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Demystifying the Digital World

by Michael A. Gross, Esq.*

E-discovery rules present opportunities even for the technologically anxious

Electronic Discovery. Hard Drives. December 1st. Metadata. Computer Forensics. Sedona Conference. Zubulake I-VII. Bits and Bytes. Megs and Gigs. Review Tools. These are all terms introduced to us by the world of electronic discovery—a world born from the marriage of new technology and new laws. It is a world that is forcing attorneys and judges to view a familiar legal landscape through a strange new lens. It has spawned a multibillion-dollar "niche" industry in litigation support. It has made many attorneys feel as if their computers were dragging them over a cliff.

Until Dec. 1, 2006, the computer was universally viewed by most attorneys as an invaluable tool in the workplace. The capability to store millions of documents in one space-saving machine; the ability to repeatedly use the same legal template for hundreds of different discovery

** Michael A. Gross is general counsel for Kryptos Forensics, LLC, a computer forensics firm in Manhattan. Daniel Kalai, forensic examiner at the firm, reviewed this article for technical accuracy.*

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Disparate Impact under the ADEA Post City of Jackson

by Susan Ritz (*sritz@ritzandclark.com*)

Until fairly recently, the Circuits had split on the availability of a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. In **Smith v. City of Jackson, Mississippi**, 544 U.S. 228 (2005), some 38 years after the ADEA was enacted, the Supreme Court finally resolved the open issue favorably to plaintiffs. The celebration was short-lived.

In **City of Jackson**, plaintiffs challenged a program that provided varying pay increases for police officers. Under the program, the city gave larger raises to officers with less than five years' tenure than to officers with greater seniority. Justice Stevens began the majority opinion by reviewing the similarities between Title VII and the ADEA, and concluded that Congress intended the two statutes to have the same meaning. From this, four Justices agreed that disparate impact analysis applies under the ADEA, following **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971) (later codified in the Civil Rights Act of 1991 under 42 U.S.C. §2000e-2(k)(1)(A)). Justice Scalia, who made up the fifth vote for the majority, concurred in the judgment, but only because he deferred to the EEOC's statutory interpretation.

While a good start for plaintiffs, the majority opinion went downhill from there. The Court noted that, in contrast to Title VII, §623(f)(1) of the ADEA has a narrower scope, because it permits an "otherwise prohibited" action if "the differentiation is based on reasonable factors other than age" ("RFOA").

Next, the Court focused on burdens of proof. It reviewed the 1991 Civil Rights Act's resuscitation of disparate impact theory after **Wards Cove Packing Co. v. Atonio**, 490 U.S. 642 (1989), and acknowledged that the Act restored the burdens of proof as follows: the plaintiff bears the initial burden of demonstrating that a particular employment practice causes a disparate impact on the basis of a protected status. The employer must then demonstrate that the challenged practice is job-related and consistent with business necessity. If the employer meets its burden of proof, the plaintiff may still prevail by showing an alternative employment practice that would have effectuated the employer's stated objective but that the employer refused to adopt. 42 U.S.C. §2000e-2(k)(1)(A).

The Court then noted that Congress applied the 1991 Act to Title VII, but not the ADEA. Therefore, the Court concluded, "**Wards Cove's** pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." In other words, the burden of proof in an age disparate impact case remains on plaintiffs at all times. In practical terms, this means that plaintiffs bear the extraordinary burden of showing that the employer's explanation for the challenged business practice is unreasonable.

Finally, the Court held that plaintiffs in the case before it failed to meet their burdens on several grounds. First, it was insufficient to simply observe that the pay plan was relatively less generous to

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April 18 - 6:30 pm
NELA Nite
3 Park Avenue – 29th Floor
(Topic to be Announced)

April 19 – 6:30 pm
"Management Bar Reception"
(Details to Follow)

Friday, May 4
NELA Spring Conference
Yale Club of New York City
Save The Date
(Details to Follow)

May 9 – 6:15 pm
Executive Board Meeting
3 Park Avenue, 29th Floor
(Open to All Members in Good Standing)

May 23 – 6:30 pm
NELA Nite
3 Park Avenue – 29th Floor
(Topic to be Announced)

June 27-30
NELA National Convention
Westin Rio Mar Beach Golf Resort & Spa
San Juan, Puerto Rico
(For information: www.nela.org)

September 28
NELA Fall Conference
Yale Club of New York City
Save The Date
(Details to Follow)

Member News

Congratulations to Justin Swartz & Joanna Weiner on the birth of their son, Samuel Jonah, on January 24th.

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Congratulations and Welcome!

Elected to the NELA/NY Executive Board are Stefan D. Berg, Syracuse, NY and Mariann Meier Wang, New York, NY.

President's Column

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

When our illustrious co-editor of the Newsletter Rachel Geman assumed her responsibilities, she implemented the innovative idea of having an other than employment lawyer write a "top ten list" of items to be considered when an employment case touches on tangential matters in the writer's area of expertise. In keeping with this theme, I have decided to devote this issue's column to a "top ten list" of items to help reduce stress and increase the enjoyment of the practice of plaintiff's employment law. In no particular order, these are:

1. Dealing with the "Bully" Adversary. When your adversary is unreasonable, you can be sure that you have the upper hand. The concept of a bully stems from a reaction formation on the part of someone who is usually extremely insecure and who is afraid of dealing with others on a fair and arms length basis. Accordingly, that person will throw his or her weight around every chance they get, to compensate for what is often his or her unconscious insecurity. This is either an indication that he is uncomfortable with his skill level, or your case is better than you think it is, or a little bit of both. Once this becomes apparent, you have the upper hand. Do not even speak to this person if she refuses to be cordial, and tell her that. If your adversary starts screaming at a deposition, end it right there. If he raises his voice over the phone, tell them you are not "hanging up," but ask him to call back when he calms down and then politely hang up. If she is ridiculous in her refusal to produce discovery, involve the court. There are other things that can be done which are beyond the scope of this article, but you get the picture. Remember, when this occurs, *you* are in the driver's seat!

2. If You Appear to Be Organized, You Will Be. Considering all of the matters that you have any one time, all of the clients that want your attention, and all of the other individuals in your life who may want the same, you will never really be organized. However, you can feel like you are, which to some degree is just as good. Therefore, to assist yourself in doing so, consider: (1) Spend time organizing each week through the creation of a master list. Cross off tasks as you accomplish them; (2) Keep a daily list of things to do and cross them off as each one is accomplished; (3) Use your daily planner or organizer (or other product) to develop a follow-up system for uncompleted tasks on the master list; (4) Develop a system of effective paper management (*i.e.*, throw things away); (5) Don't interrupt yourself from completing a task unless absolutely necessary; (6) Don't feel guilty for not being able to read every law journal, bar journal or relevant professional publication; (7) When you come across an important phone number, write it down on a Rolodex or insert into a case data file on your computer, so you do not find yourself repeatedly looking up the same number; (8) Check your voicemail at periodic times during the day, rather than constantly; (9) Organize at the end of each day or at the start of each day; (10) Don't be a slave to e-mail; check it periodically and respond as needed; (11) If you use a yellow pad, tear out the notes you made and place them in the file to avoid looking for notes later (especially if you are using more than once yellow pad at a time).

3. When You Have Control of Your Schedule, Schedule Wisely. You don't always have control of your schedule, so don't fight it. For example, when a Court responds to a motion for summary judgment and denies it, you may find yourself preparing for trial in a short period of time. Don't freak! This is something we all have to live with. However, when you can control your scheduling, be aware of your own particular idiosyncracies when doing so. Some of us recognize that we are morning people, afternoon people, night people. Take this factor into account when you voluntarily agree to schedule meetings, depositions, etc. Don't agree to something just because you have a hole in your schedule. If you have a social activity either before or after, consider that, so that you don't find yourself cramming with a short period of time to prepare. Keep your social calendar with you at work and only com-

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Bingo!

Years of effort have paid off for the NELA/NY Judiciary Committee. We are pleased to announce that the New York County Democratic Party has invited NELA/NY to nominate a representative to serve on the Judicial Screening Panel to make recommendations on the qualifications of judicial candidates.

NELA/NY received a terrific list of well qualified volunteers to serve as our representative. The Judiciary Committee recommended Daniel Alterman. That recommendation was accepted by Bill Frumkin, who has notified the Party of our nominee.

Danny has served on four prior panels or committees vetting judicial selections. We expect he will hit the ground running and give the Party plenty of reason to look to NELA/NY for future nominees.

The Judiciary Committee
Lee Bantle, Chair
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Patrick DeLince
Josh Friedman
Michael Gross ■

Discrimination Law in New York State Courts: *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295 (2004)

by Stefan Berg (*sb@berglawoffice.com*)

Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295 (2004) ("**Forrest**") is the most significant discrimination decision from the New York Court of Appeals in the past ten years. The 30-page decision (about equally divided between Judge Kaye's majority opinion and Judge (G.B.) Smith's concurrence) affirmed a First Department opinion reversing the denial of summary judgment. The Court of Appeals accepted this case to set the guidelines for analysis of discrimination cases brought in state court.

Plaintiff's attorneys should be fully familiar with this employee-friendly decision. **Forrest** not only contains a comprehensive discussion of state and federal law, it sets forth the appropriate analysis of specific federal caselaw that, in recent years, and as a practical matter, is not used for employee-friendly purposes in federal courts.

Paula Forrest sued the Jewish Guild for race discrimination under the New York Executive Law. The Supreme Court, New York County, denied defendant's motion for summary judgment. The Jewish Guild appealed to the Appellate Division, First Department which, in a 5-0 decision, granted summary judgment to the defendant. **Forrest v. Jewish Guild**, 309 A.D. 2d 546 (lst Dep't 2004). Forrest appealed to the Court of Appeals, which affirmed the decision of the Appellate Division 5-0.

A 5-0 affirmance of a 5-0 decision only requires 30 pages of analysis if the Court of Appeals intends to provide guidance to lower courts and litigants on the standards for analyzing discrimination cases. **Forrest** provides that guidance.

Forrest begins by stating that "[r]acial discrimination has no place in society. Anti-discrimination laws must therefore be strictly enforced to root out this scourge whenever it occurs." *Id.* at 298. "Animosity on the job is not actionable; unequal treatment based on racial animus is." *Id.*

This article details the federal precedents approved by the Court of Appeals, with the aspects of each of those cases endorsed by the **Forrest** court.

One, in order to succeed on a claim of racial discrimination, the plaintiff must establish a prima facie case pursuant to the standards articulated in **Ferrante v. Am Lung Assn**, 90 N.Y. 2d 623 (1997). Plaintiff must show that the decision by the defendant "occurred under circumstances giving rise to an inference of discrimination." *Id.* at 308 (citing **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989)).

"A plaintiff's prima facie case, combined with sufficient evidence to find that the employers asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 308 (citing **Reeves v. Sanderson Plumbing Prods, Inc.**, 530 U.S. 133, 148 (2000)).

Two, a racially hostile work environment exists when the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 310 (quoting **Harris v. Forklift Systems, Inc.**, 510 U.S. 17, 21 (1993)). The Court of Appeals made clear that "whether an environment is hostile or abusive can be determined only by looking at all circumstances including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance." *Id.* at 311 (internal quotations omitted) (citing **Harris**).

Three, "under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices." *Id.* at 312.

Judge Smith's concurrence focused on the standards governing summary judgment and the standards governing the allegations of racial discrimination, which related to disparate treatment, direct and circumstantial evidence in a mixed motive case, and retaliation. Judge Smith quoted **Glick & Dolleck v. Tri-Pac Export, Corp.**, 22 N.Y. 2d 439, 441 (1968): "to grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Id.* at 315. "It is not the court's function on a motion for summary judgment to assess credibility." *Id.* (quoting Ferrante, 90 N.Y. 2d at 631).

Judge Smith also quoted federal seminal case law, such as **Andersen v. Liberty Lobby**, 477 U.S. 242, 254 (1986) and **Matsushita Electric v. Zenith Radio Corp.**, 475 U.S 574, 587 (1986), to note that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" and "the facts must be viewed in the light most favorable to the non-moving party." *Id.* at 315.

Thus, even though many federal courts, as a practical matter, weigh evidence and assess credibility on motions for summary judgment, Judge Smith focused on the caselaw precluding such analysis.

Judge Smith added a section on direct and circumstantial evidence in which he cited **Desert Palace, Inc. v. Costa**, 539 U.S. 90 (2003) for the proposition that a person "alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence." *Id.* at 326.

The Court of Appeals has delivered a clear message to lower courts and the bar that New York State anti-discrimination law is informed by and may rely on federal precedent, but is distinct from federal law. To the extent federal courts have re-interpreted otherwise neutral or favorable employment precedents in a less employee-friendly fashion, New York State Courts have not and should not follow suit. **Forrest** provides attorneys representing employees with guidance on the proper analysis to be applied by New York State Courts. ■

Application of Labor Law § 193 to Commission Employees
Part II: When do Commission Formulas Violate Labor Law § 193?

by Salvatore G. Gangemi (*sgangemi@gangemilaw.com*)

Part I of this article (in the July, 2006 issue of The New York Employee Advocate, V. 13, No. 5) addressed the issue of whether executive employees were protected from unlawful deductions by the provisions of Labor Law § 193 of Article 6 of the New York Labor Law. Part II examines the circumstances under which Section 193 protects commission compensation from employer-imposed deductions or subtractions.

Labor Law § 193

Section 193 only permits deductions from "wages," charges to employees, and payments from employees that are required by law or

> are *expressly authorized in writing* by the employee and are for the benefit of the employee . . . . *Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.*

Labor Law § 193 (emphasis added).

The definition of "wages" for purposes of Article 6 includes "commission" compensation. Labor Law § 190(1). Thus, although it is clear that an employer cannot deduct amounts from commissions unless the requirements of section 193 are met, because commissions are calculated pursuant to commission formulas, which sometime take into account the employer's expenses, it is not always clear whether a particular formula violates section 193. Indeed, there are relatively few cases addressing this issue.

Labor Law § 193 Prohibits an Employer from Shifting the Risk of Loss to Employees

In **Hudacs v. Frito-Lay, Inc.**, 90 N.Y.2d 342, 349, 660 N.Y.S.2d 700, 703 (1997), the Court of Appeals recognized that section 193 "was intended to place the *risk of loss* [associated with the costs of doing business] on the employer rather than the employee." *Id.* (emphasis added.) In this connection, section 193 prohibits an employer from charging an employee or taking deductions because of an employee's failure to perform work properly or for business losses. *See* **Gennes v. Yellow Book of New York, Inc.**, 3 Misc. 3d 519, 776 N.Y.S.2d 758, 759-60 (Sup. Ct. Nassau County 2004)("charge backs" not permitted for employee's failure to renew accounts), *aff'd*, 23 A.D.3d 520, 806 N.Y.S.2d 646 (2d Dep't 2005); **Guepet v. Int'l TAO Sys., Inc.**, 110 Misc. 2d 940, 940-42, 443 N.Y.S.2d 321, 322 (Sup. Ct. Nassau County 1981)(Section 193 prohibits deductions based upon employee's failure to perform work properly); **East Coast Indus. v. Becconsall**, 60 Misc. 2d 84, 301 N.Y.S.2d 778 (Dist. Ct. Nassau County 1969)(unlawful to deduct from wages for work not done or done improperly).

Under section 193, even if an employee's deficient performance may have resulted in "lost profits," the employer cannot recover its lost profits and losses from the employee. *See* **Burke v. Steinman**, No. 03 Civ. 1390 (GEL), 2004 U.S. Dist. LEXIS 8930, at *20 (S.D.N.Y. May 18, 2004)(under section 193, employer not permitted to recoup lost profits caused by "employee's alleged negligent acts" or "alleged poor performance"); **Cohen v. Stephen Wise Free Synagogue**, No. 95 Civ. 1659, 1996 U.S. Dist. LEXIS 4240 (S.D.N.Y. April 4, 1996)(same); 12 N.Y.C.C.R. §142-2.10 (New York State Department of Labor Regulations)(prohibiting "deductions and expenses" and providing, *inter alia,* examples of unlawful deductions: "(1) deductions for spoilage or breakage; (2) deductions for cash shortages or losses; and (3) fines or penalties for lateness, misconduct or quitting by an employee without notice"). In addition, an employer may not charge an employee for a customer's failure to pay the employer's invoices. **Edlitz v. Nipkow & Kobelt, Inc.**, 264 A.D.2d 437, 694 N.Y.S.2d 439, 44 (2d Dep't 1999).[1]

The purposes of section 193 comport with New York's stated public policy prohibiting agreements that provide for the forfeiture of wages. *See* **Weiner v. Diebold Group**, 173 A.D.2d 166, 167-68, 568 N.Y.S.2d 959, 961 (1st Dep't 1991).

Is the Commission a Wage or a Bonus?

A threshold issue in cases involving deductions from commission compensation is whether the commissions constitute protected "wages" under Article 6 or just discretionary bonuses. The issue of whether commissions constitute bonuses or wages generally arises where the employee is paid a salary in addition to commissions. *See, e.g.*, **Dean Witter Reynolds, Inc. v. Ross**, 75 A.D.2d 373, 375, 429 N.Y.S.2d 653, 655 (1st Dep't 1980). The fact that an employee also receives a base salary, however, does not preclude a finding that additional compensation in the form of commissions also constitutes wages. *See* **Gennes v. Yellow Book of New York, Inc.**, 3 Misc.3d 519, 520, 776 N.Y.S.2d 758, 759 (Sup. Ct. Nassau County, 2004).

The New York Court of Appeals held in **Truelove v. Northeast Capital & Advisory, Inc.**, 738 N.E.2d 770, 715 N.Y.S.2d 366 (2000), that discretionary bonuses predicated solely on the overall financial success of the employer are not wages entitled to protection under Article 6. The **Truelove** court emphasized that such bonuses were more in the nature of profit sharing plans, and not direct compensation for work actually performed by an employee. This is distinguishable from a situation "where an employee. . . is determined to have earned commissions based solely upon such employee's own individual efforts." **Truelove v. Northeast Capital & Advisory Inc.**, 268 A.D.2d 648, 649-50, 702 N.Y.S.2d 147, 149 (3d Dep't), *aff'd*, 95

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N.Y.2d 220, 715 N.Y.S.2d 366 (2000). Nevertheless, a discretionary bonus could constitute a wage once it is earned and vested in accordance with the terms of the employer's bonus plan. Such a bonus plan, however, could include any conditions to payment, and provide for deductions relating to the employer's expenses, without running afoul of section 193 or Article 6.

Truelove, notwithstanding, "a compensation scheme which is predicated upon an employee's personal productivity and the objective success of the venture—not the employer's discretion or any subjective standard—is a contractual right of the employee." **Fiorenti v. Central Emergency Phys., P.L.L.C.**, 187 Misc.2d 805, 808, 723 N.Y.S.2d 851, 855 (Sup. Ct. New York County 2001). In **Reilly v. Natwest Mkts. Group, Inc.**, 181 F.3d 253, 264-65 (2d Cir. 1999), *cert. denied*, 528 U.S. 1119, 120 S.Ct. 940 (2000), the court recognized that the employee's compensation, referred to as "Percentage Bonus", was a wage because it was a "guaranteed" percentage of revenues generated by the employee and not subject to the "discretion" of the employer. Accordingly, the **Reilly** court ruled that the employee's commissions fell "comfortably within the definition of a 'commission' that is expressly included within the Labor Law's definition of 'wages'. . . ." *Id.*.

Despite the distinction between commission bonuses and commission wages, employers routinely argue that for purposes of section 193, a commission is only a wage once it is calculated pursuant to the commission plan at issue, much like discretionary bonus compensation. This argument, however, ignores the plain language of Labor Law §§ 190 and 193, because it results in commissions being treated differently than other wages such as salary or hourly pay.

Commission Formulas that Violate Labor Law § 193

In **Pachter v. Bernard Hodes Group, Inc.**, No. 03 Civ. 10239, 2005 WL 2063838 (S.D.N.Y. Aug. 25, 2005), the court addressed whether the manner of calculating commissions at issue in that case violated section 193 or constituted a legitimate commission formula. During her employment, Pachter's exclusive form of compensation consisted of commissions, earned upon collection, based upon monthly gross revenues she generated for her employer. For most months during her employment, she received a draw against her earned commissions. Although the parties never executed a written commission agreement, and a written commission policy did not exist, the parties agreed that her commission would be calculated by multiplying the commission rate with the gross monthly revenues she generated. The resulting amount was referred to as "Total Income" in Pachter's commission statements. From Pachter's Total Income, the employer subtracted draws paid to Pachter. In addition, the commission statement reflected certain charges or deductions to Pachter's Total Income. The most significant and consistent charge was the "Assistant Charge," which reflected a portion of the salary and employee benefits paid by the employer to its employee assigned to assist Pachter in her work. Additional charges to Pachter's Total Income included the following: Finance Charges for invoices that the employer's customers failed to pay on time; amounts for Errors attributable to Pachter; amounts for Bad Debt and Unbillables attributable to a customer's inability or refusal to pay an invoice; and Miscellaneous Costs for travel and entertainment and marketing expenses. In certain months, the charges applied to Pachter exceeded her Total Income, resulting in a negative commission balance. This negative amount would be carried forward to subsequent months until satisfied.

Pachter alleged that the charges to Total Income reflected unlawful deductions from wages. Both Pachter and the employer moved for summary judgment on the issue of liability, and Pachter prevailed. The court awarded Pachter damages totaling $234,415.78, exclusive of attorneys' fees. The employer appealed and the case is currently pending before the Second Circuit.

Although conceding that Pachter's commissions were wages, the employer argued before the district court and Second Circuit that commissions were similar to bonus compensation in that the agreement between the parties could contain any conditions for receipt of the commission. According to the employer, Pachter's commission was not deemed "earned" until after the deductions (or as the employer preferred to call them—"subtractions") were applied to her Total Income, *i.e.*, her share of the monies derived by multiplying her commission percentage to the gross revenues generated by her. The district court rejected this contention, stating that although Labor Law § 191, which governs the frequency of payment, requires that commission salesman be paid "in accordance with the agreed terms of employment," Labor Law § 191(1)(c), section 193 makes no reference to the parties' agreement and, thus, it "cannot be read to establish the same level of deference to the agreed-upon terms of employment as mandated by section 191." **Pachter**, 2005 WL 2063838 at*6.

The employer in **Pachter** sought to confuse the issue of when a commission is "earned" in order to evade the prohibitions of section 193. Indeed, though an employer and employee can agree on the timing of *when* wages are earned, *e.g.*, upon the sale or upon collection of fees, an employer cannot force an employee to agree that her wage is not actually a "wage" under the statute until the employer has deducted its costs and expenses from that very wage. *See* **Gennes**, 23 A.D.3d at 521, 806 N.Y.S.2d at 647.

Despite section 193's prohibition against deductions from commission wages, no court has ruled that only a commission formula based upon a percentage of gross revenues is legal. In other words, it appears that a commission formula may be based upon a percentage of net revenues, where the net revenues are calculated by subtracting expenses and charges from gross revenues generated by the employee. Indeed, most commission arrangements are based upon such a formula.

For instance, recently in **Kletter v. Fleming**, 32 A.D.3d 566, 820 N.Y.S.2d 348 (3d Dep't 2006), the court seemed to confirm that deducting costs and expenses from the *employer's* gross revenues (generated by the employee) to

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Top Ten Things Employment Lawyers Should Know About Having Lawyers as Clients: Ten Tips for a Successful Relationship

by Carol M. Kanarek*

1. Acknowledge your potential client's professional credentials during your initial meeting with him or her. An employment dispute is often a particular threat to a lawyer's self-esteem, as he or she may be uncomfortable in the role of "client".

2. Use ego-supportive questioning techniques in determining the merits of your potential client's case. Avoid expressing skepticism about his or her statement of facts. Instead, ask how he or she would present the "other side of the case".

3. If you decide not to accept a case, try to give the lawyer some helpful advice. Many successful plaintiffs' employment practices have been built exclusively by referrals from other lawyers.

4. Don't treat your client as your co-counsel. All too often, lawyers who represent other lawyers fail to provide the same detailed advice and explanations that they give to their non-lawyer clients.

5. On the other hand, don't assume that your client knows nothing about employment law. Speaking to your lawyer client at a level that is too basic may be viewed as condescending. Don't denigrate your client's "creative" legal theories regarding his or her case. Be respectful even if your client is completely off base.

6. Be very clear about fee arrangements.

7. Discuss with your client the manner in which you generally work. Ask if he or she prefers that you deal directly with the employer's counsel. Some lawyers want to keep a distance from their own case; others prefer to be kept in the loop. Be prepared to explain the pros and cons of each approach.

8. Where appropriate, suggest that your client read case law that is supportive of your recommendations in his or her case.

9. Be attuned to your client's other professional needs. Maintain up to date referral lists of therapists, career counselors, professional liability lawyers and lawyer assistance programs to be provided to your clients as needed. Other professionals who work with lawyers can be a source of referrals to you, as well.

10. Keep in touch with your former lawyer clients by providing them with periodic updates on employment law and your practice. ■

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arrive at the *employer's* net revenues to which an *employee's* commission percentage rate is applied does not violate or even implicate section 193. In **Kletter**, the employee complained that the employer "had improperly calculated the net amount upon which his percentage fees were based." *Id.* According to the court, a dispute relating "to the calculation of the net amount [to which a commission percentage rate is subsequently applied] does not reflect a deduction from wages within the meaning of section 193." *Id.* Indeed, this did not reflect a deduction from "wages," but rather a subtraction from gross revenues to arrive at net revenues, at which point the employee's commission percentage rate was applied.

In contrast to the situation in **Kletter**, the commissions in **Pachter** were not calculated as a percentage of net revenues, but rather a percentage of gross revenues. Once the income to Pachter was determined, however, the employer proceeded to deduct expenses from that income. Such conduct violated section 193.

Despite **Kletter**, an argument can be made, however, that an employer cannot arbitrarily apply charges and expenses to gross revenues for the purpose of reducing the net revenues to which a commission percentage is applied. Indeed, the employer would then be able to do indirectly what it could not do directly. Although courts other than **Kletter** have not addressed the issue, in a situation where commissions are based upon net revenues, a court should scrutinize whether the expenses subtracted from gross revenues are directly related to the particular sale at issue. For instance, an employer might be able to deduct the cost of goods sold from gross revenues, in arriving at net revenues, but should not be permitted to deduct losses attributable to another sale, department or employee. In such a situation, the employer is truly attempting to shift its risk of loss to its employee—which is precisely what section 193 is intended to prevent.

In reviewing compensation arrangements, practitioners should keep in mind that section 193 does not merely provide for a statutory breach of contract claim. Such arrangements should carefully be scrutinized in light of the plain language of the statute, including its strict prohibition against charges or deductions that impermissibly shift the costs of doing business, as well as its protections preventing an employee from agreeing to a compensation formula that effectively circumvents the statute.

Footnotes

[1] Section 193 upholds the principle that employees, unlike independent contractors, are subject to the employer's control. Independent contractors assume the risk of loss in exchange for the employer's relinquishment of control. *See* **In re Charles A. Field Delivery Serv., Inc.**, 66 N.Y.2d 516, 498 N.Y.S.2d 111, 116 (1985)(employee relationship is characterized by "risk of loss" being borne by employer in contrast to independent contractor relationship); **Metling v. Punia & Marx, Inc.**, 303 A.D.2d 386, 756 N.Y.S.2d 262 (2d Dep't 2003)("employer of an independent contractor has no right to control the manner in which the contractor's work is to be done and that it is therefore more sensible to place the risk of loss on the contractor"). ■

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 Tara Lai Quinlan and Rachel Bien, associates with Outten & Golden LLP, for help in the preparation of these squibs.

ARBITRATION

Exhaustion of Union Remedies

A department store employee, paid at least partly on a commission basis, took issue with the store's method of calculating commissions. In a hybrid LMRA Section 301 action against the store and his union, he argued that he was not required to exhaust arbitration relief under the collective bargaining agreement before filing a lawsuit. The district court (Richard J. Holwell, S.D.N.Y.), assuming that arbitration was an option, had granted summary judgment on the ground that the plaintiff had failed to exhaust his arbitration relief. When it developed that the union would not take his claim to arbitration, the plaintiff filed another lawsuit, and the district court dismissed it as well. The Second Circuit Court of Appeals, in an unsigned summary order (Richard J. Cardamone, Reena Raggi, and Richard M. Berman, S.D.N.Y., sitting by designation), affirmed the judgment of the district court, stating, "A union's refusal to pursue arbitration of a member's grievance does not convert an arbitrable claim into a nonarbitrable one. … [The plaintiff's] claim is arbitrable and, because he is bound by the Union's refusal to pursue arbitration, his failure to exhaust properly resulted in the entry of summary judgment in favor of [the employer]." **Vera v. Saks & Co**., 2006 WL 3610671 (unpublished summary order) (2d Cir. 12/11/06).

Sex Discrimination

A company that provided military intelligence services to the U.S. government lost an arbitration of a Title VII sex discrimination case. The arbitrator awarded Faraci $50,000 in compensatory damages, $31,848 in attorney's fees, and $64,000 in back pay. The Company sought relief in the district court for the Eastern District of Virginia, arguing that the arbitrator had manifestly disregarded governing law in determining that the claimant had been subjected to sexual harassment in the workplace and terminated because of sex discrimination. The district court emphasized the stringent standard for vacating an arbitration award, under which "[a]n arbitration award is enforceable even if the award resulted from a misinterpretation of law, faulty legal reasoning or legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same." The district court held that the arbitrator properly concluded that the arbitration contract did not incorporate Title VII's exhaustion requirement and that no law requires exhaustion in the arbitration context. Because the law is still developing concerning employers' vicarious liability for acts of individuals who are not formal decision makers, the arbitrator properly imputed liability to CACI for Faraci's supervisor's conduct. The arbitrator made a good faith effort to apply the law and found that Faraci's supervisor was a "top manager" and "deeply intertwined in the decision to terminate Faraci," poisoning the decision. Additionally, the arbitrator properly concluded that Faraci was discharged because of her gender. The arbitrator concluded that CACI's clients sought Faraci's removal from their contracts because "she was a distraction to the men at work" and "men were hanging around her, and that caused a problem at work." CACI's "blind reliance [on customer complaints] amounts to allowing customer preferences as to an employee's gender to become, impermissibly, an occupational qualification." Finally, ample testimony supported a decision for the claimant on the hostile environment claim in the particular circumstances. The court declined to overturn the award in any respect. **CACI Premier Technology, Inc. v. Faraci**, 464 F. Supp. 2d 527, 2006 U.S. Dist. LEXIS 89609 (E.D. Va. 12/12/06).

ATTORNEYS' FEES

Equal Access to Justice Act

The petitioner, a former sergeant in the U.S. Army who had been discharged as a conscientious objector, moved for attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. The petitioner had obtained a TRO and a stipulation from the Government, which the court later ordered as a consent decree, that he would not be deployed until his status was determined. The EAJA authorizes a court to award fees and other expenses to a "prevailing party" other than the United States in any civil action brought by or against the United States, unless the United States' position is "substantially justified." Judge David N. Hurd (N.D.N.Y.) held that the petitioner was a "prevailing party" because he had achieved the primary objective of his habeas corpus petition: to prevent his deployment to Afghanistan while his conscientious objector application was pending. Moreover, he had obtained his objective through court intervention, not simply as a result of the Government's voluntary change in conduct. The court also held that the Government's decision to reorder the Petitioner's deployment, after an investigating officer had determined that he qualified as a conscientious objector, was

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not substantially justified. Finally, the court held that the petitioner's attorney was entitled to attorneys' fees at an enhanced rate (above $125 per hour) because the case had required specialized expertise in military and conscientious objector law. The petitioner was represented by NELA/NY member Deborah H. Karpatkin. Congratulations, Deborah! **Martin v. Secretary of the Army**, 463 F.Supp.2d 287, 2006 WL 3483950 (N.D.N.Y. 12/4/06).

CLASS ACTIONS

Gender Discrimination

A motion for class certification of an action against Wal-Mart, alleging sex discrimination under Title VII, was granted in part and denied in part by the district court for the Northern District of California in June, 2004. Both parties appealed. The Ninth Circuit Court of Appeals, noting that a Rule 23 class certification decision is reviewable only for abuse of discretion, affirmed in a two-to-one decision. The class consisted of "approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country." Wal-Mart contended that the class did not meet Rule 23's commonality and typicality requirements, that the certification prevented it from responding to individual plaintiffs' claims, and that the claims for monetary relief predominated over those for injunctive or declaratory relief. The plaintiffs' cross-appeal asserted that the district court had erroneously limited back-pay relief for many of the plaintiffs' promotion claims. The court of appeals found that the district court had properly admitted evidence from a sociologist that, among other things, Wal-Mart's personnel policies and practices make pay and promotion decisions vulnerable to gender bias. The plaintiffs also presented evidence from a statistician that there were systemic disparities between men and women in pay and promotions, which could be explained only by gender discrimination. In addition, there was circumstantial and anecdotal evidence of discrimination (120 declarations of employees), which the court of appeals held had also properly been admitted. The court held that the named plaintiffs also satisfied the typicality requirement. The defendant's other arguments were also rejected, and so was the plaintiffs' argument that its ability to obtain class-wide back pay should not have been curtailed. One circuit judge dissented in a decision notable for its hostility to class actions generally. **Dukes v. Wal-Mart, Inc**., 474 F.3d 1214, 2007 WL 329022 (9th Cir. 2/6/07).

DAMAGES

Emotional Distress

The Second Circuit Court of Appeals (Judges Joseph M. McLaughlin, Robert D. Sack, and [U.S.D.J., S.D.N.Y.] John G. Koeltl) upheld a jury's compensatory damages award of $100,000 to an African American former corrections officer on his New York State tort claim of intentional infliction of emotional distress. Although the jury found that the individual defendant, a deputy, subjected him to a racially hostile work environment, it concluded that the hostile environment was not the proximate cause for the plaintiff's emotional distress and awarded him only nominal compensatory damages on his §§ 1981 and 1983 claims. The court of appeals upheld the jury's $100,000 award even though no medical evidence corroborated the plaintiff's testimony about his distress. Applying New York State law, the court held that medical evidence was not necessary in light of the plaintiff's testimony about the emotional and physical manifestations of his distress. It also noted that New York courts had upheld awards of over $100,000 in comparable cases. The Court's affirmance of the emotional distress award despite the nominal damages on the hostile work environment claims suggests that emotional distress claims are not—as employers often argue—merely duplicative of the hostile work environment claim. At least in this case, the jury saw a difference between the two types of claims. The court also upheld the jury's punitive damages award of $20,000 for the tort claim, as well as the plaintiff's claims under the NYSHRL and §§ 1981 and 1983. It rejected the defendant's argument that the award was excessive under the standards of **BMW of N. Am., Inc. v. Gore**, 517 U.S. 559 (1996), noting that the defendant (1) had physically assaulted the plaintiff and (2) had been motivated by racial animus. However, the court held that the award was excessive in light of the individual defendant's personal finances and remanded that issue to the district court. **Patterson v. Balsamico**, 440 F.3d 104, 97 FEP Cas. (BNA) 1057, (2d Cir. 2006).

EMPLOYMENT AT WILL

An associate at a law firm alleged that he was discharged after refusing to violate DR 1-102, the disciplinary rule prohibiting misconduct by lawyers. The plaintiff's claims survived a motion to dismiss, because the court (Rolando T. Acosta, J., Sup. Ct. N.Y. Cty.) held that he had stated a claim by alleging that the firm breached its implied-in-law obligation not to retaliate against the associate because he refused to violate his ethical obligations. In so holding, the court expanded the rationale of **Wieder v. Skala**, 80 N.Y. 2d 628 (1992), which carved out an exception to the employee-at-will doctrine. The court held that a law firm has an implied-in-law obligation of good faith and fair dealing when an associate in the firm is terminated for insisting that the firm comply with DR 1-103, which requires a firm to report lawyers' misconduct to the Disciplinary Committee. The court went on to deny the defendants' motion to dismiss on the basis of Partnership Law § 26(c)(i), but agreed with the defendants that the plaintiff was not entitled to accounting. Connolly v Napoli, Kaiser & Bern, LLP, 12 Misc. 3d 530, 817 N.Y.S.2d 872 (N.Y. County, Acosta, 4/4/06).

ETHICS

Noncompetes for Lawyers

A law firm moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss its former counsel's claim that a noncompete agreement he had signed as part of his withdrawal from the firm violated New York Disciplinary Rule 2-

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108(A). Rule 2-108(A) prohibits lawyers from entering into an employment or partnership agreement with another lawyer that restricts that lawyer's right to practice law after he has left the practice. Judge Sidney H. Stein (S.D.N.Y.) dismissed the claim, holding that New York law does not provide a cause of action for damages for a violation of a disciplinary rule. The court distinguished cases in which the plaintiffs' arguments that their noncompete agreements violated Rule 2-108 formed a part of alleged at of breaches of contracts. In contrast to the present case, those plaintiffs did not seek damages based on the violation of the disciplinary rule itself. The court also dismissed as moot the plaintiff's claim for a declaratory judgment that the noncompete agreement violated Rule 2-108 because the defendants had voluntarily released the plaintiff from the retraint. **Karas v. Katen Muchin Zavis Rosenman**, —- F. Supp. 2d —-, 2006 WL 3635330 (S.D.N.Y. 12/12/06).

FIRST AMENDMENT

Government Employees

A Rensselaer County employee alleged that the county and Kathy Jimino, the County Executive, violated his right to free speech by failing to reappoint him as the Director of the Bureau of Real Property in retaliation for speaking out about a local law that transferred tax mapping services from his department to another. The plaintiff also alleged that defendant Jimino breached an oral contract to help him find a new job. The district court (Randolph F. Treece, Mag. J., N.D.N.Y.) considered the defendants' motion for summary judgment in light of **Garcetti v. Ceballos**, 126 S. Ct. 1951 (2006). The court faced the question of whether the plaintiff, a public employee, spoke pursuant to his official duties or as a private citizen. The court granted summary judgment in part, finding that the plaintiff clearly spoke pursuant to his official duties before 2000, but a genuine issue of material fact existed as to whether he had continued thereafter to speak pursuant to his official duties or as a private citizen on matters of public concern. The court also denied summary judgment on the defendants' qualified immunity claim, because when the acts were committed, it was clearly established that the First Amendment bars an employer from retaliating against employees for speaking about matters of public importance. The court also denied summary judgment on the plaintiff's additional claims. NELA/NY member Peter Henner represented the plaintiff. Good work, Peter! **Jackson v. Jimino**, — F. Supp. 2d —, 2007 WL 189311, Civ. No. 1:03-CV-722 (N.D.N.Y. 1/19/07).

Prior Restraint

An investigator for the Rockland County Human Rights Commission (HRC) sought to enjoin the county from enforcing a policy that prohibited county employees from speaking publicly on controversial matters. In an earlier case, the plaintiff had claimed that the county discriminated against African Americans in its hiring practices, retaliated against the plaintiff when he objected to these practices, and refused to appoint him as Commissioner, both because he was African American and because of his objections. During the trial of that case, the county's speech policy came to light. After a verdict in the first lawsuit in favor of the defendants, the plaintiff filed the second lawsuit. The parties cross-moved for summary judgment. Judge Colleen McMahon (S.D.N.Y.) first held that the plaintiff had standing to raise his First Amendment claim based on his allegations that the county had threatened to discipline him for speaking publicly and that he had refrained from doing so as a result. The court next held that *res judicata* did not bar the second lawsuit, because the first lawsuit involved different claims, injuries, and facts and because the plaintiff could not have raised the speech claim in the first suit, as he did not know of the policy at the time. As for the policy itself, the court held that genuine issues of material fact—in particular, the policy's scope and whether it applied to lower-level employees in addition to senior officials—precluded judgment for the county. **Jean-Gilles v. County of Rockland**, 463 F. Supp. 2d 437, 2006 WL 3479018 (S.D.N.Y. 11/29/06).

LABOR UNIONS

Exhaustion of Contractual Remedy

An employee of the U.S. Department of Homeland Security sued the Department, alleging employment discrimination based upon race, national origin, and sex. Before he filed his federal complaint, his union challenged the Department's refusal to reinstate him after a two-year medical leave of absence, in arbitration proceedings pursuant to the union's collective bargaining agreement. The union later withdrew its grievance when the plaintiff rejected a proposed settlement. The plaintiff did not appeal the grievance to the EEOC, as required by the Civil Service Reform Act of 1978 (CSRA). Instead, he filed an original charge with the EEOC, which it dismissed on the ground that the plaintiff had already elected to proceed via the grievance procedure, and the district court dismissed the complaint. On appeal, the Second Circuit Court of Appeals (Roger Miner, Amalya Kearse, and Peter Hall, JJ) agreed that the plaintiff had failed to exhaust administrative remedies but held that his failure could be excusable on equitable grounds. In particular, the court noted that administrative exhaustion may be waived if adequate remedies are not available in the administrative forum. In this case, no adequate remedy was available, since the union had withdrawn the plaintiff's grievance and thus there was no final decision for the EEOC to review. On remand, the court of appeals instructed the district court to reconsider whether equitable principles excused the plaintiff's failure to exhaust. It also advised the district court to consider (1) the limited role the plaintiff had played in the grievance process, (2) the reasonableness of the settlement agreement that the plaintiff rejected, and (3) the plaintiff's allegation that he sought relief in the EEOC after the union withdrew its grievance, but that his request for relief was denied. **Fernandez v. Chertoff**, 471 F.3d 45, 2006 WL 3499977 (2d Cir. 12/5/06).

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NEW YORK LABOR LAW

Coverage of "Executives"

The Appellate Division, First Department, dismissed as untimely a plaintiff's appeal from a September 26, 2005 order of the New York Supreme Court (Herman Cahn, J.) dismissing a claim under New York Labor Law § 198. Section 198 authorizes the court to award costs, attorneys' fees, and damages to an employee who prevails on a wage claim against his employer. The court stated that, even if the appeal was timely, the plaintiff would not have a claim because, as a "highly compensated professional," he was exempted from the law's coverage. In support of its conclusion, the court cited **Gottlieb v. Kenneth D. Laub & Co., 82 N.Y.2d 457, 463 (1993)** and N.Y. Labor Law § 190[7], which limits the definition of "clerical and other worker" to those who earn less than $600 per week. **Zito v. Fischbein, Badillo, Wagner & Harding**, — N.Y.S.2d —, 35 A.D.3d 306, 2006 WL 3803115, 2006 N.Y. Slip Op. 10124, (App. Div. 1st Dep't 11/28/06).

Deductions from Wages

The New York State Court of Appeals has issued a decision broadly construing the prohibition in New York Labor Law § 193 against making deductions from wages. A defendant deducted a service fee whenever its employees cashed their pay vouchers at its cash machines. Section 193(1)(b) prohibits employers from deducting money from an employee's wages except as required by law or as "expressly authorized in writing" by and "for the benefit of the employee." The court held that the convenience of using an on-site cash machine, as opposed to cashing a paycheck at a bank, is not a benefit within the meaning of the section. The court rejected the defendant's argument that the deduction of the fee was a separate transaction from its payment of wages and was wholly voluntary on the part of the employee. The court held that there was only one transaction, because the fee was already subtracted at the time the employee elected to be paid by voucher rather than by check. Moreover, permitting the employer to deduct wages at a later time as long as the employee agreed would "open the door to a new category of deductions that would be illegal if directly deducted . . . ." It would also undermine the law's purpose, which is to protect workers from "coercive economic arrangements" by which their wages are diverted for the benefit of their employers. **Angello v. Labor Ready, Inc**., 7 N.Y.3d 579, 2006 WL 3313119 (N.Y. 11/16/06).

RETALIATION

What Constitutes Protected Activity

The Sixth Circuit Court of Appeals (Judges Boggs, Daughtrey, and Mills) affirmed a district court's grant of summary judgment to an employer on a retaliation claim under Title VII. During an internal investigation of sexual harassment allegations against one of the defendant's employees, the plaintiff witness revealed that she too had been sexually harassed by the employee under investigation. The defendant later fired the plaintiff. The court of appeals agreed with the district court that the plaintiff's revelation of her own sexual harassment experience in the course of the investigation did not constitute a "protected activity" for purposes of establishing prima facie retaliation. The court rejected the plaintiff's argument that her revelation constituted opposition to an unlawful employment practice and/or participation in an investigation of such a practice. Rather, the court held, the plaintiff's statement was not sufficiently "active" to constitute opposition. The court noted that the employee had merely cooperated with her employer's investigation and did not initiate any complaint of her own, either before or after she participated in the investigation. As for the plaintiff's cooperation in the investigation, the court noted that other courts had held that a plaintiff's participation in an internal investigation, in the absence of a pending EEOC charge, does not constitute protected activity under Title VII's participation clause. In adopting this position, the court rejected the plaintiff's argument that employees might be less willing to divulge information to internal investigators if they lack protection against retaliation. Instead, the court was persuaded that expanding the participation clause to include internal investigations might dissuade employers from launching such investigations in the first place. The court cited a previous decision in which it had held that the intent of the participation clause was to protect a complainant's access to the administrative process and the operation of that process once it is engaged. Accordingly, actions before administrative charges are filed are not encompassed by the participation clause and must "be considered pursuant to the opposition clause." **Crawford v. Metropolitan Government of Nashville and Davidson County**, 2006 WL 3307507, 99 F.E.P. Cas. 438 (BNA), (Not Recommended for Full Text Publication)(6th Cir. 11/4/06).

SEXUAL HARASSMENT

Employer's Vicarious Liability

A plaintiff alleged that she was sexually harassed by her male supervisor, retaliated against for complaining about the harassment, and constructively discharged. The defendants moved to dismiss her claims under the New York State and City Human Rights Laws for failure to state a claim. The defendants argued that they were not liable for the sexual harassment because they investigated the plaintiff's complaint and terminated the perpetrator. Justice Emily Jane Goodman (Sup. Ct. N.Y. Cty.) rejected their argument, holding that the complaint sufficiently alleged that the defendants knew or should have known about the harassment before the complaints were lodged, so they were still liable for their earlier acquiescence. The court upheld the plaintiff's constructive discharge claim, even though she did not resign until after the defendants completed their investigation and fired the supervisor. The court rejected the defendants' argument that their actions after the complaints were made eliminated the plaintiff's intolerable working conditions and thus her need to resign. Thus, the court appears to have held that an employee may sue for constructive discharge based on intolerable conditions that existed in the past but that

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no longer exist. As for the retaliation claim, the court agreed with the defendants that the plaintiff had suffered no adverse employment action as a result of her complaints. Specifically, the plaintiff's complaint did not allege that the return-to-work offers that the defendants proposed to the plaintiff after firing her supervisor materially changed her conditions of employment. The court held that the plaintiff's resignation out of fear that she would continue to face harassment from co-workers despite the departure of her supervisor did not constitute an adverse employment action. **Polidori v. Societe Generale Group**, No. 05-113960, (Sup. Ct. N.Y. Cty. 11/27/06).

Same-Sex Harassment

A male plaintiff alleged that his male supervisor and co-workers subjected him to a hostile work environment by making him the target of sexual innuendo and distributing sexually explicit cartoons, some of which insinuated that he wore women's clothes. He also alleged that management failed to address his complaints of harassment and that he faced retaliation for making the complaints. The work environment allegedly grew so intolerable that he was forced to resign. Applying the evidentiary standard for same-sex harassment claims set forth in **Oncale v. Sundowner Offshore Services, Inc**., 523 U.S. 75 (1998), Judge Sandra L. Townes (E.D.N.Y.) held that the plaintiff's allegations did not support his claim that his gender motivated the harassment. The court noted that the plaintiff had not alleged that the principal harasser, his supervisor, was sexually oriented toward him or motivated by sexual desire, nor had he alleged that his supervisor's or co-workers' conduct was motivated by a hatred of men or by a general hostility toward men. Furthermore, because the plaintiff worked in an all-male environment, he could not show that the alleged harassers treated men and women differently. The court distinguished the facts of **Petrosino v. Bell Atlantic**, 385 F.3d 210 (2d Cir. 2004). There, the court of appeals had upheld the sex harassment claims of a woman who worked in a sexually charged environment in which both men and women were exposed to profanity, offensive comments, and sexually explicit graffiti. **Petrosino** was distinguishable, the court held, because in that case the comments were directed to all women as a group and to a few men in particular. In contrast, the alleged harassment in the present case was directed only to the plaintiff, not to men in general. Despite the plaintiff's allegation that he was mocked, in part, for dressing like a women, the court's analysis lacks any discussion of whether the plaintiff was targeted because of his failure to conform to sex-based stereotypes about men. As for his retaliation claim, the court held that the plaintiff had met his minimal burden, and that his failure to plead a discrimination claim did not extinguish his retaliation claim. The plaintiff's alleged constructive discharge constituted an adverse employment action, and his allegations sufficed to establish a causal connection between the alleged harassment and the constructive discharge. **Borski v. Staten Island Rapid Transit**, 2006 WL 3681142, 99 F.E.P. Cas. (BNA) 778 (E.D.N.Y. 12/11/06).

STATUTE OF LIMITATIONS

Administrative Claims

An employee of the Connecticut Commission on Human Rights and Opportunities (CHRO) sued State of Connecticut, the CHRO, and various CHRO employees, and the defendants moved for summary judgment on the plaintiff's Title VII race and national origin discrimination and retaliation claims. The defendants argued that the claims were time-barred because the plaintiff had not filed her administrative charges with the EEOC within a 180-day period. On appeal to the Second Circuit Court of Appeals, the plaintiff argued for the first time that a 300-day period applied because, under a work-sharing agreement between the EEOC and the CHRO, a filing with either the EEOC or the CHRO is deemed a filing with both agencies. The court of appeals (Amalya Kearse, Joseph M. McLaughlin, and Robert D. Sack, JJ) declined to entertain the argument, noting that the plaintiff could have raised it before the district court but did not, and that no evidence in the record supported her contention that a work-sharing agreement actually existed. The court also affirmed the district court's dismissal of the claims against the CHRO employees in their individual capacities, because the plaintiff had served the Connecticut Attorney General's office, not the employees personally, and had shown no good cause for her mistake. **Bogle-Assegai v. Connecticut**, 470 F.3d 498 (2d Cir. 2006).

TAXATION

Emotional Distress Damages

The case of **Murphy v. IRS**, 460 F.3d 79 (D.C. Cir. 8/22/06), caused great excitement in the plaintiffs' employment bar by holding, in a thoughtful and carefully reasoned opinion, that taxation of emotional distress damages was unconstitutional. Now the D.C. Circuit Court of Appeals has decided to rehear the case, *sua sponte*—so stay tuned.

UNION DEMOCRACY

A longshoreman, who got work through being listed on the longshoremen's register kept by the Waterfront Commission, lost that registration in 2000 when the Commission learned that he had failed to reveal a 1998 arrest in New Jersey for marijuana possession. After that arrest, the employee had successfully participated in a pretrial intervention program, and by court order, the arrest had been expunged. He applied in 2004 for re-registration, and the Commission denied his application, citing his "serious fraud," his possession of marijuana in 1998, his alleged use of marijuana five times in 2000, his "failure to maintain any type of steady employment" since then except employment for a year as a casino dealer, and his termination from that position for excessive absences. He filed a petition under CPLR Article 78, alleging that the Commission's determination had no rational basis and was arbitrary and capricious. Justice Emily Jane Goodman (Sup. Ct. N.Y. Cty.) agreed. The Waterfront and Airport Commission Act (McKinney's Unconsol. Laws of NY §§ 9801 **et seq**.) gave only two grounds for refusal to register

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mit when it works for you. Remember, your adversary or client is probably doing the same thing.

4. Have an Outlet, Exercise or Otherwise. The day-to-day grind of lawyering, particularly of litigating, isn't easy considering we are sandwiched between clients, partners, associates, adversaries, judges, clerks, family and friends. Accordingly, each of us must have some way or mechanism to release tension, which will ultimately reduce stress. In other words, no one can expect to handle all the stresses of lawyering in general without a way to "let it all hang out." Exercise is a great way to combat this and has other physical advantages. Of course, if you have not exercised, please consult your physician before doing so. Your outlet doesn't have to be exercise. It can be anything, as long as it's something.

5. Leave the Office During the Day—Everyday. A simple yet significant stress reduction technique is to leave the office for brief periods of time on days when you don't have appointments outside the office. By removing yourself from your work environment, you can lower your blood pressure and get in touch with the "personal" side of yourself. A brief walk or even a short drive (if you're in a suburban setting) can relax you and return you to work refreshed. In modern buildings, the windows don't usually open, so make sure you take a few deep breaths of fresh air while you are out. It will make a difference as the long day wears on. Alternatively, meditation is an excellent exercise which can take ten or fifteen minutes. This will enable you to refresh and renew yourself during a hectic day. There are many books dealing with meditation, and if you need any assistance contact me and I will direct you.

6. Make Sure You Have Something to Look Forward to at the End of the Day—Everyday. An excellent way to keep a positive focus throughout the day can be creating an enjoyable activity to look forward to at the end of the work day. The activity can be something that you plan outside of the office, such as attending a movie or play. It can also be something at home as simple as watching a ball game or program, reading a book or playing with your child. It doesn't matter what it is, as long as it is something that you enjoy. Whatever the case, planning an enjoyable activity will give you something to shoot for at the end of the day.

7. Be Aware of the Transition Back to the Work Week. For many of us, as the work week progresses, we look forward to the weekend. Many attorneys, however, may find the need to work over the weekend or at least part of it. This is a reality which may not be helped, but it need not become a major source of stress. If you feel you must consistently work every Saturday or Sunday in the office or several hours at home, you can adjust to the situation and accept it without repeatedly thinking or saying, "Why me?" It is best to adjust to this reality through acceptance. It may be possible to work the same time frame each weekend, *i.e.*, Sunday mornings. If so, the rest of the weekend can be left for family time or other social activities. In addition, this consistency will also help your family or significant other to adjust to your weekend work schedule by knowing what to expect. Notwithstanding, the enjoyment that we may experience over the weekend usually comes to an abrupt halt when we arrive at work on Monday morning. For many of us, the anxiety or worry that the work week brings may actually start to seep into our minds either late in the afternoon on Sunday or Sunday evening. If you are one of these people, don't let it get the better of you. I recommend making it a point to go on the "attack" by trying to schedule something enjoyable for these times. This may help to overcome any late weekend jitters that may arise as a result of the transition back to work. A late afternoon jog or some other form of physical exercise may be helpful. It has always had an extremely calming affect on me and has actually helped me to look forward to look forward to Sunday evenings, when in the past they were often something to dread.

8. When Something Goes Right, Stay With It. It is so often the case that, due to our hectic caseloads, we have very little or no time to enjoy a positive outcome before moving onto the next issue, crisis, or concern. While the reality is that we must jump from one frying pan to another, it is important to take at least some time, maybe as brief as an evening or hopefully at least a weekend to savor our victories, to permit ourselves to feel good about what we have done, so that we can take this positive experience into the next battle. The intrinsic enjoyment in any profession is something that is extremely elusive. Thus, when something good happens, we should give ourselves an opportunity to enjoy it. The positive accomplishments of our work should not be taken lightly.

9. Pursue Perfection Realisitically. Lawyers for the most part believe that they should write the perfect brief, be the highest biller, win every case, be the most respected attorney in their office, and generally, "do it all." This, however, for a variety of reasons, is not a realistic view of what most of us are capable of. While we certainly wish to strive for attaining the highest possible goals, there is a sense of defeat or failure when we don't get the results we wish to achieve. These results, however, may be unrealistic since the facts of a particular case may often have a lot to do with the outcome. In order to accept some of the disappointments that occur along the way, it is important to develop a realistic view of your own capabilities and downplay, to some degree, the desire to be perfect. This is not to say that we should not work as hard for our clients as possible. There is, however, a place for recognizing the realities of what we can accomplish. Sometimes, not being the very best is still alright. We all have to accept our disappointments in a manner that does not leave us "spilling" our anger or frustration onto others. Losing, unfortunately, is a part of the job.

I have just realized that my list stops at nine, not "ten." Oh well, no sense stressing about it. Nine will have to be good enough! ■

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demands, motions, and briefs; a quick way to conduct legal research remotely over the telephone lines instead of in a remote library; and a new way to communicate instantly with colleagues down the hall and clients around the world—all these capabilities, and more, transformed the law office into a lean litigation machine.

Then came Rowe,[1] Zubulake,[2] and Morgan Stanley.[3] Litigators and some courts increasingly recognized that discovery was not wholly adequate without providing the information residing on a party's computer. Paper discovery just did not tell the whole tale. If one wanted to know what a litigant really said to her colleague about a defective product, an attorney needed to see the litigant's e-mailed comments or confidential memo. If an employee was engaged in corporate data theft, then general counsel needed to know the contents of the employee's e-mail messages. If a spouse was hiding a valuable stock portfolio from a matrimonial court's support obligation calculation, then an attorney needed to see the spouse's undisclosed Internet stock trades. The scenarios of potential electronic discovery are limited only by the volume and types of data which people store on their computers.

On Dec. 1, 2006, this new electronic reality became law as the new federal rules on electronic discovery took effect. Recognizing that almost all business and personal records are no longer created and stored in paper form but in digital form, Congress finally gave lawyers and their clients the right to discover their adversaries' "private" computer data.[4] Such access has proved revolutionary in courts across the nation, as the discovery of digital smoking guns is exponentially increasing the value of cases, and is causing them to be settled more quickly.

So far, so good, for tech savvy attorneys. But what about the rest of the bar who pursued a juris doctorate to practice law, and not computer science? Previously, attorneys hired computer consultants to deal with their offices' bits and bytes, megs and gigs. But now, the federal courts and some state courts are waiting to be briefed by opposing attorneys on the merits of an electronic discovery demand. While an opportunity to some, many attorneys are content to have discovery and computers co-exist in separate worlds.

Evidence for Everyone

Well, attorneys need not fear this new digital world. Digitally anxious attorneys are simply unaware of how much they really do know about computers. And the new federal rules amendments relating to electronic discovery are really not new law. They are simply a modern extension of the laws of discovery which litigators have been using for decades. There has been no seismic shift in the law ready to swallow up the technically challenged. Rather, the amendments generally have simply inserted the word "electronic" in the rules relating to discovery.

Next, let us establish a comfort zone for the anxious attorney by reviewing what is already known about computers—it records your life. In every home and office, people conduct their most private and important affairs on the computer. Whether it is e-mailing the most personal or confidential comments, using spreadsheets to track stock portfolios, editing multiple drafts of a business letter or memo, or using track changes on a negotiated contract, most attorneys are quite proficient in the capabilities of com-

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puters. Electronic discovery entails an attorney using what he already knows, and being aware of one more simple yet critical electronic fact: All these simple computer events described above are automatically recorded by the computer for a long time.

Most computer users, and not just digitally anxious attorneys, are unaware of the permanent electronic trails being created by almost every use of a computer. Every time someone saves a document revision, sends an e-mail, views a Web page on the Internet, downloads a tune or computer program from the Internet, or performs any other computer function, the action and its content are saved onto the computer. And contrary to popular presumption, using the "delete" key does not erase the record of one's computer actions.

Rather, pushing the "delete" button is just an option given to the computer user for removing the unwanted document or image from his view so that his computer folders and files appear uncluttered. But, the unwanted, deleted item still resides on the computer's hard drive. Hard drive? Forgive me. The hard drive is inside the computer box; it is a spinning silver platter about six inches in diameter which looks like a mini-record player. Every bit of information created or modified on the computer is saved on the hard drive. It is the computer's automatic self-recorder which contains all wanted and unwanted information.

Is "deleted" information saved forever? Not really. The unwanted "deleted" information remains on the computer's hard drive only until the information is actually replaced by new information which the computer user has purposely elected to "save" onto his computer. However, the modern computer has so much untapped memory that saving new information generally does not entail the replacement or overwriting of the "deleted" information. Thus, "deleted" information may reside intact on a computer hard drive for months or years after its intended deletion. To the computer owner, the unwanted information may be a potential liability. To an enterprising attorney, however, it is a potential piece of evidence to retrieve for devastating use in court.

That's it. That is all the computer education an attorney requires to effectively navigate the friendly waters of electronic discovery. The rest is about recognizing your discovery opportunity.

Bonanza of Potential Evidence

The legal opportunity is clearly tremendous for those who now realize that most people keep the details of their corporate or personal lives on their corporate and personal computers. What if an attorney could gain access to a litigant's computer and its stored information? Imagine the abundance of valuable records which would become available to an attorney for use as evidence. (Reader, be comforted, "abundance" does not mean "overwhelming"; "abundance" can refer to the potential to be quickly, accurately, and affordably sifted by electronic discovery experts and tools.) Discovery would no longer be limited to only the paper files which a litigant carefully amassed and produced pursuant to

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his attorney's careful counsel. The delivered computer files would not be missing earlier drafts of internal corporate memos, or a litigant's incriminating memo to staff. Spreadsheets, letters, and agreements might still contain all the track changes used by the original drafters of those documents, thus baring the drafter's once private thoughts about the evolution of those documents.

And what about e-mails? There lies the real bonanza of potential evidence. Approximately 50 to 100 percent of all evidence resides in e-mails.[5] Why? Because e-mail is the most ubiquitous form of communication, today. And because people "say" the darndest things in their e-mails. And they "say" them and send them under wishful thinking that they remain hallowed secrets between sender and recipient. And, because people generally do not expect to become plaintiffs and defendants. When they do become plaintiffs and defendants, their e-mails become witnesses. These digital witnesses, too, are subject to discovery and subpoenas.[6]

These digital witnesses stalk one's personal and business life. People use e-mail more than they talk on the phone, post a letter, or meet at the water cooler. E-mail, today, is also an accepted legitimate method by which businesses and corporations communicate their daily business. It also provides employees with a discreet form of communication which allows a sender and recipient to appear professionally busy at their work desks while they gab on about their business, their company's business, and their private lives. Indeed, the average business computer user spends an average of over two hours a day just dealing with e-mail.[7]

Since the once digitally anxious attorney is now chomping at the bit to engage in electronic discovery, consider some more good news. E-mails also often include informative "attachments." These attachments may contain personal notes, legal documents, contracts, spreadsheets, photo images, and Web site pages. They are easily attached to an e-mail message by just one more click of a button (or drag of a mouse). They are most efficiently used as a method to share documents for comments and edits by several parties. They also leave a permanent electronic trail once they are viewed. And even though most computer operating systems provide a prompt to the e- mail recipient which seems to offer the recipient the choice of either saving ("save") the attachment to his computer or of only opening ("open") the attachment and not saving it on his computer, it is a misleading choice. The attachment will be stored on the computer.

"What about metadata? I want metadata!" agitate our digitally aggressive attorneys. And, well, they should agitate, for electronic discovery not only yields the sought after computer documents, but also their metadata. "Metadata" is literally the data about the data. For example, the "metadata" accompanying all e-mails reveals the transmission path of the e-mail, including its origin, intermediate destinations, and its ultimate destination. These locations can be narrowed down to the country, city, and street address from where all the transmissions emanated. This is truly the golden age of discovery for identifying and locating those who have had access to and viewed potentially sensitive information.

Or, the metadata contained in a simple Microsoft Word document can reveal truths about the document that would forever be hidden in paper format. Metadata allows one to easily discern the documents' creation date, modification date, access date, number of revisions, and editing time. Such information lets an attorney know when that document was really created, modified, and inserted in someone's computer or paper file. Retrieving this information is essential for recreating time-critical events to reveal the hidden truth about disputed events.

Not Much Room to Hide

Clearly, discovery of a party's computer information provides an attorney with incredible opportunities to increase his pool of evidence and thereby enhance the value of his case. The evidence is

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a person or for revoking a registration, his commission of a crime or clear likelihood that his employment would endanger the public peace or safety, and held that neither had been shown by the Commission. The court granted the longshoreman's petition and remanded the matter to the Commission for further consideration its determination that he had committed "fraud" in failing to disclose the 1998 arrest. NELA/NY member Danny Alterman represented the petitioner. **Karahuta v. Waterfront Commission of New York Harbor**, —- N.Y.S.2d —-, Index No. 115557/05 (Sup. Ct. N.Y. Cty. 8/14/06).

PRACTICE TIP

In general, when an adversary takes your client's deposition, you want him to learn as little as possible. This is why we prepare our clients by saying, "There is nothing you can say at your deposition that will help you," "This is not the time or place to win your case," "The shortest truthful answer is the right answer," "Answer only the question that is asked, not the one that should have been asked," and similar advice. On the other hand, that deposition is the chief source of material for the almost-inevitable summary judgment motion. That means that if opposing counsel has not asked the plaintiff an important question, like "Did you tell HR about this alleged harassment?" the answer to that question will not be in the deposition transcript either. Some judges rely much more on deposition transcripts than on affidavits written in opposition to a summary judgment motion. They may even consider that if the plaintiff did not mention X in her deposition, and then says X in the affidavit, this is a contradiction and the affidavit will be disregarded. Accordingly, you may want to ask a few questions of your own at the end of opposing counsel's turn to make sure important facts will be included in the transcript and the defense lawyer will not be able to say your client has not alleged all the elements of her claim. ■

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there for the taking.

But, can't the subject of an impending electronic discovery request do something to prevent a disastrous discovery? Isn't there some way to delete, or erase/destroy/obliterate, a computer's very private information? Well, all right—yes. One can remove that six-inch hard drive and smash it into pieces. Or, one can erase, or "wipe," the hard drive with a program designed to overwrite a hard drive's previous information. But, not to worry, since an old law prohibits such a nefarious action—the law of "litigation holds."

As attorneys know, once a party can reasonably anticipate that a current dispute may one day become a litigation, then that party must take all steps to preserve all information associated with that dispute, for future discovery.[8] Well, one might challenge, that law never really worked before. After all, sought after paper files were often conveniently missing by the time litigation ensued. Weren't they shredded? Very possibly. Did the shredder face penalties? Not unless the shredder's former disgruntled colleague came forward to reveal such malfeasance, a la "A Civil Action." (Alas, no penalties there.) So, why is electronic shredding, or "wiping," any different? How does a litigation hold ensure that a party does not wipe his hard drive and cover up (literally) its potential evidence? The answer and solution is in the technology and in the law.

Electronic discovery experts can trace whether a computer hard drive was erased ("wiped") or reformatted (made like new). Once an expert states such for the court, there is no need for a former disgruntled employee of the shredding (wiping) party to come forward. The expert and the hard drive are the only necessary evidence for a spoliation charge. Moreover, the courts have enforced the amended federal rules by prohibiting corporations from erasing their computer data once a litigation hold is ineffect. And if a company cannot produce computer information which a judge determines must have existed, then it is subject to catastrophic sanctions and penalties.[9] Additionally, even outside counsel is subject to fines if she has not personally supervised her client corporation's compliance.[10]

Consequently, corporate in-house counsel and outside counsel are scrambling to ensure that their clients' information retention policies are compliant with the new amendments. "Compliance" means that a company is required to have a mechanism in place to ensure that all computer records that are related to a potential litigation issue are segregated from the company's general data recycling (destruction) system, and is preserved for a later potential discovery demand.[11] Furthermore, "compliance" means that a company's information retention policy provides for a comprehensive method of timely producing electronic discovery without missing any records which could lead to severe spoliation sanctions.[12]

So, both the technology and the law ensure that an opposing party will not obstruct with an enterprising, digitally aggressive attorney's efforts at electronic discovery. Now, every attorney can demand, and argue for, electronic discovery without having pursued a computer science degree. Discover the hidden.

Footnotes

1 **Rowe Entertainment, Inc. v. William Morris Agency**, Inc., 205 F.R.D. 421, 2002-1 Trade Cases P 73,567, 51 Fed.R.Serv.3d 1106 (S.D.N.Y. 2002).

2 **Zubulake v. UBS Warburg LLC** resulted in seven separately reported interlocutory decisions by U.S. District Judge Shira A. Scheindlin during the period of May 2003 through March 2005, commonly referred to as **Zubulake I** through **Zubulake VII**, each with its own separate citation. The decision referred to in this article is commonly referred to as **Zubulake I**, and cited as **Zubulake v. UBS Warburg LLC**, 217 F.R.D. 309, 2003 WL 21087884 (S.D.N.Y. 2003).

3 **Coleman Holdings Inc. v. Morgan Stanley & Co.**, 03- 5045, 15th Judicial Circuit, Palm Beach Co., Fla. (West Palm Beach).

4 Amended Federal Rules of Civil Procedure, eff. Dec. 1, 2006, Rules 16(b)5, 26(a)(1)(B), 26(f)(3), 33(d), 34(a)(1), 34(b), 34(b)(i), 34(b)(ii), 37(f), 45(a)(1)(C), 45(c)(2), 45(d)(1), Form 35.3.

5 Corporate Counsel, Oct. 12, 2005.

6 Amended F.R.C.P. Rule 34(a)(1), (b), Rules 45(a)(1)(C), (a)(2)(A), (a)(2)(B), (d)(1).

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8 **Zubulake v. UBS Warburg LLC**, 220 F.R.D. at 216 (S.D.N.Y. 2003) (quoting **Fujitsu Ltd. v. Fed. Express Corp.**, 247 F.3d 423 (2d Cir. 2001)), commonly referred to as **Zubulake IV**.

9 **Zubulake v. UBS Warburg LLC**, No. 02 Civ. 1243 (SAS), 2004 WL 1620866, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. 2004), commonly referred to as **Zubulake V**; and **Coleman Holdings Inc. v. Morgan Stanley & Co.**, *supra*; and *see* Amended F.R.C.P. Rule 37.

10 Id.

11 Amended F.R.C.P. Rule 37.

12 **Zubulake V**, *supra*.

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older workers. Citing **Wards Cove**, the Court held that "the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities….'."

The Court then performed an RFOA analysis on which plaintiffs similarly failed, holding that "the disparate impact was attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is *unquestionably* reasonable given the City's goal of raising employee's salaries to match those in surrounding communities." Thus, defendant met its burden merely by pointing to some neutral principal, namely, the perceived need to raise the salaries of junior officers to make them competitive with comparable markets. Notwithstanding a demonstrated disparate impact on older workers (the plaintiffs had garnered impressive statistics demonstrating the pay plan's disparate impact based on age), the ADEA claim failed.

One remarkable aspect of this opinion involves the Court's dissertation on age discrimination. It opined, without any citation, that, "Congress' decision to limit the coverage of the ADEA by including the RFOA provision is *consistent with the fact that age,* unlike race or other classifications protected by Title VII, *not uncommonly has relevance to*

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an individual's capacity to engage in certain types of employment." (emphasis added).

After paying lipservice to the possibility that some in society may perceive age to cause more differences than it actually does, the majority goes on to state that "'certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers.'" For this proposition, the Justices rely on nothing more than a report submitted to Congress by then Secretary of Labor Wirtz in 1981. Finally, the Court opines—with no citation whatsoever—that "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." It is noteworthy that these assertions were penned by an octogenarian and supported by Justices who are all past the general retirement age of 65.

The final nail in plaintiffs' coffin was this: "[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was *not unreasonable*. Unlike the business necessity test [required by Title VII], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." Thus, plaintiffs must show that the proffered explanation is unreasonable—a Herculean task, since the employer is in control of both the explanation and the supporting or detracting facts. The availability of less discriminatory alternatives does not suffice to meet plaintiffs' burden, said the Court.

One of the first courts to apply **City of Jackson** was our own Second Circuit. In **Meacham v. Knolls Atomic Power Laboratory**, 461 F. 3d 134 (2d Cir. 2006)("Meacham II"), 26 former employees brought suit under the ADEA alleging disparate impact from an involuntary reduction in force (IRIF). The Second Circuit re-heard the case after its first holding was vacated and remanded following **City of Jackson**. The Circuit had originally held that (i) plaintiffs had established a *prima facie* case by demonstrating a disparate impact from subjective decision-making involved in the IRIF; and (ii) there was sufficient evidence of an equally effective alternative to the IRIF's subjective components to support liability. **Meacham v. Knolls Atomic Power Laboratory**, 381 F.3d 56, 71-76 (2d Cir. 2004).

Although the Second Circuit appeared impressed with the plaintiffs' case, it concluded that its pre-**City of Jackson** analysis was "untenable", because the Supreme Court had held that "the 'business necessity' test is *not* applicable in the ADEA context." Rather, the appropriate test is whether the challenged employment action, in "relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals." **Meacham** II, *supra*, at 140(emphasis in original).

The Second Circuit observed the distinction between evidence of a "startlingly skewed" age distribution of laid-off employees, which is relevant to the *prima facie* case, and evidence that the employer's business justification for the specific design and execution of the IRIF was unreasonable. Ultimately, the court ruled that while the IRIF could have been better drawn, and the process could have been better scrutinized to guard against a skewed layoff distribution, it passed muster under the new test. More specifically, the court opined that "[a]ny system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable." *Id.* at 146.

No case better demonstrates the devastating impact **City of Jackson** has had on ADEA disparate impact analysis. It neatly illustrates the overwhelming difference between employers bearing the burden to demonstrate the "business necessity" of their actions vs. employees bearing the burden to demonstrate the unreasonableness of the employer's practice.

What lessons can be drawn from these cases? First, one vulnerable area appears to involve lay-off systems that terminate employees without the input of their direct managers. Second, plaintiffs must dissect the components of the challenged policy, and isolate and identify the *specific* practice, test and/or requirement that causes the disparate treatment. Scores of cases have been dismissed post **City of Jackson** for failure to satisfy this requirement.

Once that identification succeeds, the disparate impact must be proven. Many courts require statistics and are hostile to small sample cases, although there are some notable exceptions post **City of Jackson**. *Compare* **Lit v. Infinity Broadcasting Corp. of Pa.**, 2005 U.S. Dist LEXIS 30969, 2005 WL 3088364 (E.D. Pa. Nov. 16, 2005) *with* **Ackerman v. Home Depot, Inc.**, 2005 U.S. Dist. LEXIS 10579 (N.D. Tx. May 31, 2005) and **Aylward v. Hyatt Corp.**, 2005 U.S. Dist. LEXIS 16218 (N.D. Ill. Aug. 5, 2005).

Third, be sure to plead disparate impact in the EEOC charge. Some courts have been unforgiving of such omissions, though others have permitted cases to go forward. Fourth, if properly pleaded, your case will survive a motion to dismiss, but those that have, for the most part, have been lost on summary judgment. One notable exception to this distressing trend was **EEOC v. Allstate Insurance Co.**, 458 F. Supp. 2d 980 (E.D. Mo. 2006). In that case, defendant articulated several reasons justifying its rehire policy, but the court denied summary judgment, holding that the EEOC had mustered enough evidence to raise a question of fact to warrant a trial on the reasonableness of the factors other than age. The EEOC did a brilliant job of deposing the person in charge of the rehire policy, by adducing from her the justifications for the policy, and then showing, through her and others, that those justifications were assailable. The case is a "must read" for those contemplating bringing disparate impact age claims.

Ultimately, **City of Jackson** will require Congressional remedy, just as the 1991 Act was required to reverse **Wards Cove**. ■

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