NELA

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

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Overreaching English-Only Policies Spell Trouble For Employers

By Delyanne Barros
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On May 12, 2011, eight Hispanic employees of the City of Rochester filed an action against the City, among other defendants, for implementing a sweeping English-only policy that prohibited Spanish to be spoken at all times, including breaks and whether it was within or outside the presence of non-Spanish speaking employees.[1] According to the complaint, the employees' manager told them that "if you want to speak Spanish, do it at home and not at the workplace."[2]

Rochester is a thriving economic metropolitan city home to heavy-hitting corporations such as Xerox, Kodak, GM, and Bausch & Lomb. According to the 2010 census, it is the third largest city in New York, with a population of approximately 211,000 people, 16.4% of which identify themselves as Hispanic.[3] Therefore, hearing a co-worker speak Spanish in the workplace should be not only commonplace but expected. Employers should realize that these overreaching policies are illegal, bad for employee

See ENGLISH-ONLY, page 10

Associational Disability – Overlooked and Underutilized?

By Dana Sussman
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The Americans with Disabilities Act has received renewed attention lately and rightfully so. Enacted on September 25, 2008, the ADA Amendments Act of 2008 ("ADAAA") made significant changes to the definition of "disability" in an effort to reinstate the Act's broad scope of protection, and in doing so, rejected the Supreme Court's narrow interpretations of the term. The final EEOC implementing regulations were approved by a bipartisan vote and published on March 25, 2011; they went into effect on May 24, 2011. The ADAAA and its implementing regulations shift the focus of ADA claims back to its original statutory intent: whether disability discrimination actually took place, rather than whether an individual's disability fits within the narrow confines of the Court's definition.

As attorneys begin to understand and appreciate the impact of the ADAAA for their disabled clients, they should also keep in mind its impact on nondisabled clients who have relationships or associations with disabled individuals. The often overlooked[1] "associational disability" provision of the ADA gives nondisabled employees a cause of action where an employer "exclud[es] or otherwise den[ies] equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." [2] The newly expansive interpretation of "disability" applies with equal force to such claims.

The associational disability provision is broad. It covers a wide range of associations beyond immediate family and spousal relationships, described in the regulations as "family, business, social or other relationship[s]."[3] It does not require that the nondisabled employee be related to the disabled individual by blood, marriage, adoption, or guardianship to be protected.[4] Significantly, individuals in lesbian and gay partnerships are protected,[5] as are individuals in less formal social relationships, including both romantic relationships and friendships.[6]

Although "[t]he paradigmatic case is that of the parent of a disabled child, whose employer may fear that the child's disability may compromise the employee's ability to perform his or her job," this provision may also provide essential

See ASSOCIATIONAL DISBAILITY, page 4

1 Michelle Travis, Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities, 76 Tenn. L. Rev. 311, 369 (Winter 2009) (describing the prohibition against associational discrimination as "little known" and collecting cases).

2 42 U.S.C. § 12112(b)(4).

3 29 C.F.R. § 1630.8 (2008).

4 Travis, *supra* n. 1, at 368 n.344 (citing H.R. Rep. No. 101-484(III), at 38-39 (1990), reprinted in 1990 U.S.C.C.A.N., 445, 461-62 (rejecting an amendment that would have restricted the ADA's association provision only to nondisabled employees related to a disabled individual by blood, marriage, adoption, or guardianship)).

5 *Id.* at 370, n.352.

6 *Id.* at 370, n.353.

The NELA/NY
Calendar of Events

Executive Board Meeting
Wednesday, September 14
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome

NELA Nite
6:30 – 8:30 pm
Wednesday, September 21
3 Park Avenue – 29th Floor
(Hosted by the E-discovery Committee)
Save the Date

NELA Fall Conference
Friday, October 14
8:45-5:15 pm
Yale Club of NYC
Save the Date

Executive Board Meeting
Wednesday, October 19
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome

NELA Fourteenth Annual Gala Event
Thursday, November 18
Club 101
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A Word from Your Publisher

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President's Column

by Darnley D. Stewart,
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It Was The Best Of Times. It Was The Worst Of Times

Literature mavens will tell you that this quote from Charles Dickens' A *Tale of Two Cities*[1] speaks to the book's central tension between love and family, on the one hand, and oppression and hatred on the other. Recent events in our country and state seem to reflect this same sort of tension between the best and worst of us. First on June 20, 2011, the Supreme Court handed down its decision vacating class certification in *Dukes v. Wal-Mart Stores, Inc*., a gender class action filed against Wal-Mart in 2000, alleging that women employees are systematically discriminated against at Wal-Mart. Just four days later, the New York State Legislature passed the Marriage Equality Act, legalizing same-sex marriage in New York. During that week, it was indeed the worst and best of times.

The *Wal-Mart* decision, penned by Judge Scalia, will – at best -- make it very difficult for plaintiffs to recover monetary damages through the class action vehicle. Relying on the fact that Wal-Mart has an "announced policy that forbids sex discrimination," the Court stated that, "..left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." Oh really. One might wonder, then, why women at Wal-Mart have been paid less than men in every year since 1997 in every one of Wal-Mart's 41 regions in just about every job classification -- and this even though female employees at Wal-Mart have longer tenure and higher performance ratings than male employees. The best – and perhaps the only – way to get at these disparities is through the class action since Wal-Mart's non-discrimination policy apparently has not done the trick. Indeed, the 1966 Advisory Committee Notes to Fed.R.Civ.P. 23 explicitly state that civil rights cases are perhaps the most illustrative of the types of cases appropriately brought under Rule 23, particularly where class members are "incapable of specific enumeration. " Now this Supreme Court has cut off Rule 23 at the knees. That's the bad news – and it's pretty bad.

Now the good news. Nothing pleased me more this year than watching the proceedings from the floor of the State legislature in the late evening hours of June 24, as the Marriage Equality Act passed. At 9:40 pm, Republican Senator Steve Saland, calling his vote a "vote of conscience," detailed his reasons for now supporting the bill. At 10:20 p.m., GOP freshman Senator Mark Grisanti took the floor and reported that he could no longer justify denying anyone the basic right of marriage. Finally, at 10:30 p.m., the bill passed 33-29 as cries of "USA! USA! USA!" erupted from outside the chamber. It really was a glorious moment and, frankly, a somewhat stunning one. It was the best of times.

So what do we make of these two incongruous events occurring within days of each other? We have to get to work. If the Supreme Court is going to make it more difficult for women to be treated equally in the workplace, we have to move forward full speed ahead on the Paycheck Fairness Act. NELA National's Lobby Day is scheduled for October 20, 2011 in Washington. We see from what happened here in New York with respect to marriage equality that vigorous advocacy and effective leadership can change the world. Let's do it. Join us in Washington on October 20. ■

1 The entire opening passage is lovely and warrants full quotation: "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way."

ASSOCIATIONAL DISABILITY, from page 1

protections for the increasing number of employees who are caring for elderly parents. The EEOC Technical Assistance Manual explains that pursuant to the association provision, "an employer may not assume that the individual will be unreliable, have to use leave time, or be away from work in order to care for the family member with a disability."[7]

This provision is particularly relevant to employees who have relationships with someone with a disability, like HIV/AIDS, that has historically been the subject of stigma and discrimination. In fact, the legislative history of this provision reveals that it was "inspired in part by testimony before House and Senate Subcommittees pertaining to a woman who was fired from her long-held job because her employer found out that the woman's son, who had become ill with AIDS, had moved into her house so she could care for him." **Den Hartog v. Wasatch Acad.**, 129 F.3d 1076, 1082 (10th Cir. 1997) (quoting H. R. Rep. No. 101-485, pt. 2, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312 (citing this testimony as evidence of the need for the association provision)). Further, an employer may not fire, refuse to hire, or deny benefits to a nondisabled employee who provides care for someone with HIV/AIDS, including employees who volunteer at AIDS clinics during non-working hours.[8] In **Saladin v. Turner**, 936 F. Supp. 1571 (N.D. Okla. 1996), the plaintiff won his ADA association claim against an employer that had suspended and discharged him because customers were concerned about his long-term relationship with a man who had HIV/AIDS. The court noted that "[u]nder the ADA, effect may not be given to the public's fears or stereotypes." *Id.* at 1581.

In order to establish a prima facie case of associational discrimination under the ADA, a plaintiff must demonstrate that:

> 1) the plaintiff was "qualified" for the job at the time of the adverse employment action; 2) the plaintiff was subject to adverse employment action; 3) the plaintiff was known by his employer at the time to have a relative or associate with a disability; and 4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.

Dollinger v. State Insurance Fund, 44 F. Supp. 2d 467, 480 (N.D.N.Y. 1999). Courts apply the **McDonnell-Douglas** burden-shifting framework to ADA association claims; if the plaintiff establishes these elements, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. **Abdel-Khalek v. Ernst & Young LLP**, 1999 WL 190790, at *4 (S.D.N.Y. 1999) (citing **Den Hartog v. Wasatch Academy**, 129 F.3d 1076, 1085 (10th Cir. 1997)). Once such a reason is articulated, the burden shifts back to the plaintiff to prove that the employer's stated reason is pretextual and that the employer intentionally discriminated against plaintiff. **Dollinger**, 44 F. Supp. 2d at 480.

Only a handful of cases have been brought in the Second Circuit asserting claims under this provision, with varying degrees of success. Several cases have survived defendants' dispositive motions. *See Dollinger*, 44 F. Supp. 2d 467 (plaintiff sufficiently alleged a causal connection between defendants' awareness of his association with individuals with HIV/AIDS and adverse employment actions, which included denials of promotions); **Abdel-Khalek**, 1999 WL 190790 (defendant's motion for summary judgment denied where plaintiff asserted she was terminated and not hired by successor company because she had a disabled daughter); **Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc.**, 1999 WL 187055 (S.D.N.Y. Apr. 6, 1999) (plaintiff sufficiently alleged standing to sue, claiming that employer denied him insurance benefits to treat his son's autism); **Padilla v. Buffalo State College Found.**, 958 F. Supp. 124 (W.D.N.Y. 1997) (genuine issue of material fact existed as to whether defendant's withdrawal of its offer was a result of plaintiff's association with her disabled daughter).

"The associational disability provision is broad. It covers a wide range of associations beyond immediate family and spousal relationships, described in the regulations as 'family, business, social or other relationship[s].'"

While other cases have failed to sustain claims under the association provision, many of these cases sought protection for associations with tenuous relationship ties. **Manigaulte v. C.W. Post of Long Island Univ.**, 659 F. Supp. 2d 367 (E.D.N.Y. 2009) (concluding that amending plaintiff's complaint to add a Title I claim alleging associational discrimination would be futile "because Title I of the ADA does not allow relief for a teacher alleging an adverse employment action resulting from 'advocacy' on behalf of his disabled students"); **Valenti v. Massapequa Union Free Sch. Dist.**, 2006 WL 2570871 (E.D.N.Y.

See ASSOCIATIONAL DISBAILITY, page 7

7 U.S. Equal Emp. Opportunity Comm'n, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at ch. 7, § 7.4 (1992)

8 Interpretative Guidance, 29 C.F.R. pt. 1630, app. § 1630.8; H.R. Rep. No. 101-485(III), at 38-39 (1990), reprinted in 1990 U.S.C.C.A.N.,445, 461-62; *id.* at ch. 7, § 7.4.

Practice Pointers

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[*The Newsletter is launching a new feature on practice management. If you would like to contribute an article (or an idea for an article) for this section, please contact the editors.]*

DEADLINES

The good, the bad, and the ugly… in reverse order.

I'd like the thank NELA NY members Jonathan Bernstein, Joshua Friedman, Sal Gangemi, Anne Golden, and Susan Ritz for generously sharing their time and ideas in the preparation of this article.

First, the ugly – figuring out what your deadlines are.

Let's face it, the complexity of statutory and other deadlines that employment lawyers have to deal with is a gnarly mess. Nobody likes it.

Title VII provisions, alone, show how complexity quickly enters the picture: Employees of covered private entities in a deferral state like New York must file a claim within 300 days of the alleged discrimination. But private employees in non-deferral states have only 180 days,[1] and federal employees have only 45 days in which they must make initial contact with an EEO counselor at their agency.[2] Under the Lily Ledbetter Fair Pay Act, each payment of "wages, benefits, or other compensation" begins a new limitations period.[3] But, currently, at least in New York, this does not apply to payments of retirement benefits.[4]

New York clients present claims that are actionable under different city, state, and federal statutes, as well as under common law, each with different statutory limits. Susan Ritz points out that plaintiffs suing a town, city or public agency in New York must file a Notice of Claim within 90 days and may also be subject to an abbreviated statute of limitations. Anne Golden cautions that "the limitations period for an Article 78 petition is four months but only two months for the same kind of petition challenging a determination of the New York State division of Human Rights."

As if all of that is not enough, there are also singular pitfalls. For example, Joshua Friedman pointed out that while most mid-process deadlines are triggered by the attorney's receipt of a document, the 90-day limit on the EEOC's Notice of Right to Sue starts to run when the *client* receives the NORTS.

The plethora of relevant statutes sometimes has an upside, though. Joshua Friedman recommends using 42 U.S.C. §1981 whenever possible, after other deadlines have been missed, because of its 4 year statute of limitations.

Keep in mind that deadlines can change and failure to stay current might lead you to turn away or miss a viable claim. As Susan Ritz pointed out, the statute of limitations for Sarbanes Oxley whistleblower claims used to be 90 days but was recently increased to 180 days.[5]

And avoid this rookie mistake, pointed out by a number of attorneys interviewed for this article - 90 days is 90 days – not three months.

At this point, there is no alternative to identifying and staying current with the limitation periods for each of these multiple causes of action . . . but it seems like a fertile field for a joint project and a simple NELA NY website chart!

Second, the bad (or at least, the difficult).

As an attorney's practice increases, she'll likely have to juggle deadlines for multiple clients, each of whom may have multiple claims. This will involve not only filing deadlines, but procedural deadlines involving motions and discovery requests, as well as court appearances. Some sort of calendaring system is essential. While some attorneys still swear by their Day Runner or Filofax, new technologies offer additional options.

> ***"The benefit of complying with deadlines goes beyond staying out of trouble.You can not only manage deadlines, but master them."***

In either case, one calendar may not be sufficient. Insurance companies often require policyholders to use multiple calendars and some attorneys do so happily.

Sal Gangemi uses a computerized case management software called Time Matters, which syncs with his Outlook, which syncs with his Blackberry. He also created a sidebar, always visible on his computer screen, which displays a list of upcoming deadlines *and* he keeps a hardcopy list of all upcoming deadlines on his desk. Additionally, he has a subscription to Etrack, which sends reminders of upcoming deadlines and court appearances to his Outlook.

See PRACTICE POINTERS, next page

1 42 U.S.C. §2000e-5(e)(1).
2 29 C.F.R. 1614.105(a)(2).
3 42 U.S.C. §2000e-5(e)(3)(A).
4 Zimmelman v. Teachers' Ret. Sys., 2010 U.S. Dist. LEXIS 29791 (S.D.N.Y., Mar. 8, 2010), approved and adopted by Zimmelman v. Teachers' Ret. Sys., 2010 U.S. Dist. LEXIS 50039 (S.D.N.Y., May 20, 2010).
5 §922(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. H.R. 4173.

PRACTICE POINTERS, from page 5

When using hardware, especially, a multi-system approach is wise, because systems crash and cellphones fall out of pockets. A word of caution, however, when dealing with multiple calendars – you need to make sure they are *all* up to date with the *correct* information. When modifying an entry (for example, to change a court date) in a system using multiple technologies synced together, you usually have a final option of saving the *new* or the *old* information. If you carelessly select the *old* information to override, syncing could sink you. Dealing with multiple hard copy calendars is no better, in this regard, if you enter a new deadline into only one calendar and then start relying on the other.

Joshua Friedman may have the solution. His advice is to "use an online calendar (Google, Yahoo), which provides email and pop up reminders, and set it to provide multiple warnings. Have everyone in your firm use the same calendar and calendar all deadlines as soon as you become aware of them."

Not all deadlines are immutable. If multiple deadlines are fast approaching and you reasonably need more time, you could consider requesting extensions for some or all of them (given that you will not be in control of which requests are granted). Keeping in mind that many court rules require "prompt" requests for extensions, don't wait until the last minute to consider this option.

Experienced attorneys advise leniency when dealing with the other side's requests for reasonable, procedural extensions, for several reasons. You may need a similar favor in the future. Additionally, especially in circumstances when the request is likely to be granted, an absence of civility will not impress a judge who has taken time in her schedule to listen to petty arguments against the request. This applies unless a substantive right of your client is at stake.

Now a brief word on an unpleasant prospect – what to do if, even with all of your systems and good intentions, you botch it. Jonathan Bernstein says, "Take responsibility. Don't blame the computer, secretary or anyone else. Just say you will do what you can to fix the problem." Many other indispensible dos and don't's, such as getting the advice of a malpractice attorney and promptly informing your insurance carrier, are laid out in "When Mistakes Happen" by Thomas P. Sukowicz. [6]

Third, the good! (yes, really).

The benefit of complying with deadlines goes beyond staying out of trouble. You can not only manage deadlines, but master them. Anne Golden's advice leads us away from the merely utilitarian:

"Being prepared for judges, adversaries, clients, and colleagues is a mark of respect and maturity and will engender respect for you in turn. It will also make it more likely that you will win your case, please your client, forge good relationships, and get you (and your client) what you want".

As it is so often the case with wisdom, the NELA members' advice for this article on mastering deadlines was tinged with paradox. In summary, the best way to avoid deadline hell . . . is with deadlines, deadlines and more deadlines.

Sal Gangemi recommends that you employ alerts to remind you of your *pre-deadline* deadline. Jonathan Bernstein recommends *multiple* pre-deadlines. Susan Ritz reminds "there are always surprises," so factor in the unexpected and add even a little extra time. Finally, Jonathan Bernstein describes a move, which at this point I imagine is only attainable by those with their Black Belt in deadlines – write the brief, leave it on the shelf for one week, and then come back to it with fresh eyes! It must be possible. Anne Golden reports, "It took me a long time, but I learned that having something finished BEFORE it is due makes me feel absolutely wonderful!"■

6 When Mistakes Happen By Thomas P. Sukowicz. Managing Risk in the Legal Profession Volume II, 2001. http://www.attorneys-advantage.com/rm/qh/2001/vol2.jsp

ANNOUNCEMENTS

Congratulations to All Same-Sex Couples Who Were Married.

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ASSOCIATIONAL DISABILITY, from page 4

Sept. 5, 2006) (complaint dismissed where plaintiff asserted he experienced adverse employment action after advocating for his disabled students). Additional cases failed because the alleged disability was not covered by the ADA. *See, e.g.,* **Simmons v. Woodycrest Ctr. for Human Devel.**, 2011 WL 855942 (S.D.N.Y. Mar. 9, 2011) (defendant's motion for summary judgment granted where plaintiff conceded that child was never diagnosed with any condition that could be interpreted as a disability); **Sacay v. Research Found. of City Univ. of New York**, 193 F. Supp. 2d 611 (E.D.N.Y. 2002) (associational discrimination claim failed because plaintiff's mother was not disabled under law); **Rome v. MTA/New York City Transit**, 97-CV-2945 (JG), 1997 WL 1048908 (E.D.N.Y. Nov. 18, 1997) (failure to sufficiently allege inference of discrimination in the employer's decision not to cover plaintiff's speech therapy).

The association provision's coverage is limited in at least one important respect. It covers those circumstances in which an employer discriminates based on the *unfounded* belief that an employer may need additional time off, a flexible work arrangement, or other job modifications. If the employee's relationship with a disabled individual *actually* impacts job performance or results in absences or tardiness, the employee is not protected by the ADA. In other words, a disabled employee's right to request a reasonable accommodation under the ADA does not extend to a nondisabled employee who may need to care for an individual with a disability.[9] In these circumstances, a claim under the Family Medical Leave Act, if available, is the better legal avenue to pursue.

> ***"While other cases have failed to sustain claims under the association provision, many of these cases sought protection for associations with tenuous relationship ties."***

The ADAAA and its implementing regulations will undoubtedly expand the scope of disability discrimination claims and will reshape how they are litigated. It is important to recognize that it will impact both employees with disabilities and employees who have associations and relationships with individuals with disabilities. ■

9 EEOC Guidance, 29 C.F.R. app. § 1630.8.

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Paycheck Fairness: A Report From NELA-NY's Gender Discrimination Committee

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At a recent NELA-NITE, the Gender Discrimination Committee asked why, a half-century after the enactment of the federal Equal Pay Act, do women earn 77 cents for every dollar earned by men? What can be done about it? We did not achieve consensus, but we did explore a number of possible answers.

The 77 Cent Statistic

This oft-cited statistic represents the ratio of women's to men's median annual earnings for full-time year-round workers, and it has remained static since 2008.[1] A more dramatic gap exists between the earnings of a composite "average man" and women in some minority groups.[2] In addition, occupation-specific data show the greatest pay gaps exist in professional settings where salaries are individually negotiated and pay transparency is discouraged.[3]

The Federal Equal Pay Act (29 U.S.C. 206(d)) – A Plaintiff's Frustrations

The Equal Pay Act (EPA) could do more to close the wage gap. The statue requires a plaintiff within the same establishment as her male comparator(s) to show that she performed equal work on a job requiring equal skill, effort and responsibility. The "equal work" showing (at the EPA's second prima facie prong) makes sense where a comparator is working on the same factory line, as was contemplated when the EPA was passed as a 1963 amendment to the Fair Labor Standards Act (FLSA).[4] But the standard is more difficult to apply to the work of administrative, executive and professional employees (who have been covered by the EPA since 1972).

Regulations and case law define "equal work" as substantially equal, but not necessarily identical.[5] In practice, courts often use minor disparities in job tasks to find work is unequal. They also defer to employers' claims that work in different departments cannot be compared, making it extremely difficult for professional women to assert EPA claims.

> ***"Regulations and case law define 'equal work' as substantially equal, but not necessarily identical. In practice, courts often use minor disparities in jobtasks to find work is unequal."***

The EPA's fourth affirmative defense, which permits an employer to pay a woman less if her lower pay is "based on any other factor other than sex," threatens to eviscerate the rule. While the Second Circuit requires a showing that the pay differential is justified by business necessity and related to the job in question, the Seventh and Eighth Circuits do not. Moreover, courts (including those within this Circuit) typically permit employers to determine pay based on factors that may reflect inequality within the job market, such as prior salary, requested salary, and need to match another's salary offer.

Other challenges facing plaintiffs are the EPA's limited remedies (there are no compensatory or punitive damages) and its requirement, as part of the FLSA, that individual plaintiffs opt-in to class action litigation. These challenges are, perhaps, more frustrating in light of the strengths of the EPA, when compared to Title VII, in that the EPA: (1) is a strict liability statute, that requires no showing of "intent"; (2) has no administrative exhaustion requirement; and (3) has a two or three year statute of limitations (depending on whether the violation was willful).

The Paycheck Fairness Act – Proposed Update to the EPA

The Paycheck Fairness Act (PFA), sponsored by Rep. DeLauro (D-CT) and Sen. Reid (D-NV), would amend the EPA by permitting recovery of compen-

See PRACTICE POINTERS, page 18

1 See Reports by Obama Administration and Institute for Women's Policy Research at http://www.gpoaccess.gov/presdocs/2010/DCPD-201000613.pdf and http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications.

2 *Women in America, Indicators of Social and Economic Well-Being*, U.S. Dept. of Commerce, Econ.and Statistics Admin. and Exec. Office of the Pres., Office of Management and Budget (March 2011). At http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf

3 Recent occupational data, compiled by the Institute for Women's Policy Research can be found online at http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications.

4 See discussions of legislative history in Juliene James, Note: *The Equal Pay Act in the Courts: A De FactoWhite-Collar Exemption*, 79 N.Y.U. L. Rev. 1873 (2004) and Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17 (2010).

5 29 C.F.R. 1620.13(a); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995).

ENGLISH-ONLY, from page 1

morale, contradictory to diversity initiatives, and bad business overall.

English-only policies have long been criticized and targeted by the Equal Employment Opportunity Commission. In addition to Title VII of the Civil Rights Act of 1964, English-only policies may also violate other statutes such as Sections 1983 and 1981 of 42 U.S.C., as well as state and city laws.[4] Although Title VII does not provide that language is a protected category, the EEOC makes the obvious connection of language and national origin, finding that language is an "essential national origin characteristic," and therefore, English-only policies should be closely scrutinized for compliance with Title VII's prohibitions against national origin discrimination.[5] The Supreme Court has also noted that language "elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn," which "all too often result from or initiate racial hostility."[6]

Although the EEOC's guidelines provides that a blanket English-only policy *per se* satisfies the plaintiff's burden to show a prima facie case of discrimination, courts in the Second Circuit have not adopted this standard.[7] Rather, courts in this circuit have held that an English-only policy may be a basis for a hostile work environment claim based on national origin discrimination if the employee shows (1) that the employer's policy had a significant and adverse impact on the employee; and (2) the employer's justified business reason for the policy is pretextual.[8]

A conclusory allegation that an English-only policy has created a hostile work environment is insufficient to establish a hostile work environment claim.[9] However, courts will consider an English-only policy that unreasonably restricts an employee's ability to speak his native language as evidence of harassment.[10] Thus, a court will be less likely to grant an employer's motion for summary judgment where a restrictive English-only policy is accompanied by other indicia of discrimination, such as verbal harassment, excessive scrutiny, or a failure to explain the language policy to employees.[11]

English-Only Policy Must Result in an Adverse Employment Action

In order to prevail on a discrimination claim, an employee still must show that an employer's English-only policy resulted in an adverse employment action. As with any other discrimination action brought under Title VII, an "adverse employment action" in an English-only policy claim is a "materially adverse change in the terms and conditions of employment . . . more disruptive than a mere inconvenience or an alteration of job responsibilities."[12] Where the employee is seeking to prove a hostile work environment claim, the employee must show that the workplace is "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[13]

Disciplinary write-ups may constitute adverse employment actions "if they affect ultimate employment decisions such as promotions, wages or termination."[14] Although threats of disciplinary action and excessive monitoring will not in and of themselves constitute adverse employment actions, they could also support an employee's hostile work environment claim if they are "part of a broader campaign of harassment and retaliation."[15]

English-Only Policies Must Be Supported by a Legitimate Business Justification

An employer must show that the English-only policy is consistent with business necessity and that it is job-related in order to shift the burden back to the employee. An employer "cannot satisfy this burden simply by demonstrating the English-only rule is convenient or beneficial to its business. Instead, [the employer] must show that the asserted business necessity is vital to the business."[16] Limited English-only policies have been upheld where their purpose was to "facilitate[e] customer relations" or "to promote communication among employees and supervisors."[17] The EEOC's Compliance Manual further provides that an English-only policy may be justified by a business necessity such as "communication with customers, coworkers or supervisors" or "to enable a supervisor . . . to monitor the performance of an employee."[18] Some examples of legitimate business justifications that courts have upheld include "promoting employee cohesion," "improving communication with customers," and "promoting politeness to customers."[19]

> ***"Limited English-only policies have been upheld where their purpose was to 'facilitate[e] customer relations' or 'to promote communication among employees and supervisors.'"***

Selective Enforcement of an English-only Policy

If the employer provides a legitimate business reason for the policy, an employee may still prevail if the employee can show that a discriminatory reason motivated the employer or the employer's reason is not credible. Courts will be quick to find an English-only policy to be a pretext for discrimination if an

See ENGLISH-ONLY, page 12

Attorneys' Fees — Some Words for the Wise

By Stephen Bergstein
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Maintain contemporaneous time records

In December 2010, the Court of Appeals resolved an attorneys' fees appeal, remanding the case to the district court to reconsider the fee application because the prevailing attorney did not provide the court with contemporaneous time records, a requirement under Second Circuit precedent.

In that case, **Scott v. City of New York**,[1] the Second Circuit noted that, in **New York State Association for Retarded Children v. Carey**,[2] it held that "all applications for attorneys' fees ... should normally be disallowed unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done." This language was a problem for Thomas Puccio, Esq., the attorney in **Scott**, who was entitled to more than $500,000 in fees for his work on a collective action case under the Fair Labor Standards Act. His time records were not contemporaneously maintained, and when the case was remanded to the district court, it seemed possible that counsel would get no money at all. The Court of Appeals in December 2010 provided the governing standard for the district court:

> While we can imagine rare circumstances where an award of fees might be warranted even in the total absence of contemporaneous records — such as where the records were consumed by fire or rendered irretrievable by a computer malfunction before counsel had an opportunity to prepare his application — the circumstances justifying such an exception would have to be found by the awarding court and laid out in sufficient detail to permit review of the justification on appeal.

This is a tough standard to meet. Counsel's office did not burn down. Nor did his computer malfunction. However, on remand, District Judge Shira Scheindlin again awarded counsel his attorney's fees.[3] The district court stated that "there must be an exception under **Carey** based on my personal observation of Puccio and his contribution to this extraordinarily lengthy and complex litigation." Judge Scheindlin reasoned:

> Puccio, who is primarily a criminal defense attorney, is a highly respected member of the bar. Puccio, and his outstanding reputation as a skilled litigator and effective advocate, are well known to this Court.
>
> It would be fundamentally unfair and inequitable to deprive Puccio of an already deeply discounted fee award where this Court personally observed the vital and integral role he played in this protracted FLSA action.
>
> I personally observed Puccio function as lead trial counsel in a trial that lasted sixteen days, from 10:00 a.m. to 4:30 p.m. each day. Puccio was present for the entire trial and he gave the closing argument. When a modest travel allowance is added, the trial alone accounts for approximately 120 hours of in-court work. In addition, Puccio was present for most of the numerous in-person and telephone conferences that preceded the trial. I also received many letters and faxes from Puccio throughout the course of the litigation.
>
> While Puccio has not presented this Court with the type of exception noted by the Second Circuit - *e.g.*, a fire or a computer malfunction - fundamental concepts of fairness mitigate against the denial of any fee under the circumstances presented here. I surely appreciate the need for a bright line rule requiring the submission of contemporaneous time records. And I am loathe to create a "personal observation" exception. Nonetheless, given Puccio's extensive involvement in the case for more than six years, his severely reduced fee award, his predominantly criminal practice, and his role as lead trial counsel, no fee would be fundamentally unfair. In sum, despite the fact that Puccio did not submit contemporaneous time records in support of his fee application, I conclude that the deeply discounted original fee award of $515,179.28 is reason-

See ATTORNEYS' FEES, page 19

It is important for lawyers to remember that they have to maintain contemporaneoustime records in civil rights cases if they want the trial court to grant their attorneys'fees motions when they win the case.

1 626 F.3d 130 (2d Cir. 2010).
2 711 F.2d 1136 (2d Cir. 1983).
3 2011 WL 867242 (S.D.N.Y. March 9, 2011).

ENGLISH-ONLY, from page 1

employer does not enforce the policy with an even hand. For example, a New York district court denied an employer's summary judgment motion where an employee alleged that his employer subjected him to a hostile work environment because his supervisor forbade him to speak Russian during personal phone calls while allowing other employees to speak Spanish during working hours.[20] The court found that if such a policy existed that "specifically targeted plaintiff and his native language with respect to personal conversations, such evidence could be used to support the existence of a hostile work environment based upon his national origin."[21]

English-Only Policies Should not Apply To Off-Duty Conduct

Courts have upheld English-only policies that required employees to speak only English during business hours and while they were in the presence of customers.[22] However, where a bilingual employee is prohibited from speaking a foreign language at all times, including during personal phone calls and during lunch, a court is more likely to find that such a policy results in national origin discrimination.[23] Summary judgment for the employer may be avoided by evidence such as affidavits from co-workers supporting the plaintiff's claim that such a policy was applied during off-duty hours.[24]

Other Evidence of National Origin Discrimination

Other evidence of national origin discrimination can be helpful to prove that an employer's proffered reason for an English-only policy is a pretext for discrimination. In **Maldonado v. City of Altus**, the plaintiffs alleged that an English-only policy created a hostile work environment for Hispanic workers.[25] In reversing the District Court's grant of summary judgment for the defendant, the Tenth Circuit Court of Appeals noted the extensive allegations of taunting, harassment, and racial jokes that resulted from the policy.[26] Likewise in **Levitant v. City of New York Human Resources**, the court denied an employer's summary judgment motion on a hostile work environment claim where a restrictive and selectively enforced English-only policy was accompanied by insults and excessive monitoring by the employer.[27] The court noted that "[t]hough the alleged excessive monitoring and the alleged insults referring to plaintiff's racial and/or national origin (if credited) might not be sufficiently pervasive or severe to constitute a hostile work environment if viewed in isolation, there is also evidence that plaintiff was given a directive forbidding him from speaking his native language in personal conversations while others were permitted to do so."[28] Just as other evidence of national origin discrimination may be very helpful in showing that the employer's proffered justification was pretext, the absence of any such evidence may be a problem to a plaintiff trying to avoid summary judgment.[29]

Courts Will Consider Whether the Employee is Bilingual and Hired to Speak the Foreign Language for Business Purposes.

Courts have been more accepting of English-only policies where the affected employees are bilingual and have little trouble communicating without violating the policy.[30] Where an English-only policy is enforced against employees who are monolingual in their native tongue or who have difficulty communicating in English, a court is more likely to conclude that the employer's justification for the policy is pretextual. One court noted that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth."[31] However, where the employee has little difficulty communicating in English, this factor will tend to negate a finding of pretext.

Courts are hesitant to find pretext where the employee is required, as part of his job duties, to speak the foreign language at issue to customers. Where the employer has a hiring preference for bilingual employees[32] or where "an employee has been asked or required to speak Spanish on the job"[33] may weigh against an inference of discrimination when evaluating a limited English-only policy.

Conclusion

Ultimately, there is no bright line rule to determine whether an English-only policy violates anti-discrimination laws. Rather, courts balance a variety of factors when evaluating these types of claims. These factors range from the purpose of the policy to its application and effects in the workplace. Employers should be wary of applying overreaching policies that may cause hostility and tension among its workforce. The Supreme Court noted the powerful influence of language when it stated that "just as shared language can serve to foster community, language differences can be a source of division."[34]

Endnotes

1 Rodriguez v. City of Rochester, No. 6:11-cv-06256-MAT (W.D.N.Y. 2011).

2 *Id.*

3 Racial Demographics of Area Towns, RocDocs, http://rocdocs.democratandchronicle.com/database/racial-demographics-area-towns (last visited May 23, 2011).

4 *See* Pacheco v. New York Presbyterian Hosp., 593 F. Supp. 2d 599, 604 (S.D.N.Y. 2009) (action alleging violations of Title VII, Section 1981, and New York State and City Human Rights Laws).

5 EEOC Guidelines on Discrimination Because of National Origin, *29* C.F.R. § 1606.7 (Speak English Only Rules) (1980).

6 Hernandez v. New York, 500 U.S. 352, 371 (1991).

7 *See* Pacheco, 593 F. Supp. 2d at 613.

8 *See* Pacheco, 593 F. Supp. 2d at 611-612 (granting summary judgment for employer where plaintiff failed to offer any evidence to disprove employer's legitimate, non-discriminatory business reason for English-only practice); Perez v. New York & Presbyterian Hosp., No. 05 CIV5749 LBS, 2009 WL 3634038 (S.D.N.Y. Nov. 3, 2009); *see also* Roman v. Cornell Univ., 53 F. Supp. 2d 223, 236 (N.D.N.Y. 1999) ("A speak-English instruction may form the basis for an inference of national origin discrimination"); EEOC v. Beauty Enters., No. 3:01CV378(AHN), 2005 WL 2764822, at * 2 (D. Conn. Oct. 25, 2005) (jury instructions should provide that charging parties "must prove that [the employer's] English-only rule has a significant and adverse impact on Hispanic employees in order to prove a prima facie case").

9 Pacheco, 593 F. Supp. 2d at 623.

10 *See* Levitant v. City of New York Human Resources Admin., 625 F. Supp. 2d 85, 100 (E.D.N.Y. 2008).

11 *See e.g.,* Levitant*,* 625 F. Supp. 2d at 100 (employer's excessive monitoring in conjunction with prohibition of employee's native language in private conversations was sufficient to raise genuine issues of material fact); *see also* Maldonado v. City of Altus, 433 F.3d 1294, 1308 (10th Cir. 2006) (employer's adoption of English-only policy without consulting with Hispanic employees is evidence of intent to createhostile work environment)*, overruled on other grounds*, Burlington N. & Santa Fe Ry. Co. v. White, 548

See ENGLISH-ONLY, page 18

Anne's Squibs

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

These are absolutely, positively my last squibs. If you have (or come across) a decision that may be interesting or useful to members of NELA/NY, send it to the editors of the New York Employee Advocate: Stephen Bergstein, steve@tbulaw.com; Jonathan Bernstein, jbernstein@levydavis.com; and Molly Brooks, mbrooks@outtengolden.com.

AGE DISCRIMINATION

Summary Judgment

It does not look as though Congress is going to fix the ADEA to overrule the Gross decision any time soon, but the Second Circuit Court of Appeals does not seem to think that means all age cases should be dismissed. When Judge Charles Siragusa granted summary judgment to a car dealership in an ADEA case, the court of appeals examined the evidence and found it sufficient for a reasonable jury to find that the defendant's explanations for firing the 59-year-old plaintiff were pretextual, and that his age was indeed the "but for" reason he was fired. The employer alleged that the plaintiff was fired because a 36-year-old previous employee "would be a better option," but presented no evidence that the plaintiff's performance was unsatisfactory in any way, while he had presented abundant evidence of good work performance; the employer alleged that he was fired for his "negative" and "lackadaisical" approach to his work, but his supervisor affirmed that he had performed well enough despite being disorganized. On the other hand, there was undisputed evidence that the plaintiff was subjected to negative and arguably ageist comments at work, such as questions about whether he had memory lapses, and jokes about his bald head. His supervisor and the dealership's president participated in these "jokes," which were also repeated to customers. Finally, the employer alleged that the plaintiff had failed and refused to embrace new initiatives (which the court noted fed into an ageist stereotype about resisting change and new approaches), but he presented evidence that he did participate in new initiatives and, in fact, created one of his own that improved the dealership's productivity. The court rejected as probative evidence that others older than 59 were not fired, since a reasonable jury did not have to find that it believed older employees were unsuited for all jobs -- only that it believed the plaintiff's age made him unsuited for his specific job. Note, this decision was a summary order without precedential effect. **O'Reilly v. Marina Dodge, Inc**., --- F.2d ---, 2011 WL 1897489 (2d Cir. 5/19/11).

ARBITRATION

Judges really do not like being asked to vacate arbitration awards. Judge Paul G. Gardephe (S.D.N.Y.) declined to do so after a JAMS arbitrator – retired U.S. District Judge John Lifland – issued an award of only $30,295.51 instead of $349,624.38 on a contract claim. The issue involved a self-renewing ("evergreen") employment contract, and the employer had terminated the complainant's employment just before the end of the term but had then failed to give him the required written notice of non-renewal. The arbitrator held that the termination of the employee's employment precluded the automatic renewal of the contract, so he was entitled only to be paid for the remainder of the term during which he was terminated, and not for an additional one-year term as well. The arbitrator declined to "correct" the award when requested to do so pursuant to JAMS' rules, and the employer petitioned for an order confirming the arbitration award; the employee cross-moved to modify it. Judge Gardephe noted that the Federal Arbitration Act provides for only very narrow bases to disturb an arbitration award, such as an arithmetic error, a ruling outside the mandate of the arbitrator, or misconduct, corruption, or fraud. The Second Circuit has also stated that an arbitration award can be vacated if the arbitrator acted in "manifest disregard of the law," a much higher standard than it sounds like. Here, the complainant argued that the arbitrator's interpretation of the automatic renewal and termination provisions was "wrong," but that was not enough, and the court confirmed the award in the lower amount. **Silver Entertainment LLC v. Rabin**, --- F. Supp. 2d ---, 2011 WL 1097548 (S.D.N.Y. 3/21/11).

ATTORNEYS' FEES

Contemporaneous Time Records

The Second Circuit Court of Appeals could have entitled one of its recent decisions "No means no." An attorney who had prevailed in an FLSA case against the City of New York had failed to keep any contemporaneous time records. The district court (Shira A. Scheindlin, S.D.N.Y.) nevertheless granted fees, and on appeal the Second Circuit Court of Appeals remanded to the district court for an explanation. The explanation was that the district judge had seen the plaintiff's attorney in the courtroom and considered his work to be of high quality, constituting the kind of "unusual circumstances" noted in **New York State Association for Retarded Children v. Carey**, 711 F.2d 1136 (2d Cir. 1983) as an exception to the contemporaneous-records requirement. The court of appeals disagreed, holding that **Carey** "establishes a strict rule from which attorneys may deviate only in the rarest of cases ... justified by truly unusual circumstances beyond the applying attorney's control." Personal observation by the district judge was not such a circumstance, and so the plaintiff's attorney's fee award of $515,179.28 went away. However, the court noted that "entries in official court records (e.g. the docket, minute entries, and transcriptions of proceedings) may serve as reliable documentation of an attorney's compensable hours in court at hearings and at trial and in conferences with the judge or other court personnel,"

See SQUIBS next page

SQUIBS, from page 13

so a limited award of fees based exclusively on official court records might be appropriate -- although this was not an invitation to district courts to speculate. The lesson to all of us does not need emphasis here. **Scott v. City of New York**, --- F.2d ---, 2011 WL 1990806 (2d Cir. 5/24/11) (per curiam; Miner, Katzman, and Hall, JJ.).

Lodestar Method and Rates

Magistrate Judge Andrew J. Peck (S.D.N.Y.) included some good language in a decision on fees in a case that had settled in all other respects. He noted that it makes no difference if the fees exceed the damages recovered, "because the award of attorneys' fees in such cases encourages the vindication of Congressionally identified policies and rights." He also decisively rejected the defendants' argument that the fee award should be reduced because the defendants allegedly had financial difficulties, noting that they had submitted no financial evidence and that their financial condition "in any case is better than that of their former employees." He noted that the Supreme Court, in **Perdue v. Kenny A.**, 130 S. Ct. 1662, 1672-73 (2010), "appears to cast doubt on the viability of the Second Circuit's 2008 opinion in **Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany**, 522 F.3d [182,] 190." He granted the requested rate of $450 per hour for a 2001 graduate who is a partner at a well-respected firm, $300 and $275 for associates, and $300 for co-counsel at a not-for-profit organization. He reduced the total fees by 7% for some duplication of work but granted a total of $91,788 in fees and costs. The plaintiffs were represented by NELA/NY member Maia Goodell. Congratulations, Maia! **Allende v. Unitech Design, Inc.**, --- F. Supp. 2d ---, 2011 WL 891445 (S.D.N.Y. 3/15/11).

Offer of Judgment

See **Barbour v. City of White Plains**, discussed under "Procedure."

CONTRACT

Covenant of Good Faith and Fair Dealing

The CFO of a large corporation, who had received a grant of stock options under the company's Long-Term Incentive Plan (LTIP), tried to exercise the options on the last possible date to do so. Actually, the company argued, he was untimely – since technically the last date was Sunday, November 30, 2008, and he hand-delivered the exercise notice on Monday, December 1, 2008. (The district court, Shira A. Scheindlin, J. (S.D.N.Y.), found that under N.Y. General Construction L. § 25, the exercise was timely, and the court of appeals agreed.) The company changed course several times and fired the soon-to-be-plaintiff on December 11, then retroactively re-valued the options for him alone so that they were worth $31 per share (total value $2,212,500) instead of $58 per share (total value $7,612,500). Not surprisingly, he sued. The company pointed to language in the LTIP that gave the company discretion to interpret, suspend, cancel, or terminate existing awards and the specific lack of any obligation to treat all participants alike. (The LTIP was not an ERISA plan.) The district court and the court of appeals both found this argument unpersuasive and held that the retroactive re-valuation, applied only to the plaintiff and only after he had exercised the options, violated the duty of good faith and fair dealing that is implied in all contracts in New York. The court of appeals also declined to order sanctions against the plaintiff under Rule 11, Fed. R. Civ. P., for arguing that the options were securities and that he had a claim under § 10(b) of the Securities Exchange Act of 1934, even though he lost on that claim. Note, the Eric M. Nelson at Winston & Strawn who represented the company is a different Eric M. Nelson from the NELA/NY member. **Fishoff v. Coty Inc.**, --- F.3d ---, 2011 WL 744945 (2d Cir. 3/4/11) (Rosemary Pooler, J., joined by Amalya Kearse and Peter Hall, JJ.).

Oral Contract

A former employee of a capital management company apparently left after getting a bonus for the first half of 2007, but never got a bonus for the second half of the year. (The court (Joan M. Kenney, J., Sup. Ct. N.Y. County) noted several times with visible annoyance that it was not given complete deposition transcripts and was not told when or why the plaintiff left the employer.) The plaintiff alleged that the firm's president had assured him that his bonus for the second half of the year would be "better than ever," and that he had come into possession of a memorandum giving everyone's percentages, including his. He also had a memorandum from one unidentified person to another (the lack of identity increased the court's irritation) saying that after the president was paid, the rest of the fund in question would be distributed to the "staff," which included the plaintiff. The plaintiff conceded that the president's promise was "non-committal" and that the ultimate determination was "arbitrary." It is possible that if the plaintiff had made a better factual case, he might have prevailed, but it is not likely; with the skimpy facts he did present, his case was doomed and the court granted summary judgment. **Krutiansky v. Humes**, --- N.Y.S.2d ___, 2011 WL 844101, NYLJ 3/15/11 (Sup. Ct. N.Y. Cty. 3/1/11).

Sales Commission

A salesman whose employment was terminated just as a big commission was about to come in sued for breach of contract, breach of implied contract, unjust enrichment, negligent misrepresentation, and promissory estoppel. Both he and his former employer cross-moved for summary judgment. The court noted that the employer continued to send the salesman post-termination commissions on other sales and said that the timing and nature of the employee's termination "casts significant doubt upon [the employer's] motives -- doubt from which a reasonable jury could infer that [the employer] was attempting to evade its commission payment obligations." The court denied the employer's motion for summary judgment with respect to the breach of contract claim but granted it on all the employee's other claims, which his papers had failed to address. **Witkowski v. Adept Management**

See SQUIBS next page

SQUIBS, from page 14

Systems, LLC, --- F. Supp. 2d ---, 2011 WL 1770439 (N.D.N.Y. 5/9/11) (Gary L. Sharpe, J.).

DISABILITY DISCRIMINATION

An employee who suffered from bowel cancer and had at least three separate surgeries, each requiring a six-week leave of absence, was found **not** to have a disability under the ADA. Judge David G. Larimer (W.D.N.Y.) found that the plaintiff had "produced no evidence that his impairments – whatever they might have been during his medical leaves of absence – were significantly restrictive, persistent or permanent." (Of course, during the medical leaves of absence the plaintiff would not have been a qualified person with a disability, because he was unable to work at all.) Catch-22! He also had never requested any accommodations, so his failure-to-accommodate claim failed; and he produced no evidence supporting a claim that the employer violated the FMLA, either by denying him leave or by retaliating against him for taking leave. Accordingly, summary judgment was granted dismissing all his claims. **Thomsen v. Stantec, Inc**., --- F. Supp. ---, 2011 WL 1901725 (W.D.N.Y. 5/19/11).

DISCOVERY

Discipline: "Similarly Situated"

A technician who alleged that he was fired because of his race, and not because he had misrepresented his criminal history on his job application, had to ask the court to order his ex-employer first to disclose the investigation reports and disciplinary records of similarly situated technicians, and then to disclose the race of the 20 technicians for whom the records were produced. Justice Marcy S. Friedman (Sup Ct. New York Cty.) held that it was "axiomatic that the race of the employees subject to security investigations is relevant and material to plaintiff's claim" and ordered them produced regardless of whether, as the employer claimed, the plaintiff had failed to make a sufficient showing that his termination was pretextual. The employer's alternative claim that the other employees had been charged with different infractions from plaintiff's (e.g., motor vehicle violations or workplace violence, not falsifying information about criminal history) was also rejected, since the circumstances only had to bear "a reasonably close resemblance, ... rather than a showing that both cases are identical." NELA/NY members Daniel Alterman, Arlene Boop, and Nicole Denver represented the plaintiff. **Godbolt v. Verizon New York Inc**., --- N.Y. Supp. 2d ---, Index No. 109611/09 (Sup. Ct. N.Y. Cty. 5/17/11).

ANNOUNCEMENTS

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

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

Please e-mail Shelley nelany@nelany.com

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

ERISA

Fiduciary Duty

The U.S. Supreme Court distinguished a prior case, **Mertens v. Hewitt Associates**, 508 U.S. 248 (1993), which had prevented a federal court from awarding monetary damages under ERISA against a non-fiduciary private firm that provided actuarial services to a pension trustee, and held that actual fiduciaries of a pension plan could be liable for "make-whole" relief for their breach of fiduciary duty. Since ERISA governs not only pension plans but other kinds of employee benefit plans as well, such as health insurance, 401(k) plans, and long- and short-term disability benefit plans, this decision is potentially far-reaching. The Court said that traditional equitable principles applied to the relationship between beneficiaries of such plans and fiduciaries responsible for administering them. **CIGNA Corporation v. Amara**, 130 S. Ct. 1754 (5/16/11).

FAIR LABOR STANDARDS ACT

Administrative Exemption

An account manager for a company that sold customized computer software to advertising agencies sued under the FLSA, contending that she had not received overtime pay to which she was entitled. The company argued that her job fell under the administrative exemption to the overtime entitlement because her job required her to exercise discretion and judgment. The district court (N.D. Ill., Eastern Div.) granted summary judgment to the employer, and the Seventh Circuit Court of Appeals, in an opinion by Judge Richard Posner, agreed. It seemed to make a difference to Judge Posner that the employee's job was performed off-premises "where [she] can't be supervised and so if entitled to overtime would be tempted to inflate [her] hours." Her hours varied from week to week (a fluctuating workweek), but that was not an issue here; what mattered to the court was the Chief Operations Officer's description of how complex the job was and how much independent judgment was required to understand the customer's needs and customize the software to fit them. **Verkuilen v. MediaBank, LLC**, --- F.3d ---, 2011 WL 2084074 (7th Cir. 5/27/11).

Minimum Revenues

A defendant's contradictory evidence of its own annual revenue helped to torpedo its defense that it did not have over $500,000 in annual revenue as the FLSA requires. A group of plaintiffs sued for unpaid overtime, alleging that they worked 72 hours a week in the defendant's laundry and dry-cleaning store and plant for sub-minimum wages. They also sought damages for retaliation. Judge Joseph Bianco (E.D.N.Y.) found that the timing of the plaintiffs' termination, together with evidence that non-plaintiff junior employees were terminated 3 weeks after and that the plaintiffs were not rehired after a business downturn improved, were enough to defeat summary judgment on the retaliation claim; the claim proceeded even though the plaintiffs sought only

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emotional distress and punitive damages, not back pay. As for the $500,000 minimum in revenues, the court found that a significant discrepancy between the defendant's handwritten ledger and its tax return (showing far less income) created a disputed issue of material fact. The plaintiffs were represented by NELA/NY member Jonathan Bernstein. **Cardenas v. 77 Smile Cleaners, Inc.**, --- F. Supp. 2d ---, No. 09 Civ. 2867 (E. D.N.Y. 6/15/11).

PLEADINGS

Amendment

An employee who had alleged that his employer had breached an oral contract to allow him certain stock rights lost a motion to dismiss at the trial level and then in the Appellate Division. He then sought to amend his complaint to allege breach of a **written** contract, based on documents that he obtained in discovery while the motion to dismiss was pending, and the employer moved again to dismiss. The employer argued that the first dismissal was the law of the case, and the trial court held that it was powerless to permit the amendment since the Appellate Division had affirmed the first dismissal. This time, the Appellate Division disagreed. The Appellate Division noted that "[i]t is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party." The appellate court found that "until the instant motion, plaintiff never alleged the existence of a **written** agreement. Accordingly, neither the motion court nor this Court has had the opportunity to consider the merits of that claim, which, necessarily, cures the statute of frauds violation" which had doomed the first complaint. In addition, mere tardiness without prejudice is insufficient to defeat a motion to amend. Since the defendant had shown no prejudice or surprise, the appellate court held that the motion court should have granted the plaintiff leave to amend the complaint. NELA/NY member Rachel Bien represented the plaintiff. **Kocourek v. Booz Allen Hamilton Inc**., 900 N.Y.S.2d 1 (1st Dep't 6/14/11).

PROCEDURE

Offer of Judgment

In a non-employment civil rights case, three women sued the City of White Plains for false arrest, excessive force, malicious prosecution, and failure to intervene under 42 U.S.C. § 1983 and state law. The defendants made a Rule 68 offer of judgment to each plaintiff for the "total sum of TEN THOUSAND DOLLARS AND 00/000 ($10,000) for the settlement of all claims pending against the defendants in this action." All three plaintiffs accepted, and thereafter judgment was entered in favor of each plaintiff for $10,000 *plus* costs and attorneys' fees. Six days later, plaintiffs' counsel submitted a fee application. The defendants objected that they had intended to include the fees and costs in the $10,000, that the plaintiffs were not prevailing parties anyway, and that the request was excessive -- but their objections only created more work, and more fees, for the plaintiffs' attorneys. Judge Robert P. Patterson (S.D.N.Y.) noted that it was settled law that an offer of judgment had to say specifically that it included costs and fees, otherwise they were not included and would be awarded on top of the sum stated in the offer of judgment. The court rejected the defendants' other arguments (the plaintiffs had deducted seven hours' work in response to the objections) and gave the plaintiffs every penny they asked for: $290,997.94. NELA/NY member Scott Korenbaum received $450 per hour and his colleague Michael Spiegel received $625 per hour. The court also hinted that the United States Supreme Court had abrogated the part of the Second Circuit's **Arbor Hill** decision that had rejected the lodestar approach to fee calculation. Congratulations, Scott! **Barbour v. City of White Plains**, --- F. Supp. 2d ---, 2011 WL 2022884 (S.D.N.Y. 5/24/11).

RESTRICTIVE COVENANTS

Applying Connecticut law, a federal court in the District of Columbia held that unless a noncompete agreement specifically says that violation will toll the period of non-competition, it does not. A former employee of an investment banking firm signed a restrictive covenant when she became employed, saying that she would not compete with the firm after her termination as long as the firm kept paying her. After her termination, however, and while still being paid salary and benefits, she began working for a competitor. (Apparently the question did not come up whether the noncompete would be unenforceable altogether because of a dismissal without cause; in New York the consensus is that it would not be.) The parties agreed to arbitrate the ex-employer's claim for damages, so the only questions before the district court were injunctive and declaratory relief. The court (Mark R. Kravitz, J.) deferred the declaratory judgment question and held that once the restricted period ended (May 5, 2011), the request for injunctive relief was moot. **Aladdin Capital Holdings, LLC v. Donoyan**, --- F. Supp. 2d ---, 2011 WL 2293236 (D. Conn. 6/8/11).

When a former employer seeks a temporary restraining order and a preliminary injunction against an ex-employee based on a noncompete or non-solicit "agreement," the decision on the preliminary injunction generally concludes the case. IBM showed great alertness by filing a complaint and requesting a TRO only one day after an executive notified it that he intended to leave and go to work for Hewlett-Packard, IBM's arch-enemy, and IBM got a TRO initially but not the preliminary injunction it sought. The defendant employee had signed both a noncompete and a non-solicit (customers and employees). In a lengthy decision that included a coda, Judge Loretta Preska (S.D.N.Y.) applied New York law to find that the evidence presented in a four-day hearing did not support enforceability of the covenants. The employee was hired by HP not for proprietary technical knowledge (he had a business, not technical, role at IBM) but because he was a "process-oriented thinker" skilled in managing large teams. HP carefully structured the employee's new job to avoid overlap with duties he had performed and information areas he had had access to at IBM. The court reviewed each area of potential information overlap, such as cloud computing, pricing, and acquisition plans, and found that the employee

See SQUIBS next page

SQUIBS, from page 16

posed no threat to IBM in any of them. Reviewing the requirements for a preliminary injunction with equal care, the court concluded that IBM had not met its burden of proving those elements and denied the preliminary injunction. Plaintiffs' lawyers may find useful the careful discussion of what was not a "trade secret," such as strategic business and marketing plans, "troubled clients," and IBM's strategies to "attack" HP. The court noted that IBM conceded that its noncompetition agreement was "designed not to protect a legitimate business interest but, rather, to keep the leadership talent of IBM from leaving." **International Business Machines Corp. v. Visentin**, --- F. Supp. 2d ---, 2011 WL 672025 (S.D.N.Y. 2/16/11).

SUMMARY JUDGMENT

Age Discrimination

See **O'Reilly v. Marina Dodge**, discussed under "Age Discrimination."

Contract

See **Krutiansky v. Humes**, discussed under "Contract / Oral Contract."

Disability Discrimination

See **Thomsen v. Stantec, Inc**., discussed under "Disability Discrimination."

Fair Labor Standards Act

See **Verkuilen v. MediaBank**, discussed under "Fair Labor Standards Act."

Torts

See **Williams v. Pidgeon**, discussed under "Torts / Negligent Hiring and Retention."

TORTS

Negligent Hiring and Retention

Alleging that his employer knew of the violent propensities of the co-worker who assaulted him, a plaintiff defeated the defendant's summary judgment motion. The employer alleged, not surprisingly, that it had no such knowledge. Besides, it argued, the violent employee had been an independent contractor, since he – a salesman – was paid solely on commission and got a 1099, not a W-2. On the other hand, the company president (who was also an individual defendant) conceded that the assaulting employee was Senior Vice-President of the company and got health benefits through the company. Justice Peter H. Mayer (Supreme Court, Suffolk County) found that affidavits from several co-workers, saying that they had never seen the assaulter behave violently, did not disprove the existence of triable issues of fact. In addition, the claims against the president personally were not dismissed; the plaintiff testified that he had complained to the president many times that the assaulter was verbally abusive and physically threatening. The plaintiff was represented by NELA/NY members Peter Romero and Daniel Alterman. **Williams v. Pidgeon**, --- N.Y.S.2d ---, No. 08-9860 (Sup. Ct. Suffolk Cty. 4/25/11). ■

BIRTH CONGRATULATIONS

NELA member, Juno Turner and husband Pete, had a son, Willoughby on July 21st.

Editor, Molly Brooks and her husband Zach, had a son (name to be determined) on August 1st.

PRACTICE POINTERS, from page 9

satory and punitive damages, changing to an opt-out class action rule, increasing anti-retaliation protections, and requiring employers to report wage data to the EEOC.

The PFA would also amend the EPA's definition of "establishment" but not that of "equal work." The current definition of "establishment" ("the same physical office or facility") would be broadened to include "all workplaces located in the same county or political subdivision of a State." With the change, for example, a female bank teller could compare her salary to that of a male bank teller working at a branch across town. Since the PFA leaves the "equal work" requirement unaltered, a female vice president at that bank would still, in all likelihood, be unable to compare her work to that of male vice presidents in different departments (regardless of branch).

The PFA would amend the fourth affirmative defense to permit differential pay based on "a *bona fide* factor other than sex, such as education, training or experience", and then *only* where an employer can show the factor was: (1) not based on a sex-based differential in compensation; (2) job-related to the position; and (3) consistent with business necessity. This would end the circuit split over business necessity and job-relatedness. It could also increase scrutiny of employers' conclusory salary-matching justifications, requiring them to demonstrate that the basis for the differential (i.e. the market rate) was not itself tainted by sex discrimination. The House's Committee Report recommends employers do this by providing evidence that women's earnings in the given position are not frequently or consistently lower than men's.

Other Models

The PFA's success is uncertain; it failed to achieve cloture in the Senate during last November's lame duck session, but was recently reintroduced. Even if success were assured, are there other avenues that would help to close the pay gap?

The Gender Discrimination Committee also explored other models for addressing pay equity and other legislative efforts, such as the proposed New York State Fair Pay Act, (which passed in the Assembly and is currently being considered by the NYS Senate Finance Committee). New York's Act is designed to address pay gaps for minorities as well as for women. It would cover "equivalent" as opposed to "equal" jobs and bar the use of "market rates" as a bona fide factor for paying different wages.

Recommendations

The Committee reached consensus concerning two key avenues for legislative reform (in addition to those proposed by the PFA). First, we support any reform that would increase the transparency of compensation data: victims of pay discrimination cannot address their predicament where they do not know comparators' salaries. Second, we support the liberalization of the "equal work" rule to a "comparable work" or "equivalent work" standard that would employ a broader comparison methodology and apply a totality of circumstances test, based on the particular situation. Considerations might include: (1) technical or specialized knowledge; (2) level of education; (3) managerial skills and experience; (4) human relations skills and experience; (5) capital management skills and experience; (6) physical and/or mental effort; (7) exposure to hazardous working conditions; and (8) whether the requisite level of knowledge or skill may be acquired on the job or require special training.

Finally, the Committee urges advocates to contact their elected representatives, support legislative initiatives, and share ideas for change. We cannot afford to wait another 50 years to effect real progress. ■

ENGLISH-ONLY, from page 12

U.S. 53 (2006).

12 Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (internal citations and quotations omitted).

13 *See* Levitant, 625 F. Supp. 2d at 97 (citing Howley v. Town of Stratford, 217 F.3d 141, 153 (2d Cir. 2000)).

14 Knight v. City of New York, 303 F. Supp. 2d 485, 497 (S.D.N.Y. 2004) *aff'd*, 147 F. App'x. 221 (2d Cir. 2005).

15 *See* Levitant, 625 F. Supp. 2d at 98-100 (supervisor threatened to write up employee when he witnessed employee speaking Russian during personal telephone calls).

16 EEOC v. Beauty Enters., 2005 WL 2764822, at * 3 (citing Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97 (2d Cir. 2003)).

17 Pacheco, 593 F. Supp. 2d at 614-615 (collecting cases).

18 EEOC Compliance Manual § 13-V(C)(1) ("Application of Title VII to English-Only Rules") (Dec. 2002).

19 *Perez*, 2009 WL 3634038 at *14 (internal citations and quotations omitted).

20 Levitant, 625 F. Supp. 2d 85 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim).

21 *Id.* at 99-100; *see also* Velasquez v. Goldwater Mem'l Hosp., 88 F. Supp. 2d 257, 263 (S.D.N.Y. 2000) ("if plaintiff were able to present evidence that other employees were permitted to speak in, for example, Chinese or Portugese, but not Spanish, such evidence could support an inference of intentional discrimination on the basis of national origin").

22 EEOC v. Sephora USA, LLC, 419 F. Supp. 2d 408 (S.D.N.Y. 2005).

23 *See* Levitant, 625 F. Supp. 2d at 101 (denying employer's summary judgment motion to dismiss plaintiff's hostile work environment claim); EEOC v. Premier Operator Servs., 113 F. Supp. 2d 1066, 1069 (N.D. Tex.2000) (employer prohibited employees from speaking Spanish at all times, including lunch and anywhere inside the building).

24 Perez, 2009 WL 3634038 at *1, 13.

25 433 F.3d 1294, 1301 (10th Cir. 2006).

26 *Id.*

27 625 F. Supp. 2d at 101.

28 625 F. Supp. 2d at 101.

29 Perez, 2009 WL 3634038 at *14 ("Circumstantial evidence of discriminatory intent is lacking. Plaintiff's evidence of racial slurs and jokes is based solely on his own allegations and has not been substantiated by a third party's affidavit; nor do his allegations even indicate that jokes and slurs were common occurrences . . .").

30 Pacheco, 593 F. Supp. 2d at 613; Perez, 2009 WL 3634038 at *14 (*citing* Pacheco, 593 F. Supp. 2d at 613).

31 Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).

32 *Id.*

33 *Id.* (*citing* Long v. First Union Corp. of Virginia, 894 F. Supp. 933, 942 (E.D. Va. 1995) *aff'd*, 86 F.3d 1151 (4th Cir. 1996).

3 Hernandez v. New York, 500 U.S. 352, 371 (1991); *see also* Pacheco, 593 F. Supp. 2d at 612 (*citing* Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (noting that "[l]anguage may be used as a covert basis for national origin discrimination")).

ATTORNEYS' FEES, from page 11

ably supported by the record in this case and my personal observation of Puccio's efforts throughout this litigation.

This reasoning may have the ring of common sense, but it was not appropriate under the Second Circuit's test in this case. On May 24, 2011 taking up the case again, the Court of Appeals held that the failure to provide contemporaneous time records may be excused only in extreme cases.[4] The district court's equitable ruling in counsel's favor did not suffice, as that kind of judgment is not fair to lawyers who are not well-known to the court or do not otherwise have stellar reputations.

On the other hand, the Second Circuit found that the district court may award fees in a case like this if it is clear from the record that counsel did try the case and also attended court conferences. To that end, while the "personal observation" exception does not satisfy the Second Circuit's stringent standard, Judge Scheindlin was on to something. The Second Circuit said, "an award based entirely on the district court judge's personal observation and opinions of the applying attorney ... is contrary to **Carey** and must be vacated." Yet, we know the lawyer did try the case. So, the Court of Appeals says, "entries in the official court records (*e.g.*, the docket, minute entries, and transcriptions of proceedings) may serve as reliable documentation of an attorney's compensable hours in court at hearings and at trial and in conferences with the judge or other court personnel. Where the court's docket reflects that Puccio was in the courtroom participating in trial or was in chambers in conference with the judge and other counsel, these entries, comparable to contemporaneous time records, may be effective substitutes for Puccio's own contemporaneous records." But the Second Circuit says it does not want an attorneys' fees award based on the kind of conjecture that the district court engaged in, *i.e.*, awarding fees based on 120 hours of trial time.

The case is remanded once again to the district court to recalculate counsel's attorneys' fees. It looks like counsel will not get the $515,000 in attorneys fees that the district court had originally awarded him. The award will be limited to counsel's work that is reflected in the district court's docket entries. But under the Court of Appeals' recent ruling, he will get something out of this case.

The lesson here is to contemporaneously maintain time records while working on a civil rights case that provides for statutory fee-shifting. Time management software allows you to do this on your computer. You can also keep records the more traditional way, in a notebook or on a legal pad and then input those records into the computer. While the courts do not require that you provide excruciating detail in summarizing your time expended on a case, the time records must be specific enough to allow the court to know the nature of the work, *i.e.*, "prepare plaintiff for deposition, 4.25 hours."

Carefully scrutinize routine documents, including Rule 68 offers

Another recent decision favored the plaintiff. It reminds us to carefully scrutinize Rule 68 offers to ensure that defendants have included attorneys' fees in the offer. If the Rule 68 offer does not allow for attorneys' fees, plaintiff's counsel may seek them through the district court.

Offers of Judgment under Rule 68 allow the defendant to offer to settle the case. Under the rule, if plaintiff wins the case but recovers less than the Rule 68 offer, then plaintiff pays the defendants' costs and forfeits certain attorneys' fees, in particular, any fees expended after the Rule 68 offer was served. A shrewd Rule 68 offer makes the plaintiff think twice about litigating the case any further. Of course, this all requires that the defendant's lawyer serve a proper Rule 68 offer.

In **Barbour v. City of White Plains**,[5] three plaintiffs sued police officers under 42 U.S.C. § 1983 for civil rights abuses. Shortly before trial, defense counsel served on plaintiffs a Rule 68 offer, amounting to $10,000 for each plaintiff. Plaintiffs took the money, and their attorneys moved for attorneys' fees as prevailing parties. They recovered nearly $300,000 in fees. This happened because of how defense counsel worded the Rule 68 offer.

Most Rule 68 offers state that the settlement offer includes attorneys' fees. This one did not. The offer also did not specify that it included costs. It should have, if that was the defendants' intent. Citing **Marek v. Chesny**,[6] Judge Patterson wrote, "if defendants had intended its offers to include costs and attorneys fees, it offers of judgment should have so stated." Not only that, but the judgment signed by Judge Patterson said that judgment was entered in each plaintiffs' favor, "with the costs accrued, including reasonable attorneys' fees, in an amount to be determined by the Court."

Defendants' counsel claimed to be surprised when plaintiffs next moved for attorneys' fees. He argued that the Rule 68 offer was not intended to compensate plaintiffs for all their time expended on the case, and that, at best, the attorneys' fees should have come out of the $10,000 judgment for each plaintiff. Judge Patterson was not persuaded. That's an unreasonable interpretation of the Rule 68 offer, all the more so because defendants' counsel drafted the offer. He should have been more careful. Judge Patterson cited a Southern District case from 1989 that's on all fours: "Defendant's counsel simply erred in failing to protect against an acceptance of the offer followed by a request for costs, including attorneys' fees."

This amounts to a poorly-drafted Rule 68 offer that costs the defendants nearly $300,000, in part due to the huge expenditure of time that plaintiffs' counsel reasonably spent in litigating the case and preparing for trial that was only weeks away from the offer. What should have been a $30,000 settlement costs defendants nearly ten times that amount. Of course, this case serves as a lesson to defense counsel, but it also reminds plaintiffs' lawyers to carefully scrutinize what may appear to be routine documents, including Rule 68 offers. ■

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4 2011 WL 867242, ___ F.3d ___ (2d Cir. May 24, 2011).

5 2011 WL 2022884 (S.D.N.Y. May 24, 2011)

6 473 U.S. 1 (1985).

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