NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 12, NO. 1 July 2004 David Fish, Gary Trachten, Co-Editors

Judicial Reception Held January 15, 2004 Honoring Judges Who Have Contributed to NELA/NY Continuing Legal Education Programs

On January 15, 2004, NELA/NY held a reception at the Daniel Patrick Moynihan Federal Courthouse honoring federal judges in the Eastern and Southern Districts who have contributed to CLE programs. The reception was organized by the Judiciary Committee of Lee Bantle, Rich Bernstein, Chris Edelson, Joshua Friedman, Wylie Stecklow, and Shelley Leinheardt. The Committee is pleased to report that Judges Frederic Block, Denny Chin, Denise L. Cote, Steven M. Gold, Viktor V. Pohorelsky, Sidney H. Stein, Shira A. Schiendlin, and Ronald L. Ellis attended the reception and received plaques thanking them for their CLE contributions. We were also pleased to see a large number of NELA/NY members who came to meet the Judges. Judges Harold Baer, Jr., Andrew J. Peck, Loretta A. Preska, and Jed S. Rakoff were unable to attend the reception but each received a letter and plaque from the Judiciary Committee thanking them for their contributions of time. We hope everyone enjoyed the event!

NYCLU Sues Salvation Army for Religious Discrimination Against Employees in Government Funded Social Services for Children

The New York Civil Liberties Union filed a lawsuit in federal court charging The Salvation Army with religious discrimination against employees in its government funded social services in New York City and on Long Island. The lawsuit asks the federal court to order the 136 year old charity to stop the practices and to rule that the government funding of The Salvation Army's faith based discrimination against its social services employees in foster care, adoption, HIV, juvenile detention and other social services is illegal. Agencies for New York State, New York City and Nassau County and Suffolk County are named also as co-defendants.

The Salvation Army provides social services for more than 2,000 children each day who are placed with the charity by the government. The programs are funded almost exclusively by taxpayer money. The agency receives $89 million in taxpayer funds for social services and employs about 800 people.

In announcing the lawsuit, Donna Lieberman, Executive Director of the NYCLU, noted, "This case is not about the right of The Salvation Army to practice or promote its religion. They have every right to do so, but not with government money. The Salvation Army cannot use taxpayer money to practice religious discrimination against its social services employees."

The Salvation Army recently began to require all employees in its Social Services for Children division to fill out a form on which they: a) identify their church affiliation and all other churches attended for the past decade, b) authorize their religious leaders to reveal private communications to The Salvation Army; and c) pledge to adhere to the religious mission of The Salvation Army which, according to The Salvation Army, is to "preach the Gospel of Jesus Christ."

Moreover, new job descriptions for every social services employee now require compliance with The Salvation Army's religious mission statement. Previously, the social services unit had its own mission statement which was completely secular.

All this began as part of a Reorganization Plan last year by the national leaders of the charity "to narrow the gap" between the ecclesiastical Salvation Army and the social services component. The goal of the Reorganization Plan was to ensure that "as a Christian agency […] a reasonable number of Salvationists along with other Christians [will be employed by The Salvation Army.]"

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Congratulations to Herb Eisenberg and Jan Goodman for their selection to the NELA National Board of Directors.

The NELA/NY Calendar of Events

Wednesday, July 14 • 5:30-8:30
NELA/NY 3rd Annual Softball Game
Central Park—North Meadow #03
RSVP to Shelley (212) 317-2291

July 21 • 6:00 pm
Board of Directors Meeting
3 Park Avenue—29th floor
(Open to all Members in Good Standing)

September 22 • 6:00 pm
Board of Directors Meeting
3 Park Avenue—29th floor
(Open to all Members in Good Standing)

October 6 • 6:30 pm
NELA Nite
3 Park Avenue - 29th Floor
(Topic To Be Announced)

October 15
NELA/NY Fall Conference
Yale Club of NYC
(Save The Date)

November 18
NELA Seventh Annual Dinner
Yale Club of NYC
(Save The Date)

"New Member Column" As of January 2004

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NELA/NY Listserve Post of the Month

Our first Listserve "Post of the Month" is a tribute to Scott Moss, who has been a wonderful contributor to NELA/NY and its members with his incredibly helpful and insightful posts.

The May 26, 2004 post below was accompanied by two terrific memorandums.

Maybe two weeks ago, I posted on this listserv about whether Title VII's anti-retaliation provisions covered retaliation that did not take the form of an "employment" action, given the alleged standard in the Second Circuit that an employee must show a "materially adverse employment action." Various folks posted a lot of useful points and cites, so I figured I'd reciprocate by sharing the briefs we filed on this issue; they're attached to this email. (The reply brief is the one I filed after posting on the listserv.) It's a really interesting issue, and I hope we make good rather than bad law (assuming the judge issues any meaningful decision at all).

—Scott Moss

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *nelany@nelany-com*. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

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President's Column

by Herb Eisenberg, President, NELA/NY

The fiftieth anniversary of Brown v. Board of Education passed last week. Still, as an employment attorney, I find myself handling too many cases involving the discriminatory treatment of others. In many ways, these cases have become more and more difficult. I have read many cases (particularly sexual harassment cases) of late in which the conduct faced by the employee is shocking, only to find that the claims are not viable due to the failure to prove any adverse or tangible employment action.

While the case law generally recognizes that clever people rarely reveal their true motivations, the general tenor of a workplace is often parsed into several individualized actions or untoward comments insufficient to make out a case of employment discrimination. We must push the judiciary to understand that the general discriminatory tenor of the workplace is what a case is about, not solely the specific incidents of problematic treatment. These cases focus on intent, and as such, these problematic incidents are indicative of an employer's intent. Discriminatory intent is not altered by the passage of months between wrongful actions. Unlike when Brown v. Board of Education was decided, it is fortunately now both impolite and often (though not often enough) unacceptable to express racism or sexism openly. Culturally, it is a good thing that people are more careful with their words. However, that does not mean that our culture has eradicated these problems. We must continue to explain that our cases do not rest solely on the fact that racist, sexist, homophobic or ageist comments are made. Our cases rest also, if not more so, on the tenor of the workplace that is racist, sexist, homophobic or ageist that such inappropriate highlights.

Those of us in New York City need to work to pass the Local Civil Rights Restoration Act. Craig Gurian has worked tirelessly not only to draft this corrective legislation but to attain a two-thirds majority of the City Council who have supported its passage. This bill will require the New York City Human Rights law to be read expansively and not limited by the construction of Federal statutes. Among other things it would restore the right to receive catalyst fees, and make certain that all retaliation is unlawful without regard to adverse employment action. Please refer to www.antibiaslaw.com for the full text and a summary of this bill.

Civil Rights Tax Fairness

As you may know, NELA/NY has sought to address the adverse tax ramifications of resolution of discrimination lawsuits. We have established a task force that will, among other things, draft a sample brief to address the true meaning of a make whole remedy in an employment case, taking into account the adverse tax ramifications of any such award. NELA NY welcomes your input and energy. We need to make certain that prevailing in an employment discrimination case would never put your client in a worse position than had they never prosecuted the case at all. We also want to make certain that attorney fees are not taxed both to the attorney and to the plaintiff. We can do only so much locally, but we must do that which we can.

On the national level, the Senate passed a bill (S. 1637) in early May, which included one of the provisions of the Civil Rights Tax Relief Act (CRTRA). Specifically, the Senate bill would bar the double taxation of attorneys' fees in discrimination and other employment cases. The Senate finance committee is still sitting on S.557 which would amend the tax code to exclude from gross income amounts received on account of claims based on certain unlawful discrimination and to allow income averaging for backpay and frontpay awards received on account of such claims, and for other purposes. A version of a similar provision (H.R.1155) is still in the House Ways and Means committee. NELA National's web site (www.NELA.org) details the most recent actions with regard to these provisions and guidance on how you and your clients may have input to see that this important legislation is passed.

NELA/NY Creates Task Force to Address Taxation of Attorneys' Fees

by William D. Frumkin

In light of the recent decision by the United States Court of Appeals for the Second Circuit in *Raymond v. The United States of America*, 355 F.3d 107 (2d Cir. 2004), NELA/NY has established a task force to develop strategies for assisting our clients in minimizing the unfair and burdensome tax implications of their recoveries.

In *Raymond*, a U.S. District Court had awarded a refund of taxes paid on that portion of a party's wrongful termination recovery that the employer had paid directly to the party's attorney under a 1/3 contingency fee retainer. However, the Second Circuit reversed, and siding with the Internal Revenue Service, held that a charging lien under the Vermont law created an insufficient property interest for an attorney to overcome the presumption that attorneys fees made on behalf of a taxpayer are included in the gross income of the taxpayer. In doing so, the Second Circuit joined the majority of the other circuits that had considered the question.

In response to a request for interested members to participate in the task force, the following have volunteered: Daniel Alterman, Brian Heller, Anita Roberts, Robert Stroup, Hector Geribon, Robert Herbst, Robert Rosen, Justin Swartz, Janice Goodman, Lisa Lipman, Professor Laura Sager, and Deborah Zarsky.

We look forward to learning of the task force's recommendations.

Landmark ADEA Decision

by Gina Ianne

The United States Supreme Court recently held that the Age Discrimination in Employment Act ("ADEA") does not prohibit 'an employer from favoring the old over the young.'[1]

Under the ADEA, it is unlawful for an employer to . . . discriminate against any individual . . . because of such individual's age.[2] The ADEA limits its protection to individuals who are at least 40 years of age.[3] In *General Dynamics Land Systems, Inc. v. Cline*, the Court considered whether the collective bargaining agreement between General Dynamics and the United Auto Workers union the ADEA by eliminating, which eliminated General Dynamic's obligation to provide health benefits to subsequently retired employees who, as of July 1, 1997, were not yet 50 years old as of July 1, 1997., violated the ADEA.[4] Respondents, Eemployees of General Dynamics who were between the ages of 40 and 49 on July 1, 1997, brought suit in federal district court sued under the ADEA, alleging that the elimination of their health benefits constituted illegal discrimination.[5]

The trial court dismissed the action, finding that the ADEA does not recognize claims for "reverse discrimination."[6] The Sixth Circuit Court of Appeals reversed, this decision, reasoning finding that the statute's plain language is unambiguous, and finding holding that an employer may simply not discriminate against any worker age 40 or older on the basis of age.[7] [This is my assumption about what she meant, because it seemed unclear otherwise.] The Supreme Court granted certiorari to resolve the conflict among the Circuits and reversed.

In his opinion, Justice Souter ignored the plain meaning of the language and found that "social history" and "context" require that the 'phrase discriminate . . . because of such individual's age' only be understood to protect discrimination aimed against the old.[8] The Court cited numerous statements in the Act's legislative history, and several of its past decisions to bolster its argument in support of its view that the statute "manifestly intended to protect the older from arbitrary favor for the younger."[9]

The Court summarily dismissed Respondent Cline's the plaintiffs' argument that the EEOC's contrary interpretation, of the ADEA which finds it unlawful for an employer to discriminate between individuals 40 and over on the basis of their age, deserves deserved great deference, since.[10] The Court stated that, because the agency is was "clearly wrong," and because the "regular interpretative method" left no serious question, it did not owe any amount of deference to the EEOC's statutory interpretation.[11] The Court read the "text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes" to permit an employer to favor an older employee over a younger one.[12]

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[1] *See General Dynamics Land Systems, Inc. v. Cline*, 124
[2] S. Ct. 1236, 1239 (2004).

[3] 29 U.S.C. §623(a)(1) (2004).

[4] 29 U.S.C. §631(a) (2004).

[5] *See* 124 S. Ct. at 1239.

[6] *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466, 468 (6th Cir. 2002).

[7] *Id.*

[8] 124 S. Ct. at 1246 (internal quotation marks omitted).

[9] 124 S. Ct. at 1248.

[10] 29 C.F.R §1625.2(a) (2004).

[11] *See* 124 S. Ct. 1248.

[12] *See* 124 S. Ct. 1249.

Fish Says:

"**GARY** and I are very excited about the opportunity to work as your co-editors. We also understand that we seek to fill big shoes—Jonathan was fantastic.

We hope to continue to bring you an enjoyable and informative newsletter. However, that can only happen through the interest and participation of the membership. We truly welcome any and all submissions on the practice of law."

"**I** want to share some thoughts I recently had regarding trial and motion practice, and being before the cantankerous and seemingly impossible judge. Trial lawyers, particularly those new to the profession, are often in situations where they believe the trial judge is ruling in way that both hurts their client and is contrary to settled law. It is at that moment that we need to balance the interests of preserving an objection for the potential/probable record on appeal and creating an uncomfortable relationship with the judge (maybe in front of a jury—a jury that always hates us and loves the judge). This is a delicate and dangerous balancing act. What do you do?

Well, it certainly does depend on whether there is a jury, and I don't know that there is any clear answer. While at first glance it may seem obvious that each and every objection or exception to a judge's ruling must be stated clearly on the record, the experienced trial attorney, or even the meek novice, may argue otherwise. Certain judges we will see again and again, and it is easier to lay low and not make waves.

Some isolated passing and irritable comments by the judge must simply be left alone. Bite your tongue. Maybe the judge is having a bad day? Anyway, does it really affect your case?

However, if it does affect your case, create a record, and show your client that you are squarely in his or her corner. More importantly, we know that assignments of error in, for example, the admission of evidence, not set out in accordance with

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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 Douglas C. James, an associate at Outten & Golden LLP, for help in the preparation of these squibs.

ARBITRATION

A licensed funeral director alleged violations of Title VII, FMLA, FLSA, NYHRL, and the Westchester County Human Rights Law, and argued that an arbitration provision in her employment agreement was unenforceable because it would "prevent her from exercising her federal statutory rights." The plaintiff's reasons were threefold: (1) she would face prohibitive costs; (2) she would receive minimal or no discovery; and (3) she would be unable to recover punitive damages. The court dismissed all these objections. First, although significant arbitration costs could preclude an individual from enforcing statutory rights, the party seeking to invalidate the arbitration "bears the burden of showing the likelihood of incurring such costs," and because the defendant said that it would pay the arbitration costs, the plaintiff failed to meet her burden. Second, the plaintiff did have a right to discovery because the agreement referenced the rules of the American Arbitration Association, which provide for discovery, and the defendant stated that it did not object to the parties' conducting discovery. Third, the court held that the Federal Arbitration Act preempts the state rule that arbitrators cannot award punitive damages; in addition, the defendant indicated that it did not intend for the agreement to prohibit the possibility of an award of punitive damages. Accordingly, the court held that the arbitration agreement was enforceable. **Martin v. SCI Mgm't L.P.**, 296 F. Supp. 2d 462 (S.D.N.Y. 12/22/03) (John G. Koeltl, J.)

ATTORNEYS' FEES

In the absence of information showing that the requested billing rate of a seventh-year attorney had previously been awarded by a court or secured in a settlement, the court reduced the attorney's requested rate of $300 to $250. The court, however, found "no reason to reduce the hourly rate for the size of [the] firm." Rejecting the employer's argument that the size of the law firm is relevant because larger law firms have more overhead, the court stated that "there is nothing in the legislative history to support either this assumption or the conclusion to be drawn from the assumption." Further, even if larger firms do have larger overhead, the court stated, other factors also are incorporated into a firm's fee structure, such as contingency factors, and "[s]maller firms may have to charge more because of higher contingency factors." As for billing records, the court found that entries such as "letter to court" and "letter to court research/review" were not vague because, when viewed in context, they adequately informed the court of "the nature or subject of the work." **Irish v. City of New York**, --- F. Supp. 2d ---, 2004 WL 444544 (S.D.N.Y. 3/10/04) (Robert L. Ellis, Mag. J.).

Fees after Offer of Judgment

The Second Circuit Court of Appeals faced a novel issue after an ex-employee who had sued under Title VII and the New York State and City Human Rights Laws accepted a Rule 68 offer of judgment, but then applied for separate, additional attorneys' fees under the City law. The court of appeals noted that an offer of judgment that is "inclusive of all costs available under all local, state or federal statutes" includes attorneys' fees pursuant to Title VII. Title VII expressly includes attorneys' fees in its definition of costs. 42 U.S.C. § 2000e-5(k) (2001) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs"). In reversing the district court's grant of additional attorneys' fees pursuant to the New York City Human Rights Law, which has a separate statutory basis for attorneys' fees, the court noted that the Title VII and NYCHRL claims overlapped. The plaintiff's acceptance of the Rule 68 offer of judgment settled his right to fees pursuant to Title VII, and he could not also recover fees pursuant to the NYCHRL. Judge Jon O. Newman dissented, reasoning that the document said only "inclusive of costs" and not "inclusive of costs and attorney's fees," and that the majority opinion acknowledged that the term "costs" includes attorney's fees under federal law, but not under City law. **Wilson v. Nomura Securities Int'l, Inc.**, 361 F.3d 86, 2004 WL 377316 (2d Cir. 3/2/04) (Ralph K. Winter, J., joined by B.D. Parker, J.).

CLASS ACTIONS

Judge Denny Chin has certified a class of present and former African-American and Hispanic full-time employees of the New York City Department of Parks and Recreation who alleged discrimination by the City. The employees and former employees claimed that they had suffered discrimination in compensation, promotion, and geographic assignment, that they were subjected to a hostile working environment, and that they were retaliated against for asserting claims of discrimination. The class included supervisory, non-supervisory, field office, and administrative employees, with some represented by various unions. The court found that the allegations of a "dual-track" system of compensation and promotion, segregated workforce, hostile environment, and retaliation were common to all

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members and that the statistical evidence supported their class allegations. Finally, the court found that it was appropriate for the class members to request injunctive relief, even though not every class member actually felt the brunt of the challenged actions. The defendant's argument that the proposed class lacked enough commonality to be certified (the class members varied widely according to civil service classification, location, and collective bargaining agreement) was rejected because the allegations of discrimination were common to all members, and the facts of all plaintiffs' claims need not be identical. **Wright v. Stern**, --- F. Supp. 2d ---, 92 [BNA] F.E.P. Cas. 697, 2003 WL 21543539 (S.D.N.Y. 7/9/03).

CONTRACT

Implied Covenant

Two ex-employees with employment contracts sued under a variety of theories when they were fired after uncovering fraud (both against them and against customers), including RICO, tax, quantum meruit, fraud, ERISA, breach of fiduciary duty, and, of course, breach of contract. The tax claims were based upon allegations that the company had withheld from their pay, but had not remitted, the withheld funds to taxing authorities; this claim was dismissed because an employee is credited with taxes withheld even if the employer did not remit them. The plaintiffs did, however, state claims under RICO and for fraud and breach of contract, including breach of the implied covenant of good faith and fair dealing that is deemed part of every contract. The plaintiffs alleged that the company had failed to pay them commissions to which they were contractually entitled, and the court (Michael B. Mukasey, J.) not only found the contracts ambiguous on this issue, but found that the plaintiffs had sufficiently stated a breach of the implied covenant of good faith by preventing the performance of their contracts when it either fired them or made it impossible for them to continue working. **Berk v. Tradewell, Inc.**, --- F. Supp. 2d ---, 2003 WL 21664679 (S.D.N.Y. 7/16/03).

Oral Employment Contract

An Executive Minister of the Church of God in Christ and the United Church of Christ, who accepted the position in reliance upon assurance that he would have the job "for life" if he passed the first year's probation, successfully stated an oral contract of employment for a definite term ("life"), according to Justice Louis B. York. The plaintiff had foregone substantial retirement benefits with the Navy by taking the job earlier than he had wanted to, in reliance on the assurance that he would have lifetime employment with the Church, but then was discharged less than three years later after a dispute concerning alleged rumors about his relationship with the Human Resources Director. The court rejected the Church's argument that testimony about lifetime employment was barred by the parol evidence rule because the plaintiff had signed a letter agreement, stating that the letter agreement did not appear to be the sum total of all the terms agreed to. The court followed **Rooney v. Tyson**, 91 N.Y.2d 685 (1998), in holding that employment "for life or a definite period" is distinguishable from employment for an indefinite period such as "permanent." The court also held that the plaintiff stated a claim when he relied upon the employee handbook, containing an express written policy limiting the Church's right to discharge clergy employees. NELA/NY member Deborah Karpatkin represented the plaintiff. **Wilson v. Riverside Church in the City of New York**, --- N.Y.S.2d ---, Index No. 108099/03 (Sup. Ct. N.Y. Cty. 3/11/04).

DAMAGES

Faithless Servant

New York State's "faithless servant" doctrine recently got a boost from the Second Circuit Court of Appeals. A merchant banking firm and its former employee sued each other, the former alleging breach of contract, breach of fiduciary duty, and conversion, and the latter alleging (among other things) conversion of shares of stock that he believed were due him. The court of appeals noted that the ex-employee had been treated as a partner

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in every respect (although he was only a "nominal partner"), and that, before he left, he had failed to disclose to the firm certain Directors' Compensation and opportunities that he had received as a result of his service on various corporate boards as a representative of his employer. The firm, which sued the ex-employee first in state court, alleged that he had been a disloyal employee for the last nine months of his employment. He sued several weeks later in federal court, asserting claims for conversion, breach of contract, *quantum meruit*, unjust enrichment, and promissory estoppel, and removed the firm's state claims; the cases were consolidated. The district court (Shira A. Scheindlin, S.D.N.Y.) had held that the ex-employee must forfeit his ill-gotten gains, i.e., only gains from the transactions as to which he had been disloyal. He still would have come away with some four million dollars. The court of appeals went much farther, however, and required him to forfeit all his compensation from the date of his first disloyal act. The court found that he had acted as the firm's agent and, as such, was held to the highest standard of faithfulness. Accordingly, he forfeited his salary for nine months, his interests in firm investments that had been granted to him, his stock options, and even the proceeds of his own personal investments in opportunities provided to him by the firm. Judges Dennis G. Jacobs, Chester Straub, and Kimba Wood (S.D.N.Y., sitting by designation) issued the unsigned opinion. **Phansalkar v. Andersen Weinroth & Co.**, 344 F.3d 184 (2d Cir. 9/16/03) (per curiam).

DEFINITION OF EMPLOYEE

The Second Circuit Court of Appeals reversed Judge Richard Conway Casey's dismissal of a Title VII sexual and racial harassment case filed by four participants in New York City's Work Experience Program (WEP), which New York enacted after Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The court of appeals held that the plaintiffs had sufficiently alleged that they were employees pursuant to Title VII. They satisfied the two-part test established in **O'Connor v. Davis**, 126 F.3d 112 (2d Cir. 1997), which requires the plaintiff to show (1) that she was hired; and (2) that she received some form of remuneration in exchange for her work. The plaintiffs' allegations that they (1) received cash payments and food stamps, (2) received transportation and child care expenses, and (3) were eligible for worker's compensation, were considered sufficient remuneration to support a finding that they were employees of the City. Further, the plaintiffs' allegations were consistent with the EEOC's compliance manual, which states: "A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an 'employee.' The fact that an entity does not pay the worker a salary does not preclude the existence of an employer-employee relationship." EEOC Notice No. 915.003 § 5.a (Dec. 3, 1997). The court also held that the PRWORA did not preempt Title VII regarding WEP employees. Judge Dennis G. Jacobs dissented on the ground that the "remuneration" described by the plaintiffs was insufficient to show employment, because no one would voluntarily work for so little. **United States v. City of New York**, 359 F.3d 83 (2d Cir. 2/13/04) (Rosemary S. Pooler, J., joined by John Gleeson, E.D.N.Y., sitting by designation).

DISABILITY DISCRIMINATION

Standing

On an affirmative grant of summary judgment, the Second Circuit Court of Appeals adopted the reasoning of the Tenth Circuit, holding that a plaintiff employee has standing to challenge an employer's disability inquiry policy irrespective of whether the employee could prove a yet to be revealed disability. The court noted that (1) the medical inquiry provision of the ADA does not refer to "qualified individuals with disabilities," whereas other provisions do, and (2) it would make little sense to require an employee, in order to have standing, to prove the existence of a disability that she is seeking to keep private from her employer. The court of appeals also relied

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on the EEOC's enforcement guidance documents on the subject, which, although not formal regulations, the court referred to as a valuable source of information upon which litigants and courts may rely. The court reversed the grant of summary judgment to the employee, however, it held that the employer might have a business necessity defense, which presented a material issue of disputed fact. **Conroy v. New York State Dep't of Correctional Services**, 333 F.3d 88 (2d Cir. 7/18/03) (Rosemary S. Pooler, joined by Jose A. Cabranes and Robert A. Katzmann).

DISCOVERY

Immigration Status

A panel of the Ninth Circuit Court of Appeals has affirmed the validity of a district court's protective order prohibiting an alleged sweatshop owner from using the discovery process to inquire into the plaintiffs' immigration status and eligibility for employment. The plaintiffs were 23 Latina and Southeast Asian female immigrants who had sued for disparate impact discrimination based upon national origin after they were terminated, allegedly for performing poorly on job skills examinations given only in English. The employer, which had lost a motion for reconsideration prior to the Supreme Court's decision in **Hoffman Plastic Compounds, Inc. v. NLRB**, 535 U.S. 137 (2002), immediately renewed its motion for reconsideration after the **Hoffman Plastic** decision. The employer claimed that the plaintiffs' immigration status should be discoverable because it was relevant to potential remedies. The district court certified the issue for interlocutory appeal to the court of appeals, which held that the chilling effect of such discovery would unacceptably burden the public interest, because "countless acts of illegal and reprehensible conduct would go unreported." **Rivera v. NIBCO, Inc.**, --- F.3d ---, 2004 WL 771283 (9th Cir. 4/13/04).

Other Employees' Records

The New York State Office of Parks, defending an age discrimination suit by a female recruit, refused to produce "personnel files of individuals over 40 and of younger recruits" who had medical emergencies, as the plaintiff had, claiming that the files were privileged under Civil Rights Law § 50-a. The plaintiff alleged that she had suffered unrelenting harassment and was ultimately forced to resign; she sought the records of six other recruits 40 and over who resigned. Only one of those six had successfully completed training. The court held that the discovery request was suitably narrow and did not subvert the purposes of § 50-a, which was intended "to prevent police witnesses from being discredited by confrontation with irrelevant complaints, disciplinary proceedings or reprimands filed against them in the past…." The training records of the six recruits were ordered to be produced for purposes of the present action only, and the records of nine others were to be produced to the court *in camera* for inspection as to their relevance to the issue of placement on restricted duty. NELA member Eileen (Lee) H. Persky represented the plaintiff. **Crennan v. New York State Office of Parks, Recreation and Historic Preservation**, --- N.Y.S.2d ---, N.Y.L.J. 3/19/04, p. 19, col. 3 (Sup. Ct. Nassau Cty. approx. 3/12/04) (Bucaria, J.).

EQUAL PAY ACT

A female "dispatcher/corrections officer" in a county sheriff's department saw her Equal Pay Act claim dismissed on summary judgment in the Northern District of New York (Thomas J. McAvoy, J.). The court ruled that she did not perform work of equal skill, effort, and responsibility compared to the male "county corrections officers." Although there was substantial similarity in the two job descriptions and the training requirements, the court ruled that the positions were not substantially similar. The male corrections officers had primary responsibility for supervising the jail and interacting with the inmates (for example, booking inmates, screening visitors, inspecting cells, and supervising visitation). The record was devoid of any evidence that the plaintiff and other dispatcher/correction officers performed these functions. Rather, plaintiff's duties were primarily dispatching duties. Her only contact with inmates was when female inmates were subjected to strip searches or had a problem that was not appropriate for a male corrections officer to handle. The court further found that, even if their job positions were substantially similar, their working conditions were not, because the male corrections officers worked primarily in the cell blocks and the plaintiff worked in the secure control room. The court also found that expert witness testimony analyzing the two positions would not be helpful, because the trier of fact is capable of reviewing the job descriptions and analyzing the evidence about job functions and external pay equity issues without the help of an expert. The court did rule, however, that an expert would be helpful to analyze internal pay equity issues because "it is not within the ordinary purview of lay triers of fact whether accepted procedures call for an institutional classification and compensation process to address internal salary consistency." **Pfeiffer v. Lewis County**, --- F. Supp.2d ---, 2004 WL 527915 (N.D.N.Y. 3/1/04).

ERISA

Survivor Income Benefits

The surviving spouse of an employee prevailed in the Second Circuit Court of Appeals when her husband's employer's pre-retirement Survivor Income Benefits plan denied her benefits. For eight years,

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the couple had lived together as domestic partners; they finally got married, but he died less than six months later. Both domestic partners and spouses were eligible for survivor benefits, but spouses of employees were ineligible if they had been married for less than a year, and domestic partners had to file a joint affidavit, which this couple had failed to do. The plan told the employee's widow that she was, accordingly, ineligible. The plaintiff argued that the summary plan description ("SPD") was deficient because it failed to set forth the affidavit requirement. Judge David G. Larimer (W.D.N.Y.) granted summary judgment to the plan because the couple had failed to comply with the affidavit requirement and because the plaintiff failed to show that she had relied to her detriment on the SPD. The court of appeals reversed, holding that the lower court had properly concluded that the plan had not given effective notice of its appeal deadline, so it could not argue that the plaintiff had failed to exhaust her internal remedies. It also held that the plan administrator's argument that the couple had, in effect, forfeited benefits by marrying less than a year before the employee's death was "bizarre[,] … arbitrary, [and] probably illegal." Finally, the court held that where the plan and the SPD conflict, the SPD controls, and this SPD was inadequate, and the beneficiary was not required to show detrimental reliance, but only prejudice. The opinion was written by Judge Joseph M. McLaughlin and joined by Judges Roger J. Miner and Rosemary S. Pooler. **Burke v. Kodak Retirement Income Plan**, 336 F.3d 103, 2003 WL 21666136 (2d Cir. 7/17/03).

EVIDENCE

Adverse Employment Action

The Second Circuit Court of Appeals affirmed denial of an employee's post-trial motions after a jury verdict against her on her claims of race and sex discrimination and retaliation. Whether a negative performance evaluation that was in plaintiff's file for two weeks before being destroyed was an adverse employment action was a question of fact for the jury, and did not constitute an adverse employment action as a matter of law. Likewise, exclusion of the plaintiff from male-only meetings and a transfer to an allegedly crowded, run-down, vermin-infested building in Brooklyn were not adverse employment actions as a matter of law. The verdict accordingly was properly upheld. The district court's error in making the **McDonnell Douglas** burden-shifting scheme part of its jury instructions was also held harmless. Accordingly, the court affirmed the district court's (Victor Marrero, S.D.N.Y.) denial of the plaintiff's motion for judgment as a matter of law and for a new trial. The opinion was written by Richard Cardamone, J., and joined by Judges Dennis G. Jacobs and Rosemary S. Pooler. **Sanders v. New York City Human Resources Administration**, 361 F.3d 749 (2d Cir. 3/16/04).

Expert Witness Testimony

See **Pfeiffer v. Lewis County**, discussed under "Equal Pay Act."

FAIR LABOR STANDARDS ACT

The Second Circuit Court of Appeals reversed a grant of summary judgment for a garment company and remanded for further proceedings to determine whether workers hired by a contractor of a "jobber" garment manufacturer to perform final assembly of garments at contractor's facilities were "employees" of the garment manufacturer for purposes of FLSA and state statutory minimum wage and overtime provisions. On remand, said the court, the determination should be made based on the "economic reality" that the garment manufacturer suffered and permitted the workers' labor, as opposed to an unnecessarily restrictive "technical concept" test. The factors to be considered on remand include: (1) whether the principal's premises and equipment were used for the plaintiffs' work; (2) whether the contractor could or did shift the employees as a unit from one putative joint employer to another; (3) the extent to which the plaintiffs performed a discrete line job that was integral to the principal's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the principal supervised the plaintiffs' work; and (6) whether the plaintiffs worked exclusively or predominantly for the principal defendants. The decision was written by Jose A. Cabranes, joined by Ralph K. Winter and Pierre N. Leval. **Zheng v. Liberty Apparel Co.**, 355 F.3d 61 (2d Cir. 12/30/03).

PRIVILEGE

Investigation by Counsel

The holding of **Pray v. New York City Ballet Co.**, 1997 WL 266980 (S.D.N.Y. 1007), that an employer waives its attorney-client privilege with respect to an investigation conducted by counsel when it places the adequacy of the investigation in issue, has been limited by Justice Walter B. Tolub in state court. A plaintiff who alleged sexual harassment by her manager complained, first informally and then formally, and, after an investigation, she was transferred. The alleged harasser resigned two months later, at about the same time the plaintiff began her lawsuit. Six months later the plaintiff was let go, purportedly as part of a company-wide layoff. Jackson, Lewis was retained as trial counsel and conducted a second investigation, interviewing employee-witnesses. In preparation for trial, plaintiff's counsel served a document demand asking for all files concerning internal investigations of gender-based complaints against the alleged harasser, and moved to compel production. The court denied the motion, holding that the second investigation clearly had not been undertaken "in order to take corrective measures or disciplinary actions" and, therefore, it remained protected by privilege. **Sanabria v. M. Fabrikant & Sons**, --- N.Y.S.2d ---, Index No. 224478/2002 (Sup. Ct. N.Y. Cty. 2/5/04).

PROCEDURE

Sealing of File

After a multimillion-dollar settlement in a sex discrimination and retaliation case, the parties asked to have certain documents, filed under temporary seal, permanently sealed. (The documents included a Global Diversity Study by the employer that "shows that the percentage of women promoted to MD positions is disturbingly low … and well out of pro-

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the rules of evidence and not orally argued, will not be considered.

In the end, the answer—the 'right approach'—lies in what you will feel best about when you reflect upon your advocacy for your client. Did you represent your client's interests the way you would want to be represented? It's not always easy, and it's not always fun. But I have been most proud of the times that I stood strong for my client and, in doing so, was maybe berated or embarrassed by the Court. As time passes, you'll feel better and better about your resolve. I've also noted that judges either forget your mutiny, or have gained respect for your tenacity.

Pick your battles carefully, but, when necessary, battle to the end.

What do you think?"

"**LET** your reach exceed your grasp."

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portion to the number of women that make up [the employer's] workforce.") The employer argued that the stipulation of settlement terminated the court's "jurisdiction" to render any further order or decision in the case, including whether to remove the interim seal on the documents. This argument was not hospitably received by the district court judge (Harold Baer, J.). Citing the court's inherent power, the judge noted that the grant of a protective order "is not as of right, as defendants perhaps would like us to believe, but rather in the court's discretion." He also noted that the standard reasons for sealing documents no longer existed in the case and that there was, in fact, a public interest in their being made available. The court continued the interim seal only long enough for the defendants to seek a stay from the court of appeals. Apparently, the decision was not appealed. **Gambale v. Deutsche Bank AG**, --- F. Supp. 2d ---, 2003 WL 21511851 (S.D.N.Y. 7/2/03).

RETALIATION

An analyst, who was discharged 36 days after his attorney sent his employer a letter alleging age discrimination, still was unable to prove to Judge Shira Scheindlin's satisfaction that he had shown enough evidence to defeat summary judgment. The court followed **Slattery v. Swiss Reinsurance Am. Corp.**, 248 F.3d 87, 95 (2d Cir. 2001), which had affirmed a grant of summary judgment where adverse employment actions began five months before the plaintiff had filed an EEOC charge, and noted that the plaintiff analyst had complained of adverse employment actions before his lawyer's letter was sent. Indeed, the lawyer's letter itself stated that the plaintiff considered that he had been constructively discharged by those adverse actions. Accordingly, the court held, temporal proximity could not establish a causal nexus between the lawyer's letter and the discharge. The plaintiff also failed to show pretext by arguing that the employer had asserted two mutually

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The suit was filed on behalf of eighteen current and former Salvation Army employees of varying religious and non-religious backgrounds. They include many of the most respected senior managers in the agency.

Anne Lown is the current Associate Executive Director of Social Services for Children of The Salvation Army and has received 5 promotions in the 24 years she has worked for the charity. "I do not think my religious beliefs nor the religious beliefs of the 800 employees in Social Services for Children are any business of The Salvation Army," Lown says.

Added Mary Jane Dessables who is the Management Information Systems Director for The Salvation Army and has worked for the charity for 12 years, "Although I am not a Salvationist, I have sung for their Devotionals… attended their Good Friday services. I participated because I wanted to, not because it was required or requested of me."

And Margaret Geissman who is the former Human Resources Manager for Social Services for Children with The Salvation Army has left the charity rather than provide personal information about employees. "When I refused to answer questions that I felt were clearly illegal and violated my employees' privacy, I was harassed to the point where eventually I resigned. As a Christian, I deeply resent the use of discriminatory employment practices in the name of Christianity."

NYCLU Legal Director Arthur Eisenberg noted that The Salvation Army's new employment practices "have injected religion into the workplace in ways that violate the anti-discrimination principles of the Fourteenth Amendment."

Martin Garbus, whose firm, Davis and Gilbert is co-counsel with the NYCLU, cited President Bush's Faith-Based Initiative as the catalyst for the current situation and called it "the greatest transfer of wealth from governmental bodies to evangelical churches. Federal, state and local services are being used to spread the evangelical message."

In addition to Eisenberg, Lieberman and Garbus, plaintiffs are also represented by NYCLU staff attorney Beth Haroules; NYCLU co-counsel Deborah Karpatkin; and Howard Rubin and Gregg Brochin from the Davis and Gilbert law firm.

The NYCLU is the NY affiliate of the American Civil Liberties Union.

Go to *http://www.nyclu.org* for more information.

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inconsistent reasons for discharging him, or by arguing that one of those reasons, poor performance of his Fund, was insufficient to justify his termination. The court followed **James v. New York Racing Ass'n**, 233 F.3d 149, 155-56, which essentially ignored language in **Reeves v. Sanderson Plumbing Prods., Inc.**, 530 U.S. 133, 148 (2000), saying that a *prima facie* case, plus evidence of falsity, may permit the trier of fact to conclude that the employer discriminated, and focused on other language in **Reeves** saying that "in other circumstances, a *prima facie* case, combined with falsity of employer's explanation, will not be sufficient." Both **Slattery** and **James** overtly challenged **Reeves**, indicating that the court of appeals panels thought the Supreme Court's decision was wrong. **Luxenberg v. Guardian Life Insurance Co.**, --- F. Supp. 2d ---, 2004 WL 385116, 2004 U.S. Dist. LEXIS 3121 (S.D.N.Y. 3/2/04).

SEX DISCRIMINATION

Stereotyping

A school psychologist who was denied tenure sued her school district employer pursuant to 42 U.S.C. § 1983 and the New York State Human Rights Law, alleging that she was subjected to discrimination based on gender stereotyping. The plaintiff, who had been hired on a three-year tenure track, had repeatedly received excellent evaluations. As her tenure review approached, however, things drastically changed. In the spring of her second year, the Director of Pupil Personnel Services for the District "(a) inquired about how she was 'planning on spacing [her] offspring,' (b) said '[p]lease do not get pregnant until I retire,' and (c) suggested that she 'wait until [her son] was in kindergarten to have another child.'" During her third year, after she had another baby, the Director said that she should "maybe ... reconsider whether [she] could be a mother and do this job," and said that the Director and the school principal were "concerned that, if [she] received tenure, [she] would work only until 3:15 p.m. and did not know how [she] could possibly do this job with children." The court held that "sex plus" discrimination is actionable under Section 1983. Views that a woman cannot be a good mother and work long hours, or that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home," could constitute gender-based stereotypes even without comparative evidence of what was said about fathers. Indeed, the court of appeals stated that **Nevada Dep't of Human Resources v. Hibbs**, 538 U.S. 721 (2003), "makes pellucidly clear . . . that, at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based." (Citations omitted.) The court held that summary judgment was inappropriate because a jury could find that the cited reasons for denying the plaintiff tenure were pretextual, and that discrimination was a motivating factor. It dismissed the complaint as against the Superintendent and the school district for lack of evidence that they were involved in the discrimination; the case against the principal and the Director was remanded for trial. **Back v. Hastings on Hudson Union Free School District**, --- F.3d --- (2d Cir. 4/7/04) (Guido Calabresi, J., joined by Ralph K. Winter and Robert A. Katzman, JJ.)

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