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Disparate Impact in ADEA Survives Supreme Court (barely)

Stefan D. Berg, Esq.

On March 30, 2005, the United States Supreme Court decided **Smith v. City of Jackson**, 544 U.S. _____, 125 S. Ct. 1536, 161 L.Ed.2d 410 (2005). The issue before the Court was whether disparate impact is a viable theory for age discrimination claims under the ADEA.

Prior to this decision, the Second Circuit had maintained that disparate impact was a valid theory as had the Eighth and Ninth Circuits. However the First, Seventh, Tenth and Eleventh had held that disparate impact did not apply to ADEA cases. As will be detailed below, litigants in the Second Circuit gained certainty, but the theory was emasculated, giving employers an affirmative defense not clearly available prior to this ruling.

Disparate impact has its origins in **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971). Under disparate impact, employment procedures that are facially neutral but that adversely impact a protected class of employees are prohibited, unless demonstrably job related or justified by business necessity. The power of disparate impact is that it "focuses on the effects of the action on the employee rather than the motivation for the action of the employer." **Smith** at 419. This feature distinguishes disparate impact from other forms of discrimination, where the employer's motive is at issue. Thus, a test required of prospective employees which does not bear on a skill required for performance of the job but adversely impacts a class of employees is prohibited. (Currently, NELA members are challenging performance evaluations at Sprint, based on a matrix. The theory is that the use of the test, in fact, selects older employees for termination. **Williams v. Sprint**, 222 F.R.D. 483 (D. Kan. 2004).)

In the **Smith** case, a performance pay plan had been instituted by the City of Jackson where police officers and public safety dispatchers with five or fewer years of tenure with the department received proportionately greater raises than those with more than five years of tenure. The City stated that the purpose of the plan was "to attract and retain qualified people, provide incentive for performance, maintain competitiveness... and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." The plaintiffs, a group of older officers, viewed this new plan as age discriminatory and brought a claim that the plan had an age-based discriminatory impact adverse to them. The District Court had granted Summary Judgment to the Police Department.

The plurality opinion, authored by Justice Stevens and joined by Justices Souter, Ginsburg and Breyer, affirms that "The ADEA does authorize recovery in 'disparate impact cases comparable to **Griggs**'." **Smith** at 416. The plurality states clearly that "good faith does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." quoting **Griggs** at 432. However, the plurality also established an affirmative defense derived from the ADEA's Section 4(a), which concerns employment decisions or practices based on reasonable factors other than age

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Member Victory

Following the good advice from Robert S. Clemente, Esq. in his article, Securities Industry Arbitration of Employment Disputes, (see The New York Employee Advocate, February 2005), Robert Kraus, Esq., of Kraus & Zuchlewski LLP, used the NASD dispute resolution process and won an award in excess of $2 million—consisting of an unpaid bonus and stock options—in a NASD arbitration against UBS Securities. Robert represented a bond trader who had been terminated at the end of a profitable trading year, prior to the payment of bonuses. Robert successfully argued that principles of fairness and equity entitled the trader to some percentage of the profit he generated for UBS, despite the absence of a written contract. He was assisted throughout the six hearing days in this matter by Pearl Zuchlewski, Esq., and David Fish, Esq.. ■

NELA Board Retreat

Rachel Geman, Member, NELA Executive Board

On April 1, 2005, the NELA/NY Board of Directors held their Retreat.

The Board focused mainly on four areas—communications; internal governance; public interest and membership development; and programs and projects. These areas have been identified by the membership as particularly important, and/or are areas where Board members believed there to be opportunities for development.

Communications

The NELA/NY website, *www.nelany.com*, is under construction. Among the expected additions from the previous iteration of the website are a link to NELARS and sign-up instructions for the Listserve.

Among the services for NELA/NY members that have been and will continue to be available on the website are a "Brief Bank" and "Expert Depositions and Resources." The Board also discussed possible improvements to the brief bank to make it user-friendly, such as dividing up the briefs into categories, and including links from briefs to court orders (if the NELA/NY member won; no Maoist self-criticism required here!). For more information on the website, please contact Board Member Darnley Stewart.

Aside from the internet, the Board devoted most of its communications discussion to the Newsletter. We are expecting to get out a Newsletter in June, September, December, and March. We would be happy to get articles—even short, informal, footnote-less (and fancy-free) articles—about your successes, experiences, war stories, anything!

Also of note: the NELA Nites continue to be a great success, with a very warm thanks to the many NELA/NY members who speak at and attend these events.

Internal Governance

The Board is developing a change in the by-laws, which will address the issues of democratization and Board succession. Currently, there are term limits of five (5) years. Every year, under usual circumstances, two (2) new members are elected by the membership.

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The NELA/NY Calendar of Events

June 15, 2005 • 6:30 – 8:30 pm
NELA NITE
Hosted by the Sex Harassment/Sex Discrimination Committee
3 Park Ave, 29th Floor
(Details to Follow)

June 22-25, 2005
NELA National 20th Anniversary Convention
Wyndham Philadelphia at Franklin Plaza, Philadelphia, PA
Register on-line *www.nela.org*

July 20, 2005 • 6:00 p.m.
Board of Directors Meeting
3 Park Avenue—29th floor
(Open to all Members in Good Standing)

October 7, 2005
NELA/NY Fall Conference
(SAVE THE DATE*)*

November 17, 2005
NELA's 8th Annual "Courageous Plaintiffs Event"
101 Club, NYC, NY
(SAVE THE DATE*)*

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:
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President's Column

by Bill Frumkin, President, NELA/NY

On April 1, 2005, the Executive Board held a retreat to discuss numerous issues pertaining to NELA/NY for the upcoming year. These included democratization/governance, programming, and the development of future goals and initiatives. This issue of the Employee Advocate includes an article by Rachel Geman that details the projects that are currently being undertaken. The ultimate goal of the Board is to encourage the entire membership to get involved in these projects. In that way, new ideas and energy can be harnessed to enable NELA/NY to achieve an even greater level of relevance and satisfaction to its members and the clients we serve.

There is no question that NELA/NY's programming, including its conferences, NELA Nites, NELARS, and Courageous Plaintiff's dinner (to name a few), have made it an overwhelmingly successful organization with a membership of over 300. Still, we do not want to stop there. We know that all of you have busy practices and that membership in NELA is not an overwhelming priority for many of you. However, we believe that increased participation on behalf of the membership will not only enable the organization to continue to improve, but will also provide new leadership opportunities for all participants to continue to succeed. It is extremely pleasing to see many new faces at our conferences, and it is our hope such individuals will step up and assume leadership roles in the projects noted in Rachel's article. All of the members of the Executive Board are available to discuss these programs and activities with anyone who wants to become more involved. To this end, you will receive this Summer a form soliciting your involvement in any project that interests you. I hope that you will give this your serious attention, make a commitment, and follow through. Remember, the organization is only as good as the energy of its members. We cannot continue to achieve our objectives unless people step up to the challenge.

THIS EDITION'S PRACTICE TIP: It is imperative that your client's deposition not be the first time that you hear information about his or her background or personal life (which may be relevant to your client's credibility or claim for emotional distress) or any facts about the case. Your preparation of your client for his or her deposition is a make-it or break-it facet of your case, and you must give it a significant amount of time and energy. Difficult problems will often arise at a deposition; one of them should not be that you were not previously aware of critical information. Scheduling several sessions to prepare the plaintiff, rather than just having one long session, helps to make sure that all of the important questions are sufficiently explored. At least one of these sessions should take place right before the deposition, i.e., the day before, so that your client will be in a position to retain your advice.

In closing I want to reiterate that the Executive Board is reaching out to all of you to encourage your active participation in helping NELA/NY to achieve its objectives. ■

Fish Says:

WHILE we've certainly come a long way when it comes to gender stereotypes and the roles of women in the workforce, we still have a long way to go. However, as a measure of how perceptions and ideas have changed, look at this "good wife's guide," taken directly from the May 13, 1955 edition of "Housekeeping Monthly" magazine. This is not a joke.

The good wife's guide

- Have dinner ready. Plan ahead, even the night before to have a delicious meal ready, on time for his return. This is a way of letting him know that you have been thinking about him and are concerned about his needs. Most men are hungry when they come home and the prospect of a good meal (especially his favourite dish) is part of the warm welcome needed.
- Prepare yourself. Take 15 minutes to rest so you'll be refreshed when he arrives. Touch up your make-up, put a ribbon in your hair and be fresh looking. He has just been with a lot of work-weary people.
- Be a little gay and a little more interesting for him. His boring day may need a lift and one of your duties is to provide it.
- Clear away the clutter. Make one last trip through the main part of the house just before your husband arrives.
- Gather up schoolbooks, toys, paper etc. and then run a dustcloth over the tables.
- Over the cooler months of the year you should prepare and light a fire for him to unwind by. Your husband will feel he has reached a haven of rest and order, and it will give you a lift too. After all, catering for his comfort will provide you with immense personal satisfaction.
- Prepare the children. Take a few minutes to wash the children's hands and faces (if they are small), comb their hair and, if necessary, change their clothes. They are little treasures and he would like to see them playing the part. Minimize all noise. At the time of his arrival, eliminate all noise of the washer, dryer or vacuum. Try to encourage the children to be quiet.

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Lawyers Are Riding Along With Disabled

by Alicia Colon

"Uh-oh," the man next to me on the bus said as he looked out the window and saw elderly woman in a wheelchair, accompanied by a man, waiting to board. My neighbor looked at his watch and sighed. The bus was heading toward the ferry terminal, and the noon boat would be leaving for Manhattan in 20 minutes. Even though the terminal was only 5 minutes away, the process of boarding these passengers would eat away at those precious minutes.

After the driver lowered the ramp and secured the wheelchair in the designated space, she asked the man where they needed to disembark. He said, "Western Beef." We all raised our eyebrows because that supermarket was only three blocks away.

The driver said nothing and dutifully inserted the key to pull up the ramp—but it jammed. The ramp just would not move. Ultimately we were forced to exit the bus to await another. The last two riders were left on board to await assistance in disembarking, and I couldn't help but notice how embarrassed the couple looked.

Needless to say, everybody missed the noon ferry. Several passengers were on cell phones calling in late to work.

Section 222 of the 1990 Americans with Disabilities Act states that in the future it will be considered discrimination if a public entity purchases or leases vehicles that are "not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs."

I have no problem with providing access to the disabled for public services, but the implementation of such legislation can be less than efficient. New York City offers Access-a Ride paratransit service, which is available 24 hours a day, 7 days a week. A ride in one of the specially equipped vans costs only $1.50—and would surely have been more comfortable for that couple stuck on the bus for who knows how long.

Certainly, many disabled individuals travel to and from their jobs via conventional public transportation, but I question the cost of making accessible every single vehicle of a fleet of buses that carry millions of non-disabled passengers, rather than offering the individual paratransit service gratis.

A 1985 Harris poll reported that only 42% of disabled men were employed, as opposed to 88% of the general population, which helped influence the passage of the ADA in 1990. Disabled women had even lower statistics. While there had been several laws pertaining to the rights of the disabled, they were considered ineffective in protecting the civil rights of those disabled who wanted gainful employment.

The terms of the ADA of 1990, however, are so over-inclusive that it has provides a haven for professional plaintiffs who make their living off monetary damages from noncompliant businesses, which end up settling to cut legal costs.

An applicant for the job of subway conductor who weighed 410 pounds sued the Metropolitan Transportation Authority under the ADA, claiming the agency was legally required to alter the size of the cab to accommodate his "disability." One man filed 50 lawsuits in California, another man filed 1,000 against noncompliant businesses. The wave of lawsuits under the ADA harms the disabled above all.

Fear of such lawsuits has actually resulted in less employment. Because of the ill-conceived legislation, an employer may view a disabled person as a lawsuit waiting to happen if the employee does not receive promotions or is criticized for poor performance.

Before passage of the ADA, approximately 3 million Americans were blind, deaf, or in wheelchairs. Congress grossly inflated that figure to 43 million "disabled," to make for a broader appeal. Nowadays, the definition for disability ranges from physical impairment affecting mobility and sight to emotional and learning disorders. Under the terms of the ADA, employers can ask about an applicant's ability to perform a job but cannot inquire if an applicant has a disability or

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By Alicia Colon, The New York Sun, April 12, 2005.

Letter to the Editor of the NY Sun

April 13, 2005

New York Sun
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Dear Editor:
Alicia Colon writes that "[f]ear of such lawsuits has actually resulted in less employment [of the disabled]." (*Lawyers Are Riding Along With Disabled*, April 13, 2005). Baloney. Before the ADA, few employers were hiring people with disabilities—not unless they were able to "pass under the radar screen." Now that people with disabilities are empowered to disclose what they once felt compelled to hide, and still others attempt to use public transportation to travel to those jobs, Colon cries "foul!" Fifteen years after the passage of this landmark legislation, it is indeed a sad fact that people with disabilities are the only group subjected to such gratuitous attacks. "Back of the bus?" Ha! Colon doesn't even want them on the bus. We obviously have a long way to go.

Jo Anne Simon
Brooklyn, NY

The author is an attorney living and working in Brooklyn who represents people with disabilities.

When Do Covenants that Restrict Solicitations of At-Will Employees Constitute Unlawful Restraints of Trade? Perhaps Always

by Gary Trachten, All Rights Reserved

My unscientific survey of colleagues at the bar suggests that most essentially acquiesce in this notion: Unlike covenants prohibiting post-employment competition with a former employer, covenants prohibiting the solicitation for hire of the employer's remaining employees are essentially immune from public policy based challenges to their enforceability. The conventional wisdom seems to be that since agreements not to solicit employees are unlikely to substantially burden the ex-employee's ability to earn a living, principles of freedom of contract ought to rule the day.

There is no doubt but that courts, in scrutinizing restrictive covenants, emphasize the possible hardship to the ex-employee. **Cf. Gibbs & Soell, Inc. v. Armstrong World Industries**, 2005 WL 615688 (S.D.N.Y.) (Baer) ("Because enforcement of employee restrictive covenants may result in the loss of an individual's livelihood, such covenants are 'rigorously examined' and enforced only to protect an employer from unfair competition stemming from—among other things—the disclosure of trade secrets," quoting from **Baker's Aid v. Hussman Food Serv. Co.**, 730 F. Supp. 1209 (E.D.N.Y. 1990)). However, before being too quick to presume that covenants restricting solicitation of employees are likely enforceable, lawyers ought to consider the jurisprudence of restraint of trade that has long informed judicial scrutiny of restrictive covenants, even when hardship is not implicated. A good place to begin is with the words that the eminent jurist Learned Hand authored in the case of **Triangle Film Corporation v. Artcraft Pictures Corporation**, 250 F. 981 (2d Cir. 1918):

> Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose every one has not the right to offer better terms to another's employe, so long as the latter is free to leave. The result of the contrary would be intolerable, both to such employers as could use the employe more effectively and to such employes as might receive added pay. It would put at end to any kind of competition.

In **Triangle Film**, the plaintiff had argued in favor of creating a doctrine that would recognize and protect an employer's interest in the stability of its at-will workforce. The court paraphrased the plaintiff's argument as follows: "The reasonable expectation of an employer that his employees will continue with him is a part of his 'goodwill,' as we say, and anyone that hurts him in that 'good will' does him an 'injuria,' even though there be no contract broken and the employee at pleasure… that intentional damage to one's property or trade without 'just cause' is actionable." Then, the court firmly rejected the legitimacy of any such employer interest, deeming it to work an unjustifiable restraint of trade.

To be sure, **Triangle Film** is more than ninety years old, and did not specifically deal with an express *contractual* restraint on employee solicitation. Nonetheless, courts have recently cited it as a beacon that illuminates the question of whether to enforce contractual restraints on post-termination solicitations of employees.

One such case is **Schmersahl, Treloar & Co., P.C. v. McHugh**, 28 S.W.3d 345 (Mo. App. 2000). There, the court asked and answered two questions: (1) Does a non-solicitation of employees' provision constitute an agreement in restraint of trade?[1] (2) If so, is it nonetheless enforceable as protective of a legitimate interest?

In answering the first question, the court looked to § 186(2) of the Restatement 2d of Contracts, which reads:

> A promise is a restraint of trade if its performance would limit competition in any business or restrict the promissory in the exercise of gainful employment.

The Missouri court then noted:

> Competition in the market place encompasses competition in the labor market, including an employer's ability to solicit and hire the at-will employees of another and an at-will employee's ability to seek employment at better terms. The policy in favor of free competition allows an employer to make an offer of employment to a competitor's at-will employee to leave employment and compete with a former employer.

Id. at 349.

Then, citing **Triangle Film** as persuasive on the issue, the court concluded that because restrictions on solicitation "restrict[] the flow of competitive information about the labor market, including the availability of opportunities and offers of employment to an employer's at-will work force," they reduce competition and restrain trade. *Id.*

Moving on to its second question, **Schmersahl** then analyzed whether a restriction on solicitation of at-will employees serves to protect an employer from unfair competition. The court noted that although an employer can protect its proprietary rights in trade secrets and (under Missouri law) its stock of customers and their goodwill through reasonable covenants limiting competition, an employer does not have a proprietary interest in its at-will employees or in their skills. Citing **Triangle Film**, the court rejected the employer's bid to have it recognize a protectible interest in its expectation that its employees remain in its

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employ; rather, it flatly held that *"an employer's interest in protecting the stability of its work force is not one of the interests which may be protected by a restrictive covenant …" Id.* at 351.

Schmersahl's influence has extended beyond the borders of Missouri. In **Unisource Worldwide, Inc. v. Carrara**, 244 F. Supp.2d 977, 983 (C.D. Ill. 2003), U.S. District Judge Mihm found **Schmersahl** to be persuasive and predictive of what the Supreme Court of Illinois would hold despite a contrary decision by an intermediate Illinois appellate court.[2] More recently, a concurrence in **Labriola v. Pollard Group, Inc.**, 100 P.3d 791, 847 (Wash. 2004) *en banc*, citing only **Schmersahl**, opined that under Washington law, "[n]on compete agreements designed to stabilize a company's current work force through unreasonable restraints are … unenforceable." Even before **Schmersahl** was decided, the Supreme Court of North Carolina, expressly adopting the rationale of **Triangle Film**, dismissed as cognizable neither in tort nor contract claims that a former employee/insurance agent wrongfully solicited away other employee agents, despite that he had signed a restrictive covenant not to interfere with existing insurance policies. **People's Security Life Insurance Co. v. Hooks**, 367 S.E.2d 637 (N.C. 1988). The court in Hooks explained that an employer can well enough protect its interests by providing reasonable employment contracts to those employees that it wants to retain. *Id.* at 651.

To be sure, courts in other jurisdictions have regarded agreements not to solicit at-will employees as lawful and enforceable. However, the opinions of most courts so holding have generally either (a) merely balanced the public interest in enforcing contracts against the hardship imposed on the former employee requiring that he refrain from solicitation—without weighing the public interest in vigorous competition, and without discussing the nature of the employer's interest in the covenant, e.g., **First Health Group Corp. v. National Prescription Administrators, Inc.**, 155 F. Supp.2d 194, 231 (M.D. Pa. 2001) (purporting to construe Illinois law); or (b) regarded the agreement as an enforceable contract simply because it was not covered by the language of that state's statute's only prohibition on restrictive covenants, without discussing either its anti-competitive effects or the nature of employer's interest, e.g., **Smith Barney, Harris Upham & Co., Inc. v. Robinson**, 12 F.3d 515, 520 (5th Cir. 1994) (Louisiana law). Those cases that have discussed the nature of the employer's "legitimate interest" generally identified it as being along the lines of a presumed interest in "maintain[ing] a stable workforce," **Loral Corporation v. Moyes**, 219 Cal. Rptr. 836, 844 (Cal. App. 1985), or in "retaining its employees whose training represents a business investment," **Cf. Club Properties, Inc. v. Atlanta Offices-Perimeter, Inc.**, 348 S.E.2d 919, 921-22 (Ga. App. 1986) (agreement between landlord and commercial tenant, but subsequently cited as governing post-employment covenants). **Cf. Belasco v. Gulf Auto Holdings, Inc.**, 707 So.2d 858 (Fla. App. 1998) (Florida's statute expressly identifies extraordinary and specialized training as legitimate business interests). Of

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Short Course in Cleaning Up a "Dirty" NASD U-5 Termination Form

Peter G. Eikenberry

My client, a 22 year sales employee of MetLife, was fired after he told his district manager that he wished a transfer because of the corrupt and discriminatory practices of his N.J. branch office supervisors. Upon the client's termination, MetLife was required to file an NASD Form U-5 termination form as are all employers in the securities industry who terminate employees. The nature of the notation on a person's "U-5" is critical to the person ever being able to work in the industry again. In this instance, the client's "U-5" alleged that the client was terminated for "misrepresentation of policy values and options." The client was unemployable by a reputable vendor of NASD regulated products because of the false allegations on his U-5. Sales of NASD regulated products comprised about 85% of the client's normal sales and the client was left earning only a fraction of his previous income.

The client brought suit in SDNY (alleging defamation, retaliation under Title VII, age discrimination and violation of a New Jersey whistle blower statute), and filed a claim in arbitration simultaneously with the NASD, which was essentially identical to the judicial complaint. The client immediately sought a preliminary injunction in court with respect to the U-5. He had a customer base of a thousand customers developed at MetLife, and his base would dissipate rapidly if he could not get the allegations on his U-5 expunged as soon as possible so as to secure a new employer.

Judge Schiendlin denied the preliminary injunction on grounds of failure to show likelihood of success because of disputed allegations about misrepresentations to customers. However, she did find irreparable harm to the client's customer base and therefore granted expedited discovery and ordered the NASD arbitration completed within 120 days. (Judge Schiendlin also observed that MetLife's NASD filing of the U-5 was entitled to a "qualified immunity." See Jordan v. Metropolitan Life Ins. Co., 280 F.Supp.2d 104, 109 (S.D.N.Y.2003). Her holding was later followed by the arbitration panel is determining that MetLife's filing was not protected by an absolute immunity.)

The client then filed an amended claim with NASD omitting the Title VII retaliation and age discrimination claims from the NASD petition, the purpose being to preserve those claims for trial before the court. (The amendment was possible only because MetLife had not answered the petition. Had MetLife answered, the client would have waived his right to litigate any of the claims. The preliminary injunction can be brought in court by NASD rule but a complaint must be filed in court in order to move for interim relief regardless of whether or not you intend to, or have the right to, litigate as opposed to arbitrate the claims.)

The remaining NASD claims were for defamation and violation of a NJ whistle blower statute. Upon employment, persons in the securities industry sign "U-4" forms consenting to arbitration. Thus, by NASD rule, most claims must be arbitrated. Title VII type employment claims are an exception and may be litigated. The defamation and whistle blower claims could also have been litigated since the NASD bylaws permit all claims to be heard in court once a claimant chooses to litigate rather than arbitrate a Title VII type claim. However, I could find no court precedent expunging the language of a NASD U-5 termination notice as a part of a remedy for defamation, while there were court precedents confirming an arbitration panel's expungement of a defamatory U-5. Therefore, we chose to pursue the defamation claim in arbitration.

Deposition and document discovery obtained in the federal action and testimony at the preliminary injunction hearing were all invaluable at the arbitration hearing. The arbitrators awarded $316,000 in damages on the defamation claim and ordered expungement of negative material on the U-5 including multiple customer complaints obviously instigated by a retaliatory MetLife management. Judge Schiendlin confirmed the NASD arbitration panel's expungement of the client's U-5. (The arbitrators denied the NJ whistle blower claim without explanation.)

MetLife then proceeded in a related separate arbitration against the client on grounds of breach of fiduciary duty for damages and to halt solicitation by the client of his former MetLife clients. The client proceeded with the federal court litigation. In court, MetLife successfully moved to dismiss the Title VII retaliation claim on res judicata grounds (after the client had voluntarily dropped his difficult to prove age claim.) Res judicata was found applicable because the NJ whistle blower statute prohibits conduct encompassed in the alleged conduct under Title VII, and the arbitration panel had denied the whistle blower claim. After the client appealed the dismissal of his Title VII claim, the matter was settled by an exchange of releases. Under the terms of the settlement, MetLife dropped the arbitration of its breach of fiduciary claims against the client, and the client dropped his appeal of the dismissal of his Title VII action.

At the end of the day, the client got some money; he is now happily employed by a new company due to his "dirty" U-5 being "wiped clean," and he can freely solicit his former MetLife customers so that he not lose them to MetLife or someone else. I got paid by the hour for the preliminary injunction hearing and on contingency for success on the defamation claim. ■

Playing "Cyrano de Bergerac"

by Anne Golden

When a prospective client calls you and has a miserable work environment but a weak or nonexistent legal claim, but is not about to be fired, what do you do?

When a prospective client calls you and probably is about to be fired but wants to prevent it—perhaps only until she has found another job (a "soft landing"), what do you do?

When a prospective client calls you and wants to leave his job but needs severance pay to survive until he finds another job, but of course he won't get it if he quits, what do you do?

When a prospective client calls you and has already been fired but has no clear legal claim, what do you do?

The answer to all these questions may be the same: coach, advise, and counsel the client without appearing and representing him.

The client can often get more for himself than you can get for him, especially when he does not have a strong legal claim. After all, if you pop up and say to a manager at Megacorp, "I represent X, let's talk," the next voice you are likely to hear is that of the company's lawyer, saying, "I represent Megacorp, let's fight." His job description, after all, is to be tough and mean and to save money for his client (while billing the client himself, of course, unless he's in-house). The dynamic has now changed in a way that will not help your client, and you cannot go back.

Your client, on the other hand, can talk to her boss, her boss' boss, or someone else in the company who may feel unhappy with the way the matter has been handled; you can't. Your client can push the guilt button; you can't. She can point out that the company's action is unfair or hurtful, or that she needs enough severance pay to support herself and her family until she is likely to get reemployed; opposing counsel would simply laugh at you if you say such things.

Your client may have a friend at the company with both the power and the inclination to go to bat for him, but you can't talk to that person. The boss may really want to do the right thing, or may at least want to look or feel as though he is. Opposing counsel does not have any of those buttons to push.

Some clients, of course, are in no shape emotionally to do their own talking, even with coaching and counseling. But others are, and you can empower them by counseling them about what techniques are likely to succeed. You can provide useful phrases, such as "I'd be glad to listen to anything you have to say, but I can't give you an answer until I've had a chance to think about it," and "You know, we really both want the same thing—a solution to this problem that's fair for both of us—so we're really on the same side." You may even be able to help your client devise a way to become part of the solution to a problem the boss is facing.

I will often ghostwrite a letter or a memo for the client. It may be more or less heavy-handed, depending on whether it makes sense to give the company the feeling that there's a lawyer around somewhere or not. It sets out what the client wants and why such a resolution would be fair, and it sets the stage for negotiation by the client. Generally the client leaves with the ghostwritten document (which I also email to him at home in case minor changes are needed later) and does not need to retain my firm unless the negotiation stalls.

The aim of such a letter or memo may be to make harassment stop, to make the employee toxic enough to the company to induce it to offer her severance (by stating why she believes that discrimination is at work, if there is a basis for it) while protecting her from retaliation, or to spur the company to improve its severance offer. If there is no basis for a discrimination claim, the memo may be designed simply to induce guilt or sympathy. Carefully drafted, it may enable a current employee to remain employed and may prevent further harassment, discrimination, or retaliation.

This method, which one of my clients termed "the Cyrano de Bergerac method of negotiation," has another advantage. It takes less of your time and so costs your client less, so you can help more people during a typical week. I do this kind of work only on an hourly basis, because it seems unfair to take a percentage of what my client gets by doing her own talking, even if I did tell her what to say.

The client's tone of voice is crucial. He should not let anger show and must not take the opportunity to trash any individual, especially the boss. His tone should be one of concern, perhaps disappointment, "more in sorrow than in anger"—but positive. He must say he is sure this problem can be solved ("I know we can work this out; we've solved harder problems than this").

He can express that he truly does not want the situation to become adversarial. He can even say, with a degree of accuracy, "Let's work this out between ourselves without getting the lawyers involved—after all, they just gum everything up and make it more complicated and expensive than it needs to be. We both want me to leave, if I must, in friendship and not in bitterness."

If coaching from behind the scenes fails, then you can pop up and take the negotiation to the next level. I often tell clients that I think lawyers are like medicine: The smallest dose that cures you is the right dose, and more might even be bad for you. Once you appear, though, be aware that it is highly unlikely that your client will be able to stay at the company. Introducing your lawyer to your boss is not good medicine for the workplace relationship. ■

NELA Member News

A son born to **Michael Gross** and his wife on February 17th—Rafael Elan.

A daughter born to **David Fish** and his wife on May 26th—Riley.

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 interest to be discussed in these pages. Send them directly to:

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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 ReNika C. Moore, an associate with Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

Disparate Impact

The United States Supreme Court has held that a disparate impact theory may be applied in an age discrimination case, but it handed employers an exception big enough to drive a truck through. Where the language of the ADEA is derived verbatim from language in Title VII, the analysis of a claim will be identical, the Court said, holding that the ADEA does authorize recovery in disparate impact cases, just as **Griggs v. Duke Power Co**., 401 U.S. 424 (1971) held that Title VII did. Accordingly, intent to harm is not required if a plaintiff can show disparate impact. However, the Court held that the petitioners in the case before it had failed to make out a valid disparate impact claim, because § 4(f)(1) of the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age [discrimination]' (hereinafter RFOA provision)." The Court reasoned that, after all, if the "differentiation" is based on something other than age, there could not be age discrimination anyway, so the exception did not swallow the rule. The Court also noted that the amendments to Title VII embodied in the 1991 Civil Rights Act did not apply to the ADEA, including the modification of **Wards Cove Packing Co. v. Atonio**, 490 U.S. 642 (1989), which "narrowly construed the employer's exposure to liability on a disparate-impact theory." The operative parts of the opinion were written by Justice Stevens and concurred in by Justices Scalia, Souter, Ginsburg, and Breyer. Justice Scalia filed an opinion concurring in part and concurring in the judgment, and Justices O'Connor, Kennedy, and Thomas concurred in the judgment because they did not believe the ADEA encompassed disparate impact claims. **Smith v. City of Jackson**, 125 S. Ct. 1536, 2005 WL 711605 (3/30/05).

ARBITRATION

No Waiver by Participating in EEOC Process

The First Circuit Court of Appeals faced a novel argument from an employer that had failed to demand arbitration pursuant to an "agreement" in an employment contract that the employee had signed on her first day of work. The plaintiff filed an EEOC charge alleging sex discrimination, *i.e.*, that her manager had "physically abused [her] and verbally abused [her] repeatedly because he thought [she] was having a sexual affair with another employee, and [the manager] wanted [her] to have sexual relations only with him." The employer filed its position statement and the EEOC issued a Dismissal and Notice of Right to Sue, finding that the disputes were based upon the participants' domestic relationship and that the plaintiff had not taken advantage of the company's sexual harassment policy. The plaintiff timely filed suit in state court, and the employer removed to federal court—then, less than two weeks later, moved to compel arbitration and stay the court proceedings. The district court denied the motions, finding the arbitration demand untimely and the contract one of adhesion. The employer appealed, and the court of appeals reversed and determined that the issue of waiver was for it, rather than for the arbitrator, and that the employer had not waived its right to arbitration by failing to demand arbitration during the pendency of the EEOC investigation. **Marie v. Allied Home Mortgage Corp**., 402 F.3d 1, No. 04-1403 (1st Cir. 3/16/05).

ATTORNEYS' FEES

Lodestar Calculation

In a non-employment case in which the plaintiffs successfully challenged a redistricting plan in Albany County, with the assistance of a New York City law firm, they applied for their fees under the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq*. The New York City firm, Gibson, Dunn & Crutcher, applied for fees at their usual New York City rates: a partner at $703.71–825.68, four associates at $297.40–460.68, and one paralegal at $228.07–233.90. The plaintiffs said they had not been able to find counsel in Albany County and had had to import the New York City firm. The magistrate judge (David R. Homer, U.S.M.J.), in his report and recommendation, noted that Gibson, Dunn & Crutcher had substantial federal civil appellate experience (there had been a number of appeals), that the plaintiffs had shown reasonable diligence in trying to retain a law firm in Albany County that had the resources to support the litigation and did not have a conflict of interest, but that these facts alone did not establish the "special circumstances necessary for the application of Southern District rates." In other words, the plaintiffs had not shown that they had scoured all the other counties in the Northern District of New York before looking to New York City. Accordingly, the court recommended Northern District hourly rates for all counsel. However, the court agreed that it was time to increase the Northern District rate structure and suggested an increase to $210 for experienced attorneys, $150 for associates with more than four years' experi-

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ence, $120 for associates with less than four years' experience, $80 for paralegals, and half rates for time spent in travel. **Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany**, —- F. Supp. 2d —-, 2005 WL 670307 (N.D.N.Y. 3/22/05).

CLASS ACTIONS

Federal v. State Law Rights

Auto damage appraisers brought a collective action under the FLSA and, in a supplemental claim, sought classwide adjudication of Massachusetts state labor law, seeking to certify a class of approximately 51 employees. The motion for class certification was filed after the close of the opt-in period, in which only 13 class members had affirmatively opted in. Pointing to the very low participation rate, the defendant argued that the requirements for certification could not be met because the dominance of classwide claims could not be satisfied where there was a relatively low number of easily identified potential class members who had chosen not to opt in. The court disagreed, noting the numerous federal courts that have certified state law wage and hour class actions alongside FLSA collective actions, and holding that the opt-out procedures of Rule 23 class actions are not at odds with the opt-in procedures of the FLSA. In those cases, other courts had held that the opt-in FLSA claims and the state-law class actions were separate and distinct claims. Plaintiffs may elect either remedy independent of the other, so failure to opt into the FLSA collective action had no effect on their right to pursue the state-law remedies through a class action lawsuit. **McLaughlin v. Liberty Mutual Ins. Co**., 224 F.R.D. 2203, 2004 WL 2358292 (D. Mass. 10/20/04).

Pregnancy Discrimination

Six female police officers were denied class certification for "all current or future female officers employed by the Suffolk County Police Department who have or will become pregnant while the light duty exclusionary policy is in effect," *i.e*., the policy of the county police department excluding from light-duty status any police officer who suffers an off-duty injury, condition or illness. Since pregnancy is always a condition originating off-duty, the plaintiffs alleged disparate impact. The police department opposed the certification motion, and both parties moved for summary judgment. Judge Leonard D. Wexler (E.D.N.Y.) denied all the motions. The court denied the class certification motion because, it found, the proposed number of 89 possible class members did not make joinder of their claims (as opposed to a class action) impracticable; they could bring individual lawsuits, and a class action would not promote judicial economy. Since the police department stated that it would abide by the ultimate judicial determination of the validity of the policy, the possibility of inconsistent results was less likely. NELA/NY member David M. Fish represented the plaintiffs. **Lochren v. County of Suffolk**, —- F. Supp. 2d —- (E.D.N.Y. 3/29/05).

CONSTRUCTIVE DISCHARGE

A female employee of a state police department alleged that she was subjected to a continuous barrage of sexual harassment by her male supervisors, and that upon her complaining to the department's EEO officer she received a half-hearted response that did not resolve the problem. Two days later, she was arrested for allegedly having stolen her own computer-skills exam papers, which she had removed because she believed the supervisors had falsely reported that she had failed, when in fact the exams were never forwarded for grading. She then resigned from the force and sued, alleging sexual harassment and constructive discharge. The case made its way to the U.S. Supreme Court, where the question was whether constructive discharge was the kind of "tangible employment action" that makes the employer strictly liable and prevents it from resorting to the **Faragher-Ellerth** affirmative defense. (That defense would require the employer to prove both that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and also that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.) The Supreme Court tried to draw a line down the middle of the facts, holding that if the alleged constructive discharge involved an "official action," the **Faragher-Ellerth** defense is not available; otherwise, it is. The Court reasoned that if an "official act" is taken, then it is clear that the agent (the supervisor) is aided by the agency relation; otherwise, it is less clear. Accordingly, although the present case presented genuine issues of material fact concerning the plaintiff's hostile work environment and constructive discharge claims and would be remanded for further proceedings, the Court held that the Third Circuit Court of Appeals erred in declaring the affirmative defense never available in constructive discharge cases. **Pennsylvania State Police v. Suders**, 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (6/14/04).

New York courts have traditionally been hostile to claims of constructive discharge. Judge Gerard E. Lynch (S.D.N.Y.) has stepped back and held that the plaintiff, in alleging that her boss had deliberately undermined her authority, restructured her downward, and put her on 30-day involuntary paid leave, had stated enough for a reasonable jury to find that she had been constructively discharged. Even though, for instance, a reduction in job responsibility is not enough to constitute constructive discharge, "a court must examine the whole record because a combination of factors could constitute constructive discharge, even if each taken alone would not." A reduced role could have affected the plaintiff's compensation, and "[a] reasonable factfinder could believe defendants' version, but they [sic] need not." The court also found that the defendant, by leading the plaintiff to believe that it was going to settle the case, and accordingly requesting her to postpone her EEOC filing, until after the 300-day deadline. The court found that the deadline was equitably tolled. Accordingly, the court denied the defendant's motion for summary judgment. **Hnot v. Willis Group Holdings Ltd**., —- F. Supp. 2d —-, 2005 WL 831664 (S.D.N.Y. 4/8/05).

See also **Morris v. Schroder Capital Management International**, discussed under "Restrictive Covenants."

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CONTRACT

Oral Contract for Severance Pay

A president/chief operating officer continued in that position after his company was acquired by another corporation. Subsequently, the CEO's employment was terminated for cause. The plaintiff had initially continued as president/COO but then another employee took over the duties of president. The new president told him that he would be let go several weeks later but would get three months' severance pay. He never got the severance pay. He sued for it in state court; the suit was removed to federal court, where the defendant moved to dismiss based on lack of consideration. Judge Thomas P. Griesa (S.D.N.Y.) found that the plaintiff's few weeks' service after being promised the severance pay was sufficient consideration to support the oral contract he alleged. The court did dismiss the plaintiff's fraud claim, however, because it constituted "fraud by hindsight" without proof that the defendant intended to breach its promise at the time the promise was made. **Rubenstein v. S1 Corp**., — F. Supp. 2d —, 2005 WL 743121 (S.D.N.Y. 3/31/05).

DAMAGES

Punitive Damages

A former city solicitor appealed from a $10,000 punitive damage award against her personally in a race discrimination case brought by an African-American police officer. When his discrimination claim was settled in 1993 by the payment of money and reinstatement, subject to "re-training" and "a complete physical ... examination," the settlement terms gave rise to a new dispute. The plaintiff alleged that, instead of cooperating with his effort to be reinstated, the defendants engaged in a concerted campaign to stall his return to the police force in retaliation for his prior complaint, including by selectively enforcing a local ordinance barring police officers from holding outside employment. After a seven-day bench trial, the district court found that after the settlement, "the defendants began a campaign of obstruction, choreographed by the City Solicitor, designed to pressure or manipulate [the plaintiff] into abandoning his plan to return to the police force." Although the solicitor may have seen herself merely as a zealous advocate, the award of punitive damages against her was warranted because "her actions were especially unworthy of a City Solicitor." The First Circuit Court of Appeals affirmed the judgment and remanded for an award of the reasonable attorneys' fees and costs of appeal. **Powell v. Alexander**, 391 F.3d 1 (1st Cir. 2004).

DISABILITY DISCRIMINATION

Failure to Accommodate

A nonprofit group founded to help persons with disabilities was charged with failing to accommodate an employee who herself had a disability, legal blindness resulting from macular degeneration. The plaintiff, a vocational rehabilitation counselor, alleged that she had been accommodated with help making telephone calls and extra time to complete her duties until a new chief operating officer was hired. However, a new COO refused to continue the accommodations and discharged the employee after several clashes with her. The plaintiff grieved the discharge to her union, and at an arbitration hearing the agency learned that she had kept copies of part of a confidential patient file at home after her termination. The agency issued her a supplemental termination notice, so that even after the arbitrator found that the first termination was excessive discipline and ordered reinstatement, the plaintiff remained discharged. She sued the union for breach of its duty of fair representation and the agency for failing to pay her overtime, age discrimination, disability discrimination, and retaliation. Judge Denny Chin (S.D.N.Y.) held that a reasonable jury could find that the agency had failed to make reasonable accommodations, that the plaintiff's disability had been a factor in her termination, and that the two terminations had been retaliatory, but dismissed all the other claims. NELA/NY member Randall D. Bartlett represented the plaintiff. **Tomney v. International Center for the Disabled**, 357 F. Supp. 2d 721, 2005 WL 435446 (S.D.N.Y. 2/25/05).

First Amendment

A special education teacher in Connecticut survived a motion to dismiss her claims against the school board that had employed her. The teacher sued the board for failing to renew her employment contract after she recommended students with disabilities for various special placements. She believed her activities were protected under the Individuals with Disabilities Education Act. The court denied the board's motion to dismiss three of her five claims, made pursuant to the First Amendment and the Rehabilitation Act, as well as a retaliation claim. The plaintiff argued that her speech on behalf of her students was also protected under the First Amendment because it concerned a matter of public interest. She alleged that two school district employees actively undermined her application for a part-time position in a neighboring school district. The district court agreed that the plaintiff's rights under the First Amendment had been implicated. It reasoned that "the form, context and content of her statements sufficiently concerned a matter of public interest" to qualify as protected speech, and that the protection exists even where, as here, the employee communicates the statement only to his or her employer. With respect to the retaliation claim, the court found that the superintendent's failure to renew her contract sufficiently established that the school board, the official policymaker, was acting through the superintendent. Finally, the court also found that the plaintiff was protected under the Rehabilitation Act. The defamation claim was dismissed because municipalities cannot be liable for intentional torts of their employees. NELA/NY Members Gary Phelan and Tammy Marzigliano represented the plaintiff. **Sturm v. Rocky Hill Bd. of Ed**., — F. Supp. 2d —, 2005 WL 733778 (D. Conn. 3/29/04).

ERISA

Retaliation

A former HR Director who was discharged after she met with the company president to tell him she believed the company's ERISA plan had been underfunded for several years had stated a claim,

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according to the Second Circuit Court of Appeals (per curiam, before Pooler, Sack, and Raggi, JJ.). The underfunding was due to a payroll discrepancy involving underpayment of overtime to all non-exempt employees of the New York City and Los Angeles offices. The plaintiff alleged retaliation for having raised concerns under the Fair Labor Standards Act and ERISA. The court below (Barbara S. Jones, S.D.N.Y.) had dismissed the action, holding that the FLSA did not protect internal complaints but only the filing of a formal complaint with a regulatory agency or participation in a regulatory agency's formal proceeding, and that the district court construed the complaint as seeking only damages and not equitable relief as required by ERISA. The court of appeals agreed that the amended complaint was "ambiguous" and directed the district court to permit the plaintiff to file a revised amended complaint. NELA/NY member Daniel J. Kaiser represented the plaintiff. **Nicolaou v. Horizon Media, Inc**., 402 F.3d 325, 2005 WL 700951 (2d Cir. 3/28/05).

ETHICS

Disqualification

A plaintiffs' law firm had a less pleasing experience in federal court in Minnesota. In researching and developing a race discrimination class action, the firm contacted a former EEO and HR manager for the company who had contacted it once as a prospective client, and learned that he had retained a carton of documents, some of which were marked "Privileged and Confidential," including attorney-client communications. He sent the carton to the law firm, and it used the materials in identifying class members and in other ways. The firm did not notify defense counsel that it had these documents for 18 months after it first received them. The district court cited both the Minnesota Rules of Professional Conduct and its own "inherent power, authority, and duty to ensure the administration of justice and the integrity of the litigation process," and found that the law firm had behaved deceptively to the ex-manager by saying he might gain financially, had improperly induced him to breach the employer's confidences and privileges, improperly communicated with a represented party (because the ex-manager was "represented" at the time he received the documents), had improperly conducted its own privilege review, should not have returned privileged documents to the ex-manager or told him to destroy them, should not have retained a copied set, and may have concealed material facts from the court in connection with the proceedings. As a remedy, the court disqualified the firm. **Arnold v. Cargill Inc**., —- F. Supp. 2d —-, 2004 WL 2203410 (D. Minn. 9/24/04).

FIRST AMENDMENT

A tenured high-school music teacher sued her school district under 42 U.S.C. § 1983, alleging retaliation against her for having filed a prior suit against the same defendants. The prior suit had alleged retaliation against her for assisting another school district employee in her suit for gender discrimination. The district court (Thomas C. Platt, E.D.N.Y.) granted summary judgment to the defendants, finding that the earlier lawsuit did not involve speech on a matter of public concern, precluding a retaliation claim. The Second Circuit Court of Appeals reversed (opinion by Oakes, J., joined by Calabresi and Straub, J.J.), holding that the prior lawsuit was based upon speech about gender discrimination in employment, which "is without doubt a matter of public concern." Protection of the courts' interest in candid and truthful testimony makes a case of this kind particularly important under the First Amendment. The decision resolved a split among the district courts in the Second Circuit as to whether retaliation based upon identification as a witness in a co-worker's discrimination suit could give rise to a First Amendment claim; it is now clear that it can. **Konits v. Valley Stream Central High School District**, 394 F.3d 121 (2d Cir. 1/7/05).

See **Sturm v. Rocky Hill Board of Education**, discussed under "Disability Discrimination."

NATIONAL ORIGIN DISCRIMINATION

A woman of Puerto Rican origin who was a member of the Marine Corps Reserves worked as a criminal investigator in the Office of the Inspector General, Department of Health and Human Services, brought sued when she was fired allegedly for unsatisfactory performance. Initially she alleged that she was fired because of her military obligation, which required two weeks' active duty military training, and was reinstated by the Merit Systems Protection Board. While that action was pending, she also filed an EEO complaint alleging sex and national origin discrimination. She said that her boss freely granted military leave to male and non-Puerto Rican employees but treated her poorly, "seemed to have problems with females and Hispanics," told her that she was "not the right kind of people" for the Inspector General's office, and that he appreciated her "trying to be an American" by serving in the Marines. After her reinstatement, she alleged that her supervisor and others were retaliating against her. Her complaint in U.S. district court alleged that she had since been passed over for promotion in retaliation for her earlier action and because of her national origin and sex. Judge Gerard E. Lynch (S.D.N.Y.) denied the Government's motion for summary judgment on the plaintiff's termination claim, finding that the "trying to be an American" remark and others could be found to be evidence of national origin or sex discrimination. The court found that the plaintiff's "collection of complaints" about matters after her reinstatement, however, were too trivial to constitute a hostile environment and dismissed those claims. The decision is notable for a scathing denunciation of the plaintiff's counsel's inadequate papers in opposition to the summary judgment motion. **Maysonet v. Thompson**, —- F. Supp. 2d —-, 2005 WL 975897 (S.D.N.Y. 4/25/05).

PROCEDURE

Joint Employer

The EEOC brought an action for sexual harassment on behalf of thirteen female employees against two defendants in the Western District of New York. The defendants were Everydry Marketing and Management ("EMM"), a company with a patented method for waterproofing base-

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ments that it sold to franchisees nationally, and Everydry Marketing Service ("EMS"), which operated an Everdry waterproofing business in Rochester, New York. EMM moved for summary judgment, claiming that it was not the legal employer of either the individual plaintiffs or the alleged harassers. The district court (Charles J. Siragusa) denied the motion. The court applied a four-factor test that examined (1) the interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. The court focused particularly on the second factor. Witness testimony provided evidence that EMM exercised a great deal of control over EMS. Specifically, EMM had the power to hire and fire EMS employees, EMM employees trained EMS employees in sales, marketing, advertising and installation, EMM had supervisory control over EMS employees, EMS processed payroll for EMM, and EMM was involved in the administration of EMS' sexual harassment policy and had investigated several of the complaints giving rise to the suit. Perhaps most harmful to the defendant's argument were statements made by its own attorney. Citing to a transcript from a court appearance years earlier in the proceedings (apparently before counsel had fully contemplated its defense strategy), the court highlighted defendant's counsel's own testimony that he represented both EMM and EMS. When the court asked at the time if there was a potential conflict with his representation, counsel responded, "They're related entities, your Honor. We're not denying that." The court appeared nonplussed that the defendant later decided to do just that—deny a connection between the two companies—when it denied the summary judgment motion. **Equal Employment Opportunity Commission v. Everdry Marketing & Management, Inc**., —- F. Supp. 2d —-, 2005 WL 231056 (W.D.N.Y. 1/31/05.)

Late Reply Papers = No Reply Papers

A plaintiff who asked for an extension of time to file opposition papers to a summary judgment motion received an additional 13 days and was told that no further extensions would be granted. A day after the new deadline had passed, the plaintiff asked for three more days, and the request was denied because the plaintiff had not given "a satisfactory explanation as to why the prior decision should be vacated. Consequently," said the court, "defendants' motion for summary judgment is unopposed by the plaintiff." Not surprisingly, summary judgment was granted. The complaint had alleged that the plaintiff was discharged in retaliation for complaining of sexual harassment. **Snowdon v. American Express Bank**, —- F. Supp. 2d —-, 2005 WL 627640 (S.D.N.Y. 3/16/05) (Motley, J.).

State Rule: Settlements in Writing Only

CPLR 2104 requires that settlements be made either in open court or in a signed, complete writing. In a non-employment case, the New York State Court of Appeals has invalidated a $3,000,000 medical malpractice settlement because for months the mother of the infant plaintiff never sent back the papers finalizing the settlement, and the infant plaintiff then died. The hospital conceded the terms of the understanding but argued that no binding agreement had been established because the settlement was never reduced to writing. The trial court sided with the mother and gave her a second chance to complete the paperwork, which she did promptly. The Appellate Division, Second Department, reversed, and the Court of Appeals affirmed the Appellate Division, holding that no settlement existed. The moral of this story is so obvious that it need not be reduced to writing here. **Bonnette v. Long Island College Hospital**, 3 N.Y.3d 281, 819 N.E.2d 206, 785 N.Y.S.2d 738 (10/21/04).

RACE DISCRIMINATION

Pay and Promotion

The Eleventh Circuit Court of Appeals recently held that a performance rating that was not negative on its face nevertheless constituted an adverse employment action because it prevented the employee from receiving a higher raise. The plaintiff sufficiently established adverse employment action to make a prima facie case under Title VII. The plaintiff, a black Georgia probation officer, alleged race discrimination after her white supervisor gave her only a "met expectations" rating on her performance evaluation, for which the Georgia Department of Corrections awarded her a 3% raise. The plaintiff would have received a 5% raise if her supervisor had given her an

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"exceeded expectations" rating. She presented evidence that her supervisor had told her that she would never receive an "exceeded" rating. The employer argued that she did not suffer any adverse employment action because she was not "fired, demoted, or [given] less pay" and because she did, in fact, receive a raise. The court disagreed and noted that the amount in dispute not "de minimus" but significantly impacted the plaintiff's total compensation. Summary judgment for the employer was reversed. **Gillis v. Georgia Department of Corrections**, 400 F.3d 883 (11th Cir. 2/18/05).

RESTRICTIVE COVENANTS

Forfeiture of Benefits for Competing

Judge George B. Daniels (S.D.N.Y.) has dismissed a claim by an ex-employee who claimed that he was constructively discharged and thus should not have to forfeit his deferred compensation as provided by the deferred compensation plan. The plan provided that the employee's awards of cash and stock did not vest until three years after the dates of the grants and would be forfeited if he voluntarily resigned his employment and began working for a competitor. The plaintiff alleged that his ex-employer had drastically reduced his duties and responsibilities because its large and mid-cap U.S. equity operation, which he had been hired to run (among other things), was not viable. He resigned and told the company that he intended to establish his own hedge fund business in New York; the company told him his deferred compensation was no more; it rejected all his demands for payment; and ultimately he brought suit on a breach of contract claim. The court cited the "employee choice doctrine" and said the plaintiff had failed to make out a constructive discharge claim because he resigned in anticipation that his working conditions would soon become intolerable—not because they already were. The defendant's motion for judgment on the pleadings was granted. **Morris v. Schroder Capital Management International**, —- F. Supp. 2d —-, 2005 WL 167608 (S.D.N.Y. 1/25/05).

Injunction Denied

With noncompete clauses becoming more and more common, courts still seem reluctant to enforce them broadly. A national retailer of office products moved for a preliminary injunction in a Connecticut federal district court against three former sales agents and their new employer, a competitor in office supply sales. The corporate plaintiff moved pursuant to an employment contract that the three employees had signed when it had first hired them. The agreement, a one-page boilerplate form, contained a noncompete clause that prohibited the employee from working in a competitive business in "any territory" where the employee worked during his or her employment for one year after leaving the company. The court (Christopher F. Droney, J.) denied the motion for a preliminary injunction, finding that the plaintiff had not made the requisite showing of irreparable harm or likelihood that it would succeed on the merits. When the employees signed the agreements they did not have "assigned territories"; rather, they were free to solicit customers and sell anywhere. The only limitation was that they should not poach clients from other employees of the employer. Two years after the agreements were signed, the employer began assigning agents to specific "territories." The court held that the territorial restrictions were unenforceable because, at the time of signing, a "territory" was not clearly defined; thus, no meeting of the minds occurred. Furthermore, the court found that the geographic restrictions (that, if enforced, would have covered essentially all of New England) were excessive under Connecticut law. **Corporate Express Office Products v. Yesu**, —- F. Supp. 2d —-, 2005 WL 465406 (D. Conn. 2/17/05).

Safe Haven in Georgia

In New York, like many other states, a court that finds a noncompete agreement overbroad will "blue-pencil" it to narrow the provision down to an enforceable scope. Georgia does not do so, and the Eleventh Circuit Court of Appeals has not only held in favor of an insurance executive who challenged his noncompete after moving to Georgia (and, along with his new employer, suing there for a declaratory judgment) but has stated that its ruling should have nationwide effect under the full faith and credit clause of the U.S. Constitution. In other words, once the executive had his declaratory judgment under Georgia law, he could compete anywhere in the nation. **Palmer & Cay v. Marsh & McLennan**, 404 F.3d 1297 (11th Cir. 4/1/05).

SECTION 1981

Statute of Limitations

A porter in a residential building sued the building's managers under 42 U.S.C. § 1981 and Title VII, alleging that he was discharged because of his race and national origin (he was born in Ecuador). The management company alleged that it employed fewer than 15 employees, but the district court (I. Leo Glasser, E.D.N.Y.) noted that that requirement was not jurisdictional (citing Second Circuit authority) and declined to dismiss. It further declined to convert the motion to dismiss into one for summary judgment concerning the Title VII claim because the plaintiff had not had the opportunity to take discovery. With respect to the § 1981 claim, the court explained that the U.S. Supreme Court had determined that the four-year "catchall" limitations period applied to § 1981 claims, so those claims were timely. The court did dismiss the Title VII claims against the individual managerial employees of the management company. **Fernandez v. M & L Milevoi Management, Inc.**, 357 F. Supp. 2d 644, 2005 WL 524202 (E.D.N.Y. 3/7/05).

SEX DISCRIMINATION

Transgender Discrimination: Gender

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Stereotyping

A Cincinnati police officer who was a preoperative male-to-female transgender individual was known as Phillip while on duty, but off duty was taking hormone treatments and living as a female, Philecia. The plaintiff placed high on an exam for promotion to sergeant but received much more scrutiny than the other probationary sergeants. As Philecia, the plaintiff was subjected to surveillance by the Cincinnati vice squad, and during the probationary period s/he sometimes came to work wearing makeup, lipstick, arched eyebrows, and a French manicure. Accordingly, s/he earned low scores from superiors on "command presence," which was such a subjective factor that no one on the force could agree upon exactly what it meant. The intense scrutiny caused the plaintiff severe stress, and ultimately s/he was the first sergeant in seven years to fail probation and be demoted back to police officer; another probationary officer had lower scores but was not demoted. The plaintiff sued the City of Cincinnati for sex discrimination based upon the stereotyping and the resulting demotion. A jury awarded compensatory damages for pain and suffering, back pay, and front pay, and the Sixth Circuit Court of Appeals affirmed, holding that the plaintiff "was a member of a protected class by alleging discrimination … for his failure to conform to sex stereotypes." The court cited **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), for the sex-stereotyping concept. **Barnes v. City of Cincinnati**, 401 F.3d 729 (6th Cir.3/22/05).

SEXUAL ORIENTATION DISCRIMINATION

A plaintiff alleged that her employer created a hostile work environment and fired her in retaliation for complaining of harassment. She sued in state court under the New York City Human Rights Law. The plaintiff worked as an administrative assistant in the company's legal department from 1991 until 1997. Beginning in October 1992 and continuing over the next five years, she received increasingly negative performance reviews. The employer's actions culminated in a September 1997 memorandum from her supervisor telling her that she would be terminated in 30 days if her performance did not improve. The plaintiff responded with her own memorandum to the company asserting that "the Legal Department is very hostile toward me" and that its discriminatory treatment was based on her sexual orientation. The employer argued that it could not have fired her because of her sexual orientation because it was unaware that she was lesbian. The plaintiff admitted that she had never told anyone at work specifically that she was gay, but she testified and provided other evidence that she had complained to her supervisor that she had "received gay-oriented hate notes" and that co-workers had made anti-gay comments to her. The court (Barbara R. Kapnick, J., Sup. Ct. N.Y. Cty.) found that this evidence created an issue of fact as to whether the employer knew her sexual orientation before her October 1997 memo. The employer's proffer of the plaintiff's sub-par evaluations from 1992 through 1997, in light of individual defendants' familiarity with the law on discrimination, failed to convince the court that the evaluations were anything more than a pretextual "paper trail" intended to support the plaintiff's termination. With respect to the plaintiff's hostile work environment claim, many of the acts of harassment had occurred outside the statute of limitations, while instances within the limitations period did not show clear discriminatory intent on the basis of sexual orientation; but, relying on two Eighth Circuit decisions, the court held that acts outside the relevant time period can be used as evidence to give context to acts occurring within the statute of limitations. Accordingly, the court denied the defendant's motion to dismiss on this issue. **Arthur v. Standard & Poor's Corp.**, 2005 WL 545582 (Sup. Ct. N.Y. Cty. 2/7/05).

SUMMARY JUDGMENT

Disability Discrimination

When a "street reporter" for the New York Post developed epilepsy after an injury on the job, he had to take a number of leaves, well in excess of the amount of time to which he was entitled under the FMLA. When the Post offered him various full-time desk jobs, he rejected them, stating that he was unable to work and instead needed a continued leave of absence, but neither he nor his doctors indicated how long that leave might last. Judge George B. Daniels (S.D.N.Y.) granted summary judgment to the Post, holding that an "indefinite" leave was not a reasonable accommodation and that the plaintiff was not "otherwise qualified" because he could not perform the essential functions of his job, with or without reasonable accommodation (and thus was not entitled to an accommodation)—a somewhat circular pair of arguments in this case. The court rejected the plaintiff's contention that if he was given the leave of absence he sought, he *would* be able to perform the essential functions of his job when he returned and so *was* "otherwise qualified" and entitled to the accommo-

See SQUIBS, next page

ADEA, from page 1

("RFOA"). "The RFOA provision provides that it shall not be unlawful for an employer 'to take any action otherwise prohibited under subsection (a)... where the differentiation is based on reasonable factors other than age discrimination." **Smith** at 421. The plurality restates it thus: "The RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was reasonable." **Smith** at 421.

As outlined in Part IV of the opinion, "the scope of disparate-impact liability under ADEA is narrower than under Title VII." *Id.* at 421. One, the RFOA provision affords a defense unavailable under Title VII. Two, the **Wards-Cove**, 490 U.S. 642 (1989) pre 1991 interpretation of Title VII's disparate impact language fully governs the ADEA! Thus, "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." Smith at 422. In an ADEA disparate impact case, the employee "is responsible for isolating and identifying *specific* employment practices that are allegedly responsible for any observed statistical disparities." **Smith** at 422, quoting **Wards-Cove**, 490 U.S. at 656. The plurality notes that "failure to identify the specific practice being challenged is the sort of omission that could result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances." **Smith** at 422, quoting **Ward** at 657.

Justice Scalia, in a separate concurrence, joins the plurality in holding that disparate impact is available under the ADEA. Primarily, he defers to the rule making authority of the EEOC and the EEOC's interpretation, which states that "an adverse impact on individuals within the protected age group, .. can only be justified as a business necessity." 29 C.F.R. 1625.7(d)(2004). *Id.* at 424. Justices O'Connor, Kennedy and Thomas, however, are convinced that the EEOC never "authoritatively construed the statute's prohibitory language to impose disparate impact liability." **Smith** at 426. How they interpret the regulation I leave to you.

In any event, the jury instructions I find from 1993 through 2004 relative to disparate impact in the ADEA all speak of an employment practice that is job related, based on legitimate business reasons or consistent with business necessity. The **Smith** Court has added the Affirmative Defense of RFOA and clarified that the employee must identify the specific employment practice causing the disparate impact. In my opinion, litigants in the Second Circuit have lost ground. ■

SQUIBS, from page 15

dation. **Stamey v. NYP Holdings, Inc**., 358 F. Supp. 2d 317, 2005 WL 459269 (S.D.N.Y. 2/24/05).

See also **Tomney v. International Center for the Disabled**, discussed under "Disability Discrimination."

Military Reserve Status Discrimination

An IBM employee who was involved in the security aspects of a bid to run all the worldwide computer operations of JP Morgan Chase (a $6.2 billion deal) was also a member of the U.S. Army Reserve. Although he had received good reviews, his Reserve work required him to participate in training drills one weekend a month and in annual training for two to three weeks per year. Beginning in 2002, the time required for Reserve duties increased, and his immediate supervisor said, "You're killing me," because "the Deal" was "literally on fire." The supervisor also questioned him repeatedly about how much time his Reserve duties would take. Before the plaintiff-to-be left for a special extra training mission in August 2002, he left a voicemail message for another IBM employee that he contended was a joke in the same spirit often used by employees involved in "the Deal," but which if taken literally sounded like a death threat. His tone was calm and casual, the court noted, and sounded as though he was joking with someone he spoke to often. The recipient testified that she did not feel threatened but thought the message was inappropriate and mentioned it to her superiors. When the plaintiff returned from his extra mission, he was called to Texas and questioned, then fired two weeks later, allegedly for violating unspecified business conduct guidelines. Judge Denny Chin (S.D.N.Y.) found that there was a material question of fact as to whether IBM had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4311, 4312, and 4316, and the New York Soldiers' and Sailors' Civil Relief Act, N.Y. Mil. L. § 317, by discharging him because of his Reserve status and duties. Evidence of the employer's animus consisted of the repeated questioning, the timing, the evidence of unhappiness about his service among his superiors, the lack of evidence that he really made a death threat, and IBM's shifting explanations for the firing. NELA/NY members Brendan Chao and Christopher Edelson represent the plaintiff. **Warren v. International Business Machines Corp**., 358 F. Supp. 2d 301, 2005 WL 428211 (S.D.N.Y. 2/24/05).

Race Discrimination

See **Gillis v. Georgia Department of Corrections**, discussed under "Race Discrimination."

Religious Discrimination

A Financial Services Representative for a bank, who was also "a licensed ordained minister and the founder and pastor of the Full True Gospel Tabernacle," gave $10 of her own money to a homeless man while she was off duty. The man later repaid her while she was at the teller's window of the employer bank, and she put the money into her bank cash drawer. Because of the extra money, her tray failed to reconcile at the end of the day. She was fired but was not told that it was because the tray did not reconcile. Instead, she was told that it was because her religious values created a "conflict of interest" with (unspecified) bank policies. She sued, alleging discrimination based upon age and religion, as well as a hostile work environment because of age. Judge Barbara S. Jones (S.D.N.Y.) found virtually no evidence of age discrimina-

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SQUIBS, from page 16

tion and dismissed the first and third claims but denied summary judgment on the religious discrimination claim. The policy eventually quoted by the bank said nothing about personally lending or giving money to a bank customer, so the court held that there was a genuine issue of material fact concerning the plaintiff's prima facie case and the possibly pretextual nature of the bank's asserted reason for the termination. **Burroughs v. Chase Manhattan Bank, N.A.**, — F. Supp. 2d —-, 2005 WL 497790 (S.D.N.Y. 3/2/05).

TAXATION

The U.S. Supreme Court has finally spoken about the taxability of contingent attorneys' fees to the client. And the conclusion is: The client has to pay. This case, of course, arose before the effective date of the so-called American Jobs Creation Act of 2004, which amended the Internal Revenue Code (by adding § 62(a)(19), which permits a taxpayer to deduct attorneys' fees in connection with any discrimination action), and the amendment was not retroactive. The two taxpayers whose cases were considered by the Court had not included in their gross income the contingent fees that were paid to their attorneys. One fee was paid by the taxpayer out of his recovery; the other fee was paid directly to the attorney by the employer. Both cases were litigated and then settled before verdict. The two courts of appeals below (the 9th and the 6th) found the fees properly excluded from the taxpayers' gross incomes. The Supreme Court reversed. It noted that both respondents were not helped by the deductibility of attorneys' fees because both would be subject to the Alternative Minimum Tax, and that neither would be able to take advantage of the 2004 amendment to the Code. Since the client "retains ultimate dominion and control over the underlying claim," the attorney is only his agent, and no joint venture is formed. Applying the principle of "anticipatory assignment," the Court held that "[a] taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party." The Court also considered and rejected the argument that application of the anticipatory assignment principle would be inconsistent with the purpose of statutory fee-shifting provisions, particularly if the tax on a large fee exceeds the plaintiff's monetary recovery, but the Court rather smugly stated, "We need not address these claims." Both taxpayers in the cases before it had settled and had not faced this problem, since their fees were calculated purely on a contingency basis and were not court-awarded. Besides, the Court added, in future the amendments to the Code should obviate such an issue. **Commissioner v. Banks**, 543 U.S. —-, 125 S. Ct. 826, 160 L. Ed. 2d 859 (1/24/05).

PRACTICE TIP

A plaintiff's lawyer must be proactive and must push for trial. Many plaintiffs' lawyers appear in court only to ask for extensions, adjournments, and enlargements of time. This sends the message that you have a weak case and you are hoping some miracle will occur, if you delay long enough, to save you from having to try the case because you are not ready or think you will lose. This message plays into defense counsel's hands, because delay is just what they want. Long delays are not likely to help the party that has the burden of proof. Obviously if the defense is throwing up roadblocks, failing to produce documents, not making witnesses available for depositions, and ignoring deadlines, you have to act and regretfully call their lapses to the court's attention, and you may have to ask for an extension of the close of discovery; but explain to the court that you regret having to do so because you want to go to trial (with all the evidence you need) as soon as possible. If you have thirty days to produce a document and the document is sitting in your file, produce it in one day. Clients, too, hate delaying the day of reckoning and will appreciate your impatience on their behalf. ■

DISABLED, from page 4

subject applicants to tests that tend to screen out people with disabilities.

Does that make sense? How is an employer to know if a potential employee has a history of mental illness not readily apparent in an interview? Even small businesses will be liable for civil lawsuits if rejected candidates feel they are being discriminated against.

Waiting in the ferry terminal for the 12:30 boat, it occurred to me that maybe our laws are written so poorly for a reason. Among members of state legislatures and Congress, there are more lawyers than practitioners of any other profession. The American Bar Association and the Association of Trial Lawyers spend tens of millions of dollars to influence elections. The Americans with Disabilities Act has been more of a boon to lawyers than to the disabled.

Tort reform, anyone? ■

COVENANTS, from page 6

course, if an employer has a substantial interest retaining trained employees, it could and should meaningfully protect that interest by giving those employees durational contracts. Non-solicitation provisions hardly serve the identified interest; they cannot prevent trained at-will employees from leaving or being successfully solicited by anyone other than the restrained former employee. They merely reduce job opportunities that might otherwise be presented to some of their employees.

What is the law in New York? To start with, the Donnelly Act, GBL § 340, provides:

> Every contract … whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce in the furnishing of any service in this state is or may be restrained … is hereby declared to be against public policy, illegal and void."

Nevertheless, while the law is hardly developed, the few cases thus far lean in favor of enforcing non-solicitation of employees' covenants. However, those reported cases offer precious little in the way of analysis and reveal no judicial consideration of the public policy considerations that are at the hearts of cases such as **Triangle Film** and **Schmersahl**. It appears from a perusal of those decisions that public policy considerations in favor of robust competition in labor markets may not even have been argued in those courts.

For example, in **Veraldi v. American Analytical Laboratories, Inc.**, 706 N.Y.S.2d 158 (2d Dept. 2000), a former/officer/director/shareholder sued the employer on a promissory note obtained under a termination settlement agreement, and the employer counterclaimed alleging that the former employee had solicited its employees in violation of a restrictive covenant provided for in that settlement agreement. Without analysis or citation of authority on the point, the court concluded that the counterclaim stated a cause of action. However, given that the decision was rendered at the pleading stage, it ought to be of little persuasive force in a case where a record is developed about the employer's purported interest.

In **Global Telesystems, Inc. v. KPNQUEST, N.V.**, 151 F. Supp.2d 478 (S.D.N.Y. 2001), Judge Owen relied on Veraldi in enforcing, by preliminarily enjoining the hiring of a chief financial officer, an agreement not to solicit the plaintiff's employees. **Global** involved a provision in a "Confidentiality Agreement" between competing companies entered into in connection with exploring a possible strategic transaction. It was not an agreement between an employer and former employee. A close reading of Judge's Owen's opinion reveals that it was rooted in his determination that the executive employee carrie[d] in his head important corporate and proprietary information" so that it was "unclear to [him] how disclosures, even inadvertent, can be prevented." *Id.* at 482. I suggest that **Global** is essentially an "inevitable disclosure" case, using the agreement to bolster its result, and that it has very little precedential value on the issue beyond its facts concerning the issue.

More troubling is Judge Leisure's decision in **Natsource LLC v. Paribello**, 151 F. Supp.2d 465 (S.D.N.Y. 2001) preliminarily enjoining a former employee from violating non-competition and non-solicitation of employees' covenants with his former employee. In reaching his determination on the non-solicitation aspect of the case, Judge Leisure determined that it was "unclear how a one-year bar on [Paribello's] solicitation of Natsource of employees [sic] would seriously hinder his effectiveness as a broker." Id. at 47-71. For legal support, he merely relied on the general principle that deciding the enforceability of restrictive covenants requires courts to "weigh the need to protect the employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood" (quoting from **Ticor Title Insur. Co. v. Cohen**, 173 F.3d 63, 69 (2d Cir. 1999)), and noted Judge Martin's observation (in **Ticor**, 1998 WL 355420) that "the trend in New York law has been to enforce such covenants when not unduly burdensome." Id. at 470. However, while stating in a purely conclusory manner that such solicitation "would greatly harm the firm," he neither described the harm that would befall, analyzed the purportedly legitimate interest at issue, nor balanced any such

See COVENANTS, next page

FISH, from page 3

- Be happy to see him.
- Greet him with a warm smile and show sincerity in your desire to please him.
- Listen to him. You may have a dozen important things to tell him, but the moment of his arrival is not the time. Let him talk first—remember, his topics of conversation are more important than yours.
- Make the evening his. Never complain if he comes home late or goes out to dinner, or other places of entertainment without you. Instead, try to understand his world of strain and pressure and his very real need to be at home and relax.
- Your goal: Try to make sure your home is a place of peace, order and tranquility where your husband can renew himself in body and spirit.
- Don't greet him with complaints and problems.
- Don't complain if he's late home for dinner or even if he stays out all night. Count this as minor compared to what he might have gone through that day.
- Make him comfortable. Have him lean back in a comfortable chair or have him lie down in the bedroom. Have a cool or warm drink ready for him.
- Arrange his pillow and offer to take off his shoes. Speak in a low, soothing and pleasant voice.
- Don't ask him questions about his actions or question his judgment or integrity. Remember, he is the master of the house and as such will always exercise his will with fairness and truthfulness. You have no right to question him.
- A good wife always knows her place.■

COVENANTS, from page 18

interest against the public interest in a robustly competitive labor market. Indeed, the public interest in competition appears not to have been a factor that the court considered.

At the same time, it is fairly regarded as axiomatic that post-employment restrictive covenants may be enforced only "to the extent necessary (1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases where the employee's services to the employer are deemed special or unique." **Ticor Title Insur. Co. v. Cohen**, 173 F.3d 63, 70 (2d Cir. 1999). Since it is hard to understand how restraints on the solicitation of at-will employees serve to protect against unlawfully unfair competition, it is hard to understand how the enforcement of such restraints can be reconciled with the above-quoted bedrock rule.

Conclusion

When former employees find themselves contesting the enforceability of restrictive covenants (whether as defendants or declaratory judgment plaintiffs), they are usually very concerned about limitations on competition or solicitation of prospective customers, while having little concern about the prohibitions on their solicitations for employment. Nevertheless, when litigating restrictive covenants, counsel for such former employees could well serve their clients by vigorously challenging what might otherwise be a nearly singular judicial focus on whether the covenant substantially burdens the former employee's ability to earn a livelihood. In so doing, counsel will help bring into sharp focus, and remind courts, that judicial scrutiny of all restrictive covenants is not supposed to be about merely balancing an employer's business interest against a former employee's prospect for hardship. Rather, a court's primary tasks should be to determine what is the actual business purpose that the covenant is intended to serve, and then to decide whether that purpose passes the test of legitimacy in light of a strong public interest, expressed in statutory mandates, in favor of robust competition in all markets—goods, services and labor. Refocusing the inquiry in this way may prove to be useful in challenging the enforceability of any other restrictive covenants in the same case. Along the way, if informed by good advocacy, New York courts may perhaps be persuaded to adopt the **Triangle Film/Schmersahl** antipathy to restrictions on solicitations of at-will employees, and come to recognize that employee "raiding" is a pejorative term that unfairly stigmatizes conduct that has positive social utility.

Footnotes

[1] A Missouri statute, similar to New York's Donnelly Act, GBL § 340 et seq., generally makes unlawful contracts in restraint of trade.

[2] *Arpac Corp. v. Murray*, 589 N.E.2d 640, 650 (Ill. App. 1992). ■

RETREAT, from page 2

Under the new proposals, which the Board is still developing for membership consideration, the rotation would be slowed down. The objective is to strengthen member elections and provide more stability to the Board. For more information, please contact Board Member Jonathan Ben-Asher.

Public Interest and Membership Development

The Board discussed a redoubling of efforts to work with law schools to increase our profile and get at these people before they fall into the wrong hands. If you attended a law school in New York and have continued ties with public interest or career development deans, please let Board Members Rachel Geman (otherwise known as myself) or Phil Taubman know; our sense is that directed contact from alumni will get better results that sending general letters.

The other area about which we need and want to reach out to law schools concerns diversity. There was a view that NELA/NY could reach out to minority associations in law schools, as well as minority bar associations, to strive to broaden the NELA base and, with respect to the law schools, disseminate information about our practice to groups of law students.. Please contact Board Member Adam Klein for more information.

The Board also addressed lobbying and legislation. The Board focused on five areas of lobbying and legislation: (a) changes to the NYC Human Rights Law in such areas as the relationship to federal law, the availability of fees ("Intro 22") (working off draft legislation that already exists); (b) changes to the NYS Human Rights Law to allow for punitive damages and attorney's fees (working off draft legislation that already exists); (c) stronger private-sector whistleblower protection (to be modeled off of New Jersey's Conscientious Employee Protection Act); (d) implementing protections for employees who take actions (or who refuse to take actions) based on compliance with their own professional regulations (to be drafted by NELA/NY in concert with other stakeholders); and (d) changes to the New York Labor Law to allow claims for liquidated damages to be brought on a class-wide basis (to be drafted by NELA/NY in concert with other stakeholders). We would welcome members' involvement in tracking legislation, helping to build support among professional groups and others, and in raising our profile among legislators.

Programs and Projects

Finally, the Board discussed various programs and projects to enhance our member services, such as developing discounts on office supplies and electronic services, offering additional clinical support services to assist members who are preparing for opening statements at trial or for appellate argument, creating a writing workshop, redoubling our mentoring efforts for new NELA/NY members, and—last but not least—organizing social events.

The Board members who are working on these areas will present follow-up reports at the next Board meeting, which should have occurred by the time you are reading this on the subway. ■

Workers Compensation
&
Social Security Disability

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