NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 14, NO. 2 June 2007 Rachel Geman, Gary Trachten, Co-Editors

Ten Tips for Representing LGBT Employees in Discrimination Cases

by Justin M. Swartz, Stephanie M. Marnin and Anjana Samant, Outten & Golden LLP

Representing Lesbian, Gay, Bisexual, or Transgender ("LGBT") plaintiffs in employment discrimination cases is often an uphill battle, especially in federal court. New York City and New York State laws ease the burden but, even so, strategic considerations may dictate bringing a Title VII claim as well. The following are ten rules employment lawyers should follow when representing clients with LGBT discrimination claims.

Tip #1: Start with the Basics

■ ***Don't forget about disparate treatment.***

If there are facts to suggest that a similarly-situated employee of another sex was treated differently, set them out clearly. *See* **Schroer v. Billington**, 424 F.Supp.2d 203, 208 (D.D.C. 2006) ("discrimination based on sexual orientation is gender-neutral: it impacts homosexual men and women alike. But an employer who discriminates against lesbian women but not gay men would indeed violate Title

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Dismissed Financial Executive Awarded $3.1 Million in NASD Arbitration

by Lee Bantle

Charles Schaffran, the dismissed head of hedge fund sales at the financial powerhouse, AllianceBernstein, was recently awarded $3.1 million in damages by an NASD arbitration panel. The panel awarded $2.65 million for defamation and $420,000 for unpaid commissions. According to the Wall Street Journal, which reported the decision, the defamation award was one of the largest ever made by an NASD panel.

Schaffran was suspended by his employer of ten years in 2003 and shortly thereafter discharged. At the time of his suspension, AllianceBernstein released a statement to the press asserting that Schaffran had been suspended for "conflicts of interest" in connection with market timing practices at the firm. Those practices were under investigation by the SEC and the New York Attorney General at the time. The language of the press release was picked up by the New York Times, the Wall Street Journal and other publications, effectively ending Schaffran's career on Wall Street.

Schaffran contended at arbitration that he did not have any conflicts of interest in connection with market timing because, among other reasons, he had fully disclosed any market timing activities to top executives at AllianceBernstein, who had approved of the practices. In finding that AllianceBernstein had defamed him, the NASD panel credited this contention and cleared Schaffran's name.

In the arbitration, Schaffran also asserted a Sarbanes Oxley whistleblower claim against AllianceBernstein, but the NASD panel concluded that Schaffran's cooperation with investigators was not a factor in his termination.

In connection with the wider investigation, AllianceBernstein paid over $600 million to settle civil charges brought by the SEC and the NYAG.

Prior to the arbitration, the parties fought over whether the case should be heard in court or at the NASD. In a reversal of the usual positions, the employer sought to have the case heard in court (on the theory that Sarbanes-Oxley is a discrimination statute which exempts it from mandatory NASD arbitration) while Schaffran sought the NASD forum. The Second Circuit ruled that the forum question had to be decided by the arbitrators. **Alliance Bernstein Investment Research and Management, Inc. v. Schaffran**, 445 F3d 121 (2d Cir.2006). The NASD panel ruled that the case should be heard at the NASD. Schaffran wanted an arbitration panel to hear his claims in the belief that arbitrators would be more likely to render a decision that would be fundamentally fair in a situation where he had clearly been treated as a scapegoat.

The NASD arbitration took 19 days, stretching over five months. The arbitrators were Joanne Barak, Robert McDonnell and Jean Chiusano. Schaffran was represented by Bob Levy and me of Bantle & Levy LLP. The employer was represented by Joseph Baumgarten and Lloyd Chinn of Proskauer Rose. ■

The NELA/NY

Calendar of Events

June 27 - June 30, 2007
NELA National 2007 Eighth Annual Convention
Westin Rio Mar Resort & Golf Club
San Juan, Puerto Rico
For more info: *www.nelan.org*

July 17, 2007
Brooklyn Cyclones v. Williamsport Crosscutters Baseball Game
KeySpan Park
Directions:
www.brooklyncyclones.com
Contact Shelley Leinheardt for tickets-*nelany@nelany.com*
no later than Friday, June 22nd

September 27, 2007
NELA/NY-Asian American Bar
Assn Co-Sponsored Program
(Details to follow)

October 10, 2007 • 6:30 PM
NELA Nite
3 Park Avenue - 29th Floor
(Topic To Be Announced)
SAVE THE DATE

October 19, 2007
NELA/NY Fall Conference
Yale Club of New York City
(Mark Your Calendars)

November 15, 2007
NELA 10th "Courageous Plaintiffs" Event
101 Club
(Invitation to follow)
SAVE THE DATE

December 6, 2007
NELA/NY Holiday Party
SAVE THE DATE
(Details to follow)

May 16-18, 2008
NELA/NY 2008 Spring Weekend Conference
Kaatskill Mountain Club
Hunter, New York
SAVE THE DATE
(Details to follow)

A Word from Your Publisher

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NELA/NY will receive $.10 per page from these agencies to cover its expenses in administering this program and other expenses.

We suggest that you and your staff keep a copy of this handy for future reference. This discounted service may be used not only by NELA/NY members but also by attorneys associated with them, and may be used for non-employment cases as well as employment cases.

President's Column

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

The summer months begin and the flowers and trees are in bloom; this takes me back to my childhood. I spent many wonderful years at summer camp in the Catskills, and have fond memories of being a member of the "Woodstock Generation." Speaking of Woodstock, I am reminded (even though, unfortunately, I was not there) of the famous words of Grace Slick, who upon hitting the stage at daybreak with the Jefferson Airplane, shouted: "It's a new dawn." This famously became the introduction to the Airplane's classic album, *Volunteers of America*. As President of NELA/NY, I am officially declaring this summer "a new dawn" for our organization.

Two specific new initiatives come to mind. Beginning May 21, 2007, panels were formed to prepare members who request help with oral argument, trial preparation, or any other case related activities. These panels consisting of three experienced NELA/NY members will be "on call" throughout the year to provide such assistance, either in person or by telephone. While the ListServ has been an excellent mechanism for obtaining help, as has been members' calling each other, this program will now formalize another process that will provide members with a great opportunity to receive important clinical assistance.

For the other initiative, I am please to announce our Spring 2008 Conference which will be held at the Kaatskill Mountain Club (at Hunter Mountain) on May 16-18, 2008. This will be our first ever overnight or weekend conference. It will enable NELA members from both downstate and upstate to come together, network, learn, and socialize. Families and significant others will be equally welcome. We are informed that the area is beautiful area and offers lots activities. The cost will be as low as $117 per room and we will even try to arrange for car pooling for those of you who may have difficulty getting there. I am encouraging each and every member to attend our first ever conference of this nature. We hope that it will become a repeating event. The Conference Committee is hard at work planning this very important and special occasion. We hope to have at least one federal judge, in addition to other knowledgeable speakers, in attendance as presenters. We hope that all of you will put this on your calendars now, and caught up in the "buzz" this event is generating. The Executive Board totally supports this effort. Other organizations have successfully had such conferences, including other NELA affiliates around the country. NELA/NY can do the same.

While on the subject of programming, I also want to put in a plug for New York-

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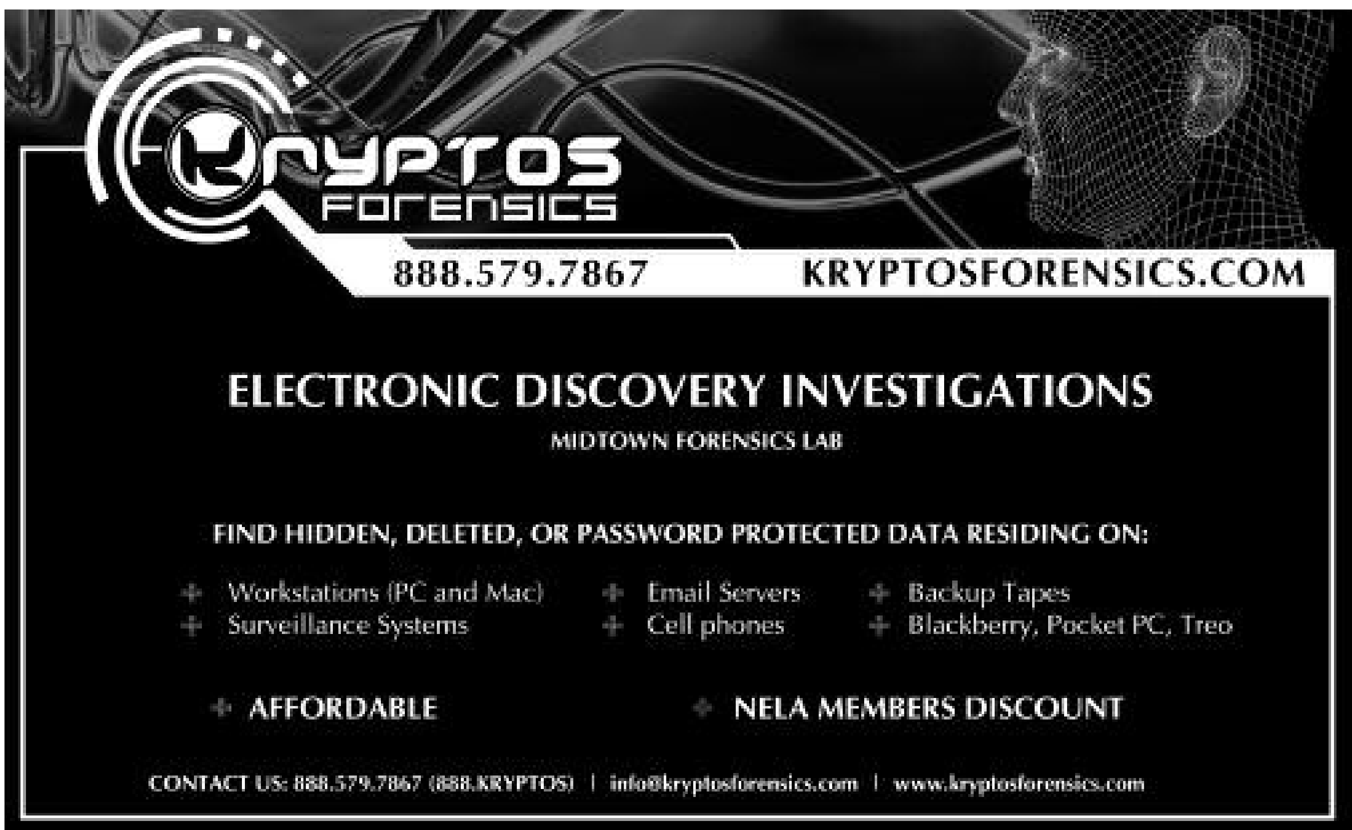

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Anne's Squibs

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 Jacqlyn Rovine, a summer associate with Outten & Golden LLP, for help in the preparation of these squibs.

ADEA

Is an Intake Questionnaire an EEOC "Charge"?

On June 4, 2007, the Supreme Court granted certiorari in **Federal Express Corp. v. Holowecki**, a case on appeal from the Second Circuit. The Court will resolve the question left open in **Edelman v. Lynchburg College**, 535 U.S. 106, 118 (2002), of whether a written submission to the EEOC that is not on an EEOC charge form constitutes an EEOC charge in satisfaction of the statute. 29 U.S.C. § 626(d) requires plaintiffs to file an ADEA "charge" with the EEOC 60 days before bringing a suit in federal court, and within 300 days from the occurrence of the allegedly discriminatory acts. In **Holowecki**, on appeal from the district court's dismissal of four ADEA pattern or practice discrimination claims, the Second Circuit (opinion written by Rosemary S. Pooler, C.J.) held that one plaintiff's EEOC intake questionnaire and affidavit constituted a proper "charge." The court noted that the ADEA does not define "charge," and interpretive regulations require only "a writing" with the names and full contact information of the aggrieved employee and the employer, and a general description of the alleged discriminatory acts with a clear and concise statement of facts and pertinent dates. Other circuits, such as the Third, impose the additional "manifest intent" rule, which requires the plaintiff to provide the EEOC with the type of notice that would convince a reasonable person that the grievant has shown an intent to activate the ADEA's machinery. The court adopted this requirement to provide the EEOC with an opportunity to fulfill its statutory purpose of notifying the prospective defendants and seek conciliation. But the court did not require full administrative exhaustion, limiting the definition of "charge" to the notice requirement, because individuals should not be held accountable for the agency's failure to act. In **Holowecki**, the Second Circuit found that the plaintiff had met both statutory and judge-made requirements of filing a charge. Her questionnaire and affidavit constituted a "writing" because it contained the full contact information of the parties, pertinent dates, the approximate number of employees at the workplace, and the instances of alleged discrimination, and it established the plaintiff's intent to activate the administrative process because of its "forceful tone and content." The Second Circuit also permitted eleven named plaintiffs who had never filed EEOC charges to take advantage of the "piggybacking" rule to satisfy the ADEA's exhaustion requirement. The first plaintiff's questionnaire gave notice that she was "not alone" in being affected. **Holowecki v. Federal Express Corp.**, 440 F.3d 558 (2d Cir. 2006), *cert. granted*, 75 USLW 3644, 2007 U.S. LEXIS 6823 (6/4/07).

ATTORNEYS' FEES

"Reasonable Rate"

In an opinion that defendants are already quoting, the Second Circuit Court of Appeals has tried to revive the idea that civil rights attorneys are not entitled to rates as high as those charged by the commercial firms that represent the defendants themselves. Even though prior case law has held clearly that civil rights and public interest lawyers should not get second-rate fees (*e.g.*, **Blum v. Stenson**, 465 U.S. 886, 892-94 (1984); **Moon v. Kwan**, 2002 WL 315 12816, at *2 (S.D.N.Y. 2002)), the panel held that a district court should consider a "presumptively reasonable rate" to be the rate that a hypothetical "thrifty" client could hypothetically negotiate with a lawyer in his or her area, using factors such as the lawyer's "societal interests" and desire for favorable publicity to lower the rate still further. Other factors were "whether the attorney was initially acting pro bono (such that a client might be aware that the attorney expected low or non-existent remuneration) and other returns (such as reputation, etc.) the attorney expected from the representation." In this case, Gibson, Dunn represented the plaintiffs, and its rates were knocked down to a range of $210 for experienced partners to $120 for junior associates. Stay tuned; a request for rehearing with suggestion for rehearing in banc, with *amici curiae* probably including NELA and NELA/NY, is in the works. **Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany**, 2007 U.S. App. LEXIS 9300 (2d Cir. 4/24/07). The panel consisted of Judges Dennis Jacobs, John M. Walker, Jr., and Sandra Day O'Connor, sitting by designation.

At least one district court has already declined to cut plaintiffs' fees based upon **Arbor Hill**. After a bench trial, Judge Gerard E. Lynch (S.D.N.Y.) awarded the plaintiffs—eleven waiters, busboys, and captains at a restaurant in Chinatown—a total of $699,374.32 under federal and state labor law. The court then awarded fees to the Urban Justice Center ranging from $200 to $450. The court emphasized the size and complexity of the case and the years of experience of lead counsel, whose rates were supported by two affidavits of other attorneys; moreover, a Southern District judge eight years earlier had approved $425 per hour. The

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court declined to reduce the total award for less than complete success, since it was "difficult to divide the hours expended on a claim-by-claim basis," and in any event, the dismissal of the case as against two of the defendants had no effect on the total amount of damages and did not "undermine [the plaintiffs'] victory on the central legal issue in this case." **Chan v. Triple 8 Palace, Inc**.; **Chan v. Sung Yue Tung Corp.**, 2007 U.S. Dist. LEXIS 33883 (S.D.N.Y. 5/4/07). Total fees and costs awarded to the plaintiffs were $699,374.32.

Costs for Retrieval of Electronic Evidence

In a Title VII sex discrimination case, Magistrate Judge Henry Pitman (S.D.N.Y.) considered whether the costs of restoring backup tapes with email should be shifted to the plaintiff. The defendant had converted the emails of six former employees to an inaccessible storage format pursuant to its policy, but it had done so after the duty to preserve evidence had arisen. The court held that cost-shifting is only appropriate when electronic discovery imposes an undue burden or expense. Even then, however, if a party created its own burden or expense by converting to an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then that party is not entitled to shift the costs. After determining that the defendant should have reasonably expected to produce five of the six former employees' emails, the court applied the **Zubulake** seven-factor cost-shifting test to the last employee's emails. The court held that the factors favored cost-shifting with respect to this employee's emails; nevertheless, even when cost-shifting is granted, the producing party must still pay for the majority of the production. In **Zubulake** the court shifted 25% of the costs. Here, the court held that the amount of cost-shifting should be higher than in **Zubulake** because the production resulted in a small portion of relevant documents and the email searches were much broader. Therefore, the court shifted 30% of the costs of storing and searching this one employee's emails to the plaintiff. In an amended opinion and order, however, the court held that the plaintiff needed to pay only $447.89 of the $9,187.50 cost for restoring the tapes, because they would have had to have been restored regardless, since they contained other emails that were ordered produced. The plaintiff was represented by Kathleen Peratis, Carmelyn Malalis, and Tammy Marzigliano of Outten & Golden LLP. **Quinby v. WestLB AG**, 2006 WL 2597900 (S.D.N.Y. 9/5/06), *amended*, **Quinby**, 2007 U.S. Dist. LEXIS 2955 (S.D.N.Y. 1/4/2007).

CLASS ACTIONS

Class Certification

Eleven African-American and Hispanic employees of the New York City Department of Parks and Recreation brought a pattern and practice class action against the Department alleging discrimination on the basis of race, color, and national origin. The district court (Denny Chin, J., S.D.N.Y.) denied the City's motion for summary judgment on the promotion, compensation, and retaliationg claims, and the motion on the plaintiffs' claim that the defendant engaged in a pattern or practice of assigning employees and allocating funds based on race, as well as their hostile environment/racial harassment claims. In reaching its conclusion, the court described the undisputed facts: statistical information regarding salaries; racist comments by a manager and other employees; discriminatory practices concerning wage increases, promotions, interviews, and job postings; and expert testimony. The plaintiffs were represented by NELA/NY members Lewis Steele, Robert Stroup, and Cynthia Rollings, among others. **Wright v. Stern**, 450 F. Supp. 2d 335 (S.D.N.Y. 2006).

Two judges, one in the E.D.N.Y. and one in the S.D.N.Y., dismissed FLSA claims for lack of subject matter jurisdiction because the employers' Fed. R. Civ. Pro. Rule 68 offers of judgment, in an amount exceeding the amount the employees would have been able to recover under the FLSA, mooted the overtime claims. Both cases were putative class and collective actions in which no other plaintiffs had yet opted in. Pursuant to Second Circuit precedent establishing that a defendant's offer of the maximum recovery available to a plain-

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ers to attend NELA's National Convention, which will take place in Puerto Rico at the end of this month. NELA/NY has always had a strong contingent attending our conventions and anyone who has been there knows how excellent the seminars are and how wonderful the networking and socializing have been. As usual, NELA/NY will sponsor a cocktail reception—always a blast.

By the time this summer ends, we hope that our Litigation Fund will become active and we will start accepting applications for grants. We will also be looking forward to our Fall Conference and our Courageous Plaintiffs dinner. Our website has been up and running and has been utilized for registration for our various events. Our Legislative Committee is actively working toward formulating proposals that hopefully will have some legs in the Eliot Spitzer era. The Sexual Harassment committee is always active. Our Diversity Committee is working on new initiatives. The qualities of the Conferences and NELA Nites speak for themselves. "Shop Talk" is a big hit! In sum, "it's a new dawn" for NELA/NY and that calls for volunteers to get involved and become active in our organization. The future leadership of the organization will come from members who have the drive and desire to contribute. The "Woodstock Generation" was an engine for social change and we continue to need people to carry on its ideals within the organization. There is no question that NELA/NY is well stocked with talented people to carry on its work. In the meantime, I will be writing the lyrics of a new version of the aforementioned rock anthem and will call it, "*Volunteers of NELA/NY*." ■

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tiff moots a case, the courts dismissed the plaintiffs' claims. After reaching this holding, the Southern District noted that the outcomes would have been different if the amount owed to the plaintiff were in dispute, or if other plaintiffs had opted into the case. **Briggs v. Arthur T. Mott Real Estate LLC**, 2006 WL 3314624; **Ward v. Bank of New York**, 455 F. Supp. 2d 262 (S.D.N.Y. 2006).

DAMAGES

Punitive Damages

The former editor-in-chief of *The Source*, a popular hip-hop magazine, alleged that she was sexually harassed, retaliated against for complaining about the harassment, and defamed by her employers, four individuals employed by the magazine. After a nine-day trial, the jury found for defendant on the discrimination claim and for plaintiff on the retaliation claim, awarding her approximately $4.3 million in damages against all four defendants jointly and severally, and $3.5 million in damages for defamation against one of the defendants. The court expressed reluctance during the trial about submitting the question of punitive damages to the jury, but did so on the basis of the discrimination claim. The jury did not return a punitive damages award. The district court (Jed S. Rakoff, J., S.D.N.Y.) denied plaintiff's **Fed. R. Civ. P. 59** motion as to the punitive damages because the jury had found the plaintiff's allegations of sexual harassment to be without merit. The court also held that the significant damages award served as a sufficient deterrent. The court noted that punitive damages are appropriate only when the defendant's conduct is reprehensible and not duplicative of the compensatory award awarded for emotional distress and reputational harm. The plaintiff also received a front-pay award of $264,575.00 based on the estimate that her employment would have continued for five years and the difficulty in obtaining a comparable editorial position at another leading hip-hop magazine. **Osorio v. Source Enterprises, Inc.**, 2007 WL 683985 (S.D.N.Y. 3/2/07).

DISABILITY DISCRIMINATION

A part-time sales associate who had retinitis pigmentosa and hearing loss was fired, purportedly because of tardiness and poor sales records, and sued under the ADA and the New York State and City Human Rights Laws. His immediate supervisor testified that he was not habitually late and that his sales records were not poor because other employees rang his sales up under their names, and that he was an excellent employee despite his struggles with vision and hearing. The employer's motion for summary judgment was denied by Judge Sterling Johnson (E.D.N.Y.). The court found that the plaintiff was a qualified individual with a disability despite having stated to the Social Security Administration, after his termination in 2002, that he could not work; he contended at trial that he could work with reasonable accommodation, and the court found these statements not inconsistent. As for the factual allegations, the court found numerous material disputed facts and held that summary judgment was not appropriate. NELA/NY member Peter A. Romero represented the plaintiff. Good work, Peter! **Walerstein v. Radioshack Corp.**, —- F. Supp. 2d —-, 19 Am. Disabil. Cas. [BNA] 211, 2007 US Dist. LEXIS 24768, 2007 WL 1041668 (E.D.N.Y. 3/30/07).

ERISA

Judge Harold Baer, Jr. (S.D.N.Y.) denied summary judgment on an age discrimination claim, holding that cash balance pension plans violate ERISA. Under the plan, the amount received by the employee when retired is based on hypothetical annual contributions to the employee's salary, and the salary is determined based on the employee's completed years of service. As a result, younger employees received greater retirement benefits because they had a longer time to "contribute" to the benefits account. The court departed from the holding of the only circuit court to address this issue, the Seventh Circuit, as well as from two other decisions in the Southern District. *In re* **J.P. Morgan Chase Cash Balance Litigation**, 460 F.Supp.2d 479 (S.D.N.Y. 4/30/06).

A 23-year employee of a drug company had amassed several million dollars' worth of stock options by the time she was 51 years old. Relying upon the documents describing the company's retirement plan and oral assurances by company officials, she terminated her service with the company. Soon thereafter, the company informed her that she had not actually retired, as she thought, because she had not achieved the early retirement age of 55, and that she was required to forfeit some options and exercise others immediately. She brought suit under ERISA, alleging (among other things) breach of fiduciary duty, denial of benefits, and failure to provide requested information. Judge Kimba M. Wood (S.D.N.Y.) denied summary judgment on the claim for breach of fiduciary duty, finding that the company had "acted in a fiduciary capacity in making statements to Plaintiff about her eligibility or ineligibility for early retirement … , and in answering her questions on the same subject." However, the court granted summary judgment with respect to promissory estoppel, denial of benefits, and failure to provide information. The plaintiff was represented by NELA/NY member Robert Kraus. **Bell v. Pfizer Inc.**, 2007 U.S. Dist. LEXIS 40244 (S.D.N.Y. 6/1/07).

ETHICS

Contact with Ex-Employee of Represented Company

Occasionally, when a non-employment case presents issues that affect employment cases too, NELA/NY will enter the fray as an *amicus curiae*. That happened in a New York State Court of Appeals case that grew out of a dispute between two corporations that had been joint venturers. The EVP and COO for one of the parties, who had been "both an important participant in the events at issue …. and a member of [his company's] litigation team" after the lawsuit began," was terminated by the company. He refused to let the company's attorneys continue to represent him and thereafter was interviewed by lawyers for the other side. Before the interview, they cautioned

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Inaugural NELA-NY Employment Law Crossword

by Rachel Geman (*rgeman@lchb.com*)

Rules: The number of letters that corresponds to a clue is set forth in the clue. For example, (4) refers to four letters; (2,4) means the answer is two words, the first of which has two letters and the second of which has four (e.g., "so what"). Only words of two or more letters have a corresponding clue; there are numerous one-letter orphans in the grid. Acronyms are treated the same as regular words, so "FLSA" would be (4). Have fun!

ACROSS

1. Possible for gender, not for race. (4)
12. Part of Rule 9's pleading standard. (3)
18. Owes DFR to its members. (5)
24. _____ Cid. (2)
38. Winners feel like doing this (figuratively); spelled another way, a kind of loser. (4)
43. A medical and legal term. (4)
52. Teenage woe. (4)
60. Fair Housing Act. (8)
79. It makes Freud or law review types excited. (2)
85. Statute involving employee benefit plans. (5)
96. Boot, down under. (3)
104. These have relevance for availability analysis. (7)
117. Type of car. (5)
138. What an annoying process server might say; a child's game. (3)
141. Managers may be this within the meaning of FLSA. (6)
148. Statute relating to medical records. (5)
157. Middle name of actor who played Lando Calrissian. (3)
161. Reasons given for adverse employment action, often. (8)
172. Letter of the Greek alphabet; a tiny amount. (4)
179. A type of loser; spelled another way, what birds do. (4)
187. *St. ____ Honor Ctr. v. Hicks* (1993 case). (5)
195. Clients often want to know these in advance. (4)

DOWN

1. Addictive when in electronic form, tasty in its literal form. (12)
4. How the courtroom gets when the judge walks in. (5)
6. If too much of this is consumed at the holiday party, a lawsuit may ensue. (5)
8. Term that is a constituent part of a device that shares a name with an intentional tort. (5)
10. What a lot credibility determinations devolve into. (2,4)
13. Failure to do this can be actionable. (4)
25. Part of a choice-of-law test. (4)
40. Common word in anti-discrimination practice. (6)
61. First name of long-time ACLU and NYCLU leader. (3)
63. Intentional tort common in England. (5)
65. We are happy when NELA members have these. (9)
87. Combination of an Attenborough film about Stephen Biko and a novel by Robert Graves about a Roman Emperor. (1, 7)
98. Party in the inaugural disparate impact case. (6)
104. Type of power or offer. (4)
138. Different types of recoveries are ___ differently by the government. (5)
144. Type of data or physics. (4)
145. Bosc is an example of one. (4)
148. You often need to depose someone in this department. (2)
150. What do patents and parents have in common? (3)
151. Prefix for flying, yet also the first letters of rock group who Walked This Way. (4) 161. Type of database used by cashiers. (3)

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185	186	187	188	189	190	191	192	193	194	195	196	197	198

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the ex-executive not to reveal any privileged or work-product information. The company's attorneys went ballistic when they learned of the interview and moved (inter alia) for disqualification of the interviewing attorneys and injunctive relief. Supreme Court, New York County, granted all the requested relief, based solely up an "appearance of impropriety," but the Appellate Division reversed. Citing **Niesig v. Team I**, 76 N.Y.2d 363 (1990), the Court of Appeals said that the interview was not improper, no privileged or protected information seemed to have been revealed, and there was no basis for disqualification. The *amicus curiae* brief for NELA/NY was written by member Darnley Stewart. **Muriel Siebert & Co. v. Intuit Inc.**, 8 N.Y.3d 506 (May 8, 2007) (op. by Eugene F. Pigott, J.).

EVIDENCE

Title VII

A woman of Asian descent brought a gender discrimination action against her employer, UBS Financial Services. Among six evidentiary motions made by the plaintiff at a preliminary conference, the district court (Gerard E. Lynch, J., S.D.N.Y.) granted plaintiff's motion to exclude evidence of a later-acquired justification for her firing. Her employer had learned that she had secretly taped conversations with her supervisors, allegedly to gather evidence to support her pending discrimination complaints. The court held that under Title VII's retaliation provision, Section 2000e-3, her activity was protected and would not have constituted a legitimate basis for termination when it was eventually discovered, even though the employer had a clear company policy against taping. The court's decision is consistent with **Heller v. Champion International Corp.**, 891 F.2d 432 (2d Cir. 1989) (dismissal of employee for secretly taping alleged evidence of age discrimination not justified). The court also granted the plaintiff's motion to exclude evidence that she referred to certain contractors as "Mexican," which the defendant sought to introduce to show that the plaintiff did not actually find racial language discriminatory, because referring to someone as "Mexican" is an "entirely neutral description of certain workers." In all, the court rejected seven of ten motions in limine made by the defendant. Among the successful three, the court excluded an administrative law judge's decision on plaintiff's application for unemployment benefits. Noting its discretion, the court excluded the governmental investigation under Fed. R. Evid. 403, despite the Rule 803(8)(C) hearsay exception, because the jury would decide the same facts that were before the ALJ. The court denied defendant's motion to exclude evidence that 36 of 37 UBS branch managers are male, despite the fact that plaintiff did not apply for such a position, because the allegedly discriminatory supervisor was the decisionmaker in each manager's hiring. NELA/NY members John A. Beranbaum, Jason J. Rozger, and Kristen Finlon, all from Beranbaum, Menken, Ben-Asher & Bierman, represented the plaintiff. Good work! **Tse v. UBS Financial Services**, 03 CV 6234 (S.D.N.Y. March 23, 2007).

FAIR LABOR STANDARDS ACT

Class Certification

A group of hourly workers alleged that their employer failed to properly record their hours and compensate them in violation of the FLSA, the New York Labor Law, and common-law fraud. The district court (Paul A. Crotty, J., S.D.N.Y.) granted the plaintiffs' motion for class certification and for a collective action. With respect to the FLSA component, because discovery had already occurred, the court considered whether the class members' potentially "disparate factual and employment settings" defeated their motion. It did not. Plaintiffs had demonstrated that defendants had systematically docked the wages of the class members and routinely treated them as non-exempt hourly workers. The court also held that, contrary to defendants' argument that individualized exemption determinations raised individual issues, Rule 23 class certification requirements were met. Adam Klein, Douglas James, Justin Swartz, and Linda Neilan of Outten & Golden LLP represented the plaintiffs. **Torres v. Gristede's Operating Corp.**, Slip Copy, 2006 WL 2819730 (S.D.N.Y. 2006).

Domestic Workers

The FLSA contains an exemption for persons "employed in domestic service employment to provide companionship services for individuals … unable to care for themselves." 29 U.S.C. § 213(a)(15). The Department of Labor issued a regulation interpreting the exemption as including "companionship" workers "employed by an … agency other than the family or household using their services." 29 CFR § 552.109(a). However, the Department's "General Regulations" also define "domestic service employment" as "services of a household nature performed by an employee in or about a private home … *of the person by whom he or she is employed*." § 552.3 (emphasis added). A domestic worker employed by an agency, which sent her into the homes of elderly and infirm persons, sued for minimum wage and overtime pay. The district court (E.D.N.Y.) dismissed the suit, and the Second Circuit Court of Appeals reversed. The U.S. Supreme Court vacated the decision and remanded in light of a recent Department of Labor "Advisory Memorandum" explaining and defending the third-party regulation; the court of appeals again held the regulation unenforceable; and the U.S. Supreme Court has now unanimously reversed and remanded, holding that the regulation filled a statutory gap and did not exceed the Department's rulemaking authority. The opinion was written by Justice Breyer. **Long Island Care at Home, Ltd. v. Coke**, — S. Ct. — (6/11/07).

See also **Chan v. Triple 8 Palace**, discussed under "Attorneys' Fees."

RESTRICTIVE COVENANTS

Judge Peter K. Leisure (S.D.N.Y.) declined to issue a temporary injunction preventing an employee of a talent and literary agency from working for a competitor or disclosing his former employer's allegedly confidential information. The court had previously signed an order to show cause but, when it heard all the

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evidence, found the two restrictive covenants in the employee's employment agreement unenforceable. For one thing, it appeared that *every* such employee's agreement acknowledged that his or her services were "special, unique, extraordinary and intellectual," that any breach of any material provision of the agreement would cause the employer "great and irreparable injury and damage," and that the employer was entitled to seek equitable relief for any breach of the agreement. The court also found that the employer had failed to show likelihood of irreparable harm, since each of its clients signed an agreement only for each particular book or article, and since the employee had taken great care not to interfere with its existing and even prospective relationships. As for customer information, the court found it not confidential, particularly since the employer took no steps to preserve confidentiality. **International Creative Management, Inc., v. Abate**, 2007 WL 950092 (S.D.N.Y. 3/28/07).

SEXUAL HARASSMENT

Judgment as a Matter of Law

A male N.Y.P.D. sergeant who alleged that he was sexually harassed by his immediate supervisor, a female lieutenant, and then retaliated against for complaining, lost on his sexual harassment claim but won a jury verdict of $300,000 in compensatory damages for his retaliation claim. The retaliation consisted of three police officers coming to his home, removing his firearms, and taking him to the precinct; he was ordered to report to the psychological services unit and then transferred to a record room, which he described as a "storage closet," with "filthy, disgusting" couches and police barriers in it, and without a computer. The plaintiff went to the hospital on his first day there because he was experiencing claustrophobia, rapid heartbeat, and difficulty breathing. After "working" there alone with no duties for more than a year, he retired. After the verdict, the City moved for judgment as a matter of law, which the court (Ronald L. Ellis, U.S. Magistrate Judge, S.D.N.Y.) denied. The City argued that no reasonable employee could have considered the lieutenant's actions to be sexual harassment; the jury obviously did not agree, and neither did the magistrate judge. The court also declined to order a new trial or to reduce the jury award. The plaintiff was represented by NELA/NY member David M. Fish. Congratulations, Dave! **Marchisotto v. City of New York**, 2007 US Dist. LEXIS 27046 (S.D.N.Y. 4/11/07).

"Prompt, Effective Remedial Action"

A woman who alleged a pervasive atmosphere of workplace sexual harassment was allowed to pursue her claim even though the employer fired the alleged primary harasser promptly after she made a formal complaint. The Appellate Division, First Dep't., in an opinion by Judge Richard T. Andrias, found that she had identified other harassers in addition to the one who was fired, and that the "defendant knew or should have known of the harassment before plaintiff made her formal complaint." Without mentioning whether the action was brought under the New York State Human Rights Law (which requires a showing that the defendant encouraged, condoned, or approved the harassment) or the

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NYCHRL (which does not), the court found that the defendant's action once the plaintiff had formally complained did not prove that it had not encouraged, condoned, or approved the alleged harassment "or that defendant took reasonable corrective action." **Polidori v. Societe' Generale Groupe**, 2007 NY Slip Op. 03584 (1st Dep't 4/24/07).

SUMMARY JUDGMENT

Age Discrimination

An employee, hired at the age of 60 and transferred to the new owner of the apartment complex where she worked a year later, found that she had a new supervisor, who made frequent references to her age, including asking her whether she would be better off if she retired so that she could "take time off to rest," among other comments. The supervisor fired her two years later, telling her that he felt it would be better for her and that he needed someone with website skills. Later he testified that he did not actually need someone with website skills but that the plaintiff was not doing her work effectively and efficiently, and also because she had violated her employer's policy on communicating with the media. She was replaced by a 25-year-old who was given responsibility for, among other things, public relations. The supervisor claimed that this was a new position and not a replacement. Judge Mukasey (S.D.N.Y.) granted summary judgment to the employer, but the Second Circuit Court of Appeals vacated and remanded, saying, "[W]e do not understand why the district court characterized [the supervisor's] remarks as stray. The remarks were made by the person who decided to terminate [the plaintiff]. They could reasonably be construed, furthermore, as explaining why that decision was taken." The court of appeals' decision was written by Judge Pierre N. Leval and joined by Judges Guido Calabresi and Daniel M. Friedman (sitting by designation). **Tomassi v. Insignia Financial Group, Inc.**, ––– F.3d –––, 2007 WL 495314 (2d Cir. 2/16/07).

Plaintiff's Story "Contradicted by the Record"

The United States Supreme Court has proved again, in a non-employment case, that hard cases make bad law. A nineteen-year-old driver, doing 73 mph in a 55-mph zone, inspired a police chase and refused to pull over. He was pursued by police for over ten miles, refused to stop, and eventually was rammed from behind by an officer's car in an attempt to force a stop. His car left the road and ran down an embankment, overturned, and crashed, and he was rendered paraplegic. He sued the police officer, alleging use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The Georgia District Court and the 11th Circuit Court of Appeals held in his favor, but the U.S. Supreme Court held that summary judgment should have been granted against him. In an opinion by Justice Antonin Scalia, from which only Justice Stevens dissented, the Court held that the possibility of harm to innocent bystanders (who the dissent states were not present, except for other drivers who were never in danger) made the officer's use of force "reasonable." Holding that there was no "genuine" dispute as to material facts because the officers' dash-

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board videos showed a chase that the majority found frightening, the Court said that "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that [*i.e.*, the non-movant's] version of the facts for purposes of ruling on a motion for summary judgment." Watch out. We're going to see that sentence quoted in defense counsel's briefs a lot in the future. **Scott v. Harris**, 127 S. Ct. 1769, 2007 WL 1237851 (4/30/07).

Race, National Origin

Judge Denny Chin (S.D.N.Y.) has denied a defense motion for summary judgment in a case brought against the U.S. Department of Commerce by a Filipina woman who was passed over for a temporary promotion in favor of an African-American candidate. The African-American candidate had dramatically lower educational qualifications but arguably better management experience, which the plaintiff alleged in turn was due to the Department's longstanding failure to promote her to management positions. The plaintiff presented evidence that the African-American candidate had been pre-selected for the position by the African-American and Hispanic decisionmakers before the job was even posted. The court held that even though the past refusals to promote the plaintiff were untimely as claims, they were still admissible as background evidence. Notably, the plaintiff offered hearsay evidence in the form of a transcript of a recorded conversation between herself and a current employee of the Department, which the court described and evidently considered in support of the plaintiff's case. The plaintiff was represented by NELA/NY members Denise Bonnaig and Mahima Joishy. **Mirasol v. Gutierrez**, 2007 U.S. Dist. LEXIS 34481 (S.D.N.Y. 5/9/07).

Sex Discrimination

A woman who claimed that she was terminated from her job as a trader for a bank and denied two annual bonus payments because of her gender and because she had complained about discrimination defeated summary judgment in Judge William H. Pauley III's courtroom (S.D.N.Y.). The plaintiff identified a number of remarks and words used by the decisionmaker when speaking to colleagues, such as "[w]omen are a problem, they are high maintenance in the context of work"; "do things the right way, not the girlie way"; "c—-"; "b——"; and (describing wine) "silky … much like, I imagine, a 16 year old French teenager." The court rejected the employer's characterization of these statements as "stray remarks," since they were made by the person who terminated the plaintiff and constituted strong evidence of discrimination. The plaintiff also alleged that she was treated differently from male employees who behaved the same way and was given smaller or no bonuses. Notably, the court also rejected the "same actor" defense, even though the man who decided to fire the plaintiff had previously hired her, since four years had passed between the hiring and the termination, "extinguish[ing]" the "same actor" inference, and was equally unpersuaded by the fact that the decisionmaker had rehired the plaintiff, since he had evidently been pressured to do so and had hoped she would refuse. Finding material issues of fact, the court denied summary judgment concerning the plaintiff's 2003 and 2004 terminations, the denial of two bonuses, and termination in order to prevent her pension from vesting, since she was fired only two weeks before it would have vested. However, the court declined to strike the defendant's after-acquired evidence defense based upon a false statement in the plaintiff's job application. NELA/NY members Kathleen Peratis and Tammy Marzigliano represented the plaintiff. **Quinby v. WestLB AG**, —- F. Supp. 2d —-, 2007 U.S. Dist. LEXIS 28657 (4/19/07).■

Answers to Crossword Puzzle

1 B	2 F	3 O	4 Q	5	6 P	7	8 A	9	10 H	11	12 W	13 H	14 O
15 L	16	17	18 U	19 N	20 I	21 O	22 N	23	24 E	25 L	26	27 I	28
29 A	30	31	32 I	33	34 N	35	36 O	37	38 S	39 O	40 A	41 R	42
43 C	44 U	45 R	46 E	47	48 O	49	50 D	51	52 A	53 C	54 N	55 E	56
57 K	58	59	60 T	61 I	62 T	63 L	64 E	65 V	66 I	67 I	68 I	69	70
71 B	72	73	74	75 R	76	77 I	78	79 I	80 D	81	82 M	83	84
85 E	86 R	87 I	88 S	89 A	90	91 B	92	93 C	94	95	96 U	97 G	98 G
99 R	100	101 F	102	103	104 S	105 E	106 C	107 T	108 O	109 R	110 S	111	112 R
113 R	114	115 R	116	117 V	118 O	119 L	120 V	121 O	122	123	124	125	126 I
127 I	128	129 E	130	131	132 F	133	134	135 R	136	137	138 T	139 A	140 G
141 E	142 X	143 E	144 M	145 P	146 T	147	148 H	149 I	150 p	151 A	152 A	153	154 G
155 S	156	157 D	158 E	159 E	160	161 P	162 R	163 E	164 T	165 E	166 X	167 T	168 S
170	172 I	173 O	174 T	175 A	176	177 O	178	179 S	180 O	181 R	182 E	183	184
185	186	187 M	188 A	189 R	190 Y	191 S	192	193	194	195 O	196 D	197 D	198 S

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VII, no less than any other employer who employs a practice that disadvantages women on some other basis").

Tip #2: Transgender Discrimination = Sex Discrimination

■ ***Discrimination because a plaintiff is transgender is itself discrimination because of sex.***

To prevail on a Title VII sex discrimination claim, there must be sufficient evidence that a plaintiff was subjected to adverse employment because of the plaintiff's sex. One way to demonstrate this is to argue that discrimination because of an employee's transgender status is *itself* a form of sex discrimination. *See* **Schroer**, 424 F. Supp. 2d at 212 ("It may be time to revisit [another court's] conclusion . . . that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex'.") (emphasis in original) (citing **Ulane v. Eastern Airlines, Inc.**, 581 F. Supp. 821, 823-25 (N.D. Ill. 1983), *rev'd* 742 F.3d 1081, 1083 (7th Cir. 1984); **Maffei v. Kolaeton Industry, Inc.**, 164 Misc.2d 547, 556 (N.Y.Sup. 1995).

Tip #3: Experts are Essential

■ ***How do you prove the science?***

Ulane and **Schroer** raise important litigation practice points: a plaintiff arguing that discrimination based on transgender status = sex discrimination must prove (1) transgender status and (2) that transgender discrimination is sex discrimination. Experts are essential for both tasks.

As for proving transgender status, **Ulane**—in which the issue was hotly contested—is instructive. The defendant argued that the plaintiff was not a transsexual, that instead she was a transvestite. Plaintiff prevailed on the following evidence: plaintiff was found to be a transsexual "by the unanimous decision of the Gender Identity Board of the University of Chicago Medical School."; plaintiff's primary doctor testified that plaintiff was and is a transsexual; and plaintiff met the criteria of the DSM III for judging transsexuality. **Ulane**, 581 F.Supp. at 825. *See also,* **Schroer**, 424 F.Supp.2d at 205; **Lie v. Sky Publ'g Corp**., 15 Mass. L. Rep. 412 (Mass. Super. Ct. 2002); *but see*, **Kastl v. Maricopa County Community College Dist.**, 2006 WL 2460636 (D.Ariz. 2006) (granting defendant's motion for summary judgment where "Plaintiff . . . failed to meet her burden of establishing a prima facie case of discrimination because she has provided no evidence that she was a biological female and member of a protected class while she was employed by Defendant.")

As for proving that transgender discrimination is actually sex discrimination, the **Ulane** plaintiff presented an expert witness who testified about the psychological and societal aspects of gender identity, and convinced the court that the defendant's expert was wrong in his assertion that "sex is not a cut-and-dried matter of chromosomes." **Ulane**, 581 F.Supp. at 825. The **Schroer** court relied on this evidence and did its own independent research. **Schroer**, 424 F. Supp.2d at 212-13. Schroer also pled in her complaint information from the leading organization for the study and treatment of gender dysphoria, the Harry Benjamin International Gender Dysphoria Association, including the formulated standards of care for the treatment of patients with gender dysphoria and the three states commonly required by doctors before sex-reassignment surgery. **Schroer**, 424 F.Supp.2d at 205. She specifically pled that she had undertaken the first of the three steps. *Id.* It is clear from Judge Robertson's opinion that this detailed pleading was critical to his order denying defendant's motion to dismiss.

Advocacy organizations, such as the ACLU LGBT & AIDS Project, can be very helpful in framing these arguments and locating qualified experts.

Tip #4: Don't Plead it Unless you Need It

■ ***When should you affirmatively plead a plaintiff's sexual orientation?***

Title VII does not prohibit discrimination on the basis of sexual orientation. *See* **Simonton v. Runyon**, 232 F.3d 33, 35 (2d Cir. 2000). It does, however, allow a claim for discrimination based on gender stereotypes, **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), and there is no prohibition against gay and lesbian plaintiffs asserting it. *See e.g.*, **EEOC v. Grief Bros. Corp.**, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004).

When bringing a gender stereotyping claim under Title VII, it is almost never a good idea to affirmatively plead or introduce evidence of a plaintiff's sexual orientation. Although courts pay lip service to the idea that sexual orientation is irrelevant to a Title VII claim, *see* **Rene**, 332 F. 3d at 1066-67; and **Bibby v. Phila. Coca Cola Bottling Co.,** 260 F.3d 257, 265 (3d Cir. 2001), pleading the plaintiff's sexual orientation can be fatal. Courts often look no further, accusing the plaintiff of trying to "bootstrap" a sexual orientation discrimination claim onto a sex discrimination claim. *See* **Dawson v. Bumble & Bumble**, 398 F.3d 211, 218-19 (2d Cir. 2005).

In cases where the plaintiff's sexual orientation is not mentioned at all, plaintiffs have had better results. *See, e.g.*, **Nichols v. Azteca Restaurant Enterprises, Inc.**, 256 F.3d 864 (9th Cir. 2001) (harassment based on co-workers' perception that plaintiff is effeminate); **Zalewski v. Overlook Hosp.** 300 N.J.Super. 202, 204, (N.J.Super.L.,1996) (upholding sex stereotyping claim, noting that "plaintiffs' co-workers did not suggest plaintiff's sexual orientation might be other than heterosexual, and there is no evidence plaintiff is homosexual or bisexual").

Tip #5: The Conduct at Work Rule

■ ***Plaintiffs should plead and prove work-related stereotype-defying conduct.***

In **Vickers v. Fairfield Medical Center**, to avoid extending the sex stereotyping theory to a plaintiff whom co-workers perceived to be gay, the court created a new rule—that the conduct defying the employer's stereotype must occur at work. 453 F.3d 757, 763 (6th Cir. 2006). The court held that, "**Price Waterhouse** focused principally on characteristics that were readily demonstrable in the work-

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place, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle." *Id.*

Tip #6: Keep Mixed Motive in the Mix

■ ***There can be more than one unlawful reason for discrimination.***

Plaintiffs can run into problems when they attempt to bring sexual orientation claims under state or local law alongside Title VII gender stereotyping claims. The solution is to plead carefully. Articulate the distinctions and similarities between the claims. Do not allow allegations and evidence of gender stereotypes to "blur into ideas about heterosexuality and homosexuality." **Dawson**, 398 F.3d 211**,** 218. Distinguish between evidence that the adverse action occurred because the employee did not conform to gender stereotypes and evidence that the employer acted out of an animus against L, G, B, or T people. If the evidence overlaps, differentiate it. A plaintiff can also plead a "perceived as" gay or lesbian claim, which can fit nicely with a gender stereotyping claim.

Tip #7: Explain what Sexual Orientation Discrimination Looks Like

■ ***Circumstantial evidence of sexual orientation discrimination has some unique characteristics.***

When bringing a claim under a statute that prohibits sexual orientation or gender identity discrimination, plaintiffs usually must rely on circumstantial evidence to prove their claim. The following cases give examples of evidence that points to sexual orientation discrimination: **Jones v. Lodge at Torrey Pines Partnership**, 147 Cal. App. 4th 475 (Cal. Ct. App. 2007); **Nichols v. Azteca Restaurant Enterprises, Inc.**, 256 F.3d 864, 870 (9th Cir. 2001); and **Doe v. Belleville**, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

Tip #8: Merely Invoking "Gender Stereotyping" Isn't Enough

■ ***Plead the supporting evidence and prove it up.***

What constitutes gender stereotyping? Just uttering it in a pleading isn't enough—a plaintiff has to support it. Although this seems to saddle plaintiffs in gender stereotyping cases with higher burdens than other discrimination plaintiffs, notice pleading doesn't seem to work.

In **Schroer**, the court dismissed the plaintiff's gender stereotyping claim because, as the court put it, she should have pled that "she ha[d] been discriminated against because of a failure to act or appear masculine or feminine enough for [her] employer," and that "[her] appearance or conduct" did not match "the employer's stereotypical perceptions." *See also,* **Dawson v. Bumble & Bumble**, 398 F.3d 211, 221 (2d Cir. 2005); **Borski,** 2006 U.S. Dist. LEXIS 89242, at 2-3 (S.D.N.Y. 2006).

To understand the type of evidence that can support a gender stereotyping claim, review **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), as well as **Smith v. City of Salem, Ohio**, 378 F.3d 566 (6th Cir. 2004), **Nichols v. Azteca Restaurant Enterprises**, 256 F.3d 864 (9th Cir. 2001), **Doe v. Belleville**, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998); **Tronetti v. TLC Healthnet Lakeshore Hosp**., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); **Doe v. United Consumer Fin. Servs.**, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001); **Cox v. Denny's, Inc**., 1999 WL 1317785 (M.D. Fla. Dec. 22, 1999); and **Zalewski v. Overlook Hosp.**, 300 N.J.Super. 202, 204 (N.J.Super. 1996).

Tip #9: All Stereotyping Isn't Alike

■ ***Make sure you (and the court) understand what kind of stereotyping occurred.***

In **Price Waterhouse**, the court recognized that two kinds of gender stereotyping could violate Title VII. "[A]n employer who acts on the basis of a belief that a woman *cannot be* aggressive, or that she *must not be*, has acted on the basis of gender." 490 U.S. at 250. Either (or both) kinds of stereotyping could be present in a claim brought by a L, G, B, or T plaintiff. Be aware of the type of stereotyping your client experienced when drafting your complaint and developing the evidence.

Tip #10: Don't Forget the Elements of the Claim

■ ***Prove an adverse employment action that was caused by the impermissible gender stereotype.***

A plaintiff cannot merely identify an impermissible gender stereotype. Harm and causation are essential to prevail.

Harm

Where there are rules that distinguish between genders, the plaintiff must allege and prove that people of the plaintiff's gender are getting the short end of the stick. For example, cases challenging gender-specific grooming codes and other rules that courts find not to disparately impact one sex—or do not impose an "unequal burden" on one sex—usually fail. *See, e.g.* **Jespersen v. Harrah's Operating Co. Inc.**, 392 F.3d 1076 (9th Cir. 2004); **Tavora v. New York Mercantile Exch.**, 101 F.3d 907 (2d Cir. 1996).

Causation

The gender stereotype has to actually cause the harm alleged. Stereotyping cases are no different than other discrimination cases in this respect. In **Lynch v. Baylor Univ. Med. Ctr.**, for example, the court dismissed the plaintiff's sex stereotyping claim because she could not establish that her non-gender-conforming appearance or behavior had any impact on the termination decision. 2006 WL 2456493 (N.D. Tex. Aug. 23, 2006).■

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