NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 5 December 2002 Jonathan Ben-Asher, Editor

Filings Trials and Settlements

Each issue, we discuss cases which NELA/New York members have started, tried or settled. If you have a case you would like your colleagues to know about, please send a description of it to Jonathan Ben-Asher at *jb-a@bmbf.com.* Please include a description of the relevant (and colorful) facts, the court and case number, opposing counsel, and anything you think is particularly interesting about the matter.

In our last issue, we briefly noted the $1.2 million settlement obtained by Mary Dorman and Coleen Meenan in **Baratto v. City of New York**, in which the plaintiff police officer was subjected for years to vicious harassment based on the perception that he was gay. Some more about the case:

Mr. Baratto was subjected to almost daily harassment by fellow officers in his precinct, often in the presence of superior officers. The harassment included a nightly ritual referred to as "The Hunt," in which other officers beat their night sticks on the lockers, stalking Mr. Baratto, forcing him into his locker and leaving him there. It also included the posting of drawings and pornographic magazine cut-outs superimposed with his likeness throughout the precinct. Many of the posters made reference to Mr. Baratto being gay.

At one point plaintiff was handcuffed behind his back and hung on

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SONDA To Add Sexual Orientation to New York State Human Rights Law

by Lee F. Bantle

At long last, it appears that the Sexual Orientation Non-Discrimination Act (S. 720/ A. 1971) will become law in New York State later this year. The bill, known as SONDA, has passed the State Assembly annually for years. Governor Pataki has promised to sign the bill and to "do everything in his power" to see that it becomes law. There are enough votes in the State Senate to pass the legislation if it comes up for a vote, which for years it did not. But now, according to Senate Majority leader Joseph Bruno, it will be brought up for a vote in a post-election special session of the legislature.

In exchange for getting the Republican controlled Senate to bring the bill to a vote, the Empire State Pride Agenda, a statewide gay rights organization, agreed to endorse George Pataki rather than Carl McCall for Governor. (Which proves the old adage that legislation is like sausage —it's best not to see how it is made.)

Passage of the bill is a dramatic step forward for the rights of lesbians and gay men in New York and will provide NELA New York members with a valuable new arrow in their quivers.

New York joins twelve other states (California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin), the District of Columbia, and numerous municipalities that have adopted such legislation.

SONDA does not create a new statute, but simply amends the New York Human Rights law to insert "sexual orientation" after "national origin" and before "sex" in every place where those terms appear. Thus, sexual orientation would be treated as any other protected category in employment litigation under state law. An employee alleging discrimination based on sexual orientation will bear the same burdens and have available the same remedies as an employee alleging discrimination based on any other protected category.

The proposed legislation amends the definitions section of the Executive Law (§ 292) to add a new subdivision 27 which reads: "The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law."

In addition to prohibiting sexual orientation discrimination in employment, SONDA amends New York State law to prohibit sexual orientation discrimination in training programs, public accommodations, housing, credit and education.

According to a Zogby poll released in 1999, 77% of New Yorkers would either be more likely to support, or would not care, if a political candidate supported SONDA. That strong level of public support apparently led to the agreement by Republicans to pass the bill. Federal legislation to prohibit sexual orientation discrimination in employment ("ENDA") is also pending, but is not close to becoming law at present.

In addition to SONDA (and until it is passed), there are other avenues to explore if a potential client comes to you with a sexual orientation claim. You will want to

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The NELA/NY
Calendar of Events

December 4 • 6:30 pm
NELA Nite
Raff & Becker
59 John Street - 6th floor

December 11 • 6:00 pm
NELA/NY Board of Directors Meeting & Elections
1501 Broadway - 8th floor

December 18 • 6:30
NELA/NY Annual Holiday Party
Malika Restaurant
210 East 43rd Street
(between 2nd and 3rd Avenues)
$25 includes dinner and cash bar

January 8 and 9, 2003
NELA/NY - Touro Law School Conference
Touro Law Center
300 Nassau Road
Huntington, N.Y.
Look for brochure

February 5, 2003 • 6:00 p.m.
NELA/NY Board of Directors meeting
1501 Broadway - 8th floor

February 26, 2003 • 6:30 p.m.
NELA Nite
Lieff Cabraser Heimann & Bernstein
780 Third Avenue

March 7–8, 2003
Protecting Employee Rights Under the FLSA, FMLA and the Equal Pay Act
Sponsored by NELA National
Crowne Plaza Hotel Union Square
San Francisco, CA

March 19, 2003 • 6:30 pm
NELA Nite
Raff & Becker
59 John Street - 6th floor

April 2, 2003 • 6:30 p.m.
NELA Nite
Lieff Cabraser Heimann & Bernstein
780 Third Avenue

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

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

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

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

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

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

A Word from Your Publisher

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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EEOC Opens New Offices

Fourteen months after its New York office, and every piece of paper in it, was destroyed in the September 11th attacks, the EEOC New York District Office has opened its new quarters downtown. The new offices are at 33 Whitehall Street, a few blocks from the tip of southern Manhattan.

The EEOC's old office at 7 World Trade Center was obliterated when that building collapsed on September 11. Although all the employees escaped, all the agency's files were lost, with only a national computer database of charges remaining.

For the last year, the EEOC worked out of extremely cramped quarters in Newark, and then in temporary offices on Varick Street. Many charges of discrimination were transferred to other EEOC offices, as the agency tried to reconstruct files for thousands of cases.

The new location was dedicated in an opening ceremony on November 15, featuring, among others, EEOC Chair Cari Dominguez, New York District Director Spencer Lewis, Judge Denny Chin, Commissioners Paul Miller and Leslie Silverman, and Regional Attorney Katherine Bissell.

The EEOC's new address is 33 Whitehall Street, 5th floor, New York, N.Y. 10004. Its new phone number is 212 336-3620. The new fax numbers are:

General fax: 212 336-3625
Mail room fax: 212 336-3621
Legal fax: 212 336-3623
Hearings fax: 212 336-3624
Enforcement fax: 212 336-3790
Mediation fax: 212 336-3633

During the ceremony, the EEOC announced that it has settled a class action brought on behalf of hundreds of older terminated employees of the F.W. Woolworth Company, who were fired during layoffs between 1995 and 1997. The defendant, Foot Locker Specialty Inc., Woolworth's parent company, agreed to pay $3.5 million in back pay and liquidated damages to 678 former Woolworth employees. In the litigation the EEOC charged that Woolworth selected older employees for termination out of proportion to their presence in the work force, and engaged in a nationwide pattern of discrimination against older employees. **EEOC v. Foot Locker Specialty, Inc.**, 99 Civ. 4758 (S.D.N.Y.)

You've Got A Friend

It can be kind of lonely being a plaintiffs employment lawyer. Fear not. NELA/NY's Listserv gives you a wealth of experienced colleagues who can help you fight the good fight.

If you need a question answered immediately, want to learn about a new adversary, need an expert or mediator, have a new client and don't know where to start – just post your question on the Listserv. The Listerv is NELANY's internet bulletin board for the sharing of information and advice, and it is growing more and more popular. You would be amazed at the variety of employment-law topics discussed and the speed and depth of responses to members' questions.

For example, let's say you need to know whether an employer's failure to pay your client's bonus violated some law, somehow, somewhere. (Please say yes, oh Lord.) A question on the Listserv will bring you, in a few minutes, a response from a NELA member about the New York Labor Law. And another with an ERISA perspective. And a third with advice on a contract-based claim. You're likely to get case cites and advice from colleagues who've handled similar cases. And all you need to do is check your e-mail. You might as well be working in one of those white shoe law firms, with a bevy of lawyers working alongside you.

It's easy to join. All you have to do is e-mail Shelley (*nelany@aol.com*) and ask her to register you. It only takes a few minutes and you'll be happy you did.

Board Elections

The Executive Board of NELA/NY will meet and elect its members for the year 2003 on December 11, 2002 at 6:00 p.m.

All members have been notified of the meeting and were encouraged to submit nominations for candidates. Elections to the Board are by majority vote of the current Board. Board members serve for a calendar year. No Board member may serve for more than five consecutive terms.

NELA members are welcome to attend this and all other meetings of the Executive Board.

NELA Member Discounts

Have you been taking advantage of our discounted offers for court reporting and appellate printing? The companies below offer significantly reduced prices to NELA members, and NELA/NY receives ten cents per page.

- Bee Court Reporting Agency
  (516) 485-2222
- Veritext Court Reporting
  (212) 267-6868
- Dick Bailey Services, Inc.
  (718) 522-4024
- Printinghouse Press
  (212) 719-0990

Condolences

We send our sympathies to long time NELA member Don Sapir, whose mother, Rena Sapir, passed away on September 27.

NELA/NY's By-laws

As a member of NELA/New York, you may be wondering what we are and how did we get here (to paraphrase David Byrne.) To answer some of those questions, here are NELA/New York's By-laws. The By-laws, originally adopted in 1992, were amended in December, 2001 to mandate "term limits" for members of the Board of Directors.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK, INC.

BY- LAWS

ARTICLE I. NAME

The name of this organization, formerly known as the Plaintiff Employment Lawyers Association of New York, shall be the National Employment Lawyers Association/New York, Inc. ("NELA/NY").

ARTICLE II. STATEMENT OF PURPOSE

NELA/NY's purpose is to promote the interests of employees and to assist the lawyers who represent them.

ARTICLE III. MEMBERSHIP

Section 1.Classes of membership.

(a) Regular members: Any member of the bar in private or public interest practice in the New York State who subscribes to NELA/NY's purpose and who certifies that more than 50% of his or her employment-related legal representation is on behalf of employees. Only regular members in good standing may vote or be on the Board.

(b) Associate members: Any other member of the bar of any state or country.

(c) Law students and paraprofessionals: May not be members but may be affiliated.

Section 2. Membership status.

The Board shall establish dues for each class of membership and shall determine the appropriate class of membership, if any, for each applicant or member.

Section 3. Termination or suspension of membership.

The Board may expel, suspend, or censure any member for failure to meet membership requirements or for just cause.

ARTICLE IV. AFFILIATION

Section 1. NELA Affiliation.

NELA/NY is an affiliate of the National Employment Lawyers Association ("NELA") and shall take all reasonable steps to be and remain an affiliate in good standing of NELA.

Section 2. Cooperation.

NELA/NY will encourage but not require members of NELA/NY to be members of NELA, and NELA/NY will generally use best efforts to cooperate with NELA in developing and promoting NELA's programs, activities, and objectives.

Section 3. Termination.

The affiliation with NELA may be terminated at any time by two-thirds vote of the Board. Upon termination of affiliation, NELA/NY would cease use of NELA's name or logo.

ARTICLE V. EXECUTIVE BOARD

Section 1. Authority.

The Executive Board ("the Board") shall be the governing body of NELA/NY and shall control and formulate policies of NELA/NY and direct to its affairs through NELA/NY's officers and committees. The Board shall do all things necessary and proper to accomplish the purposes of NELA/NY and may delegate any of its functions to any officers and Board members.

Section 2. Composition.

The Board shall be composed of the officers of NELA/NY and up to nine additional members elected by the Board.

Section 3. Election.

Board terms shall commence on the January 1st immediately after the annual meeting and shall continue for one year. If filled, any interim vacancy shall be filled by majority vote.

Section 4. Qualifications.

Each member of the Board shall be a regular member of NELA/NY in good standing.

Section 5. Meetings.

The Board shall meet at least once a year. Its annual meeting shall be held in November or December. Meetings may be called by the President, by any three officers, or by any six members of the Board. The quorum for any meeting shall be a majority of the Board. Such meetings shall be chaired by the President. The Board may act without a meeting by written vote of a majority of its members. No proxy voting is permitted.

Section 6. Nominations.

(a) At least 60 days before the annual meeting, the President shall solicit, by mailing to the general membership, nominations for officers and board members; self nominations shall be permitted.

(b) At least 30 days before the annual meeting, the nominations shall be mailed to the board.

(c) Additional nominations may be made from the floor at the annual meeting. Election shall be by a majority of the Board members present.

Section 7. Term Limits.

(a) No Board member may serve more than five consecutive one-year terms.

(b) The term limits under this Section 7 shall be phased in beginning as of January 1, 2001. For these purposes, service on the Board before January 1, 2001 shall not be counted. Effective with the Board terms that begin January 1, 2002, three members of the incumbent 2001 Board shall be ineligible for re-election. If not enough Board members volunteer for ineligibility, then the member(s) of the Board with the longest tenure on the Board shall be declared ineligible. This process shall contin-

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Avoiding Summary Judgment

by Janice Goodman

The standard for granting summary judgment in employment discrimination cases has long been subject not only to differing interpretations among different circuits, but also to differing interpretations by different panels within the same circuit, including the Second Circuit. The Supreme Court seemingly settled the conflicts in **Reeves v Sanderson Plumbing Products, Inc.**, 530 U.S. 133 (2000), which held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

As a result of **Reeves**, the question of what evidence is sufficient to raise an issue of fact as to pretext has become most critical. When relying on a **Reeves**-type of analysis, where the plaintiff has little or no direct evidence of discrimination aside from her prima facie case and evidence of pretext, it is essential that the court be urged to look at the entire record, and not allow defendants to balkanize the evidence thus obfuscating its weight. As the Third Circuit wrote, "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the whole scenario." **Abramson v William Patterson College of N.J.**, 260 F.3d 265, 276 (3d Cir. 2001), citing **Andrews v. City of Philadelphia**,__895 F.2d 1469, 1484 (3d Cir. 1990).

Prior to **Reeves**, the Second Circuit employed a pretext-plus analysis. **Fisher v. Vassar College**, 114 F.3d 1332 (2d Cir. 1997) (en banc). Soon after the decision in **Reeves**, the Second Circuit took a strong stand holding that **Reeves** did not change the law in this circuit. **James v. N.Y. Racing Assoc.**, 233 F.3d 149, 155 (2d Cir. 2000). More recently, however, the Second Circuit has softened slightly, denying summary judgment based on evidence of pretext. *See e.g.*, **Byrnie v. Town of Cromwell, Bd. of Educ.**, 243 F.3d 93 (2d Cir. 2001).

The general categories of evidence that the Second Circuit has found compelling reasons to reject summary judgment follow.

Divergent or Inconsistent Reasons: In **Byrnie v. Town of Cromwell, Bd. of Educ.**, 243 F.3d 93 (2d Cir. 2001), the plaintiff claimed that he was denied a position as a part-time high school art teacher because of his age and gender. At the State Division of Human Rights, defendant gave two reasons for plaintiff's termination. After discovery belied one of these reasons, defendant presented yet another different reason in its summary judgment papers. In denying defendant's motion, the court found that defendant's "dual explanations" for the termination, in combination with other factors, raised a question of fact regarding pretext. *Id.* at 106-07; *see also*, **Abramson**, 260 F.3d at 284 ("If a plaintiff demonstrates that the reasons given for her termination did not remain consistent, beginning at the time they were proffered and continuing throughout the proceedings, this may be viewed as evidence tending to show pretext . . ."); **Dennis v. Columbia Colleton Medical Center, Inc.**, 290 F.3d 639, 646 (4th Cir. 2002) ("The fact that an employer has offered inconsistent post-hoc explanations for its [denial of promotion] is probative of pretext."); **EEOC v. Sears Roebuck and Co.**, 243 F.3d 846, 852-53 (4th Cir. 2001) ("Indeed, the fact that [defendant] has offered different justifications at different times for its failure to hire [plaintiff] is, in and of itself, probative of pretext.") (collecting cases including **EEOC v. Ethan Allen, Inc.**, 44 F.3d 116, 120 (2d Cir. 1994)).

Timing of Defendant's Explanations: Where the timing of an employer's explanation is suspect, a court may allow the factfinder to infer that the explanation is untrue. In **Windham v. Time Warner, Inc.**, 275 F.3d 179 (2d Cir. 2001) the court denied defendant's motion for summary judgment where plaintiff's supervisor first articulated her reasons in her summary judgment affidavit, not in her contemporaneous memoranda or in defendant's EEOC position statement. See also, **Sears Roebuck and Co.**, 243 F.3d at 853 ("a fact finder could infer from the late appearance of [defendant's] current justification that it is a post-hoc rationale, not a legitimate explanation for [defendant's] decision not to hire [plaintiff].")

Discriminatory Remarks: Statements that can be construed as evidencing discriminatory animus are compelling evidence in support of plaintiff's claim of pretext. Even if the comments do not pertain directly to the decision in question, sometimes called "stray remarks," they may cast light on the decisionmaker's intent and help a plaintiff to raise an issue of fact as to pretext. **Evans v. City of Bishop**, 238 F.3d 586, 591-92 (5th Cir. 2000) (holding that after **Reeves**, remarks should not be considered "stray remarks" because "any evidence that could shed light on an employer's true motives must be considered.") Since **Reeves**, the Second Circuit has usually considered evidence of discriminatory remarks in denying employers' motions for summary judgment. *See*, **Lee v. Am. Int'l Group, Inc.**, 2002 U.S. App. LEXIS 5975, 01- 7354 (2d Cir. April 3, 2002); **Holtz v. Rockefeller & Co., Inc.**, 258 F.3d 62 (2d Cir. 2001); **Raniola v. Bratton**, 243 F.3d 610 (2d Cir. 2001).

Statistical Evidence: The Second Circuit also considers statistical evidence in determining whether plaintiff has raised a genuine issue of fact as to pretext. Even where the sample pool is too small for a sophisticated statistical analysis, or where the results are not statistically significant, numerical evidence of a workforce imbalance, combined with other evidence of pretext, can help convince the court to deny a motion for summary judgment. **Luciano v. Olsten Corp.**, 110 F. 3d 210 (2d Cir. 1997). In **Windham v. Time Warner, Inc.**, 275 F.3d 179 (2d Cir. 2001), the court held that evidence that defendant's explanation was false, coupled with the fact that three of the four African-Americans in the

See SUMMARY JUDGMENT, next page

The author gratefully acknowledges the assistance of Justin Swartz, Esq. on this paper.

SUMMARY JUDGEMENT, from page 5

department were terminated, "brings [plaintiff] within the ambit of cases where plaintiff's prima facie case, together with defendant's lack of credibility, could allow a reasonable juror to infer the defendant's proffered reason is pretextual." **Windham**, 275 F.3d at 189. *See also* **Zimmermann v. Assoc. First Capital Corp.**, 251 F.3d 376, 382 (2d Cir. 2001) (affirming judgment on jury verdict for plaintiff where employer endeavored to terminate two of the three women in plaintiff's position); **Cicero v. Borg-Warner Automotive, Inc.**, 280 F.3d 579, 593 (6th Cir. 2002) ("even a small statistical sample, though not as probative as it might otherwise be, can nevertheless serve as circumstantial evidence making discrimination more likely.")

Evidence That The Employer Failed To Take Action Against Other Employees Whose Conduct Was Similar to Plaintiff's: When an employer gives a specific reason for an adverse employment action, the veracity of the reason can be called into question by pointing to other employees who engaged in similar conduct with no consequences. **Windham**, 275 F.3d at 190 (the court pointed to evidence that other employees were often late and made personal telephone calls); see also, **Lawson v. CSX Transp., Inc.**, 245 F.3d 916 (7th Cir. 2001); **Gordon v. United Airlines, Inc.**, 246 F.3d 878 (7th Cir. 2001).

Employer Deviates From its Usual Policies or Procedures: When the decision makers deviate from their own guidelines, they cast doubt on their motives. In **Windham**, 275 F.3d 179, the Second Circuit considered the fact that the decision-maker ignored her supervisor's instruction that all employees were to be considered for termination. *Id.* at 190. Likewise, in **Byrnie**, 243 F.3d 93, the Second Circuit relied on the fact that defendant allowed procedural irregularities, including relaxing the educational requirement and ignoring the fact that the successful candidate's application was incomplete, while not sufficient on their own to show pretext, allow a reasonable fact finder "to find that it does bear on the credibility of the employer which must finally be evaluated from the perspective of the entire record." *Id.* at 104.

No Contemporaneous Criticism or Documentation: In **Zimmermann**, 251 F.3d 376, defendant offered no negative evaluations or any other evidence of alleged poor performance, told plaintiff at her termination meeting that her termination had nothing to do with her performance, acknowledged that plaintiff's and her co-worker's performance records had been destroyed, and told plaintiff at the termination meeting that she was terminated for a poor relationship with a supervisor who had not spoken to plaintiff's supervisor about plaintiff before her termination. This was sufficient to support a jury verdict in plaintiff's favor. *See also* **Melendez-Arroyo v. Cutler-Hammer De P.R. Co., Inc.**, 273 F.3d 30, 34 (1st Cir. 2001) (no contemporaneous written criticism of plaintiff's work); **Hinson v. Clinch County**, 231 F.3d 821, 831 (11th Cir. 2000) (employer's complaints about plaintiff were not expressed prior to the suit); **Cicero**, 280 F.3d at 591-92 (no contemporaneous criticism of performance).

Good Performance Reviews: Good prior performance reviews can be strong evidence challenging the truth of an employer's explanation that poor performance was the basis for dismissal. *See* **Byrnie v. Town of Cromwell, Bd. of Educ.**, 243 F.3d 93 (2d Cir. 2001) (colleague wrote positive recommendation for plaintiff); **Cicero**, 280 F.3d at 590 (employer praised plaintiff's work and gave him performance based bonuses); **Gee v. Principi**, 289 F.3d 342, 348 (5th Cir. 2002) (noting that the decision makers' explanation was contradicted by the "glowing review" that plaintiff received).

NELA Member News

Congratulations and best wishes to

Bobby and Ashka Davis on their new son, Jakob Anton Davis.

Laura Dilimetin, who married **Adam Rubin** on November 2.

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ue until every incumbent 2001 Board member has left the Board for at least one year, at which point this Section 7(b) expires.

ARTICLE VI. OFFICERS

Section 1. Positions.

The officers shall be the President, two Vice-Presidents, the Secretary, and the Treasurer.

Section 2. Qualifications.

Each officer shall be a regular member of NELA/NY in good standing.

ARTICLE VII. COMMITTEES

Section 1. Standing Committees.

The Board may establish standing committees, such as Programs and Conferences and Legislation/Lobbying.

Section 2. Ad Hoc Committees.

The President or the Board may establish ad hoc committees.

Section 3. Membership.

Any NELA/NY member can be a member of a committee.

Section 4. Chairs.

The President of NELA/NY shall designate the chair of each committee, subject to approval of the Board. Only a regular member of NELA/NY in good standing may chair a standing committee.

ARTICLE VIII. AMENDMENT

These by-laws may be amended by (i) a referendum of postal ballots of the regular members of NELA/NY in good standing, in which two thirds of the valid returned ballots approve the amendment, or (ii) two-thirds vote of the Board members present at a Board meeting, provided notice of the meeting and of the proposed amendment is sent to the members of the Board at least thirty days before the meeting.

Board Succession

Ineligible For Reelection At End Of Year
Year 1 (2001): Lipman, Flamm, Schnell
Year 2 (2002): Sager, Outten, Fishel
Year 3 (2003): Rosen, Eisenberg, Pedowitz
Year 4 (2004): Zuchlewski, Clark
Year 5 (2005): Klein, Frumkin, Ben-Asher

Just Cause under Union Contracts and Employment Discrimination Litigation

by William Herbert

The recent Second Circuit decision in **Collins v. New York City Transit Authority**, __F.3d__, 2002 U.S. App. Lexis 19634 (September 20, 2002) highlights the procedural pitfalls connected with representing an employee in an employment discrimination case challenging disciplinary action that is also subject to a collective bargaining agreement. The decision also confirms the importance of NELA members in private practice working in alliance with union counsel when a contractual disciplinary case may impact a subsequent discrimination case.

In **Collins**, the Second Circuit affirmed the granting of summary judgment in favor a public employer in a Title VII case, concluding that an arbitration award upholding the plaintiff's termination has strong probative weight regarding the employer's alleged unlawful discriminatory motivation. The court concluded that the determination by the arbitration board, finding the plaintiff guilty of assaulting his supervisor and affirming the termination, made the plaintiff unable to demonstrate a prima facie case of discrimination.

In applying the holding of **Alexander v. Gardner-Denver Co**., 415 U.S. 36 (1974), the Second Circuit found that even though a negative arbitration award will not be given preclusive effect "a decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link" to demonstrate unlawful discrimination.

The court emphasized that to defeat a motion for summary judgment, in the face of an adverse arbitration award, the plaintiff must present either "strong evidence" demonstrating that the arbitration tribunal made a factual mistake or present evidence establishing that the tribunal was itself biased.

It is common for attorneys representing employers to describe the Supreme Court's decision in **Alexander v. Gardner-Denver** as granting employees "two bites at the apple." However, **Collins** suggests that an employee with protections against discipline in a collective bargaining agreement may be entitled to merely "one nibble at the apple." The lack of discovery and the relatively short duration of an arbitration hearing, along with the use of arbitrators who lack experience and training in the field of employment discrimination, make an arbitration concerning discipline a difficult venue to prove intentional discrimination.

The procedural predicament highlighted by the **Collins** decision flows from the overlap between the elements necessary to establish just cause discipline and the elements required to prove an employment discrimination case. Many collective bargaining agreements include a just cause provision, but few agreements define the standard. Nevertheless, it is well established that the burden of proof rests with the employer in a disciplinary arbitration to demonstrate that it had just cause to impose the penalty.

The classic definition of just cause was set forth in **Enterprise Wire Co**., 46 LA 359 (1996) by Arbitrator Carroll R. Daugherty. In his decision and award, Arbitrator Daugherty set forth seven tests which are necessary to establish just cause. See also, Koven & Smith, Just Cause The Seven Tests, Second Edition (BNA, 1992).

Among the seven tests is whether the employer applied its rules, orders and penalties in a non-discriminatory manner. Evidence regarding this test requires proof demonstrating that the employer engaged in disparate treatment of employees in applying its rules, orders and penalties. However, the just cause standard regarding disparate treatment does not require the union or grievant to prove before the disciplinary arbitrator that the difference of treatment was caused by an unlawful discriminatory motivation.

Although proof of discriminatory motivation is unnecessary under just cause, and is unlikely to be accepted by a disciplinary arbitrator, there are various factors which may lead a union advocate to try to prove unlawful motivation.

The primary factor is the strong preference of the grievant. Frequently, griev-

See JUST CAUSE, page 15

Willliam Herbst is Senior Associate Counsel CSEA, Local 1000, AFSCME, in Albany.

NELA Offers Discounted Long Term Care Insurance

NELA/NY offers a discount of 20% on Long-Term Care Insurance to its members, underwritten by John Hancock Life Insurance Company. The LTC policy is designed to help plan for future financial needs and protect against the high costs of long-term care. The policy will cover the cost of long-term care services provided in your home, in an adult assisted living facility, in a nursing home, or in an adult day care center. The policy is being offered to all eligible partners, owners, employees and retires and their spouses, parents, parents-in-law, step-parents, children, and step children between the ages of 18-84. (Eligible ages may vary by state.)

John Hancock's representative is Joseph Rogers. If you have any questions, you can reach him at (516) 328-7600, ext. 272, or (914) 669-8848. NELA/NY is receiving no consideration for facilitating this offering. By facilitating this offer, NELA/NY does not endorse this particular policy and NELA/NY makes no warranties or representations. The policy offered may nonetheless be a good starting point for you to consider and evaluate LTC coverage.

Anne's Squibs

by Anne Golden

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

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Further note: Of course, these squibs are by no means exhaustive, nor should you rely upon them as a substitute for doing your own research and actually reading the cases. Thanks to Linda Neilan, an associate at Outten & Golden LLP, and Lincoln Phillip, a student intern from CUNY Law School, for help in the preparation of these squibs.

AGE DISCRIMINATION

Pleading

See **Leiser v. Gerard Daniel & Co.**, discussed under "Summary Judgment."

ATTORNEYS' FEES

When two women agreed to a settlement pursuant to an offer of judgment in their sex discrimination case, they agreed to $37,500 each, plus reasonable attorneys' fees to be determined by the court. Judge Denny Chin (S.D.N.Y.), however, compared the amount they got to the $1.25 million they had told the defendants they might receive if the lawsuit was successful. Based on that discrepancy, he concluded that they had achieved only "limited success." The court noted that both parties apparently "recognized" after the deposition of one plaintiff "that plaintiffs were unlikely to prevail in this litigation." Although the court had no problem with the requested hourly rates of $375 and $300 for a partner with 14 years' experience and an associate with 10, the fee request of $191,048.33 was reduced to $54,723.93 based on the plaintiffs' "limited success." **Baird v. Boies, Schiller & Flexner**, —- F. Supp. 2d —-, 2002 WL 1988198 (S.D.N.Y. 8/28/02).

After a jury trial on a race and age discrimination claim, the court awarded fees to the prevailing plaintiff. The court (Peter K. Leisure, J., S.D.N.Y.) found that the plaintiff's attorney's rate of $200 was within the reasonable range for an attorney of his experience. The court rejected the attorney's attempt to bill his adversary $250 an hour, however, when he charged his client only $200 an hour. The court reduced the rate for associates' work from $175 to $150 after citing cases from 1997, 1999, and 2000 that gave associates $125 to $150. (The rate of $75 per hour for a paralegal was found reasonable.) After some more minor adjustments, the lodestar amount was $43,632.50. The court denied the request for a 25% upward adjustment but found that a downward adjustment was also inappropriate because "like most employment cases, this case was brought on several different grounds seemingly 'inextricably intertwined' with each other." With respect to damages, the court reduced the jury award of $1.5 million in compensatory damages because the ADEA does not provide for compensatory damages and the maximum under Title VII is $300,000. Because the jury had found that the defendant violated Title VII but not the ADEA, the court determined the amount of back pay and awarded the plaintiff $117,550 in back pay and interest. Noting that front pay is for the court to decide, the court also granted $118,540 in front pay and interest. **Vernon v. Port Authority of New York and New Jersey**, —- F. Supp. 2d —-, No. 95 Civ. 4594 (PKL), 2002 WL 1974055 (S.D.N.Y. 8/26/02).

CLASS ACTIONS

Class Certification

Judge Lewis A. Kaplan (S.D.N.Y.) certified a class of Latino and African American police officers who sued the New York City Police Department for discrimination in disciplinary treatment, hostile work environment and retaliation. The numerosity requirement was satisfied because there were thousands in the class. The court rejected the defendants' argument that the commonality requirement was not met because individual plaintiffs were discriminated against in different ways. The court found that the legal theories were common throughout the class regardless of the fact that the "discriminatory practices [were] manifest[ed] in myriad ways." The court rejected the same reasoning regarding the typicality requirement and found that none of the defendants' challenges to the adequacy of the class representatives sufficed to defeat certification. For example, the court stated that a hypothetical conflict preventing supervisory class members from adequately representing nonsupervisory class members was insufficient to defeat certification, and it could be resolved with the certification of a subclass later if necessary. Following **Robinson v. Metro-North Railroad**, 267 F.3d 147, 168 (2d Cir. 2001), the court certified the class under Rule 23(b)(2) because the injunctive and declaratory relief sought predominated over the monetary relief. **Latino Officers Association City of New York v. City of New York**, 209 F.R.D. 79, 2002 WL 1803738, No. 99 Civ. 9568 (LAK) (S.D.N.Y. 8/6/02).

Settlement

When a race discrimination nonpromotion case against Con Ed was settled, it had not yet been certified as a class action. Judge John Gleeson (E.D.N.Y.) adopted the technique of certifying the class for settlement purposes only, then approved the settlement. He also approved attorneys' fees and costs of almost $1,800,000 (12.9% of the total settlement), based upon the common fund (rather than lodestar) principle, which is used for fee awards in many class cases. The proposed incentive awards to the named plaintiffs, however, were greatly reduced from class counsel's proposals. NELA/NY member Dan Alterman, among others, represented the plaintiffs. **Sheppard v. Consolidated Edison Co.**, —- F. Supp. 2d —- (E.D.N.Y. 8/1/02).

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DISABILITY BENEFITS

An employee participant in a long-term disability benefit plan sued the plan under the Employee Retirement Income Security Act (ERISA), alleging that she was mentally disabled and that her untimely assertion of claims for benefits and administrative review resulted from her mental condition. The court (Denis R. Hurley, J., E.D.N.Y.) entered summary judgment for the plan, and the participant appealed. The court of appeals (Cardamone, J., joined by Leval and Sotomayor, JJ.) held that the fact that the plan had contracted with an insurer to make payments to beneficiaries did not preclude it from being a proper defendant in an action to recover benefits under 29 U.S.C.S. § 1132(a)(1)(B). The court also found that the untimely appeal for denial of benefits was properly preserved and not waived, and ordered an evidentiary hearing on the question of whether the insured's mental illness impaired counsel's efforts to seek review. Finally, the court ordered the district court to determine on remand whether the time limit was enforceable, since it was not mentioned in either the policy or the summary plan description. **Chapman v. ChoiceCare Long Island Term Disability Plan**, 288 F.3d 506, 2002 WL 825958 (2d Cir. 4/29/02).

DISABILITY DISCRIMINATION

Discriminatory Policy

It is rare that a company maintains a written policy that is discriminatory on its face. A trucking company did so, however, and applied it against a truck driver who had suffered compression fractures of two vertebrae when his seat collapsed under him on a run. He could no longer drive over-the-road and was told that he could not bid for a vacant job that he could do unless his doctor first released him to work in his original job, road driver, "without restrictions." The employer never offered him any accommodation but instead fired him for "unauthorized failure to return to work." The EEOC took jurisdiction and initiated litigation, and the truck driver intervened. The case was tried to Magistrate Judge Theodore H. Katz (S.D.N.Y.) without a jury. Judge Katz, in a 96-page opinion, found that the plaintiff had a disability because the major life activity of sitting was substantially impaired (following **Toyota Motor Mfg. v. Williams**, 534 U.S. 184 (2002)), that the employer had failed to reasonably accommodate his disability, and that the New York State Human Rights Law as well as the ADA had been violated. The plaintiff was awarded $156,867 in lost wages (plus prejudgment interest) and the company was ordered to adjust his pension contributions; punitive damages of $50,000 were also awarded. The total award was $250,742.66. The intervenor plaintiff was represented by NELA/NY member Anne Golden and the EEOC was represented by Nora Curtin. **EEOC and Walden v. Yellow Freight System**, ___ F. Supp. 2d ___, 2002 WL 31011859 (S.D.N.Y. 9/9/02).

Judicial Estoppel

A "greeter" for a department store who had suffered a back injury and could no longer stand all day alleged that he could still do the job, or certain other available jobs, with unspecified slight accommodation. The plaintiff had been receiving Social Security disability benefits, however, based upon a representation that he could do only sedentary work and could not stand for more than two hours a day. Judge Robert P. Patterson (S.D.N.Y.) found that this representation was fatally inconsistent with his allegation that he was qualified for the job of greeter or the coat checker and fitting room checker positions to which he alleged he should have been transferred, since all required standing and the latter required heavy lifting, which he also had told Social Security he could not do. Since the plaintiff had "not raised a genuine issue as to the material fact that he has been unable to perform [these duties], with or without reasonable accommodation," the store's motion for summary judgment was granted. **Hidalgo v. Bloomingdale's**, —- F. Supp. 2d —-, N.Y.L.J. 7/29/02, p. 32, col. 6 (S.D.N.Y. 7/9/02).

Reasonable Accommodation

An administrative aide with psychiatric problems went on several medical leaves and was discharged when they totaled 12 weeks and she was not ready to return. On her behalf, the employee assistance program requested six more weeks of leave, but the employer fired her. She sued pursuant to the FMLA and the ADA and the New York State and City Human Rights Laws. It was important to the plaintiff and her psychiatrist that she be in an environment with "limited stress," which meant reporting to a different supervisor if and when she returned. Judge Gerard E. Lynch (S.D.N.Y.) granted the employer's summary judgment motion with respect to the FMLA because the employer's psychiatrist felt she would not be ready to return by the end of the 12 weeks and the employer was entitled to rely on that. He also granted the branch of the motion dealing with the ADA and the proposed transfer, since the plaintiff had not identified any vacant position into which she could move. The motion was denied, however, with respect to an extended leave. The court noted that the 12-week limit under the FMLA did not apply to the ADA, under which a longer leave might still be a reasonable accommodation. NELA/NY member James A. Brown represented the plaintiff. **Rogers v. New York University**, —- F. Supp. 2d —-, 2002 WL 2031567 (S.D.N.Y. 9/4/02).

DISCOVERY

In a lawsuit alleging employment discrimination based on race, national origin, and age, the plaintiff requested the names of successful applicants for the positions for which he had interviewed. He argued that the defendant's prior production of documents that grouped the applicants into the categories of Black, White, Asian or Pacific Islander, and Hispanic did not assist him in determining which applicants' national origins could be traced to the Indian sub-continent. Because the information sought would likely lead to the discovery of evidence of hired applicants from the Indian sub-continent, the court (Ronald L. Ellis, Mag. J., S.D.N.Y.) found that the information was relevant. The court stated that the defendant's speculative concerns about privacy did not warrant a reduction in the broad scope of Rule 26(b). The court noted, however, that "surnames are not a foolproof method of identifying national origin." **Tanvir v. New York State Banking Dep't**, —- F. Supp. 2d —-, No. 01 Civ. 01444 (LAK) (RLE), 2002 WL 1000963 (S.D.N.Y. 5/16/02).

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EEOC

Morgan Stanley has received a long-overdue spanking for the wildly illegal "bury the bodies" provisions in its settlement/severance agreements and its so-called Code of Conduct. Those agreements required employees to "not offer assistance or testimony in any action against [Morgan Stanley] ... unless ordered to ... and then only after you have given [Morgan Stanley in-house counsel] written notice ... [and] a copy of all legal papers and documents ... [and requires them to] meet with [in-house counsel] in advance of giving such testimony or information." The company's "Code of Conduct" required employees to notify their supervisors and in-house counsel upon receiving — and before responding to — any subpoena, inquiry, or request by any government agency or attorney. Chief Magistrate Judge Ronald L. Ellis found these restrictions void as "violat[ing] public policy" because they "chill[] employee communications with the EEOC." The opinion "adopt[ed] the position of **EEOC v. Astra, Inc.**, 94 F.3d 738 (1st Cir. 1996)," the leading case forbidding settlement agreements that deter cooperation with EEOC investigations. NELA/NY members Wayne N. Outten, Parisis G. Filippatos, Scott Moss, and Piper Hoffman represent Plaintiff-Intervenor. **EEOC and Allison Schieffelin v. Morgan Stanley**, No. 01 Civ. 8421 (RMB) (RLE), 2002 WL 31108179 (S.D.N.Y. 9/20/02).

FIRST AMENDMENT

Racist Speech

A police officer was fired after anonymously distributing racist and bigoted materials. The Second Circuit Court of Appeals (opinion by Leval, J., joined by McMahon, D.J.) affirmed the district court's decision (Buchwald, J., S.D.N.Y.) granting summary judgment for the defendants on the police officer's Section 1983 action. After outlining the importance of the community's respect for and trust in of the police department, the court of appeals stated that the First Amendment does not require the police department to continue to employ an officer who disseminates racist messages that harm the department's ability to perform its mission. The court rejected the officer's argument that these considerations should not apply to him because he disseminated the comments anonymously. The court found that he was not fired for his opinions but rather for violating a department regulation prohibiting dissemination of defamatory materials through the mail and for risking the effectiveness of the department's mission. Judge McMahon filed a concurring opinion finding that the officer engaged in private speech. Judge Sotomayor dissented. She thought that the **Pickering** balancing test favored the plaintiff, who was a low-level person doing computer work. **Pappas v. Giuliani**, 290 F.3d 143 (2d Cir. 5/13/02).

State Actor

The former Director of the Police Athletic League ("PAL") brought a claim under Section 1983 for violation of his free speech rights. He alleged that he was fired for refusing to submit false time sheets and participate in a double-billing scheme. In denying the defendants' motion to dismiss, the court (George B. Daniels, J., S.D.N.Y.) considered PAL's certificate of incorporation and the police department's control of PAL as well as the plaintiff's *pro se* status. The court found that there could be a nexus between PAL and the police department, thereby rendering PAL a state actor. The court dismissed the plaintiff's claim of wrongful termination in violation of public policy, however, because it did not fall within the narrow exception to the at-will rule. The court also dismissed the plaintiff's claim of breach of contract, rejecting his argument that an implied contract was formed when the director of employment stated that "[i]t's hard to get fired from the Police Athletic League unless you do something really bad." **Bal v. Police Athletic League, Inc.**, —– F. Supp. 2d —–, No. 98 Civ. 9115 (GBD), 2002 WL 1001052 (S.D.N.Y. 3/16/02).

Timeliness

When a sexually harassed employee sued a county agency, the court (Platt, J., E.D.N.Y.) denied the defendants' motion to dismiss the Title VII claims because the plaintiff had received a right to sue letter only 37 days after filing her charge. The court reasoned that the EEOC regulation permitting early right-to sue letters comports with 42 U.S.C. § 2000e-5(f)(1), and further, that dismissing the case would create an unsound policy and would be inequitable. The court then held that the plaintiff had established a prima facie case of First Amendment retaliation. The court stated that possible complaints about sexual harassment of other employees as well as the plaintiff "would concern system-wide or pervasive misconduct, and would qualify [plaintiff's] speech as a matter of public concern." The plaintiff established a colorable "chilling" claim when she alleged that the harasser responded to her complaints by saying that he could do whatever he wanted to her because he had all the judges in the county in his pocket. Because the court found that plaintiff stated a Title VII hostile work environment claim, she could also pursue an equal protection sexual harassment claim. She could show a custom or policy because the harassment was "pervasive and widespread," showing that the employer condoned it, because failure to train creates deliberate indifference, and because the harasser's position on the Board of Directors rendered his actions a custom or policy. **McGrath v. Nassau Health Care Corp.**, —- F. Supp. 2d ——, No. 00 Civ. 6454 (TCP), 2002 WL 1769947 (E.D.N.Y. 7/29/02).

NATIONAL ORIGIN DISCRIMINATION

A nurse formerly employed by the New York City Department of Health was an African-American female of Jamaican origin. She sued, alleging that she was subjected to mockery, repeated transfers, assignments to inappropriate tasks, denial of training opportunities, and accusations of falsehoods which she asserted constituted national origin discrimination. The court (Swain, J., S.D.N.Y.) granted a motion to dismiss her Title VII claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction because the nurse's administrative charge, a prerequisite to her claim, was based on skin color rather than national origin. Her state and local claims alleging national origin discrimination survived the motion to dismiss, however, because her administrative charge alleged different facts, but her claims based on disability were dismissed. The court denied the motion to dismiss her ADA action because the continuing vio-

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lation exception applied and because her complaint had put the defendants on notice of her impairments and the discriminatory conduct. **Benjamin v. New York City Department of Health,** —- F. Supp. 2d —-, 2002 WL 485731 (S.D.N.Y. 3/29/02).

PROCEDURE

Jurisdiction

Judge Gerard E. Lynch (S.D.N.Y.) denied an employer's motion to dismiss an ADA claim brought by a non-citizen employee of IBM who had been assigned to Chile for four years before he was terminated. The court examined the language of the 1991 amendments to the ADA that distinguished between U.S. citizens working for United States employers abroad, who are statutorily protected, and non-U.S. citizens working for U.S. employers abroad, who are not statutorily protected. Although the plaintiff was not a U.S. citizen, the court found that there were legitimate questions about whether he was employed there or employed in the United States and "merely temporarily deployed to Chile." The court rejected IBM's suggestion that the question could be answered by "asserting that the ADA does not 'apply extraterritorially' to discrimination against non-U.S. citizens." The court analogized the situation to an employee on a brief business trip abroad who is protected by the ADA. In addition, the court found that the plaintiff had stated a claim under New York Human Rights law because he alleged that (1) he was employed in New York and the discriminatory termination took place there; and (2) he was a resident of New York at the time of the discrimination. **Torrico v. Int'l Business Machines Corp.**, 213 F. Supp. 2d 390, No. 01 Civ. 841 (GEL), 2002 WL 1770775 (S.D.N.Y. 7/31/02).

Timeliness

A former employee brought an age discrimination and retaliation action against his former employer. The EEOC issued a notice of right to sue, noting however that the New York State Division if Human Rights had not established violations of the state statute. The employer moved to dismiss. The district court (Constance Baker Motley, J., S.D.N.Y.) held that: (1) the requirement that a former employee commence action within 90 days of receipt of her right to sue notice was not tolled, and (2) the EEOC's purportedly erroneous reliance on state determinations when issuing its own determination did not render its own notice defective or provide grounds to toll the 90-day limitations period. The employee pointed to a letter from the EEOC purportedly rescinding its right-to-sue notice because of an administrative error. The court held, however, that under 29 C.F.R. §§ 1601.19(b) and 1614.407, the limitations period could only toll during reconsideration in Title VII and ADA cases involving private litigants, and Title VII, ADA, and ADEA cases involving federal employees. The EEOC had no regulatory authority to reconsider or toll the limitations period in ADEA claims against private employers, and no other equitable exceptions applied. The court declined to exercise jurisdiction over any pendent state or city law claims that remained after the dismissal of her ADEA claims. NELA/NY member Daniel E. Clifton represented the plalintiff. **Vollinger v. Merrill Lynch & Co.**, 198 F. Supp. 2d 433, 2002 WL 530982 (S.D.N.Y. 4/9/02).

RETALIATION

First Amendment

A female police recruit who was denied the opportunity to be retested on part of her course requirements, expressly because she had filed a charge of discrimination against the Central New York Police Academy which gave the course, won partial summary judgment from Chief Judge Frederick J. Scullin (N.D.N.Y.). The court found that even though the Department of Criminal Justice Services knew that the Academy was retaliating against the plaintiff in violation of her First Amendment right to petition the government for redress of grievances, it refused to grant her request for an extension of time to complete the basic course and then refused to certify her as a police officer. The court found that the Department was responsible under **Monell** for the plaintiff's constitutional injury because it was deliberately indifferent to her constitutional rights, and ordered the Department to issue her a certificate of completion of the basic course. **Lathrop v. Onondaga County**, —- F. Supp. 2d —-, 2002 WL 31041820 (N.D.N.Y. 9/12/02).

SANCTIONS

A woman sued her former employer, the New York State Office of Mental Health, alleging sex discrimination, sexual harassment, and constructive discharge. Although she signed authorizations allowing the defendants to obtain her medical records, she refused to allow them to depose her therapists. After Magistrate Judge Kevin N. Fox (S.D.N.Y.) recommended that the case be dismissed, the plaintiff argued that discovery of her mental condition was inappropriate because she only asserted a "garden variety claim of emotional distress" and did not raise it in her pleadings. The district court (John S. Martin, J.) found that her pleadings constituted more than "garden variety" emotional distress. The court held that the magistrate judge had properly dismissed the case after the plaintiff failed to provide discovery after being advised of the possible sanctions. **Montgomery v. New York State Office of Mental Health**, —- F. Supp. 2d —-, No. 00 Civ. 4189 (JSM), 2002 WL 500357 (S.D.N.Y. 4/3/02).

SEXUAL HARASSMENT

Justice Rivera (Sup. Ct. Kings Cty.) was not persuaded by a restaurant's arguments that a series of verbal and physical actions against a waitress did not amount to sexual harassment. She was subjected to sexual comments and unwelcome touching, then to criticism of her work and reduced hours after she complained and filed a charge with the EEOC. She resigned and alleged constructive discharge. Justice Robert Gigante of the same court had previously dismissed the action against two of the defendants, one because of improper service of process and the other because he found that the alleged acts of that defendant were not severe or pervasive enough to constitute hostile environment sexual harassment. Justice Rivera, however, agreed with the plaintiff that the "collective conduct of [restaurant] employees, including the deliberate and unwanted touching of [the plaintiff's] breasts and buttocks on repeated occasions, which clearly constitute sexual assaults, is more than sufficient to create a sexually hostile work environment." The retaliation claim also

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survived. **Socci v. China Grill, Inc.**, —- N.Y.S.2d —-, N.Y.L.J. 8/15/02, p. 22, col. 1 (Sup. Ct. Kings Cty. approx. 8/5/02).

A man who was fired after charges of sexual harassment were filed against him by a former co-worker sued in state court for sex discrimination and retaliation. The plaintiff's allegation that his supervisor accepted his co-workers' version of events, rejected his version, and terminated him were sufficient to support a claim of disparate treatment. The plaintiff's proffer of statistics that males make up the majority of the accused in sexual harassment cases, however, failed to support a clam of disparate impact discrimination. **Iglesias v. Citibank**, —- N.Y.S.2d —- (Ct. Claims 5/24/02).

SEXUAL ORIENTATION DISCRIMINATION

After a trial that ended in a hung jury, an employer moved for judgment as a matter of law, arguing that no reasonable jury could find in favor of the employee. Judge Richard M. Berman (S.D.N.Y.) denied the motion. The employee was in charge of regional sales, and the employer claimed that he had been fired because of poor sales performance in his region. The employee had shown that his supervisor had made comments disparaging gays and "that other regional sales managers – including some who later became more senior executives – also failed to meet sales goals, but were not fired," and that the plaintiff had received positive feedback. The court quoted from **Reeves v. Sanderson Plumbing Products, Inc.**: "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." NELA/NY member Lee F. Bantle represents the plaintiff. **Lane v. Collins & Aikman Floor Coverings, Inc.**, —- F. Supp. 2d —-, No. 00 Civ. 3241 (RMB) (S.D.N.Y. 8/9/02).

SUMMARY JUDGMENT

Breach of Contract / ADEA

An employee with 25 years' experience rejected employment at his company's new headquarters in Pennsylvania, where he would have received a significant reduction in salary. He sued, alleging breach of contract (for failure to give him 90 days' notice of the company's intent not to renew his contract), age discrimination, and unpaid commissions under New York State labor law. Judge Denise L. Cote (S.D.N.Y.) held that the defendants did not breach the contract because the plaintiff received severance payments in accordance with the contract. Further, the court found no evidence to support his claim that his reduction in salary was motivated by his age, even though his salary was reduced by a greater percentage than the salary of any other salesperson from New York. **Leiser v. Gerard Daniel & Co.**, —- F. Supp. 2d —-, No. 01 Civ. 2932 (DLC), 2002 WL 1285558 (S.D.N.Y. 6/11/02).

Age Discrimination

A former bank vice president alleged that the bank and his last supervisor terminated his employment in violation of the ADEA and the New York State and City Human Rights Laws. He also alleged intentional infliction of emotional distress. The employee based his claim of discriminatory termination on two comments by his supervisor: that she wanted an "energetic, young buck" to fill a position the employee wanted, and that she wanted a "young, energetic, fresh approach in her sales managers." The court held that although the employee had made out a prima facie case of age discrimination, the defendants met their burden of articulating a legitimate non-discriminatory reason for the termination. He had been made redundant by a merger, and his supervisor's request for review and approval of the employee's discontinuance was couched in terms of her inability to find him assignments and her belief that other personnel had absorbed most of his responsibilities. Further, the employee offered no evidence to raise an issue of fact that the employee's choice of assignments for him was discriminatory. Finally, there was no evidence of outrageous behavior sufficient to support the emotional distress claim. **Buompane v. Citibank, N.A.**, —- F. Supp. 2d —-, 2002 WL 603036 (S.D.N.Y. 4/18/02)

Disability Discrimination

A former grocery store employee sued his ex-employer and his union alleging violations of the ADA, the LMRA, and the New York State and City Human Rights Law. The employee had injured his back and filed a Worker's Compensation claim asserting inability to work. When he sought to return to work, he was asked for medical documentation specifying what jobs he could do and what accommodations he needed, but he never produced the documentation and was subsequently terminated. The district court (Robert L. Carter, J., S.D.N.Y.) held that the plaintiff had not established a *prima facie* case under the ADA. His ADA claim failed because the record showed that he was able to perform a variety of jobs and thus was not substantially limited in the major life activity of working. As to the ADA claims against the union, the court found that the plain-

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tiff had failed to exhaust his administrative remedies, and his LMRA claim was time barred; summary judgment was granted. **Glozman v. Retail, Wholesale & Chain Store Food Employees Union, Local 338**, 204 F. Supp. 2d 615, 2002 WL 727020 (S.D.N.Y. 4/23/02).

National Origin

Two Hispanic employees, an assistant conductor and an engineer, contended that they were subjected to a hostile work environment based on angry reprimands by a supervisor. They also asserted that one of them was terminated and the other was denied promotions in retaliation for complaining of discrimination. The court (Harold Baer, J.) found that no hostile work environment was shown, since the encounters with the supervisor were isolated, not severe or pervasive, and did not include any racial overtones. However, the assistant conductor's termination shortly after a supervisor was reprimanded based on her discrimination complaints permitted an inference of retaliation. The failure to provide considerations in the job-qualifying process that were provided to other, non-Hispanic employees constituted sufficient evidence that the conductor's termination for failure to qualify was a pretext for discrimination. Further, while the engineer failed to show that his lack of promotion was retaliatory, the subjective and inconsistent aspects of the employer's promotion process, as well as statistical evidence of racial disparities in promotions, sufficed to support his claim of discriminatory failure to promote. NELA/NY members Daniel Alterman and Nina

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a coat hook in the presence of a sergeant. He was also handcuffed to a barbell in a kneeling position on the floor in the precinct gym.

The harassment culminated in an article in a magazine circulated among all retired and current police officers and their families. The article implied that Mr. Baratto was having a sexual relationship with another male police officer.

Mr. Baratto suffered an emotional breakdown, and became unable to get out of bed or leave his home. He almost committed suicide. He was placed on restricted duty, diagnosed with major depression and PTSD, and never returned to work. He received the minimal disability pension, which he is currently challenging in state court in a second lawsuit. (Supreme Court, New York County, No. 98/119450).

Robert N. Felix and **Joan Stern Kiok** have settled a class action against the City of New York, under the Fair Labor Standards Act, for $12.5 million, after almost twelve years of litigation. The case went up to the Supreme Court and back. The settlement includes a payment of costs and attorney fees of $1,686,538. **Yourman v. Giuliani; Feaser v. City of New York; and Carter v. City of New York** (S.D.N.Y.)

The plaintiffs in the case were over 700 managers who were misclassified as exempt from overtime pay. To gain the exemption, the City had to comply with U.S. Department of Labor regulations regarding the basis of employee salaries. A pivotal question was whether the City had an express disciplinary policy or actual practice of deducting pay from managers' salaries for disciplinary infractions other than major safety violations. Such a policy or practice would preclude the City from claiming the exemption. In 1993, the City changed its rules to explicitly prohibit such deductions.

The plaintiffs argued that until that change, the number of actual improper disciplinary deductions by the City constituted a practice. According to plaintiffs' counsel, a key factor leading to the settlement was the City's witnesses' admission that they never took into account the DOL salary basis regulations when they disciplined managers.

Yourman was originally filed in 1991. In 1993 plaintiffs won partial summary judgment on liability. In 1994 Judge Preska ruled that plaintiffs were entitled to one hundred percent liquidated damages. In 1996 the Second Circuit affirmed the judgment for plaintiffs, and the Supreme Court granted certiorari. In 1997, the court decided **Auer v. Robbins**, which adversely affected plaintiffs' claims. The Court then vacated the Second Circuit's judgment and remanded the case to the Court of Appeals, which remanded it back to the district court. After an additional round of discovery, the parties cross-moved for summary judgment. In 1999 Judge Preska granted the defendants summary judgment, and plaintiffs appealed. In 2000 the Second Circuit vacated that ruling and remanded the case for the third time to the district court, for an additional round of discovery. Plaintiffs entered into serious settlement discussions in February, 2002. The liability in the case covers the period April, 1989 until September, 1993.

Anne Golden and the EEOC recovered more than $250,000 in lost wages, interest, and punitive damages in a verdict for a truck driver whose employer refused to accommodate the injuries he suffered in an accident on the job. The employer had told the plaintiff that he could not bid on a vacant job which he was able to perform, unless his doctor authorized him to return to his original job without restrictions. The EEOC took jurisdiction and began litigation, and the plaintiff intervened. Judge Katz wrote a 96 page opinion, finding the employer liable under both the ADA and the State Human Rights Law. **EEOC and Walden v. Yellow Freight Systems**, 2002 WL 31011859 (S.D.N.Y. September 9, 2002).

Jonathan Ben-Asher and **John Beranbaum** have filed a case against MasterCard International on behalf of an Indian executive, based on race, national origin and age discrimination. The plaintiff alleges that he was subjected to anti-Indian and age-based taunts by colleagues, impugning his honesty and supposed ability to "cook up" a "numbers curry" regarding his unit's financial performance. Based on those biased and unfounded suspicions, the plaintiff was terminated for supposed financial improprieties, at the same time as an unpaid 50% bonus appeared on his last paycheck. **Mishra v. MasterCard International**, 02 Civ. 6643, S.D.N.Y.

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Koenigsberg represented the plaintiff. **Azon v. Metropolitan Transportation Authority**, —- F. Supp. 2d —-, 2002 WL 959563 (S.D.N.Y. 5/9/02).

Race Discrimination

An African-American woman was fired from her position as assistant manager, purportedly from removing broken glass and wooden shelving from the bathroom with the assistance of a neighboring store manager. The district court (Naomi Buchwald, J., S.D.N.Y.) denied summary judgment because a factfinder could infer that the proffered reasons for termination were pretextual. The court's reasons were threefold: (1) the plaintiff's acts did not necessarily violate company policy, and other employees who engaged in similar conduct were not fired; (2) the employer's reasons for termination were inconsistent; and (3) its investigation was flawed. Further, the court found that a factfinder could infer discrimination from a "climate of racial discrimination" at Coach including favorable treatment of white employees and inequitable treatment of African American customers. The court rejected Coach's argument that racial bias at the store could not be attributed to the decisionmaker, who was unaware of the employee's race. The court held that "[s]ince the inference could be made that those employees who counseled [the human resources representative] to authorize the termination were motivated by racial bias, [the human resources representative's] lack of knowledge of [plaintiff's] race cannot insulate Coach." The court granted the motion to dismiss the plaintiff's claim for reinstatement, front pay, and some back pay, however, because there were no questions of fact regarding the after-acquired evidence that she had misrepresented information on her employment application. With respect to the employer's motion to dismiss the claim for punitive damages, the court was not persuaded by an affidavit from the human resources director about its efforts to comply with anti-discrimination law, its non-discrimination literature, or its attendance lists from discrimination training programs. The court found that the employer had not established that it "had an antidiscrimination policy in place and that it made a good faith effort to enforce it." **Greene v. Coach, Inc.**, —- F. Supp. 2d —-, No. 01 Civ. 0405 (NRB), 2002 WL 1788017 (S.D.N.Y. 8/1/02).

A male Filipino former sales associate at Cartier sued his ex-employer, alleging discrimination based on sex and national origin. He alleged that the store manager effectively told him that customers relate better to people who look like them. The court (Constance Baker Motley, J., S.D.N.Y.) rejected the defendant's argument in its motion for summary judgment that the comments were not direct evidence of discrimination because they did not relate directly to his termination. The court found that the statement reflected the decisionmaker's discriminatory attitude, and therefore the evidence was sufficient to support a mixed-motive claim. The court also denied summary judgment on the plaintiff's pretext claim because the manager's statements could support the inference that there was a discriminatory sales and employment policy. **Ames v. Cartier, Inc.**, 193 F. Supp. 2d 762 (S.D.N.Y. 3/29/02).

Sexual Harassment

A woman sued her employer, alleging that one of the men she worked for sexu-

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ascertain whether the person works for an employer located in a municipality that has a sexual orientation non-discrimination law. In New York State, cities with such laws are Albany, Hampton, Ithaca, New York City, Rochester, and Syracuse. Counties with such laws are Albany, Onondaga and Tompkins.

If your potential client works for New York State, he or she can find some level of protection under Executive Order No. 28.1, which prohibits discrimination in state employment based on sexual orientation. 9 NYCRR §4.28 The executive order is enforced only by the State Division of Human Rights and does not permit a lawsuit in state court. Anecdotal evidence suggests that the SDHR is receptive to investigating sexual orientation claims, but that it may be limited in its ability to impose meaningful remedies.

Many employers across the country have adopted policies prohibiting discrimination based on sexual orientation. While it is difficult to enforce handbook promises in court, such an employer policy may at least provide leverage to negotiate a severance package.

The Equal Protection Clause of the Fourteenth Amendment is increasingly being used with some success to attack "irrational" discrimination against gays and lesbians by state actors. See, e.g., *Quinn v. Nassau County Police Department*, 53 F. Supp.2d 347 (E.D.N.Y 1999), in which Judge Spatt upheld an equal protection claim for a gay police officer who was badly harassed by his fellow employees. In *Rene v. MGM Grand Hotel, Inc.*, 2002 U.S. App. LEXIS 20098 (9th Cir. 2002), the Ninth Circuit, sitting en banc, issued a plurality opinion holding that the harassing sexual touching of a gay man by his male co-workers gave rise to a claim under Title VII for gender discrimination. This Ninth Circuit decision breaks new ground (and may well be taken up by the Supreme Court), in that it reaches the conduct of a private employer.

To read the text of SONDA or to find out more about how you can get involved in efforts to make sure the legislation passes, visit the website for the Empire State Pride Agenda: *www.prideagenda.org*.

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ants, like some plaintiffs, substantially underestimate the difficulty of proving unlawful motivation. Furthermore, some grievants do not appreciate the distinction and differences between arbitration and court proceedings. Regardless of the advice and information provided by the union regarding an arbitrator's background and views, a grievant may continue to insist that the union assert a claim of unlawful discrimination before the arbitrator.

In addition, although unions, as a matter of law, have control over the grievance/arbitration procedure under a collective bargaining agreement, there is a valid reason for unions to assert claims of unlawful motivation during an arbitration. By fulfilling the grievant's desire to present the motivational defense at the disciplinary arbitration, the union avoids possible future allegations. A union which fails to assert a discrimination claim on behalf of a member may be subject to subsequent litigation under Title VII, 42 U.S.C. 1981, Executive Law 296 and the duty of fair representation. See **Goodman v. Lukens Steel Co.**, 482 U.S. 656 (1987); **Woods v. Graphic Communications**, 925 F. 2d 1195 (9th Cir. 1991).

The Second Circuit's holding in **Collins** highlights the dangers of choosing disciplinary arbitration as the forum for raising an allegation of unlawful motivation with respect to just cause. In addition, it compounds the difficult procedural questions that must be faced when advocating for the rights of workers. A union advocate who acquiesces to the demand of a grievant to raise an unlawful motivational defense during a disciplinary arbitration may ultimately weaken a statutory claim. Conversely, the failure to do so, can lead to assertions of waiver by the employer, as well as legal acrimony between the member and the union.

In order to ensure that union members make reasonable and prudent decisions regarding choice of forum, it would be beneficial for NELA members to work cooperatively with the union advocate who is handling the related disciplinary arbitration.

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ally harassed her for over eight months. After she told a supervisor about the harassment, she was no longer required to work for the alleged harasser. However, she maintains that the remedy was inadequate, her work was at a lower level of responsibility, and she was subjected to hostility. In a brief opinion, the court (John Keenan, J.) denied the defendant's motion for summary judgment in spite of the company's "prompt and sympathetic response." The plaintiff alleged that she was still disadvantaged in her employment "in spite of what would appear to be a remedy." **Perlbachs v. Sands Brothers & Co.**, —- F. Supp. 2d —-, No. 96 Civ. 9314 (TPG), 2002 WL 519735 (S.D.N.Y. 4/4/02).

UNION MEMBERS

Preclusion by Collective Bargaining Agreement

A store allegedly made deductions from its shoe salesmen's pay in violation of common law and New York Labor Law § 193, which prohibits unauthorized deductions from wages. Both parties cross-moved for summary judgment, the employer arguing that the action was preempted by federal labor law. It noted that the plaintiff, a union member, had not filed a grievance pursuant to the collective bargaining agreement, which had a "very broad" provision for dispute resolution through the grievance procedure. Judge John G. Koeltl (S.D.N.Y.) agreed. In a decision that never mentions either **Wright v. Universal Maritime Service Corp.**, 525 U.S. 70 (1998), or **Rogers v. NYU**, 220 F.3d 73 (2d Cir. 2000), the court found that the dispute was within the purview of the CBA and dismissed the complaint. It was unpersuaded—perhaps because it had not examined these cases—by the plaintiff's argument that the alleged statutory violation was outside the scope of the CBA. **Vera v. Saks & Co.**, —- F. Supp. 2d —-, 2002 WL 2005796 (S.D.N.Y. 8/29/02).

Workers Compensation
&
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