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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Changes could be on horizon for foreign national workers

Be prepared for increased scrutiny of visas, I-9s, and other changes

By Susan Cohen, Esq.

President Trump has not long been in office, and employers are wondering how their businesses will be impacted by the Administration's U.S. immigration plans. President Trump has already implemented a travel ban against citizens of seven Muslim majority countries, an executive order that has been halted by a federal court.

President Trump has expressed the intent to make significant changes to existing U.S. immigration laws and policies, including building a wall between the U.S. and Mexico, escalating deportations of those in unlawful status with criminal convictions, withdrawing from the North American Free Trade Agreement, and terminating President Obama's Executive Order issued in 2012 that established the Deferred Action for Childhood Arrivals. In addition, President Trump also expressed a general interest in strengthening protections for the U.S. labor force and stepping up immigration enforcement generally.

The hospitality industry could see an impact not only on its foreign talent, but also a decline in foreign tourism if the U.S. is perceived as hostile or unwelcoming toward foreigners. For now, employers need to be prepared for the shifting U.S. immigration landscape. Here are some key areas of focus:

• **NAFTA.** NAFTA became effective in 1994, transforming trade relations between the U.S., Canada, and Mexico by eliminating tariffs and improving the ability for the U.S. to invest in their neighboring countries. Citizens of NAFTA countries who work in certain professional occupations may qualify for "TN" work visa. NAFTA occupations that support hospitality infrastructure may include hotel managers,

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Union's coercive harassment campaign may have violated law

Local 1 engaged in campaign targeting casino's customers

By Christopher A. Johlie, Esq., & Melissa D. Sobota, Esq.

Hospitality employers locked in a labor dispute can look to a recent lawsuit involving a casino and a union as one potential way to combat union harassment campaigns. *Ameristar Casino East Chicago, LLC, et al., v. Unite Here Local 1*, No. 16 CV 5379 (N.D. Ill. 12/19/2016).

In this case, the Unite Here Local 1 was accused of engaging in unlawful "secondary boycott" activity under the National Labor Relations Act by calling, sending letters to, and distributing leaflets to Ameristar Casino East Chicago customers' homes and the homes of their neighbors, asking them to boycott the casino due to an ongoing labor dispute. The union, which represents about 200 of Ameristar's employees, was also accused of engaging in unlawful secondary boycott activity by entering the businesses of Ameristar's customers and leafletting the business customers to support the boycott of Ameristar.

The NLRA prohibits a union from threatening, coercing, or restraining "any person engaged in commerce … to cease doing business with any other person." The courts have emphasized the key component of this prohibition is conduct that is coercive as opposed to persuasive. Courts have found peaceful handbilling to be lawful persuasive conduct, but only when the literature is being distributed to people that want to receive it. While peaceful handbilling is generally protected by the NLRA, conduct that is rises to the level of harassment or repeated trespass can violate the law.

In the *Ameristar* case, a federal district court in Illinois found that distributing leaflets and approaching customers inside a restaurant was different than traditional handbilling and was

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Sexual assault in lobby bathroom was not foreseeable

Appeals court affirms jury ruling in favor of hotel in negligence lawsuit

The resort acknowledged at trial that it allowed the man to occupy a room without check in and registering him at the front desk — which was contrary to written policy — but the court found that the man's status as an illegal immigrant was irrelevant.

The lack of foreseeability protected a resort from liability when a guest was sexually assaulted by another guest in the lobby bathroom. *Magers v. Diamondhead Resort, LLC,* No. 2015-CA-01330-COA (Miss. Ct. App. 12/13/2016).

A woman who was sexually assaulted in a hotel lobby bathroom by an undocumented worker staying on the premises filed a complaint against the resort, alleging negligent security on the premises. A jury returned a verdict in favor of the resort, and the woman appealed.

In June 2011, the woman had been at a nightclub on the resort property with a group of people. She exited the club around 1:50 a.m. to use the restroom located near the hotel lobby. Unbeknownst to the woman, a man followed her into the bathroom. The man was a member of a construction crew performing work in the area who was staying at the hotel in one of three rooms reserved by the construction crew foreman. The resort did not register the man, who was an undocumented immigrant, as a guest, in violation of its own policy.

The man brutally raped the woman and walked back to his hotel room. The woman reported the rape to security and the man was located in the hotel room. He was arrested and convicted and sentenced to serve 25 years in the Mississippi Department of Corrections.

A jury found that the hotel did not breach a duty owned to the woman, and she appealed, arguing that the trial court erred in its jury instructions, and wrongly prohibited her from referencing the man's illegal status. The woman contended that the instructions allowed the jury to determine whether the resort owed her a duty — a question she argued should be determined by the court.

The Mississippi Court of Appeals affirmed the jury's verdict, finding that the court did not err and that the resort acknowledged that it owed her a duty, but argued that the incident was not foreseeable.

The court disagreed with the woman's assertion that the man's status as an undocumented worker was relevant to the case. The resort acknowledged at trial that it allowed the man to occupy a room without check in and registering him at the front desk — which was contrary to written policy — but the court found that the man's status as an illegal immigrant was irrelevant.

Therefore, the appeals court held that the court did not abuse its discretion in excluding that information from being heard by the jury. ■

Liability for third-party acts

The Mississippi Supreme Court has declined to impose a burden of strict liability on businesses for all injuries occurring on the premises as a result of criminal acts by third parties.

Property owners have a duty to remedy, or warn of, dangerous conditions on their property that are known or should be known. However, if the alleged dangerous condition is the threat of an assault, a plaintiff must prove the hotel had either actual or constructive knowledge of the assailant's violent nature, or actual or constructive knowledge that an atmosphere of violence existed on the premises. ■

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Employees failed to show rest break policy violated state law

Restaurant updated policy after state high court clarified law

Staying on top of a rest break clarification in the California courts helped a chain squash a class action lawsuit filed by a group of employees who claimed the restaurant failed to comply with break laws. *Rosas, et al., v. Capital Grille Holdings, Inc., et al.*, No. B268959 (Cal. Ct. App. 12/21/2016)

A group of employees from The Capital Grille restaurant in Los Angeles filed a complaint alleging that they did not receive rest breaks and that the restaurant implemented a break policy that did not comply with California law. A trial court denied their motion to certify a class.

In California, labor regulations require that nonexempt employees in the "public housekeeping industry," which includes restaurants, receive rest periods based on the total hours worked daily. The labor code requires that 10-minute rest periods are provided every four hours worked, or a major fraction thereof, except for employees who work for less than 3.5 hours, who do not require a break under the law. On April 25, 2012, the California Supreme Court interpreted "major fraction" to mean any time over two hours, meaning that employees must receive 10 minutes rest for shifts between 3.5 to six hours in length, 20 minutes for shifts of six to 10 hours, and 30 minutes for shifts more than 10 hours. Employers who violate the requirement must pay a premium wage equivalent to one hour's pay.

Capital Grille L.A. adopted a rest break policy in 2010 that was compliant with the law, but corporate revised the policy in 2011 but testified that it never distributed the new policy to its L.A. location. However, the employees allege that before the court ruling, Capital Grille L.A. did not comply with those rest break requirements, and failed to provide second and third rest periods between June 2010 and April 2012.

The company's 2010 policy stated that all non-exempt employees must receive a net 10-minute paid rest break for every four hours of consecutive work, and that breaks should be taken as close as possible to the mid-point of each four-hour shift; employees working shifts longer than six hours were entitled to a second break. The restaurant trained managers on the rest break policies, including that employees logging more than 10 hours should be taking a third rest break.

In the 2011 policy, the company stated that employees were entitled to 10 minute paid rest breaks for every four hours of consecutive work or major fraction thereof, but the company defined "major fraction" as 3.5 hours. However, there is no evidence that it was distributed or made accessible to the Los Angeles location.

After the state's high court handed down its opinion in April 2012, Darden emailed its L.A. restaurant, stating that while the break polices complied with the court's clarifications, it would require a change in timing of rest breaks to ensure that ensure that employees working 3.5 hours or more in a day receive a net 10 minute rest break for every four-hour period or two-hour fraction thereof. The email also stated that a new poster would be sent to replace the goldenrod color poster (the 2011 one) immediately.

The trial court concluded that the employees provided insufficient evidence that an illegal break policy was consistently applied between June 2010 and April 2012, and they appealed.

The California Court of Appeals affirmed the ruling. The court noted that the trial court evaluated the evidence only to the extent necessary to determine whether common issues would predominate at trial, as is required for class certification.

The trial court found that the employees failed to provide sufficient evidence of a "uniform policy that was consistently applied to the putative class" and that they therefore had failed to meet their burden for class treatment. Therefore, the court held that the trial court acted within the scope of its discretion in concluding that the employees could not proceed with their class claims. ■

Lack of substantial evidence

Although the employees argued that the trial court's role was limited to determining whether they presented substantial evidence of an unlawful rest break policy, the appeals court disagreed, noting that as long as the court did not base its ruling on improper criteria or erroneous legal assumptions, there was no reason to reverse the decision if substantial evidence was not presented. ■

NRA creates law center to fight overregulation in restaurant industry

A new Restaurant Law Center has been created by the National Restaurant Association to provide legal advocacy on behalf of the restaurant industry to fight overregulation at the local, state, and federal level.

"The restaurant industry has been participating in legal battles on behalf of restaurant owners and employees for years," stated Angelo Amador, Executive Director of the Restaurant Law Center. "But as these fights become more and more prevalent, we must have the legal means and an apparatus to push back against outside groups that threaten the jobs and economic growth the restaurant industry creates, as well as to protect and advance the industry. The Restaurant Law Center will streamline the industry's ability to engage in legal proceedings and to seek just outcomes."

One of the first cases the Restaurant Law Center will manage is *Oregon Restaurant and Lodging, et al v. Perez, et al*. The Restaurant Law Center has filed a Petition of Certiorari with the U.S. Supreme Court, challenging the U.S. Department of Labor's determination that bars restaurants that do not take a tip credit from allowing front of the house staff to share tips with back of the house staff. The case was recently rated one of the top five employment cases to watch in 2017 by Law360.

To learn more about the Restaurant Law Center and the cases it is currently handling, visit www.restaurantlawcenter.org. ■

"Always consult with counsel before taking any employment actions based on a suspicion that an employee may not have valid employment status." — Susan Cohen, Esq., attorney

FOREIGN (continued from page 1)

designers, engineers, architects, accountants, computer systems analysts, and management consultants.

President Trump stated that he wants to withdraw from NAFTA, citing it as "the worst trade deal in history." If he withdraws from NAFTA, the TN visa category could be eliminated. Since NAFTA was implemented in the U.S. through an act of Congress and the authority for visas is embedded in the U.S. Immigration and Nationality Act and relating regulations, so unwinding TN visas would likely involve a long and complicated process requiring congressional action. At this point, employers should be able to retain current TN workers for the foreseeable future. However, it would be prudent to consult with your immigration counsel about alternative visa options that may be available for TN workers should the visa category become redundant.

• **DACA.** Under DACA, certain qualified undocumented immigrants are protected against deportation and may be eligible for an Employment Authorization Document, or EAD, that authorizes open-market employment. Because the EAD associated with DACA is good for unrestricted employment, there is no specific employer-sponsorship required, nor is there a qualifying professional degree or experience required to qualify for the benefit. The DACA-based EAD is a "List A" document on the Form I-9 Employment Eligibility Verification, which is proof of identity and work authorization. Those in possession of a valid DACA-based EAD may be eligible for various positions within the hospitality industry, from an entry-level dishwasher to a manager or director of operations.

Since the U.S. Citizenship and Immigration Services has approved nearly 750,000 DACA applications and related applications for EAD's, it is likely that at least some of your employees may have presented a DACA-based EAD as their I-9 document proving their eligibility to work in the U.S.

If President Trump rescinds DACA, he could potentially order the cancellation of existing DACA-based EAD's. Alternatively, he could allow the existing EAD's to remain in place until their stated expiration dates and prohibit renewals. It is more likely that existing EAD's will remain valid, but it is critical to follow this issue closely. Ensure that your human resources personnel do not take any preemptive employment actions or engage in any unfair or discriminatory practices. Always consult with counsel before taking any employment actions based on a suspicion that an employee may not have valid employment status.

Increased enforcement likely

While we do not yet know the specifics, it is highly likely that worksite enforcement of immigration laws and regulations will increase under the Trump Administration. The hospitality industry should be ready for greater enforcement.

Companies should perform a yearly I-9 audit if they aren't already doing so, and should perform an E-Verify audit and ensure their I-9's are in perfect order. Training should also be conducted yearly on I-9 and visa compliance and avoiding unfair or discriminatory hiring practices. Ensure employees on work visas are engaging in the activities described in the related petitions and applications and file amended petitions if their jobs have materially changed. Also make sure you are paying the wages promised on the visa filings and that you are paying these wages in regular payroll increments, and not with lump sum payments at the end of the year.

If you have J-1 or H-3 trainees, ensure the employees are receiving the training as promised to the government. If you employ H-1B or E-3 workers, ensure you have taken the proper steps to maintain Public Access Files, bearing in mind that anyone — such as a government investigator, employee, or visitor — may inspect the files. The Fraud Detection and National Security division of USCIS may increase unannounced work site inspections to verify foreign nationals are authorized for work at a particular site and in a particular capacity.

As we anticipate changes with the new Administration, it is the job of immigration attorneys to keep their fingers on the pulse of new programs, policies, rules, and regulations. Consulting with an immigration attorney will allow hospitality industry employers to discuss immigration-related employment hurdles and navigate options to maintain your foreign national workforce.

Susan Cohen is a partner in the Boston office of Mintz Levin and founder and chair of the firm's Immigration Practice. Firm associate Elizabeth Wheeler also contributed to this article. ■

Casino's record of policy enforcement led to dismissal of suit

Injured chef terminated after urine sample tested positive for alcohol

A casino's record of upholding its company policies and refusing to make exceptions helped it obtain summary judgment in a lawsuit filed by an employee who was fired after testing positive for alcohol. *Clark v. Boyd Tunica, Inc., d/b/a Sam's Town Hotel and Gambling Hall,* No. 16-60167 (5th Cir. 12/09/2016).

After a speciality room chef for a casino fractured her ankle after tripping over a drainage pipe in the casino kitchen, she received treatment for her injury and, in compliance with casino policy, submitted to a drug and alcohol test. The policy stated that if individuals tested positive for alcohol while on the premises that they would be subject to immediate termination. The casino had a clear record of repeatedly and consistently enforcing the policy, and fired had fired every employee who tested positive for drugs or alcohol since at least 2009.

The employee's urine sample came back positive for alcohol, measuring at 0.12 percent blood alcohol concentration, above the legal limit in the state.

The employee testified that she did not drink alcohol and provided the casino with a list of the medications she was taking and the green tea she had been drinking the day of the incident. Other employees also employees testified that she did not appear to be under the influence of alcohol.

The casino contacted Quest Diagnostics, which investigated whether the medications, or the employee's diabetes could account for the positive alcohol sample. However, the company declared that the green tea and medications could not account for the positive sample. The employee, who was out of work and receiving workers' compensation for her ankle, was then terminated.

She filed a complaint against the casino alleging that her diabetes medication, Metformin, impacted the alcohol levels in her urine and that her employer knew that she did not drink alcohol. She claimed that the casino used the positive alcohol sample to fire her because of her disability, namely, her fractured ankle, in violation of the Americans with Disabilities Act.

The casino moved for summary judgment, which was granted. The employee appealed, arguing that the district court wrongly determined that she was not disabled. A circuit court, however, affirmed the district court's decision. The court noted that the casino provided a legitimate, nondiscriminatory reason for terminating her employment — the positive alcohol sample — and that the evidence provided would not allow a reasonable jury to find that the alcohol sample was pretext for discrimination. Regardless, the court said that the pretext inquiry was not about whether the alcohol in the employee's urine sample was due to consumption of alcohol at work, but whether the casino reasonably believed it was and acted on that basis.

The court also noted that the casino made an attempt to determine whether there was a plausible reason — other than the employee's consumption of alcohol — for the positive alcohol sample.

Finally, the court said that the employee failed to show that she had been treated differently from any other employees, or present evidence that her medication has been known to cause false positive results for alcohol use. ■

Acting on good faith

When considering adverse employment decisions in discrimination cases, a court does not need to determine whether an employer's reason for firing an employee was proper — just whether it was discriminatory.

In *Clark v. Boyd Tunica*, the focus of the pretext inquiry was not whether the alcohol in the employee's urine sample was, in fact, attributable to her improper consumption of alcohol, but whether Sam's Town reasonably believed it was and acted on that basis.

Courts have held that the inquiry is limited to whether the employer believes the allegation in good faith. An employee's actual innocence is irrelevant as long as the employer reasonably believed it.

The court found that the employee failed to show that it was unreasonable for the casino to rely on her positive alcohol sample in making its decision to fire her. In the absence of any alternative explanation for the positive result, the court noted that the casino had to decide whether to credit the employee's proclamations of innocence, and that its choice to credit the opinion of the lab instead was reasonable under the circumstances and did not establish pretext. ■

DOJ settles lawsuit alleging immigration, origin discrimination

The U.S. Department of Justice reached an agreement with the owners of a chain of sports arena restaurants, settling charges that the company violated the Immigration and Nationality Act.

The DOJ claimed that Levy Premium Foodservice Limited Partnership discriminated against two lawful permanent residents at its Barclay Center restaurant by improperly reverifying their employment eligibility because of their immigration status. The department also accused Levy of improperly requiring them to present specific types of documents to re-establish their employment eligibility and suspended the charging party when he was unable to present such a document. They DOJ alleged that this amounted to discrimination based on citizenship, immigration status or national origin. Levy has since reinstated the employees.

Under the terms of the settlement, Levy must pay a civil penalty to the U.S., undergo department-provided training on the anti-discrimination provision of the INA and be subject to departmental monitoring and reporting requirements.

The anti-discrimination provision of the INA prohibits, among other things, citizenship, immigration status, and national origin discrimination in hiring, firing, or recruitment or referral for a fee; unfair documentary practices; retaliation and intimidation. ■

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much more like an attempt to interfere with the customer's enjoyment of the restaurant in order to persuade the customers of the union's cause. Furthermore, the union's repeated attempts to leaflet at a restaurant owned by a casino customer — despite repeated requests to leave by the owner — looked to the court more like trespass and harassment than lawful persuasion.

The court also noted that the union's act of going into another Ameristar customer's business and telling his employees that he was a "big gambler" and unable to give them raises because of his gambling showed that the union was not attempting to persuade anyone. Rather, the union was intending to interfere with Ameristar's customers' businesses. Additionally, the court noted that frequent and repetitive phone calls to customers and their family members supported an inference that the union intended to force neutrals to take sides in the labor dispute instead of trying to persuade the customers and their family members to support the union's cause.

Finally, the court noted that repeated leafletting of a customer's home and secondary individuals that had no connection with the casino after the union has been asked to stop raised an inference that the union's activity was designed to harass and coerce rather than persuade.

The judge in this case did not decide that the union actually violated federal labor law, but only that the casino and its plaintiff customers met a minimal pleading requirement to keep their lawsuit alive. But score this as a victory for employers — and individuals — who are caught in a union's crosshairs in a labor dispute.

The court's ruling will allow the case to proceed and could subject the union to a significant damage award. This ruling should also make unions think twice before attempting to ensnare neutrals in their labor disputes.

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Union accused of ruining reputation

The complaint in the Ameristar lawsuit alleged that the union harassed customers in the following ways:

• One customer claimed that Local 1 distributed leaflets describing him and his wife as regulars at the casino within a one-block radius of his house. He says as a result, their reputation has been diminished, neighbors and family members have asked if they have a gambling problem, and at least one neighbor who was also a customer of the man's business ceased doing business with him.

• Another customer who owns a bar and grill says Local 1 distributed leaflets identifying him as a regular at the mayor's office and the home of a village alderman. He also claimed that Local 1 members entered his bar and attempted to solicit his customers to boycott the casino.

• A third customer, who owns a restaurant, says union representative entered her establishment at dinner time and began distributing leaflets identifying her as a regular to her restaurant patrons. A month later they protested outside of her restaurant, approaching patrons, until they were ordered to leave by the local police. ■

Employees may proceed with allegations of off-the-clock work

Court certifies class of sales reps who say they deserve overtime pay

Allegations of a policy of off-the-clock work led a district court to certify a class of employees in a lawsuit against Wyndham Vacation Resorts. *Bitner, et al., v. Wyndham Vacation Resorts, Inc.*, No. 13-cv-451-wmc (W.D. Wis. 12/29/2016)

A group of Wyndham employees, who are sales representatives at the company's only Wisconsin resort, claimed that managers and supervisors maintained an unofficial policy that required them to perform unpaid, off-the-clock work in violation of the Fair Labor Standards Act. A prior court granted certification to a class of 31 current and former employees at the location in two different positions: "in-house sales representatives," who market upgrades to existing timeshare owners, and "discovery sales representatives," who market to potential customers who have already declined to purchase after an initial meeting.

The employees moved to certify a Rule 23 class of 109 in-house sales reps going back to 2011. Wyndham filed a motion to decertify the classes and both the employees and Wyndham moved for partial summary judgment.

The employees were classified as non-exempt and were paid an hourly minimum wage, as well as commissions and bonuses. Future commissions are paid out from a balance of hourly draw payments earned, which accumulate indefinitely until the employee stops working or earns enough in commissions to pay down the balance. Reps who work more than 40 hours per week earn overtime on their regular rate of pay, and employees are required to keep track of their own hours via the Wyntime electronic timekeeping system.

The company maintains a timekeeping policy, available in the employee handbook, and all new employees are trained on the policy. The policy requires employees to be clocked in while working and to clock out during meal breaks or periods of non-work, and to report off-site work and receive pre-approval before overtime work is performed.

The employees alleged that despite the policies, managers maintained an unofficial policy of requiring off-the-clock work. Some employees claimed that they were told to "manage" their time to avoid working more than 40 hours per week, which they viewed as a thinly veiled order to work "off the clock;" others claimed that they were commanded to punch out when they neared 40 hours in a week. One employee testified that he was told to be off the clock while attending training meetings. Two sales managers testified that their supervisors — in-house sales directors — were aware of and condoned the off-the-clock work.

The company uses a "payment gateway" system to process down payments from customers, and the system creates a nearly contemporaneous time stamp during processing and records the employee who made the sale. The workers provided data for 17 opt-in employees showing that they were off the clock more than 55 percent of the time when a timestamp was created.

Wyndham noted that when it received employee complaints of off-the-clock work in 2012 that it promptly investigated the charges, disciplined multiple managers, improved mandatory timekeeping training, and gave employees the opportunity to claim payment for off-the-clock work performed.

A district court, however, found in favor of the employees and certified all in-house sales representatives at Wyndham's Wisconsin location between June 2011 and fall 2014 and denied Wyndham's request for decertification. Although the court noted that the employees may have a difficult time ultimately proving that Wyndham had an unofficial policy of requiring off-the-clock work, the court held that the employees presented sufficient evidence to proceed to trial.

Despite Wyndham's argument that the employees failed to satisfy the typicality for class certification because of the variations in the alleged off-the-clock directives, the court found that they presented enough evidence to show that the different methods allegedly used by managers for off-the-clock work all contributed to the same alleged result of denying employees proper overtime compensation.

The court also dismissed Wyndham's contention that employees' variations in work experiences could not be determined through common proof, holding that since the employees are seeking to establish an unofficial policy existed, that determining liability would not necessitate separate trials. ■

EEOC claimed Fla. hotel terminated all black employees

The Equal Employment Opportunity Commission has settled a lawsuit with a Florida hotel that the agency accused of discriminating against employees because of their race.

Hospman, LLC, which operates a hotel in Fort Myers, Fla., will pay $35,000 and furnish other relief to settle the suit.

According to the EEOC's complaint, Hospman fired several black employees in August 2012 after taking over management responsibility of the property. The EEOC charged that Jose Carvalho, Hospman's former chief executive officer, ordered the housekeeping supervisor, Tinica Jones, to terminate all of the housekeepers — all but one of whom were black — because he allegedly said that he did not work with "those kind of people." Carvalho also asked Jones about her race and, upon learning that she was black, fired her as well, claimed the EEOC. The lawsuit also contended that Risha Stewart, the only black front desk attendant, was also terminated, while other non-black front desk workers were allowed to continue their employment.

Under the consent decree, Hospman will compensate the terminated employees, revise its policies regarding race discrimination complaints as set forth in its employee handbook, and conduct annual training of its managers and supervisors on the requirements of Title VII. ■

Know how to accommodate mental health conditions

Lawsuits alleging discrimination based on mental health conditions are on the rise, and as of right now, the Equal Employment Opportunity Commission is showing no signs of easing up on the enforcement of the rights of individuals with mental health disabilities protected under the Americans with Disabilities Act.

During fiscal year 2016, preliminary data shows that the EEOC handled nearly 5,000 charges of discrimination based on mental health conditions, obtaining approximately $20 million for individuals with mental health conditions who the agency says were unlawfully denied employment and reasonable accommodations.

"Many people with common mental health conditions have important protections under the ADA," said EEOC Chair Jenny R. Yang. "Employers, job applicants, and employees should know that mental health conditions are no different than physical health conditions under the law. In our recent outreach to veterans who have returned home with service-connected disabilities, we have seen the need to raise awareness about these issues. This resource document aims to clarify the protections that the ADA affords employees."

Recently, the EEOC released guidance that explains workplace rights for individuals with mental health conditions, such as depression, post-traumatic stress disorder, schizophrenia, bipolar disorder, obsessive compulsive disorder, and more. While the document is intended to help individuals with these disorders know their legal rights, it also provides information on the type of accommodations that may be thought reasonable and that employers could potentially be asked to provide. The guidance notes that an employee may qualify as an individual with a mental disability if their work activities are more difficult, uncomfortable, or time consuming compared to the way most others perform the activities.

Some of the reasonable accommodations highlighted include:

- Altering break and work schedules to accommodate therapy appointments.
- Employing a job coach.
- Locating work space in areas to create a quiet working environment.
- Modifying supervisory methods, such as providing written instructions rather than verbal.
- Providing the employee with permission to work from home.
- Offering Family and Medical Leave Act leave.

Before making a requested accommodation, however, employers do have a right to obtain reasonable documentation that an employee has a mental disability and needs an accommodation and require that the documentation comes from a health care professional or psychiatrist.

For more information on mental health accommodations, visit www.eeoc.gov/eeoc/publications/mental_health.cfm. ■

Intellectual disabilities

Lately, it appears that the Equal Employment Opportunity Commission is also homing in on intellectual disabilities and ensuring that employers are accommodating these workers.

In just the past month, the EEOC settled two such lawsuits. The first, filed by the EEOC against a Utah Papa John's Pizza location, alleged that the restaurant chain discriminated against a man with Down syndrome.

The complaint charged that the man had been employed for about five months and worked with the help of a job coach, but that a visiting operating partner ordered that he be terminated. Under a consent decree, the restaurant agreed to pay $125,000 to the man, review its equal employment opportunity policies, conduct training for management and human resources employees for its restaurants in Utah, and establish a new recruitment program for individuals with disabilities in Utah.

The case is *EEOC v. PJ Utah LLC, et al.,* No. 2:14-cv-00695-TC (D. Utah).

Another lawsuit, also alleging discrimination against an individual with Down syndrome, was filed by the EEOC against Wal-mart. The complaint alleged that a woman who had been working the same shift at a Wal-mart location for 15 years was scheduled for a different shift, and after having issues with absenteeism, was terminated. The complaint claimed that the woman repeatedly asked to work her usual shift of noon to 4 p.m., and that because of her intellectual disability, she was unable to adapt to the change in her routine.

The lawsuit, which has not yet been scheduled or gone to trial, asked the court to order Wal-mart to reinstate the employee with appropriate back pay, and compensatory and punitive damages.

The case is *EEOC v. Wal-Mart Stores East, LP,* No. 2:17-cv-70 (E.D. Wis.). ■