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Pretext-Plus in the Second Circuit:

Where It's Going Where It's Been

Part 1

By Stephen Bergstein
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Plaintiffs' employment discrimination lawyers in the Second Circuit were delighted when the Supreme Court issued *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). A unanimous Court in *Reeves* held that, in most Title VII and ADEA cases, the plaintiff may prevail at trial with a *prima facie* case of discrimination and evidence that the employer's articulated reason for the adverse employment action was false. The Court framed the issue as follows:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimina-

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The Roads Less Travelled: Local Employment Laws and Agencies in Upstate New York[1] [2]

by Matthew Bergeron *mbergeron@satterandrews.com*

Introduction

As employment lawyers, we are all familiar with Title VII and the New York Human Rights Law ["HRL"], as well as the Equal Employment Opportunity Commission ["EEOC"] and the New York State Division of Human rights ["DHR"]—the administrative agencies that administer those statutes. We are familiar with what the statutes say, what their regulations require, and the procedures to follow for each agency. However, it is important for us to know that these laws and agencies are not the only games in town. Often forgotten (or unknown in the first place) is that there are counties, cities and other municipalities in upstate New York that have their own laws that prohibit, and agencies that investigate, discrimination or otherwise regulate aspects of the employment relationship.

This article provides an overview of some local upstate employment laws and administrative agencies which administer those laws and/or deal with matters of employment discrimination. Specifically, I will discuss what those laws cover and how they interrelate with other anti-discrimination protections; what those laws provide for remedies; and how the laws are enforced, be it judicially or administratively. Also discussed will be entities which likely are at least familiar in name to many of us: "Human Rights Commissions" ["HRCs"]. Prior to writing this article, I knew very little about what these commissions do, whether they have any authority, and whether their functions are at all related or coordinated with the work of the DHR or EEOC. As you will see, the answers generally are: it varies, rarely, and sometimes.

However, as an initial matter, I think it important to address the more fundamental issue of whether and how municipalities can make their own employment laws.

May Local Governments Enact Local Laws Prohibiting Discrimination?

Of course, the question posed in the above heading is purely rhetorical. Clearly the answer is "yes."

Like most "well-settled" law, there was a time when a municipality's ability to pass local employment laws was questioned. One, if not the earliest, such challenge was posed in *City of N.Y. v. Claflington, Inc.*, 40 Misc.2d 547 (Sup. Ct. N.Y. Co. 1963). In that case, the City's own law prohibiting housing discrimination was claimed to be invalid because the state legislature, by passing the HRL, had intended to remove discrimination from local regulation. Not so, said the court. The City's law merely supplemented the state's proscriptions against discrimina-

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1 For purposes of this paper and presentation, "upstate New York" includes municipalities north of Westchester County.

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Executive Board Meeting
6:15 pm
Wednesday, December 16
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

NELA Nite
6:30 – 8:30 pm
Wednesday, January 13
3 Park Avenue – 29th Floor
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Save-the-Date

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Wednesday, March 3
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(Topic to be Announced)

Executive Board Meeting
6:15 pm
Wednesday, April 7
3 Park Avenue – 29th Floor
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NELA Nite
6:30 – 8:30 pm
Wednesday, April 28
3 Park Avenue – 29th Floor
Hosted by the E-Discovery Committee
Save-the-date

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The Use of Humor in the Practice of Plaintiff's Employment Law

by William D. Frumkin, Esq. *wfrumkin@sapirfrumkin.com*

A plaintiff's employment lawyer has various tools available that can be utilized to resolve the disputes our clients bring to us. Among these are the use of a demand letter, client counseling "behind the scenes," mediation, and of course litigation. As a new lawyer, there is a propensity to take each and every interaction with opposing counsel extremely seriously and this is very often the correct approach. As time advances, however, and confidence is gained through handling similar situations over time, one may come to realize that the "serious" approach may not always be the best way to handle a situation. I have found that the more I practice, the more opportunity there is to inject humor into the discourse, which may not only diffuse a heated disagreement, but may also actually help to further the client's interests. Don't underestimate the power of humor as an important tool in the arsenal.

No one will dispute that the initial interaction that a plaintiff's lawyer has with opposing counsel very often sets the tone for future interactions. For example, when I send a demand letter, I already know that whoever calls me in response will most likely tell me that I am absolutely wrong about the facts, that my client is way off-base, and that I should think twice before proceeding any further with the case. In response I might say: "Why is it that no one ever says to me, 'who do I make the check out to and for how much?'." This usually prompts a chuckle or a statement to the effect of, "I guess that's true, isn't it." I have found that this "ice breaker" will often move the conversation to a more pleasant level than if I said, "that is nonsense." Similarly, in response to a statement made to me such as: "this case isn't going anywhere," I might say "In all the years I have been doing this, none of my adversaries have ever agreed with me, would you like to be the first?" Ultimately, setting a humorous tone in the initial interaction with opposing counsel may diffuse the situation.

Likewise, the deposition stage of a litigation is obviously critical to its success. However, there are usually many opportunities during the course of a day with opposing counsel where humor may work wonders. For example, I usually say to opposing counsel and their witness when a lunch break is taken (at our office) that if they choose to go to the cafeteria in our office building, they should be aware that only two to three people die of food poisoning each year, so the odds are in their favor. I usually get some laugh from this, which I try to build on during the day. This may lead to a discussion of when they actually did get food poisoning or when their children may have been ill, or something of that nature, which while not really funny, gets us interacting on a personal level. This may also lead to discussion about our families generally and personal likes and dislikes. While the content of the interaction is totally unrelated to the purpose of being together, it often leads toward the development of a more open relationship, and helps to establish credibility. This is helpful to the case, particularly when it comes time for settlement.

The use of humor in court can also be very helpful. At a recent oral argument before the Second Circuit, where the issue on appeal was a lack of notice to my client in a pension claim which caused the client to take certain action that was not favorable to him, I used the following analogy: "Your Honor, if a baseball player gets up to bat in the bottom of the ninth inning with his team behind and hits a home run just beyond the wall, he cannot be told when he gets to second base that it's only a double because he had to hit the ball into the upper deck." This analogy prompted all three judges on the panel to laugh, as did many in the courtroom waiting their turn to argue. (If you don't find this funny, I guess you had to be there). Ultimately, I received a reversal of summary judgment. This may not have been due to this particular comment, but I'm sure it did not hurt. Undoubtedly, the humor that I attempted to infuse through the analogy, set a very good tone for the remainder of the argument.

Many judges also use humor in their conferences or even at trial, which also can be helpful. For example, I was recently in a courtroom discussion about *MetLife v. Glenn*, an ERISA case favorable to participants. In the case, the U.S. Supreme Court found that a potential conflict of interest exists when an insurance company denies a disability claim, which can result in a more favorable standard of review for the participant in court. When I told the Judge about my interpretation of the case, he asked my adversary if he agreed with my reading of the case. My adversary stated that he read the case, "backwards and forwards," and disagreed. The judge then asked my adversary if when he read it "backwards" did it say "Paul is dead?" (for, those of you who are too young to remember, there was a rumor in the 60's that Paul McCartney died. The rumor was fueled by the contention that if the song *Revolution 9* on the Beatles' *White Album* were played backwards, it would say "Paul is dead"). All of us at the counsel tables laughed out loud at the judge's attempt at humor and this led to a much more lighthearted discussion of the matter. It also broke the ice between myself and opposing counsel and caused us to deal with each other on a much less serious level.

Humor has a particular place in mediation. I was once involved in a mediation where my clients were attorneys, the mediator was an attorney, the defendants were attorneys, they were represented by two attorneys, and there was an attorney representative from the insurance company. We had twelve lawyers in a room with no windows. This mediation was successfully concluded at 3 a.m., after starting at 9 a.m. the pre-

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tion; it did not prohibit what state law permitted, nor did it permit what the state law forbade. *Id*. at 549. *See also, 1967 Op. Att. Gen (Inf.) 40*.

Other Attorney General Opinions have consistently come to the same conclusion. *See, 1968 Op. Att. Gen. (Inf.) 98; 1978 Op. Att. Gen. (Inf.) 115; 1987 Att. Gen. (Inf.) Op. 48, and cases cited therein*. Specifically, it has been found that the power of localities to enact their own legislation barring discrimination is derived generally from at least three sources: Article IX, §2(c)(ii)(10) of the State Constitution, §10(1)(ii)(a)(12) of the Municipal Home Rule Law, and §§297(a) and 300 of the HRL.

Conducting an analysis under this trio of laws, the courts have steadfastly held that local antidiscrimination laws are permissible as long as they are not inconsistent with the Constitution or a general state law and do not touch upon an area of law in which the State Legislature has indicated a purpose to preempt from regulation by localities. *See generally, N.Y.S. Club Ass'n v. City of N.Y.*, 69 N.Y.2d 211, 217 (1987); *Con Ed. v. Town of Red Hook*, 60 N.Y.2d 99 (1983); *see also, 1987 Att. Gen. (Inf.) Op. 48*. Since such laws clearly relate to the "protection, order, conduct, safety, health and well-being" of municipal citizens, local antidiscrimination laws are not inconsistent with the Constitution. *See generally, Bracker v. Cohen*, 204 A.D.2d 115 (2d Dep't 1994). As to whether there is inconsistency with "general state laws", however, a more interesting issue arises when a local law prohibits something upon which State law is completely silent. Alas, for opponents of local regulation, this argument too has been dismissed by the Court of Appeals: "Any time that the State law is silent on a subject," the Court opined, "the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule." *People v. Cook*, 34 N.Y.2d 100, 109 (1974).

As to the second question of whether the legislature has preempted local regulation of discrimination, the Court of Appeals answered same unequivocally in *N.Y.S. Club Association*. In that case, a New York City law prohibiting discrimination in private clubs was being challenged. Confronting narrowly the question of whether Article 15 of the HRL preempted the City's law, the Court concluded, "As we have already noted, no pre-emption is claimed here or is discernable from the statutory scheme." 69 N.Y.2d at 22.

Human Rights Commissions

Most counties (and some cities and towns) have "Human Rights Commissions" or some other agency with a similar moniker. Most of these HRCs exist under the authority of Article 12-D of the General Municipal Law, §§239-o *et seq*. Among other things, that law empowers and/or obligates HRCs to "report complaints to the division of human rights alleging unlawful discriminatory practices under article fifteen of the executive law" (*§239-q(2)(a)*) and "receive complaints of alleged discrimination…, to seek the active assistance of the division of human rights in the solution of complaints which fall within the jurisdiction of the division and to prepare its own plans in the case of other complaints with a view to reducing and eliminating such alleged discrimination through the process of conference, conciliation and persuasion." *§239-r(a)*.

Although by no means exhaustive, some examples of upstate HRCs are: City of Albany, City of Auburn, City of Geneva, Onondaga County, Orange County, Schenectady County, Sullivan County, Tompkins County and Ulster County. These examples are useful for our purposes because they represent a sampling of HRCs that operate in varying ways, which I find useful to place in three different categories: 1) HRCs that have memorandums of understanding ("MOU") with the DHR and evaluate complaints under the HRL, 2) HRCs that do not have an MOU with the DHR, but still evaluate complaints under the HRL, and 3) HRCs that do not have an MOU with the DHR, but receive and enforce complaints pursuant to local law.

HRCs with MOUs with the DHR

There are currently only three upstate counties with valid MOUs with the DHR: Orange,

Sullivan and Ulster. *See, www.dhr.staste.ny.us/local_commissions.html*.[3] "Memorandums of Understanding" are types of worksharing agreements between the DHR and local HRCs. Depending on the type of MOU, an HRC is given the authority to perform certain functions on behalf of the DHR. In exchange, the DHR agrees to provide the HRC with assistance, resources, training and access to its case management system. There generally are two types of MOUs: 1) those limited to "intake"—permitting the HRC to accept complaints, determining whether there is jurisdiction and, if so, drafting and filing a complaint with the DHR, at which time the HRC's involvement generally ends; and 2) those that allow the HRC to accept and investigate complaints.

The first breed of arrangement, the "intake" MOU, is currently more prevalent. Of the three counties that currently have MOUs, two (Sullivan and Ulster) are limited to intake. According to the Executive Directors of these commissions, the consensus is that HRCs serve as the "front line" regarding complaints of discrimination. They meet with complainants,[4] consider their stories and discuss their options. In some instances, there may not be jurisdiction at all; the employer may have less than four employees or the complaint very plainly does not involve unlawful discrimination. If the HRC determines that there is potential merit to a complaint, it may contact the employer itself and attempt to reach a resolution. If resolution is not possible, and the individual wants to file a complaint, the HRC then drafts and files the complaint in the DHR's system.

At present time, only Orange County has an MOU which includes both intake and investigation. Beyond the intake process described above, a county which investigates complaints uses the same investigatory process and tools as the DHR, *i.e*., the HRC requests a written response from the employer, a rebuttal from the

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3 Both a FOIL request and interviews with personnel from various other HRCs have revealed that there are other upstate counties that have had MOUs with the DHR which have expired (i.e., Schenectady, Chemung) and other counties that have discussed such a relationship with the DHR (i.e., Onondaga).

4 As a general rule, HRCs will only provide services for individuals who live or work in the particular county or municipality.

President's Column

by Darnley D. Stewart,
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Lilly Ledbetter Might Have Asked

A few weeks ago, I was asked by a news producer to comment on the *Vanity Fair* article written by a former female comedy writer on David Letterman's show. The producer's angle was the sexual favoritism described, but the following passage from her article also struck me:

> Did Dave hit on me? No. Did he pay me enough extra attention that it was noted by another writer? Yes. Was I aware of rumors that Dave was having sexual relationships with female staffers? Yes. Was I aware that other high-level male employees were having sexual relationships with female staffers? Yes. Did these female staffers have access to information and wield power disproportionate to their job titles? Yes. Did that create a hostile work environment? Yes. Did I believe these female staffers were benefitting professionally from their personal relationships? Yes. Did that make me feel demeaned? Completely. Did I say anything at the time. Sadly, no. Here's what I did: I walked away from my dream job.

This was a successful, confident woman at the top of her game. She was a minority of sorts, of course, given that she was one of the first and few women writers on the show – but why, when David Letterman asked her why she was leaving did she tell him it was because she missed L.A. and not because she couldn't stand working in such an environment? If this woman can't speak up, who can?

According to the Bureau of Labor Statistics, in 2008, women earned a median weekly salary that was about 80 percent of the pay for men. PayScale, a company that tracks self-reported salary data from millions of web-surfers, recently ran a series of extremely detailed statistical analyses of pay by gender, accounting for all conceivable "objective" factors, including industry, job title, position, size of the company, location of the job, budget the person managed, education, experience, and professional certifications. PayScale found that among high earners (those making more than $100,000 a year), even after accounting for all of these factors, women earn just 87 percent of what men receive. For instance, after controlling for the objective variables, female chief executives earn 71% of their male comparators; female hospital administrators earn 77% of what equally qualified men earn, and among chief operating officers, women earn 80% of what equally qualified men earn.

Interestingly, PayScale also surveyed job satisfaction and found that women are satisfied making far less money than men in the same job. In fact, the most professionally satisfied women were found to be earning around the same as the least satisfied men (those who said they "hate" their jobs). Does this mean that women are bargaining less aggressively for higher compensation because they don't care as much? Or have they resigned themselves to earning less and therefore have found other ways to assess their careers?

These are tough questions but the bottom line is this: women have to start having uncomfortable conversations with their employers and, frankly, even with their male co-workers and friends at times. I have a client now who is a manager at one of the big home improvement chains. She did not hesitate to ask her male co-workers how much they were making (for less sales volume) and they did not hesitate to tell her. It turned out to a man to be significantly more than she was making. This is an unusual client – and, in my experience, an unusual woman. Of course, the reality is many of our clients are not in a position to ask these questions and fear retaliation if they do. But others have to start asking – or, like Lilly Ledbetter, they won't know about the discrimination they are experiencing until it's too late. ■

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Congratulations to Rachel Geman, on her marriage to Andrew Nash November 8, 2009

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complainant and then often holds a two-party investigatory conference.[5] Upon completing its investigation, the HRC forwards its report to the Regional Director who then makes a finding of probable cause or no probable cause. Alternatively, the DHR may send a file back to the HRC if it feels further investigation is needed.[6] If probable cause is found, the case is scheduled for a hearing in front of a DHR Administrative Law Judge.

HRCs without MOUs

The overwhelming majority of the HRCs in upstate New York fall within this category.

Among those considered for purposes of this presentation were Onondaga County, Schenectady County,[7] and the Cities of Auburn and Geneva. Like other HRCs, they are creatures of General Municipal Law Article 12-D and are charged with performing the functions and duties outlined in that law. None of these HRCs have their own local laws to enforce, nor do they have investigatory or adjudicatory power. Rather, they counsel employees with potential complaints, engage in an effort to resolve any problems with the employer and, if all else fails, direct the employee to file a complaint with the DHR.

The reality with these commissions is that they are generally of little use to plaintiffs' attorneys and do not pose any credible threat to employers. Furthermore, since these commissions cannot accept complaints on behalf of the DHR or otherwise process complaints pursuant to local law, the safe assumption is that seeking their assistance has no impact upon statutes of limitations. Therefore, allowing a complaint to linger with one of these HRCs, or seeking their help dangerously close to the expiration of a limitations period, is highly inadvisable.

Municipalities with Antidiscrimination Laws and HRCs that Process Complaints

At least three municipalities in upstate New York that have their own antidiscrimination laws and an administrative mechanism for the purpose of receiving and processing complaints thereunder: the City of Albany, Tompkins County and the City of Ithaca.

City of Albany Omnibus Human Rights Law (§48-23, et seq.)

Although the substantive protections of the Omnibus Human Rights Law generally mirror those in the State's HRL, there are a few notable differences.

It does not contain a definition of "employer." The presumption is that Albany's law covers all employers, regardless of the number of employees.

In addition to "sex," it protects against discrimination on the basis of "gender," which includes "a person's gender identity, self-image, appearance, behavior or expression … different from that traditionally associated with the legal sex assigned to that person at birth." *§48-25(A)*.

Not only does it cover sexual orientation, but also "domestic partner" status, which relates to those that have registered as domestic partners under City law.

Unlike the HRL, Albany's law does not cover military status, genetic predisposition or those that have been acquitted of crimes.

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5 The HRC is not, however, obligated to investigate all complaints it receives. Whether due to location, complexity of the case, lack of resources, or possible conflicts, the HRC may send the complaint directly to the DHR for investigation. For example, according to the Orange County HRC, of the approximately 130 complaints filed in 2008, it investigated only 60%; the remainder were handled by the Division.

6 Unlike the DHR which aims to complete its investigation within 180 days, HRCs are required to complete their investigation within 90 days.

7 Schenectady County's MOU is currently expired, but it advises that it is in the process of renewing same.

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According to the law, enforcement is the responsibility of the City's Human Rights

Commission, which is housed within the City's Office of Equal Employment Opportunity and Fair Housing. [8] Verified complaints are filed with and investigated by the HRC. If probable cause is found and conciliation efforts fail, the HRC schedules a public hearing and a final determination is made based upon the evidence taken. Notably, unlike with the State Division of Human Rights, Albany's HRC does not provide counsel for complainants who do not have an attorney. As for remedies, they are no different than those available under the HRL.

Alternatively, complaints alleging violations of Albany's law may also be filed judicially. Just as with the HRL, Albany's law has an election of remedies provision which permits complaints filed with the HRC initially to be dismissed for administrative convenience. *§48-27(H).* However, unlike the HRL where judicial actions have a longer three year statute of limitations, the Albany law provides only a single, one year statute of limitations that presumably applies to both administrative and judicial complaints.

Tompkins County Charter Article 23, Tompkins County Chapter 92, and City of Ithaca Chapter 215

Although Tompkins County and the City of Ithaca (which is located in that County) have their own, independent antidiscrimination laws, it is appropriate to discuss them together because complaints under those laws may be processed through a single agency, the Tompkins County Human Rights Commission.

In terms of substantive protection, there are two laws on the County level. First, Article 23 of the County Charter creates the Tompkins County HRC and empowers it to accept and investigate complaints on the basis of "race, creed, color, sex, age, national origin, marital status, disability, prior arrest or conviction, retaliation, sexual orientation/ preference, and any other criterion as defined in federal, state, or local law." *§C-23.01(e).* The Tompkins County law (Chapter 92) covers only discrimination on the basis of sexual orientation. Interestingly, however, the Tompkins law goes much further than the HRL in terms of defining sexual orientation; it also bars discrimination on the basis of "gender identity or expression," which includes "[t]ransexuals in all stages of transition, including preoperative, postoperative and persons living in a gender other than their birth sex", cross-dressers, and hermaphrodites. *§92-3(A), (B), (C).* The City of Ithaca law largely mirrors the HRL, but also covers number of other traits not protected by that law, such as height, weight, immigration or citizenship status and socioeconomic status. *See, e.g. §215-3(1)(a).*

Complaints under these laws may be filed with the Tompkins County HRC. *See, Tompkins Co. §92-5(B); City of Ithaca §215-9.5(A).* Interestingly, the Tompkins County HRC seems to be a "hybrid" between those basic HRCs that have no investigatory authority whatsoever and those, such as Albany's (in theory), that are able to fully adjudicate a complaint. While the Tompkins County Charter and Law permit the HRC to accept verified complaints; investigate; hold hearings and take testimony, it oddly enough does not contain any provisions allowing it to reach a final determination and issue a final, binding award. *See generally, §92-5(B); Charter Art. 23.* Beyond the HRC, alternate avenues of recourse differ. If the complaint arose inside the County, but outside the City of Ithaca, and is based upon any of the protected traits other than sexual orientation, etc., in the absence of conciliation, a complainant's only choice for compelling compliance is to resort to that which is available under the HRL or EEOC.[9] If the complaint is based upon sexual orientation discrimination and arose anywhere within the County, or based upon any protected trait and arose within the City of Ithaca, a complainant may pursue the matter in court[10] within one year of the discrimination or one year from the unsuccessful termination of conciliation. *Tompkins County §92-5(B)(7); City of Ithaca §215-9.5(A).* As for damages, the County law specifies only "damages and such remedies as may be appropriate" and the City law is equally ambiguous, allowing "money damages and any other remedy available at law." *Tompkins County §92-5(B)(7); City of Ithaca §215-9.5(A).*

Local Laws Limited to Judicial Remedies

As discussed above, some localities such as the City of Albany, and to a lesser extent

Tompkins County and the City of Ithaca, have their own laws which can be processed either administratively or judicially. There are, however, antidiscrimination laws in upstate New York that provide for judicial recourse only. These laws include those in the Cities of Syracuse, Rochester and Buffalo, as well as in Onondaga County.

Syracuse and Onondaga County

Both Syracuse and Onondaga County have local laws prohibiting discrimination on the basis of "sexual or affectional preference or orientation." *See, Syracuse Local Law No. 17-1990; Onondaga County Local Law 2, 1998.* Each law makes clear they were enacted to provide protection which at the time was not provided by the HRL and, to this day, is still not provided by Title VII. *See, Syracuse Local Law No. 17-1990 at Art. I; Onondaga County Local Law 2, 1998 at Art. I.* In most all other substantive respects, these laws mirror the HRL, *i.e.,* an employer is defined as having four or more employees and there is aider and abettor liability as well protection from retaliation. Relative to enforcement, however,

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8 Through discussions with a member of the Albany HRC's staff, it was learned that although the City's law provides for an administrative enforcement mechanism, it does not currently exist. Notwithstanding, a discussion of same here is useful in the event that information was faulty or if such a mechanism is created in the future. Moreover, as discussed below, the law also provides the alternative of a judicial remedy.

9 However, as discussed supra, a complainant must be careful not to allow his or her complaint to linger in the HRC beyond the applicable statute of limitations.

10 The City law is peculiarly vague insofar as enforcement: "Any individual or group aggrieved and alleging unlawful discrimination may, in addition to the remedies provided by this article, have a cause of action against the violator for money damages and any other remedy available at law." Particularly interesting is that, aside from civil penalties, there are no other "remedies provided by [the] article".

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> tion may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id.* at 147-48. (citations omitted).

Reeves left open the possibility that, in some cases, even a *prima facie* case and evidence of pretext may not carry the plaintiff's burden. But the Court made it clear this was the exception to the rule. "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 148. Justice Ginsburg emphasized this in her concurrence: "I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon." *Id.* at 154.

Reeves made sense to plaintiffs' lawyers. While the *prima facie* burden may be a minimal, it exists for a reason. Evidence that the plaintiff (1) belongs to a protected class, (2) was qualified for the position and (3) was terminated or demoted (4) under circumstances creating an inference of discrimination, this evidence creates a presumption that the employer discriminated against her. *Chertkova v. Connecticut General Life Ins. Co.*, 92F.3d 81, 87 (2d Cir. 2006). Indeed, by definition, the fourth element of the *prima facie* inquiry – circumstances creating an inference of discrimination – distinguishes the case from those job actions that do not implicate the employment discrimination laws. As the Court of Appeals summarized in *Chertkova*,

> The circumstances that give rise to an inference of discriminatory motive include actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus, preferential treatment given to employees outside the protected class, and, in a corporate downsizing, the systematic transfer of a discharged employee's duties to other employees, or a pattern of recommending the plaintiff for positions for which he or she is not qualified and failure to surface plaintiff's name for positions for which he or she is well-qualified. A plaintiff might also rely upon the fact that the defendant, following plaintiff's termination, continued to seek applicants to fill the position, or, more generally, upon the timing or sequence of events leading to the plaintiff's termination. *Id.* at 91 (citations omitted).

Under the *McDonnell-Douglas* model, if the plaintiff makes out a *prima facie* case of discrimination, the employer must articulate a neutral reason for the adverse action. A false reason, combined with the *prima facie* case, makes the inference of discriminatory intent plausible. Under *Reeves*, evidence that the employer's justification is false does not entitle the plaintiff to victory; it entitles the plaintiff to a trial. The evidence comprising the *prima facie* case and the employer's bad faith reason will, in most cases, support a discrimination claim sufficient to go to a jury.

Reeves was good news for plaintiffs' lawyers. Three years earlier, the Second Circuit had issued an *en banc* ruling which made it harder for plaintiffs to prevail at trial. In *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997), the Court of Appeals held that the *prima facie* case and evidence of pretext was not necessarily enough to prevail. *Fisher* was a tenure discrimination case that reversed the district court's findings for the plaintiff after a bench trial, awarding her over $600,000 in damages. The *en banc* majority ruled that "a finding of discrimination is reviewed for clear error like any other factual determination, and thus may be reversed – even if there is a sustainable finding of pretext – if the evidence, considered in the aggregate, will not support a finding by the district court that the reason for the adverse employment action was intentional discrimination." *Id.* at 1334-35. The Court of Appeals went on to reason,

> [W]hile a *prima facie* case and a finding of pretext may in some cases powerfully show discrimination, neither one necessarily gives plaintiff much support in discharging his obligation to prove that he was the victim of discrimination. Indeed, the combined effect of both may have little capacity to prove what the plaintiff has the ultimate burden of proving. Thus, a finding of pretext, together with the evidence comprising a *prima facie* case, is not always sufficient to sustain an ultimate finding of intentional discrimination.

Id. at 1338. *See also*, *id.* at 1339 ("[a]ccordingly, a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction – or both").

In *Fisher*, the Second Circuit adopted what scholars call the pretext-plus model of employment discrimination. This was a significant departure from prior Second Circuit practice. Only a few years earlier, the Court of Appeals was routinely vacating summary judgment upon a finding of pretext, applying the Supreme Court's language in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" *Id.* at 511.

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A well-known example of the Second Circuit's mid-1990's hostility toward summary judgment in employment discrimination cases was *Gallo v. Prudential Residential Services*, 22 F.3d 1219 (2d Cir. 1994), an age discrimination case involving a reorganization and reduction-in-force. *Gallo* began its analysis by stating, "[c]onsidering how often we must reverse a grant of summary judgment, the rules for when this provisional remedy may be used apparently need to be repeated." *Id*. at 1223. Using language that became ubiquitous over the next several years, the Court of Appeals reiterated that "when deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue." *Id*. at 1224.

Consistent with *St. Mary's*, the Second Circuit in 1995 reinstated a jury verdict (and reversed the district court's Rule 50 order) in an ADEA claim where the plaintiff established that the employer's reason for terminating his position (and denying him any other available positions) was pretextual. In that case, *Binder v. Long Island Lighting Co*., 57 F.3d 193 (2d Cir. 1995), the Court of Appeals reasoned, "A trier may thus generally infer discrimination when it finds that the employer's explanation is unworthy of credence." *Id*. at 200. Anticipating the Supreme Court's decision in *Reeves*, *Binder* did hold out the possibility that, in some cases, the employer may prevail if it "explain[s] away the proffer of a pretextual reason for an unfavorable employment decision." *Id*. However, speculation was not enough to take advantage of that escape hatch. *Binder* rejected the employer's appeal because "[n]o such explanation was offered in the instant matter." *Id*.

Binder was short-lived. The *en banc* majority in *Fisher* held that "[i]f *Binder v. Long Island Lighting Co*., 57 F.3d 193 (2d Cir.1995), is read as inconsistent with this holding, we expressly reject it." *Fisher*, 114 F.3d at 1340.

Surprisingly, the Supreme Court's decision in *Reeves* was short-lived in the Second Circuit, as well. In its first published discrimination decision applying *Reeves*, the Court of Appeals narrowly interpreted that precedent in affirming summary judgment even though the ADEA plaintiff made out a *prima facie* case and proffered evidence of pretext in connection with his termination as a Legal Aid investigator. The Second Circuit stated,

> [w]e note that the [*Reeves*] Court did not categorically conclude that a *prima facie* case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden; it noted, instead, that such circumstances 'may permit' a trier of fact to conclude that a plaintiff had met his ultimate burden. If *Reeves* had ended here, we would have little choice but to reinstate plaintiff's ADEA claim in the instant case.

Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000).

Although *Reeves* presumes that evidence of pretext militates against summary judgment, *Schnabel* emphasized the language in *Reeves* that held out a possibility that the employer may could prevail despite evidence of pretext. The Court of Appeals framed the inquiry this way: "[W]e hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" *Id*. at 90. In *Schnabel*, the Court of Appeals expressly repudiated its prior cases to the extent they compelled the denial of summary judgment upon a *prima facie* showing and evidence of pretext. *Id*. at 90.

Schnabel confirmed that *Fisher v. Vassar* was alive and well in the Second Circuit post-*Reeves*.[11] In fact, the Supreme Court had suggested that *Fisher* was inconsistent with its holding in *Reeves*. But how did the Court of Appeals get around the Supreme Court's observation that *Fisher v. Vassar* was inconsistent with *Reeves*? The *Schnabel* panel boldly suggested, "[i]t is arguable that the Supreme Court's reading of *Fisher* was inaccurate. We read *Fisher* as consonant with *Reeves*: Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate inference in any other civil case." 232 F.3d at 89 n.5.[2]

Shortly after the Court of Appeals decided *Schnabel*, it was more explicit:

> [U]pon careful study of the *Reeves* opinion, we can find no indication in it that the Supreme Court has rejected what we said in *Fisher*. We believe that both opinions essentially stand for the same propositions – (i) evidence satisfying the minimal *McDonnell Douglas prima facie* case, coupled with evidence of falsity of the employer's explanation, may or may not be sufficient to sustain a finding of discrimination; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove – particularly discrimination.

James v. New York Racing Ass'n, 233 F.3d 149, 156-57 (2d Cir. 2000).

As in *Schnabel*, the Court of Appeals affirmed summary judgment in *James* despite a *prima facie* case and evidence of pretext. *Id*. at 157.

Having resurrected *Reeves*, the Court

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1 In *Reeves*, the Supreme Court stated that it "granted certiorari ... to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination ... combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140. By way of example, the Court contrasted, inter alia, *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated) with *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination)."

2 See, Anne Golden, *"It's Alive! Fisher Wasn't Abrogated After All," The New York Employee Advocate* June 2001, p.1, col. 2.

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of Appeals applied it in unpredictable ways. In *McGuinness v. Hall*, 263 F.3d 49 (2d Cir. 2001), the Second Circuit vacated summary judgment in a racial discrimination case because management had granted more generous severance packages to black employees than to white employees like plaintiff. Although the Court of Appeals noted that plaintiff did not produce evidence of discriminatory comments or a corporate history of discrimination against white employees, evidence that similarly-situated black employees were treated more favorably was enough to prevail at trial.

However, in *Slattery v. Swiss Reinsurance America Corp*., 248 F.3d 87 (2d Cir. 2001), the Court of Appeals affirmed summary judgment in an ADEA case even though the plaintiff had produced evidence of pretext as well as the following discriminatory statement from upper-level management in a published interview: "Kielholz has been concerned to dispel the perception of Swiss Re as a multinational collection of grey suits and encourage young dynamic staff to join the company. The average age has dropped significantly over the last few years to 39. Kielholz firmly believes that a younger workforce will be more in tune with the knowledge worker spirit." *Id*.

Echoing language in *Fisher v. Vassar*, the Second Circuit said, "The problem for Slattery is that the Kielholz statement on which he relies heavily, considered in the context of the case as a whole, and even combined with the possibility that Swiss Re's statements about lack of new business were pretextual, does not in the end carry the burden Slattery bears of showing he was treated adversely for discriminatory reasons." *Id*. at 94. The judges who wrote *Slattery* and *McGuinness* both voted with the majority in *Fisher*.

At this time, Judge Newman, who had dissented from the *en banc* ruling in *Fisher*, noted that the Second Circuit had narrowly interpreted *Reeves* in contrast to other Circuit Courts. He noted, "Since *Reeves,* the case law has been developing as to what sort of a record will permit a plaintiff who presents evidence of a *prima facie* case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law. The Fifth Circuit appears to understand *Reeves* to mean that a *prima facie* case and evidence of pretext take a case to a jury in the absence of '*unusual circumstances* that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII.'" *Zimmermann v. Associates First Capital Corp*., 251 F.3d 376, 381-82 (2d Cir. 2001). However, Judge Newman, noted, "[o]ur Circuit has not read *Reeves* quite so favorably to Title VII plaintiffs. Without insisting on unusual circumstances or evidence precluding a finding of discrimination, as the Fourth and Fifth Circuits have done, we have simply ruled in several cases that a record that included evidence of a *prima facie* case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination." *Id*. at 382.

While noting that the plaintiff in *Zimmerman* had "slight" evidence of gender discrimination beyond the *prima facie* case, the Court of Appeals reversed summary judgment because her evidence of pretext was "extremely substantial and the Defendant's effort to meet it is woefully inadequate" in that there was no documentary evidence to support its argument that plaintiff was fired for poor job performance and that management had, in fact, praised her performance. *Id*. at 382.

For plaintiffs' lawyers, the post-*Fisher* environment reached its nadir in a decision in which the Court of Appeals affirmed the district court's Rule 50 order vacating a $400,000 jury verdict in an age discrimination case even though the plaintiff established that the employer's reason was pretextual. In *McCarthy v. New York City Technical College*, 202 F.3d 161 (2d Cir. 2000), the Second Circuit noted,

> That an employer gives a pretextual reason for its action may indeed give support to the inference of prohibited discrimination. Depending on the circumstances, an employer's resort to pretext may give the plaintiff strong support. But, as we explained in *Fisher*, the reasons why an employer may give pretextual reasons to explain an adverse personnel action can be so numerous that the mere fact of a pretextual explanation, without circumstances suggesting that the true motivation was what plaintiff claims, does little to support a plaintiff's case. An employer's assertion of false reasons does not eliminate the requirement that the evidence, considered in its entirety, including any inference reasonably drawn from the falsity of the proffered reasons, must be capable of supporting a reasonable finding that the true reason was the prohibited discrimination plaintiff alleges.

Id. at 166.

In his concurring opinion in *McCarthy*, Judge Newman wrote that he would have preferred to uphold the jury verdict in this case but that he was bound by *Fisher*'s rejection of the literal language in *St. Mary's Honor Center* that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and ... no additional proof is required." *Id*. at 168.

These cases confirm that the Second Circuit's interpretation of *Reeves* is difficult to apply. The case-by-case approach outlined in *Schnabel* means that the likelihood of summary judgment in discrimination cases without direct evidence depends on the panel of judges hearing the case. At times, a panel will articulate language which sets aside the pretext-plus model. Collecting recent cases on the issue, the Court of Appeals in 2004 observed, "[T]o meet his or her ultimate burden, the plaintiff may, depending on how strong it is, rely upon the same evidence that comprised her *prima facie* case, without more. ... And unless the defendants' proffered nondiscriminatory reason is 'dispositive and forecloses any issue of material fact,' summary judgment is inappropriate." *Back v. Hastings-on-Hudson Union Free School Dist*., 365 F.3d 107, 123-24

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there are two significant departures from the HRL: there is a one year statute of limitations and attorneys' fees are recoverable. *See, Syracuse Local Law No. 17-1990 at Art. VI, VII; Onondaga County Local Law 2, 1998 at Art. VI, VII.*

City of Buffalo

Chapter 154, Article III of the City of Buffalo Code, broadly titled "Antidiscrimination

Law," provides expansive protections against the deprivation of an individual's "civil rights." The law defines civil rights to include many things, one of which is "[a]pplying for or enjoying employment, or any prerequisite thereof." *§154-9*. This language is a far cry from the standard verbiage used in most other employment antidiscrimination laws, including the HRL, which forbids the "refusal to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Thus, the question becomes, is "applying for or enjoying employment" sufficient to serve the same purpose as the traditional, more specific "terms, conditions or privileges of employment" clause quoted above?

Unsurprisingly, research did not unearth any cases applying the Buffalo law. However, the answer to the question seems self-evident. Through basic tenets of statutory construction, including consideration of the Buffalo City Council's intent in enacting the law,[11] a court would be hard-pressed to find that "enjoyment" of employment does not implicitly envelope the more precise phrasing used by Title VII and the HRL.

With respect to other notable differences between the Buffalo law and the HRL in terms of coverage, the former lacks a definition of "employer" and, therefore, presumably applies to all employers. Relative to procedure and remedy, the law provides only judicial recourse in which a party may seek "injunctive relief, damages, or any other appropriate relief in law or equity." *§154-11*. Furthermore, the Buffalo law also allows an award of attorneys' fees to "the party commencing such action or proceeding." Finally, the law contains no statute of limitations, not unlike §297(9) of the HRL which states only that an individual may sue in "any court of appropriate jurisdiction." Just as with the HRL, however, the three year statute of limitations provided by CPLR §214(2), which applies to "an action to recover upon a liability, penalty or forfeiture created or imposed by statute," would seem to most appropriately apply. *See also, Murphy v. Amer. Home Prods.*, 58 N.Y.2d 293, 307 (1983).

City of Rochester

Unlike the Buffalo law, the City of Rochester's law prohibiting employment discrimination is written in the more traditional boilerplate one might expect. While largely similar to the HRL in its basic protections relative to employment, three differences stand out. First, although the definition of "disability" mirrors the HRL's, it adds one peculiar caveat: "However, as used in this chapter, the term 'disability' shall not include any condition or disorders which are excluded from coverage under the Federal Americans with Disabilities Act." *§63-2*. The effect of this provision would seem to effectively eradicate the benefit of the HRL's more inclusive definition of "disability" which the Rochester law otherwise contains.

Second, the Rochester law expressly does not apply to the United States, New York, or the Monroe County governments or their departments, agencies, divisions, etc.[12] *§63-9(B)*. Finally, in terms of remedy, if sued within the one year statute of limitations, the law provides more than the HRL but not quite as much as we would like, i.e. punitive damages but no attorneys' fees. *§63-10(B),(C)*.

Living Wage Ordinances

One final group of local laws of which those representing employees should be aware are "living wage ordinances" ["LWO"]. Dating back to 1988 on the national scene, and first adopted by a New York municipality (New York City) in 1996, living wage ordinances generally require contractors doing business with the municipality to pay their employees performing work under the contract a "living" wage which is higher than the federal or state minimum wage.[13] *See generally,* www.livingwagecampaigns.org. Such laws do not, however, ordinarily apply to *all* contracts regardless of type (service vs. goods) and amount. Furthermore, a centerpiece to most LWOs is a two-tiered wage system dependent upon whether, and how much, health insurance is offered by the contractor. If the contractor offers no insurance, or insurance which is deemed inadequate under the LWO's standards, the higher wage applies.

According to www.livingwagecampaigns.org, municipalities with LWOs in New York include Buffalo, Nassau County, New York City, Oyster Bay, Rochester, Suffolk County, Syracuse, and Westchester County.

Conclusion

As we've seen, although none of them come close to the breadth or complexity of the New York City Human Rights Law or Commission, many municipalities in upstate New York also have their own antidiscrimination laws and commissions. As plaintiffs' counsel, the lesson is that before reflexively filing with the DHR and/or EEOC, consider possible alternatives that may provide speedier investigation (*i.e.*, Orange County HRC), broader coverage (Tompkins County and City of Ithaca), or better remedies (*i.e.*, Buffalo, Rochester , Syracuse and Onondaga County).■

11 §154-10 Legislative Findings and Intent. The Common Council of the City of Buffalo hereby finds that the declared policy of the City of Buffalo is to eliminate group prejudice, intolerance, bigotry and discrimination within the City and to encourage equality of treatment for, and prevention of discrimination against, persons of all races, ethnic backgrounds, religions, genders, gender identity and expression, sexual preference or disabilities, pursuant to the powers of the City of Buffalo to maintain order and preserve and care for the safety, health, comfort and general welfare of its inhabitants and visitors.

12 Although the U.S. government exemption is in essence illusory due to Sovereign Immunity, the other exceptions are undoubtedly departures from Title VII and HRL coverage.

13 There do exist more expansive "citywide minimum wage laws", but there are none in New York. Such laws apply to all employers within a city, regardless of whether they do business with, or receive subsidies from, the municipal government. *See, e.g.* http://www.nelp.org/index.php/site/issues/category/citywide_minimum_wage/.

Anne's Squibs

by Anne Golden *ag@outtengolden.com*

Note: Of course, these squibs are by no means exhaustive, nor should you rely upon them as a substitute for doing your own research and actually reading the cases.

AGE DISCRIMINATION

The United States Supreme Court last term made it significantly harder for a plaintiff to prevail under the Age Discrimination in Employment Act. The question before the Court was whether mixed-motive analysis, with burden-shifting to the employer, as first described in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), could be used in ADEA cases. The Court (in a decision by Justice Thomas) skipped over this question and held, instead, that not only could ADEA plaintiffs not use mixed-motive analysis, but they must show that age was "the 'but-for' cause" of the challenged employer action – an issue that had scarcely been briefed or argued. The stated rationale of this holding was that when the ADEA says "because of" age, this means "the" cause, not "a" cause. The majority opinion also said when Congress partially codified *Price Waterhouse* (a Title VII case), it did not amend the ADEA the same way; thus, presumably, it did not intend to … and thus, presumably, it must have specifically intended not to. (The Court added threateningly that it was "far from clear" that it would have decided **Price Waterhouse** the same way today.) It left unaddressed cases in which a plaintiff brings both ADEA and Title VII or state-law claims, which now a jury must be instructed to analyze differently. Until this decision, every court of appeals that had considered whether mixed-motive analysis could be used in ADEA cases had held that it could (the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, arguably 10th, and 11th). Congress is presently considering a legislative fix for this decision. *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343, 174 L. Ed. 2d 119, 2009 U.S. LEXIS 4535, 106 F.E.P. Cas. (BNA) 833 (6/18/09).

The Age Discrimination in Employment Act contains an exemption for "bona fide executives" and employees in "high policymaking" positions – in other words, employers may safely and legally discriminate against them because of their age, such as by requiring them to retire when they turn 65. But a pharmaceutical company that forced its chief patent lawyer to retire at 65 lost a bench trial in which it relied on that defense, and the company's loss was self-inflicted. Judge Vanessa L. Bryant (D. Conn.) concluded that because the company had gradually removed the plaintiff's policymaking duties and given them to the younger person it was grooming as his successor, he was no longer – if he ever had been – in the exempt category. Because the company had marginalized him, it had lost the defense. Unfortunately for the plaintiff, however, the court also held that he had failed to mitigate his damages because he had not made a serious effort to replace his lost income, so he recovered no damages. *Raymond v. Boehringer Ingelheim Phrams., Inc*., --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 76578 (D. Conn. 8/27/09).

The Appellate Division, 2d Department, has affirmed a post-hearing determination of the New York State Division of Human Rights that a former Assistant Dean of a college was fired because of her age. The complainant, then age 54, had been moved to a temporary, marginalized position and replaced by a 25-year-old, less qualified woman who had formerly been the new interim Dean's part-time administrative assistant. A year later, the interim Dean discharged the complainant, allegedly because his office was now overstaffed with Assistant Deans. He fired her in a way that the complainant described as "traumatic" (twenty minutes to remove all her possessions, which did not fit in her car; escorted to the curb by a security guard; etc.). Because the termination occurred in late July 2002, the complainant – who had a Ph.D. and two Master's degrees – could not find another academic position and had to take clerical jobs until she finally found a comparable position in January 2006. She and a friend testified about her emotional distress, her depression, and the effects of the firing on her physical health, but there was no testimony from a psychologist or a psychiatrist, which she could not afford. The Division of Human Rights gave her $150,000 for her emotional distress and $110,005 plus interest for back pay, and the Appellate Division cut the emotional distress award to $75,000 but otherwise affirmed the judgment. *Matter of Iona College v. Gibson*, --- N.Y.S. 2d ---, --- A.D.2d ---, 2009 N.Y. Slip Op. 4062 (2d Dep't 5/19/09), *aff'g Rossi v. Iona College*, NYSDHR Case No. 1254904 (10/31/07).

See also *Leibowitz v. Cornell University*, discussed under "Summary Judgment."

EVIDENCE

The Seventh Circuit Court of Appeals had occasion to consider the "cat's paw" theory of liability when a technologist sued under USERRA after having been fired, allegedly for having taken too much leave to fulfill his U.S. Army Reserve duties. ("Cat's paw" refers to an old French fable in which a monkey persuaded a cat to pull his chestnuts out of the fire; the cat burned her paw and the monkey ate the chestnuts.) USERRA, the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301 *et seq*., prohibits adverse employment actions based upon, among other things, military status. The plaintiff had a spotty disciplinary record – allegedly at least partly because a manager, irritated at his absences for duty, wrote him up repeatedly – and it was that record, in part, that another manager relied upon in discharging him. The court of appeals held that since there was not enough evidence to support cat's paw liability, it was error for the district court to have admitted evidence of the alleged nondecisionmaker's hos-

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tility based on his absences. The plaintiff's verdict was vacated and the district court was ordered to enter judgment for the employer. The U.S. Supreme Court has granted *certiorari*, so stay tuned. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 3/25/09).

EVIDENCE

Retaliation

A pro se plaintiff persuaded the Eleventh Circuit Court of Appeals to reverse a grant of summary judgment based on misapplication of the *McDonnell Douglas* burden-shifting analysis when she had offered direct evidence that she was fired because she had filed a charge of disability discrimination with the Florida Commission on Human Relations. She provided sworn testimony that a manager "expressly informed her" by telephone that she was fired, in part because she had filed the charge. The proffer "constitutes direct evidence because finding a retaliatory motive based on this statement requires no inference or presumption," the court said, and direct evidence sufficient to create a material disputed factual issue precludes summary judgment. **Dickey v. Dollar General Corp**., --- F.3d ---, 2009 U.S. App. LEXIS 24335 (11th Cir. 10/30/09) (unpublished opinion).

NEW YORK STATE, CITY HUMAN RIGHTS LAWS

Scope of City Law

A Justice of the Supreme Court, Kings County, was persuaded by the decision of the Appellate Division, First Department, in *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 2009 N.Y. App. Div. LEXIS 433 (1st Dep't 1/27/09), that the New York City Human Rights Law must be interpreted more broadly than its state and federal analogs, at least after the Local Civil Rights Restoration Act of 2005. The plaintiff was an orthodox Jew who alleged that he experienced a hostile work environment in the form of religious discrimination at a law firm. The defendant argued that *Williams* should not have precedential value because it was a sexual harassment case and this plaintiff alleged religious harassment. Justice Lawrence Knipel held that (a) a trial-level court is "required to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division in the trial court's department pronounces a contrary rule," and that in any event, (b) "[t]he distinction which defendant implicitly seeks to draw between sexual harassment and religious persecution is without merit. To limit *Williams* to its facts, namely sexual harassment, is without support in law or logic." The defendant's motion to dismiss under CPLR § 3211 was denied. *Lampner v. Pryor Cashman*, --- Misc. 2d ---, NYLJ 11/11/09, p. 25 col. 3 (Sup. Ct. Kings Cty. 11/6/09).

NEW YORK WHISTLEBLOWER LAW

See *Geldzahler v. New York Medical College*, discussed under "Summary Judgment."

PLEADINGS

"Notice Pleading Is Dead"

That epitaph was pronounced by Judge Shira Scheindlin, S.D.N.Y., when she spoke at the NELA/NY Fall Conference on October 23, 2009. The reason for the death, epitaph, funeral, and burial of "notice pleading," although its health had seemed to be improving after *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), was that a complaint in any civil case must state enough facts to "state a claim to relief that is plausible on its face," *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Federal Rule of Civil Procedure 8(a) merely says that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," but *Twombly* had interpreted this as requiring that the complaint include sufficient factual allegations to render the claim "plausible." "Plausible" lay somewhere between "speculative" or "possible" on one hand and "probable" on the other. Plaintiffs' counsel had hoped that *Twombly* would not be applied outside the antitrust context in which it had arisen, but in May the Supreme Court not only dashed those hopes but made the "plausibility" threshold higher. It held that plausibility is "context specific," requiring the court to "draw on its judicial experience and common sense." Plaintiffs' counsel see this as an invitation to trial judges to engage in factfinding and, even worse, to exercise their own institutional biases and personal prejudices. The decision also may be read to eliminate supervisory liability under **Bivens** (a First Amendment case) and Section 1983, and it says that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Justice Souter, who wrote *Twombly*, dissented, joined by Justices Stevens, Ginsburg, and Breyer. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009 U.S. LEXIS 3472 (5/18/09).

However, there have already been several decisions at the district court level reading *Iqbal* narrowly. Judges Kimba Wood (S.D.N.Y.) and Nancy Gertner (D. Mass.) both found the complaints before them sufficiently plausible to meet the *Iqbal* standard. Judge Wood, denying a motion for reconsideration purportedly based on an intervening change in decisional law, held in a non-employment fraud case that *Iqbal* did not constitute such an intervening change, pointing to "the Supreme Court's own discussion in *Iqbal*." She noted that "application of the Supreme Court's clarification of pleading standards under *Twombly* as set forth in *Iqbal* would lead to the same result as that provided in [the court's prior order]." She explained, "The factual content in the complaint allows this Court to draw a 'reasonable inference' that, if the allegations are proven, the Defendants are 'liable for the misconduct alleged [quoting *Iqbal*].'" Judge Gertner in Massachusetts was faced with a motion to dismiss and said, in discussing *Iqbal*, "Reaching their own conclusion about the defendants' state of mind, the majority simply found Iqbal's claim improbable. … Plausibility, in this view, is a relative measure. Allegations become 'conclusory' where they recite only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts." The court returns to the basid rule: "Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where

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the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible." *Green v. Beer*, --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 98285 (S.D.N.Y. 10/22/09); *Chao v. Ballista*, 630 F. Supp. 2d 170, 2009 U.S. Dist. LEXIS 56948 (D. Mass. 7/1/09).

PREGNANCY DISCRIMINATION

When an employee in the accounting department of a Middletown, New York company told her manager that she was pregnant with her second child, she alleged, his treatment of her drastically changed. Before the announcement, he (having just been promoted to manager) drew up a reorganization plan under which she would be cross-trained to handle additional, higher-level duties. About a month and a half after the announcement, however, her employment was terminated; in the meantime, the manager had recruited another, non-pregnant woman for an upgraded position in the accounting department. After trudging through the elements of the *McDonnell Douglas* analysis, the court catalogued the various facts that a jury could reasonably find in order to reach a verdict in the plaintiff's favor, noting specifically that under *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 135 (2000), "'a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.'" Here, the plaintiff demonstrated pretext by relying, "as she was entitled to do, on the same evidence she used to support her prima facie case." The motion for summary judgment was denied. NELA/NY members Helen G. Ullrich and Stephen Bergstein represented the plaintiff. *Ramos v. Piller, Inc*., --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 97397 (S.D.N.Y. 10/21/09) (John F. Keenan, J.).

ANNOUNCEMENTS

Don't you have an article or case for the "Filings, Trials and Settlements" column you'd like to share with your NELA/NY members?

If you have any announcements or if you an article you'd like to share with your NELA/NY colleagues,

Please e-mail Shelley
nelany@nelany.com

We will include it in our the next issue of the newsletter.

SANCTIONS

Many of us have noticed the tactic often used by Ronald Green (Epstein, Becker & Green) of filing preemptive lawsuits for "extortion" against employees who assert discrimination claims and then suggest an amicable settlement. Indeed, he has written in the New York Law Journal about this tactic. Mr. Green took it one step further recently when he filed a lawsuit, supposedly on behalf of a client, not only against two women who had filed sexual harassment charges with the EEOC but against their lawyer personally and his law firm as co-defendants. The "plaintiff" in this action was the wife of a hedge fund manager, and the claim arose from the manager's request to his assistant (one of the two female ex-employee defendants) to have photographs of his wife developed from two CDs. Some of the photos showed his wife topless on their honeymoon. Only one of the CDs was returned with the developed photos; the manager's assistant kept the other as evidence that she was being sexually harassed. Justice Walter B. Tolub (Sup. Ct. N.Y. Cty.) dismissed the complaint as to the other female ex-employee, her lawyer, and his firm, and awarded them attorneys' fees and a $1000 sanction against Mr. Green for his frivolous complaint against them. Mr. Green has vowed to appeal, thus ensuring that his behavior will not be forgotten. *Abrams v. Pecile*, --- N.Y.S.2d ---, NYLJ 11/5/09, p. 25 col. 3 (Sup. Ct. N.Y. Cty. 11/4/09).

SEXUAL HARASSMENT

See *Sclafani v. PC Richard & Son*, discussed under "Summary Judgment."

SUMMARY JUDGMENT

Age Discrimination

A former contract instructor's lawsuit against Cornell University and the New York State School of Industrial and Labor Relations (and four individuals) bounced from Judge George B. Daniels's courtroom (S.D.N.Y.) twice into the Second Circuit Court of Appeals when the district court first dismissed it and then granted summary judgment. Both times, the district court's decision was reversed or vacated in part and remanded. The plaintiff alleged age and

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HUMOR, from page 3

vious morning. We did not even discuss money until approximately 6 p.m. Upon noticing the number of lawyers in the room at 9 a.m., I could not help but make a comment about that, which led to numerous lawyer jokes being told. The theme throughout the day was akin to "how many lawyers does it take to screw in a light bulb?" The humorous tone that was set early in the day led to a successful mediation.

It has always been my belief that humor has its place in most human interactions. In our cases, specifically because of the tensions and contentiousness that often permeate our interactions, it is critical to infuse humor as much as possible. What I have not discussed at all is the use of humor with our clients. While I cannot pin-point specific examples of this, it should be employed early and often. I am sure that most of you have similar "war stories" where various humorous events have occurred. Not only can the use of humor be helpful to the outcome of the case, it can make it a lot more fun to go to work. ■

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gender discrimination and several kinds of breach of contract, including implied-in-fact-contract, as well as quantum meruit with respect to some work performed after her employment ended. The district court had held that the non-renewal of the plaintiff's five-year contract was not an adverse employment action as a matter of law because "'[p]laintiff did not have a guarantee of lifetime employment," and that the plaintiff had shown enough facts to support the inference that the failure to renew her contract was discretionary. In addition, the court of appeals disagreed with the district court's conclusion that the plaintiff had not offered enough evidence to show pretext, and added that the evidence of the prima facie case plus the evidence of pretext sufficed to defeat summary judgment. In sum, the court of appeals found that there were material disputed issues of fact upon which a jury could find age and gender discrimination, but that she had failed to prove implied-in-fact contract or quantum meruit. *Leibowitz v. Cornell University*, 584 F.3d 487, 2009 U.S. App. LEXIS 23346 (2d Cir. 10/23/09).

New York State Whistleblower Law

Many plaintiffs' employment lawyers in New York are familiar with the private-sector whistleblower law, N.Y. Labor L. § 740, with its impossibly narrow scope (as interpreted by state appellate courts). Magistrate Judge Andrew J. Peck (S.D.N.Y.), considering a motion to dismiss a *pro se* plaintiff's complaint, read it first to allege a claim under Sections 740 and 741 (relating to health care providers) and then to have stated that claim with sufficient factual allegations to survive the motion to dismiss. The plaintiff was hired by the New York Medical College as director of its Oral and Maxillofacial Residency program, which the plaintiff alleged was about to lose its accreditation but which provided a poor education, focused on making money for the college rather than training students. Even though the complaint never specified any particular statutes, the magistrate judge noted that it repeatedly used those sections' "danger to the public health" language, and the civil cover sheet said that one of the claims was brought under the "NY Whistleblower Statute." "Finally," said the court, "defendants were sufficiently on notice of the claim that they addressed Labor Law §§ 740-41 in their motion to dismiss." The court did, however, dismiss the claims for breach of contract and wrongful termination, based on New York's employment-at-will rule. *Geldzahler v. New York Medical College*, --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 96465 (S.D.N.Y. 10/19/09).

RACE DISCRIMINATION

An African American employee of a gas and electric company in Kingston, New York, was denied a promotion to First Class Lineman and demoted to Meter Reader after he failed an examination required for the promotion. The plaintiff achieved a nearly perfect score on the written part of the examination, but he failed the practical component. Two of the four proctors for the practical portion of the test said he had removed his rubber glove during the examination, contributing to the failing grade; the other two proctors said they did not see him remove the glove. The plaintiff contended that he did not remove the glove and sued under 42 U.S.C. § 1981 and the New York State Human Rights Law, Exec. L. § 296. He also said that one of his supervisors, tossing the plaintiff a length of rope, said "maybe [he would] make a noose," and another supervisor unjustly criticized him; one of his colleagues called him "boy" and "Willis," and he found photographs of African Americans taped to his locker; a photograph of all the linemen in his branch also had been taped to his locker, with his own photograph colored black. Judge Cathy Seibel (S.D.N.Y.) granted summary judgment to the employer, concluding that the plaintiff had failed to establish a prima facie case of discrimination under Section 1981 and alternatively that the employer had stated a legitimate nondiscriminatory reason for its decision and that the plaintiff had failed to provide evidence of pretext. In a summary order (without precedential effect), the Second Circuit Court of Appeals vacated the judgment and remanded the case. The court of appeals noted that the district court should not have resolved factual issues but should have resolved ambiguities and factual issues in favor of the non-movant on a summary judgment motion. The court quoted *Reeves v. Sanderson Plumbing Products Inc*., 530 U.S. 133, 146-47 (2000), which held that the factfinder may infer discrimination from the falsity of the employer's explanation. *Johnson v. CH Energy Group, Inc*., --- F.3d ---, 2009 U.S. Dist. LEXIS 25137 (2d Cir. 11/17/09) (summary order).

Technically, there is no such thing as "reverse discrimination," since the relevant statutes simply prohibit making an employee's race – whatever it is – a factor in employment decisions. The Second Circuit Court of Appeals recognized as much in an opinion by Judge Robert Sack, joined by Judges Chester Straub and Richard Wesley. The plaintiff, a white motor vehicle operator for the New York City Department of Homeless Services, alleged that his African-American supervisors made "nasty" and "harassing" "racial comments" to him; one said threateningly that he was "an ex-felon." The plaintiff said that he had been passed over for a promotion, supposedly because he lacked a commercial driver's license, although he alleged that the manager who had interviewed him said, "I wouldn't hire that white fuck." The court found that the plaintiff had made out a prima facie case with respect to his hostile work environment and failure to promote claims, and vacated the grant of summary judgment on those claims. *Aulicino v. New York City Department of Homeless Services*, 580 F.3d 73 (2d Cir. 9/8/09).

Retaliation

See *Dickey v. Dollar General Corp*., discussed under "Evidence."

SEX DISCRIMINATION

A woman and her boyfriend both applied for work at a foundry. She had five years' experience; he had none. He was hired and she was not; what is more, 14 more men were hired before she finally retained counsel, who wrote to the com-

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pany threatening to file a discrimination charge. She filed her charge of gender discrimination with the EEOC and then a lawsuit in federal court in Ohio. The district court granted summary judgment to the foundry, but the Sixth Circuit Court of Appeals reversed. The court of appeals noted that the company had given shifting, contradictory excuses for failing to hire the plaintiff (all based on statements by its HR director). The inconsistent reasons and proof that the foundry hired men with less experience than the plaintiff sufficed to show material disputed issues of fact for the jury. *Peck v. Elyria Foundry Co.*, 2009 U.S. App. LEXIS 20127 (6th Cir. 9/8/09) (unpublished opinion).

SEXUAL HARASSMENT

Sexual harassment claims based on formerly consensual relationships are particularly difficult to prosecute. A woman on Long Island, though, succeeded, at least in part. After the relationship with a co-worker ended, the co-worker allegedly harassed the plaintiff for five years, including making many derogatory sexual comments and epithets, and culminating in a physical assault. The plaintiff contended that she had complained about the co-worker's behavior to supervisors several times. The district court (Judge Joseph F. Bianco, E.D.N.Y.) was unpersuaded by the defendant's argument in favor of "a rule that, if an employee engages in a consensual relationship with a co-worker, *any* harassment following the termination of that relationship is not actionable when there is evidence that the harassing co-worker acted out of personal animosity or jealousy." In addition, the court noted that the plaintiff's claims were also based upon alleged harassment by her supervisor, who said, among other things, that "you must be pretty good in bed for [the co-worker] to freak out like that" and that "maybe if [the plaintiff] weren't so horny this wouldn't have happened." The court said that a reasonable factfinder could find that these comments were based on the plaintiff's gender and, when considered together with the co-worker's behavior, could support a claim of hostile work environment. Her disability discrimination claims based on alleged post-traumatic stress disorder, however, were dismissed because she apparently failed to contact the employer about returning to work after short-term disability leave. *Sclafani v. PC Richard & Son*, --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 104597, NYLJ 11/20/09, p. 32 col. 1 (E.D.N.Y. 11/10/09).

Sexual Harassment; Retaliation

An all-male panel of the Eighth Circuit Court of Appeals has held – without even a dissent – that a state corrections officer had no claim under Title VII for sexual harassment because the offensive touching about which she complained supposedly did not affect the terms or conditions of her employment. Her retaliation claim also failed because, according to the court, the intimidation and badgering (including threats to "break her legs") by her co-workers was not materially adverse. She filed "numerous" grievances of unfair treatment and a written report of sexual harassment; she and the alleged harasser were ordered to attend cross-gender communication classes, but she did not do so. She was written up for spending too much time looking up grievance policies and having a "ragged appearance," her performance rating was lowered, and she was subjected to drug screening. The court of appeals said that she failed to make out a prima facie case, because she had failed to show actionable harm ("a high threshold," said the court). The court also held that a lowered evaluation, "by itself," was not an actionable harm. The trial court's grant of summary judgment was affirmed. *Sutherland v. Missouri Dep't of Corrections*, 580 F.3d 748 (8th Cir. 9/8/09). ■

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(2d Cir. 2004) (citing *Carlton v. Mystic Transp., Inc*., 202 F.3d 129, 135 (2d Cir. 2000) and *Holtz v. Rockefeller & Co*., 258 F.3d 63, 79 (2d Cir. 2001) (noting that the issue of pretext "is ordinarily for the jury to decide at trial rather than for the court to determine on a motion for summary judgment").

Yet, this language was not always necessary for plaintiffs to prevail on appeal from the grant of summary judgment. In *Back* and other cases in which the Second Circuit reversed summary judgment, decisionmakers made sexist or ageist comments that permitted a direct inference of discrimination without mere reliance on pretext. *See*, *e.g*., *Carlton*, 202 F.3d at 136 ("Carlton also alleges that Baldari suggested, during the meeting regarding his termination, that he should 'retire,' and that this constitutes additional evidence of age discrimination. Although evidence of one stray comment by itself is usually not sufficient proof to show age discrimination, that stray comment may "bear a more ominous significance" when considered within the totality of all the evidence").

Part 2 to be continued in next newsletter. ■

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