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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Hospitality industry still easy target for ADA website cases

Take steps to minimize liability and meet accessibility standards

By Christine Samsel & Jonathan Sandler

It's becoming a pattern: in one California courthouse, multiple lawsuits are being filed against hotels for not having websites that are accessible to people with disabilities. On two days in December alone, 10 lawsuits were filed. The same scenario is playing out around the country. The hospitality industry is under attack by the plaintiffs' bar, and must take immediate action to minimize liability and keep up with the accessibility standards being established across the nation. With lawsuits being filed on a daily basis, it is no longer a matter of if your website will be targeted, but when.

While the Americans with Disabilities Act and related state statutes are not new to the hospitality industry, the lack of authority on the potential applicability of those laws to websites has thus far allowed the industry to escape the attention of "drive-by" plaintiffs. However, case law developments in 2017 should cause the hospitality industry significant concern and mandate a more proactive approach. With these developments, would-be plaintiffs need not even leave their home to identify targets; they simply surf the web.

Courts are split on whether a public website qualifies as a "place of public accommodation" under the ADA. More specifically, the split centers on whether all commercial websites are places of public accommodation and thus subject to the ADA, or only those websites associated with brick-and-mortar businesses. Throughout the country, courts typically adopt one of three positions: (1) places of public accommodation can only be physical structures; (2) places of public accommodation need not be physical structures; or (3) for a non-physical "place" to be a "place of public accommodation," it must

See **ADA** on page 4

Adherence to policy helped restaurant obtain dismissal

Employee claiming discrimination fired for violating alcohol policy

By Lauren E. Becker, Esq.

A restaurant that adhered to its alcohol use policy was able to easily defeat a discrimination claim brought by an employee who was terminated after taking a "to-go" cup of beer after his shift.

In *Davis v. Wings Twenty-Six, Inc.*, No. 16-11763 (E.D. Mich. 12/19/2017), a former Buffalo Wild Wings employee challenged his termination, claiming that BWW really terminated him because he is black.

Employee Saul Davis, Jr. worked as a server and bartender at three different BWW restaurants in Ann Arbor, Mich., from approximately 2005 until his termination in April 2016. BWW fired Davis when his direct supervisor saw him pour beer into a cup that he took with him off premises in violation of BWW's alcohol policy that, among other things, prohibited an employee from leaving the restaurant with alcohol. The alcohol policy was contained in BWW's Employee Handbook, a copy of which the employee admitted to receiving.

In his complaint, Davis alleged that BWW, as well as his direct supervisors, individually — a general manager and a direct manager — terminated him on account of his race in violation of state and federal civil rights laws. In support of his claims, the employee claimed that his direct manager once jokingly said the word "n-----" in his presence, but admitted that the comment was not directed at him and that no other racial comments were connected to his termination. After the restaurant moved for summary judgment on the employee's claims, Davis sought to amend the complaint by adding his former regional manager based on the "cat's paw" theory of liability, and moved for sanctions against the restaurant and supervisors.

See **DISCRIMINATION** on page 6

ADA

Casino agrees to pay $140K to settle ADA lawsuit from EEOC 3

Definition of a public accommodation under the ADA..................... 4

Man suffering from allergies from scents not disabled under ADA ... 7

How to handle scent sensitivity.................... 7

AGENCY ENFORCEMENT

DOL changes could be positive for hospitality employers 8

Retaliation tops 2017 enforcement efforts...... 8

DISCRIMINATION

Court says anti-nepotism policy enforcement not a pretext for discrimination............ 5

Anti-nepotism policies at the workplace 5

LIABILITY

Fatally injured man did not realize particular risks, court says........... 2

TOURISM

Industry groups form coalition to combat declining tourism........ 5

WAGE & HOUR

Court certified class of managers for trial over overtime claims 3

Filing a collective action under FLSA................. 3

Fla. resort ordered by DOL to pay more than $400K in back wages... 7

The court concluded that a genuine issue of material fact existed as to whether the deceased man had an actual knowledge of the particular risks associated with coming to the aid of the bouncer.

Fatally injured man did not realize particular risks, court says

Appeals court reverses decision; claims against bar may advance

A patron who died after helping a bouncer evict an unruly patron from a bar didn't necessarily realize the risk of his actions, according to an appeals court decision in a lawsuit filed by the estate of the man fatally injured outside the bar owned by Uptown Drink, LLC. *Henson v. Uptown Drink, LLC*, No. A17-1066 (Minn. Ct. App. 12/26/2017).

In March 2011, two men met up at Uptown Drink and were served at the bar. Based on reports of the alcohol the men allegedly consumed, an expert determined that the men would have been severely impaired. At one point, one of the men threw a punch at a security guard, and the other jumped on the guard from behind, putting him into a headlock. The deceased patron rushed to the aid of the security guard, removing the man from his back. The patron and the guard escorted the man out of the establishment, but once outside, someone fell and took the others down in the process. The patron fell, hit his head, and suffered a traumatic brain injury and later died.

His estate claimed that Uptown Drink was negligent by providing liquor to an obviously intoxicated person. A district court granted summary judgment to the bar and the estate appealed, arguing that the court erred in: determining that the doctrine of primary assumption of the risk precluded innkeeper liability; determining that the man's voluntary intervention precluded a dram shop liability claim; failing to consider the emergency, rescue and continuing-duty-of-care doctrines.

A Minnesota appeals court reversed and remanded the decision. The appeals court found that the primary risk assumption did not, as a matter of law, bar the estate's claim against Uptown Drink. The court noted that while foreseeability of danger depends heavily on the facts and circumstances of the case, sufficient evidence suggested that the injury suffered by the deceased resulting from the intoxication and aggression of the patron was foreseeable and preventable.

The court also found that the applicability of the primary assumption doctrine was also best left to a jury, noting that a person must have a knowledge and appreciation of the risk — as well as a choice to avoid that risk — to primarily assume a risk.

The court concluded that a genuine issue of material fact existed as to whether the deceased man had an actual knowledge of the particular risks associated with coming to the aid of the bouncer. Rather, the court found that the man's act of assisting with the removal of the intoxicated patron was "more consistent with secondary assumption of the risk, where a plaintiff voluntarily encounters a known and appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard."

The court also held that the district court erred in disposing the dram shop claim, holding that questions remain as to whether the patron's intoxication was the proximate cause of the deceased's injury, and that there is sufficient evidence that the man was illegally sold alcohol that contributed to his intoxication. ■

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Court certified class of managers for trial over overtime claims

Managers claimed job descriptions differed wildly from daily duties

By A. Michael Weber, Esq.

The question of whether the job descriptions for a class of managers matched their actual job activities on a day-to-day basis has yet to be answered. But Judge John A. Ross in Missouri's Eastern District permitted a group of 46 Steak N Shake restaurant managers to proceed as a class in their federal and Missouri state law claims for unpaid overtime.

In the lawsuit *Drake v. Steak N Shake Operations, Inc.*, 2017 WL 6555878 (E.D. Mo. Dec. 22, 2017), a group of salaried managers who worked for corporate-owned Steak N Shake restaurants in Missouri claim that the company forced them to perform primarily the same duties as its hourly workers, thereby depriving these managers of overtime pay.

The "manager" position at issue occupied a spot on the restaurant's organizational chart between the general manager and the operations supervisors, who oversee the work of the production and service staff. The job description for these managers details a number of supervisory-level responsibilities such as training, coaching, and disciplining the staff, and participating in the decisions to hire, fire, or promote them. They are also responsible for forecasting sales and making the appropriate scheduling and supply decisions to accommodate the anticipated demand.

Each manager signed a declaration affirming that they were expected to devote the majority of their work day to "management tasks." In the event that these duties were overwhelmed by service or production tasks, the managers expressly agreed in the declarations to advise the legal department or their district managers.

Eighteen managers, however, testified that their actual experiences differed dramatically from the job descriptions. Most of their shifts were instead consumed by the same duties at the servers and kitchen line workers, they said. The managers also testified that they signed the declaration knowing that the descriptions were inaccurate in order to keep their jobs.

Steak N Shake argued that the extent to which a particular manager spent most of his or her time on management tasks requires 46 individual inquiries and cross examinations, precluding the use of a class to prosecute the claims. The company also argued that separate examinations would be needed to assess whether each manager knowingly misrepresented themselves by signing the declaration, whether several failed to identify their claims in bankruptcy, and whether a number of the claims were time-barred.

The court roundly rejected these arguments, finding instead that these individualized questions do not "outweigh" the similarities between the class members. The court reasoned that if the viability of certain claimant's membership in the class could not be addressed by a limited number of motions, then representative testimony could be utilized.

Therefore, the judge ordered the parties to submit proposed dates for a class trial.

A. Michael Weber, Esq., is a partner in the New York City office of Littler Mendelson, P.C. ■

HLaw Glossary

Filing a collective action

In *Drake*, Steak N Shake argued that the managers who filed a complaint alleging violations under the Fair Labor Standards Act would not be able to stand as a class because the tasks each completed during their workweek would vary.

The law states that a collective action under the FLSA to recover overtime compensation may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." While employees bear the burden of showing that they are similarly-situated to maintain an opt-in class action, courts have held that similarly situated "does not necessarily mean identical" and that every group of employees will necessarily include individuals with different experiences.

However, the courts have said that the question "is simply whether the differences among the plaintiffs outweigh the similarities of the practices to which they were allegedly subjected."

To examine this, the court will look at:

- The disparate factual and employment settings of the individual plaintiffs;
- The various defenses available to the defendant that appear to be individual to each plaintiff; and
- Fairness and procedural considerations. ■

Casino agrees to pay $140K to settle ADA lawsuit from EEOC

A Detroit casino operator will pay $140,000 and furnish other relief to settle a disability discrimination lawsuit brought by Equal Employment Opportunity Commission. The EEOC had charged that Greektown Casino, LLC unlawfully failed to provide a reasonable accommodation to an employee with stress-anxiety disorder, leading to his discharge.

According to the EEOC's lawsuit, the employee, a pit manager, requested an additional four weeks of extended leave to return to work following a stress-anxiety-related collapse on the job. Greektown denied the request and subsequently fired the employee after his leave under the Family and Medical Leave Act of 1993 was exhausted.

The EEOC alleged that the casino's actions violated the Americans with Disabilities Act, which mandates that covered employers provide reasonable accommodations for the known disabilities of employees.

As part of the consent decree settling the suit, Greektown will pay $140,000 to the employee, and will train all supervisory and human resources employees on the requirements of the ADA.

"We are pleased with the relief provided by the consent decree," said Dale Price, the EEOC attorney who handled the case. "It provides meaningful protections for the employees of Greektown.

The case was *EEOC v. Greektown Casino, LLC*, No. 2:16-cv-13540 E.D. Mich.) ■

> *Left with an evolving body of jurisprudence and no federal guidance in sight, website accessibility standards are a moving target.*
> *— Christine Samsel, Esq. & Jonathan Sandler, Esq.*

ADA (continued from page 1)

have a sufficient nexus to a physical structure that constitutes a public accommodation. The latter two readings of the ADA are obviously more expansive and problematic for the hospitality industry.

Recent decisions from California and New Hampshire demonstrate the uphill battle that targeted companies face. In October 2017, a federal judge in California denied a motion to dismiss a complaint against *CVS Pharmacy, Inc. Reed v. CVS Pharmacy, Inc.*, No. CV 17-3887-MWF (SKx). There, the individual alleged that she is visually impaired and requires screen-reading software to interact with content on the internet, but that CVS's website and mobile app have various access barriers that prevented her from using either the website or the app, and therefore violate the ADA and California's Unruh Civil Rights Act. The court held "the requirement that a place of public accommodation refer to a physical place ... does not preclude one from challenging a business' online offerings." So long as there is "some connection between the good or service complained of and an actual physical place" — an individual may challenge the digital offerings of an otherwise physical business. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."

In November 2017, a federal judge in New Hampshire issued an order against the popular online food ordering company Blue Apron in *Access Now, Inc., et al., v. Blue Apron, LLC*, No. 17-cv-116-JL. The court recognized that courts of appeal have differed as to what constitutes a "public accommodation" in the website context, but determined that the First Circuit considers websites to be subject to the ADA.

While neither of these cases involved the hospitality industry, they are demonstrative of the issues facing the industry. Like a hotel or resort, CVS has both a public website interface and traditional brick and mortar locations. Blue Apron does not have a brick and mortar location, but like many hospitality booking companies, serves the public only online.

The volume of ADA lawsuits directed at websites is increasing exponentially, and the ease of identifying potential targets is drawing new plaintiffs — and a new crop of plaintiffs' lawyers — into the fray. As these cases are fought in court, the body of jurisprudence continues to grow, and given the results thus far, will doubtless inspire more plaintiffs to bring suit.

Any website is potentially subject to ADA liability. That is especially true with the hospitality industry due to the direct connection to physical business locations. The Department of Justice had expressed its intent to adopt the Web Content Accessibility Guidelines, Level AA standards, which outline criteria to make web content more accessible to a wide range of people with disabilities. Such adoption would, at least, have made website accessibility requirements clear. However, the DOJ recently reversed course and reported that it will not be adopting standards or issuing guidance.

Left with an evolving body of jurisprudence and no federal guidance in sight, website accessibility standards are a moving target. Companies should promptly consult with legal counsel about these issues and review and update their websites for accessibility. Website vendor contracts should be assessed to ensure they incorporate WCAG-2.0, Level AA accessibility standards, and selected vendors should be well-versed in these standards. To the extent the contracts are negotiable, they should include provisions for no-charge upgrades with respect to accessibility going forward to take into account changes in technology and updates to the standards.

Christine Samsel, Esq., and Jonathan Sandler, Esq., are shareholders at law firm Brownstein Hyatt Farber Schreck. ■

Definition of a public accommodation

By Christine Samsel & Jonathan Sandler

Title III of the Americans with Disabilities Act requires public accommodations to be accessible to individuals with disabilities, and the statute has an expansive definition of "public accommodation" that includes private entities whose businesses are generally open to the public and fall within one of the enumerated categories in the statute, such as retail stores, hotels, restaurants, recreational facilities, etc.

Each of the enumerated categories of public accommodation is a physical location, but in the statute, each category ends with the catch-all phrase "or other place ..." This phrase is one of the hooks that the plaintiffs' bar is using to argue that businesses' websites — in addition to their physical locations — must comply with the ADA. ■

Anti-nepotism policy enforcement not a pretext for discrimination

Employee failed to show he was denied promotion due to his age

A new manager's decision to update policies and enforce them was not a pretext for discrimination according to a recent district court decision. *Wilson v. Blue Sky Casino, LLC,* No. 4:16-cv-00070-SEB-TAB (S.D. Ind. 12/29/2017).

Barry Wilson began working for the French Lick Casino when it opened in 2006 as a table games floor supervisor — a position he still holds today. In June 2015, a table games shift manager position opened up at the casino, and Wilson applied for the promotion. At the time, he was 55 years old. Another 55-year-old employee was chosen for the position. However, when a new manager discovered that he was in a romantic relationship with one of the dealers he would have been responsible for supervising, she learned that the casino's parent company maintained an anti-nepotism policy that forbid individuals from supervising family members or significant others. The man was disqualified and Wilson was considered, but he, too, was disqualified because his wife was a dealer he would have had to supervise. Ultimately, only one applicant, a 35-year-old male, was found to not have any conflicts with the anti-nepotism policy and received the promotion.

Although the parent company had maintained an anti-nepotism policy, until the new manager was hired, it had not been strictly enforced. She drafted a new policy specific to the casino, notified workers, and provided a deadline for employees to disclose policy violations so that the situation could be corrected by moving employees to different shifts or departments so that they were not supervised by a family member or significant other.

Wilson filed a complaint against the casino alleging that he wasn't promoted because of his age, and that the enforcement of the anti-nepotism policy was a pretext for discrimination.

The casino moved for summary judgment, which a district court granted. The court noted that even if the casino had not enforced the anti-nepotism policy before June 2015, when the promotion was made, it failed to establish pretext. The court found that Wilson failed to present any evidence that the decisionmaker did not actually believe that it would violate company policy to promote an employee who would then be responsible for supervising a family member or significant other.

Although Wilson claimed that another manager indicated that he didn't think it would be an issue if he was promoted and had a slight overlap with his wife's shift, the court noted that there was no evidence that the manager maintained that attitude once he was informed of the parent company's policy.

The court further found that the fact that a new member of management sought to uniformly enforce a policy to which there had not previously been strict adherence was not evidence of discrimination. Although Wilson argued that the manager is not enforcing the policy — citing three examples of alleged violations — he conceded that he does not know if management is aware of the purported violations.

The court found that Wilson failed to present evidence that suggests that the company is aware of and allowing certain employees to supervise others in violation of the anti-nepotism policy, or that the policy is being enforced in a discriminatory fashion for the purpose of advancing or protecting younger employees.

Despite Wilson's argument that neither he nor the older candidates were provided the option of moving their family member of significant other to a different department or shift to alleviate nepotism concerns, the court found no evidence that such an option was offered to any other French Lick employee applying for a promotion, and the fact that the casino offered such an option to correct then-current instances of policy violations — but not when making future hiring or promotion decisions — did not establish pretext. ■

Workplace anti-nepotism policies

Courts have recognized that there are sound business reasons for instituting anti-nepotism policies — both from employee morale and business security standpoints.

The court in *Wilson v. Blue Sky Casino* noted that the fact that a new manager "sought to memorialize and uniformly enforce" an anti-nepotism policy to which there had not previously been strict adherence "does not itself evidence discrimination." To the contrary, the court said that the evidence showed that the casino took steps to create a written policy and correct then-existing violations. ■

Industry groups form coalition to combat declining tourism

Trade groups have banded together to officially the Visit U.S. Coalition, whose aim is to partner with the Trump administration to reverse the decline in U.S. competitiveness for international travel dollars.

The U.S. was one of only two destinations in the top dozen global markets to see a decline in long-haul inbound travel since 2015. The drop stands in stark contrast to other large economies around the world. Notable among the countries whose tourism shares have recently grown: France, Germany, Spain and China.

Research prepared for Visit U.S. by the U.S. Travel Association shows that while global travel volume increased 7.9 percent from 2015 to 2017, the U.S. slice of that growing pie fell from 13.6 percent to 11.9 percent in the same period — the first drop after more than a decade of growth.

That trend bodes poorly for U.S. performance in trade and job creation. Travel is a top 10 employer in 49 states and the District of Columbia, and international travel is the country's No. 1 service export and No. 2 export overall.

"Travel and tourism is our country's second largest export ...," said Katherine Lugar, president and CEO of the American Hotel & Lodging Association. "Fewer visitors means fewer hotel stays, fewer meals eaten in our restaurants, fewer goods purchased ... It also means fewer American jobs and a loss to our economy." ■

DISCRIMINATION (continued from page 1)

The U.S. District Court for the Eastern District of Michigan dismissed the case on the restaurant's motion for summary judgment.

Davis failed to offer direct evidence of discriminatory animus concerning his termination, and could not substantiate his discrimination claim with circumstantial evidence. Despite it being inappropriate for the workplace, the isolated utterance of the "n----" word did not establish a racial motive, the court found. In addition, Davis could not establish that the restaurant or its supervisors treated similarly-situated white and other non-black employees more favorably. Indeed, the restaurant established that three other employees — all of whom were white — were terminated for leaving a BWW restaurant with alcohol. As a result, the restaurant and its supervisors met their burden by establishing that BWW maintained a clearly written alcohol use policy in its employee handbook prohibiting the removal of alcohol from restaurants, and consistently terminated employees for violating that policy.

The court also granted the restaurant's motion for summary judgment since Davis failed to provide any evidence showing that the restaurant's legitimate business reason — the employee's violation of BWW's alcohol policy — was a pretext for discrimination or insufficient in some other manner.

With respect to the employee's motion to amend his complaint to add his former regional manager as an individual defendant under the "cat's paw" theory, which can attribute liability to an employer when a supervisor rubber-stamps the recommendation of a subordinate with discriminatory bias, the court denied the motion. The court found employee's motion untimely, since it was filed two months after the conclusion of discovery, and futile, since the amendment would not add support to his discrimination claim, which was itself factually deficient. The court also noted that the employee was aware of the former regional manager well before the close of discovery and at deposition he testified that the former regional manager had never discriminated against him.

Finally, the Court denied employee's motion for sanctions, holding that none of the actions by the restaurant warranted sanctions as since the restaurant and its managers did nothing wrong, much less engaged in conduct that rises to the level of sanctionable activity.

This decision is an important reminder to employers to implement clear workplace policies, apply them regularly and consistently, and document performance issues. In this case, it was significant that the employer terminated several employees for the same conduct, and maintained a clearly written policy as well as documentation of the disciplinary process. This case exemplifies why employers should clearly communicate policies and standards of conduct to employees and ensure that management applies those policies fairly and objectively. These measures are important and necessary in order for restaurants to maintain reasonable rules of conduct and avoid frivolous claims.

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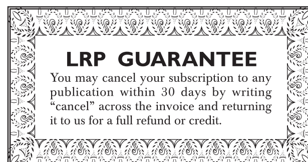

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Man suffering from allergies from scents not disabled under ADA

Court dismisses employee's claims of disability discrimination

Suffering from allergies due to certain scents can be considered disabling, but a district court found that a casino dealer who claimed he was discriminated against was not technically disabled under the Americans with Disabilities Act. *Jiménez-Jiménez v. International Hospitality Group, Inc./Casino del Sol*, No. 15-1461 (SCC) (D. P.R. 11/30/2017)

A man who worked as a dealer at a casino claimed that he suffers from a severe allergic condition triggered by some perfumes and chemicals, and sought an accommodation to deal with his condition. After working for the casino for approximately three years, the dealer took eight days of sick leave in July 2012 and returned with a medical certificate stating that he had been suffering from "severe allergies from exposure to strong perfumes used by some of his coworkers."

The doctor recommended minimizing the exposure due to his condition and recommended that the employee be offered a reasonable accommodation in an allergen-low environment. Shortly thereafter, he told his manager that he was having reactions from some of the scents of colognes and perfumes of coworkers and asked that the casino enforce its policy on "soft" colognes and perfumes, which the manager reviewed with staff. The employee was also provided with an alternative break room in case he found scents disagreeable in the regular room. When he complained that a scent was making him ill, the casino would provide an adjustment by rearranging employees.

The employee had multiple work violations, mainly surrounding his failure to register his meal periods through the casino's official time and attendance system, and in 2012 he received counseling for 26 meal period registration violations. In September 2013 the employee got into a verbal altercation with his direct supervisor and threw his casino license on the table and left a work area without authorization, and received verbal counseling again.

In November 2014, an employee complained that the casino's accommodations were causing her to be relegated to a distant area and that her performance and work environment were being affected. That same month, the employee lodged a complaint with the Equal Employment Opportunity Commission.

In early 2015, he was again counseled due to a missing medical certificate, and for making malicious accusations. On May 15, 2015, the employee resigned. He filed a lawsuit alleging disability discrimination, and claimed that after he filed his EEOC charge that he was admonished whenever he complained about scents, and that his supervisors pushed him to resign.

The casino moved for summary judgment, which a district court granted. The employee argued that his disability is a "severe allergic condition that makes him sensitive to the smell and breaking of some perfumes and chemicals" and contended that his disorder substantially limited his ability to perform the major life activities of "breathing, eating, concentrating, smelling, touching and interacting with others."

Although the ADA recognizes breathing as a major life activity, the employee presented no evidence that his condition was triggered outside of his place of employment, and the court concluded that an individual does not suffer from a disability "when an impairment only manifests itself when the individual is exposed to an allergen" at work.

Although the employee argued that the casino had a duty to accommodate him by placing him in a low-allergen environment and requested the use of "activated charcoal prefilters" in the working area, to limit use of perfumes around him, and avoid scheduling him in high antigen-load days, the court found that he failed to offer evidence as to how the casino might accomplish this accommodation, and noted that it seemed highly impractical to police the scents of employees and clients. ■

Scent sensitivities

In *Jimenez*, the U.S. District Court for the District of Puerto Rico found that an employee who suffered from allergies related to scents was not disabled. However, other federal courts have held that a sensitivity to scents can be considered a disability.

The Job Accommodations Network has free guidance for employers on how to accommodate employees with fragrance sensitivities at http://askjan.org/media/downloads/FragranceA&CSeries.doc. ■

Fla. resort ordered by DOL to pay more than $400K in back wages

A U.S. Department of Labor Wage and Hour Division investigation found that an Orlando-based resort routinely changed payroll records to avoid paying employees overtime, a violation of the Fair Labor Standards Act, resulting in $372,183 in back wages owed to 275 employees. In addition to collecting back wages, the Division assessed $41,368 in penalties against the resort for repeat violations to the FLSA.

DOL investigators determined that the management of Vistana Management Inc. — doing business as Sheraton Vistana Resort — failed to record and pay accurately for all the hours that employees worked. Specifically, the employer altered time records to record fewer hours in the payroll than employees had actually worked, according to the DOL. Investigators also said that managers requested that employees sign documents authorizing them to edit their clock-in and clock-out times, and to modify their timecards to reflect that employees had not worked through their lunch breaks when they had.

"The resolution of this case puts these wages into the hands of those who earned them, and demonstrates how the Department of Labor's enforcement protects workers and levels the playing field for law-abiding employers," said Daniel White, district director for the Wage and Hour Division in Jacksonville, Fla. ■

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DOL changes could be positive for hospitality employers

Changes are underway at the U.S. Department of Labor — changes that could be positive for employers. Toward the end of 2017, the DOL announced its semi-annual regulatory agenda, outlining plans to repeal the 2011 tip pooling regulation that has given many restaurants headaches and led to some high-profile restaurateurs to forgo tipping in their restaurants altogether.

The 2011 rule — which prohibits restaurants and bars from forcing servers to share their tips with untipped employees and deems that tips are the property of employees — was potentially up for review at the Supreme Court due to a petition from the National Restaurant Association. Now that looks largely unnecessary.

Jason Finkelstein, a New York City based attorney who is a member of Cole Schotz, P.C.'s Restaurant & Hospitality Practice Group says he expects restaurateurs to be happy with this DOL change.

"This helps them significantly," he says. "Restaurateurs can go back to what they were doing previously and splitting tips more broadly."

Although some argue that employees may suffer harm from this approach, Finkelstein says he believes bringing back the team approach in dining will actually help morale. Unfortunately, he cautioned, this change may not benefit restaurants in municipalities such as New York City that have their own strict rules on tip sharing.

While the DOL is still accepting comments on this proposed change — and hasn't been enforcing the 2011 tip pool rules since last summer — it's likely that the official repeal will go through in the next few months. Finkelstein suggests that hospitality employers make sure their policies are up to date and know their state and local rules before changing tipping arrangements.

Another DOL change may allow employers to bring back unpaid interns. On Dec. 19, 2017, the U.S. Court of Appeals for the Ninth Circuit became the fourth federal appellate court to expressly reject the DOL's six-part test for determining whether interns and students are employees under the FLSA — a test that was instituted during the Obama Administration.

The DOL clarified that going forward, it will use the same "primary beneficiary" test that the courts have used to determine whether interns are employees under the FLSA. The DOL also noted that it has directed the Wage and Hour Division to update its enforcement policies to align with recent case law, eliminate unnecessary confusion among the regulated community, and provide the division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis. ■

Retaliation tops 2017 data

The Equal Employment Opportunity Commission may be operating under a different, more pro-business administration, but the agency stated in its strategic plan that it is committed to preventing discrimination, and plans to take a more targeted approach to enforcement by prioritizing cases based on the estimated strategic impact, and the number of individuals likely affected. Given that the agency has received no budgetary increase for 2018, it may be likely that efforts are focused on egregious violations.

The EEOC announced that in 2017 it handled 84,254 workplace discrimination charges and secured $398 million for victims in the private sector and state and local government workplaces through voluntary resolutions and litigation.

According to the EEOC, the agency reduced its charge workload by 16.2 percent to 61,621, the lowest level of inventory in 10 years by deploying new strategies to more efficiently prioritize charges with merit, more quickly resolve investigations, and improve the agency's digital systems. The agency handled over 540,000 calls to its toll-free number and more than 155,000 inquiries in field offices, reflecting the significant public demand for the EEOC's services.

In 2017, retaliation continued to be the most frequently filed charge, followed by race and disability. The agency also received 6,696 sexual harassment charges and obtained $46.3 million in monetary benefits for victims of sexual harassment. Specifically, the charge numbers show the following breakdowns by bases alleged, in descending order:

- Retaliation: 41,097 (48.8 percent of all charges filed)
- Race: 28,528 (33.9 percent)
- Disability: 26,838 (31.9 percent)
- Sex: 25,605 (30.4 percent)
- Age: 18,376 (21.8 percent)
- National Origin: 8,299 (9.8 percent)
- Religion: 3,436 (4.1 percent)
- Color: 3,240 (3.8 percent)
- Equal Pay Act: 996 (1.2 percent)
- Genetic Information: 206 (.2 percent). ■