NELA THE NEW YORK EMPLOYEE ADVOCATE

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

Volume 9, No. 12 January/February 1999 Jonathan Ben-Asher, Editor

Filings, Trials and Settlements

This month we begin a new feature focusing on cases filed, tried and settled by members of NELA/NY. Here is where you can learn what your colleagues are doing, and let them know the same. The more informed we are on these developments, the better we can represent our clients.

We would like to encourage all members to regularly send us news of newly filed, tried and settled cases. We have circulated to all members a form for reporting news on your cases, and we hope to publish it on **nelany.com** shortly. In the meantime, if you need a form, call Shelley Leinheardt at NELA/NY. In addition to the material requested, if possible, tell us something colorful, wonderful or outrageous about your case (consistent with your professional obligations, of course). You can send the information to Shelley at NELA/NY or to Jonathan Ben-Asher (fax: 212 509-8088; e-mail jb-a@bmbf.com)

Trials

Bob Rosen won a generous verdict for a former associate of the law firm Jacobs Persinger & Parker, based on sexual harassment allegations against a firm partner. The bench trial, before New York County Supreme Court Justice Beverly Cohen, resulted in a verdict of $250,000 in emotional distress,

Continued on page 13

Heads Up: Supreme Court Tackling Employment Issues

Watch out, NELA members. The Supreme Court seems eager to wrestle with some crucial issues in employment and civil rights law. Based on its recent treatment of civil rights claims and its preoccupation with "federalism," we could have some interesting rulings coming our way.

States immune to ADEA suits

In what could be a sign of unpleasant times, the Court ruled in January that states and their political subdivisions are immune under the Eleventh Amendment from suits under the ADEA. While the Court pointed out that most states have their own laws protecting state and local employees from age discrimination, the decision will be of little comfort to employees who would rather press their claims in federal court based on a perception that state courts are too protective of state government. **Kimel v. Florida Board of Regents**, 2000 U.S. LEXIS 498 (Nos. 98-791 and 796).

While the Court found that Congress had clearly intended to abrogate the States' Eleventh Amendment immunity by passing the ADEA, it ruled that Congress' extension of the statute to cover state employees was an unconstitutional exercise of its powers under the Fourteenth Amendment. According to the 5-4 majority, the ADEA's burdens on state and local governments are "disproportional to any unconstitutional conduct that could conceivably be targeted by the Act." Citing to previous decisions holding that age is not a suspect classification under the Equal Protection Clause (and resulting in "rational basis" review of age classifications), the Court held that "Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities or characteristics that are relevant to the State's legitimate interests." The ADEA's application to state employees was unconstitutional, it held, because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."

Reading behind the lofty jurisprudential analysis, it is disturbing that the Court seemed to go out of its way to scoff at the harm caused by age discrimination in the public sector. "Congress' 1974 extension of the Ac to the States was an unwarranted response to a perhaps inconsequential problem," the court fulminated. "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.... Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." The Court also took pains to note that under its prior decisions dismissing Equal Protection challenges to age classifications based on "broad generalizations," States can "draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it is 'probably not true' that those reasons are valid in the majority of cases."

What does this mean for our clients who are state and local employees? As

Continued on page 14

The NELA/NY
Calendar of Events

February 2 6:30 pm
Judiciary Committee Meeting
NELA/NY office

February 8 6:00 pm
Sexual Harassment Committee Meeting
NELA/NY office

February 9 6:00 pm
Speakers Bureau: "How to Prepare an Employment Discrimination Case"
New York County Lawyers Association
For details, call NELA /NY

February 10 9:00 am
Fund Raising Committee Meeting
NELA/NY office

February 16 9:00 am
Membership Committee Meeting
NELA/NY office

March 1 6:30 pm
NELA Nite
530 Fifth Avenue (bet. 44th & 45th Street)
14th Floor Conference Room
Topic: "Congratulations -
You Have a Fee Application to File —
What Do You Do Now?"
Speakers: Leonard Flamm and
Eden Maura

March 22 6:00 pm
Board of Directors Meeting
Vladeck Waldman Elias & Engelhard
1501 Broadway - 8th Floor

Mar. 17-18
NELA National Spring Seminar: Litigating and Winning Federal Employee Rights Cases
Chicago Allegro Hotel
Chicago, Ill.

March 24
NELA/NY Upstate Regional Conference
Syracuse University Law School

April 12
NELA Nite
Open Membership Meeting
Location To Be Announced

May 2
Board of Directors Meeting
Vladeck Waldman Elias & Engelhard
1501 Broadway - 8th Floor

May 12

NELA/NY Spring Conference
Yale Club of New York City
Details to Follow

May 24
NELA Nite
Topic & Location To Be Announced

June 14
Board of Directors Meeting
Vladeck Waldman Elias & Engelhard
1501 Broadway - 8th Floor

June 21-24
11th Annual NELA National Convention
Renaissance Hotel
Washington, D.C.

October 4
NELA/NY Fundraiser
Save the Date

October 13-14 N
NELA National Fall Seminar: ERISA
Westin Tabor Center
Denver, CO

Oct. 27-28
NELA Fall Regional Conference
Yale Club of New York City
Save the Date

Attention E-mailers

If you have an e-mail address, you should notify Shelley Leinheardt as soon as possible. Even if you have already given Shelley your e-mail address, get it to her again, because there have been some glitches in sending and receiving messages. We will need your e-mail address if you want to use the new website.You can either e-mail her at nelany@aol.com or call her at 212 603-6441.

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, 1740 Broadway, 25th Floor, New York, New York 10019. (212)603-6441. 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 this calendar may be submitted by calling Shelley Leinheardt:
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President's Column

by Wayne N. Outten

The Initial Consultation

This is the second column in a series on case and client evaluation. The first column dealt with handling the initial call from a prospective client. This column contains basic suggestions about conducting the initial consultation.

In our office, we have new clients fill out a Consultation Form in the reception area. The form elicits basic information about the client (e.g., home address, telephone numbers, email address, age), the job (e.g., position, length of service, salary and benefits), the employer (e.g., name, address, number of employees), union status, and prior or pending proceedings. (Our form is available upon request.) Using the form saves time during the consultation and assures that you get complete and accurate information. You might consider having in your reception area a simple brochure or flyer about your firm and its practice.

Of course, you should try to avoid keeping a client waiting for long. You want to start off on the right foot. (Remember how you feel when a doctor keeps you waiting.) If you do keep a client waiting, apologize and explain. I expect most consultations to last about an hour, but I schedule an hour and a half or two. Doing so reduces the risk of keeping another client waiting when a consultation runs longer than anticipated.

I recommend that you ask clients to send you certain materials before the consultation, such as relevant employment and severance agreements, a chronology of significant events, and an organization chart. (To be safe, I usually tell the client that I will try, but cannot guarantee, to review the materials before the consultation.) You can review those materials at a time and pace that suits you; I prefer to do so in the relatively quiet evening hours. Reviewing materials beforehand avoids your having to read the materials quickly during the consultation (with your client watching), which increases the chance that you might miss something important.

On the other hand, some attorneys might be concerned that receiving materials before the consultation might create, or be perceived by the client to create, an attorney-client relationship before the consultation. I have never found that to be a problem, because I make clear to the new client that the purpose of the consultation is to learn about the situation and to give advice only then. Be careful, however, if an imminent statute of limitations might be revealed in the documents you receive; of course, you can address that subject in your pre-consultation telephone call. Occasionally, a client will cancel a consultation after you have spent some time reviewing the materials. You can reduce the risk of that happening by reviewing the materials only the night before or the day of the consultation. If you expect the pre-consultation document review to be extensive, you can ask the client to send a check with the materials; of course, doing so probably means an attorney-client relationship has been established then.

Clients who send materials beforehand understandably expect you to have reviewed them. Thus, you should do your best to do so (even if you have to keep the client waiting a while). Also, you should review your notes of pre-consultation telephone calls to refresh your recollection.

You should take careful notes during the consultation. You will be hearing about people and events that are new to you. Taking notes will help you keep track of who did what to whom when and to follow up on gaps and loose ends in your information. And you will often need your notes after the consultation to remind you of many details that you could not possibly remember. You should put the date on your notes; and when you are charging by the hour, it is a good idea to note the starting time and the ending time.

Immediately after the consultation, while it is fresh on my mind, I add a section at the end of my notes containing: a short summary of the key advice I gave the client, what the client and I agreed each of us would do next (e.g., the client will think about things or gather information and then call back), and when I should expect to hear from the client again or when I should contact the client. (I then note on my schedule any commitments I have made to do anything, so I don't forget.) I also note any discussions we had about future fee arrangements or estimates. This section is indispensable for quick reference days or weeks later when I revisit the consultation notes. By the way, your note taking can be simplified if you use abbreviations and symbols for common words and phrases.

During the consultation, you should listen carefully to the client and maintain eye contact as much as possible. Doing so while taking careful notes is a challenge, but it can be done. Clients seem to understand that you need to take notes, as long as they perceive that you are listening carefully.

I hold consultations in my office, rather than a conference room. I think a disorderly or cluttered office puts off some clients. Thus, I make an extra effort to keep my office fairly tidy. I try to remove most files and papers from my desk before a consultation. And I make sure that no files or papers within a client's view show the names of other clients or any other confidential information.

To avoid unnecessary distractions and interruptions, I close my office door during consultations and I do not take telephone calls. My secretary and others in the office know that no interruptions are allowed, except for an emergency or a scheduled interruption (about which the client is forewarned). Many clients resent unnecessary interruptions, and all clients appreciate having your undivided attention.

Gathering Information

I try to control the length, pace, and structure of the consultation; after all, I have far more experience with such sessions than the client does. Nonetheless, I often let the client begin by telling me what he or she wants me to hear, even if it may not be strictly relevant. The client

Continued on next page

Help Your Clients and Your Practice with our Website

Not to hector you, but if you haven't logged on to nelany.com, you are missing a lot.

Our Website is the quick, efficient and fun way to share the insights of your fellow members, exchange information on cases, defendants, and the practice of employment law, and read the latest employment law news.

Once you register, you can:

- Read and respond to members' postings on our electronic bulletin board
- Seek advice from other members on litigation and negotiation strategy, the state of employment law and running a plaintiff's employment practice
- Locate other members
- Read news updates on developments in the field
- Download briefs filed by other NELA/NY members
- Seek jobs and job applicants through our Job Bank
- Link up to many other employment law and legal sites, including courts, government agencies, law libraries and other employment law organizations.
- Read back issues of the New York Employee Advocate (including Anne's Squibs)

It's easy to start. You don't need to be experienced in Internet lore. Just go to **nelany.com**. In the box in the lower right hand corner that says "NELA/NY MEMBERS" click on "HELP! CLICK HERE" You can register in a matter of seconds.

Log on and you'll see why your NELA colleagues are so excited. Don't be left behind as NELA/NY flies into the digital future!

PRESIDENT, from page 3

often let the client begin by telling me what he or she wants me to hear, even if it may not be strictly relevant. The client probably has spent some time thinking about the "story" he or she will tell you. You can learn a lot about the client and the situation by what the client chooses to tell you and not to tell you. Of course, at some point, I take control to assure that I obtain, in a timely and orderly fashion, the information I need to provide appropriate advice.

To do our job properly, we cannot accept at face value what a client tells us. Rather, we must listen carefully, critically, and objectively. Even assuming utmost honesty, clients provide a selective account of the relevant facts; they unavoidably engage in selective perception, selective recollection, and selective recounting of events. Self-interest, and perhaps some deliberate shading, further skews the account.

Many of our clients are under considerable emotional distress; they often need and want our support and empathy. While we should provide such support and empathy, we cannot compromise the objectivity that is essential to our roles as counsel. We have an obligation to our clients and ourselves to have the best possible understanding of the complete story before we provide legal advice. Thus, we should gently "cross-examine" the client, consider the presence or absence of corroboration, and use our common sense to evaluate the story.

Evaluating the Situation and Advising the Client

Clients come to us for advice, not just for a sympathetic ear. Accordingly, after gathering information, we must evaluate it and provide legal advice.

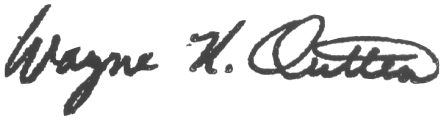
To paraphrase a familiar saying, an educated person is the best client. We should explain the relevant legal principles, so the client understands the strengths and weaknesses of the legal position. Also, the client should understand the importance of the evidence in assessing a legal position. I sometimes tell clients: whatever is the truth, what really counts is the evidence — what will the documents and witnesses show.

Developing a Plan of Action

By the end of the initial consultation, the client should have a clear and specific plan — who is going to do what. The next step might be the client gathering more information or the lawyer doing legal research. It might be the client talking with someone at work about the situation or the lawyer drafting a demand letter. Or it might be a conscious decision to do nothing for now, awaiting further developments.

Attorney's fees for future services must be discussed and documented. Be sure to ask for a check for the consultation fee. (I strongly recommend charging for the initial consultation generally.) For an hourly or partial hourly fee arrangement, ask the client for an appropriate retainer deposit. For a contingency fee arrangement, be sure the terms are well understood. Right after the consultation, prepare and send a retainer letter. Immediately after the consultation, I fill out our firm's simple new matter memo form, which covers the fee arrangements and the form of retainer letter to be sent; that form is available on request.

In future columns I will discuss in more detail the process of evaluating a client's situation, providing legal advice, and developing and implementing a plan of action.



Wayne N. Outten,
President, NELA/NY

Sexual Harassment Committee

by Lawrence Solotoff, Co-chair

The Sexual Harassment Committee has been meeting monthly. In December, as part of our series of presentations by members on cases of interest, Bob Felix and Eugenie Gilmore discussed **Alonzo v. Chase Manhattan Bank**, NYLJ, Nov. 3, 1999, and **Donovan v. Big V Supermarkets, Inc.**, NYLJ, Aug. 31,1999. These cases address the affirmative defenses employers may raise in response to claims of harassment.

In **Alonzo**, Judge Kaplan denied the employer's motion for summary judgment on the plaintiff's hostile environment / national origin claim. The court found genuine issues of fact as to whether it was reasonable for plaintiff to complain of harassment to his department head rather than Human Resources, as specified in the personnel manual, and whether the department head acted reasonably in response to the complaint.

In **Donovan**, Judge Schwartz granted summary judgment to the defendant, finding that as a matter of law, the employer had provided plaintiff with a reasonable avenue for sexual harassment complaints and had taken prompt and appropriate action in response. The court also found that absent plaintiff's prompt departure from employment due to retaliatory harassment, defendant would have stopped that harassment as well.

At the January meeting, Margaret McIntyre discussed **Ponticelli v. Zurich American Insurance Group**, 16 F. Supp.2d 414 (S.D.N.Y. 1998), in which the plaintiff successfully defeated summary judgment on her sexual harassment/ hostile environment claim. Judge Sweet ruled that summary judgment was precluded by factual disputes concerning the hostile environment claim as well as the employer's affirmative defense. One question for the jury was the reasonableness of the employer's response to plaintiff's complaint, given that no corrective action was taken against the alleged harasser. An unusual aspect of the case was that the employer's Human Resources director responded to plaintiff's complaint with comments that may have also constituted sexual harassment.

Future presenters on cases of interest will be Linda Kern (February 8); Larry Solotoff (March 14); Gene Prosnitz (April 11) ; and Robert Felix and Eugenie Gilmore (May 9). Meetings scheduled for June 13, 2000 and beyond remain open for volunteers.

The committee is preparing a panel for a NELA Nite in May concerning strategies for attacking employers' affirmative defenses. One speaker will be Michelle Paludi, a member of the Governor's Task Force on Sexual Harassment and a frequent expert witness on employee personnel policies and manuals. The committee is selecting an attorney who has litigated a sexual harassment case involving affirmative defenses to speak at the NELA Night as well.

The Committee meets on the second Tuesday of each month, providing there is no conflict with a major holiday. Our next meeting is scheduled for February 8 at 6:00 p.m. All meetings will begin promptly, and end promptly at 7:30 p.m. All members, guest attorneys and future members are welcome.

NELA/NY Elects Officers and Board Members

At its November 30 meeting, NELA/NY's Board of Directors elected this year's officers and two new board members.

The officers are: President - Wayne Outten; Vice Presidents - Herb Eisenberg and Arnold Pedowitz; Treasurer - Bob Rosen; Secretary - Allegra Fishel.

The two members newly elected to the Board are Adam Klein and Pearl Zuchlewski. Other members of the Board, in addition to the officers, are Anne Clark, Leonard N. Flamm, William Frumkin, Olati Johnson, Lisa R. Lipman, Laura Sager and Laura A. Schnell.

The deadline for articles and letters for our next issue is March 13.

EEOC Case Update

We continue our update of court cases filed and settled by New York District Office of the EEOC.

The EEOC has obtained a "nearly seven-figure" settlement of its sex and race harassment and sex discrimination case against **Prudential Life Insurance Company of America**. The consent decree settles the charges of three former employees of Prudential's Southern Connecticut agency. The charges alleged that employees were subjected to sex or race-based demotion and termination, sexual comments and photographs, racist comments and literature or other biased treatment.

Last month the EEOC filed a suit in the SDNY against the **Diller-Quaile School of Music, Inc.**, charging that employees of the prestigious Manhattan school were constantly harassed based on their national origin and were ordered to speak only English while at work. The complaint also alleges that the school failed to take remedial action after the employees complained.

The agency has also sued on behalf of a former employee of **SPC Services, Inc.** who was fired after he refused to stop his wife from filing an EEOC charge based on her work for an SPC subcontractor. SPC provides security and building maintenance services.

For more information about these cases, contact Larry Pincus of the EEOC at (212) 748-8406.

The Mailbox

To the Editor:

Re: **Marks v. NYU**, 61 F. Supp. 2d 81, a case squibbed last issue.

Marks is the case in which Judge Patterson found against an ADEA plaintiff who purported to accept a severance offer following the employer's purported revocation and the plaintiff's receipt thereof. The plaintiff foolishly argued that the OWBPA creates an irrevocable 21-day offer; the Court properly held that the OWBPA merely renders a waiver unknowing and involuntary absent a 21-day period.

The plaintiff should have argued that N.Y. General Obligations Law § 5-1109 provides that a signed writing setting forth a promise to hold open an offer for a specific time period creates an irrevocable offer for the duration of that time period, notwithstanding want of consideration. (Presumably, the offer at issue in **Marks** was drafted for OWBPA compliance purposes and accordingly provided for a 21-day deliberation period.) Needless to say, the plaintiff's attorney wasn't a NELA member.

Very truly yours,
Jonathan Bernstein

Renew Your Membership!

With the New Year, your NELA/NY dues for 2000 are due. NELA/NY can't run without your support. Your dues pay for:

- NELA Nite
- Two state/regional conferences each year
- The New York Employee Advocate
- Our website, nelany.com
- Invaluable opportunities to brainstorm, consult, network and schmooze

Be a mensch, not a scofflaw. Send in your dues to the NELA/NY office today. Dues are $100 for attorneys in practice less than five years, and $125 for all others.

NELA/NY Needs a New Home

The NELA/NY office and our masterful director Shelley Leinheardt have to relocate soon. If you know of a small office space at a reasonable rent, please call Shelley at 212 603-6441.

EEOC Outside Mediation Program Hits a Wall

The New York District Office of the EEOC is no longer referring charges to outside mediation because of a funding problem. Apparently, the EEOC does not have the necessary funding in place for the 54 "contract mediators" that have been selected for the outside mediation program. At present, the EEOC is using only two mediators who are EEOC staff. The problem appears to be a temporary one, but we do not know how long it will last.

Speakers Bureau

As part of its ongoing effort to spread the message about employee rights and NELA/NY, members of the Speakers Bureau will discuss "How to Prepare an Employment Discrimination Case" before the New York County Lawyers Association Solo and Small Firm Practice Committee on February 9. The speakers will be Jim Brown and Phil Taubman. For more information, call the NYCLA, Jim or Phil.

Upstate Employment Law Conference

NELA will host its Third Annual Upstate Employment Law Conference on March 24, 2000, at Syracuse University Law School. This year's topic is Trial Practice for the Employment Lawyer.

Conference Presentations will cover Effective Opening and Closing (Gary Hall); Preparing the Plaintiff for Trial (Mimi Satter); Deposition Law and Practice (Ron Dunn); Proving Damages through the Plaintiff and with an Expert (Diane Galbraith and Raymond Schlather); and Effective Jury Instructions (Stefan Berg).

The Conference will run 9:00 a.m. to 5:00 p.m. For more information, contact Shelley at NELA/NY or Stefan Berg at (315) 476-0806 or stefanberg@nela. org.

Second Circuit Reinstates NELA/NY Member's Libel Case

In a reversal of fortune, the Second Circuit recently reinstated NELA/NY board member Leonard Flamm's defamation case against the American Association of University Women. Judge Meskill found that the offensive terms used to describe Mr. Flamm's alleged professional practices were "reasonably susceptible to the defamatory meaning imputed to [them]." The court held that "it remains for the jury to decide whether the challenged statement was likely to be understood by the reader in a defamatory sense." The case was remanded for trial. **Flamm v. AAUW**, 2000 WL 6076, 2000 U.S. App. LEXIS 26 (2d Cr. Jan. 4, 2000). Congratulations, Len, on this important victory in a hard fought battle.

Condolences

We sadly report the deaths of Leonard Flamm's father and Kipp Watson's mother, and we send our condolences and sympathies to Len and Kipp.

Anne's Squibs

by Anne Golden

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

Anne Golden
Outten & Golden LLP
1740 Broadway
New York, NY 10019
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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, an associate with Outten & Golden LLP, and Robin Audubon, a student at St. John's Law School and intern with the firm, for their assistance with these squibs.

AFFIRMATIVE ACTION

The Second Circuit held that The New York Times and New York Newspaper Printing Pressmen's Union No. 2 violated a 1995 agreement with non-unionized employees that created an affirmative action program. The 1995 agreement required good faith efforts by the Times and the union to attain a unionized and non-unionized workforce of 25% women and minorities. In 1997, the union agreed to transfer fifteen workers from other newspapers to the Times. The court held that the transfer violated the affirmative action agreement by excluding minorities and women from the shifts of the transferees. Similarly depriving women and minorities of opportunities were decisions to allow unionized but not non-unionized employees to work an additional seventh shift during the fall 1997 holiday season. NELA/NY members Janice Goodman and Stephanie B. Davis, et al., represented the plaintiffs. **EEOC v. New York Times Co.**, 196 F.3d 72 (2d Cir. 9/1/99).

ATTORNEYS' FEES

CPLR § 8601

The Appellate Division, Third Department, in an opinion by Justice D. Bruce Crew, ordered defendant to pay $29,182 in attorneys' fees pursuant to CPLR § 8601, for representation in both administrative and judicial proceedings. The plaintiff was demoted for signing a letter to the Troy City Manager concerning the poor building conditions where several state employees were assigned to work. The plaintiff ultimately prevailed and the state was ordered to pay damages. When the plaintiff's attorney applied for fees pursuant to § 8601, the defendant objected to the hourly rate of $175 per hour and to imposition of fees connected with the underlying administrative proceeding. The Third Department held that CPLR § 8601 covered attorney's fees in connection with representation of the client in the administrative proceeding. The court also held that the $175 rate was not excessive. NELA/NY member Mark T. Walsh of Albany represented the plaintiff. **In the Matter of Hilton Perez Jr. v. New York State Department of Labor**, 697 N.Y.S.2d 718 (3d Dept. 11/4/99).

CLASS ACTIONS

Opting Out

Named plaintiffs who opted out of a class action settlement were allowed to opt back in because the effect of opting out had been unclear, S.D.N.Y. Judge Constance Baker Motley held. The named plaintiffs had commenced a class action against Smith, Barney, alleging gender discrimination, and opposing mandatory arbitration in the securities industry. Several named plaintiffs opted out of a settlement against only the Smith Barney defendants and sought to continue to press individual claims against all defendants. The court held that they had opted out of not only the settlement but the entire lawsuit. The court noted that this extent of the opt-out had been unclear, however, and accordingly allowed each named plaintiff to rescind her opt-out. **Martens v. Smith Barney, Inc**., —- F.R.D. —-, No. 96 Civ. 3779 (CBM), 1999 WL 1095343 (S.D.N.Y. 12/2/99).

DISABILITY DISCRIMINATION

Corrective Measures

After the district court found a plaintiff to have an ADA-covered disability, the Fifth Circuit remanded for consideration of corrective measures under **Sutton v. United Airlines, Inc.**, 119 S.Ct 2139 (1999). The plaintiff, who wears a hearing aid in one ear for his bilateral hearing loss, must show substantial limitation in a major life activity *with* the hearing aid. **Ivy v. Jones**, 192 F.3d 514 (5th Cir. 10/25/99).

Essential Functions

An ADA plaintiff lost on summary judgment because he was unable to obtain the commercial driver's license necessary for certain occasional duties. Judge Robert W. Sweet (S.D.N.Y.) held that the plaintiff could not perform the essential functions of the "Trades Helper-Electrical" position because "such employees may be called upon to operate heavy duty equipment for general maintenance and snow removal work." The holding illustrates the need for weighty evidence to prove that a plaintiff might be able to perform essential functions. This plaintiff, moreover, was *pro se*. **Barbella v. Port Authority of N.Y. & N.J.**, — F. Supp. 2d —-, No. 97 Civ. 8553 (RWS), 1999 WL 1206692 (S.D.N.Y. 12/15/99).

Indefinite Leave Time

The Tenth Circuit Court of Appeals has held that a plaintiff who had been out of work for 10 months and was unsure of a return date was not "otherwise qualified" for the job. Unable to return to work quickly after back surgery, he argued that he was qualified because he could work if given additional time off to recover and reassigned upon return. The Circuit found otherwise, holding that "indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence

of the expected duration of her impairment." **Taylor v. Pepsi-Cola Co.**, 196 F.3d 1106 (10th Cir. 11/12/99).

Reasonable Accommodation

An attorney who suffered from epileptic seizures brought claims of disability, race, and gender discrimination and retaliation against her former employer, Consolidated Edison, and Judge William H. Pauley III denied Con Ed's motion for summary judgment as to race and disability discrimination but granted it as to gender discrimination, including sexual harassment, and found no continuing violation. The court found issues of fact based on several adverse employment decisions, including assignment of an inferior office, probation, a suspension, and termination, along with evidence that could support an inference of race discrimination. As for the disability claim, the plaintiff showed that she was substantially limited in the major life activities of sleeping and working and that her employer had failed to accommodate her. She also produced sufficient evidence of retaliation after she filed EEOC charges to defeat summary judgment on that claim. **Franklin v. Consolidated Edison Co.**, — F. Supp. 2d —-, N.Y.L.J. 11/9/99, p. 38, col. 1 (S.D.N.Y. 9/30/99).

Reassignment as Accommodation

The Tenth Circuit Court of Appeals has weighed in on the side of transfer as a reasonable accommodation. Cautioning that an employer need not reassign an employee to a position that would be a promotion or would put an undue burden on the employer, the court nevertheless held that the obligation to reassign "means something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position." If reassignment is a reasonable accommodation, then the disabled person "has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment." Moreover, if an employee knows that the employer has a discriminatory policy against reasonable accommodation, he is not required to make a request that will surely be denied. **Davoll v. Webb**, 194 F.3d 1533 (10th Cir. 10/25/99).

The Second Circuit reversed a defense verdict because the jury was not properly charged on reassignment as an ADA accommodation. The defendant, which had employed the plaintiff as a full-time nurse, offered her two less favorable reassignments. One was part-time; the other was full-time but would have eliminated plaintiff's seniority rights. The plaintiff unsuccessfully sought another open position more equivalent to her prior job. "Reassignment does not constitute reasonable accommodation … where a position comparable to the employer's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority, or other advantages that she possessed in her former job." The Circuit reversed because the jury had not been charged accordingly. **Norville v. Staten Island Univ. Hosp.**, 196 F.3d 89 (2d Cir. 11/3/99).

A vocational rehabilitation expert's report saved an ADA claim by creating fact issues as to both the plaintiff's qualifications and the defendant's training efforts, the Seventh Circuit held, reversing a grant of summary judgment to the defendant. The plaintiff's dyslexia and other learning disabilities hampered his ability to learn a new computer system, which in the district court's view meant that he could not perform various essential functions. The court of appeals found sufficient rebuttal evidence in the expert's opinion that the defendant's training may have been inadequate in light of the plaintiff's disabilities and that the plaintiff could perform the essential functions with training properly suited to his limitations. The defendant's reassignment of the plaintiff to a less advantageous position might not have been a proper accommodation, because reassignment generally is an appropriate accommodation "only if a person could not fulfill the requirements of her current position." **Vollmert v. Wisconsin Dep't of Transp.**, 197 F.3d 293 (7th Cir. 11/24/99).

Record of Impairment

The Tenth Circuit held that a flight nurse with multiple sclerosis did not have a "record of such impairment" under the ADA. The panel found that the plaintiff, who was returned to her former hospital nursing position, did not have an impairment that sufficiently limited any major life activity because "[t]o have a record of such impairment, a plaintiff must have a history of, or been misclassified as having, an impairment that substantially limited a major life activity." Because the plaintiff was precluded not from a broad range of jobs, but only from the position of flight nurse, she was not impaired in the major life activity of working. Neither was the plaintiff regarded as disabled. **Sorensen v. Univ. of Utah Hosp.**, 194 F.3d 1084 (10th Cir. 10/14/99).

Regarded as Impaired

Reversing a grant of summary judgment to defendant, the Second Circuit found sufficient evidence that an employee with lymphoma was "regarded as" disabled under the ADA. The evidence showed that the defendant both regarded the plaintiff as "suffering from a physical impairment that restricted his ability to perform the major life activity of work … [and] discriminated against plaintiff on that basis." The plaintiff produced evidence that a former employee with lymphoma required significant leave time and that his own termination came on the heels of his request for medical leave time. **Heyman v. Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.**, — F.3d —-, 1999 WL 1079971 (2d Cir. 11/30/99).

Section 1983

The Fifth Circuit has held that a Section 1983 claim cannot be based on a Rehabilitation Act violation. The plaintiff, a visually impaired state employee, had brought the claim against her supervisor — who, as an individual, could not be sued directly under the Rehabilitation Act. The Rehabilitation Act's comprehensive enforcement scheme evidences a congressional intent to foreclose resort to the more general section 1983 mechanism, the panel held. **Lollar v. Baker**, 196 F.3d 603 (5th Cir. 12/6/99).

ERISA

Judge Allyne R. Ross (E.D.N.Y.) held that a plaintiff's claim that a pension fund miscalculated his benefits raised suffi-

cient issues of material fact to withstand the defendant's motion to dismiss under the doctrine of "equitable tolling" but dismissed the plaintiff's other causes of action as untimely. The case arose out of a merger of the Teamsters Conference Pension and Retirement Fund and the Brewery Workers Pension Fund. When the plaintiff elected the Teamsters plan, it refused to honor the transfer because he had not made his request at the time of the merger. The plaintiff sued, and the case was settled. The plaintiff later noticed there was a miscalculation of the settlement and brought this action to collect unpaid benefits. The court held that it had subject matter jurisdiction even though the original dispute occurred prior to the enactment of ERISA, because the defendants' evaluation of the Teamster's coverage pursuant to the settlement agreement was governed by ERISA. The statute of limitations for an ERISA claim is six years, and the cause of action accrues when the "benefit is clearly and unequivocally denied." The statute of limitations began to run when the defendant informed the plaintiff of the settlement award in 1985, so that the 1997 filing was untimely. The court agreed with the plaintiff, however, that the doctrine of equitable tolling should apply to the plaintiff's miscalculation claims. The plaintiff must establish, and did establish, "fraudulent or deceptive conduct by the defendants designed to conceal facts…unawareness of those facts…exercise of due diligence by the plaintiff in an effort to uncover his claims." NELA/NY member Edgar Pauk represented the plaintiff. **Miele v. Pension Plan of New York State Teamsters Conference Pension & Retirement Fund**, 72 F. Supp. 2d 88 (E.D.N.Y. 8/25/99).

EVIDENCE

Pretext-Plus

The Second Circuit upheld judgment as a matter of law for a defendant where inconsistent reasons for a discharge were insufficiently probative of age discrimination. The defendant offered arguably inconsistent alternative rationales for discharging the plaintiff from her nurse position: she lacked medical authorization following her spinal injury; and, regardless of any authorizations, she had poor IV skills. Judge Sonia Sotomayor — who recently had cautioned against over-reading **Fisher v. Vassar** as a crackdown on circumstantial pretext cases — found this a close call: While "the hospital's varying justifications are enough, albeit barely, to suggest pretext[,] … Norville produced no evidence that the hospital's reasons, even if pretextual, served as pretext for age discrimination." **Norville v. Staten Island Univ. Hosp.**, 196 F.3d 89 (2d Cir. 11/3/99).

Nexus to Race/Sex & Section 1981

A black employee who alleged race and sex discrimination when she was terminated for allegedly "making inappropriate comments" to another employee, which she denied having made, saw all her claims thrown out by Judge Harold Baer (S.D.N.Y.) on the ground that she had shown arguably unfair treatment but no nexus to her race or sex. Perhaps the plaintiff gained some satisfaction from the dictum that an at-will employee can assert a Section 1981 claim, even though the court held that she had not produced the necessary evidence of race discrimination and accordingly dismissed that claim along with the others. Judge Baer agreed with Judge Sweet in **EEOC v. Die Fliedermaus**, 1999 WL 12204548 (S.D.N.Y. 1999), that at-will employees nevertheless can assert Section 1981 claims and noted that this issue is pending before the Second Circuit Court of Appeals in **Lauture v. IBM**, 98 Civ. 4882 (S.D.N.Y. 5/25/99), *appeal docketed*, 99-7732 (2d Cir. 1/21/99). **Andrews v. Citigroup Inc.**, —- F. Supp. 2d —-, 1999 WL 1277427 (S.D.N.Y. 12/30/99).

"Gender Plus"

An overweight female lost on summary judgment because she failed to show that overweight males were treated more favorably. The plaintiff claimed that she was rejected for promotion to a sales position in favor of a woman whom a decision-maker described as better-suited to a job dealing with the public because she was "thinner and cuter." Judge Peter Leisure (S.D.N.Y.) held that the plaintiff's conclusory assertions failed to rebut the defendant's argument that its weight discrimination was gender-neutral because no overweight males were hired. **Marks v. National Communications Ass'n, Inc.**, 72 F. Supp. 2d 322, No. 95 Civ. 9727 (PKL), 1999 WL 974022 (S.D.N.Y. Oct. 26, 1999).

"Ultimate Decision-Maker"

With a ruling limiting a plaintiff's showing to evidence about "the ultimate decision-maker," S.D.N.Y. Judge John S. Martin, Jr., takes the lead over E.D.N.Y. Judge I. Leo Glasser for the 2000 Achievement in Summary Judgment Award. The plaintiff, a 60 year-old male with a neurological condition that caused tremors and required him to speak more loudly, sued under the ADEA and ADA when he was terminated. Awarding summary judgment to the defendant, Judge Martin stressed that the hiring and firing were by the same individual, who was over 40 and who saw the plaintiff's age and disability from the outset. Because the plaintiff's supervisor was a different individual who was not "the ultimate decision-maker" and had not mistreated the plaintiff for his first few months of employment, it was immaterial that the supervisor was under 40, perceived the plaintiff as having a hearing problem, made age-related derogatory comments, provided negative evaluations, and recommended the termination to the ultimate decision-maker. Also deemed immaterial: witnesses contradicting the negative evaluations and evidence that most employees were under 40, including the 26-year-old who replaced plaintiff. **Browne v. CNN America, Inc.**, —- F. Supp. 2d —-, 1999 WL 1084236 (S.D.N.Y. 12/1/99).

S.D.N.Y. Judge Lewis A. Kaplan denied summary judgment in an opinion expressing an opposite view of the law to Judge Martin's. Mr. Groesser, the plaintiff's supervisor, allegedly harassed the plaintiff racially and was one of two people recommending that he be terminated in a "significant 'downsizing.'" "[T]he process by which plaintiff was selected for termination seems almost free of any reasonable charge of discrimination — but 'almost' is not good enough on a motion for summary judgment." Non-racial insults and insults outside the 300-day window may be part of a racial harassment claim, Judge Kaplan added.

"Imputation of stupidity or other undesirable but facially neutral comments may take on a different coloration if they occur amidst explicitly racial and ethnic epithets." The comments more than 300 days before the EEOC charge also survived because the continuing violation question was appropriate for jury determination. Judge Kaplan also held that the fact that the plaintiff reported the harassment to his department head, rather than to human resources as company policy instructed, was not fatal under **Ellerth/Faragher** if the company's response, through the department head, was inadequate. **Alonzo v. Chase Manhattan Bank, N.A.**, 70 F. Supp. 2d 295, 1999 WL 979433 (S.D.N.Y. Oct. 26, 1999).

Uneven Imposition of Discipline

Although Title VII protects violators of rules from disparate treatment in punishment, summary judgment for a defendant was appropriate where the plaintiff had insufficient proof of a disparity, Judge Robert W. Sweet (S.D.N.Y.) held. The plaintiff was terminated after the discovery that he falsified call and expense reports. The plaintiff, a black man, admitted the violations but claimed that several white employees were treated more leniently. Judge Sweet stated that, for a claim of discriminatory imposition of discipline, a "similarly situated" employee "must have engaged in similar conduct and there must be no differentiating or mitigating circumstances." The defendant prevailed because the comparators' situations featured small but material differences. The plaintiff was *pro se*. **Anderson v. Anheuser-Busch, Inc.**, 65 F. Supp. 2d 218, 1999 WL 889578 (S.D.N.Y. 10/15/99).

PUBLIC EMPLOYMENT & FREEDOM OF SPEECH

Section 1983 Retaliation

When a police chief and his son brought a Section 1983 action against their town, alleging that the police department had been abolished in retaliation for protected speech, the Second Circuit Court of Appeals held that the claims presented genuine issues of material fact. The dismissal of the case by Judge Charles L. Brieant (S.D.N.Y.) was reversed in part, reinstating the claims that the defendants had an unlawful retaliatory motive in abolishing the department and that implementation of the town's policy concerning press conferences imposed a prior restraint on speech. However, the town's policy requiring the police chief merely to advise the town in advance on the subject of any press conference did not violate the First Amendment unless and until the town imposed a requirement of advance approval or sought to enjoin speech. Judge Richard J. Cardamone wrote the opinion, joined by Judges Amalya L. Kearse and Rosemary Pooler. **Morris v. Lindau**, 196 F.3d 102 (2d Cir. 10/21/99).

Section 1985

A state employee's § 1985 claim against the New York State Comptroller and Deputy Comptroller survived summary judgment before Judge Robert W. Sweet (S.D.N.Y.). The plaintiff was terminated for negative deposition testimony about the Comptroller's financial report. The § 1985 "intraenterprise doctrine" generally holds that two employees of the same corporation (or public office) are not independent entities capable of forming a § 1985 conspiracy to interfere with the right to testify. The district court found, however, that the plaintiff offered sufficient evidence that the Comptroller acted on a personal interest in the plaintiff's termination (rather than on the interests of the public office) and therefore could prevail under the "personal interest" exception to the intraenterprise doctrine. The plaintiff was represented by NELA/NY member John Beranbaum. **Roniger v. McCall**, 72 F. Supp. 2d 433, 1999 WL 1095500 (S.D.N.Y. 12/1/99).

RACIAL HARASSMENT

Facially Neutral Comments; Duty to Report Harassment

See **Alonzo v. Chase Manhattan Bank, N.A.**, discussed above under "Evidence."

SEX DISCRIMINATION

Judge Neal P. McCurn (N.D.N.Y.) held that an erroneous reading of state law could not be a valid basis for a facially discriminatory policy, granting a plaintiff's motion for summary judgment on the issue of liability. The court further held that a municipality can be liable for sex discrimination if it is responsible for the constitutional violation. The issue was whether the policy of assigning only female correction officers to the women's prison and only male correction officers to the males' housing unit violated the equal protection clause of the Fourteenth Amendment. The court held that the burden was on the defendant to show that the classification served an important governmental objective and that the discriminatory means employed are substantially related to the achievement of those objectives. The defendant failed to justify the differential sex based treatment, offering only that the rule was required by law. **Sheriff's Silver Star Association of Oswego County, Inc. v. County of Oswego**, 56 F.Supp.2d 263 (N.D.N.Y. 7/2/99).

SEXUAL HARASSMENT

Hostile Environment Sexual Harassment

Advise your clients to stay out of the Eleventh Circuit if they expect to be sexually harassed. A plaintiff whose supervisor constantly followed her and stared at her without speaking, looking her up and down "in a very obvious fashion," including looking at her groin area and making sniffing motions, and once rubbing his hip against hers, did not allege sufficient basis for a hostile environment sexual harassment claim. **Mendoza v. Borden, Inc.**, 195 F.3d 1238, 81 [BNA] F.E.P. Cas. 470 (11th Cir. 11/16/99) (en banc).

The District of Columbia Court of Appeals upheld a verdict awarding a female police officer $100,000 for sexual harassment by a fellow officer in violation of Title VII. In three separate opinions, the court upheld the decision of the district court, per curiam, that the damages awarded were not excessive and that the employer's lack of response to the plaintiff's additional complaint of harassment resulted in liability. The court additionally determined that the jury award of $100,000 was not so unreasonably high as to result in a miscarriage of justice. "An employee may be held liable for the

harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action." **Curry v. District of Columbia**, 195 F.3d 654 (D.C. Cir. 11/9/99).

One or Two Incidents of Harassment

One night of sexual harassment was sufficiently "severe" for the plaintiff to avoid summary judgment, a Kansas district court held. In two incidents in the same evening, the plaintiff's supervisor had grabbed her breast, kissed her neck, and grabbed her ankle. **Dunegan v. City of Council Grove**, —- F. Supp. 2d —-, 1999 WL 1100439, No. 97- 4039-RDR (D. Kan. 11/30/99).

Standing

The Third Circuit, following the Supreme Court (most of the way) in **Trafficante v. Metropolitan Life Insurance Co**., 409 U.S. 205 (1972), has reversed a district court and held that male employees of the New York Times mailroom had standing to allege anti-female discrimination and harassment in their workplace. The suit alleged not only sex discrimination but also race, color, and national origin discrimination; some of the plaintiffs were men and some women, some were non-Hispanic and some Hispanic. The court of appeals held that "'indirect' victims of discrimination have standing to sue under title VII if they allege a claim of injury-in-fact that is redressable at law." The court, however, still seemed to require that the "indirect" victims be able to show some kind of pecuniary damages in order to have standing. NELA/NY member Michael Shen of Shneyer & Shen represented the plaintiffs. **Anjelino v. The New York Times Co.**, —- F.3d —-, 1999 WL 1085828 (3d Cir. 12/2/99).

State Law Claims

Judge Peter K. Leisure affirmed in part and reversed in part a magistrate's report and recommendation (James C. Francis III, M.J.) granting summary judgment for an individual defendant, the plaintiff's supervisor, on claims under Section 1983, New York State Human Rights Law, and Title VII, and reinstated "aiding and abetting" claims against the individual defendant. The plaintiffs, two female bridge and toll operators, complained of sexual harassment by employees of a cleaning company used by their employer, the Triborough Bridge and Tunnel Authority. The magistrate dismissed all claims against the individual, holding that an employee is not subject to suit if he is not an owner of the company but merely carries out the personnel decisions of others, based on section 296(1) of the New York State Executive Law (the Human Rights Law). However, under section 296(6), an individual may be liable where he actually participates in the activity that could give rise to liability. Although the magistrate did not find that the defendant's behavior added up to the required level of participation, the district court "decline[d] to adopt the Report's conclusion that allegations of failure or refusal to investigate a complaint of sexual harassment, cannot as a matter of law, satisfy the requirements of … § 296(6)." "In sum, the law is clear that a supervisor need not make derogatory comments or unwelcome sexual advances to subject himself or herself to liability under the HRL."

Lewis v. Triborough Bridge and Tunnel Authority, —- F. Supp. 2d —-, 1999 WL 105112 (S.D.N.Y. 11/19/99).

STATE LAW

Employment at Will

A letter stating an employment offer and listing compensation for the first two years may create a two-year employment contract rather than an at-will employment relationship, the Appellate Division, First Department, held. While parts of the letter used hedging language that would not defeat the at-will presumption, other parts used language apparently assuming a fixed term of employment, such as by describing second-year compensation as "a guaranteed recoverable draw of $120,000, against commissions." **TSR Consulting Servs. v. Steinhouse**, —- N.Y.S.2d - —, 1999 WL 1126618 (1st Dept. 12/7/99).

Restrictive Covenants

In a decision that seems well on the way to becoming a leading precedent, Judge William H. Pauley III rejected a one-year restrictive covenant in an internet firm's employment contract. The defendant left his job as Vice President of Worldwide Content for EarthWeb, Inc., (a firm that provides online products to information technology ("IT") professionals) for a position with ITworld.com, an internet startup established as a subsidiary of an IT content producer. Judge Pauley denied the plaintiff ex-employer a preliminary injunction. It did not prove that the defendant held any trade secrets, and the doctrine of "inevitable disclosure" of trade secrets is too narrowly applied to be satisfied by unclear evidence. The restrictive covenant claim also failed for several reasons: one year was too long for a such a fast-moving industry; absent special client relationships, the defendant had no "unique and extraordinary services" supporting a restrictive covenant; and the absence of truly confidential information or trade secrets left the plaintiff without a sufficiently protectible interest. Judge Pauley declined to "blue-pencil" the restrictive covenant to preserve limited restrictions because the agreement evidenced "overreaching." **EarthWeb, Inc. v. Schlack**, 71 F. Supp. 2d 299, 1999 WL 980165 (S.D.N.Y. 10/27/99).

Unfair Competition

In an unfair competition suit, the Supreme Court of Nassau County (Winick, J.) granted a plaintiff's motion to amend the complaint requesting punitive damages and denied the defendant's motion for attorneys' fees in judgment denying the plaintiff's motion for a temporary restraining order and a preliminary injunction. Leave to amend the complaint should be freely granted unless it leads to surprise or prejudice, said the court. The court also held that a request for punitive damages in a contract suit should be denied unless a separate tort is found. Here, the court did recognize a separate tort where the defendant, motivated by greed, took business from his employer while still working for the plaintiff. Since there had been no final judgment in the dispute, the court refused to award attorneys' fees pursuant to CPLR § 6315. Attorneys' fees may not be awarded until there is a "final determination on the merits of plaintiff's claim." **Global Directmail Corp v. Stark**, NYLJ QDS 72701755 (Sup. Ct. Nassau Cty.10/29/99).

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damages and $50,000 in punitives, plus attorneys fees. Plaintiff, who brought the action herself, sued under the New York City Human Rights Law. The court also found a continuing violation beyond the three year statute of limitations. **Siler v. Jacobs Persinger & Parker**, NYLJ December 27, 1999 (Supreme Court, New York County).

Settlements

Terry Meginniss and **Yvonne Brown** report that they have settled a disability discrimination case brought against the **New York City Fire Department** by six EMTs in the Department's 911 system. Because of their disabilities, the plaintiffs could not perform the full EMT duties of their "field duty" assignments, but could do the full range of non-field duty work (for example, working in 911 communications.) Three of them had been terminated and three had been placed on lengthy involuntary leaves.

As part of the settlement, the three terminated employees were reinstated to their positions, and the three others were compensated for the involuntary leaves. Plaintiffs were awarded back pay of almost $180,000 and fringe benefits worth approximately $25,000, and were given pension credits. The case was brought under the State and City Human Rights Laws and the Due Process Clause of the federal and state constitutions. Leonard Polletta of District Council 37 was co-counsel for plaintiffs. **Locascio v. Von Essen**, Supreme Court, New York County.

Eugene Prosnitz has settled a case for an employee of the **Bronx District Attorney's office**, who alleged that he was illegally terminated based on his arrest record. The plaintiff was fired after his arrest, even though the criminal charges had been dropped. The DA's office contended that the termination was due to the plaintiff's prior misconduct, which had occurred a year before the firing. The case was settled for $90,000, after plaintiff served discovery seeking information about provisional employees who might have been employed longer than the nine month Civil Service limit. (Defense counsel had argued that plaintiff was not entitled to back pay beyond nine months because of that provision.) The case was brought under Sec. 296.16 of the State HRL and Sec. 8-107.11 of the City Law. **Beckwith v. Bronx District Attorney**, Supreme Court, Bronx County.

In a case presenting to the Second Circuit the issue of how to apply the ADA after **Sutton**, a plaintiff is waiting to see whether she will keep the verdict she won for $486,000 in back pay and Civil Service reinstatement. **Eileen Persky** represents the employee in her case against the **State Insurance Fund**, in which she claims that the Fund failed to accommodate her Adult Onset Diabetes and then terminated her in violation of the ADA. Plaintiff was also awarded $143,000 in attorneys fees. The question before the Court of Appeals is whether the employee, in light of **Sutton**, was a qualified individual with a disability. **Schaeffer v. State Insurance Fund**, SDNY, Judge Keenan.

Bruce Menken has settled a case against the City of New York on behalf of a plaintiff who alleged that she had been fired from her position in the Sheriff's office based on her age and sex. After the court denied defendants' motions for summary judgment on her ADEA and Title VII claims, defendants settled the case for $200,000. **McNulty v. New York City Department of Finance**, 45 F. Supp.2d 296 (S.D.N.Y. 1999).

New Filings

Dan Alterman has filed a case against **American International Group, Transatlantic Holdings** and **Transatlantic Insurance Co** for a client who alleges race and sex discrimination, retaliation and violations of the Equal Pay Act. The case is brought under Title VII, Sec. 1981 and the State and City HRL. The plaintiff, a claims examiner, alleges discriminatory treatment by her supervisors going back to 1990, including racist and sexist comments and excessive scrutiny of her work. The alleged comments include a statement to plaintiff by a white supervisor that it was a disgrace that she managed a white staff and that the white male staff was harmed in reporting to her. The complaint also alleges that defendants retaliated against the employee after she filed her EEOC charge. **Jean v. AIG**, 99 Civ. 11675 (S.D.N.Y., Judge Scheindlin).

Eileen Persky represents a **Transit Authority** employee suing for national origin discrimination and retaliation under Title VII, Sec. 1983 and Sec. 1981. The plaintiff, who is Indian, was successful in obtaining a probable cause finding from the EEOC on his retaliation charge. **Thomas v. NYC Transit Authority** (E.D.N.Y. 1999, Judge Sifton).

K. Dean Hubbard and **Jennifer R. Willig** are representing a former sales representative of the real estate concern **Muss Development Co.** in her sex discrimination and breach of contract action. The plaintiff alleges that she was denied opportunities afforded to men, and then terminated and not paid commissions she had earned. Plaintiff's discrimination claims are brought under the City and State Human Rights Laws. The plaintiff's appeal of the court's dismissal of her breach of contract claim for certain unpaid commissions is pending at the Appellate Division, Second Department. **Cirillo v. Muss Development Co.**, (Supreme Court, Queens County, Justice Posner, and Second Department).

Bruce Menken represents a former employee of **Active Sprinkler Corp.** who alleges that she was sexually harassed and discriminated against by management. The plaintiff, who was employed to sell plumbing fixtures under a City rebate program, also seeks unpaid commissions under the New York Labor Law. Her husband is a co-plaintiff in the case. **Zaslow v. Active Sprinkler Corp.** (S.D.N.Y. 2000, Judge Dearie).

Jonathan Ben-Asher has filed a retaliation case under the federal False Claims Act for a physician who was a long term employee of **Parker Jewish Institute for Health Care and Rehabilitation.** The plaintiff alleges that the defendant fired him because he had made complaints about what he believed were improper Medicare and Medicaid billings and pressure by management to participate in improper patient referrals. **Halio v. Parker Jewish Institute for Health Care and Rehabilitation**, (E.D.N.Y. 2000, Judge Trager).

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was true before the decision, they have remedies under the New York State and City Human Rights Laws. Many NELA/NY members choose State court as a forum anyway and can happily report generous jury verdicts for their clients. However, while many Manhattan Supreme Court judges are not afraid to rule against public agencies, plaintiffs in other, less liberal jurisdictions may not fare as well. State court can be slower than federal court, with less outside pressure to move a case along. (Note that in State court a defendant can seek to prolong a case by taking any number of interlocutory appeals.) Let the Employee Advocate know about your experiences.

Following the decision, the Supreme Court remanded two Court of Appeals decisions which had upheld the application of the Equal Pay Act to state employees as a valid exercise of Congress' power under the Commerce Clause and Fourteenth Amendments. The Court instructed the Second and Seventh Circuits to further consider their decisions in light of **Kimel**. **State University of New York v. Anderson**, 2000 U.S. LEXIS 551 (No. 98-1845, January 18, 2000); decision below: **Anderson v. State University of New York**, 169 F. 3d 117 (2d Cir. 1999); **Illinois State University v. Varner**, 2000 U.S. LEXIS 548 (No. 98- 1117, January 18 1999); decision below: **Varner v. Illinois State University**, 150 F.3d 706 (7th Cir. 1998). Since the Court in **Kimel** had partially based its ruling on the fact that age was not a suspect classification, it is troubling if these decisions signal the Court's view that state employees cannot sue under the EPA, since sex is unquestionably a suspect classification deserving of "strict scrutiny."

Proving Pretext

Our last issue highlighted the Court's granting of certiorari in **Reeves v. Sanderson Plumbing Products**, (No. 99-536, *cert. granted* November 8, 1999). The Court is to decide the proper standard for overturning jury verdicts under the ADEA. The case raises the broader issue of what plaintiffs have to show to prove age discrimination.

The plaintiff-employee in **Reeves** had prevailed at trial, and the district court denied the defendant's motion for JMOL. On appeal, the Fifth Circuit ruled that the district court erred in denying defendant's motion, and therefore granted the motion and vacated the jury verdict. The Court of Appeals held that to prove that an employer's stated reason for an adverse employment decision is a pretext for age discrimination, the plaintiff must show not only that the stated reason was false, but also that age discrimination "had a determinative influence" on its decision making. **Reeves v. Sanderson Plumbing Products**, 1999 U.S. App. LEXIS 29724 (5th Cir. 1999).

The Fifth Circuit's decision was alarming for several reasons. It reversed the district court's ruling on defendant's appeal (we are more used to seeing plaintiffs appealing from a trial court's grant of JMOL). It reversed the jury's verdict based on what really amounted to a plenary, de novo review of the evidence. It discounted the age-biased comments of one of the managers responsible for plaintiff's termination because they were not made "in the direct context of" the firing and were not made by the other decision makers.

The Supreme Court has never decided whether the **McDonnell-Douglas** method of proof applies to ADEA cases, and this may be its chance. Reeves argues that even if plaintiffs are required to show "pretext plus," that plus cannot require direct evidence of discrimination. Reeves' brief argues that it should suffice if the plaintiff shows that the employer lied about the reasons for the termination (pretext) and replaced the plaintiff with a younger individual. This argument recalls the language of the Supreme Court in **St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 511 (1993), instructing that the jury's disbelief of the employer's rationale, together with the elements of the prima facie case, may permit a jury to infer intentional discrimination.

The case also presents the court with a chance to instruct trial courts about what latitude they have in taking away jury verdicts under Fed. R. Civ. P. 50(a). As the petitioner argues, many courts have given little or no deference to jury verdicts and have been reviewing them with one question in mind: do we agree? Reeves argues that the trial court and court of appeals were not entitled to consider the record under what amounted to de novo review, but rather should have only considered the non-moving party's evidence and done so under the test for summary judgment review under Rule 56. As Reeves' brief explains, "an appellate court is not the place to make credibility choices. This displaces the jury."

Petitioner's brief has been filed, respondent's brief is due shortly, and amicus briefs have been filed by the Lawyers Committee for Civil Rights, NELA and many other civil rights groups. We'll keep you posted.

Truth or Consequences under the False Claims Act

In line with its recent interest in setting boundaries on federal authorities, the Supreme Court has also reached out to decide an issue that was not even before it in a petition for certiorari: whether individuals have standing to bring suits under the False Claims Act as representatives ("relators") of the interests of the United

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States. **State of Vermont Agency of Natural Resources v. United States ex rel Stevens**, 120 S. Ct. 523, 1999 U.S. LEXIS 767 (November 19, 1999); 162 F.3d 195 (2d Cir. 1998)

The petitioner in this case sought review of a Second Circuit decision holding that states had Eleventh Amendment immunity from suits under the False Claims Act, 31 U.S.C. Sec. 3730. The False Claims Act prohibits the filing of a "false claim" to obtain money from the federal government, and permits the United States or an individual "relator" standing in the government's place to sue for recovery of the illegally obtained funds, with a share of the recovery going to the relator.

Ten days before oral argument the Supreme Court surprised the parties by ordering them to brief and argue the much broader and more basic issue of whether Congress had acted unconstitutionally by delegating the Government's authority to prosecute these cases to private individuals.

Why is this case relevant to NELA/NY members? Because the False Claims Act provides a unique remedy to whistleblowers who have scant protection under New York's own whistleblower laws. The anti-retaliation provision of the False Claims Act prohibits discrimination against an employee who has acted in furtherance of an action under the statute — and this has been broadly construed to include internal complaints within a company as well as formal investigations and actual lawsuits. Qui tam claims are most common against health care providers (who submit claims under Medicare and Medicaid) and military contractors, and there are many health care providers in New York.

The Court could strike down the delegation of prosecutorial authority to individuals without affecting the statute's anti-retaliation provision. Nonetheless, given the court's increasing tendency to limit federal authority, who knows what the Rehnquist cabal might do?

The Violence Against Women Act

The Court's concern with the "federalism" impact of civil rights laws should also affect its forthcoming decision in the case attacking the constitutionality of the Violence Against Women Act, which creates a civil damages remedy for victims of gender-motivated violence. **United States v. Morrison**, Nos. 99-5 and 99-29. The Supreme Court granted certiorari from a Fourth Circuit decision holding that Congress could not constitutionally enact VAWA, 42 U.S.C. 13981, under either the Commerce Clause or Fourteenth Amendment. The Court of Appeals had held VAWA "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded." **Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820, 825**. (4th Cir. 1999).

With that language as a starting point, NELA members, bone up on your Articles of Confederation.

— Jonathan Ben-Asher

Workers Compensation
&
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