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LEGISLATIVE COMMITTEE UPDATE

By the NELA/NY Legislative Committee

After years of frustration, the NELA/NY Legislative Committee can report progress in the push for reform to the New York State Whistleblower Law and the New York State Human Rights Law.

First, the background

The State Whistleblower Law is woefully deficient. In the two dozen years since Labor Law §740 was enacted, not a single reported case provided any relief to a private sector whistleblower. The statute has the perverse effect of deceiving an employee into thinking he or she is protected while it actually allows an employer to retaliate against a whistleblower with impunity.

In 2009, State Senator Jeff Klein (D) and State Assemblyman Michael Benedetto (D) sponsored comprehensive Whistleblower Reform that passed both the Senate and the Assembly. That bill was ultimately vetoed by then Governor Paterson.

The Human Rights Law also needs reform. The New York State Human Rights Law was passed over 60 years ago. At the time, it was groundbreaking, but times change and the Human Rights Law has lagged behind. The most glaring problem is the stunted relief – no attorneys' fees even after a

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Wage-And-Hour Class Actions: Why They Are Better In Federal Court

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INTRODUCTION

Wage-and-hour lawsuits under the Fair Labor Standards Act, 29 U.S.C. § 201 **et. seq.** ("FLSA") have exploded in the United States over the past five years.[1] Wage-and-hour cases are quickly becoming one of the most practiced areas of Labor and Employment law.

Wage-and-hour cases are especially ripe to bring collectively because such claims usually result from unlawful company-wide policies or practices. This article will briefly discuss the standards for bringing wage-and-hour class actions in federal and New York State courts. It will explain that while federal court is the preferable venue for bringing such actions there are some circumstances when a practitioner may need to bring such actions in state court.

Standards

Federal and state courts have similar procedures for bringing class actions. Rule 23 of the Federal Rules of Civil Procedure requires that any proposed class satisfy numerosity, commonality, typicality, and adequacy of representation.[2] Where, as is typically the case in wage-and-hour cases, the lawsuit is primarily for money damages, the court must consider whether a class action is superior to alternative methods of adjudication.[3] Although Rule 23 is intended to be given a liberal construction and there is a preference for certifying class actions, the court must engage in a rigorous analysis of each these factors before certifying a class.[4]

New York State law requires that a plaintiff satisfy similar elements. CPLR § 901 states that a class must satisfy numerosity, commonality, typicality, adequacy, and superiority.[5] Under CPLR § 902, the court must also determine other practical factors.[6] Like its federal coun-

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1 http://www.seyfarth.com/dir_docs/publications/FLSA2.pdf

2 *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 251 (2d Cir. 2011) *citing* Fed.R.Civ.P. Rule 23(a).

3 *Id. citing* Fed.R.Civ.P. Rule 23(b)(3).

4 *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 104 (E.D.N.Y. 2011), *amended on reconsideration* (July 8, 2011).

5 *Krebs v. Canyon Club, Inc.*, 22 Misc. 3d 1125(A), 880 N.Y.S.2d 873 (Sup. Ct. 2009) (certifying class of restaurant workers claiming unlawful tip deductions).

6 These factors are "the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the existence of other litigation regarding the same controversy; (4) the desirability of the proposed class forum; and (5) the difficulties likely to be encountered by management of a class action. *Krebs*, 22 Misc. 3d 1125(A), at *16.

The NELA/NY
Calendar of Events

January 23rd
NELA Nite
Mediation and Arbitration of Statutory Claims – the Experience of SEIU Local 32BJ and the Realty Advisory Board on Labor Relations Since *14 Penn Plaza v. Pyett*."
6:30PM at 3 Park Avenue, 29th Floor

January 31st
Bar Talk
Co-sponsored by Legislative Committee at President Darnley Stewart's home

February 13th
NELA.NY Board Meeting
6:15PM

March 20th
NELA Nite

May 10th
NELANY Spring Conference
Yale Club

A Word from Your Publisher

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Items for the calendar may be submitted by calling Alix Ford.
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judgment, no punitive damages, no jury for equitable relief and no liability for independent contractors.

New York is a clear outlier in the relief provided to victims. Forty-one states, New York City and dozens of federal employment statutes provide attorneys' fees as part of make-whole relief. The majority of states provide more robust relief in addition to attorneys' fees. That leaves New York in the company of Mississippi and Alabama; neither of which has state statutes banning discrimination.

Now the good news

Due to the fractious nature of the State Senate, a unique power sharing structure is being established which, if reports hold up, will allow for coalition style leadership between the GOP and the breakaway Independent Democratic Caucus (IDC).

Senator Klein is back as the leader of the five-member IDC caucus, pledging to work with the Senate Republicans to set the legislative agenda. That makes Senator Klein, the Senate sponsor of the Whistleblower Reform bill, a key player. That can only be good news for Whistleblower relief which Klein has consistently championed.

As for the Human Rights Law, we are making strides to get comprehensive relief introduced and hope to have the Governor's backing. The fact that New York is such an obvious outlier, particularly on the question of attorneys' fees, makes long overdue progress possible.

This year, we have well-devised, multi-faceted and comprehensive strategies in place on both statutes. On whistleblower reform, we are pushing a bill that has these key pieces addressing the most glaring current problems with Labor Law Section 740. Our recommendations would accomplish the following:

- Increase the scope of protected activity. The current law covers health and safety violations only. We want to cover all illegal conduct.
- Protect disclosures based on a "reasonable good faith belief." Current law requires the whistleblower to prove there was an actual violation of law, rule or regulation. That is a practical hurdle that makes the statute unworkable.
- Limit pre-conditions. Current law requires that the whistleblower first notify their supervisor without exception. That requirement is excused under the proposed changes when a whistleblower has a reasonable belief that evidence will be destroyed, public harm is imminent, or the supervisor is already aware of the problem.
- Eliminate the election of remedies provision. Current law requires the whistleblower to forego all other remedies in exchange for filing a claim under the Whistleblower Statute.
- Extend the definition of retaliation to include a more realistic definition of an adverse event.

As mentioned, great progress has been made already. NELA/NY has hired the lobbying firm Malkin & Ross to help

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President's Column

by Darnley D. Stewart
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A New Year

For last year's words belong to last year's language and next year's words await another voice. - T.S. Eliot

2012 was a tough year. Europe was mired in a debt crisis that dampened our recovery here in the United States. Al-Qaeda struck again in Benghazi. Closer to home, we survived Hurricane Sandy, but almost all of us were affected by the storm, and some of us still have not been able to return to our offices. Even closer to home, we lost our beloved Executive Director, Shelley Leinheardt, on March 16.

2013 is now upon us and things are already looking up. The Senate and House compromised and agreed on a tax bill that should at least for a while avert a financial disaster. Maryland became the first state south of the Mason-Dixon line to permit same-sex marriage. In Myanmar, 90,000 people stood in a field and watched a New Year's countdown for the first time. The Knicks are actually pretty good.

2013 will also usher in positive changes for NELA/NY. Alix Ford stepped into Shelley's role last year as Interim Executive Director and showed us that while Shelley can never be replaced, there are different and equally "good" ways to run our organization. Alix has informed the Board that she will be moving on toward the middle of this year, and we have just begun a search for a permanent successor for Shelley. If anyone knows of suitable candidates for the position, please have them send their resumes to me and Alix.

It also appears that our legislative agenda has legs. As you can see from the update from our Legislative Committee included in this newsletter, there has been real progress in getting our proposed bills through this year. After years of starts and stops, our organization has committed to getting this done and I cannot tell you how hard the Legislative Committee has been working with our lobbyists to make it happen. No matter what happens, many thanks to Ron Dunn (Chair), Wayne Outten, Michael Grenert, Joe Ranni, Cyrus Dugger, and Melissa Pierre-Louis (with contributions from Felicia Nestor, Raymond Audain, Iliana Konidaris and Alix). Among the materials these folks have put together for the Governor's Office are 50-state surveys of whistleblower statutes and attorneys' fees provisions in other state's human rights laws and memoranda concerning the prior attempts to pass amendments to the New York whistleblower statute. It is truly inspiring to see our organization getting it together to achieve real, tangible change in the law.

But – as you can see in the Committee's update – we need your help. We need to build a coalition of worker organizations to join with us and push our agenda in Albany. We need that now. If you have a contact at such an organization, please get in touch with any of the Committee members above, Alix, or me. Finally, we need money to make this happen. The organization has made the most substantial financial commitment it has ever made on any project to get this done and we cannot fall short this close to the finish line. Every one of the Board members has contributed to the cause, and we have added a line on each of your renewal forms to donate $25 or more.

Let's get this done. Let's make 2013 a historic year for NELA/NY and New York workers. ■

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guide us through the legislative process. Malkin & Ross has a proven track record in helping pass legislation protecting employees. They have helped us work with key legislative leaders and representatives of the Governor's Office. Those meetings have provided further evidence of the need and justification for reform. We have also begun the work of coalition building. Strategic community partnerships are crucial in forging the public push needed to get progressive legislation passed.

Now your part

This effort requires a contribution from each NELA/NY member of your "time and treasure". Each NELA/NY member has contacts with organizations representing workers. **We need them as partners in this battle.** If you have a contact, get in touch with the Legislative Committee so we can get you the package of materials explaining the proposed legislation with talking points explaining the rationale. We also have a coalition sign on letter. Please help us add to the list of supporters. This action is needed immediately.

We also need financial commitments. Every current board member and every member of the Legislative Committee has already pledged their financial support. Each of you will be receiving a call or letter from the Committee asking for a financial contribution but feel free to reach out to us first. Professional help costs money. As lawyers we understand that.

Please be generous and make your pledge today. An opportunity like this may not occur again. Any amount is good but we need four figure contributions to make this effort a success. ■

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terpart, Article 9 of the CPLR is broadly construed.[7]

Advantages of Federal Class Actions

Employment law practitioners would likely agree that filing suit in federal court is advantageous: judges are more familiar with the law, there is a larger body of case law on point, and cases tend to more quickly reach resolution. But there are particular benefits to litigating wage-and-hour class actions in federal court.

a. No Need to Waive Liquidated Damages

Under the New York Labor Law § 198, an employee who brings an action is entitled to recover liquidated damages of 100% of his regular damages "unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law."[8] Under CPLR § 901(b), however, a class action cannot be certified to litigate causes of action that allow for recovery of penalties. Because CPLR § 901(b) prohibits class actions when the plaintiff is entitled to recover a penalty, and the New York Labor Law allows for liquidated damages, which is considered a penalty by courts, some state courts have held that New York Labor Law claims cannot be brought as a class action.[9] The general consensus, however, is for courts to allow class representatives to waive their claim for liquidated damages and to provide the class members with an opportunity to opt-out of the class if they want to pursue liquidated damages.[10] To the extent any class member wishes to prosecute his or her case individually, he or she may opt-out.[11]

Because of CPLR § 901(b), federal courts historically also required waiver of liquidated damages in order to bring a wage-and-hour class action.[12] That recently changed. In 2010, the Supreme Court held in **Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.** that CPLR § 901(b) does not apply in federal courts and Fed.R.Civ.P. 23 governs class actions in federal court instead.[13] As a result of **Shady Grove**, courts in this Circuit have uniformly allowed class actions to proceed even when the class claims liquidated damages under the New York Labor Law.[14]

b. Timing of Class Actions

In New York State Court, plaintiffs have to move for class certification very early in the case. CPLR § 902 states that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This deadline is mandatory and at least one department has denied as untimely a motion for class certification that was filed four days after the deadline.[15] Since it is impossible to do any real discovery and then draft and file a motion for class certification within sixty days after the defendant's time to respond to the complaint elapses, this rule can serve as a bar to class actions. Although some courts have extended this deadline because of unusual procedural circumstances or defendants' malfeasance,[16] plaintiffs attempting to bring a class action in State court must work to get an extension from the court as early as possible.

By contrast, under Rule 23 of the Federal Rules of Civil Procedure, a court must decide whether to certify a class at "an early practicable time after a person sues or is sued as a class representative."[17] Although a court is expected to issue a certification order early in the case, it "should delay a certification ruling until information necessary to reach an informed decision is available."[18] Indeed, the Second Circuit vacated an order denying certification when the parties had engaged in insufficient preclass discovery.[19] As a result, most federal courts will allow the parties to engage in preclass discovery before scheduling a deadline to file a motion for class certification.

c. Picking Off Class Representatives

Another potential difference between federal and state courts is whether the defendant can "pick-off" the class representatives by making an offer of judgment. Under Rule 68, a defendant may make an "Offer of Judgment," which is an "an offer to allow judgment on specified terms, with the costs then accrued."[20] If the offer is for more than the plaintiff can reasonably obtain at trial, the plaintiff's case becomes moot and will be dismissed under

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7 *City of New York v. Maul*, 14 N.Y.3d 499, 509, 929 N.E.2d 366, 372 (2010).

8 New York Labor Law § 198(1-a).

9 *Carter v Frito-Lay, Inc*., 74 A.D.2d 550 (1st Dept. 1980) *affd sub nom. Carter v Frito-Lay Inc.,* 52 N.Y.2d 994, 419 N.E.2d 1079 (1981); *Hauptman v Helena Rubinstein, Inc*., 114 Misc. 2d 935, 937 (Sup. Ct. 1982); *Foster v Food Emporium*, 140 Lab Cas P 34062 (S.D.N.Y. April 26, 2000); *Ballard v Community Home Care Referral Serv., Inc*., 264 A.D.2d 747, 748 (2nd Dept. 1999)

10 *Pesantez v Boyle Envtl. Services, Inc*., 251 A.D.2d 11, 12 (1st Dept. 1998) (allowing class members to opt-out to pursue liquidated damages); *Jacobs v Macy's E., Inc*., 17 A.D.3d 318, 320 (2nd Dept. 2005) (holding that "defendants' contention that CPLR 901(b) bars certification of a class in this case is also without merit"); *Lamarca v Great Atl. and Pac. Tea Co., Inc*., 16 Misc 3d 1115(A) (Sup. Ct .2007) *aff'd*, 55 A.D.3d 487, 868 N.Y.S.2d 8 (1st Dept. 2008) (*citing Pesantez and Jacobs*); Krebs, 22 Misc. 3d 1125(A), at *12.

11 *Krebs*, 22 Misc. 3d 1125(A), at *12.

12 *Guzman v. VLM, Inc*., 07-CV-1126 JG RER, 2008 WL 597186, at *10 (E.D.N.Y. March 2, 2008).

13 *Shady Grove*, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010);*Gortat v. Capala Bros., Inc*., 07 CIV. 3629 ILG SMG, 2011 WL 6945186, at *9 (E.D.N.Y. December 30, 2011).

14 *Pefanis v. Westway Diner, Inc*., 08 CIV 002 DLC, 2010 WL 3564426, at *7 (S.D.N.Y. September 7, 2010) (holding that "plaintiffs may now seek liquidated damages authorized by NYLL as part of a Rule 23 class action in federal court"); *White v. W. Beef Properties, Inc*., 07 CV 2345 RJD JMA, 2011 WL 6140512, at *7 (E.D.N.Y. December 9, 2011); *Coultrip v. Pfizer, Inc*., 06 CIV. 9952 JCF, 2011 WL 1219365, at *4 (S.D.N.Y. March 24, 2011); *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385, 402 n.5 (N.D.N.Y. 2011).

15 *Shah v Wilco Sys., Inc*., 27 A.D.3d 169, 173 (1st Dept. 2005).

16 *DeBlasio v City of New York*, 24 Misc. 3d 789, 798 (Sup. Ct. 2009); *Galdamez v Biordi Const. Corp*., 13 Misc. 3d 1224(A) [Sup. Ct. 2006] *aff'd*, 50 A.D.3d 357, 855 N.Y.S.2d 104 (1st Dept. 2008).

17 Fed.R.Civ.P.23(c)(1)(A).

18 *Ruggles v. Wellpoint, Inc*., 253 F.R.D. 61, 66-67 (N.D.N.Y. 2008) *citing* Fed.R.Civ.P. 23(c)(1) advisory committee notes to 2003 amendments.

19 *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003).

20 Fed.R.Civ.P.68(a).

'Garcetti' Distinctions Abound in the District Courts

By Stephen Bergstein
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After the Supreme Court in 2006 revised the framework governing public employee speech retaliation claims, few whistleblowers have survived summary judgment in the U.S. Court of Appeals for the Second Circuit. But some district courts within the circuit have allowed these claims to proceed despite the new guidelines.

The Supreme Court has long recognized the speech rights of public employees. In **Connick v. Myers**, the Court held that they may not suffer retaliation for speaking on matters of public concern. However, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[1]

In 2006, the Supreme Court ruled that the First Amendment does not protect public employee speech made in the course of official duties. In **Garcetti v. Ceballos**, the Court distinguished between citizen speech and utterances arising from the plaintiff's job responsibilities. In that case, the plaintiff, a calendar deputy employed by the district attorney, was disciplined after he drafted an internal memo that criticized search warrant affidavits. The court rejected the plaintiff's First Amendment retaliation claim, reasoning,

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.[2]

In **Weintraub v. Board of Education**[3] the Second Circuit broadly interpreted **Garcetti** in holding that the First Amendment does not protect speech that is "part and parcel" of the plaintiff's ability to properly execute his job responsibilities. In **Weintraub**, a public school teacher filed a union grievance in protesting the school's inadequate discipline imposed on a student who had twice thrown a book at him during class. In affirming summary judgment, the Second Circuit stated that "[t]he objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is 'a practical one.'" It added that "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." The First Amendment did not protect the grievance because it "was 'pursuant to' [the plaintiff's] official duties." Specifically, the grievance "was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' as a public school teacher—namely, to maintain classroom discipline."[4]

Federal courts have noted that **Garcetti** significantly restricted the First Amendment rights of public employees.[5] That is certainly true in the Second Circuit. Prior to **Garcetti**, the Second Circuit had routinely allowed First Amendment retaliation claims to proceed so long as the speech touched upon a matter of public concern.[6] However, ever since **Weintraub**, the Second Circuit has routinely rejected First Amendment retaliation claims, usually holding that the plaintiff's speech grew out of his official job responsibilities, even if it addressed corruption or disagreements in government policy.[7]

In the rare case that the Second Circuit did rule for the plaintiff over a **Garcetti** objection, the facts were unusual: The plaintiff police officer refused an order by his superiors to falsify a police report that implicated his sergeant in police brutality. In that case, **Jackler v. Byrne**,[8] the district court held that the plaintiff's refusal was official duty speech and therefore unprotected.[9]

In reinstating the case, the Second Circuit deemed the plaintiff's speech protected under the First Amendment because it had a citizen analogue: All citizens, not just police officers, have a duty to refuse to violate the law. The court held, "a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused. And, …a civilian who acceded to such pressure would subject himself to criminal liability, as would a police officer. Of course a police officer has a duty not to substitute a falsehood for the truth, i.e., a duty to tell 'nothing but the truth'; but he plainly has that duty as a citizen as well."[10] The the author represents the plaintiff in **Jackler**, and the case is now in discovery.

More recently, on Nov. 28, 2012, vacating summary judgment, the Second Circuit remanded a **Garcetti** case to the district court to determine whether a police officer spoke pursuant to his official duties in speaking out against a New York City Police Department quota that was "causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers."[1]

In contrast to the broad Second Circuit rulings that have rejected First Amendment retaliation claims, several district courts in 2012 have ruled in the plaintiff's favor by distinguishing **Garcetti's** reasoning. In the right circumstances, public employees may still pursue First Amendment retaliation claims notwithstanding **Garcetti** and its progeny.

'Griffen v. City of New York'

In **Griffen v. City of New York**, the plaintiff, a police officer, discovered that

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Fed.R.Civ.P. 12(b)(1), even if the plaintiff rejects the offer.[21] The rationale is that the United States Constitution limits the court's jurisdiction to "actual cases and controversies."[22] Once a plaintiff is offered everything he could recover under the relevant statute, there is no more "case or controversy" and the court is divested of subject matter jurisdiction.[23] In addition, many courts in this Circuit have held that the case is considered moot and dismissed even if it was brought as a collective action as long as no other plaintiffs have opted into the collective action.[24]

An exception to this rule is where the case is brought as a class action. Although normally a Rule 68 offer moots the claims of a proposed class representative prior to class certification,[25] where the Rule 68 offer is made while a motion for class certification is pending, the action is not moot and the claims of the class relate back[26] to the filing of complaint.[27] Since a Rule 68 offer does not moot a class that has been certified,[28] courts are concerned that defendants will simply try to "pick-off" plaintiffs before a class is certified, which will lead to a multiplicity of suits.[29] To avoid this problem, federal courts have refrained from dismissing cases as moot when the plaintiff has already filed a motion for class certification prior to the Offer of Judgment.

The law is far less clear under the CPLR, posing a greater risk for bringing class actions in state court. The CPLR has a provision similar to Rule 68, which states that a defendant "may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, with costs then accrued."[30] Because, like their federal counterparts, state courts are "limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal,"[31] if a plaintiff accepts a CPLR Offer of Judgment, the case would seem to be moot. There appears to be no case law, however, on whether a case is mooted if an offer of judgment for more than the plaintiff can reasonably obtain is rejected and, consequently, no case law on whether a defendant can "pick-off" plaintiffs in order to prevent a class action. So attorneys bringing a potential class action in State court should be cognizant of the risk of their clients' being "picked-off" and the class being dismissed before the case really starts.

Why Bring A Class Action in State Court?

So given the advantages of bringing a wage-and-hour class action in federal court, why would litigants file suit in state court?

In most cases, the answer is that they have no choice. Certain causes of action may only be brought in State court.

For a variety of tactical and substantive reasons, federal court is usually a better venue for wage-and-hour class actions.

a. Prevailing Wages under the Housing Act

One important claim is for prevailing wages and benefits under the Housing Act,[32] which incorporates the prevailing wage rates in the federal Davis-Bacon Act by reference.[33] Under the federal Davis-Bacon Act, any employer that enters into a contract for $2,000 or more with the federal government for "construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government . . . that are located in a State . . . and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics."[34] The "minimum wages" are those prevailing "for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work."[35]

Both the New York State Court of Appeals and the Second Circuit have held that there is no private right of ac-

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21 *See, e.g., Darboe v. Goodwill Indus. of Greater NY & N. NJ, Inc*., 485 F. Supp. 2d 221, 223 (E.D.N.Y. 2007); *Yeboah v. Cent. Parking Sys*., 06 CV 0128 RJD JMA, 2007 WL 3232509, at *2 (E.D.N.Y. November 1, 2007); *Louisdor v. Am. Telecommunications, Inc*., 540 F. Supp. 2d 368, 371-72 (E.D.N.Y. 2008); *Ward v. Bank of New York*, 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006).

22 *Darboe*, 485 F.Supp.2d at 223 *citing* U.S. Const. Art. III Sec. 2.

23 *Id.*

24 *Id.* at 223-4; *Ward*, 455 F. Supp. 2d at 267. Other courts disagree. *Bowens v. Atl. Maint. Corp*., 546 F. Supp. 2d 55, 79 (E.D.N.Y. 2008) (not dismissing the collective action because plaintiff had filed a motion for a collective action);*Velasquez v. Digital Page, Inc*., 842 F. Supp. 2d 486, 488 (E.D.N.Y. 2012) (not dismissing collective action because opt-in plaintiff had opted in); *Symczyk v. Genesis HealthCare Corp*., 656 F.3d 189, 190 (3d Cir. 2011) (relating back to the filing of the complaint the claims of anyone who opts into the collective action) *cert. granted*, 133 S. Ct. 26 (2012). *Symczyk* is currently before the United States Supreme Court, Doc. No. 11-1059. For more information on *Symczyk*, see http://www.scotusblog.com/case-files/cases/genesis-healthcare-corp-v-symczyk/.

25 *Comer v. Cisneros,* 37 F.3d 775, 798 (2d Cir. 1994).

26 The relation-back doctrine under Fed.R.Civ.P. 15(c) allows courts to treat filings made after the original complaint was filed as if they were filed with the original complaint. See, e.g., *Addison v. Reitman Blacktop, Inc*., 283 F.R.D. 74, 79 (E.D.N.Y. 2011).

27 *Bowens*, 546 F. Supp. 2d at 76-77.

28 *County of Riverside v. McLaughlin,* 500 U.S. 44, 51-52 (1991).

29 *Bowens*, 546 F. Supp. 2d at 78.

30 C.P.L.R. § 3221.

31 *Hearst Corp. v Clyne*, 50 NY2d 707, 713 (1980).

32 42 U.S.C. § 1437 *et seq.*

33 40 U.S.C.A. § 3141 *et. seq.*

34 40 U.S.C.A. § 3142(a).

35 40 U.S.C.A. § 3142(b).

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tion under the Housing Act.[36] But can an employee bring a common law claim as third-party beneficiary of the contract between the employer and the government agency which necessarily had to include a provision requiring the payment of prevailing wages under the David-Bacon Act? Here, the Second Circuit and the New York State Court of Appeals are split. Because the Davis-Bacon Act and by extension the Housing Act provide remedies via complaints to administrative agencies, the Second Circuit held that common law claims based on the Davis-Bacon Act or Housing Act are an "impermissible end-around" and prohibited.[37] The New York Court of Appeals disagreed, holding that state common law claims were not preempted by the Housing Act and anyway the administrative remedies provided under the Housing Act amounted to the employees "wait[ing], perhaps forever, for an agency to act."[38]

The result is that common law prevailing wage claims brought pursuant to a contract under the Housing Act cannot be brought in federal court but can be brought in State court. As these claims can easily run in the hundreds of thousands of dollars individually and in the millions collectively, it behooves practitioners to bring cases involving prevailing wages under the Housing Act in State court.[39]

b. State-Only Causes of Action

Although the New York State Labor Law largely mirrors the FLSA, there are some claims that can only be brought under the New York Labor Law and therefore only in state court. Here are two examples:

i. New York Labor Law § 196-d prohibits the misappropriation of tips by management.[40] At least one court has certified these types of claims as a class action.[41] The FLSA, on the other hand, does not strictly prohibit misappropriation of tips, but rather prevents an employer from availing himself to a tip credit if tips are shared with management or non-service employees.[42] Moreover, § 196-d is broader and protects more employees than the FLSA's tepid prohibition on forced tip-sharing.[43]

ii. New York Labor Law § 193 prohibits a "deduction from the wages of an employee" except under certain circumstances.[44] Included under this prohibition is the failure to pay earned commissions.[45],[46] These types of claims can be brought on a class-wide basis.[47] Under the FLSA, the failure to pay commissions could affect the proper overtime rate, but is not a separate cause of action on its own.[48]

c. Exempt Under the FLSA

In addition, there are categories of workers who are exempt under the FLSA, but not under the New York Labor Law. Although there is a significant overlap in the exemptions under the FLSA and New York Labor Law, there are some workers who are exempt from overtime under the FLSA, but not under the New York Labor Law. One example is teachers, who are generally exempt from overtime under the FLSA, but not necessarily under the New York Labor Law. Under the FLSA, teachers are exempt if their "primary duty [is] teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" and "[are] employed and engaged in this activity as a teacher in an educational establishment." 29 C.F.R. § 541.303(a).[49]

Although the New York Labor Law does not have a similar exemption for teachers,[50] it specifies that workers solely exempt under the FLSA must be paid at a reduced rate of "overtime at a wage rate of one and one-half times the basic minimum hourly rate."[51] Assuming the class can be certified under CPLR §§ 901 and 902, this is another example of a potential wage-and-hour class action that can only be brought in state court.

Conclusion

Although the standards for litigation wage-and-hour lawsuits federal and state court are largely similar, federal court is the preferred venue for various reasons. There are some circumstances, however, where some claims can only be brought in state court. Practitioners should endeavor to file in federal court where possible, but should be aware that they might need to file wage-and-hour actions in state court. ■

36 *Cox v. NAP Const. Co., Inc*., 10 N.Y.3d 592, 603, 891 N.E.2d 271, 275 (2008); *Grochowski v. Phoenix Const*., 318 F.3d 80, 85 (2d Cir. 2003).

37 *Grochowski*, 318 F.3d at 86.

38 *Cox*, 10 N.Y.3d at 606. Cox expressly did not address whether the Davis-Bacon Act preempted state common law claims, noting that the preemption question "might be closer" if the contract had been pursuant to the Davis-Bacon Act. *Id*. at 605. As such, it is not clear whether state common law claims under the Davis-Bacon are preempted under *Cox*.

39 Both federal and state courts allow employees to bring common law prevailing wage claims as third-party beneficiaries of contracts brought under New York Labor Law § 220, New York's prevailing wage statute. *Pesantez v Boyle Envtl. Services, Inc*., 251 A.D.2d 11, 12 (1st Dept 1998); *Sobczak v. AWL Indus., Inc*., 540 F. Supp. 2d 354, 361 (E.D.N.Y. 2007).

40 *Krebs*, 22 Misc. 3d 1125(A), at *16.

41 *Id.*

42 *Gunawan v. Sake Sushi Rest*., 09-CV-5018 JO, 2012 WL 4369754, at *8 (E.D.N.Y. Sept. 24, 2012).

43 *Barenboim v. Starbucks Corp*., 698 F.3d 104, 112 (2d Cir. 2012) *certified question accepted*, 2012 WL 5906694 (N.Y. November 27, 2012) *citing Samiento v. World Yacht Inc*., 10 N.Y.3d 70, 883 N.E.2d 990 (2008).

44 New York Labor Law§ 193.

45 *Jacobs v. Macy's E., Inc*., 262 A.D.2d 607, 609, 693 N.Y.S.2d 164, 166 (2d Dept. 1999).

46 Labor Law § 193 was recently amended to allow for a wider variety of deductions including deductions for overpayments and for the repayment of loans, which were prohibited under the previous version of §193. See, LABOR AND EMPLOYMENT — DEDUCTIONS — COMPENSATION AND SALARIES, 2012 Sess. Law News of N.Y. Ch. 451 (A. 10785) (McKINNEY'S).

47 *Id.*

48 *Sherrill v. Sutherland Global Services, Inc*., 487 F. Supp. 2d 344, 348 (W.D.N.Y. 2007).

49 *Franklin v. Breton Int'l, Inc*., 06 CIV. 4877 (DLC), 2006 WL 3591949 (S.D.N.Y. December 11, 2006).

50 http://www.labor.ny.gov/legal/counsel/pdf/Other/RO-09-0107%20Teacher%20Exemption.pdf.

51 N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. *See also Gurung v. Malhotra*, 851 F. Supp. 2d 583, 591 (S.D.N.Y. 2012); *Edwards v Jet Blue Airways Corp*., 21 Misc 3d 1107(A) (Sup. Ct. 2008); *Ballard,* 264 A.D.2d at 748, 695 N.Y.S.2d at 131. An employee who is exempt under the FLSA might also be exempt under the New York Labor Law. For example, the FLSA and New York Labor Law both have exemptions for professional workers. For an illuminating discussion of these issues see *Scholtisek v. Eldre Corp*., 697 F. Supp. 2d 445, 462 (W.D.N.Y. 2010).

E-Discovery: Collection of Text Messages

By Mark Lenetsky
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With the explosion of social media usage in the last 5 years, ESI from social media is now a routine element of e-discovery collections. Text messages are often a key component of social media. By text messaging, I mean the sending and receiving of short text-based messages on cellular or mobile phones using the Short Message Services (SMS) function. It has also become possible to send more complex data such as group text messages and Multimedia Messaging Service (MMS), which allows users to send pictures, ringtones, and videos.

This usage has grown significantly and will likely continue to do so. Tekelek, a major network hardware supplier estimates that the global volume of the SMS market has grown from about a billion messages in 2005 to nearly 4 billion in 2012. According to one 2008 study, the average number of monthly texts for a 13 to 17-year-old teen is 1,742. Though text messaging may be common, the logistical and technical eDiscovery issues that can arise when planning for their collection can become anything but simple.

There are a number of factors to consider when planning for the collection of text messages, which will determine whether it is possible or practical and how it can be done. These factors are: the make and model of the cellular phone, the service provider, cooperation (or lack thereof) of the custodian, state of the text messages (deleted or not), and perhaps most important, the potential significance of the text messages for the case.

Make & Model of Cell Phone - There is a wide variety of hardware configurations and mobile operating systems. Each one of them needs to be managed in a unique way, depending on how and where the messages are stored. Gonazalez and Hung, of Strosz Friedberg point out that "the primary problem is that because the mobile device industry is still relatively young, a multitude of different operating systems, communications protocols, and data storage methods are in use...." In his Westlaw blog series, Mobile Messaging and Electronic Discovery, Daniel B. Garrie, Esq likewise concludes that " Innovation will continue to increase the scope and complexity of mobile messaging and thus the complexity of the ensuing electronic discovery."

Service Provider - If you need the cooperation of the service provider, the major ones (Sprint, Verizon, AT&T/Cingular, Nextel, T-Mobile, Virgin Mobile) all have different retention policies from each other, according to a leaked DOJ memo of August 2010. They also have different policies for message details (metadata such as to, from, time, # of characters), ranging from one to five years, versus the message content, which is not retained at all, except by Verizon and then for only three to five days. However, all this may be moot as the providers probably won't release any information unless served with a court order.

Cooperation of Custodian - If you're working with a cooperative custodian, you have more options and potentially less expense. You can copy texts from many phones with free or inexpensive utilities you can search and download, but this will be useful only for informational purposes and probably not admissible as evidence, as most of these output files a re text files) can easily be altered. Forensic collection becomes necessary if the custodian is hostile or the authentication of the texts are likely to be challenged. Aside from the accuracy of the texts themselves, there is also the issue of authorship being challenged as ownership of the device is not the same as authorship of the message. A Pennsylvania Superior Court ruled in September 2011 that unauthenticated texts are hearsay and inadmissible, though the State Supreme Court is reviewing that decision and may take a more nuanced approach. In 2005, a Pennsylvania State Superior Court ruled that direct or circumstantial evidence may be used to authenticate a document (electronic or otherwise) "where the circumstances support a finding that the writing is genuine".

State of text messages - If messages have been deleted from a phone, they can sometimes be recovered, depending on the type of device and how it handles deletions. Smart phones with large memories (e.g. Apple iPhone) don't always overwrite deleted data until the space is needed. Old computer backups of the phone, before message deletion, can also be checked to see if deleted messages are present. The other party to the text may not have have deleted it and that device and backups are other possible sources. Of course, all this takes time and effort (i.e. money), leading us to the final factor for consideration.

Significance of text messages to the case - This is the question that trumps all others: how important are these text messages to your case and what are they worth? A forensic collection of a single cell phone by an established ediscovery service provider costs $250 per device plus $250 per hour of labor for the collection. Most phones can be copied with between two and four hours of work, so a general rule of thumb is that it will cost between $750 to $1,250 for a forensic copy of 60 to 70% of cell phones. Note that you will have all the data on the device, not just the text messages. Some data copies will cost less but other outliers will also cost more.

Bottom Line - The key principle here is one of proportionality. If all you need is an "informational" copy of text messages from a device and you feel comfortable working with computer utilities, this may be something you can do yourself. On the other hand, if it's important to your case to have a defensible, authenticated copy and the value of the case justifies it, I would recommend using an experienced forensics service provider to collect the data from the phone(s). ■

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Federal Sector Squibs

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In **Kloeckner v. Solis (568 U.S. ___, 2012),** the Supreme Court ended a Circuit split over appellate jurisdiction in discrimination cases filed under the Civil Service Reform Act (CSRA). The Court held that a federal employee appealing a ruling of the Merit Systems Protection Board (MSPB) in a discrimination matter should seek judicial review in federal district court, not the Federal Circuit, irrespective of whether the MSPB decided the case on the merits or on procedural grounds.

Federal employees challenging discrimination may pursue their claims in several ways, including the EEO administrative process or a union grievance. The CSRA also authorizes federal employees to appeal serious personnel actions, such as terminations, to the MSPB, **5 U.S.C. §7512**, and those appeals may involve allegations of discrimination. **29 C.F.R. §1614.302 (1998).** Employees cannot pursue alternative remedies simultaneously and, as a practical matter, cases sometimes ping pong back and forth between administrative bodies as an employee pursues her case.

Cases decided by the MSPB are subject to judicial review but the CSRA bifurcates the jurisdiction of courts depending on whether discrimination is alleged. Generally, employees must appeal MSPB decisions to the Federal Circuit, **5 U.S.C. 7703(b)(1)**. Appeals involving allegations of discrimination should be made, instead, to the district courts. **5 U.S.C. 7703(b)(2).**

In this case, Ms. Kloeckner was in the EEOC administrative process, already challenging previous Department of Labor actions as discriminatory, when the agency terminated her employment. The EEOC judge accepted the termination as an amendment in the case and the MSPB agreed to toll the filing deadlines for an appeal of the termination, for a limited period of time. Ms. Kloeckner lost her case before the EEOC long after the MSPB's deadline had passed. When she returned to the Board to file an appeal, the MSPB dismissed her case as untimely without reviewing the merits. Ms. Kloeckner's appeal to the district court was dismissed for lack of jurisdiction because Ms. Kloeckner's claims of discrimination were not decided on the merits. The district court's dismissal was upheld by the Eighth Circuit.

In the Supreme Court, the government argued that the correct interpretation of the statutory phrase "judicially reviewable action" in a related statutory provision indicated a Congressional intent to carve out an exception to the district court's 7703(b)(2) jurisdiction when the MSPB decision was not based on the merits of the discrimination claim. Rejecting that argument, Justice Kagen acknowledged that "the intersection of federal civil rights statutes and civil service law has produce a complicated, at times confusing, process for resolving claims of discrimination in the federal workplace" but said that Ms. Kloeckner "brought the kind of case that the CSRA routes, in crystalline fashion, to district court." Justice Kagen dismissed the government's premise that the exception to the district court's jurisdiction "lies hidden in the statute's timing requirements", characterized the government's argument as tortuous and concluded that the government's "mazelike tour of the CSRA" only persuaded the Court that the "merits-procedure distinction is a contrivance."

The **Kloeckner** decision changes little for New York attorneys, however, because its holding has been the rule here since 1998. In **Downey v. Runyon, 160 F.3d 139 (2d Cir. 1998),** a federal employee originally pursued his claims of discrimination through a union grievance and later had his discrimination claims dismissed by the MSPB as untimely. The Second Circuit held that "the plain meaning of the CSRA entitled Downey to seek de novo review of a discrimination claim in federal district court after the MSPB dismissed [his case] without reaching the merits of his discrimination claim." ■

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a colleague had botched a murder investigation. A detective, Kevin McCarthy, threatened plaintiff that if he did not accept blame for the failed investigation, McCarthy and other detectives would falsely tell the investigations unit that it was plaintiff's fault. Plaintiff then told the internal affairs bureau that McCarthy had instructed him to lie during an official investigation. Afterwards, plaintiff suffered retaliation for this speech.

The district court held that the First Amendment protected plaintiff's speech, insulating him from retaliation. While the NYPD Patrol Guide directs officers to report corruption or serious misconduct, the district court noted that "**Garcetti** itself 'reject[ed]…the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.'"[11] The district court declined to "'effectively curtail all [NYPD officers'] right[] to speak out about corruption, thereby discouraging whistleblower activity that is of great benefit to civil society.'"[12] The court added:

[D]efendants' argument ignores the relevant allegation that reporting internal misconduct to IAB was neither encouraged nor rewarded. Much the opposite, the complaint alleges that the NYPD actively and aggressively opposed whistleblowing….Thus, the fact that plaintiff's reporting may have been required by some broader written policy applicable to all police officers has no bearing on whether such reporting was actually expected or permitted, much less tolerated, *in practice*.[13]

Judge Raymond Dearie distinguished Griffen from cases in which "plaintiffs were *specifically directed by their superiors* to report the wrongdoing consistent with the duties specified in their respective policy manuals."[14] Moreover, plaintiff's speech was protected because it had a citizen analogue under Garcetti, reasoning that "*any* citizen may report wrongdoing to the IAB."[15]

'Stokes'

Harry Stokes was the inspector gen-

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eral for the City of Mount Vernon, empowered to investigate allegations of corruption, fraud, criminal activity or abuse by any city official or employee. Only the mayor has the authority to remove the inspector general from office. In 2008, Stokes publicly issued a report that strongly criticized the city's Payment in Lieu of Taxes Program (PILOT), concluding, among other things, that its internal and financial controls were "inappropriate, arbitrary, and inadequate."

The following year, Stokes issued two reports that concluded that the treasurer and chief financial officer of the agency that administered the PILOT program had engaged in potential criminal wrongdoing through various financial discrepancies. In retaliation for plaintiff's whistleblowing, the mayor and City Council voted to sharply reduce Stokes' salary, causing him to resign. Stokes filed a First Amendment retaliation action in federal court.[16]

While it was Stokes' job to issue the report that led to his salary reduction and involuntary resignation, the motion to dismiss was only partially successful. The district court dismissed the claims against the mayor—who had authority over Stokes' employment—and the city, which employed Stokes. However, Stokes could proceed against members of the City Council, who lacked any employment authority over plaintiff. These defendants argued that **Garcetti** precluded liability because Stokes spoke out pursuant to his official duties. Rejecting that argument, Judge Vincent Briccetti adopted the reasoning of a Tenth Circuit case, identifying another basis to distinguish **Garcetti**. The court concluded,

[T]he principle underlying the employer/employee distinction makes sense. The rationale for the **Garcetti** rule is that restricting speech owing its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. The individual defendants do not point out any hiring, firing, or employment authority they have over plaintiff.…Therefore, the rationale underlying **Garcetti is** inapplicable and the Court cannot conclude that plaintiff's speech is not protected simply because the speech at issue may have occurred in the context of plaintiff's official job duties.[17]

'Spencer v. City of New York'

In **Spencer v. City of New York**, a public school teacher complained internally and to outside law enforcement authorities about a student who had sexually harassed her in class.[18] The plaintiff brought a retaliation suit under the First Amendment. Before the case went to trial, Judge Kimba Wood ruled on defendants' summary judgment motion that the plaintiff had engaged in protected speech.[19] After the plaintiff prevailed at trial, the defendants sought judgment as a matter of law under Rule 50, claiming entitlement to qualified immunity. In the course of rejecting defendants' post-trial motion, Wood summarized the summary judgment ruling on the viability of plaintiff's First Amendment retaliation claim.

Spencer's speech to the police and the case that she brought in New York Family Court were not in furtherance of her employment responsibilities. Spencer's speech to the police and to the court was not "part-and-parcel" of her concerns about her ability to "properly execute her duties" and maintain classroom discipline. Instead, her speech related to issues of sexual harassment and sexual abuse and to her concerns for her safety both on and off school grounds and her fears for the safety of other students, other teachers, and the public. This speech was outside the course of her official duties, and it was not only analogous to, but effectively the same as, speech regularly engaged in by citizens who are not government employees. The Court thus held that the communications with the police and with New York Family Court were speech Spencer made as a citizen.[20]

The distinction that Wood drew in **Spencer** highlights the citizen analogue that the Supreme Court referenced in **Garcetti** in explaining when the First Amendment protects public employee speech. While Spencer's in-house speech remained unprotected, her nearly identical speech to outside authorities protected her from retaliation.

Conclusion

These district court cases confirm that **Garcetti's** narrow interpretation of the rights of public employees have made it difficult, but not impossible, for plaintiffs to prevail on these claims. While most forms of internal speech by public employees about matters arising from their everyday job duties are no longer protected, careful attention to **Garcetti's** reasoning and the context of the plaintiff's speech may repel motions to dismiss and allow these claims to proceed to trial. ■

1. 461 U.S. 138, 146 (1983).
2. 547 U.S. 410, 422 (2006).
3. 593 F.3d 196 (2d Cir. 2010).
4. *Id*. at 203.
5. See, e.g., *id*. at 201 (noting that *Garcetti* "'narrowed the Court's jurisprudence in the area of employee speech' by further restricting the speech activity that is protected").
6. See, e.g., *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 n.4 (2d Cir. N.Y. 2001) ("[p]laintiffs' claims related to the administration of the Cooperative and the allocation of funds were based on alleged mismanagement of government funds and violations of its by-laws, which are clearly matters of public concern"); *Hale v. Mann*, 219 F.3d 61, 71 (2000) (In adopting report that criticized management of a state institution, director of a residential youth facility engaged in speech on a matter of public concern. The author represented the plaintiff in this case.); *Dangler v. Off-Track Betting*, 193 F.3d 130, 140 (2d Cir. 1999) (executive who voiced concerns to government authorities about irregularities and possible corruption at OTB engaged in protected speech); *Lewis v. Cowan*, 165 F.3d 154, 164 (2d Cir. 1999) (First Amendment protected lottery official's speech in opposition to Gaming Policy Board's changes to Lotto).
7. See, e.g., *Ross v. Breslin*, 693 F.3d 300 (2d Cir. 2012) (plaintiff, a payroll clerk typist for a school district, spoke pursuant to her official duties in reporting financial irregularities to her superiors); *Anemone v. Metro. Transp. Auth*., 629 F.3d 97, 116 (2d Cir. 2011) (security director and his deputy did not engage in protected speech in reporting corruption to district attorney's office); *Carter v. Village of Ocean Beach*, 415 Fed. Appx. 290 (2d Cir. 2011) (plaintiff police officers who reported misconduct did not engage in protected speech because their "allegations establish no more than that they reported what they believed to be misconduct by a supervisor up the chain of command—misconduct they knew of only by virtue of their jobs as police officers and which they

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Offers of Judgment: read them carefully

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Offers of Judgment[1] can serve a critical role in civil rights litigation. Whether the Offer is inclusive or exclusive of costs and attorneys' fees, a plaintiff's failure to best the Offer has two immediate effects. First, it cuts off his or her costs and attorneys' fees prospectively.[2] Second, it obligates the plaintiff to pay defendants' costs incurred subsequent to the service of the Offer.[3] Thus, a strategically served Offer often represents the ultimate arrow in defense counsel's quiver.

Where a plaintiff accepts an Offer, whether the Offer is inclusive or exclusive of costs and attorney's fees dictates the amount of the final judgment.[4] As such, "if there is any occasion in civil litigation which calls for caution and care by counsel, it is the drafting of a Rule 68 Offer."[5] As the Second Circuit's recent decision in **Barbour v. City of White Plains**[6] makes clear, defense counsel's failure to heed this warning can have grave consequences.

In **Barbour**, plaintiffs Deja Barbour, Rakayyah Massey and Shinnel Gonzalez (collectively "Barbour") brought claims, pursuant to 42 U.S.C § 1983, sounding in false arrest and malicious prosecution, among other claims, against the City of White Plains and members of its Police Department. For more than four years of litigation, White Plains maintained a "no pay" position.[7] Shortly before trial, White Plains filed electronically three Offers, one for each plaintiff. The Offers, which were identical save for the identity of the plaintiffs, provided, in relevant part, for each plaintiff to take the "total sum of TEN THOUSAND DOLLARS AND 00/100 ($10,000) for the settlement of all claims pending against the defendants in this action." The Offers did not contain the words "costs" or "attorneys' fees." Following plaintiffs' acceptance of the Offers, the district court (Patterson, J.) entered judgment, indicating that the court would determine plaintiffs' costs and reasonable attorneys' fees. White Plains' counsel stood mum in the face of the district court's judgment.[8]

In response to plaintiffs' fee application, White Plains presented two objections. First, they argued that plaintiffs were not prevailing parties. Second, they argued that the Offers were inclusive of costs and fees. They presented no argument regarding counsel's hourly rates and lodged minimal objections to counsel's time.[9] The district court, relying upon the Supreme Court's decision in **Marek v. Chesney**,[10] rejected White Plains' argument that the Offers were inclusive of costs and attonreys' fees. As for the amount of costs and fees sought, Judge Patterson, recognizing that White Plains' no-pay position necessitated counsel's work, which included having prepared fully for trial, including witness preparation and drafting motions in limine, awarded costs and fees in the amount of $290,997.94.

On appeal, White Plains mounted two arguments. First, they renewed their argument that the Offers were inclusive of costs and fees. Second, they argued, for the first time, that the district court abused its discretion failing to reduce the Award because of the lack of proportionality between the Award and the Offers.

Joining every Circuit to address the issue,[11] the **Barbour** Court recognized that White Plains' argument was foreclosed by **Marek**. In **Marek**, the Supreme Court held as follows:

If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, it determines to be sufficient to cover the costs.[12]

Since counsel for White Plains had to concede that the Offers did not refer to costs or fees, his failure to draft Offers that comported with its stated intention cost White Plains more than $260,000.[13]

The Circuit also dispatched easily White Plains' second argument, that the Award was grossly out of line with the amount of the Offers. As mentioned, White Plains did not present this argument to the district court. Accordingly, the Circuit agreed with Barbour's counsel that White Plains had waived this argument. And, even if it were preserved, the Circuit recognized that the vast discretion afforded district courts coupled with the Court's repeated rejection of proportionality as a basis to reduce an award militated in favor of affirmance.[14]

Of the two issues presented to the Second Circuit, this latter issue represented

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1 *See* Fed. R. Civ. Proc. 68.

2 *Townsend v. Benjamin Enters., Inc*., 679 F.3d 41, 58 (2d Cir. 2012)

3 Fed. R. Civ. Proc. 68(d).

4 Whether an Offer is inclusive or exclusive of costs and fees also is relevant in determining whether a plaintiff beats an unaccepted Offer. For an interesting discussion of how courts are to assess Offers when non-monetary relief is involved, *see Reiter v. MTA New York City Trans. Auth*., 457 F.3d 224 (2d Cir. 2006).

5 *Laskowski v. Buhay*, 192 F.R.D. 480, 482 (M.D. Pa. 2000) (quotations omitted).

6 *Barbour v. City of White Plains*, Docket No. 11-2229, 2012 U.S. App. LEXIS 23386 (2d Cir. Nov. 14, 2012). I was co-counsel at trial and on appeal.

7 *Barbour*, 2012 U.S. App. LEXIS at *4.

8 *Id*. at *4-5. While not in the Court's opinion, plaintiffs' counsel had prepared and sent a proposed judgment to the Orders and Judgments Clerk that indicated his intent to move for costs and reasonable attorneys' fees. Again, defendants' counsel did not object at this time.

9 *Id*. at *5.

10 473 U.S. 1 (1985).

11 *See, e.g., Lima v. Newark Police Depot*, 658 F.3d 324, 332 (3d Cir. 2011); *McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561, 564 (6th Cir. 2004); *Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998); *Redman v. Cacaos Co*., 926 F.2d 877, 879-81 (9th Cir. 1991); *Arencibia v. Miami Shoes, Inc*., 113 F.3d 1212, 1214 (11th Cir. 1997).

12 *Marek*, 473 U.S. at 6 (citation omitted).

13 For another recent decision involving the failure of defense counsel to draft an Offer in accordance with defense counsel's professed intent, see *Sand v. Greenberg*, 08 Civ. 7840, 2010 U.S. Dist. LEXIS 1120 (S.D.N.Y. Jan. 7, 2010).

14 *Barbour*, 2012 U.S. App. LEXIS at *10.

Second Circuit Rejects Bright-line Sanction in Spoliation Cases

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The Second Circuit Court of Appeals has provided guidance on "litigation holds," the mechanism by which parties and organizations preserve potentially relevant evidence in anticipation that they will be sued. Under the Second Circuit's ruling, there is no longer any bright line rule for violating the requirement that parties preserve documents and other relevant items.

Litigation holds are a well-known procedure largely through Southern District rulings by Judge Scheindlin, including **Zubulake v. UBS Warbug**,[1] which said that "A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter." In addition, in **Pension Comm. v. Banc of Am. Secs**., Judge Scheindlin held that "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."[2] In particular, the court in **Pension Committee** suggested that after the duty to preserve has attached, it is gross negligence when the party has failed to issue a written litigation hold: to identify all of the key players and to ensure that their electronic and paper records are preserved: to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Not all courts embraced Judge Scheindlin's well-known rulings in **Zubulake and Pension Committee**. In a recent decision, Judge Baer of the Southern District of New York noted that "certain courts [around the country] have questioned the bright-line culpability rules that Judge Scheindlin promulgated in **Pension Committee**."[3] The Second Circuit has now agreed that the "gross negligence" standard is too harsh in determining whether to sanction the offending party.

The Court of Appeals issued its ruling in **Chin v. Port Authority**,[4] an employment discrimination case that went to trial. The plaintiffs prevailed on their disparate treatment and impact claims. While Port Authority appealed from the verdict, plaintiffs cross-appealed over the district court's refusal to give the jury an adverse inference instruction after Port Authority destroyed the promotional folders used to make promotions decisions.

The law governing adverse inferences shows why the Court of Appeals rejected the bright-line rule. The Court of Appeals in Chin notes that "[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."[5] District court rulings on

See SPOLIATION CASES, page 15

1 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

2 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

3 *GenOn Mid-Atl, LLC v. Stone & Webster, Inc*., 2012 U.S. Dist. LEXIS 57712, at *38 (S.D.N.Y. Apr. 20, 2012).

4 685 F.3d 135 (2d Cir. 2012).

5 685 F.3d at 162.

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the more interesting one, and the one that directly affects the plaintiffs' bar. While the Circuit correctly interpreted White Plains' second argument as one of proportionality, White Plains tried to dress it up as an argument sounding in "limited degree of success." If White Plains had presented this argument before the district court and pressed this argument on appeal, we will never know how the Circuit would have resolved this issue. The **Barbour** Court did state that "the total amount of fees and the hourly rates charged by counsel in this case could give pause[.]"[15] And, while the Second Circuit reviews a district court's decision to reduce an award for limited degree of success for an abuse of discretion,[16] it has previously indicated its concern with fee awards that vastly exceed a plaintiff's recovery.[17] ■

15 *Id.*

16 *Reed v. A.W. Lawrence & Co*., 95 F.3d 1170, 1183 (2d Cir. 1996).

17 *Vilkhu v. City of New York*, 372 Fed. Appx. 222, 224 (2d Cir. Apr. 21, 2010) ("On remand, the District Court should keep in mind that the most critical factor in determining the reasonableness of a fee award is the degree of success obtained. . . . Both the quantity and quality of relief obtained, as compared to what the plaintiff sought to achieve as evidenced in [the] complaint, are key factors in determining the degree of success achieved") (citations and quotations omitted).

ANNOUNCEMENT

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

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

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nelany@nelany.com

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

Class Action Squibs

By Julie Salwen
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The Supreme Court decision in **Wal-Mart Stores, Inc. v. Dukes** continues to have a major impact on the class action landscape, often in areas outside the most talked about aspect of the decision—the standard for commonality under Rule 23(a)(2).

STANDING TO SEEK INJUNCTIVE RELIEF

In **Wal-Mart v. Dukes,** 131 S. Ct. 2541 (2011), the Supreme Court noted that those plaintiffs who were no longer employed by Wal-Mart lacked standing to bring an action for injunctive or declaratory relief. *Id*. at 2560. In the June-July Squibs, I reported on the Report and Recommendation of Magistrate Judge Francis to Judge Sand that the plaintiffs in **Chen-Oster v. Goldman, Sachs & Co.**, No. 10 Civ. 6950, 2012 U.S. Dist. LEXIS 12961 (S.D.N.Y. Jan. 19, 2012) had standing to pursue injunctive relief "[b]ecause reinstatement absent a corresponding injunction would expose the plaintiffs to the immediate threat of further discrimination by Goldman Sachs" and that a Rule 23(b)(2) class should be certified. *Id*. at *6. Although Judge Sand agreed that plaintiffs have "a very real interest in a court-issued injunction preventing their employer from engaging in" discriminatory behavior, he interpreted **Wal-Mart** to require that he deny 23(b)(2) certification. **Chen-Oster v. Goldman, Sachs & Co.,** No. 10 Civ. 6950, 2012 WL 2912741, at *7 (S.D.N.Y. July 17, 2012). He reasoned that

> First, like the Plaintiffs here, the plaintiffs in Dukes sought reinstatement. In this respect, then, the facts of this case cannot be meaningfully differentiated from the facts in *Dukes*. Second, the issue of ex-employee standing was fully briefed and, we presume, fully considered by the Supreme Court. Third, the Supreme Court's analysis of this issue, and its blanket denial of standing to ex-employees, is not dictum: it was necessary to the resolution of this case insofar as it undergirded the invalidation of the Ninth Circuit's "predominance test" and foreclosed certification under 23(b)(2). We are therefore obligated to follow the rule, notwithstanding misgivings about its wisdom, which we turn to now.

Id. at *5 (citations omitted). In the end, Judge Sand stated that he was "oathbound to abide by [the Supreme Court's] commands" and therefore, despite his disagreement with its reasoning in **Wal-Mart**, he held that the plaintiffs did not have standing to pursue injunctive relief, and a 23(b)(2) class could not be certified.

DISPARATE IMPACT UNDER TITLE VII—EMPLOYMENT TESTS

One situation which the **Wal-Mart** Court observed would meet the Rule 23(a) commonality and typicality requirements for class certification was where the "employer 'used a biased testing procedure.'" **Wal-Mart**, 131 S. Ct., at 2553. In a long-running case, originally filed in 1996, the plaintiffs alleged just that. In **Gulino v. Board of Educ.**, No. 96 CV 8414, 2012 WL 6043803 (S.D.N.Y. Dec. 5, 2012), the plaintiffs represented African-American and Latino teachers in the New York City school system. They contended that the examination that teachers were required to pass in order to be certified was biased. Following an eight week bench trial, the district judge, Judge Constance Baker Motley, ruled that the examination had a disparate impact and had not been properly validated, but, after the Supreme Court's decision in **Watson v. Fort Worth Bank & Trust**, 487 U.S. 977 (1988), examinations did not have to be properly validated if the test was "manifestly" job related. **Gulino v. Board of Educ.**, No. 96 Civ. 8414, 2003 WL 25764041, at *30-31 (S.D.N.Y. Sept. 4, 2003). Judge Motley, the first African-American woman to serve as a federal judge and well-respected as a fighter for civil rights, determined that the test bore a "manifest relationship to teaching" because of the heavy weight given to essay writing in the test: "Defendants' decision to exclude those who are not in command of written English is in keeping with the legitimate educational goal of teaching students to write and speak with fluency." *Id*. at *31.

In 2006, the Second Circuit vacated the judgment, and remanded, reaffirming its decision in **Guardians Ass'n v. Civil Service Commission of New York**, 630 F.2d 79 (2d Cir. 1980), which required that an employment examination that has a disparate impact on a protected class must be validated to be considered job-related, a statutory defense under Title VII. **Gulino v. Board of Educ.**, 460 F.3d 361 (2d Cir. 2006). The EEOC has developed extensive guidelines on employee selection procedures. 29 C.F.R. § 1607. In **Guardians** the Second Circuit expressed deference to these guidelines but also concern that the EEOC guidelines might make it impossible for employers to show that any tests were job-related. Consequently the Second Circuit developed its own test with five parts.

> The first two concern the quality of the test's development: (1) the test-makers must have conducted a suitable job analysis, and (2) they must have used reasonable competence in constructing the test itself. The next three attributes are more in the nature of standards that the test, as produced and used, must be shown to have met. The basic requirement, really the essence of content validation, is (3) that the content of the test must be related to the content of the job. In addition, (4) the content of the test must be representative of the content of the job. Finally, the test must be used with (5) a scoring system that use-

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> fully selects from among the applicants those who can better perform the job.

Guardians, 630 F.2d, at 95. On remand the Court assessed the certification exam using the **Guardians** test and determined that it had not been validated and as a consequence was not job-related, and that therefore the defendant violated Title VII.

RULES 23(B)(2) AND (C)(4) AND INDIVIDUAL RELIEF

The Court (Kimba M. Wood, U.S.D.J.) in **Gulino v. Board of Educ.**, No. 96 CV 8414, 2012 WL 6043803 (S.D.N.Y. Dec. 5, 2012) also ruled on issues of Rule 23(b)(2) class certification post-**Wal-Mart**. Prior to **Wal-Mart**, certification of a Rule 23(b)(2) class was proper when classwide injunctive or declaratory relief *predominated* over monetary and individual relief. As a result in 2001, Judge Motley certified a Rule 23(b)(2) class for injunctive and declaratory relief and "incidental" monetary relief after the plaintiffs agreed not to seek compensatory and punitive damages. **Gulino v. Board of Educ.**, 201 F.R.D. 326, 334 (S.D.N.Y. 2001).

Judge Wood revisited class certification in her December 2012 decision in light of the Supreme Court's decision in **Wal-Mart**. Plaintiffs sought (1) "declaratory relief as to Defendant's liability," (2) "monetary relief in the form of backpay," (3) "injunctive relief providing teaching certificates and seniority rights to individual class members, and (4) "the appointment of a monitor to ensure that Defendant's current testing and licensing procedures do not violate Title VII." Judge Wood maintained certification under Rules (b)(2) and (c)(4) with regard to the first and fourth claims and decertified the class with regard to the second and third claims holding that class claims for individualized relief, including individualized injunctive relief, cannot be certified under Rule (b)(2) after **Wal-Mart**.

> Certification pursuant to Rule 23(b)(2) is not appropriate "when each member of the class would be entitled to a different injunction or declaratory judgment against the defendant." **Wal–Mart**, 131 S.Ct. at 2557. In holding that individualized claims for backpay were not cognizable as a class action under Rule 23(b)(2), the Supreme Court noted that, under Title VII, Wal–Mart would be entitled to "individualized determinations of each employee's eligibility for backpay," and would have the opportunity to show that "it took an adverse employment action against an employee for any reason other than discrimination." *Id*. at 2560–61. Although Plaintiffs characterize these requested injunctions as classwide, the injunctions they seek—including the provision of teaching certificates and seniority rights—are precisely the type of individualized relief the Supreme Court found to be outside the ambit of class certification under (b)(2).
>
> . . . Here, just as in **Wal–Mart**, the Board should have the opportunity to rebut individual plaintiff's claims for seniority rights and teaching licenses by presenting legitimate, job-related reasons why a particular individual was not promoted or did not receive a teaching license.

Gulino, No. 96 CV 8414, 2012 WL 6043803, at *12 (S.D.N.Y. Dec. 5, 2012).

Judge Wood noted that the Second Circuit encourages certification of issue classes under Rule (c)(4). Plaintiffs agreed to bifurcate the liability and remedial phases of the trial and will move for class certification under Rule (b)(3) for the remedial phase.

INDIVIDUAL ARBITRATION AGREEMENTS

In the area of arbitration agreements that foreclose employees from bringing their claims as a class or collective action, two important cases discussed in previous issues are currently being appealed. At the end of May 2012, D.R. Horton filed an appeal with the Fifth Circuit of the National Labor Relations Board decision in **D.R. Horton, Inc.**, 357 NLRB No. 184 (2012), that ruled that arbitration agreements which prevent employees from collectively bringing claims that deal with the terms and conditions of their employment illegally interfere with employees' rights to engage in concerted activity under section 7 of the National Labor Relations Act ("NLRA"). In the case discussed above, Goldman Sachs is also awaiting a decision on its appeal to the Second Circuit of the denial of its motion to compel individual arbitration of the plaintiffs' claims. **Parisi v. Goldman, Sachs & Co,** No. 11-5229 (2d Cir.). As discussed in the December 2011 issue, in **Chen-Oster v. Goldman, Sachs & Co,** No. 10 Civ. 6950, 2011 WL 2671813 (S.D.N.Y. July 7, 2011), Magistrate Judge Francis denied the motion to compel arbitration. His Order was endorsed by Judge Sand, without an opinion, on November 15, 2011. ■

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reported as 'part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties'"); *Huth v. Haslun*, 598 F.3d 70, 74 (2d Cir. 2010) (in reporting subordinate's concerns about co-worker misconduct to her superior at daily meetings, plaintiff spoke pursuant to her official duties and not as a citizen);*Wesolowski v. Bockelmann*, 350 Fed. Appx. 487, 488 (2d Cir. 2009) (Corporal's "act of taking his written report of the alleged prisoner abuse to his lieutenant was not speech protected by the First Amendment"); *Almontaser v. Department of Education*, 519 F.3d 505, 508 (2d Cir. 2008) (school principal did not engage in protected speech when she spoke to the newspaper at her employer's direction); *Platt v. Village of Southampton*, 391 Fed. Appx. 62, 64 (2d Cir. 2010) (police officer spoke pursuant to official duties in reporting improper relationship among fellow officers that jeopardized public safety).

8. 658 F.3d 225 (2d Cir. 2011).
9. 708 F.Supp.2d 319 (S.D.N.Y. 2010).
10. 658 F.3d at 241.
11. 2012 U.S. Dist. LEXIS 106208, at *29 (E.D.N.Y. July 31, 2012).
12. *Id*.
13. *Id*. (emphasis in original).
14. *Id*. at *31 (emphasis in original).
15. *Id*. at *36 (emphasis in original).
16. *Stokes v. City of Mount Vernon*, 2012 U.S. Dist. LEXIS 118386 (S.D.N.Y. Aug. 14, 2012).
17. *Id*. at *18 (citing, inter alia, *Leverington v. City of Colorado Springs*, 643 F.3d 719 (10th Cir. 2011)).
18. 2012 U.S. Dist. LEXIS 96970 (S.D.N.Y. July 12, 2012).
19. *Id*. at *18 (quoting *Weintraub*, 593 F.3d at 202).
20. *Id*. at *18-19 (citing *Jackler*, 658 F.3d at 237-38, 239).

New York City Human Rights Law Squibs

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In **Welch v. United Parcel Service**, Inc. d/b/a/ UPS, 2012 WL 2252185 (E.D.N.Y. June 30, 2012), the Court discussed whether a non-New York City resident plaintiff's claimed contact with New York City was sufficient, as a matter of law, to warrant recovery under the NYCHRL. To succeed on a claim under the NYCHRL, a plaintiff must prove that (1) the defendant discriminated against him "within the boundaries of New York City" and (2) the impact of the offensive conduct was felt in New York City. "[I]t is the impact of the adverse action, not the location where acts leading to the discrimination occur, that gives rise to a claim under the NYCHRL." *Id*. at *11 (emphasis added, internal citation omitted).

Although plaintiff's transfer, the alleged retaliatory adverse job action, was communicated to plaintiff at a meeting held within the boundaries of New York City, plaintiff felt the *impact* of the retaliation at his newly transferred location, in Nassau County. The meeting in New York City was "simply insufficient, as a matter of law, to demonstrate that the impact of the retaliation occurred in the confines of New York City." *Id*. Accordingly, the Court granted defendant's motion for judgment as a matter of law, dismissing plaintiff's NYCHRL retaliation claims.

In **Melman v. Montefiore Medical Center**, 98 A.D.3d 107 (1st Dep't. 2012), the Court affirmed the granting of defendant's summary judgment motion, dismissing plaintiff's NYCHRL claims, as he had failed under both the **McDonnell Douglas Corp. v. Green** framework and the "mixed motive" test, set forth in the First Department's decision in **Bennett v. Health Management Systems, Inc.**, 92 A.D.3d 29, 41 (2011) to demonstrate a triable issue of fact. See Bennett, 92 A.D.3d at 41 (holding that motions for summary judgment dismissing NYCHRL claims should only be granted if "no jury could find defendant liable under any of the evidentiary routes—**McDonnell Douglas**, mixed motive, 'direct' evidence, or some combination thereof"). Under the **Bennett** mixed motive test, plaintiff needed to raise an issue of fact as to whether defendant was at least partially motivated by discriminatory factors. "[T]he plaintiff should prevail in an action under the NYCHRL if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for the adverse employment decision." *Id*. at 127. The First Department found plaintiff failed to present any evidence that discrimination played a role. Despite NYCHRL's "expansive goal of protecting victims from invidious discrimination … not every plaintiff asserting a discrimination claim will be entitled to reach a jury." *Id*. at 131. ■

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adverse inferences are reviewed for an abuse of discretion. As district courts have a variety of ways to deal with this problem, that discretion ensures that not every spoliation problem will result in an automatic sanction.

Writing for the Second Circuit, Judge Livingston stated that "The Port Authority does not dispute that, upon receiving notice of the filing of plaintiffs' EEOC charge in February 2001, it had an obligation to preserve the promotion folders yet failed to do so." Yet, the Court of Appeals agrees that the district court did not abuse its discretion in declining to give an adverse inference charge to the jury. The Second Circuit writes:

> Howard Chin argues that the Port Authority's failure even to issue a litigation hold regarding the promotion folders at any point between 2001 and 2007 amounted to gross, rather than simple, negligence. We reject the notion that a failure to institute a "litigation hold" constitutes gross negligence per se. **Contra Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.**, LLC, 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010). Rather, we agree that "the better approach is to consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue. Moreover, as the district court recognized, a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction. Even if we assume arguendo both that the Port Authority was grossly negligent and that the documents here were "relevant," we have repeatedly held that a "case-by-case approach to the failure to produce relevant evidence," at the discretion of the district court, is appropriate.

Applying this new standard to the case at hand, the Court of Appeals rejects plaintiffs' argument that the district court should have issued an adverse inference instruction because the destroyed evidence played a limited role in the promotion process and there were other ways for plaintiffs to prove their case. The Second Circuit writes:

> In this case, the district court concluded that an adverse inference instruction was inappropriate in light of the limited role of the destroyed folders in the promotion process and the plaintiffs' ample evidence regarding their relative qualifications when compared with the officers who were actually promoted. At trial, Howard Chin was able to establish his service record and honors, and Chief Charles Torres testified that Howard Chin was very smart and a good employee. Under these circumstances, the district court did not abuse its discretion in concluding that an adverse inference instruction was inappropriate.[6] ■

6 *Id.*

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