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How to Interview and Evaluate Clients With Potenial Retailiation Claims Under Title VII

(Part one of a two part article)

by Allegra l. Fishel (*afishel@ outtengolden.com*) and Cara E. Greene (*ceg@outtengolden.com*)[i]

As a plaintiff's employment lawyer, chances are that at some point someone will contact you believing that they have been the victim of unlawful retaliation at the hands of their employer or former employer (collectively referred to as "the employer" in this article). The client typically begins the telephone call or meeting by stating conclusively that they have been retaliated against—that is, their employer has taken some type of adverse action against them that impacts their employment. The average employee is convinced that it is their right as an "American" to be able to stand up to injustice and wrongdoing in the workplace—free from reprisals. It is a sobering shock to many employees that this "right" is very limited. Most employees do not understand that protection from

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Anne's Squibs

by Anne Golden (*ag@outtengolden.com*)

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 and Jennifer Liu, summer associates with Outten & Golden LLP, for help in the preparation of these squibs.

Further note: This is the last time "Anne's" Squibs will appear in the **New York Employee Advocate**. It is time to pass the torch on to someone else. If any NELA/NY member would like his or her name in lights, along with the duty to review advance sheets, the Law Journal, and other sources for interesting and useful new cases—and the privilege of celebrating member victories—please contact Rachel Geman at *rgeman@lchb.com*, or Gary Trachten at *gtrachten@kudman law.com*, and let them know.

AGE DISCRIMINATION

A former assistant dean of a college filed an age discrimination complaint with the New York State Division of Human Rights, alleging that the college had violated the state Human Rights Law when it terminated her because of her age. In a purported restructuring of the college's administrative office, an interim dean had fired three employees, two of whom were over 50, and filled their jobs—or at least their functions—with much younger employees. The administrative law judge found that the interim dean's non-competitive and subjective decision-making process and the vast disparity in age between the complainant and her comparator were both highly probative of age discrimination and awarded the complainant back pay of $125,272. The ALJ also awarded her emotional distress damages of $150,000 for the mental anguish and humiliation she suffered after the interim dean told her (in a group termination with the other two employees) that he was eliminating her position "because he could" and ordered security guards to follow and supervise her as she removed her belongings from her office. NELA/NY member Mark Humowiecki of Outten & Golden LLP represented the complainant. **Rossi v. Iona College**, No. 3-E-A-02-1254904-A (N.Y.S. Div. of Human Rts. 8/6/07).

ARBITRATION

Three unionized security officers brought an age discrimination suit against their employer and office building after the company reassigned the plaintiffs, the only employees over the age of 50, to less desirable positions. The plaintiffs, however, were covered by a collective bargaining agreement that contained a mandatory arbitration clause for discrimination claims. Defendants filed a motion to compel arbitration, which Judge Naomi Reice Buchwald denied. Citing **Rogers v. New York University**, 220 F.3d 73 (2d Cir. 2000), Judge Buchwald held that the arbitration clause in the CBA was unenforceable. On appeal, the defendants argued that **Rogers**, which held that an arbitration clause was unenforceable if it did not clearly and unmistakably waive covered workers' right to bring a federal statutory claim in federal court, did not address whether an arbitration clause with a clear and unmis-

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The NELA/NY Calendar of Events

November 7, 2007
Executive Board Meeting
3 Park Avenue – 29th Floor
(Open to members in good standing)

November 15, 2007
NELA 10th "Courageous Plaintiffs" Event
101 Club
RSVP – Shelley Leinheardt
nelany@nelany.com

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

December 12, 2007
Executive Board Meeting
3 Park Avenue – 29th Floor
(Open to members in good standing)

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

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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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*)

I was recently asked by a non-lawyer friend whether things slow down in the summer. I gave my usual "knee-jerk" response of "no." However, instead of forgetting about the question, as I usually do, I started to think a little more about this always demanding, never-ending, deadline-oriented life that we practice as plaintiffs employment lawyers. I always manage to take a summer vacation, but not without paying a large price. These "payments" can be broken into phases. The first I encounter is the getting-ready-to-go phase, which usually results in the required hectic days and late nights preparing to leave. The second is the dodging of vacation interruptions. The third is the return from vacation, which can last several weeks. In this issue's column I will attempt to provide some suggestions I have developed over the years to hopefully help improve all three phases.

Notwithstanding the difficulties involved in taking time off, I hope that we are all in agreement that it's an absolute necessity to do so. As a federal judge once told me in front of a packed courtroom of lawyers, "anyone who does this for a living for twelve months straight without a break becomes unbearable." The first hurdle to overcome is to successfully prepare for the vacation. The answer is simple: start planning for the vacation well in advance of when you intend to take it. For example, if you know that you are going to be taking time off in August, then some time in late May or early June, you can start to think down the road as to what discovery issues you may have in various cases, when things need to be done to get ready, when documents need to be reviewed, when court conferences are, etc., so that you can start moving your schedule around. If you are very flexible and spontaneous and want to take a few days off without planning for it, you may find that those aspirations are easily thwarted because of a lack of necessary planning. If you have a long-range vacation planned, which is the usual case, and you don't adequately plan for it, you may live to regret it. I have also found that planning long-term is a great way to reduce stress among family members who are looking forward to the vacation. If you don't start planning early and are hectically racing up to your departure, you may not be there mentally—and may find yourself not even physically there if you are required to leave the vacation early due to some crisis. Start letting clients, adversaries and court personnel know early on that you will not be available from x to y. This will go along way to avoiding the hectic run out the door that most of us experience. It

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Confidentiality and Nondisparagement Agreements: Is the price of peace too high?

by Margaret McIntyre *(margmac@earthlink.net)*

It is so routine for employers to demand confidentiality from an employee as a condition of settlement of the employee's legal claims that defense lawyers react with disbelief (or worse) when a plaintiff's employment lawyer indicates that her client will not agree to confidentiality. At the same time, many employees, when presented with confidentiality agreements, feel that they are being gagged or are "selling out" by agreeing not to further speak out about the injustice about which they complained. This resistance is often found even with employees who express a strong desire to sever all ties with their former employers.

Because the likelihood that the employer will demand confidentiality is so high, I raise the subject with clients very early, when I am trying to assess what the client wants and whether I believe I can help the client accomplish his or her goals. Some clients indicate that they have no interest in agreeing to confidentiality. I feel obligated to let them know that taking that position may mean we have to go all the way to trial, to publicly win rather than settle confidentially. Some cases are worth going the distance and some clients are capable of going the distance. Most people want to get on with their lives, however, and most cases have circumstances that make settlement sensible.

But is it really true that most of our clients must resign themselves to keeping mum about what happened to them? This article will look at the legal limits of confidentiality agreements, and their shadowy cousins, non-disparagement clauses. It will also explore ways to negotiate agreements that leave our clients free to help other employees experiencing discrimination, if needed, and that will still satisfy defendants that our clients are actually ending their cases.

Confidentiality Agreements May be Illegal and/or Unethical

The most stringent confidentiality agreements are ones that require the employee (and sometimes the employee's attorney) to agree never to speak about even any of the allegations made by the employee. To the extent these agreements prevent the employee from cooperating with other employees contemplating litigation against the employer, they may be criminal. *See* "Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical," Stephen Gillers, 31 *Hofstra L. Rev.* 1. Gillers makes a compelling argument that not only plaintiffs who sign such agreements but the attorneys who assist their clients with such agreements may violate federal obstruction-of-justice statutes.

Lawyers also need to be concerned with whether counseling our clients to sign overly strict confidentiality agreements violates ethical rules. New York Disciplinary Rule 2-108(B) states: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law." 22 NYCRR §1200.13(b). A lawyer may not enter into a settlement agreement not to represent or cooperate with future plaintiff's against a defendant because such an agreement would violate New York Disciplinary Rule 2-108(B). **Formal Opinion 1999-03**, The Association of the Bar of the City of New York.

An agreement that violates DR 2-108(B) is not necessarily unenforceable. Even if the act of entering into such an agreement could lead to disciplinary charges against the attorney, the agreement itself would be legally binding upon the attorney. **Feldman v. Minars**, 230 A.D.2d 356, 357, 658 N.Y.S. 614, 615 (1st Dep't 1997) (finding enforceable a settling plaintiff's law firm's agreement not to assist or encourage any parties or attorneys in any action against the settling defendant). The Court in **Feldman** reasoned that it would "appear unseemly" to allow an attorney to cite its own disciplinary rule violation to avoid the obligations undertaken as part of a freely negotiated agreement. *See also* **Bassman v. Blackstone Assocs.**, 718 N.Y.S.2d 826 (1st Dep't. 2001) (finding law firm's obligation to keep confidential the settlement amount in one case conflicted with the firm's ability to contemplate settlement strategies on behalf of subsequent plaintiffs against same defendant and thereby disqualified the law firm from representing the subsequent plaintiffs). These cases provide ample support for plaintiffs' lawyers to refuse to sign confidentiality provisions ourselves.

However, even if an attorney does not personally sign an agreement, an attorney is ethically prohibited from breaching the confidentiality to which his or her client has agreed. DR 5-108 prohibits attorneys from using the confidences or secrets of the former client except under limited circumstances. 22 NYCRR §1200.27. If our clients agree to terms that narrowly restrict their ability to discuss not just their settlements but the underlying facts of their claims, then we as attorneys may be, in effect, restricted from using information learned in the first client's case in another case where the information would be of use, i.e., against the same defendant. To that extent, the agreements would be directly frustrating subsequent employees of the same employer from opposing discrimination.

Therefore, it seems critical that we counsel our clients to agree to only keep the settlement agreement itself confidential, and *not* agree to never speak about the underlying circumstances of their claims.

Confidentiality Agreements May Not Limit Investigations of Other Civil Rights Violations

An agreement that restricts an employee from ever speaking about her

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experience of discrimination may not be enforceable. An agreement that materially interferes with communication between an employee and the United States Equal Employment Opportunity Commission is void as against public policy. **EEOC v. Astra, Inc.**, 94 F.3d 738 (1st Cir. 1996). *See also* **EEOC v. Morgan Stanley & Co., Inc.**, 2002 U.S. Dist. LEXIS 17484 (S.D.N.Y. 2002)(agreements that prevent employees from speaking to the EEOC violate public policy). In **Astra**, the First Circuit upheld an injunction that banned Astra from either introducing or enforcing the non-assistance provisions of settlement agreements entered into between Astra and employees other than the plaintiffs in the sexual harassment case before the court. 94 F.3d at 744-45. Although the EEOC has the power to issue subpoenas to compel testimony, the court reasoned that the agency's subpoena power was not enough to protect the public interest and ensure the "the free flow of information between victims of harassment and the agency entrusted with righting the wrongs inflicted upon them." Id at 745.

Astra did not decide the question whether a provision that prohibited settling employees from aiding other employees, or their attorneys, as opposed to aiding the EEOC, is also void. **Astra**, 94 F.3d at 741. The distinction is important because most attorneys want to know what the potential witnesses will say even before they decide to represent a client seeking to file an EEOC charge. Other decisions have held that agreements that restrict one party's ability to reveal information that is not otherwise confidential are against public policy. "Absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." **Sparks v. Seltzer**, 2006 U.S. Dist. LEXIS 61398 (E.D.N.Y.) (quoting **Chambers v. Capital Cities/ABC**, 159 F.R.D. 441, 444 (S.D.N.Y. 1995)).

Thus, exceptions for communications in the context of an EEOC investigation or "as required by law" are indispensable to confidentiality agreements. Defense lawyers may argue that employees have the right to testify or cooperate in an EEOC investigation even if that right is not spelled out in the settlement agreement. Nonetheless, putting the right in writing makes it more likely that the client will recall that she has the right to speak to the EEOC if an investigator later calls her with questions and less likely that the client will feel she has abandoned other employees when she settles her case.

Nondisparagement Clauses

We as plaintiffs' lawyers may assume that our clients' allegations are true, and that suppressing those allegations in any way is contrary to justice. Employers, on the other hand, often hotly dispute our clients' allegations, and argue that they are willing to settle a case solely to avoid the aggravation and expense of litigation. They say that they want to know that the dispute is actually over if they settle a case, and this seems reasonable. Yes, we could argue that the employer could best protect itself by taking strong steps to prevent discrimination in the future. But it's tough to argue with the contention that if the employee is going to continue to publicly say that the employer discriminated, the employer would rather litigate the case to vindicate its good name.

Thus, if an employer agrees to limit what the employee will keep confidential to the terms of the settlement agreement only, the employer is likely to also want a non-disparagement clause. This would say something to the effect of "Plaintiff agrees not to disparage defendant in any way by making statements regarding one another's business practices, integrity, or professional competence that would tend to cast either of them in a negative light."

Exactly what is meant by the term "nondisparagement" is not often clear. "Black's Law Dictionary as relevant here defines "disparage" as 'to unjustly discredit or detract from the reputation of (another's property, product, or business)" and "disparagement" as "[a] false and injurious statement that discredits or detracts from the reputation of another's property, product, or business.'" **Kamfar v. New World Restaurant Group, Inc.**, 347 F. Supp. 2d 38, 49, n. 55 (S.D.N.Y. 2004) (quoting "Black's Law Dictionary" 483 (7th ed. 1999). The court notes that the definition raises the question whether a statement needs to be inaccurate to be actionable, as with defamation, but does not decide that issue.

Specific facts about the terms and conditions of the employee's employment are not necessarily disparaging in and of themselves. "I worked for Employer X for 10 and was denied promotion on three separate occasions." That statement could be established as factual as well as potentially relevant to a prospective plaintiff with a failure-to-promote discrimination claim against the same employer. Thus, clients who sign nondisparagement agreements should be able to speak about neutral, truthful facts that took place during their employment, even if they may not speak about what they believe were the motivations behind any of the facts.

However, to repeat the allegation that the employer discriminated may very well violate the nondisparagement agreement, certainly it would from the perspective of the employer who considers the allegation to be false. The concept of using truth as a defense, should an employer later sue an employee for violation of a nondisparagement clause, does not necessarily help. That would raise the question of how to prove the truth of the statement, "My previous employer discriminated against me." To try to prove "truth" would mean effectively litigating the underlying discrimination claim that was previously settled, which is what both sides hope to avoid by settling a case.

Still, if someone agrees to nondisparagement, and yet is called to testify in a subsequent lawsuit by another employee of the same defendant, that person can freely testify at deposition or trial regardless of the agreement. Statements made in the course of judicial proceedings are absolutely privileged, even if purportedly made in violation of a confidentiality agreement, if they may be considered pertinent to the litigation. **Denise Rich Songs, Inc. v. Hester**, 5 Misc. 3d 1013A; 798 N.Y.S.2d 708 (NY Cty. 2004)(citing **Arts4All, Ltd v. Hancock**, 5 A.D.3d 106, 108, 773 N.Y.S.2d 348 (1st Dept 2004)). ■

Section 1983 for Beginners

by Mariann Meier Wang (*mwang@ecbalaw.com*)

42 U.S.C. § 1983 ("Section 1983") can be a powerful tool for fighting abuse by state actors. Quickly passed with little debate and no amendments, it came into being in 1871 in response to the atrocities being committed by the Ku Klux Klan. Section 1983 allows for enforcement of *Constitutional and federal* statutory rights against *state and municipal officials and municipalities*. (The same type of action against federal actors may be brought pursuant to the judicially-created **Bivens** action. **Bivens v. Six Unknown Fed. Narcotics Agents**, 403 U.S. 388 (1971)). Section 1983 actions are as wide-ranging as constitutional and federal individual rights are—they encompass everything from police abuse cases, prisoners' rights cases, First Amendment cases, and of course cases enforcing rights under a variety of federal laws.

Although the law and procedure attendant to Section 1983 litigation today is complex and sometimes intimidating, the impact of such cases can be profound—successful actions not only serve to vindicate an individual's rights but also to deter state actors from further abusing the rights of others in a similar manner, whether through injunctive relief or high damage awards. Indeed, the Supreme Court has recognized precisely these dual, complementary purposes in allowing for an award of compensatory damages under Section 1983. **Carey v. Piphus**, 435 U.S. 247, 256-57 (1978). And precisely to ensure that there is an incentive for lawyers to bring such actions and accomplish these purposes, successful Section 1983 plaintiffs are awarded their attorneys' fees. 42 U.S.C. § 1988. (There is no fee shifting in a **Bivens** action.) Here are some tips for beginner users.

When to Sue

The limitations period for actions under Section 1983 is determined by reference to the most analogous statute of limitations of the state in which the action is brought. *See* **Okure v. Owens,** 816 F.2d 45, 47 (2d Cir. 1987). Because Section 1983 actions are best characterized as general personal injury actions, sounding in tort, the applicable statute in New York is C.P.L.R. § 214(5), which establishes a three-year limitations period for general claims of personal injury. *Id.* at 49. While this allows a plaintiff a longer period in which to bring an action based on facts that give rise to intentional torts—which New York law requires to be brought within one year under CPLR § 215(3)—ideally the pendant state law claims for precisely such torts are pleaded as well. In cases where a police officer assaults a civilian, for example, the facts give rise both to the state law claim for assault and battery as well as the Fourth Amendment claim based on excessive force. In short, to the extent pendant state claims are also to be pleaded (including, for example state constitutional claims), beware of shorter limitations times that may be applicable, and especially the need to file a Notice of Claim within 90 days of the incident. N.Y. Gen. Mun. Law § 50-e. Finally, to the extent that you are representing an inmate or prisoner, be aware of the possibility that the Prison Litigation Reform Act may apply (the restrictive act and/or at least certain restrictions within the act, may not apply if the plaintiff is not incarcerated at the time she files the action, **Greig v. Goord,** 169 F.3d 165, 167 (2d Cir. 1999)), and imposes numerous hurdles, including an exhaustion requirement, and limitations on certain types of damages and attorneys fees.

Who to Sue

State actors/state action. Section 1983 provides that redress may be sought against persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State. . . ." 42 U.S.C. § 1983. The Supreme Court has held that satisfying this "under color of law" provision has two elements: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible;" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." **Lugar v. Edmondson Oil Co.**, 457 U.S. 922, 937 (1982). For the most part, these two prongs are easily satisfied when the defendant commits the wrongful act in the course of exercising his duties as a state or municipal official or employee. Moreover, where a private actor or entity contracts with a state or municipality to fulfill certain services or functions, one can often still satisfy these prongs as long as they are clothed with authority of state law or if the private actors are willful participants in joint activity with the state/municipality and its agents. While merely receiving funding in exchange for the provision of certain services may not satisfy this requirement, if the private entity is afforded special powers or authority from the state or municipality, for example, you may then successfully sue that entity under Section 1983. *See* **United States v. Stevens**, 601 F.2d 1075 (9th Cir. 1979) (federal regulation requiring airlines to search luggage makes persons doing search in accordance with regulations state actors); **Goichman v. Rheuban Motors, Inc.**, 682 F.2d 1321 (9th Cir. 1982)(private towing company tows away car on police orders, state action exists); **Payton v. Rush-Presbyterian-St. Lukes Medical Center**, 184 F.3d 623 (7th Cir. 1999)(special security guards ordinance gave private security guards same police powers of regular police patrol in areas where they operate; must be investigated and licensed by city; considered state actors). Discovery may be necessary to determine the precise contours of the relationship between the state/municipality and private person or entity before this prong of acting "under color of law" is fully satisfied.

Individual Capacity/Money Damage Suits: In order to obtain money damages, you must generally sue specific state or municipal officers or employees in their *individual capacities*, and the better prac-

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tice is to expressly mention that when listing the individuals as defendants in your pleadings. **Cf. Rodriguez v. Phillips**, 66 F.3d 470, 482 (2d Cir. 1995)(indicating that when it is not expressly mentioned, the course of proceedings generally clarifies it). Suing someone in their individual capacity means that the plaintiff seeks to hold the defendant personally liable for the unlawful actions he took while exercising his state or local functions, and requires a showing of some personal involvement in the violation of your client's rights. The personal involvement need not be direct. A supervisor, for instance, can also be "personally involved" for purposes of individual capacity suits and thus money damages if "(1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event." **Spencer v. Doe**, 139 F.3d 107, 112 (2d Cir. 1998)(citing **Williams v. Smith**, 319 F.2d 319, 323-24 (2d Cir. 1986)). And, because law enforcement officers have an affirmative duty to protect civilians from constitutional violations inflicted in their presences, bystander police, security or correctional officers can be held liable for failing to intervene if there was "a realistic opportunity to intervene to prevent the harm from occurring." **Anderson v. Brannen**, 17 F.3d 552, 557 (2d Cir. 1994).

Although you may have concern that the culpable individuals or supervisors will not have deep pockets to pay the ultimate damages award, municipalities and states generally arrange to indemnify their employees for such awards. Defendants sued in their individual capacities often do, however, invoke the affirmative defense of qualified immunity (a defense that may *not* be invoked by any defendant sued solely in his or its official capacity)—a complex and sometimes confusing doctrine that effectively defeats claims if the underlying conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. **Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982). This immunity is "from suit rather than a mere defense to liability." **Mitchell v. Forsyth,** 472 U.S. 511, 526 (1985). While the doctrine of qualified immunity merits its own column (or treatise), the basic concept is that if the right you are enforcing is not well-established at the time the conduct occurred, you are unlikely to get money damages.

Finally, it is important to note that you can also obtain money damages by suing a municipality directly (and the municipality cannot invoke qualified immunity since it cannot be sued individually) but only if you are able to establish a **Monell** claim—that is, that the violation of your rights was the product of a policy or custom of the city, a difficult endeavor unless, generally speak-

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ing, the policy is written or the practice pervasive. **Monell v. Dept. of Social Services of the City of New York,** 436 U.S. 659 (1978); **Pembaur v. Cincinnati**, 475 U.S.469 (1986).

Official Capacity/Injunctive Relief Suits

In order to obtain injunctive relief, you must be sure to sue those individuals in charge of enforcing the unconstitutional policy or practice in their official capacities, and be explicit about that as well, in addition to satisfying **Monell**. (There is no reason not to simultaneously sue the same defendants both in their individual and official capacities.) Although Eleventh Amendment immunity prevents you from suing state governments or state agencies directly, **Pennhurst State School & Hops. v. Halderman**, 465 U.S. 89 (1984); **Quern v. Jordan**, 440 U.S. 332, 345 (1979), you may still obtain an injunction by suing specific state officials in their official capacity who are in charge of enforcing the policy or practice that violates the Constitution or federal law. In other words, even if you cannot sue the State of New York or the New York State Department of Corrections, you can sue the governor or the individual head of corrections in their official capacity to obtain effective injunctive relief. Significantly, you may also sue political subdivisions of the state—i.e., counties or municipalities—which have no Eleventh Amendment protection from suit in federal court. **Northern Insurance Co. of New York v. Chatham County**, 127 S.Ct. 1689 (2006); **Moore v. County of Alameda**, 411 U.S. 693, 717-21 (1973). ■

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will also go along way toward reducing the angst that will surely come while you are away.

An equally critical challenge is that of how to handle yourself *during the vacation* so that the time off does not turn into a working vacation such that the only difference in how you spend your time is that the site of the work has changed. In this era of e-mail, voicemail, laptops, BlackBerrys, and other electronic devices (some that are being developed even as we speak), it is certainly possible to spend the entire vacation working.

While I realize that many of us bring these devices along and spend great amounts of time "working," I have a few suggestions that may be used which can minimize the work time and maximize the fun time. One suggestion, which I learned from someone when I was doing my Stress Management Workshop for Lawyers program is what I call the midnight call to the office. This consists of leaving voicemails for anyone and everyone who may be covering various matters. When this call takes place and instructions are given, the recipient is advised to leave a voicemail message for the caller on his or her extension, so that when he/she calls the next night, the vacationer can pick up messages and then communicate, via voicemail, what needs to done to the others who are responsible. This way, there is no human communication between the person on vacation and the people in the office, while the work is getting done. If, of course, you are a solo practitioner, which many of our members are, this becomes more difficult. If there is someone who is looking after the store you can similarly exchange ideas with them in a non-human contact way. While e-mail may accomplish the same thing, the problem may be that the back and forth discourse may take up hours of your time that you should be using to relax. Therefore, if you are going to e-mail or even take the brave step to actually call someone and speak to them live, this probably should be done at a specific time of the day, either very early in the day or very late in the evening, so that the full day is used for the purpose for which it was intended, *i.e.*, enjoying yourself. Don't let yourself be overrun with work unless that is something you want to happen. If not, be creative in finding ways to keep up while still "vacationing."

The final and probably most important phase of taking a vacation is the return to work. There is no way to make this transition easy but here are a few tips. First and foremost do not schedule (if you can help it) any crucial activity the first few days back, *i.e.* argument of a motion, deposition, etc. If you do you will likely have to work on vacation and distract yourself from relaxation. Sometimes this can't be avoided but at last don't do it to yourself by voluntarily agreeing to, for example, a deposition.

Secondly, notify clients, adversaries, and/or court personnel that your vacation will end after you actually return from your trip. For example, if you are able to return to the office on a Monday, indicate that your return from vacation will be on either Tuesday or Wednesday, which will give you an opportunity to come into the office (during the last day or two of your vacation) and go through e-mail, voicemail, and snail mail. This will enable you to get up to speed before phone calls and other means of communication begin. Hopefully, you will have the opportunity to get organized and re-enter the atmosphere in a less convoluted way.

Finally, as you catch up, don't feel you must do everything all at once. Prioritize your tasks and try to ease into the deluge as gradually as possible. Overall, the important thing is to take a vacation and actually rest, relax and refresh. If last minute vacation planning, encountering for constant interruption while away, and experiencing a hectic return makes your vacation more stressful than working, then your vacation actually becomes more of a burden then a help. Don't let this happen to you! ■

NELA-NY Employment Law Crossword "BETTER AND BETTER"

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 "FRCP" would be (4).

ACROSS

1. Petitioner in wrongly-decided 2007 Supreme Court employment law case. (9)
19. "____ and all" (typical discovery request). (3)
24. You will face a 12(b)(6) motion if you are missing one of these. (7)
31. Title VII remedy. (5, 3)
41. Common plea (rhymes with a candy!). (4)
51. Type of Poem Keats often wrote. (plural). (4)
57. Fonda role in 1997 film. (4)
63. Exam you took. (3)
67. Abbreviation used by those who measure availability of protected categories in local area. (3)
76. Tall bird. (3)
80. My French friend. (3)
84. Habeas corpus is one example. (4)
89. "_____ wishes were horses then beggars would ride." (2)
91. Informal, potentially problematic type of promotion system: "____ and a wink." (3)
97. Third person plural pronoun. (4)
102. Large bank responsible for annoying ads about happiness (abbreviation). (4)
106. Puccini opera. (5)
114. Can be fair or square. (4)
121. Often occurs between opposing parties. (6)
132. Said in incredulous tone to Brute. (2,2)
138. Cuomo has this job now. (2)
151. Type of termination or notice. (12)
170. Cognito __ sum. (4)
175. Neighbor to the north. (6)
182. Math after trig. and before diff.eqs. (4)
188. If your plaintiff is this, it adds to the things you need to review for relevant material. (8)
200. ___ vires. (5)
208. Protected category in some limited circumstances. (3)
212. Required plaintiff's showing in certain Title VII cases. (5,5)
223. Either/___. (2)

DOWN

1. Very short biography? (4, 8)
4. To forbid. (3)
5. Type of surgeon (abbr.). (3)
6. Bad to have this in your brief. (4)
9. "In __." (2)
11. There are X of these amendments in the original Bill of Rights. (3)
13. "___ is other people." (4)
27. Party in seminal early FLSA Supreme Court case. (5,7)
29. Name of play from which the quote in 13 down comes. (2,4)
33. Your client might get asked in a deposition if she complained to this person. (9)
36. __ Boy Sandwich (2)
37. One answer to an RFA. (5)
38. One answer to a cross examination question. (3)
54. Was cut with a tool. (5)
65. City in Morocco where the King lives. (5)
77. Being this might get you protected, doing this might get you fired. (4)
85. Alvy Singer was nonplussed when Annie Hall did not order a pastrami sandwich on this type of bread. (3)
90. Duty imposed by ERISA. (9)
109. Relaxing but sin-taxing (abbr./plural). (4)
142. Type of shot you don't want to learn about for the first time in your client's deposition. (3)
145. Has adverse impact (some of us argue) to use this as a basis for hiring decisions. (4)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
16	17	18	19	20	21	22	2 3	24	25	26	27	28	29	30
31	32	33	34	35	36	37	38	39	40	41	42	43	44	45
46	47	48	49	50	51	52	53	54	55	56	57	58	59	60
61	62	63	64	65	66	67	68	69	70	71	72	73	74	75
76	77	78	79	80	81	82	83	84	85	86	87	88	89	90
91	92	93	94	95	96	97	98	99	100	101	102	103	104	105
106	107	108	109	110	111	112	113	114	115	116	117	118	119	120
121	122	123	124	125	126	127	128	129	130	131	132	133	134	135
136	137	138	139	140	141	142	143	144	145	146	147	148	149	150
151	152	153	154	155	156	157	158	159	160	161	162	163	164	165
166	167	168	169	170	171	172	173	174	175	176	177	178	179	180
181	182	183	184	185	186	187	188	189	190	191	192	193	194	195
196	197	198	199	200	201	202	203	204	205	206	207	208	209	210
211	212	213	214	215	216	217	218	219	220	221	222	223	224	225

152. Organization responsible for ensuring that those who do business with the federal government comply with nondiscrimination and affirmative action. (5)

155. Word common in Rule 45 documents. (5)

156. Four properties in the game referenced in 178 down are these. (2)

158. Former employees are entitled to maintain health benefits pursuant to this. (5)

161. Common Rule 34 objection. (5)

178. Where you are in beginning of game referenced in 156 down. (2,2)

179. Salutation used in legal correspondence that is about as authentically meant as “very truly yours.” (4)

189. The __ operon is responsible for the transport and metabolism of lactose in some organisms. Is studied in college biology courses for reasons this author, who took such courses, no longer recalls. (3)

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takable waiver is enforceable. The question had also been left open by the U.S. Supreme Court in **Wright v. Universal Maritime Service Corp.**, 525 U.S. 70 (U.S. 1998). The Second Circuit Court of Appeals rejected the employers' argument and endorsed the broader principle that *any* arbitration provision in a CBA that waives such rights is unenforceable, even if the waiver is clear and unmistakable. **Pyett v. Pennsylvania Building Co.**, 498 F.3d 88 (2d Cir. 2007).

ATTORNEYS' FEES

After trial of an age discrimination and retaliation case against a Dutch bank, the jury returned a verdict of $2.2 million in back pay and $300,000 in punitive damages on the retaliation claim, but found for the bank on the age discrimination claim. The plaintiff applied for fees and for prejudgment interest on the back pay award, and Judge Richard J. Holwell (S.D.N.Y.) rejected most of the defendants' challenges to the applications. The judge found that the rate of $550 and $385 per hour was not inappropriate for the lead attorney, NELA/NY member Murray Schwartz, and his partner Davida Perry, respectively, but did substantially reduce the rates of both attorneys (to $350 and $225) on the ground that "plaintiff was represented by a two-partner team at trial." The court declined to find the number of hours spent on the complaint (150 hours) was excessive and rejected the argument that the plaintiff had achieved only "limited success." Finally the court granted the prejudgment interesting at New York's statutory 9% rate, since the case was brought under the New York City Human Rights Law and the court had diversity jurisdiction. Total fees awarded were $606,225, and the prejudgment interest came to $557,500. Congratulations, Murray! **Insinga v. Cooperative Centrale Raiffeisen Boerenleenbank B.A.**, 478 F. Supp. 2d 508 (S.D.N.Y. 2007).

CONTRACTS

Employee Choice Doctrine

The Second Circuit Court of Appeals certified to the New York State Court of Appeals the question of whether the federal standard for constructive discharge applies in examining whether an employee voluntarily left employment for purposes of the "employee choice doctrine." The state Court of Appeals held that it is. An individual was hired as senior vice-president and head of domestic equities and signed a non-compete agreement under which he would lose his annual bonuses if he left before the three-year vesting period. He left before any of his yearly bonuses vested, but claimed that he was forced to resign because the company reduced his job responsibilities by shrinking his portfolio from $7.5 billion to $1.5 billion. Dismissing his claim under rule 12(c), the district judge (George B. Daniels, S.D.N.Y.) applied the federal constructive discharge standard, *i.e.*, the working conditions must have been so intolerable that a reasonable person would be compelled to leave. The court held that a change in job responsibilities does not meet this standard. The New York State Court of Appeals reviewed the employee choice doctrine and affirmed the district court's decision. While covenants not to compete are generally disfavored, New York courts permit them when an employer conditions receipt of post-employment benefits upon compliance with them. In effect, if the employee is given a choice of preserving his contractual benefits by refraining from competition or forfeiting those rights by competing, the court presumes that the employee is making an informed choice and there is no unreasonable restraint on the employee's freedom to earn a living. If an employer terminates the employee without cause, however, the covenant lacks mutuality and is unenforceable. Thus, the termination's voluntariness is the central inquiry. By applying the federal constructive discharge standard, the employee still has a "choice," and the employment agreement is binding, as long as the employer's conduct is not intentionally intolerable. **Morris v. Schroder Capital Management Int'l**, 7 N.Y.3d 616 (N.Y. 2006).

Judge Shira Scheindlin (S.D.N.Y.) visited the employee choice doctrine five months after **Morris** and considered whether a forfeiture provision is necessary for the doctrine to apply. The plaintiff belonged to a marine insurance partnership in Turkey until the group entered into an employment agreement with the defendant. The defendant gave the partners annual salaries, bonuses, and a revenue-sharing structure in exchange for the partnership's client roster and a twelve-month covenant not to compete. When the plaintiff's partners decided to leave the defendant's employ, bringing an end to the employment agreement, the plaintiff sought a declaratory judgment that the noncompete was unenforceable so that he could solicit old clients. The court held that the plaintiff had a choice—to return $565,000 earned through the revenue-sharing structure and be free to compete, or keep the money and remain subject to the non-compete. He decided to keep the money but filed an interlocutory appeal asserting that the employee choice doctrine did not apply because there was no forfeiture provision with respect to benefits already paid. Judge Scheindlin held that while a forfeiture clause is usually present in cases applying the employee choice doctrine, nothing in the case law or any statute precludes the application of the doctrine in its absence. The choice that triggered the application of the doctrine was whether the employee "knew full well what the consequences of his decision to violate the non-compete would be." Because the plaintiff could choose between keeping the money and competing, the "plaintiff was able to exercise precisely the choice contemplated by the doctrine." **Tasciyan v. Marsh USA, Inc**., 2007 U.S. Dist. LEXIS 23001, 2007 WL 950091 (S.D.N.Y. 2007).

DEFAMATION

NASD Form U-5

The New York State Court of Appeals decided an issue that had been certified to it by the U.S. Court of Appeals for the Second Circuit, and decided it squarely against employees and on grounds that—at least among plaintiffs' lawyers—have been widely

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criticized and that diverge from most prior caselaw. The issue was whether statements made on a Form U-5, which an NASD member firm must file with the NASD within 30 days of the end of employment of a registered representative, are protected from defamation claims by an absolute or a qualified privilege. The employer must explain the reason for the end of the individual's employment, along with reporting whether the individual has been the subject of customer complaints, an internal investigation concerning violation of investment-related rules, or criminal charges. The U-5 is filed electronically and is available to prospective employers and the public. Obviously, if false and malicious statements are made by a former employer, they can seriously harm a person's future career in the financial services industry. The Court of Appeals, buying the former employer's arguments in the case before it, held that the filing of the U-5 constituted a preliminary step in a quasi-judicial process and thus that statements made on it were absolutely privileged. It did not discuss whether a person who was the subject of an unfavorable Form U-5 because of discrimination or retaliation still had a claim under anti-discrimination laws, so it seems that in such cases, the person may not be without a remedy. **Rosenberg v. Metlife, Inc**., 8 N.Y. 3d 359 (N.Y. 2007).

DISCOVERY

Immigration Status

In an action under the Fair Labor Standards Act and the New York State Labor Law to recover unpaid overtime wages, a plaintiff asked the court to issue a protective order barring discovery of his immigration status, Social Security number, and authorization to work in the United States. His plaintiff's former employer opposed the request, claiming that the information was relevant to his overtime claims and to his credibility. Magistrate Judge Ronald Ellis granted the protective order. Even if the information were relevant, which the court found was not the case, the danger of chilling undocumented employees' reports of employer misconduct by requiring disclosure of the information (with the danger of deportation if the employee was undocumented) far outweighed its probative value. **Rengifo v. Erevos Enterprises Inc.,** 2007 U.S. Dist. LEXIS 46455, 2007 WL 894376 (S.D.N.Y. 2007).

ETHICS

Contact with Ex-Employee of Represented Company

The New York State Court of Appeals had occasion to review the issue of an attorney's contact with a former employee of another party when two companies had a dispute over the breakup of a joint venture, an Internet brokerage service. One of the companies placed its EVP and CEO on leave before his deposition, then notified its adversary that the witness was no longer under its control and would have to be subpoenaed. Then it terminated the witness. Instead of issuing a subpoena, the attorney for the opposing party interviewed the former officer, and his ex-employer moved to disqualify its opponent's counsel. But before conducting the interview, the attorney had instructed the witness not to disclose any privileged or confidential information and not to answer any questions that would lead to such disclosures. The trial court granted the motion to disqualify, citing the appearance of impropriety and the risk of inadvertent disclosure of privileged information, but the Appellate Division, First Department, unanimously reversed the decision, and the Court of Appeals agreed. The Court of Appeals held that the attorney had done everything he had to do to comply with ethical rules, and there was no evidence of improper disclosure. NELA/NY member Darnley Stewart wrote an *amicus curiae* brief on behalf of NELA/NY. **Muriel Siebert & Co. v. Intuit Inc**., 8 N.Y. 3d 506 (N.Y. 2007).

FAIR LABOR STANDARDS ACT

Punitive Damages

Judge Samuel Conti (S.D.N.Y.) has determined that punitive damages are available to a plaintiff suing for retaliation under the FLSA (Section 216(b)). The plaintiff had been suspended and then discharged, allegedly in retaliation for asserting his rights under the FLSA and the state Labor Law. The jury awarded him punitive damages but no compensatory damages. The Second Circuit Court of appeals has not ruled on the availability of punitive damages for a retaliation claim under §216(b) of the FLSA. The court found persuasive a Seventh Circuit case that in turn relied on the legislative history of the amendment to the damages section of the FLSA, which does not limit the types of damages available. **Sines v. Service Corp. Int'l**, 2006 U.S. Dist. LEXIS 82164, 2006 WL 3247663 (S.D.N.Y. 2006).

NEW YORK STATE, CITY HUMAN RIGHTS LAWS

Jurisdiction

A woman who worked out of her apartment in New York City, when she was not traveling, and who alleged that she was treated as a "girl Friday" (unlike the men at her level) instead of getting work appropriate to the level she had been hired at, sued, claiming gender discrimination and retaliation. She objected to being asked, for example, to update mailing lists, take notes at steering committee meetings, and type up minutes. Shortly after she complained to her manager and the Vice President of HR, she alleged, she was fired. She asserted that she filed a questionnaire and then a charge of discrimination with the EEOC, although the EEOC had no record of a charge prior to one that she filed 348 days after her termination. After she sued, the corporate and individual defendants (the latter were named under the New York State and City Human Rights Laws) moved for summary judgment. Judge Laura Taylor Swain (S.D.N.Y.) held that the questionnaire that the plaintiff claimed to have sent contained enough information to serve as a charge, and whether it was sent was a genuine issue of material fact that could not be resolved by summary judgment. The defendants' motion to strike her expert report on gender stereotyping was also denied,

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although the retaliation claims were dismissed because the plaintiff had never explicitly said she believed she was being discriminated against because of her gender. The court declined to dismiss the state and city law claims against most of the defendants, because the plaintiff had worked out of her home in New York City, and the defendants had communicated with her there, including giving her assignments that she claimed were discriminatory. The alleged discriminatory conduct, "though originating outside of the city," said the court, "affected [the plaintiff] in New York City, and thus may form the basis of a cause of action under NYCHRL." The plaintiff was represented by NELA/NY member John A. Beranbaum. **International Healthcare Exchange, Inc. v. Global Healthcare Exchange, LLC**, 470 F. Supp. 2d 345 (S.D.N.Y. 2007).

PROCEDURE

Statute of Limitations: 180 or 300 days in Connecticut?

A former employee of the Connecticut Commission on Human Rights and Opportunities, discharged for fraudulent time cards and thus "stealing state time," waited a little too long to file a charge with the EEOC. The district court dismissed her complaint in part because she had not proved that a work-sharing agreement between the CCHRO and the EEOC was in effect when she filed her charge, more than 180 (but fewer than 300) days after she had been notified that she would be discharged. The Second Circuit Court of Appeals (Amalya Kearse, J., joined by Joseph McLaughlin and Robert Sack, JJ.) affirmed, noting that the plaintiff had not argued the existence of a work-sharing agreement below, and concluding that the argument had been waived. (She had argued only that the 180 days should be calculated from the effective date rather than the date she received notice of her termination.) Although the question of the work-sharing agreement became an issue only because it was raised by the State, the Court of Appeals put the burden of proof on the plaintiff and refused to take judicial notice that such agreements are standard or commonly entered into. It would be smart for NELA/NY members to keep up-to-date copies of the agreement between the EEOC's New York District Office and the New York State Division of Human Rights on file, preferably with proof of authenticity if it can be obtained. **Bogle-Assegai v. State of Connecticut**, 470 F.3d 498 (2d Cir. 2006).

RESTRICTIVE COVENANTS

See **Morris v. Schroder Capital Management Intl.** and **Tasciyan v. Marsh USA, Inc.**, discussed under "Contract."

SUMMARY JUDGMENT

Age Discrimination and Retaliation

Judge George B. Daniels (S.D.N.Y.) was unconvinced that two waitresses, age 79 and 61, stated a case by alleging that their managers gave them worse assignments than the younger waitresses and made remarks like "Drop dead," "Retire early," and "Take off your wig." The defendants moved to dismiss without answering the complaint, and the court granted the motion and denied the plaintiffs' motion to amend the complaint. The court considered the allegations in the original complaint either time-barred (under the ADEA and/or the New York State and City Human Rights Laws) or insufficient to state a claim. The Second Circuit Court of Appeals, in an opinion by Judge Timothy C. Stanceu (U.S. Court of Int'l Trade, sitting by designation, joined by Judges Amalya Kearse and Robert Sack), reversed the decision in part. The court of appeals held that the plaintiffs had shown enough for some of their claims to survive, because not all the allegations were untimely and they had shown enough to be entitled to discovery. "At the pleading stage," the court said, "… plaintiffs need not plead a *prima facie* case …, so long as they provide in the complaint a short and plain statement of the claim …." **Kassner v. Second Avenue Delicatessen Inc**., 496 F.3d 229 (2d Cir. 2007).

Pregnancy Discrimination

A former spokesperson for Hennes & Mauritz, the Swedish fashion retail chain, had received excellent reviews and raises, until she was fired in her tenth week of maternity leave. She sued, stating claims of discrimination based upon pregnancy, familial status, and national origin in violation of the New York State and City Human Rights Laws. The company moved for summary judgment, claiming that it had terminated her because she had taken $11 worth of sample garments from the corporate office without immediately paying for them. Evidence showed, however, that employees were allowed to purchase sample items at nominal prices, and that it was company practice for employees to take items and pay for them later. Justice Rolando Acosta (Sup. Ct. N.Y. Cty.) denied the company's motion, finding that the plaintiff had established a triable issue of fact as to whether the defendant's proffered non-discriminatory reason for her termination was pretextual. NELA/NY member Patrick DeLince represented the plaintiff. **Towey v. H & M Hennes & Mauritz L.P.**, 2007 N.Y. Misc. LEXIS 5996 (N.Y. Misc. 2007).

Retaliation

When a woman applied for a job as a police officer with a city in Arizona, she got "the thumbs up"—until a background check revealed that she had had an employment dispute with another police department and had left that job as part of a settlement agreement; she had also been involved in other civil proceedings and had filed a workers' compensation claim and a Labor Board proceeding. Her application was rejected because of her litigation history but then conditionally accepted, whereupon she failed the psychological evaluation given by the department's psychologist and was again rejected. She filed an EEOC charge and then a lawsuit under the ADA, Title VII, and Arizona law. When the district court dismissed the complaint, she appealed. Unfortunately, as part of her employment application, she had signed a waiver of "any and all possible causes of legal action … for any statements, acts, or omissions in the course of the investigation into [her] background, employment history, health,

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family, personal habits and reputation … and [all] causes of action to the extent that the … investigation (for purposes of evaluating [her] suitability for employment) may violate or infringe upon the[ ] aforementioned rights and causes of action." Without ever addressing the validity of a purported waiver of future claims—*i.e.*, a blank check for the employer to violate the plaintiff's rights and the law—the Ninth Circuit Court of Appeals painstakingly parsed the language of the waiver and determined that it did not cover her Title VII claim. However, the court said that circumstantial evidence of pretext "must be 'specific' and 'substantial' to create a genuine issue of material fact." Although she had been told that she was a "legal risk," an apparent reference to her prior EEOC charge, her informant had "clarified" at his deposition "that his comments were 'complete assumptions and guessing.'" The initial rejection of her application because of her prior litigation also proved nothing, said the court, since she was then offered the job and rejected again purportedly for a different reason. Accordingly, the court said, she had failed to show a genuine issue of material fact, and the dismissal of all her claims was affirmed. **Nilsson v. City of Mesa**, — F3d. — , 2007 U.S. App. LEXIS 21912, 2007 WL 2669788, 101 FEP Cases 901 (9th Cir. 2007).

Sexual Harassment

A female court officer for the New York State Unified Court System told a co-worker, who was the EEO Liaison at their location, that a male co-worker had been sexually harassing her. The plaintiff did not ask the EEO Liaison to report the harassment, and she did not. When another individual replaced the first as EEO Liaison, the plaintiff told him that she wanted to file a formal complaint, and after an investigation, the harasser was formally charged, resulting in a disciplinary hearing presided over by an official of the employer. But the plaintiff was unable to appear and submit to cross-examination for medical reasons, and the charges against the harasser were dropped. The plaintiff sued the UCS and several individuals, and Judge Loretta Preska (S.D.N.Y.) granted summary judgment with respect to all the defendants and all the claims—some (under the New York State and City Human Rights Law) on Eleventh Amendment immunity grounds, and others based on the affirmative defense created in **Faragher v. City of Boca Raton**, 524 U.S. 775 (1998) and **Burlington Industries v. Ellerth**, 524 U.S. 742 (1998). Unfortunately, the court appears to have drawn many inferences in favor of the moving party and to have determined disputed facts against the plaintiff. Keep an eye on the Court of Appeals. **Duch v. Kohn**, 2007 U.S. Dist. LEXIS 56569, 2007 WL 2230174 (S.D.N.Y. 2007).

Sexual Harassment; Retaliation

Judge John G. Koeltl (S.D.N.Y.) was faced with cross-motions for summary judgment in a case in which a female curator for a private art collection alleged that she was sexually harassed by the CFO of the owner's corporation. Although conceding that each individual act comprising the sexually hostile environment seemed relatively mild, the court said that it "must consider the totality of the circumstances in the light most favorable to the plaintiff, recognizing that the accumulation of numerous mild harms might, like the slow drip of water in a case of Chinese water torture, eventually cross the threshold from a harmless office crush to the creation of a hostile and abusive work environment." Accordingly, the court denied summary judgment on the hostile environment sexual harassment claim, since the harasser might be found to have influenced the terms and conditions of the plaintiff's environment and the employer had no written sexual harassment complaint policy. It also declined to dismiss claims of retaliatory discharge, since the plaintiff was fired only three months after she complained to the company's owner about the CFO's actions, and claims under the Electronic Communications Privacy Act based on the CFO's allegedly having hacked into the plaintiff's AOL e-mail account. The court granted summary judgment on the *quid pro quo* sexual harassment claim, however, and declined to grant summary judgment to the employee on a claim of trespass and a defense of after-acquired evidence of misconduct. Finally, the court declined to reverse Magistrate Judge Francis' order denying the defendants' demand for discovery and inspection of a computer disc containing the plaintiff's personal files removed from the company laptop. The plaintiff was represented by Kathleen Peratis and Mark Humowiecki of Outten & Golden LLP. **Rozell v. Ross-Holst**, 2007 U.S. Dist. LEXIS 46450 (S.D.N.Y. 2007).

In a highly publicized case, a former high-level marketing executive for the New York Knickerbockers brought suit under Title VII against Madison Square Garden, the company's chairman, and a management-level co-worker. The plaintiff, who had been named one of the top forty sports professionals under the age of forty, was terminated after reporting that she and other female colleagues had been sexually harassed by the co-worker. Judge Gerard E. Lynch initially denied the plaintiff's motion for summary judgment on her retaliation claim and denied defendants' motions for summary judgment on retaliation, pecuniary damages, and reputation damages. On the pecuniary damages claim, the court ruled that the defendants could not, at the summary judgment stage, limit damages with after-acquired evidence of alleged wrongdoing by the plaintiff because MSG's failure to show that it terminated each and every employee that engages in similar wrongdoing created an issue of fact. The court also affirmed that Title VII authorizes compensatory damages for reputational damage where the damage negatively impacts the employee's future earnings. On the retaliation claim, however, Judge Lynch initially held that she did not establish as a matter of law that she engaged in protected activity when she undertook her own investigation before filing her EEOC charge and the subsequent lawsuit. Because she had not yet filed a charge or complaint, the court said, her activity was not protected by the participation

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clause of Title VII, but by the narrower opposition clause, which protects only complaints made reasonably and in good faith. Judge Lynch concluded that the plaintiff had not established that she made her charge in good faith, because she did not lodge her complaints until after her job security began to erode, even though the evidence showed that she had previously expressed concerns about her co-worker's harassing behavior. Throwing salt in the wound, Judge Lynch went on to note that the fact that the plaintiff had asked for a large settlement amount further detracted from the credibility of her claim. Then, however, on the plaintiff's motion, Judge Lynch reconsidered and reversed his decision: "On reflection, the Court finds that this was a mistake." The court was now persuaded that "[i]f an employer were permitted to fire employees who protested alleged illegal discrimination, simply because the employer believed the complaints were unfounded or malicious, the employees' protection would be illusory. … Although employees who make up false complaints of discrimination are not protected by [Title VII], if an employer chooses to fire an employee for making false or bad faith accusations, he does so at his peril, and takes the risk that a jury will later disagree with his characterization." In a highly publicized verdict, the jury indeed disagreed and awarded the plaintiff $11.6 million in punitive damages, with additional damages still pending. **Browne Sanders v. Madison Square Garden, L.P.**, 2007 U.S. Dist. LEXIS 65309 (S.D.N.Y. 2007).

NELA-NY EMPLOYMENT LAW CROSSWORD: "BETTER AND BETTER" ANSWER KEY

Across

1. LEDBETTER
19. ANY
24. ELEMENT
31. FRONT PAY
41. NOLO
51. ODES
57. ULEE
63. BAR
67. MSA
76. EMU
80. AMI
84. WRIT
89. IF
91. NOD
97. THEY
102. CITI
106. TOSCA
114. DEAL
121. ENMITY
132. ET TU
138. AG
151. CONSTRUCTIVE
170. ERGO
175. CANADA
182. CALC
188. BLOGSTER
200. ULTRA
208. GAY
212. PRIMA FACIE
223. OR

Down

1. LIFE SENTENCE
4. BAN
5. ENT
6. TYPO
9. RE
11. TEN
13. HELL
27. MOUNT CLEMENS
29. NO EXIT
33. OMBUDSMAN
36. PO
37. ADMIT
38. YES
54. SAWED
65. RABAT
77. MOON
85. RYE
90. FIDUCIARY
109. CIGS
142. MUG
145. FICO
152. OFCCP
155. TECUM
156. RR
158. COBRA
161. VAGUE
178. AT GO
179. DEAR
189. LAC

The Eleventh Circuit Court of Appeals rejected a sexual harassment claim based upon a **Faragher-Ellerth** defense. The court noted that an employer avoids liability if 1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities it provided. First, the employer had an anti-discrimination policy prohibiting harassment, although the plaintiff claimed that it was not applied properly. The internal investigators failed to speak with her directly, did not take notes when interviewing the alleged harasser, and interviewed the plaintiff's colleagues in a restaurant. The court held that nothing in the **Faragher-Ellerth** decisions requires "a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment"; all that is required is an effort to arrive at a fair estimate of the truth. Second, the defendant offered the plaintiff a choice of being counseled together with the alleged harasser or transferring to another city. She rejected both options because she refused to work with the alleged-harasser again and did not want to move away from her family. The court held that the defendant's remedies were sufficient, because "the complainant does not get to choose the remedy." It also noted that the plaintiff's claim could be dismissed on the alternative ground that she had waited too long—three months and two weeks—to report the alleged harassment. The court also rejected her retaliation claim. The defendant claimed that it fired the plaintiff because she would not cooperate with the proposed remedies of accepting counseling with the harasser or transferring to another city. The plaintiff argued that this reason was a pretext, because she would have worked with the alleged harasser if necessary, even though she had stated several times during the investigation that she would not. In dismissing her appeal, the court stated, "If arguments had feelings, this one would be embarrassed to be here." And if *judges* had feelings …. **Baldwin v. Blue Cross/Blue Shield of Alabama**, 480 F.3d 1287 (11th Cir. 2007). ■

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employer retaliation is only actionable where the subject matter complained about is recognized as unlawful under a particular employment-related statute.

The initial consultation is the time and place where an attorney first hears the client's story in some detail. The skilled interviewer knows that individuals who are distressed do not always recount the facts of an employment-related situation logically or in chronological order. Clients often deny less than stellar workplace performance. On the other hand, discrimination in the workplace can be painful to confront and the client who needs to relay salient facts about what they experienced and how they opposed such conduct may actually downplay the problem. Under any scenario, the attorney needs to tease out the facts and the evidence in support of these facts from the beliefs, right or wrong, of the client.

This two-part article (abridged from an upcoming edition of the *Employee Advocate*) aims to assist the practitioner in focusing on the right questions to ask when evaluating a potential client with retaliation claims under Title VII, including how to evaluate the motive of the client, how to assess the adverse conduct of the employer, and how to develop a case of employer liability, including possibly what to look for in developing a case for punitive damages. (It is assumed, for purposes of this article, that before meeting with the client you will have found whether the employer is bound by Title VII or the State and City Human Rights Laws, and whether any potential claims are timely.)

* * * *

1. What action did you take that you believe led to your employer treating you in an adverse fashion?

Title VII forbids retaliation against an individual because that individual "has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."[ii] Opposing or objecting to conduct not covered by this statute is usually not protected.[iii]

"Opposition" to an unlawful, discriminatory practice in the workplace can include anything from complaining to management to "writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges."[iv] The most common type of protected activity is complaints to management about perceived discriminatory conduct in the workplace.

Title VII also protects employees who "participate" in conduct which opposes discriminatory acts or seeks to enforce action against an employer who fails to remedy such discrimination. Generally, participation, as used in Title VII, includes filing either a charge with the EEOC or filing an employment discrimination lawsuit in court,[v] testifying

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on one's own behalf or on behalf of others in a deposition or affidavit,[vi] and refusing to testify.[vii] It may also include assisting others in pursuing a charge of discrimination, even if that employee never testifies or formally comes forward.[viii]

2. *What is the basis of your belief that what you complained about was employment discrimination?*

Even if a client does not have a viable claim of discrimination, she may still have a retaliation claim if she actually believes that unlawful discrimination did in fact happen and that belief is reasonable. To prove a *prima facie* case of retaliation under Title VII, the employee does not have to prove that the discrimination actually took place, but rather that the employee had a good-faith objective basis for believing that discrimination took place.[ix] Generally, any claim which has some good-faith objective basis will be considered enough to support a client's cause of action for retaliation.[x]

How does the client establish some good-faith basis for her opposition to discriminatory conduct in the workplace? Direct evidence of intentional discrimination will ordinarily support a retaliation claim. Where there isn't such direct evidence, however, the questioning attorney should look for ongoing patterns of behavior and examine the circumstances of the workplace generally. The operative question is whether the employee's subjective belief was reasonable.

3. Was the employer's conduct "adverse?"

In order to constitute retaliation, an employee must be subjected to an *adverse employment action.* Often, there is no doubt that the employer's action is "adverse" so as to be actionable under Title VII. For instance, demoting an employee with a decrease in their compensation and/or terminating their employment are unquestionably "adverse." But what about employer conduct that does not rise to the severity of a demotion or termination?

The Supreme Court definitively answered this question in **Burlington Northern & Sante Fe Railway v. White**.[xi] An action is adverse if it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[xii] To find out whether the conduct meets this standard, ask the client about the impact of the employer's action. Did the employee suffer financial hardship, emotional distress, lost business opportunities, or isolation in the workplace as a result of the employer's actions?[xiii] Were there circumstances unique to the employee that exacerbated the impact of the employer's action?

4. What is the connection between your complaints to management and the adverse conduct?

In order to establish a *prima facie* case of retaliation, a plaintiff must demonstrate a causal connection between the protected activity and the adverse employment action.[xiv] A nexus may be established either through direct evidence of retaliatory intent or through circumstantial evidence such as temporal proximity or disparate treatment.[xv]

Direct evidence of retaliatory intent is uncommon. Employers rarely announce that they are trying to get "rid" of an employee for calling attention to workplace discrimination, nor are there usually notes documenting such intent. It never hurts to ask the client though. On occasion there may be verbal or written statements made by the employer, for instance memoranda or other writings between Human Resource personnel and upper management memorializing not only the complaint made by your client, but also the employer's perceived reaction to the complaint. If you file a lawsuit, don't forget to ask for every possible document in the possession of the employer that might have recorded such information.[xvi]

5. How do you know your employer was aware of your protected activity?

It is axiomatic that in order for the employer to retaliate against an employee for actions protected under Title VII, the employer must know that the employee has opposed or participated in protected activities. The issue of "notice" is therefore key in assessing whether the employer acted against the employee with the knowledge of the individual's conduct.[xvii]

Often a client will say they complained about discrimination, but when the circumstances and content of the complaint are probed, the facts do not support a legal claim for retaliation or considerably weaken such a claim. For example, complaining about "unfair" treatment to the Human Resource Director, without tying this treatment to racial or sexual discrimination will not support a legal claim for retaliation.[xviii]

The following are a list of questions which may help determine the issue of notice:

A. On what date did you complain? (This will come in handy when determining causal connection.)

B. To whom did you complain? Why did you choose this person? Did you follow any employee policy about to whom you should complain in the event you experienced discrimination in the workplace? (This addresses the oft-heard defense that the employee did not follow the employer's avenues of redress for discrimination complaints.)

C. How did you complain to the designated person? Verbally? In writing? (Writing is best, but don't forget to ask the client who complains verbally whether they documented any information pertaining to their complaint after the fact, *e.g.* an e-mail to a co-worker.)

D. If you complained verbally, did you use the word "discrimination"? Did you say you were treated differently from similarly situated co-workers? Were they all white, and you are African-American, or were they all men, and were you the only woman in your department? Did you explain why you were offended by the conduct? Were there any witnesses to your verbal complaint?

E. If you complained in writing, do you have a copy of the statement(s) or document(s)?

F. Did the person receiving the complaint respond to you? If so, how? Did they state that they would initiate an investigation? Did they take notes?

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G. Did the person you complained to ask you to take additional steps to lodge your complaint? Did you follow these steps?

H. Was this the first time you complained about discrimination or was it a follow-up to earlier complaints? Had the underlying conduct about which you complained stopped? Had there been any earlier perceived retaliatory treatment against you?

I. Was the employer aware that you filed an EEOC Charge at the time it acted adversely against you? How do you know? Had the Charge been sent to your employer? Had you separately informed someone on the job that you filed such a charge?[xix]

J. How did the employer know you were going to testify in support of a co-worker's discrimination lawsuit? Were you listed as a potential witness? Did someone at work report this fact to the employer? Did the co-worker reference you as having witnessed certain events helpful to their case at his or her deposition?

In the second part of this article, we will focus on identifying circumstantial evidence of retaliation and pretext by examining the timing of and the proffered reasons for the adverse action, the key players, and the workplace policies and practices.

Footnotes

[i] Allegra L. Fishel is Of Counsel at Outten & Golden LLP and Cara E. Greene is an associate with that firm.

[ii] 42 U.S.C. § 2000e-3.

[iii] *But see* **Martin v. N.Y. State Dep't. of Corr. Servs.**, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (homosexual correctional officer who complained about discrimination based on sexual orientation was protected from retaliation, even though sexual orientation is not a protected category under Title VII, because he reasonably believed that the discriminatory behavior fell under Title VII).

[iv] **Sumner v. U.S. Postal Serv.**, 899 F.2d 203, 209 (2d Cir. 1990).

[v] *See*, *e.g.*, **Torres v. Pisano**, 116 F.3d 625 (2d Cir. 1997) (filing of EEOC charge is participation in protected activity).

[vi] *See*, *e.g.*, **Deravin v. Kerik**, 335 F.3d 195 (2d Cir. 2003) (participation includes defending oneself against charges of discrimination in an investigation or hearing); **Glover v. S.C. Law Enforcement Div.**, 170 F.3d 411 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146 (2000); **McKenzie v. Ill. Dep't of Transp.**, 92 F.3d 473 (7th Cir. 1996) (employee who disobeyed employer's order and provided affidavit in support of another employee was protected).

[vii] *See*, *e.g.*, **Smith v. Columbus Metro. Hous. Auth.**, 443 F.Supp. 61 (S.D. Ohio 1977) (plaintiff who refused to provide employer with affidavit concerning another employee's case was protected).

[viii] *See*, *e.g.*, **Jute v. Hamilton Sundstrand Corp.**, 420 F.3d 166 (2d Cir. 2005) (employee who offered to testify on behalf of another employee was protected under Title VII, even though she did not actually testify)

[ix] *See*, *e.g.*, **Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.**, 136 F.3d 276, 292 (2d Cir. 1998).

[x] *See* **Martin**, 224 F.Supp. 2d 434. *But see* **Clark County Sch. Dist. v. Breeden**, 532 U.S. 268, 271 (2001). In that case, Plaintiff's male supervisor, in her presence and in the presence of a male co-worker, read aloud a sexual comment contained in a psychological evaluation of a job applicant. The supervisor joked to plaintiff that he did not understand the comment, and the co-worker joked that he would explain it later. The plaintiff, whose job duties included reviewing such comments, claimed retaliation after complaining about the incident. The Supreme Court held that "[n]o reasonable person could have believed that the single incident . . . violated Title VII."

[xi] 126 S. Ct. 2405 (2006).

[xii] *Id.* at 2415.

[xiii] In a recent decision applying **Burlington Northern**, the court held that the following actions could be considered retaliatory: "scrutiny of [plaintiff's] work and job performance that exceeded the scrutiny to which employees who have not complained of discrimination are subjected, (2) requiring [plaintiff], but not employees who have not complained of discrimination, to provide doctors' notes to explain absences, (3) denying [plaintiff] the chance to work overtime hours and in positions deemed 'out of class,' privileges granted to employees who have not complained of discrimination, (4) telling [plaintiff] to 'get back to work,' an instruction not directed toward similarly situated employees who have not complained of discrimination, (5) forbidding [plaintiff] from using his mobile phone during work hours, a prohibition not imposed on employees who have not complained of discrimination, and (6) failing to provide [plaintiff] with tools and equipment provided to employees who have not complained of discrimination . . . [7] criticizing [plaintiff] for taking a long time to perform certain work [8] selecting an employee less qualified than [plaintiff] to teach a class about obtaining a commercial driver's license, for which that employee earned $ 7,000, [9] selecting employees less senior than [plaintiff] to serve as acting foremen, and [10] not providing [plaintiff] training provided to others." **Edwards v. Town of Huntington**, 05-CV-339, 2007 U.S. Dist. LEXIS 50074, *30-36 (E.D.N.Y. July 11, 2007).

[xiv] **Gallagher v. Delaney**, 139 F.3d 338, 349 (2d Cir. 1998).

[xv] **DeCintio v. Westchester County Med. Ctr.**, 812 F.2d 111, 115 (2d Cir. 1987).

[xvi] *See* **Feingold v. N.Y. State Dep't of Motor Vehicles**, 366 F. 3d 138 (2d Cir. 2004). (document written by supervisor that she believed plaintiff was trying to get her in trouble deemed relevant in determining motive of retaliation).

[xvii] *See* **Galdieri-Ambrosini**, 136 F.3d at 292 ("[I]mplicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the plaintiff's opposition was directed at conduct prohibited by Title VII.").

[xviii] *Id.*

[xix] *See* **Rinsler v. Sony Pictures Entm't, Inc.**, No. 02-Civ. 4096,2003 U.S. Dist. LEXIS 14754 (S.D.N.Y. Aug. 25, 2003) (defendants were unaware of charge until two months after alleged retaliatory act). ■

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