NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 14, NO. 4 January 2008 Rachel Geman, Gary Trachten, Co-Editors

How to Interview and Evaluate Clients About Potential Claims for Retaliation Under Title VII

(Part two of a two-part article)

Allegra L. Fishel (afishel@outtengolden.com) and Cara E. Greene[i] (ceg@outtengolden.com)

Following the Supreme Court's decision in *Burlington Northern & Santa Fe Railway v. White*,[ii] plaintiffs' attorneys may be more favorably inclined towards retaliation cases. Nonetheless, attorneys still face hurdles in proving retaliation. The initial consultation is critical in determining the strengths of a case, but the skilled interviewer knows that distressed individuals do not always recount the facts of an employment-related situation logically or chronologically. The attorney needs to tease out the facts and the evidence in support of these facts from the beliefs, right or wrong, of the client.

This two-part article has aimed to assist the practitioner in focusing on the right questions to ask when evaluating a potential client with retaliation claims under Title VII. In part one, we discussed how to handle questions relating to the

See RETALIATION, page 13

Anne's Squibs

By Darnley D. Stewart (dstewart@gslawny.com)

Disclaimer: These squibs are exhausting but not exhaustive. You should not rely upon them as a substitute for doing your own research and actually reading the cases. In addition, please bring any decisions, orders or results that you think might be helpful to other NELA/NY members to the attention of Rachel Geman *(rgeman@lchb.com)* Gary Trachten (*gtrachten@kudmanlaw.com)* or Darnley Stewart *(dstewart@gslawny.com).*

ARBITRATION

See **Selmanovic v. NYSE., et al.** discussed under "Retaliation."

DISABILITY

McInerney v. Rensselaer Polytechnic Institute, et al., 505 F.3d 135 (2nd Cir. Oct. 15, 2007) (per curiam): or "*Hurd Mentality*": Brain damaged Ph.D candidate at RPI sued the school under Titles III and V of the ADA, alleging that various professors failed to accommodate his disability and unlawfully retaliated against him. The District Court (Hurd, J.) dismissed the case on the ground that plaintiff had failed to exhaust his claims with the EEOC or state or local agency prior to suit. The Second Circuit vacated the lower court decision, holding that there is no administrative-exhaustion requirement for ADA Title III claims or Title V claims predicated on asserting one's rights under Title III: "There is good reason to conclude that Congress intentionally omitted the exhaustion requirement for public-accommodation claims, as it would make little sense to require a plaintiff challenging discrimination in public accommodations to file a charge with the EEOC, an agency with responsibility for an expertise in matters of employment discrimination."

FLSA

Akwesi, et al. v. Uptown Lube & C/W, Inc., 2007 U.S.Dist. LEXIS 89605 (S.D.N.Y. Dec. 3, 2007) or "*Lube it and Lose It*": Plaintiff and 14 other former employees filed a complaint against Uptown Lube under the FLSA, as well as various New York state employment statutes and regulations. According to plaintiffs, defendant (i) failed to pay overtime at one and a half the hourly rate and "spread of hours" pay as required by 12 N.Y.C.R.R. § 142-2.4; (ii) made illegal deductions from wages; and (iii) failed to make overtime payments in a timely manner. Defendant moved to dismiss, arguing that a finding of the NYS DOL investigation that Uptown Lube had paid overtime combined with a subsequent payment for the "spread of hours" violation had mooted plaintiffs' claims. The Court (Buchwald, J.) disagreed, ruling that the Court at least retained jurisdiction over a portion of the plaintiffs' claims that accrued after the time period covered by the DOL investigation. Judge Buchwald did not favor defendants' preclusion argument in any event: "While unreviewed factual determinations of state agencies may be given preclusive effect in federal court, this is not so in all circumstances, and appears to not be so in suits brought under the FLSA." *Id*. at *9.

Barturen v. Wild Edibles, Inc., 2007 U.S. Dist. LEXIS 93025 (S.D.N.Y. Dec. 18, 2007) or "*Eat This*": In case where

See SQUIBS, page 12

The NELA/NY Calendar of Events

Executive Board Meeting
January 30, 2008
3 Park Avenue – 29th Floor
(Open to members in good standing)

NELA Nite
February 13, 2008
3 Park Avenue – 29th Floor
(Topic to be announced)
SAVE THE DATE

LOBBY DAY
March 6, 2008
Washington, D.C.
(Details to follow)

Executive Board Meeting
March 19, 2008
3 Park Avenue – 29th Floor
(Open to members in good standing)

NELA Nite
March 26, 2008
3 Park Avenue – 29th Floor
(Topic to be announced)

SAVE THE DATE
NELA/NY 2008 Spring Weekend Conference
May 16-18, 2008
Kaatskill Mountain Club
Hunter, New York
SAVE THE DATE
(Details to follow)

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *nelany@nelany.com*. 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:
(212) 317-2291
Fax: (212) 977-4005
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: *nelany@nelany.com*

Editors: Rachel Geman, Gary Trachten

Discount for Depositions

	Bee Court Reporting Agency, Inc.	**Veritext Court Reporting**
Standard Page Rate	$4.25	$4.25
Expedited Rate	$4.75	$4.95
Bust Fee	$95.00	$80.00
	1486 Kew Avenue Hewlett, NY 11557 (212) 327-3500 or (516) 485-2222	200 Old Country Road Mineola, NY 11501 (212) 267-6868 or (516) 608-2400

NELA/NY will receive $.10 per page from these agencies to cover its expenses in administering this program and other expenses.

We suggest that you and your staff keep a copy of this handy for future reference. This discounted service may be used not only by NELA/NY members but also by attorneys associated with them, and may be used for non-employment cases as well as employment cases.

President's Column

by Bill Frumkin, President, NELA/NY (*frumkin@sapirfrumkin.com*)

It finally appears that the political climate is becoming more hospitable to lobbying efforts that will improve the legal landscape for our clients. Although Governor Spitzer has made a few missteps, it still appears that legislative efforts at the state level to improve the New York Human Rights Law and to strengthen the New York Retaliatory Discharge Law are ripe. To this end, the Legislative Committee of NELA/NY will soon provide its agenda to the Board for consideration for lobbying efforts in 2008. Likewise, on a national level, NELA is pursuing passage of the Civil Rights Tax Relief Act (to amend the Civil Rights Tax Fairness Act), as well as stepping up its efforts to pass a non-mandatory arbitration act. Legislation has already been introduced, some of which has passed in the House, to fix the statute of limitations issue which came to light in *Ledbetter*, to fix the Americans with Disabilities Act with respect to mitigating measures, and to "overrule" by legislative fix the Supreme Court's decision in *Ceballos v. Garcetti*. *Garcetti* essentially denied First Amendment protection to public employees when they speak out on matters of public concern when doing so is within the scope of their job responsibilities..

As a result of the above, it is critical that our membership join in the fight to support these efforts. The Legislative Committee of NELA/NY will need help in furthering its efforts to join with other organizations interested in helping shape these proposed statutes. It will not be able to do it alone, so a call to arms is necessary. All of us moan and groan about the limitations of the statutes which we use to protect our clients and now the time has come to step up. In the coming months, you will receive information about how you can help in this effort.

At the national level, NELA has scheduled numerous "Lobby Days" in Washington, D.C., where members are asked to meet with local congresspersons and senators (usually with their aids) to discuss NELA's initiatives. I have participated in these efforts several times, as have several other members of NELA/NY. We usually get a group together of about 6 to 8 members, at which point appointments are scheduled with our local representatives to discuss these matters. Those who have done it have found it to be not only rewarding, but fun. The next Lobby Day is scheduled for March 6, 2008 and I hope that many of you will give up a day in the office in the anticipation that your efforts will ultimately make your practice much more rewarding and effective.

The efforts of NELA National have in the past culminated in the Civil Rights Tax Fairness Act (as part of the enactment of the American Jobs Creation Act of 2004). In the early days of NELA, such a successful effort was only a dream. Now we now have an office established in Washington, D.C., and a Legislative Director, Donna Lenhoff, who works full-time pursuing our goals. She works closely with Bruce Fredrickson, the current NELA President, who worked with many other NELA members around the country to make the 2004 Civil Rights Tax Fairness Act a reality. That change in the law has helped so many of us to settle cases, so we are not talking about wishful thinking anymore. As one of the larger NELA affiliates, it's imperative that we make a strong showing. Therefore, please feel free to contact me directly about joining us for Lobby Day. Perhaps we can coordinate our efforts to travel in some organized fashion. Once you attend a Lobby Day, you will see how meaningful these efforts can be. Once our legislative priorities become clearer at the state level, I'm sure that a trip to Albany will be in order as well. As President, I feel it's my duty to push for involvement in this area from our membership because as we have seen, it can and will be fruitful. I will also use this opportunity to put in a plug for those of our members who have not joined NELA National to do so. These additional dues have been directly responsible for enabling NELA to establish its presence in Washington.

On another note, at the close of 2007, our membership renewal is currently at one of the highest levels than it has been since we started our chapter over twenty years ago. The Fall conference which consisted of a mock sex harassment trial was one of the best ever. Therefore, for those who could not attend, we will make DVDs available soon at a reasonable price.. We have also improved our website, have started a standing moot court assistance program, and are about to have our first-ever weekend conference (May 16-17, 2008). Overall our organization is strong and moving along quite well. That does not mean that we cannot benefit from new energy, new ideas, and increased enthusiasm from our members. The Executive Board always needs additional help and support from all of you. We are available to discuss leadership opportunities and encourage all members to consider becoming more active.

We recently had a very successful holiday party and, by the time you read this, the holiday season will have come and gone. Notwithstanding, I speak on behalf of the Board in wishing everyone a very prosperous, enjoyable and, most of all, healthy 2008. ■

Condolences

Board member, Anne Golden's father, Dr. HERBERT JOHN CECIL KOUTS, past away on January 7th. We send our heartfelt sympathy to you and your family.

The Forensic Psychology Group

Stephen Reich, Ph.D., J.D.
Psychologist and Lawyer
Director

Associate Directors

Judith Gibbons, Ph.D. Harold Schmitz, Ph.D.

Forensic Psychological Evaluations and Expert Witness Testimony

Employee Discrimination • Age Discrimination

Gender Discrimination • Sexual Harrassment

For all referrals, please contact
The Forensic Psychology Group at:
141 East 55th Street, Suite 2A
New York, N.Y. 10022

1 (212) 935-6133
or
1 (800) 852-2160

The Severance Offer: How Firm Is It? OWBPA Meets N.Y.Gen.Oblig.Law § 5-1109

By: Gary Trachten
Kudman Trachten Aloe LLP
(gtrachten@kudmanlaw.com)

Most of us have probably had this experience: Your client has received a severance package offer. He comes to you for help in understanding the documents and some advice about whether to sign or whether there may be a better alternative, such as negotiating a sweetener to add to the package. In the course of your interview, you uncover circumstances that give him some leverage that you could use in negotiations, and you suggest that it would likely be productive for him if you undertake to negotiate on his behalf. He then asks "What about the 21 (or 45) days that that the package says I have to consider the offer? They told me that this was their standard package, and they essentially said that there was no room for negotiations. I could really use the money they are offering, and I would rather accept the offer than litigate. I am afraid that if I start negotiating, they'll get angry and pull the offer. Does this 21-day period that they gave me to consider the package mean that they can't pull it until the 21 days is up?"

Or you may even have had an experience like this: Your 42 year old client received a $300k severance package proposal that recited that she would have 21 days to consider it. Early on in the consideration period, with or without your client having made a counteroffer, her former employer sent her a letter revoking its offer. Although she had before then hoped to negotiate a better deal, she gave up on that idea when she received the letter. Instead, she then quickly countersigned the "revoked" agreement that had first been offered and delivered it to her former employer before the expiration of the 21 days. Her former employer wrote a letter to her that acknowledged its receipt of the countersigned agreement within the 21 days, but stated that it would not pay the previously offered severance because it had first revoked the offer. She comes to you and asks if she can enforce the countersigned agreement (and whether you'll take her case on a contingency basis).

What do you tell these clients? What is the applicable law? We know that the Older Worker's Benefits Protection Act ("OWBPA") provides that one of a number of pre-requisites for the enforceability of a pre-charge/action waiver of a federal age discrimination claim under the Age Discrimination in Employment Act ("ADEA") is that the employer gives the releasing employee "at least" 21 days (45 days if the release is sought in a group termination program) to consider the waiver agreement. 29 U.S.C. §626(f). Therefore, employer-proposed severance agreements nearly always include a boilerplate recital that gives the employee at least (or instead, sometimes, no more than[1]) 21 days to consider the agreement – even when the terminated employee is less than forty years old and therefore too young to be covered by the ADEA. Typically, the 21-day consideration period is written as being applicable to the entire proposed agreement and not merely the waiver of ADEA claims. Does this mean that OWBPA makes it unlawful or ineffective for an employer to revoke a severance/release proposal made to an ADEA-covered employee before the 21 days period "afforded" for consideration expires? The answer to that question appears to be "no", but that should not be the end of your legal inquiry.

Those who have researched the question might have ended their inquiry with reading and KeyCiting or Shepardizing *Marks v. New York University*, 61 F. Supp.2d 81, 88-90 (S.D.N.Y. 1999) (Judge Patterson). In that case, when NYU advised Janet Marks, a 47 year old NYU Associate Dean and Associate Clinical Professor, that her position as an Associate Dean was being eliminated but that she would be retained as a faculty member, she told the university that she wished instead to end her employment with NYU and receive a severance package. The university made her a presumably OWBPA-compliant severance offer, giving her 21 days to consider it. However, upon hearing that Marks had been working for Fordham University, NYU informed her on the 20th day of the period given for her consideration that the offer was revoked, and requested that she report for work at NYU. Marks quickly signed the offer and returned it to NYU the next day (and did not thereafter return to work there.) Marks then sued NYU for, among other things, breach of the severance agreement.

Judge Patterson dismissed Marks' claim based on common law contract principles and his adoption of the holding in *Ellison v. Premier Salons Int'l, Inc.*, 164 F.3d 1111, 1115 (8th Cir. 1999) that the OWBPA "does not create an irrevocable twenty-one-day power of acceptance for offered separation agreements that include waivers of ADEA claims." Marks did not contest that NYU had revoked the offer before it was accepted or that, under ordinary common law contract principles, such a revocation would not prevent the formation of a contract. However, she contended that the offer was irrevocable under OWBPA. The court rejected her argument, determining that OWBPA merely establishes conditions necessary for the enforceability of waivers of ADEA claims. It noted that OWBPA does not set forth any commands, such as that an employer must give a departing employee 21 days to consider an offer. Nor does it establish any substantive rules or rights with respect to circumstances when the enforceability of an ADEA waiver is not at issue.

See SEVERANCE, next page

SEVERANCE, from page 10

Although I have not examined the underlying record, it appears that both Marks' counsel and Judge Patterson likely overlooked a non-OWBPA basis for finding the NYU offer to have been irrevocable for the full 21 days: the infrequently invoked § 5-1109 of the N. Y. General Obligations Law. Under the common law, an offer is irrevocable only if accompanied by a promise not to revoke it that is supported by consideration. Such an exchange for consideration creates an option contract that provides the offeree with a period during which he has an enforceable option to accept the offer, and during which an offeror's purported revocation is not effective. See *Restatement 2d Contracts*, § 25, Comment d. (It is apparent that in the *Marks v. NYU* case, the parties did not enter into such a common law option contract.) However, G.O.L. § 5-1109 abrogates the common law rule and provides for option contracts in the absence of consideration in certain circumstances. As relevant to our inquiry, it provides:

[W]hen an offer to enter is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability….

In construing this provision, courts have not required that the offer use magic words that explicitly state that the "offer is irrevocable"; rather courts have employed a common sense approach to determining what message is conveyed. Thus, in *Fullerton v. The Prudential Life Insurance Company of America*, 2000 WL 1810099 (S.D.N.Y.), where the employer offered an employee a severance package under a letter that stated "[Y]ou will only be eligible for these benefits if you sign the attached Separation Agreement and General Release by you effective [elsewhere specified] date of Separation", Judge McMahon held that the letter did not merely state a condition for the employer's giving the severance package, but that it also constituted a written offer that under N.Y.Gen.Oblig.Law § 5-1109 (also often cited as G.O.L. § 5-1109) was irrevocable from the date of the offer through the specified separation date. I suggest that nearly all 21-days-to-consider severance offers that we come across easily qualify as firm offers under G.O.L. § 5-1109. It is at least unlikely that an employer could succeed in getting a summary judgment that the offer is revocable; at worse, the provisions may be viewed as ambiguous in what they objectively convey, making it a jury question.

Now, let's go back to the client's concern in the example at the top of this article: "I am afraid that if I start negotiating, they'll get angry and pull the offer." Ordinarily, most negotiations begin with an offer followed by an exchange of counter-offers. Under the common law of contracts, each party's counter-offer constitutes a rejection of the last offer (or counter-offer) received and thus terminates the counter-offeror's right to accept that which he has rejected. *Restatement 2d Contracts*, §39. Logic and our experience tell us that, as a practical matter, we can almost always get back to the first offer. You can tell that to your client, but he may also want to know what the law is, and we are obligated to alert our clients to the legal risks associated with the advice we give them. Therefore, the above-stated rule of contract formation ought to lead you to consider the question of whether negotiating on your client's behalf legally terminates your client's continuing power to accept the initial offer.

Under New York law, whether a counter-offer to the severance offer legally terminates the offer appears to be dependent on whether the OWBPA-compliant severance offer qualifies as a firm offer under G.O.L. § 5-1109. That is because unlike other offers and counteroffers, firm offers, such as in the case of option contracts, are not terminated by an offeree's counter-offer. *See, Silverstein v. United Cerebral Palsy Ass'n*, 232 N.Y.S.2d. 968 (1st Dep't 1962) ("[U]nlike the case of an ordinary offer having no contractual status, the irrevocable offer is not deemed rejected and cancelled out by mere counter-proposals or negotiations not culminating into any agreement between the parties.") *Restatement 2d Contracts*, §37. Therefore, whether the employer's severance proposal qualifies as a firm offer under G.O.L. § 5-1109 has legal significance beyond answering the questions of whether and until when your client has the power to accept and create an enforceable agreement after the employer purports to revoke the offer because of a change of heart.

An important *caveat*: Before you get too comfortable about a particular offer, remember that G.O.L. § 5-1109 applies only to *signed* written offers. I have too frequently come across severance offers that are under cover of unsigned letters or consist solely of agreement and release documents that are not yet signed by any employer representative. In such cases, if the firmness of the offer is important, you or your client should try to get the employer representative to sign the unsigned cover letter, or obtain a signed letter confirming that what you have in hand is an offer and not merely an invitation to make an offer. To get the signature, your client may innocently go to the H.R. representative and say "Look, this letter is not signed. Doesn't it have to be signed to make it official?" Or you might explain to adverse counsel that you don't want to risk having egg on your face should your client sign, only to find the company coming to regard that signature as a signal leading to its reducing the offer. ("Oh please!" she will say. "A probe?!" But then you will say "OK, so maybe I am a paranoid, but even if so, why *not* sign and make it a real offer." You need not use the term "firm" offer.) Or you might try incentivizing the company to sign by suggesting to adverse counsel an offer that cannot be readily accepted by your client may not meet OWBPA requirements and could render the release unenforceable. (Bury the real bone: To flat out say that you want to have a firm offer during negotiations suggests that your client cannot risk losing the initial offer and that will substantially undercut your bargaining position.) Be creative; I'd love to hear other ideas.

What should you do if you don't

See SEVERANCE, see page 18

Fair Housing Work for Employment Discrimination Lawyers

By Craig Gurian
(craiggurian@antibiaslaw.com)

Even leaving aside the absurdly skyrocketing cost of office space, plaintiff-side employment discrimination lawyers face a variety of obstacles. These include growing judicial hostility to employment discrimination plaintiffs; the filing of bad cases that make it more difficult to have the good ones taken seriously; the inherent messiness of many of the cases (how likely is it that someone will have been the perfect employee at all times in the course of a 10-year employment relationship); the relentless intellectual dishonesty of many discrimination defense attorneys (as in, "Your request for plaintiff's personnel file is overly burdensome and not calculated to lead to the discovery of relevant evidence"); and the possibility that we are seeing a long-term structural imbalance between the number of attorneys seeking to do plaintiff-side employment discrimination work and the number of good individual cases that present themselves.

NELA lawyers have diversified their practices in a variety of ways. Some have provided useful counseling and training to employers. Others, reconciling themselves to the inherent problem of issue conflict with their plaintiff-side practice, represent employers in litigation. More and more of our colleagues have taken on wage and hour cases. And there is a variety of work outside the employment context that NELA lawyers perform (although admiralty practice is still the exception to the rule).

I would urge my colleagues to think seriously about supplementing their plaintiff-side employment work with representation of plaintiff individuals and organizations in the fair housing context. In the first instance, the need is great. Despite the fact that New York City is constantly referred to as "diverse," the City continues to have very high levels of residential segregation.[1] The Census Bureau has found that the metropolitan area that includes New York City and its three Northern suburbs is the most segregated major metropolitan area in the United States for Latinos.[2] In terms of one important measure of segregation – the "isolation index – our metropolitan area is the most segregated major metropolitan area in the United States for African-Americans.[3]

And race discrimination and segregation is hardly the only problem in the housing context. Hundreds of thousands of dwellings in the City remain inaccessible to people with disabilities, for example, and the City is doing little or nothing to deal with the problem. The Mayor's "New Housing Marketplace" plan, for example, doesn't even mention the needs of people with disabilities.

While the need is great, the number of attorneys doing this work in private practice in New York can be counted on the fingers of one hand. Yet the remedies available under the Fair Housing Act ("FHA") are distinctly superior to those available pursuant to Title VII. There is no cap whatsoever on either compensatory or punitive damages (like Title VII, attorney's fees and a broad range of equitable relief are available).

As a matter of legal doctrine, most of Title VIII law has been lifted wholesale from Title VII. As such, it is relatively simple to begin to supplement employment cases with fair housing cases. Factually speaking, housing cases are generally more straightforward than employment cases. You are typically dealing with a single transaction, circumscribed in time and place. In the rental context, you do have to contend with a fast moving market (so the apartment may no longer be available by the time you are brought into the picture), but your client will often have information confirming that the apartment had still been available after he or she was turned down (as opposed, say, to the denial of promotional opportunity scenario on the employment side, where you only find out that you have been rejected when you find out that a colleague has gotten the job).

Ideally, you will be provided with "testing" evidence from a fair housing organization to help in your case. The process usually involves a fair housing organization separately sending agents of the organization ("testers") to a housing provider or broker. The testers are armed with equivalent profiles in terms of qualifications (employment, income, etc.) and interest (neighborhood, apartment size, etc.). The one difference is the protected class status of the testers. When there is a pattern of differential treatment that lines up with the protected class characteristic in question, there is powerful evidence that hasn't been available in the employment context.

One part of the housing market in which it is not practical to use testers is the co-op market (a tester can hardly enter into a contract of sale and write a check for a $100,000 down payment). In those cases, you are also confronted with an industry that, as a matter of policy, refuses to provide rejected applicants with the reasons for their rejection.[4] On the other hand, you have the ability to isolate the events in a way that tends to be easier than what is available to you in employment cases. A co-op Board is only considering one applicant at a time. That applicant is one who already is in a contractual relationship with the current owner of the apartment (someone who had a interest in finding a qualified buyer). The applicant is either prepared to pay all cash or else has already gotten a commitment for financing from a financial institution. The information provided to the co-op is generally clear: a Board package, a single interview, often a credit report. Comparative information on how other applicants have been treated can be gained in discovery to see if the reason the co-op ultimately puts forward can stand up.

If I had to pick one area of housing

See FAIR HOUSING, next page

FAIR HOUSING, from page 7

discrimination that was most ripe to be explored by plaintiff's employment attorneys, it is the failure by housing providers to make reasonable accommodations and modifications for people with disabilities [for FHA purposes, "accommodations" refer to changes in rules, policies, and procedures, and "modifications" refer to physical changes to facilitate the needs of a person with a disability; under the New York City Human Rights Law ("City HRL"), the term "accommodations" refers to both].

As referenced earlier, there are lots of potential plaintiffs who continue to face barriers to accessibility, and, happily, the proof in these cases is entirely independent of the defendant's intent: either an accommodation or modification is reasonable or it is not. Unlike the employment context, where there is often a question as to whether someone can perform the essential requisites of the job even with the accommodation, in the housing context the person with a disability is highly likely to be able to "enjoy the right in question" if accommodated. Unlike ADA cases, for which 42 U.S.C. § 1981a(a)(3) provides safe harbor against compensatory damages where a housing provider has made good faith efforts to identify and make an accommodation, both the FHA and the City HRL insist that a plaintiff be compensated for lack of accommodation, even in such circumstances. Also unlike the ADA or Title VII, there is individual liability in the housing context for all wrongdoers under both the FHA and City HRL.[5]

Disability rights is an area where the structure of the City HRL does materially differ from that of the FHA. This is true not only in terms of a broader definition of disability and a broader definition of that accommodation which is reasonable, but in terms of the substantive obligations placed on the housing provider. Under the FHA, a housing provider has only *to permit* the person with a disability to make physical modifications – including modifications to common areas. The modifications have to be made by and at the expense of the person with a disability. Under the City HRL, the housing provider is itself obliged *to make and pay for* the physical modifications (unless it can prove that to do so would cause an undue hardship).[6]

I've managed to go through this whole pitch without covering some basics. First, the protected classes. Under the FHA: race, color, national origin, sex, religion, familial status, and disability. To these, the City HRL adds age, sexual orientation, marital status, domestic partner status, lawful occupation status, and alienage and citizenship status.

Second, the procedure. There is no requirement (under either the FHA or City HRL) to exhaust administrative remedies. You may go directly to court in either case. There is a two-year statute of limitations under the FHA; three-years under the City HRL.

Third, the key exemptions. Under the FHA, rentals in owner-occupied dwelling with four or fewer units are exempt.[7] In addition, for the purposes of

See FAIR HOUSING, page 19

EEOC Awards of Emotional Distress Damages Exceeding $100,000.00

By Josh Bowers[1] (Jbdclaw@aol.com)

This is the first of two articles discussing awards of over $100,000 for emotional distress injuries suffered because of wrongful discrimination. Today's article will discuss emotional distress awards by the Equal Employment Opportunity Commission in cases filed by employees of the Federal government. The second article will discuss court decisions awarding more than $100,000.

In 1991, the Civil Rights Act was amended to provide victims of discrimination with compensation for emotional distress. Since that time, Federal employees and Federal Agencies struggled in settlement negotiations trying to determine what is reasonable compensation for the emotional distress. When the parties can not agree, either an Administrative Judge of the EEOC or a jury will solve the dispute with an award for emotional distress compensation. We now have a body of EEOC and court decisions awarding emotional distress compensation that allows us to predict better the emotional distress award if a case is not settled and goes to trial.[2]

The EEOC instructs that "there is no precise formula for determining the amount of damages for non-pecuniary losses, except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm." **Moore v. U.S. Postal Service,** Appeal No. 0720050084 (March 6, 2007) *citing* **Loving v. Department of the Treasury**, EEOC Appeal No. 01955789 (August 29, 1997). The Commission's approach to determining emotional distress compensation is understood by carefully reading the many EEOC decisions applying this formula to the facts of individual cases.

In **Munno v. Department of Agriculture**, EEOC Appeal No. 01A01734 (February 8, 2001) ($**250,000** in emotional distress compensation). The Commission increased an award of $150,000 in emotional distress damages to $250,000 based on the Complainant's serious psychological and emotional injuries that required treatment for an indefinite period. The Complainant was a manager whose ongoing emotional injury was extreme, but who was capable of performing her duties and qualified for promotion to a senior management position.

Glockner v. Department of Veteran's Affairs, EEOC Appeal No. 07A30105 (Sept. 23, 2004)($**200,000** in emotional distress damages.) The Complainant was harassed at work for nearly two years and diagnosed as suffering depression, anxiety, exhaustion, migraine headaches, irritable bowel syndrome and other gastrointestinal disorder.

Sebek v. Attorney General, 07A00005 (March 8, 2001)(**$200,000** emotional distress damages) The Administrative Judge's award of $200,000 was upheld by the Commission because the agency failed to provide the Commission the evidentiary record that was before the EEOC Administrative Judge.

In **Looney v. Department of Homeland Security**, EEOC Appeal No. 07A40124, 01A53252 (May 19, 2005), (**$195,000** emotional distress damages.) The complainant suffered from:

> bouts of crying; humiliation; depression; destruction of her spirit and confidence; feelings as if she had no purpose in life; fluctuating weight problems; rashes; anxiety; nightmares relating to her supervisor; difficulty coping with life; being tense and unable to sleep when she lays next to her husband in bed; and was disinterested in sexual intercourse. As a result of medication taken for the emotional distress, complainant felt clumsy, shaky, considered herself to be unsafe operating a motor vehicle, and a nervous wreck. Complainant's husband testified that complainant was extremely stressed, experienced mood swings, became sick more often, kicked the bed while sleeping, and was exhausted to the point were she remained in bed for twenty hours during the day. He testified that complainant is unable to deal with any negativity and is extremely self conscious about her communication skills, interaction with others, and loss of professional reputation and standing in the community. Complainant's friends testified to complainant's change in appearance, including significant aging in short amount of time, facial appearance being swollen and sunken, and complainant becoming withdrawn. Complainant's psychologist testified that complainant suffered from a significant amount of depression.

Mack v. Department of Veterans Affairs EEOC Appeal No. 01983217 (June 23, 2000) RTR denied, EEOC Request No. 05A01058 (October 26, 2000)(**$185,000** in Emotional distress damages). Complainant *"unable to work for years to come."* Complainant left homeless after being fired based on his development of AIDS. The emotional distress evidence in the Commission's decision is not especially severe, but the consequences of being left homeless were quite severe. The Commission's decision may indicate the employee failed to submit significant evidence of emotional distress at the hearing. Otherwise, it is difficult to understand why being left homeless with a terminal illness did not result in an emotional distress award at the statutory ceiling of $300,000.

See EEOC, see page 16

RETALIATION, from page 1

following in an evaluation: (1) the employees' actions giving rise to the alleged retaliation; (2) the employees' basis for belief that what that what they complained about was employment discrimination; (3) whether the employer's conduct was "adverse"; (4) the connection between the employees' complaints to management and the adverse conduct; and (5) the employer's awareness of the protected activity. In this article, we turn to our last five questions.

6. Help me create a timeline of the facts in your case.

Typically, employee-side employment lawyers use circumstantial evidence to build their cases. The period of time which has elapsed between the protected activity and the adverse employment action is one significant building block. Generally, the shorter the period between the protected activity and the adverse conduct, the stronger the presumption that the conduct of the employer was retaliatory,[iii] while a large time gap may result in a finding that no causal connection exists.[iv] The logic is simple: the closer in time these two events occur, the less opportunity there is for reasons other than retaliation to exist. However, there is no official cut-off time whereby a retaliation claim would automatically be barred because of the length of the time period between the protected activity and the adverse action.[v] The circumstances of each situation must be scrutinized to determine whether the connection between the employee's assertion of a protected right reasonably appears to be the cause of the employer's adverse action.[vi]

7. What reason did your employer give you for their actions?

The interviewing lawyer needs to be sure to ask the client what reason the employer gave for taking the adverse action against them.[vii] Attorneys should not rely solely on the client's perception of why they received negative treatment from their employer. Look for objective evidence of the reasons for such treatment in performance evaluations, commendations, salary increases, and written warnings and other documented complaints about workplace performance. Ask the employee to tell you what a representative of the employer told them was the justification for the adverse conduct at a meeting, in conversation with the Human Resource Director, at an exit interview. And find out if there were any witnesses to these events.

The client may indeed have complained in good-faith about racist and/or sexist behavior in the workplace and was adversely affected by one or more employment decisions, such as a poor performance evaluation or transfer, made by her employer several months later. But what if you ask her to tell you the reason the employer gave her for the poor performance evaluation and transfer? What if she tells you that the negative performance evaluation stated that she had missed several important deadlines for completing work assignments, and significantly, she admits that this is true? If the client has a history of excellent job performance, there may be mitigating circumstances to explain the reasons for missed deadlines. For instance, in a hostile work environment case, one possibility is that the impact of the hostile work environment, which may or may not have been remediated, has diminished the client's motivation on the job.

Even when your client admits that she missed a work deadline, was late, or failed to meet the employer's expectations, or even committed some form of intentional misconduct, the analysis should not end there. Rather, unless the conduct was particularly egregious, such as stealing money from the company, attacking a co-worker, or revealing confidential information, you should still ask your client questions about whether he or she has knowledge of other employees who were accused of the same workplace infraction or performance related problem. Were similarly situated employees who committed similar types of mistakes or misdeeds treated the same? Disparate treatment in the scope and severity of any employer discipline for misconduct or inadvertent errors may well speak to unlawful motives on the part of the employer.[viii]

Then there are clients who although they made complaints to management on the job really faltered in their job performance soon thereafter, for reasons not related to the work environment. Clients are hardly likely to admit to poor job performance or a bad attitude. There is nothing worse than sinking hours into a case, only to discover that your client was fired as a result of his own ineptitude. Most clients do not want to confront their own contributions to a workplace problem. Significantly fewer individuals lie about the status of their work performance if asked direct and pointed questions about their conduct.

Still another important avenue of inquiry is the employer's finances and the corporate environment. Independent of any retaliatory motives on the part of the employer, was it facing financial problems which could justify a lay-off? Was the company merging with another business? Were positions being outsourced? Always remember to ask the follow up questions. An employee who is laid off after complaining about discrimination and then replaced raises serious questions about the truth of reason asserted by the employer, as would any "reorganization" that impacts your client.[ix]

8. Has the employer been consistent in the reasons given for the adverse action?

Another reason to memorialize the employer's stated justification for taking the adverse action goes to the heart of proving a retaliation case. Under the *McDonnell-Douglas* analysis, the employer merely has to articulate a non-retaliatory reason for the adverse action in response to a *prima facie* case of retaliation, so the real meat centers around whether the employer's reasons are pretextual.[x]

One significant way to gauge the veracity of the employer's position is comparing the reasons given by the employer at different points in time.[xi] Did the employer provide the same justification for termination at the time of a performance evaluation and at the time she was

See RETALIATION, next page

RETALIATION, from page 10

terminated? Did the employer give the same reason for termination to the Department of Labor in response to the client's application for unemployment benefits? Is the reason provided in response to a client's charge of discrimination filed at the EEOC the same as all the previous times it had to justify its actions? What about the reasons set forth in the court pleadings? Does the justification for an employer's adverse action change after the company retains counsel?

Often, the client comes to you directly after the adverse action has occurred, for instance, days after being fired. The reasons provided to the employee before counsel are involved, and any statements made by co-workers, can reflect the employer's motives most accurately.

9. Identify the individuals involved in the employer's conduct.

The client needs to identify the key "players" involved in her case. To whom did the client report workplace discrimination and who made the decision to act adversely against the employee? Are they the same person? What if the manager who terminated this client had no knowledge of the complaints made by your client? Does this mean your client has no case?

Often, employers will try to rebut the presumption of pretext by arguing that the decision makers had no knowledge of the protected activity. You may need to explore the chain of decision-makers; the ultimate decision maker may not have knowledge of the protected activity, but those who played a role in assisting the decision makers' decision and/or who were responsible for the input the decision maker relied upon may have. Further, there is no requirement that the person to whom the employee complained be the ultimate decision maker. If the decision maker had knowledge of the complaint, if there was general corporate knowledge of the complaint, or if knowledge can be imputed to the decision maker, this is sufficient.[xii]

10. What evidence do you have about whether the employer is intolerant of or indifferent to employment discrimination in its workplace? What evidence do you have that the employer does not take complaints about discrimination seriously?

Evidence of the retaliatory intent can be gleaned from the employer's general practices when it comes to discrimination and harassment issues. Does the employer have an effective anti-discrimination/harassment policy? Has there been a history of the employer tolerating racist or sexist behavior in the workplace? [xiii] What other evidence is there of racism or sexism in your department? In the company in general?

Conclusion

While the initial interview is an important step in the investigation of a client's claims, it is not the end of the road. As the process moves forward and additional information becomes available, it is helpful to re-examine many of these issues. Periodically revisiting these questions and always making certain to ask the follow-up questions

i Allegra L. Fishel is Of Counsel at Outten & Golden LLP and Cara E. Greene is an associate with that firm.

ii 126 S. Ct. 2405 (2006).

iii See, e.g., Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir.1996) (twelve days); Feingold v. New York, 366 F.3d 138 (2d Cir. 2004) (two weeks); Lovejoy-Wilson v. NOCO Motor Fuel, Inc. 263 F.3d 208 (2d Cir. 2001) (a few weeks); Richardson v. N.Y State Dep't of Corr. Serv., 180 F.3d 426, 446-47 (2d Cir. 1999) (one month after receipt of deposition notices in lawsuit filed more than one year earlier); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (two months after complaint with management and ten days after filing a complaint with state human rights).

iv See, e.g., Gorman-Bakos v. Cornell Co-op Extension, 252 F.3d 545 (2d Cir. 2001) (five months); Morris v. Lindau, 196 F.3d 102, 113 (2d Cir.1999) (two years); Cook v. CBS, Inc., No. 01-9042, 2002 U.S. App. LEXIS 19743 (2d Cir. Sep 19, 2002) (four years); Marinelli v. Chao, 222 F. Supp. 2d 402 (S.D.N.Y. 2002) (four years).

v Gorman-Bakos, 252 F.3d at 554 (there is no "bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action"); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 45-46 (2d Cir. 1980) (eight-month gap between EEOC complaint and retaliatory action suggested a causal relationship); Quinby v. WestLB AG, 04 Civ. 7406, 2007 U.S. Dist. LEXIS 28657 (S.D.N.Y. Apr. 19, 2007) (finding that eight month gap did not defeat causal connection).

vi See McInnis v. Town of Weston, 375 F. Supp. 2d 70, 85 (D. Conn. 2005) (even where temporal proximity was remote, disparate treatment supported finding of causal connection).

vii Under the analysis set forth in McDonnell-Douglas v. Green, 411 U.S. 792 (1983), after the plaintiff proves a prima facie case of retaliation, the employer need only articulate a legitimate, non-discriminatory reason for its actions toward the employee. See Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998).

viii See Feingold, 366 F. 3d at153-54 (finding that disparate treatment between plaintiff and similarly situated individuals could support an inference of discrimination).

ix See, e.g., Quinby, 2007 U.S. Dist. LEXIS 28657, at **26-28 (denying summary judgment because there was sufficient evidence undermining defendant's claim that plaintiff's position was eliminated as part of a headcount reduction).

x Once the employer has articulated a legitimate, non-discriminatory reason for its actions toward the employee, "the plaintiff must then rebut the employer's proffered reason by proving that it is mere pretext for discrimination." Sanchez v. Henderson, 188 F.3d 740, 745-46 (7th Cir. 1999).

xi See Cicero v. Borg-Warner Auto., Inc., 280 F.3d 579, 592 (6th Cir. 2002) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext.") (citing Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1167 (6th Cir. 1996)); see also Edwards v. U.S. Postal Serv., 909 F.2d 320, 324 (8th Cir. 1990); Schmitz v. St. Regis Paper Co., 811 F.2d 131, 132-33 (2d Cir. 1987).

xii See Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 210 (2d Cir. 2006) ("Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity.") (citing Gordon v. N.Y. City Bd. of Educ., 232 F.3d 111, 116 (2d Cir. 2000)).

xiii See Gibson v. Brown, 97-CV-3026, 1999 U.S. Dist. LEXIS 18555 (S.D.N.Y. Oct. 19, 1999) ("Past acts of discrimination may constitute relevant background evidence and therefore may be admissible at trial.") (citing United Air Lines v. Evans ■

SQUIBS, from page 1

defendant had terminated several of the named plaintiffs in retaliation for complaining at a demonstration that Wild Edibles had failed to pay them overtime, the Court (Stanton, J.) converted a TRO into a preliminary injunction against defendants enjoining them from "taking any adverse employment action against, or terminating the employment of, any plaintiff or other employee for bringing this action or for complaining that defendants failed to pay them wages in violation of the Fair Labor Standards Act or the New York Labor Law…" In finding that the balance of hardships tipped decidedly in favor of the plaintiffs, Judge Stanton noted that "the denial of the requested relief would leave plaintiffs exposed to the perceived risk of losing their livelihoods at the hands of an employer that had concededly fired other employees, under ambiguous circumstances, and with full knowledge of the statutes forbidding retaliation."

SEXUAL HARASSMENT

Hostile Work Environment

***Patane v. Clark, et al.,* 2007 U.S. App. LEXIS 27391 (2nd Circuit, Dec. 7, 2007) (per curiam): or "*I Know It Even When I Don't See It*"**: In this hostile work environment case, plaintiff Eleanora Patane, an executive secretary at Fordham University, alleged that her supervisor, Classics Professor John Richard Clark, among other things, (i) spent one to two hours a day watching "hard-core pornographic" videos in his office; (ii) had pornography delivered to the office which she had to open and deliver to him; and (iii) accessed pornographic websites on her computer. After plaintiff reported the issue to the university's EEO officer, she was removed from virtually all of her secretarial functions and Clark no longer spoke to her. She also alleged that another professor in the department advised Clark not to give her any more work in order to "make her leave." The District Court (Conner, J.) dismissed plaintiff's complaint on the ground that she failed to allege that she faced an *objectively* hostile work environment because "she never saw the videos, witnessed Clark watch the videos, or witnessed Clark performing sexual acts." The Second Circuit disagreed, finding that the mere presence of pornography in a workplace can alter the status of women, and that plaintiffs' allegations regarding her handling of Clark's pornography as well as his accessing pornographic websites on her computer were sufficient to survive dismissal. The Circuit Court also rejected defendants' argument that the harassing conduct was not aimed at her because of her sex, holding that "a plaintiff need only allege that she suffered a hostile work environment because of her gender, not that all of the charged conduct was specifically aimed at her." Finally, the Circuit also reversed the District Court's dismissal of Patane's retaliation claim, finding her claim that Clark removed "virtually all of her secretarial functions" in response to her reporting his conduct both specific enough and severe enough to qualify as an adverse employment action.

***Williams v. Consolidated Edison Corp. of New York*, 2007 U.S. App. LEXIS 27441 (2nd Circuit Nov. 27, 2007) (summary order): or "*Hurd Mentality II*"**: The Second Circuit reversed the District Court's (Hurd, J.) summary judgment dismissal of plaintiff's claims of a sexually and racially hostile work environment where plaintiff presented sufficient evidence of sexual and racial animus over a three-year period, including (i) references to the plaintiff as a "bitch" and "black bitch"; (ii) insinuations from co-workers that plaintiff was having a sexual relationship with a female co-worker; (iii) pornographic material in the workplace; (iv) tampering and sabotage of plaintiff's equipment; (v) comments from male co-workers that women did not belong in the facility where they worked and avoidance of shifts on which the women worked; and (vi) inadequate locker facilities for women. The Court also found evidence that workers called African-American employees "nigger" and "boy" sufficient to make out a hostile work environment claim based on race. Finally, the Circuit found that Con Ed may be held liable for the harassment notwithstanding the fact that it was perpetrated solely by plaintiff's co-workers because plaintiff reported the various incidents to her supervisors and raised them with human resources personnel.

Note: This case is being prosecuted by NELA/NY member Stephen T. Mitchell.

See **Selmanovic v. NYSE., et al.** discussed under "Retaliation."

RETALIATION

See **Patane v. Clark, et al.,** discussed under "Hostile Work Environment."

Quinby v. WestLB AG (S.D.N.Y.). On November 8, 2007, a Manhattan jury ordered defendant, a large state-owned German bank, to pay the plaintiff, Claudia Quinby, a total of $2.54 million in damages. The jury found that the bank had retaliated against plaintiff for complaining about gender discrimination by terminating her and denying her bonus compensation in 2003 and 2004.

Note: Congratulations to NELA/NY members Kathleen Peratis, Carmelyn P. Malalis and Cara E. Greene of Outten & Golden, who represented plaintiff at trial.

Selmanovic, et al. v. NYSE Group, Inc., et al*., 2007 U.S. Dist. LEXIS 94963 (S.D.N.Y. Dec. 21, 2007): or *"May the Schwartz Be With You": The Court (Batts, J.) denied defendants' motion to dismiss and for summary judgment with respect to plaintiffs' sexual harassment and retaliation claims brought under the NYC Human Rights Law. First, Judge Batts found that plaintiffs had adequately stated a claim against their employer, Building Maintenance Services ("BMS"), for "condoning" the sexual harassment they were subjected to from their supervisors, who were employed by the NYSE. BMS argued that it could not be liable for condoning the NYSE's sexual harassment because it responded to plaintiffs' complaints by communicating with NYSE on the subject and by offering Ms. Selmanovic a transfer to another location. The Court, however, found sufficient plaintiffs' allegations that BMS's communications to the NYSE were "perfunctory" and the offer of a transfer an ineffective response because the new loca-

See SQUIBS, next page

SQUIBS, from page 12

tion was less desirable. Judge Batts also denied defendants' motion for summary judgment on plaintiffs' retaliation claim. According to Ms. Selmanovic, BMS retaliated against her by taking away her locker and by issuing her a warning about using sick days after she complained of the sexual harassment. Defendants argued that the retaliation claim should be dismissed because the alleged actions taken against her did not constitute adverse actions as a matter of law. The Court disagreed, however, highlighting the differences between the New York City Human Rights Law and the State Human Rights Law and Title VII:

> In 1991 the New York City Council amended the New York City Human Rights Law to make "clear that it was illegal to retaliate in any manner…." With the Local Civil Rights Restoration Act of 2005, the New York City Council again amended the statute, aiming to "underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York State or federal statutes…." Although New York's appellate courts have not yet addressed the 2005 changes to the New York City Human Rights Law, the state's trial courts have opined that the amendments have "enacted a less restrictive standard to trigger a [human rights law] violation in that it is now illegal to retaliate in any manner."

Selmanovic, 2007 U.S. Dist. LEXIS 94963, at *16-18 (citations omitted). Accordingly, Judge Batts denied summary judgment on plaintiffs' retaliation claim. Finally, the Court also denied defendants' motion to compel arbitration, reaffirming the Second Circuit's holding that "a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable." *Id.* at *24, citing *Pyett v. Pennsylvania Bldg. Co*., 498 F.3d 88, 92 (2d Cir. 2007).
*Note: This case is being prosecuted by NELA/NY member Murray Schwartz. Please also note that the Court makes clear throughout the opinion that "in enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this Court is bound to honor. The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation." 2007 U.S.Dist. LEXIS 94963, at *11. The Court quotes from and appears to rely heavily on NELA/NY member Craig Gurian's article, "A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 Fordham Urban Law Journal 255 (2006). 2007 U.S.Dist. LEXIS 94963, at *17. Craig's article may be accessed* at http://www.antibiaslaw.com/eyes.pdf

WHISTLEBLOWER

Reddington v. Staten Island University Hospital, et al., 2007 U.S. App. LEXIS 28881 (2d Cir. Dec. 14, 2007) or "Whistling Past the Graveyard?" :
Eighteen months after her termination as Director of the International Patient Program at Staten Island University Hospital, plaintiff Reddington filed a complaint in federal court asserting a variety of claims, including age discrimination, breach of contract, intentional infliction of emotional distress, and violations under FLSA and NY Whistleblower Laws §740 (NY's "general" whistleblower statute) and § 741 (whistleblower statute enacted in 2002 that provides certain protections to employees performing "health care services"). Reddington subsequently withdrew her claims under NY Labor Law § 740 and the FLSA, as well as her claim for intentional infliction of emotional distress. Upon defendants' motion, the District Court (Glasser, J.) dismissed plaintiff's claims under NY Labor Law § 741 and for breach of contract, but sustained her federal, state and municipal age claims. After discovery on the age claims, plaintiff withdrew those claims with prejudice, resulting in an entry of final judgment and appeal to the Circuit. After a detailed discussion of the election of remedies clause under NY Labor Law § 740, the Second Circuit certified to the NY Court of Appeals the following question: Does the institution of a time-barred claim pursuant to NY Labor Law § 740 simultaneously with a claim pursuant to NY Labor Law § 741 trigger section 740(7)'s waiver provision[1] and thereby bar the section 741 claim, even if the section 740 claim is subsequently withdrawn? The District Court also dismissed plaintiff's claim under § 741 on the ground that she was not an "employee" as contemplated by the statute.[2] Finding no reported decisions discussing the definition of employee, the Second Circuit also asked the NY Court of Appeals to address whether "the definition of employee under NY Labor Law § 741 encompass[es] an individual who does not render medical treatment, and under what circumstances?"
Note: The Amicus Committee of the Executive Board of NELA/NY intends to file an amicus brief on behalf of the organization in favor of plaintiff's position at the Court of Appeals.

1 NY Labor Law § 740(7) provides, in relevant part, that the "institution – not the maintenance, pendency, or favorable resolution – of an action in accordance with section 740 'shall be deemed a waiver of the rights and remedies available under any other…law.'" Reddington, 2007 U.S. App. LEXIS 28881 at *16.

2 NY Labor Law 741(1)(a) defines "employee" as a person "who performs health care services for and under the control and direction of any public or private employer which provides health care services.

EEOC, from page 9

Furch v. Department of Agriculture, 2005 WL 1936149, Appeal No. 07A40094 (EEOC 2005)(**$150,000** for emotional distress). The employee saw a psychologist for 6-8 months, and continued to see a Licensed Social Worker through the agency's Employee Assistance Program. At the hearing, the employee testified she suffered from weekly crying spells, saw no relief in sight and was withdrawn socially from friends and family. The employee's daughter and co-workers corroborated complainant's testimony and reported complainant suffered from stomach problems, anxiety, and is no longer the outgoing person she once was. The employee submitted medical records from her physician, psychologist, and psychiatrist, stating a diagnosis of Generalized Anxiety Disorder.

Kloock v. Postmaster General, 01A31159 (2004), (**$150,000** awarded for emotional distress). An agency's discriminatory removal of complainant resulted in him having to withdraw support of his son's ambitions to become a professional hockey player and the complainant ultimately told his son to leave home. Complainant submitted evidence of non–pecuniary damages through his affidavit, as well as affidavits from a friend and his son. Complainant provided several psychological reports. Prior to May 1994, complainant was a stable, well–adjusted and relatively happy individual. Complainant described his relationship with his son before May 1994 as exceptional and had good friendships and a rewarding life. Just prior to May 1994, complainant was in the process of buying a new home and had been pre–approved for a mortgage. Prior to May 1994, complainant had been very active with his union and the local youth hockey community….)

Estate of Nason v. Postmaster General, 01A01563 (2001)(**$150,000** in emotional distress damages). Complainant, after two suicide attempts, successfully committed suicide and left behind a note that blamed the Post Office for "all the stress that they have caused me leading to this action." The Commission explained its decision in *Estate of Nason*, stating: "a tortfeasor takes its victims as it finds them." Citing *Wallis v. United States Postal Service,* EEOC Appeal No. 01950510 (November 13, 1995) (quoting *Williamson v. Handy Button Machine Co.,* 817 F.2d 1290, 1295 (7th Cir. 1987).

Franklin v. United States Postal Service, EEOC Appeal No. 07A00025; 01A03882 (January 19, 2001)(**$150,000** in emotional distress damages). Complainant's "whole world had been built around this job." Once complainant forced into disability retirement, he became withdrawn, gloomy, purposeless and depressed. He was unable to find comparable work and became estranged from his wife and children and moved into a different part of the house.

Booker v. Department of Defense, EEOC Appeal No. 07A00023 (August 10, 2000)($**150,000** in emotional distress damages) Complainant suffered severe depression, the duration of emotional distress was not put into evidence so the Administrate Judge's award of $195,000 was reduced to $150,000 based on the complainant's three suicide attempts and voluntary hospitalization.

Burton v. Department of Interior, Appeal No. 0720050066 (March 6, 2007)(**$130,000** in emotional distress damages). Complainant was out of work for three years. Complainant suffered from depression, loss of enjoyment of life, interference with family relationships, permanent diminishment in quality of life, and physical symptoms. She suffered anxiety, depression, humiliation, sleep deprivation and began a medication regimen, which included Prozac and Paxil. Complainant "saw no relief in sight, thought about suicide, and had withdrawn socially from friends and family." Complainant's husband testified the complainant suffered from anxiety, depression, and was no longer the outgoing person she had been. Complainant submitted medical records from her physicians, and noted that she had been diagnosed with post traumatic stress disorder, major depression disorder, non-epileptic seizures, panic attacks and memory loss. Complainant suffered migraines, stomach problems, nervousness, trembling, emotional issues and contemplated suicide.

Cook v. Postmaster General, 01950027 (1998)(**$130,000** awarded in emotional distress damages) Complainant disabled from future employment. The Commission awarded $80,000 in damages for daily harassment that lasted about 14 months and sporadic incidents of harassment that occurred over the next 14 months. The Commission also awarded $50,000 in emotional distress damages caused by the complainant's future inability to work. The Commission considered that the complainant prolonged her recovery by failing to take prescribed medication. The award was tempered by the fact that more than half of the total period of harassment—33 months—occurred before the effective date of the 1991 Civil Rights Act.

Cleland v. Department of Veteran Affairs, EEOC Appeal No. 01970546 (August 9, 2000)(**$125,000** award in emotional distress damages based on physical and emotional harm for 5 years and expected continuation into the indefinite future.)

Hendley v. Attorney General, 01A20977 (2003)(**$125,000** in emotional distress) Complainant's psychological harm was severe and psychological treatment required for at least two years. The Commission noted:

> . . . Complainant in her affidavit statements credibly recounted that she had an initial severe reaction to the agency's decision to discipline her for the incidents of sexual harassment that she reported to the agency in October 1994. Prior to that time she had been seeing a psychiatrist for the emotional harm from the sexual assault just months before, but was improving and was ready to return to work. She stated she shook with anger and pain became extremely distraught and filled with anxiety. Complainant stated she cried uncontrollably for

See EEOC, next page

EEOC, from page 18

long periods of time and she was filled with despair and depression. This continued for the next six years. Complainant stated that she became fearful and paranoid that prison officials would come to her house and attack her, she became anti–social, developed an eating disorder, experienced sleeplessness and nightmares. Her professional life suffered because she stated she was unable to return to work in her chosen field of law enforcement. She felt "deeply humiliated and embarrassed" because the agency concluded that she was responsible for the behavior about which she complained. Complainant also described deterioration in family relationships which her husband corroborated in his affidavit.

VanDesande v. Postmaster General, 07A40037 (2004)(**$65,979.00 for negative tax consequences**.)(Complainant harassed and terminated. The Commission reduced an administrative judges award of $200,000 in emotional distress damages to **$150,000** because the judge had not accounted for the fact that despite his mental condition, the complainant was able to train successfully as a firefighter/EMS and complete his probationary period. The complainant presented evidence that he would continue to need psychiatric treatment and medication for depression, anxiety disorder and Post Traumatic Stress Disorder for at least five years after the close of the hearing. However, the Commission reduced the award because there was no evidence the psychological conditions interfered with his training or subsequent job performance.

Santiago v. Department of the Army, EEOC Appeal No. 01955684 (October 14, 1998) (**$125,000** in emotional distress damages). Complainant harassed and then terminated. Complainant suffered depression and other emotional and mental disorders, and severe chest and stomach pains, digestive problems and incidents of shortness of breath for approximately 1? years due to three years of verbal abuse by her supervisor,

Moore v. U.S. Postal Service, Appeal No. 0720050084 (March 6, 2007)($**120,000** in emotional distress damages). The complainant was unemployed for over four years and suffered ongoing significant physical pain, loss of health, emotional pain, mental anguish, loss of career opportunities, and loss of enjoyment of life as a result of retaliatory and discriminatory conduct by the agency. His pain was chronic, and he was not been helped by multiple surgeries or steroid injections. He became so depressed and nervous that he sought treatment by a psychiatrist. Complainant's orthopedist testified the complainant's shoulder injury did not improve despite surgery and injections of steroids and painkillers designed to reduce inflammation and stiffness. The complainant's shoulder injury resulted in significant burning pain and discomfort as well as tightness. The physical pain interrupted his sleep. He essentially could not use the arm for anything, but very small activities. Complainant's psychiatrist testified the complainant is in a vicious cycle of anxiety and depression caused by his ongoing orthopedic pain.

Durinzi v. U.S. Postal Service, Appeal No. 01A41946 (July 28, 2005) reconsideration denied 05A51158 (October 10, 2005)(**$120,000** in emotional distress damages) The complainant and family members submitted affidavits:

> Since August 1997, for over six years, as a result of the U.S. Postal Service denying me reasonable accommodations and no job, to say that my life has been turned upside down would be a gross understatement. The anxiety and pain that I have experienced as a result of the agency's actions has had a severe negative impact on my physical, emotional, mental, spiritual, and financial well-being. I have gone from being a person who was secure, organized, well adjusted, focused, happy with a bright future to a person who is irritable, agitated, worried, tired, anxiety-ridden, unable to stay focused, difficulty concentrating, angry, distressed and depressed feeling a sense of dread about life in general. The person that I once was is gone...The discriminatory action of the agency against me have caused me to even challenge my faith and religion, which has become a great source of pain, sorrow, and guilt for me. My faith has always carried me through life up until this time. However, the duration of time that this has gone on - six years - has caused me to become too overburdened and too overwhelmed for too long a period of time. . .I used to be a highly motivated individual. I now feel motionless most of the time. . . I have also experienced significant amount of weight loss. . . Six years ago, when the agency denied me reasonable accommodation and denied me work because of my disabilities, they threatened everything that meant anything to me (my health, my marriage, my livelihood, my dignity, my intelligence, my faith, my very being!!!) Not only to me personally, but it took a significant toll and put a tremendous amount of strain on my relationship with my husband and on our marriage. Our intimate marital relations, as a result, have become virtually non-existent.

In **Sanford v. Postmaster General**, 01A31818 (2004)($**115,000** in emotional distress compensation)**Complainant had no time lost from work.** Complainant was stalked and sexually harassed by a co-worker for several years, and the Agency failed to protect the Complainant. The Complainant was not absent from work as a result of the discriminatory actions, but reported nausea, a lump in the throat, sweating not brought on by heat, itching all over her body, intensifying of her asthma, clammy hands, dizziness, tingling in fingers and toes, difficulty catching her breath, diarrhea, pain in the stomach, a pit in the stomach, jelly legs, hot and cold flashes, crying, disturbances in sleeping, nightmares/daydreams, shivers, and intrusive thoughts and images

See EEOC, see page 23

EEOC, from page 9

related to the violence she experienced. The Complainant's psychiatrist reported the complainant suffered from post-traumatic stress and would need 10 years of treatment to recover from the effects of the harassment.

Rivers v. Secretary of Treasury, 01992843 (2002)**($115,000** in emotional distress damages). Complainant had a preexisting condition, but the harm extended over a significant period of time. Complainant's disability not accommodated, substantial time off work, employee granted disability retirement by OPM.

Winkler v. Department of Agriculture, EEOC Appeal No. 01975336 (June 7, 2000)(**$110,000** in emotional distress damages). Psychiatric hospitalization of six weeks, no other time off work.

Brinkley v. U.S. Postal Service, EEOC Appeal No. 01953977 (1998) ($**110,000** in emotional distress damages) Complainant hospitalized and suffered feelings of hopelessness, loss of energy, agoraphobia, loss of interest in living, depressed mood, impaired memory and concentration, insomnia, agitation, and loss of interest in routine activities and personal self care.

St. Louis v. U.S. Department of Agriculture, EEOC Appeal No. 01985846 (2000)**($105,000** in emotional distress damages). Complainant's psychiatrist's report stated recovery may take years for a partial recovery. Complainant unable to work and granted worker compensation benefits by the U.S. Department of Labor.

Ellis-Balone v. Department of Energy, EEOC appeal No. 07A30125 (2004)($100,000 in emotional distress**).** Complainant suffered nine months of harassment during Complainant's pregnancy. Complainant did not miss work.

Mika v. U.S. Department of the Air Force, 07A40113 (2005)($100,000 in emotional distress damages) Complainant was wrongfully terminated from employment and started drinking so he could stay drunk and "sleep through it, [so he would not] have to worry about [being terminated]," and psychotherapy after termination.)

Green v. Potter, Postmaster General USPS, Appeal No. 01A44490 (July 19, 2005) ($100,000 in emotional distress damages) Complainant diagnosed with Post Traumatic Stress Syndrome, his social and occupational functioning had been significantly impaired, and his prognosis was poor. A clinical psychologist's stated complainant continued to display the symptom configurations associated with PTSD and major depression at severe levels. Complainant's prognosis was poor and that a global functionality assessment indicated a functionality of 50, which indicated serious impairment in social and vocational functioning. He had been on various psychotropic medications to control his symptoms, including, but not limited to Gabapentin, Citalopram Hydro bromide, Clonzpen, Quetiapine Fumarate, Trazodone, Nortriptyline, and Klonopin.

Despite extensive psychiatric treatment and evaluation, he continued to exhibit these symptoms between March 1996 and May 2004, and beyond. He reported that panic reactions would be triggered by such activities as attending church services where people would be behind him, and watching the rain. A doctor's note dated December 4, 2001, indicated that he had also been diagnosed with peripheral neuropathy, a degenerative nerve condition, which caused him to have to walk with a cane. The doctor stated that, although complainant was first diagnosed with peripheral neuropathy in 1985, the condition had been made worse by having been "coupled with his PTSD." The doctor characterized his neuropathy as, "more of a disability." The various statements from treating psychiatrists and psychologists indicate that complainant's condition is permanent. **Complainant was converted from full-time to part-time position but the amount of lost time due to discrimination is not stated in the EEOC decision.**

Holland v. SSA, Appeal No. 01A01372 (October 2, 2003)**($100,000** in emotional distress damages) Complainant and psychiatrist showed that he experienced a severe emotional injury when he continued to experience feelings of worthlessness and low self-esteem for a period of five years, after he was denied a reasonable accommodation and constructively discharge. Complainant constructively discharged.

Yasko V. Department of Army, EEOC Appeal No. 01A32340 (April 21, 2004)(**$100,000** in emotional distress damages). Complainant started feeling depressed and anxious and was still in emotional distress when her psychologist wrote his statement four years later. It was expected the distress would last at least another four to eight months. Complainant feared for her life, and continued to do so at least until she stopped working. At times she was too anxious to go to work, and upon returning from work would frequently cry and vomit. The harassment broke the complainant's spirit, and she changed from a lively affectionate person to a depressed and angry person. For months she was so depressed she had trouble getting out of bed, and when she was awake, was barely capable of conversation. She suffered from debilitating anxiety attacks for years, and was so jumpy she no longer drove. The anxiety attacks isolated the complainant, at first preventing much social contact, but later usually preventing extended social contact. She had ongoing problems with suicidal ideation, nightmares about the harassment, and insomnia. As a result of the harassment, she is distracted, and has trouble focusing and accomplishing tasks. As a result of the emotional injuries caused by the harassment, she has been incapable of working for a period of time.

Complainant's weight gain and hypertension were aggravated by the effects of the harassment, but not completely caused by it. Prior to the harassment, the complainant had weight problems and hypertension, and had been treated for high blood pressure. These are ongoing conditions. While the complainant had prior situational and reactive depression, statements by the complainant's husband and daughter demonstrate that this had resolved prior to the harassment at issue.

Hendley v. Department of Justice, EEOC Appeal No. 01A20977 (May 15,

See EEOC, see page 19

SEVERANCE, from page 11

want to seek, or are unable to obtain, the signature, or are for some other reason not confident that what your client has received qualifies as irrevocable under G.O.L. § 5-1109? You can still take steps to be careful that your negotiations do not cross the line into a rejection or counter-offer that terminates your client's power of acceptance. Your communications to the employer's representative should manifest an intention of continuing consideration of the offer by indicating that your client will continue to keep the offer under advisement. You may say things along the line of: "My client doesn't regard the proposed agreement to be fair or likely to be sufficient in light of her claims. While she continues to take it under advisement, please let me know whether your client will increase the offer to 18 months, which I know that she will accept." An offer also remains in effect during negotiations that include counter-offers if the offeror indicates as much. For further guidance, see *Restatement 2d Contracts*, §38, Comment b.; §39, Comment c.

In any event, you and your client should also appreciate that there are practical and legal considerations other than the governance of G.O.L. § 5-1109 and the common law rules concerning offers, rejection and counter-offers that inhibit an employer from taking its initial offer "off the table." I will discuss some of those considerations in a future article.

1 Query whether a 21-day deadline to sign sufficiently meets OWBPA's condition for a valid waiver. It seems to me that it inherently gives the employee a bit less than a full 21 day period of consideration because by the time the employee has taken the full time to consider the offer, it is too late for her to accept it. ■

MARK YOUR CALENDARS!

For the first time NELA/NY is having a "weekend conference"

May 16-18, 2008

The Hunter Mountain Resort
Hunter, New York
www.huntermountainresort.com

The Conference Committee is in the process of planning the 2-day program for Friday afternoon and Saturday morning.

We are also planning social activities, a cocktail party and dinner. There are many varied activities in the immediate area for you and your family so plan ahead and…

PLEASE SAVE THE DATE!

More details will follow

ASSOCIATE OPPORTUNITY DESIRED

I am a solo practitioner with nine (9) years of experience in federal civil rights litigation, employment law, negligence and appellate practice. Currently seeking a mid-level associate position in an employment law / civil rights law firm. I have extensive experience in litigating claims under Title VII, the ADEA, the ADA, 42 U.S.C. Section 1983, the NLRA, as well as NYS and NYC Human Rights Law claims (in the federal and state courts, and before the EEOC and NYSDHR). Admitted in New York State and in the Southern and Eastern Districts. Strong research, writing and networking skills. References available upon request. If interested, please contact me, Eric Sarver, Esq., at 718-784-9300, or at 917-930-8684.

FAIR HOUSING, from page 8

the provision forbidding discrimination against persons with children, housing for older persons is permitted.[8] Finally, there is an exemption for religious organizations who prefer co-religionists.[9] The City HRL almost entirely does away with the owner-occupied exemption, covering all rentals except those in owner-occupied two-family dwellings where the available apartment has not been advertised or otherwise publicly listed.[10] It has a comparable exemption for housing for older persons,[11] and a somewhat broader religious exemption than the FHA.[12]

If anyone is interested in discussing this field further, please email me at craiggurian@antibiaslaw.com.

1 See http://www.antibiaslaw.com/nycseg.pdf.

2 Iceland et al., Racial and Ethnic Segregation in the United States: 1980-2000 (U.S. Census Bureau 2002), p. 87, available online at http://antibiaslaw.com/Segregation2000.pdf

3 Id. at 69.

4 Which is why the New York City Council needs to pass the Fair and Prompt Coop Disclosure Act ("Intro 119"), a bill that preserves a co-op's right to turn people down for any currently legal reason, but which would require the co-op to provide a statement to the rejected applicant setting forth the reasons for rejection with specificity.

5 See 42 U.S.C. § 3604 and Admin. Code § 8-107(5), respectively.

6 Cf. 42 U.S.C. § 3604(f)(3)(A) with Admin. Code §§ 8-107(15)(a) and 8-102(18).

7 42 U.S.C. § 3603(b)(2). Even these units are covered to the extent that advertisements that indicate a discriminatory preference are prohibited. Id.

8 42 U.S.C. § 3607(b). The requirements vary for housing intended for occupancy by those 55 and older, and for housing intended for and exclusively occupied by those 62 and older.

9 42 U.S.C. 3607(a).

10 Admin. Code § 8-107(5)(a)(4)(1).

11 Admin. Code § 8-107(5)(h).

12 Admin. Code § 8-107(12). ■

EEOC, from page 19

2003) request for reconsideration dismissed, EEOC Request No. 05A30962 (January 14, 2004)(**$100,000** awarded for emotional distress).Complainant suspended from October 4, 1994 through November 25, 1994.

Janda V. Potter, Postmaster General, U.S.P.S. No. 07A10018 (March 4, 2002)(**$100,000** emotional distress award upheld by Commission in default case against the Agency, but there is no description of the emotional harm suffered by Complainant.

Patel v. Department of the Army, EEOC Appeal No. 01980279 (Sept. 26, 2001)(**$100,000** awarded for emotional distress)(**The EEOC denied Complainant's claim of 882 hours of annual and sick leave.**).

Leatherman v Department of the Navy, EEOC Appeal No. 01A1222 (2001)(**$100,000** in emotional distress damages where complainant expressed suicidal ideations and was twice hospitalized – once for psychiatric treatment and once to treat physical aliments related to her emotional distress. Complainant's depression became so severe she stopped bathing, combing her hair or otherwise caring for herself and remained in bed.

In the first **Chow** decision, **Chow v. Department of the Army**, EEOC Appeal No. 01981308 (August 5, 1999) the Commission awarded **$100,000** where complainant established that due to the agency's discriminatory actions she suffered from abdominal and chest pains, headaches, and hair loss, had difficulty sleeping and stopped socializing with friends. The Complainant had two years of psychotherapy and was projected to complete psychotherapy with a total of 42 months in therapy. (**The complainant made no claim for time off work**.) Subsequently, in a second **Chow** decision, in **Chow v. Department of the Army** Request No. 05991106 (February 13, 2001), the Commission granted reconsideration and modified the award based on an agreement by the parties placing a ceiling of $93,031.01 on the amount of the compensatory damages. In modifying the award, the Commission did not otherwise change the finding that based on the injuries demonstrated that an award of $100,000 in emotional distress compensation was appropriate.

Kelly v. Department of Veterans Affairs, EEOC Appeal No. 01951729 (July 29, 1998) **($100,000** awarded where subjection of aggrieved individual to hostile work environment caused her to develop severe psychological injury, from which she was still suffering at the hearing); (**Complainant off work 17 months**.)

Finlay v. U.S. Postal Service, EEOC Appeal No. 01942985 (April 20, 1997)(**$100,000** awarded for severe psychological injury over four years with harm expected to continue for an indeterminate period of time. Post-traumatic stress disorder. Complainant's symptoms included ongoing depression, frequent crying, concern for physical safety, loss of charm, lethargy, social withdrawal, recurring nightmares and memories of harassment, a damaged marriage, stomach distress and headache.)**(Complainant off work for three years).**

The author of this article will welcome your comments or questions. Please contact Attorney Josh Bowers at JBdcLaw@aol.com or visit www.JoshBowersLaw.com.

1 Attorney Josh F. Bowers has represented federal employees for over 20 years. In 2002, selected as Lawyer of the Year by the Metropolitan Washington Employment Lawyers Association, Bowers has testified before Congress on federal employee issues, and represents federal employees nationwide before the numerous administrative forums available to federal employees. His firm's website address is www.JoshBowersLaw.com.

2 There are three resources that may help you update the cases in this article:
a. The EEOC posts on its website a quarterly report of new cases including compensatory damages awards at http://eeoc.gov/federal/digest.html.
b. There are two publications that are regularly updated and publish EEOC decisions on compensatory damages awards in the federal sector. Both publications are available from Dewey publications http://www.deweypub.com.
1. Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Cases, by Gary Gilbert, 2nd Edition 2003 plus 2005 Supplement (Dewey Publications)
2. A Guide to Federal Sector Equal Employment Law and Practice, by Ernest Hadley, 2007 (Dewey Publications)(Updated Annually). ■

Workers Compensation
&
Social Security Disability

PETER S. TIPOGRAPH, ESQ.

SHER, HERMAN, BELLONE & TIPOGRAPH, P.C.

277 Broadway
11th Floor
New York, N.Y. 10007
(212) 732-8579
Fax: (212) 349-5910

and

The Cross County Office Building
Cross County Shopping Center
Yonkers, N.Y. 10704
(914) 376-3237
Fax (914) 376-3267

We have proudly represented the injured and disabled
for over thirty years.