NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 11, NO. 7 December 2003 Jonathan Ben-Asher, Editor

Filings, Trials and Settlements

In this column, we publish cases which NELA/NY members have recently filed, tried or settled. Please send information on your cases to Jonathan Ben-Asher at *jb-a@bmbf.com*. Please include the parties, court, counsel for both sides, a short description of the underlying facts and issues, and anything else which you think your colleagues would find particularly tantalizing.

Unfortunately, we have had only a few submissions for this issue. Rather than concluding that NELA members have stopped filing, settling or winning cases, we will assume they are feeling uncharacteristically shy about letting their colleagues know about their achievements, and that this will pass in time for our next issue.

Bob Herbst of Beldock Levine & Hoffman reports success in two unusual cases. In one, he settled a single plaintiff age discrimination case against Fleet Bank, on appeal, for $1.67 million. Bob tried the case for five weeks in New Jersey Superior Court (Bergen County), on behalf of a branch manager who was terminated for age-related reasons. The jury awarded her $1 million, and prejudgment interest and attorneys fees resulted in a judgment for $1.73 million. **O'Shea v. Summit Bancorp**

The plaintiff was terminated at the age of 52, after working her way

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Members to Vote in NELA Board Elections

This fall, the NELA/NY Board of Directors revised NELA/NY's Bylaws to provide that the membership will vote to fill two vacant seats on the Board each year. The new procedures go into effect this year, for the election of the 2004 Board.

Up to now, members of NELA New York's Board of Directors have been elected each December, by the current Board. In 2001, the Board revised the Bylaws so that Board members may only serve for five consecutive years. To put that change into effect, several Board members have been 'retiring' off the Board each year, in order of seniority, to allow for the election of NELA/NY members who are new to the Board. As a result, three members of the current Board are finishing their first year of service, and three are finishing their second.

In October, in the hope of making the Board more inclusive, the Board of Directors approved a changed in the Bylaws under which two Board members will be elected each year by the membership of NELA/New York. This is how the elections will work:

Sixty days before the Board's Annual Meeting, all NELA/NY members will be asked to submit nominations for popular election; this letter went out to membership in mid November. Members may either nominate themselves or nominate another member in good standing. All nominations must be accompanied by a statement in support of the candidate, which should be no more than 600 words. Nominations and statements in support of nominations must be received by the NELA/NY's Executive Director, Shelley Leinheardt, on or before December 5, 2004.

Statements in support of a candidate will be provided to each member either electronically or in hard copy. In addition, on December 10 we are holding an Open Membership Meeting, during which candidates can discuss their interests and views. (6:00 p.m., at the office of Bernstein, Litowitz, Berger & Grossman, 1285 Avenue of the Americas).

No later than December 22, 2003, Shelley will be sending to each member, by mail or e-mail, an election ballot and instructions for voting. Members may vote for up to two separate candidates for the Board. Ballots must be returned to Shelley no later than January 6, 2004, in order to be counted.

The two candidates with the highest number of votes will be deemed elected to the Board, as long as twenty-five per cent of the membership has returned valid ballots. If less than two candidates are popularly elected, the Board, at the Annual Meeting, may choose one or more of the unsuccessful candidates to fill a seat on the Board. Candidates who unsuccessfully sought election by the membership may also submit their names to the Board for election by the Board. The Board will meet on January 21, 2004, to complete elections for the 2004 Board.

We hope each of you will join in participating in the elections, and help make NELA/NY a better and more vigorous advocate for employee rights. We welcome your contributions

The NELA/NY
Calendar of Events

December 16 • 6:30 – 9:00 p.m.
HOLIDAY PARTY
Malika Restaurant
210 East 43rd Street
(between 2nd and 3rd Avenues)
$25 per person includes open bar and buffet dinner. Attorneys in practice five years or less are guests of NELA RSVP to Shelley Leinheardt.

January 7 • 6:30 p.m.
NELA NITE
Sex Harassment
Presented by the Sex Discrimination and Sexual Harassment Committee
Outten & Golden
3 Park Avenue – 29th floor

January 15 • 5:30 p.m.
Judicial Reception
Southern District of New York
500 Pearl Street – 8th floor
Food and drink

January 21 • 6:00 p.m.
Board of Directors Meeting
Completion of Board Elections
Outten & Golden
3 Park Avenue – 29th floor

February 25 • 6:30
Board of Directors Meeting
3 Park Avenue – 29th floor

March 3
NELA Nite
Topic: To be announced

April 30
Upstate Regional Conference
Doubletree Hotel
Syracuse, New York

May 7
NELA/NY Spring Conference
Yale Club of New York

Talk to a Judge without Saying "Pretext":

NELA/NY will hold its second reception for the judiciary on January 15, at the federal courthouse at 500 Pearl Street in Manhattan. The reception will honor judges who have given their time to speak at NELA conferences over the years.

As of this printing, eight judges are expected to attend. They are:

Magistrate-Judge Ronald L. Ellis, SDNY

Judge Frederic Block, EDNY

Judge Denny Chin, SDNY

Judge Denise L. Cote, SDNY

Magistrate-Judge Steven M. Gold, EDNY

Magistrate-Judge Viktor V. Pohorelsky, EDNY

Judge Sidney H. Stein, SDNY

Judge Shira A. Scheindlin, SDNY

This is a chance to chat informally with members of the bench who are particularly interested in employment law issues, and who have indicated their interest in talking with us. Food and drinks will be served. The reception begins at 5:30.

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *nelany@nelanycom*. 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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Editor: Jonathan Ben-Asher

President's Column

by Herb Eisenberg, President, NELA/NY

In considering what to write for this column, my thoughts first leaned toward the state of our country—the terrible situation in Iraq, the untold suffering of so many here in the United States with the economy weak and so many unemployed, tax breaks for the wealthy and the curtailment of services for those with limited means and less privilege. I thought about the parallels between our struggles with opponents in litigation as employment lawyers and issues that have arisen in the Bush administration.

The administration's stalling with regard to the 9/11 Commission's request for documents is emblematic of its approach to governing. The administration is holding back documents from the 9/11 Commission in the hope that the Commission's tenure will end before the dispute over the documents is resolved. The administration is adept at repetition as a public relations tool: if one says something enough times, it becomes something people believe. It repeatedly argued that going into Iraq was necessitated by the terrorism suffered in this country. Eventually admitting that there was no direct link between 9/11 and Iraq does not redeem the administration's irresponsible agenda and is something people may not yet even know or believe.

I also wanted to write about the importance of speaking out in the face of injustice and the patriotism that such discourse exemplifies. Patriotism has again been defined by those who tow the Bush administration line. Unfortunately, the word has been commandeered to curtail critical analysis and to justify polarization, revenge, destruction and war. It no longer is seen as describing those who cherish justice, democracy and the constitution and who speak our minds in support of these ideals. We must proudly wear the moniker of being "patriotic."

The work we do as NELA lawyers epitomizes this old fashioned kind of patriotism. NELA lawyers make a significant impact both locally and on a national level. By asserting the rights of countless individual clients, we inhibit the misconduct of those who would otherwise discriminate but for fear of enforcement of the laws. When we seek to enforce the law, we act patriotically. That we derive personal satisfaction in seeking justice for those who have been unlawfully treated, and that we are able to earn a living doing so, is a wonderful thing.

The founder of NELA, Paul Tobias, has said that with the talents and assets of all NELA members combined, we now have the world's largest plaintiffs' employment law firm in the country. Being a NELA member means being able to call a colleague at any time, at any place, for any reason, to ask for assistance on a moment's notice. The assistance we get is rapid and first rate. With the advent of the NELANY listserve, we can bounce questions off each other and generally get several good answers to our problems in less than an hour. With the constant activity of our listserve, we each have a responsibility to keep the discussion at a high level.

But our organization is more than that. NELA has been active on behalf of its members in the New York City Council, where we have attempted to reinvigorate the protections of the New York City Human Rights Law. By helping each other and working to change public policy, we have made NELA an important resource for employment lawyers in New York. Through our judiciary committee, we have reached out to the courts, and through our speakers bureau, to other advocacy groups, to better educate them about the work that we do.

NELA lawyers have set a standard. We educate our membership through our conferences. In litigation, we show the judiciary and the defense bar that there are plaintiffs' employment lawyers who know what they are doing and can make their clients pay big verdicts and large attorneys' fee awards. Our successful law practices have, in turn, made it easier for everyone else who practices in this area. As a group we are now more likely to succeed, rather than being stereotyped as lawyers who bring cases without merit into federal court. NELA lawyers shatter that stereotype.

We must continue to fight for our clients to vindicate their rights. Those who have not yet gotten involved in NELA/NY must keep NELA/NY moving forward and growing with our many committees and efforts to assist one another. We must speak out in the face of injustice, and we must make our voices heard. As I write, we are 311 members strong. Our collective voice can have a substantial impact through our work in public policy, legal education and advocacy. We owe it to our clients, to ourselves and to our fellow attorneys to get involved.

NELA's New Home

NELA has moved, to an office where our tireless Executive Director can stretch out a little bit. NELA's new home is:

3 Park Avenue, 29th Fl.
New York, NY 10016
Tel: 212.317.2291
Fax: 212.977.4005

Please also note NELA/NY's new e-mail address: *nelany@nelany.com*

NELA Member News

Congratulations to four of our members on the birth of their children:

Rebecca Houlding and Serge Avery - son Owen Samson, born April 28, 2003

Preston and Eileen Leschins- son Samuel born June 9, 2003.

Laura Dilimetin and Adam Rubin - son Noah Alexander, born October 16, 2003

Allegra Fishel and Peter Rich - daughter Mariel Clara Fishel-Rich, born December 7, 2003.

On a more judicial note, Ellen Gesmer was elected in November to the New York State Supreme Court, New York County.

The National Employment Law Project: Helping Workers and Working with NELA

The National Employment Law Project (NELP) is a national organization located in New York City with close ties to many NELA members here and around the country. NELP's Litigation Director, Cathy Ruckelshaus, is on NELA/NY's Board, and NELP has co-counseled a class action wage and hour lawsuit with Adam Klein and Scott Moss of Outten & Golden. NELP and NELA share many common interests, and NELP would like to encourage more NELA-NELP collaborations. First, some background.

NELP has advocated for over 30 years on behalf of low-wage workers, the poor, the unemployed, and other groups that face significant barriers to employment and government support systems. Several common themes connect NELP's work: ensuring that employment laws cover all workers; supporting worker organizing and alliance-building among key constituent groups working with low-wage workers; helping workers stay connected to jobs and employment benefits; and expanding employment laws to meet the needs of workers and families in changing economic conditions.

NELP was created in 1969 in response to the flood of employment-related questions posed by legal services attorneys to a clinical program at Columbia Law School. Today, legal services attorneys and other advocates working with low-wage workers and the unemployed, including community-based organizations, service providers, labor unions, and others call NELP with many of the same kinds of questions. In addition, advocates come forward with newer concerns that reflect changes in the U.S. economy over the past quarter century, including the declining value of the minimum wage, the shift from a manufacturing to a service-based economy, and the tremendous growth of the contingent workforce.

In the months following the September 11th disaster, NELP helped to launch the first-ever workers' rights clinics serving low income New Yorkers, in partnership with the Legal Aid Society and MFY Legal Services.This now-thriving clinic is an important provider of direct individualized employment and labor law services to low-income New Yorkers. NELP encourages NELA attorney participation in the clinics.

In addition, NELP's litigation focuses primarily on the rights of undocumented workers, unpaid minimum wage and overtime claims, and the rights of contingent or nonstandard workers, and NELP is interested in co-counseling with NELA/NY members.

For questions, contact
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Letter to the Editor

To the Editor:

I very much appreciate the thoughts expressed by Arnie Pedowitz in his lead column in the previous issue, which opened with the question: where are we with respect to diversity in NELA/NY?

The question continues to be as timely as it was in the days of PELA, NELA/NY's predecessor. I have also grappled with many of the same questions that Arnie raises, with the same stumbling onto tentative conclusions. I do agree with Arnie that NELA/NY is open and hospitable to all. Not the smallest reason for this is that Arnie is quite willing to graciously pick up the tab when the bill arrives for drinks consumed by newbies. Arnie, cheers.

I would suggest, in addition to what Arnie suggests in the way of affirmative action / recruitment efforts, that members consider that the issue of diversity is one of a larger constellation of social issues. Seen this way, it is evident that a substantial reason for under representation in NELA/NY is the under representation that generally exists in the positions of social influence, such as politics, corporate boardships and yes, our profession of law.

For years, I have complained about the inaccessibility of 80 Centre Street, which hosts a variety of New York County parts. But the din is so overwhelming and the reach of my voice is so limited, that the problem of architectural inaccessibility remains. If NELA/NY were to champion the cause of making these judicial parts accessible NOW, the effect of this outreach effort would exceed the impact of at least one hundred bar tabs and inclusions into speaking slots.

For years, I have insisted that the Task force on Minorities in the Judiciary be commissioned to investigate the de facto under representation of judges with disabilities in our legal system. To paraphrase Rodney Dangerfield, I don't feel as if I get the respect I deserve when I raise this issue.

The point I'm arriving at is this : NELA/NY needs to step up its activism in general a whole qualitative notch NOW. If it exercised the leadership desperately needed to challenge the major areas of minority powerlessness in our society, or at least as they exist in our own profession, then increased opportunities for the attainment of diversity would, in my opinion, naturally surface in the context of NELA/NY's most meaningful progressive activities. The alternative, as always and as Pink Floyd might say, is to be just another brick in the wall.

In solidarity,

Kipp Elliott Watson

NELA's Softball Team Triumphs

by Scott Moss

Central Park, NY– On July 15th, the NELA/NY softball juggernaut marched to victory over... well, over the other NELA/ NY softball juggernaut. The seven-inning game was a 18-16 slugfest, possibly a result of the unseasonably low barometric pressure causing fly balls to travel unusually far.

Fifteen NELA/NY members, friends, and family played before an eager crowd of four at the NELA/NY Second Annual Summer Softball Outing, on a lovely field in the Central Park north meadow. Highlights of the slow-pitch yet fast-paced game included: Shelley "Line Drive" Leinheardt's (2B) first hit in decades; Preston "Wild Thing" Leschins's (P) suspenseful pitches (knuckleballs?) to all portions of the backstop; Scott Moss's (P/2B) gloveless defense (we were short a glove); the youthful on-field presence of law students Brad Repinsky (SS) and Jamie Sinrich (2B/OF); and a cheering section led by Anne Golden and Preston Leshins's wife and newborn (5 weeks!) son Sam. The other players included Brad Conover (SS), Chris Edelson (OF), Herb Eisenberg (1B), Bob Felix (OF), Bob Herbst (1B), Ed Miller (3B), Linda Neilan (2B), Eric Nelson (OF), Mike O'Brien (OF), Sarah Outten (2B/OF), and Brian the random guy hanging around Central Park who joined us (3B).

Thanks to Lieff Cabraser Heimann and Bernstein for providing the equipment and to Outten & Golden for providing beverages and snacks.

Dues Are Due

You will be receiving an invoice for 2004 NELA/New York. Please pay your dues promptly, as we depend on member dues to fund our activities.

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 Claire Shubik, an associate at Outten & Golden LLP, for help in the preparation of these squibs.

ATTORNEYS' FEES

The work of two not-yet-licensed recent law graduates has been found compensable at $100 an hour, the rate of a recently admitted attorney in the jurisdiction. In reviewing the fee application of the Law Offices of Frederick K. Brewington in a non-employment civil rights case, Judge Joanna Seybert (E.D.N.Y.) found that the graduates' work was substantive and similar to the type that would be assigned to a new associate. While law graduates would typically be compensated at $50, a paralegal rate, the judge found that the graduates had performed legal research and case preparation; indeed, one of the graduates had billed more hours than anyone else except the lead attorney. In addition to holding $100 an hour a reasonable rate for the graduates, the judge granted virtually all of the plaintiff's fee application, reducing only the requested amount of compensation for some clerical work performed by the lead attorney. **Duke v. County of Nassau**, N.Y.L.J. 4/25/03, p. 1, col. 3 (4/14/03).

Judge Robert L. Carter (S.D.N.Y.) has approved a fee award in a class action brought against the New York State Division of Human Rights for violating the due process rights of complainants. After extensive litigation and a trip to the Second Circuit Court of Appeals, the plaintiffs prevailed on one of three claims. In awarding attorneys' fees for work on the successful claim, the court allowed a rate of $430 and $400 an hour for the lead attorneys, each of whom had over thirty years' experience in employment and civil rights law. Citing, *inter alia*, **Green v. Torres**, 2002 WL 922174 (S.D.N.Y. May 7, 2002), in which NELA/NY member Robert Herbst was compensated at $400 an hour, the court acknowledged such rates are "on the high end" but within the reasonable range for experienced attorneys in the district. Additionally, the court exercised its discretion to award the full hourly rate for travel time because "the total [travel] time is de minimis and the travel prevented the attorneys from making more productive use of their time." **New York State National Organization for Women v. Pataki**, --- F. Supp. 2d ---, 2003 WL 2006608 (S.D.N.Y. 4/30/03).

Leona is happier by the minute. After substantially trimming the punitive damages award against her for sexual orientation discrimination, Justice Walter B. Tolub of the New York County Supreme Court significantly reduced the attorneys' fees in the much-publicized case against the Helmsley Corporation. Using federal Title VII cases as his comparators, Justice Tolub found the plaintiff's attorney's staffing assignments and number of billed hours excessive. The court noted that in a year and a half of litigation, the plaintiffs' attorneys in **Bair v. Bois**, 219 F. Supp. 2d 510 (S.D.N.Y. 2002), another high-profile case, had billed 410 hours, while for a comparable period, counsel in the Helmsley matter logged over 2,045 hours. The court found that "the numerous conferences held with a multitude of partners constitutes a terrible waste." Additionally, in contrast to **NOW v. Pataki**, *supra*, the court deemed $300 an hour the appropriate compensation rate for an experienced civil rights attorney. Finally, the court disallowed the requested award of costs for computerized legal research, deeming such costs overhead, no differ-

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ent from the investment in a legal library. **Bell v. Helmsley**, 2003 WL 21057630, 3003 N.Y. Slip Op. 50866(U), N.Y.L.J. 4/2/03, p. 20, col. 3 (Sup. Ct. N.Y. Cty. 3/27/03).

CONTRACT

Existence of Contract

A contract must have consideration. The managing director of a company's "global institutional sales division" brought in a large account which, before it could generate its full revenue, was ended in conjunction with an "escheatment issue." Despite the lost account, the employer allegedly promised him a bonus correlated to the amount of profit the account would have generated had it not been lost. The employer never paid, and the plaintiff sued for breach of contract. Judge Miriam Goldman Cedarbaum (S.D.N.Y.), however, held that he lacked a valid contract. Because the promise to compensate the plaintiff as though the account had generated the projected revenue was made after he had brought in the client, "plaintiff's work … could not have been bargained for in exchange for the subsequent promise"—it was only past consideration, which, under New York law, is no consideration at all. **Arnone v. Deutsche Bank**, No. 02 Civ. 4915, 2003 WL 21088514 (S.D.N.Y. 5/13/03).

Implied Covenant

In New York, every contract carries with it an implied covenant of good faith and fair dealing. An at-will employee, however, even one who has an employment contract, cannot rely on this covenant except under certain circumstances, and an employee who has no contract cannot rely on it at all. An ex-employee who alleged that he was terminated so that his employer could avoid paying him commissions and bonuses lost on two grounds: the bonuses were discretionary, and the employer's policies did not constitute a contract anyway. The plaintiff's slander claim, based upon alleged statements by various employees of the defendant that he contended had dissuaded prospective employers from hiring him, was not dismissed, however, because neither party had provided enough information for the court to decide whether the employer had a qualified privilege. **Mirabella v. Turner Broadcasting Systems, Inc.**, --- F. Supp. 2d ---, 2003 WL 21146657 (S.D.N.Y. 5/19/03) (Barbara Jones, J.).

COUNTERCLAIMS

A former salesperson classified as an independent contractor filed claims for denial of benefits under ERISA and for unpaid commissions under the New York Labor Law and common law. When plaintiff filed an amended complaint, defendant asserted a variety of counterclaims, such as trade infringement, tortious interference, and misappropriation of proprietary information. The counterclaims were based on events that occurred during and after plaintiff's employment with defendant, and were known to defendant prior to the time plaintiff filed this action. Plaintiff then moved to amend the complaint to add news claims asserting that the counterclaims were unlawful retaliation under ERISA and New York Labor Law. Mag. Judge Freeman ruled that because the counterclaims could potentially affect plaintiff's personal and professional reputation and his ongoing efforts to create and maintain his own business, they could constitute adverse employment actions sufficient to sustain retaliation claims. Mag. Judge Freeman granted the motion to amend in its entirety. Plaintiff was represented by NELA member Anne Clark of Vladeck, Waldman, Elias & Engelhard, P.C. **Kreinik v. Showbran Photo, Inc.**, 2003 WL 22339268 (SDNY 10/14/03), (Mag. Judge Freeman)

DAMAGES

The Supreme Court has again muddied the waters in the debate over punitive damages. Examining a Utah state jury award of $2.6 million in compensatory damages and $145 million in punitive damages against an insurance company for bad faith, fraud, and intentional infliction of emotional distress, Justice Kennedy, writing for the Court, found the punitive damages award unreasonable, disproportionate to the wrong committed, and an arbitrary deprivation of the company's property. In a fact-dependent decision, Justice Kennedy concluded that the jury had sought to punish the insurance company for bad acts committed in another state that had no nexus to the conduct at issue in the case. After reiterating the "guideposts" articulated in **BMW v. Gore**, 517 U.S. 559 (1996), for reviewing punitive damages awards—the degree of reprehensibility, the disparity between actual harm and the punitive damages award, and the difference between the punitive damage award and civil penalties imposed in comparable cases—Justice Kennedy went on to comment that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages … will satisfy due process." While Justice Kennedy denied that he was imposing "a bright line ratio," Justice Ginsberg's dissent characterized the Court's "single-digit ratio" recommendation as "marching orders." She further disagreed with Justice Kennedy's characterization of the facts, finding ample evidence on the record showing that the company's conduct toward the plaintiffs was part of a company-wide policy that caused extreme damages within Utah. Justices Scalia and Thomas wrote separate dissents rejecting the applicability of the due process clause to review of punitive damages. **State Farm Mutual Automobile Insurance v. Campbell**, 538 U.S. 1513, 135 L. Ed. 2d 585 (4/7/03).

DISCOVERY

Judge Shira Scheindlin (S.D.N.Y.), in a detailed opinion, has clarified the test for cost-shifting in the production of electronic discovery material. Concerned that producing parties have often exaggerated the burden associated with producing electronic data, Judge Scheindlin classified general types of electronic data and the costs associated with the retrieval and production of each type. Because most electronic data is easily retrievable at minimum cost, in most cases cost-shifting should not apply. Two types of data, however—back-up tapes and erased, fragmented, or damaged data—may require expensive, time-consuming retrieval. In cases involving such tapes and data, therefore, a court should first determine what data may be found by requiring the "responding party

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to restore and produce responsive documents from a small sample" of data. Once it has been generally determined what a search will produce, the court may then consider cost-shifting. The primary inquiry in a cost-shifting analysis is, "How important is the sough-after evidence in comparison to the cost of production?" The requesting parties should not be required to show that the discovery would render "a gold mine" but only that probative evidence would result from production. Factors for the court to consider when ruling on cost-shifting include: the extent to which the request is specifically tailored to discover relevant information; the availability of such information from other sources; the total cost of production compared to the amount in controversy and compared to the resources available to each party; the relative ability of each party to control costs and its incentive to do so; the importance of the issues at stake in the litigation; and the relative benefits to the parties of obtaining the information. Judge Scheindlin stressed that these factors (a refined version of the factors articulated by Magistrate Judge Francis in **Rowe Entertainment v. William Morris**, 205 F.R.D. 421 (S.D.N.Y. 2002)) are not to be weighed equally, but all are questions to be considered in determining the cost-benefit of production. It is important, the judge cautioned, that the court maintain the presumption, articulated in the Federal Rules, for production without cost-shifting. **Zubulake v. UBS Warburg**, --- F. Supp. 2d ---, 2003 WL 21087136 (S.D.N.Y. 5/13/03).

ETHICS

An attorney who assisted his client in the client's taping of a conversation with her employer/harasser did not violate the New York Disciplinary Rules and the recordings were admissible. A Key Food employee bringing a "racial bias suit" asked her attorney to help her record conversations in her office. The attorney put the client in touch with a private investigator who set her up with a recording device. The employee then recorded a conversation with her supervisor in which he asked if a job applicant was a "fucking nigger." Once litigation commenced, the attorney arraigned for press coverage of the case; much of the coverage referred to the recordings. Justice Herbert Kramer (Supreme Court, Kings County) found no violation of any of the disciplinary rules prohibiting a lawyer from engaging in dishonest conduct. The court did not find the conduct dishonest, given the permissibility of recording one's own phone conversations in New York. Not only did the holding support the plaintiff, but the court gave a solicitous nod to all plaintiffs' employment lawyers when it commented that "[t]he public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin." This well-phrased judicial endorsement of a fair workplace is nice support for a diverse range of employment cases. **Mena v. Key Food Stores Co-Operative, Inc.**, 758 N.Y.S.2d 246, N.Y.L.J. 3/31/03, p. 33, col. 2 (Sup. Ct. Kings Cty. 3/20/03).

ERISA

No Release Required for Severance Pay

A terminated employee was told that he would get no payment pursuant to a severance pay plan because he refused to sign a release that included a two-year restrictive covenant. He pointed out that the written plan did not mention the requirement of the restrictive covenant. (Neither party disputed that the severance pay plan was governed by ERISA.) The employee had not seen the language of the release before his termination. He challenged the denial of benefits, arguing that the plan administrator had acted arbitrarily and capriciously in conditioning the payment of benefits on agreement to the non-solicitation provision, as well as in refusing to amend the provision for him when the administrator had agreed to amend it for three other employees. The district court was not persuaded by his argument, but the Tenth Circuit Court of Appeals was. It reversed the district court's grant of summary judgment to the employer and remanded the case. The plan's mere statement that benefits would be conditioned on an "Agreement and General Release" without further describing its terms made the restrictive covenant an "arbitration and irrational" requirement. **Cirulis v. Unum**

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NELARS ALERT

As many of you know, NELARS is an attorney referral service established by NELA/NY in 1992. NELARS was founded as— and remains today— a potential referral source for NELA members, as well as other attorneys. In 2003 alone, NELARS panel members earned tens of thousands of dollars in fees on cases referred to them by NELARS.

Beyond its professional mission, however, NELARS also serves an important public purpose: to provide members of the public who have not yet secured legal representation with quality representation from our members. Needless to say, NELARS' survival depends on attorney participation.

In our effort to constantly improve NELARS, we are soliciting NELA members' input as to any problems you have had with the program or things that you believe could be done better. You may contact NELA/NY Board Member Darnley Stewart directly at (212) 554-1476 with any comments or concerns.

Roseni Plaza, a former NELARS administrator, has returned to NELARS as its new administrator. Roseni is working twenty hours per week. NELARS new office is at Outten & Golden, 3 Park Avenue, New York, N.Y., 29th floor, 10016. NELARS' phone number, as before, is 212 819-9450; the new facsimile number is 212 977-4005.

Finally, if you are currently not a NELARS member, please consider joining. Please also keep NELARS in mind when you have a potential case you cannot take on.

You can obtain a NELARS information packet from NELA/NY's Executive Director, Shelley Leinheardt, by calling her at 212 317-2291, or call Roseni at 212 819-9450.

September 30, 2003

Dear NELA/NY members:

We are pleased to share with our colleagues a recent decision in which we were involved, which appeared today on page 18 of the New York Law Journal.

Since the decision refers to a subject which is frequently involved in sexual harassment cases, we thought it would be of interest to our members.

Tisi v. Verizon New York, Inc. NYLJ, September 30, 2003, p.18

Regards,

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Corp. Severance Plan, 21 F.3d 1010 (10th Cir. 3/5/03).

FIRST AMENDMENT

A world history high school teacher brought an action alleging a violation of his first amendment rights when his school district disciplined him for a letter he had written to school parents stating that he was unqualified to teach the American history course to which he had been assigned. Judge Conner (S.D.N.Y.) refused to exercise jurisdiction in accordance with **Younger v. Harris**, 401 U.S. 37, 91 (1971). **Younger** instructs a federal court to abstain from exercising jurisdiction when there is an ongoing state proceeding involving an important state interest, and the plaintiff will have adequate opportunity for judicial review of his constitutional claims. Stressing the school district's interest in maintaining order, as well as the plaintiff's opportunity to have his constitutional claims heard through an Article 75 proceeding, the court chose to abstain from exercising jurisdiction. The court further commented that the plaintiff had not demonstrated a threat of irreparable harm warranting an injunction. **Levich v. Liberty Central School District**, --- F. Supp. 2d ---, 2003 WL 1957495 (S.D.N.Y. 4/23/03).

Public Employees

The Northern District of New York has found the Central New York Police Academy liable under a **Monell** § 1983 claim arising out of one municipal decision. The plaintiff was a Police Academy student when she brought a claim of discrimination against the Academy. At the time she filed her claim, the plaintiff was awaiting retesting on her "defensive tactics skills." Upon gaining notice of her claim, however, the Academy refused to let her retest, thus foreclosing her ability to graduate the Academy and begin work as an officer. In the letter announcing that the plaintiff would not be retested, the Director of the Academy explained that the Academy's adverse decision was based on the plaintiff's filing of a discrimination claim. The plaintiff and her husband wrote several letters of appeal to the Deputy Commissioner and enclosed the Director's 'smoking gun' letter with their appeals. The Deputy Commissioner upheld the Director's decision. Judge Frederick J. Scullin (N.D.N.Y.), however, found that the Deputy Commissioner had decisionmaking authority and that his refusal to permit the plaintiff to retest demonstrated deliberate indifference to her First Amendment rights. NELA member Richard A. Maroka represented the Plaintiff. **Lathrop v. Onondaga County**, 220 F. Supp. 2d 129 (N.D.N.Y., 9/12/02).

JURISDICTION

Diversity Jurisdiction

A former employee with a breach of contract claim saw his state complaint removed to federal court based upon diversity jurisdiction which he argued did not exist. The plaintiff contended that the employer was a New York citizen for diversity purposes, since its principal place of business (he contended) was New York, based upon the company's website and its representations to employee recruiting databases and consumer reporting agencies. The court (Richard C. Casey, S.D.N.Y.) disagreed and denied the motion to remand to state court. The court found that complete diversity existed as to all parties based upon the "nerve center" test, which identifies the place where overall policy originates. Most of its top executive officers were located in Connecticut, most of its "Executive Council" and its "Line of Business Leaders" were there, and most of the members of the Board of Directors worked from the Connecticut office. The company was incorporated in Pennsylvania. "Removal was therefore proper as no defendant is a citizen of New York." **Arnold v. Towers Perrin**, --- F. Supp. 2d ---, 2003 WL 1878421 (S.D.N.Y. 4/15/03).

PROCEDURE

Minimum Number of Employees

The Supreme Court recently considered the question of whether four physician-shareholders who constituted a medical clinic's board of directors should be counted toward the 15-employee minimum required for ADA jurisdiction. With-

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out the four, the minimum was not met and there was no ADA coverage. The Court referred to the common-law element of control to resolve this issue in the case of a professional corporation. (This was the touchstone advocated by the EEOC as amicus curiae, in accordance with its guidelines.) In an opinion by Justice Stevens, with Justices Ginsburg and Breyer dissenting, the Court remanded for more evidence because the district court's findings appeared to support the conclusion that the four physicians were more masters than servants, but evidence in the record might contradict those findings or support a contrary conclusion under the EEOC's standard. **Clackamas Gastroenterology Associates, P.C. v. Wells**, 123 U.S. 1673, 155 L. Ed. 2d 615 (4/22/03).

Summary Judgment

In a class action brought by African American and Latino New York City police officers against the NYPD for, inter alia, discriminatory disciplinary enforcement, Judge Lewis A. Kaplan (S.D.N.Y.) dismissed the claims of certain named plaintiffs, to the extent that these claims were adjudicated in prior Article 78 proceedings. The named plaintiffs in question had all been dismissed from the N.Y.P.D. for alleged misconduct. They had all challenged their dismissals in Article 78 proceedings. Several of the plaintiffs had specifically raised the issue of discriminatory animus in their Article 78s. In the case of these plaintiffs, Judge Kaplan found that the Article 78 proceedings—proceedings to determine if a state agency's decision is arbitrary and capricious—had fully litigated and decided the issue of discrimination. These plaintiffs consequently were precluded under the Rooker-Feldman doctrine from raising the issue of discriminatory discipline in the federal proceeding. Two the plaintiffs, however, had not argued discriminatory motivation during their Article 78 proceedings. These plaintiffs were not precluded from litigating the issue of discriminatory disciplinary enforcement before the district court. **Latino Officers Association v. The City of New York**, 235 F. Supp. 2d 771, 2003 WL 1701221 (S.D.N.Y. 3/31/03).

RACE DISCRIMINATION

Statistics

The preference articulated in **Wards Cove Packing Co. v. Atonio**, 490 U.S. 642 (1989), that claims of disparate impact in hiring and promotion be supported by an analysis of the number of minority job/promotion applicants, is not a mandate that such statistics are always necessary to maintain such a claim. A Hispanic postal worker brought a disparate impact suit against the Post Office, claiming that the Post Office's promotion practices in Connecticut disparately impacted Hispanics. The Post Office conceded that data on the number of promotion applicants was unavailable. Consequently, the plaintiff produced a statistical analysis comparing the total number of Hispanic postal workers in the state to the number of Hispanic postal workers in the Post Office's top pay grades. The district court granted the defendant's motion for summary judgment because the plaintiff had not presented evidence regarding the promotion application pool. The Second Circuit Court of Appeals

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reversed and remanded, explaining that **Wards Cove** permits statistical analysis of "otherwise-qualified applicants" when statistics on the actual applicant pool are unavailable. **Malave v. Potter**, 320 F.3d 321 (2d Cir. 2/20/03).

SEX DISCRIMINATION

In an uncharacteristically harsh decision, Judge Robert L. Carter (S.D.N.Y.) has held that an employee's claims—that her employer did not promote her because she is a mother and that her employer had a practice of denying promotions to mothers—failed as a matter of law. The plaintiff, a staff attorney for a financial services group, had consistently advanced in her company until she took advantage of a flex-time schedule after the birth of her second child. The company likewise failed to promote other female attorneys who took part-time and flex-time schedules after having children. Acknowledging all these facts, the court still concluded that the plaintiff failed to make out a prima facie case because "Title VII does not prohibit discrimination based solely on one's choice to work part time" (emphasis added). Furthermore, the court found that the plaintiff had failed to make out a disparate impact claim because she did not compare the promotion rate of female parents to male parents, but instead compared the promotion rate of individuals taking flex time (presumably all women) to other employees. This case is notable because it found no inference of discrimination in the employer's practice—a more extreme rationale than the alternative holding that the practice was arguably discriminatory but had a legitimate business purpose. Additionally, the court construed the responsibilities of motherhood as a choice, rather than viewing the constraints of the employment environment that conflict with motherhood as colorable discrimination. **Capruso v. Hartford Financial Services Group**, --- F. Supp. 2d ---, No. 01 Civ. 4250, 2003 WL 1872653 (S.D.N.Y. 4/10/03).

SEXUAL HARASSMENT

Hostile Environment

Without discussing whether constructive discharge is a tangible employment action, which would make the **Faragher**/**Ellerth** affirmative defense unavailable to a defendant, Judge Gerald E. Lynch (S.D.N.Y.) granted summary judgment to the employer in a case where a manager's sexual harassment drove a female employee out of her job. It did so after finding, as a threshold matter, that the harassment was severe or pervasive enough to alter the plaintiff's terms and conditions of employment. Then, however, the court did not even discuss whether the affirmative defense was available or not but appeared simply to assume that it was. Noting that the employer had a written sexual harassment policy and that the employee refused to cooperate with Human Resources' investigation of her complaint, the court found unavailing her concern about violation of her privacy or the reaction of co-workers, or her concern that "creating any kind of

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up from secretary to branch manager in three years. She spent another 8 years as one of the most successful branch managers in the bank, which has over 100 branches, at one point being named Branch Manager of the Year. After the merger of Summit Bank and United Jersey Bank, two 36 year old women were appointed her Regional Manager and Area Manager. Plaintiff argued that these women wanted to replace her with a 28 year old. They therefore took her from formal warning to final warning to termination in 90 days. Plaintiff also introduced statistical evidence showing that the post-merger reduction in force resulted in disproportionate terminations of branch managers over 50.

Bob reports that the plaintiff's entire identity and source of self-esteem was her job with Summit Bank. Accordingly, her treatment and termination was devastating to her. She could not recover, could not take another banking or corporate job, and hardly mitigated. The plaintiff's economist testified that her lost earnings were $1 million, but the jury only awarded $250,000 in economic loss, finding that she did not mitigate. The jury also awarded her $750,000 in emotional distress damages. Plaintiff's experts included the statistician, the economist, a vocational psychologist and her treating therapist.

Bob also reports that in conjunction with the EEOC, his firm settled a sexual harassment case against Lutheran Medical Center on behalf of over 50 women who were sexually harassed during their pre-employment physical exams. The harassment ranged from improper questions and comments to touching of the breasts and genitalia without gloves. Bob's firm represented eight of the plaintiffs.

Plaintiffs filed at the EEOC, and waited for it to evaluate the matter. To preserve the state law claims, plaintiffs later filed claims of assault, battery and malpractice. The EEOC filed an action in the Eastern District, and plaintiffs intervened, transferring the state law claims there. The EEOC then canvassed 1000 or so current and former Lutheran employees and found over forty more potential plaintiffs. After mediation with mediator Linda Singer, the case settled for just under $5.5 million, of which Bob's eight clients received just under $2 million. Lutheran was represented by Betsy Plevan of Proskauer, Rose. **Givant, et al. v. Lutheran Medical Center**

Phil Taubman settled a race discrimination case against the City of New York for $135,000. **Jones v. City of New York** (S.D.N.Y). The plaintiff was a 41 year old African-American woman who worked as a corrections officer. Ms. Jones had a consensual sexual relationship with a fellow employee, who had a higher rank. After she ended that relationship, the employee began to relentlessly pursue her, sexually harass her, touch and spit at her, and threaten her with discipline and retaliation. She attempted to transfer positions, but her requests were denied. The Department of Corrections refused to investigate, claiming the issues were not EEO matters. Plaintiff's union also refused to help her. Eventually she prevailed on the District Attorney's office to arrest the employee. She was eventually transferred to another facility, but because of the stress related to the harassment, took sick leave for almost a year. A jury found the employee innocent of the criminal charges, and he quit the Department. DOC's EEO office finally investigated. It found plaintiff's allegations to be credible, concluded that other women had complained of assaults by the employee, and found that an investigator had been removed from the case because of his efforts to look into it. The EEOC found probable cause. Plaintiff did not have lost earnings, but based her claim for pain and suffering on medical evidence of Post-traumatic Stress Disorder, including psychotherapy and medication, and many medical issues related to the harassment.

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waves" could cause retaliation or hurt her opportunities within the company. The plaintiff also said she believed that upper management condoned sexual harassment because her manager had joked that employees should get any sexual harassment "out of [their] systems" before scheduled sexual harassment training took place; the court found this equally inadequate to support a reasonable belief that using the company's complaint policy would be ineffective. **Breeding v. Cendant Corporation**, --- F. Supp. 2d ---, 2003 WL 1907971 (S.D.N.Y. 4/17/03).

The Second Circuit Court of Appeals, however, has held that constructive discharge is *not* a tangible employment action for purposes of **Faragher/Ellerth** analysis. **Caridad v. Metro-North Commuter R.R.**, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). It followed that unfortunate principle again recently in a case whose primary analysis concerned whether a mechanic in charge of other mechanics was the "supervisor" of one of them (the plaintiff) such that the employer was vicariously liable under Title VII. The decision was written by Judge Robert D. Sack and was joined by Judges Wilfred Feinberg and Richard Cardamone. The mechanic in charge directed the particulars of each employee's work day and was the senior employee on the site. Under those circumstances, the court held that he was the plaintiff's "supervisor" and the employer could be held vicariously liable, because the power over her that the employer gave him enabled him to create or maintain the hostile environment. Since the employee had quit instead of taking a transfer and had not given the employer time to investigate or act on her complaint, however, all her claims except hostile environment were properly dismissed (by Judge Loretta Preska, S.D.N.Y.). **Mack v. Otis Elevator Co**., 326 F.3d 116, 2003 WL 1860722 (2d Cir. 4/11/03).

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