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Remembering Shelley Leinheardt

By Margaret McIntyre
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On March 31, 2012, about 200 friends and family members gathered for a memorial service for our much-loved Executive Director, Shelley Leinheardt. Held at The Friends Meeting House in Manhattan, the service was billed as "A Shelley-bration." Shelley's family even put together a Playbill for the program, which was filled with beautiful pictures of Shelley - running the gamut from young girl, to sexy 1960s vixen to a smitten grandmother – as well as stories about Shelley's life.

After a delicious lunch and reception, the service itself was held in the main hall of the House. Though the day outside was dark and wet, the hall was warm and cheerful. The sole decorations were three large vases filled with branches of white fruit blossoms. A photograph of Shelley as a girl was posted by the podium where at least 20 people stood to tell stories about Shelley's life. Everyone in attendance was provided with a bright purple scarf, to enhance the mood of celebration and to commemorate Shelley's favorite color and famous flair with accessories.

NELA/NY was well-represented, with many members in attendance,

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ATTORNEY'S FEES: THE DEATH OF *ARBOR HILL*

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The federal civil rights laws are distinct from other statues in that they authorize the district courts to grant reasonable attorney's fees to the prevailing plaintiff, payable by the losing party.[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(k) (employment discrimination actions). Congress included fee-shifting provisions to enable litigants to serve as "private attorneys general," seeking relief for themselves while assuring more generally compliance with the civil rights laws. Without statutory attorney's fees, people with modest resources or claims with low damages could not hire a lawyer, and would be left powerless to vindicate important rights – to their own and society's detriment.[2]

The Supreme Court has held that a "reasonable attorney's fee" under the fee-shifting statutes is a "fully compensated fee," commensurate with the customary compensation an attorney receives from a fee-paying client.[3] The fee must be "adequate to attract competent counsel, but which do[es] not produce windfalls to attorneys."[4] In 1984, the Court adopted the lodestar method for calculating reasonable attorney's fees which entails multiplying a reasonable hourly rate consistent with prevailing market rates in the relevant community by the number of hours reasonably expended upon the matter, with a final adjustment for case-specific considerations.[5]

In 2007, a panel of the Second Circuit, including retired U.S. Supreme Court Justice Sandra Day O'Connor sitting by designation, handed down a decision that promised to shake up attorney's fees in this circuit. In **Arbor Hill Concerned Citizens Neighborhood Assn. v. Cty. of Albany**[6], the Second Circuit declared that the value of the lodestar method for calculating attorney's fees had "deteriorated to the point of unhelpfulness," causing the court to "abando[n] its use," and replace it with the "presumptively reasonable fee." The substitution of the "presumptively reasonable fee" for the lodestar was significant not just for the change in methodologies but for the implications of that change, that heretofore, attorney's fees were to be calculated to

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1 *See, e.g.*, the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (granting attorneys' fees in actions to enforce rights under the Fifth and Fourteenth Amendments);

2 *See City of Riverside v. Rivera*, 477 U.S. 561, 574-79 (1986).

3 *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286 (1989).

4 *Hensley v. Eckerhart*, 461 U.S. 424, 444 (1983), *quoting* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (Brennan, J., *concurring in part, dissenting in part*). https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0100747637&pubNum=0001503&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)

5 *Id.*, 461 U.S. at 433-36.

6 493 F.3d 110 (2d Cir. 2007), *amended opinion and superceded on denial of rehearing*, 522 F.3d 182 (2d Cir. 2008).

The NELA/NY
Calendar of Events

NELA/NY Fall Conference
Friday, October 12, 2012
Yale Club of NY
!*Save the Date!*

NELA/NY Annual Gala
Thursday, November 15, 2012
Join us in Honoring Shelley Leinheardt
Club 101
Save the Date!

A Word from Your Publisher

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Items for the calendar may be submitted by calling Alix Ford.
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including all four of our presidents, Wayne Outten, Herb Eisenberg, Bill Frumkin and Darnley Stewart. Darnley spoke about the love, affection and appreciation that our membership felt for Shelley and read some of the remembrances that were posted on our listserve in the days following Shelley's death. Shelley's family clearly appreciated the show of support from NELA/NY.

The majority of those in attendance, and those who spoke, were Shelley's many family members and friends. They movingly related stories about Shelley at various stages of her life and praised her as a loyal friend, loving sister, aunt, cousin, mother and grandmother. Not surprisingly, all of the comments included references to Shelley's warmth, generosity and passion for life. Shelley's ex-husband spoke about their life together and their enduring friendship after their lives diverged, when Shelley needed to move to the life she wanted to live, and did live, in New York City. Many people spoke about Shelley's love for the city, especially the theater. Both of Shelley's sons, Jonathan and David, spoke movingly about Shelley's love and devotion and in doing so, they were determinedly upbeat and positive.

Several family and friends commented on Shelley having struggled to establish a career in which she could thrive and then finally finding immense satisfaction through her work with NELA/NY. It was inspirational to learn that all her hard work for us also made her happy. It makes sense, of course, that doing work she was so good at made her happy. The conviction that was expressed so consistently through all aspects of the memorial was that Shelley got stronger, happier and more beautiful as she aged. By the end of the service it became impossible not to believe that her spirit was continuing to soar somewhere, because Shelley was one powerful life force. As her nephew said near the end of the service, we will all have to step it up if we want to follow her example. ■

President's Column

by Darnley D. Stewart,
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OUR NELA CHAMPION: SHELLEY LEINHEARDT (April 25, 1941-March 16, 2012)

For those of you who were not able to attend the NELA/National Conference in San Diego last week, there was a video montage presented of various "NELA Champions" at the gala fundraiser held on Friday night, June 22. NELA members were invited to nominate their "Champion" and submit a video of up to three minutes about their nominee. NELA/NY nominated Shelley Leinheardt as our Champion and our video was selected to be part of the montage. We will be posting the video on the website as soon as we can.

We all know how we felt about Shelley as our Executive Director and our friend, but I also wanted to share with you what we and our organization meant to Shelley. At Shelley's memorial service (described very aptly by Margaret McIntrye on page 1 of this Newsletter), several of Shelley's family members and friends noted how important the organization and the people of NELA/NY were to Shelley. We learned that Shelley came to our organization at a critical time in her life when she had just moved into the city from her rather domestic existence on Long Island. She was on her own for the first time and she took on part-time work for NELA/NY. She worked her way into the Executive Director position, and the rest is history. We had our Shelley and she had us.

Along those lines, we received a letter from Shelley's cousin and best friend, Gail Appelbaum, enclosing a donation to the Shelley Leinheardt Workplace Fairness Fund. Gail wrote:

> Dear NELA/NY Members,
>
> Thank you for honoring our dear cousin Shelley by naming your Workplace Fairness Fund after her. NELA/NY had been such an important part of Shelley's life for the past 17 years. We were witness to her concern and devotion to doing the best she could for each and every one of you. We are grateful that she had NELA in her life and are glad for all of you that you got to know what a fabulous person Shelley was.
>
> Warmly, Gail and Joel Appelbaum

I ask that each of you join us on November 15, 2012 when we honor Shelley at our annual Gala at Club 101. It promises to be our best event ever and our best opportunity to show Shelley's family how much she meant to us. ■

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more closely resemble the market between client and attorneys.

So, it was remarkable when in 2011, the Second Circuit, in **Millea v. Metro-North Railroad Co.**[7], relied upon the recently obsolete lodestar method to reverse a lower court attorney's fees decision, and made just passing reference to the "presumptively reasonable fee." The "presumptively reasonable fee" method, it seems, didn't even last four years, and **Arbor Hill** appears to be a thing of the past. This article looks at the reasons for this quick judicial turnaround and what it says about the importance of statutory attorney's fees in enforcing the civil rights laws.

Arbor Hill Concerned Citizens

In **Arbor Hill**, a neighborhood association brought a successful action under the federal Voting Rights Act of 1965 voiding Albany County's redistricting plan and requiring the County to hold special elections. Plaintiffs then moved for attorney's fees under the provision of the Act granting the prevailing party reasonable fees. The sole issue on appeal was whether plaintiffs' Manhattan law firm should be awarded fees based on the hourly rate customarily charged by Manhattan attorneys or the hourly rate commonly charged in the Northern District of New York where the action was brought. The Second Circuit affirmed the district court's award based on Northern District rates, but in reaching that decision found it necessary to address more broadly the computation of fees under the civil rights statutes.

Arbor Hill described how two competing methods for calculating attorneys' fees developed within the circuits. The Third Circuit, in **Lindy Bros. Builder, Inc. v. Am. Radiator & Standards Sanitary Corp.**,[8] outlined a two-step process in which the court first took the product of the attorney's usual hourly rate and the number of hours worked, the lodestar, and then adjusted that sum by case-specific considerations, such as the lawsuit's likelihood of success. The Fifth Circuit, in **Johnson v. Georgia Highway Express, Inc.**,[9] by contrast, followed a one-step process in which the court set a reasonable fee by considering twelve factors (the "Johnson factors"), including the novelty and difficulty of the legal issues; the skill necessary to perform the legal service properly; the results obtained; and the experience, reputation, and ability of the attorneys.[10]

Arbor Hill characterized the Supreme Court's attorney's fees decisions as adopting the lodestar method "in principle." Whereas the Third Circuit had used the attorney's own billing rate to calculate the lodestar, the Supreme Court introduced a variety of less objective, case-specific factors for determining a "reasonable hourly rate." The Second Circuit criticized the Supreme Court's modified lodestar method as "unhelpful" because it obliged district courts to engage in "an equitable inquiry of varying methodology while making a pretense of mathematical precision." In the words of Circuit Judge Walker, the lodestar method, and fee-setting jurisprudence generally, were afflicted by the "serious illness" of having "come untethered from the free market [they are] meant to approximate."

In place of the lodestar method, the Second Circuit conceived the "presumptively reasonable fee." The presumptively reasonable fee calculation differed from the lodestar methodology principally in two respects. The traditional method for calculating fees involved two steps, first calculating the lodestar and then adjusting the fee for case-specific consideration, whereas the Second Circuit collapsed the two steps into one. Under **Arbor Hill**, the district courts were to assess case specific considerations, in particular the **Johnson** factors, at the point when they fixed "a reasonable hourly rate," not as a final adjustment to the lodestar. The other distinctive feature of the "presumptively reasonable fee" also concerned the reasonable hourly rate. While the lodestar method used the prevailing billing rate in the relevant community as the basis for a reasonable hourly rate, **Arbor Hill** instructed the lower courts to use "the rate a paying client would be willing to pay."

Arbor Hill gave the district courts little guidance for how to determine "the rate a paying client would be willing to pay." In fact, only at the tail end of the opinion, when the court addresses the specific question on appeal of whether to award the Manhattan law firm fees based on Northern District or out-of-district Southern District rates, is there a discussion of some of the factors that a paying client and his or her attorney would consider in agreeing on a rate. The Second Circuit noted that under its "forum rule," attorney's fees ordinarily are calculated using the prevailing hourly rate in the district where the action is litigated, although where circumstances permit, a court may apply higher, out-of-district rates. In a supposed clarification of when a district court may adjust upwards the hourly rate, **Arbor Hill** held that higher, out-of-district hourly rates may be used "if it is clear that a reasonable, paying client would have paid those higher rates."[11]

In the case before it, the court affirmed the lower court's decision to apply in-district rates, giving the following rationale:

> We are confident that a reasonable, paying client would have known that law firms undertaking representation such as that of the plaintiffs often obtain considerable non-monetary returns – in experience, reputation, or achievement of the attorneys' own interests and agendas – that might cause them to accept such representation despite a prevailing hourly rate that is lower than the law firm's customary bill-

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7 658 F.3d 154 (2d Cir. 2011).

8 487 F.2d 161 (3d Cir. 1973).

9 488 F.2d 714 (5th Cir. 1974).

10 The other *Johnson factors* are: the time and labor expended; the preclusion of employment by the attorney due to the acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

11 Two years later, in *Simmons v. New York City Transit Auth.*, 575 F.3d 170 (2d Cir. 2009), the Second Circuit made more exacting a plaintiff's burden when seeking higher, out-of-district rates. In order to overcome the presumption that the forum's rate apply, a litigant "must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result." *Id.* at 175.

Getting Paid for Your Work: A Primer on Attorneys' Liens

By Brian Moss
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What do you do when you represent a client on a contingency basis, and after discovery closes, you are terminated because the client obtained a new lawyer? Or, what do you do when represent a client on an hourly basis, and the client pays your first bill, but then does not pay the subsequent bill saying "I'm good for it and will pay you when I receive my money from the case."

In these two scenarios (and there are certainly many more than just these two), the attorney is left in a situation where he or she has rendered services but may not get paid. This article discusses (I) the two liens New York attorneys have at their disposal to ensure they get paid for their work. But, caveat jurist -- ethically, lawyers do not have license to use attorneys' liens in all situations. Accordingly, this article also discusses (II) the ethical implications associated with asserting and perfecting the two liens.

I. "Charging" at and "retaining" the foundations and applications of attorneys' liens.

In New York, attorneyshave two liens at their disposal to facilitate payment of an outstanding balance: (1) the charging lien and (2) the retaining lien.[1] The two liens are not mutually exclusive though a court has discretion in enforcing them and may substitute one for the other.[2] The underlying purpose of both liens "is to protect an attorney against the knavery of his client. . . ."[3]

1. The Charging Lien. The charging lien is a statutory lien that grants attorneys a vested property right in the proceeds of their client's case.[4] It is designed to protect the attorney from the client settling the case behind the attorney's back and from persons entitled to subrogation.[5] The charging lien applies only to the specific fund or judgment generated in the action for which the attorney seeks payment. It does not apply to the client's other funds that the attorney may possess.[6] But, the attorney need not possess the funds to enforce the lien. The court may order that the lien be satisfied from funds held by an adverse party.[7] The charging lien terminates when the proceeds of the action are distributed to the client or the attorney's fee is paid.[8]

The charging lien was first enacted in 1909 and is codified at Section 475 of the Judiciary Law.[9] It states that "[f]rom the commencement of an action . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come. . . . The court upon the petition of the client or attorney may determine and enforce the lien."[10]

Thus, in order for a charging lien to exist, an attorney must (i) assert a claim on the client's behalf that (ii) results in proceeds payable to the client or for the client's benefit. Then, (iii) to perfect the lien, the attorney needs to move the court.[11]

i. The assertion of a claim on the client's behalf

An attorney must be counsel of record on a claim or a counterclaim in order to have a charging lien on any of the proceeds.[12] The landmark case on this issue is a 1929 Court of Appeals case entitled **Ekelman v. Marano**.[13] In **Ekelman**, a woman hired an attorney to defend her in two actions brought against her by her husband to divest her of title in two properties the couple held as tenants by the entireties. The woman subsequently did not pay her attorney for his services, and the attorney brought an action to fix a charging lien. Because the attorney was defending the client and had not brought any claims on her behalf, the Court of Appeals denied the attorney's application for a charging lien.[14]

ii. Proceeds payable to the client or

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1 *Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York*., 754 N.Y.S.2d 220, 223 (1st Dep't 2002). An attorney can also sue in quantum meruit. Id.

2 *Wankel v. Spodek*, 767 N.Y.S.2d 429, 430 (1st Dep't 2003); Moore v. Ackerman, 876 N.Y.S.2d 831, 834 (Kings County, 2009).

3 *In re Washington Sq. Slum Clearance*, 5 N.Y.2d 300, 307 (1959).

4 *LMWT Realty Corp. v. Davis Agency Inc*., 85 N.Y.2d 462, 467-68 (1995).

5 *In re United Cigar Stores Co. of Am*., 9 F.Supp. 149, 151 (S.D.N.Y. 1934).

6 *See Schneider, Kleinick, Weitz, Damashek & Shoot*, 754 N.Y.S.2d at 223-24; Wankel v. Spodek, 767 N.Y.S.2d at 430.

7 *See*, *e.g., In re Cooper, 291 N.Y. 255, 260 (1943); Schneider, Kleinick, Weitz, Damashek & Shoot*, 754 N.Y.S.2d at 224.

8 *See* I*ngalls Iron Works Co. v. Fehlhaber Corp., 337 F. Supp. 1085, 1092 (S.D.N.Y. 1972); Schneider, Kleinick, Weitz, Damashek & Shoot*, 754 N.Y.S.2d at 223. But, an attorney loses his right to a charging lien if he is discharged for cause. A hearing is required to determine if the attorney was discharged for cause. *Antonmarchi v. Consol*. Edison Co. of N.Y., 678 F. Supp. 2d 235, 241 (S.D.N.Y. 2010).

9 N.Y. Jud. Law § 275 (McKinney 2012).

10 Id.

11 *See Manshul Constr. Corp. v. Geron*, 225 B.R. 41, 49-50 (S.D.N.Y. 1998).

12 *Rodriguez v. City of New York*, 66 N.Y.2d 825, 827-28 (1985). Enforcing a judgment from a claim previously asserted by another attorney also does not entitle the attorney to a charging lien. *See, e.g., Drezin v. DeLisser*, 847 N.Y.S.2d 409, 415 (Bronx County 2007) (holding that an attorney who was retained to enforce an out-of-state judgment cannot have a charging lien on the proceeds thereof because the attorney's efforts did not produce the judgment).

13 251 N.Y. 173, 174-76 (1929).

14 *Ekelman*, 251 N.Y. at 176. The attorney did, however, bring an accounting action on the client's behalf, but that action did not result in any proceeds payable to the client. Id.

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> ing rates, and that the client would have insisted on paying his attorneys at a rate no higher than that charged by Albany attorneys....

Tellingly, in making these suppositions, the appellate court cited to neither the record below nor case law, but relied on its own subjective perceptions of lawyers' motivations and clients' negotiating skills.

If the objective of the Second Circuit in **Arbor Hill** was to create a more objective, market-driven standard for setting attorney's fees, it failed. If anything, the presumptively reasonable fee was more, not less, subjective than the lodestar. The **Johnson** factors, used by **Arbor Hill** to establish a reasonable hourly rate, were open ended and generally not empirically based.

Moreover, despite the Second Circuit's claim to the contrary, pegging a reasonable hourly rate to "the rate a paying client would be willing to pay," required the district courts to engage in greater subjectivity than if they used the lodestar method. With the traditional fee award method, courts could rely on evidence such as the attorney's own billing rate in non-fee shifting matters and other attorneys' affidavits attesting to their rates in similar matters. Arbor Hill, by contrast, required the district courts to answer the hypothetical question of what a client would pay, taking into account such intangibles as the client's success in negotiating a lower fee and the "reputational benefits" of a case. As Magistrate Judge Dolinger stated in analyzing **Arbor Hill,** "[w]hat a reasonable but parsimonious client would be willing to pay for effective advocacy is not self-evident in any case; after all, the inquiry requires an excursion into the subjective state of a hypothetical person or organization."[12]

12 *Tucker v. City of New York*, 704 F.Supp.2d 347, 359 (S.D.N.Y. 2010), *adopting in part Report & Recommendation of* U.S. Magistrate Judge Dolinger, dated March 9, 2010 (internal quotation omitted). Judge Dolinger is one of the few, if not only, lower court judges in the circuit to engage in a searching analysis of *Arbor Hill*, and, not incidentally, he found the decision flawed in ways set out in this article. *See also Lucky Brand Dungarees, Inc. v. All Apparel Res., LLC*, 2009 WL 466136 (S.D.N.Y. Feb. 25, 2009).

13 __U.S.__, 130 S.Ct. 1662 (2010).

14 *See Allende v. Unitech Design, Inc.*, 783 F.Supp.2d 509, 514 n.4 (S.D.N.Y. 2011) (stating that *Perdue* casts doubt on the viability of *Arbor Hill*).

Perdue v. Kenny A.

In the interim between the Second Circuit's decisions in **Arbor Hill** and **Millea**, the Supreme Court decided **Perdue v. Kenny A. Ex rel. Winn**.[13] In **Perdue**, a class action on behalf of foster children in Georgia, the Court considered whether the lower courts erred in granting plaintiffs' counsel a fee enhancement beyond the lodestar because of superior performance and results. In the course of striking down the enhancement, the Supreme Court reaffirmed that the lodestar approach was the "guiding light of our fee-shifting jurisprudence." It explained that the lodestar calculation, by securing the attorney's fee to the "prevailing hourly rate" has the advantage of being "readily administrable" and "objective," whereas the **Johnson** factors give the district courts minimal guidance in setting a fair rate and allow for much subjectivity.

After **Perdue**, it is questionable whether **Arbor Hill**'s presumptively reasonable fee calculation remains good law.[14] The Supreme Court rejected the basic precepts of **Arbor Hill**. Whereas the Second Circuit had found the lodestar metaphor more confusing than helpful, the Supreme Court declared that it remained the foundation of attorney's fees jurisprudence. While **Arbor Hill** endorsed the **Johnson** factors for determining a "reasonable hourly rate," the Supreme Court concluded that they were less objective than the considerations used in the lodestar calculation. After **Perdue**, it was left to the Second Circuit to decide what, if anything, remained of **Arbor Hill**.

Millea v. Metro-North

While **Millea** did not explicitly overrule **Arbor Hill**, its abandonment of the "presumptively reasonable fee" analysis is clear enough. In **Millea**, the plaintiff had prevailed at trial on his claim that the defendant Railroad interfered with his right to take medical leave under the Family and Medical Leave Act, a federal fee-shifting statute. Since the plaintiff had missed just two days' work as a result of the Railroad's unlawful interference, the jury awarded him only $612.50 in damages. Although the lodestar was $144,792, the district court awarded just $204 in attorney's fees, one-third of the damages, on grounds that the recovery was *de minimis*, the case was not particularly complex or novel, and the interference claim had no public policy significance.

The Second Circuit has backtracked from its decision in Arbor Hill v. County of Albany only a few years after handing down that decision.

The Second Circuit held that the district court abused its discretion when it awarded fees as a proportion of damages and disregarded the lodestar. Citing **Perdue** a dozen times in the opinion, Millea left no doubt of the soundness of the lodestar calculation in this circuit. By contrast, **Millea** mentioned **Arbor Hill'**s "presumptively reasonable fee" once, and then only to suggest, somewhat misleadingly, that it was the equivalent of, and not a departure from, the lodestar.

Arguably as important as restoring the lodestar method in this circuit was **Millea**'s re-focus on the public policy underlying the fee-shifting statutes, which Arbor Hill, with its more market-based emphasis, had obscured. **Millea** observed that although FMLA actions are

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IPad Applications for Notes and Depositions

By John Upton
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This Spring, there is good news for iPad fans. The new iPad came out with a more powerful processor and a new feature that can be very useful to lawyers -- dictation to text capability. This means that for writing an email, a letter, or even a memorandum, you can just dictate it. In general, iPad applications are including ever more features of laptop and desktop softwares. At this rate, it won't be too long until, for many people, the iPad is the only computer one needs. In the last issue, I wrote about CaseManager, an application to manage cases. In this issue, I compare two popular note taking applications, and discuss a transcript-review application.

For note taking, there are many products on the market. One of the best is AudioNote. When you open the application, you're looking at a "legal pad" on which you can take notes with either a finger/ipad stylus or by typing (you can type with the iPad keyboard or an external keyboard). If you click a red record button, your iPad records the sound going on while you're taking the notes. Later, by selecting a place in the notes, you can listen to the sound recorded when you took that portion of the notes. The killer use here is obviously a deposition--not only do you have the verbatum testimony faster than you have the transcript, but you also have the tone of voice and other characteristics of the testimony. (Who knows, some future version of the software will probably have video recording as well!)

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often "small-ticket items," they "serve an important public purpose disproportionate to their cash value," namely "assuring that civil rights claims of modest cash value can attract competent counsel." The Second Circuit added that the district court erred in finding plaintiff's $612.50 recovery *de minimis*, observing that it was more than 100% of the damages sought on that claim.

Millea makes clear that **Arbor Hill**'s presumptively reasonable fee is unworkable with respect to civil rights claims with low damages. When 100% of the damages in a federal lawsuit are, as in **Millea**, $612.50,[15] it is fanciful to ask what rate a paying client would be willing to pay to bring that lawsuit, much less to "attract competent counsel." And the same is true for a low income worker's claim for minimum wages or unpaid overtime, or a disabled employee challenging the denial of a reasonable accommodation, or a citizen seeking vindication for being locked up without probable cause. **Arbor Hill**, taken at its word, would preclude a fee award in such small damages cases, despite their importance, since a rational paying client would not bring suit, and therefore would not pay attorney's fees.[16]

Even if **Arbor Hill**'s instruction that the fee award be based on what a paying client would pay were not applied literally, the appellate court's entreaty that the district courts "enforce market discipline" in order "to ensure that the attorney does not recoup fees that the market would not bear," was a clear and troubling signal to the lower courts to limit attorney's fees in civil rights actions, public policy notwithstanding. After all, if the goal is to make fee awards "best approximat[e] the workings of today's market for legal services," then the attorney who achieves a modest recovery for his client, should, consistent with market principles, earn only a marginal fee. Of course, setting fees according to market principles runs up against the well established public policy of the civil rights laws, which **Millea** has now put back front and center in the Circuit's attorney's fees jurisprudence.

Conclusion

It is worth asking how such a respected court as the Second Circuit could have come up with such a wrongheaded decision as **Arbor Hill**, re-writing the calculation of attorney's fees with standards that were, in great measure, unworkable, and tone deaf to long settled public policy. The Second Circuit wrote **Arbor Hill** in April 2007, when the American economy was still booming and leading voices in business, government and academia uncritically accepted the virtues of the "free market." Echoes of that prevailing credo can be heard throughout the opinion. **Millea** was decided four years later, when society was still trying to sort out the damage caused by a largely unregulated economy, and the unfettered market was no longer looked to as the wise arbiter of people's affairs. **Millea**, perhaps, can be seen not only as correcting a flawed decision, but as the appellate court's response to the sea change wrought throughout society by the ongoing financial crisis.[17] ■

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15 According to the district court, was the maximum potential recovery, including liquidated damages was $11,600. *See Millea v. Metro-North Railroad Co*., No. 3:06-cv-1929 (VLB), 2010 WL 126186 *5 (D. Conn. Jan. 8, 2010).

16 *See Tucker*, 704 F.Supp.2d at 359.

17 The change in tone and substance between *Arbor Hill* and *Millea* cannot be explained by differences in the composition of the panels. Chief Judge Jacobs, who sat on the *Arbor Hill* panel, wrote the opinion in *Millea* – making that decision all the more remarkable given his criticisms of *pro bono* lawyers taking advantage of the attorney's fees statutes to advance their own agenda. *See Amnesty Int'l v. Clapper*, 667 F.3d 163 (2d Cir. 2011) (Jacobs, C.J. *dissenting from the denial of rehearing en banc*); "Pro Bono for Fun and Profit," speech by Dennis G. Jacobs, at the Federalist Society, Oct. 8, 2008, available at http://www.fed-soc.org/publications/pubido 1178/pub_detail.asp.

Second Circuit conditionally sustains Title VII damages award

By Stephen Bergstein
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In a unique ruling that safeguards against the plaintiff's double-recovery in an employment discrimination case, the Court of Appeals has conditionally sustained a $250,000 damages award where the City of Syracuse retaliated against an officer who filed an EEOC charge against the City. However, the Second Circuit in **Lore v. City of Syracuse**, 2012 U.S. App. LEXIS 194 (2d Cir. Feb. 2, 2012), held that other state-law claims that the district court improperly dismissed on summary judgment may have influenced the jury in awarding damages on plaintiff's successful claims. This ruling requires the plaintiff make a tough choice on remand: a retrial on all claims or forego a trial on the state-law claims revived by the Court of Appeals and accept the $250,000 damages award.

This ruling reminds us that the Court of Appeals has authority to employ a safety-valve in reviewing verdicts and setting the parameters for remand. While the Second Circuit held that the damages award was not excessive, it expressed concern that it may have been tainted by claims that were not properly before the jury. For this reason, if the plaintiff wants to preserve her trial victory, she must withdraw her appeal from the district court's order dismissing the state-law claims. Otherwise, all claims – including the successful ones that the Second Circuit sustained on appeal – are set for a retrial.

Background

Decided on February 2, **Lore v. City of Syracuse** pits the police department's Public Information Officer, Therese Lore, against the City. Lore was removed from that position in 1999 and assigned elsewhere without a reduction in pay. The following year, she filed two complaints with the EEOC, claiming discrimination and retaliation for her complaints of gender discrimination. The discrimination charge alleged that she was removed from the PIO position because of her gender. The retaliation complaint was prompted by Lore's discovery, in 2000, that she was receiving fewer overtime assignments than male officers. Lore also claimed in the retaliation charge, *inter alia*, that she was transferred to less desirable positions while less qualified male officers received the positions that she requested. She claimed in the EEOC charge that these adverse actions were in retaliation for her earlier complaints of discrimination. Lore also filed an internal grievance over her removal from the PIO position.

The plaintiff wins the trial and her appeal, but there is a catch.

In 2000, when Lore discovered that she was receiving fewer overtime assignments than male officers, she photocopied their paycheck stubs (the department had them out in the open) and filed the EEOC retaliation charge. When Lore used the paycheck photocopies at her arbitration hearing on her unfair assignment grievance, the City attorney's office threatened her with criminal prosecution for making these photocopies but said it would not press criminal and administrative charges if she withdrew her discrimination complaints. Lore refused to withdraw her discrimination charges, and she was suspended for using the copy machine for personal use. Then, the City's Corporation Counsel, Rick Guy, disparaged Lore in the local media and said that she had "stolen" employee paychecks.

At trial, the jury awarded Lore $100,000 for harm to her reputation and $150,000 for emotional distress as a consequence of the City's retaliation against Lore for asserting her rights under Title VII, *i.e.*, offering to forgo criminal and administrative charges if she dropped her discrimination charge and suspending her for 10 days and seeking a criminal investigation into her photocopying. The district court also awarded plaintiff nearly $168,000 in attorneys' fees.

The Second Circuit held that the $100,000 in damages was justified because the EEOC has long recognized damages for reputational injury, Lore was shunned by her fellow police officers, and civilians had approached her about Guy's allegation that she had stolen officer paychecks. The $150,000 in damages for emotional distress may be a little high considering Lore was not fired and some of her emotional distress predated any of the City's retaliation. But the Second Circuit sustained it because it does not materially deviate from damages in comparable cases. Here are the damages that Lore endured:

> Lore's evidence of her pain, suffering, and emotional distress ... included her own testimony and the testimony of her mother, that Lore had suffered, inter alia, tension headaches, abdominal pain, insomnia, anxiety, and depression. They testified that whereas Lore had been a gregarious and vivacious person before the events of 2000 and 2001, she thereafter suffered from stress, had stomach problems, and became reclusive. Her mother testified that Lore looked like a ghost, "wouldn't talk" to anyone, and "cried and cried and cried." In addition, Lore received medical treatment, the physical side effects of which included vomiting and diarrhea. Her medical records showed, inter alia,

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for the client's benefit

In order to assert a proper charging lien, the claim the attorney brings on the client's behalf must result in an accessible fund of money. A case illustrating this point is **Natole v. Natole**.[15] In **Natole**, the plaintiff brought two actions: one for divorce from the defendant and the other against the defendant for taking improper actions with respect to a company the plaintiff and defendant co-owned. The defendant was found liable for improper actions and his share of the divorce was used to pay his damages. The defendant then did not pay his matrimonial attorney.[16] The matrimonial attorney asserted a charging lien for unpaid services. The court concluded that even though the matrimonial action was on the defendant's behalf, since his distribution from the divorce was set-off by his damages in the other action, there were no proceeds to which the charging lien could attach.[17]

iii. Perfecting the charging lien

With regard to perfecting a charging lien, as mentioned above, Section 475 of the Judiciary Law states, "[t] court upon the petition of the client or attorney may determine and enforce the lien." Thus, to perfect the charging lien, the attorney must make a motion with the court after which the attorney is entitled to a hearing to fix the amount of the lien if it is not already done so by contract.[18] The property to which the charging lien attaches need not be in the attorney's possession so it is prudent to give notice to all parties and their counsels so that money held by an adverse party is not distributed to the client without the attorney's knowledge.[19] Notice is also prudent because if the possessor of the proceeds distributes them to the client despite notice from the attorney, the possessor is liable to the attorney.[20]

2. The Retaining Lien

The retaining lien grants an attorney a lien on all of the client's property that is in the attorney's possession, regardless of its source. This includes the client's file as well as money and securities, and an attorney has a retaining lien as soon as he comes into possession of the client's property.[21] The purpose of the retaining lien is to compel payment through inconveniencing the client by not turning the client's file over to him or her. This makes it difficult for another attorney, or the client appearing *pro se*, to prosecute or defend the case. The retaining lien is derived from the com-

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15 744 N.Y.S.2d 227, 229 (3rd Dep't 2002).

16 *Id*. at 228-29.

17 *Id*. at 229. See also *Ekelman*, supra note 14, at 174-176 (holding that an attorney could not have a retaining lien on an accounting claim because there was no recovery).

18 *Antonmarchi*, 678 F. Supp. 2d at 240-42; *Costello v. Kiaer*, 717 N.Y.S.2d 560, 561 (1st Dep't 2000); *Rotker v. Rotker*, 761 N.Y.S.2d 787, 790 (Westchester County, 2003).

19 *See, e.g., Schneider, Kleinick, Weitz, Damashek & Shoot*, 754 N.Y.S.2d at 222 (holding that a discharged law firm could sue the City of New York to enforce a charging lien because the City had notice of the charging lien but still distributed the funds to the successor law firm); *Natole*, 744 N.Y.S.2d at 228 ("The law firm gave notice to plaintiff and her counsel, and defendant and his corporate counsel, of its claimed charging lien.…)

20 Schneider, Kleinick, Weitz, Damashek & Shoot, 754 N.Y.S.2d at 222.

21 *Butler, Fitzgerald & Potter v. Gelmin*, 651 N.Y.S.2d 525, 527 (1st Dep't 1997); Moore, 876 N.Y.S.2d at 834.

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mon law and has never been codified.[22]

Like a charging lien, an attorney perfects a retaining lien by making a motion to the court.[23] Once the retaining lien is asserted, the attorney is entitled to a prompt hearing to fix the amount of the lien if it is not already done so by contract.[24] Since the property must be in the attorney's possession, notice to the opposing party is likely unnecessary though still advisable.

The retaining lien has three notable differences from the charging lien. First, unlike the charging lien, it cannot be asserted against an adverse party because it applies only to things in the attorney's possession. Second, unlike the charging lien, the retaining lien applies until the attorney has been paid for all services, not just the services associated with the particular property in the attorney's possession. Third, unlike the charging lien, there is no requirement that the attorney bring an action on the client's behalf.[25]

The retaining lien terminates upon payment of the attorney's fee.[26] But, an attorney loses his or her right to a retaining lien upon losing possession of the property.[27] The court may also order the attorney to turn the property over to client upon the client showing exigent circumstances, which in the case of assets, could be indigence, or in the case of files, ongoing litigation.[28]

II. Ethical Considerations

A lawyer should use extreme caution when asserting charging or retaining liens because doing so has the potential to be unethical. Retaining and charging liens implicate Rule 1.5(f) of the New York Rules of Professional Conduct ("RPC"). Rule 1.5(f) mandates that lawyers resolve fee disputes by arbitration. Before a lawyer asserts a retaining lien on funds or documents he or she is holding or a charging lien on funds in another's possession, it is prudent to give the client notice of his or her right to dispute the attorney's fees under the New York State Fee Dispute Resolution Program. There is a split in the appellate courts on whether notice need be given absent a client's dispute as to the reasonableness of the fee. In the First Department, the attorney is required to give notice regardless of a dispute as to reasonableness whereas the Second Department only requires notice when reasonableness is disputed.[29] However, a dispute as to reasonableness need not be specific; it can be inferred from the client's conduct and statements.[30] If it is determined that notice was required but not given, the attorney forfeits his right to payment.[31] Since a client can contest the reasonableness of the attorney's fee without explicitly saying so, it is prudent to give notice.

Retaining liens also implicate Rule 1.1(c)(2) of the RPC. Rule 1.1(c)(2) states that "[a] lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by [the RPC]."[32] In the context of a retaining lien, the Committee on Professional Ethics has suggested that asserting a retaining lien would cause prejudice or damage if the lien were asserted on time sensitive documents or on sums of money in excess of what the lawyer claims to be owed.[33]

What do you do when you faithfully represented a client who then moves on to another attorney? You can use an attorneys' lien, but there are limits to this practice.

Conclusion

Since an attorney can be terminated at any time and for any reason, it is important to know the various tools a lawyer has to ensure payment if he or she discharged without cause. In New York, the attorney has two liens to facilitate payment of outstanding balances: the charging lien and the retaining lien. Though the liens are effective, the lawyer must use caution when asserting and perfecting them as both liens pose serious ethical issues. The liens are designed to protect the attorney from the "knavery" of clients, but if the lawyer is not careful and asserts the liens at the wrong time or without the proper notice, the "knavery" of the client can make a "jester" out of the lawyer. ■

22 *DeGonzalez v. Thelen Reid & Priest LLP*, 2007 WL 852548, *4 (N.Y. County Feb. 9, 2007).

23 *See Butler, Fitzgerald & Potter*, 651 N.Y.S.2d at 527.

24 *Antonmarchi*, 678 F. Supp. 2d at 241; Rotker, 761 N.Y.S.2d at 789.

25 *See DeGonzalez*, 2007 WL 852548 at *4.

26 *Moore*, 876 N.Y.S.2d at 834.

27 *Cheng v. Modansky Leasing Co*., 73 N.Y.2d 454, 459 (1989); Rotker, 761 N.Y.S.2d at 789.

28 *See Cohen v. Cohen*, 584 N.Y.S.2d 116, 117 (2nd Dep't 1992); *Pileggi v. Pileggi*, 512 N.Y.S.2d 142, 143 (2nd Dep't 1987); Moore, 876 N.Y.S.2d at 834.

29 *Compare Scordio v. Scordio*, 750 N.Y.S.2d 58, 59 (2nd Dep't 2000) with *Paikin v. Tsirelman*, 669 N.Y.S.2d 32, 33 (1st Dep't 1999). *See generally Rotker*, 761 N.Y.S.2d at 791-792.

30 *Messenger v. Deem*, 892 N.Y.S.2d 434, 438 (Westchester County, 2003).

31 *Rotker*, 761 N.Y.S.2d at 791-792.

32 There is no Comment to this portion of Rule 1.1.

33 See, e.g., *Ethics Opinion # 567* (stating that a lawyer may not assert a retaining lien on funds in excess of what the lawyer claims owed); s*ee Ethics Opinion # 591* (stating that a lawyer may not use a retaining lien as a bargaining chip in negotiating a malpractice release with a former client because it would render the negotiations unfair).

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> that her physician insisted that she remain out of work for a period in June 2001 to receive treatment for her depression.

In addition, "[s]ufficient evidence to support the jury's awards against the City of $100,000 for reputational injury and $150,000 for emotional distress, however, is found in the publicity in which Guy participated, making Lore's suspension public and casting it in a way that allowed the jury to infer that members of the public were left with the false impression that Lore had stolen other officers' paychecks."

Decision with a catch

What complicates things is the summary judgment motion. The district court dismissed Lore's state-law discrimination claim arising from her removal as Public Information Officer ("PIO"). This discrimination claim predicated Lore's follow-up retaliation claim. The Court of Appeals reinstates the discrimination claim, reasoning that the jury could deem as discriminatory Lore's removal as Department spokeswoman in 1999 because (1) she was replaced by a male and the Mayor said that "a woman should be seen and not heard" and (2) although she did not lose any salary, her removal was an adverse employment action because she lost prestige in working elsewhere in the department. In addition to the state-law discrimination claim, an unrelated state law retaliation claim is also reinstated against Corporation Counsel Guy, who disparaged Lore in the press after she pressed her discrimination claims.

The Court of Appeals noted, however, that the $250,000 damages award that it sustained is a little high, and that the parties did make reference during trial to Lore's underlying discrimination claim arising from her removal as Department spokeswoman (even though the judge told the lawyers to back off this strategy). The Court of Appeals thinks the jury may have given Lore more money than she deserved out of sympathy for the discrimination that she endured in the removal of the PIO position, even though the jury was not asked to rule on that claim because it was dismissed on summary judgment.

What this meant was that if the revived discrimination claims went to trial by themselves (the Court of Appeals having sustained the verdict in other respects) the next jury could award her damages for those claims, damages that might overlap with the money that the jury has already awarded Lore for the discriminatory and retaliatory treatment that she successfully litigated in the first trial. To avoid that result, the Court of Appeals said that, while the revived discrimination claims are reinstated for trial, there is a catch.

As noted above, the Court of Appeals sustained the $250,000 Title VII verdict. However, that affirmance was conditional. If Lore wants to relitigate her newly revived discrimination claims at trial, that trial must also include a retrial on her successful Title VII retaliation claim as well. The City gets a second bite at the apple on claims that it already lost in the first trial, but this approach ensures that Lore is not unjustly compensated in the second trial with damages that the first jury may have already given her out of sympathy for the discrimination claim that was never even properly before the jury in the first instance.

Writing for the Court of Appeals, Judge Kearse states:

> It is indisputable here that there was considerable discussion at trial as to Lore's complaints of discrimination, in part necessitated by the fact that the acts of retaliation were alleged to have been motivated by Lore's complaints of discrimination. For example, as background for her allegations of retaliation, Lore was allowed to testify to her appointment in 1996 as public information officer for the Department, serving as SPD's liaison with the media, working directly for the chief of police, and having an office of her own in the chief's office. She testified to being removed as PIO and filing grievances thereafter, alleging gender discrimination. But the testimony and arguments went well beyond the mere fact that Lore had filed complaints of discrimination. Lore also testified to the differences between her duties as PIO and her duties after reassignment, for example, being reassigned to the Department's technical operations section, in which her duties were to "overs[ee] telephones, cell phones, pagers, portable radio[s]" and other communication devices. She testified that she was replaced in the PIO position by a male, and said, "To get denied because I am a woman, dead wrong."
>
> Defendants, for their part, argued not only that there was no retaliation, but also that Lore had not been the victim of discrimination. ...
>
> it is entirely possible that the jury, while heeding the court's instructions not to concern itself with the merits of Lore's discrimination claims, was influenced in the direction of generosity by the evidence as to Lore's underlying claims of gender discrimination with respect to her removal from the prestigious PIO position and her transfer to positions involving supervision of cell phones and patrol cars.
>
> Thus, it is not clear to us that a trial limited to Lore's claims of discrimination based on her removal from the PIO position might not result in an award that in part overlaps the generous $250,000 verdict already returned by the jury on her claims of retaliation. Accordingly, to prevent the injustice of a duplicative award, we conclude that if Lore's discrimi-

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ANNOUNCEMENT

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Case Law Squibs

ATTORNEYS' FEES

By Iliana Konadaris
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Kirk v. New York State Dep't of Educ., 644 F.3d 134 (2d Cir. 2011)

Even where a case is ultimately dismissed for mootness, the plaintiff may still qualify as the prevailing party entitled to statutory attorneys' fees. Plaintiff, a Canadian citizen, obtained a temporary waiver from a New York Education Law requiring citizenship or permanent residency status, allowing him to practice as a veterinarian. Before his limited license expired, Plaintiff brought suit challenging the constitutionality of the law's citizenship or residency requirements. The district court agreed with Plaintiff, finding the law unconstitutional and denying the DOE's motion to stay enforcement pending appeal. The denial of the stay meant that the Department had to issue plaintiff a permanent license that could not be revoked even if the district court's decision were overturned on appeal. Plaintiff became a permanent resident while the case was pending on appeal, and the Second Circuit dismissed the appeal as moot and vacated the judgment. The district court denied the Department's motion to vacate the award of attorneys' fees; the Second Circuit affirmed. In affirming, the Second Circuit distinguished this case from *Sole v. Wyner,* 551 U.S. 74 (2007), finding that the plaintiff in this case won on a fully developed record, and not from an abbreviated record granting a preliminary injunction; that no court overturned plaintiff's victory on the merits; and most importantly, that the Plaintiff did not leave the courthouse empty-handed, but left with a permanent license that could not be revoked and was still valid. Plaintiff's attorneys were allowed to keep their fees of approximately $75,000.

Millea v. Metro-North Railroad Co., ***658 F.3d 154 (2d Cir. 2011)***

Four years after *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany* cast a dark cloud in fee-shifting civil rights cases by abandoning the lodestar method, it seems that the Second Circuit has finally laid the case to rest. *Arbor Hill's* farewell tour began in 2010 at the Supreme Court in *Perdue v. Kenny A.,* 130 S. Ct. 1662 (2010). In upholding the lodestar method as the "guiding light" for achieving the goals of federal fee-shifting statutes, the Supreme Court effectively rejected *Arbor Hill's* "presumptively reasonable fee" method. In *Millea,* an FMLA case, the Second Circuit finally abandoned that method and resurrected the lodestar method. At trial, the jury awarded plaintiff only $612.50 in damages for seeking leave for two days of work. The district court disregarded the $144,792 request for fees and awarded plaintiff's attorneys only $204, on the basis that the jury award was *de minimis,* the issues presented were not novel or complex, the plaintiff was not successful on his common law claims, and the interference claim had no public policy significance. The Second Circuit rejected each of these bases in turn, holding that the district court had abused its discretion in disregarding the lodestar incurred and awarding attorneys' fees in proportion with the damages award. *Millea,* 658 F. at 166. In so holding, the Court acknowledged that Congress, in providing for fee-shifting, has already made the determination that civil rights cases serve an important public purpose. *Id.* at 166. The district courts have already felt the effects of *Millea*, even while continuing to cite *Arbor Hill*, at least for now, as was the case recently in a Southern District of New York opinion. *T.K. v. N.Y. City Dep't of Educ*., 2012 U.S. Dist. LEXIS 47311 (S.D.N.Y. Mar. 30, 2012). In a footnote, the district court summed up the Second Circuit's long history with the lodestar method, concluding with *Millea*'s directive that failure to calculate the lodestar as the starting point is now legal error. *Id.*

DISCRIMINATION

By Brian Moss
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Noel v. New York City Taxi and Limousine Comm'n, No. 11 CV 237, 2011 WL 6747466 (S.D.N.Y. Dec. 23, 2011).

Disabled individuals who required use of wheelchairs and several nonprofit organizations advocating for disabled individuals brought putative class action against city taxi and limousine commission and its chairman, alleging violations of the ADA and the NYCHRL. The court held that under the Second Circuit's expansive interpretation of "programs, services or activities," and corresponding DOJ regulations, the TLC's regulatory activities were governmental activities of a public entity and therefore subject to the antidiscrimination provisions of the ADA, and NYCHRL. The court ruled that the TLC had to develop and propose a comprehensive plan to provide meaningful access to taxicab service for disabled wheelchair bound passengers and that until such a plan was approved by the court, all new taxi medallions and livery licenses must be for wheelchair accessible vehicles. *At press time, the Second Circuit vacated the injunction.* See, 2012 U.S. App. LEXIS 13287 (2d. Cir. June 28, 2012).

Bennett v Health Mgt. Sys., Inc, 936 N.Y.S.2d 112 (1st Dep't 2011)

A 47 year old Caucasian sued for unlawful termination based on his age and race. His employer claimed the termination was because the employee lost his focus and was drinking on the job. The First Department used this case as to illustrate the burdens of proof in a disparate treatment case under the NYCHRL. The court stated that in a NYCHRL claim, once evidence of pretext is presented, the employee should withstand summary judgment. However, after saying this, the court dismissed

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the employee's claim because there was undisputed evidence that he slept and drank alcohol on the job and his work performance was poor.

Wong v. Mangone, 450 Fed Appx 27 (2d Cir. 2011)

A former police officer made racial slurs towards a black motorist and initiated a fight with the motorist, which landed the motorist in the hospital. The motorist sued, and the jury returned a verdict of $200,000 in damages under 42 USC 1981 - $183,000 in compensatory damages and $17,000 in punitive damages. The Magistrate Judge entered the award of $167,286.36 in fees and expenses. The Second Circuit affirmed in all respects.

Romero v. New Eng. Laminates Co., Inc., 09 CV 1206 (S.D.N.Y. Feb. 22, 2012)

Former employee sued under the ADA, FMLA, and the NYHRL alleging that the employer discriminated against him by forcing him to take FMLA leave and ultimately terminating his employment rather than reasonably accommodating his disability. The employer moved for summary judgment. As to the wrongful termination claim, the employer's stated reason for the termination was that the employee used company time and materials for personal reasons. The court held that a jury could find the stated reason pre-textual. The court concluded that the investigation into the employee's conduct suggested bad faith because the employer attempted to confront the employee about his conduct on the same day he was terminated and therefore, the employee did not have an opportunity to explain himself in the investigation. Helen G. Ullrich and Stephen Bergstein of NELA/NY represent the plaintiff.

Daniels v. Pioneer Cent. Sch. Dist., No. 08 CV 767, 2012 WL 1391922 (W.D.N.Y. Apr. 20, 2012)

Former teacher sued school district for eliminating her position in violation of the ADEA. In late 2005 and early 2006, the principal of the school where the teacher worked said that they needed to make room for "younger staff," "new thinking," and "bright young teachers coming in at the other end." The principal also encouraged the teacher to retire and was person responsible for instituting the restructuring program that eliminated the teacher's job. The court found that given the connection between the principal's role in authorizing the restructuring and her comments, there were questions of fact as to whether the decision to terminate the teacher was motivated by the principal's alleged age-based animus. The school district moved for reconsideration, which was denied.

Joseph v. N. Shore Univ. Hosp., No. 11 CV 1014, 2011 WL 1086107 (2d Cir. Apr. 3, 2012).

French-speaking Haitian who had a bunion and difficulty walking was terminated in 2007 brought suit for violations of the ADA and Title VII. The court rejected the plaintiff's ADA claim because although the ADA was amended to broaden the interpretation of "disability," the amendments are not retroactive and the evidence that the plaintiff had difficulty walking was not enough to qualify as a "disability." The court similarly rejected her Title VII claim because the only evidence was a disciplinary notice reprimanding the plaintiff for speaking in her native French in violation of the hospital's "English-only" policy. The court said that she needed to have produced evidence of other employees being disciplined for speaking in their native languages, which she did not.

Adamczyk v. New York State Dep't of Corr. Servs., 11 CV 1406, 2012 WL 1130637 (2d Cir. Apr. 5, 2012)

A Caucasian corrections officer was fired for poor performance after an inmate was beaten up by other prison guards during his watch. The officer's lost at disciplinary arbitration after a full hearing. Generally, if you lose at the hearing, you cannot succeed in court. *Collins v. Transit Auth.*, 305 F.3d 113 (2d Cir. 2002). The office tried to circumvent this through arguing that the hearing officer relied on testimony from a racist superior officer. The Second Circuit rejected this argument because the two statements of evidence the officer used lacked sufficient probative value to suggest discriminatory animus. The office also submitted affidavits that attempted to show that the supervisor favored black employees, but the court rejected that evidence as well. ■

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> nation claims against Bernardi and the City are to be tried, there should also be a retrial of her retaliation claims against the City and Guy ..., so that a single jury may consider the circumstances of all of those claims and render a verdict that appropriately compensates Lore with respect to all of the claims it finds proven.

Conclusion

This is an extraordinary remedy, and it also appears to be unprecedented in that the Court of Appeals does not cite any case law in support of this approach. Yet, the Court deems it necessary to ensure that the city receive a fair trial in the district court in light of the real possibility that the jury awarded Therese Lore too much money on the basis of claims that were not properly before it and only alluded to by the parties at trial. Shortly after the second circuit issued its ruling in this case, Lore advised the Court that she was withdrawing so much of her (successful) appeal as challenged the summary dismissal of her claims under state law with respect to her removal from the public information officer position. This means that Lore does not want to take a chance on a second trial, thereby preserving the $250,000 verdict. ■

Class Action Summaries

By Julie Salwen
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INDIVIDUAL ARBITRATION AGREEMENTS

It has been one year since the Supreme Court decided ***AT&T Mobility LLC v. Concepcion***, 563 U.S. ___, 131 S. Ct. 1740 (2011), in April of 2011, which enforced a consumer arbitration agreement that precluded class actions and *Concepcion's* impact on employees' ability to bring their claims in class or collective actions is still being sorted out. In an attempt to force employees to only bring individual actions many employers have been requiring their employees to sign arbitration agreements that only allow for claims to be adjudicated individually. While many courts have used *Concepcion* as a bright line rule requiring enforcement of these agreements, others have taken a more nuanced approach. In addition, the National Labor Relations Board ("NLRB" or "Board") recently determined in ***D.R. HORTON, INC.***, 357 NLRB No. 184 (2012), that where the claims sought to be brought collectively deal with the terms and conditions of employment such arbitration agreements illegally interfere with employees' rights to engage in concerted activity under section 7 of the National Labor Relations Act ("NLRA").

D.R. Horton ("Horton") builds homes in more than twenty states. As a condition of employment Horton required employees to sign an arbitration agreement that specified that all employment disputes be heard by an arbitrator without the authority to consolidate employees' claims. Michael Cuda, a former employee of Horton attempted to initiate collective arbitration of FLSA claims for a nationwide class by sending notice to Horton. When Horton rejected the notice based on the arbitration agreement's preclusion of collective arbitration, Cuda turned to the NLRB and charged Horton with an Unfair Labor Practice charge. In ***D.R. Horton, Inc.***, 357 NLRB No. 184 (2012), the Board first determined that employees have a substantive right under the NLRA to bring class and collective actions. Then the Board examined whether a determination that the NLRA prohibited Horton from requiring employees to sign an arbitration agreement that waived this right would conflict with the Federal Arbitration Act ("FAA"), the statute interpreted by the Supreme Court in *Conception*. Looking to *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991), the Board noted that "the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the statute.'" The substantive right protected by the NLRA in *D.R. Horton* was the right to bring class and collective actions. "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA . . .." Although the claims that Cuda sought to arbitrate collectively dealt with violations of FLSA, the question before the Board was "not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings, but whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA." Finally, the Board concluded, even if there had been a conflict between the NLRA and the FAA, the NLRA was enacted after the FAA and therefore implicitly repealed earlier statutes with which it conflicted. Moreover, the NLRA's predecessor—the Norris-LaGuardia Act, enacted seven years after the FAA—explicitly repealed all parts of statutes, including the FAA, with which it conflicted.

Less than one month after the Board's determination in *D.R. Horton*, a district court in California provisionally acted to limit the scope of the decision. ***Johnmohammadi v. Bloomingdale's Inc.***, 11-cv-6434, (C.D. Cal. Jan.26, 2012). Fatemah Johnmohammadi brought a class action against Bloomingdale's Inc. asserting violations of California wage laws. Bloomingdale's responded by removing the case to federal court and moving to compel non-class arbitration based on an agreement that Johnmohammadi had signed as part of her initial paper work when she started working for Bloomingdale's. Unlike D.R. Horton, Bloomingdale's allowed employees to choose to opt out of the arbitration agreement if they did so within thirty days. Bloomingdale's even purported to keep the information on who opted out confidential so that managers could not retaliate because they did not know who had chosen to opt out. U.S. District Judge George H. Wu provisionally ruled that the "voluntary" nature of the arbitration agreement made it enforceable. In addition to opposing the motion in court Johnmohmmadi has filed an unfair labor practice charge with the NLRB.

Although the Board's decision in *D.R. Horton* protects many job-holders, many others are exempted from the protections of the NLRA. The category of people protected by the NLRA is both broader and narrower than those protected by the FLSA. Unlike the FLSA, the NLRA explicitly includes professionals among those protected. On the other hand, under section 2(11) of the NLRA, individuals are defined as supervisors if they have "authority, in the interest of the employer" to engage in any one of twelve enumerated functions, including "to responsibly to direct" other employees. Individuals may be defined as supervisors by the NLRA, and thus exempted from the statute's protections, even if they spend the vast majority of their time doing non-supervisory tasks and lack the power to make disciplinary decisions.

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STANDING TO SEEK IN JUNCTIVE RELIEF

In **Wal-Mart v. Dukes**, ___ U.S. ___, 131 S. Ct. 2541 (2011), the Supreme Court noted that those plaintiffs who were no longer employed by Wal-Mart lacked standing to bring an action for injunctive or declaratory relief. Id. at 2560. None of the named plaintiffs in a case that this column reported on last issue, **Chen-Oster v. Goldman, Sachs & Co.**, 10 Civ. 6950, 2011 U.S. Dist. LEXIS 73200 (July 7, 2011), are current employees of the defendant. Although they are no longer employed by the defendant, on January 19, 2012, Magistrate Judge Francis ruled that they have standing to pursue injunctive relief because all three seek reinstatement. **Chen-Oster v. Goldman, Sachs & Co.**, 10 Civ. 6950, 2012 U.S. Dist. LEXIS 12961 (Jan. 19, 2012). For a plaintiff to have standing to pursue an injunction it must be likely that absent the injunction the plaintiff will be subject to the same injury in the future. Judge Francis explained that "[b]ecause reinstatement absent a corresponding injunction would expose the plaintiffs to the immediate threat of further discrimination by Goldman Sachs, they have standing to seek injunctive relief." *Id*. at *19.

RULE 23(B)(2) CLASS AND MONETARY DAMAGES

After determining that the plaintiffs in **Chen-Oster** had standing to pursue injunctive relief, Judge Francis turned to the issue of whether the plaintiffs could maintain Rule 23(b)(2) class claims despite their claims for monetary relief. In **Dukes**, the Supreme Court ruled that back pay and other monetary relief is not equitable relief and therefore is not available to a (b)(2) class, unless, possibly, if the monetary relief is completely incidental to the equitable relief. Despite the plaintiffs' claims for back pay, compensatory damages, and punitive damages—monetary claims that were clearly not negligible nor merely incidental to injunctive relief—the plaintiffs sought certification of a (b)(2) class to determine liability. The defendants moved to strike the (b)(2) class claims.

Judge Francis determined that, under Rule 23(c)(4) and Second Circuit precedent in **Robinson v. Metro-North Commuter R.R.**, 267 F.3d 147 (2d Cir. 2001), certification of a (b)(2) class for the liability phase of a Title VII pattern or practice claim of discrimination remains proper even after the **Dukes** decision. **Dukes** overruled portions of **Robinson** but not the "'holding requiring Rule 23(b)(2) certification of the liability phase of pattern-or-practice disparate treatment cases.'" **Chen-Oster**, 2012 U.S. Dist. LEXIS 12961, at *24 n.4 (quoting **United States v. City of New York**, 276 F.R.D. 22, 33 (E.D.N.Y. 2011). In fact the **Dukes** Court endorsed bifurcation so that the individual defenses can be heard during the remedial phase, the approach utilized in **International Brotherhood of Teamsters v. United State**s, 431 U.S. 324, 361 (1977), when it rejected the concept of trial by formula. Bifurcation is proper under the Teamsters approach because "[i]n Title VII cases, the issue of 'individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination.'" **Chen-Oster**, at *23 & n.3. Therefore Judge Francis denied the motion to strike the (b)(2) class claims. ■

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The application has an important flaw though, and that is the fact that you cannot touch the screen with your hand while taking notes--if you do, the notes turn into an impossible scribble. As a result, you are forced to always take notes at the bottom of the screen.

AudioNote is free for a version that records only several minutes, $5 otherwise.

Notes Plus ($9) is another popular note taking application and it has an intriguing feature--it not only permits note taking and recording, but also attempts to turn your handwriting into text. To do this, you draw a circle around the text, there is a pause, and voila, text replaces the handwriting. Moreover, Notes Plus has a useful hand rest layer that the user can pull up from the bottom of the screen.

Alas, the app doesn›t accept handwritten text quickly enough for a lawyer›s purposes, and the accuracy of the handwriting to text is conversion is, at least for my handwriting, laughable.

If you prefer to take notes with the iPad keyboard or an external keyboard, either of these applications will work and provide audio backup. AudioNote is probably more useful because of its ability to pinpoint the part of the audio you would like to hear.

(As noted above, the new iPad allows users to enter text by simply dictating and having the iPad turn the speech into text. This won›t work for a deposition, but will for many other text entry situations.)

TranscriptPad—Ever since deposition transcripts went digital, it has been a great pleasure to carry them around as digital files rather than the 5 lb. brick paper transcripts. Now, a $50 iPad application lets you do most of your transcript digesting work at a fraction of the cost and weight of desktop/laptop software for transcripts. The main feature is that you can easily select testimony and then associate it with an issue in the case, so that you can later review all the testimony for given issue together. You can also search by word or phrase (in one or all of the case transcripts), insert notes, and export testimony or detailed reports of your work on the transcript. There is one potential limitation--the program requires that the transcript be in the txt format. Pxt files, used by many reporters, can be converted on a pc, but not a mac. Pdfs must be converted to txt also.

Other than that, with this application, you can comfortably and capably do your transcript work anyplace your 1 lb. iPad can go, instead of being weighed down by your laptop and transcripts.

In the next issue, I'll review several trial presentation applications that make a good case for not even needing your laptop at trial. ■

Workers Compensation
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