



## Multiple Embarrassing OSHA Citations:

### *The Next Union Organizing Tactic?*

By Howard Mavity (Atlanta)

While many union organizers seem to have moved to D.C. to become lobbyists, UNITE/HERE, the SEIU, and other unions continue to aggressively campaign against hospitality employers. Campaigns are becoming even more nasty than in the past. Unions consciously harm the property's reputation and inflict costly wage-hour, discrimination, and OSHA costs that may weaken the employer's resolve.

A recent *Houston Chronicle* article posted on UNITE/HERE's website illustrates the next costly step in this "organization by harassment" strategy. The May 12 article described the high rate of ergonomic injuries suffered by hotel employees, especially housekeeping employees, and their disproportionate impact on Hispanic workers.

The article relied on a UNITE/HERE study, which was in turn praised at the April OSHA "Hispanic Workers Summit." That event morphed into an unabashed organizers event where the message was, "a union will solve all of your safety issues – especially if you are a Latino worker." If this not-so-coincidental cooperation of OSHA and UNITE/HERE concerns you, your instincts are sound.

#### **How Ordinary Incidents Become Big Issues**

Both by intent and coincidence, OSHA's aggressive changes in enforcement benefit union organizing efforts, especially involving relatively lower-hazard workplaces such as hospitality employers. First, consider common union organizing tactics in the hospitality industry:

- find effective employee "wedge issues," such as safety;
- publicize these issues to embarrass the employer and to harm their "brand";
- focus on lower wage employees and on different cultural groups, and tailor the wedge issues accordingly; and
- cost the employer through regulatory complaints and civil actions.

When safety is the primary organizing issue, unions have their highest win rate of any issue. The *Houston Chronicle* article targets back, carpal tunnel, and soft tissue injuries, which are common to many hospitality employees and an appealing issue. While the proposed OSHA ergonomic standard was repealed by the Bush Administration, the Obama Administration is taking steps to cite employers for these injuries even without a specific standard by:

- gathering ergonomic data from employers, such as by adding a column to OSHA 300 Injury and Illness logs for such injuries in order to look for "patterns" of injuries;
- citing employers under OSHA's "general duty" authority for ergonomic injuries even where there is no specific standard; and
- proposing a new regulation requiring employers to analyze every job for hazards and to develop procedures, even when no specific OSHA standard exists.



Starting today, and continuing into the foreseeable future, you can count on unions to use OSHA's interest in ergonomic enforcement. That's because as many as 80% of workplace injuries fit into OSHA's broad definition of ergonomic or musculoskeletal disorders (MSD's). Unions will undoubtedly file multiple OSHA citations, which they will then use as effective campaign issues to show employees that they need the union to protect them.

The OSHA citations also serve to embarrass the property and cost the employer money for resisting the union's organization drive. Consumers are unsympathetic to "unsafe" or "environmentally insensitive" employers.

Don't be caught unprepared for such a push that targets your hotel. Review your workers comp and injury and illness records for patterns of injuries and investigate changes in work practices. Also, many workplace injuries stem from the increasing age, weight, and unhealthiness of the workforce, so wellness programs, culturally-focused insurance, and related efforts can address these underlying process concerns. Finally, enforce work practices and discipline where necessary.

#### **Death By A Thousand Cuts**

Unions consider not just "dramatic" hazards, but the day-to-day items which may reoccur despite an employer's best efforts. Unions can complain to OSHA about a large number of alleged violations and then point to the sheer number of OSHA citations to claim that the employer doesn't care about employees, which also affects penalties and classifications ("plain indifference").

Over a longer period, such as in corporate organizing campaigns, a union or disaffected employees may complain again and again to OSHA, about various locations. Each time the employer is again cited over a five-year period, the penalties will go up because they are "repeats," potentially rising to as much as \$70,000 per blocked electric cabinet, missing Material Safety Data Sheet (MSDS) for a laundry detergent, or for a fire extinguisher removed from a wall bracket.

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Your exposure will vary depending upon whether the property maintains a casino, restaurant, golf course, or a roller coaster traveling around the building, or has ongoing construction, but the following items are common OSHA citations for most hospitality properties:

- Hazard Communication Program – incomplete chemical list and MSDS's, inadequate training, etc.;
- extension cords used where permanent wiring is required;
- frayed or damaged cords and missing ground plugs;
- holes in electric cabinets, missing or damaged switch plates, and unmarked switches in electric cabinets;
- inadequate lock-out programs and training for maintenance workers;
- lack of first aid preparation;
- uncharged or uninspected fire extinguishers, or extinguishers removed from brackets;
- failure to annually train employees to use extinguishers or to flee;
- no "Emergency Action Plan" describing fire extinguisher use and evacuation;
- inadequate Personal Protective Equipment (PPE) – gloves, dust masks, eye protection;
- blocked electric cabinets, exits, and egress paths;
- poorly maintained ladders, aerial lifts and scaffolds;
- unsafe grinders and other basic maintenance machinery;
- lack of asbestos (pre-1980 buildings) notices, or poor training for housekeeping and maintenance; and
- construction violations – OSHA can cite *both* the contractor and the hospitality property.

The problem with many of these violations is that they require constant vigilance, and if OSHA shows up at the wrong moment, a bad extension cord may be in use or a housekeeping employee might be working without gloves. Accordingly, take the following steps:

- know the common violations for your type of property;
- review and update key policies, such as Hazard Communication, Bloodborne Pathogens, Evacuation/EAP, Lock-out, and PPE;
- conduct and document the required Job Safety Analysis (JSA) for each job requiring PPE;
- develop simple checklists for various supervisors to use on a weekly, daily, or pre-shift basis to show that you checked for those "low hanging fruit" items;
- make sure that you documented both classroom/video or new-employee orientation safety training before assignment and the common on-the-job safety instruction; and
- ensure that supervisors, especially in maintenance, understand the "legal" role of consistent discipline for unsafe work practices.

You can also use these safety efforts as legal defenses. As an example, if OSHA cannot show that a supervisor knew of a violation, and if the employer can show that it regularly conducted inspections, OSHA Administrative Law Judges (ALJ's) may determine that the employer acted with due diligence and could not be expected to have done more. Similarly, where an employer properly communicates safety rules, documents training, and shows consistent discipline for safety violations, they can assert that an employee's violation is "unpreventable employee misconduct."

The above steps can also serve as part of your union-proofing strategy, which should include the following:

- eliminate wedge issues between the employees and the property;
- use regular self-inspections to get supervisors out among employees or involve employees in doing the inspections;
- increase safety training to provide more opportunity for supervisors to build relationships with employees so that they will come to supervisors with problems;
- involve employees in safety which may turn into more general employee buy-in to the property's core values; and
- discipline workers who will not work safely which may eliminate employees who also corrode the workplace atmosphere or bring frivolous legal claims.

### Prepare For Bad Press

While no one in the hospitality industry would downplay the importance of maintaining clear access to exits, electric cabinets and fire extinguishers, the reality is that occasionally, fluorescent light bulbs may be leaned against an electric cabinet, boxes left in an exit path in a storage area, or an extinguisher bumped from a wall mount and placed temporarily on the floor. Consider the following OSHA press release against a big box retailer whose hundreds of stores could experience such issues in their stockrooms during unloading trucks and restocking:

*Responding to an employee complaint, OSHA found exit routes obstructed by stock and equipment, an exit route too narrow for passage, stacked material that prevented employees from identifying the nearest exit, blocked access to fire extinguishers, workers not trained in fire extinguisher use and boxes stored in unstable 8-foot high tiers. OSHA had cited the Company in 2006 and 2007 for similar conditions at other stores and as a result of these recurring conditions, OSHA issued the Company five repeat citations, with \$200,000 in proposed fines. 'It's been 99 years since the fire at The Triangle Shirtwaist Co. in New York City took the lives of nearly 150 workers and 16 years since two workers were killed when they were unable to exit the McCrory's store in Huntington Station, N.Y., during a fire' said Assistant Secretary of Labor for OSHA Dr. David Michaels. Blocked fire exits can be deadly. It is that simple.*

Hospitality employers must be prepared to respond to OSHA press releases and union use of such citations. UNITE/HERE has a long history of public attacks on its hospitality organizing targets, including, sending cow manure in heart-shaped packages to discourage scientists from attending a convention this year at a Chicago property during a seven-year strike.

Ensure that all employees know to whom they should direct press inquiries; designate several "responders"; provide them with basic "script books" for a variety of public issues; and ensure that they respond within the extremely brief time available before an item goes on the web.

By taking the steps outlined in this article, you can not only prevent costly OSHA citations but also use your efforts to further reach out to your employees and immunize them from union sales pitches.

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# New Arizona Immigration Law May Impact Workplaces Nationwide

By James J. McDonald, Jr. (Irvine)

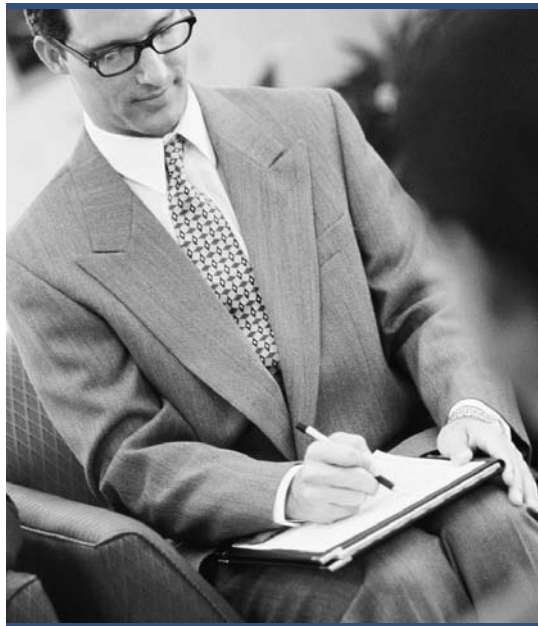
Arizona's new immigration law, enacted on April 23, makes it a state crime for anyone in the U.S. illegally to be in the state of Arizona, and it requires police to arrest anyone who cannot produce proof of U.S. citizenship or authorization to be in this country. Although this law reflects current federal immigration law, it has generated considerable controversy.

Arizona's law, of course, applies only in Arizona. But employers everywhere must be prepared for the effects of the overwhelming amount of media coverage Arizona's law has received, the further media coverage it will receive when the law goes into effect on July 29, and the media attention likely to result as other jurisdictions debate whether to enact similar legislation. This is because the Arizona law and the media coverage it has generated have placed into focus the hotly controversial issue of this country's immigration policy and the number of immigrants who are here illegally.

## Keep Things Cool

Be on the alert for debates or discussions of this issue in the workplace that might be deemed by some employees to be harassing, especially when debates involve insults and slurs. Employees may complain of harassment if they overhear slurs such as "wetback" or "beaner" even if such slurs are not directed at them. Taunting and teasing of employees, such as telling a Hispanic employee that "Immigration is looking for you" is problematic too. Strong statements that do not contain insults and slurs, such as "All of the illegals should be rounded up and sent back" may be deemed offensive, particularly if made by a member of management. Therefore you should consider taking the following steps:

- Remind all employees that the company's policy against harassment applies to insults, slurs and joking regarding employees' national origin and that such language regarding illegal immigrants can lead to discipline or termination. Employees also should be reminded to promptly report any harassing conduct to Human Resources or other management.



- Conduct training of managers and supervisors to remind them to use care in their own discussions of the immigration issue not to make anti-immigrant statements that other employees may find offensive. They also should be directed to be alert for comments or conduct on the part of employees, customers and vendors that might be deemed harassing. Managers should be instructed regarding what steps they should take if they hear comments or observe conduct that violates the policy against harassment.

The debate over immigration may also place new emphasis on "English only" policies in the workplace. Anti-immigrant fervor may cause managers or employees to demand that other employees speak only English at work. According to the Equal Employment Opportunity Commission, however, "English-only" policies may be enforced only as to employees who deal directly with customers or where safety or security issues are involved. A requirement that assembly-line employees in a manufacturing company, housekeeping employees in a hotel, or kitchen employees in a restaurant speak only English may be attacked as unlawful discrimination.

Finally, employers must be careful not to insist on over-documentation of new hires when completing the I-9 form. Requiring new employees to produce more forms of identification and proof of authorization to work in the U.S. than are required on the I-9 form is a violation of the

Immigration Reform and Control Act.

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## 2010 National SHRM Conference

Fisher & Phillips is proud to be an active participant in the 2010 National SHRM conference to be held in San Diego on June 27-30. Jackie Greenbaum, Human Resources Paralegal, Irvine office, is one of the conference Co-Chairs and has been busy working on the conference all year.

Our firm will be hosting its 6th annual reception for conference attendees on the rooftop of the Andaz San Diego on June 28th, 5:30 p.m. – 8:00 p.m. Details will be posted on our website at [www.laborlawyers.com](http://www.laborlawyers.com).

Please visit us in Booth 1544 & 1546 where you can chat with several Fisher & Phillips attorneys free of charge! If you have any questions, please feel free to email Jackie Greenbaum at [jgreenbaum@laborlawyers.com](mailto:jgreenbaum@laborlawyers.com) or call 949.851.2424.

# Cooking And Cleaning May Be “Essential Job Functions” Even For Managers

By E. Jewelle Johnson (Atlanta)

A federal appeals court decision provides some significant insight into what courts may consider to be “essential functions” of restaurant managers, in a case that arose under the Americans with Disabilities Act (ADA). *Richardson v. Friendly Ice Cream Corporation*.

## Job Descriptions Count

Katharine Richardson was an assistant manager at a Friendly’s restaurant who, according to her six-page job description, was primarily responsible for 1) assisting the General Manager with administrative and operational shift duties; 2) providing guidance and direction to restaurant personnel; 3) overseeing, directing and assisting in the kitchen, dining and take-out operations; 4) facilitating production and customer service; and 5) ensuring that safety regulations and quality standards were maintained and that customer satisfaction was achieved.

When she injured herself grilling in the kitchen and scooping ice cream, she took time off to have shoulder surgery, and was granted leave under the Family and Medical Leave Act. When her leave expired, she was incapable of returning to work and was terminated.

Following her termination, Richardson filed suit in federal court alleging Friendly’s had failed to accommodate her disability in violation of the ADA. The district court tossed the case out, ruling in favor of the restaurant, because Richardson was not a “qualified disabled individual” since she was unable to perform the essential functions of the job.

## And Size Can Matter

On appeal, the U.S. Court of Appeals for the 1<sup>st</sup> Circuit agreed and affirmed the district court’s award of summary judgment in favor of Friendly’s on the basis that Richardson was not qualified for her position, with or without an accommodation, because “an assistant manager had to be capable of performing a broad range of manual tasks.”

The court reasoned that, “[f]unctions that might not be considered essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done.” The 1<sup>st</sup> Circuit explained that, “[i]f an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for organizing the work become more limited.”

## Temporary Accommodation

Richardson admitted that it was often necessary for her to assist with the cooking, cleaning, food service, and unloading of delivery trucks in order to ensure that the restaurant ran smoothly. But she argued that the fact that her duties were temporarily reduced or removed when she first injured her shoulder and delegated to other employees proved that the tasks were non-essential.

The court rejected this argument, stating that an employer does not concede that a job duty is “non-essential” merely by temporarily accommodating a limitation. The court also found that the law “does not require an employer to accommodate a disability by foregoing an essential function of the position or by reallocating essential functions to make other workers’ jobs more onerous.” Consequently, it would be unreasonable for an assistant manager to delegate so many tasks that she no longer performed the essential function of physically assisting with the restaurant’s operations.

## Lessons Learned

The court held that the assistant manager’s job description, her admitted daily performance of manual tasks, and the fact that she sustained her injury performing these manual tasks supported the court’s determination that she spent a “substantial amount of time on the job performing manual tasks around the restaurant” and those manual tasks, therefore, were essential functions of her job.

It’s always a good idea to review your job descriptions periodically. Make sure that you’re including *all* the important tasks for every position. If managers are expected to perform manual work on occasion, make sure that it’s spelled out that way in the job description. And temporarily reassigning that work to others won’t change the fact that they are essential.

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We’re interested in your opinion. If you have any suggestions about how we can improve the *Hospitality Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto:mmitchell@laborlawyers.com).