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

VOLUME 13, NO. 6 December 2006 Rachel Geman, Gary Trachten, Co-Editors

Top Ten Traps and Tricks that an Employment Lawyer Should Know About Bankruptcy

by Paul H. Aloe[1]

Bankruptcy is one of those things that most employment lawyers do not like to think about. Yet corporate bankruptcies are common, and employment lawyers often find themselves faced with the trips and traps of bankruptcy law. Bankruptcy law can play a major role if one is pursuing a claim against a company now in Chapter 11, or if one is representing a highly paid executive who is negotiating with a company that might wind up in bankruptcy, or if one is representing an employment plaintiff who, through loss of employment, may be forced into filing for personal bankruptcy. Notwithstanding the recent changes to the bankruptcy laws by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, consumer bankruptcies abound. Indeed, since one of the key thresholds for a consumer filing for bankruptcy is a low income, those who have lost employment are now one of the main categories of individuals filing for bankruptcy relief.

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Vicarious Liability: What Constitutes an Effective Employer Investigation?

by Ashley Normand (*ashleynormand@yahoo.com*)

Employers have been conducting internal investigations of discriminatory harassment and seeking to avoid vicarious liability since well before the Supreme Court issued **Faragher v. City of Boca Raton,** 524 U.S. 775 (1998) and its accompanying case, **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742 (1998). However, as NELA members all know, these two cases marked a watershed in terms of employers' awareness of their obligations to prevent harassment in the workplace.

Theoretically, **Faragher and Ellerth** lay out straightforward rules pertaining to employer investigations: Title VII defendants can avoid vicarious liability for a supervisor's discriminatory harassment (absent tangible employment action) in cases where employers can show that they: a) exercised reasonable care to prevent and promptly correct any sexually harassing behavior, *and* b) that the alleged victim unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Then the burden shifts to a plaintiff to justify her failure to complain of harassing conduct.

Similar rules apply in other types of harassment cases. In cases of co-worker harassment under Title VII, federal courts continue to apply a pre-**Faragher/Ellerth** negligence-type standard that essentially asks whether the employer provided reasonable avenues for complaint and whether the employer knew (or should have known) of harassment and failed to stop it. *See* **Richardson v. New York State Dep't of Correctional Service**, 180 F.3d 426 (2d Cir. 1999). Under New York State law, the employer must have actual notice of harassment (see **McIntyre v. Manhattan Ford Lincoln-Mercury, Inc**., 175 Misc.2d 795 (Sup Ct. N.Y. Cty., 1997)).

In practice, the rules are not so clear-cut. The courts have yet to identify, delimit, and prioritize the elements of an effective investigation, instead tending to list a number of factors (sometimes loosely borrowed from other cases and always fact-specific) with no one factor being necessarily more important than any other. Further, courts' determination at summary judgment (where these cases tend to be decided) of the employer's "reasonable care" varies widely.

This fluidity means practitioners should use considerable latitude in applying the holdings of factually relevant cases, even if such cases involve slightly different legal standards (such as state cases, co-worker cases, and pre-**Faragher/Ellerth** cases applying traditional agency theory). However, practitioners should nonetheless be cognizant of a handful of "factors" which courts comment on frequently and with common investigative scenarios that may dramatically affect a client's attempts to seek relief, whether or not litigation has been commenced.

Significant "Factors"

Assuming a client has complained to management and cooperated in the employer's investigation, which is of primary importance, counsel's next step is

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to consider assessing the resulting employer investigation in light of the following (non-exhaustive) list of factors that are often considered in trial courts' analysis.

Promptness: An employer is responsible for "promptly" correcting any sexually harassing behavior. Courts don't require employers to commence an investigation within a specific number of days, but courts have denied defendants' summary judgment motions when the employer's investigation was slow-paced or dilatory. For instance, in **Dawson v. County of Westchester**, 351 F.Supp.2d 176 (S.D.N.Y. 2004), several female corrections officers complained to a county commissioner that their male supervisor was passing around obscene letters that prisoners had written about them. The investigating commissioner issued a "preliminary finding" within six weeks that the supervisor may have engaged in acts of sexual harassment, and referred the matter for further investigation. However, discipline of the supervisor's behavior was not addressed for five months. The court held that this delay could show it failed its obligations under **Faragher/Ellerth.** Likewise, in **Dortz v. City of New York**, 904 F.Supp. 127 (S.D.N.Y. 1995), a three-month delay in commencing an investigation was one (of many) grounds for denying summary judgment for employer. Conversely, in two other Southern District cases, **Wahlstrom v. Metro-North Commuter Railroad,** 89 F.Supp. 2d 506, 524 (S.D.N.Y. 2000) and **O'Dell v. Trans World Entertainment Corp.**, 153 F.Supp.2d 378, 389 (S.D.N.Y. 2001), the court praised employers for beginning "immediate" investigations on the day internal complaints were received.

Thoroughness: On the other hand, "prompt" should not mean "rushed." one should be skeptical of investigations that appear to rush their conclusions. While the **Wahlstrom** court looked favorably on the fact that all witnesses were interviewed within two days, other courts have found rapid investigations suggest inadequacy. In **Bennett v. Progressive Corp.,** 225 F.Supp.2d 190 (N.D.N.Y. 2002), a court denied an employer's summary judgment motion and criticized an employer for conducting a four-day investigation into a protracted pattern of abuse. Likewise, summary judgment of Title VII claims (but not NYSHRL claims) was denied in **Rivera v. Prudential Ins. Co. of America,** 1996 WL 637555 (N.D.N.Y. 1996), where the investigator claimed to be so rushed in her interviews of 13 people over the course of 3-12 days that she failed to review the alleged harasser's per-

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The NELA/NY Calendar of Events

December 6
NELA Nite
"Wage and Hour Law and Immigration"
470 Park Avenue South,
3rd Floor North

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

December 14
Holiday Party
Malika Indian Restaurant
210 East 43rd Street
rsvp: 212-317-2291 or
nelany@nelany.com

January 23, 2007
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

January 24
NELA Nite
Topic & Location TBA

Member News

Congratulations to Steve Landis and his wife on the birth of their twin girls, Emily Paige and Sophie Claire born on August 9th.

A Word from Your Publisher

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President's Column

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

During the second week of October, I had the distinct pleasure of joining other NELA members from around the country to participate in Lobby Day in our nation's capitol. This effort was coordinated by NELA National (particularly Donna Lenhoff, NELA's Legislative & Public Policy Director, and members of NELA's Legislative Committee, chaired by Bruce Fredrickson). The timing of this effort was tied to coincide with NELA's conference about gender stereotypes.

The current focus of NELA's legislative efforts is to obtain two additional components to the Civil Rights Tax Fairness Act (that was passed in part in 2004). These are to prevent taxation of emotional distress damages and to provide for income averaging to reduce the tax hit on plaintiffs who obtain a large lump sum in a particular year. The latter would permit such payments to be taxed at a rate at which they would have applied during when the payments would have been received if not for the unlawfully discriminatory loss of pay. An additional NELA initiative seeks to promote legislation that would prohibit the enforcement of employer-mandated pre-dispute arbitration agreements between employers and their employees.

New York was represented by a very solid contingent. I was joined by Brad Conover, Herb Eisenberg, Janice Goodman, Justin Swartz, and Josh Friedman. I am pleased to say that we had the largest contingent of any state that participated. We had 16 scheduled appointments with our Congressional representatives and Senator Hillary Clinton's staff. These were the results of the efforts of Rachel Horton, a paralegal in my office. Unfortunately, we were unable to get a meeting with Senator Charles Schumer's staff.

As Congress was not in session, the legislative aids who we met with were in very relaxed moods (many wearing jeans) and they gave us the opportunity to explain why these legislative initiatives are so important to our clients and other employees. The majority of whom we met were prepared with questions, and most—Democrats and Republicans alike—were extremely receptive to what we had to say. The experience was not only fun; it was also educational and cathartic.

Further legislative success is not a pipe dream. NELA National was the leading catalyst for the passage of the Civil Rights Tax Fairness Act, which is helping each one of us every single day to settle cases by essentially eliminating the taxes that our clients otherwise would have to pay on the fees that we receive. This monumental improvement to the system in which we practice is due to the efforts of NELA National. It is critically important, therefore, that all members of NELA/NY should also be members of NELA National. The effort in D.C. was a perfect blend of affiliate and NELA National action. I was extremely impressed by how well this initiative was organized. Thanks to Donna Lenhoff, Bruce Fredrickson, Cathy Vontrelli Monses and others who put so much time and energy into making it happen!

Lobby Day gave NELA members an opportunity and a forum in which to advocate for important ideas in a manner that is positive—a nice change of pace from the days when we feel beaten down by the court system and our adversaries. If the opportunity presents itself again, please come down to Washington and see first-hand what it is like to experience in this kind of participation. It is critically important for our affiliate, as one of the larger and better organized, to set an example for the others who lack our resources.

In summary, participation in Lobby Day provided the feel of "taking it to the streets" where many of us got our start. I hope that we will soon again promote these and other legislative initiatives. Also, please consider joining NELA National if you have not already done so. All of us—including you—have too much at stake for you not to join.

Practice Tip:Clients often come to us when either the 90-day deadline to file a prospective lawsuit has or is about to pass or on the cusp of the 300-day time limit to file a prospective EEOC charge. They often ask us to take on cases with little time for fully probing the merits or reflecting on the information provided. Others come with cases that present complex procedural/forum-related difficulties that we have to decipher and solve at the outset. As I have often stated, it is difficult enough to prove the underlying discrimination without having to spend major efforts dealing with issues that have nothing to do with the merits of the case. I am not saying that time sensitive cases should not be pursued; there are exceptions and a client may even be entitled to equitable tolling. Nonetheless, for me, the bottom line question is this: if the case is going to be taken on contingency, do I want to be litigating these side issues, knowing that you still have to climb the mountain of proving discrimination? Such difficulties should be carefully considered before committing to a pursuing a claim that may ultimately be lost on an issue that has nothing to do with the merits. If you decline to take a case, you will be prudent if you send the client a non-retention letter—especially if filing deadlines loom near. ■

The Washington, DC NELA Office Is Officially Open!

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The NELA/New York Fall 2006 Conference Report

The NELA/New York Fall 2006 Conference was held on Friday, October 20. It was so good that people were not even checking their Blackberries. The panelists discussed:

1. Pending E-Discovery Discovery Rules Amendments. T-minus one month: the Honorable Andrew J. Peck, Anne L. Clark, and Samuel S. Shaulson addressed the E-Discovery amendments to the FRCP, which go into effect on December 1. The panel addressed the importance of early focus on electronic discovery issues (including gathering as much information as possible from your clients about discovery sources and, if possible, having your IT people talk to their IT people); detailed the various sources of electronic data, advised as to some traps for the unwary (and the weary); and explained the state of the law relating to accessibility, privilege issues, and the safe harbors. One thing that I took away from this is that courts are as willing to toss out cases based on a plaintiff's failure to preserve as a defendant's. Focusing on e-discovery is not an option; it is a must.

2. How to Make Your Computer Your Partner. It sounds like a self-help book for internet daters, but this excellent panel, Patrick DeLince and Josh Friedman, discussed the nuts and bolts (bytes and chips?) of working with technology. Because a similar topic was covered in this Newsletter based on a recent NELA night, suffice to say here that Patrick and Josh were as impressive as always in their knowledge of everything ranging from scanners, differences between and among PDFs, TIFs, and OCRs, and working with third parties.

3. Law Updates. The next two panels updated us on federal and state case law (presenters: Elena Goldstein, Tammy Marzigliano, Ashley Normand, and Mariann Meier Wang) and Supreme Court cases (presenters: Robert Fitzpatrick and Alan Koral). The first update's coverage included, among many other timely issues, emerging case law under the Restoration Act, issues of when additional leave is an accommodation, and jurisprudence exploring the nexus between employment law and domestic violence. Equally impressive, the panelists put together more than 76 pages of ubersquibbing. All the written materials are terrific, and this piece in particular is a must-have for brief writing and oral argument in the coming year. With respect to the Supreme Court panel, NELA members are familiar with the basic holdings of some important cases from last term, such as *Burlington Northern* (clarifying the retaliation standard) and *Garcetti* (holding that when public employees make statements pursuant to official duties, they are not speaking as citizens for First Amendment purposes). The panelists analyzed the cases in context, and discussed related issues arising out of recent Supreme Court jurisprudence (what one panelist described as potential "Holy Toledo" moments from the last term). Another highlight: Bob Fitzpatrick's retelling of a conversation to which he was privy between two Bush-appointed judges in which the judges were speaking casually about the meaning of *Burlington*.

4. Immigration. The presenters of this terrific panel on how to protect clients and use the law against opponents were Claudia Slovinsky, who heads an immigration and nationality law firm, and Amy Sugimori, a staff attorney at National Employment Law Project. As they explained, there is no status in immigration law as general work authorization, as such. Instead, there are employment authorization documents (EADs) that are attached to specific visa types or given as somebody proceeds through other processes, for example, an asylum applicant. But the point is that employers cannot and should not expect that every person who is lawfully able to work has an EAD. For example, legal permanent residents don't have EADs because their ability to work inheres in their status. This panel also addressed undocumented workers' rights and remedies under the various employment law statutes in the wake of *Hoffman Plastics Compounds v. NLRB*, 535 U.S. 137 (2002). Finally, the panelists discussed how to deal with immigration issues in discovery, showing that questions about immigration status are either (a) irrelevant or (b) to the extent marginally relevant, likely to create an *in terrorem* effect. Protective orders should be available.

5. Lawyer Advertising. Finally, Carol L. Ziegler, who practices and teaches in the area of professional responsibility, spoke about ethical considerations in settling multiple plaintiff cases and the ethics of advertising and New York's proposed rules. By way of background, there are two basic principles that have developed in the last few decades with respect to lawyer advertising and solicitation: (a) states may not ban truthful, non-deceptive advertising by lawyers, though they might impose certain restrictions; and (b) states may ban direct in-person solicitation for pecuniary gain. Against this backdrop, there is a good argument that the recent proposed advertising rules in NYS (the comment period of which ends on November 15) both blur the traditional advertising/solicitation distinction by making the former subject to very stringent requirements, and create unduly onerous filing and retention requirements. Practitioners should watch the development of these timely issues closely. The comic relief: buy the reading materials and read about the pit bull motorcycle case.

Special thanks to the program committee: John Beranbaum, Elissa Devins, Shelley Leinheardt, Susan Ritz, and Justin Swartz! ■

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

Disparate Impact–"Reasonable" Excuse

Two judges of the Second Circuit Court of Appeals have made it substantially harder to win disparate impact age discrimination cases. In a decision written by Judge Dennis Jacobs and joined by Judge Joseph M. McLaughlin, the majority reversed the panel's previous decision in favor of the employees. The majority, ordered by the United States Supreme Court to reconsider its prior decision in light of **Smith v. City of Jackson**, 544 U.S. 228 (2005), held that the defendant should have been granted judgment as a matter of law because all an employer needs to show in order to defeat a disparate impact age case is that the challenged employment action "constitutes a reasonable means to the employer's legitimate goals." The court overruled its 1999 holding in **Smith v. Xerox Corp**., 196 F.3d 358, 365 (2d Cir. 1999), that the employer had to show "business necessity." It held that the employer had shown that the reduction in force, in which 31 employees were let go, 30 of whom were over 40, was a "reasonable means" to a "legitimate end," and that the plaintiffs had borne their burden of persuading the fact-finder that the employer's justification was unreasonable. Judge Rosemary Pooler dissented. **Meacham v. Knolls Atomic Power Laboratory**, 461 F.3d 134 (2d Cir. 8/14/06).

Subjective Evidence

The Third Circuit Court of Appeals has held that when a plaintiff established "sufficient implausibilities and inconsistencies" in an employer's stated rationales for laying him off, the plaintiff had adduced facts creating a genuine issue of material fact sufficient to avoid summary judgment under the ADEA and Pennsylvania's anti-discrimination statute. The employer offered the plaintiff's low score on a performance evaluation as a supposedly age-neutral reason for his termination, but the court, relying on **Goosby v. Johnson & Johnson Med., Inc.**, 228 F.3d 313 (3d Cir. 2000), determined that "[s]ubjective evaluations are more susceptible of abuse and more likely to mask pretext." Because the evaluation and the plaintiff's evidence involved a "core fact" of the decision to lay off the plaintiff, the court held that a rational fact finder could believe the plaintiff's evidence and find "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Boeing's explanation as to deem it unworthy of credence." (Internal citations omitted.) **Tomasso v. The Boeing Co**., 445 F.3d 702 (3d Cir. 4/19/06).

ARBITRATION

Two French nationals who raised national origin and age discrimination claims under the New York State and City Human Rights Laws survived the employer restaurant's motion to dismiss or compel arbitration. The plaintiffs alleged that they were falsely accused of drinking on the job and were terminated. The court (Hon. Shirley Werner Kornreich, J.) held that the plaintiffs had stated a cause of action, where they showed that other non-French and younger employees were only suspended for drinking on the job and that their work environment was tainted with anti-French sentiment. For instance, other employees were allowed to speak Spanish and Greek in the workplace, but the plaintiffs were not allowed to speak French. Despite the existence of a collective bargaining agreement, the court determined that the arbitration clause did not "clearly and unmistakably" waive the plaintiffs' right to a judicial forum, since it stated that disputes "may" be submitted for final and binding arbitration. **Bordet v. 21 Club Inc**., —- N.Y.S.2d —-, 11 Misc. 3d 1069(A), 2006 N.Y. Slip Op. 50438(U), 2006 WL 756087 (N.Y. Sup. 2/16/06).

ATTORNEYS' FEES

Eastern District Rates

Attorneys' fees granted by judges in the Eastern District of New York, just across the river from the Southern District, have been far lower than those in the Southern District for years. Magistrate Judge Cheryl L. Pollak, however, filed a report and recommendation that—if followed by the district court—will go a long way toward equalizing those rates. A case was resolved by a grant of partial summary judgment and settlement of the remaining claims, with an agreement specifying that the plaintiff was a prevailing party. The fee application asked $235 per hour for a 1999 graduate of Columbia Law School who had clerked in the Southern District, and $410 an hour for a partner of the firm (a 1969 graduate) and $330 an hour for another partner, a 1983 graduate who had clerked in federal district court in New Jersey. The total fee application asked for $295,106.45. The court noted that the plaintiff was a prevailing party not just because of the stipulation, but because the relief he had obtained in the settlement had materially altered the parties' relationship and directly benefited the plaintiff. The court declined to reduce the fee for partial success, holding that the significance of the overall relief merited full fees. The court noted affidavit testimony from other lawyers who practiced in the Eastern District, showing that

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their rates were comparable, and rejected the defendants' argument that the court should apply the discounted rates that counsel sometimes charged to public interest or poor clients. It also specifically held that an Eastern District court could consider Southern District rates in awarding fees, and set rates at $185, $350, and $300 per hour, respectively. The number of hours billed, the court held, were high partly because of the defendant's aggressive litigation tactics. The final fee award was $226,175.90. NELA/NY members Margaret Malloy and James Reif, and others at Gladstein, Reif & Meginniss, LLP, represented the plaintiff. **Greenberg v. New York City Transit Authority**, —- F. Supp. 2d —-, No 99 CV 3666 (E.D.N.Y. 9/29/06).

Offer of Judgment

In an opinion by Judge Barrington D. Parker, joined by Judges Sack and Katzmann, the Second Circuit Court of Appeals reversed and remanded a magistrate judge's decision limiting a plaintiff's attorneys' fees because of the defendants' Rule 68 offer of judgment. The plaintiff was an executive who got a negative evaluation after his wife, a co-worker, filed EEOC charges of discrimination and harassment. The plaintiff also filed an internal complaint and an EEOC charge and was subsequently demoted and transferred to a smaller department. He sued, and the defendants made a Rule 68 offer of judgment for $20,001 plus costs and attorneys' fees. He rejected it, and a jury awarded him $140,000. The district court denied the defendants' post-trial motion for judgment as a matter of law but ordered a new trial unless the plaintiff accepted a judgment of $10,000. He accepted, and the district court ordered him reinstated to his original position. The parties consented to have a magistrate judge determine the plaintiff's attorneys' fees. The magistrate judge declined to award any fees incurred after the Rule 68 offer. The court of appeals found that the magistrate judge had erred in assigning no value to the equitable relief and held that the defendants had failed to show that its Rule 68 offer was more favorable than the judgment. To the contrary, the court concluded that the judgment was worth more than the Rule 68 offer, so the plaintiff was entitled to his full attorneys' fees, and that the fee calculation should have used the current prevailing rate for the district rather than the discounted rate for civil rights cases given in the retainer agreement. The court of appeals vacated the award and remanded for further consideration. **Reiter v. MTA New York City Transit Auth.**, 457 F.3d 224 (2d Cir. 2006).

Plaintiffs' versus Defendants' Rates

A magistrate judge in the Northern District of New York, where hourly rates are far lower than in the Southern District, has considered a fee application by an attorney retained by a defendant county as independent counsel for two individual defendants in the same case, and has awarded fees at the rate of $150 per hour. The county was required by law to provide a defense for its employees in any action arising out of acts or omissions occurring in the scope of the employees' employment. If the fee is disputed, the court has to resolve it. This court (Magistrate Judge Randolph F. Treece) considered the attorney's argument that his standard rate was $200 per hour and that he was a solo practitioner and an experienced litigator, but found that the rate for a defense attorney should be lower than the rate for a plaintiff's attorney because the fee was guaranteed and carried less risk. "Thus," said the court, "it would generally appear that the lodestar for a successful plaintiff counsel is greater than the rate paid to a defense firm." **Ehring v. County of Rensselaer**, —- F. Supp. 2d —- (N.D.N.Y. 8/8/06).

CLASS ACTIONS

Fair Labor Standards Act

A proposed class of store co-managers and department managers, who alleged that the supermarket chain Gristede's and a number of its affiliated companies failed to record overtime hours, in violation of the FLSA and the New York State Labor Law, and that Gristede's committed fraud by altering payroll records, was granted class certification and for collective action status under the FLSA. Judge Paul A. Crotty (S.D.N.Y.) held that the defendants were wrong in treating the plaintiffs as exempt (among other things, the defendants docked their pay when they did not work enough hours in a workweek, they did not supervise other employees, and they spent most of their time doing manual labor). With respect to the New York Labor Law, the court found that the plaintiffs had introduced sufficient evidence of numerosity, commonality, typicality, and adequacy of representation to support a Fed. R. Civ. P. 23(a) class action under the state law, as well as meeting the requirements of Rule 23(b)(3). The plaintiffs were represented by NELA/NY members Adam T. Klein, Justin M. Swartz, Linda A. Neilan, and other attorneys of Outten & Golden LLP. **Torres v. Gristede's Operating Corp**., 2006 WL 2819730, No. 04 Civ. 3316 (S.D.N.Y. 9/28/06).

CONSTRUCTIVE DISCHARGE

The First Circuit Court of Appeals affirmed a jury verdict awarding a plaintiff $76,000 in compensatory damages and $160,000 in punitive damages for constructive discharge and disability discrimination. The employee suffered from erectile dysfunction and underwent penile implant surgery to correct the problem. To receive medical coverage, he completed paperwork for his employer detailing the surgery. A representative from the store's personnel department disclosed the employee's surgery to his co-workers. When the employee returned to work, his co-workers teased him about his surgery. One co-worker used the store's paging system to broadcast a joke about the employee's surgery. Although the employee complained to personnel that his co-workers were harassing him, the employer did not take any action to resolve the situation. The court held that that the employer was not entitled to the **Faragher / Ellerth** defense because the employer's anti-harassment policy did not reasonably prevent or correct the harassment and the employee used the policy. **Arrieta-Colon v. Wal-Mart Puerto Rico, Inc**., 434 F.3d 75 (1st Cir. 2006).

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DEFAMATION

U-5

When a registered employee is terminated from a member firm of the National Association of Securities Dealers, the member firm is required within 30 days to file a Form U-5 stating, among other things, why the employee stopped working for it. One such registered employee's U-5 stated that he may have been an accessory to money laundering. The employee sued for libel, discrimination on the basis of religion (he was a Hasidic Jew), fraudulent misrepresentation, and breach of contract. Judge Jed S. Rakoff (S.D.N.Y.) granted summary judgment on the libel and fraudulent misrepresentation claims, and the jury found for the defendant on the others. He appealed only on the libel claim, which the district court had dismissed on the ground of absolute privilege. The district court stated that "the overwhelming authority in the New York courts" supported the conclusion that statements on a U-5 are absolutely privileged. The Second Circuit Court of Appeals disagreed with this statement, found that the question was unsettled in New York, and certified the question to the New York State Court of Appeals. The opinion was written by Chief Judge Walker and joined by Judge Jacobs and a visiting Ninth Circuit judge. **Rosenberg v. MetLife, Inc**., 453 F.3d 122, 2006 WL 1755893 (2d Cir. 6/28/06).

DISABILITY DISCRIMINATION

New York City Human Rights Law

A clerical employee who had breast cancer and underwent a mastectomy, followed by chemotherapy and radiation treatment (during which she worked full-time), later took approved, unpaid medical leave to prepare for a bone marrow harvest and stem cell transplant. The leave was granted for five months but the plaintiff was ready to return to work after only three. In a letter dated only a few days before plaintiff's return, the company's Executive Vice President told her that her job had been eliminated. The plaintiff asked to be considered for reinstatement, but her request was denied. Ira Gammerman, acting as JHO, denied the defendant's motion for summary judgment: "The naked assertion of a nondiscriminatory reason for its decision [ ] …. does not act as a talisman automatically entitling defendant to summary judgment." The only evidence that the legitimate reason was actually the one that motivated the EVP's decision was her own testimony about her own internal thought processes, and since the issue turned on her credibility, summary judgment was inappropriate. The inconsistencies in the defendant's evidence also supported a finding of pretext in a lengthy, comprehensive, and thoughtful opinion. Finally, the court conceded that First Department precedent (**Sirota v. NYC Board of Education**, 283 A.D. 2d 369 (1st Dep't 2001)) had held that a plaintiff under both the New York City and New York State Human Rights Laws did not have a disability unless he could show that a "major life activity" was impaired; the court, bound by Appellate Division precedent, could not decide otherwise, but distinguished **Sirota** in part because the Local Civil Rights Restoration Act of 2005 legislatively overruled it. **Pasaturo v. Home Sewing Ass'n**, —- NYS 2d —- (Sup. Ct. N.Y. Cty. 9/14/06).

ETHICS

Disqualification of Counse

The Appellate Division, First Department, reversed and remanded a Supreme Court decision to grant a plaintiff's motion to disqualify defendant's counsel. The Appellate Division found that the trial court (Richard B. Lowe III, J., Sup. Ct. N.Y. Cty.) had erred in disqualifying the defense counsel based on defense counsel's *ex parte* interview with one of the corporate plaintiff's former executives. The court below based its decision on the "appearance of impropriety" and found that there was a "strong possibility" that the executive had disclosed privileged information to defense counsel during the interview. However, the Appellate Division found that defense counsel had warned the executive not to disclose privileged information before beginning the interview, and that the plaintiff had not established that any privileged information had actually been disclosed. The Appellate Division unanimously reversed and remanded. NELA/NY member Darnley Stewart wrote an *amicus curiae* brief on behalf of NELA/NY in support of the successful defendant-appellant. **Siebert v. Intuit, Inc.**, 32 A.D.3d 284, 820 N.Y.S.2d 54, 2006 WL 2371476 (1st Dep't 8/17/ 2006).

IMMUNITY

Local Boards of Education

In a case of first impression, the Second Circuit Court of Appeals held that a local school board was subject to suit in federal court under the Age Discrimination in Employment Act. A 72-year-old substitute teacher who was told he would be transferred but instead was fired sued for age discrimination and retaliation, and the school board raised the defense of Eleventh Amendment immunity. Writing for the court, Judge Reena Raggi noted that "[t]he immunity recognized by the Eleventh Amendment extends beyond the states themselves to 'state agents and state instrumentalities' that are, effectively, arms of the state, but that [i]t does not … extend to 'suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state." The court held that the burden of proving immunity is upon the entity asserting it, and that since local school districts were subject to suit, it would have made no sense to hold local school boards immune. NELA/NY member Stephen Bergstein represented the plaintiff. **Woods v. Rondout Valley Central School District**, 466 F.3d 232, 98 F.E.P. Cas. 1803, No. 05-1080-CV (2d Cir. 10/10/06).

RETALIATION

Scope of "Retaliation"

The United States Supreme Court decided—only two days before the national NELA convention—that the kinds of actions that may constitute "retaliation" are broader in scope than those constituting the original discrimination. Section 703(a) of Title VII, 42 U.S.C. Section 2000e-2(a), prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment…" The anti-retal-

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iation section, §704(a) (42 U.S.C. §20004-3(a)), simply says that no employer shall "discriminate against" an employee or applicant "because has [engaged in protected activity]. The prohibited "discrimination" (retaliation) is not by its terms limited to actions affecting the terms or conditions of the person's employment. Nevertheless, some circuits had so limited it, and/or had restricted it to "ultimate employment actions" such as termination, demotion, or a substantial pay cut. The Supreme Court held that those interpretations were wrong. Rather, an adverse action by an employer was unlawful retaliation if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The opinion was written by Justice Breyer. There were no dissents, but Justice Alito concurred in the result while expressing the view that sections 703(a) and 704(a) could best be "harmonized" by limiting the latter according to the language of the former. **Burlington Northern & Santa Fe R. Co. v. White**, ___ S. Ct. ___, 2006 WL 1698953 (6/22/06).

RETALIATION

The Seventh Circuit Court of Appeals affirmed a jury verdict, holding that an employer retaliated against an employee under Title VII because she filed federal and state discrimination charges, but did not retaliate against her for opposing discrimination under the First Amendment. The jury instructions permitted the jury on the Title VII claim to find for the employee "if it found the City had retaliated against her for filing charges with the EEOC and the IDHR, and/or for complaining about and opposing discrimination." In contrast, the § 1983 First Amendment claim required the plaintiff to prove that her "exercise of her free speech rights was a substantial or motivating factor in [the defendant's] decision not to promote her." The court rejected the defendant's assertion that the jury verdict was inconsistent because, while "filing of an employment grievance is entitled to constitutional protection if it addresses a matter of public concern," the jury was not instructed to determine whether the plaintiff's filed charges were a matter of public concern. The court also upheld an award for $175,000 in compensatory damages on the basis that there was a rational connection between the remitted award and the evidence, even though the award exceeded amounts that the court had approved in previous retaliation cases. **Deloughery v. City of Chicago**, 422 F.3d 611 (7th Cir. 6/1/05).

SEX DISCRIMINATION

Transgender Discrimination

A district court in the District of Columbia considered—and denied—a motion to dismiss a Title VII complaint by a plaintiff who applied for a job and got it as a man but was denied the job after explaining that she was in the process of transitioning to her female identity. The defendant, the Library of Congress, apparently did not dispute her qualifications for the job of terrorism research analyst with the Congressional Research Service. The job was offered and accepted (by "David"), but then the future plaintiff explained to her CRS contact that she was under a doctor's care for gender dysphoria and would be presenting herself as a woman, Diane, when the began work. The CRS contact, a woman, revoked the job offer, saying that "given [the plaintiff's] circumstances" and "for the good of the service," the plaintiff would not be a "good fit" and thanked her for her honesty. Her complaint alleged sexual stereotyping in violation of Title VII, and the employer moved to dismiss. The district court found that sex stereotyping involved discrimination against a male for being seen as effeminate, or against a woman for seeming masculine, and found that the theory did not apply to this plaintiff. "The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex." This was literally, the court held, "discrimination 'because of … sex.'" Dismissal on the pleadings was denied. **Schroer v. Billington**, 424 F. Supp. 2d 203 (D.D.C. 3/31/06).

SUMMARY JUDGMENT

Mixed Motive Cases

The Sixth Circuit Court of Appeals was one of the circuit courts that had held even after **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), that a plaintiff had to show direct evidence of discrimination in order to present a mixed-motive claim. (*See* A. Golden and P. Hoffman, "Did We Imagine **Desert Palace**?," *New York Employee Advocate* 13:3, February 2006, at 3.) It has now officially fallen into line, three years after **Desert Palace**, and agreed that "the ultimate question at summary judgment on a mixed-motive case is 'whether the plaintiff has presented evidence, direct or circumstantial, from which a reasonable jury could logically infer that [a protected characteristic] was *a motivating factor* in [the defendant's adverse employment action against the plaintiff].'" The quotation is from an unpublished 2005 Sixth Circuit opinion, and the present opinion actually adds, "*Accord* 42 U.S.C. § 2000e-2(m)," finally conceding that Title VII requires this result. Unfortunately, the ugly facts of the case—a man fired for multiple sexual harassment incidents and severe misconduct, who alleged that contributing reasons were his race and sex—resulted in affirmance of the district court's grant of summary judgment. **Wright v. Murray Guard, Inc**., 455 F.3d 702, 2006 WL 2058086 (6th Cir. 7/26/06).

Retaliation

The Second Circuit Court of Appeals vacated and remanded a district court's grant of summary judgment dismissing Title VII and ADEA claims, in light of the U.S. Supreme Court's decision in **Burlington Northern & Santa Fe Ry. Co. v. White**, 126 S. Ct. 2405 (2006). The plaintiff, who was Jewish, alleged that he was denied promotions and other employment privileges compared to younger, non-Jewish employees. After he filed complaints with the NYSDHR and the EEOC, he was transferred. While the transfer did not change his title, job grade, salary, benefits, or hours of work, he contended that he was now given menial tasks, and that the transfer constituted a "de facto demotion" in retaliation for his complaints. The district court (Charles L.

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Brieant, J., S.D.N.Y.) had found that a transfer could be an adverse employment action if accompanied by "a negative change in the terms and conditions of employment," but that the plaintiff had failed to show that it was anything more than a lateral transfer. In an opinion by Judge Amalya Kearse, joined by Judges Wilfred Feinberg and Reena Raggi, the court of appeals found that the Supreme Court's decision in **Burlington Northern & Santa Fe Ry. Co. v. White**, 126 S. Ct. 2405 (2006), had extended the anti-retaliation provision of Title VII to cover any "materially adverse" action, meaning one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying **White**, the court concluded that the plaintiff had presented enough evidence to create a genuine issue of material fact on this score. The plaintiff-appellant was represented by NELA/NY member Antonia Kousoulas. **Kessler v. Westchester County Dep't of Soc. Servs**., No. 05-2582, 461 F.3d 199, 2006 WL 2424705 (2d Cir. 8/23/06).

Sexual Harassment

A plaintiff who brought claims of sexual harassment and adverse employment action under the New York State and City Human Rights Laws defeated summary judgment in Supreme Court, New York County. The plaintiff alleged that her interim supervisor had sexually harassed her and subjected her to a hostile work environment. She said she had reported the harassment to her department head, her supervisor on leave, and the head of Human Resources, and that although they held several meetings supposedly to resolve the issue, she was transferred to another department and then terminated. The defendants claimed that the conduct was not sufficiently severe or pervasive to support a claim, that they had taken prompt and effective remedial action, that the plaintiff's retaliation claims should be dismissed because her transfer and termination were not adverse employment actions, and that the claims of an adverse employment action were barred by the "law of the case" doctrine. The court found that the plaintiff's description of multiple incidents of harassing comments and touching were corroborated by other employees. In light of the comments and the lack of evidence that the defendants had attempted to correct the offending behavior, the court found a genuine issue of material fact as to whether a hostile work environment had existed. The court also found a triable issue of fact as to whether defendants had taken reasonable care to correct the sexual harassment. Finally, the court found a triable issue as to whether the plaintiff had suffered an adverse employment action. The plaintiff was represented by NELA/NY member Nina Koenigsberg. **Sanabria v. M. Fabrikant & Sons, Inc.**, —- N.Y.S.2d —-, Index No. 113378/02 (Sup. Ct. N.Y. Cty. 8/8/06).

Whistleblower Law

The Supreme Court, Westchester County, denied summary judgment to a hospital on a claim that the plaintiff was fired on pretextual charges after refusing to falsify patient medical charts in preparation for an accreditation survey and state audit. The court found triable issues of fact as to whether the plaintiff and other employees

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No one article can fully teach the ins and out of bankruptcy law, but the editors of this newsletter asked me to share with you the top ten trips and traps that employment lawyers need to watch out for with respect to bankruptcy law. So, without further ado, and without David Letterman's musical accompaniment, I share ten trips below, divided into (1) Tricks and traps when it is the employer/defendant who has filed and (2) tricks and traps when it is the client/employee who has filed.

Trips and Traps–Employer Bankruptcy

1. Beware of Rejection of Executory Contracts

The bankruptcy code gives trustees and debtors-in-possession in Chapter 11 cases broad powers to reject executory contracts. This means that any long term agreement, such an employment agreement, can be rejected and largely avoided in a bankruptcy case, giving the employee nothing more than an unsecured contract claim. To make the situation even worse, in the employee situation, Section 502(b)(7) caps the amount of the claim generally to one year for front pay. Thus, compensation and benefits in a long-term contract can generally be lost if the company files for bankruptcy.

2. Employees Must Be Paid Going Forward But They Have Limited Priority

Bankruptcy does not alter the rule that an employer is obligated to pay for the services of employees. In virtually every Chapter 11 bankruptcy case, one of the first orders entered (known as a "first day order") is an order allowing the debtor to pay its employees, even if part of the pay period was for the period before the bankruptcy case was filed.

Section 507(A)(4) and (5) give a priority for wages, salaries, or commissions, including vacation, severance and sick leave pay earned by an individual within 180 days prior to the bankruptcy filing. Sales commissions are also included in the priority. The amount of the priority is limited to $10,000 per employee, increased from $4925 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Section 507(A)(5) applies to contributions required to be made to employee benefit plans, which are subject to the same limitations ($10,000 per employee, earned 180 days before the bankruptcy).

3. Watch Out For the Limitation in Code Section 503 for Stay Pay Incentives and Post-Petition Severance Packages

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has something significant to say about executive "stay pay bonuses" and termination provisions. It limits them. Under § 503(c)(1), debtor may not make payments to an insider to induce him or her to stay with the failing business absent proof that the payments are essential to retention of the person because s/he has a bona fide job offer from another business at the same or greater rate of compensation, the services provided are essential to the survival of the business, and either (a) the amounts transferred to or incurred for the benefit of the insider are not greater than an amount equal to ten times the amount of the mean transfer or obligation of a similar kind given

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to non-management employees for any purpose during the calendar year in which the transfer is made or the obligation incurred; or (b) if no such similar transfers were made or obligations incurred, the amount of the transfer or obligation is not greater than an amount equal to 25 % of the amount of any similar transfer or obligation made to or incurred for the benefit of that insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred. Section 503(c)(2) also covers severance payments to an insider of debtor. It prevents the award of the same unless (a) it is paid pursuant to a program that is generally applicable to all full-time employees, and (b) the amount of the payment is not greater than ten times the amount of the mean severance pay given to non-management employees during the calendar year in which the payment is made.

Section 503 also contains provisions permit the debtor to recover excessive payments made to insider executives before the debtor filed for Chapter 11.

4. Avoid the Avoidance Power of the Trustee

Bankruptcy law gives debtors-in-possession and trustees the power to avoid payments on account of antecedent debts made shortly before the bankruptcy. The period is ninety days except in the case of insiders, in which case the period is a year. Although payments made and received in the ordinary course of business may escape being recaptured as a preference, a payment made in the settlement of a lawsuit probably will not received ordinary course treatment and is subject to recapture.

Another trap to watch out for is payments from someone other than the one who is obligated to make the payment. Fraudulent conveyance laws and bankruptcy laws allow the debtor-in-possession and the trustee to avoid (i.e. recapture) transfers made while the debtor is insolvent if the debtor did not receive fair consideration for it. Thus, even if your client is entitled to receive the payment, if it came from a source other than the entity that was obligated to make it, it can be recaptured in bankruptcy. The focus is not on the recipient but on the debtor.

5. Beware of the Automatic Stay

One of the central features is the automatic stay, set forth in 11 U.S.C. § 362. Once a bankruptcy case is filed, all legal action against the debtor, all efforts to collect the debtor's property, and all judicial and administrative proceedings are automatically stayed. No court order is required and the violation of the stay is a contempt of court. The stay even applies to asking the debtor for payment on a prepetition claim.

There are several significant exceptions the automatic stay in the employment area, including the police power exception, which often takes government enforcement actions outside the stay, even if those actions seek the equitable remedy of back pay. The stay and does not extend to related claims against parties who are not in bankruptcy, such as the owners or managers of the bankrupt employer. Employment lawyers ought to consider the possibility of an employer's bankruptcy in considering whether to join individuals in a lawsuit where the law permits.

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A party who has been litigating against the debtor pre-petition may be successful in obtaining an order lifting the automatic stay. Courts will often allow a pre-existing litigation to continue at least the point of fixing the amount of the claim, although they generally will not permit a judgment to be enforced against a debtor.

Trips and Traps and Proofs of Claim

Proofs of claims can be trickier then they seem. A Proof of Claim must be filed to preserve a claim in any Chapter 7 or 13 case or in any Chapter 11 case where the claim is listed on the Petitioner's schedule as disputed, un-liquated or contingent, or if it is not listed at all or if it is listed in the wrong amount. If the claim is listed, and not as disputed, unliquidated or contingent, then no proof of claim need be filed in a Chapter 11 case.

In Chapter 11 cases, the deadline for filing of a proof of claim is set by an order of the court, known as the "bar date order." Some courts (like in New Jersey) have standing deadlines, but in New York, the court sets the bar date order. In Chapter 7 or 13 cases, the Proof of Claim must be filed within ninety days after the first meeting of creditors (called a Section 341 meeting). Normally, there the creditor receives a notice from the court, although the deadline applies whether the creditor receives a notice or not. In Chapter 7 cases where the debtor lists no assets for distribution (called a "no asset case"), the deadline for filing of a Proof of Claim is suspended until such time as it is determined by the trustee that there are some assets to be distributed.

Proofs of Claims are presumptively allowed, unless an objection is filed to the claim. Frequently, debtors file an omnibus "claims objection" motion, leaving the creditors who are listed on the motion with the burden of showing that they have a claim. If the dispute is not resolved, the court can schedule an evidentiary hearing, and if the amount of the claim is uncertain, the court can estimate the amount of the claim.

Filing of a Proof of Claim is not always the right thing to do. A Proof of Claim constitutes a submission by the creditor to the jurisdiction of the court. Moreover, the filing of a Proof of Claim can constitute the waiver of a jury trial where one otherwise exists. For example, the Supreme Court has held that defendant in a fraudulent conveyance action is entitled to a jury trial, but not if the creditor has filed a proof of claim in the case.

Trips and Traps–Employee Bankruptcy

7. Loss of Employment May Be Key to Bankruptcy Filing

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is designed to force most consumer debtors to file under Chapter 13. Only those consumer debtors with incomes below a certain thresholds (called the "means test") are now eligible for Chapter 7 filing. Chapter 13 debtors must devote most of their income towards paying creditors under a plan. Thus, a debtor who is temporarily unemployed may be eligible for bankruptcy relief; once the debtor is re-employed, such relief now may become unavailable.

8. Employee Must Schedule His or Her Employment Claim

Filing for bankruptcy creates a bankruptcy estate and all property that is not exempt belongs to the trustee. Thus, when an employee files for bankruptcy a claim is property of the estate. Failure to list the claim on the debtor's schedules is a defense in any action that the employee brings.

9. Although Pay Claims are Property of the Estate, New York Law Provides an Exemption for Most of the Pay Claim

If the claim is listed on the schedules, it constitutes property of the estate and belongs to the trustee unless (a) there is an exemption at law or (b) the trustee abandons the claim back to the debtor. In New York, exemptions are governed by state In New York, N.Y. Debt. & Cred. Law § 282 and N.Y. C.P.L.R. 5205(d)(2) exempt from a satisfaction of a judgment ninety percent of a debtor's earnings (except where the court determines that such an exemption is unnecessary for the reasonable requirements of the judgment debtor and the judgment debtor's dependents). These exemptions apply in bankruptcy.

10. Bankruptcy Law Has its Own Anti-Discrimination Law

Employees may find themselves subject to discrimination on the basis that they have filed for bankruptcy, but the Bankruptcy Code has its own anti-discrimination law fond in 11 U.S.C. § 525(b). That section prohibits a private employer from terminating or discriminating in employment against a debtor, or a person associated with a debtor.

[1] Partner, Kudman Trachten Aloe LLP., New York City. Mr. Aloe practices extensively in the area of bankruptcy law. ■

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sonnel file (which would have told her if any prior complaints existed).

Policy and Procedure: The very existence of an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of the defense. *See* **Leopold v. Baccarat, Inc.,** 239 F.3d 243, 245 (2d Cir. 2001) (quoting **Caridad v. Metro-North Commuter R.R.,** 191 F.3d 283, 295 (2d Cir. 1999)). However, courts are especially critical in cases where companies disregard their own complaint and investigation policies; thus, the existence of an anti-harassment policy does not, in and of itself, satisfy the employers' requirements. In **Little v. National Broadcasting Co., Inc.,** 210 F.Supp.2d 330 (S.D.N.Y. 2002), NBC responded to five separate complaints alleging various unrelated racial and sexual harassment incidents by interviewing each employee and promising to conduct an investigation. However, given that complaints dragged on for months on end with no conclusive results, an Ombudsperson told one complainant that her role was to "defend NBC," and the complainants' own supervisors started dismissing and mocking the informal complaints, the court held that there was a dispute of material fact with regard to NBC's vicarious liability for supervisor harassment. Likewise, in **Dawson**, where the county failed to follow its own sexual harassment policy regarding interviews (calling for individual interviews of all complaining parties), a fact-finder could find the employer's response to the internal complaints was not reasonable.

Training: While there is no *per se* rule that employers must provide a minimal amount of training for investigators, untrained employee investigators (typically immediate supervisors) may cut corners in their investigation methods and/or avoid making tough decisions, such that courts repeatedly cite the lack of trained investigators as a factor which could show an employer's response to a complaint was unreasonable. For instance, in **E.E.O.C. v. Rotary Corp**., 297 F.Supp.2d 643 (S.D.N.Y. 2003), an employee complained of harassment by a manager and a co-worker and identified a witness to the harassment. The subsequent investigation was so unprofessional that the court found the case particularly ill-suited for summary judgment, especially given the serious allegations. A vice-president (located at the company's Georgia headquarters) simply called the manager once to ask whether he had committed the alleged acts. The manager denied the allegations and the vice president deemed the matter investigated and concluded. Similarly, in **Bennett**, where an employee complained to her supervisor about harassment, the supervisor, untrained in investigation methods, made matters worse by trying to essentially mediate the issue rather then immediately referring the matter to human resources.

Impartiality: The importance of this factor is obvious, but in a few cases employers have unsuccessfully sought to avoid liability despite the investigator's having been personal friends with the harasser. For instance, in **Hill v. Children's Village,** 196 F.Supp.2d 389 (S.D.N.Y. 2002), a court denied summary judgment for an employer because an investigator (who asked only general questions and took no notes of interviews) had known the alleged harasser for ten years. Under these circumstances, the results of the investigation may have been a "foregone conclusion" that could create liability under both Title VII and the stricter NYSHRL standard. Likewise, in **Bennett**, where the investigator had served as an usher at the accused harasser's wedding, the court was highly skeptical of the investigator's neutrality.

Civility: An employer that treats the complaining employee with dignity as it competently handles an investigation can show or help show reasonable care. For instance, in **Gonzalez v. Beth Israel Medical Ctr**., 262 F.Supp.2d 342, 355 (S.D.N.Y. 2003), where the employer's designated complaint handler, a labor relations manager "received Gonzalez's complaints in a professional manner," the court found this factor tended to show that the employer had exercised reasonable care to prevent and correct harassment (under **Faragher/Ellerth**), notwithstanding "minor" flaws in the investigative process. Courts tend to be much less understanding of employers whose agents respond to complaints by asking "What's the big deal?" as in *McIntyre*.

Problematic Investigative Scenarios

In some recurring scenarios, the employer's investigations actually exacerbate the problems. Advocates should be prepared to gather evidence of the investigation to serve as additional proof of discrimination at trial.

Collective Inaction: The facts of **Dortz v. City of New York,** 904 F.Supp. 127 (S.D.N.Y. 1995), even if read in a light most forgiving to the (hospital) employer, illustrates how an entity's lack of coordination can show the employer ultimately condones discrimination. There, a social worker complained of a doctor's verbal abuse, and her immediate supervisor promptly took her initial complaint of harassment and forwarded it to the company's designated EEO complaint handler, and the Chief Operating Officer, and the Senior Administrator of the hospital. He then held a staff meeting of social workers to discuss the allegations where he rounded up five staff members who signed statements corroborating the doctor's abuse. The statements were forwarded to the designated complaint handler, however, that person failed to follow up with the complainant or any witnesses. Meanwhile, the Department Head warned the doctor to cease using vulgar language and advised him to avoid contact with the complainant, but failed to document the informal reprimand in the doctor's personnel file. Adding to the confusion, the complainant's supervisor suggested she speak with the doctor (who had been advised to avoid her) to clear the air. After growing tired of the complainant's comments about the lack of official response, the immediate supervisor took to calling her complaints "petty." Two months later, after the social worker had filed an EEOC complaint, the designated complaint handler began to interview witnesses. The hospital sought summary judgment (arguing the harasser has been reprimanded and the remarks did stop), but the court nonetheless denied summary judgment as factual issues persisted regarding the adequacy of the employer's efforts to take prompt and appropriate action in

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response to the complaints and its efforts to dispel workplace hostility.

Implicit Discouragement: Even where there is a policy in place that is ostensibly followed, the words and deeds of the individual complaint handler can show that the employer is sending mixed messages. For instance, in **Watts v. New York City Police Dept.,** 724 F. Supp. 99 (S.D.N.Y. 1989), a probationary NYPD officer who was undergoing police academy training advised the Department that she wished to leave because she had been sexually harassed by an instructor and a classmate. She was asked to come to the academy to resign in person and when she arrived, she was taken to speak with the EEO Coordinator, who convinced Watts to file a complaint rather than to resign. While Watts was doing this, the Coordinator mentioned that other women who had made similar complaints of sexual harassment at the Academy had all resigned before any investigation occurred. The Coordinator also denied Watts' repeated requests to change classes so as to avoid her alleged harasser. Moreover, the days following her complaint, one harasser and his buddies taunted the plaintiff for being a "squealer." Soon afterwards, the plaintiff tendered her resignation. In denying the employer's summary judgment motion, the court found that the EEO Coordinator's comments and the academy's refusal to allow Watts to change classes were two factors which, if true, would allow a fact-finder to conclude that NYPD was aware of sexually harassing conduct but failed to take adequate remedial measures (under the pre- **Faragher/Ellerth** standard).

Misguided "Help": Sometimes an employer, in the ostensible interest of remedying harassment, throws a complainant into an uncomfortable situation and makes matters worse. For instance, in **Romero v. Howard Johnson Plaza Hotel**, 1999 WL 777915 (S.D.N.Y. 1999), when a hotel guest room attendant complained repeatedly to her union that co-workers were sexually harassing her, the union responded by calling for a union meeting to specifically discuss her harassment complaints. At the meeting, in which the employer participated, the four alleged harassers were present and the employee was made to publicly recount the harassing incidents. In denying the employer's summary judgment motion, the court found the fact that "she was not provided with a private forum to air her grievances, and instead had to recount the harassment before the very men who threatened her," was among those factors showing that the employer may not have acted reasonably as a matter of law.

Also, an employer should not blindside an employee who is reluctant to complain with 'surprise' meetings to discuss harassment. In **Reed v. A.W. Lawrence & Co., Inc.,** 95 F.3d 1170 (2d Cir. 1996), a plaintiff had complained to about a co-worker's inappropriate comments to a friend, who also happened to the a company vice president. Despite promises to keep the information private, the vice president contacted the plaintiff's immediate supervisor as well as the director of personnel. The supervisor then asked the plaintiff to travel out of town for a marketing meeting with him. However, upon arrival, the plaintiff was taken to meet with the personnel director to be interviewed about the co-worker's comment. The Second Circuit found, in affirming a lower court's denial of JNOV, that the surprise meeting was a key piece of evidence from which a jury could conclude the company's procedures did not provide a reasonable avenue of complaint.

Employees Left Hanging: When an employer fails to apprise the complainant of the status of her complaint, this may constitute a failure to take the reasonable steps necessary to correct discriminatory behavior and may work additional harm by telegraphing to the complaining employee that the employer condones harassment. For instance, in **Romero**, after the hotel worker was made to confront her harassers at the union meeting, she never learned whether her harassers were questioned, and no one kept her advised of the investigation or its final outcome. Similarly, in **Reed**, the plaintiff was told, at her surprise meeting, that the co-worker who had made the offending comments had apologized. However, she was not told that the employer considered the matter resolved and waited in vain for a resolution.

Conclusion

While the facts of the above cases may not directly correspond to the reader's current cases, knowledge of these general themes and common pitfalls can help advocates to frame arguments both before and during litigation. Moreover, these cases remind plaintiffs' counsel that an employer's assertion that it investigated a client's harassment does not provide the last word on vicarious liability. Rather, such assertions mark a starting point for scrutinizing whether the investigation was sufficiently prompt, thorough, professional, and nonbiased to show the employer should be allowed to avail itself of *Faragher/Ellerth* and similar defenses. ■

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were directed "to fill in the blanks and back date patient charts with 'cookie cutter entries' for patients they had neither treated nor consulted," and that he had been fired for "refusal to participate 'as a team player' in this activity." The court rejected the hospital's argument that this activity was not unlawful and did not affect public safety, finding that falsification of patient records would violate regulations and endanger public health. The court also rejected the defendants' contention that the plaintiff had waived his hostile work environment claim on the basis of sexual orientation when he pleaded a claim under New York Labor Law § 740. Here, the court adopted the reasoning of **Collette v. St. Luke's Roosevelt Hosp.**, 132 F. Supp. 256 (E.D.N.Y. 2001), and **Kraus v. Brandstetter**, 586 N.Y.S.2d 269 (2d Dep't 1992), and rejected contrary authority from the Fourth Department in **Pipas v. Syracuse Home Ass'n**, 641 N.Y.S.2d 768 (4th Dep't 1996). The plaintiff was represented by NELA/NY member William J. Rold. **Renna v. Phelps Memorial Hosp. Ctr.**, —- N.Y.S.2d —-, Index No. 17135/02 (Sup. Ct. Westchester Cty. 8/3/06). ■

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