NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 10, NO. 5 February 2001 Jonathan Ben-Asher, Editor

Filings, Trials & Settlements

Verdicts

Paul Shoemaker, of Greenfield Stein & Senior, won a $1.25 million verdict on behalf of a former police officer who, the jury found, was retaliated against by supervisors after she filed a sexual harassment complaint. The plaintiff, Gloria Gonzales, also prevailed on her claims of constructive discharge and violation of her Fourth Amendment rights. **Gonzales v. City of New York** (S.D.N.Y., Judge Marrero, October, 2000).

Ms. Gonzales had been on the police force for twelve years when she filed a sexual harassment complaint against the supervisor. From that point on, she said, she was subjected to transfers and disciplinary charges intended to drive her from the police force, including routine citings for minor violations and poor work assignments. She was detained for 27 hours on charges of criminal impersonation after being stopped for running a red light, but acquitted. She resigned in 1996.

The City claimed at trial that Ms. Gonzales had become a problem officer, had abused sick leave and had resigned after the department filed administrative charges that she had refused to take a drug test. However, a former police investigator testified that many of the actions taken against her were baseless and showed bias.

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Changes in Federal Rules Alter Discovery Landscape in Employment Cases

Crack the rulebooks, counselors, because the rules are changing. As of December 1, 2000, new amendments to the Federal Rules of Civil Procedure change the way discovery is begun and conducted. Some of these changes are probably bad for us, and others may be somewhat helpful. Don't be embarrassed if you don't know what the new rules mean, because the courts are likely to be as befuddled as the rest of us.

The rules govern all cases commenced after December 1, 2000, and "insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court, April 17, 2000, 192 F.R.D. at 241. The amendments make important changes in the rules governing mandatory disclosure, party-initiated discovery and deposition practice. A brief summary for the perplexed:

Mandatory disclosure: The old rules required the parties to engage in mandatory disclosure before serving discovery demands or deposition notices. However, they also permitted district courts and individual judges to opt out of those requirements. Many courts did, including the Southern District of New York. The new Rule 26(a)(1) closes these loopholes, so all courts are now subject to the mandatory disclosure provisions. The new rule permits individual judges to exempt particular cases from the requirement, but it does not set out any standards for exemptions.

At the same time, the new Rule 26(a)(1) narrows the scope of what a party must reveal in mandatory disclosure. While the old version required a party to disclose all information "relevant to disputed facts alleged with particularity in the pleadings," the new rule only makes a party disclose information that it "may use to support its claims or defenses, unless solely for impeachment." According to the Advisory Committee's notes, "use" is broadly defined to include use at trial, in support of a motion, at a pretrial conference, or in discovery (for example, to question a deposition witness.) The Advisory Committee noted that under the new rule, a party no longer has to disclose information it does not intend to use. 192 F.R.D. at 385-6.

Moral: When you file a case, think very seriously about what documents and witnesses you intend to use. Of course, much of this is unknowable that early on, but mandatory disclosure is indifferent to that.

Party-initiated discovery: Changes in Rule 26(b) narrow the scope of permissible discovery, will make it harder for plaintiffs to ferret out evidence of discrimination and are likely to produce mind-numbing litigation over the meaning of the new standards.

The old Rule 26(b) gave parties the right to obtain discovery regarding any mater "relevant to the subject matter involved in the action." The new rule significantly changes that language to "relevant to the claim or defense of any party." The Advisory Committee noted that "the rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to devel-

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The NELA/NY
Calendar of Events

March 14 • 6:30 p.m.
NELA/NY Board of Directors Meeting
1501 Broadway - 8th floor

March 23
Upstate Regional Conference
Albany Law School
Look for Details

March 26 • 6:00 - 8:00
Critical Issues in Workplace Conflict Management
Association of the Bar of the City of New York
For information call 212 382-6663

March 30
NELA/NY Spring Conference
Yale Club of New York City
50 Vanderbilt Avenue (44th Street)
Look for Details

May 9 • 6:30p.m.
NELA/NY Board of Directors Meeting
1501 Broadway - 8th floor

May 17 • 6 - 9 p.m.
May 18 • 8 a.m. - 3:30 p.m.
NELA/NY Long Island Conference
Touro Law Center
Huntington, Long Island
Details to Follow

June 20 • 6:30 p.m.
NELA/NY Board of Directors Meeting
1501 Broadway - 8th floor

June 27 - 30
NELA 2001 Twelfth Annual Convention
Seattle, Washington

October/November
Date to be announced
NELA/NYFall Conference
New York County Lawyers Association

November • Date to be announced
NELA/NY Annual Fund Raising Dinner

Board Elections

On November 29, 2000, the Board of Directors held elections for the Board for 2001. Congratulations to the Board for this year:

Jonathan Ben-Asher
Anne Clark
Herbert Eisenberg
Allegra L. Fishel
Leonard N. Flamm
William D. Frumkin
Adam T. Klein
Lisa R. Lipman
Wayne N. Outten
Arnold H. Pedowitz
Robert M. Rosen
Laura Sager
Laura S. Schnell
Pearl Zuchlewski

NELA Seeking Cases to Honor

NELA is looking to honor several plaintiffs and their NELA counsel at our Annual Fund Raising Dinner, which will be held in November. If you would like to nominate a case, please contact the fundraising chair, Robert Rosen (*Bobrosen@rosenleff.com*) or Shelley Leinheardt (*nelany@aol.com*) as soon as possible. Tell us about the case, the parties, the counsel, the basic facts and the outcome.

Attention E-mailers

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

A Word from Your Publisher

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

Items for the calendar may be submitted by calling Shelley Leinheardt:
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New York Begins Attorneys Fee Arbitration Program

New York State has set up a new program for the arbitration and mediation of fee disputes between lawyers and clients. The New York State Fee Dispute Resolution Program permits clients to arbitrate fee disputes, and *requires* lawyers to participate if a client requests arbitration.

Under the program, an attorney is obligated to advise a client regarding the availability of arbitration before beginning an action to recover fees. If the client wants to arbitrate the dispute, the attorney must participate. The client has 30 days to resolve the dispute through the program. Arbitration awards are binding if neither party seeks de novo review within 30 days. The program also strongly encourages mediation. Local bar associations will sponsor arbitral forums.

The program applies to civil matters in which the representation begins on or after June 1, 2001. However it does not apply to fee disputes of more than $50,000 or less than $1,000; to cases where a fee has been determined pursuant to statute or rule and allowed as of right by the court, or determined pursuant to court order; or where no attorney's services have been rendered for more than two years.

Detailed information about the program can be found at www.courts.state.ny.us.part137.html, which contains the applicable Rules (Part 137) of the Chief Administrator of the New York courts.

Court Reporter Project

We have renewed our contract with Bee Court Reporting Agency, Inc. and Veritext Court Reporting, under which our members can receive discounts on deposition transcripts. The contracts are effective January 1, 2001 through December 31, 2002.

The NELA/NY rates will be available to any attorney in a firm in which a NELA/NY member is a partner or employee, whether or not the case is an employment case. The court reporting service may also choose, at their sole option, to charge NELA/NY rates to attorneys representing the opposing side, in a case brought by a NELA/NY member or firm that is eligible for the NELA/NY rate.

We trust you have enjoyed the use of this service and will continue to do so over the next two years.

Congratulations

Congratulations to Laura Sager, a member of the NELA/NY Board, on her recent marriage to Stephen Cohen, a professor at Georgetown University Law Center.

Death Penalty Moratorium: Should NELA Join the Call?

The New York County Lawyers Association's Board of Directors has adopted a resolution calling for a moratorium on capital punishment in the United States. Many other bar groups around the country have adopted the resolution. NELA/NY would like to know your thoughts on this issue. Please send your comments to Shelley Leinheardt at nelany@aol.com

Congratulations

Bob Lipman and Alison Plesur are the parents of a new baby boy, Asher Max Lipman, born October 12, 2000. Congratulations to the family!

Condolences

We send our condolences to NELA/NY member JoAnne Simons, whose mother passed away after a long illness.

Membership Renewals for 2001

Membership in NELA/NY is on a calendar-year basis, so your dues for 2001 are due now. Dues vary by type of membership and length of practice.

Regular Membership:

A Regular Member of NELA/NY is any member of the bar in the United States who subscribes to NELA's purposes and certifies that 50% or more of their employment-related legal representation is on behalf of employees. Only Regular Members in good standing are eligible to serve on NELA/NY's Executive Board, to chair committees and to be listed in the NELA/NY Membership Directory. Dues have been increased by $10-15 for several of these categories.

0 - 5 years in practice: $110

Over 5 years in practice: $135

Over 10 years in practice: $150

Contributing member: $150

Sustaining Member: $250

Advocate: $500

Introductory: $75
(only for first time members)

Paraprofessional and Law Student Membership

Paraprofessional and Law Student Members cannot serve on NELA/NY's Executive Board or chair committees. Dues are $25.

Associate Membership

An Associate Member is a member of the bar of any state who is not eligible to join NELA/NY as a Regular Member, and who does not primarily or exclusively represent employers in employment matters. Associate Members cannot serve on NELA/NY's Executive Board or chair committees. Associate dues are $250.

Management Perspective: Employment Mediation

by Robert Lewis

[**Editor's note**: Plaintiffs' lawyers like mediation, at least when it results in a good settlement. Of course, we always wonder what the other side thinks. If we request mediation, do they assume we're too anxious to settle? Do they come to mediation in good faith? Are they simply using it as free discovery?

As part of our irregular feature presenting the views of the management bar, we asked Robert Lewis to address this topic. Mr. Lewis is the founder of Jackson Lewis Schnitzler & Krupman, well-known for its representation of management in labor and employment law matters. Mr. Lewis is currently a mediator with JAMS, based out of its New York office. The views expressed are solely his.]

* * * * * * *

As a former management advocate, I was a strong proponent of mediation at Jackson Lewis on behalf of its clients. My pitch was "you have everything to gain and nothing to lose." I argued that, regardless of seemingly astronomical initial demands, it was worth the minimal effort and relatively minor cost. Often the client (in house counsel or human resources executive) had never met the plaintiff. Mediation would provide an opportunity to "size him or her up", evaluate the claim and how it would play before a jury.

Before I left the firm, I surveyed 60 attorneys concerning their experience with employment mediation. Almost all reported a favorable experience. Other questions were:

At an appropriate time during the mediation, do you prefer a mediator who forcefully and vigorously reviews with each party, in confidence, the mediator's opinion of the likely outcome of the case?

Everyone responded affirmatively to this question, one attorney stating, "tell it like it is – the good, the bad, and the ugly."

All other things being equal, what experience would you prefer your mediator to have?

An almost unanimous preference for an attorney experienced in employment law.

Before the mediation session, do you prefer a mediator who asks for and receives mediation position papers from all counsel?

Almost everyone responded affirmatively. In addition, most of the responses expressed a preference for a mediator who spoke to each party's counsel before the session and helped them determine who should attend the mediation to increase the probability of success.

Mediation at the EEOC

The EEOC's mediation program was launched in February 1999. It was designed to facilitate the early resolution of charges where it appeared agreement may be possible before documents had been produced and position statements drafted, thus saving time and money for everyone.

The decision to mediate is completely voluntary. The process is strictly confidential and information disclosed is not revealed to anyone, including other EEOC employees. The program has been very successful, with 65% of the mediations resulting in an agreement.

Last September, the EEOC released the results of a study of participants in EEOC mediations from March through July, 2000. The report noted that only 31% of employers initially accepted mediation when faced with an EEOC charge.

This has been my experience as a pro bono external mediator at the EEOC prior to joining JAMS. Since mediation is voluntary, the mediator has the responsibility of convincing the parties to participate. I found that the pro se charging party or counsel needed little encouragement. Not so employer counsel. While those who had previous favorable experiences were willing to attend, many were initially unwilling and needed convincing. (The EEOC study confirms my experience. Of the roughly one-third of employers who agreed to mediate, 96% stated they would use mediation again.

Mediation at the New York State Division of Human Rights

The Division recently initiated a pilot mediation program in its Long Island Region, as an alternative to its investigation of complaints. The mediators are drawn from a panel of attorneys accredited by the Nassau County Bar Association. It is still too early to evaluate the success of the program, but those matters that have been settled reduced years from the Division's long drawn out procedures.

Mediation in the U.S. District Courts

In 1998, Congress passed the Alternative Dispute Resolution Act, specifically

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EEOC Names New Regional Attorney for New York

Katherine Bissell has been appointed the new Regional Attorney for the EEOC's New York District Office. Ms. Bissell is responsible for overseeing and directing all EEOC litigation for the office, which covers New York, Massachusetts, New Hampshire, Connecticut, Rhode Island, Maine, Vermont and Puerto Rico.

Ms. Bissell has been with the EEOC since 1989. She has litigated numerous class and individual discrimination cases, and was the lead trial counsel in **EEOC v. Astra USA Inc.**, a class action for sexual harassment which settled for $9.8 million. Before joining the EEOC, she was staff attorney and managing attorney at Prairie State Legal Services in Illinois and Director of Litigation at the Atlanta Legal Aid Society.

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authorizing the use of ADR processes, including mediation, to resolve disputes prior to trial in civil cases in the federal district courts. Attendance by the parties at one mediation session is mandatory. The program has been very successful.

The courts are encouraging the use of mediation and arbitration in place of litigation. As one court noted,

Access to the courts now is neither affordable nor expeditious. In many federal district courts and state courts, years pass before an aggrieved party can even have this proverbial day in court. In the meantime, the process grinds along inflicting staggering legal expenses on the parties. We have simply priced the court system beyond the reach of most citizens, because the cost of litigation far exceeds the value of the decision itself. In short, our current legal system for resolving disputes is losing the respect of the public and is rapidly approaching failure.

Bright v. Norshipco, 951 F.Supp. 95 (E.D. Va. 1997).

Internal Corporate Mediation

Many corporations have long provided mediation as a component of their internal dispute procedure. Millions of employees are covered by internal corporate mediation programs, and the numbers are increasing as their advantages are publicized in articles and conferences. Because of mediation's effectiveness, many employers offer to pay most of the costs of administration and a portion or all of the mediator's fee as an inducement to participate in the process. As a former management advisor, I have consistently urged mediation as an integral part of a company's internal complaint procedure.

Conclusion

In my experience, mediation provides employees with a catharsis which helps address their concerns and, more often than not, leads to a just resolution of their workplace disputes. While the plaintiff bar agrees, defense counsel and their clients still need more convincing.

Silent Auction

At NELA's national convention in Washington last June, NELA and NERI ran their first Silent Auction. Because it was so successful, they will hold a Second Annual Silent Auction at the 2001 Twelfth Annual Convention in Seattle, Washington, June 27-30, 2001.

NELA would like to get a head start on the 2001 event, so we are asking our members to think about items to donate. Donations should be of significant value ($100 minimum). The funds raised from this event will be used to support a variety of joint NELA and NERI activities, such as the Employee Rights Advocacy Fellowship Program, writing amicus briefs in employment cases before the Supreme Court and federal courts of appeal, and educating the public about employee rights in the workplace.

Items which generated a lot of excitement at last year's auction included a week at a vacation chalet in Vermont; a case of fine wine; four prime Colorado Rockies baseball tickets; and a week at a country home in Woodstock.Silent Auction donors will be acknowledged in the 2001 Annual Convention Program Book, as long as the donor form is received by NELA no later than Friday, May, 2001. (Contact Shelley Leinheardt for information — (212) 317-2291 or *nelany@aol.com.*)

Sex Discrimination and Sexual Harassment Committee

by Eugenie Gilmore

The Sex Discrimination and Sexual Harassment Committee met on January 9. As part of our series of presentations on cases of interest, Rachel Levitan presented and led a discussion of the Second Circuit's decision in **Eisenberg v. Advance Relocation & Storage**, 2000 U S App. LEXIS 33954 (2d Cir. 2000). The Court of Appeals ruled that in determining whether an individual is an employee within the meaning of Title VII and the New York Human Rights Law, courts should place weight on the extent to which the hiring party controls the manner and means by which the worker completes her tasks, rather than how the person is treated for tax purposes or whether the worker receives benefits. The Court reviewed the factors discussed by the Supreme Court in **Community for Creative Non-Violence v. Reid**, 490 U S 730 (1989). The Second Circuit held that those factors should be considered, but that they do not constitute an exhaustive list, and that no and single factor is dispositive.

Future presenters on cases of interest will be: Larry Solotoff on March 13, 2001 on EEOC compliance procedures, Eric Sarver on April 10, 2001, and Margaret McIntyre on May 8, 2001,

A majority of the meeting was spent discussing the Committee's continuing work on its Jury Instruction project. The Committee is collecting jury instructions on sexual harassment issues. The members are reaching out to the legal community for any welcome contributions for cases that went to the jury after September, 1998. The goal is to have a library of such material for the benefit of NELA members. Please submit your offered instructions and the judge's instructions and include a short description of what the case was about, closing arguments, summation, and the decision in the case, to Lawrence Solotoff. If you have the material on disc, it would be appreciated.

The Committee meets on the second Tuesday of each month providing no conflict with a major holiday. All meetings will begin promptly at 6:00 p.m. and end promptly at 7:30 p.m. All members, guest attorneys and future members are welcome. The Co-Chairs are Lawrence Solotoff and Margaret McIntyre.

Law School Colloquium

On November 20, NELA/NY and St. John's School of Law held their second law school colloquium. The speakers were Laura Dilimentin, Judy Katten, Wylie Stecklow, Joe Turco and Phil Taubman.

The speakers were very well received, and the students enjoyed the opportunity of meeting with them afterwards. After the forum, the speakers were taken out to dinner with Prof. David Gregory, who teaches Labor & Employment Law, and several of his law students. The St. John's colloquium was organized by Phil Taubman, Chair of Speakers' Bureau, and his committee. Great job!

We would like to have these forums at all law schools in New York. If you are a graduate of a New York law school and would like to help the committee by calling a law school contact person, please call Shelley.

Women's Rights at Work

For more than three years, Women's Rights at Work has been helping women struggling with sexual harassment and sex discrimination on the job, and educating the community about these critical issues. WRW is the only project of its kind in New York State. Its staff has served over 1500 women in the New York area through its toll-free helpline and free forums, and has referred hundreds of women a year to NELARS, the NELA/NY referral service.

Unexpectedly, one of its major funding sources has dried up and it is reaching out to us for help as it seeks more foundation support. Please support Women's Right at Work by sending your tax-deductible donation to:

Women's Rights At Work
88 Third Avenue - 4th floor
Brooklyn, NY 11217
(718) 694-8290 ext. 42

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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E-mail: ag@outtengolden.com

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

Thanks to Scott Moss and Nantiya Ruan Rogers, associates with Outten & Golden LLP, for their assistance with these squibs.

We are including in this issue some decisions that we could not, for space reasons, include in previous columns.

AGE DISCRIMINATION

Mixed-Motive

In an opinion that begs to be overturned, Judge John S. Martin, Jr. (S.D.N.Y.) has granted summary judgment in an age discrimination and retaliation suit. The court focused on each piece of evidence standing alone and found each argument insufficient. The evidence included: (1) differing statements of why the plaintiff was terminated; (2) replacement by a younger worker; (3) statements that the plaintiff had "mature" understanding and was a "very mature person with mature knowledge"; and (4) management's instruction to the decisionmaker to document the plaintiff's job performance carefully in defense of a potential age discrimination suit. By focusing on each act and declaring it insufficient by itself, the court failed to consider the aggregate of the evidence and found "no evidence" demonstrating the defendant's nondiscriminatory reason for termination false. Watch future squibs for the Second Circuit's opinion. **O'Hara v. Memorial Sloan Kettering Cancer Center**, —- F. Supp. 2d —-, 2000 WL 1459798 (S.D.N.Y. 9/29/00).

In a decision apparently delivered from the bench, a New York County Supreme Court has denied summary judgment in an age discrimination suit on a minimal showing of pretext. The employer alleged that the plaintiff was terminated after twenty-eight years of service for gross negligence involving one bank transaction. Justice Alice Schlesinger found that because the defendant's "witness" to the plaintiff's alleged gross negligence did not have personal knowledge, and the plaintiff disputed the facts upon which the decision to fire her was made, summary judgment was not appropriate. **DiBartolo v. Chemical Bank**, —- N.Y.S.2d —-, N.Y.L.J. 10/12/00, p. 29, col. 2 (N.Y. Sup. Ct. approx. 9/28/00).

Reduction-in-Force (RIF)

Only one of two RIF plaintiffs survived summary judgment in a Seventh Circuit ADEA case in which Chief Judge Posner applied the **McDonnell Douglas** framework to an RIF in which a plaintiff may not have been replaced after termination. In a modified burden-shifting analysis, the plaintiff must show that that someone younger is doing the work that the plaintiff formerly performed or, if all department employees were laid off, that a younger employer was rehired in a different department. One plaintiff, laid off at age 61, produced sufficient evidence to create an inference that the employer considered his age in the termination decision, rebutting defendant's productivity rationale with evidence of an excellent work history and of defendant's retention of younger workers with poor evaluations. The other plaintiff did not survive summary judgment, with the panel finding it insufficient to prove that the company chose which employees to retain based on what they could contribute to the company in the long term. **Thorn v. Sundstrand Aerospace corporation**, 207 F.3d 383 (7th Cir. 3/20/00).

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ATTORNEYS' FEES

The Second Circuit Court of Appeals, interpreting New York law, has reaffirmed the rule that when a professional corporation of lawyers dissolves and a lawyer leaves with a contingent fee case, absent an agreement to the contrary, that case remains an asset of the firm. The court recognized the caveat that the lawyer remits to the former firm the judgment or settlement amount less that sum attributable to the lawyer's efforts after the firm's dissolution. The court refused to recognize a limitation of this rule that would limit its application to partnerships. **Santalucia v. Sebright Transportation, Inc.**, —- F.3d —-, 2000 WL 1677756 (2d Cir. 11/9/00).

CONTRACTS

Restrictive Covenants

Judge Colleen McMahon (S.D.N.Y.) uncharacteristically granted summary judgment for a plaintiff on the issue of liability in a case involving whether a noncompetition provision was enforceable against the employee plaintiff and the future of his stock options. The court first chastised defendant IBM for its "blatant attempt" to circumvent its rules on page limits by filing four separate motions for partial summary judgment, then praised the plaintiff for being concise and persuasive. The court found that the noncompetition agreements were unlimited in time, place, and scope and barred employees from accepting employment at competing companies at any time without forfeiture of their accrued and vested benefits. Therefore, the restriction was unreasonable on its face. As to damages, the court held that a jury would determine the amount but restricted the plaintiff's evidence by ruling that the "hindsight"-based valuation would not be admissible. **Lucente v. IBM**, 117 F. Supp. 2d 336, 2000 WL 1528288 (S.D.N.Y. 10/5/00).

It should be self-evident that a party should not move for summary judgment until disclosure has been exchanged, and more importantly, a party must demonstrate its entitlement to judgment through specific factual support in its moving papers. The Supreme Court of Suffolk County (Justice Arthur Pitts) found that neither party had sufficiently supported its respective position in cross-motions for summary judgment. The noncompetition agreement at issue was facially overbroad in that it barred the former-employee from servicing "any client" of the company. However, the court found that it could not find for either party when it was impossible to assess (1) the duration of the assignment and services rendered; (2) the geographical boundary; (3) the reasonableness of the temporal duration of two full years; and (4) the reasonableness of liquidated damages. **Kweit, Mantell & Co. v. Mihlstin**, —- N.Y.S.2d —-, N.Y.L.J. 10/31/00, p. 31, col. 1 (N.Y. Sup. Ct. approx. 10/17/00).

DAMAGES - PUNITIVE

Standard Under Kolstad

When a sex discrimination and retaliation plaintiff was awarded over $8 million in punitive damages, but no Title VII nominal nor compensatory damages, defendants challenged the award under **Kolstad**. The Seventh Circuit affirmed the state law damages award but remanded for a new trial on Title VII punitive damages. The panel found sufficient evidence for the conclusion that after plaintiff complained of sex discrimination, she suffered the retaliatory adverse employment actions of being excluded from meetings, denied promotions, and given less favorable employment evaluations. Aftr noting that intentional discrimination generally is sufficient to establish Title VII punitive damages liability, and that there was sufficient evidence that defendant acted with reckless indifference to the plaintiff's federally protected rights, the panel remanded for the district court to determine whether defendant had sufficient evidence to submit a **Kolstad** "bona fide policy against discrimination" vicarious liability defense to the jury and, if so, to hold a new trial on punitive damages. The opinion cautioned that the district court must determine whether the supervisors were ranked high enough to invalidate the affirmative defense, because the **Kolstad** defense is "inapplicable as a defense to punitive damages when the corporate officers who engaged in illegal conduct are sufficiently senior to be considered proxies for the company." **Passantino v. Johnson & Johnson Consumer Prods.**, 207 F.3d 599 (9th Cir. 3/10/00).

DISABILITY DISCRIMINATION

Drug Abuse

In a curt memorandum opinion, Judge Denise Cote (S.D.N.Y.) invited a plaintiff to argue that he could be protected by the ADA from being fired for symptoms of drug abuse ("currently engaging in the illegal use of drugs") if the taking of the drugs – opiates for back pain – was supervised by a licensed health care professional. In denying the employer's initial motion to dismiss, the court allowed the plaintiff to amend his complaint to state whether all the drugs he took in the months preceding his termination were taken under the supervision of a licensed health care professional. He then did so, and the employer's renewed motion to dismiss was denied. **Toscano v. NBC**, —- F. Supp. 2d —-, 2000 WL 1449882 (S.D.N.Y. 9/28/00); **Toscano v. National Broadcasting Co., Inc.**, —- F. Supp. 2d —-, N.Y.L.J. 12/5/00, p. 32, col. 3 (S.D.N.Y. approx. 12/1/00).

Pleading

Relying on the liberal pleading rule for plaintiffs, a court in the Eastern District of Pennsylvania (Judge John R. Padova) granted in part and denied in part the defendants' motion to dismiss an age discrimination and retaliation suit. The plaintiff suffered from post-traumatic stress disorder and chronic depression. Significantly, the court found that because mental or psychological disorders may constitute impairments under the ADA, and because thinking is a major life activity, the plaintiff sufficiently pleaded a cause of action when she stated that she experienced "significant distress" when engaged in thought. The court also found that by merely stating that she was a qualified individual who could perform the essential duties of her job, the plaintiff had sufficiently pleaded the second element of her prima facie case. However, the court dismissed a retaliation claim that provided no facts indicating the nature of plaintiff's alleged protected conduct. On the issue of harassment, the court assumed, without deciding, that harassment is a viable cause of action under the

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ADA. **Johnson v. Lehigh County**, —-F. Supp. 2d —-, 2000 WL 1507072 (E.D. Pa. 10/10/00).

Reasonable Accommodation

Mandatory overtime was an essential function of employment for a power company, the Eleventh Circuit has held. A worker sought to avoid overtime after his doctor instructed that his back condition prevented him from working more than eight hours daily. The panel affirmed the defense grant of summary judgment, finding the worker unable to perform the essential function of working overtime. On his job application, the worker answered affirmatively when asked whether he could fulfill mandatory overtime duties. Extensive overtime consistently had been the employer's practice because of its policy of prompt repairs. Moreover, an exemption from mandatory overtime would have violated CBA seniority provisions. The Eleventh Circuit joined a circuit majority (not including the Second Circuit) in holding that an accommodation is not reasonable if it contravenes CBA seniority rights. **Davis v. Florida Power & Light Co.**, 205 F.3d 1301 (11th Cir. 3/10/00).

DISCOVERY

Breadth of Discovery

A defendant (the United States) was entitled, said Magistrate Judge Henry Pitman (S.D.N.Y.), to ask the plaintiff for information and documents about both his first and second marriages, separations, and divorces (even though the first marriage ended two years before he began working for the defendant), to provide names, addresses, and phone numbers of his mother, father, sister(s) and brother(s), and to sign a release for his Worker's Compensation records. The magistrate judge ruled that the information and documents sought were relevant because the plaintiff had placed his emotional distress, including its alleged effects on his second marriage, in issue in his claim for damages for emotional distress, and that the breakup of his first marriage also might be relevant to that claim. The plaintiff, a Deputy U.S. Marshal in the Southern District of New York, alleged that he was harassed and retaliated against for opposing the hostile work environment to which his black colleagues were subjected because of their race. The opinion notes that the plaintiff had originally been represented by counsel but that his attorney had withdrawn and he was now *pro se*. **Zanowic v. Reno**, —- F. Supp. 2d —-, 2000 WL 1376251 (S.D.N.Y. 9/25/00).

Other Complaints About Perpetrator

In a police brutality case, Judge Sidney H. Stein (S.D.N.Y.) has held that the plaintiffs were entitled to all complaints against the defendant officers alleging similar acts, even those determined to be "Unfounded" or "Unsubstantiated." Such records may lead to the discovery of admissible evidence, even if they themselves are not admissible, and even if the other complaints are not precisely identical to the plaintiffs'. The court also held, however, that the 18-year-old plaintiff, despite her youth and the plaintiffs' fears about misconduct, was not entitled to have her lawyer present at her Rule 35 psychiatric and orthopedic examinations. **Reyes v. City of New York**, —- F. Supp. 2d —-, 2000 WL 1528239 (S.D.N.Y. 10/16/00).

EMPLOYMENT-AT-WILL

An employee at will may nevertheless bring a fraudulent inducement claim, Judge John S. Martin, Jr. (S.D.N.Y.) has ruled. By following **Stewart v. Jackson & Nash**, 976 F.2d 86 (2d Cir. 1992), Judge Martin found that whether a promise to the plaintiffs induced them to leave their job with defendant IBM to go to one of its subsidiaries was a question of fact for the jury. The plaintiffs alleged that they were induced to leave their jobs with IBM to go to one of its subsidiaries by a statement that the subsidiary had a five-year contract with IBM. Part of the test in proving fraudulent inducement is that the injury be separate and apart from the loss of a job. Here, the court found that the plaintiffs' injuries arose from the loss of security and other benefits attendant to continued employment at IBM. Additionally, because the plaintiffs were not challenging their termination from the subsidiary but the alleged representation that induced them to leave IBM, the court denied the defendant's motion to dismiss. The court did dismiss the negligent misrepresentation claim because the plaintiffs failed to offer any facts suggesting the existence of a fiduciary duty. **Hyman v. IBM**, —- F. Supp. 2d —-, 2000 WL 1538161 (S.D.N.Y. 10/17/00).

EVIDENCE

Many of us have tried to persuade a trial court to admit newspaper articles as evidence, and we now have some additional support. By the time of this fourth **Roniger** decision by Judge Robert W. Sweet (S.D.N.Y.), the parties were well known to the court. The court excluded all newspaper articles that (1) did not provide a sufficient link between the plaintiff's testimony and the defendant's motivations; (2) ran afoul of the hearsay rule; and (3) were cumulative. However, the court admitted the articles that were (1) relevant to the issue of both economic and pain and suffering damages; and (2) were admissible as background information, as long as the articles were hearsay but showed the defendant's state of mind. Judge Sweet dismissed as speculative the defendant's argument of prejudice because of jurors' feelings about former Mayor Dinkins, who was referred to in the articles. The plaintiff was represented by NELA/NY member John Beranbaum. **Roniger v. McCall**, 119 F. Supp. 2d. 407, 2000 WL 1577225 (S.D.N.Y. 10/23/00).

FAIR LABOR STANDARDS ACT

Managerial Exemption

Attention FLSA practitioners: the Second Circuit Court of Appeals has created a new test for the managerial exemption from the Fair Labor Standards Act. Upon remand by the Supreme Court in light of **Auer v. Robbins**, 519 U.S. 452 (1997), the district court was directed to determine applicability of the salary basis test by asking whether there is either an actual practice of making pay deductions or an employment policy that creates a significant likelihood of pay deductions. The district court had granted summary judgment for the employers, and the court of appeals reversed. The court held that, in determining what constitutes an "actual practice" of pay deductions, courts must inquire whether the employer's practices reflect

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an "objective intention" to pay its employees on a salaried basis. The court rejected the trial court's attempt simply to divide the number of impermissible pay deductions by the number of managerial employees, holding that additional factors must be examined: (1) the number of times that other forms of discipline are imposed; (2) the number of employee infractions warrant discipline; (3) the existence of policies favoring or disfavoring pay deductions; (4) the process by which sanctions are determined; and (5) the degree of discretion held by the disciplining authority. Also, the court held, since the City of New York is an employer within the meaning of the FLSA, evidence of citywide policies is admissible. Lastly, the court held that all pay deductions dating back to April of 1986 must be considered by the trial court, since that was the date of the case which upheld the application of the FLSA to public sector employees. **Yourman v. Giuliani**, 229 F.3d 124, 2000 WL 1520336 (2d Cir. 10/2/00).

FAMILY AND MEDICAL LEAVE ACT

The Department of Labor has a regulation providing that, if an employer fails to notify an employee that he is ineligible for FMLA leave before the leave begins, the employee is deemed eligible, and the question of ineligibility is waived. The Seventh Circuit Court of Appeals found this regulation invalid earlier this year; the Eleventh Circuit Court of Appeals has agreed. The Eleventh Circuit blasted the DOL declared that it perceived the need to "rein in" its "administrative hubris," holding that the regulation is invalid insofar as it purports to extend the right to FMLA leave to an employee who is not otherwise eligible. **Brungart v. BellSouth Telecommunications, Inc.**, 231 F.3d 791, 2000 WL 1584555 (11th Cir. 10/24/00).

FIRST AMENDMENT RETALIATION

Political Job

The Fifth Circuit dismissed a public school principal's Section 1983 First Amendment retaliation claim upon finding that the speech allegedly motivating the retaliation was not sufficiently of "public concern." The principal alleged that she was retaliated against for memoranda she wrote criticizing the Board of Trustees for their actions in renewing her contract and in managing a school activity fund. The contract renewal discussion was personal, not of public concern. So were the activity fund and other matters, because the memoranda focused not on fund mismanagement so much as on whether the Board adequately defended the principal against accusations previously made against her. Also, the principal's use of her official school letterhead for the memoranda heavily favor a conclusion that Bradshaw's speech did not constitute matters of public concern, but instead were in the form of a response in a employer-employee dispute more akin to a personal grievance than a matter of public concern. **Bradshaw v. Pittsburg Indep. Sch. Dist.**, 207 F.3d 814 (5th Cir. 4/11/00).

Municipal Liability for Policymakers & "Codes of Silence"

In the Ninth Circuit, an alleged custom of harassing whistleblowers sufficed to avoid summary judgment in a police officer's Section 1983 First Amendment retaliation claim. The plaintiff had reported that on-duty officers committed crimes, assaulted and planted drugs on suspects, and drank alcohol. The ensuing retaliation included locker vandalism, threatening phone calls, a denial of requested backup during a crime, and other incidents. The panel held that the evidence sufficed to establish that the police department had a custom of chastising whistleblowers, failed to train its members not to retaliate against whistleblowers and/or failed to discipline those members of the Department who retaliated. Summary judgment was inappropriate because a jury could conclude that one or more of these customs or policies was made by those in charge of the Department who were aware of the police code of silence. Moreover, the anonymity of several of the acts did not remove them from the relevant circle of allegations, because a jury could infer that co-employees committed those acts. **Blair v. City of Pomona**, 206 F.3d 938 (9th Cir. 3/21/00).

Policy Maker Positions

The Ninth Circuit reversed a grant of summary judgment in a First Amendment retaliation claim, finding unresolved facts as to whether a Deputy Sheriff was a "policy maker" lacking free speech rights vis-à-vis her public employer. Having lost her job after a domestic incident with her fiancé in which her revolver discharged, plaintiff claims that her supervisors took a particularly harsh position against her to retaliate against her for having supported the Sheriff's opponent in the last election. The district court found plaintiff's political activities not to be protected because she was a policy maker, and the Circuit reversed, stating that there is no per se rule that all Deputy Sheriffs are policy makers. On remand, the district court may review factors such as vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of the policy makers, public perception, influence on programs, contact with the elected officials, and responsiveness to partisan politics and political leaders. Defendants' qualified immunity argument was insufficient to win on summary judgment because the facts may prove that it was clear that plaintiff's supervisors knew her not to be a policy maker and therefore knew her to be protected against retaliation. **DiRuzza v. County of Tehama**, 206 F.3d 1304 (9th Cir. 3/21/00).

HARASSMENT

First Amendment Retaliation

Allentown police officers survived summary judgment on claims that they were denied promotions in retaliation for their union involvement and political support of a mayoral candidate. Under department policy, promotion to sergeant was available to anyone who worked for the police department five years and participated in the evaluation process. All of the plaintiffs had five years' experience and solid work records, and participated in the evaluation process, but many received poor evaluations allegedly as a pretextual basis for retaliation. Reversing a defense grant of summary judgment by the district court, the Third Circuit not

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only found sufficient evidence of lost promotions, but also held that the low rankings themselves were part of an actionable campaign of retaliatory harassment culminating in retaliatory rankings, even absent any causal nexus to lost promotions. The panel found the harassment sufficiently serious to be actionable not under the **Meritor** "severe and pervasive" inquiry, but under a First Amendment inquiry looking to whether the conduct was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. **Suppan v. Dadonna**, 203 F.3d 228 (3d Cir. 2/4/00).

PROCEDURE

Equitable Tolling

Where a plaintiff has been prevented from filing his federal claim within ninety days of receipt of his right-to-sue letter from the EEOC because the his attorney was suspended from practicing law, Judge John S. Martin Jr. (S.D.N.Y.) has ruled that the deadline may be equitably tolled. Judge Martin found that the plaintiff has been effectively prevented from filing his federal complaint by his attorney's suspension and excluded the number of days from the date of the attorney's suspension (prior to the deadline) to the plaintiff's notification of the suspension (after the deadline) from the ninety-day statutory filing period. Therefore, the court denied the defendants' motion to dismiss the plaintiff's race, color, and national original discrimination claims as time-barred. **Miller v. King's County Hospital**, — F. Supp. 2d —-, 2000 WL 1716309 (S.D.N.Y. 11/16/00).

RACE DISCRIMINATION

Mixed Motive/ Retaliation

In a favorable decision for the plaintiff, the Second Circuit Court of Appeals reiterated the standard for mixed-motive discrimination and retaliation cases, vacating a district court's judgment for the defendant because of the court's erroneous jury instructions. The panel held that the district court had erred in instructing the jury that the plaintiff (who was claiming retaliation for her race discrimination claim) must prove (1) that the defendant's proffered non-retaliatory reason was pretextual, and (2) that a retaliatory reason motivated the defendant's adverse employment actions. The panel ruled that the plaintiff is not required to disprove the defendant's proffered non-retaliatory reasons, but can also prevail by proving that a discriminatory motive, more likely than not, played a part as well. The panel stated that to satisfy the knowledge requirement, only general corporate knowledge that the plaintiff engaged in a protected activity is necessary. The court also found the trial court erred in instructing the jury on the **McDonnell Douglas** burden-shifting framework, and by failing to notify the plaintiff of its intended charge prior to summation. **Gordon v. New York City Board of Education**, —- F.3d —-, 2000 WL 1658156 (2d Cir. 11/6/00).

Summary Judgment

A single, race-based remark with a close nexus to an adverse employment decision is enough to defeat summary judgment, Judge John G. Koeltl (S.D.N.Y.) has held. The plaintiff, a black male of Jamaican national origin, alleged race and national origin discrimination under local city and state human rights laws. The district court found that the employer's alleged reference to the plaintiff's national origin and assertion that he had no rights in the company were enough for a reasonable factfinder to find a nexus between the discriminatory remark and the employer's decision to fire him. The court denied summary judgment on the discriminatory discharge and hostile work environment claims because (1) an issue of fact existed as to pretext, and (2) the defendants failed to respond to the hostile work environment claim. Judge Koeltl denied summary judgment on various tort claims, but granted it as to defendants whose individual involvement had not been alleged. Lastly, because the NYCHRL has made good faith compliance only one factor to be considered in mitigation of punitive damages rather than a complete defense, the defendants were not entitled to summary judgment. **Thompson v. American**

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Eagle Airlines, Inc., —- F. Supp. 2d. —-, 2000 WL 1505972 (S.D.N.Y. 10/6/00).

The court of appeals quoted George Orwell's observation that "all [employees] are equal, but some are more equal than others" as a prelude to reversing a district court's granting of summary judgment. The plaintiff, a black employee of the LIRR, alleged race discrimination, retaliation, and state law claims. On the issue of disparate treatment, the court (Cardamone, J writing) retreated from a rigid interpretation of the "all material respects" standard used in examining a plaintiff's comparison of others similarly situated, as articulated by the Sixth Circuit in **Mitchell v. Toledo Hosp.**, 964 F.2d 577 (6th Cir. 1992), and adopted by the Second Circuit Court of Appeals in **Shumway v. UPS**, 118 F.3d 60 (2d Cir. 1997). The court held that the plaintiff only show "a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." The factors to be considered are: (1) whether the plaintiff and the comparators were subject to the same workplace standards; and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness. Based on the foregoing, the court found that the district court had erred in determining that the plaintiff and two comparators were not similarly situated. The court reversed and remanded the case to the district court. **Graham v. Long Island Rail Road**, 230 F.3d 34, 2000 WL 1552018 (2d Cir. 10/19/00).

RETALIATION

Mixed-Motive Cases

Unsurprisingly, the Eleventh Circuit has weighed in on the conservative side of a much-disputed issue: applicability of the Civil Rights Act of 1991 mixed-motive standards to ADEA retaliation claims. The panel noted that the section of the 1991 Act establishing the "motivating factor" standard did not include ADEA retaliation among the list of claims to be covered (race, color, religion, sex, national origin). Accordingly, in the Eleventh Circuit, the old "but-for" causation standard of **Price Waterhouse** still applies to an ADEA retaliation claim. The breadth of the 1991 Act's applicability remains somewhat unsettled in the Second Circuit. **Lewis v. Young Men's Christian Ass'n**, 208 F.3d 1303 (11th Cir. 4/13/00).

SEX DISCRIMINATION

Summary Judgment

In a post-**Reeves** memorandum opinion & order, Judge Kevin Thomas Duffy (S.D.N.Y.) denied in part and granted in part summary judgment in a gender discrimination suit. The court granted summary judgment for the defendant on the plaintiff's failure to promote claim, because it was not filed within 300 days of the nonpromotion and she had never actually applied for the position. However, Judge Duffy relied on **Reeves** in rejecting Citibank's argument that the plaintiff must prove with adequate, additional evidence that the defendant's asserted reason is false. The court held that summary judgment is not appropriate if, as here, the plaintiff, in addition to establishing her prima facie case, has produced "sufficient evidence to reject the employer's explanation." **Hollein v. Citibank**, —- F. Supp. 2d —-, 2000 WL 1557936 (S.D.N.Y. 10/19/00).

SEXUAL ORIENTATION

Practitioners should note that the Second Circuit Court of Appeals has amended its opinion in a case which had seemed to invite the argument that a claim of sexual orientation discrimination, pleaded as sex discrimination, might be covered by Title VII. The theory would have been that, for instance, a gay man might be seen as not conforming to the "masculine" sexual stereotype. It would have been derived from the "stereotyping" argument in **Price Waterhouse v. Hopkins**, 490 U.S. 229 (1989). The amended opinion, referring to this theory, says that it is not sufficiently pleaded in this case but adds, "We express no opinion as to how this issue would be decided in a future case in which it is squarely presented and sufficiently pled." The court goes on to say, "This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes." **Simonton v. Runyon**, —- F.3d —-, 2000 WL 1575481 (2d Cir. 10/23/00).

SOVEREIGN IMMUNITY

A multi-state transit authority benefits from state sovereign immunity against ADEA liability under **Kimel v. Florida Bd. of Regents**, 120 S.Ct. 631 (2000), the District of Columbia Circuit has held. Before **Kimel**, an employment discrimination plaintiff had prevailed on both Title VII and ADEA claims against the Washington Metropolitan Area Transit Authority (WMATA). The ADEA judgment was vacated, however, because WMATA is an agency that exercises state power for governmental functions, including employment matters, and because a damages award's practical result would be payment from the treasuries of Maryland and Virginia. **Jones v. Washington Metro. Area Transit Auth.**, 205 F.3d 428 (D.C. Cir. 3/17/00).

STATE LAW

Wages

In a case of first impression, the New York State Court of Appeals unanimously upheld lower court rulings that narrowly construed the definition of "wages" protected by New York Labor Law for purposes of discretionary bonuses. The plaintiff selected a compensation plan that provided him with an annual salary and eligibility to participate in a bonus and profit sharing pool. The bonus reflected both the plaintiff's individual performance and the defendant firm's, and it was payable in four installments. After the first installment, the plaintiff resigned, and when the defendant refused to make further payments, the plaintiff sued under Labor Law article 6, alleging that the bonus fell within the definition of wages set forth in Labor Law § 190(1). The court cited the Legislature's definition of wages as "the earnings of an employee for labor and services rendered," and recognized that the definition seemingly excludes

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profit-sharing arrangements that "are both contingent and dependent, at least in part, on the financial success of the business enterprise." Because the bonus pool was solely dependent on the success of the defendant firm and the plaintiff's share was entirely discretionary, the bonus payments were removed from the statutory definition of wages. **Truelove v. Northeast Capital & Advisory, Inc.**, 95 N.Y.2d 220, 2000 N.Y. Slip Op. 08648, 2000 WL 1529830 (N.Y. 10/17/00).

Employee Handbook Whistleblowing Protections

The day after the plaintiff complained to the Inspector General about defendant's discrimination and corruption, he was terminated. Plaintiff presented evidence that the employee handbook stated that the employer could not retaliate against an employee for making a report of misconduct to the inspector general. Even in New York, an employee handbook may constitute an exception to the "at will" doctrine if the employee relied on a handbook provision to his detriment, even if he received the handbook after he started employment, the court held, citing **Waldman v. Nynex** Corp., 696 N.Y.S.2d 39 (1st Dept. 1999). Plaintiff testified that he specifically relied on the manual's anti-retaliation provision before meeting with the inspector general. The court held that it is an important public policy to uphold the employment rights of employees who report misconduct in reliance upon provisions of their employment manuals protecting them from reprisal, even where the manuals were given to such employees after their employment began. The jury found for the plaintiff in the amount of $44,187 for lost wages related to the breach of contract claim. **Finkelstein v. Dormitory Authority of the State of New York,** QDS: 22702315, NYLJ 04/03/00, pg. 25;

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The jury awarded $1 million in compensatory damages for lost wages and $250,000 for emotional distress. Three other police officials were found liable for unspecified punitive damages. The defendants have moved to vacate the verdict.

Mark H. Bierman obtained a $750,000 verdict in State Supreme Court for a former employee of Restaurant Associates who claimed that he was fired because he suffered from Tourette's Syndrome. **Davis v. Restaurant Associates Industries Inc.** (Supreme Court, N.Y. Co., Justice Eileen Bransten). The plaintiff, the former Assistant Banquet Manager at the company's operations at the Metropolitan Museum of Art, claimed that as a result of his employer's conduct, his Tourette's Syndrome, which causes involuntary motor and vocal tics, had worsened and he had become permanently disabled.

Mr. Davis testified that he had been repeatedly forbidden by his employer from exhibiting his symptoms in the office he shared with a supervisor. According the Davis, the supervisor referred to him as a "cripple" and a "disturbing element," and repeatedly told him he should "go on Social Security Disability," Mr. Davis' condition in no way interfered with his job duties, and he did not exhibit symptoms in front of patrons or clients, or in the museum's public areas. He testified that he was fired after he was forced to leave work ill on a day that a manager had abused him because of his symptoms.

The jury awarded Mr. Davis $300,000 for past pain and suffering, $200,000 for past economic damages and $250,000 for future economic damages, under the New York State Human Rights Law. Defendants' post-trial motions are pending.

Article 78:

Gene Prosnitz was successful in saving the job of a New York City detective who had been fired for allegedly falsely telling investigators that did not remember certain telephone calls he had made to a police trainee under investigation. The Appellate Division, hearing the detective's transferred Article 78 proceeding, found substantial evidence to support the Police Department's finding, after a hearing, that he had made the false statements. However, the court vacated the penalty of dismissal from employment, and remanded the case to the Police Department for a new penalty. **Harp v. New York City Police Department**, 717 N.Y.S.2d 108; 2000 N.Y. App. Div. LEXIS 12429 (1st Dept. November, 2000).

The court found that the dismissal from employment, with loss of pension rights, was "shockingly excessive," "disproportionate to the misconduct" and "shocks one's sense of fairness," for two reasons: The false statements were not made to cover up criminal conduct, corruption, or other egregious conduct, such as police brutality. Detective Harp was merely accused of improperly communicating with a police trainee who was charged with improper use of the department's computer system for personal purposes, a minor offense. In addition, Detective Harp had an exemplary record, had been a police officer for l5 years with no prior disciplinary history, and had a recent personnel evaluation rating of "exceeds standards".

Arbitration:

An NASD arbitration panel found in favor of a Deutsche Bank employee who alleged that her termination was a breach of her employment contract. The employee, whose duties included press relations, was terminated for allegedly permitting media access to a company talk that was supposed to remain internal. Her contract required that her salary be paid unless she was terminated for "cause" under a narrow contractual definition.

The arbitral panel awarded the employee $137,500 in lost salary and bonus-compensation. The panel also ordered that the employee's U-5 termination form, which remains on file with the NASD, be changed (with all prior copies expunged) so that the explanation of her termination will refer to only "alleged" violations of corporate policy. The employee was represented by Gerry Filippatos of Outten & Golden LLP. **Brandfass v. Deutsche Bank Securities, Inc.** (July 3, 2000).

Please e-mail your news about cases you have filed, tried or settled to Jonathan Ben-Asher at jb-a@ bmbf.com. You should include the case citation, court, defendant s attorneys, a brief summary of the legal claims and facts, and anything which is particularly striking or interesting about the case.

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Col 4 (Sup. Ct., N.Y. County, 2000).

SUMMARY JUDGMENT

National Origin Discrimination

A plaintiff who had earlier persuaded Judge Denise Cote (S.D.N.Y.) that her early notice of right to sue did not require dismissal of her complaint has now survived a summary judgment motion. The plaintiff, a 50-year-old woman of Chinese national origin, testified that her new supervisor called her a "bitch" and a "chink" at least three times, mocked her accent, and told her that he could "not wait to get rid of the old hags and blacks in the new millennium." A few months after he became the plaintiff's supervisor, he gave her a performance review and gave her 30 days to improve her performance in four areas and complete eight specific tasks. She was fired allegedly for unsatisfactory performance and failure to accomplish these goals. Coworkers testified that the timeframe was unrealistic and her performance was good. The court had no difficulty applying **Reeves** and denying summary judgment on both wrongful termination and hostile work environment, as well as a Section 1981 claim. **Huang v. Gruner + Jahr USA Publishing**, —- F. Supp. 2d —-, 2000 WL 1371343 (S.D.N.Y. 9/22/00).

PRACTICE TIP

In today's labor market, bonuses are frequently used as incentives by firms trying to lure new talent or retain top employees. Clients who request your services to protect any unpaid bonuses once they leave should be advised that bonuses based even partially on the performance of a firm are not wages under state law. A commission based on sales or derived from sales is ordinarily protected. *See* N.Y. Labor L § 190. However, if the compensation comes from the overall income of the firm and is not solely based on the activity of the individual employee, the bonus is not wages protected by the Labor Law. *See* **Truelove**, discussed above.

PRACTICE TIP

When you depose a former employee of a defendant employer, ask whether he or she has signed any agreement with the employer. More and more often, we see in severance agreements a provision saying that the ex-employee will "cooperate" with the employer in any subsequent investigation, administrative action, lawsuit, or other proceeding. Sometimes the provision goes farther and says that the ex-employee will not say anything negative about the employer during the course of such "cooperation." Ask the ex-employee and the employer for a copy of any agreement between them, and ask the employer in your initial document request for a copy of any agreement it has made with [here name the former employees who are on your short list of prospective witnesses for both sides]. Such an agreement, if it exists, may be useful for impeachment of a signatory witness who refuses to say anything helpful to your client.

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op new claims or defenses that are not already identified in the pleadings." The difference between the two standards is far from clear. A party may seek discovery under the old "subject matter" language only "upon a showing of good cause."

The Advisory Committee notes state that if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would then determine that question and then rule whether good cause existed for authorizing disclosure under the more liberal "subject matter" standard.

As examples of the type of information that would still be discoverable under the new "claims or defenses" rule, the Advisory Committee noted "other incidents of the same type;" information about a party's organizational arrangements or filing systems if likely to lead to the discovery of admissible evidence; and information that could be used to impeach a witness. 192 F.R.D. 388-90. Counsel for employment plaintiffs can argue that information about a defendant's discriminatory treatment of other employees is clearly discoverable even under the new standard.

Deposition practice: The revisions to Rule 30(d) limit the deposition of an individual to "one day of seven hours," but this can be extended by the court or by the parties. "The court must allow additional time...if needed for a fair examination of the deponent of if the deponent or another person, or other circumstances, impedes or delays the examination."

The Advisory Committee's notes are important here. They explain that 1) The party seeking a court order to extend a deposition must show good cause;

2) the deposition of each person designated under Rule 30(b)(6) is a separate deposition; 3) the rule contemplates reasonable breaks for lunch and other reasons, not to be counted toward the seven hours; and 4) circumstances that may justify extended depositions include examinations covering events over a long time period (as may be common when we represent long-term employees.)

The Advisory Committee notes suggest that the deposing attorney provide the deponent in advance with documents to be used at the deposition. If the witness nevertheless prolongs the deposition by not reading the documents in advance, there would be good cause for an extension.

Other changes in the rules affect the timing of the parties' Rule 26(f) discovery conference. See revised Rule 26(f).

Because of there is no body of court decisions interpreting these rules, NELA members will need to be creative about solving discovery disputes – whether it means gaining an adversary's cooperation or educating the bench about how the new rules should be fairly interpreted.

—Jonathan Ben-Asher

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