NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 2 | Decmber 2001 | Jonathan Ben-Asher, Editor

Helping Our Clients After September 11

In the aftermath of the World Trade Center attack,our clients and our practices face new and difficult problems. Many employees have lost their jobs, small businesses have disappeared, and entire companies have been decimated. For employees who lost family or friends, the psychic toll and the pressures on their own work situations are enormous. The thousands of people who fled the collapse of the towers, and the many who saw the attacks from their windows, are carrying with them their memories and fears.

New York's economy, which was already headed toward recession, has begun to reel. Six months ago, our clients could lose a job and quickly find another. A new round of reductions in force has begun, putting previously secure employees at risk. Many can expect a long period of unemployment.

As employment lawyers, our work may be more difficult after the attacks. The EEOC's New York district office at 7 WTC was completely destroyed, along with every piece of paper in its files. In the wake of the disaster, judges and jurors may view a client's discrimination claim as far less compelling and deserving of sympathy than the many greater tragedies

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EEOC Relocates and Slowly Recovers

The EEOC's New York District Office emerged from the World Trade Center disaster with all of its staff safe, but literally all of its files destroyed. Until mid-October, it was operating out of the EEOC's Newark office. It has since relocated to much smaller, temporary space on Varick Street, in downtown Manhattan, and hopes to move into new permanent offices in the next three to five months. The Varick Street address is:

EEOC
New York District Office
201 Varick Street
Suite 1009
New York, N.Y. 10014

The EEOC's staff will be answering their phones between 9:00 and 3:00. Some important phone numbers for the Varick Street office are:

General inquiries and charges: (212) 741-8815 or (212) 741-2783

Pending lawsuits: (212) 741-3181
Federal employment complaints: (212) 620-0476

Cases in mediation: (212) 620-0443

Charges filed with state or local Fair Employment Practice agencies (NYS Division of Human Rights, New York City Commission on Human Rights): (212) 620-0086

In early October, NELA members met with the Regional Attorney for the New York District Office, Katherine Bissell, the Deputy Director, Richard Alpert, and the Senior Trial Attorney, Elizabeth Grossman, at a well-attended NELA Nite focusing on the ramifications of September 11 for employees and their counsel. As they explained, the space limitations on Varick Street mean that not all staff can work in the office, and so we can expect things to simply go slower. Cases in litigation should not be compromised, they said, because most litigated matters were well into discovery on September 11, and the EEOC can obtain the documents it was seeking. The EEOC's headquarters in Washington, Bissell said, is being very supportive, and is committed to rebuilding the New York District office.

Pending charges. What survived the disaster was the EEOC's electronic list of charges, which contains the date of filing, the last action in the case, and contact information. For pending cases, that system was backed up through September 5, so that charges filed between September 6 and September 11 did not make it into the system. (Case resolutions, in contract, were backed up through September 10).

The EEOC is now reconstructing its case files on pending charges. The EEOC's Washington headquarters has sought to contact all attorneys of record by mail, explaining the procedures for reconstructing files. After that, EEOC staff wrote counsel for all parties asking for their help in that task. It is probably wise to send a letter to the District Office, advising it that you are representing a party. In litigated cases, the EEOC will be contacting parties, co-counsel and opposing counsel for help in reconstructing files.

If you filed a charge with or mailed a

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The NELA/NY
Calendar of Events

November 29
6:30 p.m.
NELA/NY 4th Annual Gala Dinner "Courageous Plaintiffs Who Fought Back"
NELA/NY's 15th Anniversary–
Yale Club of NYC

December 4
6:00 - 8:00 p.m.
Giants Of The Trial Bar III:
Cross Examination Demonstrations,
Association of the Bar of the City of New York.

$125 Member,
$185 Non-member

Materials only: $70 members, $95 non-members.
For information, call 212 382-6663 or go to *www.abcny.org*

December 10
6:30 p.m.
NELA/NY Board of Directors Meeting, Election of Board Members and Officers
1501 Broadway - 8th floor

December 11
Sex Discrimination/Sexual Harassment Committee, Informal meeting at the NELA/NY Holiday Party, Malika Indian Restaurant (see below)

December 11
6:30 p.m.
(Previous date was the 12th)
NELA/NY Holiday Party, Malika Indian Restaurant,
210 E. 43rd Sts. (Bet. 2nd & 3rd),
$25 per person (buffet, cash bar)

December 19
6:30 p.m.
NELA NITE
Topic to be announced
1740 Broadway, Conference Room

March 15 – 16, 2002
NELA National Conference
The New Civil Rights Battleground: ADR After Circuit City,
Philadelphia., PA. Contact NELA National for Details

June 26 – 29, 2002
NELA National Annual Convention, Orlando, FL

Have a Vindaloo Time at Our Holiday Party

Join us for great Indian food at our annual Holiday Party—Tuesday, December 11, 6:30 – 9:00. This year we return to Malika Indian Restaurant, 210 East 43rd Street (between 2nd and 3rd Avenues), because of the enthusiastic reaction we've had from members about previous parties. We have the whole restaurant to ourselves.

NELA/NY will buy a drink for all new (3 months or less) members and those who join at the party. When you arrive, let us know, and when you're ready, we'd like to informally introduce you around.

RSVP by Monday, December 4, to Shelley Leinheardt (212 317-2291) or by e-mail: *nelany@aol. com*. Tickets are $25 for the buffet; cash bar.

Attention E-mailers

Please let Shelley Leinheardt know your e-mail address as soon as possible. It's the quickest, easiest and most efficient way for NELA members to communicate with NELA and each other. If you want to use the website (nelany.com) or Listserve, you will need to give us your e-mail address. You can either e-mail Shelley at *nelany@aol.com* or call her at 212 317-2291.

We send our condolences to NELA/NY member Perry Friedman, whose father recently passed away.

A Word from Your Publisher

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

Items for the calendar may be submitted by calling Shelley Leinheardt:
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Advertising in our Classified Section is only $25.00 for 6 lines, plus $5.00 for each additional line.

Treasurer's Report: Where Your NELA Dues Go and Why We Need Your Help

by Bob Rosen

As Treasurer of NELA/NY, I thought it would be appropriate at this time, in our last Newsletter of the year, to inform members of NELA/NY's financial status.

Recent world events have taught us all to focus on what is important, and one of the most important is family. NELA is a family, and as a family we have stuck together through trying times.

NELA needs your support in all of its endeavors: paying dues, attending conferences, participating in the Courageous Plaintiffs dinner, placing an ad in the Journal for the dinner, and participating in our new LISTSERVE (NELA/NY's online discussion group.) NELA/NY is considered the flagship of the affiliates in the NELA national. The affiliates around the country admire our programs and innovations. Our budget for all of our activities during the year requires us to have gross revenues of approximately $140,000 each year. Those monies are all spent on our various efforts.

The funds from all sources are used to pay our administrative expenses, including the salary of our extraordinarily talented Director, Shelley Leinheardt, the expenses for our spring and fall conferences, the costs of NELA Nites, this Newsletter, the trial practice seminars at Touro Law School, and our Website. These are all expenses that a bar association of approximately 320 members would normally have during the course of the year.

I tell you this because as Treasurer, I see both sides of the ledger—the income that comes in and the funds that go out to maintain these important NELA-sponsored activities. Now more than ever, we need your help. Yes, there are many other worthwhile organizations asking for your support during these times. However, NELA/NY is the only bar association in New York representing the interests of plaintiffs employment lawyers and their counsel.

We do not want in any way to have to curtail the ambitious programs we offer our members. Unfortunately, we need your financial support to continue these activities. Think of this as a pledge drive, so please dig in.

My best wishes to all of you and to your families.

NELA's New Listserve: What's That?

Say you have a question about a case, and no-one has the answer. Your colleagues, your spouse, your smart-aleck neighbor—all befuddled. Now there is a quick and free way to draw on the expertise of your NELA comrades, and you don't even have to pick up the telephone.

NELA's new Listserve automatically distributes questions, answers and comments to all NELA members who sign up. Think of it as sending an e-mail to a good, large, targeted audience, in one step. When your fellow NELA members check their e-mail, your message is right there. (Because it is the equivalent of sending out a mass e-mail, the Listserve is different than the NELA/NY website, a bulletin board which you can only access by going to nelany.com.)

What can you use the Listserve to ask (or fulminate) about? Think of the possibilities:

- Other cases brought against an employer
- Discovery hassles and strategies
- Jury instructions
- Judicial opinions on point
- Trial and settlement techniques
- Retainer agreements
- Ethical quandaries
- What's that silly regulation mean, anyway?
- Those not so new Federal rules

This is a great way for us to share our knowledge, insights and concerns, and to build a greater sense of professional community. If you're not a Listserve participant, simply e-mail Adam Klein (atk@outtengolden.com) and he'll quickly set you up.

Board Meeting and Elections

The Executive Board will meet on Monday, December 10 to elect the Board and officers for next year, and conduct other business. Notices have already gone out to all members, soliciting nominations for the Board. If you wish to nominate someone (including yourself), please call Shelley.

At the meeting, the Board will also consider proposed revisions to NELA/NY's By-laws. The new proposal calls for at least three Board members to leave the Board each year, so that the Board would be completely replaced after five years. Under the proposed bylaws, Board members can serve for no more than five consecutive one year terms.

The Board will meet at 1501 Broadway, 8th floor, at 6:30.

NELA Nuggets

Pearl Zuchlewski has been appointed Chair of the National Arbitration & Mediation Committee of the National Association of Securities Dealers (NASD). This is a first for a plaintiff's lawyer and for a woman. Congratulations, Pearl.

Fall Conference

Our fall conference on Employment Litigation was one of our best attended conclaves. NELA members, management attorneys, judges and magistrate-judges (including Jed Rakoff (SDNY), Steven Gold (EDNY), Viktor Pohorelsky (EDNY) and Sidney Stein (SDNY)) participated in panels on developments in employment law, discovery, motion practice, trial tactics and settlement. Many thanks to the conference committee: Herb Eisenberg, Laura Schnell, Anne Clark and Shelly Leinheardt.

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:

Anne Golden
Outten & Golden LLP
1740 Broadway
New York, NY 10019
Fax: (212) 977-4005
E-mail: *ag@outtengolden.com*

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

Thanks to Nantiya Ruan, an associate with Outten & Golden LLP, and Scott McCullom, an intern with Outten & Golden LLP and third-year student at CUNY Law School, for their assistance with these squibs.

AGE DISCRIMINATION

Class Actions; Collective Actions

See **Rodolico v. Unisys Corp.**, discussed under "Class Actions."

Amendment of Complaint

In an opinion that contains good language and reaches favorable conclusions but does not otherwise break new ground, Judge Gerald E. Lynch (S.D.N.Y.) permitted a plaintiff to amend his ADEA and New York State Human Rights Law complaint to add a claim under the New York City Human Rights Law, even though the case had reached the summary judgment stage. The amendment was sought in order to support the claim for punitive damages, which had been requested in the complaint but are unavailable under the other two statutes. The court noted that age discrimination claims are analyzed identically under all three provisions, so that "permitting [the plaintiff] leave to amend will not fundamentally alter his theory of liability or the proof that he will need to present to the jury. Moreover, [the defendant] had ample opportunities to move to strike [the] punitive damages demand; having failed to do so until now, it has had every opportunity to obtain discovery about [the] punitive damages theory." The plaintiff would be limited, however, to presenting punitive damages evidence that had been timely disclosed to the defendant in conformity with the applicable rules. **Collings v. Industrial Acoustics Co.**, —– F. Supp. 2d —–, 2001 WL 913909 (S.D.N.Y. 8/13/01).

ARBITRATION

Severability

A Missouri plaintiff sued in federal court for employment discrimination and retaliation although she had signed an arbitration agreement when hired. The district court declined to compel arbitration because of an unlawful provision in the agreement (limiting potential recovery of punitive damages to five thousand dollars), which the court refused to sever from the agreement. The Eighth Circuit Court of Appeals reversed, holding that Missouri contract law supported the severability of the unlawful provision even if the agreement did not contain a severability clause. The panel also stated in dictum that the punitive damages provision was not contrary to public policy, but later conceded that the Federal Arbitration Act limits a court's review of an arbitration agreement to determining whether a dispute is properly arbitrable and does not extend the court's authority to the weighing of public policy arguments. This decision is contrary to the Eleventh Circuit's holding in **Perez v. Globe Airport Sec. Services, Inc.**, 253 F.3d 1280 (11th Cir. 2001). **Gannon v. Circuit City Stores, Inc.**, 262 F.3d 677 (8th Cir. 8/17/01).

Preclusion of Federal Claims

After obtaining a judgment in state court on an arbitration award stemming from a collective bargaining agreement, a former town employee brought suit in federal court against the town and its officials under 42 U.S.C. § 1983, claiming that his termination violated his free speech rights protected by the First and Fourteenth Amendments. The district court granted summary judgment for the town, holding that it must give full faith and credit to the state court judgment that had confirmed the arbitration award. However, the federal issues had not been raised at the arbitration. The Second Circuit Court of Appeals (Leval, C.J., joined by Van Graafeiland and Newman, C.J.J.) held that, under **Wright v. Universal Maritime Service Corp.**, 525 U.S. 70 (1998), the plaintiff was not obliged to raise the federal claims in the arbitration under the collective bargaining agreement. Further, the panel held that the state court's confirmation of the arbitration award did not preclude the plaintiff's subsequent assertion of the federal claims in federal court. Therefore, the case was remanded to the district court for determination of the federal issues. **Fayer v. Town of Middlebury**, 258 F.3d 117, 2001 WL 830797 (2d Cir. 7/24/01).

ATTORNEYS' FEES

The Seventh Circuit has agreed with the Fourth, Ninth, and Federal Circuits in holding that the portion of settlement proceeds that is paid to a plaintiff's attorney as attorney's fees is taxable income to the plaintiff. This decision is contrary, however, to decisions from the Fifth, Sixth, and Eleventh Circuits. **Kenseth v. C.I.R.**, 259 F.3d 881 (7th Cir. 8/7/01).

In considering the lodestar amount due to a prevailing party's attorney in a civil rights case, Judge John F. Keenan (S.D. N.Y.) has written a generous opinion on the calculation of fees. Recognizing that the attorney's hourly rate was severely capped by the Prison Litigation Reform Act ("PLRA"), Judge Keenan declined to reduce the amount of hours worked by any of the three attorneys, law students, and paralegals, nor did he reduce the costs in any of the ways advocated by the defendants, finding "[t]here is no 'fat' left to trim." The court also refused to apply retroactively the PLRA's provision that

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the plaintiff's jury award may offset the attorney's fees award up to 25 percent. **Hutchinson v. McCabee**, —- F. Supp. 2d —-, 2001 WL 930842 (S.D.N.Y. 8/15/01).

CLASS ACTIONS

Certification

In a decision of first impression in the Second Circuit that sent cheers through the plaintiff class action bar, the Circuit announced a liberal standard for certifying class actions where monetary relief is sought. In a race discrimination class action filed on behalf of 1,300 African-American railroad workers, the district court (Jed Rakoff, J., S.D.N.Y.) had dismissed the action and denied class certification, following **Allison v. Citgo Petroleum Corp.**, 151 F.3d 402 (5th Cir. 1998), which held that class certification should not be granted in a discrimination action unless the monetary damages sought are merely "incidental" to the equitable relief sought (which is rarely the case, now that the Civil Rights Act of 1991 provides individualized compensatory damages). The Second Circuit rejected **Allison** as too limiting and allowed certification under Rule 23(b)(2), the provision that applies to primarily equitable actions (and the provision that plaintiffs' lawyers prefer, since it does not require "predomination" of common issues as Rule 23(b)(3) does). The panel set forth a rule in "pattern or practice" discrimination cases that requires courts to weigh (1) whether the injunctive or declaratory relief sought predominates even though compensatory or punitive damages are also claimed and (2) whether class treatment would be efficient and manageable, to further the interest of judicial economy. The panel certified the disparate impact claim and, at least for a bifurcated liability phase, the disparate treatment claim. **Robinson v. Metro-North Commuter R.R.**, —- F.3d —-, 2001 WL 1191092 (2d Cir. 10/9/01).

A judge in the Eastern District of New York has certified a class action of engineers laid off in a reduction in force with respect to both ADEA and New York State Human Rights Law age discrimination claims. Applying Fed. R. Civ. P. 23, Judge Arthur D. Spatt found that the requirements of commonality and typicality were not defeated by the company's decentralized selection process for the layoff or by the fact that different rationales and defenses may have existed for different individuals in the class. The court noted that the plaintiffs had alleged a discriminatory policy or practice that was common to all the plaintiffs. The court also found that a "collective action" under the ADEA, 29 U.S.C. § 216(b), was appropriate. Both rulings were limited at present to the liability stage of the litigation. The plaintiffs were represented by NELA/NY members Walter Meginnes, Jr., James Reif, and Beth Margolis. **Rodolico v. Unisys Corp.**, 199 F.R.D. 468 (E.D.N.Y. 3/30/01).

NELA To Cuba

NELA/NY is considering sponsoring a group trip to Cuba. The anticipated cost, for eight days, including airfare and hotels, is approximately $1900. We'd like to know if there is sufficient interest in the trip, so if you are curious, please contact Shelley.

DISABILITY DISCRIMINATION

Essential Function; Reasonable Accommodation

A former convenience store employee with epilepsy who wanted to be a store manager was told that she could not be promoted to the job because she could not drive in order to take daily receipts to the bank. She proposed a number of other ways of accomplishing this task, but the employer rejected them all and said she would be limited to any of four specific stores (in bad neighborhoods) which had their receipts picked up by armored car. She ultimately accepted a promotion to assistant manager at one of the latter stores, but not before she was suspended for 12 days without pay after applying again for a promotion. (The employer alleged that she was merely taken off the schedule to ensure that she would see a doctor after hurting her elbow during a grand mal seizure.) Three months after her promotion, which she found unsatisfactory, she resigned. Judge John T. Curtin, Jr. (N.D.N.Y.) had granted summary judgment to the employer on her claims of failure to accommodate, failure to promote, and retaliation. The Second Circuit Court of Appeals (Sack, C.J., joined by Feinberg and Newman, C.J.J.) held that the district court had failed to consider the facts in the light most favorable to the plaintiff and restored all the claims except for failure to promote her to manager in one instance. **Lovejoy-Wilson v. NOCO Motor Fuel, Inc.**, 263 F.3d 208, 2001 WL 998037 (2d Cir. 8/31/01).

New York State Human Rights Law

A judge in Allegheny County (Justice Patrick H. Nemoyer) has granted a preliminary injunction requiring a public school district to provide reasonable accommodation of a cafeteria worker with a disability. The plaintiff alleged that her skin condition, dermatitis and dyshidrosis, prevented her from washing dishes. She had not been required to do so until she was reassigned after the dishwasher resigned. After she provided a doctor's note, the school district ordered her to take a medical leave and would not let her return until she could wash dishes. Attorneys with her union, the Civil Service Employees Association, sued under the New York State Human Rights Law, invoking the recent amendment to the law that requires reasonable accommodation, and the court agreed. **Gallman v. Friendship Central School District**, —- N.Y. Supp. 2d —- (article, N.Y.L.J. 9/20/01, p. 1, col. 6) (Sup. Ct. Allegheny Cty. approx. 9/18/01).

Reasonable Accommodation

After bouncing through the courts six times (including a trip to the U.S. Supreme Court), the plaintiff in **Bartlett v. New York State Board of Law Examiners** might get to take the bar examination again with accommodations for her learning disability (dyslexia). Circuit Judge Sonya Sotomayor (sitting by designation for the S.D.N.Y.) held a second bench trial with directives from the court of appeals

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Sex Discrimination and Sexual Harassment Committee

Co-Chairpersons: Margaret McIntyre, Eugenie Gilmore

The Sex Discrimination and Sexual Harassment Committee continues to be active, with 37 members, including nine who have joined in the last year.

One of the Committee's projects this year will be to host the NELA Nite scheduled for March 27, 2002. We are still formulating ideas for the evening, so if you have ideas, please bring them to the next meeting. If you can't come to meetings, but still would like to be involved in this project, call Margaret McIntyre at 212-274-9987 or Eugenie Gilmore at 212-785-5585.

The Committee is continuing its series of presentations by members on cases of interest. Members making presentations include: Eugenie Gilmore on November 13, 2001, Rachel Levitan on January 8, 2002, and Margaret McIntyre on February 12, 2002.. Meetings after that remain open for volunteers.

The Committee meets on the second Tuesday of each month, providing no conflict with a major holiday. All meetings will begin promptly at 6:00 p.m. and end at 7:30 p.m. The Committee begins each meeting with shop talk, where members exchange ideas and strategies on day-to-day issues that arise in their practices.

We will next meet informally during the NELA/NY Holiday Party, Tuesday, December 11, 2001, at Malika Indian Restaurant, 210 East 43rd Street (between 2nd and 3rd Avenues.) All members, guest attorneys and future members are welcome.

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to determine whether the plaintiff was substantially limited in the major life activity of reading, specifically with consideration of both the positive and negative effects of the plaintiff's self-accommodations. After numerous reports and testimony of the competing experts in learning disabilities and education, Judge Sotomayor found that the plaintiff was disabled within the meaning of the ADA in the major life activities of reading and, alternatively, working. Importantly, Judge Sotomayor found that the plaintiff's expert evidence that contained "clinical judgments" (meaning observations of her habits) was critical in properly assessing whether she had a disability, not just "objective" criteria such as skill testing. The court went on to hold that the defendant had sufficient information to determine the plaintiff's disability and awarded her compensatory damages for the five bar examinations she had taken and failed. **Bartlett v. New York State Board of Law Examiners**, —- F. Supp. 2d —-, 2001 WL 930792 (S.D.N.Y. 8/15/01).

The Ninth Circuit Court of Appeals has held that an employee with substantial limitations on her ability to write and use a keyboard was not disabled with respect to the major life activities of working or doing manual tasks. The plaintiff was a part-time newspaper reporter who suffered injuries to her arm, shoulder, and wrist. Her treating physician restricted her keyboard use to 30 minutes a day, continuous handwriting to five minutes a day, intermittent keyboard use to 60 minutes a day, and intermittent handwriting to 60 minutes a day. The defendant newspaper explored various possible accommodations but finally concluded that the plaintiff was no longer able to perform her job. The Ninth Circuit held that the plaintiff failed to show that she was substantially limited in her ability to work or in her ability to perform manual tasks. The panel pointed out that an employer does not concede that an employee is disabled when the employer seeks to accommodate the employee's impairment. **Thornton v. McClatchy Newspapers, Inc.**, 261 F.3d 789 (9th Cir. 8/15/01).

EMPLOYMENT AT WILL

Employee Manual

When is an employee manual not an employment contract? The answer comes in a New York State Court of Appeals case involving an employee who claimed breach of employment contract when terminated for allegedly refusing to testify falsely on the employer's behalf and in retaliation for "blowing the whistle" on a fellow employee. The manual in question encouraged employees to report any instance of illegal or unethical acts by anyone in the company and stated that the employer "assures protection against any form of reprisal" for so reporting. However, the Court of Appeals found dispositive the fact that the manual held a "disclaimer" that the manual was "not a contract of employment and [did] not create any contractual rights of any kind," and that employment was strictly at will and for no fixed duration. Therefore, the court affirmed (for different reasons) the Appellate Division's reversal of the trial court's holding that the manual created a contract. NELA/NY member Leonard N. Flamm represented the appellant/employee. **Lobosco v. New York Telephone Company/NYNEX**, 96 N.Y.2d 312, 751 N.E.2d 42, 727 N.Y.S.2d 383 (6/14/01).

FAMILY & MEDICAL LEAVE ACT

Eligibility

In a brief opinion, the Second Circuit has sided with the Seventh and Eighth Circuits in striking down a pro-employee FMLA regulation. 29 C.F.R. section 815.110(d) provides: "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." The panel found that this regulation impermissibly expands the scope of persons eligible for family or medical leave under the FMLA. However, the panel went on to hold that a plaintiff could assert an equitable estoppel claim if the employee can show that he or she detrimentally relied on the employer's representation that the plaintiff was eligible for FMLA leave. Because the plaintiff in the present case did not bring an equitable estoppel claim, her case was

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dismissed. **Woodford v. Community Action of Greene County, Inc.**, — F.3d —, 2001 WL 1191393 (2d Cir. 10/10/01).

Length of Disability

An employee had sought an unpaid leave of absence to travel out of the country to care for her two grandchildren and her adult daughter, who was on bed rest with pregnancy-induced hypertension in her 36th week of pregnancy. The cold-hearted employer denied the request, and when the plaintiff went anyway, she was fired. Under the FMLA, in order to take family leave for a child eighteen years of age or older, the adult child must be incapable of self-care because of a mental or physical disability. In defining "disability," however, the Secretary of Labor has adopted the definition used by the ADA. The district court granted summary judgment to the employer, finding that the substantial limitation of hypertension was only for a short duration. The First Circuit Court of Appeals reversed, holding that the duration of the disability is not as important under the FMLA as it is under the ADA. The panel noted that the need for leave might be over before it could be determined that the disability is of sufficient duration. **Navarro v. Pfizer Corp.**, 261 F.3d 90 (1st Cir. 8/20/01).

Method of Calculating Leave

After being terminated for excessive absences, an employee brought an FMLA suit questioning the employer's method of calculating leave. The employer argued that her leave was not protected using a rolling method, which looked back twelve months to see whether she had taken twelve weeks during the prior twelve months, rather than the calendar method. The Ninth Circuit acknowledged that the rolling method is permissible, but the Department of Labor regulations contemplate that the employer will give the employee notice of its chosen method of calculation. The panel held that absent notice to the employee, the employee is allowed to use the most beneficial means of calculation, and therefore, the plaintiff's leave was protected. The panel also held that the employer's subjective belief as to whether the leave was protected is not relevant, but only whether the employee received the substantive rights provided by the FMLA and whether the employer interfered with the exercise of those rights. **Bachelder v. America West Airlines, Inc.**, 259 F.3d 1112 (9th Cir. 8/8/01).

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HOSTILE WORK ENVIRONMENT

National Origin Discrimination

A New York City teacher, tormented by students because of his national origin (Sri Lanka), defeated a summary judgment motion by the Board of Education before Judge Allyne R. Ross (E.D.N.Y.). The plaintiff invoked Title VII and 42 U.S.C. §§ 1981 and 1983. The Board argued that its own employees and officials did not create the hostile work environment and that it could not be held liable for the misconduct of students; it also claimed qualified immunity. The court dismissed the claims against the individual officials based upon qualified immunity but declined to dismiss the claims against the Board, holding that an employer's liability for customers' harassment of its employees supported this plaintiff's claim by analogy—especially since a school can control students' behavior more easily than an employer can control that of its customers. Analogy to a recent Supreme Court case, holding a school board liable for failure to stop students from sexually harassing other students, also militated against summary judgment for the Board. For reasons best known to the court, the decision is unpublished, even by Westlaw. NELA/NY member Jeffrey Slade represented the plaintiff. **Peries v. New York City Board of Education**, —- F. Supp. 2d —-, No. 97 CV 7109 (ARR), N.Y.L.J. 8/16/01, p. 25, col. 4 (8/6/01).

PROCEDURE

Jury Selection

A judge in Civil Court, New York County, has set aside a jury verdict on a defamation case on the basis of jurors' misconduct—specifically, that four jurors "used profane, belligerent, and racially abusive language against the remaining two jurors to discourage free and collective deliberations and to compel a compromise verdict." The four jurors, three African-American women and one Latina woman, called the foreman various epithets, including "white man." They accused him of conspiring with the plaintiff's counsel, also a white man, to the point of allegedly having a homosexual encounter with him in the courthouse men's room. The sixth juror, an African-American man, added his affidavit to the

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white foreman's, corroborating the abuse. He himself had been called "Uncle Tom" by the four women for taking a position contrary to theirs and in agreement with the foreman. The special verdict, in addition, was internally inconsistent and clearly a compromise. Although the court did not grant judgment as a matter of law to the plaintiff, it did order a new trial. NELA/NY member Danny Alterman represented the plaintiff. **Wing Lam v. Chung-Ko Cheng**, —- N.Y.S.2d —-, N.Y.L.J. 9/10/01 (Civ. Ct. N.Y. Cty. 8/31/01) (Lucy Billings, J.)

New Trial

A new trial was ordered (David N. Hurd, J., N.D.N.Y.) after a jury found that the plaintiff was subject to a hostile work environment but not because of her gender. The judge held that the jury's conclusion was "seriously erroneous" in failing to find that the hostility toward the plaintiff was not motivated by her gender, because no credible evidence was presented that the perpetrator ever engaged in any harassing behavior toward male employees. In fact, the overwhelming evidence (including testimony by three female co-workers who had been similarly treated) supported the plaintiff's claim that the perpetrator's treatment of her was gender-based. NELA/NY member Peter Henner represented the plaintiff. **Finn-Verburg v. New York Dep't of Labor**, —- F. Supp. 2d —-, 86 [BNA] F.E.P. Cas. 1203, 2001 U.S. Dist. LEXIS 11779 (N.D.N.Y. 8/14/01).

PUBLIC EMPLOYEES

In a case of first impression, Judge Gerald E. Lynch (S.D.N.Y.) has held that, under the New York City Human Rights Law, sovereign immunity bars a municipality from being subject to punitive damages. The plaintiff was a civilian aide in a police station who claimed she was sexually harassed by her lieutenant supervisor and subjected to a hostile work environment by male co-workers. After a trial of the plaintiff's claims under the state and city human rights laws, the jury found for her in the amount of $400,000 in compensatory damages and $1 million in punitive damages. Granting defendants' motion for judgment as a matter of law on the latter amount, Judge Lynch held that the NYCHRL did not contain a clear intent to abrogate the municipality's sovereign immunity from punitive liability. Although Judge Lynch struck down the punitive damage award, he dismissed the defendants' remaining arguments, letting the compensatory damages award stand. **Katt v. City of New York**, 151 F. Supp. 2d. 313 (S.D.N.Y. 6/21/01).

RETALIATION

Judgment as a Matter of Law

In a reversal of summary judgment on a retaliation claim, the Second Circuit Court of Appeals has underscored the advantage of a close temporal nexus between the plaintiff's initial claim of discrimination and the adverse employment action. The district court found after a bench trial that the plaintiff had failed to make the requisite showing that she was terminated because of her gender. The Second Circuit upheld this result, holding that the evidence was sufficient to support the

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charge to the EEOC's WTC office, but have not received a letter from EEOC Headquarters, your charge may not have made it into the agency's database. You should call (212) 741-2783 or (212) 741-8815, or call the Newark Area Office at (973) 645-5974, (973) 645-3727, or (973) 645-3004 (a TTY line for callers with hearing and/or speech impairments only).

Filing new charges: New charges should be mailed to the Varick Street office. If necessary (i.e. the 300 days is upon you as you read this), charges can also be filed by fax to Varick Street (973) 620-0070 or Newark (973) 645-4524 (address faxes to Newark as Att: New York District Office.)

Clients should *not* go to the Varick Street office to file charges in person, but rather to the Newark office, where a small number of New York District staff are working. (U.S. Equal Employment Opportunity Commission, Newark Area Office, Attn: New York District Office, 1 Newark Center, 21st Floor, Newark, NJ 07102-5233.) Staff at the Newark office can be reached, between 9:00 and 3:00, at these numbers: For general inquiries and new charges (973) 645-5974 or (973) 645-3727; inquiries from callers with hearing and speech impairments (973) 645-3004 (TTY)

The EEOC will accept filings on charges even if the 300 day filing period ended between September 11 and October 2. However, whether or not the filing period is tolled in any particular case can only be decided by the court if the matter is litigated.

The EEOC plans to resume its mediation program, although there will obviously be delays. Cases which were already in mediation as of September 11 will be the first to go into mediation again. (The charge database notes if a case is in mediation).

A wealth of information on these questions can be found at the EEOC's website, *www.eeoc.gov*.

—Jonathan Ben-Asher

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district court's findings. However, with regard to the district court's grant of summary judgment on the retaliation claim, the panel held that the court below erred in concluding that no causal connection was shown between the complaint of discrimination and the adverse employment action. The panel held that the facts (viewed in the light most favorable to the plaintiff) showed that the plaintiff had hired an attorney and asserted her claim of gender discrimination only three days before she was told that she would be fired in two weeks if her performance did not improve. This temporal nexus is enough to show a causal connection, so that summary judgment should not have been granted. **Cifra v. General Electric Co.**, 252 F.3d 305 (2d Cir. 6/7/01) (Kearse, C.J., joined by Leval and Sotomayor, C.J.J.).

Selective Enforcement

In reviewing a New York State Division of Human Rights decision of "no probable cause" of discrimination in a sexual harassment and retaliation case, a judge in Supreme Court, Kings County, reversed the Division's finding that the defendant's dismissal policy was not selectively enforced. The plaintiff was fired allegedly for using the company's Federal Express account and company envelopes for her own personal use in violation of her employer's policy. Some time before the employer sought her dismissal, the plaintiff had filed, and then withdrawn, a complaint of sex discrimination. The plaintiff appealed the Division's findings that no discrimination or retaliation occurred. The court held that the plaintiff's dissatisfaction over how the Division investigated her charge could not form the basis for the court to annul the Division's decision. However, the court remanded the case to the Division for further findings on the plaintiff's retaliation claim, finding that the fact that two other co-workers who were terminated on the same grounds shortly after the complainant's dismissal did not negate the possibility that the plaintiff had been selectively discharged. **Matter of Conway v. Avidon**, —- N.Y.S.2d —-, N.Y.L.J. 8/24/01, p. 20, col. 2 (Sup. Ct. Kings Cty. 8/10/01) (Margaret Cammer, J.).

SANCTIONS

A plaintiff's attorney failed to respond to a summary judgment motion after numerous attempts by the district court to obtain a response. The court (John S. Martin, Jr., J., S.D.N.Y.) declined, however, to employ the extreme sanction of dismissing the complaint. Instead, it gave the plaintiff the opportunity to obtain new counsel in order to file a response on the condition that the plaintiff reimburse the defendants' cost of attorneys' fees in bringing the summary judgment motion and the order to show cause. "The court recognizes the plaintiff has not been guilty of any misconduct," said the court, "but ultimately the acts of his attorneys are chargeable to him." However, Judge Martin held that the plaintiff was entitled to an order requiring the attorneys to reimburse him for the amount he paid the defendants. **Forsyth v. Federation Employment and Guidance Service**, —- F. Supp. 2d —-, 2001WL 897184 (S.D.N.Y. 8/9/01).

SEXUAL HARASSMENT

Same-Sex Harassment

In a case involving same-sex harassment and retaliation, the plaintiff was a tenure-track professor who complained of sexual harassment by his supervisor and subsequent retaliation by the university. The Fifth Circuit upheld the jury verdict in favor of the plaintiff and found no abuse of discretion by the trial court in awarding five additional years of front pay (making a total of fifteen years of front pay) for the university's continued pattern of vindictive behavior against the plaintiff. The panel also held that although the plaintiff was not subject to a "tangible employment action" with respect to

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flowing from September 11. And as realistic employment lawyers, we may have to admit that at least in some cases, they may be right. From both the management and plaintiff bar, many of us have heard questions about the ultimate meaning and value of what we do.

Soon after September 11, NELA New York members began helping each other deal with the aftershock of the disaster. NELA members e-mailed each other, trying to make sure that friends and colleagues were safe. NELA members offered displaced colleagues office space, phones and conference rooms. NELA representatives met with members of other bar associations to plan aid to affected clients and colleagues. NELA members suggested issues for the EEOC to address on its website concerning the effect of September 11 on the agency, and we held a NELA Nite in early October to discuss the impact of the tragedy on our clients and our practices.

The coming months will reveal the implications for employment law of these terrible events. In this new economic climate, will our clients be more fearful of confronting their employers and asserting their rights? Will companies be less generous in settlement negotiations, or will they be less willing to litigate on strained budgets? Will employees dazed by world events be more realistic about what their cases mean and how they should pursue them? Each of us will be making our own judgments on these issues, and we invite you to share yours.

—Jonathan Ben-Asher

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the harassment, it does not necessarily follow that he was not subject to an "adverse employment action" in retaliation for complaining of the harassment: "a rational jury could have concluded both that no tangible employment action resulted from the harassment and that the [u]niversity subsequently retaliated against [the plaintiff] for filing a complaint." Additionally, with respect to the Faragher/Ellerth affirmative defense, the panel found that the plaintiff's nine-month delay in complaining of the harassment was excused because of the repeated threats of retaliation by his supervisor. **Mota v. University of Texas Houston Health Science Center**, 261 F.3d 512 (5th Cir. 8/9/01).

SEXUAL ORIENTATION

The Appellate division, First Department, has affirmed without opinion a Supreme Court, New York County, decision that refused to dismiss a claim of hostile work environment against a non-employer. The plaintiff, a gay man, brought suit against his employer and a company also at his work site whose employees engaged in offensive name-calling and threats of violence against him because of his sexual orientation. The plaintiff alleged in his complaint that the non-employer company aided and abetted the unlawful discrimination and retaliated against him because of his complaints. The court found no basis for dismissing the hostile work environment claim, however, it dismissed the retaliation claim because the plaintiff had failed to plead any facts that would indicate that the non-employer had any control over the terms and conditions of his employment or aided and abetted his termination. NELA/NY member Jonathan Weinberger represented the plaintiff/respondent. **Morrison v. Command Security Corp.**, 275 A.D.2d 221, 711 N.Y.S.2d 887, 2000 N.Y. Slip Op. 07311 (1st Dep't 8/3/00).

SUMMARY JUDGMENT

Race Discrimination

In a race discrimination case alleging constructive discharge, the Sixth Circuit Court of Appeals reversed and remanded the trial court's grant of summary judgment on behalf of the employer restaurant. The plaintiff, the only full-time African-American server at the restaurant, was subjected to racially offensive remarks, was not given as many hours as the white servers, and was assigned to the less active sections of the restaurant. A few weeks after her above-average performance evaluation, the plaintiff was told that she was being demoted to "busboy" due to poor job performance. The plaintiff quit, and the panel found sufficient evidence to support a claim of constructive discharge. **Logan v. Denny's Inc.**, 259 F.3d 558 (6th Cir. 8/7/01).

"Reasonably Related" to EEOC Charge

The Second Circuit Court of Appeals has reiterated its caution to district judges who grant summary judgment in discrimination cases by reversing a district court's ruling where evidence of discrimination might be not be overt but "its haziness counsels against summary judgment ...." The plaintiff brought a smorgasbord of discrimination complaints against her employer: age, gender, religion, and national origin. Those claims not contained in her EEOC charge were dismissed. Specifically, claims that were brought to the EEOC's attention by unsworn "affidavit" one year after the charge was filed were held by the panel to be not properly before the court, because those allegations would enlarge the scope of the charge to encompass new unlawful employment practices or bases for discrimination. However, the panel also held that the district court erred in dismissing the plaintiff's sexual harassment, retaliatory discharge, and failure-to-train-because-of-age claims, since the plaintiff's statements, if taken as true, were sufficient to defeat summary judgment. Judge Chester Straub dissented from the portion of the decision regarding the age claim, because he believed that the defendant's assertion that the plaintiff was not qualified to be trained for the asserted position was enough to support dismissal of this claim. **Holtz v. Rockefeller & Co.**, Inc., —F.3d—, 2001 WL 834023 (2d Cir. 7/10/01).

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Retaliation

A black man whose performance review was downgraded after he filed a discrimination charge with the EEOC suffered an "adverse employment action" sufficient to preclude summary judgment on his retaliation claim. Judge Peter K. Leisure (S.D.N.Y.) dismissed the plaintiff's claim for punitive damages (the Port Authority is a governmental agency under prevailing caselaw, so immune) and applied the limitations period of 180 rather than 300 days to the claims (since there is no state or local deferral agency with power over the Port Authority). The court found, however, that the plaintiff was "qualified" for a job to which he had sought but been denied promotion, because he met its minimum requirements, even though he did not have a license that the employer purportedly required. **Vernon v. Port Authority of New York & New Jersey**, 154 F. Supp. 2d 844, 2001 WL 893338 (S.D.N.Y. 8/7/01).

Sexual Harassment

A letter carrier for the U.S. Postal Service, who claimed sexual harassment by co-workers, lost on appeal to the Second Circuit Court of Appeals. The district court entered summary judgment in favor of the defendant. The Postal Service argued that there could be no gender-based discrimination when both women and men were harassed. The plaintiff had been subjected to comments that ridiculed her and a male co-worker for allegedly being involved in a sexual relationship. The panel affirmed the district court's decision that the plaintiff did not carry her burden of showing that the harassment she faced was based upon her sex. The panel held that there is no per se bar to maintaining a claim of sex discrimination where a person of another gender has been similarly treated, but that on the facts of this case the plaintiff simply could not show that she was discriminated against because she was a woman. **Brown v. Henderson**, —- F.3d —-, 2001 WL 827855 (2d Cir. 7/24/01) (Calabresi, C.J., joined by Katzmann, C.J., and Lewis A. Kaplan, U.S.D.J.).

PRACTICE TIP

Describe your consultation fee, how it is calculated, and whether you accept credit cards or personal checks, before you schedule an appointment with a prospective client—and certainly before the consultation occurs. This practice not only avoids unpleasant surprises (possibly for both of you) at the end of the consultation but also enables you to explain your telephone screening procedure: "The reason I'm sort of cross-examining you on the phone is because there's a fee for a consultation, and I wouldn't want you to come in and spend that money if I could tell right away that there's nothing I could do for you." Nevertheless, if you include topics such as negotiating advice in your consultations, you might tell the prospective client that legal leverage is only one kind of leverage, and that you may be able to help him or her identify other ways of maximizing severance, avoiding termination, or negotiating a better employment contract.

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POSITION WANTED

Tamika Sanders is a May 2001 Fordham graduate seeking employment. She has taken numerous employment law classes, interned at the EEOC, and worked at both plaintiff and defense side employment law firms. Please contact her at *tnsanders@aol.com* or 718 239-9220 with information regarding any available positions.

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