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Judiciary Committee Hosts Successful CLE for NY Employment Neutrals

by Linda M. Dardis, Esq.,
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On March 28, 2008, the Judiciary Committee of NELA/NY presented a seminar for New York Employment Neutrals. Close to 70 New York area Employment Neutrals attended the seminar, held at the New York City Bar Association. Attendance at the 3 credit hour program was free of charge for New York area Employment Law neutrals. The primary goal of the Judiciary Committee in coordinating this program was to educate and update New York Employment Neutrals on the superiority of the recently amended NYC Human Rights Law over State and Federal Law. The program included a presentation on valuation of emotional distress and punitive damages, including the different remititur standards under federal, New York State and City law, as well as a survey of the largest emotional distress and punitive damages awards under City, State and Federal law. The program also covered ethical issues confronting

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Post v. Merrill Lynch: What Does it Mean?

by Matthew Bergeron *(mbergeron@satterandrews.com)*

This article will be presented in two parts. In this offering, I will first discuss the contract principles of consideration and mutuality of obligation, each of which are central to the analysis of the question before us. With these principles in mind, I will then present the facts and findings of **Post.** The second installment will pick up with how the courts have applied and interpreted **Post**, followed by analysis thereof. The article will then finish with some musings as to what this all means to the practice of plaintiff's employment law.

I. Consideration and Mutuality of Obligation

A brief prefatory discussion of these principles is useful because, in this author's opinion, it places the question which we are considering in context, to wit, under what circumstances is a restrictive covenant enforceable against an at-will employee? The New York Court of Appeals has indicated that consideration and mutuality can be thought of as implicated at different stages of the employment relationship.

A. Consideration: Past or Present?

Taking consideration first, in order for a restrictive covenant to be enforceable, it must be ancillary to either a contract for the sale of a business or an employment agreement. *See, e.g.,* **Zellner v. Conrad**, 183 A.D.2d 250, 254 (2d Dep't 1992). When the ancillary employment relationship is at-will, the immediate question raised is whether the employer has really made any promise since (subject to certain statutory proscriptions) it can lawfully terminate the employee for any reason, or no reason, at any time. If no promise is present, it may be argued, the agreement is illusory, thus rendering it unenforceable from its inception. Although many courts have accepted this view as being fundamentally correct and, therefore, require some consideration beyond a hollow promise of continued employment,[6] the New York courts are not in accord.[7]

New York follows the rule of "past consideration" which dispenses with the requirement that consideration be tendered at the time the agreement is made. Instead of requiring contemporaneity, the courts will find that a restrictive covenant is supported by sufficient consideration, and therefore will be enforced, if the at-will employee remains with the employer for a "substantial time" after entering into the covenant. *See, e.g.,* **Gazzola-Kraenzlin v. Westchester Medical Group, P.C. et al.**, 10 A.D.3d 700 (2d Dep't 2004), citing **Zellner**, *supra*; **Scientific Management Institute, Inc. v. Mirrer**, 27 A.D.2d 845 (2d Dep't 1967). Clearly, the problem with this analysis is that it runs contrary to the most fundamental of contract theories: "Any exchange has to be contemporaneous by definition, because the promise and the consideration for that promise must serve as reciprocal conventional inducements." [8]

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The NELA/NY Calendar of Events

July 16, 2008 • 6:30 pm
'SHOP TALK'
Darnley Stewart's House
31 W. 93rd Street, Apt 1B
July 23, 2008 • 7:00 pm

Brooklyn Cyclones vs. Vermont Lake Monsters
KeySpan Park
rsvp to *nelany@nelany*
BOX SEAT TICKETS $12

September 17, 2008 • 6:30 pm
Executive Board Meeting
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

September 24, 2008 • 6:30 pm
NELA Nite
3 Park Avenue – 29th Floor
(Topic to be announced)
SAVE THE DATE

Executive Board Meeting
October 22, 2008 • 6:30 pm
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

October 24, 2008
NELA/NY Fall Conference
Yale Club of NYC
44 Vanderbilt Avenue
SAVE THE DATE
(Brochure to follow)

November 12, 2008 • 6:30 pm
NELA Nite
3 Park Avenue – 29th Floor
(Hosted by the E-Discovery Committee)
SAVE THE DATE

November 20, 2008 • 6:00 pm
Eleventh Annual Fund-raising Event
Club 101
101 Park Avenue
SAVE THE DATE
(Invitation to follow)

A Word from Your Publisher

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

President's Column

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

The downturn in the economy may lead to a downturn in businesses for many law firms, but generally not for us. I have noticed, and I expect that many of you have noticed, a recent increase in referrals. As layoffs become more widespread, many departing employees will be offered severance packages, inviting review by an employment lawyer.

This is a good time to communicate with your fellow NELA/NY members through the use of the ListServ or otherwise for comparing notes, particularly regarding large employers that have laid our clients. Such communications may uncover useful commonalities and patterns and lead to the development of coordinated strategies to attack unlawful layoff selection processes. This may lead to members collaborating in joint representation situations, which goes to the core of our function as a Plaintiff's employment bar association: Bringing members together! Education, support and communication have been and will continue to be the hallmarks of NELA/NY's existence.

The boom of these times can also lead to taking on too many cases, or possibly cases that appear at first blush to have merit, but show diminishing quality as you come to learn more. This is another reason to step up communication so we can help each other, through the dissemination of the sage wisdom that our more experienced members can offer those less experienced. As volume increases, so should our attempts to seek each other out for guidance. Paul Tobias, NELA National's founder has always stressed that our solo and small law firm member base constitutes the country's largest employment law firm. This is the opportunity NELA National provides us at the national level.

This circumstance cries out for our NELA/NY members to reach out to our brother and sister NELA National members. Attendance at the upcoming NELA National Convention in Atlanta in June is an excellent way to begin. Once you join NELA National, you have access to NELA Net, NELA's National brief bank and prior national conference materials. It's really a no brainer to get involved at this level.

While we are on the subject of solidarity, by the time this column is published, NELA/NY will have had its first ever Upstate Spring Conference. This is NELA/NY's first attempt to seek attendance by downstate and upstate members in a neutral setting. As we go to press, attendance is starting to build and we expect a great turnout. We know the content of the conference will be outstanding, just as it usually is. New York State employment practice could not be a more appropriate topic for this conference. While 2008 will be my last year as President, I will move on with confidence that NELA/NY will continue to build on this first ever conference and schedule more events to attract statewide member participation.

On an unrelated matter, I want to comment on the departure of Kumiki Gibson from her position as Commissioner of the New York State Division of Human Rights. I do not profess to know why her tenure came to an end. However, I do know that as soon as she took office she reached out to NELA/NY to establish a dialogue. The next thing we knew, cases started to move along more quickly and probable cause determinations increased. There was a major improvement in the operation of the agency. We can only hope that her successor will follow up on Ms. Gibson's accomplishments.

In conclusion, while we all expect to be extremely busy through the economic downturn, it will be up us to work together to afford our clients the best possible representation. Fortunately, we have NELA/NY and NELA National to assist us in doing so. ■

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A Practitioner's Overview of the Deficiencies of the Worker Adjustment and Retraining Notification Act Twenty Years Following its Enactment

by René S. Roupinian *(rroupinian@outtengolden.com)*

This year marks the twentieth anniversary of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101 et. seq., a law that was intended to provide workers and their families with sufficient time to adjust to impending layoffs, to obtain retraining and to look for other employment.[1] Unfortunately, only 8% of employers actually comply with the 60 day advance written notice requirements of WARN.[2]

On May 20, 2008, the Senate's Health, Education, Labor and Pension Committee held its hearing on the deficiencies of the Act, the potential impact of proposed reform legislation extending the notice period, increasing the penalty period and closing various loopholes. The hearing was chaired by Senator Sherrod Brown (OH), a strong advocate for WARN reform who introduced S. 1792 (known as "FOREWARN") on July 16, 2007, which was co-sponsored by Senators Obama and Clinton and has the support of , among others, Senators Kennedy and Kerry.

Outten & Golden, LLP submitted written testimony regarding its experience in litigating WARN cases, and Joe Aguiar, a class representative in one of Outten & Golden's pending WARN cases, **Aguiar, et al. v. Quaker Fabric Corporation, et al**., Adv. Pro. No. 07-51716 (Bankr. DE), testified about the personal hardship of being terminated from Quaker Fabric Corporation in Fall River, Massachusetts, where he and his wife worked for the past 27 and 18 years respectively, until their terminations (along with 900 others) with no notice over the July 4th holiday. The testimony coming out of the hearing underscored the fact that WARN is not meeting its intended goals and that reform is long overdue.

René S. Roupinian is of counsel to Outten & Golden LLP, and co-chairs the firm's WARN Act Class Action Practice Group with Partner, Jack A. Raisner. René is licensed in New York and Michigan and has exclusively litigated WARN cases since 2002.

Following is an overview from a litigator's perspective of the main deficiencies in the WARN Act, including hurdles not contemplated by Congress that have made WARN Act litigation difficult and often nearly impossible in ways not envisioned by Congress twenty years ago. Some of these deficiencies have been addressed by the current proposed legislation, namely S. 1792 and H.R. 3920 (which the House approved in October 2007), others have not, but should be considered as critical to making WARN a viable tool for achieving Congress' purpose of providing advance notice to terminated employees.

The WARN Act requires "employers", as that term is defined by the Act, to provide 60 days advance written notice of a "mass layoff" or "plant closing" to each affected employee.[3] Absent such notice and subject to certain exceptions, employers are required to pay 60 days wages and benefits to each affected employee.[4]

Although deceptively simple, the Act is actually rife with statutory and court interpreted exceptions, making it difficult for an employment law practitioner to assess whether the Act has been violated and to evaluate the likelihood of recovery on behalf of affected employees. These issues are further compounded by the number of employers who file for bankruptcy contemporaneous to implementing a layoff or shutdown, requiring plaintiff's counsel to file and litigate in bankruptcy court with the concomitant obstacles. Unfortunately, the proposed legislation does not address this bankruptcy component.

A. Current legislation does address the following problems in the WARN Act.

1. Increase the WARN notice period and penalties for failure to give advance notice.

The purpose of WARN notice is to allow time for affected workers to locate new jobs or decide upon retraining options, as well as time for planning and gathering of community resources. Sixty days is simply not long enough. Extending the notice and concomitant penalty period to 90 days will incentivize employers to comply with the notice requirement and employees to enforce the law when it is violated.[5]

2. Base the number of days for which back pay is owed using calendar days rather than working days.

Under the current WARN Act, it is unclear whether the appropriate calculation of the maximum period of liability is 60 calendar days or the number of working days in 60 days. In other words, if the employer fails to provide WARN notice and is found liable for 60 days of back pay, does the court multiply the amount of the employee's back pay on a given day times 60 days, or does the court multiply the amount of a day's back pay times the number of working days that would have fallen in the 60 day period – usually about 42-44 days only? The United States Court of Appeals for the Third Circuit, in **North Star Steel**,[6] holds the minority view that the liability period is 60 calendar days. In reaching its holding, the Third Circuit relied on the language of 20 C.F.R. § 639.1(a), which states in relevant part that the WARN Act "provides protection to workers, their families and communities by requiring employers to provide notification 60 *calendar* days in advance of plant closings and mass layoffs." The majority view is that the court need only award the amount of pay the employee would have earned during the 60 day period.[7]

3. Increase WARN damages.

Increasing employer damages to two days' pay for each day no notice was given

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will incentivize employers to send WARN notices and will ease economic barriers to enforcement by injured workers. Both will result in greater compliance with WARN. Double damages are the default remedy in federal wage legislation. Indeed, double, or liquidated, damages are mandatory under the Fair Labor Standard Act ("FLSA"), in the absence of pleading and proof of a good faith defense.[8] WARN, which is codified in the same title as the FLSA, contains a much more defendant-friendly "good faith" defense which can act as complete offset to a damages recovery unlike under the FLSA.[9] Accordingly, WARN plaintiffs who survive the WARN Act's good faith defense and are entitled to a damages award should automatically qualify for liquidated damages. Otherwise, there is little reason why an employer should not violate WARN and litigate when necessary—if, at worse, it will have to pay only what it was required to pay in the first place. Hence, any WARN litigant entitled to damages currently has to overcome the type of "good faith" defense that would make double liquidated damages mandatory under the FLSA.[10]

4. "Good Faith Defense" should not reduce damages.

As mentioned above, the WARN Act currently permits employers who have violated WARN to successfully reduce or completely eliminate damages to its employees despite a finding of liability.[11] The mere threat of reliance on this defense in the face of a trial may compel a substantially reduced settlement, particularly since the cost of litigation can be significant vis-à-vis full recovery for lower-paid workers. In addition, discovery on the issue of an employer's alleged good faith can often be substantial, necessitating depositions of the employer's legal counsel who may have advised the employer on its WARN obligations. The defense of good faith should be pled and proved by the employer to offset or negate penalties and interest, as under the Fair Labor Standards Act, where it can negate liquidated double damages that are otherwise mandatory.[12]

CONDOLENCES

Jo Anne Simon's father passed away on March 17th

Dave Fish's mother passed away in April

Wayne Outten's mother, Marie Perdue Outten, passed away on April 22nd

Jonathan Ben-Asher's father, Jerry Ben-Asher, passed away on May 26th.

We send our heartfelt sympathy to you and your families.

5. Reduce 50 employee minimum for single site coverage.

WARN currently provides protection to only those employees who are terminated without notice at a facility which employs at least 50 full-time employees. Employees at smaller facilities, sometimes within the same geographic area, are impacted in the same manner as their large facility counterparts, but are denied protection. Even if the smaller facility is isolated in a smaller city or town, the impact of the facility's closure may be as significant. Note, the reduction of the single site minimum does not sweep smaller companies into WARN Act coverage. Only employers who employ 100 or more employees are covered, thus small employers who comprise an enormous sector of the economy remain unregulated by WARN.[13]

It is difficult to explain to an employee that he is entitled to nothing under the Act in the wake of a company-wide shutdown simply because his office housed less than 50 full-time employees.

6. Reduce 50 employee minimum for mass layoff.

A layoff of 25-49 employees may have just as substantial an impact on one community as a 50-person layoff, depending on the relative size of the community. The lowering of the minimum says nothing about the relative ability of the employer to provide notice and pay penalties. Again, as in the lowering of the single-site threshold above, the lowering of the layoff minimum does not spread the coverage of the WARN Act to small employers. It merely makes it more difficult for employers to circumvent the law by "toeing-the-line" and ordering 49 person-layoffs, often on a rolling basis, to avoid hitting the 50 person minimum.[14]

7. Eliminate the 33% mass layoff rule.

Repealing this exemption will have a more positive impact on WARN protection and enforcement potential than perhaps any other.[15] This rule allows any savvy employer to order a mass layoff of hundreds, if not thousands of employees, simply by laying of one person short of one-third of the site. Thus, an employer with a factory of 999 employees will not be subject to WARN if it lays off 332 employees, not 333. According to the 1993 GAO report "Dislocated Workers: WARN Act Not Meeting Its Goals," over 75% of mass layoffs affecting 50 or more workers were exempt from coverage because they did not affect at least one-third of the work force.[16] The one-third rule exempted 100% of layoffs in the finance, insurance and real estate sector, according to the GAO.[17]

8. Eliminate the exception to 90-day aggregation rule.

Currently, WARN allows plaintiffs to aggregate small mass layoffs that take place over a 90-day period, as to permit the plaintiffs to claim that the sum total exceed the 50 person and 33% minimum.[18] However, an illogical result occurs under this rule whenever one of the smaller layoffs, itself meets these thresholds. The presence of the one threshold-meeting layoff, effectively negates the coverage for the others that occurred over the 90-day period and would have otherwise been added together to meet the aggregate and therefore be protected. The rule of mass layoffs should be changed so that all layoffs that occur over a 90-day period are deemed covered WARN events so long as the minimum threshold is met in the aggregate when they are added together.

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9. Uniform statute of limitations.

It is important that WARN fix a uniform statute of limitations which will help employers and employees avoid continued litigation over this issue.[19]

10. Government enforcement.

The U.S. Department of Labor has no enforcement power. Given the ineffectual enforcement of WARN by the private plaintiffs' bar, governmental enforcement of WARN is warranted. However, government resources may prove to be limited, thus this option does not relieve the need to bolster private enforcement by strengthening the law. Under the FLSA, the DOL has the authority to investigate and prosecute violations of the Act but shares enforcement responsibility with the private bar.[20]

B. Problems with the WARN Act not addressed in the current proposed legislation.

1. Protect off-site workers.

WARN currently provides protection for workers who are out-stationed, or whose primary duty requires travel or outside work, such as railroad workers, bus drivers, and salespersons.[21] Nevertheless, such off-site workers are often denied WARN protection when they are terminated without proper notice. The Regulations state that an employee will be associated for WARN purposes with the single site to which he/she has been assigned, or from which his/her work is assigned, or to which he/she reports. But neither the Act, nor its Regulations define any of these key terms. Unfortunately the courts have construed them narrowly, precluding protection to numerous categories of workers, including sales representatives[22], bus and truck drivers[23] and construction workers[24].

2. Close the "joint-employer" loophole.

WARN has been interpreted to insulate staffing agencies or off-site human resources departments from WARN liability despite responsibility for the payment of salaries, wages and employment benefits, and the reservation of right to make hiring and firing decisions. Unless the employee can show that the agency or department "ordered" the mass layoff or plant closing, the agency is absolved of liability.[25]

Importing FLSA's "joint employer" liability standards would prevent companies from easily evading WARN duties.

3. Parent liability

Currently, the Act does not expressly provide for parent liability. The Department of Labor's five factor test for determining parent or contracting company liability,[26] is inconsistently applied and has given rise to protracted litigation. The five factors are: 1) common ownership, 2) common directors and/or officers, 3) de facto exercise of control, 4) unity of personnel policies emanating from a common source, and 5) dependency of operations.

The WARN Regulations Preamble[27] state that this "regulatory provision … is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA)" adding to further confusion among the courts as to the appropriate analysis.[28]

4. "Voluntary separations" are not voluntary if they are in anticipation of shutdowns/mass layoffs.

An employer can subvert WARN by inducing voluntary dismissals within the WARN notice period using inducements such as real or sham job offers, or cash buy-outs. In fairness, it may be argued that the resigning employee should lose any WARN claim, but the loss of the employee should not permit the employer to reduce the total employee headcount for the purposes of establishing the WARN minimum threshold, thereby extinguishing others' WARN claims.

Example: Mortgage lender "H" permitted lender "C" to come on site two days before the shutdown (about the time the company stopped funding loans) and meet with its employees for the purpose of offering them jobs. The operations and salespeople were told by "C" that they would all be offered jobs. The day before the shutdown many of the salespeople were offered jobs and the operations people were instructed to fill out online job applications. Counsel has stated that sufficient numbers of employees voluntarily quit (by accepting jobs with "C"), so that at an otherwise covered facility, the number of people who suffered an "employment loss" was below the threshold. Also, many employees around the country are reporting "for cause" dismissals just prior to layoffs which bring the site under WARN's minimum. Many of these were highly rated, top performing employees.

C. Bankruptcy-Related Recommendations—Not Included in Current Proposed Legislation

Often an employer files for bankruptcy protection contemporaneous to a mass layoff or shutdown. Currently all WARN suits our office has filed are in bankruptcy court as adversary proceedings. The ability of plaintiffs to file an adversary proceeding in bankruptcy court is not clearly defined, the right to a class claim, and the treatment of WARN wages (back pay) compared to other creditor claims are all issues that are frequently litigated and therefore ripe for review and clarification. Other, WARN Act specific fixes are as follows.

1. Eliminate the "liquidating fiduciary" defense.

An employer that implements a plant shutdown contemporaneous to a bankruptcy filing may escape WARN liability by asserting that it was not acting as an "employer" at the time it ordered the shutdown, but rather a *liquidating fiduciary*.[29]

This "defense" is not found in WARN or its Regulations. Rather, it arises from the DOL's comment to WARN's Preamble.[30] Nevertheless, the Third Circuit has turned the comment into an obstacle barring plaintiffs' claims in bankruptcy, many of which are litigated in Delaware, within the Third Circuit.

In short, upon filing for bankruptcy an employer often attains the debtor-in-possession status of a fiduciary. If it chooses to then terminate its workforce, it may use the *liquidating fiduciary* defense shield against WARN liability, unless the plaintiffs can prove that the employer is still operating its business

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in the normal course. This will likely entail discovery, imposing a significant burden in the prosecution of an otherwise non-complex meritorious claim, even if the defense is not a complete bar.

2. WARN damages should be entitled to administrative priority status.

The Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCA) provides support for the treatment of WARN Act back-pay awards as first priority administrative expense claims.[31] However, given that the legislative history of this new subsection is sparse, that WARN Act back-pay is not specifically mentioned, and that it has yet to be tested in a WARN case, it is unclear whether it will provide the protection sorely needed for affected employees.

To eliminate the tactical maneuver by debtors, in terms of the timing of a plant closing or mass layoff in relation to a bankruptcy filing, and to protect employee's right of recovery for WARN violations, reform legislation should explicitly state that any back-pay award in bankruptcy be entitled to first priority administrative expense status.

D. Conclusion

The above proposed modifications to the WARN Act, together with others, such as: 1) eliminating waivers; 2) permitting only the prevailing plaintiff to recover attorneys' fees; and 3) imposing individual liability, will ensure that the goals of the Act, set twenty years ago, will ultimately be met.

Footnotes

[1] See 20 C.F.R. § 639.1. The Department of Labor published final regulations on April 20, 1989. The Regulations appear at 20 CFR Part 639.

[2] May 20, 2008 press release by U.S. Senator Sherrod Brown; *Brown Hosts Senate Hearing As WARN Act's 20th Anniversary Nears*, "The WARN Act requires certain employers to provide workers 60 days notification in advance of plant closings and mass layoffs. According to estimates by the Government Accountability Office, just 24 percent of all layoffs are subject to WARN requirements. In only about one third of those cases are WARN notices actually issued."

[3] 29 U.S.C. § 2101(a).

[4] 29 U.S.C. § 2104(a)(1).

[5] 29 U.S.C. § 2102(a) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(1) (2007); S. 1796, 110th Cong., 1st Sess. § 2(b)(1) (2007) (Brown Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(b)(1) (2007) (Miller Bill – Unreported).

[6] **United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc.**, 5 F.3d 39, 43 (3rd Cir. 1993).

[7] 29 U.S.C. § 2104(a)(1) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(c)(1) (2007); S. 1792, 110th Cong., 1st Sess. § 2(c)(1) (2007) (Brown Bill – Reported).

[8] 29 U.S.C. § 216(b).

[9] 29 U.S.C. § 2104(a)(4).

[10] 29 U.S.C. § 2104(a)(1) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(c)(1)(A) (2007); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(1)(A) (2007) (Miller Bill – Unreported); S. 1792, 110th Cong., 1st Sess. § 2(d)(1)(2007)(Brown Bill – Reported).

[11] **Kildea v. Electro Wire Products, Inc.**, 60 F. Supp. 2d 710, 712 (E.D. Mich. 1999)(holding employer was entitled to a complete reduction in damages); **Watts v. Marco Holdings, L.P.**, 1998 WL 211770 (N.D. Miss. 1998)(without discussion court reduced plaintiffs' damages by 50%, finding good faith).

[12] 29 U.S.C. § 2104(a)(4) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(d)(12) (2007);H.R. 3796, 110th Cong., 1st Sess. § 2(c)(2) (2007) (Senate Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(2) (2007) (Miller

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Anne's Squibs

by Darnley D. Stewart *(dstewart@gslawny.com)*

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

ATTORNEYS FEES

Rozell v. Ross-Holst, 2008 U.S. Dist. LEXIS 41609 (S.D.N.Y., May 29, 2008) (Francis, J.) (or "We'll Take It"): After years of contentious litigation, the parties settled on the eve of trial, leaving it to the Court to determine the amount of attorneys' fees to be paid to plaintiff's counsel. Plaintiff sought $1,348,877 in legal fees and $31,021 in costs. After defendants opposed the fee request, plaintiff reduced the amount sought somewhat, but also filed a supplemental request for work performed subsequent to the initial application in the amount of $85,743. Defendants opposed the fee request on several grounds. First, they claimed that plaintiff could not recover fees for work performed in connection with her claims under the Electronic Communications Privacy Act because there is no "prevailing party" rule under that statute and there was no finding of a violation. The Court agreed and excised 40 hours from plaintiff's potential award. Second, defendants opposed paying attorneys fees in connection with any tasks that were deemed unnecessary, unjustified or unsuccessful. The Court agreed that certain of the tasks undertaken were unnecessary and reduced the petition by an additional 50 hours. The Court also reduced the fees by 15% across the board because it felt plaintiff's counsel had devoted more time to certain tasks than was necessary. At the same time, however, the Court disagreed with many of the defendants' arguments in favor of reduction and otherwise largely agreed with the hours submitted by counsel. Defendants also challenged counsel's hourly rates. Plaintiff produced retainer agreements demonstrating that her counsel regularly receives hourly rates ranging between $140 for paralegals on the low end and $675 for senior partners on the high end. In addition, Judge Francis praised counsel's experience and reputation. The Court also credited affidavits submitted by other local practitioners who attested that the rates sought were comparable to those they charged and within the range of practitioners in the area with the same level of expertise. Nonetheless, the Court still found the rates to be high as compared to other awards in the Southern District, and reduced the range to between $125 per hour for paralegals on the low end to $600 an hour for the most experienced lawyers.

Note: NELA/NY members Kathleen Peratis, Lewis Steel, Carmelyn Malalis, Mark Humowiecki, Tara Lai Quinlan, Ossai Miazad, and tens of thousands of others at O & G worked on this matter. Shelley Leinheardt even second-sat a couple depositions.

DAMAGES

Compensatory Damages

Picinich v. UPS, et al., 2008 U.S. Dist. LEXIS 30200 (N.D.N.Y., April 11, 2008) (McCurn, J.) or "UPS to the Front Pay"): Plaintiff won a bench trial in 2005 on his claims that UPS failed to provide him with a reasonable accommodation and discriminatorily discharged him in violation of the ADA and NYHRL. Plaintiff also alleged that certain individual defendants also discriminated against him and aided and abetted the Company's violations. In an unpublished decision in 2007, the Second Circuit reversed the trial court's rulings on damages, reaffirming that the burden of proof regarding mitigation (or lack thereof) was on the defendant. On remand, now applying the correct standard, the District Court increased plaintiff's back pay from $31,000 to $243,000 and front pay from $0 to $1.2 million. The Court also ordered UPS to make pension contributions until 2024 (when plaintiff turns 65) based on its previous decision that reinstatement was inappropriate. Among other rulings, the Court stated that plaintiff did not have an affirmative duty to attend college as a reasonable means of mitigation, and that even were it to find that plaintiff failed to accept a job offer from UPS in June 2001 (as to which there was an issue of fact), because he was totally disabled at that time any such failure could not limit or eliminate his back and front pay awards. Finally, in an unpublished decision issued on April 14, 2008, the Court awarded plaintiff's attorneys fees at a rate of $210 an hour for an experienced attorney and $120 an hour for an attorney with less than four years experience, the prevailing rates in the district.

Note: NELA/NY members Cara E. Greene and Mark H. Humowiecki were among the counsel prosecuting the case on behalf of the plaintiff.

Punitive Damages

***Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F.Supp. 2d 555 (S.D.N.Y. 2008) (Sweet, J.) (or "Damages Under *Gore*: An Inconvenient Truth"):** Defendant Norddeutsche Landesbank Girozentrale (the "Bank") moved to set aside the punitive damages awarded to plaintiff Zakre, the former Treasurer of the Bank's New York office, after a 10-day trial in 2007. The jury found that the Bank had discriminated against Ms. Zakre because of her gender and retaliated against her after she complained of discrimination. Judge Sweet upheld the imposition of punitive damages, agreeing with the jury that defendant acted with the requisite malicious intent— regardless of reliance on counsel — because the relevant decisionmakers testified that they knew discrimination and retaliation were illegal and there was no claim that Ms. Zakre's claim was novel or subject to any statutory exception. However, after apply-

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ing the factors set forth in **BMW of North America Inc. v. Gore**, 517 U.S. 559 (1996), the Court reduced the punitive damage award from $2.5 million to $600,000. While Judge Sweet believed defendant's conduct to be egregious, he found the damages excessive in light of the significant amount awarded to plaintiff for compensatory damages and when compared with the facts of other state and federal cases where punitive damages were awarded—specifically those in which there was violence and/or indifference to the health and safety of the plaintiffs. The Court also upheld the jury's use of the compensation paid to the male who received the promotion plaintiff should have received in calculating Ms. Zakre's back pay and found the emotional distress damages of $100,000 to be supported by the evidence. Judge Sweet also agreed that setting prejudgment interest using the Federal rate was appropriate and that plaintiff's counsel should be awarded supplemental legal fees in connection with their having to respond to defendant's Rule 50(b) motion. The Court, however, refused to order reinstatement of Ms. Zakre in light of the damaged relationship between the parties.

Note: This case was prosecuted by NELA/NY member Anne L. Clark. Joel Cohen was counsel for the defendant—who else.

DEFAMATION

***Joyce v. Thomson Wigdor & Gilly LLP,* 2008 U.S. Dist. LEXIS 43210 (S.D.N.Y. June 3, 2008) (Gorenstein, J.) (or "15 Minutes of Infamy"):** Plaintiff alleged legal malpractice against defendants for their failure to pursue defamation claims against her former employer. After plaintiff and another female employee of "The Source," an entertainment company, filed charges of sexual harassment and wrongful termination against their employer, The Source issued a press release which, among other things, accused Ms. Joyce of falsifying health claims to stave off termination. In addition, a representative of The Source stated in an interview posted on various hip hop websites that Ms. Joyce did a "weak job" and had "faked" having breast cancer so that she would not be fired. Plaintiff's law firm subsequently filed a complaint on behalf of Ms. Joyce and her co-worker which contained a claim for defamation on behalf of Ms. Joyce's co-worker, but not her. Ms. Joyce understood the claim had been filed and sued for malpractice when she learned—after the passing of the relevant statute of limitations—that her complaint did not include such a claim. Defendants countered that Ms. Joyce never had a viable defamation claim because the statements at issue were mere opinions. In addition, defendants claimed that because the statements were not defamatory on their face, she was required to—and could not—establish "special damages"—*i.e.*, the "loss of something having economic or pecuniary value." First, the Court held that the statement concerning Ms. Joyce's work performance was a non-actionable expression of opinion. In contrast, Judge Gorenstein found the statements regarding Ms. Joyce's "faking" of her breast cancer to be statements of fact, capable of being proven true or false. Plaintiff did not argue that she could establish special damages: instead, she relied on one of the exceptions to such a required showing. The Court agreed that she was entitled to what is referred to as the "trade" exception: words that "imput[e]…any kind of fraud, dishonesty, misconduct, incapacity, unfitness or lack of any qualification in the exercise of a plaintiff's profession, trade or business…" Accordingly, the Court denied defendants' motion to dismiss her malpractice claim with respect to the two claims regarding her falsification of her health problems.

Note: NELA/NY member Patrick DeLince is counsel to Ms. Joyce in this case.

DISABILITY

See **Picinich v. UPS, et al.,** discussed under "Compensatory Damages"

EVIDENCE

***Sprint/United Mgmt. Co. v. Mendelsohn,* 552 U.S. __, 128 S. Ct. 1140 (2008) (Thomas, J.) or "*Per Se* Faith"):** The trial court precluded plaintiff in an ADEA case from introducing the testimony of five other former Sprint employees who claimed that their supervisors had discriminated against them because of age on the ground that the other witnesses were not "similarly situated" to plaintiff because they did not work in the same business group as plaintiff or share any of the same supervisors. On appeal, the Tenth Circuit reversed, finding that the trial court had erroneously applied a *per se* rule that evidence from employees with other supervisors is irrelevant. The Supreme Court reversed, finding it unclear whether the District Court had, in fact, applied a blanket rule. The Court was, however, quick to "note that, had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion" because "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules." The Court concluded that Rules 401 and 403 do not make such evidence either *per se* admissible or *per se* inadmissable and remanded the case for the district court to clarify the basis for its evidentiary ruling.

NEW YORK LABOR LAW

***Samiento v. World Yacht Inc.,* 10 N.Y.3d 70 (2008) (or "Beggars Banquet"):** Plaintiffs charged defendants with violating Labor Law § 196-d, which forbids an employer from retaining any part of a gratuity or "any charge purported to be a gratuity," when World Yacht charged customers a mandatory 20 percent "service charge" on banquet cruises but then failed to distribute that money to the wait staff. The Court of Appeals overturned the First Department's decision which had held that §196-d only applies to a voluntary gratuity and not a mandatory service charge. According to the Court, both the plain meaning of Labor Law § 196-d and its legislative history establish that the service charges at issue fall within the statute. Moreover, "[e]ven if the charge is mandatory, and not subject to negotiation, when a complaint asserts, as plaintiffs' com-

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plaint asserts here, that a service charge has been represented to the consumer as compensation to defendants' wait staff in lieu of the gratuity, such allegation is covered within the statutory language of Labor Law § 196-d." Finally, the Court declined to extend what is known as the "banquet exception" set forth in the last sentence of § 196-d to World Yacht's alleged conduct, explaining that the banquet exception only permits an employer to apply a fixed percentage to a banquet patron's bill as a gratuity which is then distributed to all personnel engaged in the function. The Court reinstated plaintiffs' cause of action under § 196-d.

Note: NELA/NY member David Colodny of the Urban Justice Center submitted an amicus brief on behalf of plaintiffs in this case.

***Pachter v. Bernard Hodes, Inc.*, 2008 N.Y. Slip Op. 5300, 2008 N.Y. LEXIS 1481 (June 10, 2008) (Graffeo, J.) (Or "Deduction Reasoning"):** Plaintiff worked for eleven years at Bernard Hodes, arranging media advertising for clients. She was paid on a commission basis pursuant to a formula under which she received a percentage of the client billings minus certain business costs, including finance charges for late payments, uncollectible debts, travel and expense amounts, and compensation for her assistant. After leaving Bernard Hodes, Ms. Pachter sued, alleging that Labor Law § 193—which prevents employers from making certain deductions from an employee's "wages"—precluded defendant from deducting the various business expenses from her commissions. Hodes responded that as an "executive" at the Company, plaintiff was not an "employee" under §§ 190 and 193 of the Labor Law, and that in any event, the deductions were not taken from her commissions, but rather used to calculate the commissions payable. The District Court granted summary judgment to plaintiff on both points. Upon appeal, the Second Circuit certified the two questions to the Court of Appeals, resulting in a split decision. First, the Court held that executives are employees for purposes of Labor Law article 6, except where expressly excluded. With respect to the second certified question, however, the Court sided with defendant:

We…conclude that neither section 193 nor any other provision of article 6 of the Labor Law prevented the parties from structuring the compensation formula so that Pachter's commission would be deemed earned only after specific deductions were taken from her percentage of gross billings. Consequently, we answer the second certified question by stating that, in the absence of a governing written instrument, when a commission is "earned" and becomes a "wage" for purposes of Labor Law article 6 is regulated by the parties' express or implied agreement; or, if no agreement exists, by the default common-law rule that ties the earning of a commission to the employee's production of a ready, willing and able purchaser of the services.

Note: NELA/NY member Sal G. Gangemi is counsel to plaintiff in this case.

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Oddly enough, the court in **Zellner** acknowledged this axiom, stating "It is certainly true that this detriment [of forbearance] would have little meaning if the employer exercised his right to terminate the employment shortly after the execution of the agreement." 183 A.D.2d at 256. Nonetheless, the court found no difficulty setting this concern aside in favor of the "but don't worry, that didn't happen here" view. Since the employee was employed for a "substantial period" after the covenant was given, the court deemed such employment sufficient consideration and enforced the agreement. This analysis is because at the time of hiring only the employer can know how long it will keep the employee. At the time the bargain is struck, the employee obviously does not have the benefit of that same foresight. Notwithstanding, this rule of past consideration continues to be followed by the courts. *See, e.g.* **Gazzola-Kraenzlin,** *supra*; **Iannucci v. The Segal Co.**, 2006 U.S. Dist. LEXIS 43339 (S.D.N.Y. 2006); **Icon Office Solutions v. Leichtnam**, 2003 U.S. Dist. LEXIS 1469 (W.D.N.Y. 2003).

B. Mutuality of Obligation

Many think of "mutuality of obligation" as the core of consideration; without the mutuality, there is no agreement. *See, e.g.* **Wood v. Lucy, Lady Duff-Gordon**, 222 N.Y. 88 (1917). As stated by one California court, "[w]hen the parties attempt...to make a contract where promises are exchanged as the consideration, the promises must be mutual in obligation." **Mattei v. Hopper,** 51 Cal.2d 119 (1958). However, as far as employment relationships go, the New York Court of Appeals has seen fit to take a different approach. In **Weiner v. McGraw-Hill**, which was decided after **Post,** the Court rejected the premise that the lack of mutuality in an at-will relationship will bar the formation of a binding contract. 57 N.Y.2d 458, 464 (1982), citing **McCall Co. v. Wright**, 198 NY 143 (1910). Instead, the Court opined

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RETALIATION

***Zakrzewska v. The New School,* 543 F.Supp.2d 185 (S.D.N.Y. 2008) (Kaplan, J.) (or "Old School Retaliation"):** The Court permitted a late amendment to the complaint to add a claim for retaliation after it emerged during discovery that plaintiff's supervisor—who worked in IT—had monitored plaintiff's personal Internet usage after she filed her charge of discrimination. Judge Kaplan stated: "I cannot foreclose the possibility that a trier of fact reasonably could find that defendants' alleged covert monitoring of plaintiff's personal Internet use at work 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,'" quoting **Burlington N. & Santa Fe Ry. Co. v. White**, 548 U.S. 53 (2006).

Note: This case is being prosecuted by NELA/NY member Jason Solotaroff.

SANCTIONS

***Attard v. City of New York, et al.,* 2008 U.S. Dist. LEXIS 36452 (E.D.N.Y. May 5, 2008) (Levy, M.J.) (or "The City Always Sleeps"):** The City engaged in years of egregiously dilatory conduct including multiple missed discovery deadlines, missed status and discovery conferences, and a persistent failure to produce accurate and usable statistical data as ordered by the Court in connection with plaintiff's age discrimination case. Upon plaintiff's third motion for sanctions, the Court declined to either strike defendant's answer or preclude defendants from contesting plaintiff's statistical expert report believing such "litigation ending" devices to be too "extreme" in the absence of bad faith. However, the Court did order defendants to pay plaintiff's expert costs in connection with the expert's prior analysis of the corrupt data, as well as the costs that would be incurred in connection with the expert's new analysis and report with the corrected data. In addition, defendants were ordered to pay all of plaintiff's counsel's reasonable fees and costs accrued in plaintiff's efforts to enforce discovery.

Note: NELA/NY member Gregory Antollino is diligently and with great frustration prosecuting this case.

SEXUAL HARASSMENT

***Sanabria v. M. Fabrikant & Sons, Inc.,* 2008 N.Y. Misc. LEXIS 2400 (March 21, 2008) (Tolub, J.) (or "Down With Brown"):** Plaintiff alleged sexual harassment by her supervisor, David Brown, and sued her employer and Brown under the NYSHRL and the NYCHRL. Defendants' motion for summary judgment was denied in 2006. Brown moved again to dismiss after Fabrikant went bankrupt and subsequently settled with the plaintiff, agreeing to a general unsecured non-priority claim in the bankruptcy estate in exchange for a release of plaintiff's claims. Brown argued that (i) the mere title of "supervisor" did not make him liable under the State and City law; (ii) because Ms. Sanabria no longer could establish liability against the Company due to her settlement, he could not be guilty of "aiding and abetting" such liability; and (iii) he should be permitted to amend his pleadings to add a set-off defense in the event his motion to dismiss was denied. Relying on the broad protections of the NYCHRL, the court held that even though Brown may not be individually liable under the NYSHRL, he could be held individually liable under the NYCHRL. The court further noted that "through the expansive language of the City Human Rights Law," the aider and abettor provisions set forth therein might support a finding of individual liability regardless of the individual harasser's role as an owner or supervisor. Finally, the court acknowledged that under the NYCHRL an individual may also be liable if he "attempts" to aid or abet discriminatory conduct, thus rendering an individual liable even in the absence of employer liability. The court denied Brown's motion to amend on the grounds that it was made on the eve of trial and because the equitable grounds for set-offs and reductions do not apply to discrimination actions.

Note: Counsel to plaintiff in this case is NELA/NY member Danny Alterman.■

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that "while coextensive promises may constitute consideration for each other, 'mutuality', in the sense of requiring such reciprocity, is not necessary when a promisor receives other valid consideration." *Id.*

So, when does "mutuality" become relevant, if ever? From **Post** and its progeny we learn that mutuality may not be as important to contract *formation* as it is to contract sustenance. In other words, while the parties' obligations need not be mutual to create a binding contract, there comes a point in the relationship where mutuality attaches and its absence will render the agreement unenforceable. With that, it seems appropriate to segue into the facts and findings of **Post.**

II. Post v. Merrill Lynch

A. Facts

Posts' facts are uncomplicated. Plaintiffs were account executives employed by Merrill-Lynch. Rather than be paid straight commissions, plaintiffs opted to take annual salaries and participate in the employer's pension and profit-sharing plans. Notably, the pension plan included a provision that mandated forfeiture of benefits if the employee ever directly or indirectly engaged in competition with the employer. When plaintiffs were terminated, they went to work for a company that was indisputably in competition with Merrill-Lynch. When plaintiffs inquired into the status of their pensions, Merrill-Lynch advised them that same had been forfeited. The plaintiffs' action ensued.

B. Analysis and Rationale

Interestingly, Merrill-Lynch did not dispute–at least for purposes of the at-issue summary judgment motion–that the plaintiffs were discharged without cause; it believed that to be irrelevant. 48 N.Y.2d at 87. Rather, Merrill-Lynch argued that **Kristt v. Whelan**, 4 A.D.2d 195 (1st Dep't 1957) was controlling. In sum, **Kristt** declared that it was not unreasonable to condition an employee's receipt of post-employment benefits on his or her abstention from competing with the former employer.[9] However, the Court of Appeals found **Kristt** inapposite for one critical reason: the employees in **Kristt** left voluntarily, where plaintiffs in **Post** had been terminated without cause.

It is important to note the Court's framing of the question before it: "*In determining the effect accorded a forfeiture-for-competition provision* in an employee's pension, we are for the first time invited to distinguish between voluntary and involuntary termination of employment of the affected employee." **Post**, 48 N.Y.2d at 88, *emphasis added*. In answering this question, the Court seemingly chose its words carefully to keep the reach of its decision from extending beyond forfeiture-for-competition cases. "We now conclude", wrote Judge Wachtler, "that our own policies—those in favor of permitting individuals to work where and for whom they please, *and against forfeiture–preclude the enforcement of a forfeiture-for-competition clause* where the termination of employment is involuntary and without cause." *Id.,* (emphasis added). In overwhelming part, however, the Court's reasoning that follows has great breadth:

> Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to compete. Where the employer terminates the employment relationship without cause, however, this action necessarily destroys the mutuality of the obligation on which the covenant rests [as well as the employer's ability to impose a forfeiture.]

Id. at 89. With the exception of the final ten words of this passage that I (not the Court) bracketed,[10] the Court is speaking in unabashedly broad terms. There is nothing about these words that make their application unique to forfeiture cases; they speak in general terms about the inequities resulting where an employer can fire an employee on a whim and still enforce his or her restrictive covenant. Therefore, it makes complete sense that any argument against covenants in cases of no-cause terminations would have this passage as its centerpiece. Unfortunately though, there is one final sentence that cannot be ignored:

> An employer should not be permitted to use offensively an anticompetition clause *coupled with* a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.

Id., emphasis added. By this, is the Court opining that the injustice which it previously condemned arises only when a forfeiture provision is involved? Or did the Court anticipate that this sentence would be parsed out, in which case the

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was a

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preceding three sentences would justify invalidating all restrictive covenants when termination is without cause? As we will see in the next installment of this article, courts have taken both views.

C. Grounds for Invalidation

We know that the Court in **Post** ultimately struck the covenant before it, but upon what grounds? As discussed above, the Court found that noncompetition agreements are binding when a "mutuality of obligation is freely bargained" and that when the employer terminates an employee without cause, it necessarily "destroys [that] mutuality...on which the covenant rests." *Id.* Putting aside that this language is at complete odds with what the Court would later find in **Weiner v. McGraw-Hill**,[11] it would seem that a lack of consideration was the basis for the Court's conclusion in **Post.** However, that presumption (as logical as it might be) would be incorrect. Instead, the Court turns to the reasonableness prong of restrictive covenant analysis, finding that "[u]nder the circumstances of the case at bar it would be unconscionable to tolerate a forfeiture, precipitated as it is by the unwarranted action of the employer" and, therefore, "such a forfeiture is unreasonable as a matter of law and cannot stand." *Id.*

By citing unreasonableness as the basis for striking the covenant, it is likely that the Court was reserving its right to address these types of cases individually, rather than enunciate a broad rule which would apply to all no-cause termination cases. In the end, while we as practitioners would have preferred the latter, the important point is that the Court–at a very minimum–has ostensibly left the door open on the broader question.

III. Conclusion

By no means did the **Post** decision enunciate a clear, unequivocal rule as to how the termination of at-will employee impacts a restrictive covenant, if at all. Certainly that decision has given the plaintiff's bar great language to build an argument upon, but the Court's hedging of its bets has made such arguments vulnerable. The following installment of this article will discuss the cases that have interpreted **Post** to reach very different conclusions.

Footnotes

[1] The substance of this article is limited to at-will situations. Where there is an employment agreement that contains limitations on the employer's ability to terminate the relationship, a breach of that agreement will necessarily invalidate the restrictive covenant. *See, e.g.* **Cornell v. T.V. Dev. Corp**., 17 N.Y.2d 69, 75 (1966).

[2] 48 N.Y.2d 84 (1979).

[3] *See, "You're Fired! And Don't Forget Your Non-Compete...": The Enforceability of Restrictive Covenants in Involuntary Discharge Cases,* Kenneth J. Vanko, DePaul Business & Commercial Law Journal, Fall 2002 at p.10 ("Only one jurisdiction has adopted a bright-line, pro-employee view of enforcing non-competition clauses in termination cases. New York courts have articulated a *per se* rule...").

[4] *See, After Termination 'Without Cause': Restrictive Covenants*, Epstein Becker & Green, P.C., February 8, 2007 at *www.ebglaw.com/showarticle.aspx?Show=5302* and cases cited therein.

[5] As discussed later in this article, although the Court discussed **Post** in **Morris Schroder v. Capital Management**, 7 N.Y.3d 616 (2006), it did so specifically in the context of the employee choice doctrine.

[6] *See* **Rogers v. Runfola & Assoc., Inc.**, 57 OhioSt.3d 5 (Ohio 1991) (employer agreed not to terminate employee except for specified reasons in exchange for covenant); **Pemco Corp. v. Rose**, 163 W.Va. 420 (W.Va. 1979) (new consideration apart from continued employment is required); **Kadis v. Britt**, 224 N.C. 154, 29 S.E.2d 543, 548 (N.C. 1944) ("A consideration cannot be constituted out of something that is given and taken in the same breath–of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under the definite threat of discharge.")

[7] At least one secondary authority takes the position that some New York courts have found at-will employment to be insufficient consideration. These cases, however, appear to address the reasonableness of the covenants, albeit in at-will contexts, and not the issue of consideration. *See,* **New York Employment Law**, Jonathan Sulds, ed. (2d Edition) at §4.03[4][b], n40, citing **Oppenheimer v. Hirsch**, 5 A.D. 232, 236 (1st Dep't 1896) (striking a covenant on the grounds that it was unreasonable, in part because the employer could have "discharged [the employee] within a week after he entered their service"); **N.Y. Linen Supply & Laundry Co. v. Schachter**, 125 Misc.2d 805 (Sup. Ct. N.Y. Co. 1925) (making no mention of the adequacy of consideration); **J. & J.G. Wallach Laundry Sys., Inc. v. Fortcher**, 116 Misc. 712 (Sup. Ct. N.Y. Co. 1921) (acknowledging that under **McCall Co. v. Wright,** 198 NY 143 (1910), "mutuality of obligation is apparently unnecessary"); **Gilbert v. Wilmer**, 102 Misc. 388 (Sup. Ct. Onon. Co. 1918) ("The provisions of the contract are too inequitable to justify a court of equity in enforcing its provisions.").

[8] *The Enforceability of Post-Employment Non-competition Agreements Formed After At-Will Employment has Commenced: The "Afterthought" Agreement*, Jordan Leibman and Richard Nathan, 60 So. Cal. L. Rev (Sept. 1987)1465 at p.1528-29.

[9] This is what is referred to as the "employee choice doctrine". *See, e.g.* **Morris***, supra*.

[10] Even considering these ten words, since they are set off by the words "as well as", it is clear that the Court intended the preceding balance of the paragraph to be independently effective.

[11] As discussed above, the Court in **Weiner** found that "'mutuality', in the sense of requiring...reciprocity" is not required as consideration in an at-will employment relationship. ■

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Bill – Unreported).

[13] 29 U.S.C. § 2101(a)(1)(A) (WARN Act); Proposed Legislation: H.R. 3796, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Senate Bill – Reported); S. 1792, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Brown Bill – Reported).

[14] 29 U.S.C. § 2104(a)(3)) (WARN Act); Proposed Legislation: H.R. 3796, 110th Cong., 1st Sess. § 2(a)(3) (2007) (Senate Bill – Reported); S. 1792, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Brown Bill – Reported).

[15] 29 U.S.C. § 2101(a)(3)(B)(i)(I); 2102(d) (WARN Act); Proposed legislation: H.R. 3920, 110th Cong., 1st Sess. §602(a)(3) (2007).

[16] *Dislocated Workers: WARN Act Not Meetings Its Goals*, GAO/HRD 93-18 (Washington, D.C.: Feb. 23, 1993), at 21.

[17] *Id*. at 22, Figure 2.2.

[18] 29 U.S.C. § 2102(d).

[19] Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(c)(4) (2007); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(5) (2007) (House Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(5) (2007) (Miller Bill – Unreported).

[20] 29 U.S.C. §216(c) (Fair Labor Standards Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(c)(4) (2007); S. 1792, 110th Cong., 1st Sess. § 2(c)(4) (2007) (Brown Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(4) (2007) (Miller Bill – Unreported).

[21] 20 C.F.R. § 639.3(i)(6).

[22] In the context of the most common category of off-site employee, sales representatives, courts

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mediators. Judiciary Committee Chair, Lee Bantle served as the moderator of the program.

NELA/NY member Craig Gurian, former Chief Counsel to the Law Enforcement Bureau of the NYC Commission on Human Rights and principal drafter for the Commission of the comprehensive 1991 revisions to the City Human Rights Law, as well as the Local Civil Rights Restoration Act of 2005, presented those in attendance with an overview of the legislative history of the City Human Rights Law and the Restoration Act, highlighting how these laws must be construed independently from similar provisions of New York State or federal statutes. His presentation also included a comparison of the City Human Rights Law and the Restoration Act, with New York State and federal laws and how the Restoration Act has been construed by federal and state courts to date.

Our own aptly prepared Josh Friedman and Susan Ritz gave a presentation that examined the distinct standards for analyzing the sufficiency of economic losses and punitive damages, as well as compensatory damages (which include emotional distress). The session explored the case law that governs the factual showing necessary to support emotional distress awards; the "Garden Variety" doctrine in the Second Circuit; different burdens of proof under city, state and federal law necessary to support an award of punitive damages; and the legal standards of sufficiency for awards of back pay, front pay and benefits, including expert testimony. Josh and Susan also reviewed the different procedural and substantive standards for motions to set aside damages verdicts and motions for remititur under federal, state and city law. Recent, significant damage verdicts from federal court, state court and the Commissioner of the New York State Division of Human Rights were also discussed.

The program concluded with a session on Ethical Obligations for Neutrals presented by highly respected JAMS mediator and adjunct NYU Law School professor, Margaret Shaw, along with distinguished Columbia Law School Professor, Vivian Berger, who has held numerous leadership positions in the field of conflict resolution in employment, as well as devoting many years of service to the advancement of alternative dispute resolution in employment. The presentation provided those in attendance with an overview of the proposed Uniform Mediation Act, as well as a series of hypothetical scenarios commonly faced by employment neutrals in the course of mediation, in which ethical considerations arise, particularly with regard to confidentiality. The presentation of thought-provoking hypothetical situations opened a lively and fruitful exchange between the panel and the attendees.

The New York area Employment neutrals in attendance at the seminar were a well represented balance of neutrals from the EEOC, the Eastern and Southern District of New York Court ADR programs, NY Courts, Cornell ILR, AAA, JAMS, FINRA, as well as other government and private ADR agencies and independent practitioners. Overall, the survey ratings and feedback received from the attendees were extremely positive and the program very well received by those in attendance.

The Judiciary Committee is very pleased with the success of this program. The Judiciary Committee is also encouraged that raising the awareness of New York area Employment neutrals as to the superiority of City Law and availability of substantial compensatory and punitive damage awards, may facilitate the effectiveness of future employment mediation/arbitration and translate into better results for our clients. The materials from this conference will be made available to NELA/NY members on the NELA/NY website. The Judiciary Committee urges our members to make use of these conference materials as a tool in preparing for future mediation and arbitration on behalf of our clients. ■

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have held that the location where salespeople 'reported' is the location of the personnel who were "primarily responsible for reviewing sales reports and other information sent by the sales representatives, in order to record sales, assess employee performance, develop new sales strategies and the like." **Ciarlante v Brown & Williamson Tobacco Corp.**, 143 F.3d 139, 148 (3rd Cir. 1998). As the dissent noted in **Ciarlante**, the application of 20 CFR § 639.3(i)(6), has been overly restrictive. "In the next decade, technology will permit workers of all types, not just salespeople or other mobile workers, to escape the physical confines of traditional offices . . . The tenor of the majority opinion, and its refusal to affirm the grant of summary judgment for plaintiffs on what I believe to be an unequivocal record, sends the opposite (and wrong) message and, I think, establishes bad precedent." *Id.* at 156-57.

[23] **Teamsters Local Union 413 v. Driver's, Inc.**, 101 F.3d 1107 (6th Cir. 1996) (85 truck drivers terminated without warning were assigned to separate terminals rather than where the company's management functions were located and where route assignments were made); **Wiltz v. M/G Transport Services, Inc.**, 128 F.3d 957, 961-62 (6th Cir. 1997)(court noted in *dicta* that employer's home office was towboat crewmen's "home base" because it was the location where crewmen received their route assignments before embarking on 30 day voyages).

[24] **Bader v. Northern Line Layers**, 503 F.3d 813 (9th Cir. 2007)(162 construction workers' site of employment held to be the workers' actual work site, not the company's headquarters, despite evidence that employees reported to headquarters for payroll and administrative functions and that project managers reported to headquarters. Accordingly, employees were not entitled to notice of their layoffs).

[25] *See* **Administaff Companies v. New York Joint Board, Shirt & Leisurewear Division**, 337 F.3d 454 (5th Cir. 2003).

[26] 20 CFR § 639.3(a)(2).

[27] 20 CFR Part 639.

[28] But see, § 2104(b) of the California Labor Code which states in relevant part that, "[a] parent corporation is an employer as to any covered establishment directly owned and operated by its corporate subsidiary."

[29] In re United Healthcare Systems, Inc., 200 F.3d 170 (3d Cir. 1999).

[30] 11 USC § 503(b)(1)(A)(ii). ■

Workers Compensation
&
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