NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 1 August 2001 Jonathan Ben-Asher, Editor

Filings, Trials & Settlements

In this space we highlight cases brought, tried and settled by members of NELA/NY. Please e-mail your news to Jonathan Ben-Asher at *jb-a@bmbf.com*. You should include the case citation, court, defendant's counsel, a summary of the legal claims and facts involved, whether or not an appeal is planned or pending, and anything which is particularly interesting about the case.

Helen Ulrich of Goshen won a $2.2 million jury award in a First Amendment case for two nurses who were fired by a medical service contractor at Orange County Jail after complaining about inmate abuse by the Orange County Department of Mental Health. The jury found that the private employer was a "state actor" because the County Executive "coerced or significantly encouraged" it to fire the plaintiffs because of their protected speech. The jury awarded $1 million in punitive damages against the County Executive, $200,000 in punitives against Eastern Healthcare Group, Inc., and approximately $1 million in compensatory damages against all defendants. The parties then settled the case for $1.275 million. Helen was assisted at trial by Scott Thornton of New Hampton, N.Y. **Berweger v. County of Orange et al**, 99 Civ. 4717 (S.D.N.Y. 2001, Magistrate George A. Yanthis) See also 121 F. Supp.2d 334 (motion for summary judgment).

See FILINGS, page 8

Representing Your Clients in ADR After *Circuit City*

"Of course," your client tells you, "my employer will never want to face a jury in my case."

Unfortunately, that jury is becoming a thing of the past for more employees. Mandatory arbitration is the new management darling, and it's being imposed with greater frequency. While the Supreme Court's decision in **Circuit City v. Adams** changed the law on mandatory arbitration only in the Ninth Circuit, the case has focused great attention on these issues.

NELA National will conduct a conference in Washington, D.C. October 4–5, to help plaintiffs' lawyers challenge arbitration agreements where necessary, properly represent clients in arbitration, and use advanced mediation strategies to employees' advantage.

The program includes sessions on:

- **Challenges to mandatory arbitration after Circuit City:** constitutional and contractual challenges, challenges based on unconscionability, waiver and public policy, and challenges based on ethics and the neutrality of ADR providers.
- **Making the record** in an arbitration, including discovery
- **Legislative update** on the new efforts to roll back mandatory arbitration
- **Making arbitration work effectively:** motion practice, selecting arbitrators, written submissions, presenting evidence, oral advocacy, strategy and judicial review.
- **Class actions** and arbitration issues
- **Mediation:** how to value your case, making a credible demand, and including the value of taxation in the award.
- **Mediation preparation and advocacy**: structuring negotiations, common mistakes, preparing the client and yourself, use of witnesses and exhibits, overcoming stonewalling, and negotiation strategy and tactics.
- **Impasse resolution techniques:** What To Do When You've Demanded $100K & Your Opponent Offers $5K

In conjunction with the seminar, NELA will be organizing a NELA Day On The Hill on Thursday, October 11, to lobby Congress on important employee rights issues. These include proposed federal legislation to prohibit mandatory arbitration of statutory claims, and the Civil Rights Tax Relief Act, which would end taxation of emotional distress damages, reduce taxes on lump sum pay awards and eliminate the "double taxation" of attorneys fees.

Early-bird registration for the seminar (postmarked by September 13) is $425 for NELA members and $625 for non-members. After that, rates are higher. The registration fee includes attendance, the course manual, two continental breakfasts, a luncheon, refreshments, and a reception. The course manual is available for separate purchase from NELA.

For more information, or to register for the conference, visit NELA national's website *www.nela.org*.

The NELA/NY
Calendar of Events

September 11 • 6–7:30 p.m.
Sex Discrimination - Sexual Harassment Committee
Meets second Tuesday of every month
Office of Margaret McIntyre
35 Worth Street
4th floor

September 12 • 6:30 p.m.
NELA/NY Board of Directors Meeting
1501 Broadway
8th floor

September 25 • 6:30 p.m.
NELA NITE
New Case Selection
New location:
1740 Broadway
55th–56th Streets
26th floor
conference room
(enter on 25)
Food returns by popular demand

October 12-13
Washington, D.C.
The New Civil Rights Battleground:
ADR After Circuit City
Sponsored by NELA National
See article in this issue

November 2
NELA/NY Fall Conference
Yale Club of NYC
Watch for Details

November 7 • 6:30 p.m.
NELA/NY Board of Directors Meeting and Board Elections
1501 Broadway
8th floor

November 14 • 6:30 p.m.
NELA NITE
Topic to be Announced
1740 Broadway
55th–56th Streets
26th floor
conference room
(enter on 25)

November 29
NELA/NY Annual Fund Raising Dinner
Yale Club of NYC
"Courageous Plaintiffs Who Fought Back"
NELA/NY's 15th Anniversary

December 7
NELA/NY Long Island Conference
Touro Law School
Watch for Details

December 12
NELA/NY Holiday Party
Save the Date

December 19 • 6:30 p.m.
NELA NITE
Topic to be Announced
1740 Broadway
55th–56th Streets
26th floor
conference room
(enter on 25)

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NELA/NY now has an free telephone access number: 866-654-5539.

A Word from Your Publisher

The New York Employee Advocate is published bi-monthly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 880 Third Ave., 9th Floor, New York, New York 10022. (212) 317-2291. Website: www.nelany.com. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

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An Unreasonable View of the Reasonable Employee: The Supreme Court Tackles Retaliation

by Scott Moss

The scope of retaliation protection for "opposition" to discrimination is a rule of reasonableness: "an employee need not establish that the conduct she opposed was in fact a violation of Title VII, but rather, only that [s]he had a good faith, reasonable belief that the underlying employment practice was unlawful." **Reed v. A.W. Lawrence & Co.**, 95 F.3d 1170, 1178 (2d Cir. 1996); see also **Sarno v. Douglas Elliman-Gibbons & Ives, Inc.**, 183 F.3d 155 (2d Cir. 1999); **Bigge v. Albertsons Inc.**, 894 F.2d 1497 (11th Cir. 1990).

The Supreme Court recently deemed insufficiently reasonable an employee's belief that discrimination had occurred. In **Clark County Sch. Dist. v. Breeden**, 121 S. Ct. 1508 (Apr. 23, 2001), a female employee claimed retaliation protection when she complained that a supervisor and co-worker laughed at a sexually offensive joke that a job applicant had made about another woman. Applying the Ninth Circuit's elaboration of the "reasonable belief" standard, the Court, per curiam, held that "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard."

Troublingly, **Breeden** may support the conservative side of the debate over whether a reasonable person could believe that a single incident of verbal harassment is actionable discrimination. In **Reed**, the Second Circuit ducked that question: "we do not suggest, much less decide, that one comment, standing alone, could support a reasonable belief that an employee was suffering unlawful, discriminatory employment conditions." 95 F.3d at 1179 n. 12.

But other circuits did extend opposition clause protection to situations of one-time verbal harassment that would fall short of the "severe or pervasive" standard for a hostile work environment. In **Trent v. Valley Elec. Ass'n**, 41 F.3d 524 (9th Cir. 1994), the supposed sexual harassment being opposed was a series of sexually offensive remarks at one seminar; in **Alexander v. Gerhardt Enters., Inc.**, 40 F.3d 187 (7th Cir. 1994), it was a single racial slur.

Expect employers to argue that **Breeden** erodes these precedents in which the allegedly offensive conduct consisted of comments too infrequent to be a "hostile work environment." A broad reading of **Breeden** requires workers to possess an intuitive sense of the numerical threshold for discriminatory comments that even lawyers and judges cannot quantify reliably.

One argument for limiting **Breeden's** effect on existing precedent is to focus on the allegedly discriminatory comment in that case. The comment not only was a one-time event but also was not that severe. The plaintiff "conceded that it did not bother or upset her" to hear the job applicant's joke read by her supervisor, so even recurring similar incidents might not have amounted to unlawful harassment. In **Trent** and **Alexander**, in contrast, the comments were offensive enough that if they recurred sufficiently often, they almost certainly would have constituted unlawful harassment.

The line that **Breeden** may draw is between comments insufficiently offensive to amount to harassment (**Breeden**) and comments offensive enough to amount to harassment if they continue unabated (**Trent** and **Alexander**). Inthis light, **Breeden** is a holding about the severity, not the pervasiveness, of alleged "harassment," and it is an exceptional case where the plaintiff conceded that the words had limited impact upon her. There is textual support for so limiting **Breeden's** holding: the Court did not write that a single incident never could support a reasonable belief; it wrote that "the single incident *recounted above*" (the sexist joke) could not support a reasonable belief.

There also are policy arguments supporting this narrow interpretation of **Breeden**. Protecting opposition to truly offensive comments is important even if those comments have not been repeated often enough to support a harassment claim. The alternative is a nonsensical rule that, before attempting the sort of opposition required by **Faragher** and **Ellerth**, employees must allow offensive comments to continue unabated until they become bad enough to arguably constitute a hostile work environment.

Though the narrow view of **Breeden** comports with existing appellate precedents, as well as the text of the decision and policy considerations, it leaves fuzzy the limits of protection for opposition to borderline-unlawful conduct. Like so many recent Supreme Court decisions, **Breeden** touches upon important questions but resolves little. On the bright side, especially if our first undemocratically elected president since Rutherford B. Hayes has any opportunity to reshape the Court with new appointments, perhaps we should cheer minimalist holdings that cause more uncertainty than harm.

Dinner and a Show

What with all those pleadings and document demands, NELA/ NY members may not go out as much as they'd like to — if at all. This summer we did what we could to change that. Twenty three of our members came to NELA/ NY's Theater Night on July 11, seeing the unusual off-Broadway production "Bat Boy—The Musical."

The New York Times called "Bat Boy" "a jaggedly imaginative mix of skewering humor and energetic glee." Most everyone seemed to enjoy the show and the pre-show dinner which started the evening.

Many thanks to NELA/NY member Jim Brown, who had the idea, picked the show and restaurant and organized the event.

Website Help for Your Practice

Our website has been reinstated and renovated. When you try it, you'll see how much it can help you with your cases and your practice.

Using our website puts you in quick touch with other NELA/NY members for advice and brainstorming. You can post questions and opinions on our bulletin board, chat with other members and get or give help in a jam. You can access our membership directory, and use internet links to other employment-related organizations and government agencies. You can comb previous issues of the Employee Advocate, and learn about NELA and NERI's publications and services.

There's no good reason not to participate, and getting online is quick and easy. New visitors (and members who haven't used the site in the last few months, since the website members' area went online again) should

1. Log onto *www.nelany.com*.
2. Scroll down to "click here" (to the left of "ENTER")
3. An application appears
4. Type in the information requested. The user ID and password should be no more than 10 characters. Please keep a record of them.
5. Once you submit the application, Shelly Leinheardt will approve it and you'll receive notice of your good standing.
6. Enjoy!

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 Nantiya Ruan, an associate, and Samantha Abeysekera, a summer associate, with Outten & Golden LLP, for their assistance with these squibs.

AGE DISCRIMINATION

Evidence

A public school acting principal who had received satisfactory evaluations for approximately two decades allegedly was told by the school superintendent that if she could not follow his instructions, he would replace her with someone "younger and cheaper." (The superintendent denied having ever said this; she alleged that he said it twice.) She was later demoted to assistant principal. The district judge (Sterling Johnson, Jr., E.D.N.Y.) refused to give a **Price Waterhouse** burden-shifting instruction at trial, and the jury found for the Board of Education, answering "No" to the special interrogatory, "Do you find that plaintiff ... has proven by a preponderance of the evidence that age was a determinative factor in defendant['s] demoting her from her position as probationary principal ... ?" The Second Circuit Court of Appeals reversed in an opinion by Judge Wilfred Feinberg (joined by Van Graffeiland and Sotomayor, CJJ). The court of appeals held that the superintendent's remarks were direct evidence of age bias entitling the plaintiff to a **Price Waterhouse** charge, requiring the employer to show that she would have been demoted even without the superintendent's discriminatory animus. The fact that she also had challenged each of the defendant's proffered reasons as pretextual did not waive her right to this charge. **Rose v. N.Y.C. Board of Education**, —- F.3d —-, 2001 WL 792667 (2d Cir. 7/16/01).

Statistical Evidence

The Seventh Circuit affirmed a defense grant of summary judgment in an age discrimination RIF case—but not before Judge Posner included two intriguingly pro-plaintiff views on discrimination evidence. Judge Posner found it "relatively unimportant" that the decisionmaker was older than the plaintiff: "it is altogether common and natural for older people … to be oblivious to the prejudices they hold, especially perhaps prejudices against the group to which they belong." He also found plaintiff's statistical evidence admissible, even though it fell short of statistical significance, because "[t]he 5 percent test is arbitrary …. Litigation generally is not fussy about evidence; much eyewitness and other nonquantitative evidence is subject to significant possibility of error, yet no effort is made to exclude it if it doesn't satisfy some counterpart to the 5 percent significance test." However, the court found insufficient evidence to survive summary judgment: the plaintiff was fired in a RIF just months after his hiring when the company undisputedly lost a major account; the statistical evidence actually supported the defendant; and the only evidence of age animus was unsupported opinion and a cryptic statement about "these guys." **Kadas v. MCI Systemhouse Corp.**, —- F.3d —-, 85 [BNA] F.E.P. Cas. 1720, 2001 WL 683471 (7th Cir. 6/19/01).

ARBITRATION

Unonscionability of Agreement

A male African-American executive challenged the enforceability of his employment agreement, arguing that he

See SQUIBS, next page

SQUIBS, from page 4

was not bound by the agreement's arbitration provision because it was a contract of adhesion. Specifically, he contended that the provision requiring him to submit a notice of claim within three days of executing the agreement was unconscionable. Judge Scheindlin (S.D.N.Y.), however, granted the corporate defendant's motion to stay the proceeding pursuant to arbitration. Unless the plaintiff can prove that the clause mandating arbitration itself is unconscionable and/or the product of high-pressure tactics or deceptive language, the court held, the enforceability of the agreement in general is solely a matter for the arbitrator to decide. The court did not stay the proceedings against an individual codefendant. The plaintiff was represented by NELA/NY member Jonathan Ben-Asher. **Wright v. SFX Entertainment, Inc.**, —- F. Supp. 2d —-, 2001 WL 103433 (S.D.N.Y. 2/7/01).

ATTORNEYS' FEES

The Tenth Circuit recently reviewed the issue of whether attorneys' fees can be awarded in a Title VII case when the jury awards only nominal damages. The multiracial plaintiff (African-American and Native American) alleged hostile work environment, discriminatory termination, and retaliatory discharge. The jury found for the plaintiff on the hostile work environment claim but awarded only $1.00 in nominal damages. The district court then awarded attorneys' fees to the plaintiff and costs to both parties. On appeal, the defendant argued that nominal damages are not recoverable under Title VII, and even if they are, they are not recoverable in a hostile work environment action because the award of nominal damages is inconsistent with the definition of actionable harassment. The Tenth Circuit rejected both arguments and determined that fees could be awarded even though the plaintiff had received only nominal damages, analyzing the three factors in Justice O'Connor's concurrence in **Farrar v. Hobby**, 506 U.S. 103 (1992). Additionally, the panel held that the district court had erred in awarding costs to both parties. **Barber v. T.D. Williamson, Inc.**, —- F.3d —-, 86 [BNA] F.E.P. Cas. 187 (10th Cir. 7/2/01).

Sometimes I Just Open Up My File Drawer and Listen to Them Barking

Each of us—yes, each of us—has cases that we regret taking. Selecting new cases is the most important factor in your firm's failure, survival or success. Want to avoid the bad ones? Join your fellow NELA/NY members on September 25 for an interactive NELA Nite on how to select new cases. We will discuss:

- Tips on recognizing good cases (and clients), and bad ones
- Questions to ask prospective clients
- Legal and nonlegal settlement leverage you may not have considered
- Early warning signs to watch for
- What to do when you're stuck with a bad case

And much more!

We will have food, which returns by popular demand. We will meet at a new location—1740 Broadway, 26th floor (enter on 25), between 55th and 56th Streets, at 6:30 p.m. Come learn how to keep the pooches at bay.

DAMAGES

The U.S. Supreme Court has held that front pay is not an element of compensatory damages within the meaning of the Civil Rights Act of 1991 and thus not subject to the Act's $300,000 statutory cap. In doing so, the Court overturned the Sixth Circuit's decision in **Hudson v. Reno**, 130 F.3d 1193 (1997), which held that front pay was subject to the cap. The Court reasoned that under § 1981a(b)(3), compensatory and punitive damages are capped, but the statute explicitly provided for them in addition to the relief available under § 706(g) of the Civil Rights Act of 1964. Therefore, Congress never intended to curtail previously available remedies. Because front pay was already authorized by the Act and functions as a substitute for reinstatement, unlike compensatory damages for future pecuniary losses under § 1981, it is not subject to the 1991 limitations. The Court drew no distinction between front pay awards made when there eventually is reinstatement and those made when there is not—neither is subject to § 1981 a(b)(3)'s statutory cap. **Pollard v. E.I. du Pont de Nemours & Co.**, 121 S. Ct. 1946, 85 [BNA] F.E.P. Cas. 1217 (6/4/01).

Emotional Distress Under State Human Rights Law

See **Epstein v. Kalvin-Miller International, Inc.**, discussed under "Disability Discrimination."

Reduced Pension

After a jury awarded an age discrimination plaintiff an advisory verdict of $110,000 in front pay over 17 years, in addition to awarding $117,000 in back pay, the employer moved to reduce the front pay award because of evidence that the plaintiff had intended to retire in 2002, but the judge accepted the jury's reasoning that he had lost value on his pension because of his discriminatory discharge. The court applied an interest rate of 3.6 percent to the $117,000 and came up with total front pay of $132,930. **Hogan v. General Electric Co.**, 144 F. Supp. 2d 138 (N.D.N.Y. 5/24/01) (Hurd, J.).

DISABILITY DISCRIMINATION

Hostile Environment

The Fifth Circuit—the Fifth Circuit!—has recognized that the principles stated by **Harris v. Forklift Systems**, 510 U.S. 17 (1993), apply to harassment on other grounds as well. The court applied Title VII principles to an ADA case brought by a medical assistant whose supervisor and co-workers harassed her after learning that she was HIV-positive. The court held, however, that the plaintiff was entitled only to nominal damages because she had not offered enough evidence of actual emotional injury. She had been placed on probation twice and fired, but the jury

See SQUIBS, next page

SQUIBS, from page 5

had found that the reasons for the termination were nondiscriminatory, and the only evidence of injury she had offered at trial related to the termination. **Flowers v. Southern Regional Physician Services, Inc**., 247 F.3d 229, 11 A.D. Cas. 1129 (5th Cir. 3/30/01).

New York State Human Rights Law

After a jury returned a verdict for the employer on ADEA and age discrimination claims under the New York State Human Rights Law, but for the employee on a disability claim under the Human Rights Law, Judge Peter K. Leisure (S.D.N.Y.) faced the usual post-trial motion by the employer for judgment as a matter of law or, alternatively, for a new trial on the state law disability claim. The CEO had testified that he and the board of directors had hired the plaintiff's replacement as a direct result of the plaintiff's cardiac incident, because they feared the plaintiff "was going to die" and leave his department in the lurch. The court also declined to reduce the jury's award of $54,000 for emotional distress, particularly since his (di)stress aggravated his physical symptoms. **Epstein v. Kalvin-Miller International, Inc**., 139 F. Supp. 2d 469 (S.D.N.Y. 4/17/01).

EMPLOYMENT AT WILL

Employee Manual

An employee has been told by the New York State Court of Appeals that he had no right to rely upon a provision in the employee manual promising "protection against any form of reprisal for reporting actual or suspected violations of our Code of Business Conduct." This is because an employment-at-will disclaimer also appeared in the same manual. The employee, named as a party-witness for his employer in a (non-employment) litigation, testified truthfully despite pressure from the company counsel to testify otherwise, and informed counsel that another employee had concealed documents relevant to the litigation. He was fired shortly thereafter and alleged, among other things, breach of contract. The lower court allowed the breach of contract claim; the Appellate Division (over two dissents) reversed and dismissed that claim. The Court of Appeals affirmed, holding that the disclaimer "prevent[ed] the creation of a contract and negate[d] any protection from termination plaintiff may have inferred from the manual's no-reprisal provision." **Lobosco v. New York Telephone Company / NYNEX**, —-N.Y.S.2d —-, 2001 WL 670099 (6/14/01).

EVIDENCE

Burden-shifting Framework

See **Rose v. N.Y.C. Board of Education**, discussed under "Age Discrimination."

HOSTILE WORK ENVIRONMENT

In a "second hand plaintiff" case, the Second Circuit Court of Appeals held that if a plaintiff was emotionally distressed by hearing that other women elsewhere in the workplace were subjected to sexual harassment and the employer had responded inadequately to their complaints, the plaintiff had constitutional standing to bring a claim. However, in the case before the court, the plaintiff failed to make a sufficient showing of injury, so the panel reversed the jury award. The plaintiff failed to carry her burden in this case because she witnessed none of the harassment that formed the predicate of her claim and ultimately failed to demonstrate an adverse impact on the terms and conditions of her employment. The panel was persuaded by the fact that the victims were harassed in a different sector of the workplace by a different supervisor, and that the plaintiff only learned about the harassment through hearsay. The panel opined that to expand the concept of environment to include venues where the plaintiff did not work would overly broaden potential employer liability. **Leibovitz v. New York City Transit Authority**, 252 F.3d 179 (2d Cir. 6/6/01).

LIMITATIONS

Back pay

In a case of first impression, the Second Circuit addressed the issue of what remedy is available to union organizers discriminated against in hiring by nonunion employers. The panel first underscored its "special respect" for the NLRB's determinations. Then, in a holding useful to all victims of hiring discrimination, the panel held that the mere possibility that an employee might have left his job sooner does not render the back pay award too speculative, so as to shorten the back pay period, since that possibility always exists. The panel also upheld the back pay award by (1) determining that back pay should not be offset by any "moonlighting" by the employee and (2) refusing to institute a **per se** rule that a failure to mitigate damages will be found where a union limits the "universe" of employers to whom an organizer may apply for employment. **N.L.R.B. v. Ferguson Electric Co., Inc.**, 242 F.3d 426, 2001 WL 122007 (2d Cir. 2/14/01).

Continuing Violation

Reversing a grant of summary judgment by Judge Thomas J. McAvoy (N.D.N.Y.), the Second Circuit Court of Appeals (opinion by Amalya Kearse, joined by Jacobs, CJJ; Judge Korman, sitting by designation, dissented in part) has held that constructive discharge is an "adverse employment action"- but not a "tangible employment action" (so the affirmative defense is available) for the purpose of an employer's **Faragher-Ellerth** affirmative defense. In addition, the quantum of proof needed to show hostile work environment is less than that required to support a claim of constructive discharge; the employee's psychological well-being need not be harmed for the environment to be hostile enough to violate Title VII. Here, although the employee showed a continuing violation in the form of retaliatory harassment, the sexual advances that she had rejected (leading to the retaliation) were held to be outside the limitations period and not part of the continuing violation of retaliation. The initial harassment was, however, admissible in evidence. NELA/NY member Peter Henner represented the plaintiff. **Fitzgerald v. Henderson**, 251 F.3 345 (2d Cir. 5/31/01).

PUBLIC EMPLOYEES

A correctional officer for DOC who was also a reverend defeated summary

See SQUIBS, next page

SQUIBS, from page 6

judgment on his claims of race discrimination, failure to accommodate his religion, and retaliation. Judge John G. Koeltl (S.D.N.Y.) denied DOC"s summary judgment motion on all counts except as to an individual defendant's liability. On the plaintiff's racially hostile work environment claim, the court relied upon **Cruz v. Coach Stores, Inc.** 202 F.3d 560 (2d Cir. 2000), to find that a series of incidents over ten years but concentrated within a two-year span was "serious, repeated, and sufficiently concentrated in time" to survive summary judgment. The court then found that religious discrimination under Title VII encompasses all aspects of religious observance and practice, and DOC's alleged refusal to let the plaintiff attend annual religious conventions met his **prima facie** burden. Because DOC failed to (1) argue the other **prima facie** factors or (2) provide affidavits supporting its reason for denying him leave to attend the religious conventions, the court denied summary judgment on the plaintiff's religious discrimination claims. On his retaliation claim, the court held that a suspension and transfer were "material alteration[s]" of the job and denied summary judgment on this ground as well. **Jones v. New York City Dep't of Correction**, —- F. Supp. 2d —-, 2001 WL 262844 (S.D.N.Y. 3/15/01).

RETALIATION

Judgment as a Matter of Law

Reversing a district court, the Second Circuit Court of Appeals has ruled that summary judgment is not appropriate where the issue of causation in a retaliation case is a factually close one. The plaintiff was discharged just twenty days after the defendant learned of her gender discrimination claims. Although the defendant contended that it was merely following a nine-month-long course of disciplining the plaintiff for poor performance and that her termination was a culmination of that process, the panel found that the twenty-day time period was itself sufficient evidence in the record form which a rational factfinder could conclude that the defendant's explanation was a pretext for retaliation. Thus, summary judgment was not appropriate. **Cifra v. General Electric Co.**, 252 F.3d 205 (2d Cir. 6/7/01).

In an unusual claim of retaliation by a tenured professor, Judge Denise Cote (S.D.N.Y.) granted summary judgment and dismissed the plaintiff's claims. The plaintiff professor claimed that he was retaliated against when he opposed the appointment by the department head of the latter's former student and alleged lover to a teaching position. The plaintiff first sued in state court, then filed an EEOC charge of discrimination and retaliation after the university moved for summary judgment, which was ultimately granted by the state court. The court held that the doctrine of **res judicata** barred the claims that the plaintiff made to the EEOC because his EEOC filing did not defeat the **res judicata** effect to give him a second chance to prevail on a different legal theory arising form the same nucleus of common facts. The court then dismissed the plaintiff's claims based upon events occurring after the filing of his state law claims, holding that preferred treatment on the basis of an intimate relationship does not constitute sex discrimination. NELA/NY member Linda G. Bartlett represented the plaintiff. **Risley v. Fordham University**, 85 F. Supp. 2d 490, 2001 WL 118566 (S.D.N.Y. 2/13/01).

Underscoring a plaintiff's **de minimus** burden in his **prima facie** showing of retaliation, Chief Judge Michael B. Mukaskey (S.D.N.Y.) denied summary judgment in favor of the plaintiff. The plaintiff and three other employees complained of sexually charged comments and conduct by a manager. After the plaintiff was given adverse job assignments and later terminated, he was able to show that (1) three of the four complaining employees were terminated and (2) the defendant's purported reduction in force was not credible because its witnesses had previously testified that other employees had been discharged because of their performance. These showings were enough for Judge Mukasey to find that a jury could reasonably conclude that the plaintiff was retaliated against for engaging in protected activity. **Donlon v. Group Health Inc.**, —- F. Supp. 2d —-, 85 [BNA] F.E.P. Cas. 705, 2001 WL 111220 (S.D.N.Y. 2/8/01).

"Reasonably Related" to EEOC Charge

The First Circuit Court of Appeals has adopted a rule that "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the

See SQUIBS, next page

FILINGS, from page 1

Gene Prosnitz succeeded in obtaining a $200,000 damage award from the New York City Health and Hospitals Corporation, in settlement of a client's race discrimination and retaliation claims. **Mendez v. NYC Health and Hospitals Corp**, Supreme Ct., Bronx Co., Index No. 6627/92 The plaintiff, an African-American accountant with the agency, had previously filed another lawsuit against HHC, in which he had obtained reinstatement. In that new job, though, he was given inferior work assignments, and, after five years, laid off, allegedly for budget reasons. However, other professionals with less seniority kept their jobs, and two of the alleged layoffs actually involved employees who could not stay with HHC because they were moving. In the second lawsuit, plaintiff alleged that his termination was in retaliation for his previous case and for discrimination complaints he made shortly before he was fired. Practice commentary: Gene explains that defendant's counsel said that the settlement would not have been as generous had the case been brought in federal court. He also says NELA/NY members should not be scared off by the 1992 index number, as the case moved slowly with another attorney.

Jonathan Weinberger recently won a $350,000 punitive damage award in a retaliation case against one of New York's largest real estate owners. The plaintiff was the white manager of the Paris Theater in Manhattan. Shortly after complaining about race discrimination against other employees, his supervisory authority was taken away, he was denied a raise and then terminated. The jury found in his favor on the first two retaliation claims, but found mixed motive for the termination. The jury awarded $250,000 in punitives against the corporate defendant, $125,000 against the company's principal, Sheldon Solow, and $15,000 in pain and suffering. **Lamberson v. Six West Retail Acquisition Inc. et al**, 98 Civ. 8053 (S.D.N.Y. 2001, Judge Chin.) See also 122 F. Supp. 2d 502 (S.D.N.Y. 2000) (denying motion for summary judgment).

Jon also won a verdict in a sexual orientation discrimination case, brought by an airport security employee under the New York City Human Rights Law. The employee was terminated afer complaining about anti-gay comments by other employees. He sued based on hostile environment, discriminatory termination and retaliation. The jury awarded $20,000 in back pay and $10,000 in pain and suffering damages. Defendant's motion for JNOV is pending. **Morrison v. Command Security**, Index No. 102582/99 (Sup. Ct. N.Y. Co., Justice Robert Lippmann). See also 275 A.D.2d 221 (1st Dept. 2000) (denying motion for summary judgment).

SQUIBS, from page 7

agency—*e.g.*, the retaliation is for filing the agency complaint itself." (A similar rule already existed in the Second Circuit.) The district court's grant of summary judgment to the employer on the retaliation claim, based on the fact that the employee had not mentioned retaliation in her EEOC charge of sexual harassment, was reversed. **Clockedile v. New Hampshire Department of Corrections**, 245 F.3d 1, 85 [BNA] F.E.P. Cas. 570 (1st Cir. 3/30/01).

Promise in Employee Manual

See **Lobosco v. New York Telephone Company / NYNEX**, discussed under "Employment at Will."

SEXUAL HARASSMENT

"Equal Opportunity Harasser"

A plaintiff who was at least the fifth woman to complain about the sexually hostile environment created by her supervisor defeated a summary judgment motion in which the employer claimed that the supervisor treated both sexes badly and so could not be discriminating against women. The plaintiff presented evidence that the supervisor used sexually offensive language and referred to her in a derogatory way, as well as yelling, slamming fists, showing aggression, and flying into a rage against the plaintiff and other female employees. The employer's attempt at a **Faragher-Ellerth** affirmative defense also failed: although it investigated and made recommendations, there was no evidence that the recommendations were carried out, either in the plaintiff's case or in others. NELA/NY member Peter Henner represented the plaintiff. **Finn-Verburg v. N.Y.S. Dep't of Labor**, 122 F. Supp. 2d 329, 84 [BNA] F.E.P. Cas. 1252 (N.D.N.Y. 11/8/00) (opinion by David N. Hurd, J.).

Motion to Dismiss

An upstate county community action agency found a friend in a Northern District of New York district judge (Lawrence E. Kahn, J.), who granted its motion to dismiss her sexual harassment and retaliation complaint, but the employee turned the tables in the Second Circuit Court of Appeals. The court of appeals noted that a plaintiff can make out the "qualified for her job" prong of a *prima facie* case without having to show "'perfect performance or even average performance,'" but only "the 'minimal showing' that '**she** "*possesses the basic skills necessary for performance of [the] job.*"' (Emphasis added by the court of appeals; citations omitted.) This plaintiff, who had worked for the employer for ten years and had received promotions and raises during that time, had shown enough. The court also castigated the district court for "disaggregating" the evidence of a hostile work environment into sexually oriented behavior and other behavior, then ignoring the latter, and for drawing inferences in favor of the nonmoving party, applying incorrect standards, and overlooking some of the plaintiff's claims altogether. **Gregory v. Daly**, 243 F.3d 687 (2d Cir. 3/27/01).

Reasonable Prevention/ Correction

In a sex and race harassment case, the Eighth Circuit Court of Appeals affirmed the district court's submission of plaintiff's § 1981 punitive damages claim to the jury, finding that the defendant failed to conduct a reasonable investigation of the plaintiff's complaints. The plaintiff, a caucasian female working at a hog processing plant and married to an African-American coworker, repeatedly

See SQUIBS, next page

SQUIBS, from page 8

complained to the plant's managers about the sexually and racially harassing behavior of the men on her assembly line. The panel found that the managers "ignored her complaints about illegal harassment and discrimination, failed to investigate whether her civil rights were being violated and did not document illegal behavior or discipline perpetrators." The panel found that the **Kolstad** affirmative defense was unavailable to the defendant because, while there was evidence at trial that it had a policy against discrimination, that fact was outweighed by proof that the written corporate policies were not carried out at the plant and that the defendant did not make a good faith effort to comply with the law. **Madison v. IBP, Inc.**, —- F.3d —-, 86 [BNA] F.E.P. Cas. 77, 2001 WL 704432 (8th Cir. 6/25/01).

SEXUAL ORIENTATION

A man who alleged that he had been harassed for appearing effeminate stated a cause of action under Title VII in the Ninth Circuit. The plaintiff was alleging that he was harassed for not meeting his coworkers' views of a male stereotype, said the court. That was enough to support a claim of harassment "because of sex." The court cited Price Waterhouse and went on to find that a hostile work environment had existed and that the employer had not met its obligation to remedy it. The employee's later termination for arguing with an assistant manager and walking off the job, however, was not a "tangible employment action" precluding the employer's affirmative defense under **Faragher** & **Ellerth**, because it was unrelated to the sexual harassment. **Nichols v. Azteca Restaurant Enterprises, Inc.**, — F.3d —-, 2001 WL 792488 (9th Cir. 7/16/01).

SUMMARY JUDGMENT

Age and Gender Discrimination

An applicant for the job of part-time art teacher who lost out to a much younger woman saw his case dismissed (predictably) by Gerard L. Goettel (D. Conn.), but the dismissal was reversed in part by the Second Circuit Court of Appeals (Pooler, CJ, joined by Walker and Miner, CJJ). The interviewers gave dual explanations for the hiring decisions, one of which lacked supporting evidence, but it was the employer's destruction of evidence (the application materials of the other candidates for the position) that really turned the case around in the court of appeals. The district court had noted that the destruction of these materials had "minimal" relevance, but the court of appeals noted that a number of other potentially important items of evidence also had been destroyed, including the interviewers' notes. The court disagreed with the district court's dismissive comment that there was no evidence of the state of mind with which the evidence had been destroyed. **Byrnie v. Town of Cromwell**, 243 F.3d 93, 85 [BNA] F.E.P. Cas. 323, 2001 WL 245400 (2d Cir. 3/15/01).

Hostile Environment

See **Fitzgerald v. Henderson**, discussed under "Limitations."

See SQUIBS, next page

SQUIBS, from page 9

Race Discrimination

Alleging race discrimination, hostile work environment, retaliation, and intentional infliction of emotional distress, an African-American nurse sued the hospital where she still worked and her white former supervisor. The Title VII claims against the supervisor were dismissed for lack of individual liability under Title VII. Judge Deborah A. Batts (S.D.N.Y.) dismissed the complaint against the hospital as well, finding that the plaintiff had not shown adverse action against her. A showing of adverse action requires proof of a "'materially adverse change' in the terms and conditions of employment," and this plaintiff had not been terminated, or demoted, lost benefits, given a lesser title, denied a transfer, etc. The "gossips, the false accusations, the hostile work environment, and the hyperintensified observation" she alleged were not supported by specific examples. Finally, the alleged false negative performance evaluations did not cause any material change in her terms and conditions of employment, and the court held that accordingly, without more, the evaluations did not constitute an adverse employment action. Without an adverse employment action, the court held, she did not make out a prima facie case, and the hospital's motion for summary judgment was granted. **Boyd v. Presbyterian Hospital**, —- F. Supp. 2d —-, 2001 WL 314655 (S.D.N.Y. 4/17/01).

Here's another chance to cite the Fifth Circuit Court of Appeals! Reversing a district court, the court of appeals has held that summary judgment is not appropriate where evidence was presented that a defendant's hiring process was manipulated. The evidence before the trial court revealed that a white candidate was awarded a position over a demonstrably better credentialed African-American candidates. The defendant city's motivation for failing to promote two African-American applicants was a question for the jury, and, consequently, summary judgment was reversed. **Pratt v. City of Houston**, 247 F.3d 601, 85 [BNA] F.E.P. Cas. 1116, 2001 WL 327165 (5th Cir. 4/19/01).

Sexual Harassment

A waitress and part-time assistant manager at a Manhattan restaurant sued based upon **quid pro quo** sexual harassment by two cooks, which the manager allegedly failed to remedy when the plaintiff reported it to him. A restaurant owner, told of the harassment, reacted with "complete indifference." Holding that the cooks' actions were actually hostile environment rather than **quid pro quo** harassment, since the plaintiff had neither submitted to their advances nor suffered any tangible employment actions as a result, the court dismissed the **quid pro quo** claim (Barbara S. Jones, S.D.N.Y.). It declined to dismiss the hostile environment claim, however, and denied the defendants' summary judgment motion on the constructive discharge claim. The court held that the claim for intentional infliction of emotional distress, however, was time-barred because it was not tolled during the pendency of the EEOC claim. The plaintiff was represented by NELA/NY member Allegra Fishel. **King v. Friend of a Farmer Corp**., —- F. Supp. 2d —-, 97 Civ. 9264 (S.D.N.Y. 7/25/01).

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