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Advocacy for the SEC Whistleblower: A Primer

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In the wake of multiple far-reaching corporate scandals and pervasive misconduct Congress enacted the whistleblower provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act.1 The provisions require the SEC to pay a large financial award, between 10-30% of the monetary sanctions collected, to whistleblowers who voluntarily provide original information leading to a recovery by the SEC of over $1 million. Notably, the act includes new robust anti-retaliation provisions.

Under Dodd-Frank, a whistleblower is any individual or group of individuals that possess a reasonable belief that the information reported to the SEC involves a possible violation of the federal securities laws. Similar to the interpretation of other whistleblower statutes, "reasonable belief" requires the whistleblower to genuinely believe that the reported conduct constitutes a possible securities violation. Remedies include

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1 17 C.F.R. § 240.21F-1, et seq.

Developments in the Fluctuating Workweek

By: Brian Moss
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Employees who successfully argue that they were wrongfully denied overtime have won a significant victory. In the wake of such success, however, is another battle - calculating damages.

By way of background, the Fair Labor Standards Act ("FLSA"),[1] guarantees employees overtime when they work more than 40 hours in a week. This is known as the "overtime requirement". The overtime requirement applies to all employees unless they are "exempt".[2] Thus, employees are categorized as either "exempt" or "non-exempt" from overtime, and an employee's status as exempt or non-exempt depends on his or her job duties. Employees can perform both exempt and non-exempt duties and still be considered exempt. An employee's most important job duties are what determine the employee's status as exempt or non-exempt. [3] If an employer treats an employee as exempt (i.e. does not pay overtime), but the employee's most important job duties are non-exempt, then the employee is "misclassified".[4] When a misclassified employee sues for unpaid overtime, it is referred to as a "misclassification" case. Damages in a misclassification case consist of the unpaid overtime plus a penalty equal to 100% of the unpaid overtime.[5]

Over the last eighteen months, there have been two U.S. circuit court decisions using the fluctuating workweek method ("FWW") to calculate unpaid overtime in misclassification cases. These decisions have serious implications because the FWW reduces the amount of unpaid overtime by approximately 2/3. But more importantly, these decisions could be construed to apply to *all* misclassification cases. This would then create three categories with respect to overtime eligibility: exempt employees, non-exempt employees, and FWW-employees.

In order to appreciate the full impact of the two U.S. circuit court cases, it is helpful to understand the nature and background of the FWW. Accordingly, discussed below are (1) application of the FWW, (2) legal authorities for the FWW, and (3) Second Circuit and New York district court case law on the FWW. Following these sections are (4) discussions of the two recent U.S. circuit court decisions on the FWW and (5) a presentation of arguments to minimize application of the FWW in misclassification cases.

Application of the FWW

Pursuant to 29 U.S.C. § 207, "no employer shall employ any of his employ-

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1 29 U.S.C. §§ 201, et seq. (2011).

2 Id. at §§ 207, 213.

3 29 C.F.R. §§ 541.2, 541.707 & 541.700 (2011).

4 Employees can also be misclassified as independent contractors.

5 29 U.S.C. § 216. A prevailing plaintiff is also entitled to reasonable attorneys' fees. *Id.*

The NELA/NY
Calendar of Events

NELA Nite
6:30 – 8:30 pm
Wednesday, January 11
3 Park Avenue – 29th Floor
Topic to be announced
Save the Date!

Executive Board Meeting
Wednesday, February 1
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome)

NELA Nite
6:30 – 8:30 pm
Wednesday, February 29
3 Park Avenue – 29th Floor
Topic to be announced
Save the Date!

NELA Spring Conference
Friday, May 18
8:45 am – 5:00 pm
Yale Club of NYC
Mark your calendars!

A Word from Your Publisher

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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2d Department Broadly Interprets NYC Human Rights Law

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Nelson v. HSBC Bank USA, et al.: The Second Department remanded Plaintiffs' hostile work environment claims, stating that the Supreme Court incorrectly applied the federal "severe and pervasive" standards to New York City Human Rights Law claims. The Court found that following the 2005 Local Civil Rights Restoration Act, the provisions of New York City Human Rights law are to be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including laws with comparably-worded to provisions of this title, have been so construed." Accordingly, the Court found that to prove a hostile work environment claim under NYCHRL, the Plaintiffs need to demonstrate that he or she was "treated less well than other employees because of the relevant characteristic". This standard, first applied by the **First Department in Williams v. New York City Housing Authority**, 61 A.D.3d 62, 79-80 (1st Dept. 2009), is now the prevailing standard in all five boroughs.

The Second Department also concluded that the 2005 amendments should be applied retroactively. Although the New York City Council did not expressly state that the amendments were retroactive, the Court concluded that this interpretation was necessary "in order to effectuate [the law's] beneficial purpose." ■

President's Column

by Darnley D. Stewart,
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BOYS WILL BE BOYS?

"It's just an amazing — you know, that here we are in 2011 and we're having a conversation that we thought we put behind us decades ago. I think the most striking thing is if you think about the architecture of sexual harassment law in this country it used to be the case that it was impossible for a woman to come forward and say, I am the subordinate, someone powerful and important harassed me. It would ruin her life. It is amazing that we've put into place an entire legal system that encourages her to come forward, that protects her from being called a hooker and a gold digger for coming forward, and yet still she's a hooker and a gold digger despite this legal architecture. So it's really an amazing thing, that having acknowledged that we have a problem, put into place a legal system that's supposed to protect women, now when women come forward men are still the victims. They're more the victims than ever before."

—Dahlia Lithwick, *Slate*

When I was in fifth grade, the boys on our school playground used to chase us girls, grope and twist our breasts (as if they were knobs on a control panel) and yell, "Calling Russia! Calling Russia!" In tenth grade, while on a Baptist Church youth group trip in Maine, the boys (beware those Baptists) would chase us, feel our backs to see if we were wearing a bra, and then scream "BL!" for "braless" if we were not. Still later, while in law school, a friend of mine asked her male Public Defender colleagues about a certain judge she would be appearing in front of. One of her supervisors said, "Laura, don't worry about that. All he'll be thinking about is doing it to you doggie style." Thanks. Very helpful. That was in 1991.

Of course, later that same year, the country was transfixed as Anita Hill testified to her experiences with her superior at the DOE and EEOC, Clarence Thomas. I recall Senator Orrin Hatch, commenting while questioning Justice Thomas, that if Professor Hill's allegations were true, then Thomas must be some kind of a "psychotic sex fiend or a pervert." I thought to myself that this guy has absolutely no idea what women deal with in the workplace. Pubic hairs and "Long Dong Silver" are the least of it.

Now, 20 years later, of course things are "better" – women are more likely to come forward with their experiences. So are men, by the way, as 16% of the sexual harassment claims are filed by men – which proves that it's really all about power. That said, as Dahlia Lithwick points out, women who come forward are still lambasted as gold diggers and liars, despite our increased knowledge of what still happens in the real world. What is more disconcerting to me personally is that I find a real gender gap in our perceptions on these types of issues. I am stunned that male colleagues whom I respect say they do not believe Anita Hill. I am stunned that male colleagues whom I respect think that William Kennedy Smith did not sexually assault Pamela Bowman in 1991. I am stunned when male colleagues whom I respect make unwelcome sexually inappropriate comments to me in professional settings. And here's perhaps a reason why folks think this behavior is ok: because women generally say nothing even when we're made to feel uncomfortable. I know I often don't. Herman Cain's wife said that he must have some kind of "split personality" to have done the things these women said. I don't think so. The problem is that when it comes to these issues, many of us have a sort of split personality. In the absence of women coming forward and the rest of us speaking up, I fear it will not be much better 20 years from now. ■

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ees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours . . . at a rate not less than one and one-half times the *regular rate* at which he is employed." (*emphasis added*). Thus, the determination of an employee's regular rate is at the heart of calculating how much overtime compensation he or she is owed. For employees paid on an hourly basis, ascertaining their regular rate is straightforward. For salaried employees, however, it is less clear.

The reader is likely familiar with the proposition that a salaried employee's regular rate of pay is the hourly rate equal to dividing the employee's weekly wages by 40. To calculate the amount of overtime due, one multiplies this hourly rate by 150%, and then multiplies the resulting product by the number of overtime hours worked.[6]

For example, an employee with a weekly salary of $1,000 works 50 hours in a particular week. Under the 40 Hour Rule, he is paid $1,000 for a 40-hour workweek, making his or her regular rate of pay $25 per hour ($1,000 / 40 hours). The employee's overtime rate is 150% of $25, or $37.50 per hour. The employee is paid $25 per hour for the first 40 hours of work, but the employee received no pay for the hours in excess of 40. Under the 40 Hour Rule, the employee is entitled to $37.50 for each of the 10 hours of overtime, which equals $375.

The FWW is an alternative way to determine an employee's regular rate of pay. Under the FWW, a salaried employee's regular rate of pay is the hourly rate equal to dividing the employee's weekly wages by the total number of hours worked in the week. To calculate the amount of overtime due, one multiplies this hourly rate by 50%, and then multiplies the resulting product by the number of overtime hours worked.

Under the FWW, each pay period has a different regular rate depending on the number of hours worked. The employee is paid the entire regular rate for every hour worked, not just the first 40 hours as is the case under the 40 Hour Rule. The employee is still entitled to overtime at a rate of 150% of the regular rate, but since the employee has been paid 100% of the regular rate for every hour of work (not just the first 40 hours), the overtime rate is only an additional 50% of the regular rate.

Under the FWW, the hypothetical employee described above is paid $1,000 for all 50 hours worked during the week, making the regular rate of pay $20 per hour ($1,000 / 50 hours). The employee's overtime rate is 150% of $20, or $30 per hour. The employee is paid $20 per hour for all 50 hours of work (as opposed to $25 per hour for the first 40 hours), so he or she is entitled only to an additional $10 for each of the 10 hours of overtime, which equals $100.

The FWW reduces overtime compensation in two ways. First, the employee only gets a 50% premium as opposed to 150% because he or she was paid 100% of the regular rate for the overtime hours. Second, and more subtly, the FWW reduces the regular rate of pay. Under the FWW, the regular rate of pay is the hourly rate equal to the weekly wages divided by the total number of hours worked. Once overtime is at issue, the total number of hours worked will be greater than 40, and therefore, the regular rate of pay under the FWW will always be less than the regular rate of pay under the 40 Hour Rule.

The Legal Justifications for the FWW

The FWW has two legal authorities: a U.S. Department of Labor ("DOL") Interpretive Bulletin and a U.S. Supreme Court decision. Under either authority, application of the FWW results in the same amount of overtime compensation due. However, the DOL Interpretive Bulletin and the Supreme Court decision are applicable in different situations.

The DOL Interpretive Bulletin 29 C.F.R. § 778.114

The DOL›s current version of the FWW is codified at 29 § C.F.R. 778.114(a) and states in relevant part that:[7]

> An employee . . . on a salary basis may . . . receive [a] fixed amount as straight time pay for whatever hours he is called upon to work in a workweek . . . [w]here there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek . . . rather than for working 40 hours or some other fixed weekly work period . . . if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate . . . and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

Under the DOL Rule, for an employer to pay an employee pursuant to the FWW, the following must be present: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary that remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at the minimum legal rate or greater; (4) the employer and the employee have a clear and mutual understanding that the fixed salary is for all hours worked; and (5) the employee receives a 50% premium for all hours worked in excess of 40.[8]

Courts differ on whether the DOL Rule can be used to calculate damages in misclassification cases. In cases where the DOL Rule is used, courts' analyses have focused on the fourth factor - the clear and mutual understanding.[9] These courts generally agreed that so long as

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6 For convenience, I refer to this method of calculating overtime as the "40 Hour Rule".

7 For convenience, I refer to the DOL's codification of the FWW as the "DOL Rule".

8 *Dingwall v. Friedman Fisher Assoc., P.C.*, 3 F. Supp. 2d 215, 221 (N.D.N.Y. 1998); *Ayers v. SGS Control Servs., Inc.*, 2007 WL 646326, *9 (S.D.N.Y. Feb. 27, 2007).

9 *See, e.g., Clements v. Serco, Inc.,* 530 F.3d 1224, 1230-31 (10th Cir. 2008); *Valerio v. Putnam Assocs. Inc.*,173 F.3d 35, 39-40 (1st Cir. 1999); *Blackmon v. Brookshire Grocery Co.,* 835 F.2d 1135, 1138-39 (5th Cir. 1988).

The Tao of Task Delegation

Iliana Konidaris *(ikonidaris@gslawny.com)*

In small firm settings, task delegation can be a complicated undertaking. Attorneys, by nature, often fall under the category of detail-oriented, Type A personalities (i.e., "control freaks") who may have trouble letting go of tasks both big and small. Especially in small firms with a do-it-yourself mentality, delegating may feel taboo. Or, it may simply not seem like a realistic option. Many of us may also work in firms that lack the obvious hierarchical structures with a boss barking orders and an obedient young attorney taking notes. This article addresses the reasons why senior attorneys must delegate tasks to newer attorneys and provides advice from (and also to) the new attorney on how to do it successfully in a small firm setting.

The Why

As Kathleen Brady, a legal career strategist, explains, senior attorneys must delegate work to remove easier tasks from their plate and to allow more time for complicated assignments and business development. She advises, however, that task delegation in a small firm should feel more like team work, where each player takes on a task to contribute to the completion of a project. Task delegation can become a team-building exercise, where some attorneys focus on smaller, easier, and less risky tasks, while also gaining critical skills, and senior attorneys (with higher hourly rates) focus on more complex tasks. As Brady points out, the effective delegator ultimately earns respect from her team by investing in building her team's skills and creating an efficient work model that avoids crisis mode and last-minute panicking. She exhibits "personal power," where her team becomes invested in the tasks she assigns and wants to work for her, instead of mere "position power."

Perhaps most importantly, plaintiffs' attorneys must also keep in mind that a judge may eventually review time records and may reduce attorney hourly rates where work has not been properly delegated to associates and paralegals. See, e.g., **E.S. v. Katonah-Lewisboro Sch. Dist.**, 2011 U.S. Dist. LEXIS 49117, at *19 (S.D.N.Y. Apr. 20, 2011) (reducing attorney's full hourly rate for tasks that were administrative or clerical in nature); **Ayers v. SGS Control Servs.**, 2008 U.S. Dist. LEXIS 69307, at *31 (S.D.N.Y. Sept. 8, 2008) (reducing award where class counsel failed to delegate sufficient work to junior attorneys); but cf., **Copeland v. Marshall**, 641 F.2d 880, 927 (D.C. Cir. 1980) (reducing fee where partners spent insufficient hours on the case while young attorneys spent too many unproductive hours on case). In other words, keep in mind the judge's views on how you delegate your time.

The key to running a successful law practice is knowing how to delegate tasks.

The How

Here are some tips from and to the younger attorneys:

Be specific about deadlines. "ASAP" is meaningless. Instead, tell your associate whether you want the task done in two hours, two days, or two weeks. Brian Moss, an associate to Jeffrey Goldman, advises that if the deadline is a court or client deadline, let your associate know that it's a firm deadline. And keep track of the new attorney's progress at regular intervals.

Form of assignment. Marisa Warren, an associate at Pedowitz & Meister, advises senior attorneys to tell their associates whether they want a quick email, a formal memo, a paragraph of a brief, or just a quick conversation with a research update.

Give the whole story. Warren also advises that senior attorneys provide newer attorneys with the background of the case. Context is important, especially for research assignments. Even if the senior partner is assigning a research task on a very discrete issue, take the extra minute or two to provide the facts and procedural history. It can be instructive for the newer attorney simply to hear the facts and procedure, and timesaving during the course of his research.

Prioritize. This is a skill that applies to both new and senior attorneys in different ways. The new attorney is often in the dark about the order of importance of the tasks on her plate; all tasks seem equally important. Warren warns, however, that new attorneys may be doing a disservice to their firm by taking that approach – some tasks need more time, and some tasks must be completed first. Moss advises new associates not to guess. Instead, explain to senior partners the tasks you have on your plate and let them decide the order of importance. Importance, of course, can be measured in several ways, such as complexity, potential case profitability, or pressing court deadlines. Senior partners remain in a better position to make that determination.

Map it out. Especially at the start of the case, be aware of short and long-term deadlines and communicate those deadlines to associates and paralegals. Brady uses the "Thanksgiving Dinner" approach, where the menu (what tasks have to be done) and the seating (who's doing what task) are planned out ahead of time. Of course, mapping things out and adhering to deadlines is a skill in itself. See Felicia Nestor's article on deadlines in the last NELA newsletter!

Celebrate. Advice not often given by the experts, but still crucial . . . at the end of a long project or case, it can never hurt to celebrate.

Good luck!

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the employee understood that the salary was meant as compensation for all hours worked, application of the DOL Rule is appropriate. In a misclassification case, the fifth factor of the DOL Rule - payment of the 50% premium - is not met because a misclassified employee has not been paid any overtime. Courts that have applied the DOL Rule in misclassification cases have deemed that the fifth factor can be satisfied retroactively through the payment of damages.[10] Conversely, in misclassification cases where the DOL Rule is held inapplicable, courts generally state that all five factors must be present.[11] These courts conclude that payment of the overtime premium must be contemporaneous with the payment of the employee's wages. It cannot be paid retroactively, and therefore, the DOL Rule cannot be used to calculate damages in misclassification cases.[12]

Supreme Court Decision

Overnight Motor Transportation Co. v. Missel

The other legal authority for the FWW is a Supreme Court decision from 1942 entitled **Overnight Motor Transportation Co. v. Missel**.[13] In **Missel**, an employee of a common carrier sued for unpaid overtime. From the outset of the employment relationship, the employer and employee understood that the employee's work schedule would fluctuate. The employer therefore paid the employee a weekly salary as opposed to an hourly rate. At issue was how to determine the employee's regular rate since he was only paid a fixed weekly amount. In ascertaining the employee's regular rate, the Supreme Court held that the weekly salary compensated the employee for all hours worked. The Supreme Court then held that the employee's regular rate was the hourly rate equal to his weekly pay divided by the total number of hours that he worked in each week. Therefore, the employee was entitled to overtime compensation at 50% of his regular rate.[14]

Unlike the DOL Rule, the **Missel** Rule has no requirement that the employee be paid the overtime premium contemporaneously with his or her wages. Indeed, the employee in **Missel** was suing for unpaid overtime. In that vein, several courts have approved of the **Missel** Rule to calculate damages in misclassification cases.[15]

Over the last eighteen months, there have been two U.S. circuit court decisions using the fluctuating workweek method to calculate unpaid overtime in misclassification cases.

Second Circuit's and New York District Courts' Interpretations of the FWW

When addressing the FWW, the Second Circuit and New York district courts have analyzed it under the DOL Rule and consistently held that it cannot be used to calculate damages in misclassification cases. No New York case has discussed the **Missel** Rule.

The only time the Second Circuit has addressed an FWW issue was in a 1996 case, **Yourman v. Dinkins**.[16] In **Yourman**, various salaried New York City employees sued for unpaid overtime.[17] The Southern District concluded that the employees were misclassified because their wages were subject to deductions for sick leave, disciplinary violations, court attendance and military duty, and therefore the salary requirements of the relevant overtime exemptions were not met.[18]

In a subsequent decision, the Southern District addressed calculating damages. The City argued that the damages should be calculated by using the DOL Rule. The court rejected this argument and held that since the employees' wages were subject to various deductions (sick leave, etc.), the second element of the FWW - receipt of a fixed salary - was not satisfied.[19]

The district court said that:

> Although the employment arrangements . . . satisfied the main requirement . . . of the FWW method - *i.e.*, plaintiffs' salaries were intended to provide straight time pay for varying number of hours rather than a fixed workweek - I cannot give the defendants the benefit of [the FWW]. To do so would be to sanction a compensation scheme expressly proscribed by the regula-

See WORKWEEK, next page

10 *See Clements,* 530 F.3d at 1230-31; *Valerio,* 173 F.3d at 39-40; *Blackmon,* 835 F.2d at 1138-39; *see also Urnikis-Negro,* 616 F.3d at 678.

11 *See, e.g., Monahan v. Emerald Performance Materials, LLC,* 705 F. Supp. 2d 1206, 1217 (W.D. Wash. 2010); *Russel v. Wells Fargo & Co.,* 672 F. Supp. 2d 1008, 1012 (N.D. Cal. 2009), *Hunter v. Sprint Corp.,* 453 F. Supp. 2d 44, 58 (D.D.C. 2006); *Rainey v. Am. Forest and Paper Assoc.*, 26 F. Supp. 2d 82, 100 (D.D.C. 1998).

12 *See Monahan*, 705 F. Supp. 2d at 1217; *Russel*, 672 F. Supp. 2d at 1008; *Hunter*, 453 F. Supp. 2d at 58; *Rainey,* 26 F. Supp. 2d at 100.

13 316 U.S. 572 (1942).

14 *Missel*, 316 U.S. at 574-81. For convenience, I refer to the Supreme Court's use of the FWW as the "*Missel* Rule".

15 *See, e.g., Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1324 (1st Cir. 1992); *Rushing v. Shelby County Gov't*, 8 F. Supp. 2d 737, 745 (W.D. Tenn. 1997); *Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283, 287 (N.D. Ill. 1995).

16 84 F.3d 655 (2d Cir. 1996).

17 *Id.* at 656.

18 *Yourman v. Dinkins*, 826 F. Supp. 736, 741 & 744 (S.D.N.Y. 1994). Pursuant to 29 C.F.R. §§ 541.100(a)(1); 200(a)(1); 541.602(a), an exempt executive or administrative employee must be "compensated on a salary or fee basis of not less than $455 per week . . . which amount is not subject to reduction because of variations in the quality of the work performed."

19 *Yourman v. Dinkins*, 865 F. Supp. 154, 157-65 (S.D.N.Y. 1994).

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tion.[20]

The Second Circuit affirmed both district court rulings but did not discuss the damages ruling at length.[21] The Second Circuit's **Yourman** decision was subsequently vacated on other grounds in light of the Supreme Court's decision in **Auer v. Robbins**,[22] which dealt with how sick leave and other pay deductions affected the overtime exemptions' salary requirements.[23] Subsequent **Yourman** decisions decided on remand in light of **Auer** did not address calculating damages.[24] Therefore, the precedential value of the Second Circuit's decision in **Yourman** is questionable.

Two district courts in New York have addressed FWW issues post-**Yourman.** The first was in the Northern District in a 1998 case entitled **Dingwall v. Friedman Fisher Associates**.[25] In **Dingwall**, a salaried designer of electrical systems sued his former employer for unpaid overtime. The court concluded he was misclassified, and the employer argued that the DOL Rule should be used to calculate damages. The court rejected the employer's argument reasoning that since the employer's employee manual stated that a normal work week was expected to be 40 hours, there was no "clear and mutual understanding" that the employee's "salary was intended to compensate him for all hours worked."[26]

The second time a New York court discussed the FWW was in the Southern District in a 2007 case entitled **Ayers v. SGS Control Services, Inc.**[27] In **Ayers**, inspectors who monitored the transfer of oil, gas and other chemicals sued their employer for, *inter alia*, improper payment of overtime under the DOL Rule. Thus, **Ayers** was not a misclassification case. The inspectors were salaried and at all times paid overtime pursuant to the DOL Rule. They alleged that their employer was using the DOL Rule incorrectly.[28]

The Southern District held that the employer's use of the DOL Rule was inappropriate because, in addition to receiving a base salary, the inspectors were given various increases in pay, including additional pay if they met performance criteria and a premium for work done in certain less desirable conditions. The court held that all of these pay increases were violations of the second factor of the DOL Rule - the fixed weekly sum.[29] In dicta, the court said that, "the fluctuating workweek method may not be utilized unless each employee receives a fifty percent (50%) overtime premium *n addition to* the fixed weekly salary."[30]

Since **Yourman**, **Dingwall** and **Ayers** were decided, the DOL issued an advisory opinion approving the DOL Rule to calculate the amount of overtime owed o a misclassified employee.[31] In DOL FLSA Advisory Opinion 2009-3, an employer that concluded it had wrongfully classified some of its employees as exempt wanted to pay these employees for any unpaid overtime that it had previously denied them. The DOL approved of the employer using of the FWW to calculate the unpaid overtime. [32]

The Two U.S. Circuit Court Decisions

In the past eighteen months, the Seventh Circuit and the Fourth Circuit have used the **Missel** Rule to calculate damages in misclassification cases. In **Urnikis-Negro v. American Family Property Services**, a salaried real estate appraiser sued her employer for unpaid overtime.[33] The Northern District of Illinois held that she was misclassified, and in calculating the unpaid overtime, rejected the employee's argument that her unpaid overtime should be calculated based on the 40 Hour Rule. Instead, the district court concluded that the employee's weekly salary covered all hours worked and applied the DOL Rule.[34]

On appeal, the Seventh Circuit rejected the district court's use of the DOL Rule, concluding that the rule is forward-looking and non-remedial. The Seventh Circuit further stated that the 50% overtime premium must be paid contemporaneously with the employee's regular wages for the DOL Rule to apply. Nonetheless, the Seventh Circuit affirmed the district court's decision, but using the **Missel** Rule instead of the DOL Rule.[35]

In **Desmond v. PNGI Charles Town Gaming, L.L.C.**,[36] salaried employees of a racetrack sued their employer for unpaid overtime. The Fourth Circuit, reversing the Northern District of Virginia, concluded that the employees were misclassified.[37] On remand, the district court calculated the unpaid overtime using the Missel Rule. The district court noted the split in authorities regarding use of the DOL Rule in misclassification cases and explicitly based its reasoning on the **Missel** Rule.[38] The Fourth Circuit affirmed the district court's use of the **Missel** Rule.[39]

Urnikis-Negro and **Desmond** could have a significant impact in the Second

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20 *Id.* at 164-65.

21 *Yourman*, 84 F.3d at 655.

22 519 U.S. 452 (1997).

23 *Id.* at 458-60.

24 The last remanded proceeding was in 2000. *See Yourman v. Giuliani*, 229 F.3d 124 (2d Cir. 2000).

25 3 F. Supp. 2d at 215.

26 *Id.* at 217-21. The *Dingwall* decision was decided during the *Yourman* remand proceedings and makes no mention of *Yourman*.

27 2007 WL 646326 at *1.

28 *Id.* *1-13.

29 *Ayers*, 2007 WL 646326 at *2-10.

30 *Id.* at *12 (internal quotations omitted) (*emphasis added*). In a subsequent decision addressing damages calculations, the *Ayers* court cited *Yourman* with approval. *Ayers v. SGS Control Servs., Inc.*, 2007 WL 3171342, * 2-3 (S.D.N.Y. Oct. 9, 2007).

31 FLSA Advisory Opinion 2009-3.

32 The New York Department of Labor also recently issued an advisory opinion approving the FWW on a going forward basis. It makes no mention of using the FWW to calculate damages in a misclassification case. *See* Counsel Letter R.O. 10-0136, Feb. 1, 2011.

33 616 F.3d 665, 669 (7th Cir. 2010).

34 *Urnikis-Negro v. Am. Family Property Servs.*, 2008 WL 5539823, *9-11 (N.D. Ill. Jul. 21, 2008).

35 *Urnikis-Negro*, 616 F.3d at 667-84. The employee also argued that the FWW was not appropriate because her hours did not fluctuate. She always worked more than 40 hours per week. The Seventh Circuit rejected this argument noting that the employee in *Missel* never worked less than 40 hours per week. *Id. See also Missel*, 316 U.S. at 574.

36 630 F.3d 351 (4th Cir. 2010).

37 *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 689-90 (4th Cir. 2009).

38 *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 661 F. Supp. 2d 573, 578-85 (N.D. W. Va. 2009).

39 *Desmond*, 630 F.3d at 357.

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Circuit. First, they are contrary to the outcome of **Yourman**, which held that the FWW could not be used in misclassification cases. **Yourman** addressed the FWW under the DOL Rule and was already of questionable authority, so **Urnikis-Negro** and **Desmond** provide a persuasive alternative. Second, the holdings of **Urnikis-Negro** and **Desmond** could be construed to apply to every misclassification case.[40] This would have the effect of creating a new category of overtime eligibility. In addition to those employees who are exempt from overtime and those who are paid hourly and therefore entitled to overtime using the 40 Hour Rule, all salaried employees who are non-exempt or who are misclassified would be entitled to overtime but only calculated according to the FWW.

How can we minimize application of the FWW in misclassification cases?

In a misclassification case, the employee does not want the FWW applied because it will reduce his or her damages. So, what arguments can be made to avoid application of the FWW? When an employer seeks to apply the FWW, the first thing the employee must ascertain is on which legal authority the FWW argument is based: the DOL Rule or the **Missel** Rule.

Arguments Against Using the DOL Rule

Should your adversary seek to use the DOL Rule, the employee can argue that the DOL Rule is exclusively forward-looking and non-remedial.[41] The employee can further argue that if the employee's pay is reduced for any reason, it violates the second factor - the fixed weekly sum. In DOL FLSA Advisory Opinion 2006-15, the DOL reaffirmed its long-standing position that the FWW cannot be used if the employee's pay is docked for reasons occasioned by the employee.[42] This means that the DOL Rule cannot be used if an employer uses a sick-leave/vacation bank whereby the employee's pay is reduced for days off taken in excess of an allotted number.[43]

Another argument against application of the DOL Rule is that if the employee receives a bonus or has any other increases in pay, it violates the second factor. This is the approach the Southern District took in **Ayers**. The DOL sought comments on a proposal to amend the DOL Rule so that yearly bonuses would not violate the second factor. However, after the comment period expired, the DOL declined to change its position that

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40 *But see Ransom v. M. Patel Enters., Inc.*, No. A-10-CA-857 (W.D. Tex. Nov. 1, 2011) (holding that determining how many hours an employee's salary is meant to cover is a fact-specific inquiry and that therefore, the *Missel* Rule cannot be applied categorically in all misclassification cases). New York law also prohibits the FWW in the hotel and hospitality industry. 12 N.Y.C.R.R. §146-2.5.

41 *Urnikis-Negro*, 616 F.3d at 667.

42 *See also Hunter*, 453 F. Supp. 2d at 61.

43 In FLSA Advisory Opinion 2009-3, the employer did not mention using such a vacation/sick leave plan.

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double back pay and litigation costs.

Dodd-Frank also reinvigorated pre-existing whistleblower claims. The bill expanded the FCA to encompasses a more expansive range of activities that could further a potential qui tam action, including protections against associational discrimination.

Similarly, Dodd-Frank expanded the Sarbanes-Oxley Act (SOX) to also include coverage of the affiliates and subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of such publicly traded company."[2]

Finally, Dodd-Frank expanded whistleblower protections to financial service employees. Covered employees include those working for any company that, *inter alia*, extends credit, or services or brokers loans.[3] Establishing a *prima facie* case of retaliation only requires proving (by a preponderance of the evidence) that the protected conduct was a "contributing factor" to the retaliation.[4]

Accordingly, to effectively negotiate a claim covered by Dodd-Frank, employee advocates must be aware of the numerous changes made to existing whistleblowing laws in order to competently evaluate any offer and implement an effective strategy. Some important considerations:

■ ***No Rush to Settle:*** The urgency that once plagued advocates to either settle or file has been mitigated by Dodd-Frank's longer statute of limitations (three months under SOX but six years from the retaliatory conduct or three years upon discovery of the conduct under Dodd-Frank).

■ ***Don't Sell Yourself Short:*** These claims are now worth substantially more due to the expanded back pay awards of double damages. Make sure when you negotiate you understand the true value of the claims.

■ ***Release of Rights:*** Be aware that Dodd-Frank invalidates any "agreement, policy form, or condition of employment, including a pre-dispute arbitration agreement" that has the effect of waiving rights and remedies available to whistleblowers.[5] Make sure there is a carve-out in the settlement agreement for these claims.

■ ***Indemnification:*** This needs to be examined on a case-by-case basis, but if the employee had a hand in the wrongdoing, you should seek an indemnification provision.

Any settlement agreement must be drafted and reviewed with Dodd-Frank in mind, including confidentiality agreements and nondisparagement clauses that expressly exclude the rights and remedies provided for by the act. Because Dodd-Frank provides additional retaliation causes of action, express language carving out the act is necessary to best protect employee interests. ■

The Dodd-Frank Wall Street Reform and Consumer Protection Act require the SEC to pay a large financial award, to whistleblowers who voluntarily provide original information leading to a recovery by the SEC of over $1 million. The act includes new robust anti-retaliation provisions.

■ ***Confidentiality Provisions:*** The SEC implementing rules expressly state that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[6] This is another potential carve-out in a settlement agreement.

■ ***Nondisparagement Provision:*** This provision becomes tricky in light of the Dodd-Frank provisions stated above, as an employer may believe it is "disparaging" for an ex-employee to allege that the company committed fraud, for example. It is important to insert carve-out language in this section too.

■ ***Cooperation Provisions:*** These are rather typical in settlement agreements, but it is important to make sure that embedded in this section is a "reasonable" factor.

ANNOUNCEMENTS

Congratulations

Former editor, Rachel Geman, gave birth to another baby girl on November 6th – Sara Gabrielle!

Don't you have an article or case for the "Filings, Trials and Settlements" column you'd like to share with your NELA/NY members?

If you have any announcements or if you an article you'd like to share with your NELA/NY colleagues,

Please e-mail Shelley nelany@nelany.com

We will include it in our the next issue of the newsletter.

2 PL 111-203, 2010 HR 4173 § 929A (2010).

3 Id. at Section 1002(15)(A).

4 Id. at Section 1057(c)(3)(c).

5 Id. at Section 922(c).

6 17 C.F.R. § 240.21F-17.

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yearly bonuses are incompatible with the FWW.[44]

Arguments Against Using the Missel Rule

Should your adversary seek to use the **Missel** Rule, the preceding arguments are less persuasive. The **Urnikis-Negro** and **Desmond** decisions imply that the **Missel** Rule is applicable in virtually all misclassification cases. But, **Missel** should not be interpreted in a vacuum. **Missel** was only one of two FLSA decisions the Supreme Court rendered on June 8, 1942. The other was **Walling v. A.H. Belo Corp.**[45] In **Walling**, before the FLSA was enacted, an employer was paying all of its employees above what was to become the minimum wage. The employees, however, did not receive any overtime. After the FSLA's enactment, the employer wanted to adjust its pay policies to comply with the Act's overtime requirements but not reduce the overall compensation already being paid to its employees. To do so, the employer guaranteed the employees a fixed weekly sum but also gave them hourly rates and overtime rates, which were 150% more than the hourly rates. Based on the given hourly and overtime rates, the fixed weekly sum was equal to 54.5 hours of work (40 at the hourly rate and 14.5 at the overtime rate). Therefore, the employee would not receive any pay in addition to the fixed weekly sum unless more than 54.5 hours were worked. The Department of Labor sought to enjoin this practice. The Supreme Court held that the practice was acceptable because the employee was always paid at the overtime rate for hours in excess of 40. The Supreme Court distinguished **Walling** from **Missel**, stating that in **Walling**, the employees had stated hourly rates whereas in **Missel**, the employee only had a fixed weekly salary, which made it difficult to ascertain an hourly rate and therefore compute overtime.[46]

Thus, an argument against application of the **Missel** Rule is the presence of stated hourly rates. But note, many present-day paystubs for salaried employees state that employees are being paid for 40 hours. It is unlikely that a paystub alone will be enough to defeat application of the **Missel** Rule.[47] But, evidence of the hourly rate being used beyond a paystub could be sufficient. Such evidence may include use of the hourly rate to make deductions for vacation and sick time or if the hourly rate is used to make pay deductions should the employee be suspended.

Conclusion

The past eighteen months have been difficult for successful plaintiffs in misclassification cases. The Seventh Circuit and the Fourth Circuit both ruled that in a misclassification case, unpaid overtime should be calculated using the FWW. This has the effect of reducing damages by over 2/3. More significantly, these decisions could be construed to apply in all misclassification cases, which would create a new class of employee that is neither exempt from overtime nor entitled to the full 150% overtime premium. While it is unclear how the Second Circuit will approach this issue, it is incumbent on NELA lawyers to safeguard traditional employee protections and ensure that the FWW does not become the standard method for calculating overtime in misclassification cases. Otherwise, the FWW may fluctuate out of control. ■

44 *See* 76 F.R. 18848 (April 5, 2011).

45 316 U.S. 624 (1942).

46 *Walling*, 316 U.S. at 625-34. The Supreme Court said, "[*Walling*] is entirely unlike the Missel case, decided this day. In the contract in that case there is no stated hourly wage and no provision for overtime." Id. at 634. (internal citations omitted).

47 *See Zoltek*, 884 F. Supp at 286-87; *Desmond*, 661 F. Supp. 2d at n.7 (both concluding that references to 40 hours a week on paystubs are "accounting artifacts" that are insufficient to invalidate the *Missel* Rule).

Making CaseManager for iPad

By: John Upton *(johnware@aol.com)*

A couple of summers ago after I bought the new iPad, while on vacation, I regretted the fact that there wasn't a way to manage my cases on it. I wanted a program that would hold my documents, notes, time records, to-do lists, contacts and calendar information, and let me enter new information. There were individual programs for these things but, I wondered – How difficult could it be to engineer an application that had all of these things?

Well, now, after a year of work with an application-design firm from Hoboken, I know the answer–it's doable but it takes a year. Last week, I finally got my application into the Apple store for iPad applications. I gave it the unimaginative but accurate name "CaseManager for Ipad". It does the things I wanted it to do and I tried to make it as easy to use as possible to use. As far as I know, it is unique in the fact it does not rely on an internet connection to access the data because the data is in the device.

While most of the year of production time was spent exorcizing the application's bugs, there was also a big delay when I started a little New York corporation to sell the app. I could almost sense Apple's scepticism about that. They said, "If we're going to be your business partner, we have to see certified incorporation papers!"

The application can be seen in the iTunes application store (search for casemanager for ipad) or at www.goodcaseapps.com (Apple wouldn't permit me to use the term "ipad" in the domain!). The app sells for $15. Apple is apparently also my lawyer because they're taking almost a third. ■

Recent Case Law Suggests That ADAAA Has Significantly Lowered the Bar For Plaintiffs Alleging A Disability

Joni Kletter (jkletter@msek.com)

This past summer, a number of courts decided cases under the ADA Amendments Act ("ADAAA" or the "Amendments Act"), a new law which became effective in 2009.

The Americans with Disabilities Act ("ADA") requires employers to make accommodations for disabled employees. Congress's goal in passing the ADAAA was, in part, to make it easier for an individual seeking protection under the ADA to establish that he or she has a "disability", as defined by that Act. The recent Amendments Act retained the ADA's basic definition of a disability as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. However, the Amendments Act greatly expanded the interpretation of "major life activities" to include, for example, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking . . ." as well as the "the operation of a major bodily function, including . . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The Amendments Act also explicitly states that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

Before the passage of the ADAAA, many courts held that individuals with illnesses such as epilepsy, multiple sclerosis, cancer, diabetes and hypertension were not substantially limited because their conditions occurred episodically or were in remission. The ADAAA has altered that analysis, and a review of recent case law indicates that courts have substantially lowered the bar for plaintiffs alleging that they are "disabled" under federal law.

In **Gibbs v. ADS Alliance Data Sys.,** No. 10-2421, 2011 U.S. Dist. LEXIS 82540 (D. Kan. July 28, 2011), the court denied defendant's motion for summary judgment and held that carpal tunnel syndrome that is debilitating in one hand may constitute a disability under the ADAAA. The court stated that under the new law, "Congress intended to convey that the question of whether an individual's impairment is a disability under the ADA should *not demand* extensive analysis and that the primary object of attention in cases brought under the ADA should be *whether entities covered under the ADA have complied with their obligations*."

In **Kinney v. Century Services Corporation**, No. 10-787, 2011 U.S. Dist. LEXIS 87996 (S.D. Ind. Aug. 9, 2011), plaintiff had isolated bouts of depression, which was debilitating when active, but did not impact her work performance when it was inactive. The district court denied defendant's motion for summary judgment and held that although intermittent depressive episodes was clearly not a disability prior to the ADAAA's enactment, plaintiff's depression raised a genuine issue of fact as to whether she is a qualified individual under the Amendments Act.

In **Feldman v. Law Enforcement Assoc.**, 10 CV 08, 2011 U.S. Dist. LEXIS 24994 (E.D.N.C. Mar. 10, 2011), one plaintiff had episodic multiple sclerosis and the other plaintiff had TIA, or "mini-stroke." The court found that the multiple sclerosis was clearly a disability under the ADAAA, as the statute specifically states that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." In addition, the recent EEOC regulations for the Amendments Act specifically list MS as a disability. As to the plaintiff suffering from TIA, the court held that "while the duration of [plaintiff's] impairment may have been relatively short, the effects of the impairment were significant", and therefore, he also alleged sufficient facts at the initial stage of the case.

In **Chamberlain v. Valley Health Sys.**, 10 CV 28, 2011 U.S. Dist. LEXIS 12296 (W.D. Va. Feb. 8, 2011), plaintiff adequately alleged that she was "regarded as" disabled as a result of her visual field defect which made fine visual tasks more difficult. The court denied summary judgment and held that the issue of whether the employer believed that plaintiff's impairment "was both transitory and minor must be decided by a jury" given that plaintiff submitted an affidavit stating that one of her supervisors insisted that plaintiff was completely unable to work as a result of her vision problem.

In **Cohen v. CHLN, Inc.**, 10 CV 514, 2011 U.S. Dist. LEXIS 75404 (E.D.Pa. July 13, 2011), plaintiff alleged that he suffered from debilitating back and leg pain for nearly four months before his termination. The court denied summary judgment and held that under the less restrictive standards of the ADAAA, plaintiff has offered sufficient evidence to raise an issue of fact as to whether he was disabled at the time of his termination. While defendant claimed that his condition was of too short a duration, the court disagreed and found that the ADAAA mandates no strict durational requirements for plaintiffs alleging an actual disability.

In **Norton v. Assisted Living Concepts, Inc.**, 10 CV 91, 2011 U.S. Dist. LEXIS 51510 (E.D. Tex. May 13, 2011), the court denied summary judgment and held that renal cancer qualified as a disability under the ADAAA. The fact that plaintiff's cancer was in remission when he returned to work is of no consequence since there is no dispute that renal cancer, "when active", constitutes a physical impairment under the statute. Moreover, cancer, when active, substantially limits the major life activity of normal cell growth, as defined by the statute and the EEOC regulations regarding the Amendments Act. See also **Meinelt v. P.F. Chang's China Bistro, Inc.**, 10-H-311, 2011 U.S. Dist. LEXIS 57303 (S.D.Tex. May 27, 2011) (denying summary judgment where plaintiff had an operable brain tumor).

Additionally, in a case decided last winter, **Lowe v. American Eurocopter, LLC**, No. 10 CV 24, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. Dec. 16, 2010), a court held that obesity may qualify as a disability under the ADAAA. Plaintiff alleged that she was disabled as a result of her weight and that her disability made her "unable to park and walk from the regular parking lot." The court found that because "walking" is specifically listed as a major life activity in the Amendments Act, plaintiff had adequately stated a claim for purposes of Rule 12(b)(6) by asserting that her obesity affected her major life activity of walking.

Since the ADA was first passed in 1990, much of the case law focused on whether a plaintiff was "disabled" for purposes of the statute. These recent cases indicate that those days are over, and courts are going to focus more on the employer's conduct as opposed to plaintiff's condition.

I would like to thank NYU Law Student, and MSEK intern, Paul Brown for his help with this article. ■

Squibs

Brian Moss *(brianmossesq@gmail.com)*

WAGE & HOUR

Mullins v. City of New York, 653 F.3d 104 (2d Cir. 2010)

Police sergeants brought an action against the City for unpaid overtime under the FLSA. The police sergeants responsibilities included pursuing, restraining, and apprehending suspects; interviewing witnesses, suspects, victims, and vehicle operators; being dispatched to all arrests in their unit and responding when directly dispatched; verifying whether probable cause to arrest a suspect exists; verifying the target location for search warrants and determining whether a warrant is appropriate based on their judgment and evaluation as to the existence of probable cause; securing and determining the size and scope of a crime scene prior to the arrival of the Crime Scene Unit; determining whether a show-up or line-up identification procedure may be conducted; taking charge of operations at crime scenes if they are the highest ranking officers present; using certain equipment, such as tasers, water cannons, and restraining tape; completing reports; instructing lower ranking police officers on proper procedures, directing them to survey certain areas, and monitoring their use of proper equipment and accurate recording of daily activities. The Court holds that the police sergeants primary duties were law enforcement and not management. They are therefore entitled to overtime.

Chen v. Grand Harmony Rest., Inc., 2011 WL 4636603 (S.D.N.Y. Oct. 6, 2011)

Restaurant employees sued for failure to pay minimum wage, denial of overtime, misappropriated gratuities, unpaid spread-of-hours compensation, and failure to reimburse uniform expenses. The plaintiffs argued that their statute of limitations should be tolled. The defendants moved to dismiss part of the action because it was time barred. The Court holds that equitable tolling is a factual inquiry within the discretion of the court. The court declined to dismiss the claims because there were disputed issues of fact.

Ji v. Belle World Beauty, Inc., No. 603228/2008 (N.Y. Sup. Aug. 24, 2011).

Salon employees sued for FLSA and NYLL violations. The employees sought to amend their complaint to reflect the 100% liquidated damages amendment made to the NYLL by the Wage Theft Prevention Act. The employees argued that the amendment should be applied retroactively. The Court holds that the Wage Theft Prevention Act was remedial and therefore applied retroactively. The employees were permitted to amend their complaint.

DISCRIMINATION AND RETALIATION

Ballard v. HSBC Bank, 2011 U.S. Dist. LEXIS 123661 (W.D.N.Y. Oct. 26, 2011)

An employee brought prevailed in the State Division on a discrimination claim under the New York State Human Rights Law. She dually filed with the EEOC. The employee then brought suit in federal court to recover attorneys' fees under Title VII. The Court holds that claims solely for attorneys' fees are claims under Title VII and thus permissible. A prevailing plaintiff under the State Human Rights Law is also a prevailing plaintiff under Title VII. The Western District agreed with the Seventh, Eighth, Ninth and Tenth Circuits, which had already addressed this issue and disagreed with the Fourth Circuit, which held the other way.

Tepperwien v. Energy Nuclear Operations, 2011 WL 5142555 (2d Cir. Oct. 31, 2011)

A security officer made a sexual harassment complaint against another male coworker. After making his complaint, management began to question him on how he performed his job claiming her violated various security rules. The security officer claimed the questioning was retaliation because any violation was minor. The jury ruled in favor of the security officer and awarded $500,000 in punitive damages. The district court vacated the $500,000 punitive damages award. The security officer appealed. The Court of Appeals holds that the alleged retaliatory acts were too trivial to dissuade a reasonable employee from complaining about sexual harassment and these incidents were not even enough in the aggregate to create an adverse action. The Second Circuit noted that the security officer worked at a nuclear power plant, which required that management exhibit little tolerance for mistakes and rule violations.

Rojas v. The Roman Catholic Diocese of Rochester, 2011 WL 4553460 (2d Cir. Oct. 4, 2011).

Female former employee filed an action against the diocese, pastoral center, and parish priest alleging that she had been subjected to sexually hostile work environment and retaliation in violation of Title VII and the New York State Human Rights Law. The employee's deposition and sworn affidavit were inconsistent with her allegations in her complaint. The Western District of New York granted summary judgment for the Defendants. The employee appealed.

The Court of Appeals holds that te inconsistencies between plaintiff's summary judgment submissions and her prior sworn statements and judicial admissions warranted dismissing the case on summary judgment.

Johnson v. Nextel Communications, 2001 WL 4436263 (2d Cir. Sept. 26, 2011).

587 Nextel employees engaged a Long Island law firm to represent them in a discrimination claim. The law firm then entered into an agreement with Nextel for $7.5 million whereby the law firm would persuade its clients to drop their claims and accept a dispute resolution and settlement agreement that mandated all their claims be mediated. The law firm would then work as a consultant to Nextel for the next two years once their clients' claims are resolved. At the law firm's suggestion, the employees accepted the dispute resolution and settlement agreement.

See SQUIBS, next page

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When the employees learned about the side deal with Nextel, they sued the law firm for among other things, fraud, legal malpractice and breach of fiduciary duty to its clients. The district court held the employees did not state a claim because they signed waivers with the dispute resolution and settlement agreement. The employees appealed. The Court of Appeals reinstates the employees' claims against the law firm. The relationship between the law fim and Nextel created a conflict of interest that could not be waived. In light of the conflict, the law firm could not have given its clients independent advice as to whether to sign the settlement and dispute resolution agreements. ■

Class Action Squibs

By Julie Salwen *(jsalwen@abbeyspanier.com)*

In 2011 the Supreme Court decided two cases—**Wal-Mart Stores, Inc. v. Dukes** 2011 U.S. LEXIS 4567, (June 20, 2011) and **AT&T Mobility LLC v. Concepcion**, 131 S. Ct. 1740 (2011)—that have the potential to change the landscape for class litigation. Both decisions have been the subject of widespread analysis elsewhere and this article is not going to repeat that analysis. Instead it will review two cases that provide some guidance on how lower courts are responding to these decisions in the context of employment litigation.

WAL-MART STORES, INC. V. DUKES

Rule 23(a) Commonality

The **Dukes** majority held that a class consisting of all women who had worked at a Wal-Mart domestic retail store since December 26, 1998 (totaling approximately 1.5 million class members), could not meet the commonality requirement of Federal Rule of Civil Procedure § 23(a)(2). Prior to this holding commonality had been considered an easy standard to meet. In fact, Justice Ginsburg's dissent emphasizes that the Rule 23(a) requirements are threshold requirements and suggests that the majority has imported the Rule 23(b)(3) predominance and superiority inquiry into Rule 23(a). It is still too early to tell what the exact contours of the commonality standard in the lower courts will be as a result of this central holding of **Dukes**. In fact, there is some disagreement as to whether the Supreme Court articulated a new standard in **Dukes** or whether the standard remains the same, but will be more rigorously applied in the future.

Perhaps the best guidance on meeting the **Dukes** commonality standard has been provided by the Ninth Circuit. In **Ellis v. Costco Wholesale Corp.**, No. 07-15838, 2011 U.S. App. LEXIS 19060 (9th Cir. Sept. 16, 2011) the appellate court vacated the district court's certification of a class of current and former female employees of Costco who were denied promotion to General Manager ("GM"), Assistant General Manager ("AGM"), or Senior Staff positions and remanded with explicit directions on the factual findings and analysis required for a ruling that plaintiffs had met their burden of showing commonality. In the district court plaintiffs presented expert evidence to show that female employees were (1) promoted more slowly and underrepresented at the GM and AGM levels compared to male Costco employees; (2) were underrepresented at the GM, AGM, and Senior Staff Manager positions compared to female representation in these positions at comparable companies; and (3) that Costco had a "pervasive culture of gender stereotyping and paternalism." *Id.* at *27 . Costco produced its own experts who reported that females were not underrepresented in these managerial positions except possibly in two out of a total of eight regions and that any disparities that did exist were caused by outside factors such as women's avoidance of jobs with early morning hours. Costco then moved to strike the plaintiffs' expert evidence. The district court denied the motion to strike holding that Costco's challenge (with one exception) went to the weight of the evidence rather than its admissibility and certified the class. On appeal, the Ninth Circuit found that the district court had conflated the Daubert analysis into whether the evidence was admissible, which the district court applied correctly, with the Rule 23(a) analysis. The inquiry into commonality required the court to weigh evidence and draw conclusions relating to whether "the whole class was subject to the same allegedly discriminatory practice." *Id.* at *28. While class certification did not require an inquiry into whether the employees had, in fact, been discriminated against, it did require the court to draw conclusions on disputes relating to whether the class as a whole was subject to the same promotion decision-making process. Among the relevant factual disputes that the court must resolve before finding that "there are common questions of law and fact among the putative class members," *id.* at *30, are whether in the two regions where Costco's experts reported women might be underrepresented among GMs and AGMs the promotion decision-making process operated differently than in the other regions and whether plaintiffs were correct that decisions on promotions were "made or strongly influenced by upper management at Costco headquarters," *id.* at *28 n.7, or Costco was correct that GMs at local warehouses decide whom to promote to AGM.

Money Damages Under Rule 23(b)(2)

While the **Dukes** court was divided on the issue of commonality, the Court unanimously held that money damages, including awards of back pay, are impermissible in a class certified for equitable relief under Rule 23(b)(2), unless, possibly, where the money damages are merely incidental to the equitable relief. This part of the holding established a bright-line rule, although it was unnecessary to the ultimate result because the Court had already held that the class must be decer-

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tified. This part of the ruling has caused a significant change in the Second Circuit, overruling the well-established standard for (b)(2) classes set in **Robinson v. Metro-North Commuter Railroad Co.**, 267 F.3d 147 (2d Cir. 2001). In **United States v City of New York**, 07-CV-2067, 2011 U.S. Dist. LEXIS 73660 (E.D.N.Y. July 8, 2011), Judge Garaufis went so far as to state that "[i]n so holding a unanimous Supreme Court reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that backpay is recoverable in employment discrimination class actions certified under *Rule 23(b)(2)*."

United States, more commonly known as **Vulcan Society**, or the Firefighters' case, involved claims that the way in which New York City hired firefighters was discriminatory. The original case was filed by the United States and alleged that the pass/fail and rank ordering application of two tests used to screen firefighter applicants constituted disparate impact race discrimination in violation of the Title VII. The Vulcan Society, Inc. and individual plaintiffs then sought to intervene alleging the that the use of the exams also constituted intentional pattern or practice discrimination. In September of 2009, the court certified a (b)(2) liability phase class of all black firefighters or firefighter applicants who took one of the two exams and were harmed by the pass/fail or rank-ordering use of the results. After **Dukes** was decided New York City moved to decertify this (b)(2) class because the remedies sought by the class included monetary relief including backpay and compensatory damages. The court denied the City's motion. To determine whether **Dukes** mandated decertification of the liability phase class the court analyzed **Robinson**. The analysis revealed that **Robinson** had four relevant holdings.

> (1) that a class seeking both classwide injunctive and individual backpay relief on a disparate impact claim should be certified for class treatment under (b)(2); (2) that a pattern-or-practice disparate treatment claim seeking compensatory damages in addition to equitable relief may be certified for class treatment under (b)(2) if the monetary relief sought does not predominate over the injunctive relief sought; (3) that even if the entire pattern-or-practice disparate treatment claim cannot be certified under (b)(2), a district court should still certify the liability phase of the claim for class treatment under (b)(2), and reconsider the propriety of continued (b)(2) certification if the case proceeds to the remedial phase; and (4) a district court may mitigate due process concerns implicated by using (b)(2) to decide questions of individual monetary relief in the remedial phase by affording notice to absent class members and giving them the right to opt-out of the (b)(2) class under Rule 23(c)(2)

United States at *24-25. **Dukes** overruled three of these holdings, but the third holding of **Robinson** remains good law. During the liability phase of a pattern or practice or disparate impact claim class certification under Rule 23(b)(2) and (c)(4) (which allows class certification "with respect to particular issues") is appropriate.

AT&T MOBILITY LLC V. CONCEPCION

Concepcion held that the Federal Arbitration Act ("FAA") preempted state law and required California's courts to enforce an arbitration clause that did not allow for class arbitration in the context of a consumer contract. While there might have been a question of whether the decision applied to employment rights created by federal statutes when the case was first decided, the Supreme Court has recently remanded a wage claim under California law. In **Sonic-Calabasas A, Inc. v. Moreno**, No. 10-1450, 2011 U.S. LEXIS 7728 (U.S. Oct. 31, 2011), the plaintiff had signed a mandatory employment contract that required that disputes be resolved by arbitration. California law allows employees to bring their wage claims to the Commissioner of Labor for an administrative hearing. If either party appeals the results of this hearing the case is heard *de novo* in the Superior Court. The California Supreme Court, ruling before **Concepcion**, held that allowing for the administrative hearing did not interfere with the arbitration clause of the contract because any appeal would be brought to arbitration. **Sonic-Calabasas A, Inc. v. Moreno**, 51 Cal. 4th 659 (Cal. 2011). The Supreme Court remanded the case to the California Supreme Court for reconsideration in light of **Concepcion**.

In the Second Circuit there have been two cases where the possibility of a class action was upheld even though the plaintiffs had signed employment contracts that did not explicitly all for class actions. The two cases took opposite tacks legally.

In **JOCK V. STERLING JEWELERS**, 10-3247-CV, 2011 U.S. App. LEXIS 13633 (2d Cir. Feb. 9, 2011), the employee plaintiffs had brought their claims of discrimination to arbitration and the arbitrator had awarded them the right to class arbitration. The district court held that, where the arbitration clause was silent with regard to class arbitration, the arbitrator did not have the authority to award class arbitration. The Second Circuit overruled the district court stating that the district court had wrongly attempted to substitute its legal analysis for the arbitrator's and holding that under Second Circuit precedent cannot overturn an arbitrator's legal ruling if the ruling is one which the arbitrator had the authority to make.

In **CHEN-OSTER V. GOLDMAN, SACHS & CO**, 10 Civ. 6950, Magistrate Judge Francis in the Southern District of New York (SDNY) denied an employer's motion to compel arbitration. The employer argued that because the employee had signed an employment contract that required that all claims be arbitrated the case must be arbitrated. After surveying SDNY cases that required pattern or practice discrimination cases be brought as class actions, the court determined that the plaintiffs' right to bring a class action claim was more than just a matter of procedure, but instead went to the substance of the rights protected by Title VII. The court also determined that under the employment agreement class arbitration would be barred. As a result, the court allowed the action to proceed in federal court. ■

Workers Compensation
&
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