NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 6 April 2003 Jonathan Ben-Asher, Editor

Filings Trials and Settlements

In this column we regularly publish news of cases brought, tried and settled by members of NELA/NY. This issue's news is sparse. We doubt this means that NELA members are filing, trying and settling fewer cases. Rather, lots of you are being uncharacteristically shy about your work. If you have case developments you'd like to share with your colleagues, send them to Jonathan Ben-Asher at *jb-a@bmbf.com*.

On February 13, 2003, Judge Baer signed a consent decree in a case brought by the EEOC and five women represented by **Anne Clark** at Vladeck Waldman against South Beach Beverage Co. and PepsiCo. **EEOC v. South Beach Beverage Co.**, 02 Civ. 10136.

The EEOC brought claims on behalf of the charging parties and similarly situated women, based on a sexually hostile work environment. The intervening plaintiffs made the same claims, as well as claims under the Equal Pay Act and state fair employment laws, and for retaliation. The five intervening plaintiffs received a total of $958,900. SoBe and Pepsi will also pay $550,000 to a fund to compensate other women who submit claims under the consent decree's claim process. Pepsi/SoBe also agreed to provide training to SoBe employees regarding discrimination, harassment and complaint procedures.

NELA/NY's Own Diversity Problem

by Arnie Pedowitz

Where are we with respect to diversity in NELA/NY? As practitioners we advocate in support of diversity in the workplace, but what are we doing organizationally? Are we simply good liberals who know how to apply statistics against an employer, or are we serious minded people willing to confront the fact that our house is not in order? Even if we intellectually want to make improvements, are we going to invest the time and attention, and allocate sufficient resources, to do something meaningful? While these are some of the issues that will be discussed in this article, if any progress is to be made, your active guidance will be required.

First, we have to recognize that as percentages go, NELA/NY is not a very diverse organization. How do I know this?—By looking around and talking to people. What percentage of attendees or speakers at NELA/NY conventions or CLE programs are, for example, people of color? Or people with disabilities? Sure there are some, but not a lot. True, most lawyers are non-disabled Caucasians, but surely there are many who are not. Then, look at the number of women in NELA/NY. While most lawyers are men, isn't it surprising how large a percentage of our members are women, and how many of them are CLE speakers and NELA/NY Board members? What is going on? Why do we have so many female members? Is there something about NELA/NY that is more hospitable to the members of some communities than to others?

Like you, I will be the first person to stand up and say that NELA/NY is open and hospitable to all. Yes, I would even say that given our mission, it is inconceivable that anyone would suggest NELA/NY to be other than an organization that is simpatico to all. Nevertheless, if I look around, and as I observe that the numbers are inconsistent with my preconceived notion, I have to ask, what is wrong with this picture? Where is the problem? Is there a problem? And, if there is a problem, what can and should we do?

In trying to find a cure, I think that we have to first take a global and evaluative look at NELA/NY. Perhaps then we can discern reasons for why the problem is continuing. As memberships go, NELA/NY is not a large organization. The active membership of NELA/NY has remained at around 325 for the past several years. Every year we gain some new members and lose some old ones. But whatever the case may be, our diversity percentages, though increasing, do not seem to be changing in a significant manner.

So, if diversity is to be a priority, I suggest that the following are possible steps that need to be embarked upon now, and with vigor.

Membership recruitment needs to be made a priority for NELA/NY, since without a groundswell of support from like minded professionals, our collective strength is undermined. Recruitment efforts must be focused on diverse bar associations, not for profit organizations, advocacy organizations and governmental agencies that have members or employees in large members who are representative of the diverse communities. Additionally, I think that we, the readers of this article, have to implement, and act in support of, this focused recruitment effort.

See DIVERSITY, page 11

The NELA/NY
Calendar of Events

April 2, 2003 • 6:30 p.m.
NELA Nite
Sponsored by the Sex Discrimination and Sexual Harassment Committe
Topic: Representing Clients Currently Experiencing a Hostile Work Environment
Lieff Cabraser Heimann & Bernstein
780 Third Avenue

April 4, 2003
NELA/NY Spring Conference
Yale Club of New York City
50 Vanderbilt Avenue

April 9, 2003 • 6:00 p.m.
NELA/NY Board of Directors meeting
1501 Broadway - 8th floor

April 11, 2003
NELA/NY Upstate Conference
Albany Law School
80 New Scotland Avenue
Albany

June 11, 2003 • 6:00 p.m.
NELA/NY Board of Directors meeting
1501 Broadway - 8th floor

June 18, 2003 • 6:30 p.m.
NELA Nite
Raff & Becker
59 John Street - 6th floor

June 25–28, 2003
NELA 2003 Fourteenth Annual Convention
Vail Marriott Mountain Resort & Spa / Antlers at Vail / Lion Square Lodge & Conference Center
Vail, CO

Join as for the NELA National Convention in Vail

Whether you're a new or old NELA member, we hope you will join us at this year's NELA National Convention, which will be held June 25–28 in beautiful Vail, Colorado. The Convention is a great way to recharge your batteries, learn from experts in the field and get to know your colleagues from around the country.

This year the Convention will include thirty concurrent and four plenary sessions, including program tracks in Trial Advocacy and Law Practice Management, and special presentations for new lawyers. As just a sample, you can attend sessions on Building Trial Skills, Preparing for Your First Trial, Building Your Case Through Depositions, Technology for the Plaintiff Employment Lawyer, Dealing with Hardball Defense Tactics, Litigating Non-Compete Claims, Mediation Advocacy, Calculating Economic Damages, and If Only I Knew Then What I Know Now. The Convention's Keynote speaker will be famed trial lawyer Gerry Spence.

The Convention includes ample opportunities for socializing—structured and spontaneous—and NELA/NY will be holding a reception for our members. High in the Rocky Mountains, Vail has many family friendly opportunities for biking, hiking, boating and swimming. For more information, or to register online, go to NELA National's website at www.nela.org. We hope to see you in Vail.

A Word from Your Publisher

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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President's Column

by Herb Eisenberg, President, NELA/NY

Things have been particularly difficult these days.

The threat of war is palpable and the attack may have already started by the time you read this. Innocents will die: the U.S. has stockpiled 16,000 body bags, and half of Iraq's population is under the age of 15. I also fear this war will do nothing to minimize the anxiety I feel just walking through Grand Central, with machine-gun toting security at my side. I instead fear that our "homeland security" or insecurity is going to get even worse.

- Sen. Robert Byrd has spoken on the Senate floor about the dearth of discourse concerning the administration's push to war. Traditional U.S. allies see the U.S. as aggressor and long standing coalitions are breaking. He criticizes the Bush administration as resorting to name calling and insults in response to those countries that disagree. Perhaps his age has marginalized him in the eyes of his Senate colleagues.
- The administration has instructed the FBI to conduct surveillance on Muslims, and to monitor mosques. Local FBI office funding will be measured by the results of this surveillance.
- I regularly read about the Justice Department's attempts to erode the Fifth and Sixth amendments of the Constitution. These efforts, coupled with efforts to limit the separation of church and state, are led by President Bush and his administration, often in the name of keeping us safe.
- President Bush speaks of his support for diversity, but opposes the University of Michigan's efforts to have an integrated and diverse student body. Many large corporations have submitted amicus briefs in support of the University's position.
- The administration favors a college admissions policy favoring the best students from each high school – in short promoting segregated high schools as a way of creating integrated colleges. A recent Harvard study suggests that American public schools are highly segregated and becoming more so, and that much of the blame goes to courts' increased hostility to desegregation suits. The study found that 70% of black students now attend schools where minority enrolment is over 50%; 36.6% of Latino students go to minority schools, up from 23.1% in 1980; and white students on average attend schools where more than 80% are white.
- The Chairman of a House subcommittee on domestic security, Representative Howard Coble (R - N.C.) recently stated that it had been appropriate to intern Japanese-Americans during World War II, a step he said had been taken mainly for their own safety, to protect them from a hostile citizenry.
- Trent Lott's vocal support for Strom Thurmond's segregationist views caused him to lose his Republican leadership post. Did he somehow change his previously held opinions? Certainly, his world view did not change. Perhaps he thought that the country was ready for racist discourse, whether direct or veiled. Perhaps he just didn't watch his words carefully. We can be certain that the discriminators we oppose will not be as loose with their thoughts as he was.

Our efforts as NELA lawyers are as important today as they have ever been. We must continue to struggle for people to be judged by their capabilities, rather than by their national origin, religion, skin color, gender or sexual orientation.

We must be vigilant and supportive of one another. We must fight for equality and opportunity for all. We must fight against reactionary judicial nominees We must fight for legislation protecting workers' rights. We must reach out and build coalitions with other civil rights groups. We must forever hope that things will get better. May we forever fight to make certain that our children may yet live in a world of peace.

Some business—

NELA/NY continues to have a positive progressive impact and presence on the law and in the legal community. The quality of the discussions on the listserve is very high. It is very impressive to see how generous our members are with their experience and knowledge. The listserve can only work when we use it wisely. Some of the pettiness on the listserve is solipsistic and silly. Please use this forum wisely so as not to alienate others.

NELA/NY needs your input, support and energy. It is clear that we have many new members and faces. NELA/NY's leadership welcomes you. If you have ideas for new NELA projects or input for ongoing projects, let us know. Your time and efforts can help our community grow.

Our Next NELA Nite: Representing Clients in a Hostile Work Environment

NELA/NY's Sex Discrimination and Sexual Harassment Committee will present a NELA Nite on Wednesday, April 2, 2003, on Representing Clients Currently Experiencing a Hostile Work Environment. Our guest speaker will be Becky Dell'Aglio, Director of Women's Rights at Work. Women's Rights at Work runs a toll-free helpline for women experiencing sexual harassment, and offers monthly workshops on laws protecting workers.

We anticipate a lively exchange on strategies for persuading employers to take appropriate corrective action to stop harassment and advising clients on how to proceed if the harassment is not stopped. Join us at 6:30 p.m., at Lief Cabraser Heimann & Bernstein, at 780 Third Ave. in Manhattan.

Spring Conference

NELA/NY's annual Spring Conference will be held Friday, April 4, at the Yale Club of New York. Our theme this year is Litigating Employment Cases on the Cutting Edge (Without Falling Off).

Panels will include:

1. Update: Case Law from Around the World and Elsewhere - Scott Moss (Outten & Golden LLP, New York, NY) and Lisa Joslin (Deily, Mooney & Glastetter, LLP, Albany, N.Y.)

2. Spotlight: New Causes of Action
   a. A New Whistleblower Cause of Action: The Sarbanes-Oxley Act - Jonathan Ben-Asher (Beranbaum Menken & Ben-Asher LLP, New York, N.Y.) and Nicholas Harbist (Blank, Rome LLP, Philadelphia, PA)
   b. The Emerging Field of Gay Rights in Employment - Lee Bantle (Bantle & Levy LLP, New York, N.Y.)

3. Spotlight: Hot Topics in Employment Law
   a. Holding Employers to their Anti-Discrimination Responsibilities: Faragher/Ellerth & Kolstad - Miriam Clark (Steel, Bellman, Ritz & Clark, P.C., New York, N.Y.)
   b. Continuing Violations in the post-Morgan World - Ivan Smith (Vladeck, Waldman, Elias & Engelhard, P.C., New York, N.Y.)

4. Attorney's Fees - Chief Magistrate Judge Ronald L. Ellis (U.S. District Court, S.D.N.Y.), Herb Eisenberg (Eisenberg & Schnell LLP, New York, N.Y.) and Victoria L. Richter (Proskauer Rose LLP, New York, N.Y.)

5. Ethical Pitfalls: When Does the Attorney Cross the Line to Becoming a Witness? - Richard Maltz (Benjamin, Brotmand & Maltz, LLP, New York, N.Y.), Janice Goodman (Goodman & Zuchlewski LLP, New York, N.Y.) and Dennis A. Lalli (Kauff, McClain & McGuire LLP,. New York, N.Y.)

6. Filling the Gaps: Spotting the "Other" Issues in Employment Cases
   a. Workers' Comp - Peter Tipograph (Sher Herman Bellone & Tipograph, P.C., New York, N.Y.)
   b. Bankruptcy - Mark D. Silverschotz (Anderson Kill & Olick, P.C., New York, N.Y.)
   c. Labor Law - Walter M. Meginniss, Jr. (Gladstein, Reif & Meginniss, New York, N.Y.)
   d. ERISA - William Frumkin (Sapir & Frumkin LLP, White Plains, N.Y.)

The conference registration includes a set of comprehensive materials, lunch and a cocktail party at the end of the day. For information or registration, call Shelley Leinheardt at NELA/NY.

New Board of Directors

In December NELA/NY's Board of Directors met to elect the Board for 2003. Under NELA/NY's By-laws (see last issue), three members of the Board are required to resign each year until all members who sat on the Board in 2001 are replaced. In addition, elections for the Board are held each December.

Congratulations to the three new Board members for 2003: Lee Bantle, Darnley Stewart and Phil Taubman. The Board thanks departing members Allegra Fishel, Wayne Outten and Laura Sager for their long service, hard work and contributions. The full list of officers and other Board members appears on Page 2.

EEOC Seminar

The New York District Office of the EEOC is conducting a Technical Assistance Program Seminar on "America Business and EEOC: A Partnership to Achieve a Fair and Inclusive Workplace." This is a valuable opportunity to learn from and meet with experts on the latest developments in EEO law, related laws and other work place issues. EEOC Chair Cari M. Dominguez is expected to deliver the keynote speech. The seminar will be held on Friday, June 6, 2003, 8:30 a.m. to 4:30 p.m., at the Roosevelt Hotel, Madison Avenue at 45th Street, in Manhattan.

Topics will include, among others: How to Process Reasonable Accommodation Requests; the EEOC's Investigative Process and Procedures; Recent Significant Cases You Need to Know About; cases the EEOC has resolved or will be litigating in New York; ADR/Mediation workshops; and Religious and National Origin Backlash. Attendees will receive the EEOC's 2003 Technical Assistance Manual on CD Rom. Admission also includes a three-course lunch and morning refreshments. Individuals registering prior to 30 days of the can pay an Early Bird Discount registration of $245. The full registration fee is $265. Seating is limited. To register, contact Larry Pincus, Seminar Coordinator, at (212) 336-3667, or e-mail *Lpincus@eeoc.gov*.

Looking for Cases

The Fund-Raising Committee has begun planning this year's gala dinner, honoring "Courageous Plaintiffs Who Fought Back." The Committee would like your recommendations for cases which could be honored at the event, which will be held on November 20. Cases should involve New York plaintiffs and/or lawyers, and must be fully adjudicated. Please send your ideas to Shelley Leinheardt.

Court Reporting Discounts

NELA/NY offers discounts on court reporting. Of course, our vendors must sometimes adjust their charges. Veritext Court Reporting Services has increased its price from $3.40 per page to $3.90 per page. Bee Reporting has increased its price from $3.65 per page to $3.85 per page.

Upstate Conference

NELA/NY will hold its 2003 Upstate Regional Conference on Friday, April 11, at Albany Law School. Our theme this year is Cutting Edge Litigation Techniques in Employment Cases. The conference is cosponsored by Albany Law School's Institute of Legal Studies.

Panels this year include:

- Keeping Statutory Claims Alive in a Union Environment - William Herbert (CSEA)
- Electronic Discovery - Richard Honen (Honen and Wood)
- Observations from the Bench on Electronic Discovery - Hon. Randolph Treece, U.S. Magistrate Judge, N.D.N.Y.
- Arbitration and Mediation: Secrets to Success - Henry Kramer, Visiting Fellow, New York School of Industrial and Labor Relations, Cornell University, and Kramer Law Office
- Review of Second Circuit and New York Cases of Note - Stefan Berg (Berg Law Office) and Allegra L. Fishel (Outten & Golden LLP)
- Severance Agreements and Settlement Agreements - Ronald Dunn (Gleason, Dunn Walsh O'Shea)

The conference registration includes a lunch and wine and cheese reception. For information, contact Albany Law School's Institute of Legal Studies, 518 445-2310, or visit *www.als.edu/cle*.

NELA Member News

Arnie Pedowitz was featured in the Sunday *New York Times* Money and Business section on February 16. In "Five Questions for Arnold H. Pedowitz," Arnie discussed the increasing use and misuse of non-compete agreements, and how employees can protect their interests when a non-compete enters the picture.

Congratulations to **Allegra Fishel** and **Peter Rich**, who were married on January 18.

Anne's Squibs

by Anne Golden

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

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Further note: Of course, these squibs are by no means exhaustive, nor should you rely upon them as a substitute for doing your own research and actually reading the cases. Thanks to Claire Shubik, an associate at Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

Reverse Age Discrimination

The Sixth Circuit Court of Appeals has upheld a claim for reverse age discrimination, finding that the language of the ADEA unambiguously prohibits an employer from discriminating against any employee aged 40 and over on the basis of age — whether "too old" or "too young." The plaintiffs, employees between 40 and 49 years of age, sued their union and employer for entering into a collective bargaining agreement that eliminated retiree health benefits except for employees aged 50 or older. The district court had dismissed the claim, concluding that "the ADEA was drafted to aid '*older* workers,' not those who suffer age discrimination because they are too young" (emphasis in original). In reversing, the court of appeals looked to the statute's plain language, declining to foray into the legislative history or to speculate on legislative intent. Based on the plain language, the court defined "older worker" in the context of the ADEA as any worker over 40, not only workers who face discrimination because they are viewed as too old. The ruling is in opposition to the Seventh Circuit's decision in **Hamilton v. Caterpillar, Inc.**, 966 F.2d 1226 (7th Cir. 1992), which held that the ADEA does not contemplate claims by younger workers against older workers. In so holding, the Seventh Circuit relied primarily on legislative intent. **Cline v. General Dynamics Land Systems, Inc.**, 296 F.3d 466 (6th Cir. 7/22/02).

ARREST RECORD

A rejected prospective employee sued a securities dealer, alleging violations of N.Y. Exec. Law § 296 (16) and New York City Admin. Code § 8-107(11) and promissory estoppel, all relating to the dealer's failure to hire him. The district court granted the defendant's motion for summary judgment except to the extent that the complaint sought relief for alleged discrimination on the basis of the employee's arrest. The plaintiff, a securities broker, was mistakenly arrested for petit larceny but was never charged. The arrest record was supposedly sealed but was nonetheless filed in NASD records, and this may have been communicated directly to Schwab. The court dismissed the employee's state and local claims because 17 C.F.R. § 240.17a-3(a) requires businesses such as Schwab to maintain arrest records, and thus there was no violation on Schwab's part in obtaining such records. There were unresolved issues of whether Schwab's decision maker(s) knew of the arrest and, if so, whether it contributed to the decision not to hire the plaintiff. The promissory estoppel doctrine does not apply in New York in the employment context; even if it did the court noted that plaintiff did not reach the elements of such a claim. The plaintiff successfully sued the City of New York for wrongful disclosure of the arrest record and obtained a settlement of $17, 500. **Shapira v. Charles Schwab & Co.**, 225 F. Supp. 2d 414 (S.D.N.Y. 10/3/02).

ATTORNEYS' FEES

The Eastern District of New York, and in particular Judge Arthur D. Spatt's courtroom, has not improved as a place to seek attorneys' fees since **Luciano v. Olsten Corp.**, 109 F.3d 111 (2d Cir. 1997) (affirming a low hourly rate set by Judge Spatt).

See SQUIBS, next page

A plaintiff who won her jury trial and obtained $100,000 in punitive damages on one of her three claims, and who received her judgment and the attorneys' fees awarded prior to the employer's appeal, asked for additional attorneys' fees attributable to her successful defense of the appeal. The employer then argued that her fee application was untimely because it was made more than 14 days after entry of the final judgment. The district court found that there was no statute, rule, or binding precedent concerning the applicable time period and that a prevailing party only needs to request fees "within a reasonable period of time after the circuit's entry of final judgment." The court, however, rejected the plaintiff's counsel's rate of $350 per hour and awarded only $250 per hour, then reduced the resulting lodestar figure by another 10% because the plaintiff had lost her cross-appeal. **Cush-Crawford v. Adchem Corp.**, 234 F. Supp. 2d 207 (E.D.N.Y. 12/12/02).

Judge Robert Sweet (S.D.N.Y.) systematically stripped away much of an award for attorney's fees in a six-year litigation that included three trips to the Second Circuit Court of Appeals. The Judge appeared to steer the middle ground between the plaintiff's requested fees of $581,024 and the defendant's consent to fees totaling $97,778, in awarding $308,896. In a detailed opinion, the court reduced fees for administrative work done by attorneys, for excessive hours in drafting a brief, and for time spent preparing to run a statistical analysis. The court did, however, approve a rate of $375 per hour for an attorney with 18 years of litigation experience. **Davis v. N.Y.C.H.A.**, —- F. Supp. 2d —-, 90 Civ. 628, 2002 WL 31748586 (S.D.N.Y. 12/6/02)

CONTRACT

Stock Options

A former employee and his ex-employer both were denied summary judgment in Judge Michael B. Mukasey's courtroom (S.D.N.Y.) on the subject of whether a contract existed obliging the employer to accelerate the vesting of the plaintiff's stock options and restricted stock units. The company had merged with another, and the employee proffered an email from the HR director which arguably constituted an agreement to his request to accelerate because of the merger. The court held, however (applying New Jersey contract law), that even without the email, a reasonable jury could find that a "unilateral contract" existed. Under this theory, "the employer's promise is not enforceable [due to lack of immediate consideration] when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise. There is no mutuality of obligation, but there is consideration in the form of service rendered." The court noted that the same theory could support an employer's obligation to pay a bonus or fulfill other promises. The court went farther and noted that an employer's conduct alone could support a reasonable inference that an offer had been made. Rejecting other arguments on both sides, the court denied both motions for summary judgment. **Levy v. Lucent Technologies, Inc.**, —- F. Supp. 2d —-, 2003 WL 118500 (S.D.N.Y. 1/14/03).

DAMAGES

Caps

Joining the Ninth and D.C. Circuits, the Third Circuit has held that the damages cap of § 1981a(3) does not bar greater recovery on a parallel state claim. An employee suffering from multiple sclerosis sued her employer under the ADA and the Pennsylvania human rights law. The jury awarded $500,000 in punitive damages on the ADA claim (the state law does not provide for punitives) and $2,000,000 in compensatory damages overall. The district court lowered the punitive award to comport with the cap provided for in §1981a but upheld the full compensatory award. In affirming the district court, the Third Circuit based its decision on the explicit directive in the ADA that the statute should not limit or invalidate rights and remedies under state law. The court looked disapprovingly at the only decision within the Second Circuit to address the issue, a District of Connecticut opinion, **Oliver v. Cole Gift Centers**, 85 F. Supp.2d 109 (D. Conn. 2000), in which the district court found that Congress intended §1981a to cap all recovery in federal employment discrimination cases. **Gagliardo v. Connaught Laboratories**, 311 F.3d 565 (3d Cir. 11/22/02)

ERISA

Oral COBRA Notice

In the Eighth Circuit, at least, it is OK for an employer to give a former employee only oral notice of her right to elect COBRA health insurance coverage. COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1986) is part of ERISA. It requires employers to notify ex-employees of their right to continue health coverage after the end of their employment, at their own expense but at group rates, 29 USC §1166. When a manager left her grocery store employer, she met with representatives of the employer and its insurance company to discuss her COBRA rights. The insurance company representative told her that it would be much less expensive for her simply to get an individual major medical policy directly from the insurer, so she expressly orally declined continued coverage under COBRA. Then, however, the same insurer declined her application because of a preexisting condition. She sued the employer, alleging that she had not received her COBRA notice in writing. After a bench trial, the district court found that she had received sufficient oral notice of her rights, and the court of appeals affirmed. The court of appeals stated that a writing was not required and that the employer need only engage in a "good faith attempt" to comply with the law. **Chestnut v. Montgomery**, 307 F.3d 698 (8th Cir. 6/28/02).

FIRST AMENDMENT

Public Employees

A law clerk who was terminated after calling the judge he worked for "corrupt" and a "S.O.B." did not have a First Amendment claim, according to the Second Circuit Court of Appeals. The clerk, upset by the judge's handling of a case, called him insulting names, and threatened to go public with allegations of corruption against the judge. In upholding a grant of summary judgment against the clerk, the court of appeals emphasized the predictably disruptive effects a fraught relationship between a clerk and a judge would have on the efficient functioning of chambers. Because the clerk failed to present evidence that would indicate he was fired because of his speech as opposed to the

disruptive effects of his speech, no genuine issue of material fact remained. The court noted that because the clerk threatened to speak publicly about the judge's alleged corruption if the judge moved to terminate him, the termination was an invitation to speak rather than a quashing of speech. **Sheppard v. Beerman**, 317 F.3d 351 (2d Cir. 1/28/03).

FAIR LABOR STANDARDS ACT

Independent Contractors

In a minimum/overtime wage class action, walking deliverymen won partial summary judgment against Duane Reade and the "labor agent" who procured the workers. Like many employers utilizing sub-minimum wage labor, Duane Reade argued that the deliverymen were not its employees but, rather, worked only for an outside "labor agent" — an individual who found the workers, set up companies to retain their services, and took a nifty profit for creating distance between Duane Reade and its deliverymen. The labor agent, in turn, claimed the workers were "independent contractors" and therefore not anyone's employees. Judge Alvin K. Hellerstein (S.D.N.Y.) found that both the labor agent and Duane Reade were "joint employers" of the workers based on the "economic reality" test, which looks to the actual facts of the relationship rather than formal labels. Summary judgment was denied for certain subsets of deliverymen, such as drivers and those responding only to "beeper" calls—pending further discovery and future summary judgment briefing. Duane Reade's and the labor agent's motions for summary judgment were denied in their entirety. NELA/NY members Adam Klein, Scott Moss, and Catherine Ruckelshaus represent the plaintiff class. **Ansoumana v. Gristede's Operating Corp.**, —- F. Supp. 2d —-, No. 00 Civ. 0253, 2003 WL 173957 (S.D.N.Y. Jan. 28, 2003).

INDEPENDENT CONTRACTOR STATUS

A 59-year-old insurance agency manager sued under the ADA after he was told to resign or be terminated. The district court granted the defendant's summary judgment motion, holding that the plaintiff was an independent contractor, not an employee. The district court based its conclusion on the facts that the employment agreement designated the plaintiff as an independent contractor, the plaintiff exercised independent judgment, he was paid by commission, and he was responsible for his own taxes. The Eighth Circuit Court of Appeals, however, found a number of factors that counseled against finding the plaintiff to be an independent contractor and reversed the lower court. Specifically, the court of appeals emphasized that the plaintiff had spent more than thirty years working for the defendant and did work that was in the regular course of its business. **Jenkins v. Southern Farm Bureau**, 307 F.3d 741 (8th Cir. 10/15/02).

See also **Ansoumana v. Gristede's Operating Corp.**, —- F. Supp. 2d —-, No. 00 Civ. 0253, 2003 WL 173957 (S.D.N.Y. Jan. 28, 2003), discussed under "Fair Labor Standards Act."

NEW YORK STATE LAW

Employee's Duty of Loyalty

A former employee sued his employer for breach of contract regarding payment of equity in the company. The employer counterclaimed, alleging breach of duty of loyalty and breach of a noncompete covenant. The jury returned a verdict for the employee on his breach of contract claim but for the employer on its breach of loyalty claim. The Appellate Division, Second Department, vacated the employee's award for breach of contract, finding that the employer's silence when the employee proposed an equity-sharing arrangement did not create a contract. The Appellate Division agreed with the lower court's ruling that, where an employer does not offer evidence of lost profit, he cannot recover damages for breach of a noncompete agreement. In contrast, however, the court held that an employer need not show lost profit to recover on a breach of loyalty claim. The court cited **Diamond v. Oreamuno**, 24 N.Y. 2d 494, 498 (1969), for the proposition that "the remedy for breach of fiduciary duty is not only to compensate for the wrongs but to prevent them." Consequently, the court held that disgorgement can be an appropriate remedy for a breach of loyalty claim. Because the trial judge improperly instructed the jury regarding damages on the breach of loyalty claim and because the verdict on that claim was substantially less than the profits earned by the employee through his breach of fiduciary duty, this claim was remanded. **Gomez v. Bicknell**, —- N.Y.S.2d —-, N.Y. Slip Op. 09688, 2002 WL 31890825 (2d Dep't 12/23/02).

PROCEDURE

Mixed Motive Analysis

Under a statute that extends Title VII rights and remedies to presidential appointees, an assistant chef at the White House filed EEOC charges against the Executive Residence, alleging that he was not promoted because he was dating an African-American woman. An internal investigation into the plaintiff's claims uncovered that he had made vague threats against the First Family. The plaintiff was temporarily suspended as a result of this investigation but was reinstated when the threats proved to be harmless. Shortly thereafter, the plaintiff was terminated when a new chief chef took over the kitchen and hired his own staff. The plaintiff alleged that both the suspension and termination were retaliation for his complaint of discrimination. The EEOC found against plaintiff on the failure to promote and termination claims, but found for him on the suspension claim. The parties cross-appealed. The Federal Circuit Court of Appeals, however, ruled against the plaintiff on all three claims. In doing so, the court rejected the plaintiff's arguments that a mixed motive burden-shifting analysis under **Price Waterhouse v. Hopkins**, 490 U.S. 228(1973) applied to his case. The court reasoned that direct evidence of discrimination is needed to trigger a mixed motive analysis. In requiring direct evidence of discrimination, the Federal Circuit declined to adopt the Second Circuit's rule that the **Price Waterhouse** mixed motive analysis applies "where the evidence is sufficient to allow the trier to find both forbidden and permissible motives." **Rose v. New York City Bd. of Educ.**, 257 F.3d 156 (2d Cir.2001). **Haddon v. Executive Residence at White House**, 313 F.3d 1352 (Fed. Cir. 11/27/02).

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Notice of Claim

The New York State Court of Appeals has clarified, once and for all, that a notice of claim is not required in order to file a complaint with the New York State Division of Human Rights. A Nassau County employee, contending that she was fired because of her gender and age, filed a complaint and obtained a probable cause determination. Seven years later, however, without having held a hearing, the Division notified her of its intention to dismiss her complaint because she had failed to file a notice of claim, in accordance with County law, within 90 days of her termination in January, 1992. She sought a declaratory judgment that a notice of claim was not required, and the Supreme Court and Appellate Division agreed with her. Finding that the Legislature had set up a comprehensive administrative scheme for resolving discrimination claims, which did not include a notice of claim requirement, the Court of Appeals agreed. Matter of **Freudenthal v. County of Nassau**, —- N.Y.2d —-, —- N.Y.S.2d —-, N.Y.L.J. 2/14/03, p. 20, col. 3 (2/13/03).

Summary Judgment

The Tenth Circuit Court of Appeals held that a district court cannot grant a summary judgment motion solely because the nonmoving party failed to file an opposition. In this ADA case, the District Court granted summary judgment based on a local rule that unopposed motions typically should be granted. The Court of Appeals held that the local rule did not circumvent the requirements of Fed. R. Civ. P. 56; the moving party must establish that there is no genuine issue of material fact regardless of whether the nonmoving party responds. The Tenth Circuit remanded the case to the District Court to conduct a summary judgment analysis and to consider if the plaintiff's repeated late filings and requests for extensions warranted sanctions. **Reed v. Bennett**, 312 F.3d 1190 (10th Cir. 12/6/02).

Election of Remedy

If you think filing a complaint with the New York State Division of Human Rights ("SDHR") would preclude only a later court claim under the New York State Human Rights Law ("SHRL"), or that filing with the New York City Commission of Human Rights ("CCHR") would preclude only claims under the New York City Human Rights Law ("CHRL"), read the statutes again. The SHRL election of remedies provision, N.Y. Exec. L. § 296 (9), provides that a person may sue to enforce rights in court unless he or she has "filed a complaint hereunder or with *any local* commission on human rights" (emphasis added). The CHRL has a mirror-image provision, precluding litigating CHRL claims if the Plaintiff has filed a complaint with the CCHR *or* with the SDHR. NYC Admin Code § 8-502(a). In a case that appears result-oriented in other respects, Judge Constance Baker Motley (S.D.N.Y.) noted that a plaintiff's having filed a complaint with the SDHR—although not with the CCHR—precluded him from bringing claims in federal court under *both* the SHRL and the CHRL. The court made no secret of its disdain for the plaintiff, who (it said) had alleged that his supervisor, a Hispanic male, had discriminated against the plaintiff in favor of a different Hispanic male because of the plaintiff's (unspecified) "Hispanic ethnicity and male gender." Both the SHRL and the CHRL claims, however, were dismissed because the plaintiff had filed a complaint with the SDHR. The Division had found no probable cause and the plaintiff had not appealed. **Alvarado v. Manhattan Worker Career Center**, —- F. Supp. 2d —-, 2002 WL 31760208 (S.D.N.Y. 12/10/02).

RACE DISCRIMINATION

Compelling State Interest/Adverse Action

In the weeks following the torture of Abner Louima by police officers in the 70th Precinct, the New York City Police Department transferred several black and black-Hispanic officers into the troubled command post. Twenty-two of these officers brought suit alleging that the transfers violated the Equal Protection Clause and Title VII. In an opinion that tells us much about the court's thinking on racial classifications and affirmative action, the Second Circuit upheld the jury's verdict for the plaintiffs, finding that the transfers based on race violated the Equal Protection Clause, that transfer of one plaintiff ran afoul of Title VII, and that each plaintiff was entitled to an award of $50,000 in compensatory damages. The court noted that remediation of past discrimination is the only judicially recognized compelling state interest to warrant racial classification. The court viewed skeptically the Department's argument that the decision to transfer officers of color was justified by the potential for rioting (which did not occur) after the Louima scandal. Referring to the internment of Japanese-Americans during World War II, the court explained that government invocation of an emergency should not shield state action from constitutional scrutiny. It then held that the jury was within the law when it found the policy to be in violation of the 14th Amendment. Turning to the Title VII claim, the court held that the transfer of an officer trained in

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domestic violence work from a domestic violence job to a non-specialized position could constitute an adverse employment action. (This is in keeping with the Circuit's liberal reading of the adverse employment action requirement. *See* **Branch v. Guilderland**, discussed under "Retaliation."). Finally, the court declined to hold that physical symptoms are required for emotional damages under § 1983. The court cautioned that the testimony of a plaintiff in and of itself would not be enough to sustain emotional damages, but did not elaborate further. District Judge Sidney H. Stein, sitting by designation, wrote the opinion in which Judges Leval and Calabrese joined. **Winslow v. City of New York**, 310 F.3d 43 (2d Cir. 10/17/02).

RELIGIOUS DISCRIMINATION

Favoring One Religion

According to the Second Circuit, the schoolyard rhyme "sticks and stones may break my bones but names will never hurt me" does not apply to the workplace. In a religious discrimination and retaliation case brought by a Jewish Suffolk County police officer, the court reversed a district court's grant of a summary judgment to an employer. The plaintiff had sued the County based upon the Department's failure to promote him and upon his eventual demotion. The officer offered evidence that the Department engaged in anti-Semitic remarks, pro-Catholic remarks, pro-Catholic promotion practices, and retaliatory conduct. Nevertheless, Judge Jacob Mishler (E.D.N.Y.) had granted summary judgment for the County, reasoning that evidence of the Department's "preference for Catholics was insufficient to support a prima face case of religious discrimination" and that the plaintiff failed to provide evidence that could demonstrate a causal connection between his statements criticizing the Department and the adverse employment actions taken against him. Judge Richard A. Cardamone, joined by Judges Fred I. Parker and Barrington D. Parker, disagreed, finding that the lower court had failed to consider evidence of anti-Semitic comments and reminding us that, regardless, "an employer discriminating against any non-Catholics violates the anti-discrimination laws no less than an employer discriminating against only one discrete group." Furthermore, unlike in **Sheppard v. Beerman**, *supra*, the Appellate Court found that the burden was on a defendant to demonstrate that the public employee's speech was disruptive to government operations, and held that the defendants did not meet that burden here. **Mandell v. County of Suffolk**, 316 F.3d 368 (2d Cir. 1/17/03).

RETALIATION

First Amendment

Transfer as Adverse Action

A school bus driver in northern New York sued his school district and supervisor, alleging retaliation, under § 1983 and Title VII. The driver alleged that, after he complained of a co-worker's misconduct, the school district commenced a policy and custom of retaliatory conduct toward him. This conduct, he said, lasted several years and began five years prior to his filing suit. On a Rule 12-b(6) motion, the court held that because a jury could find that the defendants' actions comprised a continuing violation, the plaintiff's claims did not fail as a matter of law. The court further held that the school district's demotion and eventual termination of the driver were "classic examples of adverse employment actions," while several other actions taken by defendant—conspiring to have employees file false sexual harassment charges against him, giving him negative job assessments, and making it harder for him to complete his route on time—were adverse employment actions under the Second Circuit's decision in **Philips v. Bowen**, 278 F.3d 103 (2d Cir. 2002), which defined adverse employment actions as conduct that objectively render the working environment "unreasonably inferior." **Branch v. Guilderland Central School District**, —- F. Supp. 2d —-, 2003 WL 110245 (N.D.N.Y. 1/10/03).

SEX DISCRIMINATION

Hostile Environment

A female corrections officer brought a Title VII action against the New York State Department of Correctional Services (DCS). A jury awarded damages to plaintiff on her hostile work environment claim in the U.S. District Court for the Northern District of New York (Mordue, J.). DCS appealed the denial of its post-trial motion for judgment as a matter of law, arguing that the trial evidence was insufficient to establish a hostile work environment or to support the award of compensatory damages. The plaintiff cross-appealed the dismissal of her termination claim. Judge Dennis Jacobs, joined by Walker, Chief Judge, and Sack, writing for the Second Circuit Court of Appeals, concluded that the evidence at trial was insufficient to establish a hostile work environment under Title VII and reversed. The court noted that "even if [the plaintiff] could demonstrate an adverse employment action," she had failed to show that "similarly situated male employees received more favorable treatment in each situation of which she complains." Remarkably, the court of appeals found that the twelve incidents cited by the corrections officer, taken together, were insufficient as a matter of law to meet the threshold of severity or pervasiveness required for a hostile work environment claim. The court stated that while it will examine the totality of the circumstances, specifically the severity and frequency of the challenged conduct, there must be a threshold, which was not met here. The judgment of the district court was reversed and remanded for entry of a judgment dismissing the complaint, and the order dismissing the termination claim was affirmed. **Alfano v. Costello**, 294 F.3d 365 (2d Cir. 6/25/02).

Alfano v. Costello already has evil progeny. In a Title VII sexual harassment action, the defendant City moved for reconsideration. The court granted the city's motion and dismissed the employee's remaining claim of hostile environment sexual harassment. The court noted that it did not consider the statements made during the plaintiff's deposition that bore directly on the second element of her claim, i.e. whether the alleged harassment was motivated by her gender. The court noted that there was evidence that she was treated badly not because of her gender but rather because of individual dislike. The court also held that Title VII requires some basis for inferring that incidents sex-neutral on their face were in fact discrimina-

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tory, and noted that the only permissible inference was that the plaintiff was simply disliked by other personnel. The court examined several practical jokes that were played on the employee and concluded that the incidents were facially neutral and not motivated by gender. **Figueroa v. City of New York**, —- F. Supp. 2d —-, 2002 WL 31163880 (S.D.N.Y. 9/27/02).

SEXUAL HARASSMENT

Hostile Work Environment

One act of touching—in this case rubbing the bare back of a subordinate—does not a hostile work environment make, even when the supervisor became hostile to the subordinate's request that he stop. Furthermore, admissible evidence is required to survive summary judgment on a § 1981 pay disparity claim. So said Judge Denise Cote (S.D.N.Y.) in granting partial summary judgment for the defendant. **Medina v. New York City Department of Parks and Recreation**, —- F. Supp. 2d —-, No. 01 Civ. 7847, 2002 WL 31812681 (S.D.N.Y. 12/12/02).

See also **Alfano v. Costello** and **Figueroa v. City of New York**, discussed under "Sex Discrimination."

SEXUAL ORIENTATION DISCRIMINATION

An openly gay man sued his employer, alleging that harassment by co-workers and a supervisor constituted discrimination based on sex under Title VII. The employee alleged his co-workers lewdly whistled and blew kisses at him, grabbed his crotch and poked their fingers at his anus through his clothing. The United States District Court for the District of Nevada granted summary judgment to the employer, holding that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender, not discrimination based on sexual preference. A plurality opinion by the Ninth Circuit Court of Appeals, sitting *en banc*, relied heavily on the Supreme Court's opinion in **Oncale v. Sundowner Offshore Servs. Inc.**, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), and held that the employee had stated a claim for sex discrimination under Title VII. Under Title VII, offensive sexual touching is actionable discrimination even in a same-sex workforce. So long as the environment was hostile to the employee because of his or her sex, the reasoning as to why the harassment was perpetrated is of no legal consequence. **Rene v. MGM Grand Hotel**, 305 F.3d 1061 (9th Cir. 9/15/01).

SUMMARY JUDGMENT

First Amendment

A former public school principal brought a §1983 claim against the school board that allegedly reassigned her for objecting to the input process used in developing school policy. Judge Harold Baer, Jr. (S.D.N.Y.) denied the defendant school board's summary judgment motion, holding that the input process for formulating public school policy was a matter of public concern. The court additionally held that the plaintiff's reassignment to the district office could constitute an adverse employment action, where plaintiff lost the use of a secretary, could no longer send letters in her own name, had to report to

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DIVERSITY, from page 1

Assuming that people accept the responsibility and the recruitment mission, and that they act on it, then I believe that NELA/NY, organizationally and in the person of each of us, must take special actions to make the new members feel welcome and as though each is a meaningful part of the organization. By this I mean that we need to consider ourselves as mentors and buddies for the new members.

Steps need to be implemented in order to fast track these new members into having friendships with older members, getting access to advice from more experienced practitioners if that would be helpful, getting referrals, and being given speaking and other important opportunities. In other words, the sink or swim reality that most new members face should be jettisoned in favor of an expedited facilitation of comfort and presence.

Why do I think that we need to express diversity members to the front of the organization? It is because NELA/NY has demonstrated an inability to grow a diverse membership, and I think that radical steps need to be taken if a transformation is to occur. When people develop friends, obtain preferential access to advice, are made to feel a part of the organization or get referrals, they experience benefits that make them want to stay and do more. And when members of the diverse community can then talk about their positive experiences, or when others can point to a burgeoning group of diverse members as a base that others can join, and when everyone can see that NELA/NY treasures its diversity, then membership will follow and grow.

Over the years I have made a point of giving new attorneys an opportunity to appear on panels or to assume roles that they had not yet earned. It never troubled me that not everyone on a panel would be the "best." After all, one of our missions is to develop a new cadre of leaders, and you can't do that if you always look to those who are established to be the role models.

People need to be given a chance, and then they need to be given a second chance. Whatever the result, whether the person succeeded in the opportunity or not, I would then make a point of reinforcing them. I tell my people where they screwed up and what they could have done differently, and then channel them on to new and other experiences. In this way a lot of people have grown into their self-identification as speakers or "can do" people. NELA/NY can do this with members of the diverse communities and it should do so with increased energy.

Perhaps we should have CLE programs on diversity (in the workforce or in law firms). Efforts should be made to give new diverse members speaking opportunities; they should be appointed to working committees (if we can create some) where they have a chance to interact in a meaningful way for NELA/NY; and their buddies/mentors should be held accountable for their efforts. Maybe we should give scholarships to our programs or to the NELA National Convention, as a vehicle for bringing diverse members in.

It won't be easy to become diverse. On the other hand, if we don't try, then it will never happen.

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another principal, and lost the ability to earn wages in addition to her salary. **Hurdle v. Board of Education**, — F. Supp. 2d —, 01 Civ. 4703 (HB), 2002 WL 31834454 (S.D.N.Y. 12/16/02).

National Origin

Race Discrimination

A nurse who applied for the position of Case Manager for an insurance company was filling out the job application in a cubicle after her panel interview, "job shadow," and peer meeting when she heard one of the participants in the peer meeting nearby expressing hostility to her and saying "Get her black ass out of here" and "She doesn't belong here," among other things. She left and later told the employee in charge of recruitment about what she had heard, saying, "I don't think the EEOC would like to hear about this" and "I'm putting you on notice." Two weeks later she was notified that another candidate had been selected. Judge Denise L. Cote (S.D.N.Y.) denied the employer's motion for summary judgment, finding that the plaintiff's evidence had raised material issues of fact and rejecting the employer's "stray remark" argument. The court quoted **Bickerstaff v. Vassar College**, 196 F.3d 435, 450 (2d Cir. 1999), to the effect that the bias of a single individual at any stage of the employment process may taint the ultimate decision if that individual played a meaningful role in the process. **Romain v. Cigna Life Insurance Co.**, — F. Supp. 2d —, 2002 WL 31385816 (S.D.N.Y. 10/22/02).

Retaliation

Thorny problems can arise when spouses or relatives work for the same employer and one raises a discrimination claim. When a woman complained of sex discrimination and retaliation, eventually naming her husband's immediate supervisor as a respondent, the supervisor seems not to have taken it well. The husband received a "marginal" evaluation and ultimately filed his own EEOC charge. Judge John G. Koeltl (S.D.N.Y.) noted that many courts have held that a retaliation claim is sufficiently stated by an allegation that the plaintiff was retaliated against because of the protected activities of another closely related person. Although these claims were dismissed for lack of proof, the plaintiff's transfer three months after he filed his own EEOC charge sufficed to constitute an adverse employment action, said the court, because of the loss of status and fringe benefits, even though his salary was unchanged. **Reiter v. Metropolitan Transit Authority**, — F. Supp. 2d —, 2002 WL 31190167 (S.D.N.Y. 9/30/02).

See also **Romain v. Cigna Life Insurance Co.**, discussed under "Summary Judgment — Race Discrimination."

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