NELA THE NEW YORK EMPLOYEE ADVOCATE

National Employment Lawyers Association/ New York • Advocates for Employee Rights

VOLUME 12, NO. 4 February 2004 David Fish, Gary Trachten, Co-Editors

New Board Elected

On December 15, 2004, NELA/ NY held its Board elections. Herb Eisenberg, who was NELA's president for 3 terms and long time Board member, as well as Anne Clark, also a long time NELA Board member, retired from the Board. We express our heartfelt thanks and appreciation for their years of dedication and service to NELA/ NY.

The 2005 officers and Board of Directors are:

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*Welcome to new Board members Rachel Geman and Josh Friedman.■

President's Column

by Bill Frumkin, President, NELA/NY

This is my first column as President of NELA/NY. I want to begin by thanking the members of the Executive Board who elected me to this position. I also want to acknowledge Herb Eisenberg, outgoing President, and Anne Clark, Board Member, both of whom have left the Board. They have performed outstanding work for NELA/NY. I also want to welcome Rachel Geman and Josh Friedman, who are newly elected members.

I am pleased to say that NELA/NY has been an inclusive organization that has sought and utilized input from all those members who have been willing to become involved. It is my goal to further this inclusive effort by seeking creative input and putting new ideas in action. When I first joined NELA, which at the time was called PELA (Plaintiff's Employment Lawyer Association) in 1988, the usual course of interaction was a phone call seeking help with a case. In a sign of the times, and of NELA's success, that networking has now evolved into the continually growing listserv, where more and more members are getting involved in daily interaction with each other. I still encourage members to pick up the phone to call each other, as there is no substitute for "human" interaction. Whatever the method of communication, it's great to see that members are tapping into each other's knowledge and experience. This helps us to achieve the common goal of helping plaintiffs to be successful in prosecuting their employment claims.

In the coming months, I hope to organize an agenda of new initiatives so that NELA/NY can stay "fresh" and continue to meet the needs of its members and their clients. To this end, I encourage anyone reading this column to call me with any ideas they may have so that we can harness energy from every corner of the membership. It is also my goal to increase the number of attendees at our conferences, committee activities, NELA Nites, and at the Courageous Plaintiffs dinner. Although we have been successful in all of these endeavors, I hope that more individuals will get involved and attend these events. On behalf of the Board I reach out and encourage all of you to attend as many events as possible.

As a long-term member of NELA/NY, I have practiced longer than some and not as long as others. I have always sought advice from others and provided it when asked. As a result, I intend to offer a "practice tip" in each of these columns. This issue's tip is: DON'T CONFUSE THE STATUTE OF LIMITATIONS WITH THE STATUTE OF CLIENT RELATIONS. By this I mean many of us are so busy with handling cases in our caseload that are "hot" that it is hard to find the time to speak to clients whose cases are in a dormant stage. This does not mean, however, that the client is not concerned about his or her case or is not desirous of hearing from us. Many NELA members have complained to me at times that their clients are calling them constantly and taking up inordinate amounts of their time. This is a problem for all of us and may be ameliorated to some degree by taking a proactive approach by reaching out to

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The NELA/NY
Calendar of Events

March 11-12, 2005
NELA National Conference
Litigating Harassment Claims
The Omni Chicago Hotel
Chicago, IL
(Contact the National office
@ 415-296-7629)

March 23, 2005 • 6:30 – 8:30 pm
NELA NITE
Topic: Electronic Discovery
(Look for Details)
3 Park Ave, 29th Floor

April 15, 2005
Upstate Spring Conference
Albany Law School
(Brochure to Follow)
SAVE THE DATE

April 20, 2005 • 6:30 – 8:30 pm
NELA NITE
To Be Announced

May 4, 2005 • 6:00 p.m.
NELA/NY Board of Directors meeting
3 Park Avenue—29th floor
(Open to all Members in Good Standing)

May 6, 2005
Spring Conference
Yale Club of New York
(Brochure to Follow)
SAVE THE DATE

June 15, 2005 • 6:30 – 8:30 pm
NELA NITE
Sponsored by the Sex Harassment/ Sex Discrimination Committee
(Details to Follow)

Please Renew Your Membership for 2005 Now!

Membership in NELA/NY is on a calendar-year basis.

Under 5 years in practice:	$150
5-10 years in practice:	$175
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Payment can be made either by check payable to NELA/NY or credit card. Please send your payment to:

NELA/NY
c/o Shelley Leinheardt
3 Park Avenue, 29th Floor
New York, NY 10016

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *NELA/NY@nelany.com*. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

Items for the calendar may be submitted by calling Shelley Leinheardt:
(212) 317-2291
Fax: (212) 977-4005
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: *NELA/NY@NELA/NY.com*

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Herb Eisenberg

In early 1998, a CBS sportscaster, James Snyder, known as "Jimmy the Greek," said that he thought African Americans were better athletes than white people. He said, "(t)he black is the better athlete and he practices to be the better athlete, and he's bred to be the better athlete because this goes way back to the slave period. The slave owner would breed this big black with this big black woman so he could have a big black kid. That's where it all started." The next week, after the uproar and outrage in the press and public, CBS fired him.

Last week, in a speech to a National Bureau of Economic Research conference entitled Diversifying the Science and Engineering Workforce: Women, Underrepresented Minorities, and their S. & E. Careers, Lawrence Summers, the president of Harvard University, addressed the question of why so few women were on math and engineering faculties at top research universities. He proposed that men may outperform women in math and in the sciences because of biological differences, and that discrimination is no longer a barrier for female academics.

He offered three explanations for the shortage of women in senior posts in science and engineering, starting with women's reluctance to work long hours because of child-care responsibilities. He said that top positions on university math and engineering faculties require extraordinary commitments of time and energy, with many professors working 80-hour weeks in the same punishing schedules pursued by top lawyers, bankers and business executives. Few married women with children are willing to accept such sacrifices, he said. He went on to argue that boys outperform girls on high school science and math scores and that it was important to consider the possibility that such differences may stem from biological and genetic differences between the sexes. He played down the impact of sex bias in appointments to academic institutions stating, "(t)he real issue is the overall size of the pool, and it's less clear how much the size of the pool was held down by discrimination."

It should be noted that during Summers' presidency, only four of 32 tenured job openings were offered to women. He hasn't lost his job. I am certain there are many in our country now quoting the president of Harvard.

In our society, there have undoubtedly been gains made in gender and racial equality. Title IX has proven that there are many extraordinary female athletes. Two generations ago, women were not integrated in the work force and today, while there are women in some of the most important jobs in our country, women generally continue to earn significantly less than men. While there is a small percentage of African American representation in the highest levels of business and government, the lack of reasonable inner city education and the number of African American households living in poverty is outrageously disproportionate.

Demanding justice and speaking out against injustice is vital. The importance of speaking truth to power is what motivates me to do the work I do. We must make certain that we are vocal against those who exhibit (either overtly or covertly) their discriminatory zeal and are able to broadly control the most important institutions of our society. What is the message to female math and science students at Harvard University as delivered by the school's leader? What is the message that we, as individuals, an organization and as a society, can send to those who are beaten down by this blindness, obstinateness and injustice?

We must be vocal in our work and in our communities about the intolerance that is still prevalent around us. We cannot for a moment believe that the struggle for gender and racial equality is over and that equality has triumphed. For if we do, our culture will suffer and any gains that have been made will wither because of ambivalence, jealousy and misguided rationales for what is in reality caustic and abusive discriminatory power. Remember, those who do not study history are condemned to repeat it.

This is my last column that I write as president. My term as president commenced with 9/11 and has come to a close with the reelection of George Bush. I truly know that we will have long and busy careers fighting for equality and economic justice in the workplace. I also know that hope springs eternal and that we can and must continue to make a difference by the work we do. Thank you for the opportunity to be president of NELA/NY. A heartfelt thanks to all of you who have helped me, the membership, the former leadership and Board members, the present leadership and Board members and Shelley Leinheardt who keeps this ship afloat. It has been an honor to do this work, to get to know and work with many of you, and to promote a worker's rights agenda in a meaningful, respectful and honorable manner. I know that NELA/NY is in fine hands with an excellent Board and with Bill Frumkin as President. ■

NELA Member News

NELA member **Eleanor Jackson Piel**'s husband passed away after having a stroke. Our condolences**.**

NELA member **Sal Gangemi** and his wife had twin boys on October 3, 2004.

NELA member **David Fish** won the Challenge of Champions XVII Grappling Tournament on December 4, 2004, in Elizabeth, NJ. David competed in the New York City Golden Gloves on February 2, 2004. While he was stopped in the second round, he will not stop competing. He will compete in the North American Grappling Association World Championships on March 12, 2004 in Jersey City, New Jersey.

Services We Offer Our NELA/NY Members

NELA/NY'S Mentoring Program

If you are interested in our Mentor Program, either as a "mentee" or "mentor," please contact Shelley at 212.317.2291 or NELA/NY.NELA/NY.com and she will be happy to pair you with the appropriate person.

As a "mentee", you can be specific as to the area(s) you would need mentoring and as a "mentor" you can specify your area of expertise.

Discount on Appellate Printing

NELA/NY has an agreement with two appellate printers who provide our members discounted prices. If you are in need of an appellate printer, please give them a call.

Printing House Press
(212) 719-0990

Dick Bailey Services, Inc.
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This discounted service may be used not only by NELA/NY members but also by attorneys associated with them, and may be used for non-employment cases as well as employment cases.

Discount For Depositions

We also have agreements with two court reporting services offering discounted prices for NELA/NY members. They are:

Bee Court Reporting Agency, Inc.
(212) 327-3500, or
(516) 485-2222

Vertitext Court Reporting
(212) 267-6888, or
(516) 608-2400

This discounted service may be used not only by NELA/NY members but also by attorneys associated with them, and may be used for non-employment cases as well as employment cases.

We suggest that you and your staff keep a copy of these phone numbers for future reference.

LCD (PowerPoint) Projector Rental

NELA/NY has a Sony VPS C56 LCD (PowerPoint type) projector for the use of its members. The projector allows the use to display information from a variety of software programs onto a large screen from a compatible computer.

The projector may be rented by any member of NELA/NY. The minimum rental rate is $100 which includes having the machine for up to three business days (plus the weekend if the rental commences on Thursday or Friday). Additional time may be negotiated for with NELA/NY. Additional days will be charged at the rate of $35/day. A credit card security deposit of $100, as well as the amount of the rental, must be paid before the projector will be given to the renter. Please contact Shelley Leinheardt at NELA/NY to reserve the projector.

Discounts on Conference Calls

As a NELA/NY member, you are entitled to a great rate on conference calls. The discounted rate is $.18 per minute per person or less depending on the user's volume. The member rate will be available to any attorney in a firm of which a NELA/NY member is a partner or employee. Please contact

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Posts of the Month

From: mwgarbar@aol.com

Sent: Thursday, Oct. 28, 2004 2:43 PM

To: nelanewyorkstate@ yahoogroups.com

Subject: Re: [nelanewyorkstate] COBRA 'OT'

Bob, was your client using viagra?

Listmates,

A client was laid approximately one month after turning 65. We negotiated 18 months of paid COBRA family coverage (which the Company is honoring). Based on his own research, he has concluded that he is eligible to extend the family coverage under COBRA for a second 18 months (at his own expense) because he was eligible for Medicaire prior to being laid off.

Anyone familiar with this? If so, can you point me to a statute, reg or commentary.

—Bob Levy

From: Herbeisen@aol.com

Sent: Thursday, Nov. 04, 2004 4:58 PM

To: nelanewyorkstate @yahoogroups.com

Subject: [nelanewyorkstate] Poem for these times

Where The Mind is Without Fear

Where the mind is without fear and the head is held high
Where knowledge is free
Where the world has not been broken up into fragments
By narrow domestic walls
Where words come out from the depth of truth
Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Into the dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father, let my country awake

—Rabindranath Tagore, 1913 Nobel Laureate in Literature ■

ONLY HUMAN: Our Kids and the Workplace

by Kathleen Peratis*

Thousands of children will go to work with their mothers or fathers on Ms. Magazine's "Take Our Daughters and Sons to Work Day" in April. Most of the kids will spend the day in a white-collar enclave, the sort of place they may hope or expect to inhabit in four or eight or 10 years. But much sooner, many of them will be going to work in places that are considerably less well-mannered—fast-food restaurants and large chain retail stores—and they will be ill prepared for what lies ahead.

The daughter of a friend of mine works in one such place, a fast-food restaurant. A few weeks ago, my friend asked me if the laws against sexual harassment apply to 16-year-olds. She came to learn that the 19-year-old assistant manager (and scheduler) was hitting on her daughter. Her daughter was holding him off, but she knew her time was running out.

This girl's experience is not uncommon. In early December, the Washington Post reported that the Equal Employment Opportunity Commission had filed a lawsuit on behalf of a 17-year-old high school student and part-time waitress against a St. Louis fast-food restaurant, Steak 'n Shake Operations. A cook had grabbed, threatened and exposed himself to her, she alleged, and when she complained, the manager suggested it would be better if she quit. This was the commission's 25th sexual harassment lawsuit on behalf of teens in 2004, up from eight in 2002.

A few days later, the Equal Employment Opportunity Commission announced a $400,000 settlement with a Burger King franchise on behalf of seven young women, six of them high school students, whose complaints to assistant managers of similar conduct went unheeded.

One anecdote and a few dozen lawsuits do not make a trend—but, as with all forms of sexual abuse, the experience is often rampant long before official reports show up on the public radar screen. Reliable data on sexual abuse of kids at work are sorely lacking, but it seems that young workers are seriously at risk in the places of employment most likely to hire them.

About 3 million kids work in part-time jobs during the school year and a million more during the summer. All told, according to a 2002 study by sociologist Susan Fineran, 80%-90% of teens are employed part time at some point during their high school years. In her groundbreaking study of more than 700 part-time employed high school students in Maine, Fineran reports that one-third of them experienced sexual harassment at work.

Little wonder: The sexualization of these kids has become part of the landscape.

In September, Playboy.com announced that it was seeking America's sexiest McDonald's employees "to serve a little shake with their fries" and to pose for the upcoming "Women of McDonald's" online pictorial. On his late night television show, David Letterman observed of the prospective contestants: "They are just like McDonald's—cheap and not hot enough."

Funny line, but I wonder if he knows how young they are. As many as 70% of McDonald's employees are under the age of 20; most have never been employed before. And because of McDonald's extraordinarily high annual turnover rate, the employees are often supervised by people not much older than they are, people who have little managerial experience or, more likely, none at all—which accounts

See WORKPLACE, page 11

**Kathleen Peratis, a partner in the New York law firm Outten & Golden, LLP, is a trustee of Human Rights Watch.*

Securities Industry Arbitration Employment Disputes
A (Former) Insider's Perspective

by Robert S. Clemente*, © 2005 All Rights Reserved

Overview

The Constitution and Rules of the New York Stock Exchange ("NYSE" or "Exchange") require members to arbitrate any dispute that arises out of their business.[1] Any person, customer or employee can require an Exchange member to arbitrate, even without an arbitration agreement.

In the mid-1950's the obligation to arbitrate employment disputes with registered employees became bilateral with the Exchange's adoption of a rule which provided that any employment dispute between a registered representative and any member be settled by arbitration.[2] Since that time, scores of employment disputes were resolved through industry-sponsored arbitration.[3]

Historically, disputes brought in arbitration between securities industry employees and their employer brokerage firms were limited to contractually based claims. For example, by virtue on employee being a "registered representative," a firm may have sought reimbursement of training costs or repayment of a promissory note if that employee left the firm prior to the time set forth in an agreement. This was because: (1) the NYSE Rule 347 specifically referred to "registered representatives," and (2) the U-4 Uniform Application for Securities Industry Registration or Transfer contains an arbitration clause. On the other hand, an employee may have sought damages in the form of unpaid commissions, incentive compensation, wrongful termination or defamation, with or without the existence of a pre-dispute arbitration agreement.[4]

Prior to the 1990's few, if any, claims were filed in arbitration against a non-registered employees, such as unregistered sales assistants or other "support" personnel. This was due to the lack of any standardized contract containing an arbitration agreement with non-registered or other lower level employees. However, under the provisions of New York Stock Exchange Constitution and Rules, "non-members" were permitted to compel members to arbitrate.[5]

The character of employment arbitration in the securities industry changed dramatically with U.S. Supreme Court's decision in **Gilmer v. Interstate Johnson Lane**, which upheld the enforceability of a securities industry arbitration agreement for a claim brought under the ADEA.[6] In the years following **Gilmer**, the securities industry won cases that upheld the enforceability of pre-dispute arbitration agreements under the various anti-discrimination statutes and began a wholesale effort to impose arbitration provisions for all employee disputes. The results have been mixed as arbitration has proven successful for the majority of employees, albeit, in some cases, with lower dollar awards than may have been recovered in court.

In December 1998, the Exchange amended its rules to exclude employment claims that alleged discrimination or sexual harassment from the pre-dispute arbitration provision. As a result employment discrimination claims are now eligible for arbitration at the NYSE only when both sides agree to arbitrate *after* the dispute arises.

To clarify Rule 347 and ensure its intent was understood, the Exchange added a supplementary paragraph to the rule which provides:

> Nothing in the Rules of the New York Stock Exchange, Inc. is intended, nor shall be construed, to prohibit any employee from bringing a claim against any member or member organization arising out of the employment or termination of employment of such employee with such member or member organization before the Equal Employment Opportunity Commission, any state or local anti-discrimination agency, or the National Labor Relations Board.[7]

During the 1990's, employment disputes accounted for over one-third of all cases filed at the NYSE. That percentage included claims brought by employees and claims against employees initiated by member firms. Employment disputes often included contractual or compensation issues, claims for defamation and wrongful discharge.

Under NYSE rules, employment disputes are heard by three arbitrators, a majority of whom are public arbitrators. At the employee's option, a majority of the arbitrators will be from the securities industry.

With a vastly larger number of claims filed with the NASD, it chose a different path.[8] The NASD rules excluded discrimination claims from mandatory arbitration.[9] However, rather than to exclude statutory employment discrimination claims from arbitration when the employer and employee had entered into a pre-dispute arbitrary agreement, the NASD established special procedures designed to make arbitration of these claims more responsive to the concerns raised by employee advocates and Congress.[10] For example, NASD adopted special arbitrator qualifications for employment discrimination claims to insure that arbitrators classified as "industry" cannot serve and to provided that the single arbitrator or chair of a 3-person panel be a lawyer with ten or more years experience.[11]

Statistics

There was a 20 percent increase in claims filed with the NYSE in 1999 compared to 1998. However, claims filed by employees slightly declined from 51 (13 percent of filings) in 1998 to 49 (10 percent of filings) in 1999. The Exchange has not published recent statistics breaking down the distribution of claims so current data is unavailable. Claims against employees are slightly higher: 116 (24 percent of filings) new claims filed in 1999

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**Robert S. Clemente, of counsel to the firm Liddle & Robinson, L.L.P., was the Director of Arbitration at the New York Stock Exchange from 1991 to 2003.*

Anne's Squibs

by Anne Golden

Note: Readers are invited to send us decisions in their cases, or in recent cases they come across, that are of wide enough appeal to be discussed in these pages. Send them directly to:

Anne Golden
Outten & Golden LLP
3 Park Ave
New York, NY 10016
Fax: (212) 977-4005
E-mail: ag@outtengolden.com

Further 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. Thanks to Douglas C. James, an associate with Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

Discrimination against Younger Older Employees

Despite the language of the Age Discrimination in Employment Act that simply prohibits "discriminat[ion] because of [an] individual's age" against those in the protected class of age 40 or over, the Supreme Court has held that the ADEA does not protect an over-40 individual from age discrimination in favor of older persons. The Court held that such a reading of the statute would not square with Congress' intent in passing the ADEA. The opinion contains a somewhat tortured discussion of the word "age" and how, according to the Court, it means different things in different parts of the statute. **General Dynamics Land Systems, Inc v. Cline**, 549 U.S. 481, 124 S. Ct. 1236, 157 L. Ed. 2d 1994 (2/24/04).

ARBITRATION

Preclusion by Arbitration Award

An employee of a commercial building in Manhattan was fired after an incident involving an employee of a construction worker at the building. The employee sued the employer and its executive vice president under the New York State and City Human Rights Laws, alleging that he had been discharged because of his disability, mild retardation. The employer's stated reason for the discharge was an allegation that the plaintiff had sexually harassed one or more women in his work area, the freight elevator and the lobby. The plaintiff's union had unsuccessfully grieved and arbitrated the discharge. Justice Barbara R. Kapnick (Sup. Ct. N.Y. Cty.), in a thoughtful opinion, held that the arbitration award estopped the plaintiff's action against his employer but not the action against the individual defendant. The court noted that in order to show that the executive vice president was liable as an aider and abettor, the plaintiff would have to show that the employer had subjected him to a hostile work environment, but that "such proof will not be foreclosed by the arbitration provision of the CBA because the proof will not be offered to support a claim against [the employer]." NELA/NY member John A. Beranbaum represented the plaintiff. **Azzopardi v. New Water Street Corp.**, — N.Y.S.2d —, 2004 WL — (Sup. Ct. N.Y. Cty. 5/21/03).

Remittitur

In 2002, a justice of Supreme Court, New York County, modified and confirmed an arbitration award pursuant to an NASD arbitration, including a provision for $25 million in punitive damages; the Appellate Division, First Department, vacated the punitive damages award and remanded the matter to the original panel of arbitrators "for reconsideration of the issues of punitive damages." The panel issued a second award, slightly amending the language of the first award to further excoriate the respondents' behavior, and again awarded punitive damages of $25 million. Supreme Court, New York County, vacated the second award and ordered the matter submitted to a new panel of arbitrators. The petitioner moved for modification of that order, proposing a conditional remittitur. Noting that the arbitration and its appeals and remands had already consumed more than seven years, Justice Michael D. Stallman (Sup. Ct. N.Y. Cty.) bemoaned the fact that the very purpose of arbitration had been undermined—"to provide a manner of dispute resolution more swift and economical than litigation in court." The court said that although the proposed conditional remittitur appeared sensible, nothing in either the Federal Arbitration Act or the CPLR allowed it, so the motion had to be denied. **Sawtelle v. Waddell & Reed Inc.**, — N.Y.S.2d —, 2004 WL 2732252, N.Y.L.J. 12/6/04, p. 20 col. 1 (Sup. Ct. N.Y. Cty. approx. 11/30/04).

ATTORNEYS' FEES

Offer of Judgment

In an action for discrimination and retaliation by a high-ranking person whose wife had filed an EEOC charge, the defendant MTA very early made a Rule 68 offer of judgment, in the amount of $20,001, that the plaintiff rejected. The jury awarded $140,000, but the district judge ordered a remittitur to $10,000, which he accepted rather than having a new trial. The court also ordered reinstatement to the plaintiff's former position but denied back pay, front pay, restoration of vacation time, prejudgment interest, and injunctive relief. The plaintiff then applied for attorneys' fees, and the parties agreed to let Magistrate Judge Gabriel W. Gorenstein (S.D.N.Y.) decide the application. Judge Gorenstein held that the fees were not justified after the first approximately $17,000 because the offer of judgment cut off his entitlement to fees and costs after the offer was made. The court rejected the plaintiff's argument that the value of the reinstatement raised his victory above the amount of the offer of judgment, finding that the reinstatement represented no economic benefit whatever. **Reiter v. Metropolitan Transportation Authority**, 224 F. Supp. 2d 157, 2004 WL 2072364 (S.D.N.Y. 9/10/04).

Nominal Damages

Three individuals, who identified themselves as preoperative transsexuals, entered a Toys "R" Us store to shop but were harassed by store employees. They sued in federal court under the New York City Human Rights Law, seeking compen-

See SQUIBS, next page

SQUIBS, from page 7

satory, actual, and punitive damages, injunctive relief, and attorneys' fees. After a nine-day jury trial, at which their attorney requested substantial damages, the jury returned a verdict in favor of the plaintiffs, finding that the conduct of the store employees violated their rights under the statute, but awarded damages of only $1 for each plaintiff. The plaintiffs then applied for attorneys' fees of approximately $206,000. The defendant opposed such an amount, citing **Farrar v. Hobby,** 506 U.S. 103 (1992), in which the Supreme Court held that it would rarely be appropriate to grant fees in a case where the plaintiff obtains only nominal damages unless the case served a significant public purpose. The district court (Charles P. Sifton, J., E.D.N.Y.) held that such a public purpose had been served, since this was the first public accommodation discrimination case to proceed to trial under the New York City Human Rights Law and the first case in which the rights of transsexuals were asserted and vindicated; moreover, under the version of the law in effect when the case was initiated, it was not clear whether transsexuals were protected. The district court awarded fees in the amount of $193,551, and the defendant appealed. The Second Circuit Court of Appeals certified to the New York State Court of Appeals the questions whether New York applies **Farrar** and, if so, whether a case such as this would justify fees. The state court of appeals first held that **Farrar** would be followed, particularly in light of the fact that the City Council had not amended the fee provision of the statute in the twelve years since **Farrar.** With respect to whether this case could have fallen within the "significant public purpose" exception to the "no fee" holding of **Farrar,** the Court of Appeals said that it could have, even though there had been a few prior decisions holding that the city law protected transsexuals. Since the verdict clarified that it did, the Court held that it could serve a public educational function. Two judges dissented. The case was returned to the Second Circuit Court of Appeals for disposition. **McGrath v. Toys "R" Us, Inc**., 3 N.Y.3d 421, 2004 WL 2720092 (11/23/04).

CLASS ACTIONS

Class Certification

In a case before Judge Thomas C. Platt (E.D.N.Y.), the plaintiffs brought a FLSA collective action and classwide state wage and hour claims. One day before the defendant's answer was due, it served on the plaintiffs, but did not file, a motion to dismiss the complaint on the basis that the state law claims would predominate over the federal claims. In response, the plaintiffs requested an order permitting them to conduct class-based discovery and, for the purposes of discovery, asking the court to appoint temporary class counsel. The defendants countered that solely legal questions were presented by the motion to dismiss, so discovery was not necessary. Citing **Ansoumana v. Gristede's Operating Corp**., 201 F.R.D. 81 (S.D.N.Y.2001), Judge Platt held that the question whether state law claims predominated, so as to render exercise of the court's discretion regarding supplemental jurisdiction improper, was a question of fact. Accordingly, resolving the question of whether state law claims predominated required a developed factual record. Only by determining whether the plaintiffs' claims shared an operative nucleus of common facts could the court determine whether the exercise of supplemental jurisdiction was appropriate. The court granted the plaintiffs' request to send opt-in notices, appointed plaintiffs' counsel temporary class counsel, permitted the plaintiffs to engage in classwide discovery, and stayed the filing of the defendant's motion to dismiss until after discovery was completed. **Wolfson v. Cablevision Systems Corp**., — F. Supp. 2d —, 2004 WL 2677168 (E.D.N.Y. 9/20/04).

Class Representative

After being discharged, a worker at a "natural food" store in Manhattan (who had earlier complained to his supervisor that the store sold mislabeled food) brought an action against the owners on behalf of himself and all others similarly situated, alleging that he and others had not been paid time and a half for work in excess of forty hours a week. He alleged that both he and another employee who had "opted in" were qualified to serve as class representatives, and the defendants argued against class certification on the usual grounds of ascertainability (the proposed class assertedly included undocumented aliens and had high turnover), numerosity, commonality, typicality, adequacy of representation, predominance of class claims, and superiority of the class action form. In a heavily footnoted opinion, the court (Shira Scheindlin, J., S.D.N.Y.) found in the plaintiffs' favor on all grounds and certified the class. Along the way, the court held that the second employee was a proper class representative even though he was only an "opt-in" and not a named plaintiff (footnote 97). NELA/NY member Karl J. Stoecker represented the plaintiffs. **Noble v. 93 University Place Corp**., 224 F.R.D. 330 (S.D.N.Y. 5/3/04).

DAMAGES

Equitable Relief

It is the unfortunate truth that a successful plaintiff cannot always get relief from a court that truly makes her whole. Apparently recognizing this, Judge Arthur D. Spatt (E.D.N.Y.) did what he could: After a judgment for a plaintiff in a race discrimination and retaliation employment case, he ordered the employer to purge her personnel file of all documents related to the allegedly retaliatory disciplinary charges and other negative comments placed in the file after her EEOC charge. The court expressly did so "[i]n order to preclude 'further retaliatory conduct by preventing any reliance on discriminatory evaluations and records.'" The court also entered an injunction against future retaliation. However, since the plaintiff was in the process of applying for early retirement and was out on leave due to an unrelated injury, the court declined to designate her a detective retroactive to the month after her EEOC charge was filed. **Collins v. Suffolk County Police Department**, — F. Supp. 2d —, 2004 WL 2943229 (E.D.N.Y. 12/20/04).

DISABILITY DISCRIMINATION

Failure to Accommodate

An employee of the City of New York with "a connective tissue disease which

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Introduction to Fair Housing Law and Practice

A program offered by the Anti-Discrimination Center of Metro New York

March 18, 2005
9:00 a.m.–5:00 p.m.

Fordham University School of Law

140 West 62nd Street (west of Columbus Avenue)

Housing segregation and housing discrimination remain widespread; the number of lawyers trained to handle potential fair housing claims is astonishingly small. This program will provide an intensive introduction to fair housing, covering liability theories and methods of proof; case investigation and issues in trial presentation; the theory and proof of organizational standing and damages; the scope of vicarious liability and punitive damages; recurring issues in discovery; the requirements to affirmatively further fair housing; and recent developments in the law.

This program is being offered at no cost to participants. Application for CLE accreditation of this program in New York State is currently pending.

Program faculty are leading fair housing practitioners and scholars: Chris Brancart, a partner in Brancart & Brancart, a California law firm specializing in fair housing litigation throughout the United States; John Relman, the founder and director of Relman & Associates, former project director of the Fair Housing Project at the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and author of *Housing Discrimination Practice Manual*; Stephen Ross, Associate Professor of Economics at the University of Connecticut, who has researched and published extensively on housing discrimination, including being co-author of *Discrimination in Metropolitan Housing Markets* and *Now You See It, Now You Don't: Why Some Homes are Hidden from Black Buyers*; and Robert Schwemm, Ashland Professor at the University of Kentucky College of Law, author of *Housing Discrimination Law and Litigation*, and plaintiffs' counsel in several landmark housing discrimination cases, including three heard by the United States Supreme Court.

If interested, please email your contact information to *center@antibiaslaw.com*. ■

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caused pain in her muscles and soft tissue area" and cervical radiculopathy (compression of nerve roots of cervical spine), asked for modified light duty, an ergonomic chair, and voice-activated software. Unsatisfied with the City's response, she filed a charge of discrimination with the EEOC, subsequently withdrawn (although the plaintiff contended that the withdrawal was a mistake by the EEOC). Two months later, her supervisor wrote to a personnel officer recommending that the plaintiff be terminated or demoted based upon alleged insubordination, resistance to supervision, and poor work product. The plaintiff alleged that she was then assigned a job involving moving heavy boxes, which contravened her doctor's orders. With the new duties came a new probationary period, which she did not pass, and she was returned to her previous position. She filed a grievance, a second EEOC charge, and then a lawsuit. In ruling on the City's motion for summary judgment, Judge Robert W. Sweet (S.D.N.Y.) held that the plaintiff had shown (based almost exclusively upon her own affidavit) that she was an individual with a disability, but that "[i]n order to prevail on the claim that the defendants failed to accommodate [the plaintiff's disability] in a timely manner, [the plaintiff] must prove that the failure 'was motivated by discriminatory intent.'" The court held that although the City had failed to make reasonable accommodation in the new job, in which the plaintiff had failed probation, the plaintiff had failed to prove a harassment claim. She did, however, make out a *prima facie* case of unlawful retaliation. The court found that the four-month period between the protected complaint and the first adverse action was "sufficient evidence, albeit barely, to avoid summary judgment," even though the City claimed that it had begun documenting dissatisfaction with her performance before her first complaint. NELA/NY member Jeffrey S. Karp represented the plaintiff. **Lyman v. City of New York,** — F. Supp. 2d —, 2003 WL 22171518 (S.D.N.Y. 9/19/03).

Major Life Activity

The Third Circuit Court of Appeals, reversing a Pennsylvania district court, held that end-stage renal disease, requiring dialysis, substantially impairs a major life activity. The district court (opinion of a magistrate judge, adopted by district judge) had characterized the plaintiff's argument as claiming that she was "substantially limited in the major life activity of kidney function" and had decided that kidney function was not a major life activity. Relying upon **Bragdon v. Abbott**, 524 U.S. 624, the court of appeals held that a major life activity, need not be external or volitional, nor need it be a recurrent or daily feature of life. The major life activity, it held, was not "kidney function" but the ability to cleanse the blood and process bodily waste, even though it was not visible or volitional. "The touchstone," said the court, "is not publicity or frequency, but importance to the life of the individual." The limitation need not even be based upon physical impossibility; in **Bragdon**, the court noted, it was not. "What matters is a broad practical assessment of whether an individual's ability to pursue the major life activity is limited by the physical impairment or condition …." *See also* **Gilbert v. Frank**, 949 F.2d 637 (2d Cir. 1991) (plaintiff on dialysis had a "handicap" under Rehabilitation Act § 504 but was not "otherwise qualified" for the heavy-lifting job because of lifting limitation). The court also noted that a Ninth Circuit case had held diabetes to be a disability because it substantially limited the life activity of eating. **Fiscus v. Wal-Mart Stores, Inc**., 385 F.3d 387 (3d Cir. 10/5/04).

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ETHICS

Disqualification

In a non-employment case where proper mailing of a notice was an issue, the defendant moved for an order disqualifying the law firm that had sent the notice. The court (Judge Manuel J. Mendez, Civil Ct. Kings Cty.) examined the relevant disciplinary rule, DR 5-102, and determined that it referred only to attorneys, and that the evidence showed that the notice in question had been sent by a mailroom employee, so there was no showing that any of the attorneys would have to testify. Accordingly, disqualification was denied. **NYC Medical & Neurodiagnostic PC v. Republic Western Ins. Co**., 784 N.Y.S.2d 840, N.Y.L.J. 11/24/04, p. 22 col. 3 (Civ. Ct. Kings Cty. 11/10/04).

EVIDENCE

Adverse Employment Action

See **Hillig v. Rumsfeld**, discussed under "Retaliation."

Influence on Discriminatory Decision

The Seventh Circuit Court of Appeals, in a decision by Judge Richard Posner, held that an employee can prove that a decision was discriminatory by proving that it was influenced by a non-decisionmaker, even if the ultimate decisionmaker was not "a mere cat's paw" for the discriminator. A woman alleged that she was passed over for a promotion because of her gender in favor of a less qualified young man. Her immediate manager had made numerous sexist remarks, but the ultimate promotion decision had been made by his manager, who (apparently) had not. The court of appeals saw evidence of sexism in the assumption that the plaintiff would not want to relocate because she had children and her manager assumed she would not want to move her family, and in the fact that the manager's manager found a way to promote the plaintiff two months later, as soon as she had filed an EEOC charge, even though he had claimed she was unable to get along with customers. (The court had some negative comments both about defense counsel's understanding of the law and legal strategy and about defense witnesses' veracity.) The plaintiff received only a very small back pay award because she was promoted so quickly to an equivalent job, but the jury gave her $100,000 in compensatory damages for emotional distress and $1 million in punitive damages. The trial judge reduced these to $27,000 for emotional distress and $273,000 in punitive damages (totaling the statutory cap of $300,000). The court of appeals rejected the argument that the ratio of punitive to compensatory damages was disproportionate because "the legislature has placed a tight cap on total, including punitive, damages," but reduced the punitive damages to $150,000 as the maximum reasonable amount. **Lust v. Sealy, Inc**., 383 F.3d 580 (7th Cir. 9/7/04).

Statute of Frauds

A law firm's partnership agreement incorporated an early retirement provision that provided, in part, supplemental retirement payments for life, beginning in the fifth year after the partner's retirement. Partners who retired at the request of the firm could receive the additional payments pursuant to a written agreement entered into at the firm's discretion. The law firm requested the plaintiff's resignation, promising that he would receive supplemental retirement payments. After hiring an outside actuary and directing the firm's controller to calculate the amount of supplement payments the plaintiff would receive (embodied in a memorandum stating that plaintiff was entitled to receive payments of $81,245 per year), the defendant refused to pay. The plaintiff brought a breach of contract action to enforce the oral agreement. The court granted the defendant's motion to dismiss based upon the statute of frauds, but the Appellate Division, First Department, reversed. On appeal to the New York State Court of Appeals, the plaintiff argued that the oral agreement granted him rights under the early retirement plan, a separate written agreement. According to the plaintiff's argument, the oral agreement did not create the obligation to pay but was simply an agreement to consider him within the confines of the early retirement plan, and accordingly could be completed within a year and did not violate the statute of frauds. He argued that the firm's obligation to pay was found in the retirement plan, a writing, which satisfied the statute of frauds. However, the Court of Appeals rejected this argument and reinstated the lower court's decision, stating that because a partner who retires early is not generally entitled to supplemental benefits, including those who retire at the request of the firm, it was only the oral agreement (which the plan specifies must be in writing) that created the obligation to pay. In addition, the Court rejected the plaintiff's argument that the actuary's calculation and the memorandum by the controller satisfied the statute of frauds, as they did not state that the firm had agreed to pay the amounts stated and did not indicate a meeting of the minds. **Sheehy v. Clifford Chance Rogers & Wells LLP**, — N.Y.S.2d —, 2004 WL 2381183 (N.Y. 10/26/04).

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SERVICES, from page 4

Mark Guy of Arkadin, Inc.
(212) 946-4684, or
m.guy@arkadin.com

Long-Term Care Insurance

John Hancock long-term care insurance is being offered premium discounts of 20% to all NELA members and is also eligible to partners, owners, employees and retirees and their spouses, parents, parents-in-law, step-parents, children, and step children between the ages of 18-84. For more details, please contact

Joseph Rogers
(516) 328-7600 X 272

Disability Income Insurance

As a member of NELA/NY, you have the opportunity to apply for a 10% to 25% discounted disability income insurance policy with Massachusetts Mutual Life Insurance Company.

John Higgins
(212) 635-6065, or
Jhiggins@finsvcs.com

We hope you are able to take advantage of these benefits. Please call Shelley Leinheardt if you have any questions. ■

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FAIR LABOR STANDARDS ACT

Definition of Employer

Whether on not a person is an employer for FLSA purposes is determined by the economic realities of the defendant's relationship with the employee. The controlling factors include the power to hire and fire, control over schedules and working conditions, setting pay rates, and maintenance of employment records. A group of restaurant employees charged two corporations and twelve individuals with wage and hour violations, misappropriation of tips, and failure to reimburse uniform expenses in violation of the Fair Labor Standards Act ("FLSA") and New York State labor law. Four of the individual defendants moved to dismiss the complaint against them, arguing that plaintiffs had not adequately pleaded that they were "employers" under the FLSA, and to dismiss the state claims, arguing that supplemental jurisdiction should be declined because the state claims predominated over the federal claims. The four defendants' argument that they were not employers appeared, at first blush, to have some merit based on the plaintiffs' conclusory allegations. However, Judge Gerard E. Lynch (S.D.N.Y.), pointing out that no single factor is controlling, found that in addition to the defendants' titles, the plaintiffs alleged concrete acts of control that, if proved, could lead a fact finder to conclude that these defendants were "employers." Most notably, with respect to one of the four, the plaintiffs alleged only that he held the title of manager and stole their tips with the acquiescence of other defendants. Even though the complaint specifically identified two other defendants as controlling the distribution of tips, the court held that the alleged theft of the tips, combined with the allegations of general control over the rate of pay, was sufficient to survive the defendants' motion to dismiss. **Chant v. Triple 8 Palace**, — F. Supp. 2d —, 2004 WL 1161299 (S.D.N.Y. 5/24/04).

FIRST AMENDMENT

See **LaForgia v. Davis**, discussed under "Summary Judgment / First Amendment."

HIPAA

When the EEOC sued an employer on behalf of an individual who alleged disability discrimination, the employer wanted all her medical records and wanted to communicate *ex parte* with her psychologists, BOCES educational service, Adult Protective Services, and the Suffolk County District Attorney's office. When the EEOC and the individual plaintiff refused, the employer sought an order from Magistrate Judge William D. Wall (E.D.N.Y.). The plaintiff had authorized the release of her medical and BOCES records and the depositions of her doctors, BOCES (through which she had become employed), and the District Attorney (which had investigated and prosecuted another employee who had allegedly harassed and abused the plaintiff), but opposed the *ex parte* communications. The EEOC and the individual plaintiff argued that HIPAA and federal and state law privileges prohibited such communications. Noting that regulations promulgated pursuant to HIPAA govern "health information" in the possession of "health providers," the court included both treating and non-treating physicians in the latter category. HIPAA allows disclosure of health information without patient consent in response to a subpoena or discovery request if the health care provider is adequately assured that the patient has received sufficient notice. Any protective order must prevent the parties from using the information for any purpose other than the litigation or proceeding and the destruction of the information at the end of the proceeding. The court found that *ex parte* communications create "too great a risk of running afoul of [HIPAA's] strong federal policy in favor of protecting the privacy of patient medical records" and that, accordingly, release of health information should be made only

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for why complaints are ignored, and the victims and their parents have little recourse but to seek legal intervention.

Kids are not ignorant of the phenomenon of sexual harassment, but they get their information from television and movies, where it is likely to be trivialized, or from a women's studies class, where the emphasis is on ideology, not on the nuts and bolts of workers' rights. For a young, and especially a first-time worker, if the workplace is raunchy, she thinks that must be the way things are in the real world. If a supervisor talks to her or touches her inappropriately, she wonders if she is being a big baby for finding it objectionable and worries whether reporting it will just get her in trouble. The Equal Employment Opportunity Commission has launched a program to address this ignorance called Youth@Work, one of the few programs aimed at teen workers from a rights perspective. But at best it will reach a fraction of the audience that needs the information.

That audience includes boys, 10% percent of whom, according to Fineran's study, also experience sexual harassment at work. The differences between the groups—for example, the harassers of girls were mainly males, but the harassers of boys were both males and females—points to the need for further studies. More significant, perhaps, is that girls felt much more upset and threatened by the harassment than the boys did, though the long-term impact on either group is unknown.

Sexual harassment of young workers is not news to Marie Wilson, former chair of the Ms. Foundation, who launched "Take Our Daughters To Work" in 1992. She intervened in a "situation" in the Iowa state legislature in the mid-1970s involving young female pages who were being sexually harassed by middle-aged male legislators. She engineered a sit down among the pages and the legislators, and what emerged seemed to be an understanding and a solution. Permanent? Probably not.

We try to arm our kids to face so many hazards, from smoking to college anxiety, from peer pressure to bad politics, but we can't arm them against a hazard we don't know about. Add this one to your list. ■

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through use of the methods listed in HIPAA (court order or subpoena or discovery request conforming to the statute's notice and protective order requirements). With respect to representatives of the District Attorney's office and BOCES, the court found no privilege and stated in essence that it was up to them whether they wanted to speak with defense counsel *ex parte*. The EEOC was represented by NELA/NY member Judy A. Keenan. **EEOC v. Boston Market Corp**., — F. Supp. 2d —, 2004 WL — (E.D.N.Y. 12/16/04).

RETALIATION

A former employee who was denied prospective employment, allegedly because of retaliatory negative references from her former supervisors, did not have to prove that she definitely would have received the prospective job but for the negative references, at least not in the 10th Circuit. The plaintiff had filed two race discrimination charges with the EEOC concerning her former supervisors at one U.S. government agency, then applied for a position with a different agency where she was told that she "would be a perfect fit for the position." The job went to a Caucasian woman after the plaintiff's former supervisors told the new employer that she had "performance problems" at work at was a "shitty employee." Despite the new employer's testimony that the plaintiff was not hired for a variety of other reasons, the jury found that the bad references were retaliatory and resulted in an adverse employment action, and awarded damages. The district court awarded judgment as a matter of law to the ex-employer, holding that the plaintiff had not suffered a "tangible employment action," but the 10th Circuit Court of Appeals reversed, holding that "adverse employment action" must be liberally defined on a case-by-case basis. **Hillig v. Rumsfeld**, 381 F.3d 1028 (8/27/04).

SEX DISCRIMINATION

The Ninth Circuit Court of Appeals was once a bastion of employee rights. Is a collapse in the offing? A panel of that court has held, two to one, that requiring a female beverage server to wear makeup is not sex discrimination. The plaintiff alleged that she had tried it, and that it made her feel sick, degraded, exposed, and violated, because it "forced her to be feminine" and to become "dolled up" like a sexual object; indeed, it interfered with her ability to be an effective bartender when she had to deal with unruly, intoxicated guests. Female beverage servers also had to have "teased, curled, or styled" hair and to wear stockings and colored nail polish. Men in the same job only had to have short haircuts and neatly trimmed fingernails and were not allowed to wear makeup or colored nail polish. Citing prior decisions "that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex," the court of appeals limited its inquiry to weighing the degree of the burden on one gender and determined that the plaintiff had produced no specific evidence supporting the contention that the requirement imposed tangible burdens on women. Therefore, it said, it could not find that the burden on women from having to buy, apply, and wear makeup was greater than the burden on men from having to get haircuts and refrain from wearing nail polish. When trying to respond to the plaintiff's invocation of **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), the court veered into a discussion of sexual harassment based upon gender stereotypes and declined to apply **Price Waterhouse**, sticking to the "unequal burden" test and the plaintiff's purported failure of proof. The dissent stated that the plaintiff had made out a case based on both unequal burden and stereotyping, arguing that **Price Waterhouse** clearly applied and that this stereotype violated Title VII because it "rest[s] upon a message of gender subordination." **Jesperson v. Harrah's Operation Co**., — F.3d —, 2004 WL 2984306 (9th Cir. 12/28/04).

See also **Harris v. City of New York**, discussed under "Summary Judgment."

SUMMARY JUDGMENT

First Amendment

Judge George B. Daniels (S.D.N.Y.) is fast developing a reputation as a defendant's friend. He granted summary judgment to a municipality sued by its Commissioner of the Department of Public Safety (police commissioner). The plaintiff had complained about certain budgetary matters and alleged improper departmental activities, the appointment of the Mayor's personal chauffeur and bodyguard as First Deputy Commissioner and gross errors of the Technology Commissioner. She believed them to be unqualified and disruptive in city government. She walked out of one meeting and apparently slammed a door. When she returned from a scheduled vacation six days later, the Mayor terminated her employment, even though he had previously called her the best Commissioner the city had ever had, and she had succeeded in lowering crime and improving the effectiveness of the municipal police department. The plaintiff alleged that the termination was in retaliation for protected speech, *i.e*., her objections to the Mayor. In granting the city's motion for summary judgment, Judge Daniels noted that the plaintiff did not have to take her speech public for it to be protected. However, he found that her objections had been motivated by solely private and personal concerns, and that she had failed to prove in any event that they were motivating factors in her ter-

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clients during times of inactivity. Let your client know that you are aware of her case, that you care about it, and that you will be addressing every issue in the case as the need arises. You do not do enough if you merely respond to deadlines set by courts and administrative agencies. Behind every redweld is a person and that person still needs guidance, direction and support regardless of the status of his matter.

In closing, I look forward to my work as President in the coming year and welcome input from anyone in NELA/NY. ■

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mination. Noting that the plaintiff had admitted that her behavior in walking out of the meeting was "inappropriate" and that she could be dismissed for it, the court concluded that "there is no evidence suggesting that Plaintiffs speech was a motivating factor in her firing." Further, even if it were, the city's interest in avoiding disruption trumped the First Amendment rights of the plaintiff, whose "abrupt departure from the meeting indicated she was refusing to work cooperatively with her two deputies, whom the Mayor had informed her were valuable members of his administration." The court went on to find that the Mayor's false statements to the press that the plaintiff had quit without notice and had created a "chaotic environment" in her department did not stigmatize her and did not occur in the course of her termination, so she was not entitled to a name-clearing hearing. Finally, with little analysis, the court cloaked the Mayor's actions in qualified immunity. **LaForgia v. Davis**, — F. Supp. 2d —, 2004 WL 2884524 (S.D.N.Y. 12/14/04).

Race Discrimination

An African-American employee of the New York City Fire Department, alleging discriminatory nonpromotion and retaliation, has defeated a summary judgment motion in Judge Denise L. Cote's courtroom. The plaintiff was able to produce an affidavit from a white man who was a former supervisor of both the plaintiff and the white man who was promoted over the plaintiff twice, attesting that the plaintiff was more qualified than the other candidate. Accordingly, the plaintiff had made out a *prima facie* case. Evidence of pretext included the fact that the FDNY had not posted the job vacancy (contrary to its policy) and that the decisionmaker had not interviewed either candidate, since he intended to promote the white candidate. The court held that a reasonable jury could find the FDNY's proffered reason—that the decisionmaker believed the white candidate was more qualified and that the promotion was "merely an enhancement" of his previous duties—was pretextual "and that racial discrimination was one of the motivating reasons," in light of the evidence of the plaintiff's superior qualifications and experience, as well as other evidence. It also rejected the "same actor" inference. The court also held that the plaintiff had offered enough evidence that he had suffered an adverse employment action for that claim to go to the jury as well. NELA/NY member Paula Johnson Kelly of Goodstein & West represented the plaintiff. **Harris v. City of New York**, — F. Supp. 2d —, 202204 WL 2943101 (S.D.N.Y. 12/21/04).

Religious Discrimination

Immediately after September 11, 2001, a Muslim employee of an electrical contractor, stationed at a Merrill Lynch facility, was involved in an argument with a co-worker about whether Muslims were likely involved in the 9/11 terrorist attacks. His foreman learned of the argument and also learned that the plaintiff had previously used a Merrill Lynch computer to download information about assault rifles and submachine guns—something that the plaintiff asserted the foreman himself had also done. Prior to September 11, 2001, the employee had objected to the

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versus 93 (23 percent of filings) in 1998. The pace of employment claims filed at the NYSE appears to have remained roughly 25–35% of the cases filed in 1999 through 2004.

The NASD, which handles over 90% of all securities industry arbitrations, has a slightly lower percentage of employment claims, with a downward trend of filings going from approximately 27% (of *all* claims) in 2000 to 15% in 2004. However the percentage of all employment cases filed by employees, rather than employers, has trended upward from 26% in 2000 to 29% in the last 3 years.

The majority of arbitration claims settle prior to a decision by arbitrators. Employment claims are no exception. In 1998, 46 percent of employee-initiated disputes were settled. In 1999, that figure rose to 69%. Employer-initiated claims, which are primarily contract-based disputes (training agreements and promissory notes) have an even higher settlement rate. In 1998, 58 percent of employer-initiated cases settled; in 1999, that figure rose to 71%. Typically contract based claims filed by employers against employees, especially "promissory note" cases, have a high settlement rate. Although there are exceptions, arbitration claims at the NASD and NYSE are generally resolved in 12 to 16 months on average.

Discrimination Claims

As stated, both NYSE and NASD rules exclude discrimination claims from mandatory arbitration. Discrimination claims will be entertained by the NYSE upon a post-dispute separate agreement to arbitrate, and by the NASD upon a pre-dispute arbitration agreement between our parties.

Employment discrimination claims are processed substantially the same as other disputes at the NYSE. However, unless the parties agree otherwise, the Exchange will propose at least one arbitrator to sit on the case who possesses knowledge, experience or training in employment law. As with all other cases at the Exchange, the parties may agree to select their arbitrators or agree on an alternate process by which arbitrators will be selected.[12]

As mentioned above, the NASD has pursued a different approach. While the NASD will honor a pre-dispute agreement to arbitrate all employment related disputes, including those arising under the discrimination laws, the NASD amended its rules to provide for special procedures for these disputes.[13] Arbitration provisions may not even be within the confines of a formal employment agreement but may appear in an Employee Handbook.[14]

General Employment Claims

Within the realm of arbitration of employment disputes in the securities industry several hurdles that exist in court do not generally exist in arbitration. In arbitration, arbitrators seek to do equity, they are not, therefore, confined by the letter of the law, legal precedent or legal technicalities. This however, at times, is a detriment, particularly when arbitrators do not strictly adhere to statutory schemes that provide for the recovery of attorneys' fees or treble damages.

However, by virtue of the securities industry imposing arbitration upon its employees at least two circuit courts and most arbitration panels have held that "some standards of discernible cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship."[15] This "just cause" requirement has been successfully used to defeat the so-called "employment-at-well" doctrine in New York.

Of equal importance in an industry where an employee's total compensation is often made up of a disproportionately sized bonus or incentive compensation award (upwards of 50% to 80% of total compensation), is the recognition that such payments are recoverable as "wages" under New York Labor Law or under the doctrine or *quantum meruit*.[16]

An Insider's View From the Outside

Since December 2003, I have served as of counsel to the firm of Liddle & Robinson, L.L.P., primarily providing counsel on arbitration and litigation of securities industry to employees in disputes with their former securities industry employers. Since that time, I have witnessed first hand the benefits, and shortcomings, of SRO[17] arbitration as compared to litigation in state and federal courts.

In arbitration there is generally no dismissal or summary judgment motion procedure whereby an employee claimant is forced to present his/her proof of wrongful termination or withholding of wages prior to the presentation of his case-in-chief. Notwithstanding the burden of having to present an entire case before a respondent employer can seek summary judgment, the majority of employment

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disputes in arbitration generally result in some award for the claimant/employee.

A second benefit of arbitration is that, unlike a typical jury, most, if not the majority of arbitration panels consist of at least one, if not a majority, of individuals who are either participants in or employees of the securities industry. Therefore, the so-called triers of fact are generally familiar with the custom, practice and particularly high pay scale of the industry. A jury will likely consist of individuals who find the elevated pay scale of the securities industry exhorbanent.

As a former arbitration administrator, I have generally found that the arbitrators are much more receptive to applying industry norms than would be a jury. This is particularly true in compensation-based claims involving employees who commonly earn in excess of six-figure compensation in good and bad years.

The one thing I have found detrimental to employees in securities industry arbitration is the absence of a voice on their behalf on the rule making and advisory bodies such as the NASD Arbitration and Mediation Committee ("NAMC") and the Securities Industry Conference on Arbitration ("SICA"). While both of these bodies have representatives of the SROs and the securities industry (in the form of employer firms), neither body has any representation on behalf employees.

In virtually all arbitration claims, the employee is a party-most often as co-respondent in customer disputes, to employee's interests are, for the most part, aligned with his or her securities industry employer. However, in most customer initiated cases in arbitration, it is the employee who has the most to lose, because such disputes remain on the employees CRD (central record depository) record forever. Such negative records can and do prevent securities industry employees from obtaining future employment in the industry. Too often, a firm may pursue an expeditious monetary settlement, without regard to the life long ramifications of a negative notation on an employees' CRD.

Having spent 18 years as an SRO arbitration administrator and the past year as a private attorney representing securities industry employees, I am convinced more than ever that arbitration provides employees many advantages over litigation. I am also convinced that the securities industry employees, whose interests diverge substantially from those of the employers or their customers when involved in disputes, should have a voice/representation on the rule-making and oversight committees such as the NASD's NAMC and SICA.

I suggest that now is the time for NELA members to embrace the fact that arbitration will remain the primary, if not sole, forum for the resolution of employment disputes in the securities industry and to demand a seat at the table with the SRO's the SIA and the SEC when the rules and procedures of the arbitration process are discussed.

Footnotes

[1] See: NYSE Const. Art. XI, Sec. I.; NYSE Rule 600.

[2] See: NYSE Rule 347.

[3] See also: NASD Code of Arbitration Procedure ("CAP") Section 10101, 10200 et seq.

[4] See: NYSE Rule 347 and 600.

[5] See: NYSE Const. & Rules Article XI Section 1 and Rule 600(a).

[6] 500 U.S. 20 (1991).

[7] See: NYSE Rule 347.10.

[8] See: NASD CAP Rule 10210.

[9] NASD CAP Rule 10201 (b)

[10] See: Employment Discrimination: How Registered Representatives Fare In Discrimination Disputes, GAO/HEHS-94-17 (March 30, 1994).

[11] NASD CAP Rule 10211.

[12] See: NYSE Voluntary Supplemental Procedures for Selecting Arbitrators, (*www.nyse.com/pdfs rules.pdf*).

[13] See *supra*, note 8.

[14] **Chanchani v. Salomon/Smith Barney, Inc**., No. 99 Civ. 9219, 2001 WL 204214 (SDNY); **Bishop v. Smith Barney, Inc.**, No. 97 Civ. 4807, 1998 WL 50210 (SDNY).

[15] **PaineWebber v. Agron**, 49 F.3d 347, 352 (8th Cir. 1995); see also **Shearson Hayden Stone, Inc. v. Liang**, 653 F.2d 310 (7th Cir. 1981).

[16] See: **Mirchel v. RMJ Securities Corp.**, 205 A.D.2d 388, 613 N.Y.S.2d 876 (1st Dept. 1991); **James Xu v. J.P. Morgan Chase**, 2001 Civ. 8686 (S.D.N.Y. Sept. 23, 2003). ■

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removal of a Muslim calendar from his locker and to the site manager's criticism of his ritual washing before prayers. The foreman did not question the employee but went to his superior, who went to the site manager, at each step allegedly exaggerating the disruptiveness of the employee's actions, who was then discharged. The employee sued both his immediate employer and Merrill Lynch. Judge Harold Baer (S.D.N.Y.) denied Merrill Lynch's motion for summary judgment noting that it was unnecessary for the plaintiff to show that the final decisionmaker knew that he was Muslim if the final decisionmaker had only "rubberstamped" the recommendation of those who did know. The employer's proffered legitimate non-discriminatory motives, the downloading of weapons information and the plaintiff's alleged inflammatory statements that the terror attacks might have been committed by Chinese, Russians, Jews, or the CIA, both could be seen by a rational jury as pretextual. **Pjetrovic v. Merrill Lynch & Co**., — F. Supp. 2d —, 2004 WL 2725993 (S.D.N.Y. 11/30/04). ■

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