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Workplace Romance and Love Contracts

By Delyanne D. Barros
dbarros@outtengolden.com
and
Kathleen Peratis
kp@outtengolden.com

What better way to discuss love in the workplace than in contractual terms? Workplace romances are increasingly common and employers are aware of this. In a 2010 survey by Vault.com, almost 60% of those surveyed admitted to having an office romance and 69.7% said that the plunging economy would not deter them from engaging in an office romance if given the opportunity.[1] Not surprising in light of the reality that most of us have so little time left over after work and sleep that our place of employment is our main chance for finding a mate.

In the last few years, companies have responded to this reality by instituting what has been popularly dubbed as "love contracts." These contracts may contain several different provisions, but most commonly it seeks to establish that the two employees are in a consensual dating relationship and that they will not allow the relationship to interfere with their work productivity. One sample love contract provided that by signing the love contract,

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Litigating Employment Discrimination Cases: A View From The Bench

By Stephen Bergstein *steve@tbulaw.com* and
Helen G. Ullrich *hullrich@frontiernet.net*

Retired U.S. Magistrate Judge Mark D. Fox was appointed to the federal bench in 1988 and retired in 2008. As a U.S. Magistrate Judge assigned to the White Plains courthouse, Judge Fox presided over thousands of cases, many of them alleging employment discrimination. His unique perspective in supervising discovery and presiding over trials prompted NELA/NY to ask him about plaintiffs' strategies and choices in the employment law context.

SB: Having presided over many trials and resolved motions on employment discrimination cases, are there red flags that plaintiffs lawyers should look out for in reviewing potential claims?

FOX: I think that from a plaintiff's perspective, from anybody's perspective, you need to look at the client and try and get some idea about how the jury is going to perceive that client. If the plaintiff comes across as someone who is looking for a big payday and wasn't a really hard worker and was not the kind of employee that the jury might want to have working for them, I think it's going to be problematic for the client.

On the other hand, if the employer was less than considerate, particularly of a hard working employee, I think then the jury is going to react that way. I think most people who serve on juries are decent, hardworking people who try to do their job well and take pride in their work, and if the jury will identify with your client in the case, then that is the big hurdle in being successful. So I would look for what kind of person is your client particularly from the plaintiffs' perspective. And how is the jury going to perceive this person.

I remember a case I tried in which the plaintiff was a man who was not particularly well educated. He worked for I believe one of the railroads and had served two tours in Vietnam, which I think is still a plus with juries in terms of veteran status. Came home and got a job, it was basically a laboring job, and the reaction of the railroad people when he made his claim was really demeaning and insulting, and the jury reacted, they gave him a very substantial verdict. His point was, "I just want to work. I want to be able to work and take care of my family." The supervisory representative of the railroad was really demeaning when he spoke of him, he said "what is this guy like a kindergarten kid, we have to do this for him, we have to tell him that," and the jury didn't like it. That's one that always stayed with me.

SB: So can the lawyers on the case make a difference in the outcome of the trial, in terms of their personalities and how they approach the witnesses?

FOX: I think their skill can make a difference. I mean the cases are decided

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The NELA/NY
Calendar of Events

NELA/NY Fall Conference
8:45 – 5:00 pm
Friday, October 15
Yale Club of New York City
Mark your calendars!

Executive Board Meeting
Wednesday, November 3
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome)

NELA/NY 13th Annual Event
6 – 9:00 pm
Thursday, November 18
Club 101
Save the Date

NELA NITE
6:30 – 8:30 pm
Wednesday, December 8
3 Park Avenue – 29th Floor
(Topic to be Announced)
Save the Date

NELA Holiday Party
Monday, December 13
(Location to be announced)

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

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Items for the calendar may be submitted by calling Shelley Leinheardt:
(212) 317-2291
Fax: (212) 977-4005
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: nelany@nelany.com
Editors: Stephen Bergstein
Jonathan Bernstein
Molly Brooks

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by the facts. But how the facts are presented, particularly the skill in which the adversary's version of the facts come in, can certainly make a difference. I think that's one of the problems with the legal system today because we're getting fewer and fewer trials which in turn means there are fewer and fewer opportunities for lawyers to develop trial skills.

SB: Let's talk about settlements. Based on your experience in having resolved a lot of cases, do you find the employment lawyers set their sights too high, too low, when they're trying to negotiate settlements? Any feedback on effective negotiations for settlement?

FOX: I think there are as many answers to that as there are cases and lawyers. It's a very hard thing to quantify what's an appropriate number, particularly in an employment case. I mean, you have the lost wages issue, but in terms of the emotional distress damages if you will, that's difficult and I'm not sure, I don't think anyone's really sure on how you do it. I suppose there are some cases where you put in a settlement demand for $200,000 and the other side's offering $25,000 and you go to trial and the jury comes in with $2 million, you know, what do you do?

I suppose the answer is it takes time, you have to sit down with the client and try to get the client's expectations to be reasonable and when you arrive at a reasonable number, and you go into your settlement conference and the other side comes close, that's when you have to weigh what your chances are and what you think is going to happen at trial and that's when skill comes in. Your litigation skills and sometimes the other side makes it very easy for you. Because if you legitimately think you have a case that's worth $150,000 and they're offering $10,000 or they're offering nothing, which makes it easier, you've got nothing to lose.

The client should be made to understand or brought to understand the risks, but in terms of how you go in there, I think every judge in a settlement conference, I'm assuming you mean a conference where the judge is involved, every judge does these things differently. I know in some places there's a lot of pressure to settle from the court. I've had lawyers tell me that. I don't understand why that would be although I suppose I might be guilty of it as well. But there are some cases where we have a really clear view of what's going on and one side or the other is just not seeing it from your point of view. Of course judges are not omnipotent. And sometimes you're wrong. So for that reason I don't think there should be a lot of pressure from the bench to settle cases.

Sometimes some cases have to be tried and should be tried. When we have trials we get feedback from the public because that's of course who serves on our juries. About how the public views a particular situation or how these 6 to 8 people view it. And that can be very helpful; it also helps in the development of jurisprudence.

HGU: I think that a number of judges and litigators have bemoaned the fact that fewer and fewer cases are being tried through a jury. I'm wondering, aside from becoming educated by the public, as you just enunciated, what other values are there in trying cases to a jury and having trials?

FOX: I think when you have trials the word gets out not only to the participants but the whirlwind of the press coverage, and I think there is something to be said for public confidence in the system that I think is bolstered by jury verdicts. I know of course that there are a lot of cases, for various tactical reasons, lawyers waive the jury, but for the most part, when I was practicing law, for the most part, I wanted jury trials. And in all the time and all the cases I tried – the court clerk's office told me it was a little over 200 while I was on the bench – I know I can only think of one case where I really strongly disagreed with the jury verdict. And that was a situation where my disagreement was based on a strong feeling on the credibility of a couple of key witnesses. The jury saw it differently. And that's what juries are for. I think juries do a wonderful job and it's always been interesting to me how you can get a group of people from different backgrounds and different walks of life and different experiences and they all come together in the jury room and their collective wisdom is really wonderful.

SB: And they do it unanimously.

FOX: Yes.

SB: So you mentioned a jury verdict that really surprised you. Without naming the parties or the attorneys can you tell us why that particular verdict was shocking or surprising?

"I can only think of one case where I really strongly disagreed with the jury verdict. And that was a situation where my disagreement was based on a strong feeling on the credibility of a couple of key witnesses. The jury saw it differently. And that's what juries are for."

FOX: The two plaintiffs testified, one in particular, and I thought rather incredibly. I just did not believe his testimony and just did not believe his version of what happened and the jury viewed it entirely differently.

SB: Was that an employment case?

FOX: No, it was a civil rights case.

SB: Most of the time verdicts that came in were consistent with how you saw the case?

FOX: Almost, almost invariably. Sometimes the number, sometimes the amount of the verdicts were somewhat different from what I thought they ought to be, but in terms of outcomes, there's only one case that I can think of where I strongly disagreed, and of course that verdict stood because I disagreed on a matter of credibility, that's not a basis for setting it aside and I didn't.

SB: Let's turn to discovery. The

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President's Column

by Darnley D. Stewart,
President, NELA/NY,
dstewart@gslawny.com

Who Are We?

On the NELA/NY website there is a tab which links the reader to our description of "Who We Are." According to the website, the mission of NELA/NY is two-fold. First, we "advance[] and encourage[] the professional development of [our] members through networking, educational programs, publications and technical support." In addition, NELA/NY "promotes the workplace rights of individual employees through legislation, a legal referral service, and other activities, with an emphasis on the special challenges presented by New York's employment laws."

I think we would all agree the organization does a wonderful job as a bar association. There are multiple opportunities for professional networking through NELA/NY, whether it be at Bar Talk, after a NELA Nite, at one of our conferences or at the annual benefit. Similarly, our educational programs are some of the best I have ever attended, and our Newsletter is top-notch.

The second part of our mission at least as important as the first – to promote the workplace rights of individual employees. On a micro level, again, we accomplish this successfully in a number of ways, including working on legislation, writing amicus briefs, and running a successful legal referral service which I believe is unique among NELA affiliates.

That said, should we be taking a broader view of "promoting the workplace rights of individual employees?" This issue has been weighing on my mind because a Board member at our most recent meeting asked whether as an organization we should write a letter or issue a statement supporting the building of the Islamic Centre on Park Place. Both the City Bar and NYCLA have done so.

As has been the case throughout the country, the response to this agenda item was mixed and at moments, tense. Some Board members were in favor of issuing a statement, believing that as an organization, we should necessarily be concerned about ethnic stereotyping and the preservation of the constitutional freedom of religion. Others felt quite the opposite, both on a personal level and on behalf of their public sector employee clients. The bulk of us – including me – agreed that we should not issue such a statement because it is such an incendiary, divisive issue and because we did not feel that it was sufficiently related to our organization's mission. We ultimately voted not to issue a statement either in favor of or against the building of the Islamic Centre.

I felt perfectly comfortable with what is probably still the correct decision until I read in the New York Times the other day that discrimination claims on behalf of Muslims in the workplace have surged in recent years (up 60% since 2005) and even more so in recent months – that is, since this issue concerning the building of the Islamic Centre has arisen. Muslim workers are being called "terrorists," "camel jockeys," and "Osama," among other names, in the workplace. Others have been told they cannot wear their headscarves in the workplace, even during Ramadan. Of course, most, if not all of us, would take on these claims if these individuals came to us as potential plaintiffs. Similarly, it would be an easy call for NELA/NY to decry their treatment in the workplace as an organization. But what about the broader view? Is our organization taking a stand when an issue only touches on our stated mission, and when the principled response to an incendiary issue is not easily reached? Should we be? Like the Islamic Centre debate, there is no easy answer, but the discussion needs to be had.

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magistrate judges spend a lot of time dealing with discovery issues. What are the two or three most common discovery problems in these sorts of cases, employment cases, and what can plaintiffs' lawyers do to minimize the disputes?

FOX: I think some of the biggest problems today have to do with the electronically-stored information. Often times the clients do not understand, because they're not lawyers, and they don't understand the significance of not doing a thorough and diligent search of their records to come up with the requested information, both the electronic information and paper information. Also, I've come across a couple of times where clients have a view of the legal system that's inaccurate. They think it's trickery and gamesmanship, and I've had a couple of cases where this was put out and therefore they think if they've got something that might help the other side they should withhold it. And I think it's incumbent on the lawyers to really take the time to sit down with the client in employment cases and impress upon them, number one, disclosure is the right thing to do and that's why we do it, and number two, it's very dangerous if you withhold it because if the other side finds out – and there are times when they do – the results can be devastating to the case. Severe sanctions for withholding information can result in the case being dismissed for misconduct rather than being decided on the merits.

Roberts against Texaco was a gender and race case and the lead plaintiff was an African-American woman and the plaintiffs' allegations about some of the conduct of some people at Texaco were really more than upsetting, just absolutely improper. What happened was, there were certain records and documents that the plaintiffs kept insisting Texaco had, and Texaco kept denying it, and when discovery was complete, Texaco had an official who sat in on their board meetings and his responsibility was to take notes at the board meetings. And to make sure that he took notes correctly, that his notes were accurate, he brought in a pocket tape recorder. But apparently he recorded them surreptitiously because it didn't appear that the other people at the table knew that they were being recorded. If memory serves, shortly after discovery closed the individual was in some kind of dispute, I don't know if he was let go or resigned but he left Texaco and apparently there were some bad feelings because he turned the tapes over to the plaintiffs' lawyers and flat-out caught some people on the Texaco board in major lies. The one comment that was in the complaint is they made some comment about African-American employees "and well you know how the black jellybeans always get left in the bottom of the jar."

HGU: That was in the newspapers.

FOX: Yes it was. So anyway I was on vacation and when I came back there was a show cause order on my desk that Judge Brieant had signed and made returnable before me. I spoke to him about it of course and he said "you handled all that discovery and you're in the best position to handle it." Texaco was rep-

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resented by a talented lawyer who was absolutely caught short, I believe, I'm sure she knew nothing about this improper conduct.

SB: One more question about discovery. Any areas that you found particularly wasteful on the part of plaintiffs' attorneys when it came to discovery, pursuing information that they never really need or being too aggressive in certain areas?

FOX: I didn't see that. When we talk about discovery one of the things that sometimes gets neglected is plaintiff's obligations to provide discovery. And I've seen in a number of instances where plaintiffs' employment cases did not adequately document their attempts to mitigate in terms of finding other employment and things like that. I think that's an area that counsel need to impress upon the plaintiff as well. There are also instances I saw where plaintiffs had statements or had tape-recorded information that they do not turn over because of some reason or concern that they were going to be treated unfairly, that the company or the employer had treated them unfairly and they didn't trust the system. That's an area that the lawyer really needs to explain to the client and make sure that everybody's on the same page in terms of their obligations.

SB: Let me ask about trials. Having presided over many employment trials, what are the things that plaintiffs thought lawyers have been doing right? What do they do right at trial that other lawyers should be aware of?

FOX: I think a trial's a trial. I mean, an employment case is like any other case but I think if the plaintiff's counsel in an employment case knows the client and has been able to spend the time to prepare the client to present to the jury the client's point of view and where the client is coming from, what went into the formulation of that point of view, and let the client's personality come across. I'll always remember – it wasn't an employment case, it was a personal injury case – and the plaintiff was a woman in her forties who was an executive in a company, and during cross-examination the defense lawyer said to her, "And isn't it true that you haven't applied, you haven't claimed one single day of lost wages as a result of what you claim is this injury?" And the woman looked at him and said, "Oh my gosh, of course not, why would I do that. I've been blessed, I'm very fortunate. My employer has kept me on the payroll at full pay the whole time I was out with these injuries, the whole time I was recovering from these injuries. I've been blessed with working with this company and I didn't lose any pay so I certainly made no claim for it." The jury, the reaction of the jury as you can imagine was very positive. I think that can carry through with any plaintiff. If the jury sees the plaintiff as somebody who's really been hurt and really been damaged and is seeking to be made whole for those damages but that's all, I think juries appreciate that and would want to like the client and like the client's position. And of course, if the jury likes your client and at least the client's position you're most of the way home. Some plaintiff's lawyers have a tendency to guild the lily and try to get a result or number that's too high, and I think jurors react to that. But for the most part I think the plaintiff's employment bar, from the cases that I saw, does a good job. I mean, they have tough cases to try and it's not like a "hit in the rear auto accident" case with liability as a foregone conclusion.

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SB: No, in employment discrimination cases you have to prove intent. So are there areas that plaintiffs' lawyers can improve upon?

FOX: Well, judges always talk about preparation. The problem isn't to say did you prepare, the question is would you or how did you prepare. I was kind of a nut when I was in practice myself; I wanted to see every scrap of paper, I wanted to see every report. It takes so much time with the client to get the client to understand what is going to happen when you get in the courtroom. It takes so much time to prepare the client to be cross-examined. I wonder how many lawyers from the plaintiffs' side bring the client in and have another lawyer come in, either another lawyer from the firm they haven't met or some other lawyer come in and put the client through a really rough cross. That's one of the things I think that can be done. I suppose a lot of people do it, but I've seen cases where you know they didn't. But the biggest hurdle is the facts are what they are. I was fond of saying, "I don't write the script and I don't cast the parts, I'm a lawyer." You've got limitations in that regard. You can't make up something that isn't there, but in terms of presenting what you have it takes a lot of thought, a lot of preparation, to get your facts in order and to come up with a presentation that's logical that makes sense, that's going to be understood by the jury. I don't know what else to tell you in that regard in terms of my own experience.

SB: Opening statements, what works, what doesn't? Some people discount them, some people think you're on the way to winning the trial based on a good opening statement. What do you say about opening statements?

FOX: There were some studies done by some of the jury psychologists. They polled some juries and they found that

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an overwhelming percentage of jurors make up their minds after the opening statements. I don't know. Maybe they make up their mind and change them later. When I was in practice most of my trials were criminal cases and there were some cases where you really didn't have much to say in the opening. I think in a simple context that the opening statement should be, number one, short. Even in the most complicated case you should not go more than 20 to 30 minutes in an opening statement, in my view. It takes a lot of work to sometimes narrow the facts down to where you can make a brief opening statement and the opening statement should lay it out. When you're done with your opening the jury should be convinced that if everything you've told them is true, you've got to prevail. I've seen cases where lawyers spend a lot of time prepping the cross and prepping the direct and the opening, well I'll just get up and tell them about it. Well maybe that works for some people. I don't think it works for most. It certainly didn't really work for me.

When I was trying cases, I used to write out my opening and write out my summations. I didn't even read them but I'd write them out because it was my experience that writing them out, taking the time to put the words down, helped me to formulate the thought process.

SB: What about summation? What works and what doesn't work, particularly in employment cases?

FOX: If you have a case where you heard the facts for the first time and you got angry and if you're able to present that to the jury, then I think a little bit of righteous indignation should help. But the biggest problem that I see again is taking the time. It's awfully tough to do, I mean, you've been on trial for two weeks and you finish and you have summation the next day and there are a lot of techniques about how to organize the summation as the trial goes along. But the biggest thing that I see is, again I know cases where the whole case was lost in summation because the lawyer spoke for 2 or 3 hours, and I just don't think that's productive anymore. You know years ago, Clarence Darrow used to make summations for half a day or more. We don't have that type of jury anymore. Today, everything is wrapped up within the 60 minutes less commercials of most TV programs. I think that the studies tell us that the attention span of people on a particular issue is 7 minutes. So I think during that period of time you make your point you've got to segue into something else or a different aspect of what you're going to present. I think summations, if they're done right, that's where you get the leeway to let it all hang out. Cases can be won on summation but they can also be lost on summation. But I think preparation again is important. Whatever works for you. Some people like to record their summations and then dissect them, analyze them and decide what works best. That can be very helpful, particularly with video recordings

Getting back to the witness preparation, when you have a case that warrants it or you have video equipment, I think it's a tremendous technique to videotape your client's examination so that your client can see what they look like and hear what they sound like. I think the same is true of opening statements. I don't know if you've ever had occasion to go to some of these advocacy programs but NITA [National Institute for Trial Advocacy] does that for the lawyers, the National Association of Criminal Defense Lawyers also does it. I just taught at the NYSBA Young Lawyers Section trial academy at Cornell where we did that. It's very helpful to a lawyer, from the lawyer's perspective. Most of us have never heard what we sound like on tape or see what we look like on video and it's very helpful. It's rough, you've got to leave your ego at the door, but it can be very helpful in terms of developing a technique or your trial technique.

SB: In summation do you think lawyers should ask the jury for a specific dollar amount?

FOX: There's some case law on that. There are some jurisdictions where you're not permitted to do it. I'm not sure about asking for a specific dollar amount. This is just one lawyer's point of view. I think you can lead them to it without giving them a number because if you give them a number they may have been thinking of a bigger number, from plaintiff's perspective. A lot depends on what the testimony was. I mean, sometimes an economist will come in and they do what they do with the numbers and they come out with an opinion of whatever lost wages would be or future lost income. So the jury's heard the numbers. One of the most effective prosecutors I ever saw in the Bronx never asked the jury to convict. He asked them to do what they thought was the right thing.

"When you're done with your opening the jury should be convinced that if everything you've told them is true, you've got to prevail."

SB: Do you think juries have difficulty fixing damages awards for pain and suffering?

FOX: They don't seem to.

SB: Well they do come up with a number. So obviously they come up with a number, but do you think when they go to the jury room and they decide the case without any guidance from the judge, you know, "here's what a case might be worth," do you think they struggle with arriving at the right number for pain and suffering?

FOX: If they do, I think it's a failure of proof on the part of the plaintiff. You can give a jury enough information to allow them to come to a conclusion as to what the proper amount is.

SB: Juries aren't given charts that say "here's what a case is worth," and jurors have told us, "we don't know what to do when it comes to damages," and I guess giving them a number in summation might help, but then again

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it might be seen as presumptuous, you may not feel comfortable. I don't think we feel comfortable, Helen and I, specifically asking for a number.

HGU: What I try to do in my summations is to at least say, "well you know you need to consider lost wages and you need to consider this and you need to consider that," but then I don't wrap that up with, "and you know therefore you should be giving my client half a million bucks," that's the step I don't take.

FOX: If you're not comfortable doing it then clearly you shouldn't do it because the jury's going to pick that up. There are some cases I can think of, a huge medical malpractice, month-long trial, and on summation the plaintiff's lawyer used a chart, big sheets of white paper with magic markers as she was doing her summation, outlining the amount of damages they were looking for on each issue, but that was a case where because of the length of the trial, the jury, by the time counsel stood up to give her summation, was so angry at one of the defendant physicians, one in particular, they let several other physician defendants out of the case, but one in particular was clearly liable and pretty arrogant and the jury didn't like him at all, so they were at that point receptive to hearing some big numbers. But for the most part I agree with you and especially if you're not comfortable with doing it. The jury puzzles it out and they really do very well.

SB: We talked about the importance of the plaintiff at trial and witness preparation. Is it ever advisable not to put the plaintiff on the stand first and to call a different witness to lead off the trial?

FOX: I think there are cases when it is. It all depends on your facts. I don't think there should be any fast and hard rules in terms of how you're going to proceed. There certainly are cases where, for example, you may want to call one of the defendants as your first witness. You made your opening statement, the jury knows what the case is about. If you've got a defendant who was really obnoxious, clearly at fault, and unpleasant and rude, and you've got that documented, you've got the proof of it, you may want to call that person first. Whatever sets the proper theme for your case

SB: What about crossing adverse witnesses. I've heard judges suggest that it's better with an adverse witness to ask open-ended questions provided you know the answers, but most lawyers will ask leading questions with adverse witnesses. What do you think?

FOX: It depends on the adverse witness. You depose these people first so you have an idea of what the person's like. If you've got someone who you think is going to be candid, why approach them in an adversarial way when you can get the information without it.

SB: Is it more persuasive to a jury when you have an adverse witness and you're able to get them to make admissions through open-ended questions?

FOX: I don't know. I think it's more a question of just getting information out to the jury. I cross examined a police officer, in a case I tried years ago. One of the police witnesses I thought had withheld some information, had not taken some important steps, and had really fabricated parts of his testimony. Then another investigator came on for a very limited purpose having to do with identifying a vehicle. It was a rape case, and I adopted him as my own witness, took him completely off his direct, and asked him, "You are not the lead investigator in this case?" He said, "No, I wasn't." So I said, "But you have been the lead investigator in other allegations of sex crimes?" He said, "I have." I said, "in your professional opinion, is it always a good idea to send the victim's clothing for laboratory analysis in an allegation of a sex crime case?" He said, "absolutely." And the judge said to me afterwards, "You took an awful chance with that witness." I said, "not really, Judge, because I've known him a long time, he does not lie. That was his reputation, a sterling reputation that's with him to this day." So it depends on who the witness is. If you can get the information without being hostile and adversarial, you should, because jurors don't like nastiness and overbearing conduct. That's my view. I think if you start off pleasantly and politely and the witness is nasty or biased, and then you let them go, and let them go a little more, and you watch the jury. If the jury appears to be getting annoyed, like why isn't this lawyer doing something, at that point of course it's great to jump in and do what you have to do. But if you can do it professionally and politely I think it's always better. I think jurors like that. They like lawyers who act professionally and courteously.

SB: I've heard you say that while good trial lawyering is important you can't win without the horses. So to what extent is sheer lawyering skill enough to prevail at trial?

FOX: Without the facts?

SB: Well a marginal case or without the facts. This analogy about not winning without the horses, what did you mean by that?

FOX: Jurors want to do the right thing and I think they want to find out what the facts are and they want to decide them properly based on whatever legal structure the court gives them. Haven't you had cases where you won and you felt if you had been on the other side you could've won it for the other side?

SB: Sure.

FOX: There's the answer. I think there are close cases where advocacy matters but if the case is overwhelming on the facts even an inept lawyer can probably fumble through and win it.

SB: What does it take for a plaintiff to really win over a jury when you have serious credibility disputes?

FOX: That's where advocacy comes in. I think if the jury – if it can be demonstrated to the jury – that key witnesses on opposite sides of the case are being less than truthful and less than candid I think jurors are offended by that. And I think that's the area where you can do the most good.

SB: So in these cases, these employment cases, where intent is an issue and it's all about credibility, can the plaintiff reasonably expect to win at trial if defendant's counsel can impeach his or her credibility on a few occasions? At what point does the plaintiff fatally lose credibility in a "he-said she-said" case?

FOX: I think it just depends on how the facts go. I don't know where it happens or how it happens. But you can see it happening because if you observe the

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jurors you can see it in their faces and their body language.

SB: In Title VII cases there's been a debate in the Second Circuit about pretext-plus, remember Fisher vs. Vassar [114 F.3d 1332 (2d Cir. 1997)]? And the question will always be, how much do you need to win? Is that an academic exercise, pretext-plus? In your experience when is a plaintiff able to win at trial strictly on the basis of sheer pretext? You know, as opposed to stray remarks or reduction in force that impacts women? I'm talking sheer pretext. Can a jury appreciate the theory that pretext may create an inference of discrimination or are they really looking for something more than simply inconsistent explanations or a bad sequence of events?

FOX: I think it depends on the jury. I think that the importance of pretext in a case for the plaintiff's perspective is it's a major credibility factor. I mean, the jury's going to listen to the whole thing and I think jurors may tend to identify if they're employers, or if they're employees, with the party in a sense of, "if I was this employee how would I feel if this happened to me." Or, "if I was this employer faced with these circumstances how would I deal with it and how would I deal with the impact on my employees if I have to lay people off or cut hours or cut back." I think jurors look at all sides of the trial. And they make the determination of who's being candid with them. And if the jury finds pretext well then obviously the employer is not being candid and they've floated this balloon up for us, this set of facts, which we don't believe. And if it's pretty obviously pretext I think jurors react to that. Whether it's enough to bring it over the top, depends on how the instructions come in and how the jury reacts to the instructions. It's been my experience they try very, very hard to follow the legal instructions. Different judges deal with it in different ways. I used to give them copies of the instructions.

SB: What about damages? What can plaintiffs' lawyers do in terms of maximizing damages, or are they doing everything they can now?

FOX: Again I think it depends on the skill of the particular lawyer. I mean, how do you prove, well you know lost wages and so forth that's pretty clear cut, but how do you prove the emotional damages.

SB: Yes, I'm focusing on emotional damages because there are not going to be documents unless you have medical records.

FOX: And of course without a medical expert you're limited as to how much you can recover on emotional distress damages. I mean, the plaintiff can take the stand and say they lost, had difficulty sleeping and upset stomach and that sort of thing, but without some medical documentation and testimony there was case authority on this. I haven't seen any recently but around the time I left the bench, there was case authority that was 10 to 15 thousand dollars or 20 thousand was pretty much the upper area.

HGU: If there's no evidence, but I don't think you're necessarily required to have medical evidence, you can have evidence of family members. I don't know if you remember the Toni Masten case, that was tried before you, it was one of my very early trials; she was a police woman in the Village of Monroe, and we put on her former boyfriend who testified very poignantly that how this whole series of incidents destroyed their relationship. And we got a pretty hefty jury verdict. And that always comes to mind when I think about how you prove emotional damages, who do we get on that witness stand who's going to be able to really articulate it.

FOX: Well the question of course is who's impacted by it. You can have the individual talk about how they were upset and difficulty sleeping and eating and difficulty doing things they have to do all day and the jury hears that and, okay, how does that come across. But who else was impacted? If you've got a woman there was impact on her children, for example, and on the spouse or on the significant other. Having those people come in and talk about it can be very effective in terms of giving the jury a complete picture of the impact on the entire family unit. I don't know what else you can do, you're really limited in terms of what you can do. Whatever you can do to give the jury a complete picture rather than just an abstract, "okay so they had difficulty sleeping and it went on for a couple weeks," how much is that worth?

SB: When should lawyers hire experts for that purpose?

FOX: Well, what happened when the client comes in when you're first signing the case up? What has the client indicated about their situation? Are they still having emotional difficulties? If they are, if they have in the past, did they get treatment and if they're still having problems maybe it's worth having the client evaluated. In terms of experts, there are as we all know, experts who have a reputation for working for one side or the other, either plaintiff's expert or defendant's expert. But what I always thought was that the best expert would be whoever the treating physician was in a medical case. If the treating physician takes the stand and says, "look I don't usually do this, in 30 years of medical practice, this is only the fourth case I've testified on," I think that has much more of an impact on the jury. But I think it depends on what the client is telling you. If the client tells you that, "yeah I had difficulty, I was depressed for a couple weeks, but I got another job and now I'm feeling better," then that's pretty much it.

"What I always thought was that the best expert would be whoever the treating physician was in a medical case. If the treating physician takes the stand and says, 'look I don't usually do this, in 30 years of medical practice, this is only the fourth case I've testified on,' I think that has much more of an impact on the jury."

HGU: You're not going to get a whole

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NELA/NY Helps Select New York State Judges

By Lee Bantle

About five years ago, NELA/NY was "given a seat" on the judicial screening panel for Supreme Court and Civil Court Judges in New York county. This occurred through the lobbying efforts of the Judiciary Committee, and particularly our members Patrick DeLince and Josh Friedman. Now, whenever a judicial vacancy occurs, NELA/NY is asked to appoint a representative to sit on the panel.

While there is no guarantee we will be invited to participate in the future, we have been appointed to each panel since we first got a seat. This is no doubt due to the talented members we have asked to serve on that panel: Danny Alterman, Herb Eisenberg, John Beranbaum, Patrick DeLince, and Jan Goodman. There is currently a screening panel up and running and our representative is Chaim Book.

Janice Goodman described how the process works: Our panel was broken into sub-committees with each sub being responsible for interviewing a select number of applicants, and checking their references. We would report our findings to the full panel which would then interview the candidates and all panel members were given an opportunity to question the candidate. At the end there is a secret ballot and the panel is asked to approve 3 candidates for each vacancy. Those are the candidates who are voted out and recommended to the party. Party leaders then select from this list.

"I think our participation is very valuable," said Danny Alterman. "Members of the bar and potential applicants for judgeships and renewals become aware of the incredible work that NELA does and also the scope and breadth of the NYC Human Rights Law and how it is more expansive than the State and Federal Laws."

Danny's sentiments were echoed by Patrick DeLince, who said, "Although a lot work, you get to contribute to the public good. When on the committee you realize that you can help sway group opinion. Employment lawyers are really unique to the selection committee."

"I have been very pleasantly surprised by the lack of politics and political considerations," commented our current representative, Chaim Book. "My co-panelists are very thoughtful, committed, hard-working and interested in a high quality judiciary."

NELA's involvement, however, does not come cheaply. "There is an extraordinary amount of work involved," Janice commented. "We met weekly for 6 weeks, for at least 3 hours per session, but it was not unusual to meet until 10 p.m. In addition we had responsibility for meeting with our assigned individual candidates." According to Danny, sitting on the screening panel was "exhausting and a huge time commitment but worthwhile and necessary."

So, a big thank you to all our representatives who served on the screening panel!

And for the record, the Judiciary Committee is composed of myself, Linda Dardis, Patrick DeLince and Josh Friedman. We are always looking for new members who are willing to work. Our next project is to draft new jury charges for the New York State Pattern Jury Instructions which reflect the differences under the New York City Human Rights Law. ■

ANNOUNCEMENTS

NELA member, Ashley Normand
was married on
June 19, 2010

CONGRATULATIONS ASHLEY

Congratulations to NELA member,
Michael Scimone, and his wife,Caroline,
on the birth of their son, Colin James,
born June 2, 2010

CONGRATULATIONS DARNLEY!

We are so pleased to announce the marriage of
Darnley Stewart to Rita Hernandez on
October 8, 2010

CONDOLENCES

Phil Taubman's mother, Claire Taubman,
passed away on September 22, 2010
Our deepest sympathies Phil!

ROMANCE, from page 1

the employees "notify the company that [they] wish to enter into a voluntary and mutual consensual social relationship" which they "are both free to end . . . at any time. Should the relationship end, [they] agree that [they] will not allow the breakup to negatively impact the performance of [their] duties."[2]

The contract can also refer to the company's sexual harassment policy and "that entering into the social relationship has not been made a condition or term of employment."[3] Most important to employers, the contract may limit the grievance process to arbitration only, potentially limiting an employee's right to file a lawsuit in court.[4]

Although employers may point to productivity reasons and avoiding distraction in the workplace as a reason for instituting such contracts (which doesn't really make much sense when you think about it), the more obvious reasons is to limit an organization's liability in the event that the romantic relationship sours. Even though such a scenario is rare, some employers erroneously believe that such a contract would protect them from any potential liability.[5] (It might actually do the opposite if the policy is not enforced and a spouse blames the company for not preventing the employee-spouse from fooling around with the secretary).

One survey of 617 enterprises revealed that 4% of people who were involved in an office romance that later failed actually filed a formal complaint.[6] To some, this seems so small that love contracts may seem like overkill[7] and impractical[8]. But 4 % of all employees across 617 enterprises still represent a lot of employees and a lot of formal complaints.

In addition, complying with such a contract would require the couple reporting their relationship to Human Resources when it begins and when it ends, which could potentially pose privacy issues.[9] Then again, it is possible for an employer to be well aware of an employee's blossoming work-romance if the employee has been using company-owned equipment to communicate with their love-interest. Most employers have a company policy notifying employees that their computers and company-issued blackberries and iPhones are subject to inspection. This means that an employer may be able to search personal messages transmitted on company-owned equipment which may lead to a secret office romance being exposed.[10] As a result, the employer may require the employees to sign a love contract.

"Employers should not view all voluntary workplace romances as a potential liability. First, nothing will stop them, and besides, office romances can improve the workplace—so long as they are voluntary. Employees whose relationships result in marriage are generally happier, thus more productive in the long run."

Furthermore, this invasion could have a negative effect on morale and cause employees to feel stifled.[11] The terms of the love contract usually includes a provision that the consequence of violation is termination. One might ask whether such a term is legally enforceable. However, the fact is most employment is "at will" so the employer usually does not need a reason to terminate the employee. Nevertheless, what the employer gets out of such a contract might be a defense to the employee's claims of discrimination or other legal violations. Employees might try to assert that the contract is void because it is the product of economic duress—they feared losing their job or being subjected to retaliatory actions.[12] One court, the Supreme Court of Montana, hinted that duress was a factor in rejecting the employer's attempt to use a love contract as an affirmative defense against a sexual harassment claim.[13] It was held that the love contract was "a contract of adhesion, given the disparate bargaining powers of supervisor and subordinate."[14]

This is not to say that relationships between supervisors/managers and subordinates should be allowed or unmonitored. Such relationships can more readily lead to claims of "sexual favoritism" in terms of promotions, job assignments and evaluations and of course sexual harassment claims.[15] In any event, employers should not view all voluntary workplace romances as a potential liability. First, nothing will stop them, and besides, office romances can improve the workplace—so long as they are voluntary. Employees whose relationships result in marriage are generally happier, thus more productive in the long run.[16]

Instead of employers injecting themselves into what could be an extremely thorny and gray area, they should focus on instituting and enforcing their anti-harassment, retaliation, and discrimination policies. Increasing awareness through sexual harassment training or providing the opportunity of transfer for managers or supervisors who are dating subordinates are ways of dealing with office romances without the need of a contract. ■

1 Vault's 2010 Office Romance Survey, Vault.com, available at http://www.vault.com/wps/portal/usa/!ut/p/c5/hY1dC4IwGIV_UbzvHNv00qXmQNfKIvUmRogM_Ogigv59elUU1jmXz_mAGiYP9u5ae3PjYDsooeZnTgJdiNTDrTEM1VoeYrM3NCJi4tU739EIFRxlNCN_2qf5bznB2Sf_3p85LijE3_tHAjodwYqqMUr5ctNgEppkssEPT_kUHVNay8PuPYlOrVKngFgSbk!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfNjE5TlM3SDIwT1BQNTBJQ0JURVBSUDNEVTE!/?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/Vault_Content_Library/other_content/workplace+survey/Office+Romance+Survey+2010/ (last visited August 2, 2010).

2 Caught in the Pact; Couples involved in Office Dalliances Required to Sign 'Love Contract', SFGate.com, December 2, 2001, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/12/02/AW129618.DTL (last visited August 2, 2010).

3 Id.

4 The Scoop on Love Contracts, About.Com, June 1, 2008, available at http://humanresources.about.com/b/2008/06/01/the-scoop-on-love-contract-policies.htm (last visited August 2, 2010) [hereinafter Scoop on Love Contracts].

5 Managing Workplace Romances Requires More Than a Love Contract, Palaborand employmentblog.com, May 19, 2008, available at http://www.palaborandemploymentblog.com/2008/05/

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lot more out of it.

FOX: Nor should you.

SB: So a general question about trial lawyering, what are some of the top three do's and don'ts for lawyers at trial?

FOX: Preparation of course, I always think about preparation. I think it's important to convey to the jury that you as a lawyer respect them and that you in turn want respect from them and demand respect from them and also from your adversary.

I think it's always dangerous to attempt to come in there like a gunslinger. Being short or rude with your adversary, I don't think jurors like that. There are some lawyers who think that they're going to gain points with the jury by showing how tough they are. Sometimes they confront the court and take the court on and that's usually not a good idea because jurors tend to identify with the judge. Especially, again I'm only speaking from my own experience, but I used to tell jurors they're judges, they're judges of the facts. My role is to be the judge of the law, to instruct them as to the law that applies and to see to it that the trial is properly conducted. But they're also judges. They're going to determine the credibility of witnesses so they tend to identify with that. And lawyers who displease the judge and need to be reminded to behave appropriately, I don't think that such an admonition does you any good. I think it's helpful to be professional, you can still be aggressive, in terms of representing your client's interests, but in order to be aggressive, you don't have to be rude to people who are involved in the trial, particularly your adversary. To me that lack of courtesy is the biggest "don't" and we've all seen lawyers who do that. I don't understand what they think they're gaining by it.

SB: Pretrial, a case will not get to trial if summary judgment is granted. What can the plaintiff's lawyers do to persuade the judge that the case is trial worthy, that summary judgment is not warranted?

FOX: Well that's not the standard, the standard is are there issues of fact outstanding which require a trial.

SB: Right. But how can they deal with that on their motions?

FOX: I think you need to present enough facts, assuming you have them. But presenting the facts, particularly to show that there is a question about the intent of the employer. I assume you're talking about plaintiff's perspective. If you can show the court that there are fact questions based upon all this evidence, they did this they did that, they said that, they said this, there certainly is an issue here in terms of what they intended to do when they did it. And that's a jury question. You just need to take the facts and go on them and then demonstrate to the judge how these facts would lead, we think lead to one conclusion, but it's arguable about what that conclusion is and you're not usually going to get summary judgment on these facts. At least there's enough here to say it requires a trial to resolve.

SB: How should the lawyer develop the facts for the judge? In the brief with the facts and the law, or devote the brief solely to the law and develop the facts in the Rule 56 statement or attorney's affirmation that summarizes the evidence. What did you prefer as a judge?

FOX: The 56.1 statement to me was always something that was a good reference point. Some lawyers don't do the 56.1 properly; they don't give you the

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articles/discrimination-harassment/managing-workplace-romance-requires-more-than-a-love-contract/ (last visited August 2, 2010) ("Love Contracts have limited utility absent a broader policy and training approach").

6 Love and Romance in the Workplace, Business Know-How.com, 2005, available at http://www.businessknowhow.com/manage/romance.htm (last visited February 9, 2009).

7 Love, Contractually, CBS News, May 17, 2005, available at http://www.cbsnews.com/stories/2005/05/17/eveningnews/main696022.shtml (last visited August 2, 2010) [hereinafter Love, Contractually] ("If you're looking for a love poem, don't come to an attorney. But even some attorneys see the 'love contract' as overkill.").

8 Doing the Love Contract, HR.com, June 2, 2003, available at http://www.hr.com/hr/communities/legal/workplace_regulations/doing_the_love_contract_eng.html (last visited August 2, 2010) ("Many lawyers and professional HR people are coming to the opinion that company policies that just prohibit any kind of romantic attachment between employees aren't practical to enforce and often cause disruption and inefficiency in the workforce.").

9 Scoop on Love Contracts, supra, ("any love contract policy requires disclosure of a romantic relationship to Human Resources"); Andrea Kay, Would you sign a 'love contract'?, Honolulu Advertiser, April 23, 2007 (on file with author) ("the biggest consequence for the worker is that a workplace romance gives an employer an excuse to probe the intimate details of your personal life").

10 Quon v. City of Ontario, No. 08-1332, __ S. Ct. __, 2010 WL 2400087 (June 17, 2010) (a public employee's text messages on a city-owned pager may be subject to a reasonable search without violating the Fourth Amendment).

11 Love, Contractually, supra, ("But some say a love contract is something only a lawyer could come up with. 'I think it makes a relationship kind of cold . . . I'd almost want to have it more romantic and secret.").

12 Scoop on Love Contracts, supra, ("employees can always charge that they were pressured into signing the love contract at a sensitive time during their employment.")

13 Williams v. Joe Lowther Ins. Agency, Inc., 177 P.3d 1018, 1020, 341 Mont. 394 (2008).

14 Williams v. Joe Lowther Insurance Agency, Inc., HRC Case No. 0041010741, at *17 (Mont. Dep't of Lab. & Indus. Mar. 7, 2005), available at http://erd.dli.mt.gov/humanright/decisions/finalorders/2005pdf/williamsfad.pdf (last visited August 2, 2010).

15 When Cupid Strikes at the Cubicle, TheNewYorkTimes.com, April 9, 2010, available at http://www.nytimes.com/2010/04/11/jobs/11career.html (last visited August 2, 2010); From Love to Lawsuits, Expert Advises Against Workplace Romance,Fogcityjournal.com, April 24, 2008, available at http://www.fogcityjournal.com/wordpress/2008/04/24/from-love-to-law-suits-expert-advises-against-workplace-romance/ (last visited August 2, 2010).

16 See, e.g., Cathy F. Bowen, Rama Radhakrishna & Robin Keysor, Job Satisfaction and Commitment of 4-H Agents, 32:1 J. Extension (1994), available at http://www.joe.org/joe/1994june/rb2.html (last visited August 2, 2010) ("Job satisfaction of agents was significantly related to . . . marital status."); Charles N. Weaver, Sex Differences in the Determinants of Job Satisfaction, 21 Acad. Mgmt. J. 265 (1978) (implying that serious workplace romance benefits the romantic coworkers); C. Carnall & Ray Wild, Job Attitudes and Overall Job Satisfaction: The Effect of Biographical and Employment Variables: Research Note, 11 J. Mgmt. Stud. 62, 66 (1974) ("Marital status appears to have a relatively substantial effect on the relationship of self-actualization and job satisfaction and on the overall satisfaction and attitudes to supervision, personnel/industrial relations, training, social peer relations and the amount of work and effort required."). See also Andrea Kay, Would you sign a 'love contract'?, Honolulu Advertiser, April 23, 2007 (on file with author) ("[C]o-workers who spend more time at work, have higher motivation, fewer sick days and less turnover").

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Anne's Squibs

by Anne Golden
ag@outtengolden.com

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

Thanks to Jennifer Donohue, an associate in the Colorado office of Outten & Golden LLP, for her help with these squibs.

If you have (or come across) a decision that may be interesting or useful to members of NELA/NY, send it to me: ag@outtengolden.com, or fax 646-509-2061.

AGE DISCRIMINATION

Reduction in Force

The Sixth Circuit affirmed a grant of summary judgment to the employer in an age discrimination case because the plaintiff failed to establish a prima facie case of age discrimination under the heightened pleading standard required by that circuit in reduction in force (RIF) cases. Plaintiffs in age discrimination cases must set forth evidence in the complaint alleging four elements: (1) the plaintiff was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he was replaced by someone outside the protected class. *Martin v. Toledo Cardiology Consultants, Inc*., 548 F.3d 405, 410 (6th Cir. 2008). The Sixth Circuit requires a heightened pleading standard on the fourth factor for plaintiffs in RIF cases and requires them to provide additional direct, circumstantial, or statistical evidence showing that the employer singled out the plaintiff for discharge for impermissible reasons. In this case, the court affirmed the district court's determination that the plaintiff failed to meet this heightened pleading standard, and held that there is no prima facie case of age discrimination when the plaintiff's former work is redistributed among existing employees who already perform related work. *Johnson v. Franklin Farmers*, 2010 WL 1994853 (6th Cir. May 19, 2010).

See *Barry v. City University of New York,* discussed under "Immunity."

See *Yee v. UBS O'Connor, LLC*, discussed under "Summary Judgment."

ARBITRATION

Agreement to Arbitrate

The Third Circuit Court of Appeals affirmed a Pennsylvania district court's determination that a shareholder/director cannot be compelled to arbitrate her civil rights claim pursuant to a corporate policy that she had never seen or consented to. The court determined that Pennsylvania law applied in the case, and determined that the factors requiring arbitration pursuant to the Federal Arbitration Act include: (1) the existence of a valid agreement to arbitrate, and (2) a type of dispute that falls within the scope of the arbitration agreement. *Trippe Mfg. Co. v. Niles Audio Corp*., 401 F.3d 529, 532 (3d Cir. 2005); *Quiles v. Fin. Exch. Co*., 2005 PA Super. 250, 879 A.2d 281, 283 n.3 (Pa. Super. 2005). The plaintiff in this case had never received or signed a copy of the corporation's arbitration agreement. The court found that the employer could not enforce the arbitration agreement against plaintiff because there was never a mutual manifestation of an intent to be bound. Without having read and signed the arbitration agreement, the plaintiff could never have explicitly agreed to arbitrate her claims. *Kirleis v. Dickie, McCamey & Chilcote, P.C*., 560 F.3d 156 (3d Cir. 2009).

Payment of Expenses of Arbitration

The worm turned when an employer lost its objection to having to pay expenses of arbitration over a ceiling of $3,000 in accordance with an employment agreement. The employee was a mortgage sales manager for the employer, a mortgage broker, and the employment agreement capped at $3,000 the employee's responsibility for fees and expenses associated with an arbitration of any dispute between the parties. The employee paid $3,000 toward arbitration pursuant to AAA, but the employer stopped paying after only $731.25, leaving an outstanding balance of $23,968.75. The arbitrator, Rosemary Townley, issued a "Suspension for Non-Payment Order," and the employee petitioned before Justice Randy Sue Marber (Supreme Court, Nassau County) for an order directing the employer to pay. The employer argued that the fee-splitting arrangement should be declared unenforceable as a matter of public policy. It claimed that when its principal signed the employment agreement, which the employee's attorney had drafted, she did not have a lawyer and did not understand what she was signing. The court noted that the employer had never objected when it received the arbitration notice or later when it received notice of the AAA's fees due, and that the employer had participated in the arbitration process, thus waiving its objections. In fact, it had taken various actions that increased the costs of the arbitration. Matter of *Matarazzo v. L.R. Royal Inc*., 2010 WL 2569159, N.Y.L.J. 7/7/10, p. 26 col. 3 (Sup. Ct. Nassau Cty. June 25, 2010).

Unconscionability

The Second Circuit Court of Appeals has held an agreement to arbitrate unconscionable, adhesive, oppressive, and thus unenforceable – in a non-employment case, under California law – but it's a start. The plaintiff, in a putative class action, was a student loan borrower who alleged that the defendants had engaged in fraudulent and deceptive practices in connection with the solicitation, consolidation, and servicing of student loans. Several years after he graduated from law school, he responded to a solicitation from the defendants offering to consolidate his student loans in a single loan, which he was to repay over approximately 29 years. The principal amount of the loan was $52,915.49, but over the 29 years he was to pay a total of $153,712.52, including interest. Then he discovered that if his payment

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was received before the 14th day of the month, it was applied solely to interest and did not reduce the principal, and he sued. The defendants asked the district court (Thomas P. Griesa, S.D.N.Y.) to stay the action and compel arbitration, on an individual rather than class basis, and the district court denied their motion because under California law, the arbitration provision of the loan agreement was unconscionable and thus unenforceable; the defendants appealed. In an opinion by Judge Amalya Kearse, joined by Judges Jose Cabranes and Chester Straub, the court of appeals held that the loan agreement with its arbitration clause contravened California law and was not preempted by the Federal Arbitration Act. The district court's decision was affirmed. *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. July 12, 2010).

ATTORNEYS' FEES

New York State Equal Access to Justice Act

A female former New York State Trooper sued based upon gender discrimination, sexual harassment, and retaliation, in violation of (inter alia) the New York State Human Rights Law. A jury found in her favor, and the judgment was affirmed. She and her attorney moved for an award of attorneys' fees and expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86. The New York EAJA was enacted in 1989 "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain civil actions against the state of New York." Eligible parties include individuals "whose net worth, not including the value of a homestead …, did not exceed [$50,000] at the time the civil action was filed." CPLR 8602(d)(i). The Appellate Division, Fourth Department, found that based on its plain meaning, the statute applied in this case. The decision was 3 to 2: Justice Peradotto wrote the opinion, and Justices Green and Gorski concurred; Justice Scutter, joined by Justice Carni, dissented. *Kimmel v. State of New York*, 2010 WL 2436503 (4th Dep't June 18, 2010).

Proportionality Rejected

See *Lewallen v. City of Beaumont*, discussed under "Constitutional Law."

CONSTITUTIONAL LAW

Section 1983

A female specialist in a municipal police department who was passed over for the position of detective had to overcome a number of hurdles in order to get and keep her jury verdict and fee award. The detective position carried the same salary, so the plaintiff had to show that it would have been a promotion; she proved that she was more qualified than the male applicants who were selected over her (even though the Fifth Circuit Court of Appeals held that she did not have to make that showing in order to prove sex discrimination); she had to show that the sex-based adverse employment action of which she complained was causally connected to a policy, custom, or act of an official policy maker; and she had to show that the custom or policy was the "moving force" behind the adverse employment action. The court of appeals held that she had proved all these things. The jury awarded her $75,000 in past and future compensatory damages, but the court of appeals vacated the $25,000 in future compensatory damages as unsupported by the evidence. The court affirmed the award of $428,421.75 in attorneys' fees and $15,873.11 in costs, holding that the fee award did not have to be proportionate to the damages awarded to the plaintiff. *Lewallen v. City of Beaumont*, 2010 WL 3303756 (5th Cir. Aug. 23, 2010).

DAMAGES

Punitive Damages

See F*ischer v. United Parcel Serv. Inc*., discussed under "Evidence."

DISABILITY DISCRIMINATION

ADA Amendments Act

This may be the first litigated violation of the ADAAA. The court held that the Act applied because the plaintiff was first rejected from work on January 2, 2009, the day after the Act took effect. Observing that the Act was needed because of courts' "parsimonious" interpretation of "substantially limits," the Massachusetts district court observed that "Congress took particular umbrage at *Sutton* … and *Toyota Motor*." The plaintiff here alleged that his complete blindness in one eye inhibited two major life activities, seeing and working. The court stated that "[a]lthough [the plaintiff] might have done a better job of providing details in his Complaint describing the precise nature of his 'substantial limitations,' enough is pled to satisfy the relaxed disability standard of the Amendments Act." In saying so, the court recognized that meeting the *Twombly* standard on the issue of disability should now be easier. In addition, the court noted that a plaintiff who alleges that he was "regarded as" disabled is no longer subject to a functional test as the Supreme Court had said in *Sutton*. Finally, the court held that the affirmative defense of "direct threat" "is fact-laden" and "simply has no place in a motion to dismiss." Thanks to Brian East of Austin, Texas, for this squib. *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234 (1st Cir. March 25, 2010).

Independent Contractors

The Ninth Circuit Court of Appeals has held, in a case of first impression, that a doctor who was an independent contractor rather than an employee of a medical center could still assert a disability discrimination claim under the Rehabilitation Act. The medical center had refused to accommodate his request for reasonable accommodation of his sickle cell anemia. When it learned he had the disease, it told him it would not be able to accommodate his operating-room and call schedules. He declined to accept this condition of employment, effectively canceling the contract the medical center had offered him, and sued for breach of contract and disability discrimination. The district court, ruling that he was an independent contractor and that independent contractors were not protected by the Rehabilitation Act, granted summary judgment, and he appealed. The court of appeals began its analysis by noting that to answer the question before it, "we must

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decide whether § 504(d), which refers to 'the standards applied under title I of the Americans with Disabilities Act … as such sections relate to employment,' incorporates Title I literally or selectively." The court concluded, agreeing with the Tenth Circuit and disagreeing with the Sixth and Eighth, "that § 504 incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I in toto, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor." (Note, the medical center has petitioned for certiorari, and because of the circuit split it would not be surprising if it is granted.) NELA/NY members Gary Phelan and Seth Marnin represented the plaintiff. *Fleming v. Yuma Regional Medical Center*, 587 F.3d 938, 22 A.D. Cases 1033 (9th Cir. Nov. 19, 2009).

Reasonable Accommodation

A paper inspector who asked for a two-week unpaid leave to see a doctor for a bone spur in his foot lost his job instead. He sued, claiming age and disability discrimination, and alleging that the leave was a reasonable accommodation that had been unlawfully denied him. The Second Circuit Court of Appeals held that he had failed to make out a prima facie case that the leave would have been a reasonable accommodation, because there was no indication that he would have been able to return to work at the end of it. Indeed, his doctor (in order for him to qualify for a disability retirement option) had said that he was "totally incapable" of doing his job and that, if he had surgery, it would be at least 2-3 months until he could return to any kind of work, even with restrictions. Although the court of appeals stopped short of holding that a leave could never be a reasonable accommodation, it stated that in such cases there had to be a showing that the accommodation would enable the employee to do the essential functions of his job "at or around the time at which it is sought." *Graves v. Finch Pruyn & Co.*, 353 Fed. Appx. 558, 22 A.D. Cases 1039 (2d Cir. Nov. 17, 2009).

ANNOUNCEMENTS

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

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

Please e-mail Shelley
nelany@nelany.com

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

At the other end of the leave-of-absence spectrum, a New York City employee with breast cancer asked for a one-year leave, and the city similarly terminated her employment, refusing to give her leave beyond her FLMA twelve-week entitlement. The motion court (Carol Robinson Edmead, J. Supreme Court, New York County) dismissed the complaint on its face, but the Appellate Division, First Department reinstated it. In an opinion by Justice Rolando T. Acosta, joined by Justices David B. Saxe and Dianne T. Renwick, the Appellate Division held that the request for a reasonable accommodation required an individualized interactive process, not the across-the-board uniform policy the city cited as its reason for the denial. The court also held that the plaintiff had sufficiently pleaded a cause of action for disability discrimination under both statutes, separate and apart from the duty to reasonably accommodate. The court engaged in an extended analysis of the broad protection of the NYCHRL after the Local Civil Rights Restoration Act and faulted the dissent (Richard T. Andrias, J.P.) for analyzing that claim as though the law were a carbon copy of the federal and state counterparts and for viewing the right to reasonable accommodation "in an unreasonably narrow manner." *Phillips v. City of New York*, 66 A.D.3d 170, 884 N.Y.S.2d 369, 2009 WL 2225617 (1st Dep't July 28, 2009).

What's a Disability?

An elementary school music teacher with multiple sclerosis sued her school district for failing to reasonably accommodate her disability, refusing to hire her for an administrative job because it regarded her as disabled, and retaliating against her for filing a charge of discrimination. She unsuccessfully applied for several dozen administrative and "teacher on special assignment" (TOSA) positions and was in fact placed in several TOSA positions, but eventually she told the school district that she could no longer work as a music teacher because of voice, breath, and stamina issues. Her doctor and the school district's doctor both testified that she lived a relatively normal life and could deal with her problems with sensory impairment, voice, pain, vision, and fatigue by making minor adjustments. The Eighth Circuit Court of Appeals affirmed the district court's decision that the plaintiff had failed to prove that she had a disability or was regarded as disabled, or that she was retaliated against for filing her charge, under the ADA, the Rehabilitation Act, or Minnesota law. The court held that she had not shown that her MS substantially limited any major life activity. There was no discussion of any possible deterioration in her condition after her deposition, when she had testified to only having difficulty swallowing, projecting her voice, teaching music generally, going on a Caribbean cruise, lifting 14-20 pounds, and sensitivity to heat. In a footnote, the court of appeals mentioned the ADAAA of 2008 and held that it was not retroactive. We can expect defense attorneys to argue from this decision that MS is not a disability in other cases, so watch out. *Nyrop v. Independent School District No. 11*, 2010 WL 3023665 (8th Cir. Aug. 4, 2010).

The Third Circuit Court of Appeals has agreed with the Seventh Circuit that the side effects of mediation, taken to treat a medical condition, may create a disability even if the underlying medical condition is not one. Unfortunately for the plaintiff-appellant in this case, the court also held that he had not proved that the side effects he experienced were disabling. The plaintiff took medication

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for obesity and sleep apnea; the obesity medication created a gastrointestinal disorder that resulted in the need for frequent long bathroom breaks. At the Army's request, his employer decided to transfer him, but there were no other work areas available, so he accepted a layoff and then sued his civilian contractor employer and the U.S. Department of the Army under the ADA and the Rehabilitation Act, respectively. The district court granted summary judgment and the court of appeals affirmed. The real news of this opinion is the holding that the side effects of the plaintiff's medication, if they had been severe enough, could have been considered a disability within the meaning of the ADA and the Rehabilitation Act. *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 23 A.D. Cases 27 (3d Cir. April 12, 2010).

EVIDENCE

Causation

The Second Circuit Court of Appeals has reiterated that in a retaliation case, a plaintiff does not have to show that the particular individuals who made the challenged employment decision knew of his protected activity; no circuit, said the court, has ever held that anything more than "general corporate knowledge" is required. "A causal connection is sufficiently demonstrated if the agent who decides to impose the adverse action but is ignorant of the plaintiff's protected activity acts pursuant to encouragement by a superior (who has knowledge) to disfavor the plaintiff." The court of appeals also cautioned against the future use of a "pretext" instruction, because Title VII requires only proof of discrimination, not proof of deceitful misrepresentation. The court reversed and remanded because the plaintiff's evidence, "while not overwhelming," would support a reasonable jury's finding of retaliation under federal and state law, and this jury might have so found, had it been properly instructed with respect to the "general corporate knowledge" error. The plaintiff, however, had requested the pretext instruction himself, so the court did not reverse on that ground. The court also approved a "standardized approach" developed by lower courts in the circuit for deciding when a "stray remark" is admissible, involving consideration of four factors. *Henry v. Wyeth Pharmaceuticals Inc*., 2010 WL 3023807 (2d Cir. Aug. 4, 2010).

"First Opportunity"

An African-American former UPS manager, who had sued for race discrimination, retaliation, and harassment and had lost at trial, returned to work after the trial. He had been on leave since before the case began. But he alleged that as of his first day back on the job, his supervisor singled him out for differential treatment, and he sued again for retaliation. The company argued that the lapse of time between the beginning of his first case (October 2000) and his firing soon after he returned to work (February 2003) destroyed any inference of retaliation. This time he won, and the jury awarded him $650,000 in compensatory damages, $150,000 in back pay, and $1,300,000 in punitive damages. The trial court reduced the punitive damage award to $300,000 in order to comply with the Title VII cap, but then vacated the punitive damages completely. The Sixth Circuit Court of Appeals reinstated the $300,000 in punitive damages. The court rejected UPS's argument based on lapse of time, agreeing with the trial court that the retaliation began as soon as the opportunity presented itself. In addition, applying the three factors in *Kolstad v. American Dental Association,* 527 U.S. 526 (1999), the court of appeals determined that the plaintiff had proved everything necessary to support the punitive damages award, and restored his total recovery to $1,100,000. *Fischer v. United Parcel Serv. Inc*., 2010 WL 2994002 (6th Cir. July 27, 2010).

Mixed-motive Instruction

The Fifth Circuit Court of Appeals has held that the mixed-motive theory of liability is still available to prove retaliation in Title VII cases, despite the recent U.S. Supreme Court decision in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009). In *Gross*, the Court held that mixed-motive analysis did not apply to cases under the Age Discrimination in Employment Act. The court of appeals noted that in *Gross*, the Supreme Court clearly said its holding related to age claims, and the court therefore concluded that it did not apply to Title VII retaliation claims. Rather, it held, "the kind of proof necessary for either discrimination or retaliation claims should be the same." The decision created a circuit split with the Seventh Circuit. *Smith v. Xerox Corp*., 602 F.3d 320 (5th Cir. March 24, 2010).

IMMUNITY

An employee of Hunter College, part of the City University of New York, sued CUNY when it refused to reclassify him into a higher-level job that he alleged he had already been doing. He alleged that he was denied the reclassification because of his age and sued under the ADEA and (apparently) the New York State Human Rights Law. Judge Denise L. Cote (S.D.N.Y.) granted CUNY's motion to dismiss under Fed. R. Civ. P. 12(b)(1), claiming that it was actually an arm of the State and thus immune from suit under the Eleventh Amendment. The court agreed and dismissed the complaint as to CUNY, stating that CUNY senior colleges such as Hunter College are controlled by and accountable to the state, which also pays any money judgments against them. The court also noted that the Supreme Court had held in 2000 that the ADEA was not a valid abrogation of states' sovereign immunity under Congress's Fourteenth Amendment enforcement powers. That left two individuals and the City of New York as defendants, but the two individuals had not been served within the required time limits, so they were dismissed too. *Barry v. City University of New York*, 700 F. Supp. 2d 447 (S.D.N.Y. March 30, 2010).

PLEADINGS

Insufficiency

Can anything feel worse than filing a

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complaint and having the court dismiss most of it *sua sponte* six days later, before the defendants have even appeared? A nurse who had injured her hip got doctors' notes as requested but was fired for "unauthorized leave and failure to comply with the [employer's] Leave Policy," after her employer rejected her doctor's "light duty" recommendation. Her complaint alleged ten causes of action, including disability discrimination (failure to reasonably accommodate) under the ADA, the Rehabilitation Act, and the New York State and City Human Rights Laws. Judge Joanna Seybert (E.D.N.Y.) held that the complaint was deficient. Without discussion of any differences between the New York City Human Rights Law and the other statutes, the court noted that the plaintiff failed to state what "major life activities" were "substantially limited" by her injury, and that "without such factual specificity, the Complaint fails to plead that [the plaintiff] was disabled." *Broderick v. Research Foundation of State University of New York*, 2010 WL 3173832 (E.D.N.Y. Aug. 11, 2010).

"Notice Pleading Is Dead" – Or Is It?

In the Third Circuit, at least, *Twombly* does not apply to affirmative defenses. The plaintiff in an age discrimination case filed a motion to strike the defendant's affirmative defenses on the basis that the defense's own answer did not allege enough facts to meet the minimum standards of Fed. R. Civ. P. 8(b)(1)(A). The plaintiff argued that the *Twombly* pleading standard for complaints also applied to affirmative defenses, and that the defendant had to provide sufficient factual allegations to support the defense. The court said that there was no precedent for the plaintiff's argument in the Third Circuit, however, and held that it was meritless. *Romantine v. Hill*, 2009 WL 3417469 (W.D. Pa. Oct. 23, 2009).

In a district court in Virginia, and elsewhere, however, *Twombly* does apply to affirmative defenses. A magistrate judge in the Eastern district of Virginia said that most federal trial courts that have decided the issue have held that the Supreme Court's "plausibility" test applies not just to a plaintiff's claim for relief but also to a defendant's asserted bases for avoiding liability, and found their reasoning persuasive. The Supreme Court's test requires the pleading of some facts to support an allegation. Applying that rule, the magistrate judge struck 10 of the 15 affirmative defenses asserted by an employer in response to a complaint of race-based retaliation, although she granted the employer leave to amend its answer. *Francisco v. Verizon South Inc.*, 2010 WL 2990159 (E.D. Va. July 29, 2010).

Pleading in the Alternative

A recently terminated employee brought a Fair Labor Standards Act claim and individual state law claims against his former employer to recover overtime compensation that he believed was owed to him under federal law, and to recover for unjust enrichment of the employer on vacation pay and a nondiscretionary bonus he believed was owed to him under state law. The employer sought to dismiss his state law claims, arguing that there was no supplemental jurisdiction over the state claims because the FLSA claim already provided a vehicle for defendant to recover on the unjust enrichment claim. The district court (Paul G. Gardephe, S.D.N.Y.) disagreed, and found supplemental jurisdiction to exist because, pursuant to *28 U.S.C. § 1367(c)*, the plaintiff's state claims and FLSA claim were "derive[d] from a common nucleus of operative fact." Even though the plaintiff could not obtain a double recovery for unjust enrichment on both his FLSA and state law claim, he was not barred from pleading a demand for unjust enrichment on both claims simultaneously. *Chaluisan v. Simsmetal East, LLC*, 698 F. Supp. 2d 397 (S.D.N.Y. March 23, 2010).

PREGNANCY DISCRIMINATION

Emotional Distress Damages

After a determination of the New York State Division of Human Rights finding it guilty of pregnancy discrimination in discharging a complainant, the employer appealed. The Appellate Division, Fourth Department, found that the determination was supported by substantial evidence and that the employer had shown no prejudice from the transfer of the case from the ALJ who heard the case to a different ALJ, who rendered the determination. The court also found, however, that the award of $10,000 for mental anguish was too much (!) because the only evidence supporting it was the employee's testimony that she was diagnosed with depression or anxiety and suffered from high blood pressure, which she still had at the time of the hearing. The court reduced the emotional distress damage award to only $5,000, saying that since the appellee was offered another job after the birth of her child, the emotional distress could not have lasted long. In the matter of *KT's Junction, Inc. v. New York State Division of Human Rights*, on the complaint of Carrie A. Oursler, 903 N.Y.S.2d 645 (4th Dep't June 18, 2010).

See also *Dollman v. Mast Industries, Inc.*, discussed under "Summary Judgment."

RACE DISCRIMINATION

In another firefighter case, the Second Circuit Court of Appeals held that the City of Syracuse was not entitled to rely on a 1980 consent decree to justify rejecting the applications of two white firefighter hopefuls in favor of a number of African-American applicants who had scored lower on the civil service examination. The city relied upon the consent decree, which had been entered after a finding of "a pattern of long continued and egregious racial discrimination," but the decree also stated the after five years, any party could move for its dissolution if its goals had been met. The plaintiffs here contended that the consent decree had expired, or should be deemed to have expired, before the city passed them over. Both sides moved for summary judgment, and both sides' motions were denied. The city used the wrong metric (the proportion of African-Americans in the general population instead of those in the work force, as specified in the decree) and lacked proof as to whether the goals of the decree had been met, so they could not rely upon it as a legitimate nondiscriminatory reason for selecting

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the African-American applicants. The white plaintiffs had standing, since their injury-in-fact was denial of the ability to compete equally, not denial of the jobs, but the absence of evidence concerning the proportion of African-Americans in the work force kept them, too, from getting summary judgment. In addition, the consent decree was not self-terminating and had not been terminated by any body or court with authority to do so. Two judges concurred in the result but considered it an open question whether the decree was still constitutional. *Vivienzo v. City of Syracuse*, 611 F.3d 98 (2d Cir. July 1, 2010).

SEXUAL HARASSMENT

Faragher / Ellerth Defense

A student working part-time at the print shop of the university where she was enrolled alleged that her immediate supervisor sexually harassed her, then retaliated after she complained; she sued the school under the New York City Human Rights Law, citing diversity jurisdiction. The school moved for summary judgment, arguing that it was not vicariously liable for the manager's alleged sexual harassment and that the plaintiff could not make out a prima facie case of retaliation. The parties disputed whether the affirmative defense set out by the Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), could be invoked by a defendant in a NYCHRL case. That defense, applicable in federal Title VII cases, provides that an employer is not liable for a supervisor's sexual harassment of a subordinate if it proves that (1) no tangible employment action was taken, (2) the employer exercised reasonable care to prevent and promptly correct any harassment, and (3) the employee unreasonably failed to take advantage of any such preventive or corrective measures. The district court concluded that the NYCHRL on its face appeared to say that the Faragher/Ellerth defense was inapplicable in city law cases, and concluded that the plain meaning of the law should be followed and the school could not take advantage of the defense. He certified an interlocutory appeal to the Second Circuit Court of Appeals, which punted to the New York State Court of Appeals. The state Court of Appeals reviewed the legislative history of the NYCHRL, as amended by the Local Civil Rights Restoration Act, and concluded that an employer is, as the law says, strictly liable under that law for the discriminatory acts of a supervisory employee. NELA/NY members Jason Solotaroff and Darnley Stewart (our President) represented the plaintiff. *Zakrzewska v. The New School*, 14 N.Y.3d 469, 928 N.E.2d 1035, 902 N.Y.S.2d 838, 109 [BNA] F.E.P. Cas. 234 (N.Y. May 6, 2010).

SUMMARY JUDGMENT

Age Discrimination

A "strategy analyst / portfolio manager" at an investment bank alleged that he was put on a performance improvement plan and then let go because of his age, 54. His manager (8 years younger) had given him good reviews but no raises and sharply reduced bonuses in the last 6 years. The manager criticized his revenue production in his last two years at the firm and told him, as well as the trader on the same team, that revenues had to improve, but put only the plaintiff on the PIP (the trader was 15 years younger than the plaintiff), offering him the alternative of severance. The plaintiff proposed a third alternative, transfer, and was put on a paid leave to look for another position in the bank, but during the leave he received notice that his employment was terminated; during the same time, his replacements (12 and 25 years younger) were hired. The plaintiff's trader was promoted at the same time, even though he was considered equally responsible for the declining revenues. The magistrate judge held that the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343 (2009), had not taken ADEA cases out of the *McDonnell Douglas* analysis scheme – it had only held that the plaintiff in an ADEA case had to show that age discrimination was the "but for" reason for the challenged adverse action. The magistrate judge found material disputed facts on each element of the plaintiff's prima facie case and held that the employer had not produced a legitimate nondiscriminatory reason for terminating him – instead, it had only claimed that there was no adverse employment action because he had supposedly resigned. Consequently, it did not meet its burden of production, and summary judgment was denied. *Yee v. UBS O'Connor, LLC*, 2010 WL 1640192 (N.D. Ill. April 23, 2010) (mem. op.).

Disability Discrimination

An employee who had been diagnosed with depression was fired and sued under the Americans with Disabilities Act and the New York State Human Rights Law, claiming discrimination on the basis of her disability. The employer moved for summary judgment, claiming that the plaintiff had been fired for performance. Judge Joseph F. Bianco (E.D.N.Y.) held that plaintiff was not suffering from depression at the time of her adverse employment action, and therefore, that she was not discriminated against based on an actual disability under the ADA at the time her employment was terminated. Accordingly, summary judgment was granted with respect to discrimination based upon an actual disability under the ADA. However, the defendant's motions for summary judgment on all other issues, including retaliation, hostile work environment, whether or not the plaintiff was disabled according to the NYSHRL, and whether or not she was capable of performing the essential functions of her job with a reasonable accommodation, were denied. *McCowan v. HSBC Bank USA*, 689 F. Supp. 2d 390 (E.D.N.Y. Feb. 12, 2010).

Pregnancy Discrimination

A woman who was discharged while pregnant, allegedly because her job was eliminated in a restructuring, survived summary judgment on her pregnancy discrimination claim by showing that her employer advertised to fill her position after the decision to discharge her was made and continued to do so after she was let go. Although the district court (William H. Pauley III, S.D.N.Y.) dismissed several other claims, he denied

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summary judgment on the pregnancy discrimination claim, holding that the plaintiff had proffered enough evidence to reject the employer's "restructuring" justification as well as its allegation that it had selected the plaintiff to be let go because she was the weakest performer in her job title. NELA/NY member Preston A. Leschins represented the plaintiff. *Dollman v. Mast Industries, Inc*., 2010 WL 3239067 (S.D.N.Y. Aug. 17, 2010).

Sex Discrimination

A female telephone company technician, whose hostile environment gender discrimination claim was thrown out by the district court (Paul G. Gardephe, S.D.N.Y.), appealed to the Second Circuit Court of Appeals and succeeded in getting the grant of summary judgment vacated and remanded. Among the evidence of hostile working environment were allegations of disparate discipline, work assignments, transfers, and application of rules; the plaintiff alleged, for instance, that she was routinely assigned to less desirable and more dangerous work, that she was assigned to work alone in unsafe areas while men never were, that her work location was frequently changed while men were allowed to work continuously in one area so that they could become familiar with it, that she was skipped for overtime work at least ten times, and that her requests for help were denied because allegedly no one was available to help, although then, in her presence, help would be assigned for male technicians; many other examples of disparate treatment were also given. The plaintiff filed a complaint with the internal EEO office, but this caused additional retaliation. The court of appeals noted that incidents that may appear sex-neutral may sometimes be used to establish a course of sex-based discrimination, and found that the hostile workplace actions of the plaintiff's supervisors could rationally be found to be both severe and pervasive. NELA/NY member and Executive Board members Stephen Bergstein and Helen Ullrich represented the plaintiff-appellant. 2010 WL 3191433 (2d Cir. Aug. 13, 2010).

The Northern District of Georgia applied an intermediate level of scrutiny to a wrongful termination suit brought by a transgender woman and found that termination based on failure to conform to gender stereotypes is discrimination on the basis of sex. The plaintiff was born a biological male but identified as female, and began the medical process of becoming physiologically female while still employed by the defendant. Thereafter she was discharged. She alleged sex discrimination and violation of her constitutional rights under 42 U.S.C. § 1983 and the Fourteenth Amendment; both the defendant and plaintiff moved for summary judgment on each issue. The court found that the plaintiff was the victim of sex stereotyping. The application of the intermediate scrutiny test resulted in the determinations that she had not received equal protection of the laws, that she was treated differently from other similarly situated individuals, and that her firing bore no substantial relationship to any important government interest. The court granted summary judgment for her on the sex discrimination claim. With respect to the Fourteenth Amendment claim, the plaintiff alleged that the defendants had prevented her from undergoing medical treatment for her gender identity disorder and that this action bore no rational relationship to any legitimate government interest. The court applied the rational basis test for this claim and found that there was a legitimate government interest in terminating the plaintiff under this claim, because the state had an interest in preventing her from using women's restrooms while she still had male genitalia to ensure that no sexual harassment lawsuits developed as a result. 2010 WL 2674413 (N.D. Ga. July 2, 2010).

Sexual Harassment

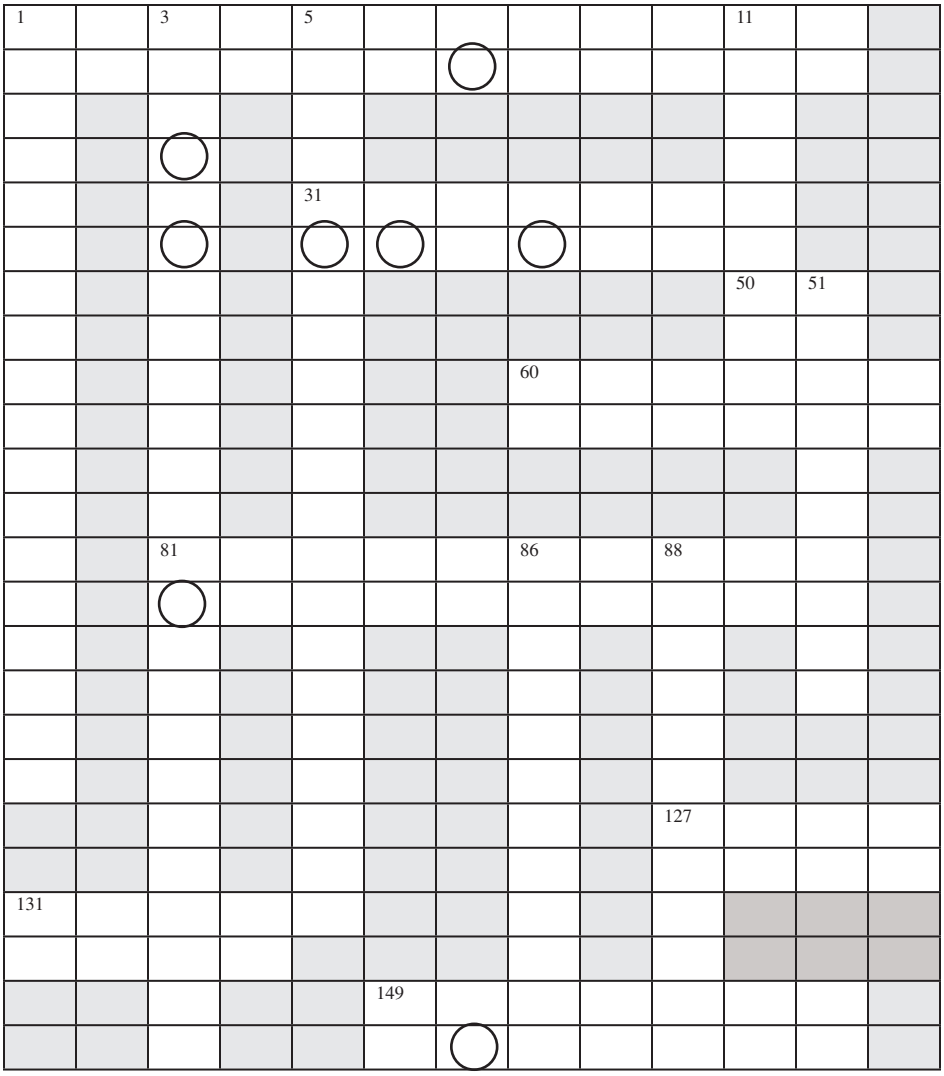
A female civilian employee with the Department of the Army sued the Department and several individuals, alleging that she had experienced a two-year campaign of sexual harassment by her co-worker at an Army medical clinic. The district court granted summary judgment, concluding that the alleged conduct amounted only to a lack of courtesy and professionalism, not gender-based harassment sufficiently severe or pervasive to create a hostile work environment. The First Circuit Court of Appeals vacated and remanded, holding that the Army's focus on showing that the supervisor was not sexually attracted to the plaintiff was "misdirected" because there was "ample circumstantial evidence" for a jury to find that a hostile work environment was triggered by the plaintiff's sex, with or without sexual attraction. "There is no legal requirement," said the court, "that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures." The supervisor made constant comments to the plaintiff about her body, her clothing, and her underwear; he also behaved in non-sex-specific ways, such as throwing her food away and throwing away photographs from her desk. It probably affected the circuit court's decision that the plaintiff became depressed and had panic attacks; her marriage broke up, and she was hospitalized, requiring psychiatric treatment and medication. *Rosario v. Department of Army*, 607 F.3d 241 (1st Cir. June 2, 2010). ■

NELA-NY CROSSWORD:
"Lights, Camera, Cause of Action"

—Rachel Geman (rgeman@lchb.com)

Rules: Every answer to this puzzle is the name of a movie or part of the name of a movie. Only words of three or more letters have a corresponding clue.

Bonus: the letters in the circles, when unscrambled, form the name of a 1980s movie about a would-be whistleblower.



ACROSS

1. Sexual harassment in the mining industry, a monster of a problem.
31. In this award-winning late-1980s film, an early scene is employee getting sexually harassed by a prospective mentor who is not her employer; however, her own employer set it up. Does she have a case?
60. Mid-90s movie whose title suggests a literal whistleblower.
81. 1990s film, again with the sexual harassment.
127. Lots of immigration and law of the sea issues with a dangerous employment portrayed in this whale of a film.
131. Payback for a workplace sexist. What a way to make a living. First word of this movie. This word is also a 2009 movie based on a Fellini film.
149. Again with the sexual harassment, from the sensitive soul who brought you Glen Gary Glen Ross

DOWN

1. Union! You really like me!
3. What a lighting director does first thing in the morning, also a 1941 movie. The first word (four letters long) is what you do when the judge comes in; the last word (the last five letters) is the name of yet another movie, this one about a piano player-hard work!
5. A character in this wonderful early 1990s film, based on a novel, quits his job because he believes the company will go under— does he have a claim for the opposite of fraudulent inducement?
11. First name in documentary about plant closings.
51. Title _____ of the Civil Rights Act – also a film where Pitt gets angry.
88. The ___ is the name of this scary movie. You'll have a rule against perpetuities problem with these.

LITIGATING EMPLOYMENT, from page 12

source for the evidence. They just make the statement, which of course is insufficient. I didn't really much care how it came in. I think that an attorney's affirmation, a short one, outlining what the case is about, was helpful, because remember, in some cases during discovery the judge gets to know a good deal about the case, but in many others the judge doesn't really know much about it until the motions are submitted. I used to like oral argument in summary judgment cases I'd read the papers, the affirmation from the attorney and the affidavits or whatever other documentation was submitted that counsel is relying on. Any questions I had could be answered at argument. So then I had a framework, I knew what I was looking for. So , I didn't rely on the 56.1 for facts in and of themselves, but it would direct me to where the facts were. That was my way of looking at it.

SB: What else should plaintiff's lawyers know about litigating these cases from inception, from intake all the way to trial?

FOX: I think you need to know whatever your client knows and the difficulty with that is that clients will tell you – and not meaning to do anything wrong – but they tell you what they think you want to hear. And that's perfectly understandable because they want you to be their advocate. I think that it's important to spend enough time with the client to get all the information the good, the bad and the ugly so that you're prepared to deal with it. And once you have all the facts then you're in a position, because most of these cases there certainly are things that have happened from the plaintiff's perspective that the lawyer would rather have not happened but they're there. The other side's going to know about it so the sooner you know about it the easier it's going to be to deal with it. I think spending time with the client more than anything else helps you to complete the full factual picture, and I think that's the most important thing.

SB: That's what we found in trial prep. We spend a lot of time with the client. So I guess that brings me to motions in limine, bad stuff about the plaintiff. If the motion in limine fails and the plaintiff has to bring it out, I assume it's ad visable for the plaintiff's lawyer to bring it out on direct rather than wait for it to come out for the first time on cross.

FOX: Usually. That's the prevailing wisdom.

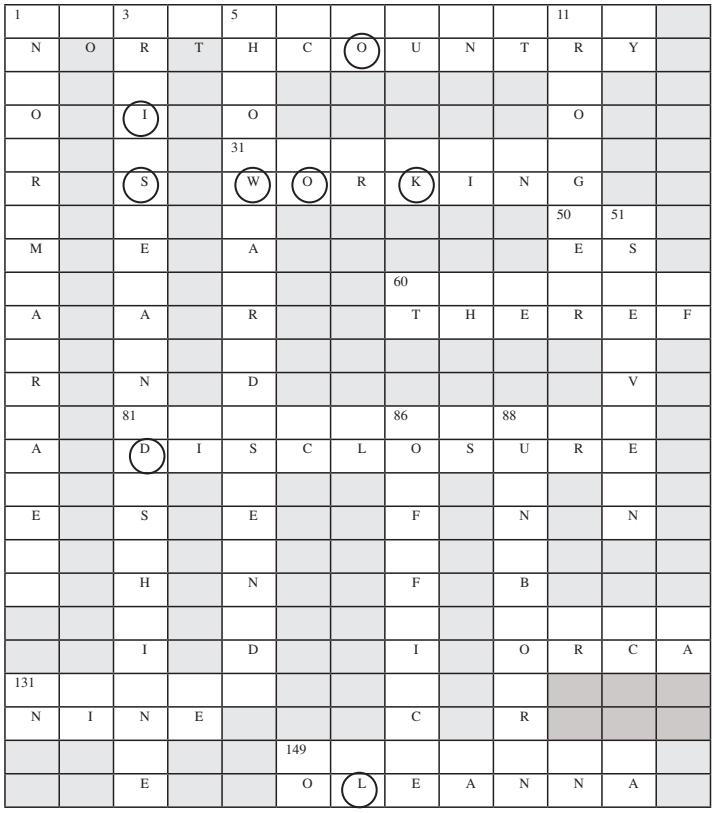
SB: I mean prior bad acts, convictions, can a lawyer lose credibility with a jury, for example, you may have good evidence and the plaintiff may be okay but can a lawyer lose credibility with a jury if the jury thinks the lawyer's playing games? And assuming the answer's yes, can that make an outcome in the verdict?

FOX: I don't know how much it affects the outcome but certainly it's not a good thing to do. If there are those kinds of negatives, my personal view is that they should be brought out early. With an explanation, you can do it in your opening statement.

HGU: The "no one's perfect" kind of approach.

FOX: Sure. And you never know what's going on in the background of some of your jurors or some of their close family members and in federal court it's always tough to find out because you don't get to do a detailed attorney conducted voir dire. ■

ANSWER KEY: NELA-NY CROSSWORD: "Lights, Camera, Cause of Action"



Answer to word jumble:
SILKWOOD

Workers Compensation
&
Social Security Disability

PETER S. TIPOGRAPH, ESQ.

SHER, HERMAN, BELLONE & TIPOGRAPH, P.C.

277 Broadway
11th Floor
New York, N.Y. 10007
(212) 732-8579
Fax: (212) 349-5910

and

The Cross County Office Building
Cross County Shopping Center
Yonkers, N.Y. 10704
(914) 376-3237
Fax (914) 376-3267

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NELA/NY
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: nelany@nelany.com
(212) 317-2291
Fax: (212) 977-4005