NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 10, NO. 2 May/June 2000 Jonathan Ben-Asher, Editor

Filings, Trials and Settlements

Each issue we highlight cases brought, tried and settled by NELA members. We all benefit from knowing how each others' cases are faring, so tell us your news. E-mail your information to Jonathan Ben-Asher at *jb-a@ bmbf.com*. Tell us the parties, court, judge, and defense counsel, any available citations, and include a description of the claims and factual context.

Robert Felix deserves applause for three successes in one case. He won partial summary judgment for his client in an action under the LMRDA; it was Judge Glasser who wrote the favorable decision; and he then settled the case. **Perez v. Local Union No. 30, International Union of Operating Engineers et al.**

The plaintiff sued for damages for violation of his free speech rights as a union member. After complaining to the International union about abuses he perceived by his Local, the Local charged him with violations of the union's rules, and fined him $4,000. When plaintiff refused to pay the fine, the Local deprived him of his membership privileges. After exhausting his internal appeals, the plaintiff sued for reinstatement of his privileges, arguing that the Local's actions violated the LMRDA. He also sought compensatory and punitive damages, and attorneys fees.

Continued on page 11

NELA/NY's Annual Meeting: Members Speak Up

Why does NELA/NY do what it does? Can it be more useful to its members? How can our members become more actively involved? NELA/NY members spoke about all these issues at the annual meeting on April 12.

NELA/NY has 343 members. What began with a few plaintiffs' employment lawyers fourteen years ago has grown into a well- respected bar association and voice for lawyers representing employees.

At the meeting, members discussed NELA's many committees, programs and services. A common thread was that these activities are entirely member-run, they will prosper or wilt based on member involvement, and so we need you.

NELARS, which began nine years ago, now has two part-time staffers, who field five hundred calls each month from individuals seeking representation in employment matters. NELARS attorneys (there are currently 35) get referrals and perform an important public service. NELA members can apply to be on NELARS panels, which concentrate in specific subject matter areas of employment law. Because the volume of calls has increased greatly, NELARS expects to increase its staffing and set up a computer database to track NELARS referrals. (Chair: Adam Klein).

Our **Website – nelany.com –** has been running since last fall, and is a great resource for advice and brainstorming on employment law and managing a law practice. It also provides valuable links to other legal websites, a membership directory, and a job bank. NELA members are also working on an ADR project for the website, with information on mediators and arbitrators, and a jury instruction bank. (Adam Klein, Jerry Filippatos).

The **Speakers Bureau** has rejuvenated, thanks to support from NELA and NERI. The Bureau has already sponsored several community forums on employment law, and has mounted an extensive outreach program to community groups. The committee did a mailing offering its services to 500 community groups, and will follow up with a new brochure. For information, contact Phil Taubman.

NELA's **Conference Committee**, which organizes our fall, spring and other conferences, is always interested in hearing members' ideas for conferences and presentations. (Herb Eisenberg, Laura Schnell, Anne Clark, Shelley Leinheardt).

The **Amicus Committee** drafts amicus briefs to the Second Circuit, New York Court of Appeals and Appellate Divisions on significant legal issues. The Committee frequently coordinates its work with NELA National. If you have an appeal that you think would be helped by an amicus brief, call Herb Eisenberg.

Attorneys Fees: The Attorneys Fees Committee will help you get them. The Committee can give assistance with the format, structure and content of fee applications, and can provide caselaw and affidavits in support of fee requests. (Anne Golden, Herb Eisenberg).

The **Pro Se Mediation Project** has matched NELA/NY members with plaintiffs who need representation in a single mediation in the Southern District. So far, thirty NELA members have participated in mediations. For information, call Lois Bloom at the SDNY at 804-0177.

The **Judiciary Committee** organized NELA/NY's reception for judges on June 8, to develop collegiality and respect from

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The NELA/NY
Calendar of Events

June 13
6:00 p.m.
Sexual Harassment Committee
1740 Broadway - 25th floor

June 14
6:30 p.m.
Board of Directors Meeting
1501 Broadway – 8th Floor

June 21-24
11th Annual NELA Convention
Washington, D.C.
For details, call NELA National.

September 6
Bar Talk
To be announced

September 13
NELA Nite
Topic & Location to be announced

September 20
6:30 p.m.
Board of Directors Meeting
1501 Broadway – 8th Floor

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

October 11
Bar Talk
To be announced

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

October 18
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 Dates

December 4
NELA Nite
Topic & Location to be announced

Attention E-mailers

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

Bar Talk

Bar Talk has been revived. Based on what members expressed at the annual meeting, the hosts and locations (and food and drink) for Bar Talk will revolve. Bar Talk is a great, informal way of meeting other NELA members, learning about your colleagues' practices and getting to know your fellow employment lawyers personally. There is no requirement that you talk about employment law, and as the evening goes on, it is even less likely that you will want to. The next Bar Talks are September 6 and October 11.

We have openings for co-hosts for Bar Talk beginning in the fall. If you would like to host an evening, please call Shelley

A Word from Your Publisher

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

Items for the calendar may be submitted by calling Shelley Leinheardt:
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President's Column
by Wayne N. Outten

Working with Your Client to Analyze the Case

This column is the fourth in a series on case and client evaluation. The last column urged you to look beyond the legal merits of a possible case in determining how you can help the new client. This column addresses gathering and evaluating relevant information during the initial consultation.

I often let the client begin by telling me what he or she wants me to hear, even if it may not be strictly relevant. The client probably has spent some time thinking about the "story" he or she will tell you. You can learn a lot about the client and the situation by what the client chooses to tell you and not to tell you. Of course, at some point, you need to take control to assure that you obtain, in a timely and orderly fashion, the information you need.

To do our job properly, we cannot accept at face value what a client tells us. Rather, we must listen carefully, critically, and objectively. Even assuming utmost honesty, clients provide selective accounts of the relevant facts; they unavoidably engage in selective perception, selective recollection, and selective recounting of events. Self-interest, and perhaps some deliberate shading, further skews the accounts.

Many of our clients are under considerable emotional stress; they often need and want our support and empathy. While we should provide such support and empathy, we cannot compromise the objectivity that is essential to our roles as counsel. We have an obligation to our clients and ourselves to have the best possible understanding of the complete story before we provide legal advice. Thus, we should gently "cross-examine" the client.

In doing so, however, we should not let it appear that we distrust the client. One technique for doing this is to explain to the client the difference between "the truth" and "the evidence." While related, these are different concepts. You can tell the client that what really counts in litigation and negotiations is the evidence – what we can prove by documents, testimony, and inferences. You can then grill the client on "the evidence" without seeming to doubt the client's truthfulness.

In evaluating "the truth" and the evidence, consider the presence or absence of corroboration. Ask the client to produce potentially relevant documents and examine them to ascertain whether they support or contradict the client's version of events. When relevant, review any performance evaluations and any correspondence about the client's performance. Keep in mind, of course, that employers sometimes try to create a paper trail, which may or may not accurately reflect the facts. Ask the client to explain inconsistencies and gaps in the documentation.

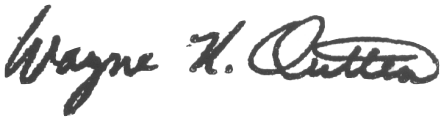
Ask about potential witnesses – coworkers, superiors, customers, and family members. Can they support (or refute) the client's position? Will they cooperate? Can you talk with them? Would they provide supporting statements or affidavits? Keep in mind that you can talk with all former employees and with any current employees who are not "alter egos" of the employer, with certain exceptions. See **Niesig v. Team I**, 76 N.Y.2d 363 (1990).

Taking into account what you have learned from the client and the extent and nature of any corroboration, use your common sense to evaluate "the story." Does it make sense to you? Would it be convincing to a judge or jury? What is the client not telling you? Do you (or the client) need to gather more information? If so, do you have the time to do so?

In evaluating the evidence with the client, one way to avoid the appearance of distrusting the client's story is to pose the questions a defense lawyer or judge might ask. For example, you can say, "If this situation ends up in litigation, the company's lawyer will probably ask you why you believe you were discriminated against."

You can also use hypothetical questions. In discharge situations, for example, I typically ask the client three questions: What reason did the employer give you? What do you believe is the real reason? Without regard to whether or not it is true, if your boss were talking confidentially with his best friend about your discharge, what reason do you think he would give? A hypothetical question like this can yield information that the first two questions might not yield, especially if the client is reluctant to give you unfavorable information. For example, the answer might be, "my boss would say I drink too much at lunch."

Obviously, you will never have all the information you want or need to evaluate the situation completely. At some point, depending on the time and need to delve further, you must proceed with the imperfect information you have.



Wayne N. Outten

Practice Tip

In this era of corporate acquisitions, your client's employer may flourish today and disappear tomorrow. Before filing a complaint, you should, of course, make sure that you are suing the right defendant. An easy way to learn what you need to know about a publicly traded company is through the SEC's on-line archive of public filings, EDGAR, at *www.sec.gov/edgarhp.htm.* Through this cite you can review 10-K statements, other SEC filings and the text of some corporate merger agreements. You can see how the company is doing financially, who controls it, and its plans for the future.

— JB-A

National Lobbying Day in Support of the Tax Fairness Bill

by Janice Goodman

The Civil Rights Tax Fairness Bill is still very much alive on Capital Hill, but it needs our help if it is to be given serious attention and pass this year.

The bill is sponsored by Rep. Deborah Pryce of Ohio and is joined by 23 Representatives from both parties. Just to remind you, this is the proposed legislation that will:

- exclude from taxation awards for emotional pain and suffering;
- allow discrimination victims who receive lump sum payments to income average;
- direct that payments made for attorneys fees are not imputed income to the employee.

To give the bill that extra boost, NELA has planned a lobbying day to be held in conjunction with this year's National Convention in Washington, D. C. Members are invited to join in this effort on Wednesday, June 21st, the day before the Conventions opens.

The day will start with a briefing on the substance and status of the bill. Information packets will be given to each member/lobbyist so we are fully informed and up to date in our presentations to the legislators.

Armed with our materials, we will then invade Capitol Hill as constituents, meeting with representatives from New York. It is important that large numbers of us come and show our support; legislators respond to anyone from their home state. It would be particularly helpful, however, to have folks from outside of Manhattan – especially from Suffolk County, home of Rep. Rick Lazio, and from upstate New York, where there is a possibility of convincing Rep. Amo Houghton.

Appointments with key New York representatives will be made in advance. If anyone has a special contact to any of the legislators, that would be best.

If you can join us, want further information, or have suggestions about how to best plan our delegate visits and travel, please contact Jan Goodman by telephone, 212 869-1940, or e-mail *Janiceag@aol.com.* Thanks in advance for making this a great day for NELA and NELA/NY.

How to Navigate the EEOC

If you're not attending the Annual Convention in Washington, you can learn how the EEOC handles cases from intake through settlement at the EEOC's Technical Assistance Seminar. The conference, to be held on Friday, June 23 in Garden City, Long Island, is sponsored by the EEOC's New York District Office.

The program features sessions on:

- The Commission's Charge Processing Procedure
- How an EEOC Charge is Handled from Intake to Resolution
- Tips on What you can do to Represent your Business or Client
- Mediation at the EEOC
- Legal Update on the EEOC's Guidance on the ADA

Conference workshops will also discuss hypothetical employment cases based on recent agency proceedings, and present a mock mediation. EEOC Commissioner Reginald Jones will give a keynote address at lunch.

The Seminar will run from 9:00 to 4:30 at the Garden City Hotel, 45 Seventh Street, Garden City (516 747-3000). The registration fee is $235. For more information or to obtain a registration form, call Tina Ortiz at the EEOC at (212) 748-8403. Seating is limited.

Join Us at NELA's National Convention

There's nothing like NELA's Annual Convention to change the way you think about legal conferences. This year's Convention will be held June 21–24 in Washington, D.C. The location is the closest to New York it's been in quite a while, so this is an easy way to learn, network, party and reinvigorate yourself for fighting the good fight.

The theme for the 2000 meeting is Justice in the Workplace. There will be three plenary and thirty concurrent sessions in two different tracks: Trial Advocacy and Alternative Dispute Resolution. The speakers are nationally known experts in their fields, and the knowledge and materials they'll provide can help you be a more knowledgeable, efficient and well-paid employment lawyer.

If you haven't been to a NELA convention before, you're in for a heady experience. It's informal, fascinating, and energizing, and there are lots of opportunities for socializing with your colleagues from around the country. And you won't be lonely, because there's always a large and vocal contingent of New Yorkers to add our own special pizzazz.

For information, check out the NELA National Website (*www.nela.org*) or call NELA National at 415 227-4655.

NELARS Moves

NELARS has moved its offices to:
500 Fifth Avenue
Suite 5100
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The deadline for articles and letters for our next issue is July 14, 2000.

Sexual Harassment Committee

by Margaret McIntyre

In its April meeting, the committee continued its series of presentations by members on significant cases. Gene Prosnitz discussed **Ackerman (Benincasa) v. National Financial Systems**, NYLJ, 2/8/2000, p. 37, col. 6 (E.D.N.Y.) and **Malick v. Carrier Corp.**, NYLJ, 2/8/2000, p. 36., col. 1 (2d Cir.).

In **Ackerman** the court ruled that whether or not the plaintiff subjectively perceived the environment she worked in to be hostile, and whether or not she was unreasonable in failing to take advantage of the employer's sexual harassment policy, were both matters for a jury, making summary judgment inappropriate.

In **Malick**, the Second Circuit reversed a jury's favorable ruling on a plaintiff's claim for negligent infliction of emotional distress (under Connecticut law) brought by a male employee based on incidents surrounding the investigation of a sexual harassment complaint made against him. The court found that federal policies would be undermined if employers had legal duties imposed on them (i.e. the risk of these kinds of common law claims) that would reduce their incentive to take reasonable corrective action on sexual harassment complaints, as required by federal law.

As part of the committee's collection of jury instructions, Rachel Levitan will be collecting cases in which the jury instructions may be useful. Committee members will contact the attorneys on those cases to obtain copies of the instructions.

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

Anne's Squibs

by Anne Golden

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

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

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

ATTORNEYS' FEES

Mixed-Motive Showing

The Fifth Circuit upheld an award of one-quarter attorneys' fees to plaintiff's attorneys where plaintiff proved race a "motivating factor" but won no relief because defendant proved it would have made the same decision absent any forbidden animus. Plaintiff, a Hispanic police officer, claimed defendant's failure to transfer him to the Special Weapons and Tactics (SWAT) team was racially discriminatory. Plaintiff proved that race was a motivating factor in the promotion process, but defendant proved that the employee's lack of experience and poor work record also explained the decision, yielding a jury verdict for the employer. **Garcia v. City of Houston**, 201 F.3d 672 (5th Cir. 2000).

DAMAGES — PUNITIVE

Standard Under Kolstad

The Fourth Circuit affirmed an award of punitive damages to two race discrimination plaintiffs, rejecting defendants' **Kolstad** challenge. The panel found sufficient evidence that the supervisors acted within their scope of authority and in a managerial capacity when refusing to promote plaintiffs because of their race, "in the face of the perceived risk that doing so would violate federal law." The company could not establish a good-faith defense based on a written anti-discrimination policy bcause the evidence showed that the top executives did not follow that policy, making this a case where the presence of an adequate on-paper policy "is not automatically a bar to the imposition of punitive damages." **Lowery v. Circuit City Stores, Inc.**, 206 F.3d 431 (4th Cir. 3/14/00).

The Tenth Circuit upheld a sexual harassment plaintiff's verdict and award of punitive damages. Plaintiff proved that the manager had knowledge of serious sexual harassment but failed to respond, which was sufficient for an inference of the requisite recklessness and malice for punitive damages. The panel also held that since the supervisor was designated as the final person responsible for implementing the sexual harassment policy, the district court was able to impute direct liability to the employer, and the employer is precluded from asserting the "good faith" punitive damages defense in a case of direct liability. Reviewing the size of the punitive damages award under **Gore v. BMW**, the panel held that the defendant had "fair notice that it could be exposed to the statutory maximum for damages" and that the award, although exceeding a 6:1 ratio, was not wholly disproportionate considering the size and wealth of the defendant. **Deters v. Equifax Credit Information Services**, 202 F.3d 1262 (10th Cir. 2/1/00).

DEFAMATION

A defendant that failed to investigate the facts in its own files before accusing an employee of theft and causing his arrest won a Rule 12(b)(6) dismissal from Judge Colleen McMahon (S.D.N.Y.) but then saw the judgment reversed by the Second Circuit Court of Appeals. The court

of appeals agreed that failure to investigate, without more, does not permit a finding of constitutional malice, even if a prudent person would have investigated, but disagreed with the employer's contention that the failure to investigate could not support an inference "at this nascent stage of the litigation" that the employer showed bad faith and "abused its qualified privilege." An investigation would have shown that the plaintiff had not cashed a second, duplicate check that he was accused of having converted. Furthermore, even if the plaintiff could not at this stage establish a cause of action for defamation, his allegations might still warrant discovery. The plaintiff was represented by NELA/NY member Raymond Nardo. **Boyd v. Nationwide Mutual Insurance Co.**, 208 F.3d 406 (2d Cir. 3/24/00).

DISABILITY DISCRIMINATION

Reasonable Accommodation

In a decision by Judge Pierre Leval, the Second Circuit Court of Appeals has defined burdens of proof in an ADA case in a way that seems to overrule the statement of the plaintiff's burden in **Borkowski v. Valley Central School District**, 63 F.3d 131 (2d Cir. 1995), while claiming to follow it. The plaintiff worked for a state agency. After surgery, he had disabilities that prevented him from doing his most recent job, but he was able to do the desk job that he had done earlier. The court of appeals, describing the "interactive process" of identifying a reasonable accommodation, held that he had the burden of proving that a specific reasonable accommodation existed, *i.e*., in this case, that a specific vacancy existed into which he could have been transferred at the time he sought a transfer. Although the plaintiff and two management representatives testified that they believed his old job was still vacant, the defendant's mandatory preferred lists for the job had to be complied with, so that he could not simply be transferred back into it. The grant of summary judgment by Judge Thomas J. McAvoy (N.D.N.Y.) was affirmed. Judges Walker and Pooler joined in the decision. **Jackan v. New York State Department of Labor**, 205 F.3d 562 (2d Cir. 3/3/00).

Insurance Coverage

The Second Circuit has joined a majority of circuits in holding that the ADA is not violated when an employer offers more generous disability benefits for physical disabilities than for mental/emotional disabilities. The EEOC filed suit based on two complaints of long-term disability policies that offered only coverage of limited duration (18 months or two years) to employees disabled due to mental/emotional conditions while offering coverage without such limited duration to employees disabled due to physical conditions. Upon finding the ADA's plain language equivocal on the issue, the panel was "reluctant to infer such a mandate for radical change absent a clearer legislative command." Moreover, the legislative history included indications that Congress intended to allow differential treatment of different conditions. "So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." Judge Sack wrote the opinion, which Judges Feinberg and Cardamone joined. **EEOC v. Staten Island Sav. Bank**, 207 F.3d 144 (2d Cir. 3/23/00).

Mixed-Motive Showing & Judicial Estoppel

The Second Circuit reversed a defense grant of summary judgment in a ruling clarifying how it interprets (a) mixed-motive standards in the ADA context and (b) judicial estoppel in ADA claims by individuals who had claimed inability to work in disability benefits applications. On the first point, the panel held that the Civil Rights Act of 1991's mixed-motive provisions apply to the ADA: "a plaintiff need not demonstrate that disability was the sole cause of the adverse employment action. Rather, he must show only that disability played a motivating role in the decision." The possibility that personal favoritism also motivated the adverse action therefore did not suffice for summary judgment, the panel concluded. On the second point, the panel clarified that under **Cleveland v. Policy Mgmt. Sys.**, 526 U.S. 795 (1999), an individual who claimed inability to work in a disability benefits application is not judicially estopped from supporting an ADA claim unless he or she took a directly factually contradictory position in the earlier benefits proceeding that was adopted by the tribunal. Because this is a fact-specific analysis, a plaintiff must have the opportunity to offer an explanation for any apparent inconsistency, which here required a reversal of the summary judgment grant. Judge Sotomayor wrote the opinion, which Judge Newman joined; Chief Judge Winter dissented but discussed only the judicial estoppel point. **Parker v. Columbia Pictures Indus.**, 204 F.3d 326 (2d Cir. 2/28/00).

"Regarded As" Disabled

The Fifth Circuit actually has yielded a useful precedent, reversing a defense grant of summary judgment by holding that relatively minor impairments can support a "regarded as disabled" ADA claim. Due to a head injury, the plaintiff had slurred speech, a limp, and difficulty with certain manual tasks such as cursive handwriting. The panel distinguished away precedents finding similar impairments insufficient to meet the ADA "disability" threshold by (a) emphasizing that disability analyses are "individualized inquiries and (b) citing evidence that even if the impairments were in fact insufficient, there was evidence supporting a claim that he was "regarded as" disabled and therefore covered by the ADA. **McInnes v. Alamo Community College Dist.**, 207 F.3d 276 (5th Cir. 3/20/00).

ERISA

The Sixth Circuit affirmed a plaintiff's verdict on an ERISA § 510 claim of interference with pension rights. During a workforce reduction, one plaintiff was laid off five years before his scheduled retirement, resulting in a 50 percent reduction in benefits, and another was laid off six years shy of retirement, also resulting in a significant reduction in benefits. Plaintiffs successsfully proved that they were singled out for layoff because they were older and closer to retirement. Because the plaintiffs were terminated in close proximity to retirement, saving the company substantial benefits payments, plain-

tiffs established their prima facie case, and the presumption of intent arose. The plaintiffs established the requisite causal link between the adverse employment decision and their pension losses because defendants knew that plaintiffs' benefits were about to vest, and there was sufficient circumstantial evidence to prove it was more likely than not that defendant used this knowledge as a criterion for the terminations. **Pennington v. Western Atlas, Inc.**, 202 F.3d 902 (6th Cir. 2000).

ERISA

Severance Pay

See **Kosakow v. New Rochelle Radiology Associates**, discussed under "Procedure (Issue Preclusion)," below.

EVIDENCE

Pretext v. Mixed Motive

The Third Circuit has joined the Second and Fourth in holding that the section of the 1991 Civil Rights Act setting an easier burden of proof of causation for mixed-motive cases did not change that burden in pretext cases. In a pretext case, in which the standard **McDonnell Douglas** analysis is used, a plaintiff must show that the unlawful reason was a "determinative factor" in the challenged employment decision. In a mixed-motive case, however, the plaintiff need only show that the unlawful reason was "a motivating factor." The former instruction was given to a jury that then returned a defendant's verdict, and the plaintiff challenged it on appeal; the court of appeals affirmed. **Watson v. Southeastern Pennsylvania Transportation Authority**, 207 F.3d 207 (3d Cir. 3/20/00).

FIRST AMENDMENT RETALIATION

Political Job

A New York State assemblyman who fired his legislative aide for speaking out publicly against police brutality did not violate her right to free speech, held Judge Jack B. Weinstein (E.D.N.Y.). In characteristic language, Judge Weinstein first noted that judges who have "lifetime tenure must exercise restraint in overseeing the staffing decisions of legislators who periodically stand for office." The plaintiff spoke at a protest and a press conference during the trial of the police officers who killed Amadou Diallo and the police officers who assaulted Abner Louima. Even though she did not claim to speak for the assemblyman she worked for, the court determined that he had not violated her First Amendment rights in firing her: "An extension of free speech tenure to legislative aides would run headlong into the State's authority to prescribe the operation of its legislative body. It would also jeopardize the vital and dynamic relationship that must exist between elected legislators and their constituents." **Gordon v. Griffith**, 88 F. Supp. 2d 38 (E.D.N.Y. 3/16/00).

Municipal Liability for Policymakers & "Codes of Silence"

Three former corrections officers who were harassed after they opposed brutal treatment of jail inmates by the Schenectady County Sheriff and other correction officers have won reinstatement of their claims against the sheriff, other county employees, and the county. The district court (Thomas J. McAvoy, Chief Judge, N.D.N.Y.) had granted summary judgment dismissing the case on the ground that the sheriff was not a policymaker in the area of general personnel and employment policy. In an opinion by Judge Amalya Kearse, joined by Judges Chester Straub and Rosemary Pooler, the court of appeals held that this standard was too general. The sheriff was a policymaker with respect to operations at the jail and especially "the management of his jail staff with respect to the existence or enforcement of a code of silence." **Jeffes v. Barnes**, 208 F.3d 49 (2d Cir. 3/28/00).

HARASSMENT

Reinstatement as Relief for Harassment

A female employee of a maximum-security facility for male juvenile offenders, suing for sex discrimination, lost her termination claim but won reinstatement and $125,000 in damages as relief under her sex harassment claim. Coworkers harassed plaintiff and encouraged inmates to do so as well; plaintiff's reports to her supervisor went unremedied. Eventually, plaintiff slapped an inmate who shouted profanities at her and was terminated for using "excessive force." Although the jury determined that termination was not gender-based, the panel held that "reinstatement is an appropriate remedy when a hostile environment prevented an employee from adequately performing her job" (citing **Carrero v. New York City Hous. Auth.**, 890 F.2d 569 (2d Cir. 1989)). The district court found that she was "programmed for failure." **Slayton v. Ohio Department of Youth Services**, 206 F.3d 669 (6th Cir. 2000).

Sexual Harassment

A plaintiff states a claim when she alleges that she was fired for breaking off a sexual relationship with her boss. But does she still state a claim if he fired her after *he* ended the relationship? Not according to Judge Robert W. Sweet (S.D.N.Y.), who granted an employer's motion to dismiss on those facts. Notably, the judge declined to dismiss on the alternative ground that the EEOC had issued its notice of right to sue before the expiration of the 180-day period provided for in 42 U.S.C. § 2000e-5(f)(1), although some other appellate and district courts have held that a "premature" notice of right to sue deprives the district court of jurisdiction. It is not sex discrimination, however, said the court, when a supervisor fires his subordinate sexual partner because of his own desire to end the relationship. The court stated in overbroad language that "employment decisions predicated upon the existence or termination of consensual romantic relationships do not give rise to claims of gender discrimination." **Kahn v. Objective Solutions, Int'l**, 86 F. Supp. 2d 377 (S.D.N.Y. 3/8/00).

Racially Hostile Work Environment

A racial harassment action lost on summary judgment before Judge Nickerson in a decision that carefully divided the racial and non-racial incidents among the alleged harassment. The workplace was not "permeated with racial discrimination" because "[o]ver the course of several years of employment, plaintiffs can point only to three specific instances where racial epithets were used." Other hostile

conduct was insufficiently race-related to support a harassment claim, even though some of the alleged incidents were harassment for filing Labor Board claims. **Brady v. KBI Security Service, Inc.**, 91 F. Supp. 2d 504 (E.D.N.Y. 3/27/00).

Quid Pro Quo

The Third Circuit allowed a quid pro quo sexual harassment claim to survive summary judgment and reversed a grant of summary judgment for the defendant. Plaintiff, a packaging engineer, went on a business trip with her supervisor, who placed his hand on her knee in a suggestive manner and implicitly proposed an affair. She was subsequently terminated. The panel held that plaintiff met her burden of showing "that his or her response to unwelcome advances was subsequently used as a basis for the decision about compensation." The plaintiff produced sufficient evidence of a causal connection "to substantiate both her prima facie case of retaliation and her prima facie case of quid pro quo sexual harassment." As the preceding quote indicates, the panel also allowed plaintiff's Title VII retaliation claim to survive summary judgment. For both claims, close temporal proximity (three to four weeks between plaintiff's actions and termination) and limited circumstantial evidence were sufficient to defeat summary judgment. **Farrell v. Planters Lifesavers Insurance Company**, 206 F.3d 271 (3rd Cir. 2000).

PROCEDURE

Issue Preclusion

Issue preclusion, formerly called collateral estoppel, is the principle barring relitigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination of that issue was essential to the judgment, regardless of whether or not the two proceedings are technically based on the same claim. That principle has now been applied, or misapplied, by Judge Colleen McMahon (S.D.N.Y.) to dismiss a plaintiff's FMLA claim because she got a "no probable cause" finding in the New York State Division of Human Rights. The court found that the SDHR necessarily determined that the employer had a legitimate business reason, not motivated by discrimination, when it eliminated the plaintiff's job while she was out on disability leave but before 12 weeks under the FMLA had expired. There was no discussion of what made the SDHR's proceeding "quasi-judicial," but the court held that it had given her a full and fair opportunity to "litigate" her claim. It did find, however, that she might be entitled to severance pay under ERISA, since the employer had a severance pay plan that constituted an employee welfare benefit plan subject to ERISA, and remanded the matter to the plan administrator for a decision. The plaintiff was represented by NELA/NY member William D. Frumkin of Sapir & Frumkin. **Kosakow v. New Rochelle Radiology Associates, P.C.**, 88 F. Supp. 2d 199 (S.D.N.Y. 3/10/00).

RELIGIOUS DISCRIMINATION

An adjunct professor of accounting who alleged that the was not hired for a permanent position because he was a "non-observant Jew" married to a Catholic lost on summary judgement before Judge David Trager (EDNY), although he defeated summary judgment on his claim of Title VII retaliation. The discrimination claim was dismissed because, said the court, the plaintiff could not prove that he was qualified for the job. The court held that the plaintiff could not prove he was qualified unless he met "the posted job qualifications," which the successful candidate met. There was no discussion of whether the plaintiff alleged that those posted qualifications were pretextual or whether the court might have found a material disputed factual issue if he did make that allegation. The retaliation claim survived in part because the plaintiff alleged that his supervisor specifically expressed her displeasure with his having filed an EEOC charge when she gave him a new schedule that she knew he could not adhere to. **Kratz v. College of Staten Island**, No. Civ. A. 96-CV-0680 DGT, 2000 WL 516888, QDS:03762270, NYLJ, 03/31/00, pg. 35, Col. 6 (E.D.N.Y. 3/15/00).

RETALIATION

Sexual Harassment by Non-Employee

A hotel employee alleged that after she confirmed that she had been sexually assaulted by a hotel guest, she was subjected to retaliation in the form of reprimands about her performance and terminated. (The plaintiff did not report the assault but admitted that it had occurred after her supervisor heard about it and reported it.) Some of the reprimands were for the shortness of the plaintiff's skirts; others were for unrelated performance deficiencies. The discharge, according to the employer, was for taking a half-written memo from her supervisor's desk — a memo addressed to the plaintiff — and then refusing to attend a meeting in the hotel manager's office about her taking of the memo. After disposing of some identity-of-defendant issues in the plaintiff's favor, Judge Deborah A. Batts (SDNY) granted the defendants' motions for summary judgment. The court held that, although the single sexual assault "was sufficiently severe to constitute a hostile work environment," the hotel had responded reasonably and that the plaintiff had not engaged in a protected activity, because she had opposed a discriminatory act by a private individual, not by her employer. Additionally, the court held that her supervisors' criticism of her was not "adverse action" and that her discharge was for her unsatisfactory behavior, not her complaint. **Flower v. Mayfair Joint Venture**, __ F. Supp. 2d ___, 2000 WL 272187, No. 95 CIV. 1744(DAB) (SDNY 3/13/00).

SANCTIONS

Judge John S. Martin, Jr. (S.D.N.Y.) showed some regret that a defendant had not asked for Rule 11 sanctions against a plaintiff for filing what the judge called "a totally meritless claim of employment discrimination." Even after the court *sua sponte* invited submissions on that issue, the defendant did not request sanctions, so the court could not award them; but the defendant did ask for attorneys' fees, so the court had to be content with that. Apprehension about reversal kept the court from awarding the fees against the

plaintiff's attorney without the requisite Rule 11 procedures, but the court ordered the defendant to make a formal motion for fees against the plaintiff and submit a detailed account of its fees. **Briskovic v. Our Lady of Mercy Medical Center**, ___ F. Supp. 2d ___, 2000 WL 257161, No. 96 CIV. 7452(JSM), 96 CIV. 8932(JSM) (S.D.N.Y. 3/7/00).

SUMMARY JUDGMENT

Age Discrimination

A plaintiff who was in his 60s and who was let go in a job consolidation, in favor of several younger persons who were retained, stated a *prima facie* case of both age discrimination and retaliation with respect to each act of which he complained except a salary reduction (and that claim was dismissed because it was part of his damages rather than being a separate claim). Judge Robert P. Patterson, Jr. (S.D.N.Y.) correctly applied the summary judgment standard, noting that there were genuine issues of material fact as to each claim with respect to evidence of the employer's true intent. The court found, with respect to the retaliation claims, that a reasonable juror could find a causal connection between the plaintiff's complaint and the adverse employment actions (poor review, failure to promote) solely because of their proximity in time — approximately eight months. **Kolakowski v. Consolidated Edison Co.**, ___ F. Supp. 2d ___, 2000 WL 231086, No. 98 Civ. 6001(RPP) (S.D.N.Y. 2/29/00).

Disability Discrimination

A former long-haul truck driver alleged that compression fractures of two vertebrae substantially impaired him in the major life activities of sitting and working, and that his employer had not reasonably accommodated him by letting him bid for a "yard" position that he concededly would have gotten. The employer had a written policy stating that an employee who wanted to return from Workers' Compensation had to bring a doctor's note saying he was cleared to return to his former job "without restriction" before he could bid on another job. When he could not get such a note, the plaintiff was terminated. The employer alleged that the plaintiff's condition was not a disability under the ADA. The EEOC sued and the employee intervened, and everyone moved for summary judgment. Both motions were denied. Judge William H. Pauley III (S.D.N.Y.) found material disputed issues of fact as to whether the policy — concededly a facial violation of the ADA — was enforced in this case, whether the plaintiff's condition was severe enough to be a disability, and whether the employer offered a reasonable accommodation. The plaintiff-intervenor was represented by NELA/NY member Anne Golden. **Walden v. Yellow Freight System, Inc.**, ___ F. Supp. 2d ___, 2000 WL _____ (S.D.N.Y. 3/21/00).

First Amendment

Employment-at-will has brought down a plaintiff who had the bad luck to get Judge Goettel (D. Conn.) as his district judge and then Judges Winter, Leval, and Magill on his Second Circuit panel. The plaintiff was fired purportedly based on failure to accomplish certain safety tasks that were part of his job and complaints

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by the Fire Marshall, customers, and other employees. He alleged that oral promises of notice and procedural job protections were made to him when he was hired (the disclaimer in the employee manual disposed of that claim) and that he was fired for writing two memoranda complaining harshly about the noncompliance with safety regulations that existed when he was hired. He pointed out that the memoranda were closely followed in time by his discharge and claimed First Amendment protection. The court of appeals held that this fact was insufficient to defeat summary judgment in this case because there was no reason to believe that these statements "inconspicuously inserted in run-of-the-mill reports to management would motivate his superiors to act against him." **Lowe v. Amerigas, Inc.**, No. 99-7813, 2000 WL 268570 (unpub. op.), N.Y.L.J. 3/28/00, p. 33, col. 1 (2d Cir. 3/10/00).

National Origin Discrimination

A Hispanic woman who was hired as a bilingual-Spanish patient representative, then allegedly fired for objecting to an "unwritten English-only rule" and an "unwritten no-Spanish rule" when not speaking with Hispanic patients, lost a summary judgment motion before Judge Sidney H. Stein (S.D.N.Y.). The court treated the two rules separately but held that neither would show national origin discrimination, despite the EEOC's regulation stating that English-only policies are presumptively discriminatory. The plaintiff's termination a week after she protested the policy also was not retaliatory, the court held, because it was not clear that she was saying it was discriminatory, and her Section 1983 claim failed because she could not show a causal connection between the alleged protected speech and her termination. **Velasquez v. Goldwater Memorial Hospital**, 88 F. Supp. 2d 257 (S.D.N.Y. 3/16/00).

Race Discrimination

Three minority "extra" or "casual" employees in the delivery department of a newspaper sued both the newspaper and their union, alleging that white extras were treated preferentially compared to minority extras. Only one of the plaintiffs had filed a timely charge with the EEOC and obtained a notice of right to sue. The district court (Richard Conway Casey, J., S.D.N.Y.) granted summary judgment to the union but denied it to the employer. The court noted that the Second Circuit rule is that if one plaintiff has filed a timely EEOC charge, others who did not file such a charge may join the action if their individual claims "arise out of similar discriminatory treatment in the same time frame." The court, listing the allegations of disparate treatment, held that they sufficed to meet the material-disputed-fact standard requiring denial of summary judgment to the employer, *e.g.*, white extras were able to advance to regular (non-extra) status while blacks remained extras for as long as 20 years, and minority employees suffered greater discipline than whites for the same alleged infractions. Since the union had no power to make the decisions that the plaintiffs challenged, however, and the plaintiffs had offered no evidence of discrimination by the union, it was dismissed as a defendant. **Luten v. Daily News**, ___ F. Supp. 2d ___, No. 97 Civ. 2462 (RCC), 2000 WL 335731 (S.D.N.Y. 3/30/00).

FILINGS, from page 1

Judge Glasser granted plaintiff's motion for partial summary judgment on liability, 1999 WL 684156. Defendants then offered $5,500 to cover all damages and fees. Plaintiff rejected the offer, and further settlement discussions were unproductive. In a settlement conference with Magistrate Robert Levy, defendants agreed to settle the case by paying plaintiff $20,000, and paying fees and costs of $45,000.

Judith Katten and **Jane Bevins** successfully settled a sexual harassment and discrimination action by a female New York City police officers for $375,000. In the process, the City Corporation Counsel got a well-deserved lashing from Judge John Martin.

The plaintiff alleged that she had been harassed by male officers (in one incident, noone responded to her call for backup); she was also denied assignments and given undesirable ones. The City agreed to a $350,000 settlement, and confirmed the settlement in writing, to be fully memorialized later on. Several weeks later, after repeated assurances that the settlement papers were on their way, a different attorney from the Corporation Counsel's office pulled the offer off the table. Plaintiff's counsel wrote Judge Martin, asking for leave to move to enforce the agreement, and Judge Martin ordered an evidentiary hearing on whether a settlement had been reached. During the hearing, Judge Martin ordered defendants' counsel to produce an internal document arguing for settlement because, in part, "Judge Martin is no friend of this office."

Judge Martin urged defendants to reconsider their position and said that they probably "would not want to read what I have to say about the City's conduct in this matter." Defendants then settled the case for $375,000, $25,000 more than the original figure. **McGinley v. City of New York** (SDNY 2000).

Adam White won a jury verdict in an unusual breach of contract case which relied on the anti-retaliation provision of a state agency's employee handbook. The plaintiff was fired one day after complaining about religious discrimination and corruption at the New York State Dormitory Authority. The plaintiff testified that he had relied on the anti-retaliation provision before making his complaint. The court found that the plaintiff could rely on the anti-retaliation clause even though he had received the handbook after beginning work. The jury awarded the plaintiff over $44,000 in lost pay based on his breach of contract claim. **Finkelstein v. Dormitory Authority of the State of New York**, NYLJ April 3, 2000, page 25, col. 4. (Supreme Ct. N.Y. Co. 2000).

Dan Alterman has filed an ADA, race and retaliation case against Bell Atlantic. The plaintiff's employer removed him from a technical program because he was on limited duty and could not climb telephone poles. The plaintiff was transferred out of the program after he spoke with his white supervisor about the Million Man March and requested to attend a workshop for African-American technicians. The case was filed in New York Supreme Court but was removed to federal court (Judge Harold Baer) by defendant's counsel, Epstein Becker & Green.

MEETING, from page 1

federal, state and local judges. Other possible projects include a role for NELA/NY in interviewing and recommending judicial candidates.

The **ERISA Committee's** message was: you don't have to be an expert to be involved, and novices are encouraged to join. The Committee hopes to demystify this important area of employment law, and educate NELA members about the many ways ERISA can help our clients. (Bill Frumkin, Edgar Pauk)

The **New York City Commission on Human Rights Committee** has "pretty much reflected our agency" by not being particularly active, explained Jonathan Weinberger. The Committee hopes to do better than its namesake this year. Possible programs include a NELA Nite presentation by the Commission's counsel.

The **Sexual Harassment Committee** has been meeting regularly each month. Members present and discuss significant new cases and discuss case strategy, and are preparing a bank of jury instructions. (Lawrence Solotoff, Margaret McIntyre).

The **ADR Committee** wants to be a home for NELA members interested in mediation. The Committee will be collecting information on mediators and expects to actively promote other projects. So far, there has been surprisingly little participation by NELA members, so there's lots of room for those who are interested. (Allegra Fishel)

The **Membership Committee** works to expand our membership and spread the word about NELA. It is reaching out to law students and law grads and planning a new members social. (Shelley Leinheardt)

The **Fundraising Committee** has been planning our October 4 gala dinner to honor courageous plaintiffs and their lawyers. The Committee meets regularly (by phone) and can always use help. (Robert Rosen et al.)

After committee presentations, members discussed their views of what NELA does well and not so well. Some suggestions included:

- Publicizing the work of the committees more extensively, to make clear that they welcome new members and are not limited to people with expertise in the area. One well received suggestion was to devote a NELA Nite to introducing members to NELA committees.
- Publicizing NELA Nites more extensively.
- Rotating the location and hosts for Bar Talk and having each host organize and boost the meeting. (This has been done, as you can see from recent faxes you've received).
- Reinvigorating a Talk Back Committee to respond to media presentations of employment law issues.

So, if you've been reticent to get more actively involved in NELA because you think you're not needed, keep in mind that your help will be enthusiastically welcomed and appreciated. If you have concerns or ideas you want to voice, call Shelley, a committee chair or one of the officers. Don't be shy, NELA wants you.

—Jonathan Ben-Asher

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