NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 13, NO. 2 November 2005 David Fish, Gary Trachten, Co-Editors

President's Column

by Bill Frumkin, President, NELA/NY

Between listening to Grateful Dead CDs on my drive home from the NELA Convention in June, I reflected on some of the comments made by Cliff Palefsky (NELA member from San Francisco who has championed the opposition to mandatory arbitration) and became somewhat depressed. Mandatory arbitration has to be the low point in the life of a plaintiff's employment lawyer. Where else can one witness the evisceration of the right to jury trial, meaningful discovery, and access to an appeal in one fell swoop?

My participation in Lobby Day, which preceded the NELA Convention, confirmed that opposition to mandatory opposition on Capitol Hill is somewhat off in the distance. Therefore it does not appear that our clients will in the near future receive any relief in connection with this very difficult road block. The choice between refusing to sign a pre-hire mandatory arbitration provision or going to work to support one's family is a no-brainer. What can we do to deal with this oppressive circumstance?

First and foremost is to support NELA National's legislative efforts to oppose mandatory arbitration. As President of NELA/NY I will continue to recommend to the Executive Board that as an affiliate we do everything possible to support this effort. Each of us can also assist NELA National by financially supporting and otherwise getting directly involved in NELA's lobbying efforts.

While these initiatives are underway, we still have to cope with mandatory arbitration on a practical level. The threshold question in a particular case is whether the enforceability of the arbitration clause can be challenged by bringing the case in court and being prepared to fight a motion to compel arbitration. This strategy, of course, depends upon whether the arbitration clause appears coercive. The strategy involves some financial risk-taking on either the client's part or ours, depending on whether or not the case is contingent. Relevant case law indicates that this tact more often than not fails, resulting in a waste of time and money.

Another strategy is to recognize that the case will be subject to arbitration and then prepare the case for that forum. One of the critical components of arbitration and one possible benefit is having some input in the selection of the arbitrator. This is clearly one area where we and our clients benefit from our informally sharing information within NELA/NY to assist each other in the arbitrator selection process.

If the case is going to arbitration, and discovery is critical to the case (which most of the time it is), it will be important for us to educate the arbitrator regarding the necessity of discovery and to push for it to the extent required. I have spoken to numerous arbitrators who are new to employment matters. Many of them have commented to me that ruling on discovery disputes is new to them, but that they recognize its importance to the process. We cannot be bashful in our attempt to seek discovery and to aggressively pursue it with the arbitrator in the event the inevitable disputes occur. As part of this education process, we may also want to invite arbitrators to speak at our conferences.

Employers are also trying to utilize summary judgment as a tool in arbitration the same way it is employed in court. This is another area where I believe we can ban together to try to fight against the use of dispositive motions in a summary proceeding such as arbitration, because its use seems to go against the grain of arbitration in the first place. The arbitrator often has a background in rendering decisions based on the merits, rather than determining whether there are material issues of fact. Hopefully, this predisposition will be helpful in at least getting our case heard.

The current trend validating mandatory arbitration is a mechanism to move our clients out of the judicial system and,

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Member Victory

On October 14, 2005, Geoffrey Mort, Esq., of Kraus & Zucklewski, won a declaratory judgment declaring a non-compete clause in an employment agreement unenforceable. The New York State Supreme Court for New York County (Hon. Richard B. Lowe, III) declined to "blue pencil" the agreement and granted the plaintiff's motion to declare the non-compete clause unenforceable. ■

Post of the Month

From: Joe Ranni [joeranni@rannilaw.com]

Sent: Monday, August 22, 2005 8:07 AM

To: NELA/NY Networking List

Subject: [nela] Deposition Equivocations

As I prepare for 2 evasive witnesses today, I think of pat responses I was given last week. Perhaps w/ others, certain deposition responses give me a laugh. Here are two of my favorites.

"I have no specific recollection"—this seems more common lately.

"There were clear indications"—this was in response to whether there was a sexual harassment complaint procedure and basis for performance criticism where no direction.

"There was training but I don't remember when it was, what it consisted of or any of the material" Usually followed by "but it may be in a book behind my desk."

I just love these. Anyone have any other gems?

The NELA/NY
Calendar of Events

November 2, 2005 • 6:15 p.m.
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

November 8, 2005 • 6–7:30 pm
Sexual Harassment/Discrimination Committee Meeting
100 Church Street, Suite 1605
Meetings 2nd Tuesday of every month

November 17, 2005
NELA's 8th Annual "Courageous Plaintiffs Event"
101 Club
NYC, NY

November 30, 2005 • 6:30–8:30
NELA Nite
3 Park Avenue, 29th Floor
Frank D. Tinari, Ph.D. Speaker
Economic Expert

December 14, 2005 • 6:15 p.m.
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

December 8, 2005
NELA Holiday Party
(Venue to be announced)

Happy May 26!

Rebecca Houlding, NELA member, baby son, Sam, born;

David Fish, NELA member, baby daughter, Riley, born.

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *NELA/NY@nelany.com*. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

Items for the calendar may be submitted by calling Shelley Leinheardt:
(212) 317-2291
Fax: (212) 977-4005
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: *NELA/NY@NELA/NY.com*

Employment Contracts: Substantive and Procedural Protections Against Termination Without Cause

by Gary Trachten (All rights reserved)

A simple hiring letter suffices to memorialize an employee's title and terms of compensation. Therefore, although provisions for position and compensation generally constitute material terms, the heart of most employment contracts is the protection given the employee against being terminated without sufficient "cause." The difficulty lies with the fact that the term "cause" is not well defined in the law. Case law generally defines "cause" differently in different employment contexts. Therefore, a practitioner representing an employee in the negotiation of an employment contract should not depend on a presumed jurisprudence of "cause." Rather, she should bargain for carefully worded provisions that anticipate both (a) the possible scenarios that might lead to her client's need to enforce the contract, and (b) the tactics that the employer may use prior to, or in the course of, litigation in trying to avoid responsibility for the job security assurances that it made.

Under age-old principles for traditional employment contracts, *i.e.*, contracts for a stated duration, an employer may discharge an employee and avoid damages for the balance of the term only upon circumstances that generally discharge a promissor from its continuing obligations under an executory contract. For the most part (subject to the applicability of principles like mutual mistake, frustration of purpose, etc.), that means that an employer generally may not lawfully terminate the employment except upon the employee's material breach of his contractual duties (which encompass the employee's common law duties as an agent).[1] Thus, unless otherwise provided, the circumstances permitting lawful termination are a function of the employee's conduct. It is long and well-established that the employer bears the burden of proving the facts showing such grounds, or cause, for termination.[2]

Notice that under the traditional model described above, the employer's motive is immaterial to whether the discharge constitutes a breach. The employer may not escape liability on grounds that it honestly believed that the employee had materially breached his contractual or duties even if the employer reached that conclusion in good faith upon undertaking an objective and thorough investigation of the circumstances. Thus, in a contract for a term, unless otherwise provided, if the discharge arises from the employer's honest mistake, the employee will prevail on a contractual claim for wrongful discharge. Watch out for contract provisions that provide otherwise by trying cause for termination to the employer's judgments or conclusions.

On the other hand, this traditional motive-neutral model at the same time privileges a termination made in total ignorance of an employee's actual breach regardless of the employer's motive—even if the motivation is arbitrary or malicious. Both Corbin[3] and Williston[4] state the rule that, under a traditional contract for a term, an employer may defend against liability for wrongful termination by adducing evidence at trial of an employee's breach of duty that it first learned about long after the termination. Thus, the "cause" that could justify the termination need not have been the circumstance that, in fact, *caused* the termination. The employer's legal right to use of after-acquired evidence to avoid liability often leads to a great deal of mischief. When an employee challenges an unjust termination under a traditional contract, it is likely that the employer will examine under a microscope the entirety of his job performance and sift through every transaction—particularly expense reimbursements—with a fine tooth comb in search of breaches of duties. The employer will likely try to exploit behavior that had been acquiesced in unofficially or orally (such as with respect to travel and entertainment expenses, personal use of the company's photocopy machine, etc.) but that could colorably serve as "cause" for termination. Given the motivation and the opportunity and economic incentive to do so, some employers will manufacture testimonial or even documentary evidence of cause and present it at trial as "newly discovered" cause. Defense counsel typically will inflate and exaggerate the significance of certain facts in resistance of a claim that a termination or impending termination was, or a threatened termination will be, without cause. Since the employer and its counsel may become very attached to, and start believing, the creative contentions in which they will have invested, the result is that a wrongfully discharged employee who is likely to prevail at trial will have less settlement leverage than she ought to have—particularly in the absence of a fee shifting provision.

In recent decades, a considerable number of states (but not, for the most part, New York) have come to recognize employee contractual job protections arising from other than from traditional, explicit and formal kinds of employment contracts. Contractual protections from termination having indefinite durational terms often are derived from employee handbooks that expressly or implicitly promise that termination will be only for some form of cause. Such protection may also arise from informal contracts such as hiring letters or oral promises. Contractual protections also may be implied by the totality of a set of circumstances. Although the courts of differing states are not uniform in their approach to such contracts, the consensus is that (unless expressly otherwise) the protections are more so tied to the quality of the employer's motive than of the employee's conduct.[5] In connection with indefinite term contracts, an employer's honest, subjectively reasonable, good faith business judgment that the employee's position or function warrants elimination generally serves as sufficient "cause" for lawful termination. Where an employer claims that employ-

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ee misconduct served as the cause for her termination, the employer's mistaken belief that the employee engaged in the alleged misconduct will suffice to justify the lawfulness of a termination—particularly if the employer shows that it reached its conclusions reasonably upon an adequate investigation.[6] The model of these cases more closely resembles discrimination claims than traditional employment contract claims.

Additionally, not all formal employment contracts are for a term of definite duration. More and more often, the model being used is a formal "at-will" contract that permit the employer lawfully to discharge the employee at any time for any reason, but that nonetheless protects the employee by providing for a severance payment (as distinct from a right to damages) if the termination, lawful though it may be, is without "cause." It is far from clear whether, in the absence of clear contractual language, courts will apply an employer-motive or employee-conduct model to determining whether the termination was with or without "cause."

In negotiating employment contracts on behalf of employees, whether for definite or indefinite terms, practitioners should be very attentive to the employer-motive/employee-conduct dichotomy as applied to "cause" determinations. Ideally, the employee's attorney will effectively provide that "cause" for termination will be only if the employer was actually motivated by the wrongful conduct that the employee actually engaged in. The employer's attorney may try to provide that "cause" for termination includes an honest belief at the time of the termination that the employee engaged in wrongful conduct, while still preserving an employer right to rely at trial on allegations of wrongful conduct that it did not even suspect at the time of the firing.

For attorneys representing employees, I make the following recommendations:

- Define "Cause" solely in terms of your client's culpable and material conduct. Your client's job security means that the employer should bear the risk of circumstances outside of your client's control.
- Provide that a termination is for "Cause" be a matter that must objectively be determined by a third-party fact finder, without deference to an employer determination or subjective evaluation. Watch out for "satisfaction contracts" where "Cause" includes "a failure of an employee to perform to the satisfaction of the employer." These provide essentially no protection. If you cannot negotiate the elimination of such a provision, you should strongly caution your client, in writing, that such a provision is, as a practical matter, tantamount to having no protection.
- In a contract for a definite term, be sure that the contract clearly permits termination only for "Cause" as defined in the contract. Otherwise, the employer may be able to successfully argue in court that the right to terminate for defined "Cause" supplements, rather than limits, the grounds permitted for termination without employer liability.[7]
- Make sure that the definition of cause is *exclusive*. Do not accept language like: "'Cause' shall *include* …"
- Insist that the factual basis of the alleged cause for termination be clearly assigned at the time of the termination: "The employer may terminate the employee only for Cause by delivering to the employee written notice of the termination which particularizing the circumstances that constitute the Cause for termination." This is very important. It should insulate against a defense based on allegations of circumstances unknown to the employer at the time of the firing or unstated by the employer in the termination notice. Make sure that the particularized notice is written as a *condition* for firing, and not a mere promise. If clearly stated as a condition, the discharge will be ineffective until the notice is given; if stated as a promise ("Employer shall give notice …"), and notice is not given, the termination will likely be regarded as effective and your client will merely have the right to prove damages (usually none) arising from the failure to give the promised notice.[8]
- Even if you are unable to negotiate a provision for a contemporaneous-with-firing particularized notice of the facts constituting the alleged cause, you should still try to assure that cause is limited to actual wrongful conduct that actually motivated the employer. Use the terms "for the reason" or "because." Try language like this: "'Cause' shall mean for the reason that the employee: [(a) willfully failed ….. (b) was convicted of ….. etc.]"
- As best as you can, restrict "Cause" to conduct that it is expressly o-r inherently "willful" and materially harmful, or likely to be materially harmful, to the employer. "Cause" should not include violations of policies that are not expressed clearly and in writing, or failure to follow directives that are not clearly stated, in writing, reasonable and of considerable importance.

In sum, the employer's attorney will likely try to preserve as much wiggle room as it can to later justify a pretextual or precipitous termination. However, keep in mind that since your client's services are likely to be meaningfully in demand at the contract formation stage, you have a good opportunity to bargain

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unfortunately, leave them with limited rights. This appears to be part of the conservative trend to erode many of the gains previously fought for and achieved with respect to civil rights. Notwithstanding, in the true spirit of being plaintiffs' advocates, we will again have to rise up to try to change the system and, if necessary, make lemonade out of lemons as we have done so many times before. ■

When Outsourcing Cheats Workers

by Adam Klein, Esq. and Mark R. Humowiecki, Esq.

More than 60 years after the passage of federal minimum wage and overtime laws, hundreds of West African immigrants were working twelve hours a day, seven days per week, for as little as $1.25 per hour, at New York City's largest retail grocery stores and pharmacies. How could well-known, multi-billion dollar companies, such as Duane Reade, A&P, and Gristede's, so openly and egregiously violate the law? Welcome to "outsourcing"—a corporate practice touted by business visionaries as a way of focusing on core competencies and producing efficiencies, but also a tried and true means of lowering labor costs, escaping liability for employment law violations, and blocking labor organizing efforts, all achieved by avoiding a formal employment relationship with outsourced workers.

The retailers claimed that they did not employ the delivery workers. Instead, they contracted with independent delivery companies who hired and paid the workers. The retailers, however, supervised and controlled the workers on a daily basis. Extending the outsourcing arrangement to an absurd extreme, the delivery companies asserted that they, too, did not "employ" the delivery workers. Instead, each worker was an "independent contractor," or private businessman, who sold his own services to the delivery company. Thus, each immigrant deliveryman was ostensibly his or her own employer.

Wage Violations in Subcontracting Arrangements

In low-wage industries such as retail and manufacturing, rampant wage-and-hour violations often hide behind subcontracting arrangements. Rather than directly employ janitors or line production staff, companies commonly outsource those services to contractors who compete with one another for the opportunity to provide the same services. To win and retain the contract, contractors must offer the lowest price. To do so, they push wages as low as possible, often below the legal minimum. The contractors can get away with this because there is a near limitless supply of unskilled workers, often undocumented immigrants, desperate for work and with few options to support their families.

Contractors are willing to gamble with liability for wage-and-hour violations as a business practice because the risk of getting caught is small and the penalties insufficient to outweigh the benefits. State and federal governments consistently refuse to allocate to their labor departments the resources to effectively police hundreds of thousands of small businesses. Exploited workers rarely report violations, either out of ignorance, concern for losing their jobs, or fear of other forms of retaliation—including a call to immigration authorities. Contractors know that, even if hit with a judgment for unpaid wages they can, as small, undercapitalized businesses, simply close their doors and open up shop under a new name down the street.

Any real minimum wage enforcement effort, therefore, must target not only the contractor, but also the outsourcing company that benefits from the wage-and-hour violations through lower production costs. Under a legal concept known as "joint employment," advocates and government attorneys can prosecute the bigger, more established company, along with its contractors, for the illegal wages paid to outsourced workers. Joint employment recognizes that two or more individuals or companies can be the legal employers of a single employee. By holding the ultimate beneficiary of the workers' labor responsible for ensuring proper wages, joint employment encourages companies to police their own contractors for wage violations, rather than turn a blind eye.

Ansoumana v. Gristede's

In the case of the West African delivery workers, Outten & Golden LLP, along with the National Employment Law Project (NELP) and the New York Attorney General, prosecuted the retailers as well as their delivery contractors for willful violations of the federal Fair Labor Standards Act (FLSA) and the New York Labor Law. **Ansoumana v. Gristede's Operating Corp.**,[1] filed as a collective and class action suit on behalf of hundreds of immigrant delivery workers,[2] challenged the practice of concealing responsibility for minimum wage and overtime through outsourcing. Three different subcontractors hired O&G's clients, as independent contractors, rather than employees, to escape the requirements of paying minimum wage and overtime (and employment taxes, including FICA and unemployment insurance). The contractors were essentially shell corporations consisting of one or two principals, themselves friends and/or relatives of the principals, each working in tandem. The retailers paid the contractors a flat fee ranging from $115 to $300 per week for each delivery worker; the contractors in turn paid the workers $75 to $90 per week, or as little as $1.25 per hour, for 60 to 84 hours of work. Because no one could deny that the plaintiffs had not received the minimum wage and overtime pay, the case centered on the question of who legally employed the workers, and therefore was liable for the unpaid wages. Ultimately, O&G recovered more than $7,220,000 from Gristede's, Duane Reade, A&P, and the labor contractors for violations of minimum wage and overtime laws for approximately 1000 workers.

The Legal Basis of Joint Employment

As a legal matter, joint employment turns on the definition of "employer" and "employ."[3] The FLSA and New York Labor Law both define "employ" as "to suffer or permit to work." This is the broadest definition of employment of any federal statute. Courts have commented for years on the "striking breadth" of employment relationships under the FLSA, which is attributed to its remedial purpose of eliminating a wide range of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The FLSA definition extends beyond the ancient common-law concept

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of employment, which is based on control of "servants," to capture relationships that, though lacking in formal control, exhibit a level of dependence such that, "as a matter of economic reality," one suffers or permits another to work.[4]

Courts have found joint employment situations for workers in such disparate circumstances as home health care workers,[5] farm workers,[6] garment workers,[7] and subcontracted cleaning services.[8] Currently, Wal-Mart faces a class action suit in New Jersey on behalf of more than ten thousand janitors, most of whom are undocumented immigrants, who worked in Wal-Mart stores nationwide but were formally employed by more than 100 subcontractors. The janitors, who claim that Wal-Mart is a joint employer, worked eight hours per night, seven nights a week, without ever receiving overtime payments. In a related case, Wal-Mart recently paid $11 million to the federal government to settle allegations of immigration law violations caused by the same cleaning contractors hiring hundreds of undocumented workers.

A joint employment relationship exists where the employee performs work that simultaneously benefits two or more employers and:

1. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
2. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly by reason of the fact that one employer controls, is controlled by, or is under the common control with the other employer. 29 C.F.R. § 791.2.

It is not always self-evident whether one is "acting directly or indirectly in the interest of the other employer" or whether two employers are "not completely disassociated with respect to the employment" of an employee. Therefore, courts have established different tests for determining whether in "economic reality" a putative joint employer bears a close enough relationship to the employee to impugn employer status and joint liability for wage violations.

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For many years, the federal appeals court in New York, the Second Circuit, had stated that the economic reality test was a "totality of the circumstances analysis," but focused primarily on four factors that concern the power of control. *See* **Carter v. Dutchess Community College**, 735 F.2d 8. One lower federal court in New York applied a more expansive seven-factor test for joint employment that combined the four Carter factors with several factors taken from a later Second Circuit case that analyzed whether nurses were employees or independent contractors of a putative employer. *See* **Lopez v. Silverman**, 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

Then, in December 2003, the Second Circuit revisited the question of what constitutes "economic reality" for purposes of joint employment liability under the FLSA, in a case called **Zheng v. Liberty Apparel, Inc.**, 355 F.3d 61. In **Zheng**, the lower court had applied the same four factors from Carter—whether the putative employer 1) had the power to hire and fire the employees, 2) supervised and controlled employee work schedules or conditions of employment, 3) determined the rate and method of payment, 4) maintained employment records—and determined on summary judgment that no joint employment existed. On appeal, the Second Circuit clarified that the four Carter factors, while sufficient to find joint employment, are not necessary because they focus solely on the formal right to control, which is the hallmark of common law employment. *Id.* at 69. Instead, reaching back to the Supreme Court's 1946 decision in **Rutherford Food Corp. v. McComb**, 331 U.S. 722 (1946), the Second Circuit identified six factors that were relevant to determining the economic reality of an subcontracted employee's relationship to a putative joint employer.

In Rutherford, the Supreme Court held that the slaughterhouse employed the workers who deboned meat notwithstanding the presence of a subcontracting relationship with an independent boning supervisor who hired, paid, and supervised the workers. The six Rutherford factors identified by the Zheng court are:

1. Whether the putative joint employer's premises and equipment were used for the plaintiff's work;
2. Whether the contractors had a business that could or did shift as a unit from one putative joint employer to another;
3. The extent to which plaintiffs performed a discrete line-job that was integral to the putative joint employer's process of production;
4. Whether responsibility under the contracts could pass from one subcontractor to another without changes;
5. The degree to which the putative joint employer or its agents supervised plaintiffs' work; and
6. Whether plaintiffs worked exclusively or pre-dominantly for the putative joint employer.

Zheng is important because it rejected the limited, control-based analysis of Carter as an exclusive measure of joint employment. The court reaffirmed the expansiveness of employment under the FLSA and reinforced the distinction between common law employment and the economic reality test. Zheng, however, did not go far enough in its explanation of the economic reality test. First, it simply pulled out the factors cited in

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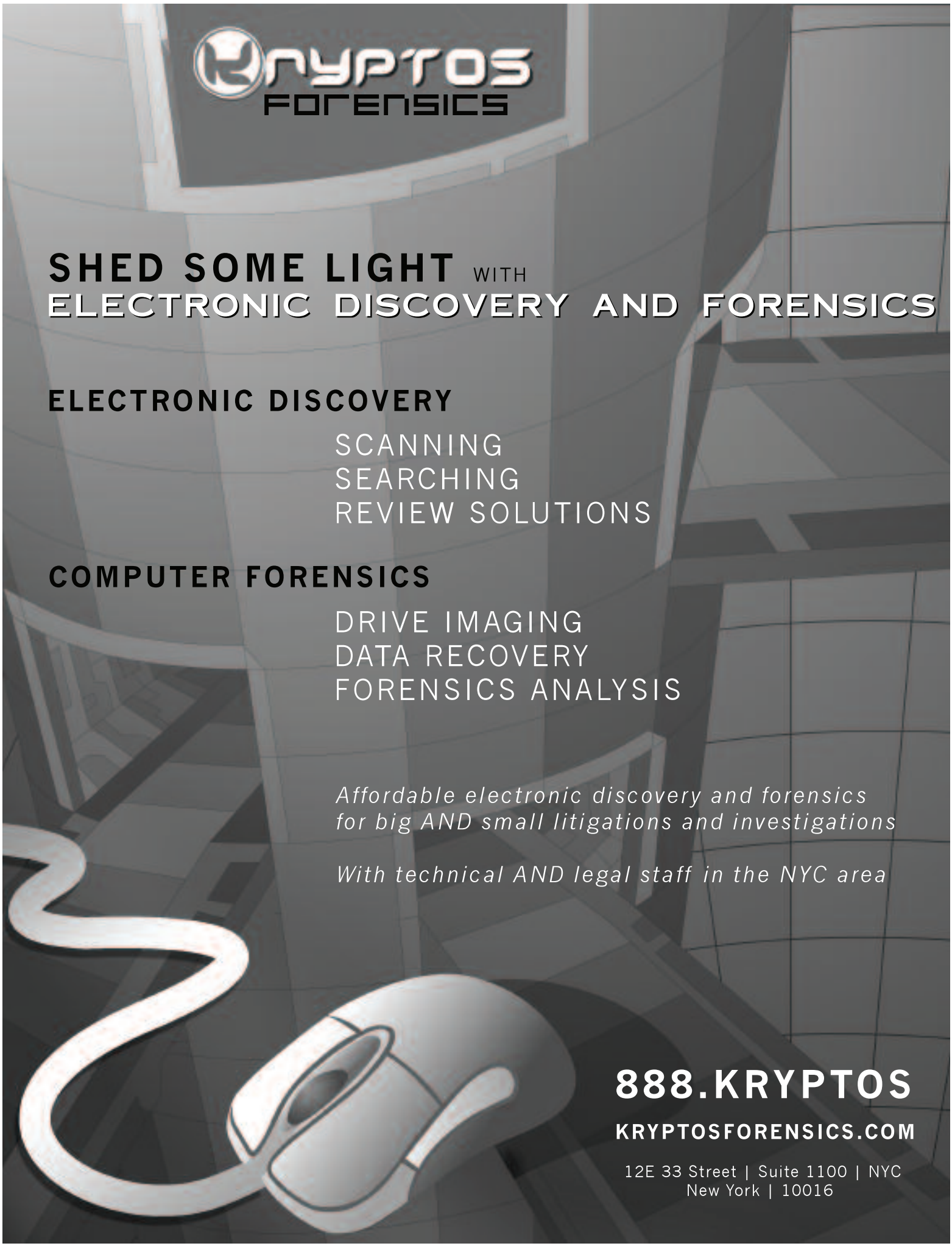
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Rutherford, which were somewhat distinct to that factual situation and were not supposed to be exhaustive. It did not offer a comprehensive vision of what is "economic reality."

Second, the decision suffers from the court's preoccupation with protecting "legitimate outsourcing" arrangements from being enveloped by joint employment. The court was "mindful of the substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy." *Id.* at 73 (citing "The Outing of Outsourcing," The Economist, Nov. 25, 1995, at 57, 57). That concern led the court to attempt to distinguish proper outsourcing from subcontracting that is a mere "subterfuge" for evading wage and hour laws, and to limit joint employment as much as possible to the latter situation.

Zheng's neat distinction between legitimate and illegitimate subcontracting breaks down in reality, especially in low-wage industries. Subcontracting may offer both real efficiencies achieved through specialization as well as a scheme for paying illegal wages, making distinguishing the "true motivation" behind subcontracting difficult. In **Chen v. Street Beat Sportswear, Inc.**, 2005 WL 774323 (E.D.N.Y. 2005), the first post-Zheng joint employment case in New York, experts offered competing explanations for the rise of subcontracting in the garment industry decades ago. Defendants' expert explained that by outsourcing its sewing, defendants could produce its garments more cheaply and efficiently, thereby allowing defendants to "remain competitive in the increasingly global garment industry." *Id.* at 10. Plaintiffs' experts testified that outsourcing in the garment industry developed historically as a means of lowering labor costs and standards. They argued that defendants achieved cheaper production, not as a result of efficiencies created by contractors' expertise or size, but rather through sub-minimum wages achieved because "the manufacturer will not be subject to liability in damages for wage and hour violations to which the workers hired by the contractor to assemble the manufacturers' garments are subjected." They noted that illegal wages are "endemic to the garment industry because contractors that hire workers such as plaintiffs do not earn enough under the contracts with manufacturers to adequately pay them." *Id.* at 9.

In the same attempt to safeguard legitimate outsourcing, Zheng inappropriately equated "economic reality" with "economic purpose," thereby over-limiting joint employment to only those outsourcing arrangements that have no valid economic basis in terms of efficiency or other value. Rutherford makes clear that the economic reality test seeks to identify whether the worker's efforts are sufficiently allied with the company's business such that, regardless of common law employment, the company in effect suffers or permits him or her to work. Thus, properly applied, the FLSA may extend to legitimate subcontracting relationships, if they provide services that are integral to the joint employer's business.

The fallacy of requiring subterfuge as a precondition for joint employment is seen in the example of individual employer liability. It is common under the FLSA to find that individual owners of a company who have operational control over the employer company themselves meet the definition of employer and are therefore joint employers along with the company. *See* **Herman v. RSR Security Services, Ltd.**, 172 F.3d 132, 139 (2d Cir. 1999). Such a determination of liability is not premised on some finding that the individual is using the corporation as an illegitimate shield from liability, but rather that the individual meets the very broad definition of employer under the statute. Similarly, joint employment by two separate companies should be guided by the breadth of the statute's definition, which includes the economic dependence of the worker on a putative employer.

Zheng's emphasis on subterfuge jeopardizes full enforcement of the FLSA's remedial purpose, particularly in areas like the garment industry where contractors routinely flout the dictates of the FLSA as a business practice, for the sake of avoiding any risk to so-called legitimate outsourcing. While more expansive liability may present a minor disincentive to subcontracting, it's unlikely to fully deter subcontracting that is fueled by real economic efficiency, whereas more liberal joint employment standards will certainly dampen subcontracting that is motivated solely by a desire to avoid liability. Therefore, courts should err on the side of holding companies jointly liable for subcontractors' violations, even where real efficiencies exist to justify the outsourcing, to carry out the FLSA's remedial purposes and to encourage companies to monitor their subcontractors' compliance with wage laws.

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for tight definitions and procedures. The employer is trying to attract your client; it does not want to send a message that it wants to be able to be free terminate your client other than because of your client's wrongful conduct. If the negotiation with counsel is hardnosed, I suggest that you ask for a meeting of counsel and clients together. That will give you the opportunity to pitch the other *party* on issues of fairness, and reveal for your client the true character of his prospective employer.

Footnotes

[1] Restatement 2d Agency ¶ 409(1).

[2] **Linton v. Unexcelled Fireworks Co.**, 124 N.Y. 533 (1891).

[3] **Corbin on Contracts**, § 839.

[4] **Williston on Contracts**, § 744.

[5] *E.g.,* **Gaudio v. Griffin Health Services Corp.**, 733 A.2d 197, 208 (Conn. 1999).

[6] *E.g.,* **Cotran v. Rollins Hudig Hall Intern.**, 948 P.2d 412 (Cal. 1998).

[7] N.B. **Tricat Industries Inc. v. Harper**, 748 A.2d 48 (Md. App. 2000).

[8] Compare **Ainsworth v. Franklin County Corp.**, 592 A.2d 871 (Vt. 1991) to **Savannah College of Art v. NULPH**, 460 S.E.2d 782 (Ga. 1995). ■

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Zheng's concern for "legitimate" outsourcing relationships unduly narrows the Rutherford factors. While, on the one-hand, announcing that the degree to which the putative employer supervises the plaintiff's work is a relevant factor in joint employment determinations, the court then limited the factor to only supervision that demonstrates effective control of the terms and conditions of employment, citing a business journal that stated that "the most successful outsourcers find it absolutely essential to have both close personal contact and rapport at the floor level and political clout and understanding with the supplier's top management." 355 F.3d at 75 (quoting James Brian Quinn and Frederick G. Hilmer, "Strategic Outsourcing," *Sloan Mgmt. Rev.*, Summer 1994, at 43, 53). Rutherford suggests that greater direct supervision by the company of its contractor's employees indicates that the work performed is more closely aligned with the company and being performed for the company's benefit. While not every instance of supervision should be sufficient to find joint employment, the court unnecessarily tightens the standard in order to try to protect "legitimate" outsourcing.

Joint Employment in *Ansoumana*

In Ansoumana, the court easily found that the retailers, along with their labor contractors, were joint employers of the delivery workers.[9] Though decided before Zheng, the court's determination is equally supported under the new six-factor test. Not only did the plaintiffs work from the retailers' premises and perform a task that was integral to the companies' business, they also regularly assisted the retailers' employees with non-delivery work such as bagging, stocking, and security. Store managers directed these employees in their work, and the plaintiffs worked exclusively for the retailer to whom they were assigned. Finally, the court found that the relationship between the retailer and the labor intermediary was "so extensive and regular as to approach exclusive agency." 255 F. Supp. 2d at 195.

In contrast to Zheng's conflation of joint employment and wrongdoing, Judge Hellerstein properly distinguished between the issue of joint employment and the ends pursued by joint employers through subcontracting. "Duane Reade had the right to 'outsource' its requirement for delivery services to an independent contractor…and seek, by outsourcing, an extra measure of efficiency and economy in providing an important and competitive service. But it did not have the right to use the practice as a way to evade its obligations under the FLSA and the NY Minimum Wage Act." 255 F. Supp. 2d at 196. Holding retailers accountable for their contractors' wage violations allows retailers to benefit from efficiencies created by outsourcing but rightly requires them to police their contractors to ensure that cost savings aren't achieved through systematic violation of wage and hour laws.

Another Solution

Wage violations attendant to outsourcing are so rampant in the garment industry that the United States Department of Labor has become increasingly aggressive in policing the industry. In certain cases it has required manufacturers to sign compliance agreements pursuant to a so-called "hot goods" provision of the law, which makes it illegal "to transport, … ship … or sell … any goods" whose production involved violations of the minimum wage, overtime, or child labor provisions of the FLSA. 29 U.S.C. § 215(a). Under such agreements, as seen

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The More Things Change…

by Christopher Edelson, Esq.

I am not a violent person. In fact, I am essentially a pacifist. I've never been in a fight in my life. But as I watched the movie *North Country*, I felt something I can only describe as a violent rage building inside me. As the story unfolded, I grew more and more furious.

What inspired my rage was *North Country*'s depiction of the virulent sexual harassment, disdain, and abuse Charlize Theron's character, Josey Aimes, experiences. (The movie is loosely based on the nation's first sexual harassment class action). Watching *North Country* is an intense, searing, infuriating experience, one that should be of interest to employment discrimination lawyers, who will recognize many of the problems the movie confronts.

At the beginning of the movie, we quickly see that all the men in Josey's life subject her either to violence, contempt, or ridicule. When she takes her children to her parents' house after being beaten by her husband, her father accuses her of having brought the abuse on herself by sleeping with another man. Even her teenaged son mocks her for emotionally tearing up when she brings her children to a simple diner for what she calls the family's first meal in a real restaurant.

What allows Josey to take her kids out to eat, and to leave the refuge of her parents' house for a home of her own, is the job she finds at the town's iron mine, the main source of decent paying work in the small Minnesota town where she grew up. Josey finds out about the job from an old friend, Glory (Frances McDormand). Glory drives a truck at the mine and tells Josey she can make good money there, though she'll have to develop a thick skin to deal with the men, who make up more than 90% of the workforce. At first Josey laughs off the idea, telling Glory women don't belong at the mine. But she ultimately decides to work there, moved by the fact that she can make six times as much as she did in her old job.

On Josey's first day, a supervisor gives an orientation to her and a few other women also starting work. He tells the women they are only there because the Supreme Court decided they should be—if it was up to him, they wouldn't have their jobs. From this inauspicious beginning, we watch as Josey and her female co-workers experience an escalating torrent of abuse and harassment, beginning with obscene graffiti and catcalls, and culminating in sexual assault.

At first, Josey endures the derision and vulgarity of the men at the mine, trying to build an 'alligator skin" as her friend Glory advises. The job has some rather tangible benefits; Josey is able to buy a house, feed her kids, buy them gifts. For the first time, she says, she feels like a real person.

What Josey means by this is that she has established her own identity, independent of any man. Unlike her mother (Sissy Spacek), who does the household chores (for which she should be paid, as she tells Josey's father, but isn't), Josey is financially self-sufficient. But her independence is threatening to men, who are accustomed to having sole access to the mine's relatively high paying jobs (the mine has no female employees until 1975). When women like Josey begin to enter the mine as workers, the men see a threat; if women can earn their own money, they may not need men. Josey's father puts voice to this fear when he asks Josey, when she explains she will be working with him at the mine, if she is becoming a lesbian.

When the harassment at the mine gets worse, Josey decides to take action. Her complaints, ignored by management, lead to a lawsuit against the mine. Josey is represented by a former high school hockey star from the town (Woody Harrelson) who has just returned from New York City, where, one assumes, he practiced employment discrimination law and was an active NELA/NY member (the movie does not make this clear). The courtroom scenes take some license (Josey's lawyer makes speeches to the jury and breaks down one hostile witness with what my friend who saw the movie with me compared to Tom Cruise's technique with Jack Nicholson in A Few Good Men), but it is a relief to see Josey's case make some headway. As my friend noted during the movie, "something good had better happen".

The reason this movie needs a feel-good courtroom scene is that much of the movie depicts, in excruciating detail, scenes of increasing barbarity. As the harassment intensified, my anger mounted. Watching the men at the mine make mocking references to oral sex, scribble the word "cunts" on the womens' locker room door, and, in a particularly disturbing scene, cover one woman in waste spilling from an overturned port-a-potty, I naturally thought of plaintiffs I have represented in sexual harassment cases. They experienced some of the things Josey and her co-workers experience—graphic sexual comments, managers who fail to investigate complaints, defense attorneys who probe into their sexual histories when they bring suit. About halfway through the movie, I was seething at the outrageous treatment the women at the mine endured. At that moment, my friend (who is a woman, and also a lawyer) turned to me and said "I hate men!" Ironically, those were my feelings exactly.

Though there is, for the most part, a happy ending, it was still difficult to feel optimistic after the movie ended. The movie takes place around 1990, and viewers might assume the type of blatant harassment it shows is a thing of the past. Women and employment lawyers know differently. We know women confront harassment every day, and much of it is jolting, obscene, dehumanizing, even dangerous. Women who experience harassment continue to face many of the problems depicted by the movie; if they complain, they risk losing their jobs. If they bring suit, witnesses (fearing for

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Anne's Squibs

by Anne Golden

Note: Readers are invited to send us decisions in their cases, or in recent cases they come across, that are of wide enough interest to be discussed in these pages. Send them directly to:

Anne Golden
Outten & Golden LLP
3 Park Ave
New York, NY 10016
Fax: (212) 977-4005
E-mail: ag@outtengolden.com

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 ReNika C. Moore, an associate with Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

Knowledge of Age

A 61-year-old plaintiff's age discrimination case failed, in both the district court (Denise L. Cote, S.D.N.Y.) and the Second Circuit Court of Appeals, when she could not prove that the decisionmaker knew that she was substantially older than her replacement, who was 43. The plaintiff was General Sales Manager of a television station whose owner was acquired by the parent of Fox. Before the merger, Fox compiled a list of employees of the merged stations to be terminated, using employment agreements, labor agreements, personnel lists, and benefits information. None of the decisionmakers had ever met, seen, or spoken with the plaintiff. The advertising sales departments of two stations were merged, and the Fox station's sales manager rather than the plaintiff was selected to manage the consolidated departments. The plaintiff signed a severance agreement that failed to comply with the Older Workers Benefit Protection Act. The court of appeals, following the **McDonnell Douglas** analysis, held that it was not enough for the plaintiff to show only that Fox knew she was over 40 and had worked for her company for over 16 years. (Her replacement had worked for Fox for 12 years.) The court held that some evidence of knowledge of the allegedly significant age discrepancy between the favored and disfavored employees was necessary to establish a *prima facie* case. The opinion affirming summary judgment was written by Judge Raggi and joined by Judges Pooler and Sack. **Woodman v. WWOR-TV, Inc.**, 411 F.3d 69 (2d Cir. 6/13/05).

ARBITRATION

See **George v. LeBeau**, discussed under "Contracts," and **Hamilton v. Sirius Satellite Radio Inc.**, discussed under "Constructive Discharge."

ARTICLE 78

An employee of the Port Authority of New York and New Jersey, which had been headquartered in the World Trade Center, sought help from the Red Cross with child care because of trauma from seeing the terrorist attacks. He received money to cover child care expenses and later was told that he need not return it, even if he was still receiving paychecks. The Port Authority, however, held an administrative hearing and fired him, determining that he had falsely stated that he was laid off and not being paid, which supposedly brought "discredit to the Port Authority." On appeal, the Appellate Division, First Department, held that this decision was not supported by substantial evidence in the record—a difficult standard of review that has felled many an Article 78 appeal. The statement that the plaintiff had been laid off had not been written by him, but by a Red Cross representative, although the plaintiff had signed it; the plaintiff had called to ask if he should return the money since he was still being paid, and had been told no; he was entitled to the aid he received under the Red Cross' criteria; his signature was unsworn and he had, in fact, truthfully told the Red Cross employee that he was "displaced." Congratulations to NELA/NY member Doris Traub for this victory. **In re Mapp v. Burnham**, --- N.Y.S.2d ---, N.Y.L.J. 8/25/05, p. 18, col. 1 (1st Dep't 8/18/05).

ATTORNEYS' FEES

Fees to Prevailing Defendant

A former deputy sheriff who had sued for discrimination and retaliation lost on all his claims on a motion for summary judgment. The district court for the Southern District of Florida found that he had failed to make out even a *prima facie* case of retaliation, and that he made out a *prima facie* case of discrimination but could not rebut the defendant's proffered legitimate nondiscriminatory reason for not promoting him. The 11th Circuit Court of Appeals held that the plaintiff had to pay the defendant's legal fees attributable to the retaliation claim, for which he had not stated a *prima facie* case, but not those attributable to the discrimination claim, on which he had stated a *prima facie* case (by definition, nonfrivolous). The court of appeals noted that it joined two other circuits, the First and the Seventh, in awarding fees to a defendant for defending against frivolous claims, if they can be separated from non-frivolous ones. The factors to be examined in deciding whether a claim is frivolous, said the court of appeals, are (i) whether the plaintiff established a *prima facie* case, (ii) whether the defendant offered to settle, and (iii) whether the case was resolved prior to or as a result of a trial on the merits. This decision should ring all our alarm bells, because we can expect defense attorneys to seek to expand this peculiar test for frivolousness whenever and wherever they can. **Quintana v. Jenne**, 414 F.3d 1306 (11th Cir. 6/28/05).

Lodestar Calculation

In a non-employment civil rights case, a store owner obtained a jury award of $2,500 on his claim that his eviction from his storefront without notice was a violation of his due process rights. His attorney submitted a fee application for

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$65,400 but was awarded only $12,000, because the court (David N. Hurd, N.D.N.Y.) found that the 477.5 hours of attorney time were excessive and 90 hours would have been appropriate, "when the narrow issue *and final result* are taken into consideration." On appeal, the Second Circuit found this explanation ambiguous, because it could have meant that the district court had followed an improper rule of proportionality, *i.e.*, that a fee of $65,400 for such a small result was disproportionate and excessive. The plaintiff argued, and the court of appeals agreed, that if the district court had reduced the fee because of a belief that the fee should not be disproportionate to the result, it contravened **City of Riverside v. Rivera**, 477 U.S. 561 (1986), and **Quaratino v. Tiffany & Co.**, 166 F.3d 422 (2d Cir. 1999). Accordingly, the case was remanded to the district court for clarification. **Kassim v. City of Schenectady**, 415 F.3d 246 (2d Cir. 7/18/05).

Prevailing Party

A consent decree in 1983 was supposed to have ended a class action, brought in 1979, alleging that the defendants improperly denied unemployment benefits and fair hearings in violation of the Social Security Act, the equal protection and due process clauses of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Federal Unemployment Tax Act. However, the defendants repeatedly failed to comply with the terms of the decree. The plaintiffs moved to compel enforcement, and the defendants moved to modify the decree to end monitoring of current cases by plaintiffs' counsel. The Second Circuit Court of Appeals affirmed the decree with some modifications, and the plaintiffs applied for attorneys' fees. The defendants opposed the fee application, arguing that they were not prevailing parties and citing **Buckhannon Board of Care Home, Inc. v. West Virginia Dep't of Health & Human Resources**, 532 U.S. 598 (2001). **Buckhannon** held that fees are available only when a plaintiff "obtains a judgment on the merits" or where a court order causes a "change [in] the legal relationship between [the plaintiff] and the defendant." It was not hard for Judge Robert L. Carter (S.D.N.Y.) to find that the plaintiffs met this standard, and also that they were entitled to fees for their post-judgment motion and opposition to the defendants' cross-motion and appeal; fees may be awarded for efforts to ensure compliance with court orders in civil rights cases. Finally, since success was not "limited," fees were awarded in the full amount (unspecified) requested by plaintiffs. Congratulations to NELA/NY member Robert L. Becker, who represented the plaintiffs. **Barcia v. Sitkin**, --- F. Supp. 2d ---, 2005 WL 1606038 (S.D.N.Y. 7/7/05).

CONSTRUCTIVE DISCHARGE

An employee who took several long leaves of absence, interspersed with telecommuting, to help his wife after the birth of a child, was told by his employer that for business reasons it was a "bad time" to take another leave. However, he took it anyway. Toward the end of the leave, the employee was told that his three-person group would be eliminated at the end of the year because of budget cuts. Rejecting both a severance agreement and a suggestion that he look for a position in one of several other groups, he wrote a letter of resignation thanking his managers for the trust shown him and the responsibilities and opportunities given him. After he left, he learned that some employees in his group had not been terminated and that an outside consultant had been hired (who later became a full time employee) to take over some of his past duties. He filed a Request for Mediation, later converted to a demand for arbitration, but the arbitrator granted summary judgment to the employer, finding no constructive discharge or any other adverse employment action. The arbitrator relied on the claimant's resignation letter thanking his managers, as well as his testimony that he could have kept working or looked for another job within the company but chose to resign instead. The claimant sought to vacate the award, alleging that the arbitrator manifestly disregarded the law. Judge John G. Koeltl (S.D.N.Y.) denied the petition, holding that the criteria for vacatur were not met, since an arbitration award "must be confirmed if there is 'even a barely colorable justification for the outcome reached.'" (Citation omitted.) The court reviewed "imminent discharge" cases (petitioner's argument) and found that the arbitrator had not manifestly disregarded the law but had followed **Pennsylvania State Police v. Suders**, 542 U.S. 129 (2004). The petition to vacate was denied. **Hamilton v. Sirius Satellite Radio Inc.**, 375 F. Supp. 2d 269 (S.D.N.Y. 6/28/05).

CONTRACT

Automatic Renewal of Employment Contract

An Executive Director for a union, appointed with a one-year employment contract that expired by its terms in May 1996, continued to serve until she lost an election for the position in 2002. She served an arbitration demand in 2004 pursuant to the arbitration provision in the expired contract as well as the collective bargaining agreement. The union (actually, the individual who had won the election) opposed the arbitration demand and requested a stay of arbitration and a declaratory judgment holding that the ex-employee was not entitled to arbitration because (a) the employment contract had expired and had not been renewed, (b) the ex-employee was not covered by the collective bargaining agreement, and (c) it would violate his fiduciary duty under the LMRDA to authorize payment of her claims. The court (Michael B. Mukasey, SDNY) found the first question dispositive. It held that under New York law, if an employment contract for a definite term expires but the employee continues to work under the same terms without expressly entering into a new agreement, it is presumed that the old agreement was automatically renewed for successive one-year periods. Here, since neither party had expressly rejected a renewal offer, the employment agreement was presumed to have been renewed year to year—including the arbitration clause. Accordingly, the stay of arbitration was denied. **George v. LeBeau**, --- F. Supp.

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2d ---, 2005 WL 1639415 (S.D.N.Y. 7/11/05).

DAMAGES

Affirming the judgment of the district court (D. Conn., judge not identified), the Second Circuit Court of Appeals has held that (a) the burden is on the employer to show a plaintiff's failure to mitigate damages, and (b) when the defendant failed to object to the jury's consideration of lost wages under Title VII, the jury could render a verdict on the question—as to both front and back pay. A former fire department employee, whose termination was reduced to a suspension and the suspension then vacated, did not return to work because, she testified, she "couldn't take it anymore." She did not testify about any efforts to mitigate her damages but did testify that but for the treatment she described (but which the court of appeals did not describe), she would have stayed with the department. Asked what she planned for the future, however, she only said she was unemployed and had no plans, "but I was waiting for the trial to be over and the date kept moving. So I kind of have been in limbo." In closing argument, her attorney asked the jury—without objection from defense counsel—to award her $30,000 a year until she reached retirement age, and they returned a verdict of $1,446,772, including $965,571 in lost wages. The court of appeals (opinion by Robert Katzmann, joined by Guido Calabresi and Barrington D. Parker) rejected the defendant's argument that the plaintiff's failure to offer any evidence of any effort to look for work proved her failure to mitigate, because such a holding would incorrectly shift the burden to the plaintiff to prove mitigation. The court then said that both back pay and front pay are equitable remedies, so that a party "is generally not *entitled* to a jury determination on the question." If one party asks for a (non-advisory) jury determination of the question, however, and the other party does not object, the court held that the right to a court determination was waived. Both results might have been very different if the defendant had been better represented. **Broadnax v. City of New Haven**, 415 F.3d 265, 2005 WL 1684211 (2d Cir. 7/20/05).

DISCOVERY

Medical Records

In a non-employment personal injury case in state court, after the note of issue had been filed, the defendants moved for an order requiring the plaintiff to provide authorizations to let defense counsel speak with her treating physicians before trial. Alternatively, it sought to preclude her from offering the physicians' records or testimony at trial and to preclude her own attorneys from speaking with the physicians. Justice John Curran (Sup. Ct. Niagara Cty.) wrote a lengthy opinion examining the history of CPLR § 3121 and exploring the effect of the federal Health Insurance Portability & Accountability Act (HIPAA) on state court practice concerning disclosure and trial preparation. HIPAA required the U.S. Department of Health and Human Services to establish a Privacy Rule to guard against the misuse of health information (45 CFR 160, 164(A), (E)). Treating physicians now require written authorizations from plaintiffs, and the authorizations must comply with HIPAA. Various judges have devised their own language for such authorizations. Justice Curran concluded that fairness required the plaintiff to waive physician-patient privilege, so "by bringing or defending a personal injury action in which a party's mental or physical condition is affirmatively raised, that party waives any rights or remedies under HIPAA as to the mental or physical conditions asserted in the litigation." **Holzle v. Healthcare Services Group Inc.**, --- N.Y.S.2d ---, NYLJ 6/3/05, p. 21 col. 1 (Sup. Ct. Niagara Cty. approx. 5/20/05).

Tax Returns

When an employer demanded production of tax returns and documents concerning the immigration status of aggrieved individuals in a case brought by the EEOC, Magistrate Judge Arlene R. Lindsay ruled—and Judge Joanna Seybert (E.D.N.Y.) agreed—that the information did not have to be produced. Magistrate Judge Lindsay granted the EEOC's application for a protective order concerning the tax returns because the defendant could not show both (a) that they were relevant and (b) that it could not get the information it wanted from them in any other way. The immigration documents were not discoverable because the defendants were, in effect, estopped from inquiring now, since they had shown no interest in their employ-

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ees' immigration status when they were hired. Discovery of their immigration status now would tend to embarrass the employees and possibly subject them to criminal charges, deportation, or both. **E.E.O.C. v. First Wireless Group, Inc.**, 225 F.R.D. 404 (E.D.N.Y. 11/19/04).

DUTY OF LOYALTY

A law firm sued an associate who had left the law firm without notice and told a co-worker that a partner and another employee were nasty, abusive, and difficult. The first count of the complaint stated that the associate's failure to give notice had cost the firm money in reviewing files and playing catch-up, and that she had taken computer disks and had planned her escape and solicited the firm's clients before she left. The second count alleged defamation. Justice Rosalyn Richter (Sup. Ct. N.Y. Cty.) dismissed the defamation count because the statements "do not have a precise meaning, but rather are merely an indication of the defendant's own views of [the person's] temperament." The part of the first claim alleging that lack of notice caused the firm expense was dismissed because the employment at will doctrine permits either party to end the employment relationship with or without cause, and with or without notice. The question of whether the associate removed computer disks or solicited clients before leaving, in violation of her duty of loyalty, however, remained, and she was ordered to answer the complaint with respect to that portion of the first claim. **Greenberg & Reicher LLP v. Hyman**, --- N.Y.S.2d ---, N.Y.L.J. 7/26/05, p. 19 col. 1 (Sup. Ct. N.Y. Cty. approx. 7/15/05).

ERISA

Independent Contractor v. Employee

After termination, a plaintiff who had worked for an investment banking company as a vice-president in its equities and fixed income divisions for 22 years sued for his pension benefits. He was told that he was ineligible for the benefits because he had been an independent contractor, paid on a Form 1099 rather than a W-2. The employer moved to dismiss under Fed. R. Civ. P. 12(b)(6). The pension plan defined an eligible "employee" as not including "any person treated by the [employer] as an independent contractor," and the defendant argued that it treated the plaintiff this way on its books and records. On some of the employer's records, however, the plaintiff showed that he was

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in Street Beat, manufacturers agree to monitor their contractors' compliance with the FLSA through such efforts as performing feasibility analyses to determine whether their contract prices could reasonably support payment of legal wages, requiring contractors to sign employer compliance programs (ECP) that commit them to abide by the FLSA, making retroactive adjustments when prices were insufficient to cover costs and pay legal wages and reporting any known wage violations to the DOL. The manufacturer is required to report its compliance efforts on a semi-annual basis, and failure to comply with the agreement can result in the manufacturer being required to pay back wages for the employees of contractors who have failed to pay minimum wage and overtime to their workers. **Chen v. Street Beat Sportswear, Inc.**, 2005 WL 774323, *22 n.48.

Compliance agreements offer obvious advantages over reliance on joint employment. The proactive monitoring requirements aim to identify and prevent/redress wage violations by contractors and, by holding manufacturers accountable, reorient the financial incentives to promote compliance. All this is accomplished irrespective of the intensive and somewhat uncertain joint employment analysis. Moreover, the agreement constitutes an enforceable contract to which the contractors' employees are third party beneficiaries with the independent ability to enforce.

While compliance agreements are well-suited to the garment industry because of the special "hot goods" provision, contractual enforcement through employers may be more difficult in the service industry, which generally produces no tangible "hot good" at all. Furthermore, with its resources scarce, the government simply cannot police every instance where outsourcing is being used as a tool to evade minimum labor standards. The DOL typically enters into a compliance agreement with a manufacturer only after repeated complaints about its contractors; so such a solution is imperfect at best.

Conclusion

Outsourcing is not all bad. Often companies rely on subcontractors for specialized services on an as-needed basis. In low-wage industries, however, companies commonly use outsourcing to evade responsibility for paying the minimum wage. While not all outsourcing should carry with it joint employer responsibility, when employers have significant economic control over their contractors' workers, they are in a position to monitor and to affect their contractors' employment practices. Under such circumstances, the FLSA should hold companies jointly liable with their contractors.

In Zheng, the Second Circuit recognized the tension between outsourcing as a positive economic force and as a means to duck the law, but struck the wrong balance. In attempting to safeguard legitimate outsourcing, the court defined joint employment too narrowly. The FLSA's expansive coverage of employment relationships is not intent-driven; economic reality goes to the dynamics of economic power relationships, not the party's intent to evade the law. The overriding policy concern must be to ensure that proper wages are paid.

Ansoumana properly recognized that it is incumbent on employers—including those who farm out their own work—to make sure wages are paid. In the interests of deterring violations and ensuring that workers are paid (or if not, can actually recover) minimum and overtime wages, courts should err on the side of broader joint employer coverage. Whether we use joint employment, compliance agreements, or some other means, the company that ultimately benefits from the subcon-

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treated as an employee—including records kept for compliance purposes. The district court (Lewis A. Kaplan, S.D.N.Y.) denied the motion to dismiss, also finding that the employer's statute of limitations defense would not be sustainable if, in fact, the plaintiff's employment during the relevant period was covered by the pension plan. **Nahoun v. Employees' Pension Plan of Credit Suisse First Boston**, --- F. Supp. 2d ---, 2005 WL 1476453 (S.D.N.Y. 6/22/05).

EVIDENCE

Privilege

Courts have taken an increasingly dim view of claims that attorney-client privilege is waived merely by inattention of the party (or counsel) seeking the return of allegedly privileged documents that have found their way into opposing counsel's hands. An employee who was apparently discharged and escorted out without a chance to retrieve her personal possessions left behind a computer disk inside a file folder in her work area. It contained both business and personal documents, according to its label. The employer had told her that her personal items would be returned, but the disk was not; she took no action. Eventually, after she sued, her ex-employer produced a letter from her to her former counsel that it had found on the disk. Judge Gerard E. Lynch (S.D.N.Y.) held that the privilege had not been waived, since the employee said she had not used the employer's equipment to write it and had taken reasonable steps to protect its confidentiality. When the employer promised to return her personal items but did not return the disk, said the court, it was not unreasonable for her to assume that it did not have the disk. The court ordered the defendant to return the disk and any copies. **Tse v. UBS Financial Services, Inc**., --- F. Supp. 2d ---, 2005 WL 1473815 (S.D.N.Y. 6/21/05).

FMLA

Overly Strict Return-to-Work Requirements

When a U.S. Postal Service employee took a month's FMLA leave, he submitted letters from his doctor saying he would be absent for four weeks and

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tracted workers' labor and controls the terms of the subcontracting relationships must face a real economic price if we hope to end the sorts of egregious wage violations found in Ansoumana and every day in sweatshops throughout the country.

Footnotes

[1] 255 F. Supp. 2d 184 (S.D.N.Y. 2003)(J. Hellerstein).

[2] The federal Fair Labor Standards Act, 29 U.S.C. 201 et seq., provides for opt-in "collective actions." In contrast, claims under the New York Labor Law, which has the benefit of a six-year statute of limitations compared to the two-year (or three-year in the case of willful violations) statute of limitations under the FLSA, can be brought as an opt-out class action under Rule 23 of the Federal Rules of Civil Procedure. **Ansoumana** was one of the first "hybrid" class actions, combining an FLSA collective action and a Rule 23 class action asserting state claims. **Ansoumana**, 201 F.R.D. 81 (S.D.N.Y. 2001).

[3] "Employer" is defined broadly, but somewhat circularly, as "any person acting directly or indirectly in the interest of an employer." 29 U.S.C. § 203(d).

[4] **Bartels v. Birmingham**, 332 U.S. 126, 130 (1947).

[5] **Bonnette v. California Health & Welfare Agency**, 704 F.3d 1465 (9th Cir. 1983)(holding that counties and individual recipients were joint employers of "chore" workers who provided in-home services for disabled public benefit recipients).

[6] **Martinez-Mendoza v. Champion Intern. Corp.**, 340 F.3d 1200 (11th Cir. 2003)(holding that farm labor contractor and agricultural employer were joint employers).

[7] **Lopez v. Silverman**, 14 F. Supp. 2d 415 (S.D.N.Y. 1998)(holding that contractor and jobber were joint employers of garment workers under a seven-prong test).

[8] **Vega v. Contract Cleaning Maintenance, Inc.**, 2004 WL 2358274 (N.D.Ill. 2004)(ruling, on a motion to dismiss, that UPS may be a joint employer with its cleaning subcontractor of cleaning service employees).

[9] Before finding joint employment, Judge Hellerstein first held that plaintiffs were in fact employees of the labor intermediaries rather than independent contractors. Though this finding also turned on the broad definition of 'employ', the analysis of whether someone is an independent contractor or an employee is different than whether someone is an employee of a single company or jointly employed by a subcontractor and contractor, 255 F. Supp. 2d 184, 190-192 (applying five-factor economic reality test in **Brock v. Superior Care, Inc.**, 840 F.2d 1054 (2d Cir. 1988)). Judge Hellerstein easily found that these unskilled, immigrant workers, many of whom did not speak English, who were subject to control by the intermediaries and performed an integral part of the companies' business, were in fact employees and not independent businessmen. *Id.* at 190-92. Judge Hellerstein also found that the individual owners of the labor intermediaries qualified as employers and were therefore jointly and severally liable, because they were owners who exercised operational control over the company. *Id.* at 192-93.

Authors' Note: *Unrecognized workers, whether outsourced or not, face exploitation in the form of poverty wages, forced "off the clock" overtime, lack of medical coverage or other benefits, and more. Cases such as Ansoumana can provide a powerful tool allowing some workers to address flagrantly illegal acts, bringing some egregious violations to the public's attention.*

As noted in this article, however, workers cannot count upon the availability of government compliance mechanisms to ensure the law is enforced. Moreover, the federal minimum wage obligation enforceable under the Fair Labor Standards Act is still not enough to live on. It is for this reason that Coalition of Concerned Legal Professionals, throughout its history, has worked alongside organizations of seasonal and service workers, domestic workers, farm workers, temporary and other low-paid workers in building organization to address those divisions of labor—both legally and practically—that pit one group of workers against another and allow them to be exploited by the unscrupulous or the uncaring. In this context, it is not efficient for society as a whole when businesses externalize costs by dumping them on others or making impoverished workers do without. For our economy to function efficiently, living wages must be paid to all workers at all times. The plight of poor workers is a problem demanding ever-vigilant action by everyone in a position to help. We call upon legal professionals and others concerned about the plight of low-income working people to join with us in this struggle. ■

NELA/NY
Request for Committee/Project Participation

The Executive Board has embarked on a new and exciting initiative to increase participation in NELA/NY's committees and projects. This effort seeks to utilize the talent of our members, while providing new opportunities for leadership roles within the organization. In furtherance of this goal, we have provided below the committees/projects that are in need of development and/or assistance. If you are interested in getting involved in any project(s)/committee(s) please indicate by placing an "X" in the space provided, fill in your information below and return this form via e-mail to Shelley Leinheardt, Executive Director at *nelany@nelany.com* or fax (212) 977-4005. You will be contacted shortly to discuss your participation. We would appreciate your response by no later than **Friday, November 4, 2005**.

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1. **Discount benefits:** We are hoping to expand the discounts currently available to members (court reporting services, appellate printing, etc.), to potentially include low cost office supplies, computer support services and any other services that can be explored. We believe that an organization of approximately 300 should be able to obtain volume discounts where appropriate. _____

2. **Focus groups/mooting:** The Board is interested in organizing panels to be available to critique opening and closing statements and to assist members with oral argument preparation. _____

3. **Diversity:** The Board is interested in continuing efforts to expand the diversity of the NELA/NY membership. We believe that it would be beneficial to our membership to raise NELA/NY's profile and make and strengthen connections with other organizations such as minority bar committees. _____

4. **Judiciary:** The Judiciary Committee has enjoyed success in making judges more familiar with our organization and its members. Last month, along with NYCLA, the Judiciary Committee hosted a successful and well-received judicial reception and CLE. This Committee wants to continue these efforts and, eventually, expand into issues involving judicial selection. _____

5. **Legislation:** The Board is interested in pursuing legislative advocacy around issues of importance to our membership relating to the NYSHRL, the NYCHRL, and the N.Y. Labor Law, such as attorney's fees, remedies in the individual litigation and class action context, and protections for whistle-blowers and those who abide the ethical codes of their professions. This committee would work with other interested organizations, track legislation, lobby, and work on model legislation. _____

6. **Sexual Harassment/Sexual Discrimination Committee:** This committee has been extremely active in providing support for members who practice in this area. This committee has also developed programs for NELA Nites. _____

7. **Social Events:** On July 13, 2005 many members, including families and friends attended the Brooklyn Cyclones game. This was an extremely enjoyable and successful event. It is our hope that we can organize future events of this nature. _____

8. **Membership/Law School Liaison:** The membership Committee works to expand our membership by recruiting new members. We are especially interested in reaching out to new attorneys and attorneys starting to practice employment law. The Law School Liaison Committee has organized presentations on employment law at local law schools, in which NELA/NY members have provided an introduction to the field. _____

9. **Attorney's Fees:** The Attorney's Fees Committee assists members with fee applications, by providing sample briefs and affidavits to support a fee request. One or two NELA members have traditionally handled this work, and so more are welcome. _____

10. **Communications:** This new committee will handle how we present ourselves to the outside world. Such projects may include the website, press relations and publicity for certain NELA sponsored events. _____

Thank you for taking the time to review this form and to respond. We hope that all of you will use this opportunity to become more involved on whatever level you may choose.

Name: _____

Address: _____

_____

_____

_____

Phone: _____

E-mail: _____

If you haven't already sent in the "Request for Committee/Project Participation" form, which is enclosed, please take a few minutes of your time to fill it out and return it to Shelley at the NELA office, 3 Park Ave., 29th Flr., NYC, NY 10016, or fax it to (212) 977-4005. Much appreciated…thanks!

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giving his return-to-work date. The Postal Service wrote to him demanding, in accordance with its regulations, documentation on the nature and treatment of his illness, the dates he was unable to work, and any medications he was taking. When he did not provide this information, and refused to be examined by the Postal Service doctor when he tried to return to work, he was considered AWOL and fired after a disciplinary hearing. The Seventh Circuit Court of Appeals held that the Postal Service regulations "impose a greater burden on the employee and therefore cannot be employed," because "the provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider; the return-to-work certification need not contain specific information regarding diagnosis, prognosis, treatment and medication." A collective bargaining agreement can supersede provisions of the FMLA as long as it grants "more or equal, not less, protection to the employee." **Harrell v. U.S. Postal Service**, 415 F.3d 700 (7th Cir. 7/19/05).

Release of Claims Invalid

The U.S. Department of Labor ("DOL") has promulgated a regulations that prohibits waiver of FMLA claims unless the waiver is approved by the DOL or by a court. The regulation—29 CFR § 825.220(d)—has now been enforced by the Fourth Circuit Court of Appeals. An ex-employee who received $12,000 for waiving her rights under the FMLA (among other laws) claimed that she had been fired for taking FMLA leave. The absence from work resulted in a poor evaluation, which was used in targeting her for a reduction in force. The DOL analogized the FMLA's enforcement scheme to that of the FLSA, which prohibits waivers of statutory rights because of its basic requirement of providing minimum standards. The court stated that "[w]ithout the regulation's non-waiver provision, the unscrupulous employer could systematically violate the FMLA and gain a competitive advantage by buying out FMLA claims at a discounted rate." This sounds like a roundabout way of rationalizing enforcement of the regulation, but it worked for this plaintiff. **Taylor v. Progress Energy Inc.**, 415 F.3d 364 (4th Cir. 7/20/05).

See **Hamilton v. Sirius Satellite Radio Inc.**, discussed under "Constructive Discharge."

NEW YORK STATE LABOR LAW

An account representative for a media advertising sales company was paid on commission only. Her employer deducted from her pay for her clients' unpaid bills, errors made by her, half of her clients' bad debts, a percentage of her assistant's salary, and other items, objected on the basis that the deductions from her "wages" violated Section 193 of the New York State Labor Law. The defendant moved for summary judgment on the ground that Section 193 has been held not to apply to individuals who work in an executive or administrative capacity, according to the definition of "employee" in Section 190. Judge Robert P. Patterson (S.D.N.Y.) held that the "executive exemption" applied only to Section 191. Accordingly, the deductions from the plaintiff's compensation violated Section 193. NELA/NY member Salvatore G. Gangemi represented the plaintiff. Congratulations, Sal! **Pachter v. Bernard Hodes Group, Inc.**, --- F. Supp. 2d ---, 2005 WL 2063838 (S.D.N.Y. 8/25/05).

PREGNANCY DISCRIMINATION

An airline employee sued her employer under Title VII and the Pregnancy Discrimination Act after it failed to accommodate her pregnancy-related requests, then terminated her allegedly in retaliation for those requests. The district court (Denise L. Cote, S.D.N.Y.) dismissed her hostile work environment claim but upheld her disparate treatment claim. The plaintiff worked for the airline at its Tampa, Florida, terminal, where she collected tickets, checked bags, staffed the gates, and performed other duties at the ticket counter. She was also trained to work as a ramp agent, where

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NORTH COUNTRY, *from page 16*

their jobs) may not tell the truth. At depositions and at trial, they encounter what Josey's lawyer calls the "nuts or sluts" defense (echoing the description of Anita Hill, whose testimony at the Clarence Thomas hearings is seen on TV in a few scenes, as "a little bit nutty, a little bit slutty"); defendants will either say harassment plaintiffs are making it up, or brought it on themselves, and will delve into plaintiffs' utterly irrelevant sexual histories (as painfully shown in the movie).

Of course it is important for sexual harassment cases to be brought in court, and victories should be celebrated. But, as Josey's lawyer wisely tells her, even if you win at court, you don't really win. You won't get your job back, the money you get won't really compensate you for the harm, and no one can erase the indignity you experienced. I think my friend had a good idea when she suggested the best hope for real change is to change the way boys and men think about and treat women. In an emotional scene, Josey's father reminds a group of angry male mine workers, furious at Josey for bringing a lawsuit, that the women they are harassing could be their sisters, their wives, their daughters. Maybe this is a way to get through to harassers; surely they would not want someone to torment their loved ones with the same unwelcome comeons, sexual insults, and abuse. Change will, of course, take time. It would be nice to one day look back at a movie like *North Country* as an artifact. Right now, it tells a story of outrageous conduct that is all too real, and not always promptly redressed, if at all. ■

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she loaded and offloaded baggage in temperatures that often exceeded 95 degrees. Once the plaintiff became pregnant, she found the ramp work stressful and worried that it endangered her pregnancy, so she asked to be exempted from ramp work for the duration of her pregnancy. Her supervisor refused to accommodate her request and told her to take disability leave if she could not perform all her assigned duties. Even after she provided a note from her obstetrician stating that she could not work in temperatures over 98 degrees—restrictions, the doctor noted, that were typical for any non-high-risk pregnancy—the airline did not accommodate her request. Instead it proposed a series of other arrangements, all of which required her to perform duties that violated her doctor's advice. Finally it told her if she did not accept any of its alternate proposals, she would not be able to return until six weeks after the birth of her child. Consequently, the plaintiff did not return to work even though she was "able to perform the major functions of her job throughout her pregnancy with a reasonable accommodation." The district court determined that the airline had been premature in claiming that the plaintiff did not properly identify similarly situated employees; such issues are fact-specific and could not be resolved appropriately at this stage under the simple pleadings standard. The court further determined that the plaintiff's allegations that her supervisor ordered her to provide a doctor's note, that he repeatedly told her to use disability leave in lieu of her request for accommodations, and that he reprimanded her on several occasions, even if true, were not sufficiently pervasive or severe acts to support a hostile work environment claim. **Gratton v. JetBlue Airways**, --- F. Supp. 3d ---, 2005 WL 1251786 (S.D.N.Y. 5/25/05).

SEXUAL HARASSMENT

An office manager for a not-for-profit agency alleged that for over a year her supervisor subjected her to continual lewd and inappropriate comments about her body, his sex life, and his sexual desires. The plaintiff's job duties required her to spend significant amounts of time riding in the agency's car with her supervisor and working in an office in close proximity with him. During this time, her supervisor would discuss his lack of sexual relations with his wife and his desire to sleep with the plaintiff. When she ultimately complained to the agency's management, they tried to dissuade her from filing a formal complaint with the EEOC. They performed their own investigation, which resulted in reprimands for the harasser and loss of eligibility for a promotion. But they also admonished the plaintiff and instructed her not to "encourage" his sexual banter, and they allowed the harasser to continue supervising her. Finding it understandably difficult to work with the harasser, the plaintiff filed a charge with the EEOC. Subsequently, the agency took away her office equipment, began enforcing stricter rules against her than against other employees, and yelled at her for no reason; this treatment continued for several months. The plaintiff successfully argued that the incessant sexual comments, coupled with unwanted hugs and other physical contact, created a hostile and abusive work environment. With respect to her retaliation claim, the court held that a reasonable juror could determine that plaintiff suffered adverse employment actions severe enough to impute liability to the employer. The court suggested that the plaintiff's year-long delay in complaining about the harassment was excusable because the plaintiff reasonably feared retaliation. NELA/NY member Anne L. Clark represented the plaintiff. **Guillebeaux v. Jewish Child Care Ass'n**, --- F. Supp. 3d ---, 2005 WL 1265906 (S.D.N.Y. 5/25/05).

SUMMARY JUDGMENT

Sexual Harassment and Retaliation

See **Guillebeaux v. Jewish Child Care Ass'n**, --- F. Supp. 3d ---, 2005 WL 1265906, discussed under "Sexual Harassment."

WHISTLEBLOWERS

Sarbanes-Oxley Act

An administrative law judge for the U.S. Department of Labor awarded a former in-house counsel $317,000 in damages after she was let go in a RIF of one, shortly after reporting and then pressing her concerns about financial improprieties at her company. What made this case unusual is that the plaintiff's bankrupt employer and the "turnaround specialist" company helping it to restructure were held to be joint employers, and both were found liable for discharging the plaintiff in violation of the Sarbanes-Oxley Act. Even though the "turnaround" company was not publicly traded, the DOL ALJ, Daniel F. Solomon, found that it was the agent of the publicly traded employer when it discharged the plaintiff, because it would defeat the goal of the Act to allow non-publicly traded companies, working at the behest of public companies, to escape liability. The contract between the companies, in fact, provided for reciprocal, mutual indemnification in case of liability. **Kalkunte v. DVI Financial Services, Inc.**, (DOL ALJ No. 2004-SOX- 00056, 7/18/05).

PRACTICE TIP

If the relationship between you and your client is strained or deteriorating, it is especially important to put your advice in writing. For example, suppose your client wants you to take a position in dealing with opposing counsel that is frivolous, uncivil, or unethical, or one that simply is bound to fail and is against the client's interest. You may fear that stating your position in writing, and explaining in writing why the client is wrong, may further exacerbate the problems in the relationship. Overcome your reluctance. An email to your client is perfectly good, and less formal and confrontational than a letter on letterhead. If the relationship with the client is so poor that you are afraid to write him or her an email or a letter, the end of the representation may be inevitable anyway, and you may especially need the protection of having warned the client in case of a fee dispute and/or a malpractice claim or disciplinary complaint—and of course the former often triggers either or both of the latter. ■

NELA/NY
3 Park Avenue, 29th Floor
NY, NY 10016
nelany@nelany.com

We are asking all NELA/NY members to let us know about cases which they file or settle or for which they obtain verdicts. Your reports will be invaluable to your fellow NELA members. When you file, settle or obtain a verdict in a case, please fill out the appropriate form and send it to the NELAY/NY by fax, mail or e-mail

Verdict Award and Settlement Report Form

1. Forum *(provide details)*

a. Settlement negotiation?

Prelitigation mediation?

b. Federal trial court (district):

c. State trial court (court and county):

d. Arbitration (NYSE, NASD, AAA, etc.):

e. Appellate court:

2. Names of judge/arbitrator(s), if any:

3. Recovery:

a. Back pay: $_____

b. Front pay: $_____

c. Emotional distress: $_____

d. Punitive: $_____

e. Other: $_____

4. Digest *(One or two sentences on nature of claims and any distinguishing features)***:**

5. Defense Attorneys:

6. Experts Used:

7. Plaintiff's Attorney *(name and telephone number)***:**

Report of Case Filed

1. Case name *(Plaintiff v. Defendant)***:**

2. Court:

3. Judge *(when known):*

4. Causes of Action:

5. Defense Attorney(s) *(when known)***:**

6. Miscellaneous:

Workers Compensation
&
Social Security Disability

PETER S. TIPOGRAPH, ESQ.

SHER, HERMAN, BELLONE & TIPOGRAPH, P.C.

277 Broadway
11th Floor
New York, N.Y. 10007
(212) 732-8579
Fax: (212) 349-5910

and

The Cross County Office Building
Cross County Shopping Center
Yonkers, N.Y. 10704
(914) 376-3237
Fax (914) 376-3267

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for over thirty years.