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President's Column

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

A Whole New World

As Chief Justice Warren Burger stated in his concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the proscriptions against homosexuality have "very 'ancient roots,'" beginning with sodomy's status as a capital crime under Roman law. *Id. at 192*. According to Justice Burger, the Georgia statute outlawing sodomy challenged in Bowers was just another step in a long history of condemnation of homosexuality throughout the history of Western civilization: "In 1816, the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id. at 196-97*.

Four years after the *Bowers* case, James Dale, "by all accounts,…an exemplary [Boy] Scout," and an assistant scoutmaster of Troop 73 in New Brunswick, New Jersey, was thrown out of the Boy Scouts after

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14 Penn Plaza v. Pyett: What Hath Justice Thomas Wrought?

by Jonathan Bernstein *(jbernstein@levydavis.com)*

It happens every now and then – a potential client has apparently viable discrimination or other claims against her employer, but appears to be bound by an agreement (or, if you prefer, "agreement") to arbitrate employment disputes. There are two kinds of arbitration agreements – those in individual employment agreements (employee handbooks fall into this category for purposes of this article) and those in collective bargaining agreements (CBAs) between union and management. This article concerns the latter category.

Background: the Gardner-Denver Rule and its Erosion

For 30 years or so, the rule was: a waiver of the right to litigate (as opposed to arbitrate) statutory employment disputes contained in a CBA was not enforceable, *i.e.,* a member of a collective bargaining unit had the right to bring an individual Title VII (etc.) claim even where the CBA provided for arbitration of employment disputes.[1] *Alexander v. Gardner-Denver Co*., 436 U.S. 36 (1974). In that case, the Supreme Court expressed its concern regarding the "exclusive control over the manner and extent to which an individual grievance is presented" and noted

> [i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. And a breach of the union's duty of fair representation may prove difficult to establish.

Id. at 58 n. 19. And they were in a good position to know that, because they had recently decided in *Vaca v. Sipes*, 386 U.S. 171 (1967), that individual employees have no right to have their complaints taken to arbitration. Because "union discretion is essential to the proper functioning of the collective bargaining system,"[2] over the years courts have allowed unions to refuse to process employee complaints where the union reckons its chances for success in arbitration to be insufficient.[3] Accordingly, and since a union does not breach its duty of fair representation unless its refusal to press the member's grievance is arbitrary, discriminatory or in bad faith (*Vaca*), a standard almost impossible to satisfy, the consensus was that

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1 That is, the employer could not compel a union member to arbitrate a statutory discrimination claim in the first instance; however, an arbitral order once issued might have preclusive effect on later court proceedings (a subject of much litigation over the years).

2 *Electrical Workers (IBEW) v. Foust*, 442 U.S. 42, 51 (1979).

3 *See, e.g*., *Williams v. Sea-Land Corp*., 844 F.2d 17 (1st Cir. 1988).

The NELA/NY
Calendar of Events

Executive Board Meeting
6:15 pm
Wednesday, September 16
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

NELA Nite
Wednesday, September 30
6:30 pm
3 Park Avenue – 29th Floor
Topic To Be Announced-
Save-the-Date

NELA/NY Fall Conference
Friday, October 23
Yale Club of NYC
Save-the-Date

Executive Board Meeting
6:15 pm
Wednesday, October 28
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

NELA Nite
Wednesday, November 11
6:30 pm
3 Park Avenue – 29th Floor
(Topic to be Announced)

NELA/NY 12th Annual Gala
Thursday, November 19
Club 101-New York City
Evan Wolfson Keynote Speaker
(Invitations to Follow)

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Hoffman v. Paradise Publications

by David Bargman *(dwbargman@gmail.com)*

This past May, the First Department in *Hoffman v. Parade Publications*, 2009 N.Y. Slip Op. 0378, 878 N.Y.S.2d 320 (1st Dep't 2009) held that New York's Courts have subject matter jurisdiction over a claim of discriminatory termination under New York State Human Rights Law (NYHRL) and the New York City Human Rights Law (NYCHRL) where the discriminatory conduct occurs in New York even though the terminated employee resides and works outside of New York. This case brings much needed clarification to the so-called "impact rule" of subject matter jurisdiction over New York State and City antidiscrimination laws and teaches that a pleading which alleges either that a discriminatory act or the affect thereof took place in the jurisdiction is sufficient to defeat a CPLR 3211(b)(2) motion to dismiss.

Plaintiff-Appellant Hoffman, who resided in Georgia and managed a group for defendant twelve southern and western states, sued Defendant-Respondent Parade Publications for age discrimination under the NYHRL and the NYCHRL. Supreme Court granted defendant's motion to dismiss for lack of subject matter jurisdiction, holding "as a matter of law that the impact of defendants' misconduct was not felt inside either New York City or New York State, as required by *Shah v. Wilco Sys*., Inc., 27 A.D.3d 169 (1st Dep't 2005)." Shah involved a nonresident computer consultant who was employed by a New York company but was working on a long term assignment at a client's office in Jersey City, New Jersey when she was terminated. Both the termination and the conduct cited by the employer as the cause of termination took place in New Jersey.

Holding that "the applicability of the NYCHRL is limited to acts occurring within the boundaries of New York City [citations omitted]" and finding that "Shah did not allege that the decision to terminate her was made in New York City" the Court affirmed dismissal of the YCHRL claim for lack of subject matter jurisdiction. The Court cited *Ikanow v. Mobil Corporation*, 541 N.Y.S.2d 428 (1st Dep't 1989) in which the Court dismissed for lack of subject matter a NYSHRL claim brought by the London employee of New York company where, as in Shah, the complaint did not allege that any discriminatory act took place in New York. See, *Rylott-Rooney v. Alitalia-Linee Aeree Italiane Societa*, 549 F.Supp.2d 549, 551-52 (S.D.N.Y. 2008) (Rakoff) ("In concluding that the New York Court had no subject matter over the alleged wrong, the [Ikanow] Court implicitly suggested that the result might have been different had the plaintiff in fact alleged that the decision to implement [defendant's worldwide layoff] policy in a discriminatory fashion had been made in New York.")

After holding that the *Shah* complaint should be dismissed because there was no allegation of New York conduct, however, the Shah Court went on to state in dictum that "the locus of the decision is of no moment. What is significant s where the impact is felt. Thus, even if the termination decision had been made in New York City, the NYCHRL would not apply since its impact on her occurred in New Jersey, not within the five boroughs." For this proposition, the Court cited *Whalstrom v. Metro-North Commuter R.R. Co*., 89 F. Supp.2d 506, 527-28 (S.D.N.Y. 2001)(dismissing a NYCHRL claim for sexual harassment where harassment alleged took place outside New York City. "Th[e] argument that a discriminatory decision in New York City suffices for subject matter jurisdiction] has been explicitly rejected, however, by courts **in this District** that have held that the NYCHRL only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City office," [Citations omitted.] (Emphasis supplied.) Moreover, the federal court in *Wahlstrom* found that there was no allegation of discriminatory conduct or impact in New York City.

However, long before *Whalstrom*, the First Department had denied a motion for summary judgment on a gender discrimination claim because there was an issue of fact as to whether the discriminatory action had taken place in New York or Indiana, thereby indicating that the "locus of the decision" was indeed of some moment and that "impact" referred both to act causing the impact and where the impact was felt. *Walston & Co. v. Comm. on Human Rights*, 41 A.D.2d 238 (1st Dept 1973])

Thus the First Department in *Shah* stated dictum citing a district court opinion in *Whalstrom* which was relied on by the motion judge in *Hoffman* as a statement of New York State and City law. It was left to the First Department in *Hoffman* to make clear that an allegation of discriminatory conduct which causes an impact outside the State or City in New York State or City, respectively, suffices for subject matter jurisdiction over NYHRL and NYCHRL claims.

The Southern District, however, still applies the old impact rule despite Judge Rakoff's insightful reading of Ikanow in Rylott-Rooney. Judge Patterson's recent decision in *Pouncy v. Danka Office Imaging*, 2009 U.S. Dist. LEXIS 44752 (S.D.N.Y.2009) (RPP) held, citing Southern District cases only, that the court had subject matter jurisdiction over the NYCHRL claims of a plaintiff who lived and worked in New York City because "the impact of [defendant's] allegedly discriminatory acts [made out of state] was felt within New York City." Ibid, p.25 and cases cited ("These courts have focused on whether the Plaintiff felt impact from the discriminatory remarks or acts in New York City…."). While Judge Patterson reached the right decision on the facts of *Pouncy, Hoffman* makes clear that, contrary to the Southern District line of cases, the "impact rule" extends to a discriminatory decision made in New York that has an impact on an employee who lives and works outside the City and State. ■

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Gardner-Denver struck an appropriate balance.

Then came the Reagan-Bush years, and with them the end of judicial disfavor for arbitration. Even so, the *Gardner-Denver* rule was entrenched. The Second Circuit reaffirmed it in *Rogers v. New York Univ.*, 220 F.3d 73, 75 (2d Cir.), *cert. denied*, 121 S. Ct. 626 (2000),[4] as did the majority of the circuits. But the campaign to erode *Gardner-Denver* was underway. In *Wright v. Universal Maritime Serv. Corp*., 525 U.S. 70 (1998), the Supreme Court refused to enforce a waiver of Title VII litigation rights contained in a CBA, because the waiver at issue was less than explicit, *i.e*., did not specifically incorporate by reference the antidiscrimination statutes purportedly enforceable by the contract arbitrator. The *Wright* Court refused to enforce the waiver because "[n]ot only is [the] statutory claim not subject to a presumption of arbitrability, we think any CBA requirement to arbitrate must be particularly clear." *Id*. at 80.[5] The Court left pen one question: what about hen the CBA requirement to arbitrate statutory discrimination is clear and unmistakable?

Pyett

The building service workers' union, Local 32B-32J, represents employees such as superintendents and porters in NYC residential buildings and office cleaners in commercial buildings.[6] Rather than negotiate a CBA with each building or real estate company, the union negotiates a handful of master agreements with the Realty Advisory Board, the real estate industry employers' trade association. The RAB is represented by some of the leading management attorneys in New York. When CBAs came up for renewal after *Wright*, the RAB began inserting explicit and clearly unmistakable requirements to arbitrate statutory employment disputes.

Pyett was a night watchman who brought an ADEA claim against 14 Penn Plaza. Judge Buchwald (S.D.N.Y.) refused, on *Rogers* grounds, to compel arbitration and the Second Circuit affirmed. The Supreme Court surveyed the development of the law of individual arbitration cases (*Gilmer, et al*.: the right to litigate, rather than arbitrate, is a procedural, not a substantive right) and simply stated that because the NLRA authorizes compulsory arbitration of workplace disputes, and the union and the RAB had elected to arbitrate this category of disputes, the Court must respect that choice. 129 S. Ct. 1456, 1466 (2009). The remainder of the opinion is mostly a conversation with the dissent, in which Justices Stevens, Souter, Ginsburg and Breyer say "the Court's decision does not comport with *Gardner-Denver*" and Justice Thomas says "it does, too" before conceding that maybe it doesn't, but *Gardner-Denver* was wrong to say that arbitrators can't decide discrimination cases as well as judges can. Justice Thomas did acknowledge the DFR concerns raised by the dissent and the *Gardner-Denver* court but said that there was no reason to assume that DFR is the norm (and if it is, it is up to Congress to remedy this by amending the NLRA). *Id*. at 1473.

The upshot is: an explicit, clear, and unmistakable CBA clause requiring arbitration of statutory employment disputes is now enforceable. We can expect to see these clauses more and more. What can you do about it?[7]

Kravar v. Triangle Services

In that S.D.N.Y case, plaintiff (represented by NELA/NY president Darnley Stewart) had overcome summary judgment four days before the Supreme Court issued Pyett. The plaintiff was a NYC building worker subject to the same CBA as was Pyett. Plaintiff, having argued prior to the Supreme Court decision in *Pyett* that "the 32-BJ arbitration clause puts the employee at the mercy of his or her union, which may be indifferent or even hostile to the employee's claim of individual discrimination" refined the argument by submitting: (1) the plaintiff's affidavit that the union had actually refused to arbitrate the claim and (2) the union official's deposition testimony that the grievance had been dismissed prior to arbitration. 2009 U.S. Dist. LEXIS at * 8.

On this record, Judge Holwell found that "[t]he CBA here operated to preclude Ms. Kravar from raising her disability-discrimination claims in any forum. As such, the CBA operated as a waiver over Ms. Kravar's substantive rights, and may not be enforced." *Id*. at * 9 (emphasis in original; citing *Pyett* and *Gilmer*).

The employer offered to arbitrate the claims, but the Court recognized that the employer's consent was irrelevant absent the union's consent. That is, the CBA is a contract between the union and management, not the employee and management, and a court has no power to force the employee into a new contract with management.

The employer has appealed denial of its motion to compel arbitration; *Kravar* is now before the Second Circuit.

So, what can you do? You can develop the factual record. Don't just argue "But judge, the union member has no individual right to compel arbitration." Show that the union actually frustrated the employee's ability to arbitrate the claim, which, though permissible under the NLRA, operates to deprive the client of a substantive statutory right.[8] This means that when a union member comes to you with a discrimination case and a clear and unmistakable CBA, you're going to have to try to invoke the CBA

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4 The case was prosecuted by Nela/NY member James Brown with amicus support from Nela/NY.

5 Generally, in CBAs, the union is waiving its members' rights and that is why the waiver must be "clear and unmistakable." There is no such requirement when people waive their own rights.

6 Local 32E in the Bronx.

7 Assuming that you want to do something about it. CBA arbitration is not always a bad thing and may, in the particular case, be the best approach for the client. But these considerations are beyond the scope of this article.

8 In labor law circles, there has been much discussion of NELA/NY member Mitchell Rubenstein's 2007 law review article "Assignment of Labor Arbitration," which examines whether, and under what circumstances, a union's refusal to press a grievance to arbitration is an abandonment that empowers the individual employee to bring the grievance to arbitration. 81 St. John's L.R. 41. Note, however, that this is not necessarily an "abandonment." That is because the employee's Title VII and other statutory employment rights arise from statutes whereas the employee's right to be discharged or disciplined only for just cause arises from the CBA, *i.e*., would not exist in the union's absence.

An Introduction to New York Prevailing Wage Law

by Jason Rozger *(jrozger@bmbblaw.com)*

Under New York law, certain workers on publicly funded projects are entitled to a level of wages and fringe benefits, called the "prevailing wage." As we will see, the term is a bit of a misnomer, since the "prevailing wage" is usually higher than the market rate for similar labor. This article will explain what employees are entitled to this "prevailing wage," and what their remedies are if their employer fails to pay.

What kind of worker is covered?

New York Labor Law § 220 provides that a "laborer, workman or mechanic" employed on a "public work," where the employer has is the State, a public benefit corporation, a municipal corporation, or a commission appointed pursuant to law, is entitled to be paid at least the "prevailing rate of wages," as defined by the statute.[1] Those employees are also entitled to "prevailing" fringe benefits.[2] In addition, Labor Law §§ 230 and 231 provide that a "building service employee," such as a watchman, doorman, cleaner, porter, handyman, or groundskeeper, is also entitled to prevailing wages.

"Laborer, workman or mechanic" is not defined by the statute. However, the statute itself and the attendant caselaw shows that this phrase should be interpreted expansively and in favor of the employee[3]. Section 220(4) specifically excludes only a narrow class of workers consisting of "stationary firemen in state hospitals," "other persons regularly employed in the state institutions, except mechanics," and "engineers, electricians and elevator men in the bureau if building management of the office of general services during the annual session of the legislature." Courts have uniformly held that §220 covers "that specific portion of the work force which is involved in the construction, replacement, maintenance and repair of public works.[4]" The schedules of prevailing wages promulgated by the Department of Labor comprise a comprehensive list of job descriptions, such as laborer, carpenter, glazier, and electrician. Thus, the statute covers both skilled and unskilled labor.

An employee in an exclusively supervisory position would be exempt from the prevailing wage requirements.[5] It is unclear whether employees with minor supervisory duties are covered for all of their work, on the theory that spending some small part of the time asupervising does not change their character as a "laborer, workman or mechanic,"[6] or are covered for only the percentage of their work spent on non-supervisory tasks.[7]

What is a "Public Work"?

The Labor Law does not define "public work." This term is also afforded a liberal construction, although not every public contract is a "public work."[8] courts, and the Department of Labor, define the term to encompass all construction, repair, and maintenance done on public buildings and the fixtures thereto.[9] It is the public function of the work, rather than the physical characteristics of the work, that controls. Thus, a worker painting a sign to be affixed to a public building or street is performing "public work," just as a mason working on a wall or a laborer constructing a dam would be.[10] Similarly, installation of telecommunications equipment in a public building is "public work,"[11] as are warranty repairs on materials installed on a public building.[12]

How are the "Prevailing Wages" determined?

The N.Y. State Department of Labor, Bureau of Public Work[13]is responsible for setting most of the classifications of workers by job type and the accompanying prevailing wage rates. Separate rates are set for each locality in the State, generally by county. For public works contracts to which the City of New York or any of its departments is a party, the New York City Comptroller sets the rates and classifications.[14] New rates are published on July 1st of each year.

In the early part of he 20th century, the "prevailing wage" rate was set through surveys of the wages paid in the relevant localities. In 1983, §220 was amended to allow the prevailing wage rate to be set by reference to the wage

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1 N.Y. Labor Law § 220(3)(a).

2 N.Y. Labor Law §220(3)(b).

3 *Bucci v. Village of Port Chester*, 22 N.Y.2d 195, 201, 202 N.Y.S.2d 393, 239 N.E.2d 335 (1968) ("Section 220 mus be construed with the liberality needed to carry out its beneficent purposes;") *see also Austin v. City of New York*, 258 N.Y. 113, 117 (1932) ("The present statute is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics. It is to be interpreted with the degree of liberality essential to the attainment of the end in view.")

4 *Tenlap Construction Co. v. Roberts*, 141 A.D.2d 81, 85, 532 N.Y.S.2d 801, 804 (2d Dept. 1989) (quoting *Varsity Transit. v. Saporita,* 98 Misc.2d 255, 259, 413 N.Y.S.2d 868, *aff'd* 71 A.D.2d 643, 418 N.Y.S.2d 667, *aff'd* 48 N.Y.2d 767, 423 N.Y.S.2d 910, 399 N.E.2d 941).

5 Austin v. City of New York, 258 N.Y. 113 (1932).

6 Id. at 116 (foreman's duties, "though they put him in a grade above his fellows, were so close akin to theirs, so predominantly physical in content and attendant risks, that he was still in the same genus, the broadly inclusive class of ''workmen,'' though, perhaps, in a different species..... If the plaintiff, while serving as a foreman, was still within the trade, he was still within the statute.")

7 *Tenlap Construction Corp. v. Roberts,* 141 A.D.2d 81, 532 N.Y.S.2d 801 (2 Dept. 1989).

8 *Joint Industry Board of the Electrical Industry v. Koch,* 114 Misc.2d 868, 869, 452 N.Y.S.2d 488, 490 (Sup. Ct. N.Y. Cty. 1982)

9 *Golden v. Joseph,* 307 N.Y. 62, 120 N.E.2d 162 (1954).

10 *Miele v. Joseph,* 280 A.D. 408, 113 N.Y.S.2d 689 (1 Dept. 1952), *aff'd,* 305 N.Y. 667, 112 N.E.2d 764

11 *Koch,* 114 Misc.2d at 869.

12 *Bridgestone/Firestone, Inc. v. Hartnett*, 175 A.D.2d 495, 497, 572 N.Y.S.2d 770, 772 (3d Dept. 1991).

13 http://www.labor.state.ny.us/workerprotection/publicwork/PWGeneralProvisions.shtm

14 §220(5)(e).

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rates contained in the collective bargaining agreements in force in the relevant localities.[15] Although the legislative history indicates the reason for this change was "because collective bargaining has been recognized as the most efficient and effective [way] of achieving competitive wage agreements, this change has had the effect of making the "prevailing wage" generally higher than the market wage. Thus, at the present time the prevailing wage statute is widely understood to be a mechanism to protect union wages, as it gives non-union contractors on public jobs the same obligations to pay the union/prevailing wage rate as a unionized contractor. This obviously creates a powerful incentive for a non-union contractor to try to circumvent the prevailing wage rules.

What remedies are available to the employee for non-compliance?

An employee who has not received the required prevailing wages has both a private remedy and a remedy with the N.Y. Department of Labor (or for violations involving contracts with the City of New York, with the New York City Comptroller). The DOL is authorized to investigate complaints of failure to pay prevailing wages, and to "expeditiously" conduct hearings on such complaints. The DOL can award the employee unpaid prevailing wages going back 3 years, as well as interest. The DOL may also assess liquidated damages of up to 25%, but those damages are paid to the state and not the employee. The hearing result may be appealed by an Article 78 proceeding, directly with the appropriate Appellate Division, within 30 days of filing of the DOL's order.[16]

There is no private right of action under Labor Law §220 or §230 directly. However, courts recognize that an employee may bring a private right of action to recover unpaid prevailing wages under a third-party beneficiary to contract theory. This remedy is available because §220(3)(a) provides that each public works contract must contain a provision that prevailing wages be paid, and §220(3)-a provides that the contracting agency, municipality, or public benefit corporation must, prior to the contract being sent out for bid, must write to the DOL (or the NYC Comptroller, as appropriate) to ask for a determination of what job classifications will be performing work on the contract, and the contracting agency must also attach that determination, along with the appropriate prevailing wage schedules, to both the bid documents and the public works contract. These requirements are generally honored in the breach. However, because these requirements are set forth in the statute, courts in New York have universally held that they are read into the contracts as a matter of law, should the required language be omitted.[17] Thus, employees can maintain a third-party beneficiary lawsuit, even if within the four corners of the contract there is no mention of employee wages at all. Employees proceeding on this theory enjoy a six year statute of limitations.

Conclusion

This article is an introduction into the basics of a New York prevailing wage law claim. Labor Law §§220 and 230 contain close to a century of accretion and change, and cases will often involve an unwieldy combination of state law, Department of Labor practice, and references to various collective bargaining agreements. Attorneys wishing to practice in this area should read the statute carefully, and utilize the DOL's website for information on how both pre-contract procedure and after-the-fact investigations are conducted. ■

15 Labor Law §220(5)(a).

16 Labor Law §220(8).

17 *Fata v. S.A. Healy Co*, 289 N.Y. 401, 46 N.E.2d 339 (1943) (Labor Law 220 "governs the contract and the rights of the parties, whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject"); *see also Twin State CCS Corporation v. Roberts,* 72 N.Y.2d 897, 528 N.E.2d 1219, 532 N.Y.S.2d 746 (1988) ("the failure to annex the PRS [prevailing rate schedule] to the work specifications did not relieve petitioner of its obligation to pay prevailing wages") *Wright v. Herb Wright Stucco, Inc*., 50 N.Y.2d 837, 407 N.E.2d 1348 (1980) (approving dissent below, reported at 72 A.D.2d 959, 422 N.Y.S.2d 253).

Settlement News

In *Auritela Santos v. The City of New York, Department for the Aging* and Edwin Mendez-Santiago, 08 Civ. 01849 (AKH), the City of New York, Department for the Aging, settled for $225,000 mid-way through discovery in a sexual harassment case brought by the Commissioner's executive secretary. The lawsuit, alleging claims under Title VII and the NYCHRL, had been filed after the State Division of Human Rights found probable cause and granted an administrative convenience dismissal. Plaintiff possessed a number of offensive emails that the Commissioner had sent her. In discovery, the plaintiff had sought "me too" electronic evidence, including emails between the Commissioner and a number of similarly situated female subordinate employees. After reviewing the emails sought, the City opted to settle the case and the Mayor announced the sudden resignation of the Commissioner for "personal reasons." The settlement sum included $69,000 in back pay, $39,000 in attorneys' fees and $117,000 in compensatory damages. NELA/NY member Doris G. Traub was counsel for plaintiff in this case. ■

Anne's Squibs

by John Beranbaum *(jberanbaum@bmbf.com)* and Bill Frumkin *(wfrumkin@sapirfrumkin.com)*

AGE DISCRIMINATION

Gross v. FBL Financial Svcs., Inc., __ U.S. __, 129 S.Ct. 2343 (June 18, 2009). An employee whose responsibilities had been transferred to a younger employee sued for discrimination under the ADEA, claiming that the transfer constituted a demotion based on his age. The employer contended that his change in his duties was because of corporate restructuring and that his new position was better suited to his skills. The district court instructed the jury that it could find for the employee if it believed that age was a "motivating factor" in the employer's decision and the employer did not prove that it would have made the same decision anyway. The jury found for the employee and the employer appealed. The Eighth Circuit vacated and remanded the decision on the grounds that the jury instruction was flawed because it failed to state that the employee had to provide direct evidence of age discrimination to prove a mixed-motive case. On appeal to the Supreme Court, the employer made the argument, not presented in its certiorari petition, that the ADEA does not contain a similar provision that was enacted in the 1991 Civil Rights Act amendments to Title VII that allowed for a "mixed-motive" allocation and order of proof. Although the issue was not the one upon which certiorari was granted, the Supreme Court held in a 5-4 decision that the ADEA, unlike Title VII, does not shift the burden to the employer to show that it would have made the same decision absent its discriminatory motive where such motive is shown to have informed the challenged decision. In the absence of any amendment to the statue to provide for the burden shifting that governs mixed-motive cases under Title VII, the plaintiff in an ADEA case must prove by a preponderance of the evidence that he was discriminated against "because of" his age. "Thus, to establish a disparate treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse action." The plaintiff, therefore, retains the burden of persuasion throughout the case and must show that absent the discriminatory motive, the employer would not have made the challenged personnel action. This ruling overrules all prior circuit court decisions on the issue and will make it more difficult for plaintiffs to prevail in many ADEA actions.

Meacham v. Knolls Atomic Power Lab., __ U.S. __, 128 S.Ct. 2395, 171 L. Ed. 2d 283 (2008). When the employer's layoff criteria resulted in 30 of the 31 employees let go being over the age of 40, the affected employees sued under the ADEA claiming both disparate treatment and disparate impact. The employers offered the defense of "reasonable factor other than age" ("RFOA"). The employees prevailed at trial and the Second Circuit initially affirmed the decision under a burden shifting analysis of *Wards Cove Packing v. Antonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989). The Supreme Court vacated the Second Circuit's decision and remanded for reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536 (2005). On remand, the Second Circuit reversed its prior decision, determining that it had erroneously used a "business necessity" test in the first instance when it should have used a "reasonableness" test. The court then determined that the employees had failed to carry their burden of persuasion that the offered reason was not reasonable. Judge Pooler dissented, arguing that the burden should rest with the employer as an affirmative defense. The case went back to the Supreme Court, which reversed the Second Circuit and remanded the case again. The Court ruled that the RFOA is an affirmative defense upon which the employer has the burdens of production and persuasion because the RFOA relieves the employer of liability and the party that wishes to receive such relief has the burden of proving that it is entitled to it.

Gomez-Perez v. Potter, __ U.S. __, 128 S.Ct. 1931, 170 L. Ed. 2d 887 (2008). A postal employee sued for retaliation under the ADEA, alleging that was subjected to various indignities, including a false accusation of sexual harassment, after he had sued for age discrimination in connection with a denial of a requested transfer. The district court dismissed the claim on the basis of sovereign immunity, holding that the U.S. had not permitted itself to be sued for age retaliation claims. The First Circuit held that although the Postal Service Reorganization Act waived immunity, the public sector provisions of the ADEA did not allow for a claim of retaliation. The Supreme Court reversed, and held that retaliation based upon filing claims of age discrimination is itself a form of age discrimination, expressly prohibited by the ADEA.

Kassner v. 2nd Ave. Deli., Inc., 496 F.3d 229 (2d Cir. 2007). Two waitresses filed a suit claiming age discrimination, hostile work environment, and retaliation. The district court dismissed, holding that the waitresses' allegations that they were given less-desirable shifts and stations that affected their tip income did not state a claim upon which relief could be granted and that the complaint failed to cite specific instances of harassment and retaliation. The court also refused to allow the waitresses to amend their complaint. The Second Circuit vacated much of the district court's decision, making clear that the waitresses were not required to make a prime facie showing of their claims to survive a motion to dismiss. In addition, the court held that it was unwilling to rule as a matter of law that a waitress who is assigned shifts and stations that reduce her potential income could never prove that she thus suffered an adverse action under Title VII. The court also found sufficient specific instances in the complaint where at least one of the waitresses pled a claim that

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would survive a motion to dismiss.

Weiss v. JP Morgan Chases & Co., No. 08–901-cv, 2009 WL 1585279, 2009 U.S. App. LEXIS 12121, (2d Cir. June 5, 2009). By summary order, the Second Circuit reversed the grant of summary judgment in favor of JP Morgan Chase. The court found that the 56 year-old plaintiff presented triable issues of fact where there was evidence that he was replaced by a 40 year-old with inferior qualifications. The Second Circuit reiterated that "[a]n employer's invocation of the business judgment rule does not insulate its decision from all scrutiny in a discrimination case." Further, the court emphasized that special scrutiny is required where, as here, the decision-makers relied on subjective evaluations. The court also observed that a jury could conclude that an official's statement that Weiss was not a "positive energized leader," when considered in the context of evidence of pretext, was a euphemism for youthful. **The NELA firm, Garrison, Levin-Epstein, Chimes & Richardson, P.C., in New Haven, CT, represented the plaintiff.**

New York State Tug Hill Comm'n v. New York State Div. of Human Rights, 860 N.Y.S.2d 698 (4th Dept. 2008). The State Division of Human Rights was entitled to deference in its determination that a state agency had discriminated against one of its employees because of his age. The record showed that the employee had not been offered an opportunity to remain employed at a lower pay rate, which younger employees were offered. In addition, newer employees were hired who were younger than the complainant and younger employees were offered pay raises just months before the complainant was terminated.

Jordan v. Bates Adver. Holdings, Inc., 848 N.Y.S.2d 847 (1st Dept. 2007). The weight of the evidence was against a jury determination that an employer did not have a legitimate, non-discriminatory reason to terminate an employee. The employer offered strong evidence it terminated the employee because of a drop in business. The employee had not adduced any evidence controverting of the employer's stated reason for her termination. As the ultimate burden of proving discrimination lies with the employee, the court held that the record consisting of the employer's considerable and consistent evidence showing a financial need to terminate the employee coupled with the employee's failure to controvert that evidence showed that the jury's verdict was clear error.

Anagostakos v. New York State Div. of Human Rights, 846 N.Y.S.2d 798 (3d Dept. 2007). The record supported the State Division of Human Right's determination that an employer both created a hostile work environment and unlawfully terminated a waitress because of her age. On the harassment issue, the record showed the employer frequently told the waitress she should retire because of her age and constantly called her a "stupid old ya-ya." On the discrimination issue, the record showed that the employer reduced the waitress' hours, repeatedly told her to retire because of her age, and terminated the waitress while replacing her with a much younger worker. The employer's alleged non-discriminatory reason for her termination lacked credibility because it was countered by a customer's account of the waitress' termination as well as information the employer himself provided on an unemployment insurance form.

Miller v. National Life Insurance Co., 07 cv 00364(PCD), 2009 WL 347657 (D.Conn. Feb. 11, 2009). The plaintiff, a 55-year old wholesaler in financial products, defeated a motion for summary judgment in an age discrimination and retaliation case. The court found that plaintiff established triable issues concerning whether the employer's rationale for the termination – poor performance, memorialized by a performance improvement plan – was pretextual. Not only did the plaintiff shoot holes in the performance argument, he cited ageist remarks by the CEO, such as "we need younger wholesalers," and we "could replace our wholesalers with twice as many 25 year olds and have them do the job." **NELA/NY members Murray Schwartz and Davida Perry represented the plaintiff.**

ARBITRATON

14 Penn Plaza, LLC v. Pyett, __ U.S. __, 129 S.Ct. 1456, 173 L. Ed. 3d 398 (April 1, 2009). A group of lobby night watchmen were reassigned to other tasks when their employer contracted with an outside security company to provide nighttime security personnel. The night watchmen filed grievances with their union that the reassignment violated the collective bargaining agreement's ("CBA") prohibition of age discrimination. The CBA contained a clause that specifically stated that all claims under the ADEA would be subject to arbitration. The union withdrew the age discrimination claim from the arbitration proceeding because it had agreed to the outsourcing of the night security detail. When the night watchmen brought suit in the Southern District of New York, the employer moved to compel arbitration under the Federal Arbitration Act. The court denied the motion under Second Circuit precedent applying the Supreme Court's ruling in *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 94 S.Ct. 1011 (1974), and upon an interlocutory under the FAA, the Second Circuit affirmed. The Supreme Court, in a 5-4 decision, reversed, holding that a collective bargaining agreement (CBA) that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The Court reasoned (in part) that since freedom of contract is a long recognized fundamental policy of the National labor Relations Act (NLRA) and Congress did not remove age discrimination claims from the NLRA's broad sweep, the terms of the CBA must be honored. The Court distinguished *Gardner-Denver* (which it also criticized) by pointing out that the CBA in the earlier case did not explicitly provide that statutorily-provided claims would be subject to arbitration. This case constitutes a significant break

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from long established precedent that will force many plaintiffs into arbitration to prosecute discrimination claims. (An article by Jonathan Bernstein about Pyett appears in this issue.)

In re American Express Merchants Litigation, 554 F.3d 300 (2d Cir. 2009), *petition for certiorari filed 5/29/09*. This is an anti-trust case, brought by restaurants and other businesses against AmEx over merchant fees, that has significant implications for employment-related class actions. The Second Circuit held that the purported waiver of class actions contained in AmEx's mandatory arbitration clause was unenforceable. To enforce the waiver, the court stated, "would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs" since the costs of bringing individual actions would be prohibitive. The court declined, however, to decide whether class action waivers when included in mandatory arbitration agreements are always unenforceable. In the decision, the Second Circuit also held that courts, not arbitrators, should decide the enforceability of class action waivers in arbitration agreements.

Kravar v. Triangle Services, Inc., 1:06-cv-07858, 2009 WL 1392595 (S.D.N.Y. May 19, 2009) (J. Holwell). *Kravar* is one of the first lower court decisions interpreting *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), discussed above. In Pyett, the Supreme Court held that a collective bargaining agreement (CBA) that "clearly and unmistakably" requires union members to arbitrate ADEA claims – such as the 32B-J one in question – is enforceable. Distinguishing *Alexander v. Gardner-Denver Co*., 415 U.S. 36 (1974), a 5-4 Court explained that an agreement to arbitrate, instead of litigate, ADEA claims is not a substantive waiver of a statutory right, but "only the right to seek relief from a court in the first instance." *Pyett*, 129 S.Ct. at 1469. However, the Court expressly declined to consider whether the 32B-J CBA operates as an impermissible substantive waiver of ADEA rights "because it precludes a federal lawsuit, but also allows the Union to block arbitration of these claims." Id. at 1474. In *Kravar*, the defendant employer was a signatory to the same 32B-J CBA. The district court addressed the very issue that the Supreme Court declined to consider, i.e. whether the CBA acted as a substantive waiver of statutory rights in cases where the Union elected not to pursue arbitration of the plaintiff's discrimination claim. The record showed that the Union refused Kravar's request to arbitrate her ADA claims. This left her without a remedy, in federal court or elsewhere, since the CBA made the grievance and arbitration procedure the "sole and exclusive" means of redressing discrimination. The district court held in these circumstances the CBA substantively waived the plaintiff's ADA claims and, therefore, would not be enforced. **NELA/NY member Darnley Stewart represented the plaintiff.**

Brady v. Williams Capital Group LP, 878 N.Y.S.2d 693 (1st Dept. 2009). The First Department, in a 3-2 decision, held that a provision in an employment agreement requiring that the costs of mandatory arbitration be split between the employer and employee takes precedence over AAA's rules that the employer assume all arbitration costs in statutory employment claims. The Appellate Division stated, "Whether a fee-splitting clause in an arbitration agreement supercedes a contrary AAA rule presents a general rule of contract interpretation governed by New York law," and New York contract law required that the arbitration agreement controls "every aspect of the arbitration."

All was not lost for the employee, however. The First Department invalidated this particular fee-splitting provision as violative of public policy in the circumstances before it. By the time of the court action, Brady had been out of work 18 months and paying half the arbitration costs, $21,500, would have been so onerous as to effectively preclude her from arbitrating statutory claims. The First Department noted that its approach – a case-by-case analysis, focusing on the claimant's ability to pay arbitration fees and whether the cost differential between arbitration and litigation was so great as to deter any legal action – was consistent with that of most federal appeals courts and federal trial courts in New York (the Second Circuit has not yet addressed the issue).

CONTINUING LIABILITY

Pouncy v. Danka Office Imaging, 06 Civ. 4777 (RPP) (S.D.N.Y. May 19, 2009). In denying summary judgment, the court held that repeated acts of discriminatory allocation of territories to the plaintiff, a sales representative, was analogous to a hostile work environment, and therefore may form the basis for a continuing violation under Title VII and section 1981. **NELA/NY member Jason Solotaroff represented the plaintiff.**

DISABILITY DISCRIMINATION

Wildman v. Verizon Corp., 1:05-cv-899, 2009 WL 104196, (N.D.N.Y. Jan. 14, 2009). Judge Scullin dismissed, on summary judgment, plaintiff's reasonable accommodation and disability-related hostile work environment claims. Plaintiff had a back injury and asserted that Verizon's four-month delay in providing her an ergonomic chair violated his right to reasonable accommodation. The court, however, held that the plaintiff failed to show that the delay was unreasonable, and therefore was unable to establish discriminatory intent. Regarding plaintiff's hostile environment claim, the court found such comments as "Hurry up, gimpy." as falling into the category of simple teasing that, along with other a isolated incidents, were are not sufficient to establish discrimination.

ERISA

Kennedy v. Plan Adm'r of DuPont Sav. & Inv. Plan, __ U.S. __, 129 S.Ct. 865 (Jan. 26, 2009). A worker designated his wife as a beneficiary of his employer's savings and investment plan (SIP). The couple later divorced and although the wife released any claim to any of her husband's pension benefits, the

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worker neglected to change the name of the beneficiary for the SIP. When the worker died, the plan administrator paid the SIP benefits to the ex-wife. The worker's estate sued both the plan and its administrator. The district court entered judgment for the estate, but the Fifth Circuit reversed, reasoning that the wife's waiver constituted an assignment or alienation that violated 29 U.S.C. § 1056(d)(1). The Supreme Court affirmed, but on a different ground. The Court unanimously held that the plan documents at all times control the plan. Since the worker had not changed the beneficiary and his ex-wife had not filled out a plan document stating she waived her claim to the SIP benefits, the plan documents required the SIP benefits be paid to the ex-wife. The plan administrator correctly followed those documents.

Metro. Life Ins. Co. v. Glenn, __ U.S. __, 128 S.Ct. 2343, 171 L. Ed. 2d 299 (2008). An employee sought to receive long-term disability benefits from her employer's welfare plan. The plan administrator was MetLife, an insurance company that was also the insurer of the plan. The plan gave MetLife (as administrator) discretionary authority to determine the validity of the claims that (as insurer) MetLife would be liable to pay. MetLife denied the employee's claim for benefits and she sued. The district court granted judgment for the insurance company under the plan's deferential standard. Applying the same standard on appeal, the Sixth Circuit reversed, holding that a conflict of interests exists when a plan authorizes an insurer to both decide an employee's eligibility for benefits and to pay those benefits. Weighing that conflict in with other factors, the court determined MetLife's denial of benefits was an abuse of discretion. The Supreme Court affirmed. The Court first made clear that where an employer both funds a plan and evaluates the claims, the immediate financial interests of the employer conflict with its fiduciary duty of loyalty to plan beneficiaries. It then concluded that the conflict is similar (even if perhaps less significant as a factor) when the administrator is an insurance company – particularly since the insurer is the customer of the employer, which may be more interested in lower premium rates than accurate claims processing, and not of the employees. However, recognizing that a deferential standard combined with the existence of a conflict is part of the established fabric of the ERISA scheme, the Court held that a conflict should only be taken into consideration as one factor among others when determining whether the plan administrator abused its discretion when denying a claim. The conflict alone does not suffice to set aside a plan administrator's determination.

LaRue v. DeWolff, Boberg & Assocs., __ U.S. __, 128 S.Ct. 1020, 169 L. Ed. 2d 847 (2008). A participant in a defined contribution plan directed the plan administrator to make changes in the investments in his 401(k) account. The administrator did not comply with these instructions and, the participant alleged, that caused his account to lose over $150,000. The employee filed suit in district court against the administrator under section 502(a)(3), which provides for equitable remedies for a breach of fiduciary duty. The district court dismissed the suit on the pleadings because it determined complaint sought only monetary relief. On appeal, the participant argued for the first time that he also had a valid claim under section 502(a)(2) on behalf of the plan for damages arising from a breach of fiduciary duty. Despite that the section 502(a)(2) argument was not raised below, the Fourth Circuit ruled on its merits. Relying on *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985), it held that since section 502(a)(2) provides only for claims for harm to an "entire plan," it does not provide a remedy for claims by an individual participant in a 401(k) plan for recovery for a loss to his individual account. In its decision on appeal, the Supreme Court disagreed, holding that section 502(a)(2) does allow for claims there under when a breach of a fiduciary duty adversely impacts the value of a defined contribution plan's assets in a participant's individual account. That account is a portion of the plan's assets. The Court distinguished *Russell*, explaining that it arose in the context of a defined benefit plan, where the claim was for consequential damages arising from a delay in processing a claim for benefits and did not allege harm to the asset value of the plan. Thus, the Court vacated and remanded the case back to the Fourth Circuit for consideration of the participant's claim in light of the Supreme Court's reasoning.

Henry v. U.S. Trust Co. of Cal., N.A., 569 F.3d 96 (2d Cir, 2009). In this recent case that had been to the Second Circuit once before, participants in an employee stock ownership plan ("ESOP") had sued the trustee of the ESOP for purchasing stock from an interested party while failing to engage in adequate, good-faith investigation of the stock's value. That purchase resulted in the ESOP overpaying for the stock to the tune of 7.75 million dollars. The district court (Hurd) accordingly awarded damages plus interest and attorneys fees. On the first appeal, the case was remanded with instructions to determine whether any award of damages would result in a windfall to the ESOP because of a particular issuance of additional stock. The district court then determined that because of a repurchase of the stock during the pendency of the appeal, but not specified as in settlement of any issues in the litigation, the earlier award would result in a windfall. Therefore, the district court did not reach the issue given to it on remand, i.e. whether a particular stock issuance would render the award a windfall. On a second appeal, the Second Circuit vacated the decision of the district court, holding that it had improperly treated the price of the interim repurchase (in the form of forgiveness of debt incurred to buy the stock) as a reduction of the amount initially paid for that stock. The Second Circuit remanded, again, on the same issue for which it remanded on the first appeal.

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In re Halpin, 566 F.3d 286 (2d Cir. 2009). The Second Circuit affirmed the district court's decision that unpaid contractual obligations for contributions to an ERISA pension plan were dischargeable in bankruptcy. Determining as a matter of law that unpaid contributions are not assets of a plan, the court concluded that an exercise of control over those unpaid funds does not make the obligor a "fiduciary" where under the Bankruptcy Code the debt could be excepted from discharge for "fraud or defalcation while acting in a fiduciary capacity." The court followed an advisory letter from the Department of Labor that opined that the point where employer contributions would be determined to be plan assets would follow common-law principles of property; therefore, employer contributions are not plan assets until the employer pays them. The court also reasoned that classifying unpaid employer contributions as assets would make employers fiduciaries of the plan and would result in untenable competing loyalties to employees, shareholders, customers and lenders.

FIRST AMENDMENT

Cicchetti v. Davis, 607 F. Supp.2d 307 (S.D.N.Y. 2009). The district court vacated a jury verdict in favor of Cicchetti, the former Fire Commissioner for City of Mount Vernon. Cicchetti claimed that the Mayor fired him because of his political association with the Mayor's political opponent. A public employee's political association is ordinarily protected by the First Amendment, except where the employee is a "policymaker." See *Branti v. Finkel*, 445 U.S. 508 (1981). Here, based on the jury's written answers to questions about the nature of Cicchetti's position, the court determined that the Fire Commissioner was a policymaker, not protected by the First Amendment.

Anderson v. State of New York*, __ F. Supp.2d __, 2009 WL 1176618 (S.D.N.Y. Apr. 27, 2009).* Judge Scheindlin denied the defendant's motion for summary judgment on a First Amendment retaliation claim brought by an attorney working for the First Department's Departmental Disciplinary Committee. The attorney had objected to her supervisors and court officials about the DDC's "whitewashing" complaints of attorney misconduct. In letting the case go to trial, the court distinguished *Garcetti v. Cabellos*, 541 U.S. 410 (2006). *Garcetti* held that a public employee's speech made pursuant to her professional duties is not protected by the First Amendment. Here, however, the district court noted that Anderson was doing more than disagreeing with her supervisor's handling of specific cases; she was speaking out about systematic corrupt practices. Therefore, the court held that plaintiff's speech was neither required by nor made pursuant to her job, making *Garcetti* distinguishable. **NELA/NY member John Beranbaum represented the plaintiff.**

Kempkes v. Marvin, 2008 WL 5330673 (S.D.N.Y. Dec. 19, 2008). Judge Karas dismissed a police officer's First Amendment claim that he was fired in retaliation for his having brought a previous suit against his employer, the Village of Bronxville. In the earlier suit, the police officer, had alleged, in part, that the Village had violated his due process rights by terminating his disability benefits and reducing his salary, and retaliated against him for expressing concerns about the police department's discriminatory hiring practices and selective prosecution of racial minorities. The district court held that plaintiff's initial suit was not a matter of public concern, enjoying constitutional protection, because he had in that suit sought damages entirely personal to him. Therefore, according to the court, the action "only vindicat[ed] a plaintiff's purely parochial interests" (even though the first suit made allegations about departmental racial discrimination and selective prosecution). Because the initial suit did not address matters of public concern, the court determined that the Village was free to fire the plaintiff for having brought the earlier suit.

GENDER STEREOTYPING

Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009). The Second Circuit reversed summary judgment entered against a male claiming he was the victim of gender stereotyping. Gamache, the Commissioner of the Dutchess County Board of Elections, forced the plaintiff to resign after he was charged with sexual harassment, presuming "... you probably did what she said you did because you're male and nobody would believe you anyway." The Second Circuit held that Gamache's comment, "pointing to the propensity of men, as a group, to sexual harassment" reflected an "invidious sex stereotyp[e]," from which "a reasonable jury could infer the existence of discriminatory intent." Coupled with the sex stereotyping was defendant's failure to investigate the charges. The court held that the lack of an investigation "may indicate discrimination by an employer whose adverse determination against the putative harasser *otherwise bears indicia of prohibited discrimination*." (Emphasis added.) The Second Circuit took pains to say that an inadequate investigation of a sexual harassment charge, in and of itself, does not support an inference of discrimination.

IMMUNITY

Gorton v. Gettel, 554 F.3d 60 (2d Cir. 2009). The Second Circuit held that a board of cooperative educational services (BOCES) was not an arm of the State and, therefore, was not immune from suit under the Eleventh Amendment. The court reviewed six factors: (1) how the entity is referred to in originating documents; (2) how governing members are appointed; (3) how the entity is funded, (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has veto power over its actions; and (6) whether the entity's financial obligations are binding on the state. Because the six factors pointed in different directions, the court based its ruling on the ultimate factor: whether a federal lawsuit would threaten the state and put

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its treasury at risk. Because the county BOCES is locally run and affiliated with the local school districts, the court found its liability would not reflect poorly on the state and the state treasury would not be responsible for paying any judgment. Therefore, the entity was not entitled to immunity.

NYS AND NYC HUMAN RIGHTS LAWS

Zakrzewska v. The New School, 598 F. Supp.2d 426 (S.D.N.Y. 2009). Judge Kaplan held that Title VII's *Faragher/Ellerth* affirmative defense to hostile environment claims is not available under the NYCHRL. The district court found that the New School had an adequate anti-harassment policy and complaint procedure; that no one in a position of authority knew of the harassment; that the plaintiff waited a long time before complaining; and that when she reported the harassment the School took effective steps to end it. Under Title VII, plaintiff's case would be dismissed pursuant to the *Faragher/Ellerth* affirmative defense. However, because NYCHRL § 8-107 subd.13(b) creates vicarious liability for the acts of managerial and supervisory employees, even when the employer acted with reasonable care to prevent and correct discriminatory actions, the court held that the local law does not recognize the affirmative defense and denied summary judgment. The Second Circuit has accepted the interlocutory appeal of the issue. NELA/**NY member Jason Solotaroff represented the plaintiff.**

Hoffman v. Parade Publications, 878 N.Y.S.2d 693 (1st Dept. 2009). The lower court had dismissed the action brought under the NYS and NYC Human Rights Laws for lack of subject matter jurisdiction because the plaintiff worked in Atlanta, and thus the impact of defendants' alleged discriminatory conduct was not felt inside either the City or State, as required by *Shah v. Wilco Sys., Inc*., 806 N.Y.S.2d 553 (2005), l*v. dismissed in part, denied in part*, 7 N.Y.3d 859 (2006). The First Department reversed, holding that "[t] so-called "impact" rule as expressed in Shah should not be applied so broadly as to preclude a discrimination action where the allegations support the assertion that the act of discrimination, the discriminatory decision, was made in this state."

Esposito v. Deutsche Bank AG, 07 Civ. 6722, 2008 WL 5233590 (S.D.N.Y. Dec. 16, 2008). Judge Sullivan denied a motion to dismiss, finding plaintiff's NYSHRL and NYCHRL claims timely in all respects. Deutsche Bank argued that plaintiff's mere filing of an EEOC charge did not toll the statute of limitations for claims under the NYSHRL and NYCHRL brought more than three years after the acts of discrimination. The court held to the contrary. Pursuant to the dual-filing provisions of the Work-Sharing Agreement between the EEOC and the SDHR, the court determined that filing with the EEOC was sufficient to toll the statute, and the plaintiff did not have to actually file a NYSHRL charge. The court determined that the plaintiff's claims of discrimination in connection with her awards of a bonus and salary increase were not time-barred also because, according to the ruling, the statutory period began to run not when the plaintiff first received the bonus and salary increase, but at the later time when she learned that similarly situated younger employees received greater compensation than she did. Only then did receipt of the bonus and raise become "adverse employment actions." **NELA/NY member Patrick DeLince represented the plaintiff.**

RETALIATION

Riscili v. Gibson Guitar Corp., 605 F. Supp.2d 558 (S.D.N.Y. 2009) (J. Holwell). The district court applied the Supreme Court's expansive view of Title VII's participation clause, as expressed in *Crawford v. Metropolitan Gov't*, 129 S.Ct. 846 (2009), to the NYCHRL, upholding a gay man's retaliation claim. After a co-worker used mimicking gestures to mock that Riscili is gay, the plaintiff spoke to the office manager, but told her not to report the incident because he intended to speak directly with the co-worker. Nonetheless, the office manager spoke with her supervisor, who called in Riscili to ask what he intended to do. Riscili again said that he would bring up the matter directly with the co-worker. The co-worker later apologized, but in the aftermath of the incident, Riscili's relationship with his co-workers and supervisors soured and he was shut out of the company's business.

Riscili claimed unlawful discrimination on the basis of sexual orientation and retaliation. The court dismissed the discrimination claim since the anti-gay bias was limited to a single incident. However, the court allowed the retaliation claim to go to trial. In rejecting defendant's contention that Riscili's actions were not sufficiently active, forceful, or affirmative to be protected by the HRL, Judge Holwell, citing *Crawford*, held that the plaintiff's responses to his employer's questions about potentially illegal action was protected under the NYCRL. The court also rejected defendant's argument that Riscili did not have a reasonable belief that he had been discriminated against. The court found that the supervisor's action in calling him in to discuss the incident with the co-worker allowed Riscili to reasonably believe that the single incident of harassment violated the NYCHRL.

SEXUAL AND RACIAL HARASSMENT

Zakrzewska v. The New School, 598 F. Supp.2d 426 (S.D.N.Y. 2009). See above under heading of *NYS and NYC Human Rights Laws*.

Brown v. Orange & Rockland Utilities, Inc., 594 F. Supp.2d 382 (S.D.N.Y. 2009) (Robinson, J.) The district court allowed plaintiff's racial harassment claim to go to trial, but dismissed his constructive discharge claim. Two nooses in the workplace put there by a co-worker established, without more, a hostile environment claim. The court short-circuited its analysis – to the benefit of the plaintiff – as to whether liability for the co-worker's conduct could be imputed to the employer. The court held

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that plaintiff's complaints to his supervisor put the employer on constructive notice. However, this is a co-worker harassment case, and the court failed to consider whether the employer acted reasonably when it learned about the pictures of the nooses, in which case it would not be liable. Had it considered the issue, the court very well might have found the employer's conduct reasonable since the supervisor, upon hearing about the pictures, immediately took down them down. The court did stress the supervisor's prompt remedial action when dismissing plaintiff's constructive discharge claim. The supervisor's prompt corrective action showed that the employer *did not act deliberately* in creating an intolerably hostile environment, a necessary condition in the Second Circuit (but not other Circuits) for making out a constructive discharge claim.

In Messer v. Fahnestock & Co. Inc., No. 1:03-cv-04989, 2008 WL 4934608 (E.D.N.Y. November 18, 2008) (J. Vitaliano). In denying the employer's motion for summary judgment under Title VII and NYSHRL, the district court found that supervisor's conduct, including repeatedly leering at the plaintiff, often while licking his lips in a sexually provocative way, and scratching his crotch, was "severe or pervasive." The court ruled that the employer's failure to investigate plaintiff's allegations was an aggravating factor when considering the severity of the sexual harassment. The court also held that the plaintiff made out a viable claim of *quid pro quo* harassment. Even in the absence of an express request for sexual favors, the jury could conclude that she was terminated for refusing to go out on a date.

Levitant v. City of New York Human Resources Admin., 1:03-cv-04989, 2008 WL 5273992, 11 (E.D.N.Y. Dec 18, 2008). Judge Vitaliano denied the defendant's bid for summary judgment in a race and national origin discrimination case that asserted hostile environment, promotion denial and retaliation claims. The court found triable issues of fact concerning whether Levitant was subjected to a hostile environment based on race and national origin where there was evidence adduced that he was disparaged as Russian and Jewish; told that Russians drank from toilets; had his supervisor stick her fingers in his face and mock his accent; twice was prevented from making personal phone calls in Russian although others were allowed to make calls in Spanish; and was monitored excessively.

King v. Interstate Brands Corp., No. 02 Civ. 6470, 2009 WL 1162206 (E.D.N.Y. Apr. 29, 2009) (J. Bianco). The district court had no difficulty in concluding that plaintiff had established material issues of fact that the employer subjected him to a racially hostile environment. King was the object of a steady stream of "vicious racial slurs" and "racially demeaning jokes" from supervisors and co-workers. More controversial was whether the plaintiff's claims were barred by the *Faragher*/*Ellerth* affirmative defense because he admittedly did not avail himself of the employer's complaint procedure. In rejecting that defense, Judge Bianco credited plaintiff's argument that other judges have rejected in similar circumstances. The court held that King's failure to make an internal complaint was not unreasonable because he was never made aware of the complaint procedure; his supervisors were perpetrators of the harassment and therefore he would not want to make complaints to them (although the policy allowed complaints to be made to HR); and he had a reasonable belief that another black employee who made a complaint of race discrimination was subjected to retaliatory harassment.

Olsen v. County of Nassau, __ F. Supp.2d __, 05 Civ. 3623, 2009 WL 1296742 (E.D.N.Y. May 7, 2009). Magistrate Judge Boyle upheld a combined $1 million emotional distress jury award in favor of three female detectives victimized by discrimination and retaliation. The court cited evidence that each plaintiff was diagnosed with stress-related disorders, each underwent lengthy mental health treatment and that two of the three women were prescribed anti-depressants. Based on this and other evidence, the court found the respective awards of $500,000, $400,000 and $100,000 appropriate. **NELA/NY Mathew Porges and two other members of his firm represented the plaintiffs.**

SARBANES-OXLEY

In the Matter of Joseph Walters v. Deutsche Bank, AG, 2008 SOX 70 (ALJ, Mar. 23, 2009).

In a decision that may help rejuvenate SOX's whistleblowing protections, an ALJ held that a whistleblower working for a non-public subsidiary company may hold its publicly traded parent company directly liable for the subsidiary's unlawful retaliation. In so holding, *Walters* conflicts with prevailing SOX law insulating parent companies from liability for the unlawful conduct of their non-publicly traded subsidiaries. *Walters* reasoned that in determining corporate liability, the majority position mistakenly uses a labor law analysis, which conditions parent company liability upon a showing that the parent has substantial control over its subsidiary's personnel matters. According to *Walters*, SOX is at heart an anti-fraud statute, and thus its interpretation should be guided not by labor law, but by the statute's overall purpose to protect shareholders from fraud. As an anti-fraud statute, the ALJ held that SOX makes the parent company directly responsible for its subsidiaries' statutory violations, including SOX's provision protecting whistleblowers from retaliation. ■

Another great NELA/NY conference coming up in the Fall

Please mark your calendars and
Save the Date
Details will follow

Friday, October 23, 2009
Yale Club of New York City

PRESIDENT'S COLUMN, from page 1

appearing in a newspaper article covering a seminar about the psychological and health needs of gay teenagers. Dale filed a complaint against the Boy Scouts in state court alleging violations of New Jersey's public accommodations statute. The case went all the way to the Supreme Court, and in 2000, the Court issued a 5-4 opinion (Rehnquist, C.J. writing for the majority) upholding the Scouts' First Amendment right to exclude Dale as an adult leader. The reasoning for the organization's decision to revoke Dale's membership and strip him of his position as scoutmaster was that it found homosexuality to be inconsistent with the values embodied in the Boy Scout Oath and Boy Scout Law. According to the Scouts' position statement issued following Dale's revocation, the organization "believe[d] … homosexual conduct [to be] inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." The Supreme Court found that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). According to Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas, the Scouts should not be forced to send such a message.

Justice Stevens disagreed, writing in dissent:

> That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."
>
> If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

That was less than 10 years ago. The attorney who represented James Dale and argued this landmark case at the Supreme Court was Evan Wolfson, then the Legal Director of Lamda Legal Defense and Education Fund. At the time Wolfson reflected on the positive publicity and comments the case had generated: "Even before we change the policy, we are succeeding in getting people to rethink how they feel about gay people."

A year after the *Dale* decision came down, Wolfson formed Freedom To Marry – and we all know the remarkable gains that have been made in that arena. In 2004, *Time Magazine* named Evan as one of the 100 Most Influential People in the World, noting that he had made a seemingly impossible idea – marriage for gay people – conceivable for the first time.

The fight for gay rights has also come to the workplace. A number of our fellow NELA members have prosecuted or are currently litigating cases on behalf of LGBT plaintiffs who have been discriminated against by their employers. Indeed, there are firms (such as Outten & Golden and Bantle & Levy) that have an entire practice group devoted to prosecuting just these kinds of cases.

Those of us in the gay community would never have dreamed even a few years ago that the prospect of equality would come (albeit grudgingly) as quickly as it has. One of the reasons it has happened is because people like Evan Wolfson have changed the context of people's thinking. NELA/NY is pleased to honor Evan at our annual benefit this November 19, 2009, at Club 101. We hope our members will come out to honor Evan, hear him speak, and enjoy a fun evening of eating and dancing. ■

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grievance process, and if you can't get arbitration, then you can go to court. And, no matter how long that takes, don't forget to file the EEOC charge within 300 days.

What else can you do? Work with the union to prosecute a discrimination claim in arbitration. Some unions are open to working with private counsel, others are not (and no law requires them to). If the union knows that you are in the picture, it may be more careful about the way it handles the client's grievance than it otherwise might be. ■

We look forward to you joining us at our

12th Annual NELA Event

Thursday, November 19

Club 101

SAVE-THE-DATE

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