NELA
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Playing *Niesig*: Judge Lowe's Decision Disqualifying Counsel in *Muriel Siebert & Co., Inc. v. Intuit Inc.*

by Darnley Stewart (*darnley@blbglaw.com*)

It has long seemed clear that *ex parte* communications with a former employee of an opponent are permissible under the Court of Appeals' decision in **Niesig v. Team I**, 76 N.Y.2d 363 (1990). Indeed, in **Niesig**, the Court addressed the scope of Disciplinary Rule 7-104 of the Code of Professional Responsibility, concluding that the rule's prohibition on contacting represented employees "applies only to current employees, not to former employees." 76 N.Y.2d at 369. Since this ruling, plaintiffs' lawyers have felt reasonably comfortable reaching out to former employees of a defendant-employer, whether as part of our investigation into the merits of our client's claims or in anticipation of deposition discovery. A recent state Supreme Court decision by Judge Richard B. Lowe III in a commercial case entitled **Muriel Siebert & Co. v. Intuit Inc.** (Sup. Ct., N.Y. Co. Nov. 3, 2005) ("**Intuit I**"), however, has thrown that general rule into doubt

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Application of Labor Law § 193 to Commission Employees

Part I: Are Executives Covered?

by Salvatore Gangemi (*www.gangemilaw.com*)

This article is the first of two on the application of Section 193 of Article 6 of the New York Labor Law ("Labor Law § 193") to employees whose compensation is based at least in part on commissions. This article addresses the threshold issue of whether executive employees are excluded from the protections of Labor Law § 193.

Labor Law § 193

Labor Law §193 imposes a "rigid restriction" on the types of deductions or charges an employer is permitted to make against the wages of an employee. **Guepet v. International TAO Systems, Inc.**, 110 Misc. 2d 940, 940-42, 443 N.Y.S.2d 321, 22 (Sup. Ct., Nassau Cty, 1981). Labor Law § 193 only permits charges or deductions that are required by law, or are expressly authorized in writing by the employee and are made for his or her benefit. Labor Law § 193(1) (listing insurance, health/welfare, charity, dues to a labor organization, and others).

In addition, Labor Law § 193(2) prohibits employers from requiring that an employee "make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under [Labor Law § 193(1)]." Labor Law § 193(2).

"Wages" is defined in Labor Law § 190(1) and includes earnings determined on a commission basis. Finally, Labor Law § 193 prohibits an employer from making deductions to the wages of an "employee." The term "employee" is defined as "any person employed for hire by an employer in any employment." Labor Law § 190.

Relevant Case Law

Based upon a plain reading of Labor Law § 193, it would appear that all employees are entitled to the protection of the statute. Many courts have so held. **Miteva v. Third Point Management Co.**, 323 F. Supp. 2d 573 (S.D.N.Y. 2004)(collecting cases).

Some courts, however, have held that executive employees are not covered by Article 6 of the Labor Law and, consequently, are excluded from coverage under Labor Law § 193. Courts that have found executive employees to be outside Labor Law § 193's seemingly broad coverage generally rely upon the Second Department's decision in **Conticommodity v. Haltmier**, 67 A.D.2d 480, 416 N.Y.S.2d 298, 299 (2d Dep't 1979), and the subsequent New York Court of Appeals' decision in **Gottlieb v. Kenneth D. Laub & Co., Inc.**, 82 N.Y. 2d 457, 605 N.Y.S. 2d 213 (1993). Although Conticommodity involved a Labor Law § 193 claim, courts' reliance on **Gottlieb** is misplaced.

In **Conticommodity**, a commodities brokerage account executive challenged deductions to his commissions, his sole form of compensation, for deficits in client accounts. The court rejected the account representative's claim that the practice violated Labor Law § 193 because, according to the court, an employee who

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The NELA/NY

Calendar of Events

September 19
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

September 27
NELA Nite
Topic & Location
TBA

October 20
NELA Fall Conference
Yale Club of NYC
(Details to Follow)

November 7
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

November 16
Courageous Plaintiffs Event
NELA/NY 20 Year Anniversary
101 Club
101 Park Avenue
(Invitation to Follow)

December 6
NELA Nite
Topic & Location
TBA

December 12
Executive Board Meeting
(Elections)
3 Park Avenue, 29th floor
(Open to all members in good standing)

December 14
NELA Holiday Party
SAVE THE DATE!

NELA/NY Spring 2006 Conference Roundup

by Robert Davis *(rbdavislaw@hotmail.com)*

As we've come to expect, the seasonal NELA/NY conferences are informative, provoke illuminating Q & A, and are relevant to our practices. The spring 2006 conference, organized by John Berenbaum, Shelley Leinheardt, Susan Ritz and Justin Swartz, brought us sessions on litigating in state court, a review of the 2005 amendments to the NYC Human Rights Law, the seasonal federal/state law update, a session on representing military personnel, ethical issues in employment, and a panel, on entertainment law.

NY State Practice: With the federal bench growing increasingly hostile toward discrimination claims, many of us have been filing in state court, or at least exploring that option. Justice Louis B. York , Supreme Court, NY County, walked us through the basic steps in filing and prosecuting a claim in state court.

The state practice panelists, including (NELA/NY Board Member) Phil Taubman, pointed out the difficulties of obtaining discovery in state court as well as the risk of having your case transferred to the Civil Court, "325d'd." As Supreme Court has equitable jurisdiction where the Civil Court does not, it is critical when your case is conferenced by the court to note you are seeking injunctive relief to avoid transfer. Panelists also pointed out that where viable claims for injunctive relief accompany monetary claims, a jury waiver is effected.

Phil included a variety of useful materials in the conference book for

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A Word from Your Publisher

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President's Column

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

NELA/NY is a statewide NELA affiliate. No one will dispute that. NELA/NY is not NELA/NYC, Long Island and Westchester. Nor is it NELA/Upstate NY. Our organization faces the problem of how can it measure up to the daunting task of serving all of its members equally, regardless of geographic location. The problem is easy to identify; the solution is not.

Since becoming President a year and a half ago, my focus, and the Executive Board's focus, has been to improve the availability of our resources to our upstate members. The question is, has anybody noticed? Unfortunately, the answer is no. Why not? For starters, although we will gladly fund NELA Nites or holiday parties at various upstate locations, we have not been successful in getting them arranged because, we are told, our members are too spread out. Secondly, while our Upstate Conference Committee has worked tirelessly to put on high quality conferences, attendance has been poor. New York State is big, and "upstate" is a six letter word that hardy describes the expanse we are dealing with.

One tempting solution is to just "go online." We can make all of our services, *i.e.*, NELA Nites, Conferences, Project and Committee Meetings, etc., available online for all to access and share equally. Good idea! —Let's just go "Listserv" 24/7/365. This way we will never have anyone lose out . . . . except for one tiny, tiny factor . . . . WE WILL NEVER SEE EACH OTHER. NELA/NY (or should I say PELA/NY) was not built that way and I doubt it will flourish without the collegiality and networking that comes from interacting with each other IN PERSON.

This is not to say that we should not expand and improve our member services through the use of technology. The Listserv is very successful and our website will make a significant impact on how we do business in the future. However, we should not lose sight of our founding principles (*i.e.*, having direct human contact) as we go down this road. I can assure our upstate members that the Board is hard at work at trying to offer all our services equally. For example, we are exploring the possibility of having a reasonably priced Fall 2007 upstate weekend conference at a location that we hope will be attractive to all our members and will draw also the attendance of their families and/or significant others.

We recognize that we are NELA/NY (state) and we are trying to measure up to our name. The Board needs and welcomes input from anyone who can help, whether upstate or down. We particularly need members in the Albany region and western part of the state to assist us in this initiative. As John Lennon said: "Come together right now!"

Practice Tip:No one enjoys being yelled at by their adversary. Dealing with a difficult, unreasonable adversary can be like walking on hot coals. What to do? The answer is DON'T. When yelled at, try saying something like: "I cannot talk to you when you raise your voice. So I am hanging up. I am not 'hanging up on you.' I am just hanging up. Please call back when you will be civil and I will gladly discuss this issue with you. If you call and yell again, I will hang up again, so think it over before you call. Goodbye." I have used this effectively many times. Give it a try. Oh, I almost forgot, while you are waiting for the return call, go outside for a walk, or have an ice cream cone. Remember, it's your job—not your life. Enjoy it, because life really is too short! ■

Courageous Plaintiff Event

Thursday, November 16, 2006

Our Ninth Annual Fund-raising "Courageous Plaintiffs" event is being held this year on Thursday, November 16, 2006 at the 101 Club, 101 Park Avenue. So many of you who have attended this special event over the years know what a moving, wonderful evening it is. Please mark your calendars! Invitations will be mailed in early September.

If you have not received our letter dated June 8, 2006 in which we describe the three cases being honored, along with the names of the honored plaintiffs and their attorneys, please contact the NELA office at *nelany@nelany.com*.

If you are interested in joining the Benefit Committee, please contact Shelley Leinheardt, 212.317.2291 or *nelany@nelany.com*, before Friday, August 18, 2006, in order to be listed on the invitation. For all other information regarding tickets and ads for the journal, please contact Shelley. ■

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acts in an administrative or executive capacity is not afforded the protections of Labor Law § 193 against unlawful deductions. The court in **Conticommodity** devoted only two sentences to this issue and based its decision not on the definition of "employee," which is the term that appears throughout Labor Law § 193, but rather on the definition of "commission salesman," which excludes "an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." Labor Law § 190(6). However, "commission salesman" is not mentioned in Labor Law § 193. Rather, the term is defined in Labor Law

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Proving Emotional Pain & Suffering Damages

by Josh Friedman (*josh@joshuafriedmanesq.com*)

Counsel often focus on their client's economic loss, but most clients are not high wage earners, and the most fruitful source of damages is often emotional pain and suffering. This article is a summary of my approach to building a strong claim for emotional pain and suffering (EP&S).

Case Selection

Proof of EP&S Damages begins with case selection. If your client has trouble telling the truth, he will destroy his case and all the time and money you have invested will be wasted. My retainer agreement states that: "You are required to be honest at all times. There should be no difference between what you would answer if I asked you a question when we are alone, and what you would answer when you are testifying on the witness stand. The key to success is being completely honest with your attorney and as a witness. If you lie, exaggerate or deviate in any way from the facts as you know them you will ruin your case."

Evidence of Medical Treatment

At the outset of the relationship with the client, look for evidence of medical treatment. Loss of health insurance is a common factor in decisions to forgo psychological counseling, but the inquiry does not end there. If someone did not seek help from someone in some form, what she went through was probably not severe enough to warrant a large damage award. People with serious psychological injuries often—not always—find a way to discuss them with some sort of professional, or at the minimum with a close friend or family member who may play a role similar to a professional.

Ask your client "who went through this with you," and interview one or two of these witnesses. They should be able to describe what the plaintiff was like before the discrimination, what happened during the discrimination, and how she changed after it ended (if it has ended).

Speak to all treating medical professionals the client saw and review all their records for the period beginning when the discrimination started to the present, to determine whether the client mentioned or was treated for stress on the job, or even just stress. People mention job stress or symptoms or job stress at regular checkups and even dental visits, such as complaints about grinding teeth, or jaw pain, which may be diagnosed as Bruxism or aggravation of TMJ.

Hostile work environments produce the most severe emotional injuries. They may also produce physical injuries, which most disparate treatment cases do not, in the case of sexually or racially motivated assaults, and environments intentionally created or maintained to aggravate existing disabilities (e.g., refusing to grant a smoke free environment to someone who has obstructive pulmonary disease).

Involving a Forensic Psychiatrist

Once I have identified a case where there is a prospect of a significant EP&S damages award, I usually involve a forensic psychiatrist from the beginning. Large pain and suffering awards are forever being sliced and diced by the First Department, with such illuminating explanations as "too large." You need all the ammo you can get.

A forensic psychiatrist is useful for more than just defending your award on appeal. If you consult with your forensic psychiatrist early on, he should be able to identify issues that typically arise when plaintiffs have the type of experience your client had, which will help you in preparing your client. A forensic psychiatrist can suggest strategies for discovery, particularly depositions, identify potential weaknesses and pitfalls early on, and suggest ways of dealing with them. A forensic psychiatrist will review all treatment, education and employment records; he will be qualified to testify about the meaning of these records, which may otherwise not be admissible as to mental injury.

A forensic psychiatrist can provide a diagnosis, and testify as to how long the effects of the injury will persist. A forensic psychiatrist can identify additional types of EP&S which may not be apparent (loss of enjoyment of work was a new one for me, but it is important).

I look for someone who plays a significant role at a respected teaching institution, such as head of a forensic psychiatry program, has a significant publication history, is certified in the subspecialty of forensic psychiatry by the American Board of Psychiatry and Neurology, has an active patient practice, and with whom I can talk easily.

Google the candidate. If you find articles about cases that were thrown out because the expert acted inappropriately with a witness, as happened recently while I was researching a candidate, assume your adversary will find the article as well. If you are stuck with an expert you cannot use (because he drew wrong conclusions interviewing your client, or because you came to the case late), hire the expert as a litigation consultant, and throw up a work product wall, to make sure your adversary never gets to ask the expert about the client interview and his conclusions.

I favor MDs because they are harder to trip up on qualifications (e.g., "As a psychologist you have never studied alcohol metabolism, so you cannot say whether … correct, "). You may need a psychiatrist to separate out biological from psychosocial causes of symptoms such as impotence and to review & analyze the medical records accurately.

A rough estimate cost would be between $5,000 or less to get a report, and another $5,000 for testimony. If you are realistically hoping for a high six figure award for EP&S, which is going to support an even higher punitive damages award as a multiple of the EP&S award, the expert's cost is well justified.

Client Deposition

Preparation of the client for deposition is extremely critical where EP&S are a significant part of prospective damages. Defense counsel frequently question the plaintiff broadly about all the bad things

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Top Ten Things That Employment Lawyers Should Know About Long Term Disability Insurance Claims

by Scott M. Riemer (*sriemer@riemerlawfirm.com*)

The jobs of an employment lawyer and a disability lawyer intersect when a disabled worker complains of discrimination. Such a worker, lets call her Jane, may simultaneously have a possible claim under the ADA and a possible claim for long term disability benefits under the employer's LTD policy. How should you advise her? Should Jane seek an accommodation or settlement with her employer? Should she apply for disability benefits? Can she do both?

I would like to share with you the top ten things that you should know about long term disability benefits before giving your advice to Jane.

1. Requests forAccommodations

Requests for accommodations raise the bar for obtaining disability benefits. This is the case whether or not they are granted. If they are granted and Jane later applies for LTD benefits, the insurer will in the future use her accommodated job in order to determine whether she is disabled. This makes it more difficult to establish disability because the accommodated position is presumably easier to do. On the other hand, if they are not granted and Jane applies for LTD benefits, they will use the request as an admission that she could perform the duties of her job.

2. Exit Strategy from Work

If Jane wants to apply for disability benefits right away, she needs an exit strategy from work. The first question that the insurer will ask her is, "why was she able to work yesterday, but not today?" In other words, "what has changed?" The way to avoid/answer this question is to arrange for a transitional event between Jane's work and disability. I usually do this by having the client fully examined and tested by her treating physician. What has changed?—Jane's doctor has now thoroughly examined her and has advised her to stop working. Please note that it is very important that Jane not go back to work again after the examination. If she does, it only confirms that she is not disabled and that the doctor's opinion was wrong.

When arranging an exit strategy, you should do this behind-the-scenes. If the insurer knows Jane has an attorney, they will be immediately suspicious of the claim.

3. Active Employment

Jane is only "covered" under the LTD policy when she is in active employment, which will end on her last day of actual work. It is therefore very important for Jane to go out on disability **prior** to her anticipated termination. If Jane has already been terminated, the claim is much more difficult, and she could expect a challenge by the insurer. To obtain benefits, Jane will have to establish that even though she worked a full day on her last day of work, she was disabled on that day. This can be done by establishing that she was not effectively doing her job or showing that she was desperate. Surprisingly enough, in **Hawkins v. First Union**, 326 F.3d 914 (7th Cir. 2003), Chief Judge Posner himself found that there was no logical incompatibility between working full time and being disabled from working full time.

4. Partial Disability

Jane may want to transition her disability by first going out on partial disability. Partial disability, however, is almost always problematic, even if Jane's employer were willing to let her work part time. To support partial disability, Jane would need her doctor to opine that she only could work a specified number of hours per day or week. This is problematic because it deals in shades of grey. If Jane's doctor says she could work 20 hours per week, the insurer will then want to know why she cannot work 24 or 26 hours per week. It is very difficult for any doctor to say Jane could work 20 hours per week, but not 24. I always prefer my clients to go out on total disability, which is much more concrete.

7. The Arbitrary & Capricious Standard of Review

The standard of judicial review affects not only the outcome in court, but also the chances that the insurer initially will grant or deny the claim. The standard of review is determined by the policy language. If the Policy grants the insurer discretionary authority to interpret the policy or determine eligibility for benefits, the court will only reverse the insurer's determination if it is arbitrary and capricious. You may have heard that the NYS Department of Insurance has recently banned these clauses, but that ban is now being challenged by the insurers.

Although most well supported claims are granted by insurers, Jane should know that applying for benefits is not without significant risk—even if she has strong evidence. Moreover, it often takes several months for the insurer to make a decision. Jane's job guarantee under the FMLA may run out prior to her hearing from the insurer.

6. Definitions of Disability

Definitions of disability vary considerably. You should therefore check it to make sure that Jane would be eligible. The best policies provide benefits if Jane is unable to perform the material duties of her "own" occupation. Most policies, however, only provide this protection for two years. Thereafter, Jane would have to establish that she was unable to perform the material duties of "any" occupation to which she is qualified by education, training and experience.

It is more difficult to establish disability under the "any" occupation standard because Jane would have to establish that she could not do a whole universe of jobs,

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those who are new to state court practice. In addition to describing discovery dispute resolution and jury selection in state court, Phil reminded us of the significance of forum shopping. In short, if you can file at the courthouse near Yankee Stadium, don't walk, run.

NY City HRL: Craig Gurian, Esq., Executive Director of the Anti-Discrimination Center, NELA/NY Board Member, and principal drafter of the 1991 and 2005 (Local Civil Rights Restoration Act of 2005) amendments to the NYC Human Rights Law, gave a moving presentation on the vital tool we have in the City law. In addition to adding partnership status as a protected class, the amendments to the retaliation provisions should have far-reaching impact:

> "*The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing, or a public accommodation or in a materially adverse change in the terms or conditions of employment, housing or a public accommodation, provided, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.*" NYC Administrative Code Title 8 – Chapter 1 - §8-107(7)

In sharp contrast to Title VII's requirement of an adverse employment action (until the 6.22.06 Supreme Court decision in **Burlington Northern and Santa Fe Railway Company v. White**, 2006 U.S. LEXIS 4895 (2006)), the plaintiff's burden under the revised City law is far lighter, and I believe, more effectively designed to chill the retaliatory conduct of employers. The problem of some state judges not following City law provisions was reflected in a recent Appellate Division case **Pimentel v. Citibank**, 811 N.Y.S.2d 381 (1st Dep't 2006) where a disability claim was dismissed without any analysis of applicable City law provisions. The burden is on us to educate the bench regarding City law claims.

Fed/State Caselaw Updates: Douglas James, Esq. and Rebecca Osbourne, Esq. presented the caselaw update. While providing insightful commentary on recent developments, their approach of alternating case analyses between them was quite effective. (According to this theater critic.) Ms. Osbourne discussed **the Burlington Railway v. White** case mentioned above.

Mr. James provided an in-depth analysis of case law addressing electronic disclosure and the unfortunate inclination of courts to deny sanctions for non-disclosure based on "harmless error." (see **Quimby v. WestLB**, No. 04 Civ. 7406, 2004 WL 3453908 (S.D.N.Y. Dec. 15, 2005)(Pitman). For a discussion of issues regarding disclosure of "metadata" which we will see more of in our local courts, see **Williams v. Sprint/United Management Co.**, 230 F.R.D. 640 (D. Kan. 2005).

Military Law: The Military Law panel engaged us in an arena, most of us probably have not encountered. The large number of military reservists and national guard members called for duty in Afghanistan and Iraq, leaving and, some at least, seeking to return to their jobs, has raised a host of legal issues. There was an interesting discussion of the rights of some to redress under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). While certain individuals can qualify for reemployment with up to five years cumulative service, a key eligibility factor is the nature of the service discharge.

There are significant differences between USERRA and the employment laws we typically bring claims under, e.g. USERRA has no statute of limitations or minimum number of employees requirement. We are perhaps more familiar with some of the defenses afforded to an employer under USERRA such as undue hardship. Individuals with claims can be referred to the Veterans Employment & Training Service ("VETS") which will investigate and attempt to resolve claims. VETS can send unresolved claims to the U.S. Department of Justice or Office of Special Counsel, which can elect to prosecute.

Coverage under USERRA's umbrella is not afforded to everyone returning from military service. For example, students, judges and lawyers, private physicians, legislators and their staff, and rabbis and ministers are not covered.

Ethics: Civil rights litigator and ethics expert Ellen Yaroshefsky, Executive Director of the Jacob Burns Ethics Center at Cardozo Law School led a lively discussion. She used hypotheticals that explored the pitfalls that can occur when plaintiff's counsel interview former high-level employees of defendant (Niesig issues). NELA/NY members Miriam Clark and Josh Friedman bravely volunteered to weigh in on these issues. An interesting discussion was had regarding what information is or is not confidential and how to handle documents you suspect your client may have acquired unlawfully. She noted that when there is a question of whether such documents contain confidential information, counsel ought to consider presenting those documents to the court under seal for a ruling. Of course, the issue of admissibility remains. The materials in the conference handbook, which include opinions from Bar Associations, are useful for ethics cites and for discussions on issues such as multiple client representation and waiver.

Entertainment Law: The last panel of the conference was on entertainment law. Panelists noted how practice in this area sharply differs from other areas of employment practice. For instance, where a collective bargaining agreement regulates an employee's terms of employment, individual agreements may still be negotiated. Where the individual secures a contract beyond the terms of the CBA, the CBA constitutes the floor for terms of employment. In that case the union may still represent that employee in enforcing terms that were individually bargained for. The discussion of issues peculiar to representing entertainers such as gross vs. net participants in profits and precedent in the context of employers concerns of this deal effecting negotiations with other parties, underscored the highly specialized qualities of this practice area. ■

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 interest 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 Natalie Holder-Winfield, an associate with Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

Jury Verdict Reversed

After a jury returned a verdict for two plaintiffs on age discrimination, their employer, a union, appealed. The plaintiffs had been business agents of the local, which itself had been the subject of a federal RICO investigation that prompted a takeover by the international union. After the takeover, the plaintiffs—64 and 55 years old—were fired. They testified at trial that prior management had said many times that they had to go because they were too old. One said that the Trustee had told him he was being fired "because we need new blood, and that is the reason that we have to let all the old people go." The jury, crediting the plaintiff's testimony, awarded damages. The Appeallate Division, First Department, reversed. The majority noted testimony that the Trustee had been told that the plaintiffs were implicated in the local union's corruption, and that three much younger business agents "who had also been implicated in the corruption" were fired at the same time as the plaintiffs, while two employees older than 50, "not … so implicated," were not fired. Neither the Appellate Division nor the Court of Appeals (which affirmed) ever distinguished between the alleged existence of a reason that *could* support termination and any proof that it actually **was** the motive for termination. **Stephenson v. Hotel Employees & Restaurant Employees Union Local 100**, 6 N.Y.3d 265, 811 N.Y.S.2d 633 (2/16/06).

Ministerial Exception to the ADEA

When a 70-year-old Methodist clergy member was forced to retire because of the church's mandatory retirement policy and the bishop's personal policy against reappointing retired clergy, the Second Circuit Court of Appeals (in an opinion by Sonia Sotomayor, J.) determined that the Religious Freedom Restoration Act ("RFRA") was constitutional. The RFRA, which states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," was the defense the bishop and the Methodist Church raised against the plaintiff's ADEA action. Without addressing the merits of the case, the court held that the RFRA was constitutional as applied to federal law, and that it amended the ADEA to include the RFRA standard. The court reasoned that RFRAs did not violate the Establishment Clause because its secular purpose was to protect individual First Amendment rights, it neither advanced nor inhibited religion, and it decreased government entanglement with religion. **Hankins v. Lyght**, 438 F.3d 163 (2d Cir. 2/16/06).

ARBITRATION

NELA/NY members Lee Bantle and Robert Levy of Bantle & Levy were successful in compelling arbitration of their client's wrongful termination under Sarbanes-Oxley ("SOx"). The plaintiff was an employee who sought to compel arbitration before the NASD. The employee signed a Form U-4 (Uniform Application for Securities Industry Registration or Transfer) which included a mandatory arbitration clause where the employee agreed to "arbitrate any dispute, claim or controversy that may arise…". Analyzing the claim within the context of **AT&T Techs., Inc. v. Communications Workers of Am.**, 475 U.S. 643, 649 (1986) (arbitrability should be resolved by the courts "unless the parties clearly and unmistakably provide otherwise"), the court (Denny Chin, J., S.D.N.Y.) held that the issue of whether the SOx claim should be arbitrated was a matter for the arbitrator to decide, because the Form U-4 clearly and unmistakably stated the parties' intent to arbitrate disputes over interpretations of provisions of the NASD Code. **Alliance Bernstein Investment Research & Management, Inc. v. Schaffran**, 445 F.3d 121 (2d Cir. 4/12/06).

ATTORNEYS' FEES

After a solo practitioner prevailed in an ERISA case in the S.D.N.Y. against a union pension plan, he applied for fees. In fact, he applied for fees on two different occasions—once to Judge Naomi R. Buchwald after the resolution of initial district court proceedings, and later after a hearing before Judge P. Kevin Castel following a Second Circuit appeal. Judge Buchwald cut the requested rate from $425 to $325 and reduced the hours by 35%, mainly for unsuccessful claims but also because the plaintiff's attorney was a solo practitioner. The Second Circuit Court of Appeals (Judges Calabresi, Cabranes, and Wesley) affirmed that award but noted in a footnote "that district courts should not treat an attorney's status as a solo practitioner as grounds for an automatic reduction in the reasonable hourly rate" and that "[w]orking as a solo practitioner may be relevant to defining the market," *i.e.*, "smaller firms may be subject to their own prevailing market rate." (Citation omitted.) The second fee award, however, was vacated because Judge Castel had apparently invented a new way of calculating a solo's reasonable rate by "blending" a rate for work that only the practitioner himself could do, such as conducting the trial, with a lower rate for a "hypothetical group of inexperienced associates," who could

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have done other work such as "researching and cross-moving for summary judgment and opposing summary judgment." The court of appeals remanded the case for recalculation. **McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund**, —- F.3d —-, 2006 WL 1541473 (2d Cir. 6/6/06) (per curiam).

CONSTRUCTIVE DISCHARGE

In affirming a district court's (Shira A. Scheindlin, J., S.D.N.Y.) dismissal of an employee's constructive discharge and sexual harassment claims, the Second Circuit Court of Appeals held that an employer could raise the **Faragher / Ellerth** affirmative defense because the supervisor did not take any "tangible employment action" against the employee to further his misconduct. The plaintiff worked for a hot-tempered supervisor who was verbally abusive and hostile toward her after the plaintiff returned from breast cancer surgery. After sales in the plaintiff's division declined, the supervisor restructured her job duties, cut her annual salary from $270,000 to $200,000, and excluded her from important meetings. The court held that the employer's actions were taken for legitimate business reasons and were not part of the discriminatory harassment. The court (Judges John Walker, Jr., Jacobs, and Hall) reasoned that the employer had provided sufficient evidence to prove that the financial slump in the plaintiff's division motivated the employer's decision to demote her. There was no distinction made between a motive that could have been enough to support the action and the motive that actually motivated it. **Ferraro v. Kellwood Co**., 440 F.3d 96 (2d Cir. 3/7/06).

DAMAGES

In a commercial fraud and embezzlement case, Judge Jed S. Rakoff (S.D.N.Y.) awarded over $2 billion in compensatory damages and $1 billion in punitive damages against five fugitive individual defendants and three corporate defendants, in favor of two corporations. The judgment was rendered pursuant to Illinois law, but the court noted that it also did not violate due process under **BMW of North America v. Gore**, 517 U.S. 559, 568 (1996). Factors to be considered were "whether 'the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" (Citation omitted.) The defendants had converted over $2 billion from the plaintiffs and "more than $5 billion in connection with an entirely separate $6 billion bank fraud" and had "resorted not only to further lies and corporate manipulations but even to obstruction of justice and, ultimately, misrepresentations to this Court." Some of this language might be usefully imported to certain egregious cover-ups of corporate discrimination. **Motorola Credit Corp. v. Uzan**, 413 F. Supp. 2d 346 (S.D.N.Y. 2/8/06).

JURISDICTION

The Supreme Court was left to decide the issue of whether the 15-employee minimum requirement was a "threshold determinant of subject-matter jurisdiction" or an element of the merits of the employee's claim. By comparing the employee-numerosity requirement to 28 U.S.C. 1331's federal question jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), which provides a federal court forum for Title VII actions, and to the $75,000 monetary jurisdictional requirement of 28 U.S.C. § 1332, the court determined that the employee numerosity requirement was non-jurisdictional in character and was instead an "essential ingredient of a federal claim for relief." The employer could have dismissed the claim under 12(b)(6) for failure to state a claim before the trial, but lost the right to do so on appeal because a 12(b)(6) motion only "endures up to, but not beyond, trial on the merits." The opinion was written by Justice Ruth Bader Ginsburg. **Arbaugh v. Y&H Corp**., 126 S. Ct. 1235 (2/22/06).

PROCEDURE

The Second Circuit Court of Appeals affirmed that employment discrimination cases do not have to be pleaded to meet the legal framework of **McDonnell Douglas Corp. v. Green**, 411 U.S. 792 (1973). The district court (George B. Daniels, J., S.D.N.Y.) had dismissed the plaintiff's Title VII, ADEA, and Equal Pay Act claims for failure to state a prima facie case. On appeal, the circuit court (Kearse, Miner, and Hall, per curiam) held that where the plaintiff alleged that her employer had a unofficial policy of giving other employees with her title tenured professor status but that it violated its own policy because of her age and gender, the plaintiff had met the Fed. R. Civ. P. Rule 8(a) requirement of pleading a "short and plain statement of the claim showing that the pleader is entitled to relief." The court reasoned that "the mere allegation that such evidence does exist is sufficient to support the inferences to be drawn therefrom and thus overcome a motion to dismiss." The court also held that the plaintiff had stated breach of contract and Equal Pay Act claims. **Leibowitz v. Cornell University**, 445 F.3d 586 (2d Cir. 4/17/06).

RACE DISCRIMINATION

In a race discrimination case alleging failure to promote in violation of Title VII and § 1981, a jury awarded the plaintiffs compensatory and punitive damages. The 11th Circuit Court of Appeals ordered a new trial under Rule 50(c), holding that the plaintiffs' evidence did not support the verdict. While the Supreme Court left room for the possibility that the court of appeals was correct in its final analysis, it vacated and remanded due to two errors. Although the manager who made the disputed promotion decision referred to the plaintiffs as "boy," the court of appeals had held that use of the word "boy" without a racial classification was not evidence of discriminatory intent.The Supreme Court determined that the word alone is not always benign because, "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." The court of appeals had erred in stating that when comparing the plaintiffs' qualifications against those of the employees who were promoted, pretext is only established when "the disparity in the qualifi-

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and created a firestorm of controversy regarding the continuing viability of **Niesig**'s exception to New York's no-contact rule.

The **Intuit** case, originally filed in 2003, involved an alleged breach of a strategic alliance agreement between the discount brokerage firm, Muriel Siebert ("Siebert"), and Intuit Inc. ("Intuit"), a leading provider of financial management software. Two years into the case, on September 6, 2005, Nicholas Dermigny, Siebert's Executive Vice-President and Chief Operating Officer, was terminated. Dermigny had been intimately involved in the relationship with Intuit and had participated in a number of privileged communications with Siebert's counsel about the prosecution of the case and various pleadings up until shortly before his termination.

Dermigny's deposition was originally scheduled for August 2005. That same month, while Dermigny and Siebert were in the process of negotiating his severance agreement, Siebert's counsel informed counsel for Intuit, Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel"), that Dermigny was in the process of separating from Siebert, and that they did not control him and could not facilitate his appearance at the noticed deposition. With Siebert's counsel's knowledge and approval, Quinn Emanuel served Dermigny with a third-party subpoena for documents and for a deposition in late September.

Several days after Dermigny's termination on September 6, he went to Quinn Emanuel's office for a "pre-deposition informal interview" that lasted approximately three hours. At this meeting, Intuit's counsel was clear with Dermigny that he not disclose any privileged information during the course of the interview, including the substance of any communications he had had with Siebert's counsel, or impart any knowledge he might have gained concerning Siebert's legal strategy. Counsel further cautioned Dermigny that he should not answer any questions that might lead to the disclosure of confidential information.

Shortly before Dermigny's deposition, Siebert learned about the September 14 meeting with plaintiff's counsel, and moved to disqualify Quinn Emanuel. At the court conference on Siebert's disqualification motion, Quinn Emanuel offered to let Siebert's counsel depose Dermigny on the subject of his communications with the firm, but Siebert declined to do so. Instead, Siebert asked that Quinn Emanuel be disqualified because the firm may have been exposed to Siebert's "confidential privileged information," including its counsel's work product. Quinn Emanuel responded that its meeting with Dermigny was appropriate under DR 7-104 because Dermigny was a former employee.

On November 3, 2005, Judge Lowe issued an unpublished opinion agreeing with Siebert and disqualifying Quinn Emanuel. As a threshold matter, Judge Lowe found that because Dermigny was no longer employed by Siebert when he met with Quinn Emanuel, DR 7-104(A)(1)[1] was not implicated, and disqualification was not warranted on that ground. **Intuit I**, at 6, quoting **Niesig**, 76 N.Y.2d at 369.

The court went on, however, to disqualify Quinn Emanuel on the grounds that a lawyer "should avoid any suggestion or even the mere appearance of impropriety." (*Id*. at 5.). According to Judge Lowe, because Dermigny had been a senior officer of Siebert privy to "intimate privileged information relating to the facts as well as strategies of this action, all obtained while he was employed with Siebert," and because he was a non-lawyer who might not be able to discern what was privileged and what was not, the "appearance of impropriety permeate[d] this ex parte communication....", thus warranting Quinn Emanuel's disqualification. (*Id*. at 6; 8-9.).[2]

Quinn Emanuel immediately sought reconsideration, and in a move reminiscent of the scene in Woody Allen's "Annie Hall" where Allen produces the media critic, Marshall McLuhan, to tell a pompous college professor standing in line ahead of him at a movie that he doesn't know anything about McLuhan's work,[3] Quinn Emanuel submitted a lengthy affidavit from Professor Hazard informing Judge Lowe that he misconstrued his treatise, and concluding that disqualification was not warranted. The Court was unmoved:

> Professor Hazard, while opining that the "contact with an interview of former employees, even high-ranking ones, is permissible...as long as the inquiry is not made into a protected category, also articulates that disqualification is warranted "where it is evident that the interview was conducted for the very purpose of obtaining confidential information, or where it entails a high risk that such information will be disclosed."

Muriel Siebert & Co. v. Intuit Inc. (Sup. Ct., N.Y. Co. Dec. 23, 2005) ("**Intuit II**"). Judge Lowe also disagreed with Quinn Emanuel that his decision effectively overruled **Niesig**. First, the Court noted that he had specifically *not* disqualified Quinn Emanuel under DR 7-104(A)(1). Moreover, in his view, **Niesig** only addressed **ex parte** interviews with *non-managerial* witnesses, while in this case the *ex parte* contact had been with a high-ranking corporate officer possessing highly confidential, privileged information. (**Intuit II**, at 5.). Ultimately, the Court said that in taking into account "the broad range of interests at stake and the high risk that this *ex parte* communication divulged privileged information, the court neither misinterpreted the law nor overlooked the pertinent facts in making its determination." (*Id*.).

Needless to say, Intuit and its counsel appealed the court's decision to the Appellate Division. NELA/NY filed an amicus brief in connection with the appeal arguing, in essence, that Judge Lowe's bright-line test for disqualification will be particularly damaging to the constituency of NELA/NY in view of, among other things, the widely-recognized difficulty in proving discrimination and the relative cost-effectiveness of informal discovery.[4] Instead of the bright-line test applied by the lower court, NELA/NY's amicus brief asked that if the Appellate Division shared Judge Lowe's concerns regarding the protection of the attorney-client privilege and work production doctrine, it should follow the "flexible" approach adopted by a number of courts addressing the issue of

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ex parte communications with former senior executives. Under the "flexible" approach, an attorney is permitted to engage in *ex parte* communications with a former managerial employee so long as counsel does not solicit any privileged information and the employee does not disclose any such information. *See, e.g.,* **Merrill v. City of New York**, No. 04 Civ. 1371, 2005 WL 2923520, at *4 (S.D.N.Y. Nov. 4, 2005).

Judge Lowe's decision may well be overruled by the Appellate Division. However, regardless of what happens, there are certain fundamental things that can be taken away from the case that should be kept in mind in engaging in *ex parte* communications with a former employee. First, always determine at the outset what the employee's position was in the company's organizational structure and whether the employee had regular communications with the employee's attorneys. If the witness was a high level managerial employee and had communications with the company's attorneys regarding the subject matter of the lawsuit, you should not proceed with the interview, regardless of the "flexible" test described above. Given the risk of disqualification, it would be best to rely on formal discovery devices. Moreover, even if the employee was *not* a managerial employee, you should still be careful to instruct the witness to not disclose any conceivably privileged information. Roy Simon, a Professor of Legal Ethics at Hofstra University School of Law, sums up the lesson of **Muriel Siebert v. Intuit**, as follows:

> In sum, Dermigny had a close and broad relationship not only with Siebert but with Siebert's counsel, and the "operating procedures" designed to guard against the misuse of Siebert's confidential information...were not sufficient to eliminate the likelihood that Dermigny would reveal privileged information "whether intentionally or unintentionally"....The "appearance of impropriety" is not a satisfactory standard for deciding routine motions to disqualify, but in the circumstances of the **Muriel Siebert** case, I think Judge Lowe was correct that the dangers were too great to permit Quinn Emanuel to continue as counsel. He did not overrule **Niesig** or alter the scope of the no-contact rule in New York. He merely recognized that not all former employees are equal, and that in rare situations the appearance of impropriety is too great to tolerate.

Roy Simon, "Interviewing A Former Officer of Your Adversary," *New York Professional Responsibility Report* (March 2006), at 8 (citations omitted). Keep that lesson in mind in dealing with former managerial employees and you will avoid the fate of Quinn Emanuel in **Intuit**.

Footnotes

[1] DR 7-104(A)(1) provides that: "(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

[2] In his decision, Judge Lowe relied heavily on the following passage from Professor Geoffrey Hazard's famous treatise on ethics:

> [S]ome former employees continue to personify the organization even after they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction, who was also conferring with the organization's lawyer in marshalling evidence on its behalf. But the rationale is a different one. This kind of former employee is undoubtedly privy to privileged information, including work product, and an opposing lawyer is not entitled to reap a harvest of such information without a valid waiver by the organization, or according to narrow exceptions in the discovery and evidence rules.
>
> Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, at 436 [1988 Supp.].

[3] **WOODY ALLEN:** You don't know anything about Marshall McLuhan's work—

MAN: Really? Really? I happen to teach a class at Columbia called TV, Media and Culture, so I think that my insights into Mr. McLuhan, well, have a great deal of validity.

WOODY ALLEN: Oh, do you?

MAN: Yeah.

WOODY ALLEN: Oh, that's funny, because I happen to have Mr. McLuhan right here. Come over here for a second?

MAN: Oh—

WOODY ALLEN: Tell him.

MARSHALL McLUHAN: — I heard, I heard what you were saying. You, you know nothing of my work. How you ever got to teach a course in anything is totally amazing.

WOODY ALLEN: Boy, if life were only like this.

[4] The author notes that, among other cases, NELA/NY's amicus brief cited to NELA/NY member Marc A. Rapaport's case, **Mena v. Key Food Stores Co-Operative, Inc**., 195 Misc.2d 402, 407, N.Y. Slip Op. 23490, at 4 (Sup. Ct. Kings Co. 2003) (plaintiff's counsel not disqualified for surreptitious audiotaping of defendant employer where there was "activity that might otherwise evade discovery or proof" and a circumstance with "compelling" policy interests). ■

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that have happened to him, in an attempt to establish that the plaintiff's present EP&S is the result of things other than defendant's illegal discrimination.

Prepare the plaintiff for this. Every plaintiff has had several bad experiences in his life other than the defendant's illegal conduct, and should be prepared to testify truthfully as to those experiences. No jury is going to find it credible that the only EP&S in plaintiff's life was the loss of her job. Nonetheless, it is important that plaintiff understand the use defendant plans to make of this testimony.

Another defense favorite in hostile work environment cases is to ask the plaintiff to "tell me every incident of harassment." If your client experienced a few discrete incidents that were sufficiently severe that they constituted a hostile work environment, this is not a problem. However, more often, clients experience harassment on a regular basis, and can only remember several representative incidents. Do not allow you client to be boxed into conceding these were the only incidents. Prepare them to respond: "I cannot tell you every incident of harassment, because I was harassed several times a week for a year. I can tell you approximately how often I was harassed, they types of things that were said, by whom and where they occurred. There are several incidents I recall specifically, which I can describe…"

Defense counsel have a penchant for separating the EP&S from the events giving rise to the EP&S. After the plaintiff has finished explaining the harassment

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incidents at her deposition, the question I often hear is: "what effect did these events have on you, if any?"

Defense counsel would be very happy if the plaintiff confined herself to a two minute answer that mentioned feeling sad, headaches and difficulty sleeping. This is where you want to let your adversary know that they have a potentially huge EP&S award to contend with. It is important that your client be extremely well prepared to go back over all of the incidents of illegal conduct and testify, as to what happened, how she felt when it happened, the things that she did that exemplified how she felt (showering immediately, wearing a sack dress to work the next day), when and where she cried, and with whom.

It is very difficult to answer this question in the abstract. It is a lot easier for the witness to review the events in her answer to remind herself of what she felt when the discrimination was happening.

Trial

Your client's trial testimony should present a complete before, during and after picture of how the discrimination ruined her life. Have the client testify about what her life was like before the discrimination, how she relaxed with her family, friends and coworkers, how she enjoyed her work, the sacrifices she made to get where she was, working a second job, thrift, extra hours on the job. Let her paint a complete picture of her life, including the difficulties she overcame, and the pride and dignity she felt as a result.

Have the client testify about going through the discrimination, with whom she shared her pain and fears (some of these people may make effective witnesses), what it was like to make her complaints to an incredulous employer, how she felt when the discrimination continued, whom she cried with, how often, and how this stress affected her family.

Then have the client testify about how the discrimination changed her. Clients should build on their previous testimony about what had meaning for them in their lives, and explain how the discrimination destroyed all of the enjoyment and fulfillment they obtained from their lives. The client should explain how the discrimination invaded family relationships, including the bedroom, if applicable, how the anxiety and depression made it impossible for her to function as a mother, and as friend to her friends. She should explain how she withdrew as a result of the discrimination, and its effects, and stopped functioning, including on the job as a result. Have the client remind the jury about her goals, and passions and sources of self worth and dignity, and how all of these were destroyed.

In a sexual harassment case, a woman may experience flashbacks in the bedroom, and loose the ability to enjoy intimacy with her partner. It is important for her first to build the story of the relationship, and it's success, and then show how it was destroyed. I had a client who was sexually assaulted by her employer. She had explained in her earlier testimony how long it had taken her to find her husband and a relationship in which she was fulfilled. After the assault and associated flashbacks, she testified that she was first unable to be intimate with her husband, and then unable to enjoy relations with him, which led to her divorce. This led to a large EP&S award.

This type of injury can be an issue for men or women in racially hostile work environment. Men and women can experience a loss of self worth and confidence that invades the bedroom.

Whether racial, sexual or any other type harassment, victims stop functioning as parents, and sometimes regret how they

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not just her own. Jane should be made aware that in two years, when the definition of disability becomes "any" occupation, she will face a re-review and possible benefit termination by her insurer.

7. Notice of Claim

Almost all LTD policies have a notice of claim requirement. To satisfy this requirement, a letter must be sent to the insurer usually within 20 or 30 days of becoming disabled. The notice should specify that Jane has been disabled as of a specific date and specify the nature of her illness or injury. The notice should also request the applicable forms that must be completed.

If you are in the process of negotiations with Jane's employer, it is important not to let this date slip by if Jane has already left work.

8. Insurance Forms

The LTD application has three sections to be completed by Jane, her doctor and her employer, respectively. If you thought that you could keep Jane's reasonable accommodation negotiations secret, forget about it! Often, the employer form asks whether an accommodation was requested, granted or could be granted. The form almost always requests the reason for the claimant's termination. Here's where your negotiation skills are crucial. The quickest way for Jane's application to be denied is if the employer's form says that she was terminated or retired. You want it to say "disability."

9. Benefit Offsets

Jane may think that she is entitled to a LTD benefit equal to 60% of her salary. Read the small print. All employer LTD policies provide for offsets of various kinds, which usually include Social Security disability benefits, workers compensation benefits, retirement benefits, severance benefits, and third party settlements. This means that the settlement that you worked so hard for may provide no benefit to Jane. Check the policy language carefully.

The way an offset works is as follows: Monthly Salary ($10,000) x 60% - Social Security benefit ($2,000) = Actual benefit ($4,000).

10 Taxability of Benefits

Some LTD benefits are taxable and some are not. If Jane paid the premiums of the policy on an after tax basis, then the benefits are tax free. Under all other circumstances, the benefits are taxable. If Jane paid a percentage of the premium on an after tax basis, then the benefits will be tax free in the same percentage as the premium. ■

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HELPFUL INFORMATION:

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treat their children. Periods like these can destroy relationships with kids, and cause the kids permanent harm.

Depending on venue, a jury may be able to relate to problems developing with substance abuse, where for example a recovering abuser resumed using after a long period of abstinence. If this is an issue in a venue where an admission of drug use is the death knell, your expert may be able to help by explaining it as self treatment.

You need not have a hostile work environment case to prove EP&S. The same techniques can be used in a disparate treatment case, where the victim was aware of the disparate treatment, and complained. The complaint, perhaps to the CEO through an "open door policy," may be a stepping stone to the client voicing his feelings during testimony.

Do not ask your client to discuss her feelings unrelated to her story. Constantly focus on a narrative that will allow her to express her feeling naturally. All that can be done by having her repeat what she told those whom she was close to, and her therapist.

Rely on the testimony of plaintiff's friends, relatives and coworkers. Corroborative testimony is important. It is particularly powerful to have people from different walks of the client's like give their unique perspectives on the changes the client went through during and after the discrimination. Co-workers, even those still employed by the defendant, will sometimes corroborate these changes. It is the rare defense attorney who will prepare them to be on the watch for such questions.

The testimony of treating medical professionals can be very effective. A treating psychologist or psychiatrist is a fact witness. She can testify that your client tried to describe how she was treated at the defendant, she sobbed uncontrollably, hyperventilated, and had to be taken to a hospital and medicated because the experience of reliving the events was so traumatic.

A treating psychologist or psychiatrist can also be qualified to offer expert opinion, however, it is unlikely that you want two experts offering diagnoses; leave that to your forensic psychiatrist. If your treating psychologist did report a diagnosis, prepare her to be cross-examined on it. You should discuss her preparation with your forensic psychiatrist.

Your forensic psychiatrist will corroborate all of the client's testimony regarding the sources of joy and satisfaction in her life, and how the discrimination destroyed that. He will be able to explain exactly how discrimination or harassment can and did cause such serious and long lasting injury. E.g.: "without treatment the prognosis for such impairments includes further deterioration such as increasing social alienation, loss of friendships, self-medication (via alcohol or drug use) of hyperarousability driven by fear and helplessness, premature aging, and associated mental and physical comorbidity."

Your opening and closing statements should focus on painting a picture of your client as a complete human being—just as her and her friends and family's trail testimony did. You should review the activities from which she derived pleasure, whether singing in the choir or going

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out with friends. You should review the struggles and sacrifices she made to achieve what she achieved, not only at work, but through education, and the sacrifices she made to have and support her family. You should talk about the value work held for her which was central to her life, how if allowed her to have dignity—as an achiever and a good parent—and the pleasure she derived from work. With the evidence you have presented, through your client, her family, friends, treating physician and forensic psychiatrist, the jury should be able to conclude that the defendant has permanently destroyed most of the value your client obtained from her life, and you will have laid an evidentiary foundation that is defensible on appeal.

Summary—Practice Pointers

- Ask your forensic psychiatrist whether she prefers to have the plaintiff's deposition transcript before she writes her report, whether she requires any other transcripts, and schedule expert report due dates accordingly. If your client becomes tearful during the deposition, or becomes overwhelmed by emotion and has to leave the deposition, this is important information your forensic psychiatrist will miss unless you make a record of what happened. You can resume the deposition and state that the witness was tearful during the entire ten minute recess.
- In preparing your client for her IME you may show her your expert's report, or you may discuss certain key points with her.
- Try to limit the IME to as little time as possible with a lunch break in the middle. You do not want your client being exhausted.
- Remind her that she is entitled to take a break whenever she feels she needs one. IMEs can be very stressful. Be available by phone during the session.
- Tell the client that if she feels that the psychiatrist does something inappropriate she may take a break and call you, if necessary, or write down any questions that troubled her when she gets home and email them to you.
- Minnesota Multiphasic Personality Inventory (MMPI) is the most frequently used personality test in the mental health field. It can be scored by the defendant's expert, or sent out to be scored independently. Find out who scored it. ■

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§ 190(6) for purposes of Labor Law § 191, which is the only substantive section of Article 6 in which the term appears. Labor Law § 191 addresses an employer's obligations concerning the frequency and timing of wage payments. Thus, while the plain language of Labor Law § 191 excludes executives and administrative employees from the scope of that particular section, Conticommodity does not identify any basis for extending that exclusion to Article 6, generally, including Labor Law § 193.

Conticommodity's reasoning was far from universally accepted in subsequent cases. For instance, in **Daley v. The Related Cos., Inc.**, 179 A.D. 2d 55, 58, 581 N.Y.S.2d 758, 760 (1st Dep't 1992),the plaintiff asserted a common law claim for unpaid commissions, but did not assert a violation of any of the substantive provisions of Article 6. Nevertheless, Daley sought the remedies provided in Labor Law § 198(1-a) which were available "upon a wage claim by an employee." The court held that executives were only excluded from those provisions of Article 6, which expressly provide for such exclusion. According to the court,

> [t]he IAS court erred in finding that the definition of "commission salesman" in § 190(6), which excludes employees "whose principal activity is of a supervisory, managerial, executive or administrative nature", applies to exclude plaintiff from the ambit of § 198(1-a) . . . . This is apparent when the statute is read as a whole. Thus "employee" is also defined in § 190 as "any person employed for hire by an employer in any employment" (subd. 2). . . . *In § 191, dealing with frequency of payments, different subsets of workers are treated in different manners and "commission salesman" is used as one of these categories. Obviously, if plaintiff raised an objection to the frequency of his commission payments, this section would be relevant as would the fact as to whether or not he acted primarily as a supervisor or manager.*

Id. (emphasis added); *see also* **Maggione v. Bero Const. Corp.**, 106 Misc.2d 384, 386, 431 N.Y.S. 2d 943, 945 (Sup. Ct., Seneca Cty. 1980) (executives are covered by §§ 193 and 194).

Although Daley did not involve Labor Law § 193, the court's interpretation of "employee" as including all employees, even executives, appeared—at least until the following year—to foreclose any argument in the First Department that executives were not covered by Labor Law § 193.

In **Gottlieb v. Kenneth D. Laub & Co., Inc.**, 82 N.Y. 2d 457, 605 N.Y.S. 2d 213 (1993), the plaintiff sued his former employer for common law breach of contract to recover unpaid commissions. Despite not asserting a statutory violation of any provision of Article 6, like the plaintiff in **Daley**, the plaintiff asserted a second claim pursuant to Labor Law § 198(1-a), for attorneys' fees and liquidated damages. The Court rejected the plaintiff's claim for attorneys' fees and liquidated damages on the basis that the remedies of Labor Law § 198(1-a) were only available to a plaintiff who succeeded in alleging and proving a substantive violation of the Labor Law. According to the Court, Labor Law § 198(1-a) did not provide a remedy for common law wage claims.

The Court's opinion, however, went further. Having determined that the plaintiff had failed to specify any statutory violation, the **Gottlieb** court likened the plaintiff's common law nonpayment of wages claim to one arising under Labor Law § 191, which deals with the frequency and timing of wage payments. By construing a nonpayment of wages claim as arising under Labor Law § 191, the **Gottlieb** court determined that the plaintiff could not recover because "[e]xcept for

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manual workers, all other categories of employees entitled to statutory protection under Labor Law § 191 are limited by definitional exclusions of one form or another for employees serving in an executive, managerial or administrative capacity." **Gottlieb**, *supra*, at 461, 605 N.Y.S. 2d 216.

Gottlieb, then, stands for three distinct propositions:

(1) The remedies of Labor Law § 198 (1-a) are only available to prevailing employees who allege and prove a violation of one of the substantive provisions of Article 6;

(2) Labor Law § 191 covers nonpayment of wages, not just the frequency with which wages must be paid; and

(3) An executive cannot maintain a nonpayment claim and recover the remedies of Labor Law § 198(1-a) because executives are excluded from coverage under Labor Law § 191.

Despite these precise holdings, some courts have read **Gottlieb** as precluding executives from maintaining wage claims under any substantive provision of Article 6, including a claim for unlawful deductions under Labor Law § 193, even though **Gottlieb** did not involve, nor did the Court address, the broad language of Labor Law § 193. For example, although not a Labor Law § 193 case, in **Taylor v. Blaylock**, 240 A.D. 2d 289, 659 N.Y.S. 2d 257 (1st Dep't 1997), the First Department rejected an executive employee's attempt to recover attorneys' fees under Labor Law § 198(1-a) for the employer's breach of contract to pay salary and other compensation due under an employment contract. **Taylor**, *supra*, at 292, 659 N.Y.S. 2d at 260 (citing **Cohen v. Fox-Knapp, Inc.**, 226 A.D.2d 207, 208, 640 N.Y.S.2d 554, 555 (1st Dep't 1996)) (emphasis added); **Rice v. Scudder Kemper Investments, Inc.**, 2003 WL 21961010, at *3 - 4 (S.D.N.Y., Aug. 14, 2003) (holding that executives were excluded from coverage).

While many courts have undertaken a cursory look at **Gottlieb** and this issue, in **Miteva v. Third Point Management Co**., 323 F. Supp. 2d 573 (S.D.N.Y. 2004), Judge Marrero engaged in a comprehensive analysis in determining whether executives are excluded from maintaining claims under Article 6. After examining all of the provisions of Article 6, the court concluded that an executive whose compensation consisted of commissions could assert a claim under Labor Law § 193, but not Labor Law § 191. The court noted that "while it is clear from the language of [Labor Law § 190(6)] that individuals serving in supervisory, managerial, executive, or administrative capacities do not fall into the sub-category of 'commission salesman,' the same language implies that those individuals *do* fall within the broader Article 6 definition of "employee." **Miteva**, *supra* at 578 (emphasis in original). According to the court, while employees whose income is based on commissions needed to qualify as "commission salesman" in order to assert claims under Labor Law § 191, such employees were not required to qualify as such in order to state a claim under Labor Law § 193.

In its analysis, the court in **Miteva** noted how a finding that executives are not covered by Labor Law § 193 would also necessitate holding that a female executive would not be entitled to assert a wage disparity claim under Labor Law § 194. According to the court,

> [n]o specific exception is made in [Labor Law § 194] for executives and professionals. It would be illogical to suppose that the legislature intended to deny that category of persons employed in the workforce the protections of that prohibition, and thereby give employers a license to discriminate in pay on sexual grounds, by categorically excluding executives and professionals from the definitions of employees contained in another provision of the statute that is apparently designed for an entirely different purpose. That result, however, would follow as a logical consequence of the argument that the exclusion of executives and professionals set forth in § 190(7) is intended to generically modify all references to "employee" in every provision of Article 6.

Id. It is doubtful that any court would rule that female executives are excluded from Labor Law § 194.

The following year, in **Pachter v. Bernard Hodes, Inc.**, 2005 WL 2063838 (S.D.N.Y. August 25, 2005), the court granted summary judgment in Pachter's favor concerning the issue of whether as an executive she was covered by Labor Law § 193, as well as whether the charges to her commissions constituted unlawful deductions. See **Pachter**, *supra*, at *4 ("[a] plain reading of Article 6 supports the conclusion in **Miteva**").

More recently, the court in **Eschelbach v. CCF Charterhouse/Credit Commercial de France**, 2006 WL 27094, *14 (S.D.N.Y. January 4, 2006) relied upon both **Miteva** and **Pachter** in finding that executives were covered by Labor Law § 193. Moreover, the court in **Eschelbach** went even further than those cases since it involved claims under Labor Law §§191 and 193. According to the court, "Eschelbach is entitled to pursue his unpaid wage claim-even if it should have been brought under Section 191(3), rather than Section 193(1), of the Labor Law." **Eschelbach**, *supra*, at *14. It remains to be seen how this language will be interpreted in subsequent cases.

Unfortunately, recent New York court decisions have rejected the holdings in **Miteva** and **Pachter**, instead basing their decisions on the assumption that Gottlieb precludes all Article 6 claims brought by executives. In two recent cases, decided the same day and by the same judge, the court refused to recognize that executives are covered by Labor Law § 193. The court in **Carlson v. Katonah Capital, L.L.C**., 2006 WL 273548, *4 (Sup. Ct. N.Y. Cty., Jan. 27, 2006) and **Nornberg v. Thai Magic Co., Inc.**, 2006 WL 216685, *4 (Sup. Ct. N.Y. Cty. Jan. 27, 2006), rejected the argument that executives were covered under Labor Law § 193, holding that "[n]otwithstanding the rationale of [**Miteva** and **Pachter**], as a trial court in the First Department, I am bound by its clear and unequivocal decisions." *Id.* at *4, n. 4. The court in those cases purported to rely on **Taylor**, which was not only far from clear and unequivocal, but as stated above, did not even address Labor Law § 193.

Conclusion

It is unclear whether what I believe to

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be the misuse of **Gottlieb** springs from a lack of focus on its precise holdings, or from a concern that a plaintiff might attempt to do an end run around Labor Law § 191 by characterizing a nonpayment of wages claim as an unlawful deductions claim under Labor Law § 193. These concerns are probably a result of **Gottlieb**'s holding that nonpayment of wages claims fall under Labor Law § 191.

As a result, rather than attempt to distinguish a nonpayment of wages claim from an unlawful deductions claim, some courts have avoided the issue entirely by interpreting **Gottlieb** to preclude all claims by executives for redress under Article 6. It probably would be best for plaintiffs to avoid characterizing a nonpayment of wages claim as involving unlawful deductions until the Court of Appeals has addressed the issue of whether executives are covered under Labor Law § 193.

Moreover, plaintiffs should keep in mind at the pleading stage that employers will argue throughout the case that executives are excluded from coverage under the statute. Thus, the complaint should make no reference to the plaintiff as a "commission salesman." Referring to the plaintiff as a commission salesman may prompt a court, already confused by the conflicting case law, to consider whether the plaintiff satisfies the term's definition or is otherwise an executive.

Finally, to the extent possible, plaintiffs should attempt to bring such claims in federal court, which generally have rejected the view that **Gottlieb** precludes the claims of executives under Labor Law § 193. Indeed, the court's reasoning in **Miteva**, upon which subsequent federal cases, including **Pachter**, have relied, cannot be seriously disputed by any court engaging in a thorough analysis of the issue.

Footnotes

[1] Following **Gottlieb**, the First Department addressed a subsequent appeal after remand in Daley and affirmed the dismissal of the executive's claims "[i]n light of the intervening change in law by the decision in [**Gottlieb**]." **Daley v. The Related Companies**, 210 A.D. 2d 76, 77, 620 N.Y.S. 2d 947, 948 (1st Dep't 1994). Because Daley did not involve Labor Law § 193, the ultimate disposition cannot be read to support the proposition that executives are barred from asserting claims under Labor Law § 193.

[2] **Cohen** did not involve Labor Law § 193. Rather, the court considered whether the plaintiff could recover the remedies set forth under Labor Law § 198 based upon a breach of contract claim for wages. In ruling for the plaintiff, the court held that "the decision of the Court of Appeals in [Gottlieb] holding that the salary claim of an executive is not within the purview of Labor Law § 198 by reason of its exclusion from article 6 of the Labor Law, is distinguishable. Here, the record reveals that at the time that plaintiff was discharged by defendants he was no longer employed in an 'executive, managerial or administrative' capacity, but rather was a salaried salesman or consultant." **Cohen**, *supra* at 208, 640 N.Y.S.2d at 555.

[3] Arguably, a failure to pay wages arises under Labor Law §197, which expressly refers to "[a]ny employer who fails to pay the wages of his employees. . . ." Labor Law § 197. Like Labor Law § 198 (1-a), however, the section appears to be remedial and, consistent with **Gottlieb**, would probably not be interpreted as providing for a separate substantive claim for nonpayment of wages. *See* **P&L Group, Inc. v. Garfinkel**, 150 A.D. 2d 663, 541 N.Y.S. 2d 535 (2d Dep't 1989)("Labor Law § 197 and 198 reflect a strong legislative policy aimed at protecting an employee's right to wages earned.") ■

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cations is so apparent as virtually to jump off the page and slap you in the face." (Internal citations omitted.) While the Supreme Court did not define pretext standards in comparing qualifications, it held that this standard was "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." **Ash v. Tyson Foods**, 126 S.Ct. 1195 (2/21/06).

RETALIATION

Writing for the Third Circuit Court of Appeals, Judge Samuel Alito held that a retaliation claim predicated upon hostile work environment is actionable under Title VII. The plaintiff was subjected to vile obscenities, property damage, and name calling by her co-workers when her complaint about a supervisor's proposition for sex resulted in his termination. The court reasoned that retaliatory conduct violates Title VII when it alters the terms and conditions of employment, and thus retaliatory harassment that is severe or pervasive enough to create a hostile work environment can be actionable. The court also held that the plaintiff's Title VII sex discrimination claim based upon her co-workers' harassing conduct was actionable. "When a woman who complains about sexual harassment is thereafter subjected to harassment based on that complaint, a claim that the harassment constituted sex discrimination … will almost always present a question that must be presented to the trier of fact." **Jensen v. Potter**, 435 F.3d 444 (3d Cir. 1/31/06).

Sexual Harassment

The Second Circuit Court of Appeals warned district courts against examining the factors set forth in **Harris v. Forklift Systems, Inc.**, 510 U.S. 17, 23 (1993)—the frequency and severity of the discriminatory conduct—in isolation instead of as a whole. An employee who was dating a co-worker was told by her supervisor that she was "sleeping with the wrong employee" if she wanted a substantial raise. At times he inappropriately touched her neck and back, leaned into her while she worked, and took a picture with his hand on her thigh at a company Christmas party. She resigned and subsequently brought a claim for hostile work environment, constructive discharge, and retaliation under Title VII and the New York State Human Rights Law. The district court (Denis R. Hurley, J., E.D.N.Y.) granted the employer's motion for summary judgment, concluding that the supervisor's conduct consisted of "relatively innocuous incidents of overbearing or provocative behavior" that did not interfere with the employee's ability to work. (Internal quotations omitted.) The court of appeals (opinion by Robert Sack, J., joined by Amalya Kearse and Timothy C. Stanceu of the U.S. Court of International Trade, sitting by designation) vacated the district court's decision as to the hostile work environment claim, explaining, "[a]n Article III judge is not a hierophant of social graces and is generally in no better position than a jury to determine when conduct crosses the line between boorish and inappropriate behavior and actionable sexual harassment". (Internal quotations omitted.) **Schiano v. Quality Payroll Sys., Inc**., 445 F.3d 597 (2d Cir. 4/24/06). ■

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