NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 4 August 2002 Jonathan Ben-Asher, Editor

Filings Trials and Settlements

Mary D. Dorman and **Coleen Meenan** settled a sexual orientation case against the New York City Police Deparment for $1.2 million. The plaintiff, a police officer, was subjected for years to harassment based on the perception that he was gay. He was finally forced to retire. **Baratto v. City of New York**, (Supreme Court, New York County, No. 98/119450). Details will follow in our next issue.

Gary Trachten successfully tried to a federal court jury a breach of employment contract case against **HIP** (Health Insurance Plan of Greater New York). The jury reached its verdict in approximately fifteen minutes. Judge Miriam Cedarbaum entered a judgment in the amount of $561,892.81. Ironically, HIP had previously withdrawn from a settlement of $331,000 that had been made subject to the approval of its compensation committee.

The plaintiff, Dr. Carols Beharie, was Acting Chief Medical Officer when HIP told him it would not be renewing his contract. At the same time, HIP instructed Dr. Beharie to stop reporting to work, and removed him from the payroll. Dr. Beharie's contract (negotiated by NELA past president **Joe Garrison**) provided for a substantial severance payment if HIP terminated his employment without cause at any time during the contract term.

See FILINGS, page 14

Congress Passes New Protections for Corporate Whistleblowers

by Jonathan Ben-Asher

As part of its response to the multiplying corporate scandals, Congress has enacted protections for employees of public companies who complain about or disclose fraud by their employers. The new statute prohibits retaliation against employees for such activities, and permits employees who suffer retaliation to sue their employers in federal court. This is a significant advance for New York employees in the private sector, who, for the most part, have had to live with the anemic whistleblower provisions in Labor Law Sec.740. (Employees terminated for protesting or reporting fraud by their employers on the federal government have been protected by the False Claims Act, 31 U.S.C. Sec. 3730(h).)

The new provision is part of the Sarbanes-Oxley Act of 2002, which President Bush signed into law on July 30. Section 806 of the Act, titled "Protection for Employees of Publicly Traded Companies who Provide Evidence of Fraud," creates 18 U.S.C. Sec. 1514A, "Civil Actions to protect against retaliation in fraud cases." It prohibits a publicly-traded company from discharging, demoting, suspending, threatening, harassing or "in any manner" discriminating against an employee in the terms and conditions of employment, because of the protected whistleblowing activity listed in the section. Sec. 1514A(a).

Protected Activity

An employee's protected activity under the statute includes any lawful acts taken to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of the securities laws noted in the statute, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. The specific securities laws noted are 18 U.S.C. Secs. 1341 (mail fraud), 1343 (wire fraud) and 1344 (bank fraud). Sec. 1514A(a)(1).

Significantly for our clients, employees are protected when they provide information or assistance either within the company or to an appropriate federal official. Within the company, employees can provide information or assistance to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)". Outside the company, they can provide it to a federal regulatory or enforcement agency, or a congressperson or congressional committee. Sec. 1514A(a)(1). Employees are also protected from retaliation for filing, participating in, or assisting in a proceeding filed or about to be filed relating to the listed federal securities provisions, if the employer has "any knowledge" of that activity. Sec. 1514A(a)(2). The statute prohibits retaliation by a broad range of actors. These include not only the employer, but any officer, contractor, subcontractor, or agent. Sec. 1514A(a).

Enforcement

To protect their rights, employees must first file an administrative charge with the Department of Labor. Sec. 1514A(b)(1). The statute of limitations for filing a claim

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The NELA/NY
Calendar of Events

September 10 • 6:00 pm
NELA Nite
Sex Discrimination and Sexual Harassment Committee
Law Office of Margaret McIntyre
100 Church Street - Suite 1605

September 25 • 6:00 pm
NELA/NY Board of Directors meeting
1501 Broadway - 8th floor

September 27
NELA/NY Fall Conference
Yale Club of New York
50 Vanderbilt Avenue

October 9 • 6:30 - 9:00 p.m.
NELA Nite
Raff & Becker
59 John Street - 6th floor
Topic to be Announced

October 18 - 19
Evidentiary Issues for the Employment Lawyer
The W Hotel
Chicago Center
Chicago
For information: *www.nela.org*
Early Bird registration ends September 17

October 30 • 6:00 pm
NELA/NY Board of Directors meeting
1501 Broadway - 8th floor

November 21 • 6:00 pm
NELA/NY - Workplace Fairness Annual "Courageous Plaintiffs" Dinner
Watch for Details
Yale Club of New York
50 Vanderbilt Avenue

December 4 • 6:30 - 9:00 p.m.
NELA Nite
Raff & Becker
59 John Street - 6th floor
Topic to be Announced

December 11 • 6:00 p.m.
NELA/NY Board of Directors meeting and election
1501 Broadway - 8th floor

The NELA/NY Membership Directory is enclosed with this issue.

Come Meet the NELA National Board on September 27

This year the NELA National Board of Directors will be meeting in New York City the weekend of September 27. To allow as many NELA/NY members as possible to meet and talk with the National Board, we have scheduled our fall conference for that date. The conference will conclude with a cocktail reception on Friday afternoon so we can "meet and greet" the National Board. If you have ideas for NELA National or issues you want to raise, or if you just want to chat, please join us. We will be sending out details of the conference program and the cocktail reception shortly.

The presentations of our speakers at our conferences, and the columns that appear in this Newsletter, represent the views of the authors and are not necessarily those of NELA/NY.

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

While waiting in my dentist's office, I picked up Forbes magazine (August 12, 2002) and came upon an article entitled "Removing the Scarlet A –Age Discrimination Laws can Backfire on Older Job Seekers" by Ira Carnahan. This article commences with a discussion of an Abbott Laboratories employee who earned $100k per year, was fired and sued for age discrimination. The jury came back with a verdict in his favor for $25.7 million dollars. The case is on appeal. The article goes on to talk about how age discrimination suits are the fastest growing category of discrimination complaints filed with the EEOC and recommends that employers not hire older people because "a worker who has lost a job is usually much angrier –and quicker to sue – than a job applicant never hired."

While reading the Washington Post recently (August 10, 2002), I read a letter by Karen Ferguson, director of the National Pension Rights Center, in which she blasts an economist for characterizing employees' depleted 401(k) plans favorably because this will encourage workers to work longer and begin saving earlier. She details the story of a WorldCom employee who not only lost his job but his life savings of $400,000 in his 401(k). She argues that a worker who puts in an additional 20 years would just lose that much more of her savings and that legislation be enacted to truly protect workers' hard earned savings for retirement.

Maureen Dowd wrote recently in the New York Times (June 26 2002) about a friend who lamented the fact that back in the 60's "We thought America was being run by the corporate-military-industrial white male power structure. We were certain that there was a right-wing conspiracy. We thought civil liberties and free speech were imperiled. We were suspicious of rich people. We had reason to believe that there was corporate malfeasance and Wall Street was bad. We worried that the government was backing coups in Latin America. We figured the administration wanted to topple all the overwrought, self appointed messiahs who didn't know how to run their own little societies. We assumed that powerful people were rigging elections. We feared there were people who wanted to blast roads through forests and rip up tundra." She concludes "the times they ain't a changing'".

In the August 11, 2002 New York Times, there is an article about a police officer in Chicago who won a sex discrimination suit against her employer. The article details that because of the state of the law she will be responsible for paying tax on her $300,000 award as well as $850,000 in attorney fees and $100,000 in costs. By winning her case, she not only loses every penny of her award but ends up owing the IRS $99,000. It is this extreme example that highlights the importance of passage of the Civil Rights Tax Relief Act, now pending before Congress. A majority of members of the Senate Finance Committee are co-sponsors of the bill. Many members of the House Ways and Means Committee from both parties are also sponsoring this legislation. We must contact our congress people and urge their support of this measure. For more information look as the NELA national web site and contact the NELA national office.

It is clear that NELA's role as an employee advocate bar association is as necessary as ever. While we have made great strides in the development of the law for employee rights, we have a long road to hoe and we can anticipate setbacks along the way.

Our Listserve has been able to effectively provide a forum for questions, ideas and thought. I am pleased to see the volume and intellectual vigor of most of the Listserve discussion. I also believe that this forum provides an outlet for those of us practicing in small offices to build on the collegiality and community we have created.

New York NELA's CLE conferences this past year have been quite successful. In addition to being worthwhile educational programs, we have been able to increase our overall attendance and open our programs to wider audiences. We have also been lucky to benefit from the participation of many members of the judiciary. For our September 27, 2002 Autumn conference in NYC, we have received commitments from Judges Frederic Block, Harold Baer, Jr. and Denise Cote to participate.

Our local lobbying efforts are in their infancy but we must persevere. We sought to reach out to other civil rights organizations toward the passage of the Sexual Orientation Non Discrimination Act (SONDA), which did not go anywhere this year. I would love to see involvement from our membership and an employee rights legislative agenda.

It has been a difficult and trying year in New York City. I am proud of the fact that NELA New York has been able to be an effective voice in the cause of employee rights, and has been able to create a vibrant community of advocates in pursuit of that cause. While there continues to be much for us to do, we can look at our accomplishments with pride and our future with humility, insight and energy.

Increase your Client Base with NELARS

by Adam Klein

Do you need more clients? If your answer is yes, then NELA/NY can help. The Legal Referral Service of NELA/NY (NELARS) receives approximately 400 calls per month from individuals who are seeking legal assistance with their employment-related issues. These potential client calls are then distributed to NELARS panel members based on their specific needs. How do you become a member of NELARS? It's simple: fill out an application for membership, pay a fee, and let us know your preferences for panel membership. The panels are segregated by major topic: discrimination, contract issues, benefits claims, and public employment. So, just let us know which panel you are interested in applying for, pass the informal screening, and your name will be added to the roll of NELARS attorneys. For more information, contact me.

Fall Conference

NELA/NY will hold our annual Fall Conference on Friday, September 27. The day will feature presentations by the Hon. Frederic Bloc (E.D.N.Y.), the Hon. Denise L. Cote (S.D.N.Y.) and the Hon. Harold Baer, Jr. (S.D.N.Y.) Another panel will focus on arbitration of employment claims.

As noted elsewhere in this issue, the national board of directors of NELA will be joining us at a cocktail reception at the end of the day.

You should be receiving an brochure and registration form shortly.

NELA at the Bat

NELA/NY members met for our first annual Members Family and Friends Softball/Park Outing on July 10. Playing in sultry weather in DeWitt Clinton Park, everyone had a great time. We hope to make this an annual event. Many thanks to Scott Moss, NELA's de facto Sports and Recreation Commissioner, for organizing the evening.

Join Us November 21 at the Annual "Courageous Plaintiffs" Dinner

Our annual dinner honoring "Courageous Plaintiffs who Fought Back" will be held this year on November 21, at 6:00 p.m. We hope to see you at the Yale Club of New York, 50 Vanderbilt Avenue. NELA/NY and Workplace Fairness will jointly sponsor the occasion.

Join us as we recognize the courageous plaintiffs and their attorneys who brought and fought important discrimination cases. This year we will honor these cases:

Bartlett v. New York State Board of Law Examiners: Marilyn Bartlett, a 1991 law school graduate with learning disabilities, applied for and was denied reasonable accommodations for the New York State Bar Examination. She filed suit in 1993, after being denied five times. Dr. Bartlett won at the district court, on a motion for reconsideration and on appeal. After the Supreme Court's decision in the **Sutton** trilogy of ADA cases, the Supreme Court granted the defendant's petition for certiorari. The Supreme Court then vacated the Second Circuit's decision, and remanded for further findings in light of the **Sutton** cases. The Second Circuit upheld its original analysis, but remanded for an evidentiary hearing as to whether Bartlett was substantially limited in a major life activity. After a four day retrial, the district court again found for the plaintiff. Throughout the nearly nine years of litigation, during which she was ridiculed by defendants, Bartlett has focused not on herself but on the legal precedents set and the impact of future high stakes testing on applicants with disabilities. **JoAnne Simon, Attorney**.

Stanley B. Sawtelle v. Waddell & Reed, Inc., et al.: Mr. Sawtelle alleged that Waddell & Reed unlawfully interfered with his business as a securities broker after Waddell & Reed terminated its relations with him, and that much of its motivation was to retaliate against him for courageously telling the truth in testimony to the SEC, to Waddell & Reed's detriment. Mr. Sawtelle won an arbitration award against W&R for $27,574,499 (including $25 million in punitive damages). The arbitrators found that W&R unlawfully interfered with Sawtelle's business as a securities broker—in violation of the Connecticut Unfair Trade Practices Act—after W&R ended its relationship with him and he went to another firm. **Jeffrey L. Liddle and Michael E. Grenert, Attorneys**.

Tazul, et al. v. Rekrim, Inc., dba, Whole Foods in Soho: This action was brought on behalf of eleven Muslim employees who were subjected to repeated discrimination and retaliation by their employer. Many of the employees were fired when they refused to sign false affidavits in support of the employer during the EEOC's investigation. The prosecution and settlement of this action for $715,000 presented many unusual problems as a result of the tragic events of September 11. **Preston A. Leschins, Attorney**.

Funds raised through the Courageous Plaintiffs dinner are crucial to the activities of NELA/NY, and are a great benefit to Workplace Fairness. The dinner is a chance to meet with old friends and colleagues, and the plaintiffs and indefatigable NELA lawyers in these inspiring cases. Please join us for this gala occasion. You will be receiving an invitation shortly. For more information, contact Shelley Leinheardt.

The Courageous Plaintiffs dinner is being organized by our Fundraising Committee. Many thanks for taking on the many time consuming tasks involved, to Bill Frumkin, Bob Rosen, Jerry Filippatos and JoAnne Simon, and our tireless Executive Director, Shelley Leinheardt.

Recent NYC Human Rights Law Developments

by Craig Gurian

Bar Association Charges City With Failing to Enforce Local Human Rights Law

At the end of last year, the Association of the Bar charged in a report that neither the City Human Rights Commission nor the City's Law Department, the two agencies charged with enforcement of the law, had been taking any serious steps to fulfill their statutory responsibilities. The Bar Association recommended that the Human Rights Commission adopt a much greater law enforcement focus, increase the use of testing, and otherwise begin to try to attack discrimination at a systemic level. It also urged a change in the Law Department's record, of more than a decade, of zero pattern-and-practice prosecutions under the Human Rights Law. The Bar Association's report is available at *www.antibiaslaw.com/CommitteeReport.pdf*. NELA/ NY, joined by other civil rights groups, has urged the City to adopt the Bar Association's recommendations.

Promise and Pitfalls at the City Human Rights Commission

The City Commission has markedly changed its stated policy since a new administration took over in February. Patricia Gatling, the new Commissioner, came to the agency from the Brooklyn District Attorney's Office, as did three of her principal deputies. She says that the Commission was intended and will now be a law enforcement agency. The Mayor's Executive Budget (the City's final budget was not in place as of this writing) calls for a seven attorney increase in the Commission's staffing. While this is a modest increase given a 75% decrease in City-funded staffing over the preceding 10 years, it is in contrast to budget cuts being imposed on other agencies. Perhaps more importantly, the Commission will for the first time have its much larger federally-funded field staff assist in enforcement activities. The Commission is now separating out its handling of backlogged cases from its handling of new cases. In two months, it reviewed more than 1,000 backlogged cases, but its original promise of completing a review of all of the more than 4,000 such matters by the end of May has been pushed back to the end of the summer, and a further modification is likely.

The Commission does say that its "day forward" policy means that it can actively and immediately investigate and prosecute any strong case brought to its attention. Should any NELA members take the Commission up on its offer, please keep me informed of your experiences.

A continuing concern is that the Commission—for budgetary and other reasons—will understate the complexity of discrimination cases, and overstate the number of cases it believes its staff will be able to handle. In discussions in May, for example, Commissioner Gatling and her staff said that their experience of their existing caseload was that these cases were simple and straightforward, and that they expected each attorney on staff to be able to fully handle 50 complaints per year. Another major concern is that the Commission has backed away from its initial commitment to adopt the Bar Association's recommendations that testing for discrimination be conducted at least once a day.

Law Department Remains Intransigent

In contrast to the positive developments at the City Commission, the Law Department has continued to refuse to meet its statutory responsibilities. Council member Bill Perkins, the Chair of the Committee on Governmental Operations, urged the Corporation Counsel to adopt the Bar Association's recommendation that the Law Department create a small civil rights unit of six attorneys (less than one percent of its legal staff) devoted to the development and prosecution of pattern-and-practice cases. The Law Department has skilled staff attorneys in its Affirmative Litigation Department who are interested in developing these types of cases, and the language and legislative history of Chapter 4 of the Human Rights Law makes clear that the Law Department's responsibilities in this area were intended to be supplemental to the efforts of the City Commission.

Nonetheless, the Corporation Counsel maintains that all investigations will be handled by the understaffed City Commission, and that it will not create a civil rights unit. In his letter in response to Council member Perkins, the Corporation Counsel was not able to cite any civil rights prosecutor whose strategy was to avoid having its attorneys work on case development, but simply to wait until something came along.

A remaining problem is the existence of issue conflict for the Law Department. The Department seeks a narrow construction of the Human Rights Law in its role as the City's discrimination defense counsel, but it is supposed to seek robust interpretations of the law as the City's civil rights prosecutor and advocate. Back in 1991, some argued that all of the City's human rights enforcement functions should be contained within the Human Rights Commission, and this question is likely to reemerge before the Council this fall.

Gender Identity Protection Passed

The City Council has enacted an amendment to the Human Rights Law, adding significant protections against discrimination based on gender identity. Local Law 3 of 2002, adding paragraph 23 to section 8-102 of the City's Human Rights Law, provides:

The term 'gender' shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.

This amendment makes New York City one of the few jurisdictions in the country to protect transgendered individuals. The provision does not only protect transgendered individuals; it much more broadly and explicitly insists that gender-based stereotyping of any type is indeed an unlawful discriminatory practice.

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Sex Stereotyping: Does Title VII Protect Everyone?

by Margaret McIntyre

Title VII does not prohibit discrimination on the basis of sexual orientation. **Simonton v. Runyon**, 232 F.3d 33 (2d Cir. 2000). However, the law does prohibit sex stereotyping on the job, and this prohibition applies to all persons, regardless of sexual orientation, so long as a plaintiff can show that the discrimination is "because of sex." **Samborski v. West Valley Nuclear Services, Co., Inc.**, 1999 U.S. Dist. LEXIS 20263 (W.D.N.Y. 1999). Establishing a claim of sex stereotyping can be difficult when the subject of the plaintiff's sexual orientation is raised, whether by the plaintiff directly or by co-workers reacting to someone who may be either gay or straight but expresses his or her sexual identity in an unconventional way. This article is intended to generate ideas on how to secure Title VII protection for all men and women.

The question of whether Title VII might prohibit sexual orientation discrimination was briefly considered open to interpretation after the Supreme Court ruled, in **Oncale v. Sundowner Offshore Services, Inc.**, 523 U.S. 75 (1998), that a Title VII claim of sexual harassment is not precluded simply because the person accused of harassment is the same sex as the a plaintiff, so long as the plaintiff proves that he or she was discriminated against "because of sex." 523 U.S. at 81. The Court noted that sex discrimination has often been inferred in male-female sexual harassment cases, on the assumption that proposals of sexual activity would not be made to someone of the same sex, and that the same inference may be made in a same-sex sexual harassment case if there were evidence that the harasser were homosexual. Id. The ruling thus created some ambiguity about whether discrimination "because of sex" encompassed any discrimination involving sexuality.

Following **Oncale**, more cases alleging same-sex sexual harassment were filed, many involving allegations suggesting that the harasser was motivated by hostility toward the plaintiff because of the plaintiff's sexual orientation or perceived sexual orientation. This raised the question whether **Oncale** had created a cause of action for sexual orientation discrimination, which was quickly answered in the negative.

In **Simonton v. Runyon, supra**, the Second Circuit affirmed a district court's dismissal of a claim brought by a plaintiff alleging same-sex sexual harassment because his co-workers left pornographic photographs in the workplace and made abusive comments of a sexual nature: "go fuck yourself, fag," "suck my dick," and "so you like it up the ass." Many of the actions taken against Simonton were similar to allegations frequently made by female victims of sexual harassment, as the court noted: "The facts of this case are all too familiar in their general form." 232 F.3d at 34. Thus, the case would seem to have fit the same factual scenario that was upheld in **Oncale**.

However, the Second Circuit rejected Simonton's claim, based on **Oncale**, that the harassment violated Title VII because it was directed at him "because of sex." The court found "no basis to infer from the complaint that the harassment Simonton suffered was because of his sex and not, as he urges throughout his complaint, because of his sexual orientation." 232 F.3d at 37. Since Simonton did not offer any evidence about how the harasser treated both sexes, the court ruled that it could not infer that the alleged conduct would not have been directed at a woman. ***Id.***

Implicitly, the court reasoned that Simonton had failed to show that the harassers were motivated by homosexual desire, perhaps because Simonton had characterized the harassers as homophobic. At the same time, the court implied that a plaintiff being harassed by someone of the same sex is required to show that employees of the opposite gender were not harassed, a principle that has not been applied to the traditional female plaintiff alleging male-female sexual harassment.

The Second Circuit refused to address Simonton's second argument, that the harassment constituted discrimination based on sexual stereotypes, ruling that he had failed to plead sufficient facts to support that claim. 232 F.3d at 38. Specifically, the court noted that there was "no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his nonconformity with gender norms instead of his sexual orientation." *Id.*

The opinion did not elaborate on why a male plaintiff must necessarily engage in "stereotypically feminine behavior," as opposed to failing to conform to stereotypically male behavior simply by being gay, to state a claim for sex stereotyping. An earlier district court opinion specifically rejected such a claim. **Martin v. New York State Dep't of Correctional Services**, 115 F.Supp.2d 307 (N.D.N.Y. 2000) (rejecting claim of sex stereotyping because plaintiff did not "meet stereotypes associated with his gender" brought by "an admitted homosexual" whose co-workers verbally harassed him by calling him "faggot," "pervert," "homo" and "queer.")

The implication of both **Simonton** and **Martin** is that when the plaintiffs raised

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Sex Discrimination and Sexual Harassment Committee

The Sex Discrimination and Sexual Harassment Committee will hold its next meeting on Tuesday, September 10, at 6:00 p.m, at Margaret McIntyre's office, 100 Church Street, Suite 1605. New members, current members, and curious NELA members are welcome.

September 11 Compensation Fund Corrects Lurking Discrimination in Payments to Survivors

by Deborah Baumgarten

Aspects of the federal government's plan to compensate victims of the September 11, 2001 terrorist attacks raised issues of interest not only for tort lawyers but also for all attorneys who follow developments in the federal government's treatment of women and minorities.

President Bush signed the "September 11th Victim Compensation Fund of 2001" into law on September 22, 2001. To implement Congress' intent to compensate victims of the terrorist attacks, the Department of Justice issued preliminary regulations outlining its methods of determining Fund compensation, and named Kenneth J. Feinberg as Special Master to develop and implement the compensation scheme. NOW Legal Defense and Education Fund reviewed the rules and comments made by the Compensation Fund's staff to the press, and learned of potential discrimination against women and minority claimants. We quickly organized a team of New York City-based civil rights groups to raise these concerns.

Responding to a DOJ call for public input, NOW Legal Defense filed comments criticizing two aspects of the Fund's proposed plan. First, in initial comments to the press, the Compensation Fund's staff indicated that they would value the lives of victims killed on September 11 by resorting to race and gender-based "worklife tables." These tables are sometimes used in wrongful death actions to determine how long the victim would have survived and thus how much income he or she might have earned. Some of these tables categorize persons by race and gender, with African American and Hispanic men presumed to earn less over expected lifetimes than Caucasian men, and women of all races presumed to earn less than their male counterparts. Press statements indicated that the federal government would use these tables to decide how to compensate claimants.

Second, the Compensation Fund's initial regulations would have undercompensated women and some men by denying any compensation for the "second shift," unpaid work done by full-time working men and women. Child care, chores around the home, time spent in managing a household, and other unpaid work would not be compensated where the victim had worked full-time, though it would be compensated if the victim had been a retiree or part-time worker. Because women do the bulk of such unpaid work, NOW Legal Defense sought to ensure that the loss of any victim's unpaid work would be valued and compensated.

In public comments filed in January 2002, NOW Legal Defense challenged the government's implied use of race- and gender-based data that assumed women and minority victims would have earned less money than their white male counterparts, as it could lead to reduced compensation for women and minority victims and their families. We argued that the government's use of such data violate federal and state equal protection guarantees, and noted that under Title VII precedent, such use of gender- based actuarial data was disfavored. We also contended that the government's plan to exclude from valuation unpaid work performed by full-time workers ran counter to the practice in tort cases and would systemically penalize female victims and their survivors.

Mr. Feinberg requested a meeting with our office and two other New York-based civil rights groups to discuss the concerns presented in the comments. At his request, NOW Legal Defense sent him a memorandum explaining the economic literature and legal support for valuing unpaid work for all persons.

We were pleased to learn from the final rules issued on March 7 that the government will not rely on gender or race-based data to calculate the value of victims' worklives, and that any claimant can present data indicating the amount and nature of unpaid work performed, whether or not that person was a full-time worker. Our public comments and memorandum as well as DOJ's final rule are available on our website at *www.nowldef. org.*

Deborah Baumgarten is a Staff Attorney at the NOW Legal Defense and Education Fund in New York.

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the subject of sexual orientation discrimination, they removed themselves from Title VII protection on the basis of sex, as if they stopped being men when they identified themselves as gay men. These cases place gay and lesbian plaintiffs in an untenable situation. The result is less severe, of course, for plaintiffs in New York City or other jurisdictions where sexual orientation discrimination is explicitly prohibited by statute. Plaintiffs who do not have that protection must continue to rely on Title VII.

The Second Circuit's ruling in **Simonton** left open the possibility that a plaintiff who alleges discrimination based on sexual orientation (or perceived orientation) may also state a claim for discrimination based on sex stereotyping if the plaintiff alleges sufficient facts to support the claim. For example, **Simonton** did not affect an earlier district court ruling that the sexual orientation of the plaintiff is irrelevant if the plaintiff has been treated differently from members of the opposite sex. **Samborski v. West Valley Nuclear Services, Co., Inc., supra**.

In that case, plaintiff Dawn Samborski alleged sex discrimination on the basis of defendant's encouragement of rumors in the workplace that Samborski was a lesbian. Neither confirming nor denying the truth of the rumors, Samborski claimed

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In Memoriam: Eugene Prosnitz

Long time NELA member Eugene Prosnitz died at the age of 70 last month, after a long illness. Gene had long been active in NELA/NY—in our NELA Nites, our social events, and most recently, in writing an amicus brief for NELA/NY in **Kosakow v. New Rochelle Radiology Associates, PC,** 274 F.3d 706 (2d Cir. 2001). Before entering private practice, Gene had been an attorney at Bronx Legal Services.

Many of us did not know that Gene was a highly talented championship bridge player. After his death, he was honored in the New York Times Bridge column, which noted that he was in one of the world's longest-lived bridge partnerships, and had had a bridge playing career "that included successes at every level of the game except the very highest."

We will miss Gene's indefatigable spirit, dedication to his clients, and commitment to the cause of employee rights..

Gene's wife, Sandra, sent NELA this memorial message:

What I'd like to share with you and the NELA membership was the passion Gene brought to everything he cared about.

He was an excellent lawyer, a good writer and would ride to battle for any client he felt had got a raw deal. He was ethical to a fault, and his opposing attorneys always respected him. Not only was Gene an excellent bridge player, he was also very interested in bridge theory, and would discuss bidding and play problems endlessly. In bridge as in law, Gene was scrupulously ethical, and very much respected for it.

In addition to playing bridge, he played a game called Diplomacy, a game of world domination which he played by email (in earlier years, of course, it was by phone and mail). In this game too he excelled and his opponents have told me he will be sorely missed.

Gene was also active in reform politics and never abandoned his idealistic ideals. His last major piece of writing was an article for the magazine Democratic Left, decrying the actions of the Supreme Court in Bush v. Gore.

One of Gene's most endearing qualities was his love of animals. He adored our two cats, Frankie and Dennis. He participated in a dolphin research project, and we both participated in a chimp research project with Washoe and her family, the chimps who speak sign language. For the last year of his life, he volunteered twice a month at the ASPCA, interviewing people who wanted to adopt animals and socializing animals, especially cats.

NELA Members News

Congratulations to Liz Schalet, who has a new baby boy. Liz's partner, Andrea Bernstein, gave birth on April 24 to Jonah Elias Bernstein-Schalet.

And congratulations to Scott Moss, who was married on March 10 to Marianna Khevelve. Scott is the keeper of the NELA/NY Second Circuit Scorecard, and we are sure that the Court of Appeals is in turn keeping an eye on the Moss-Khevelve house as well.

Richard Cantwell was recently elected as the Clinton County District Attorney. His wife, Lori Cantwell practices in the Plattsburgh area.

Eric Sarver has opened his own law office. Eric can be reached at 118-21 Queens Boulevard, Suite 516, Forest Hills, N.Y. 11375. Telephone: (718) 830-9200; e-mail: *pdworks@earthlink.net.*

Jonathan Ben-Asher is happy as all get out that he was the second fastest male runner in the Paul Tobias 5K run at the 2002 National NELA Convention in Orlando. Adam Klein, who claims he doesn't run, was close behind.

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she was ridiculed by male co-workers because "her femininity was exhibited in a way that did not meet these employees' expectations of how women are to appear and behave." The court inferred from the traditionally male oriented nature of plaintiff's work (never actually described in the opinion), in a largely male workplace, that the harassment was based upon plaintiff's sex. *Id.* at p. 12.

But suppose such inferences cannot be made from the nature of the work or other factors that may be found in the context of a particular workforce. Shouldn't a plaintiff whose expression of her femininity, or his masculinity, is ridiculed to such a degree that a hostile work environment exists be afforded protection from discrimination on that basis alone?

A district court in Massachusetts recently answered that question in the affirmative. **Centola v. Potter**, 183 F.Supp.2d 403 (D. Mass. 2002). Stephen Centola, a Postal Service letter carrier, never disclosed his sexual orientation to his co-workers or managers. Nonetheless, with the acquiescence of management, Centola's co-workers subjected him to a barrage of anti-gay comments and placed anti-gay materials, designed to mock Centola, in the workplace. Judge Nancy Gertner denied the defendant's motion for summary judgment, noting that while Centola could not maintain a claim for sexual orientation discrimination, he could ground a Title VII claim on evidence that he was discriminated against because he did not meet "stereotyped expectations of masculinity." 183 F.Supp.2d at 409, citing **Higgins v. New Balance Athletic Shoe, Inc.**, 194 F.3 252, 261 (1st Cir. 1999). "Stated in a gender neutral way, the rule is: If an employer acts upon

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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.

AGE DISCRIMINATION

Pleading

A senior cleaner for a school district sued *pro se*, claiming that his job location and schedule were changed because of his age. The district court (Sidney Stein, J., S.D.N.Y.) declined to dismiss the claim on the pleadings, relying upon the recent Supreme Court decision in **Swierkiewicz v. Sorema**. The court noted that "an employment discrimination plaintiff need not plead a prima facie case of discrimination." In addition, since the plaintiff was *pro se*, the court held his pleadings to "less stringent standards than formal pleadings drafted by lawyers." **Johnson v. Eastchester Union Free School District**, 88 BNA FEP 838, No. 01 Civ. 2835 (SHS), 2002 WL 449584 (S.D.N.Y. 3/22/02).

ATTORNEYS' FEES

A plaintiff's counsel who was awarded fees and costs as sanctions for the defendant's spoliation of evidence (see prior order in same case discussed under "Sanctions") received fees at her customary rate of $300 per hour, even though the case was venued in the Eastern District of New York. The defendant argued that the rate was excessive and that $200 an hour would be more in line with the "prevailing community." It also attacked as excessive the time spent on writing letters, which appear to have been more in the nature of briefs. The court (Cheryl Pollak, Mag. J.) held that the time spent was reasonable, except for half an hour of travel time, and so was the rate. The court noted that the cases supporting only $200 per hour for a partner were decided some time ago and that in 1998 the rate of $275 was found reasonable in the district, so that $300 was reasonable in 2001 and 2002. **Foster v. TWR Express, Inc.**, —- F. Supp. 2d —-, No. 00 CV 3231 (SJ)(CP) (E.D.N.Y. 4/10/02).

CLASS ACTIONS

A group of professional banquet waiters were hired by an employment agency to work at catered events held at restaurants. The plaintiffs claimed that the defendants—both the employment agency and the restaurants—violated New York State Labor Law § 196 by failing to pay them their pro rata share of a 22% service fee that was included in banquet customers' contracts. The plaintiffs also moved for class certification. The court found that, since the plaintiffs were hired, paid, and managed by the employment agency, they were independent contractors vis-à-vis the restaurant defendants under the Labor Law. The plaintiffs were, therefore, unable to invoke the protection of § 196. The plaintiffs withdrew this aspect of their claim against the employment agency because it did not negotiate or benefit from the service charge paid by the banquet clients to the restaurants. As all the underlying claims were dismissed, the motion for class certification was denied. **Bynog v. Cipriani Group, Inc.**, —- N.Y.S.2d —-, NYLJ 4/4/02, p. 19, col. 3.

CONTRACT

Enforcement of Settlement Agreement

A woman who settled her sex and race discrimination and retaliation claims learned later that her ex-employer had not complied with all the provisions of the settlement agreement. Although its check cleared, the agreement also required a specific managerial employee to undergo individual management coaching. The manager attended fewer than 5 of the 26 coaching sessions, none of which dealt with Title VII's prohibitions against race and sex discrimination. The employee sued for discrimination under 42 U.S.C. § 1981, for breach of contract, and for several other claims. With respect to § 1981, the district court (John S. Martin, J., S.D.N.Y.) held that the required injury-in-fact could be noneconomic, and that the stigmatizing injury caused by racial discrimination, alleged by the plaintiff, was sufficient to state a claim, because she alleged that the company complied with settlement agreements with white plaintiffs but not with her. In addition, "[i]n allegedly refusing to honor the terms of the contract, Defendant has 'injured' Plaintiff's right to contract." The court also found that she had standing to object to the breach, despite the defendant's argument that enforcement would have benefited only employees still at the company. The court dismissed the claims against the manager, however. NELA/NY member Nina Keilin of Alterman Boop was of counsel to plaintiff's attorney, Chinyere Okoronkwo. **Vazquez v. Salomon Smith Barney Inc.**, —- F. Supp. 2d —-, No. 01 Civ. 2895 (JSM), 2002 WL 10493 (S.D.N.Y. 1/4/02).

Oral Modification

An employee who chose (according to her employer's long-term compensation plan) to receive stock options instead of annual salary increases alleged that the head of HR told her when she quit that the company would keep her on the payroll until all her options had vested. Accordingly, instead of exercising them at that time, she tried to do so a year later and was told that she had forfeited them, losing approximately $300,000. The advice she said the head of HR had given her directly contradicted the long-term compensation plan. She sued, alleging breach of contract, breach of fiduciary duty, waiver, unjust enrichment, quantum

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meruit, and negligent misrepresentation. Justice Ira Gammerman (Sup. Ct. N.Y. Cty.) was unpersuaded. He held that the plan could not be modified orally, that the company had not waived the plan's provisions either directly or by an agent, that there was no promissory estoppel because of the lack of agency relationship, that there was no fiduciary duty to be breached, and that the plaintiff's reliance on the alleged statements was not reasonable. The complaint was dismissed. Moral: When you advise a client who has stock or options and is about to leave the company, voluntarily or otherwise, get and read the summary plan description of the plan that grants them! **Bailey v. Gray, Seifert & Co.**, —- N.Y.S.2d —-, N.Y.L.J. 5/2/02, p. 20, col. 3 (Sup. Ct. N.Y. Cty. approx. 4/25/02).

DISABILITY BENEFITS

The Second Circuit Court of Appeals has held that a disability insurance carrier that raised only one defense to a claim had waived any others and could not hold them in reserve for later. The court held that the insurance company had "waived its defense of lack of disability because it chose not to pursue it, relying instead on the defense of lack of coverage." The court distinguished its decision in **Juliano v. Health Maintenance Organization of New Jersey**, 221 F.3d 279 (2d Cir. 2000)—which had declined to apply the doctrine of waiver to an ERISA claim—explaining that "**Juliano** did not hold that the doctrine of waiver never applies to an ERISA claim." The court held: "[T] his case raises the concern that plan administrators like First Unum will try the easiest and least expensive means of denying a claim while holding in reserve another, perhaps stronger, defense should the first one fail. In light of ERISA's remedial purpose of protecting plan beneficiaries, we are unwilling to endorse manipulative strategies that attempt to take advantage of beneficiaries in this manner." The court noted that other circuits are split on the question of whether waiver applies in the ERISA context. The calculation of the plaintiff's damages was remanded to the district court, as was the issue of whether attorney's fees should be awarded. NELA/NY member Peter Eikenberry represented the plaintiff. **Lauder v. First Unum Life Insurance Co.**, 284 F.3d 375, 380 (2d Cir. 2002).

DISABILITY DISCRIMINATION

Association with Persons with Disabilities

The Third Circuit Court of Appeals has held that friends and relatives of individuals pursuing disability discrimination claims are protected by the ADA from retaliatory employment actions. The plaintiff was the son of a man who was bringing an ADA discrimination claim against the hospital where both son and father worked. Shortly after his father brought his complaint, the hospital fired the son. The court acknowledged that its holding was not in keeping with the letter of the statute but maintained that it was very much in tune with the law's spirit. In reaching its decision, the court relied on a "perception" theory. According to this theory, if "adverse action was taken against [the son] because [the hospital] thought that he was assisting his father [in his lawsuit] and thereby engaging in protected activity, it does not matter whether [the hospital's] perception was factually incorrect." **Fogelman v. Mercy Hospital, Inc.**, —- F.3d —-, No. 00-2263 (3d Cir. 2002).

Definition of "Disability"

See **Gonzalez v. Rite Aid**, discussed under "Summary Judgment."

New York State Human Rights Law

A plaintiff filed a disability discrimination action when she was fired shortly after having surgery on her foot for Morton's neuroma and hammer toe. In this case, the court (Sidney Stein, J.) found that the plaintiff was unable to show that her former employer considered her substantially limited in the major life activity of working pursuant to the ADA. However, the court further held that the definition of disability in the New York State Human Rights Law is broader than the ADA's definition, since it includes medically diagnosable impairments that do not necessarily substantially limit an individual in a major life activity. Having dismissed the federal claims, the court declined to exercise supplemental jurisdiction over the state claims but dismissed them without prejudice. **Grecius v. Liz Claiborne**, —- F. Supp. 2d —-, No. 00 Civ. 9518 (SHS), 2002 WL 244598 (S.D.N.Y. 2/20/02).

"Regarded as" Disabled

A factory worker with a long psychiatric history defeated a summary judgment motion in Judge Frederic Block's courtroom (E.D.N.Y.). She had had conflicts with management and co-workers and, after seven years of employment, was fired after her supervisor told her that she "needed help and should see a psychiatrist." When she brought suit, the employer counterclaimed, seeking $500,000 for alleged harassment, interference with "business operations," and "employee morale," and damage to its reputation. After finding that the plaintiff had failed to prove that she had a disability or a history of a disability under **Toyota Motor Manufacturing v. Williams**, 534 U.S. 184 (2002), the court found that the ability to get along with others is a major life activity (an unresolved question in the Second Circuit) and that she had presented enough evidence to raise a jury question whether her employer regarded her as having such a disability. The court also found a material issue of fact as to whether the plaintiff was discharged in retaliation for her Labor Law complaints. The court then *sua sponte* examined the counterclaim and gave the employer a chance to submit evidence justifying it and showing why sanctions should not be imposed under Rule 11. In a supplemental decision, the court held that reasonable accommodation should be provided even when the employee is only "regarded as" being disabled, and it adhered to its original decision denying summary judgment. **Jacques v. DiMarzio, Inc.**, 200 F. Supp. 2d 151 (2/27/02 and 5/6/02).

DISQUALIFICATION

In a gender discrimination class action, a co-counsel firm was disqualified on the ground that a partner in the firm had

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defended the company "in a number of [other] lawsuits while employed as counsel at her former firm. The class complaint alleged a continuing policy and practice of gender discrimination in hiring, promotion, job assignment, compensation, and other terms and conditions of employment, and further alleged retaliation in response to complaints of gender inequality. The attorney's new firm, based in San Francisco, had only about 12 lawyers in its New York office and was slow to institute screening measures to ensure that confidential information about the defendant company could not pass to any employee of the new firm. The attorney, while employed at her old firm, had defended the company in matters that did not relate directly to employment discrimination but that were closely allied to matters alleged in the instant action. There she had learned information concerning procedures for hiring, training, supervision, compensation, and discipline of persons in the same group represented by the class plaintiffs, including with respect to several employees who might qualify as class members. This was too close for the court's comfort. The district court (William H. Pauley, J., S.D.N.Y.) disqualified the attorney's new firm. **Mitchell v. Metropolitan Life Insurance Co.**, —- F. Supp. 2d —-, No. 01 Civ. 2112 (WHP), 2002 WL 441194 (S.D.N.Y. 3/20/02).

EMPLOYMENT AT WILL

Exception to Employment at Will

In **Wieder v. Skala**, 80 N.Y.2d 628 (19____), a law firm associate was held to have stated a claim for unlawful termination in retaliation for having insisted that the firm comply with ethical obligations applicable to members of the bar. That exception has now been broadened to include physicians, who also are required to comply with a code of ethics applicable to the medical profession. The plaintiff was a doctor employed in The New York Times' medical department, where her principal duties were to provide "medical care, treatment and advice" to the company's employees. She alleged that on "frequent occasions" various named departments of the company asked her for confidential medical records of employees "without those employees' consent or knowledge," and that the vice president of human resources instructed her to "misinform employees regarding whether injuries or illnesses they were suffering were work-related so as to curtail the number of Workers' Compensation cases filed against The Times." She sought advice from the state Department of Health, which advised her that such conduct would violate her legal and ethical duties to patients, so she refused and was soon fired—purportedly because of a restructuring, but really (she alleged) in retaliation for her adherence to medical ethical standards. Justice Edward Lehner (Sup. Ct. N.Y.Cty.) denied the Times' motion to dismiss, and the Appellate Division, First Department, affirmed (op. by Betty Weinberg Ellerin, J.). NELA/NY member Pearl Zuchlewski represented the plaintiff. **Horn v. New York Times**, —- A.D.2d —-, 739 N.Y.S.2d 679 (1st Dep't 3/21/02).

ETHICS

Contacting Company's Employees

When our NELA colleague Ellen Messing was sanctioned by Massachusetts courts for contacting employees of Harvard College, which she was suing on behalf of a client with sex discrimination and retaliation claims, NELA filed an *amicus curiae* brief, and so did seven other organizations. The Superior Court's sanction order was initially upheld by the appeals court but has now been overturned by the Supreme Judicial Court of Massachusetts. The court adopted the rule as enunciated in **Niesig v. Team I**, 76 N.Y.2d 363 (1990), banning contact only with those employees who have the authority to commit the organization to a position regarding the subject matter of representation, *i.e.*, those employees who are empowered to make litigation decisions, and those whose actions or omissions are at issue in the case. The sanctions, which had amounted to $94,418.14, were vacated. **Messing, Rudavsky & Weliky, P.C. v. President and Fellows or Harvard College**, —- Mass. —- (3/19/02).

EVIDENCE

A complaint by an African-American secretary alleged numerous instances of racial discrimination in her work. Specifically, she claimed that she was improperly passed over for a training bonus that was awarded to all the Caucasian secretaries, that she was denied three separate promotions in favor of Caucasian secretaries, that a less experienced Caucasian secretary was hired at her level but at a higher salary, and that in 1997 every member of her department received a raise except herself. Most of her claims were found to be time-barred under Title VII. The court (Casey, J., S.D.N.Y.) held, however, that the facts surrounding the plaintiff's time-barred discrimination claims were nevertheless admissible as circumstantial evidence in support of her remaining Title VII claim, relating to the pay raises, that was not time-barred, since there is no statute of limitations for evidence. The court also rejected the defendant's motion to dismiss plaintiff's state law claims, noting that the New York State and New York City Human Rights Laws have a three year statute of limitations, as opposed to 300 days to file a charge with the EEOC. **Griffin v. New York City Off-Track Betting**, —- F. Supp. 2d —-, No. 98 Civ. 5278 (RCC), 2002 WL 252758 (2/20/02).

Spoliation of Evidence

See **Foster v. TWR Express, Inc.**, discussed under "Sanctions."

FIRST AMENDMENT

A sizeable verdict for a sheriff's department employee under 42 U.S.C. section 1983 was affirmed by the Second Circuit Court of Appeals. The employee alleged that she was harassed by the sheriff and his staff and was denied promotions and fringe benefits in retaliation for having supported the election campaign of a rival for the elective sheriff's office. The jury found in the plaintiff's favor and awarded her a total of $400,000 against the sheriff and his chief deputy, who were the principal harassers. The district court (Lawrence E. Kahn, J., N.D.N.Y.) denied the defendants' motions for judgment as

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a matter of law and a new trial, and the court of appeals affirmed, holding that the harassment of the plaintiff was more than "incidents that normally occur in a working environment" and had combined to reach a "critical mass" so as to constitute an adverse employment action. Sitting by designation on the court of appeals panel, however, was U.S. District Judge John S. Martin, Jr., who dissented on the grounds that the incidents of which the plaintiff complained were "trivial" and that "[a]ffirmance in this case leaves the parameters of a judicially created constitutional claim to the subjective judgment of shifting groups of citizens who are called to jury service." The court of appeals addressed this statement in the majority opinion (Pooler, J., joined by McLaughlin, J.): "Of course, leaving judgments of fact within the province of properly charged jurors is precisely the foundation of our legal system." **Phillips v. Bowen**, 278 F.3d 103 (2d Cir. 1/24/02).

NATIONAL ORIGIN DISCRIMINATION

New York State and City Human Rights Law

See **DiStefano v. Carozzi North America, Inc**., discussed under "Procedure: Jurisdiction."

PROCEDURE

Bankruptcy

Attempting to end its punishment for a serious of outrageous actions of sexual harassment and retaliation, the defendant in a pending litigation brought by the EEOC filed a voluntary petition for bankruptcy. The bankruptcy filing raised the issue of whether the EEOC's action was stayed pursuant to the bankruptcy rules. Judge Robert W. Sweet (S.D.N.Y.) held that, to the extent the EEOC was exercising its police and regulatory function, rather than merely adjudicating the private rights of the individual employees, it qualified for an exception to the general bankruptcy stay. Accordingly, the action was permitted to continue. **EEOC v. Die Fliedermaus, L.L.C.**, 274 B.R. 66, 88 FEP 521 (S.D.N.Y. 2/26/02).

Jurisdiction

The dismissal of a national origin discrimination case for lack of personal jurisdiction was reversed by the Second Circuit Court of Appeals (per curiam; the panel was Judges Feinberg, Cabranes, and Parker). The plaintiff had worked on Staten Island as Vice President for Marketing and Sales for a Delaware corporation, but he was fired at a meeting in New Jersey. He sued, alleging diversity jurisdiction, under the New York State and City Human Rights Laws. The issue became whether New York's long-arm statute, CPLR § 302(a)(3), conferred personal jurisdiction on the federal court in New York. Judge Sterling Johnson, Jr. (S.D.N.Y.), had held that it did not because the termination occurred in New Jersey, the employer's only office was in Rhode Island, it had no property or assets in New York, and all its employees except the plaintiff lived and worked in Rhode Island. The parties both referred to the long-arm statute under the assumption that employment discrimination was a tort subject to § 302(a)(3). Interestingly, the plaintiff's claim was that he was fired because he was Italian, and the Chilean majority shareholders of the employer, an importer of Italian pasta, feared that he would favor the minority Italian shareholders. **DiStefano v. Carozzi North America, Inc.**, 286 F.3d 81 (2d Cir. 10/18/01).

Limitations

Justice Clarence Thomas, to the amazement of all, has written an opinion favoring employees. In a 5-4 decision, joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court held that a continuing hostile work environment (in this case, racially hostile) "by its very nature" constituted "one unlawful employment practice." Accordingly, "the employer may be liable for all acts that are part of this single claim." The Court drew a qualitative distinction between "discrete acts," such as denials of promotions or of transfers, and an ongoing hostile work environment. It rejected the guideline espoused by some circuits that the statute of limitations begins to run whenever the employee knew or should have known that his problems were actionable—an impossible rule subject to 20-20 hindsight and inviting result-oriented decisions. The opinion also specifically noted that the statute of limitations does not apply to admissibility of evidence for "background" purposes "in support of a timely claim." **National Railroad Passenger Corp. v. Morgan**, 122 S. Ct. 2061 (6/10/02).

It is common knowledge that the New York State Division of Human Rights is overwhelmed, underfunded, and understaffed, and that it often turns people away without letting them file complaints. Some of those people miss the limitations period for filing the complaint. Judge Gerald E. Lynch (S.D.N.Y.) has implicitly recognized the severe limitations of the Division by holding in a *pro se* case that the plaintiff is deemed to have filed her complaint on the first day she showed up at the Division's office to file it, rather than on the day they finally took it. The decision follows case law in the Appellate Division, First Department. **Hall v. City of New York,** —- F. Supp. 2d —-, No. 00 Civ. 8967(GEL), 2002 WL 472057 (S.D.N.Y. 3/27/02).

The Appellate Division reversed a lower court's dismissal of sex and disability claims based upon collateral estoppel. Justice Louis York (Supreme Court, New York County) had held that the statute of limitations on the plaintiff's state law discrimination claims was not tolled during the pendency of an action timely filed on the same facts in federal court, and that dismissal in federal court of the plaintiff's federal discrimination claims with prejudice and of her state discrimination claims without prejudice collaterally estopped plaintiff from litigating the state law claims in state court. The Appellate Division noted that "CPLR 205(a) provides that a plaintiff may commence a new action in state court within six months of the dismissal of the federal action provided that the federal action was timely commenced and not terminated by final judgment on the merits and that the state action would have been timely at the time of the commencement of the federal action." The court found that the plaintiff satisfied these requirements and reinstated her state law discrimination claims. NELA/NY member Salvatore G.

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Gangemi represented the plaintiff. **Jordan v. Bates Advertising Holdings, Inc.**, 738 N.Y.S.2d 348 (1st Dep't 3/12/02).

See also **Griffin v. New York City Off-Track Betting**, discussed under "Race Discrimination; Evidence."

Pleading

It took the United States Supreme Court to overturn the Second Circuit's line of precedent holding that an employment discrimination complaint had to set forth the plaintiff's entire *prima facie* case in order to avoid dismissal. A unanimous Court held that the Federal Rules' requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), is all that a complaint has to contain. The *prima facie* case is "an evidentiary standard, not a pleading requirement," said the Court. The Court further noted that the **McDonnell Douglas** analysis is not even used if a plaintiff can show direct evidence of discrimination, which may not be uncovered until discovery. "It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." The really amazing thing about this opinion is that it was written by Justice Clarence Thomas. **Swierkiewicz v. Sorema N.A.**, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2/26/02).

See also **Johnson v. Eastchester Union Free School District**, discussed under "Age Discrimination."

RACE DISCRIMINATION

An African-American delivery driver who wore his hair in dreadlocks brought suit against his former employer for retaliation and discrimination. The plaintiff's employer had a policy requiring its drivers to maintain a "businesslike" hairstyle. Pursuant to this policy, the plaintiff was required to wear a woolen cap to cover his dreadlocks while working. Specifically, the policy restricted dreadlocks, cornrows, and braids—typically African-American hairstyles, which an agent of the defendant characterized as being analogous to "mohawks" and "green hair." Even though the plaintiff claimed that, of the eighteen employees subject to defendant's "hat policy" in the New York area, seventeen were black, the court (Sidney Stein, J., S.D.N.Y.) held that the plaintiff failed to show that this policy "severely impacts African-Americans as a class." The court further found that derogatory comments made by various managers regarding the plaintiff's hairstyle were not racist in nature, because dreadlocked hair "is not so closely associated with black people that a racially neutral comment denigrating it can reasonably be understood as a reflection of discriminatory animus." **Eatman v. United Parcel Service**, 194 F. Supp. 2d 256 (S.D.N.Y. 3/31/02).

RELIGIOUS DISCRIMINATION

Failure to Accommodate

A postal worker who bid on a route, knowing that it would require him to work on Saturdays (his Sabbath), then simply did not go to work on those Saturdays, and who declined to bid on other positions that would have accommodated his religious beliefs, did not have a claim for failure to accommodate his beliefs, said the Second Circuit Court of Appeals (Cardamone, C.J., joined by McLaughlin and F. Parker, C.JJ.) The plaintiff had been disciplined for the absences, and the discipline also was a contributing—but not the only—reason for his nonpromotion. The district court (Marrero, J.) had found after a bench trial that the Postal Service had fulfilled its duty to try to accommodate the plaintiff's religious beliefs, and the court of appeals affirmed. The plaintiff was *pro se*. **Cosme v. Henderson**, 287 F.3d 152 (2d Cir. 3/29/02).

Evidence

A Jewish school administrator brought a religious discrimination and retaliation action against the Board of Education and others, but the jury returned a verdict for the defendants on all counts. The plaintiff moved for judgment as a matter of law or a new trial, arguing that she had presented overwhelming circumstantial evidence of religious discrimination and that the defendants had failed to disprove the presumption of discrimination raised by her having made out a *prima facie* case. The court (Garaufis, J., E.D.N.Y.) held that, although there was significant evidence in plaintiff's favor, a reasonable jury could find for defendants, given the totality of the evidence offered at trial. **Tesser v. Board of Education**, 190 F. Supp. 2d 430 (E.D.N.Y. 3/7/02).

RESTRICTIVE COVENANTS

Judge Leonard D. Wexler (E.D.N.Y.) parsed out a covenant not to compete and blue-penciled and enforced some parts but declined to enforce others. The court granted a preliminary injunction against a former employee and his wife and new employer, but not against a group of other former employees that he had taken with him to the new employer. The principal individual defendant had been a shareholder and EVP of the plaintiff corporation with an Employment and Non-Competition Agreement that lasted for two years after his employment ended. He also had a confidentiality agreement. When he began to believe that his employer planned to force him out, he sued, seeking (among other things) a declaration that the restrictive covenant was unenforceable. Meanwhile, his wife developed a plan to set up a competing business, believing that as long as her husband had no interest in it and gave no information, she was free to do so. She recruited a number of employees from the soon-to-be-plaintiff corporation, claiming that she never asked her husband for any advice or leads. The court found this testimony "utterly incredible," found the two-year restriction reasonable, and enforced it. *Unisource Worldwide, Inc. v. Valenti*, 196 F. Supp. 2d 269 (E.D.N.Y. 4/19/02).

RETALIATION

Judgment as a Matter of Law

The long-running saga of two female toll collectors who were sexually harassed by employees of a cleaning company under contract with their employer, despite complaining for two years, appears to have finally ended. The Second Circuit Court of Appeals has affirmed the decision of Judge Peter K. Leisure (S.D.N.Y.) not to grant judgment as a matter of law

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FILINGS, from page 1

At trial, HIP did not contend that it had terminated Dr. Beharie for cause. Rather, it argued that it had not terminated Dr. Beharie, because it had intended to keep him on payroll through the end of the contract term but inadvertently forgot to do so.

The judgment included an award of attorney fees under the contract. In setting the award, Judge Cedarbaum apparently concluded that Dr. Beharie was entitled to be reimbursed for much of the contingent portion of his fees. The fee award came to about 150% of his counsel's normal full hourly rates.

HIP was represented by Stroock and Stroock and Lavan.

Mark B. Stumer & Associates, P.C., is representing eight Muslim employees at the Plaza Hotel in EEOC claims based on their religion and national origin. The charge states that the discrimination started immediately after September 11. The employees, who had worked in the hotel's Oak Room Restaurant as waiters, captains, and bussers, were called Taliban, Al Queda, Osama, Terrorists, and Dumb Muslims by their supervisors and coworkers. Supervisors also told them sarcastically not to blow up the hotel. They were instructed to "Go help your fellow Taliban!" whenever guests who appeared to be Arab would enter the restaurant. Management wrote written "Osama," "Bin Laden," "Al Queda" and "Taliban," on documents the employees were given, in place of their names. Some of the employees were fired, and others' work shifts were drastically reduced. Since the filing of the EEOC charge, the key harasser has been terminated from the hotel. Some of the complainants have received an increase in the number of their work shifts.

Doris Traub recently received a favorable decision from EEOC Judge David Licht of the New York regional office, in a case against the U.S. Cudtoms Service. The case involved her client's not being selected for two supervisory positions, and her transfer from to a far less desirable work site in a basement filled with files. The complainant raised claims of race discrimination (she is white), and retaliation for the filing of her own EEO charge and her counseling of another employee about a sexual harassment complaint. Judge Licht found in favor of Doris' client.

After the complainant counseled another employee about a sexual harassment complaint, the Area Director said that she was on the "wrong side of management." Shortly after that, the complainant was not selected for a supervisory position in her office, where most of the employees were minorities. The Area Director had said at a mangers meeting that she believed "minorities could better be supervised by minorities." The person selected, after some manipulation of the Best Qualified List for the position, was a minority. Other white supervisors were also transferred out of the office.

Judge Licht directed that the complainant be promoted, retroactively, and be granted back pay and seniority. He also ordered the agency to pay her attorneys fees and costs. **Dana Murnane v. U.S. Customs Service**, EEOC New York Regional Office.

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to the employer after a jury verdict in favor of the plaintiffs on sexual harassment and in favor of one plaintiff on retaliation as well. Accordingly, the verdict stands. The employer had argued that the plaintiff had shown insufficient evidence of adverse employment actions following her complaints. While noting that "the proof is certainly not overwhelming, either with respect to the existence of adverse employment actions … or with respect to the link between those employment actions and Lewis's complaints," the court held that there was enough evidence to support the verdict. (A prior decision in the case, 2001 WL 21256, had denied the employer's motion *in limine* to prevent the jury from learning that the supervisor to whom the plaintiffs had complained was widely known as "the porno king of the Whitestone Bridge.") **Lewis v. Triborough Bridge & Tunnel Authority**, 2002 WL 464704 (2d Cir. 3/26/02) (summary order).

A district judge (Charles P. Sifton, J., E.D.N.Y.) declined to dismiss a complaint alleging discrimination and retaliation, brought by a former employee of the New York City Sanitation Department. The plaintiff alleged that he had a back condition qualifying him for a handicapped parking permit issued by the New York City Department of Transportation, but after he parked in a handicapped spot next to a sanitation facility, he found his car blocked by another. Another employee told him that he had just gotten himself onto a "shit list" because that was the Commissioner's car. Getting no cooperation from other employees, who laughed at his predicament, the plaintiff-to-be filed a complaint with the local police, and his car was eventually unblocked. Shortly afterward, he was subjected to several bogus disciplinary charges, the handicapped parking sign was removed, and he was assaulted by another employee. The court rejected the City's arguments that the complaint to the police was an insufficient basis for alleging retaliation and that the plaintiff had not been adversely affected by any employment decision, because, after **Swierkiewicz v. Sorema** (see "Procedure," above), not all the elements of a *prima facie* case need be specifically alleged. NELA/NY member Kipp Elliott Watson represented the plaintiff. **Aponte v. City of New York**, —- F. Supp. 2d —- No. CV-02-0284 (E.D.N.Y. 5/7/02).

Opposition to Customer Practices

Title VII prohibits retaliation against an employee for opposing unlawful *employment* practices, but a racial slur by a customer is not an employment practice. This was the holding of decision by Judge Sterling Johnson, Jr. (E.D.N.Y.). Judge Johnson was unpersuaded by the employee's arguments that she reasonably believed her opposition was a protected activity and that she should be protected against racism

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Local Civil Rights Restoration Act pending

When New York City enacted comprehensive revisions to its Human Rights Law in 1991, the Mayor and Council were reacting to restrictive state and federal civil rights decisions. Some council members now feel that it is again time to fight back against the continuing trend at the federal level of cramped interpretations of civil rights law, especially since both state and federal judges have regularly failed to abide by the City Council's intention that the City Human Rights Law be independently and liberally construed.

Among the major provisions in the proposal are the restoration of protection against retaliation, even where no "materially adverse action" as interpreted by the courts has occurred; incorporating a strengthened "liberal construction" provision into the statute itself; restricting city contractors from imposing mandatory arbitration on their employees; providing attorneys fees in catalyst cases; rejecting a decision which purported to eliminate punitive damages in cases against the City; and requiring coops to disclose to rejected applicants the coop's reasons for rejection. More information about the proposal is available at *www.antibiaslaw.com/LegislativeProposals.htm*.

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by customers just as she should be protected against sexual harassment by customers. Furthermore, said the court, the employer had stated a legitimate preexisting reason for firing the plaintiff, and she had offered no evidence of pretext. **Foster v. T.W.R. Express**, —- F. Supp. 2d —-, N.Y.L.J. 7/8/02, p. 30, col. 4 (E.D.N.Y. approx. 7/1/02).

SANCTIONS

Defendant's Spoliation of Evidence

Sanctions were awarded against a defendant that failed to produce relevant records and alleged that they had been inadvertently destroyed after an EEOC charge had been filed. EEOC regulations require the retention of all records for two years once a charge has been filed. The defendant made two contradictory arguments: that no other employee must have been disciplined because of customer complaints, since there was no record of such discipline and there would have been if such discipline had been administered, but that the company could neither admit nor deny that allegation in the plaintiff's request for admissions because the relevant records had been destroyed. The company could not explain how the records had been destroyed, alleging only that there was a "rumor" that a temporary intern had discarded them and that there was no one left at the company who knew what had happened. More recently, some of the files were discovered in the company president's office, and it was unclear how these could have been overlooked. Magistrate Judge Cheryl Pollak (E.D.N.Y.) found that the company had been guilty of at least gross negligence, supporting a finding of spoliation, and deemed the requests for admissions admitted. She also granted the plaintiff reasonable costs and attorneys' fees incurred in connection with the motion for sanctions. (In this connection, see the later decision in the same case discussed under "Attorneys' fees.") NELA/NY member Deborah H. Karpatkin represented the plaintiff. **Foster v. TWR Express, Inc.**, —- F. Supp. 2d —-, No. 00 CV 3231 (SJ)(CP) (E.D.N.Y. 10/31/01)

Sanction Threatened for Defendant's Retaliation

See **Jacques v. DiMarzio**, discussed under "Disability Discrimination."

SEX DISCRIMINATION

On appeal, a petitioner successfully challenged the New York State Division of Human Rights' monetary award to a former employee who had brought sex discrimination charges against him. The former employee had been petitioner's secretary in his medical office. When she became pregnant, petitioner had initially been supportive and enthusiastic. Shortly thereafter, however, the petitioner's wife became abusive towards the employee, accusing her husband (the petitioner) of being the baby's father. The situation became increasingly tense, and the petitioner's solution to the problem was to discharge his secretary. No evidence indicated that the petitioner and his secretary had, in fact, engaged in any sort of sexual relations. Nonetheless, the court held that, having been presented with the "Hobson's choice" of continuing to employ his secretary or "saving his marriage," the petitioner was justified in firing his employee. **Mittl v. New York State Division of Human Rights**, 741 N.Y.S.2d 19 (1st Dep't 4/4/02).

SEXUAL HARASSMENT

A woman who worked in a warehouse, photographing items for publication in auction catalogs, brought a sexual harassment action against her employer, as well as New York State law claims of aiding and abetting against two co-employees—her direct supervisor and the warehouse foreman. The court (Lawrence E. Kahn, N.D.N.Y.) granted the individual defendants' motions to dismiss the claims against them, holding that "[s]ince the New York courts are split on this issue, this Court declines to exercise jurisdiction over this claim." The court gave extensive treatment to the conflicting lines of cases following **Tomka v. Seiler** and **Patrowich v. Chemical Bank**. **Fiacco v. Christie's, Inc.**, —- F. Supp. 2d —-, No. 00-CV-526 (LEK)(DRH), 2002 WL 257693 (N.D.N.Y. 2/21/02).

SUMMARY JUDGMENT

Age Discrimination

A plaintiff alleged that his investment bank employer had retaliated against him, by first demoting and then firing him, for filing an age discrimi-

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stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII's prohibition of discrimination: on the basis of sex." *Id*.

The opinion elaborates upon the complexity of sex stereotyping where issues surrounding sexual orientation are raised, and notes the importance of analyzing such cases under a mixed-motive approach, as required by the Civil Rights Act of 1991. "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." 183 F.Supp.2d at 410. While not directly so ruling, the court notes that sex stereotyping can be demonstrated if a harasser discriminates against an openly gay co-worker, or a man perceived to be gay, even if the man behaves in a stereotypically masculine way, if the harassment is based on a stereotypical perception that "real men don't date men." *Id*. The decision affirms a plaintiff's right to statutory protection irrespective of what he or she chooses to reveal to co-workers about his or her sexuality.

If you have a plaintiff who is being discriminated against for failing to conform to sexual stereotypes, these cases show that the claim will be more likely to succeed if you can present facts that compare the defendant's treatment of the plaintiff with that of employees of the opposite gender. If you don't have such facts, you can cite **Samborski** for the proposition that inferences of stereotyping may be drawn from the context of the workplace, or cite **Centola** to show such comparison is not always necessary. Clearly, if sexual orientation discrimination were explicitly prohibited by Title VII, gays and lesbians would not have to jump through hoops to secure protection from sexual harassment on the job, and some of this confusion generated by **Oncale** over the meaning of the phrase "because of sex" would disappear. In the meantime, if we argue effectively, the issues raised by sex stereotyping cases may lead to a more progressive interpretation of Title VII.

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nation charge with the EEOC and also hiring an attorney to recover improperly withheld bonus money. The district court (Denise Cote, J.) granted summary judgment on the plaintiff's claim for retaliatory termination, holding that his "discharge … after his function in the company was eliminated does not constitute retaliation." The court did allow the plaintiff's claim for retaliatory demotion to stand, however, noting that mere chronological proximity between the plaintiff's protected activity and the defendant's adverse job action was insufficient to support an inference of retaliation but finding other circumstantial evidence that two persons who knew of his EEOC age discrimination charge were more involved in the reorganization decision than they had claimed. NELA/NY member Jeffrey L. Liddle represented the plaintiff. **Alban-Davies v. Credit Lyonnais Securities (USA) Inc.**, —- F. Supp. 2d —-, No. 00 Civ. 6150 (DLC), 2002 WL 498630 (S.D.N.Y. 3/29/02).

Disability Discrimination

A 31-year-old man with a heart condition that prevented him from engaging in sports or any strenuous activity was denied a promotion to assistant store manager and sued for disability discrimination; he also alleged that he had not been paid for substantial amounts of overtime. There was direct evidence that he was not promoted "due to health reasons," but the employer alleged that he had failed to prove that he had a disability under the new, heightened standard set forth in **Toyota Motor Manufacturing v. Williams**, 534 U.S. 184 (2002). Judge Denny Chin (S.D.N.Y.) held that this question was for the jury and denied summary judgment. The question of whether the failure to pay overtime was willful, affecting the statute of limitations, also was for the jury. (The court did not expend much ink on the allegation in a district manager's deposition that "OT" stood for "own time.") **Gonzalez v. Rite Aid**, 199 F. Supp. 2d 122, A.D. Cas. 39 (S.D.N.Y. 4/23/02).

National Origin

Statistical evidence of the lack of Hispanics at upper levels of the MTA defeated summary judgment for one plaintiff in Judge Harold Baer's courtroom (S.D.N.Y.), and a complaint to the authority's Hispanic Society followed by dismissal for apparently trumped-up reasons defeated summary judgment for another in her consolidated retaliation case. The first plaintiff alleged failure to promote and also showed that, although the MTA claimed he was not promoted because of a prior disciplinary record and a low test score, a non-Hispanic applicant with a disciplinary record was promoted, and the test score was subjective and was scored differently for a non-Hispanic applicant. Each plaintiff lost other claims (retaliation for the first, hostile environment for the second). The plaintiffs' lawyers, Dan Alterman and Nina Koenigsberg of Alterman Boop, P.C., note that this seems to be the first time in some ten national origin discrimination cases before Judge Baer that he has denied summary judgment. **Azon v. Metropolitan Transit Authority**, 88 FEP 1784, —- F. Supp. 2d —-, No. 00 Civ. 6031, 2002 WL 959563 (S.D.N.Y. 5/7/02).

Race Discrimination

See **Griffin v. New York city Off-Track Betting**, discussed under "Evidence."

Retaliation

A court in the Northern District of New York (Lawrence E. Kahn, J.) found that a teacher who filed age discrimination claims against his school district

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employer before the New York State Division of Human Rights and also availed himself of union representation in meetings and negotiations with school district representatives had presented enough facts to defeat summary judgment on his retaliation claim. The court noted that summary judgment motions in employment discrimination cases require special scrutiny. Since "writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's documents, a trial court must be particularly cautious about granting summary judgment when the employer's intent is at issue." NELA/NY member Phillip G. Steck represented the plaintiff. **Morton v. Noe**, —- F. Supp. 2d —- (N.D.N.Y. 3/1/02).

UNION MEMBERS' RIGHTS

A thirty-year member of Local 1199 submitted an open letter, signed by approximately 70 other union members, to the *1199 News*, strongly criticizing the union leadership. Although the letter was published, it was significantly edited to omit some of its more forceful language and personal attacks against senior union officers. Following the publication of the letter, the plaintiff was removed from her position as an elected union delegate without notice or a hearing. She sued the union and its senior leadership under the LRMDA and the LMRA, alleging retaliation, improper discipline, and infringement of her speech by the union leadership. The court (Naomi Reice Buchwald, S.D.N.Y.) denied a motion to dismiss the plaintiff's claim that her removal without due process from her position was retaliatory. The court did, however, grant defendants' motion to dismiss the related claim that her removal constituted "discipline" under the LRMDA. It also granted the motion to dismiss the claim that the plaintiff's speech was improperly infringed under the LRMDA. The court noted that when her letter was published, even in edited form, the plaintiff was given a voice on the relevant issues. In reaching this decision, the court observed that the protection of speech afforded to union members by LRMDA is not "coextensive with that of the First Amendment." **Messina v. Local 1199 SEIU**, —- F. Supp. 2d —-, No. 00 Civ. 7375 (NRB), 2002 WL 243781 (S.D.N.Y. 2/14/02).

PRACTICE TIP

If you are retained only to negotiate for a client in the hope of settling the case, but not to litigate (pending new retainer terms if litigation becomes necessary), it makes sense to include the EEOC process in your definition of "negotiation." This is because the EEOC's first act often is to propose mediation, and even an employer that refused to negotiate with you directly before may well accept the invitation from the EEOC. In addition, if you can succeed in getting a probable cause finding, the next step is conciliation—another opportunity to settle, and with much better leverage.

WHISTLEBLOWERS, from page 1

is extremely short—90 days. Sec. 1514A(b)(2)(D). If DOL does not issue a final decision within 180 days, the employee can bring an action "for de novo review" in federal court. Sec. 1514A(b)(1). A prevailing plaintiff is entitled to "all relief necessary to make the employee whole," which "shall include" reinstatement with seniority, back pay with interest, and compensation for any "special damages sustained as a result of the discrimination," including attorneys fees and costs. Sec. 1514hhA(c).

Sarbanes-Oxley explicitly provides that administrative enforcement actions at the Department of Labor will be governed by the rules set out in a little-known federal law prohibiting retaliation against airline employees who provide safety information, 49 U.S.C. Sec. 42121(b). See 18 U.S.C. Sec. 1514A(b)(2)(A). Under the airline safety provisions, DOL must conduct a preliminary investigation and, within 60 days after the complaint was filed, determine if there is "reasonable cause" to believe that a violation occurred. If DOL finds reasonable cause, it issues an order for preliminary relief. If either the employer or employee objects, DOL must conduct a hearing "expeditiously," and issue a final order within 120 days after the hearing. Either side may seek review of the hearing decision in the Court of Appeals for the Circuit where the violation occurred. The employee may also seek enforcement of the DOL's order in federal district court.

Sarbanes-Oxley also defers to these airline safety provisions in defining the burden of proof for an employee bringing a securities whistleblower claim in federal court. 18 U.S.C. Sec. 1514A(b)(2)(c), referring to 49 U.S.C. Sec. 42121(b). How those provisions will be applied, however, is extremely unclear, since they are phrased in terms of the burdens and defenses the employer and employee have at various stages of an administrative proceeding. 49 U.S.C. Sec. 42121(b)(2)(B).

For example, DOL is not supposed to conduct an investigation unless the employee makes a prima facie showing that the protected activity was a "contributing factor" in the employer's actions. 49 U.S.C. Sec. 42121(b)(2)(B)(i). Even if DOL finds this standard has been met, it is not supposed to investigate if the employer shows, by clear and convincing evidence, that it would have taken the same action "in the absence of" the employee's conduct. 49 U.S.C. Sec. 42121(b)(2)(B)(ii). Ultimately, DOL can only find a violation if employee proves retaliation by the "contributing factor" test, and cannot find a violation if the employer shows it would have acted similarly in the absence of the employee's whistleblowing.

So, how this applies in federal court is murky. The burden of proof seems to require a mixed motive analysis. Is the "contributing factor" test the employee's prima facie case in court? Does the "absence of" test only require the employer to articulate an alternative reason for the challenged adverse action, with the burden then shifting back to the employee to show that the employer's motive was retaliatory? Does the employee ultimately prevail if he shows his whistleblowing was a contributing factor in the employer's action? Does the "absence of" test define the employer's affirmative defense?

What Congress Didn't Tell Us

Open questions under Sarbanes-Oxley include:

- What will the courts require of a plaintiff in pleading a whistleblower case under Sarbanes-Oxley? Normally, Fed. R. Civ. P. 9(b) requires plaintiffs in federal court to plead fraud claims with particular specificity. Must the plaintiff allege the fraud with the same specificity in a whistleblower action based on the plaintiff's reasonable belief that a fraud occurred? While we're waiting for an answer, it certainly makes sense for the plaintiff to be clear and specific in the complaint about the employer's fraud. This will (best case) bolster his credibility with the court and (worst case) reduce the chances that the court will view the plaintiff as a dissembling opportunist.
- What will the courts consider a "reasonable belief" that fraud occurred?
- When employees complain within their companies, how specifically must they articulate their belief that there has been the wrongdoing referred to in Sarbanes-Oxley?
- What can an employer do to an employee which does not rise to the level of a retaliatory act? Will the courts look at this issue in the way they have considered retaliation claims under Title VII?
- Can a plaintiff recover emotional distress damages as part of the "special damages" authorized by Sarbanes-Oxley? Some courts have construed the similarly- worded anti-retaliation provision of the federal False Claims Act to permit an award of emotional distress damages. **Hammond v. Northland Counseling Center, Inc.**, 218 F.3d 886 (7th Cir. 2000). What about punitive damages?

Representing clients in these cases will require us to broaden our knowledge of the securities laws, and be creative and bold. If we do that, we may get some justice for many whistleblowers who until now could be drummed out of the workplace without protection.

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