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Restaurant not entitled to use unregistered Krusty Krab mark

Court affirms decision for Viacom in Lanham infringement action

By Diana S. Barber, Esq.

Who lives in a pineapple under the sea? If you know the answer to that question, consider yourself one of the 73 million plus people who enjoy and love the Nickelodeon hit cartoon series. After all, a third of the viewers are adults.

The popular series began airing in May of 1999 and is still airing today. Besides winning numerous awards, there are two successful motion pictures featuring SpongeBob and there's even a Broadway musical based on the series. But just having a successful series is not enough to win an infringement action under the Lanham Act — more is needed. *Viacom International v. IJR Capital Investments, LLC,* No. 17-20334 (5th Cir. 05/22/2018).

Viacom sued a restaurant for infringing on its common law trademark, The Krusty Krab, which is a fictional restaurant in its SpongeBob SquarePants series.

The cartoon, which has been the most-watched animated television series for the past 15 years, features The Krusty Krab in the vast majority of its episodes, and is an element of Viacom's mobile app. Viacom has also licensed Krusty Krab merchandise in the form of playsets, video games and accessories. However, Viacom has never used The Krusty Krab to license a restaurant.

In 2014, IJR decided to open seafood restaurants in California and Texas, and the owner says he initially planned to name the restaurants the Crusted Crab, before changing it to The Krusty Krab. IJR's owner says he didn't become aware of SpongeBob until he was searching to see if other restaurants had a similar name, and because no actual restaurants used the mark, he filed a trademark application. Viacom had not previously registered The Krusty Krab mark,

See **TRADEMARK** on page 4

Court denies equitable exceptions to waiting time penalties

Calif. appellate court decision provides guidance to employers

By Carly Baratt, Esq.

A California appellate court recently provided additional guidance to California employers regarding "waiting time" penalties, so-called because they are awarded for an employer effectively making the employee wait for his or her final paycheck, in *Diaz v. Grill Concept Servs.*, Inc., 23 Cal. App. 5th 859 (Cal. App. Div. 2018).

The legal issues presented in this case were a restaurant's underpayment of its employees who had quit or been fired and its liability for anything beyond the reimbursement of underpaid wages. These issues stemmed from the restaurant's location — in a hotel near the LAX Airport and, more specifically, within a geographic zone regulated by the City of Los Angeles. Pursuant to Los Angeles Ordinance Number 178, 432 (codified at L.A. Mun. Code, §§ 104.101 et seq.), the restaurant, as a "hotel employer," was required, inter alia, to pay its employees a "living wage" higher than the state minimum wage. The source to which the "living wage" was keyed changed on July 24, 2010, when the ordinance was amended to a bulletin published annually by the Los Angeles Bureau of Contract Administration. However, the restaurant continued to pay its employees the living wage prescribed by the original ordinance, which was lower than the amended ordinance, until June 2014, when it received a demand letter from two employees.

While the restaurant promptly reimbursed its employees for the full amount of underpayment, it disputed liability for waiting time penalties under California Labor Code Section 203. The trial court awarded waiting time penalties, finding that the restaurant's failure to pay the living wage set by the ordinance was "willful" within the meaning of the Labor Code and that

See **TIME** on page 6

The Four Seasons argued that the danger posed by a wet marble floor was open and obvious, and that it therefore negated any duty that it owed the guest.

Slippery marble floor was open, obvious hazard, court affirms

Premises Liability Act not triggered by lack of mat in front of shower

A slippery marble floor was an open and obvious hazard, held an appeals court in a slip and fall lawsuit filed by a guest at a Four Seasons hotel. *Coleman v. Four Seasons Hotel Ltd.*, No. 1-17-1013 (Ill. Ct. App. 05/30/2018)

The guest, who was staying in a suite that featured a shower stall and separate bath tub, claimed that the hotel was negligent and liable for his injuries when he fell in the bathroom on the third day of his stay, injuring his ankle.

The guest testified that he commonly showered, exited without drying off to shave in front of the sink, and then returned to the shower. He conceded that the floor was wet when he slipped because he had dripped water on to it.

However, he said he realized after his fall that a bath mat had not been present at the entrance of the shower. He claimed that at other Four Seasons' hotels, a bath mat is placed on the floor in front of the shower or hanging by the shower door for the guest to place on the floor. As a result, he claimed that the Four Seasons violated the Premises Liability Act by failing to exercise ordinary care in maintaining the bathroom area by not providing a bath mat or another anti-slip measure. The hotel moved for summary judgment, arguing that the guest's own negligence either contributed to, or was the sole cause of, his injuries.

A hotel employee testified that guests in suites at the Four Seasons are provided with a bath mat, which is thin and towel-like, as well as a bath rug, which is thicker. Housekeeping is directed to fold bath mats and drape them over the side of the bath tub, while bath rugs are placed on the floor in front of the sink. The employee said he had never received a complaint about the slipperiness of the floor, and noted that guests are expected to place the bath mat at the entrance of the shower stall prior to showering.

A court granted summary judgment to the Four Seasons and the guest appealed. An Illinois appeals court affirmed the ruling. Although the guest argued that there was a genuine issue of material fact as to whether the dangerous condition — a floor that became slippery when wet — was open and obvious. The Four Seasons argued that the danger posed by a wet marble floor was open and obvious, and that it therefore negated any duty that it owed the guest.

The court agreed, noting that the guest testified that he has marble tile floors in his home bathroom and is aware that they become slippery when wet. While the guest contended that no bath mat was placed in front of the shower the day he fell, he conceded that he walked across the floor at least twice that day and that the condition of the bathroom floor was readily available to him. The court also found that a reasonable person would have recognized the risk associated with the wet marble tile floor, and would have avoided the open and obvious danger posed by the marble floor.

Although the guest further charged that, even if the condition was open and obvious, the hotel had a duty to exercise reasonable care, the court noted that he testified that even if he was not provided a bath mat, as he claimed, other towels and bath linen were available that he could have placed on the floor. ■

HOSPITALITY LAW

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Court grants discovery in suit alleging disability discrimination

EEOC alleges that casino wrongly terminated employee with cancer

By A. Michael Weber, Esq.

An Illinois federal judge refused to grant a Chicago-area casino's motion to summarily dismiss an employment action filed against it by the Equal Employment Opportunity Commission on behalf of a slot technician who was terminated after requesting additional leave to continue his cancer treatment. In doing so, the court granted the EEOC's motion to proceed with discovery, because the EEOC argued that it could not properly oppose the summary judgment motion. *EEOC v. Midwest Gaming & Entertainment, LLC,* No. 17 C 6811, 2018 U.S. Dist. LEXIS 88367 (N.D. Ill. 05/25/2018).

The case arises from employee Dolman Lake's request for a reasonable accommodation from his employer, Rivers Casino, that would extend the end of his leave from January 2016 through the beginning of March 2016 so that he could receive additional surgical treatment for his cancer. Rivers Casino denied the request for accommodation and terminated Lake's employment effective January 28, 2016.

Rivers Casino relied on a Seventh Circuit decision, *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), in arguing that

(1) The request for leave was beyond the scope of a reasonable accommodation under the Americans with Disabilities Act, because the employee would have been on leave for a total of eight months; and

(2) An employee who needs long-term medical leave cannot work and, therefore, is not a "qualified individual" under the ADA.

The court wrote that "[t]here can be no doubt that Severson undercuts" the EEOC's case, but noted that *Severson* was decided on a "fully developed" record, whereas this case is in the preliminary stages. In granting the EEOC's motion for discovery, the court noted that the record had not yet been developed as to whether Lake's request was reasonable under the circumstances, such as whether Lake's presence at his job site was an essential function of the slot technician position.

The court also said that discovery was needed to determine who made the decision to terminate Lake and concerning Rivers Casino's leave policy and whether it was more favorable to non-disabled employees.

Pursuant to the order, Rivers Casino can renew its motion for summary judgment after discovery is completed.

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

HLaw Glossary

What constitutes a 'qualified individual' under the ADA?

Under the Americans with Disabilities Act, a qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.

Requiring the ability to perform "essential" functions assures that an individual will not be considered unqualified simply because of he or she cannot perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation.

In *EEOC v. Midwest Gaming*, one of the big questions was whether an employee who needed long-term medical leave, and therefore was unable to work, remained a "qualified individual" under the ADA. If the employee can show that his or her presence at the job site is not an essential function, an employee may be able to establish that extended leave is a reasonable accommodation, the court noted.

For individuals who are disabled due to cancer, the Equal Employment Opportunity Commission advises employers to consider granting leave to employees who may be unable to provide a fixed date of return as a reasonable accommodation. The EEOC notes that although many types of cancer can be successfully treated or cured, "... the treatment and severity of side effects often are unpredictable and do not permit exact timetables. An employee requesting leave because of cancer, therefore, may be able to provide only an approximate date of return."

When leave of this nature is provided, the employer has the right to require that the employee provide periodic updates on his condition and possible date of return, and can then reevaluate whether the continued leave constitutes an undue hardship or remains a reasonable accommodation. ■

Cities, states creating ordinances to restrict short-term rentals

Boston, Mass., has created one of the most restrictive short-term rental ordinances in the country.

The Boston City Council voted 11-2 in favor of Mayor Marty Walsh's short-term rental ordinance, which targets investor units and institutes a strong set of regulations to ensure data transparency and accountability from short-term rental platforms, while still allowing for true home-sharing.

The ordinance was created in part to prevent operators from monopolizing Boston's housing market with short-term rentals, and the regulations provide a standardized framework for regulating units as well as protections for occupants. The ordinance is also intended to minimize the impact of short-term rentals on surrounding neighbors of these units.

The mayor's ordinance was supported by the Massachusetts Lodging Association.

San Diego and Pennsylvania are considering similar programs. San Diego Mayor Kevin Faulconer released his short-term rental proposal, which addresses many of the concerns raised by the hotel community around establishing a level playing field for all lodging accommodations.

In Pennsylvania, the state's House of Representatives passed legislation that requires short-term rental record keeping, reporting and platform registration and institutes penalties for failure to comply. ■

> *"To determine whether a mark is distinctive, a plaintiff must prove that the mark is inherently distinctive or has developed secondary meaning."*
> *— Diana S. Barber, attorney*

TRADEMARK (continued from page 1)

and IJR's mark was published without opposition and approved.

IJR purchased domain names for the restaurant concept, which was described as Cajun seafood, leased property and procured equipment. Its business plan made no reference to SpongeBob or its fictional restaurant.

In November 2015, Viacom sent a cease-and-desist letter demanding IJR stop using The Krusty Krab mark. IJR responded and Viacom filed suit in January 2016.

A district court granted summary judgment to Viacom on its trademark infringement and unfair competition claims. IJR appealed, arguing that Viacom's trademark wasn't valid and that its seafood restaurants would not create a likelihood of confusion between the two marks.

The circuit court affirmed the district court's decision. The court noted that while Viacom never registered The Krusty Krab mark, the U.S. Supreme Court has held that the Lanham Act "protects qualifying unregistered marks." The circuit court noted that other courts have protected the trademarks of Kryptonite and the Daily Planet from Superman and the General Lee from The Dukes of Hazzard because of their critical roles in the entertainment. The court found that Viacom's licensing of SpongeBob, which prominently features The Krusty Krab as a source identifier, provides further evidence that Viacom owns the mark.

The court also found that Viacom showed that IJR's proposed use of The Krusty Krab mark created a likelihood of confusion. The court noted that the two marks used the same spelling, including the unconventional use of K's instead of C's. Although the fictional restaurant and the proposed seafood restaurant have little overlap in terms of menu and style, the court found that given the success of SpongeBob, IJR's use of the mark would likely cause confusion.

Furthermore, the court noted that Viacom could develop a real The Krusty Krab restaurant based on the fictional eatery, as its subsidiary did when it licensed Bubba Gump Shrimp Co., a fictional business in the movie "Forrest Gump," to create a chain of real seafood restaurants.

Protecting trademarks

To protect one's trademark, there are two requirements under the Lanham Act. First, there must be ownership of a protectable mark (a distinctive mark) and second, use of that mark by others will create confusion. The court said the mark does not have to be registered but that ownership "accrues when goods bearing the mark are placed on the market."

In the *Viacom* case, the court looked at whether the mark, The Krusty Krab, is used as a source identifier invoking protection under the Lanham Act. The focus on the mark is not the overall success of an entertainment show, but the role that the mark plays within the show. Just an occasional mention of a mark in a successful television show may not be enough to satisfy the test. The court noted that since The Krusty Krab mark is featured prominently in over 80 percent of SpongeBob SquarePants episodes and is also featured in video games and legally licensed merchandise, there is strong evidence that it is recognized as a source identifier and therefore Viacom owns the mark.

To determine whether a mark is distinctive, a plaintiff must prove that the mark is inherently distinctive or has developed secondary meaning. The court concluded as a matter of law that The Krusty Krab mark is distinctive through secondary meaning by analyzing these seven factors:

(1) Length and manner of use of the mark or trade dress.

(2) Volume of sales.

(3) Amount and manner of advertising.

(4) Nature of use of the mark or trade dress in newspapers and magazines.

(5) Consumer-survey evidence.

(6) Direct consumer testimony.

(7) The defendant's intent in copying the mark.

As for the second element under the Lanham Act, the court looked at factors known as "digits of confusion," including bad faith by the defendant. The lower court concluded that the restaurant did have bad faith because an investor referred to SpongeBob when discussing the name of their proposed new restaurant. However, the appellate court believed the trial court erred in its conclusion of bad faith, but said the survey admitted into evidence showed a strong likelihood of confusion. Therefore, the trial court decision was affirmed.

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Washington State accuses Motel 6 of violating consumer laws

State claimed motel chain regularly released guest registries to ICE

Handing over guest registries to law enforcement and federal agencies has come up in the courts multiple times in the past decade, and with an uptick in investigations, employers would be wise to develop policies and training on how to deal with requests for records.

In *Washington v. Motel 6 Operating LP,* No. C18-337-MJP (W.D. Wash. 05/18/2018), the state of Washington filed a complaint against Motel 6 Operating L.P. alleging that the motel chain has a corporate policy or practice of voluntarily providing guest registry information to the U.S. Department of Homeland Security and the U.S. Immigration and Customs Enforcement Office, which the state claims violates the Washington Consumer Protection Act and the Washington Law Against Discrimination.

Washington State claimed that the motel turned over registration information to ICE agents almost daily, without the agents providing "any documentation or evidence of reasonable suspicion, probable cause, or a search warrant for the requested guest registry information." The state further charged that Motel 6 staff observed ICE agents circling Latino-sounding names. Motel 6 removed the case to federal court; Washington State moved to remand.

A district court remanded the case to the King County Superior Court. The court agreed with Washington State's contention that Motel 6 failed to satisfy the requirements for removal because it was not acting under or pursuant to a federal officer's directions. The state argued that Motel 6's decision to turn over its guest registries was discretionary, and the court agreed that Motel 6 failed to satisfy its burden of establishing that it acted under a federal officer and was required or obligated to turn over its registries.

The court noted that some of Motel 6's properties did refuse to provide requested guest information to DHS and ICE agents, and that the company modified its corporate policy to prohibit motels from "voluntarily providing daily guest lists … absent compulsory process, including subpoena or warrant, or truly extenuating circumstances, such as an imminent threat to public, employee, or guest safety."

Although Motel 6 also argued that it was immune under the Supremacy Clause because it "reasonably complied with the authority of government agents," the court found that it failed to establish that it acted "at the direction and control" of the agents."

Finally, Motel 6 argued that Washington State's law was preempted by federal law, but the court found that the motel chain failed to explain how federal laws allowing DHS/ICE to investigate and enforce a range of civil and criminal statutes preempted state law, noting that if DHS and ICE have probable cause, they can seek warrants to inspect guest registries. ■

Review I-9 forms for accuracy

U.S. Immigration and Customs Enforcement has been busy in the past year, and has doubled the amount of ongoing worksite cases this fiscal year compared to FY 2017.

Bill Ford, president of Tennessee-based consulting firm SESCO Management Consultants, says the hospitality industry has been specifically identified by ICE as a target because of its status as a so-called "low-wage industry" under the U.S. Department of Labor. He urges hospitality owners and operators to remain vigilant in their recordkeeping efforts and to confirm their employees' legal status to work. One area of concern is the timely and accurate completion of I-9 forms.

"What we see a lot — particularly with restaurants — is that back of the house may be in desperate need of help, and managers may put new employees to work first and worry about the compliance requirements later," he says. "Sometimes management is just trying to keep the facility staffed and compliance becomes secondary in nature."

This move, however, is risky, and can lead to fines between $600 and $1,500 per I-9 form mistake. Ford urges employers to train managers on the process and completion of the forms and ensure that it's done first. He also suggests that companies not located in states that require the use of E-Verify consider using the service to verify work status of employees.

Ford recommends that employers conduct an audit of their I-9 forms going back at least three years for accuracy, and to place I-9 forms in separate binders outside of the personnel files. Forms for former employees must also be retained unless they are both older than three years from the date of hire and older than one year from the date of termination.

Finally, Ford urges employers to cooperate if the feds come knocking at the door, and be prepared to hand over information within three days of the request. ■

Jack in the Box chain accused of failing to pay workers overtime

JB Restaurants Inc., which operates 14 Jack in the Box fast-food restaurants in the San Francisco Bay Area, has agreed to pay $511,117 in back wages and liquidated damages to 152 employees after a U.S. Department of Labor's Wage and Hour Division investigation found the employer violated overtime and child labor provisions of the Fair Labor Standards Act. The company will pay $255,558 in overtime back wages and an equal amount in liquidated damages. The child labor violations led to assess an additional $18,529 in civil money penalties.

DOL investigators found JB Restaurants failed to total the hours individual employees worked at different locations owned by the franchisee during each workweek when determining whether overtime was due, and also failed to record the number of hours actually worked by employees.

Overtime violations resulted when workers' combined totals exceeded 40 hours per week, but the employer paid for those hours separately for each restaurant as straight time. Investigators also found minors operating prohibited equipment, including deep fryers and trash compactors, and working during hours prohibited by FLSA's child labor regulations. ■

TIME (continued from page 1)

it was not authorized to waive waiting time penalties for equitable reasons.

On appeal, the California Appeals Court wholly affirmed the trial court's order. Reviewing the lower court's finding of willfulness de novo, the court rejected the restaurant's arguments that it was unaware of the amended ordinance, and that even if had seen the amended ordinance, the restaurant would not have been able to understand it, rendering its underpayment a mere mistake.

The court's reasoning was simple. First, the court relied on the long-standing maxim that ignorance of the law is no excuse. The court also found the restaurant's ignorance was negligent given that as early as 2010, the restaurant's human resources director was aware that:

(1) The living wage within the Zone was higher than the wage paid by the restaurant.

(2) An amendment to the ordinance was "in process."

As a result, the restaurant should have conducted further research to confirm its suspicion of underpayment, including but not limited to looking up the ordinance, the court said.

Second, the court applied California's vagueness standard, which generally presumes a law's constitutionality and requires more than a showing that a law "requires interpretation" or that a law's meaning "is difficult to apply." Under this standard, there was no question that even though the ordinance requires employers to look at an exterior source of information to determine the applicable living wage, it directs readers to the correct source — in the court's words, "the dots all connect." Consequently, the restaurant had not established a "good faith dispute" as to its challenge of the ordinance's vagueness so as to defeat a willfulness finding. Finally, the court propounded two reasons for its unwillingness to recognize equitable discretion to except an employer from a waiting time penalty other than non-willful failure to pay. According to the court, the statute's use of the word "shall" to unambiguously require payment of waiting penalties. The court also found that the purpose of the waiting time penalty — i.e., "to compel the immediate payment of earned wages upon a discharge" — would be subverted by introducing equitable exceptions, reasoning that many employers would choose to litigate the issue rather than paying waiting penalties upfront.

While *Diaz* has important legal implications on employers operating within the Zone, its holdings on waiting time penalties lend it broader relevance. Specifically, *Diaz* is another reminder that waiting time penalties may be awarded when an employee's final paycheck is for less than the applicable wage, not only when the final paycheck is late. *Diaz* also indicates that a "good faith" defense to waiting time penalties based on a vagueness challenge will likely be met by the courts with skepticism.

Finally, while *Diaz* is good law, waiting time penalties will be strictly construed in favor of employees. Because waiting penalties can be sizeable, particularly in class actions, *Diaz*'s refusal to recognize equitable exceptions to waiting time penalties is an important development.

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Union engaged in unfair labor practices with threatening letter

Court held NLRB's ruling for union was 'legally unsupportable'

A union's actions of asking for full back dues of core members and garnishing their wages took a hit constituted an unfair labor practice, held the D.C. Circuit court in an appeal of a National Labor Relations Board decision. *Tamosiunas v. NLRB*, No. 16-1338 (D.C. Cir. 06/15/2018)

Four employees of a Hyatt Regency Hotel in Hawaii objected to and formally declined full membership in Unite Here! Local 5 labor union, which had represented hotel workers at the Hyatt Regency since at least 2006. Until 2010, the collective bargaining agreement between the union and the hotel included a "union security clause" that required all Hyatt employees to become at least core members of the union as a condition of continued employment. When the CBA expired June 30, 2010, the security clause was terminated as well. In 2012, the four employees informed Local 5 that they would no longer allow Hyatt to remit their core fees to the union.

However, they received a letter from the union requiring immediate payment of full union dues. Soon after, Local 5 sent every core member — including the four that contested paying any fees — a letter demanding full membership dues, with a note that Hyatt would garnish paychecks for the balance. The union also contacted Hyatt, asking that it garnish the unpaid fees from the core member's paychecks, which the hotel did — at the maximum amount allowed of $62.50 — until it learned that the union's demand was unjustified and recredited the amount to the employees the following pay period. The union neither stated that the letter it sent to employees was a mistake nor apologized for it.

The four employees filed a complaint with the NLRB charging Local 5 with unfair labor practices under the National Labor Relations Act, arguing that its actions violated their Section 7 right not to join the union in full and attempted to coerce them not to exercise that right. An administrative law judge held that the letter did not threaten employees beyond the threatened suspension of union membership, and that therefore no unlawful coercion occurred. The NLRB, in a divided opinion, agreed. However, NLRB member Lauren McFerran dissented, stating that she believed the union's demand of "dues from employees who did not owe them" itself constituted an unfair labor practice, and that its garnishment from the employees' paychecks was an adverse consequence.

The employees appealed the NLRB's ruling, and the Washington D.C. Circuit Court of Appeals granted the employees' petition. The circuit court vacated the NLRB's decision and remanded the case, holding that the NLRB's argument that no reasonable employee would have felt pressured to pay the demanded full union membership dues was "legally unsupportable." The court found that the text of the dues letter read "very much like a payment demand" and that each letter included an individualized accounting of the amount purportedly outstanding, and stated that the employee "must" pay those dues. The court noted that the letter also threatened the garnishment of wages for failure to pay, which was "no idle threat" since Hyatt wrongly extracted dues payments at the behest of the union.

"The only choice about paying full union dues that was left to the employee was, in effect: 'We can do this the easy way, or we can do this the hard way,'" the court said. "That is the very definition of coercion and restraint."

The court said that the board's decision "ignores the significant practical consequences that docking a paycheck could inflict on the many wage earners who rely on their weekly income to make ends meet." ■

SCOTUS sides against unions

Unions took a hit in late June when the U.S. Supreme Court held that requiring non-union governmental workers to pay compulsory fees is unconstitutional and violates public sector workers' First Amendment rights in *Janus v. AFSCME*.

The suit, which was instigated by Illinois Gov. Bruce Rauner, means state workers can no longer be forced to pay union fees if they choose not to be a member of the union. The ruling affects public employees in 22 states.

Illinois stated that all public employees will have an opportunity to change their union status and that it will no longer withhold fair-share fees from non-union members. ■

LA restaurant accused of reducing work hours of pregnant server

A Los Angeles restaurant and jazz night club has agreed to pay $82,500 and furnish other relief to settle a pregnancy discrimination lawsuit brought by the U.S. Equal Employment Opportunity Commission.

According to the EEOC's lawsuit, LA Louisanne violated federal law when it reduced the working hours of one if its servers after learning she was pregnant, eventually removing her from the schedule entirely. The company then refused to allow her to return her to work after giving birth, the EEOC claimed. The EEOC also charged that other servers for LA Louisanne experienced similar discrimination during their pregnancies.

In addition to the $82,500 in monetary relief for the victim and the establishment of a class fund, LA Louisanne will retain an external EEOC monitor who will review and revise the company's discrimination and harassment policies as necessary. The company will also provide training for all employees regarding discrimination and harassment. The EEOC will monitor compliance with the three-year consent decree.

"Stereotypes regarding pregnant employees still persist, particularly in the food industry," said Anna Park, regional attorney for the EEOC's Los Angeles District. "We commend LA Louisanne for taking the necessary steps to create a more inclusive work environment for expectant employees." ■

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Calif. hotels must create housekeeper injury prevention plans

California hotel owners and operators have a matter of months before they need to evaluate their worksites and develop comprehensive plans to keep their housekeepers safe.

On July 1, 2018, the California Occupational Safety and Health Administration Standards Board's Hotel Housekeeping Musculoskeletal Injury Prevention Program took effect, or MIPP. This standard requires hotels to create written policies and training programs for housekeepers and their supervisors on the prevention of workplace injuries. The program's intent is to reduce the risk of musculoskeletal injuries common to housekeepers, such as carpal tunnel syndrome, back pain and tendinitis. While the law has technically taken effect, employers have until Oct. 1, 2018 to complete an initial worksite evaluation for their MIPP.

Hotel workers suffer disproportionately higher rates of injuries than service workers in any other industry, and among those employees, housekeepers suffer from the most injuries, according to the Occupational Safety and Health Administration.

Cindy Roth, CEO of Ergonomic Technologies Corporation in Massapequa, N.Y., says it's not surprising given that these housekeeping employees, who are predominately women and immigrants or people of color, may lift 100-pound mattresses, push heavy supply carts, climb surfaces to dust and drop to their knees to clean bathrooms multiple times a day.

Identify ergo risks

Even though California is currently the only state requiring sweeping changes to housekeeper safety and training, ergonomics expert Cindy Roth says identifying and correcting risk factors for housekeepers should be a priority for all hotels who want to maintain a healthy work force.

She suggests that hotels use a team approach for cleaning rooms because the employees can more effectively turn mattresses, make beds and clean surfaces without excessive reaching. She also urges hotels to purchase telescopic, adjustable cleaning tools.

"When you have a revolving door, it costs employers a lot of money," she said. "Smart managers understand the importance of providing the best equipment for the employees ... because you want to ensure that person comes to work the next day." ■

For an employer to have a compliant MIPP, they must identify the potential injury risks in the various rooms on the property, says Larry Eppley, a managing partner in the Chicago office of Sheppard Mullin. In a standard room, it may be noting the carpeting, bedding, pieces of furniture that need to be cleaned. In upscale rooms, that would be part of it, as well as hazards in bathrooms, and surfaces that present slip and fall risks such as marble flooring. The MIPP also requires hotels to take into account lifting, exertion, reaching, as well as the weight of certain things such as bedding.

Training is another major component of the MIPP. Shawn Fabian, a senior labor and employment associate for Sheppard Mullin, says that all new housekeepers and supervisors must be trained under the new regulations, and that if room dimensions change, items are swapped out, or the housekeeper has a new job assignment, they must be retrained.

"The regulations require very specific components of the training, such as the signs, symptoms and risk factors common to [musculoskeletal] injuries," Fabian says. "Employees also must be training on the elements of the employer's prevention program … the training also has to include a system for employees to report MIPP issues."

Jonathan Sandler, a shareholder in the Los Angeles, Calif., office of Brownstein Hyatt Farber Schreck, says employers also must develop a system to verify that their supervisors and housekeepers are complying with the elements of the MIPP and using the equipment identified as appropriate for each task, as well as procedures for investigating any musculoskeletal injuries that occur.

Although these MIPP requirements are specific to hotels operating in California, like the sexual harassment panic button legislation that has been spreading throughout the country, Eppley says he wouldn't be surprised to see other states implement similar housekeeper safety programs.

For more information, visit www.dir.ca.gov/oshsb/Hotel-Housekeeping-Musculoskeletal-Injury-Prevention.html. ■