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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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'Cannatourism' presents legal implications for hospitality

Demand for marijuana-friendly accommodations poses problems

By Jason S. Cetel, Esq.

The nascent, but fast-expanding, marijuana industry is the new Wild West. A place with a complicated web of intertwining legal, societal, regulatory, political, and sociocultural elements, with various competing stakeholders at the local, state, federal, and international levels, all fighting for a piece of the action. Like any new economic or social movement, early adopters have an advantage to seize new business opportunities and capitalize on consumer demand.

But the cannabis industry is hardly a trend; not since the dot-com era has there been an entirely new industry created, almost overnight, that has the capacity to transform entire medical and recreational sectors of the economy.

Business opportunities are everywhere, but careful planning for legal compliance is absolutely critical, more so than in most other heavily-regulated industries, due to the complicating factor of federal prohibition. States have legalized marijuana in direct contradiction of federal law, although U.S. Department of Justice policies are effectively allowing state-compliant businesses to continue operating provided they do not violate certain federal enforcement priorities.

Cannabis-touching businesses — those that actually cultivate, process, manufacture, distribute, and sell marijuana products — obviously are in the best position to reap the immediate financial benefits from the demand for marijuana. The hospitality industry is uniquely situated to play an important role in the emerging industry. By offering accommodations for consumers traveling to states such as Colorado, Washington State, Oregon, and Alaska — the four states that have legalized marijuana for recreational use — to partake in the recreational marijuana

See **MARIJUANA** on page 4

9th Circuit decision throws tip-pooling policies into doubt

Western states should be wary of including back-of-house in pools

By Andria L. Ryan, Esq.

In a decision that may require many restaurants and other hospitality businesses in the western U.S. to alter their labor practices, the 9th Circuit Court of Appeals upheld a 2011 U.S. Department of Labor rule that prohibits businesses from requiring employees to share their tips even if the tipped employees are paid minimum wage. *Oregon Restaurant and Lodging Association, et al., v. Perez, et al.*, Nos. 13-35765, 14-15243 (9th Cir. 02/23/2016).

Under the federal Fair Labor Standards Act, employers are permitted to utilize a limited amount of employees' tips as a credit against their minimum wage obligations through a tip credit. But state law in most California, Nevada, Washington, Oregon, Montana, and Alaska, prohibit employers from taking take tip credit. Some employers in these — and other — states have instituted tip-pooling programs, which require servers to share the tips they receive with workers in customarily non-tipped positions, such as back-of-the-house staff. This practice was affirmed in the 9th Circuit with the 2010 decision *Cumbie v. Woody Woo Inc.*, when the court concluded that the FLSA is silent as to who may participate in a tip pool if the employer does not take a tip credit.

In direct response to *Woody Woo*, the DOL issued a new regulation in 2011 stating that tips are the sole property of the tipped employee and cannot be used in a pool to share with back-of-the-house staff. The DOL's position was that an employer cannot use an employee's tips except where possible to do so as a credit against minimum wage — an arrangement unavailable to employers in many western states. In February 2012, the DOL issued a directive to its field agents to begin enforcement of the new regulation.

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Employee may continue with ERISA lawsuit against restaurant

The employee argued that Dave & Buster's actions curtailing her hours amounted to discrimination against her "for the purpose of interfering with the attainment" of her right to participate in the employee benefit plan.

Server contended employer cut hours to avoid ACA obligations

Since the Affordable Care Act went into effect changing the law to require many employers to provide health insurance to employees who work 30 hours or more per wee or pay a penalty, some companies have been cutting hours to avoid that expense. However, doing so could leave your business open to an Employee Retirement Income Security Act violation charge. *Marin v. Dave & Buster's, Inc., et al.*, No. 1:15-cv-03608-AKH (S.D. N.Y. 02/09/2016)

An employee at Dave & Buster's restaurant filed a complaint alleging that the company discriminated against her and other employees in violation of the ERISA by cutting hours to skirt health insurance requirements mandated by the Affordable Care Act.

The employee, who had worked full-time clocking between 30 to 45 hours per week at the Dave & Buster's Times Square location, had received health insurance through the company under an ERISA employee welfare benefit plan.

In June 2013, store managers allegedly told employees that the company would reduce its full-time employees from more than 100 to 40 to avoid ACA costs. The employee claimed that beginning in June 2013, her hours were reduced to an average of 17.43 per week. She said she also was notified at that time that because she had become a part-time employee, she was no longer qualified for health insurance through the company's benefits plan. She argued that Dave & Buster's actions curtailing her hours amounted to discrimination against her "for the purpose of interfering with the attainment" of her right to participate in the employee benefit plan.

Dave & Buster's moved to dismiss the employee's complaint, arguing that her theory of liability failed as a matter of law. A district court denied Dave & Buster's motion, holding that the employee stated a plausible and legally sufficient claim for lost wages and the reinstatement of benefits.

The court noted that the employees described several meetings in which management stated that the ACA requirements imposed under the law would cost the company $2 million, and that the company would be reducing full-time employees to avoid the cost. A Securities and Exchange Commission finding seemingly corroborated the employees' allegations.

Although Dave & Buster's argued that employees have no entitlement to benefits not yet accrued, the court found that employees presented evidence that the restaurant acted with an "unlawful purpose" that took adverse actions against employees by allegedly deliberately interfering with benefits. ■

Employee benefit plans

Section 510, 29 U.S.C. § 1140 provides that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." ■

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Man ceased to be invitee when he was ejected, court said

But security failed to ensure both parties left premises after argument

Security personnels' failure to ensure two arguing parties actually left casino grounds after they were ejected could have been an expensive negligence case for a casino . *Lee v. MGM Resorts Mississippi, Inc., et al.*, No. 2014-CA-00475-COA (Miss. Ct. App. 02/09/2016).

On March 9, 2008, the a chef at a nearby casino visited Gold Strike casino and got into an argument with another man. Security officers intervened and both men were asked to leave. Security officers asked the other man to exit first, and once they believed he had left the premises, they ordered the chef to leave.

The other man had not left the casino property, however, and was waiting in the atrium between the door to the casino and the parking lot doors. When the chef entered the atrium, he said the two exchanged words and a physical altercation ensued. Casino security intervened and the man admitted to assaulting the chef. The chef claimed that he asked security officers to call him an ambulance, but that they refused and handcuffed him. When law enforcement arrived, the chef was arrested and charged with disorderly conduct and disturbing the peace, but the charges were later dismissed.

He filed a complaint against the casino alleging negligence, malicious prosecution, false imprisonment, and intentional infliction of emotional distress, and claimed that the altercation caused injuries to his arm and elbow which required surgery and rehabilitation.

After a jury trial, the casino moved for a directed verdict, which was granted. The judge held that even if the chef had remained an invitee after he was asked to leave the property, he failed to provide evidence that Gold Strike knew or should have known about the other man's violent nature or that there was an atmosphere of violence at the casino. The judge also held that the chef ceased to be an invitee when he was asked to leave.

The chef appealed, but the Mississippi Court of Appeals affirmed the ruling. The court noted that the circuit judge granted the casino's motion for a directed verdict after it found that the chef "failed to present evidence to prove essential elements of his negligence claim." Although the chef argued that the casino owed him a duty and breached that duty, the court noted that the record was devoid of any evidence that the casino knew that the man who assaulted the chef had a violent nature. The casino had no record of the man being involved with any prior altercations, and no employees witnessed anything other than a verbal altercation between the two men. As a result, the court held that no reasonable juror could have found that Gold Strike should have foreseen the physical assault.

The court also held that the chef's false imprisonment and emotional distress charges were properly dismissed. ■

Follow ejection procedures

By Lance Foster

When two individuals engaged in a verbal confrontation in the precursor to the incident that prompted *Lee v. MGM Resorts Mississippi,* security personnel were called to handle the situation. That was the correct procedure to follow for employees of Gold Strike Casino. They separated the parties and told them to leave one at a time. That was also the correct procedure. But what happened next is what allowed the physical altercation to occur.

When a person or persons are told to leave a property, it is important to ensure the person has actually left the property. Security in this case should have watched the first person enter his vehicle and leave the property completely, and then escorted the second person to his vehicle. It is not uncommon in these situations for an ejected patron to loiter. If security personnel had followed that procedure, no injury would have occurred and Gold Strike would not have had to defend itself in this lawsuit.

The judge in this case dismissed the lawsuit against Gold Strike during the trial, in part because the casino could not have foreseen the eventual assailant would be violent. That ruling might have been different in other courts.

Whenever a situation occurs that can disturb customers or interfere with the normal operation of the business, the party should be approached by someone in authority. This can be security personnel, managers, or the owner. The behavior should be discussed with the individual(s) involved and, if the behavior has not reached a level to where that a guest needs to be expelled, normal activity can resume and the situation should be monitored. If someone is asked to leave and they refuse to do so, the police should be called without delay.

Lance Foster is the owner of Security Associates, Inc., in Tampa, Fla. ■

Cheddar's franchisee agrees to pay $450K to settle harassment suit

A Cheddar's Casual Cafe franchisee has agreed to pay $450,000 to settle a sexual harassment lawsuit filed by the Equal Employment Opportunity Commission.

The complaint alleged that Mint Julep Restaurant Operations, LLC, violated federal law by maintaining a hostile work environment at its Winchester Road restaurant in Memphis, Tenn., by permitting sexual conversations and jokes and by allowing a general manager and bar manager to subject several female employees to sexual harassment. According to EEOC's lawsuit, among other things, the restaurants managers allegedly made requests for sexual favors and explicit sexual comments, and subjected female employees to unwelcome touching. The EEOC further alleged that despite having received complaints from its female employees that the company did not respond to those complaints in a prompt and appropriate manner.

Besides the monetary relief, the consent decree settling the suit includes mandatory anti-harassment training; maintenance of workplace cameras; monitoring workplace behavior; notice of the settlement to the restaurant's employees; and reporting future complaints of sexual harassment to EEOC for three years.

The lawsuit is *EEOC v. Mint Julep Restaurant Operations, LLC,* No. 2:15-cv-02650 (W.D. Tenn.) ■

"As recreational marijuana markets continue to expand across the country, it is imperative for the hospitality industry to decide whether, and if so how, to market themselves as marijuana-friendly."
— Jason S. Cetel, attorney

MARIJUANA (continued from page 1)

market, hospitality companies will be able to promote marijuana tourism, or "cannatourism."

As hospitality industry members, adapting to these changes and patrons' demand for marijuana-friendly accommodations will require a flexible approach to this new industry as states continue to legalize and expand the marijuana market and, with it, the demand for cannatourism resources. Naturally, as people travel to states that have legalized marijuana for adult use, these tourists will require accommodations. As a result, like the hospitality industry surrounding Napa Valley and other winery destinations, there is an emerging trend towards accommodating these new marijuana tourists.

In a recent survey commissioned by the Colorado Tourism Office, 48 percent of summer travelers said that legal recreational marijuana influenced their decision to travel to the Centennial State. Members of the hospitality industry need to be prepared for the eventuality that marijuana will be legal in a state where they operate, and that guests will be planning visits with the intent to consume marijuana on the premises. It is critical to be prepared for the questions that guests will have by proactively planning and creating company policies regarding marijuana use.

As a general matter, states that have legalized marijuana for adult recreational use have limited the consumption to private, non-public spaces. The essential question to consider is what laws govern the private use of marijuana?

Unlike in the alcohol industry, there are no on-premise consumption licenses, although Alaska, in an unprecedented industry move, is planning to allow licensed retailers to obtain a consumption endorsement to allow on-site marijuana use in designated parts of a licensed premise. But the current climate involves off-premise consumption. Consumers must purchase marijuana products at licensed retail dispensaries, like an alcohol package store, to be consumed at another location. If dispensaries require consumers to consume marijuana in private, the question is what constitutes private use in the context of public accommodations? And how do hotel rooms, private balconies, or other outdoor designated smoking areas in lodging facilities fit into this legal structure?

As recreational marijuana markets continue to expand across the country, it is imperative for the hospitality industry to decide whether, and if so how, to market themselves as marijuana-friendly. With the general uncertainty in this area, cannabis-inclined prospective guests are leaning towards peer-to-peer directories that offer short-term rental options on private properties rather than commercial hotels or motels.

In order to compete and offer alternative arrangements, commercial hotels and motels need to consider how to accommodate these guests in a responsible and legal manner. Laws governing clean indoor air and smoke-free room polices must be considered, especially to determine how these laws apply to marijuana use. For example, Alaska, which does not have a statewide indoor smoking ban, prohibits marijuana consumption in public places, which are defined by administrative regulation to include places where a substantial group of people have access as well as hallways, lobbies, and other portions of hotels not including private rooms. Oregon also prohibits public use of marijuana and has a statewide ban on smoking in indoor public places, but it contains an exception that allows hotels or motels to designate up to 25 percent of its rooms to permit smoking.

Clearly, state laws and even local ordinances differ with respect to the question of private consumption of marijuana and general smoking restrictions. Legal compliance requires a multi-jurisdictional analysis to create state-specific corporate policies. These polices also don't encompass all marijuana products, such as vaporizing and marijuana-infused edibles.

Ultimately, a comprehensive understanding of the nuances of the modern marijuana business and the complex laws governing this highly-regulated industry is vital to successfully navigating this emerging market. Balancing the risks of entering the marijuana space with the potential upside of attracting new clientele should be weighed at the corporate level, analyzed by legal counsel, and implemented at the ground level to ensure the goals of corporate responsibility and profitability are met. The marijuana industry is a cutting-edge and exciting place to be, but navigating the legal and regulatory risks associated with it are critical for success.

Jason S. Cetel is an associate in the Tampa, Fla. office of law firm GrayRobinson, P.A. ■

Injured employee failed to show she was discriminated against

Casino followed policy and fired chef for violating alcohol policy

Adhering to policies and allowing an employee to present evidence to defend herself helped an employer obtain summary judgment in a lawsuit filed by a worker who failed an alcohol test after she was injured on the job. *Clark v. Boyd Tunica, Inc., d/b/a Sam's Town Hall and Gambling Hall,* No. 3:14-cv-00204-MPM-JMV (N.D. Miss. 03/01/2016)

A specialty room chef at Sam's Town Hotel & Gambling Hall tripped on a pipe near a sink at work and fractured her ankle. She was taken to a nearby clinic for treatment and gave blood and urine samples for testing pursuant to the hotel's substance/alcohol abuse and drug testing policy, which required tests following on-the-job injuries that necessitated medical treatment. Quest Labs, which tested her urine, found it positive for alcohol at a level of 0.12 percent, which was above the legal limit. However, the blood sample tested negative for alcohol.

Management asked the chef to provide information on all medications she had been taking to determine if a prescription or supplement had created a false positive result. Quest reviewed her information, but found nothing that could have interfered.

The company stated that urine was more accurate than blood for alcohol results, and said the urine test was accurate. The chef was terminated for violating the company's zero-tolerance policy regarding substance use on the job. She filed a complaint against the hotel, alleging that her employment was wrongfully terminated and that any positive test result was inaccurate because she does not drink alcohol.

She argued that she has diabetes and stated that she believed her medications did, in fact, impact the accuracy of the results. She further contended that she was actually terminated because her workplace injury rendered her disabled, and that the company's allegations that she was terminated because of the test result was a pretext for discrimination in violation of the Americans with Disabilities Act.

The hotel moved for summary judgment on the chef's claims, and a district court granted the motion. Although other courts have concluded that "an impairment is not categorically excluded from being a disability simply because it is temporary," the district court held that the chef's ankle injury did not substantially limit her major life activities to the degree necessary to maintain a prima facie case for an ADA violation. The court also noted that the chef acknowledged that her impairment was projected to be less than five months in duration, and that she presented no evidence that she would have any permanent or long-term impact from the accident.

Even if the chef had been able to establish a prima facie case of discrimination due to a disability, the district court held that the hotel presented a legitimate, nondiscriminatory reason or her termination. The hotel presented evidence that any employee who had tested positive for alcohol or illegal substances while on the job were terminated.

Despite the chef's assertions that the alcohol test showed a false positive, the court held that an employer's reliance on an erroneous test result did not create a claim under the ADA without an independent showing that the real reason for the termination was a disability. The court held that the chef's own admission that she was not terminated until the company had determined that her medications could not have created a false positive undermined her own ADA argument. ■

Temporary disabilities and the ADA

The Americans with Disabilities Act was enacted to protect the rights of individuals with physical or mental impairments that substantially limit one or more major life activity. When the ADA Amendments Act substantially expanded the definition of a disability, courts in many circuits, including the 5th Circuit Court of Appeals where *Clark v. Boyd Tunica, Inc.,* was heard, have generally held that short term or temporary injuries or disabilities lasting fewer than six months in duration do not render an individual disabled within the meaning of the statute.

In *Clark*, the employee charged that ADAAA made clear that the "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting."

However, the court noted that case law on the issue simply does not support the legal conclusion that a broken foot — which by all accounts healed in the normal course — qualifies as a disability which substantially limits ones major life activities. ■

Restaurant accused of FLSA violations for second time in 3 years

The U.S. Department of Labor has filed a lawsuit against Salsitas Mexican Restaurant & Cantina in Youngstown, Ohio, alleging that the restaurant owes $21,390 in back wages and an equal, additional amount in liquidated damages totaling $42,780 for 17 employees of the restaurant. The suit also seeks an injunction against the company to prevent future Fair Labor Standards Act violations.

The DOL alleges that the restaurant violated the minimum wage, overtime and record-keeping provisions of the FLSA by failing to pay servers and wait staff for all hours worked and that, as a result, these employees were not paid the current $7.25 per hour federal minimum wage. The lawsuit accuses the restaurant of paying a number of workers a fixed daily rate, or a fixed weekly rate regardless of the number of hours they worked in a given day or week. Investigators also claimed that the company improperly classified two salaried cooks as exempt from overtime and failed to maintain accurate time and pay records.

The Wage and Hour Division assessed civil money penalties of $7,947 for repeated and willful violations of the FLSA. A previous investigation found similar violations at the location in 2012, and the company paid a total of $33,813 in back wages at that time.

The lawsuit is *DOL v. Salsitas Mexican Restaurant & Cantina,* No. 4-16-cv-00618 (E.D. Ohio). ■

TIP (continued from page 1)

In reaction to this new position, a group of western restaurant and lodging associations and the National Restaurant Association sued the DOL, arguing that it had exceeded its statutory authority and ignored the binding precedent established by the *Woody Woo* case. Around the same time, two Wynn Las Vegas casino dealers also challenged their employer's tip-pooling arrangement.

In 2013, a federal judge in Portland handed a victory to the associations and invalidated the DOL's new tip-pooling regulations. Shortly thereafter, a federal judge in Las Vegas ruled in favor of the casino and dismissed the dealers' case. The DOL appealed the Oregon decision, and the 9th Circuit consolidated the two cases.

In a surprise 2 to 1 ruling, the 9th Circuit upheld the DOL's 2011 rule, holding that the regulation was reasonable. The court also said that the rule was consistent with Congress' goal under the FLSA of ensuring that tips stayed with the employees who received them.

Of course, many are confused by this conclusion. Judge N. Randy Smith, the lone vote against the DOL rule, put it best: "Colleagues," he begins in an exasperated dissenting opinion, "even if you don't like circuit precedent, you must follow it." As he pointed out, this same court decided in the 2010 *Woody Woo* case that the FLSA's bar against tip-pooling among the back-of-the-house staff applies only in tip-credit states. There are no tip-pool restrictions in those states where customarily tipped employees earn minimum wage. Nevertheless, despite the confusion and exasperation, the decision reverses this precedent, and could soon be controlling law in the 9th Circuit.

Although the associations have sought a review of this decision before an 11-judge panel of the 9th Circuit (known as en banc review), until it is determined whether that review will be granted, employers can continue to operate tip-pooling plans so long as they recognize that this decision may go into effect at any time. In other words, continuing with the status quo may prove risky.

Unless the ruling is overturned, many restaurants and hospitality businesses in the western U.S. will have to reconfigure how they disperse tips. Employers using a tip pool will need to ensure that none of their back-of-the-house staff — line cooks, dishwashers, expeditors, or any other staff that may not fall within the FLSA's definition of "customarily and regularly tipped employees" — partake in sharing the tip pool.

Of course, excluding a large portion of staff from the opportunity to earn tips could be disastrous for morale, and hospitality companies are considering their alternatives, such as including separate tip lines for front-of-the-house and back-of-the-house staff, or abandoning tipping altogether.

Given the uncertainty of success in challenging the DOL's new rule, restaurants and other hospitality businesses in the western U.S. should consider implementing these changes as soon as possible.

Andria L. Ryan is a partner and chair of Hospitality Practice Group in the Atlanta, Ga. office of Fisher & Phillips, LLP. ■

Environment not pervasive enough to be considered hostile

Court dismisses man's allegations of race-based discrimination

Immediately investigating complaints and taking action to correct inappropriate behaviors can help employer quickly end a lawsuit. In *Lang v. Bloomin' Brands, Inc., et al.*, No. CV414-196 (S.D. Ga. 02/09/2016), a district court dismissed a former busser's lawsuit alleging that he was subjected to a hostile work environment and discriminated against on the basis of his race.

The busser, who was black, began working at Outback Steakhouse in March 2009, and received an employee handbook containing the company's discrimination and harassment policy at the start of his employment.

The busser said he was told he would be promoted to a higher-paying kitchen position when it became available at the time of his hiring. However, when a kitchen job opened up, the busser did not file a formal application and a white male was instead hired for the job.

In October 2009, the busser sent a complaint to the manager, arguing that the managers engaged in "blatant anti-black practices" and talked loud and unprofessionally to him regarding his cleaning of tables. When management received notice of the complaint, an in-house attorney began investigating the complaint, which he could not substantiate. The busser said initially that he thought his situation had improved, but later said that the environment had deteriorated for black employees.

In January 2010, the busser filed a complaint with the Equal Employment Opportunity Commission, contending that black employees were subjected to disparaging race-based remarks made by white managers and other employees, and were assigned to more jobs than their white counterparts. When Outback executives received information about the EEOC complaint, they investigated the allegations. They found that some racial tension existed and learned that a white employee had been verbally reprimanded for referring to the busser as "boy."

Within days of the busser's complaint, several female employees complained that the busser had made sexually inappropriate remarks to them. The company investigator contacted the busser to discuss the allegations, but he refused. He was terminated a month later for refusing to cooperate with the investigation.

Establishing a hostile environment

To establish a hostile work environment claim, an employee must show:

(1) That he belongs to a protected group;

(2) That he has been subject to unwelcome harassment;

(3) That the harassment was based on a protected characteristic of the employee

(4) That the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and

(5) That the employer is responsible for such environment under either a theory of vicarious or of direct liability. ■

He claimed that his termination was in retaliation for his protected activity. The restaurant moved for summary judgment, and a district court granted the motion. Though the court found that the employee provided evidence that he endured some harassment at the hands of his coworkers, it held that the busser failed to show that the harassment was severe or pervasive. The court noted that the employee provided evidence of, at most, four racial comments.

While the court noted that the comments were inappropriate, it held that it was "unable to conclude that these isolated incidents from three different people over the course of approximately 11 months renders the conduct pervasive." The court found that his other complaints about his supervisor's treatment of him were not race-based, and though they may have been unpleasant, they couldn't qualify as racial discrimination under Title VII.

The court also held that the busser failed to show that he was terminated in retaliation for his protected activity. The restaurant submitted evidence showing that the busser's hours were reduced and he was suspended after multiple complaints of sexual harassment were made against him and he failed to cooperate with the investigation. Although he argued that this was a pretext, he did admit that he engaged in at least some of the alleged sexually harassing activity for which the restaurant stated he was terminated. As a result, the court held that the busser failed to show that the proffered reason for his termination was false and that he was terminated in retaliation for his complaint. ■

OSHA levies fines of more than $76K against D.C. hotel

The Occupational Safety and Health Administration has accused a Washington, D.C. hotel of exposing employees to more than two dozen safety hazards.

OSHA issued 12 serious and 14 other-than-serious citations to the Wardman Hotel LLC, which operates the Marriott Wardman Park Hotel after it identified hazards including:

- Inadequate personal protective equipment for employees working with chemical products.
- Deficiencies with the documentation of the OSHA 300 log.
- Failure to report a worker hospitalization to OSHA within 24 hours.
- Employees cleaning with compressed air in excess of 30 pounds per square inch.
- Electrical hazards.
- Deficiencies with the hotel's energy control program.
- Fall hazards as high as four feet.
- Deficiencies in the hotel's bloodborne pathogen and hazard communication programs.

OSHA has proposed a penalty of $76,700 for the alleged violations. The employer has 15 business days from receipt of the citation and proposed penalty to comply, request an informal conference with OSHA's area director, or contest the findings before the Occupational Safety and Health Review Commission. ■

EEOC files suits alleging discrimination 'because of' orientation

Everyone expected the very active Equal Employment Opportunity Commission to file a Title VII suit alleging sex discrimination "because off" sexual orientation and now that day has come. In March, the EEOC filed its first two sex discrimination cases based on sexual orientation.

The agencies Philadelphia (Pa.) District office charges that a gay male employee of Scott Medical Health Center was subjected to harassment because of his sexual orientation. In *EEOC v. Scott Medical Health Center,* No. 2:16-cv-00225-CB (W.D. Pa.), The agency alleges that the male employee's manager repeatedly referred to him using various anti-gay epithets and made other highly offensive comments about his sexuality and sex life. The lawsuit claims that when the employee complained to the clinic director, the director responded that the manager was "just doing his job," and refused to take any action to stop the harassment. The employee quit, alleging that he couldn't endure any further harassment.

The EEOC's Baltimore (Md.) Division filed a lawsuit against Pallet Companies, doing business as IFCO Systems NA. The lawsuit, *EEOC v. IFCO Systems*, No. 1:16-cv-00595-RDB (D. Md.), claims that a supervisor at IFCO harassed a lesbian employee because of her sexual orientation. The complaint alleges that the supervisor made numerous comments to the woman regarding her sexual orientation and appearance, such as "I want to turn you back into a woman" and "You would look good in a dress." The complaint also claims that at one point, the supervisor blew a kiss at her and circled his tongue at her in a suggestive manner. The employee said that she complained to management and called the employee hotline about the harassment, and alleged that she was fired just a few days later in retaliation for making the complaints.

Under Title VII, sexual orientation is not explicitly listed as a protected class. While some states have made sexual orientation protected under state human rights laws, about half of the nation does not have these laws in place.

While it's unclear how the courts will rule in these cases, coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions has been listed as one of EEOC's Strategic Enforcement Plan priorities.

Glenn Grindlinger, a partner in the New York City office of law firm Fox Rothschild, LLP, said that although he believes these types of sexual orientation discrimination lawsuits will likely be dismissed at the trial court level, he said they may find a more receptive audience at the appellate level.

"Regardless of the outcome of these lawsuits .. it would behoove all hospitality employers to include sexual orientation as a protected category in their anti-discrimination policies — even if they're in a state or municipality that does not specifically protect sexual orientation," he said.

To that end, employers should take time now to ensure their workplace sexual harassment and discrimination policies clearly forbid harassment and discrimination based on sexual orientation. These policies should be a standard part of employee handbooks.

In addition, employers should ensure that both staff members and managers receive training on how to identify harassment or discrimination based on sexual orientation and how to handle such complaints. ■

Sexual orientation discrimination under Title VII

The Equal Employment Opportunity Commission contends that harassment and other discrimination because of sexual orientation is prohibited sex discrimination under Title VII of the Civil Rights Act, noting that:

- Sexual orientation discrimination necessarily involves treating workers less favorably because of their sex because sexual orientation as a concept cannot be understood without reference to sex;
- Sexual orientation discrimination is rooted in non-compliance with sex stereotypes and gender norms, and employment decisions based in such stereotypes and norms have long been found to be prohibited sex discrimination under Title VII; and
- Sexual orientation discrimination punishes workers because of their close personal association with members of a particular sex, such as marital and other personal relationships. ■