NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 10, NO. 4 July/August 2000 Jonathan Ben-Asher, Editor

EEOC Mediation Alive and Well

You may have thought that funding problems had eviscerated the EEOC's mediation program for early resolution of federal discrimination charges. Actually, mediation is flourishing at the EEOC, and the agency is actively seeking cases for the program.

Over the last few years, the EEOC has aggressively promoted its mediation efforts, which included the use of paid contract mediators. Unfortunately, this fiscal year, Congress did not appropriate the funds the EEOC needed to pay the mediators. However, the agency's New York office has been successful in resolving many cases using both pro bono mediators and its three staff mediators (two in New York City and one in Buffalo.) Over the last year, it has resolved 328 cases through mediation, a success rate of about 75 per cent. Mediation of a case is entirely voluntary, and normally takes place before the employer has filed its position statement in response to the charge.

As described by Michael Bertty, ADR Coordinator for the New York office, the EEOC is careful to train volunteer mediators and evaluate their work. Mediators are trained in a two day program jointly run with Cornell University's School of Labor and Industrial Relations. The training includes sessions on discrimination law, mediation techniques,

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Reeves and Dale: Pretext and Puritanism

by Scott Moss

In **Reeves v. Sanderson Plumbing Products, Inc.**, 120 S. Ct. 2097 (6/12/00), the Supreme Court unanimously disposed of the "pretext-plus" standard, which required additional evidence in discrimination cases beyond proof of pretext. The decision also put to rest the contrary implications of **Fisher v. Vassar College**, 114 F.3d 1332 (1997). In **Boy Scouts of America v. Dale**, 120 S. Ct. 2446 (6/28/00), the case of a scoutmaster terminated for being openly gay, a 5-4 Court struck down New Jersey's application of its sexual orientation discrimination statute as an infringement of the First Amendment "expressive association" rights of an organization opposed to homosexuality. The plaintiff employment bar must be prepared to argue for a broad interpretation of **Reeves** but a narrow interpretation of **Dale**.

For plaintiffs attorneys opposing summary judgment or JMOL, **Reeves** is the state-of-the-art citation for the proposition that plaintiffs need not produce evidence directly reflecting discrimination. Because the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt, a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability.

We can expect defense arguments that **Reeves** says nothing the Court failed to say seven years ago in **St. Marys Honor Center v. Hicks**, 509 U.S. 502 (1993). There the court held that the "factfinder's disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination." **Reeves** explicitly leaves open the possibility of summary judgment in pretext-only cases, even quoting **Fisher** that "[t]his is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. [I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent."

Although **Reeves** reins in circuits that treated employees too harshly, it is difficult to find in **Reeves** any quotation that is not a paraphrase of one in **St. Marys Honor Center**. In this view, the case was not a pro-plaintiff leftward march, stretching the bounds within which plaintiffs can survive defense motions. It simply reiterated the existing standard and halted the rightward march of rogue circuits.

Plaintiffs' attorneys can argue that **Reeves** does curb summary judgment because once pretext has been shown, there is limited room for a defense verdict. **Reeves'** example of when pretext would not suffice is if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to [pretext] ... and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

Reeves appears to envision a new stage of burden shifting. Once the employee proves pretext, the employer can avoid a plaintiff's verdict only by meeting a burden of proving conclusively some other, nondiscriminatory reason, such as with independent evidence. Thus, **Reeves** is an important holding that proof of pretext presumptively, absent proper rebut-

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The NELA/NY
Calendar of Events

September 12th • 6:00
Sexual Harassment Committee
1740 Broadway
25th Floor

September 13 • 6:30
NELA Nite
Speaker: Randolph Wills
Deputy Commissioner - NYC Commission on Human Rights
Topic: New York City Commission on Human Rights
CLE credit available

September 14 • 6:00
Judiciary Committee
1740 Broadway
25th floor

September 20 • 6:30
Board of Directors Meeting
1501 Broadway –
8th Floor

October 4
Third Annual Gala Dinner
Yale Club of New York City
Hold The Date

October 11 • 6:30
Bar Talk
Grand Hyatt-New York
42nd Street - between Park and Lexington
(next to Grand Central Station)
Sun Garden, Level 1

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

October 18 • 6:30
NELA Nite
Speakers: JAMS Endispute
Topic: Successful Strategies for Handling an ADR
CLE Credit available

November 1 • 6:30
Bar Talk
Grand Hyatt-New York
42nd street between Park Avenue and Lexington
(next to Grand Central Station)
Sun Garden, Level 1

November 3-4
NELA Fall Regional Conference: Federal Trial Practice for Plaintiffs' Lawyers
Yale Club of New York City
Save The Dates

December 4 • 6:30
NELA Nite
Topic & Location to be announced

Attention E-mailers

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

The updated NELA/NY membership directory is enclosed.

The deadline for submissions for the next issue of the *New York Employee Advocate* is September 19.

A Word from Your Publisher

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

Items for the calendar may be submitted by calling Shelley Leinheardt:
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Filings, Trials and Settlements

by Jonathan Ben-Asher

In this space we highlight cases brought, tried and settled by members of NELA/NY. Please e-mail your news to Jonathan Ben-Asher at *jb-a@bmbf.com*. You should include the case citation, court, defendant's attorneys, a brief summary of the legal claims and facts involved, and anything which is particularly striking about the case.

James Brown won a $408,000 award for pain and suffering damages on behalf of a client in a sexual harassment case against the **National Park Service**, only to see it vacated minutes later by Judge Sterling Johnson, EDNY. The court set aside the jury's decision on defendant's motion for JMOL, based on insufficient evidence. The trial lasted four days and an appeal is planned.

On the morning of jury selection, **Gerry Filippatos** settled a doctor's age and medical leave discrimination case against **Metropolitan Hospital Center** for roughly $300,000: $170,000 for plaintiff and $129,975 in attorney's fees. **Sherry v. New York Medical College, et al.** (SDNY, Judge Lewis Kaplan). The doctor's evidence included one medical leave-related comment by a decision-maker, evidence of pretext (witness skepticism and inconsistent application of the supposed neutral termination criteria), and an economist's statistical analysis finding age (but not any neutral criteria) to have been a significant factor in the employer's RIF termination choices.

The settlement provided for $170,000 for plaintiff and for attorney's fees as determined by the court. Plaintiff requested $162,469 in fees. The court initially awarded $118,633 but then added $11,342 more on reconsideration. Before discovery, the Corporation Counsel had rejected plaintiff's $130,000 settlement offer; just before the fee motion, defendants offered $60,000 to settle the fee claim.

Jonathan Ben-Asher has filed a breach of contract, fraud and race discrimination case against **SFX Entertainment**, Clear Channel Communications and an individual defendant, on behalf of an African-American former employee of SFX. The complaint alleges that the plaintiff was fraudulently induced to work for defendants' corporate predecessor, based on representations that he would succeed to ownership of a corporate division. Plaintiff claims that defendants' predecessor had no intention of making good on those promises, and merely wanted to portray the company to others as an African-American-owned business. During plaintiff's employment, the company filed documents with vendors (including federal agencies) stating that plaintiff was a co-owner of the business and claiming that the company was a minority-owned enterprise, in order to gain tax and business advantages available to minority ventures. Plaintiff was eventually terminated for alleged insubordination. **Wright v. SFX Entertainment et al. (SDNY, Judge Scheindlin).**

Speakers Bureau

by Judy Katten

The NELA/NY Speakers Bureau is on the move!

Conceived as a cross between a public information resource and a booking agency, the committee is putting final touches on its introductory brochure, while at the same time confronting the task of finding (or as the case may be, generating) appropriate forums for its speakers.

The Committee has compiled a list of some 400 organizations whose members are presumed to be interested in issues relevant to employment law and discrimination. We have sent a preliminary mailing to each of them. As that list continues to grow, the committee members have been following up by calling these organizations to lock in speaking engagements.

One such forum took place on July 13, before "Women In Crisis," a community-based not-for-profit service organization dedicated to providing assistance to those seeking to overcome drug addiction, HIV and AIDS, or criminal records. NELA members Jim Brown and Judy Katten spoke before 25 to 30 men and women, each of whom was attempting to return to the job market.

After introductory remarks and a brief overview of the law by both attorneys, the meeting was opened up to questions from what proved to be a highly informed and committed audience. Many expressed concerns about how far prospective employers could inquire about applicants' past histories, and what responses should be provided on job applications or in interviews. The meeting lasted about an hour, and by all reports was deemed informative and useful to all participants.

As we move into the fall months, the Speakers' Bureau will be swinging into full action. As of this writing, St. John's Law School has already rebooked speakers for its employment law forum, and additional dates throughout the city are soon to follow. NELA members interested in joining the Speakers Bureau should contact Shelly, or Phil Taubman at 212 227-8140.

Representing Civil Services Employees

by James Brown

When discussing the "employment-at-will" doctrine with prospective clients, we have all grown accustomed to addressing the doctrine's exceptions, which include employment in the civil service. This article provides an overview of civil service job protection available to non-federal employees.

Statutory job security for non-federal civil servants employed in New York State is governed by Civil Service Law § 75, which addresses "removal and other disciplinary action". Generally, Section 75 job security is conferred on non-probationary civil servants who qualify pursuant to one of five categories set forth in the statute. Those qualifying for Civil Service § 75 protection include permanent (rather than provisional) civil servants and those serving in the non-competitive class in excess of five years.

Section 75 provides that written disciplinary charges must be filed against a civil servant, and that he or she may not be suspended without pay in excess of thirty days pending the outcome of the disciplinary proceeding. If the employee is acquitted, he or she is entitled to reinstatement with full back pay for the thirty-day suspension if served. A public employer is also obligated to bring any Section 75 disciplinary charges within eighteen months of the alleged "misconduct" or "incompetence," unless the charges, if proven, would constitute a crime.

Most civil servants who contact you will also be union members with contractual job security as well. An inquiry should be made whether contract arbitration is available to these potential clients and, if so, why they are rejecting arbitration, which has been "pre-paid" by their union dues. You will find that some civil servants, who actually have arbitration as an option, will prefer the Section 75 disciplinary proceeding because the arbitration process typically permits a public employer to impose a penalty (including termination) after a Step II grievance level. Thus, the civil servant pursuing arbitration may be off payroll for many months pending the outcome of a protracted arbitration. Therefore, some civil servants who have a choice elect the Section 75 proceeding because of the rule prohibiting suspensions in excess of thirty days pending the outcome of the Section 75 disciplinary proceeding.

When preparing a Section 75 disciplinary case, as with any labor arbitration, you must review your client's disciplinary history. Progressive discipline largely guides the determination of an appropriate penalty once guilt is established. Generally, a Section 75 hearing officer will be reluctant to recommend termination or a lengthy suspension if your client has no prior discipline and has not committed some "capital" offense, i.e., gross insubordination, theft, or some violent act. Longevity, or years of service, is also credited, as senior employees are more likely to avoid harsher penalties. In "time and leave" cases, determine if your client has received any written notice prior to the disciplinary charges that the latenesses or absences have been deemed unacceptable. Also, it is important to consider whether your client has been disparately treated, especially when managers may be culpable.

In New York City, virtually all Section 75 disciplinary hearings are conducted at the Office of Administrative Trials and Hearings ("OATH"). At OATH, a disciplinary proceeding is assigned to a conference judge before trial. The conference judge will assist the parties in defining the issues and in attempting to facilitate a settlement of the case. According to OATH, over the last three years 83% of all cases filed with OATH were settled before trial. However, other cases may require multiple hearing dates. Thus, your retainer agreement should avoid any flat-rate payment and should rather provide for additional compensation depending on the length of the proceeding.

A Section 75 hearing officer only recommends a penalty to the public employer, and an agency head or commissioner has the right to reject the recommendation. According to OATH statistics, during the past three years, eleven percent of recommended penalties have been rejected.

You should also be aware of the penalties prescribed by Section 75, which include reprimand, a fine not to exceed $100.00, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal.

If it appears that a disciplinary penalty is inevitable, you should consider a settlement which may allow for alternative penalties. For example, a public employer may be willing, in lieu of a suspension, to debit your client's annual leave days or impose a "pay fine" as a disciplinary penalty. A "pay fine," which at first seems draconian, permits an employer to withhold one or two days' pay from future two-week pay periods for time actually worked. In other words, your client may work ten days in a two-week pay period but only receive pay for eight or nine days until the penalty is satisfied. Some clients prefer a "pay fine" because they cannot afford to serve a prolonged suspension without pay.

Finally, Section 75 decisions may be appealed to either the Civil Service Commission within twenty days of written notice of an adverse decision pursuant to Civil Service Law § 76, or directly into court pursuant to CPLR Article 78.

Membership Committee

The Membership Committee, chaired by James Brown and Jonathan Bernstein, is working on ways to attract and retain new members. For the last two years we welcomed NELA recruits with a New Members Social, but the Committee would like to energetically expand its activities. If you would like to contribute to this important effort, please contact Shelley, or the chairs (Jim - 212 587-4151; Jonathan: 212 371-0033)

Sexual Harassment Committee

by Eugenie Gilmore

In our June meeting, the Sexual Harassment Committee presented a guest speaker, Antonia Kousoulas, who discussed litigating claims against state agencies and the related issue of 11th amendment immunity.

The discussion focused on when Congress may take away a state's immunity to suit, as it has with Title VII. When Congress abrogates a States's immunity, there must be a clear statement of its intent, and Congress must act within its authority. The Supreme Court found in **Kimel v. Florida Board of Regents**, 120 S. Ct. 631 (1999) that the State of Florida was immune from suit under the ADEA. The court, citing to its view that age is not a suspect classification, found that victims of age discrimination did not need a federal remedy for violations of the 14th Amendment.

Practice tip: Check if your defendant receives grants or contracts from the Federal government. The acceptance by the employer of those monies may include assurances that the employer will comply with Federal statutes.

The Committee has begun work on its Jury Instruction project. The Committee is collecting jury instructions regarding sexual harassment issues.

Please send Lawrence Solotoff your instructions and the judge's instructions, and include a short description of what the case was about, closing arguments, summation, and the decision. If you have the material on disc, it would be appreciated. The goal is to have a library of such material for the benefit of NELA members.

Future presenters on cases of interest will be: Margaret McIntyre on September 12, Robert Felix on October 10, Lawrence Solotoff on November 14, and Rachel Levitan on December 12. Potential topics for future seminars are violence in the workplace and jury instructions.

The Committee meets on the second Tuesday of each month, providing no conflict with a major holiday. All meetings begin promptly at 6:00 pm and end promptly at 7:30. All members, guest attorneys and future members are welcome.

Anne's Squibs

by Anne Golden

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

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

Thanks to Scott Moss, an associate with Outten & Golden LLP, and Robin Audubon, a student at St. John's Law School and intern with the firm, for their assistance with these squibs.

AGE DISCRIMINATION

Failure to Promote

A railroad police officer denied promotion despite passing his examination sued his employer, his union, and the union's Vice President under the ADA, the ADEA, 42 U.S.C. § 1981, and the New York State Human Rights Law. The court (Colleen McMahon, S.D.N.Y.) held that the EEOC retained jurisdiction despite issuing an early notice of right to sue because "the EEOC and state administrative agencies are so overwhelmed with charges that they could not possibly investigate more than a small fraction of them within 180 days." Plaintiff's claims against the MTA (but not against the union) under all but Section 1981 were preempted by the Railway Labor Act, however, and his claims against both defendants were filed too late, except for one claim against the union. The claim against the union official under the State Human Rights Law survived. **Parker v. Metropolitan Transportation Authority**, 97 F. Supp. 2d 437 (S.D.N.Y. 5/5/00).

ATTORNEYS' FEES

A race discrimination, sexual harassment, and retaliation plaintiff who prevailed only on her retaliation claim, and only for $6,240 in damages, nevertheless won an award of attorneys' fees from Judge Robert L. Carter (S.D.N.Y.). A Title VII prevailing party can be denied fees only if the success was "de minimis," which means not only low damages, but also relatively unimportant legal principle and public interest vindicated. Despite the low damages, the legal principle and public purpose are important in this sort of typical retaliation case because "reminding recalcitrant employers" of the "simple legal proposition" against retaliation is important. The lodestar was reduced 54 percent for various reasons: among unsuccessful claims, only the harassment claim, not the race claim (which covered different defendants), was intertwined with the successful retaliation claim, justifying an hours reduction; the attorneys' requested rates were lowered because they had limited experience; and the billing records were too vague. **Sowemimo v. D.A.O.R. Secur., Inc.**, No. 97 Civ. 1083 (RLC), 2000 WL 890229 (S.D.N.Y. 6/30/2000).

See **Cush-Crawford v. Adchem Corp.**, discussed under "Damages," below.

BANKRUPTCY

A recording artist filed a Chapter 7 petition in bankruptcy without having fulfilled his exclusive contract, which required him to record enough material for one album and deliver it to the company. The contract provided not only that the artist's services were "unique and extraordinary" but that, in effect, if he did not complete performance, the contract never ended. The company sought a declaratory judgment stating that the artist's obligations under the contract were not discharged in the bankruptcy. Judge Stuart M. Bernstein (Bankr. S.D.N.Y.) denied summary judgment motions — neither party offered evidence other than

the contract itself — noting that although a New York court will not compel specific performance under a personal service contract, contract language cannot bind a reviewing court. **In re Mitchell**, 249 B.R. 55, 2000 WL 708459 (Bankr. S.D.N.Y. 5/24/00).

CIVIL RIGHTS

A former police chief of the Village of Athens, New York, who was arrested (but later acquitted) for impersonating a police officer when (after a traffic stop) he showed a badge identifying him as the past police chief, sued the Village of Catskill for various common-law claims (false arrest and imprisonment, etc.) and discrimination, including claims under 42 U.S.C. §§ 1983 and 1988. The plaintiff was openly gay, the order to arrest him came from his successor (who, in seeking the plaintiff's indictment and trial, omitted the fact that the badge was factually accurate and not unlawful because it identified him only as the former police chief), and the plaintiff had not tried to use the badge to get favorable treatment nor to act as a police officer. Summary judgment was denied as to the village and the new police chief under § 1983 principles because the chief was a policymaker in the area of making arrests, and the chief was denied qualified immunity because his behavior was not objectively reasonable. **DePrima v. Village of Catskill**, ___ F. Supp. 2d ___, No. 98-CV-1780, 2000 WL 744174 (E.D.N.Y. 6/6/00).

CONTRACTS

See **In re Mitchell**, discussed under "Bankruptcy," above.

DAMAGES

Equitable Relief

Reviewing a $1.4 million age discrimination verdict, the Second Circuit reversed S.D.N.Y. Judge William Connor's denial of pension credits and prejudgment interest. Judge Connor had denied pension credits as discretionary "prospective relief;" he also had denied prejudgment interest for various reasons, such as the "surprisingly generous" damages award and plaintiff's "desultory efforts" at mitigation. The Circuit panel reversed, holding that pension credits are a basic part of the make-whole compensatory package that should be restored either via equitable restoration of the credits denied (by the Court) or via an equivalent money award (by the jury). The panel also reversed the denial of prejudgment interest, finding that Judge Connor's rationales impermissibly sought to lower the damages award via a denial of interest. Judge Pierre Leval wrote the opinion, joined by Judge Chester Straub and a visiting judge. **Sharkey v. Lasmo**, — F.3d —, Nos. 99-7928(L), 99-7932(XAP), 2000 WL 732215 (2d Cir. 6/8/00).

Emotional Distress

A psychologist whose career and mental health were ruined by false charges of sexual misconduct against him won a jury verdict of $6.6 million in compensatory damages and $10 million in punitive damages against a co-worker under 42 U.S.C. § 1983. The co-worker had caused patients at the residential treatment facility to make the allegations. The employer investigated and determined that the charges were unfounded, but the New York City Police Department also investigated and arrested the plaintiff for sexual abuse. He was jailed for fifteen days and indicted; the charges later were dropped. Diagnosed with chronic, permanent, severe post-traumatic stress disorder, he was unable to resume work as a psychologist and now worked part-time as a doorman. Magistrate Judge Henry Pitman reduced the emotional distress damages and the punitive damages to $500,000 each; the damages for lost wages and benefits remained at $1,372,988. Comparing other New York cases, the court found the larger $500,000 award justified because "the false charge… involved the highest level of moral turpitude, implicated [the plaintiff's] professional fitness in the most serious manner possible and destroyed his ability to practice his profession." The seriousness and duration of psychological injury outweighed the lack of physical injury in supporting the award. **Komlosi v. Fudenberg**, ___ F. Supp. 2d ___, No. 88 Civ. 1792 HBP, 2000 WL 351414 (S.D.N.Y. 3/31/00).

Punitive Without Compensatory

In a matter of first impression within the Second Circuit, Judge Arthur D. Spatt (E.D.N.Y.) allowed a plaintiff who recovered no compensatory damages to keep a $100,000 punitive damages jury award. With other circuits split, Judge Spatt followed **Timm v. Progressive Steel Plating, Inc.**, 137 F.3d 1008 (7th Cir. 1998) and denied judgment as a matter of law vacating the award of punitive damages. The district court drastically cut attorneys' fees, however, cutting both the hours and the hourly rate of plaintiff's counsel, following its own precedents and awarding only $200 for partners, $135 for associates, and $50 for paralegals, cutting out one lawyer's work altogether, reducing the hours of the rest, and cutting the resulting lodestar further for a total fee award of $54,052. **Cush-Crawford v. Adchem Corp.**, 94 F. Supp. 2d 294 (E.D.N.Y. 4/14/00).

Standard Under Kolstad

While upholding an ADA plaintiff's disability discrimination and retaliation verdict, the Second Circuit agreed with the district court (Louis L. Stanton, S.D.N.Y.) in vacating the jury's punitive damages award. The defendant fired the plaintiff while he was on disability leave after a heart attack because it deemed the uncertain return date unacceptable; it also stopped looking for a new position for the plaintiff as soon as he filed a discrimination charge. The per curiam (Judges Jacobs, Straub, and Pauley on the panel) opinion's **Kolstad** analysis indicates that even blatant illegality is insufficient for punitive damages absent actual evidence of the employer's "perceived risk that its actions will violate federal law," a ruling that seems to ignore the possibility that sufficiently illegal conduct could support an inference that the employer knew it at least *might* have been acting illegally. The court upheld economic damages of $75,000 and compensatory damages of $65,000 (which the district court had lowered from $95,000). The plaintiff was represented by NELA/NY member John A. Beranbaum. **Weissman v. Dawn Joy Fashions, Inc.**, —- F.3d —-, No. 98-7813(L), 99-7407(XAP), 2000 WL 714377 (2d Cir. 6/5/00).

Affirming a plaintiff's verdict on sex harassment, constructive discharge, and retaliation claims, the Eighth Circuit upheld a $260,000 punitive damages award (which had been lowered by the district court from $500,000). Under **Kolstad**, because of the harassing supervisor's knowledge of the corporate harassment policy and his harassment training, the jury could "infer [he] had knowledge of Title VII's proscriptions, and given this knowledge, reasonably conclude he acted in the face of a perceived risk that his actions would violate federal law." The defendant failed to show "good faith efforts to comply with Title VII" sufficient to avoid punitive damages because, despite its on-paper policies, its response to plaintiff's complaints was inadequate. Roughly $180,000 in non-punitive damages also were affirmed. **Ogden v. Wax Works, Inc.**, —- F.3d —-, No. 99-1643, 2000 WL 718787 (8th Cir. 6/6/00).

DEFAMATION, ETC.

A town employee who broke off a consensual sexual relationship with his female supervisor and thereafter faced an abusive work environment, including one physical assault, sued the town and the supervisor individually under Title VII, the New York State Human Rights Law, the Equal Protection Clause, defamation, and intentional infliction of emotional distress. The district court (Jacob Mishler, E.D.N.Y.) dismissed the Title VII claim against the individual defendant under **Tomka v. Seiler Corp.**, 66 F.3d 1295 (2d Cir. 1995), but not the claim under the "aiding and abetting" section of Human Rights Law, N.Y. Exec. L. § 296(6), which applies to individuals who actually participated in the conduct giving rise to the discrimination claim. The defamation claim, based on the defendant's having filed a police report stating falsely that the plaintiff hit her, survived summary judgment, despite the defendant's qualified privilege, because the plaintiff had alleged actual malice. The intentional infliction claim was dismissed for insufficient extreme and outrageous behavior, and the Equal Protection Clause claim failed for lack of a conspiracy. **Perks v. Town of Huntington**, ___ F. Supp. 2d ___, 2000 WL 679984 (E.D.N.Y. 5/23/00).

ERISA Committee

Many of our clients have ERISA issues lurking in their cases. They may not know it, but their lawyer should. NELA lawyers can expect to confront issues regarding:

- Pension benefits
- Health insurance
- Disability insurance
- COBRA benefits
- Rights under the Health Insurance Portability and Accountability Act
- Stock op-tions and other fringe benefits

The ERISA Committee, chaired by Bill Frumkin and Edgar Pauk, welcomes participation from any NELA/NY member interested in learning more about this area or helping to educate other members. You do not — repeat not — have to have experience in this area. If you are interested, please call Bill Frumkin - 914 328-0366.

DISABILITY DISCRIMINATION

Definition of Disability

The fallout continues from **Sutton** and the other negative Supreme Court decisions of last year, with Judge Peter K. Leisure (S.D.N.Y.) granting summary judgment to an employer whose motion had been denied before those cases. The court concluded that the plaintiff, who had Type 2 diabetes and heart disease, could not show any major life activities that had been substantially impaired after treatment despite the defendant's earlier stipulation that he was disabled under the ADA. The plaintiff contended that his ability to walk was impaired, but the court engaged in hairsplitting analysis of his physician's testimony and held that he had not shown that it was impaired enough. The plaintiff's analogous claim under the New York State Human Rights Law remained since that statute has a broader definition, and an age claim remained undisturbed. **Epstein v. Kalvin-Miller International, Inc.**, ___ F. Supp. ___, No. 96 Civ. 8158(PKL), 2000 WL 798625 (S.D.N.Y. 6/21/00).

An airline employee suffering from depression and other psychological problems, which her psychologist traced to her night shift assignment, alleged that her employer failed to accommodate her disability or engage in the ADA-required interactive process, and the Seventh Circuit Court of Appeals agreed. The employer's doctor told the plaintiff that her problems were "personal" rather than job-related and suggested that she just quit her job and stay home. Since she was on medical leave during the annual bid, when she could have bid for a non-night position, she did not. The district court granted the employer judgment as a matter of law, reasoning that plaintiff's failure to bid relieved the employer of its obligation to discuss accommodation. The court of appeals reversed, holding that whether the plaintiff was a qualified person with a disability who could have done her job with reasonable accommodation was a question for the jury, and finding harmless the erroneous (under **Sutton**) jury charge that the plaintiff's impairment should be assessed without regard to mitigating measures, since she was substantially impaired even with medication. It struck the award of punitive damages, however, holding that the plaintiff had not shown that the employer knew specifically that it was violating federal law. **Gile v. United Airlines, Inc.**, 213 F.3d 365 (7th Cir. 5/22/00).

"Regarded As" Disabled

A medical resident with breast cancer who lost certain privileges because her employer felt that she could not handle the stress of having cancer lost a summary judgment motion before Judge John F. Keenan (S.D.N.Y.). She was granted part-time status, a six-month leave, and days off for treatment, but a few weeks after she told the Director of Residency Training in her department that the cancer might have recurred, her clinical privileges were withdrawn, and she was terminated the following month. The hospital produced poor evaluations of the plaintiff that were done before she ini-

tially informed it of her illness, as well as others, also poor, that were done later. The case turned upon whether the hospital regarded her as substantially limited in her ability to work in a broad range of jobs because of her illness. Finding that she was regarded as substantially limited only in her ability to do the specific job of anesthesiology resident, the court answered this question in the negative, then held in addition that she had failed to prove that the stated reasons for her discharge were pretextual, since she did not show that her performance had met her employer's legitimate expectations. **Pikoris v. Mount Sinai Medical Center**, ___ F. Supp. 2d ___, No. 96 Civ. 1403 (JFK), 2000 WL 702987 (S.D.N.Y. 5/30/00).

Retaliation

A sanitation worker whose job duties were made more demanding and who faced continuing taunts from his supervisor after he returned from a heart attack filed an ADA and New York State Human Rights Law complaint, then a retaliation complaint after he suffered another heart attack and had to leave the job permanently. The district court (Charles L. Brieant, S.D.N.Y.) granted summary judgment to the employer on all claims. In an unpublished opinion, the Second Circuit Court of Appeals reinstated his retaliation claim under the ADA, which had been dismissed because the district court had incorrectly decided that the plaintiff did not suffer any materially adverse employment action. In fact, he was required to do heavier work, lost seniority, lost his driver route, and was subjected to routine taunting about his initial ADA suit. The court also clarified that events occurring outside the 300-day statute of limitations period for filing an EEOC charge may still be considered as evidence of causation. The plaintiff's claim for breach of contract (the partial settlement of the plaintiff's first ADA claim) was also reinstated. The plaintiff was represented by NELA/NY member Dan Getman. **Curran v. All Waste Systems, Inc.**, 213 F.3d 625, No. 99-9250, 2000 WL 639999 (2d Cir. 5/16/00).

"Direct Threat" Must be to Others

The ADA's "direct threat" defense, 42 U.S.C. § 12113, does not allow exclusion of an individual where the only "threat" would be to his *own* health, the Ninth Circuit has held, in a circuit split on the point. The individual's Hepatitis C made work in the refinery's coker unit hazardous to his liver, defendant argued. Although most of the few courts addressing the issue have opined that a direct threat may include a threat to the worker, the Ninth Circuit panel (in an opinion by the plaintiff-friendly Judge Reinhardt) held otherwise. The panel cited the ADA's plain language ("risk to the health or safety *of others*") as well as ADA legislative history and gender discrimination case law that strongly caution against allowing paternalistic exclusion of employees from jobs employers deem too dangerous for them. **Echazabal v. Chevron USA, Inc.**, — F.3d —, No. 98-55551, 2000 WL 669137 (9th Cir. 5/23/00).

Schedule Flexibility as Accommodation

The First Circuit reversed a grant of defense summary judgment in a ruling that sounds a cautionary note to both plaintiffs and defendants that whether a fixed schedule is an "essential function," and therefore whether a flexible schedule is a reasonable accommodation, is a context-specific inquiry that will turn on the facts and, ultimately, the lawyering in each case. The plaintiff was a laboratory and data entry assistant whose arthritis frequently yielded extreme morning stiffness that caused the tardiness for which he was terminated. The court held that such a case "requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question. And the defendant… should bear the burden of proving that a given job function is an essential function," including adherence to a regular schedule. **Ward v. Massachusetts Health Research Institute, Inc.**, 209 F.3d 29 (1st Cir. 4/12/00).

FAIR LABOR STANDARDS ACT

No Punitive Damages for Retaliation

Purporting to be only the second federal appeals court to decide the issue, our friends in the Eleventh Circuit have created a circuit split by holding that no punitive damages are available for retaliation in violation of the Fair Labor Standards Act (FLSA). While the statutory language on remedies for substantive FLSA claims (i.e., minimum wages and overtime pay) lists particular non-punitive remedies, the later-added language on remedies for FLSA retaliation is more general, listing various specific remedies "without limitation" as well as "such legal or equitable relief as may be appropriate to effectuate the purposes" of the anti-retaliation section. The Seventh Circuit had found room for a court to award punitive damages in **Travis v. Gary Community Mental Health Center, Inc.**, 921 F.2d 108 (7th Cir. 1990), but the Eleventh Circuit disagreed, reasoning that the listing of only non-punitive remedies throughout the FLSA implied that punitive damages were inappropriate for FLSA-based lawsuits of any stripe. **Snapp v. Unlimited Concepts, Inc.**, 208 F.3d 928 (7th Cir. 4/5/00).

FAMILY & MEDICAL LEAVE ACT

Eleventh Amendment Immunity

When Congress enacted the FMLA, it found that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." The Second Circuit, however, found that the provision of FMLA leave for an employee's own "serious health condition" was overbroad in light of that objective, since there was no finding that women are disproportionately affected by such conditions. Accordingly, the court found that Congress had no authority to abrogate the sovereign immunity of the states on claims arising from employees' own health conditions. While dismissing the male plaintiff's FMLA claim, the court reversed the grant of summary judgment on his First Amendment claim. **Hale v. Mann**, ___ F.3d ___, No. 99-7326, 2000 WL 675209 (2d Cir. 5/25/00).

Employer Notice Requirement

Taking the plaintiff's side in a circuit split on the validity of a strict FMLA

employer notice regulation, the Sixth Circuit reinstated an FMLA claim by an employee who would not have been able to return within the 12-week FMLA leave time limit, because the employer had not yet notified the employee that his paid disability leave would be designated as FMLA leave. The Department of Labor regulations, 29 C.F.R. §§ 825-208(a)-(c), require employers to notify employees when leave is designated as FMLA-qualifying. Only leave time taken after such notification counts towards the 12-week FMLA limit. Circuits are split on whether these regulations are valid interpretations of the FMLA; the Sixth found them valid in light of "Congress's concern with providing ample notice to employees of their rights under the statute." The panel affirmed the dismissal of the plaintiff's disability discrimination claims, however. **Plant v. Morton Int'l, Inc.**, 212 F.3d 929 (6th Cir. 5/12/00).

PROCEDURE

Early Notice of Right to Sue

A plaintiff who requested and received a notice of right to sue only a few days after she filed her EEOC charge faced affirmative defenses on the ground that her Title VII and ADEA claims were barred because the complaint was filed before the end of the respective waiting periods for the EEOC's administrative review. Rejecting the affirmative defenses, Judge Denise Cote (S.D.N.Y.) granted the plaintiff's motion to strike and denied the defendant's motion to dismiss. In a split among district courts in this circuit, the court found valid 29 C.F.R. § 1601.28(a)(2), permitting early issuance of a notice of right to sue. The ADEA claim similarly was not dismissed, because the untimeliness of the complaint filed less than 60 days after the date of the EEOC charge was cured by filing an amended complaint after the 60-day period. **Huang v. Gruner + Jahr USA Publishing**, ___ F. Supp. 2d ___, 2000 WL 640660 (S.D.N.Y. 5/17/00).

See also **Parker v. Metropolitan Transportation Authority**, discussed under "Age Discrimination," above (same result).

SEX DISCRIMINATION

In a non-employment case under the Equal Credit Opportunity Act, a plaintiff stated a claim in the First Circuit when he alleged that he had been denied a bank loan because he had been dressed as a woman. When he asked for a loan application form, the bank officer refused to give him one until he "went home and changed," because he was not dressed the way he had been in the pictures on his photo ID cards. The district court dismissed the case, but the court of appeals reversed because it was not clear that the plaintiff had "no viable theory of sex discrimination consistent with the facts alleged." **Rosa v. Park West Bank & Trust Co.**, ___ F.3d ___, No. 99-2309, 2000 WL 726228 (1st Cir. 6/8/00).

SEXUAL HARASSMENT

Federal Rule of Evidence 412 broadly bars evidence of a sexual harassment plaintiff's sexual history, the Second Circuit Court of Appeals has held. The plaintiff, a police officer, worked in a station featuring pornographic posters and videos

as well as derogatory news items about female police officers. The jury found that the work environment was hostile but that the plaintiff suffered no damage. The Circuit held erroneous the admission of testimony regarding the plaintiff's sexual history, finding that the Rule 412 bar applied and that "the evidence was of, at best, marginal relevance. Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending on her sexual sophistication." Yet the Circuit affirmed the defense verdict because, the plaintiff's psychiatrist having been properly excluded as untimely, the plaintiff did not produce evidence of damage (not even testimony by herself) to defeat the jury's finding of no damage. The opinion was written by Judge Rosemary Pooler and joined by Judges Ellsworth Van Graafeiland and Chester Straub. **Wolak v. Spucci**, No. 99-7535, 2000 WL 867582 (2d Cir. 6/23/2000).

The "equal opportunity sexual harasser" is no longer hypothetical. He and his employer both escaped unpunished in the Seventh Circuit Court of Appeals when the court took the narrow view that ""discrimination' in sexual harassment cases … is to be determined on a gender-comparative basis." Therefore, the court held, when a bisexual harasser makes sexual overtures to members of both sexes, he is not "discriminating" but is treating both sexes alike — although badly. Holding that a different result "would change Title VII into a code of workplace civility," the court of appeals affirmed the district court's dismissal of the complaint. **Holman v. State of Indiana**, 211 F.3d 399, 82 [BNA] F.E.P. Cas. 1287 (7th Cir. 5/1/00).

SEXUAL ORIENTATION

Judge Leonard Wexler (E.D.N.Y.) adopted the report and recommendation of Magistrate Judge Michael L. Orenstein permitting the plaintiff to amend her complaint to add a claim of discrimination based on sexual orientation under the Equal Protection Clause of the Fourteenth Amendment, but denying permission to add sexual orientation discrimination claims under Title VII and the New York State Human Rights Law. The court held that those statutes prohibited same-sex sexual harassment but not sexual orientation discrimination. With respect to state action, the court held that the defendant, a New York nonprofit corporation, may have been heavily enough regulated by New York Social Services Law to support the allegation that it acted "under color of state law" but that the record was insufficient to make this determination, and that sexual orientation discrimination was within the ambit of the Fourteenth Amendment's Equal Protection Clause. Finally, the court rejected the defendant's argument that the proposed amendment was untimely, since the defendant had failed to produce documents that supported the new claim until their existence came to light during a deposition after the deadline to amend pleadings, and the plaintiff moved promptly thereafter. **Dunayer v. Adults & Children with Learning & Developmental Disabilities, Inc.**, ___ F. Supp. 2d ___, N.Y.L.J. 5/26/00, p. 36, col. 1 (E.D.N.Y. approx. 5/24/00).

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settlement agreements and a mock mediation. So far the office has conducted thirteen training sessions, and has on call a pool of 300 volunteer mediators.

After a mediation ends, an outside contractor evaluates the session, using input from participants and the mediator. While NELA members have had both positive and negative experiences in the program, EEOC mediation presents an important opportunity to explore a pre-litigation resolution, in a context that encourages serious discussion.

If you have a case which you would like to move into mediation, please call Michael Bertty at 212 748-8425.

– Jonathan Ben-Asher

STOCK OPTIONS

A computer software engineer who alleged that he was induced to take a job by promises of stock and stock options (in expectation of an initial public offering) sued because he was fired one day before trading in the company's stock commenced, resulting in forfeiture of most of his still-unvested options. He also alleged that the company had falsely informed him that he had only half the original number of options vested because of a reverse stock split. He sued under § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, common-law fraud, negligent misrepresentation, unjust enrichment, and breach of contract. Judge John F. Keenan (S.D.N.Y.) dismissed the securities claim based upon limitations because the plaintiff had constructive notice of the alleged violations more than one year before suit. The other claims were also dismissed, but the plaintiff was allowed to amend his complaint to replead the claims for securities violations and fraud. **Butvin v. Doubleclick, Inc.**, ___ F. Supp. 2d ___, 2000 WL 827673 (S.D.N.Y. 6/26/00).

SUMMARY JUDGMENT

Age Discrimination

The Seventh Circuit Court of Appeals makes an analytical distinction between "RIF" cases (including "mini-RIFs" of one), in which the plaintiff's position is not filled, and other discrimination cases, in which the plaintiff is replaced. In non-RIF age cases, although plaintiffs need not identify "similarly situated" employees treated more favorably, they still must show replacement, or absorption of duties, by employees not in the protected class. The court rejected a plaintiff's argument that even though the employer may have believed that it needed to cut costs, it was still motivated by discrimination when it decided to eliminate his job, because the plaintiff lacked evidence that the employer "did not, at the time of his discharge, honestly believe the reason they gave." Watch out for Seventh Circuit employment cases, which your adversaries will love to quote but which you may be able to distinguish based on analytical differences. **Michas v. Health Cost Controls**, 209 F.3d 687 (7th Cir. 4/6/00).

Disability Discrimination

See **Pikoris v. Mount Sinai Medical Center**, discussed under "Disability Discrimination," above.

Religious Discrimination

Judge Sidney H. Stein (S.D.N.Y.) dismissed claims of religious and race discrimination in violation of Title VII and 42 U.S.C. § 1981, holding that the plaintiff had not established discrimination and that her employer had reasonably accommodated her religious beliefs. The plaintiff, a black Seventh Day Adventist, observed Friday night and Saturday as the Sabbath. Her department operated rotating shifts, and in 1996 her new supervisor told her that he could not make an exception for her because then everyone would want special days off, and if she did not like this arrangement she should take a demotion to her old job. She alleged that her employer's disciplinary warnings about arriving four hours late every other Saturday, when she could not arrange coverage for her shift, were discriminatory, since one more would cause termination; these were later expunged, but she alleged that the harassment continued. The district court found insufficient allegations of harassment to state a claim for hostile work environment. **Durant v. NYNEX**, ___ F. Supp. 2d ___, 2000 WL 798623 (S.D.N.Y. 6/21/00).

Sex Discrimination

A female firefighter alleged sex discrimination under Title VII, based on claims of failure to promote her to assistant chief and hostile environment sexual harassment, as well as alleging intentional infliction of emotional distress against the alleged principal harasser. The district court (Alfred V. Covello, D. Conn.) granted summary judgment based on insufficient evidence of pretext or hostile environment, but the Second Circuit Court of Appeals reversed. The court of appeals agreed with the plaintiff that the district court had improperly considered the record solely in piecemeal fashion and had credited "individual strands of evidence" instead of viewing the record as a whole in the light most favorable to the plaintiff, or crediting permissible inferences in her favor. The claim of hostile work environment was supported by more evidence than the single incident mentioned by the district court, and the court remanded that claim for trial. Although the court found it unclear whether the plaintiff could present sufficient evidence of pretext on the failure-to-promote claim to avoid summary dismissal in the future, and remanded for either trial or fuller summary judgment consideration on that claim, it found that summary judgment had been improperly granted at this stage, and it vacated and remanded with costs. **Howley v. Town of Stratford**, ___ F.3d ___, 2000 WL 827303 (2d Cir. 6/23/00).

PRACTICE TIP

The requirement in **Kolstad**, rigorously interpreted by the Second Circuit and others, that punitive damages cannot be awarded without proof that the employer knew specifically that its actions might violate the law, should guide our approach in discovery. When you depose the decisionmaker, or the person who was supposed to review the decisionmaker's actions, show him the company's written policy against discrimination (or sexual harassment, etc., as appropriate) and ask if he was aware of it; ask him if he knew that age discrimination (or whatever you are alleging) was against the law; ask whether he tried to find out whether his proposed action would violate the law; ask whatever you need to ask in order to establish that specific knowledge. Read **Kolstad** closely to fashion additional questions and request additional documents. Be prepared to counter defense counsel's objection that you are asking a lay witness for a legal opinion. After **Kolstad**, you should be entitled to ask these questions. Be prepared for objections based on attorney-client privilege as well, but phrase your questions carefully in order to avoid these objections if possible.

REEVES AND DALE, from page 1

tal, yields a plaintiff's verdict.

Though technically a public accommodations case, **Dale** threatens employment plaintiffs by creating a disturbing new defense. Employers who engage in "expressive activity that could be impaired" by the presence of homosexuals can argue that there is a First Amendment "freedom not to associate" with homosexuals that trumps state or local antidiscrimination laws.

In contrast to **Reeves**, **Dale** requires plaintiffs' attorneys to argue for the narrow interpretation of a potentially broad-ranging decision. Citing **Dale**, defendants in sexual orientation discrimination cases may claim a First Amendment right to reject gay employees without interference by state or city antidiscrimination laws. If an employer "sincerely holds th[e] view" that it cannot express itself as an association while associating with homosexuals, courts "must... give deference to [the] association's view of what would impair its expression." Employers with policies against hiring homosexuals could make this argument because, under **Dale**, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."

Dale may not apply, however, to many institutions other than the Boy Scouts, which the Court carefully characterized as a "not-for-profit organization engaged in instilling its system of values in young people." To the Court, the conflict was between plaintiff's expression and defendant's very mission: "The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill," while scoutmaster James Dale was "an avowed homosexual and gay rights activist" who spoke out in newspapers. Given their values-based purpose, the Boy Scouts' right to discriminate in hiring scoutmasters may be the secular parallel to the Catholic Church's right to discriminate (against women) in hiring priests – the Freedom of Expression analogue to the Church's well-established Freedom of Religion exception to Title VII. A case against a garden-variety employer would not implicate the First Amendment interest in protecting a non-profit's values-focused mission, and so **Dale** should be distinguishable for the vast majority of employers.

Workers Compensation
&
Social Security Disability

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