discrimination, and retaliation claims. The appellate court affirmed the ruling finding that Plaintiff failed to show she was terminated illegally. The court also found no evidence that HR acted with racial intent, since the record showed that HR investigated the complaints against Plaintiff in the same manner as all employees. The court held that district court correctly dismissed Plaintiff's charge of retaliation.

24. *Garcia v. Hampton Inn and Witter-Gortner v. Hampton Inn,* 2100 WL 5121131 (D. Colo., 10/28/11). Both Plaintiffs in this pair of cases are employees who claim discrimination based on sex discrimination, hostile work environment, wrongful termination, and retaliation. Both sued under Title VII. Defendant hotel moved for consolidation, claiming both discharges were based on the inn's decision to replace staff because the hotel was under performing and had multiple employee problems. Plaintiff Garcia alleges she was locked in her office by a co-owner of the hotel who screamed at her and threatened her while waiving a hunting knife. She was told her termination was based on allegations she participated in credit card fraud and padded her time card. The other Plaintiff alleged "routine harassment" by the same owner. She was told her termination was based on low hotel scores on customer satisfaction surveys, and she was accused of having friends and relatives "stay improperly" at the hotel, and of

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participating in a credit card scam. Noting the similarities in the two cases, the court granted consolidation, saying it would be "appropriate and efficacious."

Employment/Discrimination/National Origin

25. *Beyene v. Hilton Hotels Corp.*, __F.Supp.2d__, 2011 WL 4527066 (D. D.C. 09/30/11). Plaintiff filed a complaint against his employer, the Defendant, alleging discrimination, retaliation, and harassment, as well as intentional infliction of emotional distress, and negligent retention. Plaintiff, an Ethiopian native, worked as a food server in the room service department. Plaintiff claimed that two of his coworkers had threatened to kill then-President George W. Bush, and made comments about favoring terrorist organizations, and denouncing Christianity. He claimed that when he reported their behavior to federal agents and his employer, that the two began to threaten him, and harassed him particularly when they saw him reading the Bible at the workplace. He said he complained to Defendant about the harassment, but that it continued for nearly three years. When Defendant received Plaintiff's complaint, the company investigated and interviewed other employees, but could not corroborate Plaintiff's assertions. Plaintiff claimed that after he made the complaints, Defendant retaliated by giving him two unjustified "write-ups" and paid him a smaller percentage of gratuities than other room service attendants. He further complained that Defendant failed to accommodate his religious beliefs by denying his request to have Sundays off to attend church, however, the court dismissed those charges. Regarding his hostile work environment claim, the court held that Plaintiff could not proceed because he failed to show that the harassment was based on his religion or national origin. The court also dismissed Plaintiff's retaliation claim, finding that he failed to show he engaged in protected activity. As to Plaintiff's claims of negligent retention, the court found sufficient evidence to create a question of fact whether Defendant should have known that the co-workers' behavior was directed toward Plaintiff, so Plaintiff was allowed to proceed on those claims.

26. *De Los Santos v. Panda Express, Inc.*, 2010 WL 4971761 (N.D.Ca., 12/3/10). Plaintiffs, non-Asians, are employees of Defendant Panda Express, Inc. They sought promotions to managerial positions as lead cashier and lead counter helpers. They were denied the positions while Asian employees with less experience were promoted. Plaintiffs claim national origin discrimination. Defendant challenged Plaintiffs' standing to sue on the failure to promote claim with respect to any position other than the lead jobs for which the Plaintiffs had applied. The court ruled Plaintiffs had standing in reference to all managerial jobs. The court held however that Plaintiffs lacked standing on the claim Defendant failed to hire non-Asian employees directly into managerial positions since all Plaintiffs were hired in entry-level positions; none had been an applicant not hired for a managerial position.

Employment/Discrimination/Race

27. *Radford v. Union Here Local 2, et al.*, Nos. C-10-00745 EDL, C-10-2338 EDL (N.D. Cal. 06/29/11). Plaintiff, a cook at the St. Regis Hotel, was terminated for failing to comply with the hotel's policy on time and attendance requirements. Plaintiff sued on the basis of race and that his progressive discipline termination was retaliatory. Plaintiff

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admitted that no one made comments to him that were offensive or motivated by his race, but he said he believes that the hotel discriminates against black workers because two other black employees at the restaurant were all terminated within seven months. The hotel stated that one was fired before the end of his probation period for substandard work, and the other resigned. The court held that Plaintiff failed to prove race discrimination and held that Plaintiff's retaliation claim must fail because he provided no evidence that he engaged in a protected activity prior to his termination. The court granted summary judgment to Defendant.

28. *Johnson v. Western Hotel & Casino, et al*., 2011 WL 4963039 (D. Nev., 10/19/2011). Plaintiff, a black security supervisor for Defendant was terminated for violating the company policy of assaulting a guest. Later that month, a white security supervisor was involved in an altercation with a guest and the security supervisor received a demotion, but was not terminated. Defendant alleged that Plaintiff failed to establish he was discriminated on the basis of his race. The court stated that Plaintiff performed his job adequately and that he and the white security supervisor were similarly situated because their disciplinary records were similar. The court held that Defendant failed to show that the white security supervisor's offense was distinguishable from Plaintiff's incident, and therefore denied Defendant's motion for summary judgment. The court held that the question remained as to whether Defendant's reason for terminating Plaintiff was pretext for discrimination.

29. *Smith v. Martin, et al*., 2011 WL 3703255 (E.D. N.C. 08/23/11). Plaintiff, a black maintenance worker at a LaQuinta Inn and Suites for less than a year, claimed he was terminated because of his race. He also alleges that the company violated the Fair Labor Standards Act by failing to pay him for certain overtime hours. Defendant claimed that Plaintiff received written warnings for failing to tell the front desk that certain rooms had been placed out of order, failing to pick up trash, and taking too long to run work-related errands. He also received counseling for exceeding his spending limit when purchasing supplies, as well as for poor performance and was subsequently fired. The court held that Plaintiff lacked evidence that Defendant terminated him because of his race. The court also dismissed Palintiff's overtime claims.

30. *Mikell v. Marriott International, Inc., d/b/a Philadelphia Marriott West*, 789 F.Supp.2d 607 (E.D. Pa. 05/19/11). Plaintiff, a black loss prevention officer at Defendant's hotel, filed a complaint alleging race discrimination and retaliation because he was not promoted to an accounting position which Plaintiff applied for but was not selected. Several years later, Plaintiff applied for the loss prevention supervisor position, and was informed in writing that he had not been selected. A white female, who had been working in a loss prevention role for the hotel three years longer than Plaintiff, was hired as the new supervisor. The court found that Defendant offered a legitimate, nondiscriminatory reason for terminating Plaintiff, and that Plaintiff failed to show the Defendant's reason for firing him was a pretext for discrimination. The court also dismissed Plaintiff's retaliation claim.

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31. *Ferguson v. Hilton Hotels Corporation*, 2011 WL 1485680 (S.D. Tex. 04/19/11). Plaintiff, a black cashier at Defendant's hotel claimed that she was discriminated against because of her gender and race. The court found that Defendant provided a legitimate, nondiscriminatory reason for hiring an Asian female over Plaintiff, and that Plaintiff could not show that she was better qualified since the other woman had a bachelor's degree. The court dismissed all claims with prejudice.

32. *Crosby v. Premier Entertainment Biloxi, LLC, et al*., 2011 WL 839540 (S.D. Miss. 03/07/11). Plaintiff, a black cashier, worked at Defendant's hotel for two months. Plaintiff said her first supervisor often made sexually explicit comments to the staff and also granted white workers certain privileges denied to black workers. Plaintiff also claimed that some coworkers used racially derogatory language to describe both guests and other employees. After Plaintiff made a complaint, Defendant required all workers in Plaintiff's area to attend a training session on harassment and discrimination. Plaintiff, however, did not attend. Plaintiff was subsequently terminated for insubordination by failing to sign disciplinary warnings and Plaintiff filed a complaint of discrimination against Defendant alleging that she was subjected to a racially hostile work environment and retaliated against for her complaints. The court stated that Plaintiff failed to show how coworkers' remarks or the supervisors' actions demonstrated discrimination as it relates to the casino's termination of her employment and dismissed Plaintiff's retaliation claim. Although the court noted that the harassment allegedly experienced by Plaintiff must be far greater to create a hostile work environment, Plaintiff's claim that her former supervisor taped a line on the floor and told only black cage employees not to cross it was differential treatment based on race, and the court ruled that the question of whether Plaintiff experienced a hostile work environment based on race should be left for a jury to decide.

33. *Mutua v. Texas Roadhouse Management Corp., et al*., 123 F.Supp.2d 954 (D. S.D. 11/10/10). Plaintiff, a black woman who worked as a server and trainer for Defendant, said that she was discriminated against on the basis of her race and subjected to a hostile work environment. Plaintiff stated that Defendant allowed customers to dictate the race of the serve and Plaintiff complained to the EEOC. Plaintiff was subsequently terminated for "customer complaints" and "a bad attitude," and she filed a complaint against the restaurant. The court found that Plaintiff alleged sufficient facts that she was subjected to a hostile work environment. The court ruled that a jury could find that a customer's continued discriminatory conduct and the restaurant's acceptance of that conduct could be sufficiently humiliating to the affected workers to create a hostile work environment. Denying Defendant's motion for summary judgment in part, the court found that Plaintiff presented a causal connection between her protected activity and her termination, finding that the restaurant's reasons for her termination could have been pretext and that she was fired in actuality for filing a discrimination complaint. The court found that Plaintiff failed to support her allegations of disparate treatment and breach of contract allegations, and granted summary judgment to Defendant on those two claims.

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34. Miles v. BG Excelsior, d/b/a The Peabody Little Rock, et al., 2011 WL 124300 (E.D. Ark. 01/14/11). Plaintiff, a black woman with blonde hair, claimed she was asked by a human resources employee to wear a wig during employee orientation because the hotel's "executives" would not approve of her hair color. Plaintiff said she complained to human resources multiple times that her supervisor was "picking" on her and mockingly sang the theme song to the Jeffersons, making reference to her race. Plaintiff resigned stating that her health had been deteriorating since she started working at the hotel. Management offered to transfer her to another department but she declined and filed a complaint with the EEOC for discrimination, retaliation and hostile work environment. The court found that Plaintiff received $2 more per hour than other newly hired seamstresses receive, and worked for Defendant's hotel for less than a year, making her ineligible for a raise per company policy, which she acknowledged with a signature. She also failed to show that she and the white seamstress were similarly situated with respect to work assignments and duties. The court dismissed Plaintiff's claims of disparate treatment based on race. The court rejected Plaintiff's argument that the Peabody's "southern history and tradition," including its guidelines for female associates that prohibits extremes in hair coloring, is discriminatory since it allows white employees to bleach their hair blonde but relegates blacks who do so to the back of the house. The court noted that the record showed that Plaintiff shared a workspace with other seamstresses and that the hotel made no attempt to "hide" her. Defendant had invited her to work as a bartender on occasion, an offer she accepted to make extra money. The court found that the former supervisor's comments about the Jeffersons were ill chosen, but did not support a finding for hostile work environment. The court dismissed the case.

Employment/Discrimination/Religion

35. *Abdel Nofal v. Jumeirah Essex House, et al.*, 2010 WL 4942218 (S.D. N.Y. 12/03/10). Plaintiff filed a complaint against his employer alleging discrimination based on race and religion, and accused his supervisors of creating a hostile work environment and terminating him when he complained about another coworker and the hotel's failure to accommodate his religious practices. Plaintiff was terminated for violating the hotel's anti-harassment policy. Plaintiff argued that his termination was pretext for his complaints over the hotel's failure to accommodate his religious observance and comments he made about another employee's inappropriate behavior. The court disagreed, finding that he failed to assert any facts of discrimination based on his race. In addition, the court said Plaintiff failed to distinguish between behavior characterised as racial bias and that which is religiously motivated. The court declared that even if the hotel was hostile to Islam—which it found unlikely considering the race and religion of the hotel owners—Plaintiff could not assume that religious discrimination as he alleged equals racial discrimination.

Employment/Discrimination/Sexual Orientation

36. *1212 Restaurant Group, LLC, et al., v. Alexander, et al.*, __NE2d__, 2011 WL 4578822 (Ill. App. Ct. 08/25/11). Plaintiff filed a complaint with the Chicago Commission on Human Relations, alleging that he endured harassment and wrongful termination on the basis of perceived sexual orientation while employed by Defendant. Defendant said that

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while they did call him names occasionally out of frustration, they said they knew he was not gay, and said Alexander never complained about it. The commission awarded Plaintiff $35,000 in emotional injury damages and $140,000 in punitive damages, along with approximately $85,000 in attorney fees. The appellate court affirmed the Commission's conclusion noting that ordinances prohibit discrimination due to "the actual or perceived state of heterosexuality, homosexuality or bisexuality." The court also noted the Commission's finding that it would be hard to imagine a work place "more objectively offensive to an employee, more viciously permeated with anti-gay vitriol" than what Plaintiff endured at the restaurant.

Employment/FLSA

37. *Simons v. Pryor's, Inc., et al.,* 2011 WL 6012484 (D.S.C. 07/26/11). Plaintiff filed a complaint against Defendant, a KFC franchisee, for herself and on behalf of other employees, alleging that the restaurant's policy and practice of making improper deductions from the salaries of managerial employees has caused them to lose "exempt" status under the Fair Labor Standards Act. The court found that Plaintiff failed to provide support for her assertions that the deductions made by the restaurant were improper and caused its managers to lose their exempt status under the FLSA. The court also declined to grant conditional certification of a collective action.

38. *Lyles v. Burt's Butcher Shoppe and Eatery, Inc., et al*., 2011 WL 4915484 (M.D. Ga. 10/17/11). Plaintiff filed a complaint against his former employer, Burt's Butcher Shoppe and Eatery, alleging that he was ordered to work as a cook off the clock once he reached 40 hours in a week due to the restaurant's efforts to evade Fair Labor Standards Act overtime requirements. The court noted that Defendant was aware of its obligation under the FLSA to pay an overtime premium, and that the restaurant's dual record-keeping system was to avoid its obligation. The court stated that this multi-year arrangement "establishes the willfulness" of Defendant's actions, allowing Plaintiff to recover unpaid overtime going back three years per the statute of limitations.

39. *Hines, et al., v. State Room Inc., et al*., __F.3d__, 2011 WL 5903863 (1st Cir. 11/28/11). Several employees filed complaints against their employers alleging that they were entitled to overtime under the Fair Labor Standards Act, claiming that although their employers categorized them as exempt administrative employees under the FLSA and their work did not involve sufficient discretion to satisfy the exemption. A district court found in favor of the Defendants and granted Defendants summary judgment on that claim. The workers appealed, arguing that their job duties did not meet the third prong required for an administrative exemption under the FLSA — whether their primary duty included the exercise of discretion and independent judgment with respect to matters of significance — but the court disagreed and the court held that the employees exercised discretion on matters of significance to their employers, stating that the. district court properly concluded that the employees were exempt under the administrative prong of the FLSA.

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40. *Schwerdtfeger, et al., Demarchelier Management, Inc., et al.,* 2011 WL 2207517 (S.D. N.Y. 06/06/11). Plaintiffs working at Defendant's restaurant claimed that they were not paid minimum wages or overtime and that Defendant unlawfully withheld tips and gratuities. Plaintiffs asked the court for conditional class certification for all current and former employees, and Defendant claimed that the Plaintiffs' arguments were without merit and that they are not similarly situated as to merit class certification. The court held that the Plaintiffs satisfied the minimal burden of showing that other similarly situated employees exist. Although Defendant argued that because some employees received tips and others worked in positions that did not customarily receive gratuities, the court declared that this distinction did not preclude conditional certification. The court noted that all of the Plaintiffs claimed they did not receive minimum wage or overtime, contending that Defendant should not have received a tip credit because it improperly retained gratuities, making them similarly situated.

41. *Politron, et al., v. Worldwide Domestic Services, Inc., LLC, et al*., 2011 WL 1883116 (M.D. Tenn. 05/17/11). Plaintiff, a cleaning vendor, filed a complaint against Defendant on behalf of himself and others for unpaid wages and overtime in violation of the Fair Labor Standards Act. Brinker, one of the Defendants, filed a motion to dismiss, arguing that it was not a joint employer, but that the company had an outsourcing relationship with Worldwide to have its restaurants cleaned after hours. The court granted summary judgment to Brinker.

42. *Fast, et al., v. Applebee's International, Inc., et al*., 638 F.3d 872 (8th Cir. 04/21/11). Current and former employees at Applebee's restaurants brought a suit claiming that Defendant violated the Fair Labor Standards Act's tip credit rules. A district court denied Defendant's summary judgment, noting that the 1988 Department of Labor handbook requires employers to pay a full hourly rate to tipped workers if their non-tipped duties exceed 20 percent of their overall work. Defendant appealed and argued that the court's conclusion was inconsistent with the express language in relevant statutes and regulations. Defendant argued that the statutes in the FLSA focus on the occupation, not the specific duties performed, which is why the restaurant is entitled to take the tip credit for the entirety of a server's or bartender's shift, so long as their earning were sufficient to meet the tip credit rules. The court noted that "occupation" is not defined in the FLSA, but regulations do recognize that one employee may perform more than one job for an employer, such as an individual who works as a bartender and a maintenance man. Under the FLSA, such an employee would receive the full hourly rate for his maintenance work, and the tip credit rate for performing bartending duties. The court ruled that the district court properly concluded that the handbook's interpretation of "substantial" non-tipped work as it applies to the tip credit should govern this case and affirmed the decision.

43. *Gionfriddo, et al., v. Jason Zink, LLC, et al.,* 2011 WL 2791136 (D. Md. 03/11/11). Plaintiff and two other former employees working for taverns owned by Defendant claimed that Defendant unlawfully participated in the taverns' tip pools. Zink also worked as a bartender at his two taverns. Defendant conceded that he worked as a bartender and participated in the tip pool, but he argued that even though he is an

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employer, he should be permitted to share in the tip pool because he is also a tipped employee. The court agreed with Plaintiff and the other bartenders, stating that the courts have consistently agreed that employers may not participate in employee tip pools. In some circumstances it may be theoretically possible for one to be classified as both an employer and employee. In this case, Defendant, as sole owner of both taverns, is unquestionably an employer. As the owner, he was the sole beneficiary of the "tip credit" provision of the FLSA and therefore prohibited from participating in the tip pool.

44. *Garcia v. La Revise Associates LLC, et al.*, 2011 WL 135009 (S.D. N.Y. 01/13/11). Plaintiff filed suit against his employer on behalf of himself and other employees claiming the group was owed unpaid wages and overtime compensation under the Fair Labor Standards Act and New York Labor Law. The court held that Plaintiff and the other bussers could not proceed with their claims, noting that the interactions between customers and the captains and banquet coordinator were more than de minimis and Defendant provided sufficient evidence that the owner had the sole authority to hire and fire employees and made all staffing decisions, including how the tip pool was to be allocated. The court declared that the inclusion of captains, bartenders and the banquet coordinator in the tip pool was proper under FLSA and under New York law. The court also found that Defendant properly paid service staff both straight and overtime hours at the tip-credit rates for non-trainees and full minimum wage for trainees.

45. Shahriar, et al., v. Smith & Wollensky Restaurant Group, et al., 659 F.3d 234 (2d. Cir. 09/26/11). Plaintiff and other servers at Smith & Wollensky's Park Avenue location in Manhattan filed a complaint alleging that Defendant violated minimum wage and overtime provisions of the Fair Labor Standards Act by failing to pay waiters for extra hours when their shifts lasted longer than 10 hours, and allegedly requiring waiters to share tips with ineligible employees. The employees moved to have their state law claims certified as a class action, which was granted and Defendant appealed, arguing that the court abused its discretion in exercising jurisdiction over the servers' New York State Labor Law claims, and that it erred in determining that the servers provided sufficient evidence to meet the standards for class certification. The court stated that the New York law and FLSA actions brought by the servers "arise out of the same compensation policies and practices of Park Avenue." Furthermore, the court noted that other circuits, including the 7th, 9th and D.C. Circuits have determined that supplemental jurisdiction is appropriate over state labor law class claims in an action where the court has federal question jurisdiction over FLSA claims in a collective action. The court also held that the Plaintiffs provided sufficient evidence to meet the standards for class certification. The class includes about 275 people to satisfy the requirement, all the claims derived from the same compensation and tipping practices, and the claims of the representatives appear typical of the claims of the class.

Employment/Negligent Hiring

46. *Venito v. Salverson, et al*., 31 Misc.3d 1244(A), 2011 WL 2464760 (N.Y. 06/21/11). Plaintiff was assaulted while playing beer pong, a known drinking game, at Defendant's restaurant. The bartender on duty unsuccessfully intervened twice during the altercation,

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and then retreated to safety behind the bar where he dialed 911. Plaintiff claimed that he suffered permanent, serious injuries and he filed a complaint against Defendant alleging that the bar was negligent in not providing adequate security, hiring, supervision, and training of its employees. Defendant's motion for summary judgment was denied. The court held that the bartender's failure to effectively intervene and promptly call for help inferred a deficiency in the bartender's hiring, supervision, and training. The court also ruled that Plaintiff did establish a prima facie case for liability under the Dram Shop Act. Although Defendant argued that the man who assaulted Plaintiff did not seem intoxicated, the court noted that common sense acknowledges that many individuals become aggressive when intoxicated, and that the man's aggressive behavior itself may have been sufficient evidence of intoxication.

47. *Wayman v. Accor North America, Inc. d/b/a Motel 6, et al*., 251 P.3d 640 (Kan. Ct. App. 03/18/11). Plaintiff was a guest at Defendant's motel and was injured by a car driven by the motel's general manager who was arrested for driving under the influence of alcohol. Plaintiff filed a complaint against Defendant alleging that the motel was vicariously liable for the general manager's negligent behavior and that Defendant negligently hired, retained, and supervised him. A district court granted summary judgment in favor of Defendant and Plaintiff appealed. Defendant argued it could not be held vicariously liable for the manager's negligence because the manager was not on duty at the time of the accident. Plaintiff argued that since the manager was required to live on the premises, it could be assumed that he was always on duty, and therefore the question should be left for a jury to decide. The appellate court disagreed and ruled that the manager was not acting within the scope of his employment when he struck and injured Plaintiff. The court noted that while the manager may have been on call, he had not performed any work-related duties, but instead spent the day at a bar. The court affirmed the district court's grant of summary judgment on Plaintiff's claims of negligent hiring, retention, and supervision. Plaintiff argued that Defendant should have known about the manager's drinking habit since he visited the local tavern daily. The court found no evidence that Defendant knew or should have known that the manager's drinking created an undue risk of harm.

Employment/Polygraph Protection Act

48. *Sanchez v. Prudential Pizza, Inc., et al.*, 2011 WL 5373976 (N.D. Ill. 11/02/11). Plaintiff worked as a phone clerk and hostess for Defendant's pizza franchise. Plaintiff alleged that her supervisor sexually harassed her by making comments about wanting to sleep with her and spank her. After she reported the accusation, the supervisor responded that the claim was a lie and that he would take a lie detector test to prove it. Defendant's supervisor asked Plaintiff if she would take one, too. Plaintiff was terminated and claimed that she was retaliated against for complaining about sexual harassment. Defendant said Plaintiff was terminated because she had nine incident reports on her record for action ranging from being tardy to not wearing her uniform. Plaintiff argued that the owner violated the EPPA which forbids any employer "directly or indirectly, to require, request, suggest, or cause any employee to take or submit to any lie detector test." Although there was no formal written request and Plaintiff did not take the test, the

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court found that the statement is at the very least an indirect suggestion that Plaintiff take a polygraph test, which falls within the prohibition of the EPPA. The court granted summary judgment to Plaintiff on this claim.

Employment/Retaliatory Discharge

49. *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper,* 17 A3d 676 (Crt. App. Md., 5/20/11). Former employee brought action against former employer for retaliatory discharge. The court gave the wrong jury instruction at trial, necessitating a new trial. The court instructed the jury that Plaintiff must prove that the exercise of her protected activity was a "determining" factor in her discharge. The law requires only that she establish her exercise of protected activity was a "motivating" factor.

Employment/Sexual Harassment

50. *Santiero v. Denny's Restaurant, et al.,* 786 F.Supp.2d 1228 (S.D. Tex. 04/13/11). Plaintiff, a server at a Denny's Restaurant claimed that her supervisor began harassing her the moment she began working by grabbing her bottom, demanding that she expose herself in order to be placed on the work schedule, and fondling her without her consent. After a few weeks, she reported her supervisor's actions. He was promptly suspended and terminated several days later. She did not complain of harassment after the supervisor's termination. Plaintiff filed a complaint for quid pro quo sexual harassment and hostile work environment and claimed that Defendant was vicariously responsible under state law for her sexual assault, assault, and offensive bodily contact, as well as intentional infliction of emotional distress, negligence and premises liability. The court granted summary judgment to Defendant on the majority of her claims. The court found that Plaintiff failed to establish a hostile work environment claim because Defendant reacted to her harassment complaint quickly and effectively. Plaintiff also failed to satisfy requirements for a quid pro quo harassment claim because she did not suffer a tangible employment action as a result of her supervisor's actions. However, the court declared that Plaintiff could proceed with several of her state law claims of vicarious liability against Defendant. The court stated that her supervisor acted as a "vice-principal" of the restaurant, and as such, his acts were "the acts of the corporation itself." Since the supervisor possessed substantial authority over his workers, the court said there was sufficient evidence to raise a genuine material of fact that the supervisor was a vice-principal, making Defendant vicariously liable under Texas law for her claims of assault, sexual assault, and offensive bodily contact.

Franchise

51. *Stuller, Inc., v. Steak N Shake Enterprises, Inc., et al.,* 2011 WL 2473330 (C. D. Ill. 06/22/11). Plaintiff, a franchisee of five Steak N Shake restaurants in Illinois, has been operating as a Steak N Shake franchise since 1939, making it the longest standing franchise of the company. In 2010, Defendant, which operates and grants franchises, adopted a policy requiring all franchisees to follow set menu and pricing, excepting only breakfast items, and offer all company promotions as published. Plaintiff said this policy was contrary to company custom, practice, and policy; which had always allowed franchisees to set their own prices and maintain custom menus, as well as choose which

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promotions it would offer. Plaintiff said that when it refused to implement the policy, it was sent default notices threatening termination of its franchises. Plaintiff filed a complaint against Defendant alleging that its agreement did not permit the company to set prices or require it to participate in all promotions, as well as breach of contract and violations of the Illinois Franchise Disclosure Act. Plaintiff showed that for 70 years it had set its own prices and chose which promotions to honor. A magistrate judge declared that the agreement between Plaintiff and Defendant was silent regarding whether Plaintiff can be required to follow the policy. However, the magistrate stated that Plaintiff failed to show that it would suffer irreparable harm if the injunction was not granted, noting that the company stayed afloat when it suffered a loss, and that if it chose to ignore the policy and have its franchise revoked, it would be self-inflicted. The district court disagreed with the magistrate's report but since the loss of a franchise can constitute irreparable harm, and since Plaintiff showed a likelihood of success on the merits of the case, the court granted Plaintiff a preliminary injunction. Although Defendant said it would be harmed by an injunction because it would send other franchisees the message that they can choose which directives to abide by, the court said the potential harm to Defendant does not outweigh the harm that Plaintiff would suffer if the franchises were terminated.

52. *Travelodge Hotels, Inc. v. Perry Developers, Inc.*, 2011 WL 5869602 (D.N.J., 11/22/11). Plaintiff was the Travelodge franchisor. Defendant was a Missouri franchisee. Per their contract, Defendant was prohibited from transferring the business without the franchisor's consent. Defendant nonetheless transferred its interest without notification to Plaintiff, prompting the franchisor to sue. A forum selection clause in the franchise agreement identified New Jersey as the location for lawsuits but was, by its terms, non-exclusive. Defendant sought to transfer this New Jersey case to Missouri. The court considered the following matters: each party's choice of forum, whether the claim arose outside the chosen forum, convenience of the parties and witnesses, location of relevant books and records, and the efficiency and economy of conducting the trial in one place or the other. The court found Missouri was the "center of gravity" of this case and so, because the forum selection was nonexclusive, the court granted Defendant's motion to transfer.

53. *Hardee's Food Systems, Inc., v. Hallbeck, et al*., 2011 WL 5307807 (E.D. Mo. 11/03/11). Plaintiffs were franchisees of Defendant Hardee's Food Systems, Inc., and the Plaintiffs claimed that Defendant breached the implied covenant of good faith and fair dealing by running "lewd" television advertisements and treating Plaintiffs less favorably than other franchisees. On the Plaintiffs' claim of the breach of the implied covenant of good faith for airing "lewd" ads, the court held that Defendant was entitled to summary judgment. The court found that Plaintiffs failed to provide evidence of bad faith on the part of Defendant in producing the ads, which they said appealed to their target demographic, males ages 18-49.

54. *Holiday Inn Franchising, Inc. v. Hotel Associates, Inc.*, __SW3d__, 2011 WL 657222 (Ark. App., 4/6/11). Plaintiff, a Holiday Inn franchisee, enjoyed a long and rewarding relationship with the hotel chain based on trust and loyalty. The franchisee evaluated a

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property in Wichita Falls, Texas. It needed a lot of work and so he sought a franchise of longer duration than the typical ten-year grant. The request was denied but he was told if he operated it appropriately, he would likely receive a license extension. Relying on this information the franchisee purchased the property, renovated it, and received high ratings for its operation. Prior to applying for relicensing, he made $3 million of renovations as required by Holiday Inn. Meanwhile, unknown to him, Holiday Inn was reviewing another franchise application in the area. Ultimately, the franchise was granted to the other property. Plaintiff sued for, inter alia, fraud. A verdict in his favor was upheld on appeal. He was awarded compensatory and punitive damages.

Insurance

55. *APMC Hotel Management, LLC, v. Fidelity and Deposit Company of Maryland*, 2011 WL 5525966 (D. Nev., 11/10/11). The Chief Financial Officer of Plaintiff hotel, the Alexis Park, embezzled in excess of $800,000 over a 22-month period. A portion was diverted from proceeds of a convention, part from accounts payable, and part from daily deposits. The hotel sought recovery from its insurance carrier. The policy limit was $500,000 per "occurrence." The hotel filed three claims, one for each category of money stolen. The insurance company acknowledged a valid claim but argued that the theft constituted only one occurrence. The insurance company thus paid $500,000 and the hotel sued for the balance of its loss. The policy's definition of an occurrence was, "All loss caused by, or involving, one or more employees, whether the result of a single act or series of acts." The court ruled the theft constituted only one occurrence and so granted summary judgment to the insurance company.

56. *Westport Insurance Corp. v. Choice Hotels International, Inc.*, 2011 WL 4804896 (M.D.Fla., 10/11/11). Plaintiff husband was killed after contracting Legionnaires' disease while in a spa tub at Defendant's hotel. The spa tub contained Legionella bacteria. Plaintiff sued Defendant which sought coverage from its insurance company. That company denied liability based on the policy exclusions for pollution and fungi or bacteria. The court concluded neither exception applied and directed the insurance company to indemnify the hotel.

57. *Encore Enterprises, Inc. v. Roberts Hotels*, 2011 WL 5357533 (M. D. Fl., 10/31/11). Plaintiff owned a hotel in Fort Myers, Florida that was damaged by Hurricane Wilma in October, 2005. Thereafter Plaintiff's insurance company issued a check to Plaintiff for $160,169 to cover the cost of repairs to the hotel. The check was lost and was reissued in 2008. In the interim, Plaintiff sold the hotel to Defendant. The replacement check was issued to Defendant by mistake. Defendant kept the check and refused to pay the money to Plaintiff. In this lawsuit, Plaintiff sought return of the money based on unjust enrichment as well as money had and received. The court agreed that Defendant did not have any right to the insurance proceeds and issued judgment in favor of Plaintiff.

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Jurisdiction

58. *Rainbow Hospitality, LLC v. Trevino*, WL 1642261 (Tex. App., 4/28/11). Plaintiff, a resident of Texas, complained of insect bites suffered during his stay at a Holiday Inn Express in Hillsborough, NC. He sued the hotel's owner in Texas. The owner has no offices or businesses anywhere in Texas, does not have employees or agents in the state, does not have a bank account there, does not advertise there, or place any orders to companies in Texas. The hotel sought dismissal for lack of personal jurisdiction. Although Plaintiff claimed the owner had continuous and systematic contacts in the state, Plaintiff presented no evidence to support the claim. The court thus dismissed Plaintiff's claim for lack of personal jurisdiction.

59. *Wilson v. RIU Hotels and Resorts*, 2011 WL 3241386 (E.D. Pa., 7/29/11). Plaintiff, a resident of Pennsylvania, was a guest at Defendant hotel in Cabo San Lucas, Mexico. While there, she slipped and fell in the shower resulting in injury. Plaintiff sued the hotel in Pennsylvania; it denied jurisdiction. Plaintiff claimed Defendant deliberately targeted Pennsylvania in marketing one of its hotels by distribution of brochures, which included a toll-free phone number to travel agencies within the state, provision of marketing materials to a Pennsylvania travel agency for use on its website, and maintenance of a website accessible to Pennsylvania residents. The hotel countered that the contacts referenced by Plaintiff were directed generally throughout the United States and not to Pennsylvania in particular. The court ruled that the contacts cited by Plaintiff were insufficient to support personal jurisdiction over Defendant as they did not deliberately target the Commonwealth, and the hotel lacked systematic and continuous contact. Therefore, Defendant's motion to dismiss was granted.

Malicious Prosecution

60. *Childress v. Concord Hospitality Associates, LLC, et al.*, 714 SE2d 274, 2011 WL 2848767 (N.C. Ct. App. 07/19/11). Plaintiff, a member of the Sons of Confederate Veterans group, reserved a block of rooms at the Wingate Inn and informed the staff that the group would be holding its national convention in the area that weekend. Plaintiff prepared one of the rooms to hold a reception in honor of soldiers from Kentucky and placed a Confederate flag in the window. After several requests to remove the flag from the window due to "issues of sensitivity," Defendant asked Plaintiff to remove the flag. Plaintiff declined, stating that asking him to remove the flag was a violation of his rental contract. The hotel operator then called Plaintiff demanding that he remove the flag or answer to the police. Plaintiff was then arrested at the request of the hotel operator and charged with trespassing. Plaintiff filed a complaint against the hotel for malicious prosecution and breach of contract. A trial court granted Defendant's motion to dismiss for malicious prosecution but not on the claims for breach of contract. Plaintiff appealed, arguing that there was no probable cause for the hotel to have commenced criminal proceedings against him, and said that the demand to remove the flag was in violation of the terms and conditions of the room rental contract. The court agreed with Plaintiff that Defendant did not have reasonable grounds to prosecute Plaintiff for trespass. The hotel had no written policy prohibiting the display of

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the flag, so demanding that he remove it was in violation of the room rental contract. The court reversed the dismissal of Plaintiff's malicious prosecution charge.

Negligence/Duty of Care

61. *Hampton v. Riverfront Foodservice Corp.*, 946 NE2d 715 (Mass. Ct. App. 05/16/11). While dining at the restaurant, Plaintiff ordered a gorgonzola cheese and walnut salad. However, believing that she might be allergic to gorgonzola, asked the server to substitute feta for gorgonzola. Plaintiff did not mention that she was allergic to anything in the salad. The server said she would see if a cheese substitution could be made. After the salad arrived, Plaintiff said she assumed the salad contained feta, but when she took several bites, she experienced an allergic reaction and immediately left the restaurant for the hospital. She said when she returned to speak with the manager the following day, she learned that no substitution had been made and that he restaurant does not have feta cheese. Plaintiff filed a complaint against Defendant for $10,000 in medical costs and additional damages, as well as emotional distress from her allergic reaction. A court granted Defendant summary judgment, and Plaintiff appealed, arguing that the judge's determination that medical evidence was required to address the causation was improper. The court disagreed with Plaintiff, finding no evidence in the record to establish that Plaintiff is actually allergic to gorgonzola cheese. Additionally, the court said Plaintiff's allergists report indicates that Plaintiff had recent reactions, and the expert believed a cheese such as gorgonzola was unlikely to cause that type of reaction. The allergist also suggested that Plaintiff be tested for a reaction to walnuts, which were also in the salad. The court, therefore, affirmed the ruling of summary judgment in favor of Defendant.

62. *Colson v. Tampa Hotel*, 2011 WL 5553840 (M. D. Fla., 11/15/11). Plaintiff ordered a cheeseburger from room service at Defendant hotel and began feeling ill the next evening. She was found to have contracted a virulent strain of E coli, requiring removal of her colon. When she sued the hotel, it claimed she failed to prove that the burger caused the illness. The court cited the rule for food poisoning cases that a mere showing that Plaintiff became sick after eating is insufficient. Plaintiff's expert doctor testified that ground beef is known to carry E coli, and she ate the meat within the known incubation period (one to nine days). For these reasons the doctor opined that more likely than not the cheeseburger caused the problem. The court found the doctor's opinion to be little more than speculation and granted summary judgment to the hotel.

63. *Rasnick v. Krishna Hospitality, Inc.*, 713 S.E.2d 835, 2011 WL 2610298 (Ga., 7/5/11). In this wrongful death action against a hotel, Plaintiff wife had been unable to reach by phone her 77-year-old husband, who was a guest at the hotel. She called the inn and asked that someone check his room for possible need of medical assistance. No one did. He was found by housekeeping the next morning lying on the floor unable to get up. An ambulance was called and transported him to a hospital where he died soon after. A doctor opined that the man would have lived had he received medical treatment the night before. The court determined that the innkeeper did not owe a legal duty to monitor possible health problems of a guest and affirmed the grant of summary judgment in favor of the hotel by the Court of Appeals.

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64. *Abramson v. The Ritz-Carlton Hotel Company*, 2011 WL 2149454 (D. N.J. 05/31/11). Plaintiff was eating dinner with her family at The Ritz-Carlton Golf and Spa Resort, Rose Hall, Jamaica when her husband went into cardiac arrest. The hotel's loss prevention officers arrived at the scene with an oxygen tank and automatic external defibrillator. Plaintiff said the defibrillator produced just a "faint like quiver" and the oxygen tank was empty. Her husband was transferred to a nearby medical clinic and airlifted to Miami, Florida where he subsequently died. Plaintiff argued that Defendant's breach of duty to her husband substantially increased his risk of death. Defendant argued that it discharged its limited duty to summon medical assistance, and said that the Good Samaritan Act protected it to the extent that it assumed a duty by providing Plaintiff with medical equipment. The court held that under New Jersey law, the hotel had no duty to provide medical service and only a limited duty to secure medical care for a guest. The court rejected Plaintiff's claims that Defendant was required to provide, or be prepared to provide, all the medical care that it could reasonably foresee that might be needed by a guest. Therefore, the court declared Defendant did not have a duty to provide oxygen or a defibrillator to Plaintiff. "Imposing liability under these facts would only discourage hotels from acquiring life-saving equipment" the court said in its decision to grant summary judgment to Defendant.

65. *Pape v. Macks, LLC, d/b/a Best Western, et al.*, 2011 WL 11466433 (Minn. Ct. App. 04/19/11)
Plaintiff suffered injuries after a glass shower door fell on his foot while he was staying at Defendant's hotel. Plaintiff filed a complaint against the hotel for negligence. The hotel's general manager said the hotel does not have a written policy concerning room inspections, but that housekeeping staff check rooms upon checkout, including shower doors to make sure that they operate. In addition, Defendant sends representatives to properties twice annually to inspect rooms at random to confirm that they meet the company's standards. Plaintiff said the shower door did not appear to be malfunctioning during his visit, but Defendant would have discovered any defects upon a reasonable inspection. The court disagreed, stating that this assertion was not supported by the record as no evidence exists that an inspection would have revealed a defect. The court did note that summary judgment "is highly unusual in a negligence action because the assessment of breach generally is a factual question to be addressed by the jury" except for when undisputed facts compel only one conclusion, as in this case. The court affirmed summary judgment in favor of Defendant.

66. *Frederick, et al., v. Intercontinental Hotels Group Resources, Inc*., 2011 WL 666843 (E.D. La. 02/14/11. Plaintiffs were a married couple who were staying at a New Orleans Stay Bridge Suites. The couple maintained that the hotel has failed to maintain a clean and sanitary environment, which ultimately led to an MRSA infection. Defendant argued that the couple failed to produce evidence of any defect in the hotel, or that the hotel should have known of a defect on the premises. Defendant also argued that the couple failed to show that an unsanitary condition at the inn caused them to acquire MRSA. The dirt Plaintiffs complained of did not even touch their skin, and they did not have any open

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wounds, which is the common entry point for MRSA. The court dismissed the complaint with prejudice.

67. *Radicevic v. LaGuardia Associates, L.P., et al.*, No. 12620/2008 (N.Y. 02/07/11). Plaintiff, who worked as a security guard at Defendant's hotel, was ordered to guard the hotel owner's luxury sports car, which was parked in front of the hotel, to deter any vandalism by the striking workers; due to an ongoing labor dispute with hourly workers. While standing guard in front of the vehicle, Plaintiff was struck in the head with a frozen can of soda and injured. She argued that Defendant was negligent and owed her a duty of care for the incident. She also claimed that Defendant had an extensive file of incident reports of acts of violence and vandalism by the protesters, but that Defendant failed to produce them, making them guilty of spoliation. Defendant moved for summary judgment on the grounds that the incident was unforeseeable. The court denied the hotel's motion, holding that Plaintiff had a reasonable expectation that Defendant would not put her in harm's way. As a security guard, she was asked to face a crowd of angry picketers alone who had already made threats of violence and vandalism, which the court said results in the question of whether the incident was foreseeable. The court disagreed with Defendant's contention that Plaintiff, as a security guard, assumed that she would be confronted with violence and unruly behaviors by the nature of her position. The court held that triable issues of fact remain as to the hotel's duty to the security guard and its liability.

Negligence/Firefighter's Rule

68. *Wallace v. Crowne Plaza Hotel*, 2011 WL 5119131 (Ky. App., 10/28.2011). Disorder broke out at a company holiday party held at a bar in the Defendant Crowne Plaza Hotel. Police were called concerning a particular rowdy attendee. The officer attempted to remove him and his wife from the premises, both of whom had been drinking and appeared intoxicated, but they kept reentering the bar. The couple then cursed and assaulted the police. They were arrested and charged with trespass and disorderly conduct. Thereafter the police officer sued the hotel for injuries incurred while dealing with the couple, claiming the hotel had violated the Dram Shop Act by serving the offending twosome. The hotel moved for summary judgment based on the Firefighter's Rule. The court on appeal upheld the dismissal based on that rule.

Negligence/Open and Obvious

69. *Faller v. Endicott-Mayflower, LLC*, 2011 WL 258239 (Ky., 2011). Plaintiff tripped on a high threshold while leaving defendant restaurant, causing a bone fracture. The elevation of the walking surface changed in the vestibule causing the fall. Plaintiff had been to the restaurant seven times in the previous year and testified she was aware of the uneven elevation. The court denied recovery finding that the condition was open and obvious.

70. *Watts v. Michigan Multi-King d/b/a Baha Fresh*, 804 NW2d 569 (Mich. Ct. App. 12/14/10). Plaintiff filed a complaint against Defendant when she slipped on a wet floor that had just been mopped in Defendant's restaurant. Plaintiff did not see any "wet floor" signs. She alleged that the restaurant was negligent for permitting an unreasonably

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dangerous condition to exist. Defendant said that Plaintiff's claim was barred by the open and obvious doctrine, and a trial court dismissed her claims. On appeal, Plaintiff claimed that the trial court erred by dismissing her claim on the basis that the hazard that caused her fall was open and obvious. In this case, the court noted that both parties agreed that the floor had been mopped shortly before Plaintiff fell, and that the restaurant failed to present any evidence to demonstrate that the floor was visibly, or obviously, wet when Plaintiff fell. The court rejected Defendant's notion that a wet floor in a restaurant is an everyday hazard that customers should be aware of regardless of visibility. The court reversed the trial court's decision and remanded the case.

71. *Ehrler, et al., v. Frankenmuth Motel, Inc*., 2011 WL 3299900 (Mich. Ct. App. 08/02/11). Plaintiffs, guests at Defendant's motel, claimed that they were injured after falling on ice in the courtyard of the motel following an ice storm. Defendant's front desk attendant applied salt to areas around the front office, the ramp leading to the office door, the areas around the guests' cars, and the walkways leading to the rooms. There were no signs advising guests where it was safe to walk. Plaintiff claimed that she told the desk attendant that something should be done about the ice. Both were injured when they fell and subsequently filed a complaint against the motel alleging that it breached its duty of care when it failed to inspect and detect the ice on the grounds, failed to warn guests of the dangerous condition, failed to correct the danger, and allowed the ice to remain when it had knowledge of the unreasonable risk of harm. Defendant argued that Plaintiff's claims must fail because the ice was an open and obvious danger. A court granted summary judgment to Defendant, and the guests appealed, arguing that there was a question of fact as to whether the motel desk attendant actually salted the premises. The appellate court reversed, finding that Defendant did owe the guests a duty of care. The court held that in this situation, the ice was a special aspect to the dangerous condition that was effectively unavoidable, which required the court to evaluate the objective nature of the condition, not the subjective degree of care used by the guest. As a result, the court declared that Defendant owed the guests a duty of care despite the fact that the condition was open and obvious. Therefore, the court held that the standard of care in responding to the ice storm raises a factual issue to be determined by a jury and reversed and remanded the case.

Negligence/Premises Liability

72. *Jarmak v. Ramos,* 2011 WL 4381496 (W. D. Va., 9/21/11). While a guest at one of defendant's cabins, plaintiff fell through a hammock and suffered injuries. Defendant testified that she routinely inspected the hammock and did not notice anything broken. No evidence was submitted that the hammock's defective condition would have been visible upon inspection. The court thus concluded that Defendant conducted adequate examination of the hammock and was not on constructive notice of any defects. The case was therefore dismissed.

73. *Prophet v. International Lifestyles, Inc.***,** 2011 WL 5603830 (11th Cir., 11/18/11). Plaintiff sued in Florida a resort hotel at which he was a guest while visiting Jamaica. Plaintiff was seriously injured in the fitness room while preparing to lift a barbell on the

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"power rack", Instead of pins or angled hooks, which are generally used to hold the barbell in place, it rested "precariously" on flat metal pegs. When Plaintiff attempted to use it, the barbell slid off the pegs, crushing Plaintiff's face, jaw, and skull. The result was life-threatening injuries. A local physician sent Plaintiff to a bigger city for medical care. No ambulance was available so Plaintiff took a taxi. Eventually an air taxi transported him to Miami for surgery. In due time, Plaintiff sued for negligent installation of fitness equipment, and failing to inform about lack of emergency care. The resort moved to dismiss the case based on forum non conveniens. The court ruled that Defendants must present "positive evidence of unusually extreme circumstances," and must be "thoughly convinced that material injustice is manifest" to grant the motion. The district court applied a different standard. The court thus remanded the case.

74. *Biebly v. Saginaw Plaza Group, LLC*, 2011 WL 668374 (Mich. App., 2/24/11). While a guest at defendant's hotel, plaintiff fell in the shower. He had put his forearms against the back wall and leaned away from the showerhead to allow hot water to fall on his lower back. As he did so, the mat on the bottom of the tub slid out from underneath him and he fell forward, suffering injuries. Plaintiff testified that he had inspected the mat before entering the shower and it appeared moldy. This raised an inference that the mat had not been inspected or cleaned for a considerable time before Plaintiff's fall. The hotel stated that its cleaning staff accessed, inspected and cleaned the room on a regular basis and had never reported a problem with the mat. However, there was no evidence to support a finding that the staff had regularly inspected the mat to ensure it remained securely fastened to the tub floor, or even made a casual inspection of its condition. The court thus determined that a jury could reasonably conclude that the hotel should have discovered the mat's dangerous condition. Thus, summary judgment for the hotel was denied.

75. *Neyland v. Marriott Hotel Services, Inc.*, 2011 WL 3209049 (Cal. App., 7/27/11). While heading toward Defendant hotel's front entrance, Plaintiff fell while walking on a warning strip mandated by the ADA. The strip is red and measures 36 inches wide. Several wheelchairs were gathered in the area. Plaintiff acknowledged seeing the strip before stepping onto it, and noticing a difference between the surface of the strip and the concrete sidewalk. The strip was in good condition and had not been altered or repaired. No one else had ever fallen on it, and it was free from debris. The court affirmed the trial court's ruling that Plaintiff failed to present evidence sufficient to establish a triable issue, and dismissed the case.

76. *Goodman v. 1012, Inc., et al*., 2011 WL 1902050 (Mich. Ct. App. 05/19/11). Akil Goodman was shot and killed in the parking lot of a night club by a man who became involved in a dispute with another person. When the man was escorted out of the club, he retrieved a gun and fired it into the parking lot, hitting bystanders Goodman and Washington, who were not involved with the argument. Goodman's representatives claim that the night club negligently failed to contact the police after becoming aware that the gunman had threatened to "pop somebody" as bouncers removed him from the club. The court disagreed that the club had a duty to contact the police and said that even though

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the gunman made threats heard by the bouncers, they were "generalized" threats and not directed at any specific person. There was no risk of imminent and foreseeable harm to patrons on the premises that would give rise to a duty to act. On their dram shop claims, the court affirmed the trial court's ruling that Plaintiff was unable to establish that any illegal sale or furnishing of alcohol was the proximate cause of the shooting. The court noted that the gunman consumed, at most, two drinks at the club, and that Plaintiff failed to present any evidence that the gunman was intoxicated and that the shooting was a result of his alcohol consumption.

77. *Reynolds v. CB Sports Bar, Inc., et al.*, 623 F3d 1143 (7th Cir. 10/22/10). Plaintiff's car would not start and a taxi from Defendant's bar was not available, so Plaintiff was approached by a couple at Defendant's bar who offered to give Plaintiff a ride home, but first they began purchasing Plaintiff rounds of drinks "in an attempt to cause [Reynolds] to comply with their design to lure her to their apartment for sexual exploitation." Plaintiff also believed the couple drugged her drink, and said when she asked the bartender about the couple; he assured her that they were regulars and would get her home safe. When she realized that the couple was not driving toward her hotel, she escaped from the car during a stop and tried to walk back to her hotel. Because of her intoxication, she wandered onto a highway and was hit by a car, suffering serious injuries. Plaintiff filed a complaint alleging that the bar knew or should have known that the couple was trying to take advantage of her, and at worst, that the bartender was complicit in the event. A district court dismissed her claims against Defendant, finding that its duty to protect did not extend to this type of circumstance. On appeal, the court found that Plaintiff' allegations raised a plausible claim of negligence against Defendant based on Plaintiff' allegations that the attack must have been reasonably foreseeable. The court stated that "although CB Sports was not obligated to investigate [the couple's] motives behind buying Reynolds drinks or driving her home, once it allegedly learned of their ill motives it acquired the duty to protect Reynolds from the attack." The court reversed the district court's dismissal of Plaintiff' negligence claim against Defendant and remanded the case for further proceedings.

78. *Yi v. Pleasant Travel Service, Inc.*, 2011 WL 6002625 (D.Hawaii, 11/30/11). Plaintiff was a guest at Defendant's hotel. She sank below the surface in the hotel swimming pool and suffered severe brain damage. No lifeguard was on duty. A sign was posted near the pool, "Warning No Lifeguard on Duty." Plaintiff claimed the hotel was negligent for failing to provide a lifeguard. The court rejected Defendant's assumption of risk argument, and ruled that the issue of whether the Defendant had a duty to provide a lifeguard was a question for the jury.

79. *Worthem v. Evergreen Motor Lodge, Inc.*, 2010 WL 4702385 (S.D. Ind. 11/12/10). Plaintiff was attacked in his motel room when he allowed the perpetrators to have entry into his room. Plaintiff filed a complaint against Defendant alleging that the hotel had a duty to ensure his safety and failed to take reasonable precautions to prevent criminal acts against guests. He claimed that his attack was reasonably foreseeable because the hotel had insufficient security measures. The property, he said, lacked security cameras and

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patrols, and he claimed that the motel's employees were young and unable to handle emergency situations. Defendant said that the alleged attackers did not check in at the front desk or request Plaintiff's room number, and claimed that the hotel's personnel were unaware of their presence on the property until after the attack occurred making the attack unforseeabale. The court agreed. The court said that due to lack of similar incidents at the motel and the fact that Plaintiff opened the door to his motel room to the attackers, that Defendant could not have reasonably foreseen the incident.

80. *Howe v. Seven Forty Two Company, Inc.*, 117 Cal.Rptr.3d 1286 (Ct. App. Cal. 11/05/10). Plaintiff leaned against the back of his stool at an IHOP restaurant counter when the seat fell off the base which caused him to fall to the ground causing injuries. Plaintiff filed a complaint againstDefendant, but a trial court found in favor of Defendant. On appeal, Plaintiff argued that the trial court erred by finding in favor of Defendant on his charges of premises liability and negligence. Defendant said that employees routinely inspect the stools by visually checking the top and bottom, and received no previous reports of similar accidents. However, only the heads of the screws were visible from the bottom of the stools. An appeals court reversed, invoking the res ipsa loquitur doctrine, finding that the stool would not have fallen from its base unless Defendant had been negligent. In reversing the trial court's decision, the court said the stool tops were in the exclusive control of Defendant, and a jury, therefore, could infer that the owner's negligence in maintaining the stools was a proximate cause of Plaintiff's injuries.

81. *Oskoui v. Red Roof Inns, Inc.* 2011 WL 1357514 (N.D. Ill, 4/11/11). Plaintiff was a guest at Defendant's Red Roof Inn. He had previously suffered a shoulder injury and so requested and received a handicapped accessible room. While exiting the shower and reaching for a towel, he started to fall. He grabbed the towel bar to catch his fall. He hit his head against the bar causing injury to his eye that required surgical removal of the organ. The hotel's evidence established that a maintenance worker checked the towel racks monthly, and housekeeping checked them frequently. Additionally the chain's headquarter manager checked the racks twice a year. None of the inspection reports referenced any problems with the rack in Oskoui's room. Oskoui, who had occupied the room for several months, had never complained about the rack. The court also found that Oskoui's injury was not foreseeable. Summary judgment was granted for the hotel.

82. *Gordon v. Starwood Hotels & Resorts Worldwide, Inc.*, 2011 WL 4479088 (N.D. Ga., 9/26/11). A fight broke out in front of a hotel after 3:00 a.m. Plaintiff was exiting his vehicle when he saw the fight. He approached the altercation and was attacked. He sued the hotel claiming its security was insufficient. The court dismissed the case finding that Plaintiff assumed the risk. The court noted that Plaintiff knew of and appreciated the danger and yet willingly proceeded toward it.

83. *Doe, et al., v. Jameson Inn, Inc., et al*, 56 So.3d 549 (Miss. 01/13/11). Ann Doe, 13, and her 12-year-old friend were invited by a stranger to a Jameson Inn hotel where several teenage boys were present to smoke weed. The front desk worker was unaware that the group had reentered the hotel because they went through a side door that can be opened

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with a hotel room key. Doe said she was raped by the man in the bathroom of the room, and said her friend had sex with more than one of the other boys. Doe's attacker pleaded guilty to statutory rape. Doe's parents filed a complaint against Defendant and the front desk worker, but a trial court determined that because Doe was on the premise to smoke marijuana, her status was one of a licensee, whereby the Defendants merely owed her a "duty to refrain from willfully or wantonly injuring" her. The court also held that none of the Defendants breached a duty to Doe. The Does appealed and the court affirmed the judgment of the trial court, holding that Doe was not an invitee, but a licensee, since she admitted entering the inn to perform an illegal activity, and that the hotel received no benefit from Doe's presence on the premises. As a result, the inn owed Doe no higher duty than to refrain from willfully or wantonly injuring her. The court also held that the Does' claim of premises liability must fail because Doe's injury, a rape that took place in a private room, did not result from a dangerous condition at the hotel.

84. *Logsdon v. The Standard Hotel*, 2011 WL 3251372 (Cal. Ct. App. 08/01/11). Plaintiff filed a complaint against Defendant asserting claims for negligence and negligent infliction of emotional distress stemming from an assault by a former guest outside a lounge of the hotel. A jury found that Defendant had engaged in negligent conduct, but that its conduct was not a substantial cause of Plaintiff's injuries. The appellate court affirmed the lower court ruling. The court found that there was no reasonable belief that Plaintiff would have prevailed if further requested jury instructions had been given, concluding that any instructional error regarding premises liability was harmless. On his liability argument, the court noted that businesses are obliged to take reasonable measures to shield their guests from injuries caused by third parties, including injuries that occur off its property when an affirmatively dangerous condition was created on site, but found that Defendant's conduct did not cause Plaintiff's injuries.

85. *Flynn v. Audra's Corp., et al.*, 796 NW2d 230 (Wis. Ct. App. 02/23/11). Plaintiff sustained injuries in a fight outside Defendant's bar. A court denied Defendant's request for summary judgment and held that Plaintiff could pursue his claims finding that a jury should decide whether the fight actually occurred on Defendant's premises. The appellate court affirmed the decision, noting that the Defendants actually maintained the parking lot, benefited from it and used it for parking for its patrons despite the fact that it did not have title to the ownership of it. Wisconsin statutes specify that a tavern has "a duty to use ordinary care to protect members of the public while on the premises from harm caused to them by the accidental, negligent, or intentional acts" of third persons. Although Defendant declared that the tavern's premises only include property actually owned by the tavern, the court said that prior case law fails to define "premises" strictly according to legal ownership. Though Defendant does not own the property, but because the Wisconsin Department of Transportation, which owns the property, gave Defendant permission to use it, and because the bar plows and maintains the parking lot, the court held that there was no legitimate difference between land owned by the tavern and the adjacent parking lot owned by the state. Therefore, the court declared that the tavern knew or should have known whether Plaintiff was a risk of injury and affirmed the ruling.

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86. *Bonilla v. Motel 6 Operating L.P.*, 2011 WL 4345786 (W.D. Pa. 09/15/11). Plaintiff, a guest of Defendant's motel, filed a complaint against Defendant alleging that the hotel was negligent and breached its duty of care by failing to take reasonable steps to protect him from criminal activity on the hotel premises. A man selling sexual services outside one of the motel rooms punched Plaintiff in the face and a second man chased him into the parking lot, slashing his neck from his ear to his throat with a knife. Defendant argued that Plaintiff's participation in prostitution was "an obviously dangerous activity" that it had no duty to protect against, that his participation caused him to lose his status as an invitee, and that his participation was a substantial factor in producing his injuries and therefore barred him from recovery. The court held that Plaintiff produced sufficient evidence to create an issue of fact of whether the motel breached its duty to take precautionary measures to protect its guests from harm. The court held that the police records showed that the motel had more than 142 violent or potentially violent incident reports in the first six months of the year. The court also noted that nearly half of the incidents took place between 10 p.m. and 6 a.m., and local law enforcement testified that the motel was considered a "problem area." The court said a reasonable juror could conclude that the motel had reason to anticipate that criminal conduct was likely to occur on its property and pose a danger to patrons. The court also determined that the question of whether Plaintiff remained a business invitee is for a jury since discrepancies exist between what witnesses say happened and Plaintiff's claims that the prostitution transaction had been over for nearly four hours at the time of the injury. The court denied Defendant's motion for summary judgment.

Negligence/Slip and Fall

87. *Eshaghian v. Marriott International, Inc.*, 2011 WL 452824 (Cal. Ct. App. 09/30/11). Plaintiff filed a complaint against Defendant after she slipped while descending the lobby stairs at a Marriott in Palm Desert, Calif., and sustained injuries to her left hand and arm allegedly due to accumulated water on the stairway. A trial court entered judgment in favor of Defendant finding that the hotel did not have notice of any dangerous condition. On appeal, Plaintiff argued that Defendant failed to show that it had no notice of a dangerous condition, and that Defendant's contention that it has an inspection program was insufficient to negate the possibility that the hotel had constructive notice of a hazard in the lobby. The court noted that the California Supreme Court previously concluded that "evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it." While the court noted that Defendant indicated it has policies and procedures for safety inspection, the hotel failed to show the policy was executed, and had no facts to verify that the premises had been inspected. Finally, the court said that although Defendant claimed the premises were inspected throughout the entire resort, 24 hours a day, seven days a week, such a "broad statement is insufficient to demonstrate that, at a particular place and time, inspections actually were carried out as required under the company's policy." The court, therefore, reversed, holding that Defendant presented insufficient evidence to preclude the existence of a triable issue of fact on the question of constructive notice of a hazard.

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88. *Coffey, et al., v. Casino Queen, Inc*., No. 5-10-0485 (Ill. App. Ct. 09/19/11). Plaintiff allegedly slipped and fell in a puddle of liquid in the men's bathroom, which he said caused him to cut his leg and hit his head. A jury heard the case and returned a verdict in favor of Defendant. Plaintiff moved for a new trial arguing that Defendant destroyed a surveillance tape that would have shown Plaintiff and the casino's employees entering and exiting the bathroom, and would have allowed the Plaintiff to investigate how long the puddle had been on the floor. The court held that the Plaintiffs had been given ample opportunity during trial to add a claim for spoliation of evidence and due to the failure to add the claim, Plaintiffs cannot now seek a new trial on the grounds that their own decision not to amend was wrong.

Nuisance

89. *OHM Lounge, LLC. V. Royal St. Charles Hotel, LLC*, __So.3d__, 2011 WL 4407443 (La. App., 9/21/11). Plaintiff hotel and Defendant lounge entered into a lease agreement, providing 800 square feet of space on the hotel's first floor for use as a nightclub. A year and a half later the hotel sought to evict the lounge on the ground it created a public nuisance. Specifically the hotel objected to the lounge playing excessively loud music into the wee hours. It caused persistent guest complaints of disrupted sleep and resulting dissatisfaction with the hotel, and many employee complaints of inability to carry on business at the front desk because of the loud music. The lease stated that the lounge "shall not do . . . anything that would be a nuisance or annoyance to other tenants." The court affirmed the lounge's eviction.

Occupant

90. *Calco Hotel Management Group, Inc., v. Gike v. Wood*, 22 A3d 60 (N.J. Sup. Crt, 6/28/11). Defendant is an elderly woman who occasionally hired an out-of-town handyman to assist her in odd jobs. While he was doing yard work for her, he had a seizure. She took him to a nearby hospital and returned home. He needed to remain in the vicinity for treatment but had no place to stay. She rented a hotel room for him for two days. He took to the room a filled gas can. He lit a cigarette and prepared to "huff" the gasoline. (This means purposefully inhaling chemical vapors to achieve an altered mental or physical state, creating a euphoric effect.) He accidentally kicked the gas can over, spilling it. The tip of the cigarette ignited the gas, causing damages to the hotel stipulated at $675,000. In this lawsuit, the hotel argued that Defendant was responsible for illegal activities of her guest (here, fire code violation) while in the hotel room. A New Jersey statute holds an "occupant" responsible to the extent she has the power to prevent violations of law. Defendant denied liability since she never was in the room or had a key. The court recognized defendant's altruistic reasons for arranging the room, but rejected her argument and ruled she was an "occupant." However, the court denied summary judgment in favor of the hotel on the issue of Defendant's liability for compensatory damages. That issue was remanded to the trial court for each side to brief and argue.

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Private Clubs

91. *Gate City Billiards Country Club v. Guilford Co. Dept of Public Health, 713 SE2d 546 (Crt. App. N.C., 7/19/11).* North Carolina's smoking ban provides an exception for private clubs but the exception is limited to nonprofit corporations. Gate City Billiards Country Club (Gates Club), a business that operates for profit, allowed smoking in its establishment and was ordered to pay civil penalties. It appealed the fines claiming the statute, by limiting private clubs to nonprofit corporations (thus enabling private clubs to permit smoking but not for-profit facilities), violated the equal protection clause and was thus unconstitutional. The court rejected the argument finding that one of the legislature's legitimate purposes in adopting the smoking ban was to protect the health of individuals in public places. Nonprofit private clubs are closed to the general public. The court thus found that the exemption is rationally related to the legislative goal.

Service of Process

92. *Sharif v. Decatur Hotels, LLC,*2011 WL 5403139 (E.D.La., 11/8/11). Plaintiff James Sharif filed a lawsuit for invasion of privacy against Defendant hotel. Plaintiff claimed Defendant used Plaintiff's image in an advertising campaign without Plaintiff's permission. A default judgment was entered in favor of Sharif for $400,000. The hotel claimed service of process was faulty and it never received proper notice. The court said it was not convinced that the hotel operated with clean hands on the issue of service. Although the court determined that Plaintiff "surely demonstrated due diligence" in serving Defendant's registered agent, the court also faulted petitioner for not trying harder to personally serve the hotel's president. The court ruled that service was not proper and the $400,000 judgment was void.

Statute of Limitations

93. *Osako v. Crowne Plaza Hotel,* 2011 WL 4827682 (D. Or. 10/11/11). Plaintiff's daughter was found dead in a guest room at Defendant's hotel. Plaintiff claimed that the death "was made to look like a suicide and was not investigated by Portland Police." The complaint further alleged that hotel employees aided and abetted the alleged murderers by destroying evidence and misleading the police. Plaintiff sued for wrongful death. His daughter's demise was reported on June 8, 2008. The complaint was filed June 9, 2011, one day beyond the three years statute of limitations period. The court therefore dismissed the case. What a difference a day makes.

Time Share Fraud

94. *Korff v. Hilton Resorts Corp. d/b/a Hilton Grand Vacations*, __F.Supp.2d__, 2011 WL 2532898 (N.D. Ohio 06/24/11). Plaintiff filed a complaint against Hilton Resorts, alleging that a sales representative who sold him a timeshare made fraudulent statements to induce him into purchasing the timeshare. Defendant filed a motion to dismiss alleging that Plaintiff's claims are not actionable fraud claims because they were all promises that the program would function as the sales representative claimed sometime in the future, and that the parol evidence rule, that evidence outside of the contractual document is inadmissible, excludes Plaintiff's evidence of fraud. The court noted that Plaintiff's

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contract with Defendant contains a merger clause that states that nothing the salesperson said would be part of the final agreement between the parties. As a result, the court granted summary judgment to Defendant.

Tipping

95. *Davis, et al., v. Four Seasons Hotel Limited, et al.,* __F.Supp.2d__, 2011 WL 3841075 (D. Hawaii 08/26/11). Plaintiff and other servers who worked at the Four Seasons Resorts in Maui filed a complaint alleging that the entire portion of the service charge added by the Defendant to resort customers' food and beverage bills should be distributed to servers. Plaintiffs claim that Defendant failed to disclose to customers that this service charge is not fully remitted to servers, and that the resort retained a portion of every 18 to 22 percent service charge. This action misleads customers who may be otherwise inclined to leave additional gratuity, constituting unfair competition. Plaintiffs filed a motion for summary judgment regarding Defendant's liability for unpaid wages, claiming that Hawaii statutes require hotels and restaurant to distribute service charges on food or beverages to employees as tip income or clearly disclose to purchasers that the service charge is used for other purposes. The district court disagreed, claiming that Defendant failed to cite any authority to contradict the legislative history, and that by asking the court to ignore the plain meaning of the language in the statutes would lead to "an absurd result." The court held that the statutes clearly provide employees with a cause of action for the withholding of wages, including tip income, and that the laws require that companies remit service charges to employees as tip income unless they "disclose their contrary practice to customers." The court also dismissed the Defendant's charge that the Hawaii state statutes are preempted by Fair Labor Standards Act regulations that differentiate between a service charge and a tip. The court stated that the FLSA does not define service charge as tip income, but requires employers to distribute service charges as tip income unless the employee clearly discloses its choice not to do so to customers. The court noted that the servers showed that the resort failed to distribute the entire service charge to employees, and failed to make disclosures to hotel customers that it retained a portion of the service charge on food and beverage bill prior to the filing of the lawsuit. The court granted summary judgment to Plaintiffs on their claim that Defendant is liable for unpaid wages under Hawaii statutes.

96. *Wadsworth v. KSL Grant Wailea Resort, Inc.,* 2011 WL 6029976 (D. Hawaii, 12/2/11); *Kyne v. Ritz-Carlton Hotel Co., LLC,* 2011 WL 6030117 (D., Hawaii, 12/2/11), *Lara v. Renaissance Hotel Operating Co.,* 2011 WL 6002521 (D. Hawaii, 11/29/11). These three class action lawsuits are part of a series of seven that claim the Defendant hotels' method of distributing service charges violates Hawaii law. Particularly, Plaintiffs claim the hotels imposed service charges and used a portion to pay for expenses other than wages and tips of employees without disclosing that fact to customers, in violation of a Hawaii statute. That law, Section 481B-14, requires a restaurant that utilizes a service charge for other than wages and tips of employees to disclose that fact to the customer. Two of the cases were stayed while the Hawaii Supreme Court addresses a related issue. The third case was settled for $90,000 (*Lara v. Renaissance Hotel*).

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97. *Bednark, et al., v. Catania Hospitality Group, Inc*., 947 NE2d 42 (Mass. Ct. App. 02/25/11). Several bartenders filed a complaint against Defendant alleging that at various times, the hotel assessed function event customers an additional charge of 18 to 19 percent of the amount invoiced for food and beverages for an "administrative fee." No written explanation or description accompanied this fee, which was also displayed on event contracts and menus. Plaintiffs' position is that the administrative fee was actually a "service charge" that a "patron or other customer would reasonably expect to be given to a wait staff employee, service employee, or service bartender." Since the administrative fee proceeds were not distributed to the wait staff, Plaintiffs alleged that Defendant violated wage and hour laws. Defendant maintained that its written designation as an "administrative fee" brought it within safe harbor provisions in the law, and that the hotel, therefore, was not required to distribute this money to service staffers. A district court granted summary judgment to Defendant. The appellate court reversed the decision holding that Defendant failed to establish that it had satisfied the requirements of safe harbor, or that the charge designated as an "administrative fee" was not, in fact, a service charge. The court ruled that relevant issues were in dispute, such as whether Defendant informed patrons that the administrative fee was not a tip or gratuity.

Torts/Emotional Distress

98. *Gupta v. Asha Enterprises, LLC d/b/a Moghul Express & Catering, Co.*, 274 A.3d 953 (N.J. Super. Ct. App. Div. 07/18/11). Plaintiff and 15 other Hindu vegetarians filed a complaint alleging negligence, negligent infliction of emotional distress, consumer fraud, products liability, and breach of warranties when an Indian restaurant filled their order for vegetarian samosas with meat-filled Indian pastries. Plaintiffs claimed that eating meat-filled samosas caused spiritual injuries resulting in damages. The group asked the court for compensation for emotional distress and the debts they would incur by having to participate in a required religious cleansing ceremony along the Ganges River in India. The court granted summary judgment to Defendant and the Hindu group appealed, claiming that the restaurant was guilty of "deceptively advertising the sale of vegetarian food." The court said it could not find evidence of ascertainable loss by the Hindus since they did not show loss of money or property, and admitted that they accepted new vegetarian samosas delivered by the restaurant when the mix-up was discovered. The court affirmed the dismissal of their claim. Regarding the breach of express warranty, the court held that the Plaintiffs presented evidence of warranty by employees of the restaurant that the samosas were vegetarian. While the court recognized the difficulty of calculating damages for spiritual injury, the court stated that that obstacle was not grounds for dismissing the charge, and remanded the breach of express warranty claim for further proceedings.

99. *Durham v. McDonald's Restaurants of Oklahoma, Inc.*, 256 P.3d 64, 2011 WL 1994096 (Sup. Crt. Okla., 5/24/11). The tort of intentional infliction of emotional distress requires Plaintiff to prove, inter alia, Defendant's alleged conduct was extreme and outrageous, and the emotional distress suffered by Plaintiff was severe. Plaintiff was a 16-year-old McDonald's employee. He asked his supervisor three times for a break to take his anti-

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seizure medication. The supervisor refused and called Plaintiff a "f. . . .ing retard." Plaintiff left the facility crying and never returned. He became withdrawn, depressed, introverted and a recluse, sleeping much of the day and necessitating home schooling. The court found the Defendant's conduct sufficiently outrageous and Plaintiff's distress sufficiently severe. Summary judgment for McDonald's was thus reversed.

Trademark/Proprietary

100. *BLT Restaurant Group, LLC, v. Tourondel, et al.*, 2011 WL 3251536 (S.D. N.Y. 07/19/11). Plaintiff filed a complaint against Laurent Tourondel, Michael Cinque and LT Burger, Inc., alleging breach of contract, use of proprietary and confidential information, unjust enrichment, breach of fiduciary duty, and unfair competition. Plaintiff operates 18 restaurants and had hired Tourondel as executive chef. Plaintiff agreed to incorporate Tourondel's initials into the company's restaurants, ie. BLT for Bistro Laurent Tourondel. In 2010, Tourondel left the restaurant chain and opened a restaurant called LT Burger, which Plaintiff claims uses the same proprietary recipes as BLT, that the menu is almost exactly the same as BLT's Burger Menu, and that Tourondel also stole an element of Plaintiff's own marketing strategy by promoting himself and LT Burger through a similar promotional magazine. The court found that Plaintiff made sufficient factual allegations to proceed with its unfair competition claim. The court agreed with Plaintiff's assertion that its burger menu constituted trade dress since the dining experience is built around the unique menu that is also distinctive. The court allowed Plaintiff to proceed with its breach of contract claim, finding that the use of proprietary recipes may serve as the basis of a breach. The court also allowed the breach of fiduciary duty claim to proceed. However, the court stated that Plaintiff failed to state a claim for deceptive acts or practices regarding Tourondel's use of a similar promotional model, finding that Plaintiff failed to show harm from the marketing model or that it caused a harm to public interest, and also dismissed its unjust enrichment claim.

101. *Famous Joe's Pizza, Inc., v. Vitale, et al.*, 2011 WL 2693276 (S.D. N.Y. 12/23/10). Plaintiff filed a complaint against Giuseppe Vitale, Joe's Pizza of Bleecker St. Inc., and others, claiming that Defendants violated federal and state trademark laws and engaged in illegal cyber squatting. The court found that at least some of Plaintiff's Lanham Act claims would likely proceed because Defendant's advertising and marketing materials contained several false representations, including making representations that the Carmine Street location of Joe's Pizza was one of Defendant's restaurants. The court declared that Defendant "misrepresents the nature, characteristics" and qualities of his restaurants. Because Plaintiff demonstrated that he would suffer irreparable harm as a result of Defendant continuing to make misrepresentations, the court granted Plaintiff a preliminary injunction. The court declared that Defendant must remove photo images of Plaintiff's businesses and eliminate any references to the Carmine Street location. However, the court said that Plaintiff could not obtain a preliminary injunction on all his trademark infringement claims. Although Plaintiff produced photos of his distinctive logo, the court declared that it was not consistently applied, and that questions remain as to whether his restaurant goes by the name "Joe's Pizza" or "Famous Joe's Pizza."

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Union/NLRB

102. *Bally's Park Place, Inc., v. National Labor Relations Board, et al.*, 646 F.3d 929 (D.C. Cir. 08/05/11). Plaintiff, a dealer at Defendant's casino, was terminated for violating Defendant's honesty policy when Plaintiff claimed he was taking FMLA leave time to care for his daughter. Part of this time, however, was spent attending a union rally. The UAW filed unfair labor practice charges against Bally's in response to the termination, and the National Labor Relations Board's General Counsel issued a complaint alleging that Bally's violated the section of the National Labor Relations Act that forbids an employer from interfering with the rights of employees to "form, join, or assist labor organizations" as well as "discrimination in regard to … tenure of employment … to encourage or discourage membership in any labor organization."The complaint alleged that Bally's illegally instructed Plaintiff from talking about the union on the casino floor and terminated him for engaging in union activity. An administrative law judge found that Bally's violated the NLRA by telling him that he could not discuss union issues on the casino floor because employees were allowed to discuss non-work issues there when customers were not present, as well as due to the threat of termination. However, the ALJ dismissed the allegation that Plaintiff's termination violated the NLRA. Although the ALJ found that the General Counsel established a prima facie case of retaliation, Bally's showed that it would have discharged Plaintiff in the absence of his union activity because the casino had a zero-tolerance policy for FMLA abuse. However, the NLRB disagreed with the ALJ's determination on retaliation, and Bally's filed a petition for review. Bally's did not contest the decision that it violated the NLRA by asking Plaintiff not to talk about union issues on the floor, but claimed that the NLRB erred by not adopting the ALJ's determination on the charge that it terminated Plaintiff for his union activity. The court denied Bally's petition for review. The court noted that Bally's alleged no tolerance policy for FMLA abuse was not in writing, and the casino failed to provide evidence that such a policy had ever been announced to its employees. Rather, the work rule Bally's cited in the case requires employees to communicate openly and honestly, and states that individuals who violate the rule will be subjected to a four-step progressive discipline process.

103. *Trump Marina Hotel & Casino v. NLRB,* 2011 WL 4915153 (C.A.DC, 10/14/11). The court upheld a ruling of the NLRB finding Trump Marina Hotel & Casino had committed several unfair labor practices during a representation campaign that ended in a very close vote against the union. The offending conduct related to conversations had by various managers with employees. The conversations included: a) attempts by supervisors to elicit or influence employees' views about the Union; b) a statement by a manager that he would be unable to grant shift preferences or correct scheduling errors in the same way if the union won; c) speculation about layoffs, not based on objective fact; and d) assertion that management would not negotiate with a union. An additional unfair labor practice consisted of disciplining a union activist in retaliation for protected activity. The remedy was an order that a second election be held.

104. *NLRB v. Pacific Beach Hotel*, 2011 WL 6009237 (D. Hawaii; 11/29/11). In a prior case Defendant hotel was found to have violated the National Labor Relations Act, the details

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of which were not included in this case. The hotel failed to comply with the resulting court order and a determination of contempt was found. The current court imposed the following sanctions: 1) pay full wages including tips and fringe benefits plus interest for all shifts and hours that the hotel was required to assign a particular employee and failed to do so; 2) pay the NLRB and the hotel workers' union all costs for investigating and prosecuting the contempt proceeding; 3) post unobstructed copies of the contempt order at the work site; 4) read the contempt order to all current employees during paid time; and 5) serve the court with an affidavit by a responsible corporate official verifying in detail compliance with the order.

Union/Standing

105. *Meeks v. HMS Host*, 2011 WL 5416191 (N.D. Ca., 11/8/11). Petitioner worked as a bartender at the Gordon Biersch Restaurant for 25 years. She was terminated when a loss prevention manager observed several rules violations including: she failed to record two sales or to deposit the cash received from one of the sales into her register; she over-poured alcoholic beverages; and she failed to check identification before serving alcohol. Petitioner is a member of a union, which has a collective bargaining agreement (CBA) with an organization of restaurants including Gordon Biersch. Petitioner's union grieved her dismissal and ultimately submitted it to arbitration. The arbitrator's decision sided with the employer. Petitioner thereafter filed this claim in court. The CBA states that only the union and not the employee can submit a dispute to arbitration. Only a party to an arbitration can appeal it. Since petitioner was not a party, she lacks standing. Therefore, her claim is dismissed.

Workers Compensation

106. *Fitzgerald's Casino/Hotel v. Mogg,* 2011 WL 5844867 (Sup. Crt. Nev., 2011). Respondent was a surveillance officer at appellant casino and hotel. He was injured when he fell over in his chair while attempting to put his feet on his desk while working. He sought workers compensation benefits. There was no evidence that the chair was defective. The hotel claimed that Plaintiff's conduct was barred by an implied prohibition against surveillance officers placing their feet on work desks. The court rejected this argument. Instead, it applied the *personal comfort doctrine,* which permits compensation when an employee is injured while engaging in a reasonable activity designed for personal comfort, such as stretching or using the restroom. The court held that Plaintiff's actions fell within the ambit of the personal comfort doctrine, and thus the injuries are compensable.

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