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Discounted meal rules did not violate state break rules

Taco Bell entitled to ask employees to eat half-price meals on premises

By Jeffrey H. Ruzal

A U.S. District Court in California recently ruled that Taco Bell's policy of providing its restaurant employees a food discount as long as they remain in the restaurant to consume the discounted food did not run afoul of a California law prohibiting employers from requiring its employees to work during a meal or rest break.

In *Rodriguez v. Taco Bell Corp*., No. 1:13-cv-01498-SAB, employee Bernardina Rodriguez, who worked at a Taco Bell in Suisun, Calif., brought claims against her employer, alleging that the company failed to provide proper meal and rest breaks and, as a result, failed to properly pay her for overtime hours worked. Rodriguez's claims stemmed from Taco Bell's discounted meal policy, which states that employees may purchase a discounted meal immediately before, during or after their shift, but that they must eat their discounted meals in the restaurant.

Taco Bell apparently maintains its dine-in only policy to dissuade employees from purchasing discounted food for individuals other than themselves.

Rodriguez alleged that this policy violates California law stating that an employer shall not require an employee to work during a meal or rest period, and that if an employer fails to provide a meal or rest period in accordance with this law the employer will be required to pay the employee an additional hour of pay at the employee's regular hourly rate. She also argued that because Taco Bell required employees to remain on premises to eat their discounted meals, the company failed to provide her with a break that was completely free of work.

In addition, Rodriguez claimed that Taco Bell failed to properly compensate her because

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Employee's termination due to poor performance, not race

Court holds that supervisor's comments were unrelated to race

By Gregg A. Gilman and Shira Franco

A hotel management company's recent victory in a race discrimination case underscores the importance of evaluating employee performance based on objective criteria and carefully documenting performance deficiencies.

In *Milladge v. OTO Development, LLC*, No. 14-cv-00194 (E.D. Va. 10/01/2014), the court granted summary judgment to OTO, a hotel development and management company, in a race discrimination case brought by black employee, Demetra Milladge, who worked as a sales director for the company.

During her employment by OTO, Milladge managed a sales team responsible for attracting business to two hotels near Dulles Airport. Both hotels continually struggled under her management. Milladge's hotels were ranked low compared to similar area hotels, performed poorly against the RevPAR (revenue per available room) Index, and failed to meet budget goals for 2011, 2012, and the first half of 2013.

In February 2013, OTO hired Jason Poynter, who is white, as OTO's regional director of sales for the region that encompassed Milladge's hotels. Poynter and Milladge immediately clashed, with Milladge disputing Poynter's negative assessment of her hotels. Milladge also alleged that Poynter was condescending and rude toward her, and that he would often demand answers from her or interrupt her. Poynter also allegedly made comments such as "You need to be on top of this," or "You have to put your big girl panties on," and "You have to have a backbone." Poynter also told Milladge that she needed to be more like the only other black sales director, whom Poynter said "always gets on board" and "does everything I ask her to do."

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The court granted Outback's motion, holding that Boudreaux's complaint failed to contain sufficient allegations under the theory of intentional interference because he only sued the corporate entities themselves, and the tortuous interference claim only extends to individual corporate officers.

Employee failed to show non-compete agreement was deceptive

Court also dismisses man's theory of intentional interference charge

Companies have a vested interest in protecting their business and trade secrets through non-competition agreements. However, these must be crafted carefully to hold up in the courts, which have generally taken an unfavorable view of such agreements.

In *Boudreaux v. OS Restaurant Services, LLC, et al*., No. 14-1169 SECTION I (E.D. La. 09/30/2014), an Outback Steakhouse relinquished its right to enforce a non-compete agreement signed by a former employee after he filed a complaint seeking to invalidate the agreement. But a district court sided with the company on the employee's further charges of intentional interference with contractual relations and unfair trade.

Steven Boudreaux worked for Outback Steakhouse restaurant and was terminated in May 2013. During his time with Outback, he signed an employment agreement containing a noncompete clause that Boudreaux alleges is invalid.

The employment agreement stated that after the termination of Boudreaux's employment contract with Outback, for two years he cannot be employed by or hold an interest in any steakhouse located within a 30 miles radius of any Outback Steakhouse or proposed Outback Steakhouse.

Initially, Boudreaux sought declaratory judgment that the non-competition agreement was invalid, as well as an injunction prohibiting Outback from enforcing the agreement. However, after Outback sent a letter stating that it would "irrevocably waive any rights they may possess to enforce the non-competition provision in [plaintiff's] employment agreement," Boudreaux agreed that those two counts were moot and should be dismissed.

Boudreaux, however, continued to pursue his other two claims for damages under a theory of intentional interference with contractual relations as well as violations of the Louisiana Unfair Trade Practices Act. Outback moved for summary judgment.

The court granted Outback's motion, holding that Boudreaux's complaint failed to contain sufficient allegations under the theory of intentional interference because he only sued the corporate entities themselves, and the tortuous interference claim only extends to individual corporate officers.

The court also held that Boudreaux failed to show that he was entitled to damages under LUTPA. Under LUTPA, any person who suffers the loss of money or movable property as a result of the use or employment by another person of an unfair or deceptive method, act, or practice may bring an action to recover actual damages.

Outback noted that it only took one action to enforce its contract — sending Boudreaux a form letter shortly after his termination in which he was reminded that certain provisions of the employment agreement survived his termination, including the non-competition and confidentiality agreements signed by Boudreaux.

The court noted that while it sympathized with Boudreaux, Outback did not engage in fraud, misrepresentation, deception or similar conduct to enforce the agreement. ■

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Email may not be good enough for sending FMLA notices

Court holds that casino worker may proceed with interference claims

Properly advising employees of their recertification responsibilities under the Family and Medical Leave Act continues to be a headache for employers. While some courts have found that notifying employees exercising their right to leave of pending paperwork deadlines via snail mail is too unreliable, it now appears that email notification may not be sufficient either.

In *Gardner v. Detroit Entertainment, LLC d/b/a MotorCity Casino*, No. 12-14870 (E.D. Mich. 10/15/2014), a district court held that an employee could proceed with her claims that her employer interfered with her FMLA leave due to the lack of proof that the employer properly notified the employee of her need to submit recertification paperwork.

Summer Gardner began working at MotorCity Casino in 1999. In 2004, he asked for Family and Medical Leave Act leave on and off intermittently during the next seven years. The first leave related to Gardner's current medical condition, a degenerative spinal disorder, which began in 2006.

During the first 10 years of her employment, FMLA leave requests were processed internally through the company's human resources department. Beginning in 2009, however, MotorCity retained a third-party administrator, FMLASource, to process its employees' FMLA requests. When the system was changed, Summer asked to be communicated with by postal mail. Between November 2009 and December 2011, Summer received numerous letters from FMLASource through postal mail.

On Oct. 7, 2011, FMLASource sent a letter via email to Summer notifying her that her health care professional needed to re-certify her basis for leave by Oct. 25, 2011. FMLASource sent her a second email on Oct. 27, 2011 seeking recertification documents. The email also stated that any FMLA leave after Oct. 7, without receiving certification, would be denied and subject to the casino's attendance policy. On Nov. 2, 2011, she was terminated.

Summer contends that she never received the emails and had asked FMLASource to communicate with her exclusively by regular mail. The company claimed that Summer asked for communication via email exclusively.

Obtain proof of receipt

Getting written confirmation of receipt of certification notices sent to employees exercising their rights under the Family and Medical Leave Act may be the best strategy for protecting yourself from lawsuits like *Gardner*, said Jeff Nowak, co-chair of the Labor & Employment Practice Group at Chicago law firm Franczek Radelet P.C.

"If the employee is on site when notices are to be sent, I recommend providing them in hand to the employee and obtaining written confirmation," he said.

For notices from third-party administrators, Nowak recommends sending notices via certified mail. While this method may be costly, Nowak says "it's seemingly the only method of delivery courts will accept if employers want to prevail on summary judgment and avoid a trial." ■

Summer contacted FMLASource on Nov. 7, 2011, notifying them that she was unaware that recertification had been opened and that she never received the paperwork. She appealed the denial of her leave and submitted paperwork from her doctor. Her leave was approved between Nov. 22 until Dec. 12, 2011, but denied the earlier leave, making her termination final.

Summer alleged that the casino interfered with her FMLA leave, and a district court held that she could proceed with her claims. Although the casino argued that it should be entitled to summary judgment because Summer failed to submit her recertification paperwork by the deadline, the court agreed with Summer that the company's notice of its request for recertification was insufficient.

The court noted that the transmission of an email, in the absence of proof that the email had actually been opened and received, can only amount to proof of constructive notice. The court also noted that the 6th Circuit has held that an employer has a duty to inform an employee of an FMLA certification deficiency and provide the employee a "reasonable opportunity" to cure it.

The court held that since there is a genuine issue of material fact as to whether the casino provided Summer a "reasonable opportunity" to cure the deficiency, MotorCity's motion for summary judgment on her FMLA interference claim must be denied. ■

AH&LA urges House to get back to work to reauthorize TRIA

The American Hotel & Lodging Association, along with more than 80 other hotel industry groups including hotel brands, management companies, real estate investment trusts, owners and state hotel associations, have called on the U.S. House of Representatives to get back to work and pass the Terrorism Risk Insurance Act in a letter sent to House leadership.

AH&LA urged lawmakers to focus on the immediate priorities, including passage of this legislation, which the AH&LA says is critical to protect job and economic growth within the hotel industry and across the broader economy. More than 80 groups joined AH&LA in signing the letter, which was sent to every member of the House of Representatives in addition to House leadership.

"This program protects future development projects and provides security that hoteliers need to grow and create jobs," said Katherine Lugar, President and CEO of the AH&LA. "The Senate did what was necessary and passed a bipartisan, comprehensive bill with overwhelming support. It's now time for the House to take action and pass a similar bill that both maintains a strong, effective program and extends it on a multi-year basis,"

The Senate passed TRIA in July by a vote of 93-4, which reauthorizes the program for seven years. ■

"This case serves as an important reminder to employers to consider any and all benefits provided to employees because a non-exempt employee's regular rate should account for any value of that benefit."
— Jeffrey H. Ruzal, attorney

MEAL (continued from page 1)

her overtime rate of pay does not include the additional realized remuneration in the form of meal discounts. She argued that the value of the employee discount must be factored into her regular rate of pay by adding the value of the discount to the compensation paid and dividing the total by all hours worked to arrive at the regular rate which is used to compute overtime. The parties cross-moved for summary judgment on these issues.

On Oct. 23, 2014, the district court rendered its decision on the parties' motions. The court granted summary judgment to Taco Bell dismissing Rodriguez's claim that the company failed to provide a meal break in accordance with California law. The court held that Taco Bell did not effectively force its employees to remain on site during their breaks, but rather provided them with a choice as to whether to stay on premises and eat a discounted meal, or leave the premises and eat or rest elsewhere.

The court reasoned that, "[e]ven if it were assumed that Defendant's restrictions on off-duty time were primarily to Defendant's benefit, the restrictions imposed here are not so substantial that they interfere with employees' ability to engage in private pursuits. Here, the requirement to remain on premises is only triggered if the employee voluntarily chooses to purchase a discounted meal. Thus, the conditional requirement did not prevent employees from using their time effectively for their own purposes."

In addition, the court denied summary judgment to Rodriguez on her claim that Taco Bell failed to properly compensate her for any overtime she may have worked, finding that she failed to offer any evidence of how she was paid, her hourly rate, or how much she should have been paid. The court further found that Rodriguez incorrectly assumed that the "value" of her employee discount for purposes of calculating the regular rate is the amount of the discount, and that she failed to submit any evidence supporting the reasonable cost or fair value of the discount.

The court noted that, "hypothetically speaking, if the reasonable cost or fair value of the employee discount is zero, plaintiff's regular rate was calculated correctly and plaintiff suffered no underpayment in overtime under her regular rate theory. This could be the case if defendant's cost to produce discounted food products is equal to or less than 50 percent of the retail price, meaning defendant breaks even or makes a smaller profit when selling food items with the employee discount."

The question left for trial is whether Taco Bell's employee food discount holds any value, and, if so, how it should be measured for purposes of calculating the regular rate for overtime purposes. As the court aptly pointed out, measuring the fair value of the benefit to the employee is not as straightforward as simply deducting the employee discount from the retail cost of the food item. It is instead necessary to look behind the production cost of the food to determine whether there is any actual cost to the employer.

Consider all benefits in rate of pay

Nevertheless, this case serves as an important reminder to employers to consider any and all benefits provided to employees because a non-exempt employee's regular rate should account for any value of that benefit. If your non-exempt employees work hours beyond 40 hours per week in the same work week that they receive a benefit, you may be required to add the value of that benefit to the employee's regular rate for purposes of computing overtime pay.

Jeffrey H. Ruzal is senior counsel at Epstein Becker Green in New York City. ■

HLaw Glossary

Payments other than cash

Providing benefits to employees may be a good retention strategy, but employers need to be aware that there can be implications for doling out these perks in some instances that may change an employee's rate of pay for overtime purposes.

Under law, 29 C.F.R. § 778.116, where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the employees regular rate of pay.

Where, for example, an employer furnishes lodging to his employees in addition to cash wages, the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined. ■

Diabetic doorman may proceed with discrimination claims

Questions over whether man can perform essential functions remain

The absence of a job description led a district court to allow a former doorman with diabetes to proceed with his disability discrimination claims. *Melton v. Resorts International Hotel, Inc., et al.*, No. 11-06449 (RMB/KMW) (D. N.J. 10/20/2014)

Damian Melton, who is a Type I diabetic, began working as a door person at Resorts Atlantic City in 2004, but was terminated in December 2010. During his time at Resorts, he was granted an accommodation so that he did not need to work the graveyard shift.

In August 2010, Melton sustained an injury to his shoulder, and after he returned from surgery, Melton was assigned to light duty as a valet cashier. In December 2010, ownership of the casino changed hands, and the entire staff was terminated. All employees were encouraged to reapply for positions with the new company.

Melton applied for positions as a door person, bartender, valet cashier, and bellman, but was not hired for any of the positions. Six door people were hired; five of them had worked for the prior company with Melton.

Melton filed a complaint alleging that he was discriminated against on the basis of his disability under the New Jersey Law Against Discrimination. Melton claimed that he was not hired for the door person position because of his diabetes.

A district court held that Melton could proceed with this charge, finding that questions exist regarding whether the proffered reasons for choosing a different candidate for the position were a pretext for disability discrimination.

While the casino claimed that Melton failed to show that he was qualified for the door person position, Melton argued that he met his burden of demonstrating that he can perform the essential functions of the job because he had been employed as a doorman at the casino for more than six years, and received positive reviews.

Although the casino argued that because he was on light duty during the time of the rehire, "one would have to assume that he was physically incapable of performing the lifting and other physical activities necessary to act as a door person," the court noted that the record showed that the reassignment was anything other than a temporary accommodation to permit Melton's shoulder injury to heal.

Although the casino argued that Melton did not work the graveyard shift, and therefore didn't have the requisite schedule flexibility for the position, Melton argued that the casino failed to demonstrate that flexibility was an essential function of the position. While managers testified that "an employee who couldn't work the grave shift or wouldn't work the grave shift couldn't be considered" for the position, the court noted that the fact that a job description that outlined this requirement was unavailable complicated the court's analysis.

The casino also argued that decision makers did not know about Melton's disability, but the court held that the record contained enough evidence that those involved in the hiring decision for the doorman positions were aware of Melton's diabetes and corresponding inability to work the graveyard shift. ■

Diabetes and the ADA

The Americans with Disabilities Act Amendments Act made diabetes an easily qualifying disability. If an employer has hired an applicant who discloses that he or she has diabetes, there are some questions an employer may ask.

According to the Equal Employment Opportunity Commission, after making a conditional job offer, an employer may ask:

- How long the person has had diabetes;
- Whether the person she uses insulin or oral medication;
- Whether and how often the person experiences hypoglycemic episodes; and/or
- Whether the person will need assistance if her blood sugar level drops while at work.

The employer also may send the applicant for a follow-up medical examination or ask the person to submit documentation from a doctor answering questions specifically designed to assess the individual's ability to perform the job's functions safely. Permissible follow-up questions at this stage differ from those at the pre-offer stage when an employer only may ask an applicant who voluntarily discloses a disability whether the applicant needs an accommodation to perform the job and what type.

An employer may not withdraw an offer from an applicant with diabetes if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation.

Source: www.eeoc.gov/laws/types/diabetes.cfm. ■

Man behind Subway POS hacking scheme sentenced to prison

A California man was sentenced to serve 18 months in prison and ordered to pay $34,712 in restitution, today for remotely hacking into the computerized cash registers of Subway restaurants and fraudulently obtaining more than $40,000 in gift cards.

Shahin Abdollahi, a/k/a Sean Holdt, 46, of Lake Elsinore, Calif., pleaded guilty on May 14, 2014, to one count of conspiracy to commit computer intrusion and wire fraud and one count of wire fraud. Abdollahi admitted that he owned Subway franchises in Southern California, and later operated a California company called "POS Doctor," which sold and installed point-of-sale computer systems to Subway franchises around the country. He acknowledged that, beginning in 2011, he and Jeffrey Wilkinson conspired to remotely hack into the POS systems he installed in Subway franchises around the country. Members of the conspiracy hacked into at least 13 Subway POS systems and fraudulently added at least $40,000 to Subway gift cards. Abdollahi acknowledged that he and Wilkinson used the fraudulent gift cards to make purchases at Subway, and Wilkinson also sold fraudulent gift cards on eBay and Craigslist.

Wilkinson, 37, also pleaded guilty and was sentenced to six months in prison on May 28, 2014. ■

RACE (continued from page 1)

In April 2013, Milladge received an unsatisfactory, "needs improvement" performance review. In August 2013, after her hotels were ranked last in revenue based on a report reflecting market information on hotel performance, OTO terminated Milladge's employment.

In her complaint, Milladge alleged violations of 42 U.S.C. § 1981. Milladge asserted that she was subjected to a racially hostile work environment and discrimination based on Poynter's comments and the termination of her employment. Milladge also brought a retaliation claim, alleging that she had complained about Poynter's general demeanor to one of her supervisors before she was terminated.

Rejecting Milladge's case in its entirety, the federal court in Virginia granted OTO's summary judgment motion. The court found that Milladge could not show that any of Poynter's comments or his general demeanor had anything to do with her race.

The court also rejected Milladge's theory that Poynter revealed racial animus by comparing her to the only other black sales director. To the contrary, the court found that Poynter's praise of the other sales director actually undermined Milladge's theory that Poynter harbored racial animosity. Additionally, the court noted that even if Poynter acted disrespectfully toward Milladge, his behavior and style did not rise to the level of hostility necessary to establish a legal claim.

In dismissing the race discrimination claim, the court held that Milladge failed to prove that her job performance was satisfactory. OTO had submitted extensive evidence, including evidence that Milladge's hotels fell short of their revenue goals, to support the company's position that she was failing to meet her performance objectives. Milladge's performance deficiencies provided a legitimate, non-discriminatory reason to terminate her employment, and thus she failed to demonstrate that race was the true reason for her termination.

On the retaliation claim, the court found that Milladge did not engage in protected activity, which is among the key elements necessary to state a claim for retaliation. The only complaint that Milladge had asserted during her employment was about Poynter's general demeanor, which she mentioned to a supervisor. However, she made no claims or inferences that his behavior was based on racial animosity.

This case serves as a reminder to hospitality employers of the importance of giving employees timely and regular performance appraisals, as well as clear performance targets. When an employee is responsible for meeting certain objective performance metrics, continuing failure to meet these metrics provides a legitimate, non-discriminatory reason to take disciplinary action up to and including termination of employment. This case also reflects that employee complaints of rude or dismissive behavior by supervisors — unrelated to any protected characteristic of the employee — does not support a claim for a legally actionable hostile work environment.

Gregg A. Gilman is co-chair of the Labor & Employment Practice Group of Davis & Gilbert. Shira Franco is a counsel in the group. They can be reached at ggilman@dglaw.com *and* sfranco@dglaw.com. ■

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Agreement gave club discretion on security arrangements

Lack of expert opinion to support negligence charge doomed lawsuit

The wide range of discretion over security measures outlined in a nightclub's agreement with its neighborhood commission allowed an appeals court to affirm dismissal of a negligence lawsuit filed by patrons injured in a fight. *Night and Day Management, LLC, et al., v. Butler, et al.*, Nos. 13-CV-944, 13-CV-1168 (D.C. Ct. App. 10/23/2014)

Four men sued Night and Day Management, LLC, which owns Fur Factory Nightclub, alleging that they sustained injuries in a fight due to the club's negligence.

In February 2010, the men reserved a table in the VIP section of the club. One of the four slipped and fell, and knocked over a bottle of vodka belonging to patrons at another VIP table. The men said they repeatedly offered to buy a new bottle of vodka for the party but were refused. Over the next 15 minutes, tensions increased and the other group allegedly flashed gang signs, and a man broke the empty bottle of vodka over the head of the man who knocked it over and a brawl ensued. There were no security personnel in the VIP room when the fight began and the security cameras were not working.

The men alleged that club security did not arrive until the fight was over and did not attempt to determine who started the fight. They claim that security escorted all of them out of the club but did not offer any medical assistance although several of the men were visibly bleeding. The men went to a nearby hospital for treatment.

The men alleged that the club failed to provide adequate security. A trial court granted summary judgment to the club but denied its request for attorneys' fees. The court found that the men failed to establish a standard of care for nightclub security without presenting expert testimony. The men appealed the decision, and the club appealed the denial of attorneys' fees.

The appeals court affirmed the trial court ruling, holding that expert testimony was required to establish a standard of care in negligence cases that involve "issues of safety, security, and crime prevention."

The court noted that the men claimed that the nightclub was negligent because security personnel failed to intervene in the fight in the VIP room, but did not provide evidence, including:

- How many guards were on duty the evening of the fight;
- How they were deployed; or
- Why they did not intervene.

The court said that even assuming that there were no security guards or working security cameras in the VIP room when the fight occurred, "those facts cannot establish, by themselves, what the nightclub security arrangements should have been."

Although the nightclub had an agreement with its Advisory Neighborhood Commission that outlined a standard of care for security, the court noted that the agreement contained no specific instructions on how the nightclub was to arrange its security, only that it "shall have on the premises a sufficient number of employees to assure adequate security and to control unruly patrons, whether inside or in the immediate area." The court said that because the agreement used works like "sufficient" and "adequate" that it provided the club with considerable discretion as to how to handle its day-to-day security.

The court also affirmed the denial of attorneys' fees to the club, holding that because the men had a good-faith basis for thinking that their claims were meritorious, the trial court's refusal to sanction the men was affirmed. ■

Establishing negligence

In many negligence lawsuits, plaintiffs will provide expert testimony to support their claims. Most courts have stated that expert testimony is required to establish the standard of care in negligence cases that involve "issues of safety, security and crime prevention."

In *Night and Day Management, LLC*, in lieu of expert testimony, the plaintiffs argued that they were pursuing their theory under the doctrine of negligence per se, in which a plaintiff may, in certain circumstances, rely on a statute or regulation as proof of the applicable standard of care.

However, the court noted that a violation of a statute may constitute negligence per se only "if the statute is meant to promote safety, if the plaintiff is a member of the class to be protected by the statute, and if the defendant is a person upon whom the statute imposes specific duties." Without expert testimony or some other evidence of the standard of care, a jury could resolve a plaintiff's negligence claim only through sheer speculation, the court said. ■

EEOC accuses bar of discriminating against pregnant applicant

The Equal Employment Opportunity Commission has filed a complaint against a Michigan bar and restaurant, alleging that it discriminated against a pregnant applicant. The complaint alleges that Crooked Creek Investment Company, doing business as Crooked Creek & Creekside Bar & Grille in Saginaw, Mich., violated federal law when it refused to hire an applicant as a food server because she was pregnant. The EEOC charges that the woman had prior experience working in a restaurant when she applied for a vacant food server position in February 2013.

The complaint alleges that her first interview with Crooked Creek went well and she was asked to return for a second interview. When she revealed her pregnancy during the second interview, however, Crooked Creek refused to consider her further for the job, the EEOC said.

The EEOC's suit seeks back pay, compensatory and punitive damages on behalf of the applicant along with injunctive relief intended to prevent further instances of pregnancy discrimination.

"Women should not be forced to remove themselves from the labor market simply because they are pregnant," said EEOC Trial Attorney Omar Weaver. "The EEOC will vigorously enforce a pregnant woman's right to be fairly considered for a job."

The lawsuit is *EEOC v. Crooked Creek Investment Co., d/b/a Crooked Creek & Creekside Bar & Grille*, No. 2:14-cv-14239 (E.D. Mich.) ■

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Even without passage, legislation could encourage unionization

**In this issue,* Hospitality Law *has invited two Washington, D.C. plaintiffs attorneys to provide their perspective on proposed legislation and the future of unionization in the hospitality industry.*

By R. Scott Oswald and Tom Harrington

Regardless of whether it passes, the introduction of the Employee Empowerment Act last summer could lead to an increase in unionization.

In July 2014, U.S. Reps. Keith Ellison (D-Minn.) and John Lewis (D-Ga.) introduced H.R. 5280, the Employee Empowerment Act, a bill that would strengthen protections for employees who are retaliated against for union activity. If passed, the Employee Empowerment Act would amend the National Labor Relations Act to increase protections for employees' labor activities. The law would allow employees who allege discrimination or retaliation for engaging in union activity to pursue litigation in federal court.

Currently, private sector employees may turn to the NLRA for protection from harmful and exploitative management practices. Pro-employee groups have criticized the NLRA because it provides limited penalties against employers. Penalties available to the National Labor Relations Board include issuing cease and desist orders to employers and ordering an employer to take affirmative action to remedy an NLRA violation, such as bargaining with employees in good faith. Other remedies available under the NLRA are back pay and reinstatement for terminated employees or expungement of employment records for employees who are disciplined for union activity.

The Employee Empowerment Act, however, would create a private right of action for employees against employers who violated the act. The act would also permit a plaintiff to pursue damages allowed by the Civil Rights Act of 1964, meaning that an employee could seek compensatory and punitive damages, and the prevailing party would be able to seek attorney's fees.

Although unlikely to pass, the bill's introduction may mark a turning point for unions after years of decline in union popularity and membership. The AFL-CIO and Service Employees International Union immediately stated their support for the legislation when it was announced. After the bill was introduced, SEIU president May Kay Henry issued a statement of support. "…[W]e believe that workers have the right to stick together and that there are powerful interests dead set on stripping them of that right," she said. "In order for workers to be heard, it's often necessary to band together so companies take them seriously. Too many employers try to prevent this so they can limit workers' power. Collective bargaining enables employees to unite as a group so they can speak with a more powerful voice."

And the hospitality industry has grown in recent years and is full of jobs that cannot be exported or automated. The industry has several major unions including Unite Here and SEIU, and still retains the potential for significant growth in union membership. The introduction of the Employee Empowerment Act, even if it never passes, may encourage more hospitality workers to unionize.

R. Scott Oswald is a managing principal at The Employment Law Group, P.C., a Washington D.C. firm representing employees. Tom Harrington is a principal at the firm. ■

Unions remain in decline

By R. Scott Oswald and Tom Harrington

In recent years, the labor movement and support for unions has eroded. In 2012, only 11 percent of workers belonged to a union, in stark comparison to the height of union membership in 1954 when 28 percent of workers were union members.

In the past several years, some states have passed legislation that could make union organizing more difficult. For example, in February 2012, Indiana passed a "right-to-work" law making payment of union dues voluntary for workers.

Union support in the hospitality industry has also been rather unevenly distributed in the U.S. Tourism hotspots, including Las Vegas and New York, have thriving union membership. Other tourist-driven cities, such as New Orleans, have almost no union membership.

This may be changing, however. In late 2014, the hospitality and gaming union Unite Here and Teamsters Local 270 won a card check election at New Orleans's Harrah's Hotel, which could lead to a revival of union activity in the city. ■