NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 10, NO. 1 March/April 2000 Jonathan Ben-Asher, Editor

Issue Spotting: Avoiding the "Doorknob Syndrome"

by William D. Frumkin, Esq.

In my prior career as a psychiatric social worker, I frequently encountered the following syndrome during the course of psychotherapeutic treatment: a patient would spend an entire therapy session discussing trivial matters such as the weather or sports, but just prior to the end of the session would provide critically important/ground breaking information. By that point, there was no time to explore it further. This untimely circumstance has become known as the "Doorknob Syndrome" (usually the patient's hand is not actually on the doorknob, but pretty close).

In psychotherapy, because the therapist often believes that it is best to "stay where the patient is," the Doorknob Syndrome tends to impede progress. Inevitably, when the therapist raises the critical information at the start of the next session, the patient is often unwilling to discuss it again.

As lawyers, it is usually not our job nor is it advisable to "stay where the client is." Accordingly, during the course of a consultation or even during the course of a litigation it is important to aggressively pursue information from clients for the

Continued on page 13

Supreme Court Hears Arguments on Standard for Proving Employment Bias

The Supreme Court heard oral argument last month in a closely-watched case which may settle crucial questions about proving employment discrimination under federal law. The argument appeared to have gone well for the cause of employee rights in **Reeves v. Sanderson Plumbing Products, Inc. No. 99-536** (March 21, 2000). NELA National and many other civil rights organizations filed amicus briefs in the case.

As reported last issue, **Reeves** presents the issue of the proper standard for overturning jury verdicts under the ADEA — and, by extension, other federal laws prohibiting job discrimination. The plaintiff had prevailed in the District Court and had successfully resisted defendant's motion for JNOV. Nonetheless, the Fifth Circuit overturned the verdict on what amounted to a de novo review of the evidence.

Essentially, the Court of Appeals looked at the record, stepped into the shoes of the jury, and threw out the verdict based on its finding that the plaintiff had only shown pretext. The court ruled that the striking age-biased comments of plaintiff's supervisors were not made "in the context" of his termination, and that other unfavorable treatment of Reeves was not significant. Despite the finding of pretext, the court ruled that plaintiff had not demonstrated that age bias motivated the decision to fire him.

In Reeves' brief to the Supreme Court, he argued that even if the ADEA requires a showing of more than "pretext," it still does not require direct evidence of discrimination. Instead, a finding of pretext, together with the plaintiff's prima facie case, should be enough to get a plaintiff to a jury. Reeves also contended that the Court of Appeals acted improperly by reviewing the jury's finding de novo; instead, the court should have only considered the non-moving party's evidence.

The argument was extended and lively. As recounted by NELA member Eric Schnapper, who was one of the co-authors of plaintiff's brief, Reeves' counsel James Wade had tremendous command of the evidence and trial record, and "completely charmed" the Court. Wade insisted that a jury hearing the evidence is in the best position to evaluate it and to determine if discrimination was a factor in the termination.

At one point, Chief Justice Rehnquist wondered whether Reeves' employer had simply not liked him, rather than harboring age bias against him. Wade told Rehnquist that "If you'd been there, you would have liked him," — and seemed to win the point.

Justices Rehnquist and Ginsburg seemed to think that Reeves had presented enough evidence to get to the jury. Justice Souter appeared amazed by the defendant's argument that the age-biased statements made by plaintiff's supervisor were "stray remarks." (Several months before the firing, the supervisor had said that plaintiff was "too damn old for the job" and "must have come over on the Mayflower.") Defendant's counsel argued that those comments were not admissible and not relevant, much to Justice Souter's apparent puzzlement.

Continued on page 3

The NELA/NY
Calendar of Events

April 25
4-5:25pm
Current Litigation Issues in Employment Discrimination Law
Louis Graziano, EEOC trial attorney
St. John's University School of Law
Room 2-25 (free of charge)
For information call (718) 990-6600

May 2
6:30
Board of Directors Meeting
1501 Broadway – 8th Floor

May 12
NELA/NY Spring Conference
Yale Club of New York City

May 24
NELA Nite
530 Fifth Avenue
14th Floor (44th & 45th Sts)
Topic: Emotional injuries, jury instructions & remititur
Presented by the Sexual Harassment Committee
Speaker: David Gabor

June 14
Board of Directors Meeting
1501 Broadway – 8th Floor

June 21-24
11th Annual NELA Convention
Washington, D.C. .

July 22
"Transatlantic Perspectives on Labor and Employment Law"
Call St. John' University of Law for more information
(718) 990-6600

September 13
NELA Nite
Topic & Location to be announced

September 20
Board of Directors Meeting
1501 Broadway – 8th Floor

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

October 3-14
NELA National Fall Seminar: ERISA
Westin Tabor Center
Denver, CO

October. 18
NELA Nite
Topic & Location to be announced

December. 4
NELA Nite
Topic & Location to be announced

November.3-4
NELA Fall Regional Conference
Yale Club of New York City
Note Date Change
Save The Date

Attention E-mailers

If you have an e-mail address, you should notify Shelley Leinheardt as soon as possible. Even if you have already given Shelley your e-mail address, get it to her again, because there have been some glitches in sending and receiving messages. We will need your e-mail address if you want to use the new website.You can either e-mail her at nelany@aol.com or call her at 212 317-2291.

A Word from Your Publisher

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

Items for this calendar may be submitted by calling Shelley Leinheardt:
(212) 317-2291
Fax: (212)317-0463
880 Third Avenue, 9th Floor
New York, NY 10022
E-mail: nelany@aol.com

Editor: Jonathan Ben-Asher

Business Editor: Robert Rosen

Editorial Committee:
Anne Golden, Wayne Outten, Arnold Pedowitz and Kipp Watson.

Executive Board of NELA/NY:
Wayne Outten (President),
Herb Eisenberg (Vice President)
Arnold Pedowitz (Vice President)
Robert Rosen (Treasurer)
Allegra Fishel (Secretary)
Anne Clark, Leonard N. Flamm, William Frumkin, Olati Johnson, Adam Klein, Lisa R. Lipman, Laura Sager, Laura A. Schnell, and Pearl Zuchlewski

Director: Shelley Leinheardt

President's Column
by Wayne N. Outten

Evaluating the Client and the Case

This column is the third in a series on case and client evaluation. The first two columns dealt with the initial call from a prospective client and the conduct of the initial consultation. This column addresses the phase in the initial consultation when you evaluate the client and the case.

During the early part of the initial consultation, the client typically does most of the talking. It is important for the client to tell "the story;" and it is important for you to listen to it carefully, critically, and sympathetically, while occasionally guiding the process with your questions and suggestions. (This listening phase was addressed in the last column.) While listening, you begin the process of evaluating the client and "the case."

You begin making judgments about the client: Is the person honest, rational, reasonable, and credible? Is this person telling you the story in a straightforward and logical manner? Does the story make sense? Is this person someone you would feel comfortable working with and representing? Does the person have the intelligence, education, articulateness, thoroughness, and analytical abilities to make a good client and witness? How good was the client's job performance? Does the person tend to blame others for everything or to exaggerate things? Are the client's objectives and expectations realistic and reasonable?

You also begin to make judgments about the case: Has the employee's boss or company acted unfairly? Does the employee have any viable legal claims? What evidence is available or attainable to support (or refute) the claims? Are there problems with timing, such as imminent deadlines or statutes of limitations? What damages has the client suffered? How much money might be recoverable under various claims and scenarios? Are mitigation problems present? What are the political and personal factors that affect what happened? What avenues or forums are available to address the situation? Is settlement a realistic possibility? What attorneys' fees arrangements are appropriate?

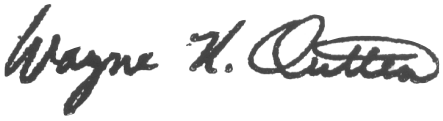
In evaluating "the case," you should keep in mind that not every employment problem or dispute is or should be grist for a lawsuit. Clients come to see you with a problem, not necessarily a case. Your role can be that of a professional problem-solver and dispute-resolver, not just that of a litigator. Thus, you should evaluate the situation not just in terms of a possible lawsuit, but also in terms of what you can do to help the client with the problem.

Such a mindset can drastically affect the way you evaluate the case. By training and experience, employment lawyers have very good analytical skills. Many clients, on the other hand, do not. Moreover, even those clients who have good analytical skills commonly lack the objectivity and perspective to analyze their own situations effectively. Thus, you can provide valuable assistance merely by helping the client think through the problem, identify possible avenues for solution, and decide on a course of action, all without regard to the existence of grounds for a lawsuit.

In fact, the best initial steps toward addressing many employment problems often involve non-legal approaches, before or in lieu of asserting legal claims. Identifying and pushing personal and political "buttons" can be the most effective way to address the problem. Of course, if such buttons are unavailable or are unsuccessful, the next steps can be more aggressive, including the assertion of legal claims. In a future column, I will address in greater detail the step-by-step escalation approach that I typically employ.

For now, the point is that, during the initial consultation, you should not be so focused on evaluating the legal merits that you overlook ways to help the client who has no legal claim, who would prefer not to pursue a legal claim, or who may be able to achieve a satisfactory resolution without asserting a legal claim.

In the next column, I will continue discussing the evaluation phase of the initial consultation.



Wayne N. Outten

SUPREME COURT, from page 1

Wade also argued that the Fifth Circuit acted improperly by reviewing all the evidence in the record, rather than just the plaintiff's. Otherwise, Wade explained, the court "is open to consider evidence that the jury did not believe."

According to Schnapper, the Court appeared to have been motivated to hear the case by its interest in defining "pretext plus." Schnapper predicts that the Court will reinstate the verdict and reiterate the standard of **St. Mary's Honor Center v. Hicks,** 509 U.S. 502 (1993). In **Hicks**, the Court held that the jury's disbelief of the employer's rationale, together with the elements of the prima facie case, may permit a jury to infer intentional discrimination.

—Jonathan Ben-Asher

We've Moved

NELA/NY has moved to new offices. Our new address is:
880 Third Avenue
9th Floor
Phone: (212) 317-2291
Facsimile: (212) 371-0463

Mentor or Be Mentored

NELA/NY's Mentoring Program has been operating for 3 years. While many members participate in this worthwhile venture, many more are welcome.

The Mentoring Program is designed primarily to help attorneys who have less than five years experience practicing employment law. (As a result, it is not limited to those who are less than five years out in practice.)

The program has two aspects. One is a panel of experts willing to field questions from NELA/NY members, either on a particular topic of substantive law, or in an area of law office practice or management. The second is a "Big Brother / Big Sister" matching program, to connect new NELA members and practitioners to seasoned employment practitioners on a longer term basis. The goal is to give mentees regular access, as needed, to more experienced practitioners for guidance in handling cases and managing a practice.

There is no cost to participate in this Program — on either end. If you are interested in becoming a mentor, either as a topic panelist, or as a one-on-one advisor, we welcome your participation. If you interested in being a mentor or mentee, please contact Shelley Leinheardt at NELA/NY, and she will be happy to talk to you further.

Filings, Trials and Settlements

We continue with our feature, begun last issue, spreading the word about new cases, trials and settlements by NELA/NY members.

This installment is slimmer than the previous, probably because most people were counting their attorneys fees from last issue's cases. For next month's issue, send your news to Jonathan Ben-Asher, by e-mail at jb-a@bmbf.com or by fax (212) 509-8088. Let us know the forum of the case, the parties, the judge, names of counsel, recovery (by category) a very brief summation of the nature of the claims and significant facts, experts used, and anything else you would like to share.

James N. McCauley filed a case against **Rubbermaid-Cortland, Inc.** and **Rubbermaid, Inc.**, alleging that his client was fired in violation of the FMLA after taking time off because of a serious chronic health condition. The plaintiff contended that defendant never gave her and other employees notice of their FMLA rights. As a result, she did not ask to have her time off designated as FMLA leave, and she exceeded her allowable absences under the employer's policy. When she learned about her FMLA rights after being fired, she requested reinstatement, which the employer denied. The plaintiff alleged that Rubbermaid illegally failed to properly designate her absences as FMLA-qualifying leave, and unlawfully counted that leave under its absence policy. As a result of a confidential settlement pursuant to court-ordered mediation, the court issued a judgment dismissing the case by reason of settlement. **Riker v. Rubbermaid-Cortland, Inc. and Rubbermaid, Inc.**, NDNY, No. 99-CV-277 (NAM-GID).

Phyllis Gelman and **Lindsay Nicely Feinberg** finally resolved, after a prolonged battle, a disability discrimination and sexual harassment case brought against **Prudential Insurance**. The plaintiff alleged that she was sexually harassed at work, and then had a nervous breakdown due to the harassment and her fear of returning to a hostile environment. The plaintiff also contended that Prudential failed to accommodate her disability. The District Court (New Jersey) dismissed all the plaintiff's claims on summary judgment (Title VII, ADA and the New Jersey Law Against Discrimination), holding that **Faragher** and **Ellerth** the plaintiff had unduly delayed complaining to management. On plaintiff's appeal, the Third Circuit reversed, holding that the Faragher and Ellerth do not govern cases under the New Jersey LAD. On remand to the District Court, the parties reached a confidential settlement. NELA/NJ member Lisa Manshel, who wrote an amicus brief on appeal, was also instrumental in the case. **Styles v. Prudential Insurance Co. of America, Inc.** (3rd Cir. 1999)

Law Day

National Law Day is May 1st , and events that week are a chance for NELA members to educate the public about their rights as employees. On May 1 through May 4, the Association of the Bar of the City of New York, through its Legal Referral Service, is sponsoring ten public information booths in street-fair style to facilitate public access to attorneys. In past years these events have drawn hundreds of people and received much coverage by the media.

This year booths will be set up in Union Square Park in Manhattan (Wednesday May 3); Brooklyn (Tuesday, May 2, at Borough Hall); Bronx (Monday, May 1, outside Supreme Court); and Queens (Thursday, May 4, Queens Civil Court). The booths will be open 11:00 a.m. until 2:00 p.m.

If you are interested in participating, please contact (to see if space is still available) Kristin Leitch, Public Relations and Marketing Coordinator of the Legal Referral Service at (212) 382-6756, or kleitch @abcny.org.

Dues Are Past Due

Many members have not yet paid your dues for the year 2000. If we don't receive your dues by May 8th, we will have to drop you from our directory of Active Dues Paying Members, which means you will no longer receive the New York Employee Advocate or any other member benefits.

Don't get left out in the cold. Send in your dues today to NELA/NY.

The deadline for articles and letters for our next issue is May 12, 2000.

Sexual Harassment Committee

by Lawrence Solotoff and Eugenie Gilmore

The Sexual Harassment Committee continues to be active and productive. In our February meeting, Linda Geiger Kern discussed **Smith v. Norwest Financial Acceptance, Inc**., 129 F.3d 1408 (10th Cir. 1997). In that case, the court held that six sexually harassing comments directed at the plaintiff over a twenty three month period were sufficiently severe and pervasive to create a hostile work environment. Of significance to the court was the relatively small size of the office, the fact that the comments were overheard by co-workers and the fact that the comments were made directly to the plaintiff.

At our March meeting, Lawrence Solotoff discussed the Violence Against Women Act. The VAWA provides for a private cause of action against both individuals and corporations. It has a number of significant advantages over other remedies for sexual harassment victims, including no requirement for administrative exhaustion; unlimited compensatory and punitive damages; no minimum number of employees, and a four year statute of limitations. The Supreme Court will decide this term whether the Act is constitutional.

The Committee will be presenting a NELA Nite on May 24. David Gabor will discuss assessing the value of emotional injuries, jury instructions and remittitur, based on his review of approximately 2, 800 jury awards.

The Committee has also begun work on its Jury Instruction project. We are interested in collecting jury instructions on sexual harassment issues, and welcome submissions from NELA members. Please include a short description of your case, some words about closing arguments, and the outcome of the case.

The next meeting will be held May 9, 2000, at 6:00 p.m. The Committee meets on the second Tuesday of each month, providing there is no conflict with a major holiday. All meetings begin promptly, and end promptly at 7:30 p.m. All members, guest attorneys and future members are welcome.

Gene Prosnitz will be presenting a case of interest at our April meeting (to be discussed next issue); Robert Felix and Eugenie Gilmore will speak on May 9,. and Antonia Kousoulas will discuss litigating claims against state agencies on June 13. Meetings scheduled for July 11, 2000 and beyond remain open for volunteers.

NELA/NY's Spring Conference

NELA/NY will hold its Spring Conference on Friday, May 12 at the Yale Club of New York City, 50 Vanderbilt Avenue at 44th Street. Don't miss this great opportunity for to learn about the latest developments in employment law and winning strategies for your clients and your practice.

The Conference will include:

- Federal and State Law Update (John A. Beranbaum and Lizbeth S. Schalet)
- Use of ERISA in Employment Cases (Edgar Pauk and Robert J. Bach)
- Current Issues under the Fair Labor Standards Act and New York Labor Law (Patricia McConnell)
- Current Ethical Issues Concerning Fee Arrangements in Employment Cases, including the Resolution of Cases and the Interplay between Attorneys' Fee Awards and Contingent Fees (Rosalind S. Fink)
- How to Navigate Your Client Through the Maze of the ADA, FMLA, and Disability Benefit Plans: Through Both the Plaintiff's Perspective and Management's Perspective (Jay P. Levy-Warren and Laura H. Allen); and
- Tips and Pointers on Advising Clients and Negotiating Employment Contracts (James D. Esseks and Wayne N. Outten).

The Keynote Speaker at lunch will be Barbara Underwood, Principal Deputy Solicitor General, United States Department of Justice. The conference will conclude with a cocktail party. This program qualifies for 6 CLE credits, one of which is for ethics and professionalism.

Registration is $180 for NELA/NY members ($210 if you sending in your check after April 28), and $210 for non-members ($230 after April 28). Many thanks to the members of our conference committee for all their work in planning this even.

For more information, call Shelley Leinheardt at (212) 317-2291.

Fund Raising News

By Robert M. Rosen

The Third Annual, extremely popular and welcomed NELA Fund-Raiser, for the year 2000, is well along. We will be holding the event in October, with the date to be firmed up soon.

We are looking for cases to salute for the event. If you know of a case that you feel would be of interest to our committee, please submit it to Shelley Leinheardt at the new NELA office, at 880 Third Avenue, New York, New York 10022, or by fax (212)371-0463.

Our committee this year has expanded, and now includes Gerry Filippatos, Bill Frumkin, Colleen Meenan, JoAnne Simon, Shelley Leinheardt, and our ex officio and valiant leader, Wayne Outten. The Committee meets approximately every three weeks by telephone conference call and inches forward towards the gala event.

Again, we are going to ask for your support, so please be prepared for our nudging you. As part of that, please let us know of vendors who you think would be interested in advertising in our journal.

Watch the Employee Advocate for future developments.

Ask Ms. Pretext

Ms. Pretext is here to answer all your questions about employment law and workplace etiquette. From this month's mailbox:

Dear Ms. Pretext,

My friends and I started an Internet company last year in our garage. Now we have 3,000 employees. Most of them are okay, but some are from the typewriter age. At 10:00 p.m. they're like, "I need to get home to my family." We want to ditch them but worry that a lawsuit might mess up our IPO. Any tips?

— Overachiever

Dear Overachiever,

No problem. The next time one of these slowpokes waves his Medicare card at you, just chuckle. Smart planning can help your company shed dead leaves and raise profits, so you and your friends can buy more expensive junk for your lifestyle. Take these steps:

1. Older employees shun e-mail. It gets them nervous. Make them use it for every task. When they fumble, out they go.
2. Evaluate, evaluate. Any employee can be made to look faltering on a good HR form. Set unattainable goals. Check off "below expectations" everywhere.
3. Discharge — constructively! Older workers need stability, hate change. That's why they listen to Carole King. Shifting responsibilities, wacky quotas and frequent demotions will nudge out company turtles, pension or no pension. Be patient and believe in your dream.

Dear Ms. Pretext,

I am a plaintiff's employment lawyer. Yesterday I was meeting with a new client for a consultation, and I fell asleep. Do I have a problem?

—Ferberized

Dear Ferberized,

For some reason, when these things happen, we like to blame ourselves. A better question would be: why was this client not meeting **your** needs? Was he or she an "at will" noodnik, with no lurking protected class or contract? Was the client fired after many on the job booboos? — Ms. Pretext calls these clients "sleepy surgeons." Or perhaps your client actually wrote that detailed narrative you requested, and you were reading it? Finally, did you see this person gratis?

Dear Ms. Pretext,

I'm a Human Resources manager. Our company policy is to protect sexual harassers as much as we can. How can I do this and not get served with process?

—Prurient

Dear Prurient,

As in Chinese cooking, preparation is key. My recommendations:

1. Have a good, thick employee handbook. Update it incoherently in dribs and drabs. Make sure no one knows where the new pages go. Distribute it on Christmas, Yom Kippur and Ramadan.
2. The manager charged with listening to employee gripes about workplace passion should travel a lot, and not speak English.
3. When interviewing a sexual harassment victim, leer supportively.

Dear Ms. Pretext,

I'm just starting out in this plaintiff's employment business. How will I know when I have a good case? —Idealist

Dear Idealist,

Don't furrow your brow too much over this one. Here are my rules:

1. Twenty minutes into an initial consultation, show the client the door. If you need to learn more, attend your client's deposition.
2. Always assume the worst. In today's economy, most employers discharge solely for discriminatory reasons. I'm sure your client falls into something.
3. Remember, your client is the best judge of the settlement value of his case. Defer to him on this one.

Dear Ms. Pretext,

My co-worker winked at me at a company party. Do I have a case?

—Offended

Dear Offended,

Yes.

Send your questions to Ms. Pretext c/o Jonathan Ben-Asher, at jb-a@bmbf.com

Representing Employees Living in Employer-Owned Housing

by Jonathan Weinberger

What do you do if your client is an employee of an employer who provides housing in connection with employment and the employer says both "you're fired" and "get off the premises"?

This situation comes up in the case of building superintendents, university and hospital employees, and in certain corporate settings. Does the tenant-employee who claims that the firing was motivated by discrimination have to leave immediately? No.

The employer cannot merely lock the employee out. As a residential landlord, the employer will have to commence a holdover proceeding in landlord-tenant court to evict the employee. The New York City Civil Court has jurisdiction in these proceedings to entertain answers and counterclaims alleging discrimination.

If you have filed a charge with an administrative agency, you may be able to obtain a stay of the landlord-tenant proceeding pending the resolution of the administrative claim. **Boca Broadway Realty v. Naim**, NYLJ 6/8/95, p. 31, col. 5 (App. Term 1st Dept); **Ennismore Apartments v. Gottlieb**, NYLJ 9/24/92, p. 24 col. 5 (App. Term 1st Dept); **Mora v. Debartolo**, NYLJ 2/8/95 p.27 col. 2. If a stay is not granted, you can conduct discovery regarding the claim. **Rose Associates v. Kaiser**, NYLJ 7/11/94 p. 27 col. 3, (App. Tm 1st Dept) and obtain a jury trial.

Anne's Squibs

by Anne Golden

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

Anne Golden
Outten & Golden LLP
1740 Broadway
New York, NY 10019
Fax: (212) 977-4005
E-mail: ag@outtengolden.com

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

Thanks to Scott Moss, an associate with Outten & Golden LLP, for his assistance with these squibs.

ARBITRATION

Judge Deborah A. Batts (S.D.N.Y.) has confirmed an NASD arbitration panel's award of over $140,000 to a stock brokerage employee based on common law claims. The employee, after his termination, claimed fraudulent inducement to accept the job, termination in violation of an employment contract, and tortious interference and defamation in the derogatory text in his U-5 termination form. Judge Batts initially remanded to the arbitral panel to clarify the rationale for its award of a precise compensatory damages amount, but then approved the award under the very deferential review standards applicable to confirmations of arbitral awards. Most of the over $40,000 in compensatory damages represented six months of lost salary, based on the panel's finding of a year-long term of employment in ambiguous documents. The $100,000 in punitive damages were based on malicious defamation in the U-5 termination form, which the panel ordered revised to eliminate various accusations. **Acciardo v. Millennium Sec. Corp.**, ___ F. Supp. 2d ___, No. 99 Civ. 3371 (DAB), 2000 WL 177793 (S.D.N.Y. 2/15/00).

The New York State Court of Appeals has affirmed the confirmation of an arbitration reinstating a corrections officer who had been suspended for flying a Nazi flag at his home to celebrate the anniversary of Hitler's declaration of war on the United States. The officer was charged with violating employee manual provisions against off-duty conduct "reflect [ing] discredit upon the Department or its personnel" and against affiliation with a group that would interfere with performance of workplace duties. Defendants pressed safety arguments, but lost at arbitration pursuant to a collective bargaining agreement. After a split decision at the Appellate Division, the Court of Appeals unanimously affirmed. Courts may vacate an arbitral award only where it "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power." Here, only public policy grounds were at issue, and the Court found no sufficiently "well-defined" public policy jeopardized by the arbitral award. **New York State Correctional Officers & Police Benevolent Ass'n, Inc. v. State**, 163 L.R.R.M. (BNA) 2239, 1999 N.Y. Slip. Op. 10737, 1999 WL 1220305 (12/21/99).

ATTORNEYS' FEES

Hourly Rate

Judge Spatt strikes again, citing his own previous decisions cutting down attorneys' hourly rates in order to continue to do so. In a class action in which the plaintiffs prevailed on "duty of fair representation" claims, the plaintiffs applied for $436,396.12 in fees (including a 50% enhancement for the risk of contingent-fee litigation), based on hourly rates for the two senior counsel of $325 and $315 per hour. Judge Arthur D. Spatt (E.D.N.Y.) found that a "reasonable hourly rate" for those attorneys was only $200 per hour, that many of the hours expended were "unnecessary and excessive" or vague, and that no multiplier was justified. After all the chopping, slicing, and dicing, the court came up with a final fee award of $151,611. NELA/NY member Leonard N. Flamm, et al., represented the plaintiffs. **White v. White Rose Food**, ___ F. Supp. ___, 2000 WL 148511 (E.D.N.Y. 2/7/00).

Partial Success

After a tortured journey to the Second Circuit Court of Appeals and back to Judge Denise Cote (S.D.N.Y.), a plaintiff who alleged sexual harassment and Equal Pay Act violations got attorneys' fees of only about 13.5% of the initial lodestar amount. The jury had returned a verdict for her on both claims, in which she received $90,000 for the sexual harassment under the New York State Human Rights Law (but not under Title VII) and $20,000 for the EPA violation. The state Human Rights Law does not provide for attorneys' fees. The Court of Appeals had held that the plaintiff was not a prevailing party under Title VII, **Bonner v. Guccione**, 178 F.3d 581, 601 (2d Cir. 1999), and had remanded for an adjusted attorneys' fee award. The district court found that the two claims on which the plaintiff had prevailed were not "inextricably intertwined," justifying a fee for work done on both, and further found that the EPA claim had taken less work and less time. Judge Cote, who had awarded $634,970.88 in fees in 1997 before the Second Circuit appeal, on remand awarded only $190,000 for all the work done on the case from beginning to end. **Bonner v. Guccione**, ___ F. Supp. 2d ___, 2000 WL 12152 (S.D.N.Y. 1/6/00).

Pro Se Plaintiff

A *pro se* plaintiff, who was a prevailing party in an action under the Privacy Act to obtain and amend documents in his CIA personnel file, was entitled to receive his attorneys' fees and litigation costs under that statute, said the D.C. Circuit Court of Appeals. The fees were for consultations with licensed outside counsel. The plaintiff, a computer scientist employed by the CIA, had discovered that his personnel file contained allegations

of sexual harassment, which he said were false and inaccurate. Although some cases hold that *pro se* litigants cannot recover attorneys' fees, in part to further the statutory policy of encouraging litigants to retain counsel, the court noted that the plaintiff was trying to recover fees for the work of attorneys, not for his own work. "[W]e find nothing in the statute or the case law that requires an attorney to file a formal appearance in a case in order to claim fees," said the court; all that is necessary is a genuine attorney-client relationship. However, most of the requested fees were denied in this case based on inadequate substantiation. **Blazy v. Tenet**, 194 F.3d 90 (D.C. Circuit 10/26/99).

CLASS ACTIONS

Settlement Approval

A settlement was approved in a class action filed by the United States against the New York City Board of Education alleging that various hiring procedures for school custodians had a disparate impact on blacks, Hispanics, Asians, and women. The challenge focused on recruitment efforts and written examinations that allegedly left many candidates excluded from any position, from civil service status, or from full seniority. The settlement included the following: targeted minority recruitment advertising; elimination of challenged examinations; consultation with designated experts before any use of new examinations; new positions or retroactive seniority for 97 minority or female individuals; and periodic compliance reports to the United States. Magistrate Judge Robert M. Levy rejected all objections, finding that race-conscious remedies were appropriate because they were narrowly targeted to the prima facie showing of statistical disparity and that the negative impact on those outside the class was minimal and unobjectionable, as outsiders had no impinged-upon protected interest. **United States v. New York City Bd. of Educ.**, ___ F. Supp. 2d ___, No. 96-CV-374 RML, 2000 WL 217671 (E.D.N.Y. 2/9/00).

DISABILITY DISCRIMINATION

Alcoholism and Rehabilitation

A New York City corrections officer who was a recovering alcoholic brought an Article 78 action challenging his termination as being based on disability discrimination. Even though he had violated an agreed-upon one-year probationary period, said Justice Simeon Golar (Sup. Ct. Queens Cty.), he could not be terminated based upon excessive absences, latenesses, and AWOLs that had all occurred before he entered a rehabilitation program that he successfully completed. After completing it, he had returned to work for more than a month without any time or attendance violations, but he was then discharged for the time and attendance problems, which he argued were all related to his alcoholism, that predated his entry into rehab. Judge Golar granted the Article 78 petition and vacated the termination, ordering the petitioner reinstated with full back pay and all benefits. The petitioner was represented by NELA/NY member Arthur H. Forman. **Matter of Singleton v. Kerik**, ___ N.Y.S.2d ___ (Sup. Ct. Queens Cty. 2/18/00).

Direct Threat

An employer defending an across-the-board safety policy that tends to screen out disabled workers faces only the "business necessity" standard, not the "direct threat" standard, the Fifth Circuit has ruled. In the wake of the oil spill by the Exxon Valdez, a tanker whose chief officer was treated for alcoholism, Exxon imposed a company-wide rule barring employees who had substance abuse treatment from certain safety-sensitive and little-supervised positions — which amounted to about ten percent of Exxon jobs. Reversing the District Court's application of "direct threat" analysis to Exxon's defense showing, the panel held that the "direct threat" standard applied only to actions targeting particular employees, whereas the "job-related and consistent with business necessity" standard applied to across-the-board rules. **EEOC v. Exxon Corp.**, ___ F.3d ___, No. 98-11356, 2000 WL 149559 (5th Cir. 2/11/00).

EQUAL PAY ACT

A licensed engineer of Polish ancestry who saw her jury verdict on liability taken away by a grant of judgment as a matter of law from Judge John Gleeson (E.D. N.Y.) got it back from the Second Circuit Court of Appeals. She alleged that, because of her gender and national origin, she was subjected to insults, jokes, and harassment, passed over for promotion, paid less than a similarly situated male colleague, and then terminated. The court dismissed almost all of her claims but allowed one part of her Title VII claim and part of the EPA claim to go to trial. The employer had argued that its pay decisions had been made pursuant to a valid merit pay increase policy (although it failed to produce documentary evidence at trial) and pointed out that the plaintiff had received only average evaluations and that the man to whom she compared herself got better evaluations. The jury found for her on one EPA claim but was told that damages would be determined by the court, which instead then granted JMOL to the employer on that claim. The court of appeals held that the EPA's "merit system" defense was narrowly construed and protected an employer only if it proved certain criteria, which the court referred to as a "heavy burden." Here, it did not carry that burden, and the jury's verdict was supported by the evidence. The opinion was written by Judge Miner and joined by Judges Kearse and Leval. **Ryduchowski v. Port Authority**, ___ F.3d ___, 2000 WL 136834 (2d Cir. 2/8/00).

FLSA OVERTIME

Scope of "Interstate Commerce" Coverage

Judge John E. Sprizzo (S.D.N.Y.) has held that a church employee may be covered by FLSA overtime provisions even though only a portion of the employer's and employee's work involved interstate commerce — the FLSA's jurisdictional trigger. Although the church engaged in some qualifying commerce (*e.g.*, renting its facilities to outsiders for special events), the quantum would not reach the threshold of $500,000 unless the church devoted some of its non-commercial funds to those activities — a question not resolvable on

summary judgment. The court did grant plaintiff partial summary judgment on one issue, however: that the employee's limited involvement in interstate commerce — between 14 and 30 orders of custodial and other goods for the church over several years — was sufficient to render his entire employment covered under the FLSA. **Boekemeier v. Fourth Universalist Soc.**, ___ F. Supp. 2d ___, No. 96 Civ. 1459 (JES), 2000 WL 194800 (S.D.N.Y. 2/15/00).

Scope of "Motor Carrier Exception" / Independent Contractor vs. Employee

Judge Colleen McMahon (S.D.N.Y.) has held that, as to employees who were bakery products distributors, a baked goods producer was exempt from FLSA overtime rules under the motor carrier exception. The employees drove truck shipments of English muffins from the producer's distribution depots to retailers. Even though baked goods, not transport, was the defendant's primary business, the employees' transportation activities were sufficient to subject them to regulation by the Secretary of Transportation, which under the FLSA exempts their employer from FLSA requirements. A silver lining to the defense grant of summary judgment is that Judge McMahon explicitly found factual issues concerning the plaintiffs' status as employees or independent contractors, even though a prior non-FLSA action found them to be independent contractors, because "the standard for determining 'employee' status under the FLSA differs from that under the common law or ERISA" and is more expansive. **McGuiggan v. CPC Int'l, Inc.**, ___ F. Supp. 2d ___, No. 97 Civ. 7241 (CM), 2000 WL 146022 (S.D.N.Y. 1/31/00).

PROCEDURE

EEOC

See EEOC v. Die Fliedermaus, L.L.C., discussed under "Sexual Harassment," below.

Limitations; Continuing Violation

Judge Norman A. Mordue (N.D.N.Y.) was persuaded to change his mind and un-dismiss several claims on a Rule 59(e) motion ("to alter or amend a judgment") based on newly discovered evidence, when a deposition taken after the dismissal provided support for the plaintiff's continuing violation and equitable estoppel theories. (The deposition was taken because some of the claims had survived the dismissal.) The plaintiff had filed his complaint more than 300 days after his termination, alleging age and national origin discrimination and retaliation under federal, state, and city law; an amended complaint added other state-law claims. The district court, on the Rule 59(e) motion, concluded that the events after the plaintiff's discharge — failure to reinstate — might turn out to be sufficiently related to the claims in the EEOC charge to extend the limitations period, and that the plaintiff's allegation that the defendants repeatedly told him that they would recall him from administrative leave when a position became available deterred him from filing a timely charge, so that they should be equitably estopped from raising limitations as a defense. Accordingly, although some claims remained dismissed on other grounds, those that had been dismissed on limitations grounds were revived and further discovery was ordered. NELA/NY member Arthur M. Wisehart represented the plaintiff. **Bissonette v. Marine Midland Bank**, __-F. Supp. 2d ___, No. 98 CV 944 (N.D.N.Y. 3/2/00).

PUBLIC EMPLOYMENT

Disability Discrimination

See **Matter of Singleton v. Kerik**, discussed under "Disability Discrimination."

First Amendment Retaliation

In the Sixth Circuit, a female jailer survived summary judgment with a Section 1983 claim of First Amendment retaliation. The plaintiff, holder of the office of "jailer," worked under the elected county sheriff. She was terminated after she supported her husband's election challenge to the sheriff; the defendants countered that she was fired for the serious error of failing to notice outstanding warrants against an individual who was arrested and then released. The claim survived summary judgment because supporting her husband's campaign was protected activity as "political association" and "intimate association." The defendants' argument that she would have been fired for her error absent any retaliatory motive was insufficient for summary judgment, in light of various indicia of pretext, such as the greater leniency given others who made such errors. **Sowards v. Loudon County**, ___ F.3d ___, No. 98-6768, 2000 WL 134965 (6th Cir. 2/8/00).

RESTRICTIVE COVENANTS

A preliminary injunction enforcing a restrictive covenant against an insurance "producer" (salesman) was denied because the five-year ban on soliciting the plaintiff company's clients failed the **BDO Seidman v. Hirshberg** reasonableness requirement. The court also found that, despite the contract's recitation that the defendant employee was privy to confidential information, "[c]ustomer lists in the insurance industry are not generally considered to be confidential." There was no irreparable injury because "money damages could be calculated without great difficulty if defendant obtained business from plaintiff's confidential lists." The court did not consider "blue penciling" the agreement to save some relevant portion. **Bender Ins. Agency, Inc. v. Treiber Ins. Agency, Inc.**, N.Y.L.J. 2/7/00, p. 27, col. 4 (Sup. Ct. Nassau County) (Praga, J.).

A preliminary injunction enforcing a restrictive covenant against the seller of a company that produced digital prints was granted despite the plaintiff's breach of the sale contract. The defendant, who had remained as the corporation's president, quit, alleging that the contract explicitly declared the plaintiff's tardy installment payment a "material breach" voiding the restrictive covenant. The court noted that the contract provided a grace period for the plaintiff to cure tardy payments, so the defendant's repudiation was premature. The court found, without factual inquiry, that the plaintiff would "presumptively suffer irreparable harm to the goodwill they purchased if [the defendant] is permitted to disregard the restrictive covenant." **Aloni v. Unidigital Inc.**, N.Y.L.J. 2/24/00, p. 30, col. 3 (Sup. Ct., IA Part 49, N.Y. County) (Cahn, J.).

RETALIATION

Mixed-Motive Cases

What appears to be undisputed direct evidence may not suffice for partial summary judgment for the plaintiff, the District of Columbia Circuit has held. The NASA supervisor who terminated the plaintiff had admitted that her letter accusing the defendant of discrimination was "the straw that broke the camel's back." This was enough to convince the District Court that retaliatory animus at least "played a part" in the termination decision, mandating mixed-motive liability. At the trial for damages, after the defendant had presented part of its case, the District Court entered judgment as a matter of law for the plaintiff, finding it sufficiently clear that NASA would not have terminated her but for the retaliatory animus. The circuit panel reversed the plaintiff's summary judgment and remanded for trial, finding that even if the letter's discrimination accusations were protected activity and the letter was "the straw that broke the camel's back," the letter contained many things other than the protected discrimination charge, making it unclear whether the protected activity or some other portion of the letter was the motivation for the termination. **Borgo v. Goldin**, ___ F.3d ___, No. 98-5503, 2000 WL 198942 (D.C. Cir. 3/3/00).

Relief

A plaintiff who lost all her discrimination claims at summary judgment nevertheless prevailed at trial on retaliation claims, winning back pay, compensatory damages and attorney's fees. In part because the plaintiff effectively mitigated and in part because widespread layoffs covered her job, the plaintiff's financial losses were limited, and total damages were $23,000: $1,500 in lost severance pay; $1,500 in loss of two additional weeks of work; $14,000 in lost opportunity to be rehired; and $6,000 in compensatory damages for mental anguish. The Court also awarded prejudgment interest and attorney's fees limited to the retaliation claim (not the dismissed discrimination claims), but refused to allow punitive damages to go to the jury, finding little support under **Kolstad v. American Dental Association** for a finding of the requisite culpability. **Robinson v. Instructional Sys., Inc.**, ___ F. Supp. 2d ___, No. 96 Civ. 8356 (CBM), 2000 WL 64885 (S.D.N.Y. 1/26/00).

SANCTIONS

The Second Circuit Court of Appeals has reversed another order sanctioning an attorney. This time the sanction ($1,000) was imposed by Judge Jed S. Rakoff (S.D.N.Y.) upon counsel for a plaintiff (no surprise there) in a non-employment case, based upon the attorney's having moved for reconsideration of an order granting summary judgment to the defendant. Being an evenhanded and fair-minded judge, Judge Rakoff had also sanctioned the defendant's counsel ($5,000) for something else, but the judge had then amended his order to provide that it was to be paid not to the plaintiff but to the Clerk of the Court. The case involved a minor medical malpractice claim. After the grant of summary judgment, in a conference call with the judge's law clerk, both lawyers expressed an intention to move for reconsideration, but only the plaintiff's attorney did so, although the clerk said his arguments did not seem "reasonably likely" to meet the local rules' standards for such motions. The court of appeals held that Judge Rakoff had not made the necessary specific factual findings to support imposition of sanctions and added in a footnote that, although premotion conferences with judges are useful, it did not encourage "the practice of having litigants confer on the merits of cases with law clerks or other chambers personnel." **Eisemann v. Greene**, ___ F.3d ___, 2000 WL 197428 (2d Cir. 2/17/00).

SEX DISCRIMINATION

A woman who brought a mixed-motive Title VII action after she was fired for being "aggressive and sometimes abrasive," while (she alleged) men who exhibited the same traits were not fired, stated a claim in the Seventh Circuit. The district court had granted summary judgment to the employer; the court of appeals reversed and remanded in a case with good language about prohibition of discrimination even during economic reorganizations. There was testimony that the company employed a double standard and that, although the company had claimed to have discharged the plaintiff in a "reduction in force," she actually was replaced by a man. Not surprisingly, the court of appeals applied **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989) and found that the plaintiff had also made out a prima facie case under a non-mixed-motive analysis. **Bellaver v. Quanex Corp**., 200 F.3d 485, 81 [BNA] F.E.P. Cas. 1260 (7th Cir. 1/18/00).

SEXUAL HARASSMENT

Hostile Environment Sexual Harassment

An EEOC action against a bar and its owners, based on numerous sexual harassment and race discrimination charges by female employees (followed by retaliation charges and the arrests of managerial employees for egregious retaliatory conduct), was not dismissed pending "good faith" conciliation efforts. The court (Robert W. Sweet, S.D.N.Y.) declined to dismiss the individual intervenor employees' cases for failure to get notices of right to sue, declined to dismiss a black employee's Section 1981 claim based on an argument that the statute did not apply to employees at will, declined to dismiss the retaliation claims, and found that the company's vicarious liability for intentional tort had been properly pleaded. However, it dismissed constructive discharge claims for failure to prove the employer's intent to force the employees to quit, and it dismissed claims for intentional infliction of emotional distress because that tort was a claim of "last resort" when no other would serve, and here a defamation claim was available. Finally, the court declined to dismiss the New York City Human Rights Law claims based on failure to serve the complaint on the city Commission on Human Rights and the Corporation Counsel. **EEOC v. Die Fliedermaus, L.L.C**. [**sic**], ___ F. Supp. 2d ___, NYLJ 12/20/99, p. 38, col. 3 (S.D.N.Y. approx. 12/10/00).

See also **Ackerman v. National Financial Systems**, discussed below under "Summary Judgment."

Retaliatory Harassment

The Sixth Circuit (joining the Second and several others) has held that harassment motivated by retaliatory animus violates Title VII. The plaintiff's sexual harassment claims lost on summary judgment for lack of sufficient severity/pervasiveness: dirty jokes in the plaintiff's presence; a sexual advance upon her when she complained about her evaluations; once referring to plaintiff as "Hot Lips"; and commenting several times on her clothing. For purposes of the **Faragher/ Ellerth** affirmative defense, the panel found no tangible employment action in a single job evaluation that was only slightly lower (downgraded from "excellent" to "very good") and which had no other tangible repercussions. The panel did find retaliatory harassment, however, in various actions undertaken after the plaintiff complained: visiting her office and calling her on the telephone numerous times despite warnings not to do so; "making faces" at her; destroying the television she occasionally watched at work; and going to her home to give her "the finger" and to throw nails on her driveway. **Morris v. Oldham County Fiscal Court**, 201 F.3d 784 (1/20/00).

Rights of Alleged Harasser

Now that employers are finally beginning to take allegations of sexual harassment seriously, we are seeing more and more prospective clients who have been fired based on allegations that they sexually harassed someone else. In some cases, the factual allegations fall short of sexual harassment but seem to have been used by the employer as an excuse to fire the alleged harasser, either because it wanted to get rid of him for other reasons, because a person fired for cause gets no severance, or because firing the employee is easier than doing a good-faith investigation. Do these individuals have a cause of action? Not according to the Second Circuit Court of Appeals. At trial, the plaintiff was awarded $400,000 by the jury for negligent infliction of emotional distress during the investigation. The district court (Gerard L. Goettel, D. Conn.) granted a remittitur to $120,000, which the plaintiff accepted; but then the court of appeals took it all away. The court reasoned that, if an employer has a legal duty to investigate, then investigating could not have breached a duty owed to the person accused. There is plenty of good dicta in the opinion about the employer's duties under Title VII — good for persons who allege harassment, though not good for alleged harassers. The court also found that the plaintiff had no cause of action for defamation or for tortious interference with contract. **Malik v. Carrier Corp**., ___F.3d ___, 81 [BNA] F.E.P. Cas. 1275, 15 [BNA] I.E.R. Cas. 1551, 2000 WL 85200 (2d Cir. 1/26/00),

Summary Judgment

In denying summary judgment to a harassment defendant, Judge Arthur D. Spatt (E.D.N.Y.) emphasized that factual disputes concerning harassment allegations should go to the jury. One defendant argued, and the plaintiff admitted, that the plaintiff had not viewed that defendant's behavior as offensive until after it stopped. Extensively quoting and citing the Second Circuit's decision in **Gallagher v. Delaney**, Judge Spatt noted that whether behavior is harassing or

offensive is the sort of question that judges ordinarily should not take from the hands of juries. Whether harassers were "supervisors" and whether the plaintiff "unreasonably" failed to take advantage of internal procedures also were factual questions precluding summary judgment. **Ackerman v. Nat'l Fin. Sys.**, 81 F. Supp. 2d 434 (E.D.N.Y. 1/31/00).

SEXUAL ORIENTATION

"Sexual Stereotyping"

Judge John T. Elfvin (W.D.N.Y.) denied a 12(b)(6) motion to dismiss where the plaintiff alleged that she was stereotyped and harassed based on rumors that she was a lesbian. While pure sexual orientation discrimination may not violate Title VII, the court held, the plaintiff could state a claim that "because she is a woman in a male-dominated work facility and did not exhibit her femininity in a stereotypical manner, she was exposed to conditions of employment that her male co-workers were not." Judge Elfvin explicitly cited **Price Waterhouse v. Hopkins** as precedent for recognizing as gender discrimination the sort of sexual stereotyping that would lie at the heart of many sexual orientation discrimination claims. **Samborski v. West Valley Nuclear Servs. Co.**, 1999 WL 1293351 (W.D.N.Y. 11/24/99).

SUMMARY JUDGMENT

Age Discrimination

Not surprisingly, a *pro se* plaintiff-appellant who drew a hostile panel for his Second Circuit appeal has seen a grant of summary judgment against him affirmed. Judge Eugene H. Nickerson had granted summary judgment for the employer, 1998 WL 960304 (E.D.N.Y. 12/10/98), on the ground that the plaintiff had failed to show that his transfer from one school to another and then another was an "adverse employment action," so that he had failed to make out a *prima facie* case. The court of appeals affirmed on the same ground. In so doing, it narrowed the definition of "adverse employment action": "[A] transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career." The opinion was written by Judge Parker and joined by Judges Jacobs and McLaughlin. **Galabya v. New York City Board of Education**, 202 F.3d 636 (2d Cir. 2/7/00).

Reaffirming the principle that summary judgment is ordinarily inappropriate in a discrimination case where intent and state of mind are in dispute, the Second Circuit has reversed a grant of summary judgment to an employer that had attempted to use the "same actor" defense. The court of appeals held that, where seven years had passed between the plaintiff's hiring and firing by the same decisionmaker, and where his performance was objectively good and he was replaced by someone considerably younger and not significantly less expensive, summary judgment should not have been granted, especially when the employer gave differing reasons for the discharge at different times. The opinion was written by Senior Circuit Judge Richard J. Cardamone (author of **Gallo v. Prudential Residential Services, L.P**.) and joined by Circuit Judge Dennis G. Jacobs and S.D.N.Y. Judge Colleen McMahon, sitting by designation. NELA/ NY member Ethan A. Brecher represented the plaintiff. **Carlton v. Mystic Transportation, Inc**., ___ F.3d ___, 81 [BNA] F.E.P. Cas. 1449 (2d Cir. 1/28/00).

Disability Discrimination

An employer may be liable for failing to inquire whether a reasonable extension of disability leave time would accommodate a disabled employee currently unable to work, Judge Lewis A. Kaplan (S.D.N.Y.) held in denying an ADA defendant summary judgment. The plaintiff was out on disability leave, first for a leg injury and then for depression for which she was hospitalized. After roughly a year of total leave, the defendant terminated the plaintiff, giving eight days' notice. Judge Kaplan focused on the defendant's failure to meet its summary judgment burden to establish that the plaintiff's particular diagnosed depression was not a qualifying disability and to "establish[] that [the plaintiff] would have been unable to return to work if the bank had extended her leave instead of firing her." Although the plaintiff had not formally requested accommodation, here it was clear that the defendant knew of the plaintiff's then-existing inability to work for mental health reasons but made no further inquiry before the termination. **Durrant v. Chemical/Chase Bank/ Manhattan Bank, N.A.**, ___ F. Supp. 2d ___, No. 97 Civ. 1609 (LAK), 2000 WL 122216 (LAK) (S.D.N.Y. 2/1/00).

First Amendment

The Northern District of New York (Frederick J. Scullin, Jr., J.) acted prematurely in granting summary judgment to the Department of Veterans Affairs, said the Second Circuit Court of Appeals, vacating the judgment and remanding the case. The plaintiff, ironically, was a management employee who was reassigned to a non-management position after an investigation confirmed that he had made racist remarks, discriminated based on race in hiring, and psychologically abused his staff. His complaint alleged that he was being punished, as a public employee, for protected speech on a matter of public concern (affirmative action). Before the plaintiff had had a chance to conduct any discovery, the Department moved for and was granted summary judgment. The court of appeals, in an opinion by Judge Joseph M. McLaughlin, joined by Judges Kearse and Katzmann, held that "[o]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." **Hellstrom v. U.S. Department of Veterans Affairs**, ___ F.3d ___, 2000 WL 51973 (2d Cir. 1/24/00).

Multiple Grounds Pleaded

In a case that may illustrate the perils of "everything but the kitchen sink" pleading, Judge Constance Baker Motley (S.D.N.Y.) granted summary judgment against three psychiatrists at Mount Sinai Hospital. On largely the same facts, all three claimed age discrimination; two claimed gender discrimination; one claimed national origin; and two claimed breach of employment contract. All three resigned in the face of various adverse actions such as refusal to promote, loss of office space, general ostracism, etc.; they claimed, in addition to discrimination in the form of various discrete adverse actions, constructive discharge and discriminatory harassment. The Court

ISSUE SPOTTING, from page 1

simple reason that (as is often the case in psychotherapy), clients may not be aware of the true reason that they have sought professional assistance.

For example, when clients mention in a consultation that they believe they have been terminated because of a personality conflict with their supervisor, we all explore whether discrimination may have been the true reason for the termination. The usual questions we address include whether the client has been treated disparately, whether there is any direct evidence of discrimination, whether any evidence exists to challenge negative performance evaluations, and whether any evidence exists to support a retaliation claim.

As the client tells his or her story, you may be looking for evidence of discrimination. Meanwhile, your focus should be much broader. Many clients may have been terminated and not offered severance while similarly situated co-employees have received severance. The pattern and practice of paying severance may constitute an ERISA welfare plan which may provide a cause of action that the client never contemplated. Likewise, if the client is an hourly employee, you should explore whether there are any Fair Labor Standards Act violations pertaining to overtime. This may even be the case if the employee is salaried but is docked pay in the form of partial vacation or sick days, which may constitute a waiver of an FLSA exemption.

It is up to you to explore these issues with the client who may not believe them to be relevant. It is your job to ask the right questions. Ultimately, what you wish to avoid is the client mentioning something important toward the end of a consultation in a Doorknob Syndrome scenario. If you are primarily focused on discrimination, you may miss the opportunity to explore other viable causes of action.

The need to spot issues should not end even after you have filed your complaint. During the course of litigation you may obtain information distilled from documents or through deposition which may lead you into areas not addressed in the complaint. These may include a variety of common law causes of action, such as defamation or fraudulent inducement, or they may take the form of ERISA claims. Such newly discovered evidence will enable you to amend your complaint and pursue the litigation in a direction that you never even considered when you initially met the client.

You should be open to this possibility and realize that the Doorknob Syndrome can rear its ugly head if you learn of information during the course of litigation but wait until the eve of trial to amend the complaint. Be conscientious in moving to amend once you feel that you have met your obligations under Fed. R. Civ. P. 11. Do not to lose the opportunity to pursue what may have become a more viable cause of action than the one which initially drew your interest to the case. In other words, **do not get locked into your initial view of the case!**

If you are just entering the employment law field and do not feel that you have sufficient expertise to deal with certain issues which arise, for example, under ERISA or the FLSA, you should consider that NELA's very purpose is to enable its members to network and to seek advice from each other. It may very well be that you have unearthed a large class action that you do not feel able to handle, but that another NELA member may be interested in working on with you. The consummate employment lawyer will aggressively pursue any and all potential causes of action when assessing a case. Employment practitioners should develop at least a basic understanding of common law claims, employee benefits, wage and hour laws, and traditional labor law issues, to recognize any possible cause of action that may be presented.

A very aggressive, exploratory approach can help us all to wipe out the Doorknob Syndrome in our lifetime!

took on a generally dismissive tone, based on the insufficiency of the facts to show constructive discharge or harassment, and on the lack of any focused theory of discrimination: "Allegations which fall short of showing age discrimination, coupled with allegations which fall short of showing gender discrimination, joined by allegations which fall short of showing national origin discrimination cannot be somehow synergistically totaled to add up to one prevailing discrimination claim." **Mark v. Mt. Sinai Hosp.**, ___ F. Supp. 2d ___, Nos. 97 Civ. 1947 (CBM), 97 Civ. 4841 (CBM), 97 Civ. 4774 (CBM), 2000 WL 219970 (S.D.N.Y. 2/18/00).

Pregnancy Discrimination

Applying various Title VII doctrines restrictively, the Seventh Circuit upheld summary judgment for a pregnancy discrimination and retaliation defendant. The plaintiff alleged pregnancy discrimination in her sub-par salary and retaliation in her termination after her salary complaints. The panel found no "direct evidence" of pregnancy discrimination in her manager's statement to the plaintiff, during a discussion about one raise, that "[y]ou just have to stop having kids and I'll get you up to mid-range [salary] in a couple of years," because that discussion was unrelated to prior salary decisions and related only to one raise that was relatively high. The panel also found no retaliation when the defendant terminated the plaintiff for criticizing her supervisors and co-workers and threatening to quit unless her salary was raised, because at that meeting, she had not made explicit that her comments related to discrimination allegations. **Miller v. American Family Mut. Ins. Co.**, ___ F.3d ___, No. 99-1537, 2000 WL 174623 (7th Cir. 2/16/00).

Race Discrimination

Four black employees with consolidated cases against the same employer lost a summary judgment motion in Judge Larimer's courtroom (W.D.N.Y.). One had been terminated, the others passed

CLASSIFIED ADS

POSITION AVAILABLE

Well known Nassau County plaintiff's employment law firm seeks a third/fourth year associate to handle a varied federal and state employment law litigation practice.

Applicant must have experience in taking and defending depositions and defending summary judgment motions. Some trial and administrative experience is helpful. You must be computer literate in Windows 98 and Word Perfect 7. Good research and writing skills are crucial, as is knowledge of WESTLAW.

Our firm is seeking a self starter interested in building their own practice while handling the firm's cases with a minimal amou.nt of supervision.

Fax resume and salary requirements to: 1-516-593-0683. All faxes will be held strictly confidential. If you have a writing sample you would like to include, please do so.

GROWING FIRM SEEKS MERGER

Prominent Nassau County employment law firm seeks to expand its practice through growth and new opportunities. The firm wishes to merge with an experienced employment law attorney who is a sole practitioner, or a two person firm, with gross billing of at least $175,000 and is presently self sustaining, but seeks growth and depth. Attorney(s) must be fully experienced in federal and state employment law litigation and have first seated a federal or state employment trial to verdict.

Our firm's computer system is state of the art and we are fully computerized in WESTLAW for research. We have one of the most unique law office settings on Long Island. If you are interested in establishing a dialogue, please fax your interest to 516 593-0683.

over for promotion, and one of those individuals had voluntarily resigned. The court found that none of the plaintiffs had presented enough evidence to give rise to a genuine issue of fact concerning whether the employer's proffered reasons for its actions were a pretext for discrimination. The first plaintiff's early good evaluations did not disprove his later poor ones, and allegedly racist statements by a non-decisionmaker were held to be irrelevant, as were comments about his dreadlocks. Discrepancies in treatment between him and white employees were not considered by the court because he did not show that they were similarly situated. Another plaintiff was ultimately promoted, which "greatly undercut" his allegations, and the court also found the employer's rationale persuasive and said it would not second-guess an employer's personnel decisions. The court found similar problems with all the other evidence presented by all the plaintiffs and dismissed all their complaints. **Hines v. Hillside Children's Center**, 73 F. Supp. 2d 308 (W.D.N.Y. 9/28/99).

A group of individuals who alleged a racially hostile environment also lost on summary judgment before Judge Shira Scheindlin (S.D.N.Y.). The court found that, although they alleged nine incidents of harassment, "only two . . . include arguably racist comments." The other comments generally involved shouting and cursing, all concededly perpetrated by a white supervisor against minority employees, but without any overtly racial remarks or overtones. The two comments involving race were made by the same supervisor. One of the employees filed a union grievance which alleged "abusive, intimative [*sic*], threatening, and harassive [*sic*] language" but did not mention race. While the court agreed that evidence of discrimination is seldom overt, this evidence did not even support a reasonable inference of racial discrimination. **Curtis v. Airborne Freight Corp.**, ___ F. Supp. 2d ___, 2000 WL 20701 (S.D.N.Y. 1/11/00).

Retaliation

See **Miller v. Am. Family Mut. Ins. Co.**, ___ F.3d ___, No. 99-1537, 2000 WL 174623 (7th Cir. 2/16/00), under "Pregnancy Discrimination."

Sex Discrimination

A teacher at a Catholic parochial school, whose contract was not renewed after she became pregnant, saw her sex discrimination complaint dismissed by an Ohio district court but reinstated by the Sixth Circuit Court of Appeals. (The plaintiff and her fiance got married before the baby was born, but the administrators of the school counted backward from 9 and figured out that they had had sex before they were married.) The court noted that, while Title VII exempts religious organizations for discrimination based upon religion, it does not exempt them with respect to all discrimination, quoting a 1985 Fourth Circuit case that held, "Title VII does not confer upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin." Framing the question as whether the school made decisions about nonrenewal of contracts based upon pregnancy, which would violate Title VII, or as a gender-neutral enforcement of the school's premarital sex policy, which would not, the court held that this was "primarily a factual battle." If the school uncovered premarital sexual activity only through pregnancies, then only women would be caught, and the effect was to discriminate. **Cline v. Catholic Diocese of Toledo**, ___ F.3d ___, 81 [BNA] F.E.P. Cas. 1171, 1999 WL 1256186 (6th Cir. 12/28/99).

Sexual Harassment

Judge Jed S. Rakoff's (S.D.N.Y.) grant of summary judgment to an employer was affirmed in part and vacated in part by the Second Circuit Court of Appeals. The plaintiff had had a physical altercation with a co-worker who had verbally harassed her, and both were terminated. She alleged that the company condoned her supervisor's unwelcome touching of her, failed to promote her because of her race, and retaliated against her for defending herself against the co-worker's sexual harassment and physical assault. The court of appeals affirmed summary judgment with respect to the retaliatory termination because the plaintiff had not shown that she was similarly situated to other employees with whom she compared herself; it also affirmed dismissal of her disparate impact claim and denial

of class certification. It vacated and remanded, however, her claim based on sexually and racially hostile work environment. Notably, the court found that the district court, in its decision below finding that she had no case, had misstated the facts alleged by the plaintiff. **Cruz v. Coach Stores, Inc**., ___ F.3d ___, 2000 WL 122117 (2d Cir. 1/20/00).

A plaintiff who was sexually harassed by her supervisor defeated summary judgment in Judge Arthur D. Spatt's courtroom (E.D.N.Y.) based on **Faragher**, **Ellerth**, and Judge Jack B. Weinstein's Second Circuit decision in **Gallagher v. Delaney**, 139 F.3d 338 (2d Cir. 1998). Although some claims against the individuals involved were dismissed, the claim against her employer based upon vicarious liability survived, with the court considering the employer's claims of **Faragher-Ellerth** affirmative defenses and ruling that they presented a jury question, not appropriate for summary judgment. **Ackerman v. National Financial Systems**, ___ F. Supp. 2d ___, NYLJ 2/8/00, p. 37, col. 6 (E.D.N.Y. approx. 1/25/00).

Whistleblower Law

A doctor who reported a colleague in the burn center of the hospital where he worked as behaving in a mentally disturbed manner and providing "questionable treatment" to burn victims under his care, and who was then stripped of his faculty appointment at Cornell University Medical College and transferred to Jamaica Hospital with a pay cut, stated a claim under New York's private-sector whistleblower law, N.Y. Labor L. 740, said the Appellate Division, First Department. The lower court (Franklin Weissberg, J., Sup. Ct. N.Y. Cty.) had granted summary judgment to the employer, holding that the plaintiff had failed to state a prima facie case: he was not transferred or demoted immediately after his complaint, and the employer had stated a legitimate nondiscriminatory reason for its actions. (The employer claimed that the tensions between the plaintiff and his allegedly disturbed colleague were disrupting the hospital's Burn Unit, where they were the only two physicians.) The Appellate Division, however, noted that the hospital did not provide any affidavits or documentation to support its claim that there was no substance to the plaintiff's allegations, "asserting that any material relating to its investigation is privileged." Accordingly, the court said, it had not carried its burden of proof on the summary judgment motion. **Dr. Jerome Finkelstein v. Cornell University Medical College**, ___ A.D.2d ___, N.Y.L.J. 2/3/00, p. 27, col. 4 (1st Dep't approx. 1/15/00).

CLASSIFIED ADS

SPACE AVAILABLE

Outten & Golden LLP is beginning to look for office space in midtown, with the expectation of moving into new offices between July 1 and December 31, 2000. The firm expects to lease 7,000 to 10,000 square feet, but will need only about 4,000 to 5,000 square feet for its own purposes at the outset. Thus, several thousand square feet of space will probably be available for sublet to solo lawyers and/or small firms. The space is expected to be Class A space with amenities such as kitchen, library, conference rooms, plus a receptionist. The rent will probably be in the $50 per square foot range. Anyone interested in such space should call Gerry Filippatos at 212-245-1000

POSITION WANTED

Experienced union and plaintiffs' labor and employment lawyer, with substantial litigation background, excellent academic record, and strong research and writing skills is seeking full-time, part time, per diem or hourly employment. Please contact Louise. Telephone: (212) 543-2466; fax: (212) 781-9979; E-mail: GILMORE10@AOL.COM

WARN ACT

A defendant violated the Worker Adjustment and Retraining Notification Act ("WARN Act") by failing to notify restaurant workers that their restaurant would close for a substantial period if its lease was renewed. The closing was required for renovations that would occur upon renewal, but the defendant did not notify the workers until December 10, 1998, after signing the lease renewal, that the restaurant would close in about a month. This violated the WARN Act requirement of 60 days notice for any "plant closing" that causes a six-month "employment loss" for at least 50 employees of a business with at least 100 employees. Judge Michael B. Mukasey (S.D.N.Y.) found inapplicable the exception for a "business circumstance that is not reasonably foreseeable," which requires a "sudden, dramatic, and unexpected action or condition outside the employer's control." Trial will proceed as to damages. **Hotel Employees & Restaurant Employees Int'l Union v. RAROC, Inc.**, No. 99 Civ. 3078 (MBM), 2000 WL 204537 (S.D.N.Y. 2/22/00).

WORKERS' COMPENSATION

The New York State Court of Appeals has held, once and for all, that Workers' Compensation benefits are available for mental and emotional injuries on the job as well as physical ones. A claimant, who had been the manager of a supermarket, was diagnosed with panic disorder and hospitalized after a series of negative changes in his working conditions. Two seasoned co-managers had been replaced with allegedly incompetent individuals, and the store's night crew were assigned to the day shift, so that shelves had to be restocked during busy daytime hours, creating increased pressure on everyone. Those changes were reversed while the claimant was absent on his medical leave. Of course, Workers' Compensation benefits are ridiculously small. The implication of this decision is that an employee who cannot prove that his employer intentionally broke down his mental or emotional condition in order to get rid of him for discriminatory reasons is relegated to the Workers' Compensation Law for his remedy; Workers' Comp still does not cover intentional torts. **Matter of De Paoli v. Great A&P Tea Co.**, ___ N.Y.S.2d ___, N.Y.L.J. 2/25/00, p. 26, col. 1 (Ct. Apps. 2/24/00).

Workers Compensation
&
Social Security Disability

PETER S. TIPOGRAPH, ESQ.

SHER, HERMAN, BELLONE & TIPOGRAPH, P.C.

277 Broadway
11th Floor
New York, N.Y. 10007
(212) 732-8579
Fax: (212) 349-5910

and

The Cross County Office Building
Cross County Shopping Center
Yonkers, N.Y. 10704
(914) 376-3237
Fax (914) 376-3267

We have proudly represented the injured and disabled for over thirty years.