NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 13, NO. 3 February 2006 Rachel Geman, Gary Trachten, Co-Editors

New Interview Column

NELANY: Winter Quarterly Interview

On November 17, 2005, at its Annual Gala Dinner in New York City, NELA/NY once again celebrated "Courageous Plaintiffs Who Fought Back." Last year's honorees were the plaintiffs in the following three lawsuits: (1) **Alston et al v. Liebherr America, Inc.***; (2)* **Rotondo v. City of New York***; and (3)* **Campos, Martinez, Cenostin v. Tratoras Construction, Inc.**. *In this issue of NELA/NY Quarterly, we feature interviews with the lawyers who represented these plaintiffs: Joshua Friedman; Anne Golden and Carmelyn Malalis; and Richard Bellman. Interviews were conducted by Nicholas Diamand.*[1]

INTERVIEW WITH RICHARD F. BELLMAN
Legal Director of the Anti-Discrimination Center of Metro New York:
Campos, Martinez, Cenostin v. Tratoras Construction, Inc.

ND. Please summarize the case and the claims.

RB. This case involved a struggle that began in 1995 by three minority women to work as laborers on a federally funded construction pro-

See INTERVIEW, page 24

FLSA: U.S. Supreme Court Clarifies Pre-Don Post-Doff Compensable Time Issues, and Why You Should Care

by Jonathan Bernstein

This past fall, the Supreme Court resolved a circuit split to rule that: (1) time spent walking between changing and production areas is compensable; (2) time spent traveling to and from the production area after donning (putting on) and before doffing (taking off) protective gear is compensable; (3) time spent waiting to doff is compensable; and (4) time spent waiting to don is not compensable. **IBP v. Alvarez**, 126 S.Ct. 514 (2005).

Experienced Fair Labor Standards Act ("FLSA") practitioners can glean from my introductory paragraph alone that this opinion was a victory for plaintiffs and a boon to a plaintiff's employment law practice. Other employment lawyers may require a little bit of context, history, or explanation. The sub-category of wage and hour law at issue in Alvarez was "compensable time"—how to define and delimit the hours that the employer must pay for.

In 1938, the FLSA established, among other things, minimum wage and overtime protection for most American workers. 29 U.S.C. § 201 *et seq.* It did not, however, define "workweek" or "work." This gap in the law occasioned much litigation in the early years of the FLSA. In 1946, the Supreme Court defined the workweek as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946). So, for example, employers were held to be required to pay miners for the time spent crawling between the mine entrance and the coal seam.

This early FLSA jurisprudence provoked howls of resentment from employer groups. In all fairness, those groups complained not about the money that they would have to pay, but rather about the settled expectations, the customs and usages that would be upset by the compensation scheme. Accordingly, in 1947, Congress passed the Portal-to-Portal Act. The Portal Act treated then-existing claims one way and prospective claims another. As to prospective claims, the following were made non-compensable:[1] travel to and from the actual place of performance of the employee's principal activities and activities which are preliminary or postliminary[2] to principal activities, which occur prior or subsequent to the beginning or end of the principal activities. 29 U.S.C. § 254(a). Clear enough? Of course not.

The Portal Act and regulations promulgated thereunder begat such litigation as **Steiner v. Mitchell**, 350 U.S. 247 (1956). The **Steiner** battery-plant workers were required by state health and hygiene laws to change clothes and shower at the workplace; showering and changing were held compensable—because these were principal activities, *i.e.*, integral and indispensable parts of the principal activities and not specifically excluded by the cited language of the Portal Act. This means that the donning

See FLSA, page 27

"You Say Goodbye, and I Say Hello": NELA Board Changes

Outgoing Executive Board Members: Dave Fish, Bob Herbst, Adam Klein, and Bob Stroup. Thank you for your dedication and years of service to NELA/NY!

New Executive Board Members: Craig Gurian. Margaret McIntyre, Justin Swartz. Welcome to the new members!

NELA Member News

NELA member **Vivian Berger** married Michael Finkelstein on Sunday, January 29, 2006. Congratulations!

A Word from Your Publisher

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

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

The NELA/NY Calendar of Events

February 16, 2006
Sexual Harassment/ Discrimination Committee Meeting
100 Church Street, Suite 1605
Meetings 2nd Tuesday of every month

February 15, 2006 • 6:15 p.m.
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

March 1, 2006 • 6:30–8:30
NELA Nite
3 Park Avenue, 29th Floor
Topic: Document Technologies
(Details to Follow)

April 7, 2006 • 9-1:00 pm
Upstate Spring Conference
Doubletree Hotel
Syracuse, NY
(Brochure to Follow)

April 19, 2006 • 6:15
Executive Board Meeting
3 Park Avenue, 29th floor
(Open to all members in good standing)

April 26, 2006 • 6:30–8:30
NELA Nite
3 Park Avenue, 29th Floor
Lori Matles, Mediator
(Details to Follow)

April 28, 2006 • 9-1:00 pm
Upstate Spring Conference
Albany Law School
Albany, NY
(Brochure to Follow)

May 5, 2006
NELA Spring Conference
Yale Club of NYC
(Brochure to Follow)

May 24, 2006 • 6:30–8:30
NELA Nite
Frank D. Tinari, Ph.D
Tinari Economics Group
(Details to Follow)

June 14, 2006 • 6:15 pm
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
(Brochure to Follow)

June 28, 2006 • 6:30–8:30
NELA Nite
3 Park Avenue, 29th Floor
Sex Harassment/Sex Discrimination Committee Presentation
(Details to Follow)

President's Column

by Bill Frumkin, President, NELA/NY

The recent nomination of Samuel Alito to the United States Supreme Court has raised some interesting issues as to what NELA/NY could, should, or should not do in terms of taking a position with respect to his nomination. Specifically, during the second week of January, I received an e-mail indicating that the Texas Employment Lawyers Association ("TELA"), NELA's Texas affiliate, issued a press release coming out against Judge Alito's nomination.

At first blush, it appeared to me that NELA/NY should do the same. The Executive Board e-mailed among ourselves concerning whether NELA/NY should assume a similar position. Ultimately, the consensus was that it might be problematic for us, as the Executive Board of a bar association to just *assume* that our membership would be against Judge Alito's nomination. Certainly, anyone following the nomination closely should be aware that his decisions on employment matters have generally been against the interests of our clients. Notwithstanding, this raises the greater philosophical issue of should the Executive Board just assume that the membership is in favor of such action without pursuing this through a referendum or other mechanism.

The legislative efforts of NELA National have certainly been warmly received by its members throughout the country. No one (I would think) would have any problem with the amendments to the Civil Rights Tax Fairness Act, which have provided such a great improvement in our ability to settle cases for the benefit of our clients. This begs the question of whether the backing of legislation that may be good for our members is the same thing as backing or opposing judicial candidates. I know that NELA National has consistently opposed the nominations of district court and circuit judges that were not in line with our clients' interests, presumably without objection. However, although there has been much discussion about backing and opposing judicial candidates (certainly at the state level), I as a long-time NELA/NY member am not aware of any specific procedure that has been developed to poll the entire membership to determine whether to say 'yea' or 'nay' with respect to a specific candidate. I am not saying that Judge Alito would have been a friend to employees. Rather, I am just addressing the greater issue of what position our bar association should take with respect to prospective candidates in terms of taking the temperature of its members, or just assuming, as an Executive Board, or Judicial Committee, that a particular candidate is someone who we should or should not support.

What it comes down to is this: should we have a process to democratically take a position with respect to this issue? I don't have the answer, but I would welcome input with respect to how the membership views this issue. Rather than bantering this question around on the ListServ, I am asking people to e-mail their comments to Shelley Leinheardt directly. The Executive Board is committed to acting in accordance with the views of our membership and in an area such as the backing of judicial candidates, it seems only reasonable that we receive guidance. Possibly our Judicial Committee can act as a clearinghouse. If people view the backing of legislation similarly (although I personally think it is not the same because a particular bill is going to have a particular purpose, and a judicial candidate will be confronted with numerous issues, some of which may be favorable and some unfavorable to our clients) we would like to be made aware of such concerns as well. As a democratic organization the Executive Board needs direction. As long as I am President it will be my goal to operate in this fashion. Overall, I think it is fair to say that fourteen people (the Executive Board) can assume what the views of three hundred will be to a point, and this is one of those situations when I believe a system needs to be developed to democratize how we arrive at our position.

See PRESIDENT, page 18

New Members

Zafer A. Akin Esq.
Akin & Smith, LLC
305 Broadway, Ste 1101
New York, NY 10007
Work: 212-587-0760
Fax: 587-4169
akin99@yahoo.com

Patrick Boyd Esq.
The Boyd Law Group, PLLC
230 Park Avenue, Ste. 1000
New York, NY 10169
Work: 212-808-3054
Fax: 808-3020
pboyd@theboydlawgroup.com

Brendan Chao Esq.
Attorney & Counselor at Law
150 Great Neck Rd, Ste 304
Great Neck, NY 11021
Work: 516-466-2033
Fax: 466-2007
bchao@bchaolaw.com

David A. Colodny Esq.
Senior Staff Attorney
Urban Justice Center
666 Broadway, 10th Floor
New York, NY 10012
Work: 646-459-3006
Fax: 212- 533-2241
dcolodny@urbanjustice.org

Nicholas Diamand Esq.
Lieff, Cabraser Heimann & Bernstein, LLP
780 Third Avenue - 48th Floor
New York, NY 10017
Work: 212-355-9500
Fax: 355-9592
ndiamand@lchb.com

Denise Dunleavy Esq.
Kramer & Dunleavy LLP
350 Broadway, Ste 1100
New York, NY 10013
Work: 212-226-6662
Fax: 226-8089
dmd@kramerdunleavy.com

See NEW MEMBERS, page 20

Holiday Party, December 8th, 2005

George Wayne Outten Washington

President Bill Frumkin (D NY)

Roz Fink and Jan Goodman

"Round 1 of this match goes to…" Patrick Delince and Liz Schalet

"You didn't like my joke?"
MC Phil Taubman

"What do you mean I can't have another drink? I thought this was a 'bar' association!" Patrick Boyd

"Josh, it wasn't that funny."
Mahima Joishy and Josh Friedman

Eliot Baumgart and Shelley Leinheardt
"Thanks, Shelley, for the captions."

"What a long trip (from LI) it's been!"
Matt Porges and Rick Ostrove

Did We Imagine Desert Palace?

By Anne Golden* and Piper Hoffman**, Outten & Golden LLP

When the U.S. Supreme Court decided **Desert Palace v. Costa**, 539 U.S. 90 (2003), there was great rejoicing in the plaintiffs' employment bar. **Desert Palace** very clearly held that neither direct evidence nor any other heightened evidentiary showing was required to trigger a mixed-motive analysis. Mixed-motive analysis shifts the burden of proof to the employer to show that it would have made the same adverse employment decision even absent discrimination. But the jubilation was premature, and we have begun to wonder whether Desert Palace ever really happened.

After the Supreme Court's opinion on mixed-motive analysis in **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989), several circuits had grafted the requirement onto mixed-motive analysis that a plaintiff must show direct evidence of discrimination before that analysis would apply. "Direct evidence" is evidence that does not require the fact-finder to make an inference, as opposed to "circumstantial evidence," which does require an inference. One classic illustration involves evidence of rain. Seeing the rain out the window is direct evidence. Seeing someone enter the room with a wet umbrella is circumstantial evidence because it requires the viewer to infer that it was rain that made the umbrella wet. See **U.S. v. Henderson**, 693 F.2d 1028, 1031 (6th Cir. 1982) (facts asserted on the basis of the witness's personal knowledge are direct evidence, whereas testimony to other facts and circumstances from which the jury may make inferences as to facts is circumstantial evidence); 22 Charles Alan Wright & Arthur R. Miller, **Federal Practice and Procedure** § 5162.

Direct evidence of the ultimate issue in a Title VII racial discrimination case could include, for example, a letter from the plaintiff's supervisor stating, "I am firing you because of your race." Since direct evidence is obviously hard to come by, requiring it before a court will shift the burden to the employer to prove that it would have taken the same adverse action against the plaintiff even absent a discriminatory motive means that mixed-motive analysis loses much of its usefulness to plaintiffs.

In 1991, Congress amended Title VII to undo some bad case law that had grown up to choke the statute. Among other things, it added 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). Subsection (m) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Subsection 5(g)(2)(B) provides that if an employee proves a violation under subsection 2(m), "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." **Desert Palace**, 539 U.S. at 94 (internal citation omitted). There is no requirement anywhere in Title VII that the subsection 2(m) analysis cannot apply unless the plaintiff offers direct evidence—or any other heightened form of proof—of discrimination.

Nonetheless, most circuits continued to require plaintiffs to proffer direct evidence of discrimination before they would apply a mixed-motive analysis. The Supreme Court resolved the circuit split in its 2003 **Desert Palace** decision.

In **Desert Palace**, the Supreme Court recognized that the plain language of Title VII does not require plaintiffs to offer direct evidence in order to invoke the mixed-motive analysis. "The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII. … We hold that direct evidence is not required." *Id.*, 539 U.S. at 92. Later, the Court noted that the text of the 1991 Act itself "leav[es] little doubt that *no* special evidentiary showing is required," *id.* at 99 (emphasis added), including direct evidence or any other heightened showing.

But even after both Congress and the Supreme Court have spoken, a number of decisions from various courts around the country continue to flout, and, in some cases, ignore, **Desert Palace** by requiring direct evidence or some other heightened showing from plaintiffs making a mixed-motive argument. Given the importance of this analysis and the fact that many of these cases are within the Second Circuit, our alarms should be sounding.

In the Second Circuit, there are at least three district court decisions and one court of appeals decision in this group: **Stone v. Board of Educ. of Saranac Central School Dist.**, 2005 WL 2861618 (2d Cir. Nov. 2, 2005) (unreported summary order); **Monte v. Ernst & Young LLP**, 330 F. Supp. 2d 350 (S.D.N.Y. 2004) (Swain, J.); **Schreiber v. Worldco, LLC**, 324 F. Supp. 2d 512 (S.D.N.Y. 2004) (Chin, J.); and **Soderberg v. Gunther International, Ltd.**, No. 3:02 CV 2010 (PCD), 2004 WL 57380 (D. Conn. Jan. 7, 2004).

Stone is an example of a court's simply ignoring the **Desert Palace** ruling:

> Regarding plaintiff's theory of "mixed motive" discrimination, it is well-settled that "to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment." **Raskin v. Wyatt Co.**, 125 F.3d 55, 61 (2d Cir. 1997).

Stone at *2.

See DESERT PALACE, next page

** Anne Golden is a founding partner of Outten & Golden LLP. She represents individual employees in negotiations and litigation. Ms. Golden is a board member of NELA/NY.*

*** Piper Hoffman is a senior associate at Outten & Golden LLP. She represents employees in class actions and in individual negotiations and litigation.*

DESERT PALACE, from page 5

Other circuits that have refused to follow **Desert Palace** include the Third, Sixth, Eighth, and Eleventh. *See* **Kovoor v. School District of Philadelphia**, 93 Fed. Appx. 356, 359, 2004 WL 363299, at *3 (3d Cir. 2004) ("a mixed motive charge was inapplicable because there was no direct evidence linking discrimination with the failure to promote"); **Lepore v. Lanvision Systems, Inc.**, 113 Fed. Appx. 449, 452-453, 2004 WL 2360994, at *3 (3d Cir. 2004) (unpublished opinion) (mixed motive claim "properly rejected" because plaintiff had not "cleared the high evidentiary hurdle of **Price Waterhouse**"); **Sigall-Drakulich v. City of Columbus**, 2005 WL 3419995, at *5-6 (6th Cir. 2005) (unpublished decision) (where a plaintiff offers only circumstantial evidence of discrimination, she must prove pretext); **Hunter v. General Motors Corp.**, 149 Fed. Appx. 368, 373, 2005 WL 2033323, at *4 (6th Cir. 2005) (unpublished decision) (plaintiff must produce "direct evidence that the employer considered impermissible factors when it made the adverse employment decision at issue" when alleging mixed motives) (internal citation omitted); **Simpson v. Des Moines Water Works**, 425 F.3d 538, 542 (8th Cir. 2005) ("the **McDonnell Douglas** framework remains the proper mode of analysis for summary judgment cases"); **Johnson v. AT & T Corp.**, 422 F.3d 756, 760 (8th Cir. 2005) ("evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues"); **Kratzer v. Rockwell Collins, Inc.**, 398 F.3d 1040, 1045-46 (8th Cir. 2005) (plaintiff "may proceed under **Price Waterhouse** [only] if she produces direct evidence"); **McShane v. U.S. Attorney Gen.**, 144 Fed. Appx. 779, 792-793, 2005 WL 1799435, at *12 (11th Cir. 2005) (unpublished decision) (mixed-motive analysis does not apply where plaintiff has not shown that defendant's proffered non-discriminatory reason for the adverse action was pretextual).

Circuits that have followed the Supreme Court's clear ruling in **Desert Palace** include the First, Fourth, Fifth, Ninth, Tenth, and the Court of Federal Claims. *See* **Burton v. Town of Littleton**, 426 F.3d 9, 19 -20 (1st Cir. 2005); **Diamond v. Colonial Life & Acc. Ins. Co.**, 416 F.3d 310, 317 (4th Cir. 2005); Mereish v. Walker, 359 F.3d 330 339 -340 (4th Cir. 2004); **Richardson v. Monitronics Intern., Inc.**, 2005 WL 3485872, at *3-4 (5th Cir. 2005) ("a plaintiff in a Title VII action need only provide circumstantial evidence of discrimination to be entitled to proceed under the mixed-motive framework"); **Bell v. Kaiser Found. Hosp.**, 122 Fed. Appx. 880, 882, 2004 WL 2853107, *1 (9th Cir. 2004); **Medina v. Income Support Div.**, 413 F.3d 1131, 1135 (10th Cir. 2005) (noting that **Desert Palace** recognized the modification by statute of **Price Waterhouse**); **Christensen v. U.S.**, 60 Fed. Cl. 19, 26 (Fed. Cl. 2004).

While some courts simply ignore **Desert Palace**, others attempt to distinguish it or explain it away. As shown above, the Eighth Circuit has ruled that **Desert Palace** applies only at trial, and not at the summary judgment stage. **Griffith v. City of Des Moines**, 387 F.3d 733, 735 -736 (8th Cir. 2004). Therefore, plaintiffs in the Eighth Circuit still must prove that a defendant's proffered non-discriminatory explanation for its adverse action is pretextual in order to defeat summary judgment. *Id.* Under a proper mixed-motive analysis, the plaintiff does not have to show that the defendant's proffered explanations are pretextual in order to prevail. Rather, she can allow that the defendant's explanations may be true, but show that in addition the defendant also acted out of a discriminatory motive.

The **Griffith** court offered several convoluted and unpersuasive reasons for its ruling. First, the court argued that "[a]t the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment." While that statement is music to the ears of plaintiffs' lawyers, it is meaningless in practice, because the **Griffith** court invoked it as support for its conclusion that a plaintiff must prove pretext to defeat summary judgment. *Id.*

Second, the Griffith court argued that "**Desert Palace** did not forecast a sea change in the [Supreme] Court's thinking" because in a subsequent opinion, **Raytheon Co. v. Hernandez**, 540 U.S. 44, 49 (2003), the Supreme Court "approved use of the **McDonnell Douglas** analysis at the summary judgment stage." **Griffith** at 735. But in **Raytheon**, no multiple, let alone mixed, motive analysis was at issue at all; furthermore, **Raytheon** was decided under the Americans with Disabilities Act, not Title VII.

Third, the **Griffith** court tap-danced around the meaning of "direct evidence":

> Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, … 'direct' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part **McDonnell Douglas** analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the **McDonnell Douglas** analysis, *including sufficient evidence of pretext.*

Griffith at 736 (emphasis added). This passage ignores the Supreme Court's holding in **Desert Palace** that "no special evidentiary showing is required" to trigger the mixed-motive analysis and thus avoid the requirement to prove pretext. **Desert Palace** at 99.

Finally, some of the circuits that have ignored or unreasonably limited Desert Palace in some opinions have followed it in others. *See, e.g.,* **White v. Burlington Northern & Santa Fe R. Co.**, 364 F.3d 789, 811 (6th Cir. 2004) (**Desert Palace** held "that a direct evidence requirement is inconsistent with the text of" Section 2000e-2(m)); **Strate v. Midwest Bank-**

See DESERT PALACE, page 22

What Every NELA/NY Lawyer Should Know: A Guide to the Statutes We Use Every Day

by Piper Hoffman, Esq. and Katherine Olshansky*

Lawyers who represent employees have a lot to remember. To make even a preliminary assessment of a potential claim's viability, we must have quite a few facts at our fingertips: the minimum number of employees an employer must have before the Family Medical Leave Act applies; the cap on punitive damages under Title VII for an employer with 150 employees; the statute of limitations for filing a lawsuit under the New York State Human Rights Law; which anti-discrimination laws provide for compensatory damages or attorneys' fees and which don't; and on and on.

This article is a concise guide to the information you need to make an initial evaluation of some of the most common employee claims, with an emphasis on private employers in New York State and the Second Circuit.

§ 1983—Civil Action for Deprivation of Rights

The federal Civil Rights Act[1] ("Section 1983") creates a right of action against a person who, under color of state law, custom, or usage, deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws."[2]

Section 1983 has two purposes. First, it aims to provide federal remedies where state laws and remedies are inadequate or unavailable in practice. Section 1983 gives plaintiffs access to federal courts when state laws do not protect their Fourteenth Amendment rights.[3] Second, Section 1983 aims to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[4] Section 1983 provides remedies for all violations of civil rights secured by the Constitution, not just class-based discrimination.[5]

Elements of a Claim. In order to state a claim for deprivation of rights under Section 1983, a plaintiff must show that "(1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of her federal statutory rights, or her constitutional rights or privileges." Courts use a "fair attribution test" to determine whether a plaintiff has satisfied the first element above: "[f]irst, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. … Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."[7]

Limitations. Section 1983 does not have its own statute of limitations; instead, courts apply the statute of limitations applicable to personal injury claims in the relevant state.[8] There are no requirements for size of employer, or length of employment. There is no administrative exhaustion requirement.

Damages. In addition to back pay and front pay, plaintiffs can recover compensatory damages for emotional distress under Section 1983.[9] Compensatory damages may not include an amount assessing the abstract monetary value or importance of the constitutional right which had been violated.[10] Liquidated damages are not available. Courts award punitive damages only when the defendant acted with malice or "callous indifference" to the plaintiff's federally protected rights.[11] Courts have discretion to award reasonable attorneys' fees and costs.[12] Equitable relief is available under Section 1983, which gives trial courts discretion to fashion remedies to make plaintiffs whole, that is, to recreate the employment conditions and relationships that would have existed in the absence of intentional discrimination.[13]

§ 1981—Equal Rights Under the Law

The federal Civil Rights Act[14] ("Section 1981") prohibits discrimination in the making and enforcing of contracts. Courts have applied it to cases involving contracts for private employment where a particular employment decision was racially motivated.[15]

Elements of a Claim. To establish a prima facie case under Section 1981, a plaintiff must show: (1) membership in a racial minority; (2) an intent[16] to discriminate on the basis of race on the part of the defendant; and (3) discrimination interfering with an activity enumerated in the statute (i.e., making and enforcing contracts, suing or being a party to a lawsuit, giving evidence, or receiving "the full and equal benefit of all laws and proceedings for the security of persons and property"[17]).[18] A plaintiff who has made out a prima facie case under Title VII has also done so under Section 1981, as long as the prima facie case includes a showing of intent to discriminate.[19]

Limitations. The statute of limitations for a Section 1981 claim is determined by the statute of limitations applicable to personal injury claims in the relevant state[20]—unless the claim was made possible by the 1991 Civil Rights Act's amendment of Section 1981,[21] in which case the statute of limitations is four years.[22] The statute of limitations is not tolled by the filing of a claim under Title VII.[23] There are no minimum requirements for the size of an employer or the length of employment, and there is no administrative exhaustion requirement.[24]

Damages. A plaintiff can recover damages under both Title VII and § 1981.[25] A plaintiff who establishes a cause of action under both Title VII and Section

See STATUTES, next page

* *Piper Hoffman is an associate at Outten & Golden LLP (www.outtengolden.com). You can reach her at 212-245-1000 or* ph@outtengolden.com. *Katherine Olshansky is a law clerk at Outten & Golden LLP and a third-year law student at New York Law School.*

STATUTES, from page 7

1981 is entitled to equitable and legal relief (compensatory and punitive damages) stemming from both actions.[26] Compensatory damages are available under Section 1981.[27] Liquidated damages are not. Punitive damages are available only if the defendant acted with "malice, an evil motive, or recklessness or callous indifference" to the plaintiff's federally protected rights.[28] Courts have discretion to award "reasonable" attorneys' fees to the prevailing party (other than the United States).[29]

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 ("Title VII")[30] prohibits discrimination based on sex, race, color, religion, or national origin in hiring, firing, or compensation, in terms, conditions, or privileges of employment, and in limiting, segregating, or classifying employees or applicants in an adverse way.[31]

Limitations. Title VII applies only to employers engaged in an "industry affecting commerce"[32] and employ fifteen or more people "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[33]

Title VII requires aggrieved employees to exhaust their administrative remedies before beginning litigation by filing a charge with the Equal Employment Opportunity Commission ("EEOC"), which investigates the charge and determines whether there is reasonable cause to believe that the charge is true.[34] An aggrieved employee must file his charge with the EEOC within 300 days of the adverse employment action in deferral states,[35] and within 180 days in non-deferral states. Once the employee receives a Notice of Right to Sue from the EEOC, he has 90 days within which to file a complaint in court.[36]

Damages. Back pay and front pay are available under Title VII.[37] Liquidated damages are not available under Title VII. Courts have discretion to award reasonable attorneys' fees.[38] Courts may fashion appropriate equitable relief for violations of Title VII.[39]

Title VII provides for compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.[40] Title VII allows for punitive damages if the plaintiff can show that the defendant acted with malice or reckless indifference.[41] But Title VII caps the sum of compensatory and punitive damages on a sliding scale based on the maximum number of employees the employer had in each of 20 or more calendar weeks in the current or preceding calendar year: for employers with 15 to 100 employees, the maximum combined amount of compensatory and punitive damages is $50,000; for employers with 101 to 200 employees, the cap is $100,000; 201 to 500 employees, 200,000; over 500 employees, $300,000.[42]

Americans with Disabilities Act

The federal Americans with Disabilities Act of 1990 ("ADA")[43] protects disabled individuals from discrimination in private, state government, and local government employment, as well as by employment agencies and labor organizations. The ADA prohibits employers from discriminating against qualified individuals with disabilities in the terms and conditions of their employment, and requires covered entities to make "reasonable accommodations" for individuals with disabilities.[44] The ADA adopted all the "powers, remedies, and procedures" of Title VII.[45]

Elements of a Claim. An individual bringing a claim under the ADA must show that: "(1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability."[46] To show that he is disabled within the meaning of the ADA, a plaintiff must show: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) that he was regarded as having such an impairment.[47]

Limitations. The ADA has the same jurisdictional requirements as Title VII. It applies to employers with at least 15[48] employees on each working day in each of twenty or more calendar weeks in the current or preceding calendar year. An aggrieved individual must exhaust her administrative remedies at the EEOC before she can file a complaint in court.[49]

Damages. Courts look to Title VII case law for guidance on ADA remedies. Courts have discretion to provide relief including reinstatement, back pay, and front pay.[50]

Compensatory damages are available under the ADA for future pecuniary losses,[51] emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, unless the employer "demonstrates good faith efforts" to make effective accommodations in consultation with the disabled employee.[52] Punitive damages are available to plaintiffs who can show that the defendant acted with malice or reckless indifference, in accordance with Title VII[53] rules. Liquidated damages are not available under the ADA. Courts may award reasonable attorneys' fees as under Title VII. Attorneys' fees are also available for administrative proceedings.[54]

Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 ("ADEA") forbids employment discrimination against people over forty years old on the basis of their age.[55] There are a few exceptions to ADEA, including one that permits employers to force employees to retire at age 65 if they have worked in a "bona fide executive" or "high policymaking position" for the prior two years and would receive an annual retirement benefit of at least $44,000.[56]

Limitations. ADEA applies only to employers with at least 20 employees working on each working day in at least twenty calendar weeks in the current or preceding calendar year.[57] ADEA requires an aggrieved individual to file an administrative complaint with the EEOC within 300 days of the violation and at least 60

See STATUTES, next page

STATUTES, from page 8

days before filing a lawsuit, but does not require the individual to obtain a right-to-sue letter from the EEOC before filing suit.[58] Unlike Title VII, "ADEA permits concurrent rather than sequential state and federal administrative jurisdiction" because "the delay inherent in sequential jurisdiction is particularly prejudicial to the rights of older citizens to whom, by definition, relatively few productive years are left."[59]

Damages. ADEA provides for legal and equitable relief in the form of employment, reinstatement, promotion, back pay, interest on back pay, front pay, or other relief the court deems appropriate.[60] Liquidated damages, in the amount of the award for back pay and benefits,[61] are available where the violation was "willful"[62] and the defendant has no good faith defense.[63] Compensatory damages for pain and suffering or emotional distress are not available under ADEA, nor are punitive damages.[64]

Family and Medical Leave Act

The Family and Medical Leave Act of 1933 ("FMLA")[65] guarantees employees the right to take temporary unpaid leave under certain circumstances. It requires covered employers to grant eligible employees twelve weeks of consecutive or intermittent leave during any twelve-month period because of (1) the birth of a child; (2) the placement of a child for adoption or fostering; (3) the serious health condition of a spouse, child, or parent; or (4) a serious health condition that makes the employee unable to perform the functions of her position.[66] When an employee returns from FMLA leave, her employer must restore her to her former job or a similar one with the same salary and benefits.[67]

Limitations. The FMLA covers only employers with at least 50 employees for each working day during each of the 20 or more workweeks in the current or preceding calendar year.[68] The FMLA applies only to employees who have worked for the employer for at least 12 months, and who have worked at least 1,250 hours during the 12-month period immediately preceding the leave.[69] The FMLA does not require administrative exhaustion, so an aggrieved employee can take his claim directly to court. The employee must file his complaint within two years of the violation, or three years if the violation was willful.[70]

Damages. A prevailing plaintiff can recover damages for lost wages, employment benefits, or other compensation, plus interest.[71] If the violation of the FMLA did not cause the plaintiff to lose any compensation, she can recover damages for other monetary losses, up to a sum equal to 12 weeks of her wages plus interest.[72] Liquidated damages equal to the amount of monetary damages are available, but the court can reduce the amount of liquidated damages if the employer can show that it acted in good faith and with reasonable grounds for believing it was not violating the FMLA.[73] A prevailing plaintiff is entitled to reasonable attorneys' fees and other costs.[74] Punitive damages are not available. The FMLA empowers courts to grant equitable relief including employment, reinstatement, and promotion.[75]

Equal Pay Act

The Equal Pay Act ("EPA")[76] requires employers to pay women and men the same amount for substantially equal work.

Elements of a Claim. To show that an employer has violated the standards of the EPA, an employee must show that an employer pays a male and a female employee different wages on the basis of sex, even though they perform equal work in jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions."[77] Employers may pay men and women different wages for substantially equal work if the difference is based on "a merit system," "a seniority system," a "system which measures earnings by quantity or quality of production," or "a differential based on any other factor other than sex."[78] The EPA prohibits retaliation against employees for filing complaints about EPA violations or testifying in EPA-related proceedings.[79]

Limitations. The EPA applies to all employers engaged in commerce or producing goods for commerce with an annual gross volume of business of at least $500,000, and to employers engaged in operating a hospital, school, or certain other institutions.[80]

The Fair Labor Standards Act[81] supplies the limitations that apply to the EPA. There is no administrative exhaustion requirement under the EPA.[82] A plaintiff must file a complaint under the EPA within two years of the violation, or within three years if the violation was willful.[83]

Damages. Back pay and front pay are available up to the amount of the wage disparity.[84] Compensatory damages for emotional distress are not available. Liquidated damages are available in an amount equal to the unpaid wages, but the court can deny liquidated damages if the employer shows that it acted in good faith and with reasonable grounds to believe it was not violating the EPA.[85] Punitive damages are not available.[86] Attorneys' fees are available.[87] Courts may award appropriate equitable relief, including employment, reinstatement and promotion. The EEOC can obtain injunctive relief, but individuals cannot.[88]

New York State Equal Pay Law

New York State's Equal Pay Law ("EPL")[89] is "virtually identical" to the federal Equal Pay Act.[90] It requires employers to pay female and male employees the same amount for "equal work" in jobs that require "equal skill, effort and responsibility, and which [are] performed under similar working conditions."[91] The jobs compared must be "substantially" the same.[92] Wage differentials between the sexes pass muster under the EPL if they are based on a "seniority system; a merit system; a system which measures earnings by quantity or quality of production; or any other factor other than sex."[93]

Limitations. A plaintiff must file a complaint within six years of the violation.[94] There are no requirements for the size of the employer or for length of employment.[95] The EPL does not apply to governmental employers.[96]

See STATUTES, page 14

STATUTES, from page 9

Damages. Damages may include "full wages, benefits, and wage supplements."[97] Liquidated damages are available in the amount of 25% of the wages due to the plaintiff.[98] Reasonable attorneys' fees and costs are available.[99]

New York State Human Rights Law

The New York State Human Rights Law ("NYSHRL")[100] prohibits employment discrimination on the basis of "age,[101] race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status."[102]

Limitations. An aggrieved employee can either file an administrative charge with the State Division of Human Rights ("SDHR") within one year of the violation,[103] or file a civil suit in state court within three years of the violation.[104] The NYSHRL applies only to employers with four or more employees.[105]

Damages. Prevailing complainants may recover lost back pay with interest.[106] Compensatory damages are available for mental anguish.[107] Equitable relief is available in the form of hiring, reinstatement, or upgrading.[108] Punitive damages, attorneys' fees, and costs are not available.[109]

New York City Human Rights Law

The New York City Human Rights Law ("NYCHRL")[110] prohibits employment discrimination inside New York City on the basis of "the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person."

Limitations. The NYCHRL applies only to employers with at least four employees.[111] An aggrieved individual may either file an administrative charge with the New York City Commission on Human Right ("NYCCHR") within one year of the violation, or file a civil suit within three years of the violation.[112] Before filing a lawsuit under NYCHRL, the plaintiff must serve a copy of the complaint upon the NYCCHR.[113]

Damages. In addition to back pay and front pay, compensatory and punitive damages are available with no caps.[114] Attorneys' fees and costs are available.[115] Civil penalties of up to $100,000 (in administrative proceedings only) are available for non-compliance with the Commission's order.[116] Equitable relief is available.

Footnotes

[1] 42 U.S.C. § 1983.

[2] *Id.*

[3] **District of Columbia v. Carter**, 409 U.S. 418, 423 (1973).

[4] **Wyatt v. Cole**, 504 U.S. 158, 161 (1992); *see also* **Monroe v. Pape**, 365 U.S. 167, 180 (1961).

[5] **Blake v. Delaware City**, 441 F. Supp. 1189, 1199 (D. Del. 1977).

[6] **Annis v. County of Westchester**, 136 F.3d 239, 245 (2d Cir. 1998).

[7] **Lugar v. Edmondson Oil Co., Inc.**, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753-2754 (1982).

[8] The statute of limitations for Section 1983 claims in New York is three years. See N.Y. C.P.L.R. § 214 (McKinney 2005).

[9] **Carey v. Piphus**, 435 U.S. 247, 264 (1978).

[10] See **Memphis Cmty. Sch. Dist. v. Stachura**, 477 U.S. 299, 304-313 (1986).

[11] **Smith v. Wade**, 461 U.S. 30, 56 (1983).

[12] 42 U.S.C. § 1988(b).

[13] *See* **Gurmankin v. Costanzo**, 626 F.2d 1115, 1118-1124 (3rd Cir. 1980).

[14] 42 U.S.C. § 1981.

[15] *See, e.g.,* **Patterson v. County of Oneida**, 375 F.3d 206 (2d Cir. 2004).

[16] Disparate impact claims are not viable under Section 1981. *See, e.g.,* **Gay v. Waiters' and Dairy Lunchmen's Union**, 694 F.2d 531, 537 (9th Cir. 1982) ("a prima facie case of racial discrimination in cases brought under section 1981 … requires proof of intentional discrimination").

[17] 42 U.S.C. § 1981(a).

[18] *See, e.g.,* **Mian v. Donaldson, Lufkin & Jenrette Securities Corp.**, 7 F.3d 1085, 1087 (2d Cir. 1993).

[19] **Miller v. Fairchild Indus., Inc.**, 797 F.2d 727, 733 (9th Cir. 1986) ("A plaintiff who raises genuine factual issues regarding disparate treatment under Title VII presents triable claim under § 1981").

[20] In New York state, the statute of limitations for Section 1981 claims is three years. *See* **Bembry v. Darrow**, 7 F. App'x 33, 36 (2d Cir. 2001).

[21] The Civil Rights Act of 1991 added subsections (b) and (c) of Section 1981. *See* Pub. L. 102-166. Arguably, the only 1981 claims that are not subject to the four-year statute of limitations are discriminatory hire claims. *See* **Rivers v. Roadway Exp., Inc.**, 511 U.S. 298, 302 (1994).

[22] **Jones v. R.R. Donnelley & Sons Co.**, 541 U.S. 369 (2004). The Civil Rights Act of 1991 added subsections (b) and (c) of Section 1981. *See* Pub. L. 102-166.

[23] Since Section 1981 claims are distinct from Title VII claims, the statute of limitations applicable to an action under § 1981 is not tolled pending disposition of a Title VII claim arising from the same facts. *See* **Burns v. Union Pac. R.R.**, 564 F.2d 20, 21 (8th Cir. 1977); **Fuentes v. City of New York Human Res. Admin.**, 830 F.Supp. 786, 789 (S.D.N.Y. 1993).

[24] *See* **Randolph v. IMBS, Inc.**, 368 F.3d 726, 732 (7th Cir. 2004); **Wilson v. Fairchild Republic Co., Inc.**, 143 F.3d 733, 739 (2d Cir. 1998).

[25] *See* **Hernandez v. Hill Country Tel. Coop., Inc.**, 849 F.2d 139, 143 (5th Cir. 1988) (Title VII and § 1981 are overlapping but independent remedies for racial discrimination).

[26] *See* **Johnson v. Railway Express Agency, Inc.**, 421 U.S. 454, 459-60, 461 (1975).

[27] *Id.* at 460.

[28] *See e.g.,* **Stephens v. South Atlantic Canners**, Inc., 848 F.2d 484, 489 (4th Cir. 1988), cert. denied, 488 U.S. 996 (1988).

[29] 42 U.S.C. § 1988(b).

[30] 42 U.S.C. § 2000e et seq., as amended.

[31] 42 U.S.C. § 2000e-2(a)(1)-(2).

[32] "The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Reporting and Disclosure Act of 1959, and further includes any governmental industry business, or activity." 42 U.S.C. § 2000e(h). Title VII does not apply to private membership clubs which are exempt from taxation under Section 501(c) of the Internal Revenue Code of 1954, Indian tribes, or the United States and District of Columbia governments. 42 U.S.C. § 2000e(b).

[33] 42 U.S.C. § 2000e(b). "Regular part-time employees" are counted for jurisdictional purposes. Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634-35 (1st Cir. 1983).

[34] 42 U.S.C. § 2000e-5(b).

[35] 42 U.S.C. § 2000e-5(e)(1). A deferral state is a state which has an agency empowered to process discrimination claims that has been designated as a Fair Employment Practices Agency ("FEPA").

[36] This time period is subject to equitable tolling. **Zipes v. Trans World Airlines**, Inc., 455 U.S. 385, 393 (1982).

[37] *See, e.g.,* **Robinson v. Metro-North Commuter R.R. Co.**, 267 F.3d 147, 157 (2d Cir. 2001).

[38] 42 U.S.C. § 2000e-5(k).

[39] 42 U.S.C. § 2000e-5(g).

[40] *See* 42 U.S.C. § 1981a(a)(1)&(b)(2); EEOC Enforcement Guidance N-915.002 (EEOC Compliance Manual Section 603 App'x).

[41] 42 U.S.C. § 1981a(a)(1), (b)(1). Punitive damages are not available against the government. *Id.* at (b)(1).

See STATUTES, page 23

Use Of Expert Medical Testimony In A Disability Case

by Ronald Dunn, Gleason, Dunn, Walsh & O'Shea

Many of us are asked to provide advice to employees concerning their on- or off-the-job injuries. Such employees may seek to obtain compensation from their employer. They may seek compensation from third parties through specialized statutes or employee benefit plans that compensate employees for disabilities. They may wish to press a right to return to work in some capacity. An employee's particular circumstances may give rise to a traditional Workers Compensation case, a disability retirement case, or a case under any of numerous statutes and other sources that provide for employee rights in the wake of injuries (including benefits, compensation, or right to a light-duty assignment or other reasonable accommodation).

In such cases, medical evidence will often be critical to whether the employee's case will succeed or fail. Questions frequently arise about whether the event giving rise to the claim either temporarily or permanently incapacitated the employee from performing his or her duties, or whether an undisputed injury was actually causally related to an event at work. As to the latter, the general difficulties of proof of causation may be complicated by questions related to whether the employee had some preexisting condition. The employee must adduce proof about the extent of an injury and its effects.

We have found that the proper presentation of medical proof can address all of these issues in a "winning way". Here are our tips, most of which you may already know, but some of which you may have forgotten.

1. Get the Medical Records

First, it is critically important that you obtain all medical records directly from all of your client's medical providers. Do not assume that the client has complete records. We always ask our clients to complete HIPAA-compliant medical release forms in our favor in all cases. We use the form approved by the NYS Office of Court Administration and the New York State Health Department. It can be downloaded at *nycourts.gov/ forms/ hipaa_fillable.pdf*. That form allows you to obtain all medical records, not just those that the client thinks are relevant. The reason for this is simple: Most patients never see their medical records, and they may have no idea what is in them. Doctors frequently include in the medical records details of prior health histories and other information which can be quite helpful in proving either that the client did not have a prior existing condition or that a prior existing condition was stable prior to the latest work-related incident that the pre-existing condition exacerbated. The expense of getting the records is easily warranted in almost all instances.

2. Get the Medical Records that the Employer Has

Cooperate with the employer in the mutual exchange of all medical records. There is really no advantage in not providing access to medical records. The courts almost universally hold that where an employee is applying for an enhanced benefit because of a job-related injury, that employee's cooperation in the investigation is required as a condition of receipt of the benefits. *See generally* **Schenectady PEA v. PER**, 85 N.Y.2d 480 (1995).

Also, you can almost always get an agreement with the employer to share any medical records that it has received. Under N.Y.S. Public Health Law § 18, upon written request, all patients always have the right to their own records. As a practical matter, that statutory right can usually be leveraged into an agreement to mutually exchange all records. Plus a simple confidentiality agreement overcomes most privacy concerns except in the rarest of cases. There is no good reason for being surprised at a hearing by a medical record that you have not seen earlier. Full disclosure by all parties of all medical records in advance of the hearing saves you from that surprise.

3. Bolster Patient History with Testimony from Friends, Relatives and Knowledgeable Associates

It is easy to get taken in by the wonderful new advances in diagnostic medicine. MRIs are able to show physical conditions that at one time were simply not possible to show, such as injuries to the cartilage and tears and rips in soft tissue. Some kinds of high-tech exams can even show inflammation in soft tissue. Challenging issues of proof arise in cases where there is only soft tissue damage and your client suffers from debilitating pain not revealed with the new wave of high tech tests. Employers may use the lack of a "high tech" test result in arguing that there is no injury at all.

In such circumstances, we frequently use functional capacity examinations. These are tests performed by trained therapists that measure a patient's ability to perform certain discrete tasks such as lifting weights. These tests are typically used to measure the limits of a patient's ability to work, i.e., placing weight restrictions on lifting. But we often use these to help prove the underlying injury as well. Although it is possible to fake such an examination, there are reliability tests that can be used to minimize that risk. Assuming that you are willing to lay the proper foundation for the test and go through the steps of ensuring that the test administrator is well trained, these examinations can frequently show the debilitating effects of pain in a quantifiable way when there is no concrete traditional diagnostic medical test to demonstrate the injury or damage. This is particularly true in soft tissue cases, including cases involving chronic diseases such as fibromyalgia.

The courts have specifically ruled that a functional capacity examination can form the basis for a determination that a particular employee is or is not disabled. *See generally* **Sewell v. Kaplan**, 298 A.D.2d 840 (4th Dep't 2001); **Fleiss v. South Buffalo R. Co.**, 291 A.D.2d 848 (4th Dep't 2002).

See TESTIMONY, next page

TESTIMONY, from page 11

4. Proving the Difference between Degenerative Disease Caused by Chronic Events and Acute Events

Frequently, the medical case boils down to determining the precise date of the onset of symptoms. Even when a diagnostic exam proves definitively that there is a disabling physical condition, that does not necessarily mean that the disabling condition was caused by the discrete event at issue. In such an instance, most medical providers will tell you that patient history is critical to determining with any degree of certainty precisely what caused the accident or injury. Obviously, the client's testimony is critical to this in detailing the precise onset of the symptoms. Family members can also be used to corroborate this. The more corroborating facts you can introduce, the more likely it is that you will be able to overcome any suggestion that the patient has the most to gain by either exaggerating or lying about the onset of certain symptoms. Such suggestions are the traditional means of defeating these applications.

That is particularly true where a disease or condition can be caused by either a chronic condition simply brought on by age or an acute event such as a trauma. Most medical professionals will tell you that arthritis or stenosis (a narrowing of the casing around the spinal chord) can be brought on by either a degenerative condition that is chronic, i.e., simply "time on the planet," or an acute traumatic event. In the former case, the degenerative condition does take a period of months for an onset of symptoms. Thus, it is critical that the expert medical witness clearly testify how he or she has come to the conclusion that the event was the acute trauma rather than chronic degeneration.

5. Exacerbation of Preexisting Conditions

The cases interpreting specialized work-related disability statutes hold that the exacerbation of a preexisting condition independently qualifies an employee for the benefit. **Matter of Thomas v. Regan**, 125 A.D.2d 127 (3rd Dep't 1987); **Matter of Sanchez v. NYS and Local Police Ret. Syst.**, 208 A.D.2d 1027, 1028 (3rd Dep't 1994). This inquiry requires you to develop testimony from the medical provider that your client's condition was stable prior to the reinjury.

6. Properly Cross the Employer's Expert

Finally, you have to properly cross examine the employer's expert. Almost always, the employer's "independent expert" has seen the plaintiff once in what can only be described as an adversarial examination conducted in a quick visit.

In contrast, the plaintiff's treating physician has met with the plaintiff on multiple occasions. This is a critical difference in a case that turns on patient history (i.e., the patient's report of symptoms). Invariably, the employer's expert will discount patient history. That same expert cannot deny that from Day One in medical school all doctors are taught that patient history and carefully listening to what the patient is reporting are critical to good medicine. That makes for devastatingly effective cross examination.

The cross of the employer's expert also requires complete access to your client's prior medical history. This is where the value of a complete medical history pays off. Invariably, prior medical records will show that the "independent expert" simply did not have all the facts. That undercuts the testimony and maximizes success. ■

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

Statutory Rights and Collective Bargaining Agreements

The S.D.N.Y. recently decided that an individual employee can determine in what forum he will vindicate certain statutory rights, including those under the ADEA. An employer moved to dismiss an employee's ADEA claim on the ground that the court lacked subject matter jurisdiction over the matter because the grievance and arbitration procedure of the CBA provided his exclusive remedy. After closely analyzing the different facts in the Supreme Court's decisions **Alexander v. Gardner-Denver Co**., 415 U.S. 36 (1974), **Barrentine v. Arkansas-Best Freight System, Inc.**, 450 U.S. 728 (1981), and **Gilmer v. Interstate/Johnson Lane Corp**., 500 U.S. 20 (1991), the court decided that while an individual may prospectively waive his own statutory right to a judicial forum to litigate an ADEA claim, his union may not do so for him. **Beljakovic v. Mehlohn Properties**, 2005 WL 2709174 (S.D.N.Y. Oct. 17, 2005).

ATTORNEYS' FEES

Fees for Prevailing in NYSDHR

A bus company manager was discharged in 1987, dual-filed a complaint with the NYSDHR and the EEOC, and, 12 years later, received a favorable decision from the SDHR. After another three years, she got her prejudgment interest. Plaintiff then filed a federal complaint seeking attorneys' fees under Title VII only, having received her back pay in the SDHR and state court action. (Of course, the NYSHRL does not provide for attorneys' fees even to a prevailing plaintiff.) The district court (Joanna Seybert, E.D.N.Y.) dismissed the action under Fed. R. Civ. P. 12(b)(1) (subject matter jurisdiction). It found that (1) the plaintiff was not a "prevailing party" under Title VII, (2) **NY Gaslight Club, Inc. v. Carey**, 447 U.S. 54 (1980), was not controlling, (3) federal courts do not allow suits solely for attorneys' fees, and (4) the plaintiff had elected her remedy when she filed with the SDHR. The Second Circuit Court of Appeals disagreed, holding that the plaintiff should be permitted to amend her complaint to address its jurisdictional deficiency, even though she had "made a colorable pleading of subject matter jurisdiction." The decision was written by Judge James Oakes and concurred in by Judge Guido Calabrese, but Judge Amalya Kearse concurred "dubitante" on the ground that **Carey** was distinguishable and that *res judicata* applied to preclude plaintiff's federal suit. **Aurecchione v. Schoolman Transp. Sys., Inc.**, 426 F.3d 635 (2d Cir. Oct. 17, 2005).

Lodestar Calculation

Plaintiffs' attorneys outside of New York City have always had trouble getting courts to award them adequate hourly rates. After a jury verdict on a claim alleging failure to pay overtime pay in violation of the Fair Labor Standards Act, the plaintiffs moved for fees and costs, as well as for reversal of the jury's finding that the employer had acted in good faith and that therefore liquidated damages were not awarded. Magistrate Judge Lisa Margaret Smith (S.D.N.Y.) granted NELA/NY member Dan Getman an hourly rate of $375 (twenty years' experience) and another lawyer who worked on the case an hourly rate of $300 (nine years' experience). The court also granted fees for the fourteen hours spent preparing the fee application, in accordance with established case law. With respect to the Rule 59 post-trial request for relief based upon alleged "good faith," the magistrate judge found that there had been no evidence adduced at trial from which a reasonable jury could have found good faith. This fact, coupled with the "strong presumption in favor of awarding double damages," impelled the court to set aside the jury verdict concerning the defendant's supposed good faith.

Congratulations to Dan Getman, who represented the plaintiffs. **Gjurovich v. Emmanuel's Marketplace, Inc.**, — F. Supp. 2d — (S.D.N.Y. Sept. 30, 2005).

CONTRACT

Employee Manual

An employee who alleges a breach of contract claim based on an employee manual finds a more hospitable audience in federal court than in state court. A manager at a bank who reported improper loans authorized by his supervisor said that he had relied upon the bank's "speak-up policy," instructing "staff who have genuine suspicions about wrongdoing to speak up" and assuring them that "[a]ny report which you make will be listened to, investigated and treated in confidence. Victimisation of anyone who comes forward will not be tolerated. … You will not be blamed for speaking up." The plaintiff employee alleged that after he reported the improper loans, he was mistreated and eventually fired. The district court (Laura Taylor Swain, S.D.N.Y.) dismissed the implied contract. The court of appeals, vacating and remanding in a summary order, found that the bank's "speak-up policy is sufficiently committal under New York law to raise an issue of fact" and that the plaintiff had alleged sufficient reliance upon the promise to survive summary

See SQUIBS, next page

SQUIBS, from page 13

judgment. **Loli v. Standard Chartered Bank**, 2005 WL 3263831 (2d Cir. Nov. 30, 2005) (summary order not constituting precedential authority).

DAMAGES

Inadequacy of Statutory Caps

In a June 2005 opinion, Magistrate Judge James Orenstein (E.D.N.Y.) recognized that the $300,000 cap on punitive damages under the ADA (and Title VII) is meaningless to "commercial titans" such as Wal-Mart. An employee with cerebral palsy sued Wal-Mart for subjecting him to adverse employment actions, hostile work environment, intentional infliction of emotional distress, and constructive discharge, as well as negligence in hiring, supervising, and retaining employees in violation of the ADA and the New York Human Rights Law. The jury awarded plaintiff $5 million in punitive damages, $2.5 million in compensatory damages, and $9,114 in economic damages based on his loss of back pay. Although the court reduced the entire damages award to comport with the statutory caps as a matter of law, Magistrate Judge Orenstein took the opportunity to opine about the injustice of statutory caps as they relate to companies such as Wal-Mart. He wrote, "[I]t took Wal-Mart only 37 seconds last year to achieve sales equal to the $300,000 it must now pay to [plaintiff] in punitive damages. There is no meaningful sense in which such an award can be considered punishment." B**rady v. Wal-Mart Stores, Inc.**, Slip Copy, 2005 WL 1521407 (E.D.N.Y. June 21, 2005).

Liquidated Damages Apply to Municipalities & State Entities

In a case of first impression, the Second Circuit Court of Appeals held that government employers are liable for liquidated damages under the ADEA. Two employees, ages 59 and 62, alleged that the New York City Transit Authority (NYCTA) schemed to withhold training from them and subsequently denied them promotions. A jury awarded the plaintiffs liquidated damages and $50,000 in compensatory damages. The NYCTA appealed, alleging that government entities are exempt from liquidated damages because they are punitive, and that the award for compensatory damages "deviated materially from reasonable compensation." Writing for the court of appeals, Judge Reena Raggi relied on the U.S. Supreme Court's opinion in **Trans World Airlines, Inc. v. Thurston**, 469 U.S. (1995), which held that Congress intended for the ADEA's liquidated damages provision to be "punitive in nature." The court also relied on **Potence v. Hazelton Area School Dist.**, 357 F.3d 366 (3d Cir. 2004), to determine that since state and municipal entities are expressly included in the ADEA's definition of employer, Congress did not intend to limit liquidated damages to private employers. Despite the NYCTA's contention that the plaintiffs were not entitled to the $50,000 in compensatory damages because there was no evidence of medical treatment, the court upheld the award. The court explained that "while many cases applying N.Y. C.P.L.R. § 5501(c) 'reduce awards to $30,000 or below,' others 'uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment'" (*quoting* **Meacham v. Knolls Atomic Power Lab.**, 381 F.3d 56, 78 (2d Cir. 2004)). **Cross v. NYCTA**, 417 F.3d 241 (2d Cir. Aug. 2, 2005).

DISABILITY DISCRIMINATION

Minnesota Multiphasic Personality Inventory

Three brothers who worked for a chain of household appliance stores challenged the administration of the Minnesota Multiphasic Personality Inventory (MMPI), a psychological test that the employer said it used to measure personality traits, as one of a battery of tests required of any employee who wanted a promotion. Elevated scores on certain scales of the MMPI can be used to diagnose certain psychiatric disorders. Any applicant who scored more than 12 "weighted deviations" on the MMPI was not considered for promotion, and the three plaintiffs all had more than 23 deviations. They sued, claiming that the employer's use of the MMPI violated the ADA. The district court granted summary judgment. The Seventh Circuit Court of Appeals reversed the holding that use of the MMPI was a medical examination and directed entry of judgment in favor of the plaintiffs. Other parts of the decision below, however, were affirmed. **Karraker v. Rent-a-Center, Inc.**, — F.3d — (7th Cir. June 14, 2005).

DISCOVERY

Electronic Discovery

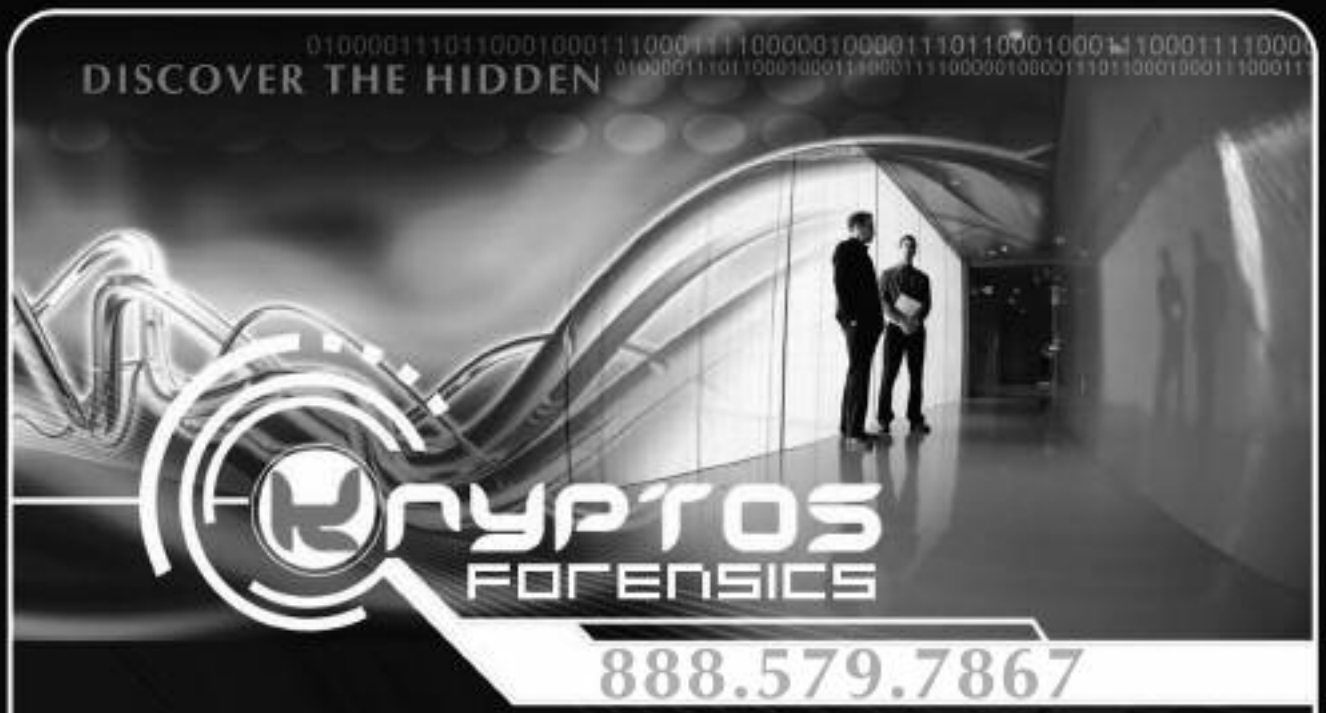
In a contentious age discrimination collective action in federal court in Kansas, a defendant produced electronic documents only after scrubbing the metadata and locking spreadsheet cells so that their contents were sometimes incomplete. (Metadata is "data about data," i.e., "information describing the history, tracking, or management of an electronic document." Ordinarily most metadata is not visible on the document but can be brought out by technically adept computer users. Software exists that enables a custodian of electronic documents to "scrub," or remove, the metadata.) The plaintiff requested sanctions. The magistrate judge considered the facts that (1) the plaintiff had not specifically requested preservation of the metadata, (2) the court had ordered production of the documents and the spreadsheets "as they were kept in the ordinary course of business," (3) some information in the metadata might be privileged, but the defendant had not produced a privilege log, (4) standards for production of electronic documents are evolving, and (5) the defendant knew or should have known that some of the deleted or hidden information was relevant and called for. The court held that the information had to be produced but that, because standards were unclear and evolving, sanctions were not justified. **Williams v. Sprint/United Management Co.**, — F. Supp. 2d —, 2005 WL 2401626 (D. Kan. Sept. 29, 2005).

ERISA

Employer Contributions

Judge Denis R. Hurley (E.D.N.Y.) confronted the issue of whether a joint employer, which had not signed a col-

See SQUIBS, page 16



OVERVIEW

- Kryptos Forensics has both the technical *and* legal expertise in targeting and retrieving electronic data. We extract "hidden" electronic data for our clients from a wide array of electronic storage devices.
- We use leading-edge forensics technology and industry standard tools and practices to perform ON-SITE, or in-lab, data collection and retrieval.
- Kryptos Forensics employs forensics and legal analysts to ensure that our searches and analyses are cost efficient and court sanctioned.
- Our legal team can liaison with e-discovery firms and lawyers to best target electronic data sources, and to help organize data within legal issue parameters.
- Kryptos Forensics helps our clients achieve the results they need - on time, and within budget.

12 E 33 STREET | SUITE 1100 | NEW YORK | NY | 10016 | KRYPTOSFORENSICS.COM

SQUIBS, from page 14

lective bargaining agreement, was obligated to make employer contributions to employee benefit plans in the absence of any allegation of fraud or alter ego. The plaintiff-employees sued to recover unpaid employee fringe benefit contributions from Premier Staffing, a company that provided human resources services to employers. Premier Staffing leased employees to its clients and maintained substantial control over their compensation, such as the ability to hire and fire. Premier provided staffing services to P.M.B. Development Team Corp. Although P.M.B. signed a collective bargaining agreement with a union, Premier did not. Section 515 of ERISA provides that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. Although Premier and P.M.B. were joint employers, Premier was not deemed an employer for ERISA purposes. "Thus, satisfying the statutory definition of employer as provided for in 29 U.S.C. § 1002(5) is in itself insufficient to impose a duty on an employer to make pension contributions; rather Section 515 permits recovery only against those employers who are already obligated in the absence of ERISA, to make ERISA contributions." (Internal citations omitted.) **Olivieri v. P.M.B. Const., Inc.**, 383 F. Supp. 2d 393, 2005 WL 2037349 (E.D.N.Y. Aug. 24, 2005).

Promissory Estoppel

In a summary order, the Second Circuit Court of Appeals reversed a decision by Judge Naomi Reice Buchwald (S.D.N.Y.) that had dismissed an ERISA complaint alleging promissory estoppel and breach of fiduciary duty. The plaintiffs, employees of Credit Lyonnais Rouse, lost certain pension benefits that had been promised to them when their employer merged into its parent company, Credit Lyonnais. After the merger, the plaintiffs, who had received documents showing that their starting date with Rouse would be treated as their starting date with the merged company for purposes of vesting and funding, learned that their pensions would not be retroactively funded to their Rouse starting dates. The district court held that neither claim was viable, because the plaintiffs could not allege a sufficient writing proving the existence of the promise and because the relief sought was not equitable. The court of appeals held that promissory estoppel could, in fact, be a cause of action under ERISA, as long as the four elements of promissory estoppel could be alleged: a promise, reliance upon it, an injury caused by the reliance, and an injustice if the promise is not enforced. The court held that the plaintiffs had shown documentary evidence sufficient to show the promise, and that there was "reason to think that discovery would reveal additional writings, such as internal memoranda, that would support plaintiffs' claim." There was also enough evidence to show breach of fiduciary duty. The plaintiffs were represented by NELA/NY member Pearl Zuchlewski (and the defendants by Barbara Roth of Torys. Extra special congratulations to Pearl!) **Ladouceur v. Credit Lyonnais**, 2005 WL 3452357 (2d Cir. Dec. 16, 2005) (summary order not constituting precedential authority).

FMLA

Retaliation: Employed Less than a Year

An employee who was fired after she informed her employer that she was pregnant and would need maternity leave beginning after her one-year anniversary, stated a claim, according to a district court for the Eastern District of Pennsylvania. Even though an employee must work for at least a year in order to be eligible for FMLA leave, which plaintiff had not done at the time of the pregnancy notification, the plaintiff complied with the FMLA by telling her employer, approximately six months after she started work, that she would need FMLA leave at some point after she had worked there for twelve months. Two weeks after the notification, she was subjected to a pre-disciplinary conference, a written reprimand, and a negative performance evaluation, followed by termination. She sued for, among other things, retaliation in violation of the FMLA. The district court rejected the employer's arguments that she was not protected because she had not worked for it for more than a year when she was fired, and that her assumption that she would still have been employed by the expected date of her delivery was too speculative. **Beffert v. Pennsylvania Dep't of Public Welfare**, — F. Supp. 2d — (E.D. Pa. April 18, 2005).

JURISDICTION

Brookhaven National Laboratory

Brookhaven National Laboratory is a research facility operated by Brookhaven Science Associates, LLC, pursuant to a contract between the BSA and the U.S. Department of Energy. Is it a government agency? Is it part of the federal or possibly the state government? A "federal enclave"? A state actor? Does state law apply to it? Counsel for a man alleging employment discrimination based upon age and disability had a hard time answering these questions; he sued under the ADEA, the Rehabilitation Act, the New York State Human Rights Law, and 42 U.S.C. § 1983. The answer according to Judge Arthur D. Spatt (S.D.N.Y.) seems to be that the land upon which BNL resides is a federal enclave (over which the federal government ordinarily exercises exclusive jurisdiction) but that New York State exercises concurrent jurisdiction for service of process only, so the New York State Human Rights Law does not apply. The Section 1983 claim was dismissed as having been insufficiently pleaded. The ADEA retaliation claim was dismissed because the alleged retaliatory acts occurred before the plaintiff filed his EEOC charge and so, the court held, should have been included in the charge. Because of statute of limitations issues, the only remaining claim was the ADEA termination claim. **Schiappa v. Brookhaven Science Associates, LLC**, — F. Supp. 2d —, 2005 WL 3358413 (E.D.N.Y. December 12, 2005).

PREGNANCY DISCRIMINATION

Even in the notorious Fourth Circuit, as long as there are different decisionmak-

See SQUIBS, next page

SQUIBS, from page 16

ers involved in an employee's hiring and discharge, the employee does not have to show that she was replaced by someone outside her protected class to establish a prima facie case under Title VII. A female account manager, fired a year after she gave birth, sued alleging sex discrimination, pregnancy discrimination, and retaliation. When the employee initially announced her pregnancy, her supervisor transferred her to a less profitable sales territory. During her pregnancy, he recommended her termination, and when she returned from maternity leave he gave her an unsatisfactory performance rating. He eventually fired her and replaced her with another woman. The plaintiff had not been hired by the same supervisor who fired her. The court determined that the district court had failed to consider whether the plaintiff's case qualified for the different-decisionmaker exception to the fourth prong of the prima facie case. The fourth prong is warranted because "replacement within the protected class gives rise to an inference of non-discrimination with respect to the protected status." However, the court recognized that there are instances where a defendant will hire someone from within plaintiff's protected class to "disguise its acts of discrimination." Regardless of whether the district court determines that the plaintiff falls within the different-decisionmaker exception, she had already established a prima facie case with her pregnancy discrimination claim. Her protected class was pregnant women, and the woman who replaced her was not pregnant. **Miles v. Dell, Inc.**, 429 F.3d 480 (4th Cir. Nov. 22, 2005).

PROCEDURE

Meeting the 15-Employee Title VII Minimum

A plaintiff who alleged sexual harassment worked for two different companies simultaneously. The companies were engaged in the same project and worked together, but neither had as many as 15 employees (although they did in combination). In order to meet the Title VII minimum, she alleged that they were joint employers. Although the complaint was dismissed, the court explained that aggregating the employees of multiple entities could be justified under a joint employer theory only when counting the number of employees attributable to each employer either because they are formally employed or jointly employed by that employer. In other words, since she was the only employee jointly employed by both employers, they still did not meet the statutory minimum number of employees. Joint employer status assumes that there is no single integrated enterprise. However, under the single employer theory, where two entities are actually a part of a single enterprise, all employees of the constituent entities are considered employees of the "overarching" integrated entity. **Arculeo v. On Site-Sales & Marketing, LLC**, 425 F.3d 193 (2d Cir. Sept. 30, 2005).

RELIGIOUS DISCRIMINATION

In a lengthy decision, Judge Sidney H. Stein (S.D.N.Y.) dismissed, pursuant to Fed. R. Civ. P. 12(b)(6), a complaint by employees of the Salvation Army, Inc., asking for relief from the Salvation Army's efforts to enforce compliance with its religious mission by its staff. The complaint named as defendants not only the Salvation Army but the City of New York and the commissioners of several state and local government entities that contract with the Salvation Army for the provision of social services. The district court found that the plaintiffs had failed to allege that the discrimination they suffered could properly be attributed to the government defendants, and that the Salvation Army itself was not a government entity (although it derives more than 95% of its budget from contracts with government entities). Accordingly, the complaint was dismissed in all respects except (a) against the government defendants with respect to the plaintiffs' taxpayer status and (b) against the Salvation Army with respect to the retaliation claims under state and city law. **Lown v. Salvation Army, Inc.**, 393 F. Supp. 2d 223, 2005 WL 2415978 (S.D.N.Y. Sept. 30, 2005).

RESTRICTIVE COVENANTS

Justice Charles Edward Ramos (Sup. Ct., N.Y. Cty.) declined to enforce a restrictive covenant in an otherwise valid employment agreement, flatly holding that the fundamental requirement that a restrictive covenant governing post-employment competition must further the employer's legitimate interests allows restrictions only (a) to the extent neces-

See SQUIBS, next page

SQUIBS, from page 17

sary to prevent disclosure or use of trade secrets or confidential information, or (b) where the employee's services are unique or extraordinary. Two former employees of the corporate plaintiff, as well as their new employer, were defendants. One of the former employees had been looking for a new job and was fired when the prospective (and later actual) new employer accidentally faxed to a partner of his then-current employer a memorandum asking its counsel for advice about the legality of hiring him in light of his noncompete agreement. After he was fired, he moved to the new employer and solicited the second individual defendant-to-be to join him there. The old employer tried to induce her to sign a new, more restrictive noncompete in return for a promotion; she responded by saying she had to consult her attorney, then downloaded a client contact list and other information (which she later returned). She let the promotion offer lapse and was fired, and both individuals began work at the new employer on the same day. The court denied the preliminary injunction sought by the corporate plaintiff, holding that it had not shown a likelihood of prevailing on the merits, that it had not shown that it would suffer irreparable injury absent the injunction, and that the balance of equities did not favor it. **Kanan, Corbin, Schupak & Aronow v. FD International, Ltd.**, 8 Misc. 3d 412, 797 N.Y.S.2d 883, N.Y.L.J. 5/23/05, p. 19, col. 3 (Sup. Ct. N.Y. Cty. May 9, 2005).

RETALIATION

Title VII protects an employee even if she is merely named as a voluntary witness in someone else's action that is settled before she testifies. The Second Circuit Court of Appeals held that the employee had "participated in protected activity for the purposes of alleging her retaliation claims"—since the employer had taken certain actions against her the day after the plaintiff co-worker's deposition. The retaliatory actions consisted of the witness' being angrily removed from the work team with which she had been successfully working for over a year, then being told by the company's HR manager (!) to "find another job" as the harassment was "never going to stop." For the next two years, the company continued to retaliate against her, including failure to promote and train, and ultimately fired her during a restructuring. Later, an offer of reemployment was rescinded because her former supervisor said she "had a lawsuit" against the company (she had filed an administrative complaint with the CCHRO). The district court (Alfred Covello, D. Conn.) had dismissed the complaint for lack of proof—*e.g.*, the plaintiff had not provided an affidavit or direct proof from a representative of the defendant that the "lawsuit" comment "caused or contributed to" the revocation of the reemployment offer. In an opinion by Judge Thomas Meskill, joined by Judges Jon A. Newman and Jose Cabranes, the Second Circuit Court of Appeals held that the plaintiff was protected from retaliation under Title VII and Connecticut state law, and vacated the district court's finding that she had not made out a *prima facie* case. The court of appeals held that it was error for the district court to refuse to "consider," even as background evidence, alleged retaliatory acts occurring outside the statute of limitations, and to refuse to consider any alleged retaliatory acts not specifically mentioned in the EEOC charge. The court also reinstated the failure-to-rehire claim, holding that the ex-supervisor's negative reference created a jury question about whether such conduct amounted to an adverse employment action. **Jute v. Hamilton Sundstrand Corp.**, 420 F.3d 166 (2d Cir. Aug. 23, 2005).

An employer will sometimes go to great lengths to retaliate against an employee. Writing for the Seventh Circuit Court of Appeals, Judge Frank Easterbrook revived a plaintiff's claim that her senior manager had retaliated against her in violation of Title VII by "eliminating a flex-time schedule that had allowed her to leave work by 3 p.m. to care for her developmentally disabled son." For years the plaintiff had been allowed to work from 7 a.m. to 3 p.m. However after she filed a race discrimination charges with the EEOC against her employer, her flex-time privileges were revoked. The court reasoned that the retaliation provision of Title VII is much broader than a claim for discrimination because "retaliation may take many forms" and does not require an adverse employment action. Unlike Title VII discrimination charges, which focus on discrimination regarding an employee's compensation, terms, conditions, or privileges of employment, retaliation may occur well beyond the workplace. The court held that if an employer seeks to exploit an employee's particular vulnerability in retaliation for a charge of discrimination, a reassignment could be a material change, or even a constructive discharge. For example, the plaintiff's employer could have retaliated by auditing her tax returns or hiring a private investigator to spy on her. **Washington v. Illinois Dep't of Revenue**, 420 F.3d 658 (7th Cir. Aug. 22, 2005).

See SQUIBS, next page

PRESIDENT, from page 3

Practice tip: In this era of "pretext plus" it is imperative that we rule out through discovery any other potential reason(s) for an adverse employment action other than the one provided, *i.e.,* poor performance. I always make it a practice to ask the decision maker at his or her deposition whether the reason(s) given for the discharge are (is) the only one(s). If the answer is yes, I continue by asking if there is another reason he or she is too embarrassed to admit. If the response is no (and I anticipate it will be) then I ask if the termination was because he or she didn't like the person, or if it was due to favoritism, nepotism, office politics, log rolling, back scratching, etc.—or any other reason. I will bet the response will be no, no, no, etc. At that point, if you can prove the stated reason is pretextual then you can argue that the cause of the adverse employment action was discriminatory if admittedly there was no other reason that is being covered up. ■

SQUIBS, from page 18

SEXUAL HARASSMENT

Affirmative Defenses Must Be Argued

The **Faragher/Ellerth** affirmative defenses to sexual harassment must be raised by an employer before a court can consider them. On appeal, a unanimous panel of the D.C. Circuit Court of Appeals concluded that the trial court had erred when it dismissed a female police officer's Title VII sexual harassment claim against the District of Columbia Department of Corrections. Judge Janice Rogers Brown, relying on Rule 8(c) of the Federal Rules of Civil Procedure and the court's decision in **Harris v. Virginia**, 126 F. 3d 339, 74 FEP Cases 1835 (D.C. Cir. 1997) said, "[T]he Department concedes that it failed to raise the **Faragher/Ellerth** defense in its answer to the amended complaint, and it presents this court with no argument as to why our holding in Harris should not apply, arguing instead that Jones suffered no prejudice from its failure to plead the defense. However, in **Harris**, we were very clear that lack of prejudice is not determinative." By not including the **Faragher/Ellerth** defense in its answer, the Department of Corrections failed to comply with Rule 8(c) and, under Harris, was not eligible for summary judgment on that basis, the court said. On remand, the Department of Corrections may seek to amend its answer to plead the defense, and renew its summary judgment motion. **Jones v. District of Columbia Dep't of Corrections**, 429 F.3d 276 (D.C. Cir. Nov. 15, 2005).

SUMMARY JUDGMENT

Adverse Employment Action

A pro se plaintiff's claims for discrimination and retaliation were dismissed by Magistrate Judge Andrew Peck (S.D.N.Y.), as affirmed in a summary order. The court of appeals held, among other things, that a decrease in workload, without a demotion or pay cut, is not an adverse employment action covered by Title VII. The plaintiff, a Jehovah's Witness of Puerto Rican descent, alleged discriminatory comments by managers such as "you people rather die than take blood" and "to hell with your God." She complained to HR, which she said did nothing, and then to her manager's boss, and promptly got her first poor review in twelve years. She hired counsel and filed a complaint with the State Division of Human Rights, and several months later received a "final written warning," followed by termination. The termination was effective some 5-6 months after she had filed the SDHR complaint. The magistrate judge, quoting the usual case law about being cautious in granting summary judgment in employment discrimination cases, interpreted **Reeves v. Sanderson Plumbing Prods.**, Inc., 530 U.S. 133 (2000), as having held that "merely proving a *prima facie* case and disproving the employer's explanation … will not preclude summary judgment in all cases; rather, a case-by-case analysis is necessary." Here, the plaintiff had alleged that after her complaints, her important duties as an "administrative secretary" had been removed from her, leaving only tasks such as envelope stuffing, making coffee, copying, and cleaning after office parties that she had

See SQUIBS, next page

SQUIBS, from page 19

refused to attend. Considering only the lapse of time between the SDHR filing and the termination (without any of the interim, ongoing events), the court held that the temporal proximity—without more—was insufficient either to make out a *prima facie* case or to create an inference of discrimination or retaliation. The court of appeals seems to have adopted this rather flawed conclusion without paying much attention to the facts. **Diaz v. Weill Medical College**, 138 Fed. Appx. 362, 2005 WL 1608609 (2d Cir. July 1, 2005) (summary order not constituting precedential authority), *aff'g* — F. Supp. 2d —, 2004 WL 285947 (SDNY Feb. 13, 2004).

Age, National Origin, and Race

The Second Circuit Court of Appeals recently upheld a ruling from the Southern District of New York (Denny Chin, J.) that had granted summary judgment dismissing an age, national origin, and race discrimination complaint. The complaint had been filed under Title VII of

See SQUIBS, next page

NEW MEMBERS, from page 14

Elena Goldstein Esq.
New York Legal Assistance Group
450 W. 33rd St., 11th Flr
New York, NY 10001
Work: 212-613-5024
egoldstein@nylag.org

Danielle Guistina Esq.
Dolin, Thomas & Solomon, P.C.
The Strong-Todd House
693 East Avenue
Rochester, NY 10407
Work: 585-272-0540
Fax: 272-0574
dguistina@dts-esq..com

Gary E. Hanna Esq.
Law Offices of Gary E. Hanna
225 Broadway, Ste. #1910
New York, NY 10007
Work: 212-267-2073
Fax: 267-7299
G-Hanna@msn.com

Glenn R. Kramer Esq.
425 East 76th St., #6A
New York, NY 10021
Work: 508-740-1131
gkramer@gmail.com

Todd A. Krichmar Esq.
Beranbaum Menken Ben-Asher & Bierman, LLP
80 Pine St., 32nd Flr
New York, NY 10005
Work: 212-509-1616
Fax: 509-8088
tkrichmar@bmbblaw.com

Peter Malloy Esq.
Law Office of Howard A. Kornfeld
20 Vesey Street
New York, NY 10007
Work: 212-227-4492
Fax: 619-6701
pmalloy@nysbar.com

Letisha Miller
129 West 147 Street, # 25K
New York, NY 10039
Work: 917-312-4671
miller1@mail.law.cuny.edu

Felicia Nestor Esq.
301 29th Street, Apt. 7
Union City, NJ` 07087
Work: 201-330-1618
Fax: 330-1618
felicianestor@yahoo.com

Kimberly Nichols Esq.
Dolin, Thomas & Solomon, P.C.
The Stron-Todd House
693 East Avenue
Rochester, NY 10407
Work: 585-272-0540
Fax: 272-0574
knichols@dts-esq..com

Rick Ostrove Esq.
Leeds Morelli & Brown
One Old Country Road, Ste. 347
Carle Place, NY 11514
Work: 516-873-9550
Fax: 747-5024
rostrove@optonline.net

Samuel F. Prato Esq.
183 Eastt Main Street, Ste 1435
Rochester, NY 14604
Work: 585-325-5900
Fax: 232-1752
pratolaw@frontiernet.net

Munir Pujara Esq.
Ritz & Clark LLP
40 Exchange Place, Ste. 2010
New York, NY 10005
Work: 212-321-7075
Fax: 321-7078
mpujara@ritzandclark.com

Fran Rudich Esq.
Locks Law Firm, PLLC
110 East 55th, 12th Floor
New York, NY1 10022
Work: 212 838-3333
frudich@lockslawny.com

Adana Savery
760 Montgomery Street, #5H
Brooklyn, NY 11213
asavery@gmail.com

Sarah B. Shlehr Esq.
Law Offices of Sarah B. Schlehr
3940 Laurel Canyon Blvd., #196
Studio City, CA 91604
Work: 310-492-5757
Fax: 601-7959
sarah@pregnancylawyer.com

Derek T. Smith Esq.
Akin & Smith, LLC
305 Broadway, Ste 1101
New York, NY 10007
Work: 212-587-0760
Fax: 587-4169
dtslaws@msn.com

David C. Wims Esq.
229 East 95th Street, #1R
Brooklyn, NY 11212
Work: 718-345-5286
Fax: 866-450-9512
davidwims@hotmail.com

SQUIBS, from page 20

the Civil Rights Act of 1964 and the Age Discrimination in Employment Act with the New York State Division of Human Rights ("NYSDHR"). In December 1996, an African-American employee of the NYCTA, then 63 years old, applied for a promotion to Civil Engineer. By April 1998, the NYCTA posted the list of employees who were promoted. Although the plaintiff had learned in late 1997 that another candidate had been promoted, he filed his federal and state complaint with the NYSDHR over 300 days later. The NYCTA argued that the plaintiff should have filed his complaint within 300 days of learning about the first promotion in April 1997, but Judge Chin reasoned that learning of one promotion out of eighteen in late 1997 was insufficient to prove that the plaintiff had necessarily received notice that he would not be promoted. Although summary judgment was denied on the timeliness of the plaintiff's administrative complaint, the court determined that he nevertheless had failed to offer sufficient evidence that NYCTA's proffered non-discriminatory reason for failing to promote him was a pretext. Further, nineteen of the 48 successful candidates for the promotion were over 50 years of age, and three were over age 65, at the time of their applications. **Moorehead v. New York City Transit Authority**, 2005 WL 3076883 (2d Cir. Nov. 17, 2005) (summary order not constituting precedential authority).

Disability Discrimination

A construction worker who sued for disability discrimination lost on his claims on a motion for summary judgment. The district court for the Southern District of New York found that the *pro se* plaintiff had failed to prove that he was disabled within the meaning of the ADA. The plaintiff claimed that his employers fired him because of his disability, a heart attack. During the deposition, the plaintiff admitted that he did not have difficulty with any major life activity. This testimony was fatal to his claim, of course, because in order to be protected by the ADA, the plaintiff had to establish not only that his heart attack was an impairment but that it substantially limited a major life activity. As a result, the court determined that no reasonable jury could find in the plaintiff's favor, and that his heart attack could not be a disability under the ADA. The court also dismissed the complaint because when the plaintiff returned to work after his heart attack, the employer made him a Lead Estimator on a multi-million dollar project. Although the employer had knowledge of his impairment, the plaintiff could not show that this meant it regarded him as disabled. **Batac v. Pavarini Const. Co.**, 2005 WL 2838600 (S.D.N.Y. Oct. 27, 2005).

Disability Discrimination and Retaliation

A Senior Analyst in the Treasury Department of Marsh & McLennan Co. ("MMC") took a temporary medical leave from his position and did not resume full-time duty for three months. When the employee returned to work, his supervisor barely spoke to him, and he was "deluged" with work. The employee met with human resources and explained that he was considering leaving MMC. He shared these same feelings, and more, with his supervisor. By the end of the meeting, the two began discussing the possibility of the employee leaving MMC with a severance package. The employee's attorney sent a letter to MMC in an attempt to negotiate an acceptable severance package and advised that the employee had a "colorable" claim under the ADA. Within a day of receiving counsel's letter, MMC gave the employee an unusually large amount of work. The employee's attorney told MMC that he considered such action retaliatory. A few days later, MMC sent the employee's attorney a letter saying that it accepted the employee's resignation and would accede to counsel's demand for a three-month severance package in exchange for a release of the employee's claims against MMC. However, MMC rejected the employee's demand for payment of his bonus, and he sued. While the court granted summary judgment on the employee's claim for disability discrimination, the retaliation claim survived. The court reasoned that the temporal proximity between receipt of counsel's letter and the dismissal could lead a finder of fact to conclude that the employee was fired in retaliation for raising a disability discrimination claim. The employee was represented by NELA-NY member Harvey Mars. Congratulations! **Stall v. Marsh & McLennan Co.**, Index No. 121232-03 (Sup. Ct. N.Y. Cty. Nov. 15, 2005).

See SQUIBS, next page

DESERT PALACE, from page 6

centre, Inc., 398 F.3d 1011, 1015 (8th Cir. 2005) ("The Supreme Court held that direct evidence is not required in order for a mixed motive jury instruction to be given."). In 2005, the Sixth Circuit laid out the history of the mixed-motive analysis, acknowledging that the Supreme Court had overruled its own opinions:

> In the wake of [the enactment of Section 2000e-2(m)] and the **Price Waterhouse** opinion, most courts (including this one) held that to invoke the mixed-motive analysis, a plaintiff must produce direct evidence.... However, in **Desert Palace**, the Supreme Court clarified that direct evidence is not required to establish liability under § 2000e-2(m); rather, a plaintiff can obtain a 'mixed-motive' jury instruction based only on circumstantial evidence.

Harris v. Giant Eagle Inc., 133 Fed. Appx. 288, 296-297, 2005 WL 1313147, at *7 (6th Cir. 2005). Unfortunately, this opinion is unpublished.

As plaintiffs' attorneys, we must diligently advance and protect the Supreme Court's ruling in **Desert Palace**. Some circuits are trying to ignore **Desert Palace** or marginalize it into oblivion, and it is up to us to make the ruling impossible to ignore. ■

SQUIBS, from page 21

Race Discrimination and Retaliation

The practice of employment law often requires counsel to parse out different causes of action and their differing requirements and consequences. One attorney represented both an African-American mechanic, who claimed race discrimination, and a white mechanic, who claimed retaliation for opposing discrimination. Both claims were brought under 42 U.S.C. § 1981. The court dismissed the retaliation claim on the basis that "[r]etaliation is grounds for relief under Title VII of the Civil Rights Act of 1964, which 'makes it unlawful for any employer to discriminate against an employee for opposing a practice made unlawful by the Act,' but Section 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination," *quoting* **Little v. United Techs., Carrier Transicold Div.**, 103 F.3d 956, 72 FEP Cases 1560 (11th Cir. 1997). The plaintiff's claims against his union for breach of the collective bargaining agreement and breach of duty of fair representation in resolving the dispute with the employer were dismissed. Plaintiff's attorney did not raise his arguments until the reply brief on the summary judgment motion. The court noted that arguments that first appear in a reply brief are deemed waived. Fortunately, the race discrimination claim survived based upon sufficient circumstantial evidence to show a discriminatory employment action. **Hart v. Transit Mgmt. of Racine Inc.**, 426 F.3d 863 (7th Cir. Aug. 17, 2005).

Sex Discrimination

In a lengthy, careful opinion, Judge Robert W. Sweet (S.D.N.Y.) denied a German bank's motion for summary judgment in a gender discrimination case and motion to strike various materials submitted in opposition to the motion. The plaintiff, a trader in the bank's treasury department, alleged discrimination in its refusal to promote her to treasurer after it demoted her from that role and replaced her with a man, who later retired, creating a vacancy. Other women testified that the plaintiff's manager, whose role in the decision making process was disputed, had made biased remarks about women. The court rejected the defendant's argument that such comments were mere "stray remarks," citing (among other cases) **Reeves v. Sanderson Plumbing Prods., Inc.**, 530 U.S. 133, 152 (2000). With respect to the manager's role, the court noted that "[w]here successive evaluators consider and rely on the report or recommendation of prior biased evaluators, the fact-finder may infer that discrimination has infected the entire process." Since the plaintiff's qualification for the promotion was one of several disputed factual issues, the court declined to grant summary judgment. With respect to whether she had suffered an adverse employment action, the court held that intangible as well as tangible employment actions could be considered. As for the plaintiff's claim of hostile work environment, again the court deferred to the fact-finder. It also declined to strike any of the affirmations and other materials attacked as inadmissible or irrelevant by the defendant. Hearty congratulations to Anne L. Clark, who represented the plaintiff (against Joel E. Cohen of McDermott Will & Emery). **Zakre v. Norddeutsche Landesbank Girozentrale**, 396 F. Supp. 2d 483, 2005 WL 2864667 (S.D.N.Y. Nov. 1, 2005).

TITLE VII

Employers Vicariously Liable for Harassment by Independent Contractors

A nurse filed a sexual harassment and a U.S. Constitution Equal Protection Clause claim against an employer-hospital for not preventing a doctor from engaging in discriminatory treatment toward women. The doctor, who defendant hospital claimed was an independent contractor, was abusive to the hospital's female staff. When the doctor learned that the plaintiff-nurse filed the complaint, he pinned her to a cabinet and brushed her cheek with his closed fist. The nurse quit a few days later. The district court held that the hospital was not liable for the acts of an independent contractor, but the Seventh Circuit Court of Appeals, reversing, held that the hospital was vicariously liable. The court's analysis flowed from direct liability theory in private law. However, the plaintiff's constructive discharge, retaliation, and Equal Protection claims failed. The court did not consider the doctor's threat of physical violence an adverse employment action because "talk is cheap." The court took the position that the doctor's threat of physical violence did not amount to constructive discharge, because only an employer can discharge a worker, and the doctor was not her employer. The court also dismissed the constitutional claim because the Consti-

See SQUIBS, next page

STATUTES, from page 9

[42] 42 U.S.C. § 1981a(b)(3).

[43] 42 U.S.C. §§ 12101 et seq.

[44] 42 U.S.C. § 12112(b)(5).

[45] 42 U.S.C. § 12117(a).

[46] **Heyman v. Queens Vill. Comm. for Mental Health**, 198 F.3d 68, 72 (2d Cir. 1999).

[47] 42 U.S.C. § 12102(2).

[48] 42 U.S.C. § 2000e-5(b).

[49] 42 U.S.C. § 12117, 2000e-5(b).

[50] 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 12117.

[51] 42 U.S.C. §§ 1981a(a)(1), (b)(2).

[52] 42 U.S.C. § 1981a(a)(3); *see also* **Roberts v. Progressive Indep. Inc.**, 183 F.3d 1215, 1223 (10th Cir. 1999).

[53] 42 U.S.C. § 1988(c).

[54] 42 U.S.C. § 12205.

[55] 29 U.S.C. §§ 621-634.

[56] 29 U.S.C. § 631(c)(1).

[57] 29 U.S.C. § 630(b).

[58] 29 U.S.C. § 626(d).

[59] **Oscar Mayer & Co. v. Evans**, 441 U.S. 750, 757 (1979) (internal citation omitted).

[60] 29 U.S.C. § 626(b).

[61] Front pay is not included in the calculation of liquidated damages. **McGinty v. State**, 193 F.3d 64, 69 (2d Cir. 1999).

[62] Violations of the ADEA are "willful" "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." **McGinty v. State**, 193 F.3d 64, 69 (2d Cir. 1999) (*quoting* **Hazen Paper Co. v. Biggins**, 507 U.S. 604, 614 (1993)).

[63] 29 U.S.C. § 626(b). Liquidated damages are generally computed by doubling the amount awarded to a successful ADEA plaintiff for back pay and benefits. Front pay is not included in the calculation of liquidated damages. **McGinty v. State**, 193 F.3d 64, 69 (2d Cir. 1999).

[64] *See* Comm'r of Internal Revenue v. Schleier, 515 U.S. 323, 326 (1995).

[65] 29 U.S.C. §§ 2601 et seq.

[66] 29 U.S.C. § 2612(a)(1).

[67] 29 U.S.C. § 2614(a)(1).

[68] 29 U.S.C. § 2611(4).

[69] 29 U.S.C. § 2611(2).

[70] 29 U.S.C. § 2617(c).

[71] 29 U.S.C. § 2617(a)(1)(A).

[72] *Id.*

[73] *Id.*

[74] 29 U.S.C. § 2617(a)(3).

[75] 29 U.S.C. § 2617(a)(1)(B).

[76] 29 U.S.C. § 206.

[77] 29 U.S.C. § 206(d)(1).

[78] *Id.*

[79] 29 U.S.C. § 215(a)(3).

[80] 29 U.S.C. § 203(s)(1).

[81] 29 U.S.C. §§ 201 et seq.

[82] **Ososky v. Wick**, 704 F.2d 1264, 1265 (D.C. Cir. 1983).

[83] 29 U.S.C. § 255(a). Claims for unequal pay, whether under the EPA or Title VII, are not continuing violations; each unequal paycheck is a discrete violation, triggering the running of the statute of limitations. *See* **Pollis v. New Sch. for Soc. Research**, 132 F.3d 115, 119 (2d Cir. 1997); *but see* **Jenkins v. Home Ins. Co.**, 635 F.2d 310, 312 (4th Cir. 1980).

[84] *See* 29 U.S.C. § 206(d).

[85] *See* 29 U.S.C. §§ 216(b), 260.

[86] *See* 29 U.S.C. § 216(b).

[87] *Id.*

[88] *See* **Erickson v. New York Law Sch.**, 585 F.Supp. 209, 213 (S.D.N.Y. 1984).

[89] N.Y. Lab. L. §§ 194-198-a.

[90] **Mize v. State Div. of Human Rights**, 328 N.Y.S.2d 983, 986 (1972).

[91] N.Y. Lab. L. § 194(1).

[92] **Mize** at 987.

[93] N.Y. Lab. L. § 194 (1).

[94] N.Y. Lab. L. § 198(3).

[95] N.Y. Lab. L. § 190(3).

[96] *Id.*

[97] N.Y. Lab. L. § 198(3).

[98] N.Y. Lab. L. § 198(1-a).

[99] N.Y. Lab. L. §§ 198(1), (1-a).

[100] N.Y. Exec. L. § 296.

[101] The NYSHRL prohibits discrimination on the basis of age against individuals who are 18 or older. N.Y. Exec. L. § 296(3-a)(a).

[102] N.Y. Exec. L. § 296.

[103] N.Y. Exec. L. § 297(5). Once a claimant has filed a charge with the SDHR, she cannot bring a lawsuit until the SDHR has disposed of her charge. N.Y. Exec. L. § 297(9).

[104] N.Y. C.P.L.R. §214(2) (2005); *see also* **Murphy v. American Home Prod. Corp.**, 58 N.Y.2d 293, 297 (1983).

[105] N.Y. Exec. L. § 292(5).

[106] N.Y. Exec. L. § 297(4)(c)(ii); **Aurecchione v. New York State Div. of Human Rights**, 98 N.Y.2d 21, 26, 771 N.E.2d 231, 233, 744 N.Y.S.2d 349, 351 (2002).

[107] N.Y. Exec. L. § 297(4)(c)(iii).

[108] N.Y. Exec. L. § 297(4)(c)(ii).

[109] N.Y. Exec. L. § 297(4)(c)(iv); **Obas v. Kiley**, 149 A.D.2d 422, 539 N.Y.S.2d 767 (2d Dep't 1989).

[110] N.Y.C. Admin. Code § 8-107.

[111] N.Y.C. Admin. Code § 8-102(5).

[112] N.Y.C. Admin. Code § 8-402(b), § 8-502(d). The three-year limit is tolled during the pendency of an administrative charge with the NYCCHR. Id. at § 8-502(d).

[113] N.Y.C. Admin. Code § 8-502(c).

[114] N.Y.C. Admin. Code § 8-120(a), § 8-502(a).

[115] *Id.* at § 8-502(f).

[116] *Id.* at § 8-124(a). ■

SQUIBS, from page 22

tution does not require the state to prevent or redress the misconduct of private actors. **Dunn v. Washington County Hospital**, 429 F.3d 689 (7th Cir. Nov. 17, 2005).

PRACTICE TIP

When examining a witness at a deposition or at trial, or when preparing your own witness, it may be hard to draw out information from the witness in admissible form. For example, a witness may say that a co-worker was having an affair with the boss, but he may be unable to say how he knows that. "It was common knowledge" or "They didn't really hide it" or "Everyone knew" will not be admissible. But "She kept looking into his eyes and giving him little smiles" or "When he lit her cigarette, he held her hand in his hand" or "When they left the office holiday party, I saw them both drive in the same direction, toward her house, even though he lives in the opposite direction" or "He called her into his office at least once or twice a week and locked the door—I tried the door—and she didn't come out for an hour" not only will get the affair into evidence (circumstantially, but there's nothing wrong with that) but will do so in a truly vivid way.

U.S. Supreme Court Note: Roberts at Odds with EEOC

In August 2005, memos surfaced that revealed the adversarial stance of Supreme Court Justice John Roberts Jr. towards the U.S. Equal Employment Opportunity Commission. According to a report in Bloomberg.com, the National Archives released memos from Judge Roberts' days as special assistant to Attorney General William French Smith. The Bloomberg.com article reported that Roberts wanted to "rein in" the EEOC because "its civil rights positions were 'totally inconsistent' with President Ronald W. Reagan's policies." ■

INTERVIEW, from page 1

ject in Brooklyn, the Williamsburg Houses. Ruth Campos, Elaine Martinez and Marie Edith Cenostin fought to be hired and then challenged a pervasive pattern of sex discrimination, sexual harassment, and retaliation at the hands of their supervisors at Tratoras Construction, Inc. They challenged this conduct, and were the catalysts for, and intervened in, a lawsuit brought by the EEOC [] in the Eastern District of New York in August 2001. In March 2005, the plaintiff-intervenors won a $355,000 settlement. Campos is African-American, Cenostin is Haitian-American, and Martinez is a Latina.

From the outset, the supervisors were extremely hostile to the notion of hiring women, and only did so after Campos complained at a community taskforce meeting. [The] women suffered from discriminatory work assignments, including cleaning up and loading debris from the work areas, cleaning hallways and bathrooms, and moving bags of cement and other equipment rather than demolition work, painting and shoring jobs (work given exclusively to the male laborers). The women were fully capable of performing the functions given to the men. In fact, Martinez had done demolition work on a previous job. The refusal to assign the women to the "male" positions contributed to the more frequent layoffs experienced by the women.

Tratoras payroll records confirmed that the women were subjected to a pattern of periodic layoffs not experienced by the male laborers. [For example], during the summer of 1999, Campos, who at the time was the only female laborer on the job, was laid off for four months to make room for her supervisor's male nephew who wanted a summer position. The women would be told there was "no work" and they should not report to work. These layoffs ranged from a day or two to several weeks.

Throughout their employment with Tratoras, the women were constantly forced to put up with demeaning comments from their immediate supervisors about their menstruation cycles and their sex life. The women complained without success to the supervisors making the comments, but the supervisors did not relent. The women did not take their complaints to higher management for fear of losing their jobs.

The fear of job loss for complaining proved justified. Once, while working on the roof of one of the buildings, Martinez asked the foreman where to plug in a vacuum cleaner. The foreman responded in vulgar terms. Martinez complained to her supervisor, and was terminated. He informed her that "You gotta learn too keep your mouth shut. That's why you got fired."

Campos, who is a widow, also lost her job in the wake of a complaint she lodged about a supervisors' accusations that she and the other female employees were lovers. She received no response to her complaint, except that on March 13, 2000 she was told there was no more work for her and she was terminated. That same day Cenoscin was also told she was terminated for lack of work.

Tratoras payroll records confirmed that, after the firings of the three women, the company continually hired new male laborers for the Williamsburg Houses job.

ND. How did you get this case?

RB. I had done work over the years with Brooklyn Legal Services in Williamsburg. The director there called me to see if I was interested in talking to three women who had experienced discrimination. Everyone in my previous office liked the idea of the case. Women trying to be laborers sounded sexy. And, once I met the women and investigated the claims, it sounded like a solid case which it proved to be. In fact, it was an extremely strong case.

ND. Please describe the most challenging aspect of the case.

RB. Discovery was just about completed when in October 2002 the case took a troubling turn: Tratoras' counsel advised us that the company was basically insolvent, that counsel wanted court approval to be relieved, and that the insurance carrier had denied coverage on the basis of having received an untimely notice of claim.

What followed was about a year and a half of litigation concerning the timeliness of Tratoras' notice to the carrier. Judge Dearie ultimately ruled that the EEOC charges did not constitute a "claim" for purposes of the insurance policy and that the notice given when the litigation was commenced was timely notice. The insurance carrier filed an appeal from this ruling to the Second Circuit.

While the appeal was pending, the parties entered into settlement discussions with the carrier (Tratoras remained insolvent and out of business).

ND. Please describe lessons learned while working on the case.

RB. In every case, I am now very keen on finding out about insurance policies. I ask for any and all policies and consider an injured party claim under New York Insurance Law. I take very seriously the Rule 26 provisions regarding insurance, and I follow up to make sure that I see the policies.

ND. What were your most memorable experiences as a lawyer?

RB. There have been a lot. Two, in particular, spring to mind: the first one was Huntington Branch NAACP v. Town of Huntington, which overturned discriminatory zoning laws blocking construction of subsidized housing. After we lost initially, the District Court's ruling was overturned by the Second Circuit in a wonderful ruling, which was affirmed without argument by the U.S. Supreme Court. It is the only ruling of the U.S. Supreme Court implying acceptance of impact theory in housing. The second one was the Mount Laurel Litigation in New Jersey involving the low-cost housing obligations of municipalities. In unprecedented fashion, the New Jersey Supreme Court held three days of televised arguments where all plaintiffs and defense lawyers had to prepare to answer questions from the court. This resulted in lots of low-cost housing.

ND. What cases are you working on at the moment?

RB. At the Anti-Discrimination Center, we deal mainly with housing discrimination. A few weeks ago, we won a jury trial relating to discrimination in a rental property in Staten Island.

See INTERVIEW, next page

INTERVIEW, from page 24

INTERVIEW WITH JOSHUA FRIEDMAN

Joshua Friedman, Attorney at Law.
Alston et al. v. Liebherr America, Inc.

ND. How would you summarize the case?

JF. It was essentially a hostile work environment based on race case, that was filed in the Eastern District of Virginia brought by 26 African American employees. The Defendant, Liebherr, manufactures mining trucks. Those are those monstrous-sized trucks that work at mines. They're the largest trucks in the world.

The plant in question was located in Newport News, Virginia. And, the plaintiffs were not allowed to use certain rest-room facilities that were set aside for whites. It was right out of a time warp. They were subjected to racial slurs by their supervisors. They were assaulted.

There were basically no economic damages in this case. All the monies I think that were awarded in the settlement were for emotional pain and suffering, and potentially the avoidance of punitive damages.

ND. And how did you come to have this case?

JF. Well, the plaintiffs had originally filed suit and retained a local attorney. That attorney got a little bit overwhelmed by the pace of litigation in the Eastern District, which is also known affectionately as the "rocket docket." That's where the government files all its cases that it wants to get on a really fast track because in the Eastern District, they have a firm rule that cases must be tried within 6 months of the date of the filing of the answer. In this case, because we had 26 individual plaintiffs, the Court granted us an additional 3 months This was not a class action. It was an individual action brought by 26 plaintiffs. Defendant's motion to sever was eventually denied.

The local attorney dismissed the case without advising his clients, without prejudice. They actually found me through my website. They had started their search locally but they couldn't find anybody who wanted to take the case. I don't think anyone saw any value in the case because there had actually never been a verdict in favor of an African American in the Eastern District in a race case. In addition, it was based in traditionally one of the poorest counties in the United States where juries are thought to be very stingy. So, I don't think anybody wanted this case

ND. Why did you take the case?

JF. For me this was a proof-of-concept case. I've always thought that potentially an area of great value for plaintiffs is hostile-work-environment cases, where psychological and perhaps even physical injury is the principal damage.

And, you know, in this case I had 26 people who had been subjected to an extremely hostile work environment. And, what I did was I brought in a forensic psychiatrist to evaluate all of them. Not surprisingly, working in that environment, they had suffered a lot of injury. I was prepared to put on all their friends and family, spouses, everybody who'd gone through this with them, to talk about how working there completely destroyed their relationships with their spouses. We had an epidemic of divorce in this group during the period that they were working there. So, I saw this really as sort of a proof-of-concept case from my idea that even very low-income people with no loss of wages can recover significant awards for emotional pain and suffering.

I wanted to approach these cases the same way a personal injury lawyers does, and argue that the value in these cases is in the injury done to the plaintiff. So, this was a pretty good test, because if you can get $180,000 for each plaintiff for emotional pain and suffering in the Eastern District of Virginia, then I think it works.

ND. What would you say was the most challenging aspect of the case?

JF. Well, being a solo practitioner and representing 26 individual plaintiffs in a case where the defendant produced well over 100,000 documents, without any support staff, handling the entire thing myself.

ND. How did you manage to do that?

JF. I made Bill Gates my partner…. We had everything scanned, and I put the entire case on my laptop, and I went down to Virginia, and I basically spent three months down there. I conducted 40 depositions myself, including all 26 of my clients back-to-back, literally every day of the week. And the rest of them, it was another 15 or 18 or so, the defendants, I conducted those literally every other day. It was like a marathon for me. The pace was dictated by the trial schedule in the Rocket Docket, but the advantage was that I had all the facts fresh in my mind going into trial and summary judgment.

ND. What would you say were the lessons that you learned while working on the case? Personally, but also perhaps that you think others could benefit from?

JF. Well, I guess one thing is that as a practical matter, it makes sense to do everything electronically, have everything scanned. I am putting together a NELA Nite with a firm that handles electronic document discovery, I am going to share everything I learned about going paperless, all the technology. Solos can do it cheaply. It just makes life a whole lot easier. I think that this case demonstrates that this is a good model for litigation, the idea that we should focus a lot on the psychological injury caused on our clients in order to help our clients maximize their returns.

I guess the other thing that I would add is that this was an extraordinarily enriching experience for me, working with 25 people, getting to know every single one of them. Understanding what they went through really changed my outlook on what I do, as an employment lawyer.

ND. Can you talk about what other memorable experiences you have had as an attorney that you might want to share with others?

JF. The case that I'm working on now with the University Club case has been pretty extraordinary because what I did was I had a very vulnerable group of plaintiffs: extra banquet servers, women who call and find out whether they have work on a weekly basis, can be told by their captains if they don't.

These plaintiffs can't afford any retaliation. They couldn't even afford to be suspended with pay while they were investigating their allegations, because it would have meant that they would have lost the tips that they get. These women were two or three weeks of unemployment away from a homeless shelter. So, what I had to

See INTERVIEW, next page

INTERVIEW, from page 25

do in this case was make a motion for a protective order, and ask for a temporary restraining order to prevent the Club from in any way reducing their compensation, or taking any retaliatory action against them, at the very outset of the case, the day I filed the case. This was even before I had any proof of retaliation. I had to ask basically the judge just to make the order based upon the extraordinary vulnerability of the clients. And she did, and now the defendants are violating the order, and we are in the process of prosecuting a contempt motion as to that violation.

Also, getting what was briefly the highest pain and suffering award at the NYSDHR, $500,000, before the 1st Department knocked that down to $125,000 because it was "too large." The GC at the Division, told me the case was a road map for the use of experts and fact witnesses in proof of pain and suffering. That was what gave me the idea that in the absence of high salaried clients, the best hope for a large damage award is proof of pain and suffering.

INTERVIEW WITH ANNE GOLDEN & CARMELYN MALALIS

Outten & Golden, LLP

Rotondo v. City of New York

ND. Please would you summarize the case.

AG/CM. Rose Rotondo fought for 15 years to overcome the debilitating multiple sclerosis that afflicted her at the age of 21. She wanted, more than anything, to be able to work—and at 36 she was finally asymptomatic enough to take a position as a school aide at a high school in Brooklyn. But the job that she so valued became a lost dream when she was sexually assaulted by the school principal in a vault in the sub-basement of the school. He had told her she had to go there with him to find some typewriter parts; then he locked her in and tried to rape her. She escaped only by chance. With incredible bravery, Rose not only reported the attack to the police but, at their request, wore a recording device and met with the perpetrator again, and he admitted his crime on tape. He was arrested and pleaded guilty, and he served one day in jail. But the attack stripped Rose of her ability to work and exacerbated all the MS symptoms she had overcome. She had to drop out of college and has never been able to work again. In the face of this life-altering incident, Rose had the strength to confront the Board of Education in a lawsuit for negligence and sexual harassment. Instead of offering to compensate her, the City fought her all the way. Throughout the trial, she saw former friends—who still work for the Department of Education—testify for the City, avoiding eye contact with her. She learned for the first time from the testimony of her neurologist at trial that the effects of the attack would soon confine her to a wheelchair. Despite the pain of the attack and of the trial itself, Rose arrived at court every morning determined to hold the City accountable for its inaction. Rose's will power paid off—on the fourth day of the trial, the case was settled for $1.5 million.

ND. How did you get the case?

AG. Roy Karlin, a NELA/NY member, called me to ask whether we would be trial counsel. I found out more about the case, interviewed Rose, discussed it with my partners, and said yes. At that point, all discovery had been completed. The former school principal—who had been fired after his arrest—defaulted in the civil suit and had been precluded from testifying.

ND. What was the most challenging aspect of the case?

AG. It may sound strange, but certainly one of the most challenging aspects of the case was opposing counsel, the Assistant Corporation Counsel. She was from the Tort Division of Corporation Counsel's office, and she did not seem to have much experience with employment law. Here's one example. During jury selection, she refused to agree to a challenge for cause because she agreed with the blatant prejudices of one prospective juror—because it was in the Bible!

CM. I agree with Anne that it was challenging to work with an adversary with little employment law experience. This was my first case against a public employer and I also found that challenging as the City allowed the case to linger on without any apparent incentive to resolve it.

ND. What lesson have you learned while working on the case?

AG. Every case and matter that I have worked on has taught me more lessons about human nature, the diversity of human experience, and the courage of which some individuals are capable. Rose was one of the most gallant persons I have ever met.

CM. This was my first trial experience as an advocate, and my first state court experience at all. Gearing up for trial was filled with many lessons, but state court voir dire was probably the most enlightening experience for me. Prospective jurors and opposing counsel were quite candid about their personal biases and prejudices. After the case was settled, we had an opportunity to poll the jury. I was fascinated to see how individual biases informed jurors' interpretation of testimony and how they experienced the witnesses and lawyers.

ND. What was your most memorable experience as a lawyer?

AG. This is a very tough question. I've had so many. My best moments happen when someone who has been mistreated or abused at work gets out of the situation, preferably with severance pay or whatever else he or she needs and wants, and thanks me. One of my favorite such instances was when I advised a female university professor who had been denied tenure, and who had also discovered that she was paid substantially less than the male professors at the same level. I ghostwrote some memos for her and coached her about how to make her case to the administration, but never appeared on her behalf—because she wanted to stay there. She called me later to say that she had been granted tenure and her salary had been retroactively raised to the level the men received. I was so thrilled and delighted that I've never forgotten that thank-you.

CM. I have fortunately had many memorable experiences as a lawyer vis-à-vis clients. Especially now as an employment lawyer, I find that every client brings her/his own interesting narrative, and with it, another life lesson for me specifically as a lawyer and generally as a person. I also experience many memorable

See INTERVIEW, next page

FLSA, from page 1

and doffing of protective gear is generally compensable. Similarly, the court held that butchers' knife-sharpening performed before and after the butchering constituted principal activities. **Mitchell v. King Packing Co.**, 350 U.S. 260 (1956).

Over the years, courts applying the integral and indispensable language have analyzed such factors as whether the activities were performed for the benefit of the employer or the employee and whether they controlled or required by the employer. *See, e.g.*, **Holzapfel v. Town of Newburgh**, 145 F.3d 516 (2d Cir. 1998) (analyzing compensability of time spent by K-9 officers caring for dogs boarded at officers' homes with reference to these factors). Similarly, time spent driving from the employer's office to a remote worksite is integral and indispensable (and compensable), but time spent driving to and from work is not.

In **Alvarez**, the employees were required to don protective gear and store equipment in the locker room, and then walk to the production area. The employer paid employees for the donning time, but not for the subsequent time walking. The employer argued that inasmuch as the Portal Act repudiated the **Anderson** rule of compensability of walk time prior to the commencement of the principal activity, the court should not require compensation of post-commencement walk time and that a regulatory footnote justified the non-payment.

The court rejected the employer's arguments and held that any activity that is integral and indispensable to a principal activity is itself a principal activity; walking time occurring between the beginning of the first principal activity and the end of the last is compensable.

Now that you have read my description of the history of compensable time, you may be wondering how **Alvarez** reached the Supreme Court. This history makes the court's holdings look obvious, predictable and required by prior caselaw. Well, they weren't. The First and Ninth Circuits had reached different results.

As noted, non-compensable means merely that compensation is not required, not that compensation is forbidden. Under the Portal Act, some preliminary and postliminary activities are compensable under custom, practice or collective bargaining agreement. 29 U.S.C. § 254(b)(2). The strength of unions in the American workplace has declined catastrophically at the same time that new management techniques have revolutionized the production line, thereby undermining custom and practice.

IBP is Tyson Foods, the poultry processor. The amount of time at issue was significant—a few minutes per worker repeated many thousands of times per day. The poultry industry has devoted significant resources to inviting courts to revisit **Steiner** and its progeny and to finish the job Congress started in passing the Portal Act, *i.e.* to eviscerate (a word never used in the poultry-processing cases) the FLSA. Although the employers' briefs argued simply that the principal activity is poultry processing, not donning protective gear, the industry advanced policy-based arguments for why the sky would fall if the walk time were held to be compensable: a rule requiring compensation of employee time spent complying with safety precautions would discourage employers from employing those precautions.

The opinion, written by Justice Stevens for the new (and unanimous) Roberts Court is short and succinct. It recites the history of compensable time in much the same way I did here. That is, the Court declined the industry's invitation to revisit settled caselaw in an employer-friendly way. This is the reason that **Alvarez** is significant even beyond the circle of FLSA practitioners.

Those of us who concentrate in other areas of employment law know that it is generally easier for employers to secure employer-friendly rulings in times of less than full employment. The FLSA's purpose is not to put a few extra dollars in workers' pockets—it is to promote full employment. If an employer has so much work to do that one person cannot do it in 40 hours, then that employer has two choices: hire a second worker or pay 150% of its usual labor cost. A rational employer presumably opts for the more economical choice—or tries to circumvent the law by defining certain activities as not "work." **Alvarez** thwarts one such attempt and so encourages poultry-industry employers to hire more people.

The holding that any activity that is integral and indispensable to a principal activity is itself a principal activity may indicate that the Roberts Court is not hostile to emanations and penumbras.

Compensable time, a category that encompasses such issues as on-call time (which is pertinent for white-collar as well as other workers), break time, and sleep time, will continue to raise important issues for many employers, employees, and their lawyers.

Footnotes

[1] Non-compensable, in this context, means that the employer is not required to pay for the time, not that the employer is forbidden to pay for the time.

[2] Spell-check says it isn't a word, but Congress says it is. ■

INTERVIEW, from page 26

moments while working with students and interns interested in pursuing legal careers, and witnessing them get energized by issues and advocacy.

ND. Why did you become a lawyer?

AG. Originally I went to law school to do traditional labor law on the union side, after seven years in book publishing and one year as a union organizer. I had spent 3 1/2 years at Harper & Row (when it was still Harper & Row), as a copy editor and union officer in its little house union. We experienced a historic 17-day strike in 1973 and then affiliated with District 65, D.W.A. (late lamented). When I realized that I could go to law school and learn to do what our wonderful lawyer, Harold Cammer, did, I was excited beyond words and that became my goal. After law school and a clerkship, I discovered that there were very few such jobs, and I went to a large firm, then a bank; then I moved in 1985 into employment law on behalf of employees. In five years as an associate in Donald Sapir's office, I learned an enormous amount and felt that I had come home.

CM. Tough question. ■

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.