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

We have proudly represented the injured and disabled
for over thirty years.

NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 13, NO. 4 April 2006 Rachel Geman, Gary Trachten, Co-Editors

When Twelve Weeks is Not Enough: FMLA, ADA and NYCHRL

by Marc A. Rapaport, Esq.

Most plaintiffs' employment lawyers are all too familiar with the stinginess of the Family Medical Leave Act ("FMLA"), both in terms of the substantive protections that it offers, and the damages that it makes available. Like decaffeinated coffee or non-alcoholic beer, the FMLA can, at times, seem a bit too weak to get excited about. The unavailability of punitive or emotional distress damages under the FMLA is particularly frustrating, given the seemingly modest burdens that the law typically imposes on employers.

Because of the limited protections and penalties offered by the FMLA, I often emphasize the Americans With Disabilities Act of 1990 (the "ADA"), and New York City's Human Rights Law ("NYCHRL") when pursuing employees' claims that arise from or relate to health conditions. Unlike FMLA, the ADA does not impose a bright-line time restriction with respect to leaves of absence. The reasonableness of an employee's request for a leave

See FMLA, page 22

Top Ten Things That Labor and Employment Lawyers Do That Drive Divorce Lawyers Crazy*

by Susan M. Moss

By definition, divorce lawyers are nuts. (Otherwise, why would we subject ourselves to endless mini-Ricki Lake episodes which make up our caseloads?) However, we are driven further into the spectrum of crazy by having to undo or downplay what our colleagues in other disciplines get our clients to sign while in the midst of hotly-contested divorce battles.

I would like to share with you the top ten things that labor and employment lawyers do that drive divorce lawyers crazy.

1. Voluntary Resignations

The winner and champion of this top ten list is definitely "voluntary resignations." When an employee is terminated, typically if he or she has signed a divorce agreement, the employee will want a modification of divorce payments. Unfortunately, the case-law is clear that if a party voluntarily terminates his or her position, that party is not entitled to a downward (or upward) modification of any child support or maintenance (a fancy term we now use for alimony) terms.

What does this mean? Well, when smart labor and employment lawyers want their clients to save face when applying for that next job and negotiate an agreement stating that they in fact were not fired but instead voluntarily resigned from their previous position, any future application for modification of support will be very, very difficult (add a few more "verys") to achieve.

2. Classifying Payments as Past Compensation

When negotiating a termination agreement while the party is in the midst of the divorce, it is extremely important to understand that how you define payments will have a significant affect on how the funds will be distributed in a divorce. If payments are classified as compensation for past acts (and a divorce action has been commenced), then those funds are certain to be classified as marital property and subject to division between the spouses. Otherwise, an employee has at least a fighting chance to keep such payments from a soon-to-be-former spouse.

3. Getting Front Loaded Payments

For the same reasons set forth above in #2, front loading payments rather than having the payments be made over time may affect whether the payments will be divided with an soon-to-be-ex spouse.

See TOP TEN, page 23

* ***Editors' Note:*** Top Ten lists are not just for Letterman anymore. This edition inaugurates a new column in which practitioners from other areas of law share with us top ten things we should know about those areas. This will help us help our clients by increasing our awareness of other legal issues clients may be facing, as well as how our clients' situations vis-à-vis their employment has implications in other areas of their lives. If you have ideas for this column, or would like to write one based on your experiences practicing in multiple areas, please contact Rachel Geman (*rgeman@ lchb.com*).

The NELA/NY
Calendar of Events

May 5
NELA Spring Conference
Yale Club of NYC
(check www.nelany.com for more info)

May 10
EEOC & NELA/NY
Co-Sponsored Panel
(check www.nelany.com for more info)

May 24
NELA Nite
Frank D. Tinari, Ph.D
Tinari Economics Group
(check www.nelany.com for more info)

June 14
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

June 23-26, 2006
NELA National Convention
San Francisco Marriott
San Francisco, CA
(check www.nela.org for more info)

June 28
NELA Nite hosted by
Sex Harassment/
Sex Discrimination Committee
6:30 – 8:30 pm
Raff & Becker Law Firm
470 Park Avenue So., 3rd Flr North
(check www.nelany.com for more info)

Law Office Technology and Electronic Evidence: Three Perspectives

NELA Nite, March 1, 2006

by Gary E. Ireland

A paperless law office? How liberating and scary. According to NELA/NY's own Josh Friedman, though, "[b]y scanning documents you can obviate the storage of most (or all) hard copies." Friedman made this bold statement at the NELA/NY & NYCLA's Cyberspace Law Committee's seminar "Law Office and Technology and Electronic Evidence: Three Perspectives" on March 1. He, as well as the two other panelists, Mark Reichenback and Harry Buck, made the frightening topic of technology both interesting and understandable. Many of us left the event eager to pursue the noble goal of a paper-free office.

Friedman explained how his office, using only an $800, 2004 Xerox Documante 262, scanned and saved on his computer most of his law office documents. Since most of us are used to saving every scrap of paper that comes through our doors (some of us are even accustomed to having paper spilling out into the hallway), Friedman's presentation was revolutionary.

Attorney Harry Buck, sales representative for Village Litigation Support, explained how his company aids attorneys in scanning and organizing documents on computer in usable

See TECHNOLOGY, page 22

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: *www.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: *www.nelany.com*

Editors: Rachel Geman, Gary Trachten

Executive Board of NELA/NY:
William D. Frumkin (President),
Jonathan Ben-Asher (Vice President)
Darnley D. Stewart (Vice President)
Anne Golden (Secretary)
Susan Ritz (Secretary)
Philip E. Taubman (Treasurer)
Lee F. Bantle, Patrick DeLince,
Ronald G. Dunn, Joshua Friedman,
Rachel Geman, Craig Gurian,
Margaret McIntyre, Justin Swartz

Executive Director:
Shelley Leinheardt

TOP TEN, from page 1

4. Going on Strike

Unfortunately, many judges believe that all strikes are short lived. This creates a problem when trying to move for a downward modification because of a strike. Accordingly, it is very difficult to convince the judiciary that strikes can last for long periods of time and/or can lead to terminations.

5. Overestimate Likelihood of Success of Claims Against Past Employers

When an employee sues a past employer over a termination, often times he or she simultaneously sues a spouse for a downward modification of support. If a law suit has been filed wherein a former employee overestimates the likelihood of success of claims against a past employer, again, it gives a lot of fodder for a spouse to claim that no downward modification should be awarded.

6. Changing Benefits After a Divorce Deal Has Been Signed

Often times, a divorce agreement sets forth a party's obligations concerning health insurance or other benefits that a party must supply to a spouse. When benefits change, it can create chaos and require again going back to court seeking a modification of the original deal. These post-divorce actions are costly and time consuming.

7. Non-Compete Clauses

By definition, non-compete clauses severely limit an employee's chance to get a future job. Since it is extremely difficult to win a downward modification of support, such a clause can be deadly if a former spouse leaves a job.

8. Changing an Employee From a W-2 Earner To a 1099 Earner

When an earner is a 1099 earner (and files a Schedule C on their personal tax returns), often times, a court will assume that the spouse actually runs a business which then is considered a marital asset which must be distributed (e.g. the other spouse gets a share of the valued business or a credit against other assets).

9. How Options Are Classified

If options are classified as a reward for past services and the employee is going through a divorce, then those options will be considered marital property subject to division. If options are classified as a reward for future service, then a very different result will be achieved.

10. Creating Deferred Compensation Programs That Are Impossible to Value

Sometimes creative souls create deferred compensation programs that are literally impossible to value. This wastes tremendous transaction costs because often times each party will come up with huge variations of how much such an asset it valued. Many times simple is better.

The bottom line is that when a client is also going through a divorce, the labor/ employment lawyer and divorce lawyer must work together to make sure that collectively we are both working in the client's overall best interest. The good news is that, generally, your divorce lawyer brethren are a fun bunch and I know you will enjoy getting to know us.

Susan M. Moss is with Chemtob Moss Forman & Talbert, LLP, 3 East 54 Street, New York, NY 10022 and can be reached at smoss@cmftlaw.com; (212) 317-1717; (212) 317-1555 (fax). She is a Fellow of the American Academy of Matrimonial Lawyers. ■

FMLA, from page 22

employee who is terminated for exhaustion of leave is deemed to have been discriminated against "because of disability within the meaning of the ADA", where his or her request for an accommodation was not appropriately investigated or acted upon by the employer.

Where an employee's medical condition does not necessitate a continued leave of absence, or where there is concern that an employer could establish that continued leave would impose an undue hardship, it may be appropriate to request a part-time work schedule or other scheduling accommodation upon the expiration of the twelve-week FMLA leave period. *See, e.g.*, **Ralph v. Lucent Technologies**, 135 F.3d 166 (1st Cir. 1998).

Particularly in light of the favorable precedent in the Second Circuit, and the generous provisions of the NYCHRL, FMLA leave should be viewed as the beginning, rather than the totality, of the options that may be available to employees with medical impairments.

[1] There has been considerable debate on the issue of whether (and under what circumstances) a facially a neutral personnel policy can give rise to an ADA claim based on a disparate impact analysis. In addition to corporate leave policies, the disparate impact issue has arisen in the context of whether facially neutral no-rehire rules violate the rights of recovered alcohol and drug addicts. ■

FMLA, from page 1

of absence involves a fact-sensitive analysis that will typically involve a case-specific review of both the employer's needs and the employee's medical condition. Although the length of the requested leave is a crucial factor in determining the reasonableness of the request, the ADA does contain a clearly delineated time restriction.

The success of a claim under the ADA depends, in part, on a plaintiff's ability to walk through a dangerous minefield: she must establish that (a) she suffers from a "disability", as defined by 12102(2) therein, but (b) is not so disabled as to be unable to perform her essential work responsibilities if given a "reasonable accommodation". Clearly, many plaintiffs have failed in their efforts to stake a claim to the narrow territory that lies between being insufficiently impaired, and thus unable to meet the ADA's restrictive definition of disability, on the one hand, and overly impaired (or perhaps insufficiently accommodable) on the other.

The precariousness of the tightrope that must be traversed in every ADA case is manifested by the comparative statistics that have been compiled regarding different types of discrimination claims. With regard to summary judgment, claims for disability discrimination are more likely to be dismissed than any other type of discrimination claim. Berger, Finkelstein and Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Labor and Employment Law J., 45, 60 (2005). In its annual surveys of ADA claims, the American Bar Association has reported similarly dismal results for ADA plaintiffs.

Despite the considerable challenges associated with disability-related employment claims, I believe that these types of cases can be both personally fulfilling and financially rewarding. Because my practice overwhelmingly involves clients who live and work in New York City, many of my clients receive the benefit of the NYCHRL's less restrictive definition of "disability" and more generous provisions relating to damages. In the Second Circuit, we also benefit from the relatively favorable position that the Court here has adopted with regard to the issue of whether, and under what circumstances, a leave of absence can constitute an accommodation required under ADA.

One common scenario involves employees whose exhaustion of FMLA leave is misinterpreted (or exploited) by employers as a basis for denying additional accommodations that may be required under the ADA. These cases involve a common theme—the unwarranted presumption that the employer's obligations toward a disabled employee ends with the FMLA's twelve-week leave of absence.

In actuality, where an employer has been made aware that an employee's disability precludes her from returning to work after the twelfth week of FMLA leave, it is incumbent upon an employer to consider the accommodations required under the ADA. In these situations, the greater protections afforded by the ADA require an employer to commence the interactive process with the employee regarding the accommodations (including a longer leave of absence) that could be afforded. The requirement that an employer consider a request for additional leave is particularly clear in matters subject to the jurisdiction of the Second Circuit, which has unequivocally held that unpaid leave is a legitimate accommodation under FMLA. **Parker v. Columbia Pictures Industries** 204 F. 3d 326 (2nd Cir. 2000).

At bottom, FMLA may not be used as a pretext for denying the full range of benefits available to an employee who qualifies under the ADA. FMLA regulations make it clear that when both the FMLA and the ADA laws apply in a given case, or conflict in a given case, the employer must "comply with whichever provides the greater rights to employees." See, C.F.R. § 825.702(a).

As alluded to above, the Second Circuit has not permitted employers to supplant the broader leave of absence required under the ADA with the more limited FMLA protections. In **Parker v. Columbia Pictures Industries** 204 F. 3d 326 (2nd Cir. 2000), the Court held that: (a) a leave of absence may constitute a reasonable accommodation under the ADA, and (b) an employer may not circumvent its duty to investigate and determine the feasibility of a request for leave solely because an employee has exhausted the leave provided for under FMLA or the employer's personnel policies.

Some circuits have taken more restrictive approaches toward leaves of absence under the ADA in general. *E.g.*, **Byrne v. Avon Prods., Inc.** 328 F.3d 379 (7th Cir. 2003)

The Second Circuit's decision in **Parker** offers important guidance with regard to several key issues that arise in these types of cases. Significantly, the court in Parker flatly rejected the notion that a facially neutral personnel policy can trump an employer's duties to investigate and accommodate under the ADA. *Id.* at 338. The **Parker** decision suggests that an employer's policy may run afoul of the ADA even if it is completely silent as to disability.[1] An

See FMLA, next page

TECHNOLOGY, from page 2

form. The scanning process at copying companies costs from about 20 cents a page for small cases to only 10 cents a page for cases involving over 100,000 pages. If organized, scanned documents are very easy to locate, using a word search.

The guest panelists also emphasized the necessity of asking for all electronically stored information in "Native Format" when making discovery requests. Such information should include drafts of letters, e-mails, and all other requested discovery.

The evening was a great success. Overheard chatter on the way out: Any way to reduce law firm clutter is "a good thing." ■

President's Column

by Bill Frumkin, President, NELA/NY

As a result of recently attending a non-NELA employment law conference, I started to think about whether NELA/NY's purpose should include educating the management bar regarding the practical realities confronting our clients in the workplace. NELA was established as a haven for plaintiff lawyers to share experiences and to educate each other. At the time, the established bar associations did not provide a useful forum for plaintiffs' lawyers because of the staggering numbers of management attorneys involved. It was this circumstance that lead to the formation of what was then known as the Plaintiffs Employment Lawyers Association (PELA).

My evaluating our overall purpose stems from what I believe to be very stilted views of our clients shared by many management attorneys. For example, it appears that many management lawyers believe that retaliation is a cause of action that is pursued to attack employers in the absence of any legitimate underlying discrimination claim. In other words, the feeling appears to be that any employee can raise a baseless, frivolous allegation and then hide behind the protections of both federal and state anti-retaliation provisions. Little credence is given to the underlying claim; it is almost as if there is a belief that our clients intentionally complain to seek cover under the anti-retaliation protections. Many management lawyers suffer from the misconception that plaintiffs "work the system" by complaining about discrimination for protection when all else fails.

Another example comes from a discussion of privacy in the workplace. There seems to be a general feeling among the management bar that our clients are aware that the computers they use in the workplace can be monitored. Unfortunately, it has been my experience and very possibly the experience of many of you that our clients are frequently not aware that they are being monitored. Some even communicate with us by e-mailing us from work. I have often found the need to tell clients that their office computer and e-mail may be monitored, and that they should be very careful about how they use the internet and/or e-mail at work. The management bar seems to believe that our clients are aware of various internet and e-mail use policies and intentionally ignore them. There doesn't appear to be any understanding of how many of our clients actually view their computer at work (as their own), and innocently and often incorrectly believe they have an expectation of privacy.

All of this leads me to believe that the management bar is grossly out of touch with our clients' day to day experiences in the workplace. Of course, it is their job to defend their clients, but it would certainly help all concerned if the management bar had a more realistic understanding of what our clients experience. This will help them to understand how legal issues actually play out in the practical day to day operation of the workplace.

Since NELA (after 20 years) is reaching maturity as a bar association, the time may have come for us to expand our purpose to include educating the management bar concerning issues such as discussed above. Maybe NELA/NY's goal should be to reach out to the management bar and attempt to create either social or educational opportunities which will foster our ability to convey what our clients experience. Many of us are involved in the labor and employment law sections of the American Bar Association and the New York State Bar Association which can provide appropriate opportunities. I'm not saying that NELA/NY should move away from its overall purpose in terms of using its available resources to make us better advocates for employees, but we might be also advocating for our clients and for ourselves if we reach out and try to get involved in activities with the management bar to educate them to what our clients actually experience. The greater issue is how to do this. I will bring this issue to the next Executive Board Meeting to discuss the possibility of creating a task force to examine it. I also welcome anyone else's thoughts on the subject.

In sum, while the circumstances that led to the formation of NELA still exist, I think that as a mature organization secure in its goals and objectives, we can now reach out to the management bar to assist them to achieve a greater understanding of what our clients experience on a day to day basis in the workplace. In my view, this will be a benefit to all concerned.

Practice Tip: How many times have you said to yourself in the course of a litigation, "if I had known about this I would have never taken the case." This is not to say that our clients intentionally withhold information from us but, nonetheless, with some degree of frequency, our clients are less than forthcoming about important facts. Information first learned through the formal discovery process that hurts the case could have been uncovered if there was a greater effort to learn about the defense's position prior to initiating the litigation or, for that matter, even filing an EEOC Charge. Every NELA lawyer should carefully consider whether a demand letter will serve not only the purpose of possibly coming to an early resolution, but also possibly learning what the defense is going to before we have invested the time, energy and money into actually going through the administrative agency or filing a lawsuit. My demand letters often tease out additional information that my clients had not disclosed. Careful consideration should be given to writing a demand letter before the case proceeds to a more involved stage. ■

NELA/NY Committees: Getting Involved and Getting Things Done

Most NELA/NY members are well aware of, and many are involved with, the various committees within NELA/NY, such as NELA Nites and Conferences. Below are blurbs that explain in broad terms the mission statements of some of the other committees about which members may be less aware, or about which the board or the members have expressed interest in a new or renewed focus. The contact names for each committee are below. We look forward to hearing from you!

Attorneys' Fees Committee

The Attorneys' Fees Committee stands ready to support fee applications by NELA/NY members who have won their cases at trial. We can help you by telling you what you need to submit, providing one or more affidavits from NELA/NY members who are hopefully more expensive than you are in order to show how reasonable your rate is, and—if we have enough lead time—even possibly help with the brief. (This means offering some editing, not researching or writing the brief for you.) Favorable judicial determinations on fee applications benefit everyone in NELA/NY.

If you would like to get more information or to get involved, please contact Anne Golden (*ag@outtengolden. com*).

Communications Committee

The Communications Committee is working on various projects that will allow NELA/NY members to access the incredible wealth of knowledge and practical experience we have. This committee is working actively to have a functioning, fully-stocked "Document Bank" before the end of the calendar year. (Those involved with the "Document Bank" project include Josh Friedman, Felicia Nestor, Dorothy Wendel and Patrick DeLince.) Other ongoing projects include making NELA Nite and CLE materials available, such as by having videos of past NELA Nites on-line. This committee will also make sure that everyone can say the word "Webinar" with a straight face and even to know what it means.

The NELA website is being updated on a timely basis so please refer to it to find out what's happening in the organization. You can also register for all conferences, NELA Nites, and renew your membership online. We hope you take advantage by logging on frequently to *www.nelany.com*.

If you would like to get more information or to get involved, please contact Josh Friedman (*Josh@joshua friedman esq.com*).

Discount Benefits Committee

As many of you are hopefully aware, NELA/NY already offers discounts on court reporting services (Bee Court Reporting and Veritext Court Reporters); appellate printing services (Printing House Press); long-term health insurance (John Hancock) and conference call discounts (Arkadin). We are now hoping to expand these discounts to cooperative buying of office supplies as well as obtaining discounts for computer support services. We are hoping to compile a list of vendors that would offer discounts to our members. We will need the assistance of members to provide us with the names of vendors who they are comfortable with so that we can complete this task. We also seek members to assist in this project. This could lead to significant savings. You will be receiving information in the very near future concerning this important project.

If you would like to get more information or to get involved, please contact Shelley Leinheardt (*nelany@nelany.com*), Bill Frumkin (*wfrumkim@safirfrumkin.com*), or Susan Ritz (*sritz@ritzandclark.com*).

Diversity Committee

As advocates for workers' rights, we understand the value of diversity and inclusion and of promoting equal opportunity in the workplace. Given this, it is important that we work to open our organizations and the plaintiffs' employment bar to lawyers from groups that are currently underrepresented. As the Supreme Court has recognized, diversity can provide a "substantial" contribution to an organization. **Grutter v. Bollinger**, 539 U.S. 306, 324 (U.S. 2003). Especially in organizations that prosecute discrimination cases, a diverse legal team can provide a "perspective different from that of members of groups which have not been the victims of such discrimination." *Id.* at 319. Diversity can help plaintiffs' employment firms in a number of specific areas including client relations, business generation, case investigation, gathering evidence, framing arguments, and presenting a case to a fact-finder convincingly and effectively. In these and many other ways, a diverse legal team can make our organizations "stronger than the sum of [their] parts." *Id.* at 315-316.

The primary goals of the Diversity Committee are to assist plaintiffs' employment firms in mentoring, recruiting, and retaining lawyers of diverse race, sexual orientation, gender identity, ethnicity, gender, religion, age, and disability status, and to make NELA/NY itself a more diverse and inclusive bar association. Recognizing the unique challenges that small organizations face in efforts to diversify our workplaces (erratic hiring needs, the need to fill vacancies quickly, limited training resources, and the inability to pay market-rate salaries) the Diversity Committee will provide practical guidance to our member organizations that want to become more diverse and work to bring more plaintiffs' employment lawyers into NELA/NY.

See COMMITTEES, page 21

COMMITTEES, from page 4

If you would like to get more information or to get involved, please contact Justin Swartz (*JMS@outten golden.com*).

Focus Groups/Mooting Committee

NELA/NY has developed an informal mechanism to assist members in preparing for district court or appellate arguments by mooting those arguments with other NELA members. We have now set up a committee to formalize this process. It is our hope that we can set up panels of two to four volunteer lawyers to be available on a pre-scheduled rotating basis. Briefs and other documents can be circulated in advance. We think that this will be a boost to NELA/NY's support services, and we hope that many of you will be as excited as we are to get it off the ground. If you would like to participate, please contact Shelley Leinheardt.

We would also like to set up focus groups to act as either mock juries or a source of feedback for trial preparation. Our counterparts in the management bar have extensive experience with this tool, but that most of our members cannot afford the costs. This project would, we hope, make up for this. Again, if you are interested in helping, please contact Shelley Leinheardt.

If you would like to get more information or to get involved, please contact Bill Frumkin (*wfrumkim@safir frumkin.com*), Anne Golden (*AG@outtengolden.com*), or Jon Ben-Asher (*jb-a@bmbf.com*).

Judiciary Committee

The Judiciary Committee of NELA/NY was formed with the objectives of: (1) promoting informal exchanges between members of NELA and the federal and state judiciary; (2) educating judges on employment law; and (3) obtaining a voice for NELA in the screening of judicial candidates. In the recent past, the committee, spearheaded by members Lee Bantle, Adrienne Baranoff, Linda Dardis, Josh Friedman, Patrick DeLince, and Michael Gross, has sponsored two receptions for federal court judges and one reception for state court judges. In conjunction with that reception for state court judges, we also presented a CLE program on emerging issues in state employment law.

The committee's future projects include seeking a seat on judicial screening panels at the state court level, ensuring that employment law is included in the curriculum of the Judicial Institute and hosting additional events at which our members can meet federal and state judges.

If you would like to get more information or to get involved, please contact Lee Bantle (*bantle@civil rightsfirm.com*) or Patrick DeLince (*jpd@delince clyne.com*).

Legislation Committee

The Legislation Committee is seeking to identify those areas that the NELA/NY membership believes need legislative action, whether at the state or local level, or both. When you submit suggestions, please don't censor yourself out of concern that the proposal may not seem immediately achievable. We first of all want to get a broad picture of that which needs to be done, and leave prioritizing for the next step. We think that prospects are brightening: we have seen that the New York City Council can be moved to take action; with a new Governor—and with a potential change in the composition of the State Senate—the State Legislature will likely come to be a more employee-friendly zone.

Some things we're thinking about already: expanding Whistle Blower protections; expanding and clarifying coverage of joint employers (including those employers who use "temporary" workers"; expanding the availability of punitive or liquidated damages in class actions in New York State courts and under the State Human Rights Law; expanding the availability of attorney's fees under the State Human Rights Law; conforming State Human Rights Law to federal practice so that the interposition of a demand for equitable relief in state court would no longer act as a waiver of the right to a jury; and making the term "adverse action" more inclusive as a matter of State Human Rights Law.

Please get us your wish list as soon as you can. If you would like to get more information or to get involved, please contact Ron Dunn (*rdunn@gdwo.net*) or Craig Gurian (*craiggurian@antibias law.com*).

Membership and Law School Liaison Committee

The Membership and Law School Liaison ("LSL") (not to be confused with "LOL" or LSD...) committee has two, mutually-reinforcing objectives. One, we want to increase membership by reaching out to current and future plaintiff-side employment lawyers. We anticipate that our outreach efforts will involve partnering with other committees, such as the diversity committee.

Two, recognizing that many plaintiff-side firms and practices do not have the resources to reach out to law students—and certainly not to the extent that our friends on the other side of the bar do—we want to reach out to local law schools to tout the merits of our work and organization. The benefits of contacts with law schools are not limited to connecting with potential future NELA members. The students are the future law clerks in the courts we practice in every day.

If you have outreach ideas, or generally want to get involved, please contact Rachel Geman (*rgeman@lchb.com*) or Phil Taubman (*PTEsquire@aol.com*).

Sexual Harassment Committee

The committee meets monthly and offers a place where members can share ideas with colleagues on the day-to-day issues that arise in our practices. On June 28, 2006, the Sexual Harassment Committee will be sponsoring a NELA Nite on the topic of investigations of sexual harassment complaints (i.e., what should be done, what is often actually done and ways to legally challenge inadequate investigations).

If you would like to get more information or to get involved, please contact Margaret McIntyre (*margmac@earthlink.net*). ■

SQUIBS, from page 19

judgment. Magistrate Judge Donna F. Martinez (D. Conn.) recommended denying the motion, noting that "Title VII is violated when 'a retaliatory motive plays a part in adverse employment actions towards an employee, whether or not it was the sole cause." Although the court did not cite **Desert Palace v. Costa**, 539 U.S. 90 (2003), and applied the **McDonnell Douglas** analysis, it found that the plaintiff had raised material issues of fact from which a reasonable juror could infer a retaliatory motive, e.g., there was no evidence that she had performed her job poorly, and the defendant's stated reason for the termination had shifted over time. NELA/NY members Anne Clark and Victoria de Toledo represented the plaintiff. **Pappas v. Watson Wyatt & Co.**, --- F. Supp. 2d --- (D. Conn. 3/6/06).

PRACTICE TIPS

There has been a long-running debate among NELA/NY members about whether state or federal court is a more hospitable venue for plaintiffs' employment litigation. As the federal courts have become more conservative, state trial courts may have become more attractive. But be aware that appellate court judges are appointed—by Governor Pataki, a conservative Republican. The *New York Times* published a story about this dichotomy on February 6, 2006. It reported that Pataki's last seven appointments to the Appellate Division, First Department (to which appeals are taken from Supreme Court in Manhattan and the Bronx) have all been white men: six Republicans and one conservative Democrat. In a deal with the Queens Democratic leader, Pataki's own counsel, James M. McGuire, became a Supreme Court justice in Queens, which qualified him (technically) for a promotion to the Appellate Division, Second Department. He got that promotion from Pataki in August, and the *Times* noted that "word is that he'll be that court's next presiding justice." So even if you win big at trial in state court, just remember the appeal, because that's where you are increasingly likely to lose your win.

If a statute of limitations (non-jurisdictional) is approaching and you want to toll the running of the statute because you're negotiating, or for some other reason, you and opposing counsel may decide to sign a tolling agreement. Such an agreement provides that defense counsel will not raise statute of limitations as a defense under certain circumstances, and in return you will not file the charge, complaint, etc., for some period of time. There are two basic versions of the tolling agreement. One says that the statute will be suspended for a specified period of time, such as thirty days, and may be renewed. The other says that the statute will be suspended unless and until you serve notice that within (e.g.) two weeks, you will file the charge or pleading. The second kind is the only kind you should agree to. It is far too easy to forget to renew the first kind, and then you have committed a very basic form of malpractice, known by the legal term of art, "blowing the statute." ■

Private Sector Whistleblower Protection

By Philip Taubman and Antonette Milcetic

The Whistleblower statutes under state law are found in Sections 740 and 741of the Labor Law for private employees and Section 75-b of the Civil Service Law for public employees. The focus of this article is Labor Law Sections 740 and 741, the latter of which deals specifically with health care employees. The Labor Law Whistleblower statute under New York State Law is extremely limited. Both sections limit damages to an injunction to restrain continued violations; reinstatement of the employee with full fringe benefits and seniority rights; compensation for lost wages, benefits and other remuneration and the payment of reasonable costs, disbursements and attorney fees. Both sections of the private sector Whistleblower statute as well as the public employer law deal only with issues of public health and safety. The statute shields employers from secondary claims for damages such as emotional distress, loss of reputation, punitive damages or any other claim that might arise. ***Caveat:*** This law allows an employer to recover costs, disbursements and attorney fees if the Court determines that an action brought by the employee was without basis in law or in fact.

Labor Law §740(2) provides, in pertinent part, that "[a]n employer shall not take any retaliatory personnel action against an employee because such employee * * * (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety * * * or (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation." Thus, in order to establish a violation of this section, a plaintiff must prove that the activity, policy or practice that he objected to, refused to participate in, disclosed or threatened to disclose: (1) was an activity, policy or practice of the employer, (2) that the activity, policy or practice constituted an *actual* violation of law, rule or regulation, and (3) the violation is one that creates and presents a substantial and specific danger to the public health or safety. **Kraus v. New Rochelle Hospital Medical Center**, 216 A.D.2d 360, 364, 628 N.Y.S.2d 360 (2nd Dept. 1995).

In order to establish a violation of Labor Law §740, a plaintiff must prove, inter alia, that the activity, policy or practice that he objected to, or refused to participate in, was an activity, policy or practice of the employer. **Radice v. Elderplan, Inc.**, 217 A.D.2d 690, 691, 630 N.Y.S.2d 326 (2nd Dept. 1995). The proof necessary to establish this first element of a whistleblower claim is minimal. As demonstrated by case law, a plaintiff need only prove that the individual who engaged in or directed an illegal act was an employee of the defendant employer. *See*, **Rodgers v. Lenox Hill Hospital**, 211 A.D.2d 248, 626 N.Y.S.2d 137 (1st Dept. 1995); **Kraus v. New Rochelle Hospital Medical Center**, 216 A.D.2d 360, 628 N.Y.S.2d 360 (2nd Dept. 1995); **Radice**, 217 A.D.2d 690, 630 N.Y.S.2d. 326.

For example, in **Kraus v. New Rochelle Hospital Medical Center**, the plaintiff had been employed by the defendant as Vice-President of nursing. 216 A.D.2d at 362, 628 N.Y.S.2d 360. The plaintiff had learned that Dr. Robert Brandstetter, an attending physician who practiced as a pulmonologist, and who was also employed by the hospital as the Assistant Director of Medicine and Associate Director of its residency program, had written on the charts of four patients that he had performed bronchoscopies on them when in fact he had not performed the alleged procedures and/or had not obtained informed consents from the patients or their relatives for the procedures. *Id.* After plaintiff reported what she had learned to the hospital's administration, she was terminated. Id. at 363, 628 N.Y.S.2d 360.

The court in **Kraus**, upon reviewing the evidence, concluded that plaintiff sufficiently established a violation of Labor Law §740. *Id.* at 364, 628 N.Y.S.2d 360. The court first found that Dr. Brandstetter's hybrid role at the hospital rendered him more of an employee than an independent contractor. The court went on to hold that Dr. Brandstetter failed to properly document his patients' charts and his failure to obtain their informed consents constituted violations of the regulations of the Commissioner of Health of the State of New York. The court concluded that because the evidence showed that a bronchoscopic procedure could result in death and other serious conditions and that proper chart documentation was necessary for the nurses to determine an appropriate care plan, "we cannot but reasonably conclude that the failure to properly document and/or obtain informed consents for a procedure which can be fatal created a substantial and specific danger to the public health and safety." *Id.* at 364-365, 628 N.Y.S.2d 360.

Although not specifically discussed by the court in **Kraus**, surely the defendant hospital did not have an official written policy that permitted physicians to perform medical procedures on patients without first obtaining their consent. As the court never even raised the issue or questioned what the hospital's official policy was with respect to informed consent, it evidently did not deem such evidence necessary to its determination that Dr. Brandstetter's actions constituted an "activity, policy or practice of the employer" or to its determination that plaintiff sufficiently established her whistleblower claim.

Similarly, in **Rodgers v. Lenox Hill Hospital**, the plaintiff, the director of the EMS department at defendant hospital, was terminated after he testified before the New York State Department of Health regarding an incident where EMS workers employed by the hospital mishandled an emergency ambulance call that led to a woman's death and then attempted to cover up the incident. 211 A.D.2d 248, 249-251, 626 N.Y.S.2d 137. Again, without even discussing whether the actions

See WHISTLTEBLOWER, next page

WHISTLEBLOWER, from page 5

of the EMS workers constituted an activity, policy or practice of the defendant hospital, the Court determined that plaintiff's claim fell within both the "letter and the spirit of the whistleblower statute." *Id*. at 251, 626 N.Y.S.2d 137. *cf.* **Radice**, 217 A.D.2d 690, 691, 630 N.Y.S.2d 326 (holding that nurse discharge planner failed to state a cause of action under Labor Law §740 as the activity she allegedly reported "was not an activity of the defendant *or any of its employees*") (emphasis added).

In order to establish a cause of action under Labor Law §740(2)(c), a plaintiff must show that he was discharged in retaliation for refusing to participate in an activity, policy or practice which violated a law, rule, or regulation, and which created a substantial and specific danger to the public health. **Hughes v. Gibson Courier Services Corp.**, 218 A.D.2d 684, 630 N.Y.S.2d 552, 553 (2nd Dept. 1995).

In **Hughes**, plaintiffs, armed guards employed by defendant, claimed that after it had moved its base of operations from Nassau to Suffolk County, the defendant directed them to violate the law by working with pistol permits that, due to the move to another county, had become invalid. *Id*. at. 684, 630 N.Y.S.2d 552. However, the court in **Hughes** dismissed plaintiffs' claim, holding that "[a]lthough the plaintiffs allege that they were informed that their permits were invalid because their employer had moved its base of operations from Nassau County to Suffolk County, Penal Law §400.00(6) provides that 'a license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be effective throughout the state'. Thus, a license 'does not expire or become ineffective simply because the licensee moves to another county.'" *Id*. In Hughes, therefore, the Court dismissed plaintiffs' whistleblower claim because defendant's directive to work with the pistol permits they had *did not actually violate any law. The plaintiffs' reasonable belief that the directive violated the law was insufficient.*

Labor Law §740 requires plaintiff to establish that the "activity, policy or practice of the employer" violated the law and that that violation presented a "substantial and specific danger to the public health or safety."

The term "present" as defined in Webster's Dictionary means "to introduce." *Webster's II New Riverside University Dictionary* (The Riverside Publishing Company) (1988). Similarly, the term "create," according to the dictionary, means "to bring into being" or "to give rise to."

In this regard, *see also,* **Nadkarni v. North Shore-Long Island Jewish Health System**, 21 A.D.3d 354, 799 N.Y.S.2d 574 (2nd Dept. 2005). In Nadkarni, thus, the plaintiff, a hospital employee, alleged that the defendants retaliated against her because she complained and refused to participate in a *proposed* revised plan seeking to utilize hospital volunteers to assist hospital employees with the service and retrieval of patients' meal trays. The plaintiff alleged that the use of volunteers would violate the regulation requiring hospitals to provide residents with "nourishing, palatable and well-balanced diets" and to employ sufficient support personnel to carry out the functions of the dietary service. The defendant moved to dismiss pursuant to CPLR 3211(a) (7) for failure to state a cause of action. Noting that Labor Law Section 740 requires a plaintiff to allege an actual violation of a law, rule or regulation, the court dismissed plaintiff's section 740 cause of action on the ground, in part, that because the proposed plan was never implemented, it did not constitute an actual violation. *Id*. at 355, 799 N.Y.S.2d 574. The the plaintiff failed to meet the second element (actual violations). The court also dismissed plaintiff's claim because she did not establish the third element (substantial and specific danger to public health or safety). Plaintiff offered nothing other than her own belief to establish that using volunteers to serve meals would somehow prevent patients from receiving their meals. Specifically, the court held, "In the case at bar, the revised plan was never implemented *and* the plaintiff's contention that utilizing volunteers could adversely affect patient health and cause a substantial and specific danger to the public health or safety was no more than speculation" (emphasis added). *Id*. The court went on to state, "Whether reasonable or not, her concerns were solely her belief…" *Id*.

The **Nadkarni** court did not accept the defendant's challenge to the public health or safety nature of the asserted violation in that case, instead stating "this is not a case of financial irregularities or improper accounting for which courts have uniformly declined to extend protection to whistleblowers under the statue." The danger presented need not be to the public at large in order to recover under the whistleblower statute. *See*, **Rodgers v. Lenox Hill Hospital**, 211 A.D.2d 248, 626 N.Y.S.2d 137 (1st Dept. 1995); **Kraus v. New Rochelle Hospital Medical Center**, 216 A.D.2d 360, 364, 628 N.Y.S.2d 360 (2nd Dept. 1995); **Bompane v. Enzolabs, Inc.**, 160 Misc.2d 315, 608 N.Y.S.2d 989 (Sup.Ct. 1994). The Supplementary Practice Commentaries to §740 state, "…there is no requirement that there be …a *large-scale* threat, or multiple potential…victims" (emphasis in original); "…health or safety is sufficiently important that a threat to any member of the public might well be deemed sufficient" [to trigger application of the statute]; and "…anything causing risks to workers, obviously a part of the public, can also constitute a legal infraction" (1993 Cumulative Annual Pocket Part, pp. 67-68).

Section 741 of the Labor Law was enacted in 2002. It is applicable specifically to health care workers, states, in relevant part, "…no employer shall take retaliatory action against any employee because the employee does any of the following: (a) discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, *reasonably believes* constitutes improper quality of patient care; or (b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, *reasonably believes* constitutes improper quality of patient care. (emphases added)." "Improper quality of patient care," under the statute, means, "with respect to patient care, any practice, procedure, action or failure to act of an

See WHISTLEBLOWER, page 18

SQUIBS, from page 17

disability and was protected by the ADA. The court held that the plaintiff had made out a prima facie case of discrimination because he was significantly more qualified than the candidate who was promoted. However, the court dismissed the plaintiff's constructive termination claim on the basis that not being promoted was not objectively intolerable. In addition to surviving summary judgment, this case has a happy ending. The plaintiff eventually received a kidney transplant, and the less qualified employee who was named as Vice President was eventually fired for poor performance. **Heiko v. Colombo**, 434 F.3d 249 (4th Cir. 1/10/06).

Gender Harassment

The Ninth Circuit has held that offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees. A male supervisor exhibited physically threatening and hostile behavior toward women but rarely acted this way with men. In its defense, the employer argued that the work environment was predominantly female and that the alleged harasser was not motivated by lust or a desire to drive women from the workplace. However, the court held that "this case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men." Even the defendant's attempt to have the case dismissed on the basis that it was not named in the E.E.O.C. charge was not persuasive. Quoting **Sosa v. Hiraoka**, 920 F.2d 1451, 1458-59 (9th Cir. 1990), the court said that "where the EEOC or defendants themselves 'should have anticipated' that the claimant would name those defendants in a Title VII suit, the court has jurisdiction over those defendants even though they were not named in the EEOC charge." **EEOC v. National Educ. Ass'n**, 422 F.3d 840 (9th Cir. 9/2/05).

Religious Discrimination

Two Orthodox Jewish employees of a Jewish institution, alleging that their employment had been terminated because they were more observant than most of the other Jewish employees, sued alleging religious discrimination in violation of Title VII and the New York State and City Human Rights Laws. One plaintiff was an Orthodox Hasidic Jew of the Chabad sect; he wore a beard and supervised the cafeteria's food preparation to make sure it abides by *kashruth*, the Jewish dietary laws; the other, a woman, was fired allegedly because of poor job performance after she insisted upon leaving early on Fridays to prepare for the Sabbath. The latter also alleged age and gender discrimination. Both plaintiffs quoted members of management as having made insulting remarks about their religious observances. Judge Naomi Reice Buchwald (S.D.N.Y.) denied the employer's motion for summary judgment on the religious discrimination claims arising from their termination. It granted the motion, however, with respect to the claims for religiously hostile work environment and the second plaintiff's claims for age and sex discrimination. NELA/ NY members Lindsay Nicely Feinberg and Phyllis Gelman represented the plaintiffs. Good work! **Shain v. Center for Jewish History, Inc.**, --- F. Supp. 2d ---, 2005 WL 2298165 (S.D.N.Y. 8/19/05).

Retaliation

Judge Sterling Johnson (E.D.N.Y.) was not convinced that a Hispanic plaintiff-anthropologist was rejected for a university teaching position in retaliation for his previous anti-discrimination activities, even though the employer admitted that it knew about them. Judge Johnson granted the university's motion for summary judgment. On appeal, the Second Circuit Court of Appeals focused on the plaintiff's failure to meet the minimum submission requirements for the position: CUNY limited its search to candidates who researched human anthropology, while the plaintiff's research focused on humanoid great apes. Moreover, the search committee member who was familiar with plaintiff's past activities specified that the hiring decision was based on previous knowledge of the plaintiff's reputation for lacking collegiality. The court held, an a summary order, that "[t]his ambiguous-at-worst comment does not satisfy [the plaintiff's] burden of showing causation." **Sarmiento v. Queens College CUNY**, 153 Fed. Appx. 21, 2005 WL 2840269 (2d Cir. 10/28/05).

Sexual Harassment and Retaliation

After a female account manager reported her manager's sexually inappropriate behavior to his manager, the company conducted an investigation, with which she fully cooperated—until the HR representative ordered her to attend a face-to-face meeting with the harasser. She objected that the meeting would make her uncomfortable and she found it a "highly inappropriate request," and that she would continue to cooperate in the investigation and meet with anyone else, but not with the harasser. She was told that the meeting was mandatory and was fired for insubordination. She sued under Title VII and the Connecticut Fair Employment Practices Act. The employer moved for summary

See SQUIBS, next page

WHISTLEBLOWER, from page 18

one and the same as §740. Hence, "section" in 740(7) should be construed to mean Article 20-C. Thus, it appears that plaintiff health care employees may utilize both statutes.

Unfortunately the New York State Whistleblower statutes do not blow a whistle that is sufficiently loud and piercing to protect employees in many whistleblower situations. The limitations relating to health and safely issues do not provide any protection for issues such as corruption and financing irregularities. Further the failure to provide punitive damages or damages for emotional distress make the statutes less than attractive for the majority of at-will employees. ■

WHISTLEBLOWER, from page 6

employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient." *Unlike under §740, according to the plain language of the statute, a plaintiff need not establish an actual violation of law in order to recover; a plaintiff need only establish that he had a "good faith" and "reasonable belief" that an "activity, policy or practice of the employer" constituted "improper quality of patient care."* Any person who performs health care services for an employer which provides health care services for wages or remuneration is covered. The protection only applies if the employee has brought the issue of improper quality of patient care to a supervisor or where there is an imminent threat to public health or safety or to the health of a specific patient and the employee *reasonably believes in good faith* that the reporting to the supervisor would not result in corrective action. Improper quality of patient care is broadly defined and with respect to patient care covers any practice, procedure, action or failure to act of an employer which violates any rule, law, regulation or declaratory ruling, where such violation relates to matters which may present a substantial and specific danger to public safety or health or a significant threat to the health of a specific patient.

An interesting question now arises: What happens if you plead Section 740 (the non- health worker whistleblower statute)? Can you also plead Section 741? We have faced this dilemma in representing a physical therapist who claims he was ordered to treat trauma patients without obtaining medical clearance a violation of New York State law. We commenced an action under Section 740 and Section 741 and faced a motion to dismiss our Section 741 claims. This is significant as the language pursuant to Section 741 does not require an actual violation of law to recover. The motion is still pending and is undecided. Our arguments for defeating the motion follow:

Labor Law §740(7) provides that "institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." We argued that, Section 741, enacted 18 years after §740, was intended to be an expansion of §740. Thus, for purposes of §740(7), §740 and §741 should be construed as one "law." That the two statutes are not to be treated separately is highlighted by the amendment to 740, at the same time that 741 was enacted, adding a paragraph (d) to subdivision 4 to provide for a civil action against those who take retaliatory action against an employee in violation of the provisions of section 741 of the Labor Law. Were the two statutes to be treated separately, this additional paragraph in 740 would not have been necessary. This amendment provides specifically, "Notwithstanding the provisions of paragraphs (a) and (c) of this subdivision, a health care employee who has been the subject of a retaliatory action by a health care employer in violation of section seven hundred forty-one of this article may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory personnel action was taken…" Subdivisions (a) and (c) refer to the statute of limitations for bringing suit and defenses, respectively. Conversely, in §741, subdivision 5 entitled "relief" refers to the relief granted in §740.

The alleged purpose of §740(7) was to "avoid the burden of duplicative litigation, or worse, duplicate remedies." Givens, Practice Commentaries, op. cit. at p. 577. According to the practice commentaries to 740, "If a collective bargaining agreement contains a provision barring retaliatory action and a grievance is brought under that provision, the Legislature obviously intended to prevent both the grievance and a suit under §740 from being pursued in the same case." *Id.* However, because plaintiff's 740 and 741 claims are being litigated in the same forum at the same time, and where the relief under both statutes is identical, namely, back pay and reinstatement, the plaintiff, even if successful on both theories, would certainly not be permitted to recover twice his back pay. Nor can he be reinstated twice.

As recognized by the **Southern District in Colette v. St. Luke's Roosevelt Hospital**, 132 F.Supp.2d 256 (S.D.N.Y. 2001), by enacting 740(7), "[t]he legislature thus deliberately shielded employers from secondary claims for damages such as emotional distress, loss of reputation or loss of consortium—or any other claim that might arise from whistleblower-retaliation—which might upset the delicate balance of employee protection and employer freedom of action crafted by the Act…The Legislature has carefully constructed a narrow new right, designed to protect conduct that was previously unprotected, but not to permit a cumulation of remedies or causes of action that would impose greater burdens on employers than the Legislature specifically intended." Because the remedies under both 740 and 741 are identical, there can be no duplicative or secondary recovery.

Moreover, the Budget Report on Bills with respect to bill to enact §741 noted: "This bill would provide explicit and *additional protection* from employer retaliatory actions for health care employees who report (or threaten to report) substandard care to a supervisor or regulatory authority" (emphasis added), further stating "Section 740 of the Labor Law protects employees who report any health and safety hazards from employers who would penalize them for making such reports. This protection covers both workplace hazards and conditions affecting the public. The instant bill would *build upon* these protections and would specifically address the employment situations of heath care workers" (emphasis added). *Id.*

Finally, when the legislature enacted §740, it was the only section that made up Article 20-C of the Labor Law entitled "Retaliatory Action by Employers." Sections 740 and 741 together now make up all of Article 20-C. When the Legislature drafted 740(7) and used the terminology "this section," it was undoubtedly referring to the whole Article 20-C, it being

See WHISTLEBLOWER, next page

I've Seen This One Before

Using Information Obtained While Representing One Client— in the Representation of Another Client

by Justin M. Swartz, Esq. and Cara E. Greene, Esq.

What happens if you learn information while representing one client, and later determine that the information is relevant to your representation of another client? To what extent may (or must) you use the information that you gained in the course of one representation in concurrent or subsequent representations? Are there circumstances in which your possession of information can prohibit you from undertaking a subsequent representation at all?

A recent opinion of the Committee on Professional and Judicial Ethics of the New York City Bar Association (the organization formerly know as the "Association of the Bar of the City of New York") addressed some of these issues. *See* N.Y. City Bar Ass'n Comm. on Prof'l and Judicial Ethics, Ethical Op. 2005-02, 2005 WL 682188 (2005) ("NYCBA Opinion"). The NYCBA Opinion addresses the sometimes delicate balance between multiple clients' interests and a lawyers' duty to zealously represent them. Upon a thorough discussion of the matter, the Opinion concludes that the ethical obligations of an attorney who possesses information from one client matter that might be relevant to another client's matter turn on the specific circumstances, making a careful analysis necessary.

Zealous Representation and Free Flow of Information

It is a lawyer's most fundamental professional obligation is to represent her client zealously. Subject to specific limitations, zealous representation requires a lawyer to use all available means to achieve effective representation. N.Y. Code of Prof'l Responsibility DR 7-101(a)(1), EC 7-1. The duty of zealous representation "includes the duty to use all available information for the benefit of the client . . ." NYCBA Opinion at *2. In some instances, therefore, zealous representation may require a lawyer to use information in her possession for the benefit of her client.

The law and the ethics rules disfavor restrictions on information flow, especially when the information in question would be helpful to a client. Especially in federal court, liberal discovery rules are designed to encourage full disclosure and allow a thorough search for the truth. They disfavor limitations on disclosure. *See, e.g.*, **Hickman v. Taylor**, 329 U.S. 495, 507-08 (1947).

Lawyers cannot—and should not—be required to empty their minds from representation to representation. "Indeed, what a lawyer learns in a representation necessarily becomes part of the storehouse of knowledge and experience that the lawyer may draw on in the lawyer's career and that is part of the value the lawyer brings to each successive representation." NYCBA Opinion at *3. Indeed, "it is this previous experience which may make the attorney more attractive to the potential client." Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Ethics Op. 1988-104, 1988 WL 236371, *1 (2004).

There are times, however, when restrictions on the duty of zealous representation and the free flow of information are appropriate. The duty of zealous representation is sometimes tempered, and a lawyer's ability to use information obtained in the course of a prior representation limited, by additional considerations—ethical, legal, and contractual. These include the duty of confidentiality to a prior client, statutes and regulations that govern particular industries, and a lawyer's duty not to embarrass or otherwise harm the interests of the prior client. These duties can differ depending on whether the lawyer has an ongoing attorney-client relationship with the "prior client" or whether the attorney/client relationship has terminated.

Confidential and Privileged Information

The most obvious limitation regarding information from a prior representation is the duty of confidentiality. New York's Code of Professional Responsibility (the "Code") DR 4-101(B) prohibits

See BEFORE, next page

Members' Victories

A jury in the Eastern District of New York decided in favor of the plaintiff in the trial of a Title VII retaliation case which concluded April 7, 2006. The plaintiff in **Blatt v. City University of New York** was an adjunct professor at the College of Staten Island who alleged that the college had deprived him of promised teaching and counseling work in retaliation for his assisting a college librarian with her discrimination action against the college. The jury deliberated for approximately one day before returning its verdict, which included an award of $80,000 in emotional distress damages. Judge Charles Wolle, a visiting judge, will decide the appropriate amount of back pay and whether or not the plaintiff should be reinstated. The plaintiff was represented by our colleagues *Geoffrey Mort of Kraus & Zuchlewski LLP* and *Lee Bantle of Bantle & Levy LLP*. CUNY was represented by the New York State Attorney General's Office. ■

BEFORE, from page 7

a lawyer from (1) "*reveal[ing]* a confidence or secret of a client;" (2) "*us[ing]* a confidence or secret to the disadvantage of the client;" or (3) "*us[ing]* a confidence or secret of a client to the advantage of the lawyer or of a third party, unless the client consents after full disclosure." N.Y. Code of Prof'l Responsibility DR 4-101(B) (emphasis added). "Confidences" are information protected by the attorney-client privilege. "Secrets" are "information gained in the professional relationship *that the client has requested by held inviolate* or the disclosure of which would be embarrassing or would likely be detrimental to the client." N.Y. Code of Prof'l Responsibility DR 4-101.

It is important to realize that "using" information and "disclosing" or "revealing" information are not the same. There are circumstances in which a lawyer may be entitled to use information gained from a prior representation but not entitled *disclose* or *reveal* the information, either to a subsequent client or in the course of that client's representation. In other words, in some circumstances, a lawyer may know the information contained in a document and use the information to formulate questions at a deposition, but not may show the document to anybody without the first client's informed consent.

The Code does not prohibit a lawyer from revealing *all* information gained during the course of a representation, because not all information gained in a lawyer-client relationship is a "confidence" or a "secret." N.Y. Code of Prof'l Responsibility DR 4-101; see also NYCBA Opinion at *3 (the prohibition "extends only to 'confidences' or 'secrets' . . . Not all information gained in the course of the professional relationship is either a 'confidence' or a 'secret.'"). Moreover, the Code does not prohibit a lawyer from using or revealing general company information learned through discovery unless it would be harmful to the client, the information is protected by the attorney-client privilege, or the client has asked that the lawyer keep the information confidential. For example, information about a company's compensation practices, while likely information that the company would not want to be publicized, is not usually a "confidence" or a "secret" of an employee-client. A lawyer can, therefore, share it with a subsequent client or use in a subsequent representation.

Before using information gained in discovery in a subsequent representation, a lawyer should carefully consider whether her use of the information will disadvantage the prior client. If the information is general information about the employer's policies and practices, like payroll data, human resources policies, or internal company memoranda, its use is not likely to affect the prior client's interests. If however, use of the information could lead to liability for the prior client, or damage the prior client's reputation, the lawyer should not use the information in a subsequent representation without the prior client's informed consent. *See* N.Y. Code of Prof'l Responsibility DR 4-101.

The Code is also very protective of privileged information. A lawyer may not even *use* information that the attorney-client privilege protects for her own benefit or the benefit of a third party, without the client's consent. N.Y. Code of Prof'l Responsibility DR 4-101(B)(3).

Contractual Limitations

Even though the Code allows some information to be used and revealed, an attorney may contract away the right to reveal information. For example, a lawyer may agree to a confidentiality stipulation that covers a document production or to a provision in a settlement agreement against disclosure of certain facts.

However, an attorney may not contract away the right to *use* information that she otherwise has no duty to keep confidential. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 730, 2000 WL 1692770 (July 27, 2000). Doing so could constitute an impermissible limitation on the practice of law and deprive clients' the right to obtain counsel of their choice. For example, a proposed settlement including a provision that prohibits disclosure of "any information concerning any matters relating directly or indirectly to the settlement agreement or its terms" would be an impermissible restriction. *Id.* at *3. The broad terms of the settlement agreement could foreclose the lawyer's participation in cases where she might have occasion to use information that was not protected as a confidence or secret under DR 4-101, for example, information on the company's structure or discriminatory practices, but was nevertheless tangentially covered by the broad language of the settlement. *See id*.

Legal Limitations

Sometimes, information cannot be revealed because of legal limitations. A judge may order a document or filing sealed or issue a protective order. A statute may prohibit certain documents from being disclosed. *See, e.g.*, Health Insurance Portability and Accountability Act, 29 U.S.C. § 1181 *et seq*. Some statutes even prohibit a lawyer from acknowledging the existence of a lawsuit at all. *See, e.g.*, False Claims Act, 31 U.S.C. § 3729 *et. seq*. These circumstances trump the duty of zealous representation. *See* N.Y. Code of Prof'l Responsibility DR 7-101(a)(1); EC 7-1.

May You Undertake the Second Representation at All?

In some circumstances, a lawyer's possession of information that she obtained in the course of a prior representation may preclude her from representing a subsequent client. Assuming that there is no direct conflict between the clients, the lawyer must determine whether an indirect conflict would prohibit the subsequent representation. Such an indirect conflict can arise when a lawyer has information from a prior representation that is material to the new representation but is prohibited from using or revealing the information. Such circumstances do not automatically bar the subsequent representation, but raise the question of whether it is possible for the attorney to represent

See BEFORE, page 16

Editors' Apology

In our last issue, we published NELA/NY Holiday Party pictures while neglecting to credit the photographer, Jack Tuckner. Forgive us, Jack, and thanks!

SQUIBS, from page 16

SEXUAL HARASSMENT

The Ninth Circuit Court of Appeals did not consider negative performance memoranda and probation "tangible employment actions" that would prevent an employer from asserting the affirmative defenses under **Farragher / Ellerth**. Under **Farragher / Ellerth**, an employer may escape liability and damages if it can prove that it 1) "took no 'tangible employment action' against the employee; 2) exercised reasonable care to prevent and correct promptly any sexually harassing behavior and 2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742, 765 (1998). Here, the male employee went out for drinks, unrelated to work, with a female supervisor who frequently made sexual advances toward him. After the supervisor's advances were rejected one too many times, she threatened the employee by telling him, "You're finished." His employee was subsequently reprimanded for his sales performance and was placed on probation. Citing a hostile work environment, the employee submitted his letter of resignation. The court was not convinced that the employee's work environment was so intolerable and discriminatory that a reasonable person would be forced to quit. The alleged harassment had ended ten months before the employee resigned, and the employer had placed the employee and another co-worker on probation for poor work performance and insubordination. **Hardage v. CBS Broadcasting Inc.**, 427 F. 3d 1177 (9th Cir. 11/1/05).

SUMMARY JUDGMENT

Age Discrimination

A former employee of the New York City Department of Sanitation sued the City and two of his former managers, alleging that they had refused to promote him unless he immediately retired at the age of 60. The plaintiff alleged that one of the managers had told him that he had to retire because the manager was looking for "young blood" and that if he did not retire they would "bust [him] down," i.e., demote him. The plaintiff agreed and put in his retirement papers after getting the promotion, but then withdrew his retirement request and returned to work. The managers threatened him again, and approximately two months later he retired again and then sued. Judge Peter Crotty (S.D.N.Y.), a former New York City Corporation Counsel, denied summary judgment to the City on the plaintiff's claims under 42 U.S.C. § 1983 (age discrimination) and the New York State and City Human Rights Laws. The court noted that the City had made certain concessions for purposes of its summary judgment motion and, had it not done so, "many genuine issues of material fact would have existed and summary judgment would have been entirely inappropriate," and that furthermore, "parties … strain credulity when the litigation posture of a summary judgment motion directly contradicts the parties' sworn testimony at prior depositions." The court rejected the City's contention that the plaintiff had not suffered an adverse employment action, as well as the contention that the two managers were approximately the same age as the plaintiff and so could not have discriminated against him because of his age. It also held that he had made out a case of constructive discharge and that the individual managers were not entitled to qualified immunity. NELA/NY member Robert N. Felix represented the plaintiff. Congratulations! **Stampfel v. City of New York**, --- F. Supp. 2d ---, 2005 WL 3543696 (S.D.N.Y. 12/27/05).

Contract

Judge Deborah A. Batts (S.D.N.Y.) dismissed claims of age discrimination under the New York City Human Rights Law, breach of contract, and breach of implied-in-fact contract, brought by a plaintiff who was an instructor for Cornell University's ILR School for 25 years. When he was promoted to the position of Senior Extension Associate, the associate deans told him that he was granted the equivalent of tenure. After a dean allegedly pressured him to retire, the plaintiff was fired, purportedly for offering employment to a candidate without receiving proper authorization. His age discrimination claim under the NYCHRL was dismissed. Although the plaintiff's dinner meetings with the dean who told him to retire were held in Manhattan, and the decision to terminate his employment was made by a dean who worked in New York City, the court held that the impact of the termination decision occurred in Long Island, so the City law did not apply. As for the breach of contract claim, the court relied on the Cornell Faculty Handbook, which contradicted Plaintiff's allegations. Even though the court rejected Cornell's argument that the "plaintiff may not rely on an implied-in-fact contract where an express contract governs the subject matter," because there was not an express contract, the court once again relied upon the faculty handbook. The court determined that "[t]he Complaint's general reference to Cornell and the ILR School's conduct indicating to Plaintiff that he was a tenured faculty member is too vague to overcome a Rule 12(b)(6) motion." (Internal quotations omitted.) **Germano v. Cornell University**, --- F. Supp. 2d ---, 2005 WL 2030355 (S.D.N.Y. 8/17/05).

Disability Discrimination

The Fourth Circuit Court of Appeals found a material disputed issue of fact regarding whether an employee with end-stage renal failure was disabled under the Americans with Disabilities Act and denied a promotion because of his disability. The plaintiff required dialysis at least three days a week. When an opportunity for a promotion to Vice President arose, the promotion went to a candidate with less experience. As the plaintiff's condition progressed, he was relegated to inferior roles and was demoted to positions that he held when he was initially hired. He plaintiff eventually resigned and filed a complaint of disability discrimination and constructive termination. In deciding whether the plaintiff was protected under the ADA, the court's initial inquiry was whether the ability to eliminate bodily waste was a disability that substantially limited a major life activity. The court determined that "[t]he elimination of bodily waste is basic to any person's daily regimen"; thus, the plaintiff had a

See SQUIBS, page 19

SQUIBS, from page 15

RELIGIOUS DISCRIMINATION

See **Shain v. Center for Jewish History, Inc.**, discussed under "Summary Judgment / Religious Discrimination."

RESTRICTIVE COVENANTS

Courts in New York have historically looked with suspicion upon restrictive covenants, since (a) competition is good, which is why we have antitrust laws, and (b) courts do not like to see individuals prevented from making a living, at least in part because they do not want to see able-bodied individuals drawing public assistance. The test traditionally applied is whether the restriction is "no broader than necessary to protect the legitimate interests of the employer." Recently, though, judges have been siding more often with employers. A former employee of a defense procurement company, who left his job after his salary was cut and he was relegated to part-time hours, went to work for a competitor and was sued based upon a five-year-old noncompete. He alleged that, as an immigrant, he had been forced to sign the noncompete as a condition of the employer's sponsoring him for an H1B visa, and that he had later been forced to resign by the reduction in his salary and hours. In an opinion devoid of sympathy for the former employee, Justice Stephen A. Bucaria (Sup. Ct. Nassau Cty.) held that he had not been forcibly "coerced" into signing the noncompete. Rather, the employee only "was given the choice that many such employees are given in many varied businesses: either agreed [sic] to be bound by a non competition / confidentiality agreement and an employment agreement with a restrictive covenant, or be asked to resign." It seemed irrelevant to the court that the employee pointed out that he had not taken any trade secrets or documents. The court added that the employee "executed the agreement in 1999 and was not heard to complain about it until the plaintiff sought to enforce it," as though this constituted a waiver. Since the employee had learned the business on his employer's time, the court held that he was now competing unfairly and granted a preliminary injunction. **Mil-Spec Industries Corp. v. Mahmood**, --- N.Y.S.2d ---, NYLJ 3/15/06, p. 20 col. 3 (Sup. Ct. Nassau Cty. approx. 3/6/06).

When an employer sued its former employees for breach of the noncompete provision in their employment contracts, the court held that the noncompete provision, which prohibited the employees from engaging in business within a 100-mile radius, was unreasonably broad. The former employer brought suit against technicians, a dispatcher, and an office worker who had signed employment agreements with a company it had acquired; the employees resigned and went to work for a competitor. Using a three-pronged test, "that the covenant 1) is no greater than is required for the protection of the legitimate interest of the employer; 2) does not impose undue hardship on the employee; and 3) is not injurious to the public," the court dismissed the employer's claim on summary judgment. The court held that the services of a dispatcher, an office manager, and technician were not unique or extraordinary, and that the employer had failed to prove that the employees shared the employers' trade secrets with its competitor—especially since the employer had published its client list on its website. **ENV Services, Inc. v. Philip Alesia et al.**, 10 Misc. 3d 1054(A), 809 N.Y.S.2d 481 (Sup. Ct. N.Y. Cty. 11/28/05).

RETALIATION

A paper trail in a retaliation case can be a plaintiff's equivalent to Hansel and Gretel's trail of crumbs. An African American Program Specialist in the Office of Diversity and Economic Opportunity within the FDIC claimed that she was not promoted because of her race and was subjected to retaliation when she filed a formal charge of race discrimination. Specifically, the plaintiff claimed that the FDIC's decision to promote a white applicant over her was motivated by race. The plaintiff made a formal charge of discrimination with the EEOC and noticed a drastic decrease in the quality of her work assignments. While the court held that the employee failed to present evidence that the FDIC's decision was not legitimate, it nevertheless held that the FDIC's decision to reassign her to tasks well below her employment grade level was evidence of retaliation. Although the retaliatory acts occurred two years after her initial complaint to the EEOC, the court determined that the plaintiff's continued communications with the EEOC, which were copied to her supervisors, and her continued internal complaints were sufficient to establish the "close temporal proximity" that can support an inference of causation. The court determined that adverse employment actions are not limited to hiring, firings, promotions, or other discrete incidents. They also include reassignment with significantly different responsibilities. **Holcomb v. Powell**, 433 F.3d 889 (D.C. Cit. 1/10/06).

See SQUIBS, next page

BEFORE, from page 8

the subsequent client zealously without using the prohibited information. If "information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information," then a conflict exists and the lawyer cannot undertake the second representation. NYCBA Opinion at *5.

It may seem like we are stepping in an ethical minefield by representing multiple clients in related matters but we should not be gun-shy. Our experience with certain repeat-offending employers is valuable to our clients. Old client files (electronic files, hardcopies, or mental files) can be a great source of useful information. By carefully considering our duties, and obtaining necessary consents, we can navigate the thorny issues of confidentiality and conflicts of interest and serve the interests of old and new clients ethically and effectively. ■

Quarterly Interview

Nicholas Diamand's Interview with James Atleson
(April 2006)

***Nicholas Diamand** is a lawyer in the New York office of Lieff, Cabraser, Heimann & Bernstein, LLP. His diverse practice includes employment law, consumer protection law, and international law. Nick's quarterly interview column was inaugurated in the last edition of the newsletter. For this column, he has interviewed James B. Atleson.*

James B. Atleson is Distinguished teaching Professor at Buffalo Law School specializing in labor law. He teaches courses in labor law, collective bargaining, internal union democracy, labor law history and international labor law as well as a seminar on law and the visual arts. Professor Atleson is also a labor arbitrator.

N. Diamand: In 1985, you wrote an article in the Maryland Law Review called "Reflections on Labor, Power and Society" in which you concluded it was "time to reexamine existing power relationships and the goals of federal labor policy." What do you think the federal labor policy is at the moment?

Prof. Atleson: Well, there really isn't any. There are no proposals for change, partly because those who want to change it are out of power. The Republicans have not tried to alter labor law. I take it they are now particularly satisfied. They would like to make a change in the Fair Labor Standards Act and a few other acts. But, as far as collective action is concerned, they seem perfectly happy.

N. Diamand: Does that reflect "If it ain't broke, don't fix it" or "Since it's broke, we're happy with it as it is?"

Prof. Atleson: I think the latter probably. They're in control of the National Labor Relations Board, they pretty much control the courts. The law has not been particularly supportive of either representation by unions or collective action for a long time. So there is no reason to open it up for change because you never know what might happen.

N. Diamand: And were you to propose changes, what would they be?

Prof. Atleson: There are lots of proposals out there for change and a lot of them are very good ones.

We have to alter the election process. Perhaps either do away with it and use just card checks. A card check means that if a majority of the employees sign cards, the employer has an obligation to recognize them and begin to bargain without going through an election. It's basically how the National Labor Relations Act was originally set up in the beginning but we've gotten away from that and the law now acts as if elections were the only way you could possibly do it. And, as many have said before, what happens is that employers can pretty much make the representation that the election is a referendum on whether employees want to keep their job.

Another proposal would be to amend the secondary boycott laws which have been very effective in making sure employees cannot take effective action. Internationally, as unions and employees are beginning to think of themselves as having an interest in common with employees across the border and to act in supportive ways, it will make sense to think of taking part in empathetic or secondary action. In fact, that's occurring now. In fact, at times, they are even employees from the same firm since a high percentage of employees work for multi-national firms. So, they work for the same firm that German or Italian or Hong Kong or Malaysian workers work for.

N. Diamand: Wal-Mart is a company that is notorious for its hostility to unions. I'm curious to hear what your thoughts are, not only about Wal-Mart's policy toward unions but also the various creative responses to the company's aggressive attitude.

Prof. Atleson: I don't know when this started, but the idea is that because wages are so low and the health care plan at Wal-Mart is so bad, this actually puts a burden on the state and the taxpayers of the state because of the use of emergency wards rather than regular medical care.

So, a number of states, Maryland being one, have passed or are thinking of passing acts to require employees to provide health insurance in various ways. I think that is an immensely creative way to get at the question of employer health care and potentially very effective against Wal-Mart. I think it leads to a lot of pressure on them and they are certainly reacting to it. As far as unions are concerned they haven't had very much success in trying to organize Wal-Mart employees. The harm is that Wal-Mart threatens existing wage rates and benefits at markets and other firms by putting them out of business basically. So I'm not sure what unions can effectively do. I suspect that the turnover of employees at Wal-Mart is fairly high.

N. Diamand: To turn to more recent work, you spoke earlier about the international component of your work. I know you have written about labor rights as human rights and wanted to know how that connects with the international issue.

Prof. Atleson: In much of the world, labor rights are thought of as human rights. There are a number of conventions of the International Labor Organization, which makes clear that freedom of assembly and the right to engage in collective bargaining and even the right to strike are basic rights and, in fact, one can look at a variety of UN conventions as well which makes the same point. In the United States, however, unlike Europe by and large, these rights are not seen as basic human rights but are seen as practical results to get at certain policy ends whether it's to depress the number of strikes or basically to keep the peace since that's the only goal of the National Labor

See INTERVIEW, next page

INTERVIEW, from page 9

Relations Act that the courts ever talk about anymore. But they are not thought of as basic rights, they're thought of policy-based rights, and I think American lawyers are just waking up to the fact that in much of the world, these conventions of the UN and ILO set out basic human rights and that's how labor rights are thought of.

That combines with the point I mentioned before that employees are starting to think that instead of seeing the rest of the world as competitors, which of course they are in part, they also see them as employees with interests that merge or that they share. In fact, there have been a number of cases where unions have acted to support each other, either with funds, or pressure, or threatened strikes, or actual strikes.

N. Diamand: Can you give an example of that?

Prof. Atleson: The best example is the one I discussed in a recent article. ("The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity"—Buffalo Law Review, Winter 2004). A ship called the Neptune Jade had some cargo loaded in Liverpool by non-union longshoreman called Warfees in Britain. It then traveled to Oakland, California where it was met by a picket line which American longshoreman did not cross. The picket line lasted three days. The ship wasn't unloaded. The ship went to Vancouver, British Columbia, and the same thing occurred. It then traveled to two ports in Japan, and the same thing occurred again. This is an amazing case. Longshoreman have long thought of themselves as international workers, but we see these kinds of things in other cases as well.

Another less well-known strike was between the teamsters and UPS—prior to Hoffa's leadership of the union. The union spent a lot of time talking to unions in Europe and they were threatening strikes, actually striking, conducting various kinds of demonstrations and exerting pressure all through Europe. It's not clear how much effect that had on UPS, but it must have had some. UPS is a big player in the United States but apparently it is quite small in Europe. And there were strikes throughout Europe against UPS and in each case, just like the example of the Neptune Jade, the actions were unlawful under domestic law, not necessarily under international labor law, but under domestic law of all those countries in which it occurred pretty much. And so, unlawful, that's my main point, I guess it is certainly sad in a way, that unlawful secondary pressure is going to seem a rational device.

A third example in which the U.S. was not involved was the closing of a Belgian Renault plant, where there were strikes and actions all across Europe. Not only because the plant closed in violation of domestic law and there was no plan for the employees without any discussion with the union, but because they were going to shift some of the production to Spain. And so employees in other countries who, in a sense, could be seen as competitors, acted to support the workers in Belgium. Pretty amazing. It's the first Europe strike. It's called the first Euro strike, which I think makes sense. So there are just three examples. And there are more. One of the problems is they are not well reported. If it wasn't for the internet, you would never know about these cases.

N. Diamand: Do you think that these types of sympathetic actions could have a place and power in the United States? Can you envision a sympathetic action across state lines?

Prof. Atleson: Sure. Take the car industry. If there is a threatened strike in Ontario then GM plants in Wisconsin and Michigan will feel it in a day or two. They will be affected, so that will create a sense of self-interest. But, the unions would have to be willing to engage in what might be unlawful action. Unfortunately that could be expensive. They might decide it's not worth it.

N. Diamand: You have also written about labor and war time states. If you can summarize, how do labor and the war really connect?

Prof. Atleson: I looked at World War II and found that in a lot of historical writing about labor in the United States, the literature would go up through the 30s and then say there was a war. And the next chapter would start at the post-war period. It was as if nothing of value or of importance happened during the war. Actually, a lot of good, if not vital, ideas came out in the war and then seemed to go to sleep after the war ended. For instance, the idea of racial and gender equality in the workforce which were principles of the war Labor Board.

One of the main things that happened during the war was that a lot of folks in Washington were in policy positions in various war-time agencies and operating in a system where there simply could not be strikes. After the war, they became our well-known writers, professors, scholars, arbitrators, Secretaries of Labor and so on. There's a whole generation where the war affected their thinking about strikes and about trying find ways to have alternatives to strikes. It's during the war that arbitration becomes part of governmental policy because it was seen as an alternative to strikes, which made a lot of sense during a war. But, they were carried over into peace-time. The whole sense of what collective bargaining was about and how it should proceed, I think, was changed by the war.

N. Diamand: Have you seen this concept replicated in other countries in war time?

Prof. Atleson: Yes, though in different ways. In Japan, for example, military officials tried to think of ways to increase the morale of workers and so they created this idea called lifetime employment and that's where it comes from. It comes from the war, that this was a way to increase the morale of the workers and so you create the idea of lifetime employment, you then encourage employers to think that employees have value, to train and retrain them, support them with healthcare and so on. But all that starts in the war.

N. Diamand: Finally, let me change gears for a second. I also saw that you've written about arbitration and the presence of values and rational decision-making in arbitration. Would you talk about that for a minute and what your thesis was there.

See INTERVIEW, page 14

SQUIBS, from page 14

sented the plaintiff. Congratulations! **Garraway v. Solomon R. Guggenheim Foundation**, 415 F. Supp. 2d 377, 2006 WL 397911 (S.D.N.Y. 2/16/06).

Retaliation

An employer's numerous, ambiguous requests for medical information upon an employee's return from FMLA leave may create a question of fact concerning whether the employer was retaliating against him. An employer required an employee, upon return from FMLA leave, to undergo a medical fitness exam even after his treating physician cleared him to return to work. After the employee successfully completed the medical exam, he then had to submit information regarding his psychiatric health. Despite his efforts to comply with this request, the employer was not willing to help him find a psychiatrist who would satisfy the employer's requirements. The employee sued, alleging retaliation under the FMLA. Although the employer argued that its requirement that the employee be physically fit to operate a bus was legitimate, the court held that "a jury could reasonably infer from the chronology of events that defendants were making excuses to prevent [the plaintiff] from returning to work and their real motive was to retaliate for plaintiff's FMLA-covered absence." **Stevens v. Coach U.S.A.**, 386 F. Supp. 2d 55 (D. Conn. 9/8/05).

IMMIGRATION

The Court of Appeals of New York held that Labor Law §§ 240(1) and 241(6) were not preempted by federal immigration laws when it decided that undocumented aliens who are not authorized to work in the United States are nevertheless entitled to recover lost wages for personal injuries caused by their employer's violation of the Labor Law. The court reviewed the statutory language and intent of the federal Immigration Reform Control Act and the Immigration Nationality Act and determined that neither preempted the New York State Labor Law. The Labor Law is concerned with protecting workers by holding the owner and general contractor responsible for safety at building construction jobs. The federal immigration statutes are designed to control illegal immigration. The Court of Appeals reasoned that "limiting a lost wage claim by an injured undocumented alien would lessen an employer's incentive to comply with the Labor Law and supply all of its workers the safe workplace that the Legislature demands." In distinguishing **Hoffman Plastic Compounds Inc. v. National Labor Relations Bd.**, 535 U.S. 137 (2002), which held that an undocumented alien was not entitled to back pay as a result of an employer's unfair labor practice, this plaintiff did not engage in any criminal conduct by using fraudulent documents to obtain work. IRCA does not make it illegal for an undocumented alien to work. This plaintiff was also physically injured and unable to continue working, which affected his ability to mitigate his damages. "Mitigation of damages is not implicated when a worker's injuries are so serious that the worker is physically unable to work." Further, the court determined that to limit any conflict with IRCA's purpose, juries are permitted to consider immigration status as one factor in determining damages. **Balbuena v. IDR Realty LLC**, --- N.Y. ---, N.Y. Slip Op. 01248, 2006 WL 396944 (2/21/06).

JURISDICTION

There suddenly seem to be a disproportionate number of discrimination cases against Brookhaven National Laboratory. Two African-American employees of BNL brought suit under Title VII, the New York State Human Rights Law, and 42 U.S.C. § 1983 (and the ADA with respect to one of the plaintiffs) in the Eastern District of New York, alleging race discrimination and retaliation. The retaliation claims arose out of the complaint of a third African-American employee who had charged racial harassment. Granting a motion to dismiss in part, Judge Arthur D. Spatt stated that it was "well-settled that alleged adverse employment practices such as failure to promote, failure to compensate adequately, undesirable work transfers, and denial of preferred job assignments are considered discrete acts," not continuing violations, and accordingly some of the acts challenged by one plaintiff under Title VII were time-barred. The hostile work environment claim survived, and so did the first plaintiff's ADA claim, i.e., that BNL had punished him by transferring him to a job it knew he could not do because of his disabilities. Although the plaintiff had not included disability discrimination in his EEOC charge, the court found that it was "reasonably related" to the race charge. The § 1983 claims failed because BNL was not claimed to be a governmental agency, but the court permitted the plaintiffs to amend their complaint and assert § 1981 claims. The court rejected BNL's argument that it was immune from the state Human Rights Law claims because it was a federal enclave. NELA/NY member Bernard Weinreb represented the plaintiffs. **Benjamin v. Brookhaven Science Associates, LLC**, 387 F. Supp. 2d 146, 2005 WL 2065167 (E.D.N.Y. 8/24/05).

NEW YORK STATE LABOR LAW

New York State Labor Law § 193 forbids an employer to make deductions from the wages of an employee except under certain very limited circumstances. The commissions of a salesperson are specifically included in the definition of "wages," § 190(1). A number of account executives (salespersons) sued Yellow Book of New York, Inc., alleging that it had wrongfully made deductions from their commissions for existing accounts assigned to them that had failed to renew. Supreme Court, Nassau County (Peck, J.) held that this practice violated the Labor Law, and the Appellate Division, 2d Dep't, affirmed. There was no discussion of whether the "executive exemption," N.Y. Labor L. § 192(2), applied; some courts have limited it to the section in which it appears, *e.g.*, **Miteva v. Third Point Management Co.**, 2004 WL 1494758 (S.D.N.Y. 2004), and others have applied it to the entire New York State Labor Law. NELA/NY member Robert D. Lipman represented the plaintiffs. **Gennes v. Yellow Book of New York, Inc.**, 23 A.D.3d 520, 2005 WL 3118054 (2d Dep't 11/21/05).

See SQUIBS, next page

SQUIBS, from page 13

als who had not complained of discrimination, and that nominal partners of a law firm without real decisionmaking authority could be considered "employees" entitled to ADEA protection. Most recently, the law firm raised the defense that, since the individuals on whose behalf the EEOC had sued had never filed timely charges themselves with the EEOC, the agency's suit was barred by the statute of limitations. This defense too was rebuffed in a pithy opinion by Judge Posner, filed only ten days after the appeal was submitted. **EEOC v. Sidley Austin LLP**, 437 F.3d 695 (7th Cir. 2/17/06).

EQUAL PROTECTION

In a 4-to-1 opinion, the First Department Appellate Division reversed Judge Doris Ling-Cohan's decision legalizing same-sex marriage and holding the Domestic Relations Law (DRL), which only allows marriage between men and women, unconstitutional. Justice Milton Williams held that the DRL was constitutional and that Judge Ling-Cohan's decision had improperly "rewrite[ten] [the DRL] and purportedly create[d] a new constitutional right, an act that exceeded the court's constitutional mandate and usurped that of the Legislature." Justice Williams, who is a Trustee of St. Patrick's Cathedral and a member of other conservative Catholic organizations, held that the DRL does not violate equal protection statutes because members of one sex can only marry members of the other sex, thus treating both sexes equally. **Hernandez v. Robles**, 805 N.Y.S.2d 354 (1st Dep't 12/8/05).

FMLA

Mixed Motive Analysis

Does a mixed-motive analysis apply to FMLA retaliation cases? The answer is yes, according to the Fifth Circuit Court of Appeals. A plaintiff filed an FMLA suit against her employer for denying her FMLA leave and restricting her ability to work overtime in retaliation for taking the leave. Her claim was dismissed, and she continued to work for the employer. A little over a year later, her employment was terminated, allegedly for violation of the attendance policy. On appeal, she argued that the district court had erred when it failed to apply a mixed motive analysis to her case—that is, that even though retaliation was not the sole reason for her termination, it was a motivating factor. Under this analysis, "1) the employee must make a prima facie case of discrimination; 2) the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action; and 3) the employee must offer sufficient evidence to create a genuine issue of fact either that a) the employer's proffered reason is a pretext for discrimination, or … b) that the employer's reason, although true, is but one of the reasons for its conduct, another of which was discrimination." Although the court recognized that the mixed motive framework applies to FMLA cases, it held that the plaintiff's abuse of the attendance policy and failure to adhere to the dress code gave Monitronics sufficient reason to fire her despite a retaliatory animus. **Richardson v. Monitronics Int'l, Inc.**, 434 F.3d 327 (5th Cir. 12/21/05).

Psychiatric Disability

A warehouse worker who suffered from "psychosis not otherwise specified," involving symptoms such as hearing voices when he did not take his medication, was hospitalized several times over a seven-year period. Each time he took, and was allowed, FMLA leave. He was fired before returning from his last leave, allegedly because he did not follow the employer's policy about calling in. He sued under the FMLA and the New York State and City Human Rights Laws. Both parties moved for summary judgment, and Judge Louis A. Kaplan (S.D.N.Y.) denied both parties' motions. Among other things, the court held that a reasonable jury could find that the employer was on notice to inquire when the plaintiff would be able to return to work, rather than placing the entire responsibility on him to tell them. NELA/NY member Jonathan Weinberger repre-

See SQUIBS, next page

INTERVIEW, from page 10

Prof. Atleson: I wrote an article, a very modest one, about the values that arbitrators apply. That got me into a lot of trouble with arbitrators who argued that they just read the agreement and they try to come out with the most rational interpretation of the agreement and they don't have any values, they don't have any basic values.

I didn't want to do a whole book so I just took one narrow area. I looked at cases where employees were disciplined or discharged for swearing at their foreman and found that it is very clear that arbitrators, at least many of them, thought in terms of a hierarchy in the workplace so that perhaps a steward could swear at a foreman but an employee couldn't, even though an employee doesn't have a lot of authority or influence in those kinds of battles and swearing often turns out to be a weapon of the weak rather than the strong. In lots of cases, arbitrators seemed to assume that there was a status problem here. That employees were of lower status and they had to keep their place and that was built into the way they looked at the work place. I was surprised because I hadn't actually expected to find that, but I did.

N. Diamand: What sort of flak did you get?

Prof. Atleson: Very strong, very strong responses. And so has Jim Gross who also wrote a piece. I think both pieces came out in the same issue of the Buffalo Law Review. Jim wrote a much broader piece on the values of arbitrators. Both of us arbitrate but we both got a lot of flak from this. The idea that somehow neutrality means you don't have any assumptions of your own about what the workplace should be like is just silly. But, arbitrators have an economic investment in having no interests of their own, no values of their own.

N. Diamand: Most lawyers would not claim with a straight face that judges have no values of their own.

Prof. Atleson: That's right. ■

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 Natalie Holder-Winfield, an associate with Outten & Golden LLP, for help in the preparation of these squibs.

AGE DISCRIMINATION

A 49-year-old man who aspired to be a Nassau County police officer was not allowed to take the required Civil Service exam because the upper age limit was 35. The trial court (Sandra J. Feuerstein, E.D.N.Y.) dismissed his ADEA case, and the Second Circuit Court of Appeals affirmed, on the grounds that the ADEA exempts state or municipal firefighters or law enforcement officers employed by a state or a political subdivision of a state where age limits are set by state or local law. These individuals may be retired pursuant to "...a bona fide hiring or retirement plan that is not subterfuge to evade the purposes of [the] Act." 29 U.S.C. §623(j)(2). **Feldman v. Nassau County**, 434 F.3d 177 (2d Cir. 1/9/06).

In a case of first impression for the Second Circuit Court of Appeals, the court held that state and local governments are subject to liquidated damages under the ADEA. A jury had found the New York City Transit Authority liable for age discrimination in the training and promotion of older workers. The defendant resisted the imposition of liquidated damages, arguing that these damages were punitive in nature and that, as a government entity, NYCTA was exempt from punitive damages. Judge Reena Raggi, writing for the court, concluded that ADEA liquidated damages "may be characterized as punitive in nature." However, she held that the "traditional concern with allowing punitive damages against government entities—the danger of subjecting the government to crippling and open-ended damage awards for the actions of its agents—is not at issue under the ADEA" since the liquidated damages are capped at an amount equal to back pay. The court further relied on the Third Circuit's decision in **Potence v. Hazelton Area School Dist.**, 357 F.3d 366, 373 (3d Cir. 2004) and its interpretation of Congress' intent: "[A]s Potence concludes and we agree, the language of this integrated statutory scheme, read as a whole, makes it clear that Congress intended to subject municipalities … to the liquidated damages provision of the ADEA." (Internal quotations omitted.) **Cross v. N.Y.C. Transit Authority**, 417 F.3d 241 (2d Cir. 8/2/05).

ARTICLE 78 PROCEEDINGS

A Certified Professional Teacher (CPT) received notice in June 2003 that he "and all other Preparatory Provisional Teachers" (PPTs) were being terminated. He protested that he was not a PPT but a CPT, a higher level of substitute teacher. He had a Ph.D. in biology, the subject he was teaching. In September 2003 he was rehired but was paid at a lower rate than he was entitled to and not paid at all for some pay periods. Meanwhile, in August 2003 he had filed an Article 78 petition, alleging that his June termination was arbitrary and capricious. He taught in the fall of 2003 for two months and then was terminated again, with the undisputed result that, for the rest of the 2003-04 school year, his class had no qualified biology teacher. Justice Doris Ling-Cohan (Sup. Ct., N.Y. Cty.) agreed that the actions of the Department of Education were arbitrary and capricious, and ordered reinstatement with back pay. **Orlian v. New York City Department of Education**, --- N.Y.S.2d ---, 11 Misc. 3d 1052(A), 2006 N.Y. Slip Op. 50184(U), 2006 WL 344,000 (Sup. Ct. N.Y. Cty. 1/17/06).

BENEFITS

The Second Circuit Court of Appeals reversed a decision of Judge Shira Scheindlin (S.D.N.Y.) that a claimant was not "disabled" under his MetLife employee benefits plan at the time of his termination. In a summary order, the court of appeals (Judges Dennis Jacobs, Chester J. Straub, and Rosemary S. Pooler) found that MetLife's determination failed even under the deferential "arbitrary and capricious" standard. The plaintiff-appellant suffered from depression, other psychiatric conditions, and the side effects of HIV medications; his colleagues and managers gave detailed statements that, in the last few months before his termination, they personally saw his job performance and overall functioning "deteriorating precipitously," said the court, "to the point where he was barely surviving on the good-will he had built up over his time at the Company." Defendant-appellee relied on the HR department's conclusory statement that the employee's performance was "satisfactory" and that he was fired for reasons unrelated to his disability. The court found that MetLife had "cherry-picked" the evidence it wanted to support its determination that he was not disabled—including "the opinions of three independent consultants who never personally examined" the plaintiff—and ignored evidence it did not like. The plaintiff was represented by NELA/NY member Scott M. Riemer. **Winkler v. Metropolitan Life Insurance Co.**, --- F.3d ---, 2006 WL 509387 (2d Cir. 3/1/06).

CLASS ACTIONS

The at-will doctrine, jurisdictional defects, and issues of computation proved insurmountable barriers for a putative class of plaintiffs. The plaintiffs, con-

See SQUIBS, next page

TESTIMONY, from page 11

sisting of both U.S. citizens and non-citizens, alleged that their employer discriminated against them in violation of the New York State and City Human Rights Laws based on their respective citizenships. Plaintiffs alleged that the foreign citizens were underpaid relative to their U.S. citizen counterparts, and that the U.S. citizens were denied training. They also sought class certification a contract claim. The court held that despite the existence of a document entitled "Main Terms & Conditions of Employment," the plaintiffs were employees at will, since the purported employment agreement did not limit the employer's right of termination and did not expressly state the duration of employment. One of the plaintiffs, a computer programmer who primarily worked at a client location in New Jersey, had her claim under the New York City Human Rights Law dismissed because the "impact" of her termination would have occurred outside of the five boroughs even if the termination decision was made in New York City. The plaintiffs' class certification motion was dismissed with prejudice because of an error in computing the time to file it. **Shah v. Wilco Systems, Inc.**, 806 N.Y.S.2d 553, 2005 WL 3547036 (1st Dep't 12/29/05).

Editors' Note: The plaintiffs in this case, despite the outcome, have been among those who have called attention to purported abuses involving "guest workers" and the impact of these guest worker programs on U.S. and non-U.S. citizens alike in certain sectors.

CONSTRUCTIVE DISCHARGE

Demotions

A constructive discharge claim may find a more hospitable reception in state court than in federal court. A salesperson who had been quickly promoted all the way up through Senior Global Manager to Branch Manager / Director of Corporate Accounts, with responsibility for an annual sales plan of approximately $50 million, began an equally rapid descent back to sales representative at the age of 55. His complaint alleged that he was passed over thereafter for numerous promotional opportunities, all of which went to substantially younger employees. The plaintiff resigned. Justice Emily Jane Goodman (Sup. Ct. N.Y. Cty.) held that he had made out a prima facie case with respect to age discrimination. As for the allegation of constructive discharge, the court quoted the standard in **Pena v. Brattleboro Retreat**, 702 F.2d 322, 325 (2d Cir. 1983)—"working conditions so intolerable that the employee is forced into an involuntary resignation"—and found that the defendant's treatment of the plaintiff met that standard. The court also found that the complaint stated a claim for improper failure to pay commissions under N.Y. Labor L. § 191(1)(c). NELA/NY member Richard S. Corenthal represented the plaintiff. **Sutton v. MCI Communication Corp.**, --- N.Y.S.2d ---, 2006 WL ---- (Sup. Ct. N.Y. Cty. 3/8/06).

DAMAGES

With the impending threat of having a $5 million punitive damages award vacated, a plaintiff stipulated to reduce her award to $1.1 million. During the trial, one juror had a brief conversation in the ladies' room with the defendant about the plaintiff's history of suing her former employers. The juror shared this information with another juror. The court,

See SQUIBS, next page

SQUIBS, from page 12

informed of the conversations, then substituted alternates for both of the jurors. Although defense counsel objected to the substitution, the trial proceeded. On appeal, under CPLR 4106, the court held that the substitution violated the defendant's constitutional and statutory right to a civil trial by a jury of six persons to deliberate on all matters. Rather than have the court vacate the judgment, the plaintiff agreed to reduce the award. **Gallegos v. Elite Model Management**, 807 N.Y.S.2d 44 (1st Dep't 12/29/05).

DISABILITY DISCRIMINATION

Essential Functions

A social worker for the Veterans Administration alleged that she was wrongly disqualified from her job, which required driving to home visits for veterans in a 30-mile radius around the veterans' hospital where she was based. Management officials discovered that she took an opioid-based pain medication for several painful conditions and terminated her for "not being able to perform the physical demands of the position," although the job description did not include any physical requirements. Her doctor explained that the medication, which she had taken without incident for ten years, did not affect her thinking, reactions, or concentration, and that she could drive; his letter was ignored. The complainant asked for a reasonable accommodation of having a nurse accompany her on home visits (already being done), but the request was denied. Although the termination eventually was rescinded, she was then immediately terminated again. Unfortunately, after a fall on the ice the complainant became permanently totally disabled, but based on the VA's previous actions, the EEOC's administrative law judge found that she had shown that she was regarded as having a disability and was thus protected under the Rehabilitation Act, that the VA regarded her as having an impairment that substantially limited the major life activity of driving, that the VA had wrongly refused to provide a reasonable accommodation, and that it had retaliated against her by terminating her employment. NELA/NY member Bernard Weinreb represented the complainant before the EEOC. **Dremmel v. Nicholson**, EEOC Case No. 160-2003-08504X (10/7/05).

"Judicial Estoppel"

Magistrate Judge Fox (S.D.N.Y.) awarded a plaintiff over $150,000 in overtime pay, liquidated damages, back pay, and punitive damages for violations of the FSLA and the ADA. The plaintiff, a building superintendent, worked more than 40 hours per week and was not allowed to leave the work premises during his lunch break. When the employer failed to pay the plaintiff overtime because of costs associated with renovating the building and a shortage of tenants, the court determined that the employer's decision to withhold overtime pay was made knowingly. The case presented the issue of how a claim of being "totally" disabled to the worker's compensation board affects a later ADA discrimination claim. The defendant argued that the plaintiff should be judicially estopped from asserting that he was a qualified individual with a disability, but the court disagreed. Using a two-step test that "1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and 2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment," the court determined that the statements were not inconsistent, especially given that the plaintiff's doctor's note indicated that he could do limited work and that the Worker's Compensation Board did not render a favorable judgment. **Rosso v. Pi Management Associates, L.L.C.**, --- F. Supp. 3d ---, 2005 WL 3535060 (S.D.N.Y. 12/23/05).

Reasonable Accommodation; "Regarded As" Disabled

The Eleventh Circuit, adding to a growing circuit split, held that "under the plain language of the ADA, employers are obliged to provide reasonable accommodations for individuals falling within the ADA's definitions of disabled, including those 'regarded as' being disabled." A plaintiff, who worked in a fish processing plant, sorting fish on a conveyor belt, developed vertigo. When she informed her employer about the diagnosis and said that the conveyor belt made her dizzy, the employer fired her, purportedly out of concern that she would "pose a safety hazard to [herself] and [her] co-workers." While the court held that the plaintiff's vertigo was not an actual impairment under the ADA because she did not prove that she was substantially limited in the major life activity of working, the court, in a matter of first impression, held that employers must provide reasonable accommodations for employees who are "regarded as" disabled under the ADA. Although the circuits are split (the Fifth, Sixth, Eighth, and Ninth Circuits have held otherwise), the court reasoned that "[b]ecause a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we … h[old] that regarded-as disabled individuals also are entitled to reasonable accommodations under the ADA." **D'Angelo v. Conagra Foods, Inc.**, 422 F. 3d 1220 (11th Cir. 8/30/05); *see also* **Williams v. Phila. Hous. Auth. Police Dep't**, 380 F.3d 751 (3d Cir. 2004) and **Kelly v. Metallics West, Inc.**, 410 F.3d 670 (10th Cir. 2005).

DISCOVERY

When a defendant university tried to subpoena the plaintiff ex-employee's employment records from his next employer, another university, the plaintiff successfully moved to quash the subpoena. Magistrate Judge Ronald L. Ellis held that the plaintiff had a personal privacy right in the records and that the subpoenas were overbroad. **During v. City University of New York**, --- F. Supp. 2d ---, 2006 WL 618764 (S.D.N.Y. 3/9/06).

EEOC

The EEOC's age discrimination case against Sidley Austin LLP continues to make law. Previously, the Seventh Circuit Court of Appeals had ruled that the EEOC could sue on behalf of individu-

See SQUIBS, next page