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NELA/NY
ADVOCATES FOR EMPLOYEE RIGHTS
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

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President's Column

We Did It: The State Legislature Finally Enacts Attorneys Fees

By Joshua Friedman, Esq.
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NELA/NY and has been working on passage of a NY State attorney's fees statute for decades. Several years ago NELA/NY's Legislative Committee started a new initiative, and began lobbying for passage of a new bill in Albany. To gain traction, we decided to hire a professional lobbying firm. This required a large budget, and several rounds of fund raising. We appealed to you, and you responded.

The first legislative session ended without passage. We doubled down with our lobbying firm, which required that our members give generously again, and you did. The turning point came when our bill became part of the Women's Equality Agenda. The Governor subsequently limited the fees bill to gender cases. We would have preferred fees in all cases, however, we saw a real prospect for passage, after 30 years in the desert. There were the usual Byzantine twists in Albany, but in the end, a lot of good legislation was passed, including our bill. We are already working on options

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The Practical Aspects of Litigating a Case of Discrimination Based on Domestic Violence Victim Status

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Introduction

Discrimination based on domestic violence (hereinafter, "DV") victim status is a relatively new area of law which is becoming more widely litigated in the past few years. However, due to the novelty of the law and the scarcity of cases, there is not much guidance with respect to the obstacles one might expect in litigating such a case. My discussion will hopefully shed some light on the practical aspects of litigating these types of cases by presenting various difficulties that I have come across, as well as some suggestions on how to overcome those obstacles.

Background of the Law

The New York City Human Rights Law (hereinafter, "NYCHRL") was amended in 2001 to include Section 8-107.1, which makes it an unlawful discriminatory practice "for an employer, or an agent thereof, to refuse to hire or employ or to bar or to discharge from employment, or to discriminate against an individual in compensation or other terms, conditions, or privileges of employment because of the actual or perceived status of said individual as a victim of domestic violence, or as a victim of sex offenses or stalking." NYCHRL § 8-107.1(2).

To give some perspective on just how rare DV discrimination cases are, and were, litigated, although the city law was amended in 2001, the first New York Supreme Court case was not decided until 2004, almost three years later. In *Reynolds v. Fraser*, 5 Misc. 3d 758, 765, 781 N.Y.S.2d 885, 2004 N.Y. Misc. LEXIS 1446 (N.Y. Sup. Ct. 2004), New York County Supreme Court held that the NYCHRL "imposes on an employer the burden of proving undue hardship to its business whenever it refuses to reasonably accommodate the special needs of a domestic violence victim." Further, the *Reynolds* court made clear that there is no requirement of discriminatory intent for the employer to be held liable. Instead, the Court held that even where an employer may not have intentionally acted in bad faith, they may act in contravention of the city law if they fail to make reasonable accommodations for an employee's status as a victim of DV. *Id*.

Given the newly elucidated law set out by the *Reynolds* Court, one would think that there would be an increase in the number of cases following that decision. However, even today, over 10 years later, only two cases cite to the *Reynolds* decision. In fact, finding any DV discrimination cases to use in support of a plaintiff's claims is an arduous tasks. Despite having been enacted for over 13 years, there are very few cases discussing and enforcing NYCHRL 8-107.1(2).

In further illustration of DV discrimination laws' delay in progressing, the

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The NELA/NY Calendar of Events

NELA/NY Fall Conference: Friday, October 9, 2015:
Register to ensure a seat at our informative bi-annual conference on Representing Employees.

NELA Nite: Thursday, October 15, 2015: Steve Sonnenberg will discuss psychological issues in employment law. Stephen Sonnenberg is a partner in the Employment Law practice of Paul Hastings and Chair of the New York Employment Law Department.

NELA/NY 18th Annual Gala: Tuesday, November 17, 2015:
Join us as we honor our Legislative Committee on the Passage of Attorney's Fees bill!

Board Meetings:
October 7, 2015, November 4, 2015, December 2, 2015

A Word from Your Publisher

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This year I am excited to celebrate the passage of the attorney's fees bill with our very own legislative committee! I am proud of their dedication and passion to help advance employment law, in as many ways as possible. We will also pay special tribute to Murray Schwartz, a long-time NELA/NY member and committed advocate for employees, who has recently passed. Please join us on November 17, 2015 as we celebrate life, victory and the pledge to employee rights. Email me for questions or details at nelany@nelany.com.

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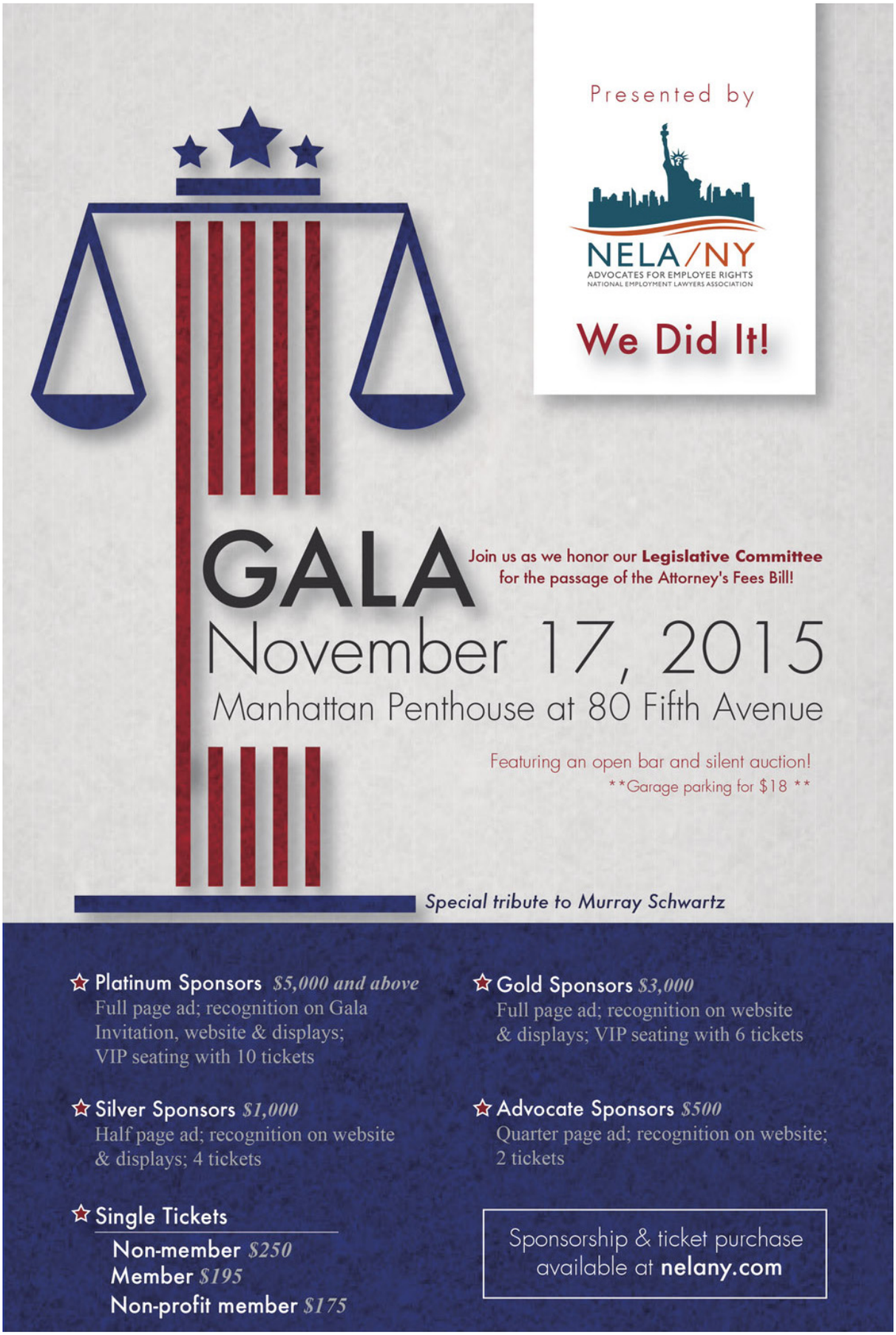
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to expand coverage to all cases, however, this new statute will immediately provide a significant benefit to plaintiffs in many cases.

The theme for our Gala this year is We Did It! Your contributions, phone calls and emails made this happen. We will honor you, our members, who were instrumental in passage through their contributions, the Legislative Committee, our Liaison to the WEC, our former President and our Founder.

November 17 is the date, please mark your calendars. Our next project: A Whistleblower Statute (a real one). A bill passed only to be vetoed by Patterson. The Legislative Committee drafted a new proposed statute, which was in play until the end of the prior legislative session. We have made a lot of allies, and the Legislative Committee has gained a reputation for expertise on employment legislation. I am confident we can get a real whistleblower statute passed, but we need your support. See you all at the Gala!■

The 2015 NELA/NY softball game, Central Park.

The 2015 NELA/NYConference

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New York State Human Rights Law (hereinafter, "NYSHRL") was not amended to protect against discrimination based on DV status until 2009, five years following the *Reynolds* decision. Although not as broad as the city law, the state law was amended to make it unlawful for an employer, because of an individual's "domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." NYSHRL § 296(1)(a).

Unlike the city law, the state law counterpart does not contain an express requirement that an employer provide a reasonable accommodation to an employee who is the victim of DV. However, the New York State Division of Human Rights (hereinafter, "NYSDHR"), has held that a DV victim's need for medical or mental health leave is protected by the NYSHRL's disability and reasonable accommodation provisions.

It is an even more difficult task finding supportive caselaw under the state law than under the city law. This may be due to the fact that the state law is newer, or because it is not as broad as the city law and therefore more cases are brought under the city law. Or, it could be due to one or more of the obstacles in litigating DV cases, as I will discuss in more depth at this time.

Obstacles in Litigating DV Cases

When bringing a case based on law with which you've had a lot experience, you can anticipate some of the obstacles that you might face. For example, in bringing a hostile work environment claim, you may anticipate having difficulty showing that the misconduct was severe, or pervasive. In bringing a disability claim, you know you may have trouble showing that your client's condition substantially limited a major life activity, or that the reasonable accommodation requested would not have been an undue burden for the defendants.

However, in bringing a case based on a law that is not well-established, and which you may have not litigated before, it would be difficult to predict the hurdles you might face.

A. Scarcity of Cases to Use As Guidance

As you can see, discrimination based on DV status is a relatively new area of law that has taken time to be established and fully fleshed out. Consequently, there is very little caselaw on the subject matter. This is problematic not only because it means there are fewer cases to use in support of a particular plaintiff's claims, but also because it means there is less literature for practitioners to read in their own learning of the law. Without caselaw, it makes it very difficult to get an idea of how a court may interpret the facts of a case, or even the law itself.

In contrast, for instance, with the abundant caselaw we have regarding sexual harassment in the workplace, as plaintiffs' attorneys, we have a fairly accurate concept of what may be considered severe or pervasive misconduct that would establish a hostile work environment claim. However, with the scarcity of caselaw regarding DV discrimination, attorneys are left nearly in the dark when determining whether the facts presented to them establish the elements of a DV discrimination claim. This leaves many open questions: What if the violent spouse shows up at work, is the employer still obligated to accommodate the victim? What types of accommodations are considered reasonable for a DV victim? Does the law recognize the concept of a "perceived" DV victim?

These are all questions that may be answered and supported by caselaw in the more frequently litigated areas of law. However, in litigating a DV discrimination case, attorneys are faced with the obstacle of bringing, and proving, a claim based on the face of the law.

B. An Inexperienced Opposing Counsel and/or Court

There are practical implications of the scarcity of cases based on DV status discrimination. One such implication is that the number of attorneys, as well as courts, with experience litigating, and deciding, DV cases is almost as low as the number of cases on the topic. At first glance, this may seem beneficial for the plaintiff pursuing a DV discrimination claim because it affords the plaintiff the opportunity to set the stage and take the lead on educating the Court to the extent that it becomes necessary. However, in practice, the inexperience of attorneys and the Court in litigating DV cases poses difficulties for the plaintiff.

i. Opposing Counsel's Inexperience May Lead to Unnecessary Motion Practice

First, opposing counsel's inexperience can contribute to unnecessary motion practice. In order to determine whether a plaintiff has sufficiently pled her case, opposing counsel needs to know the law and the facts that need to be stated to sufficiently plead a violation of that law. Thus, it necessarily follows that those attorneys who are inexperienced with DV discrimination laws may be too quick to determine that a plaintiff has insufficiently pled her claims and consequently move to dismiss them. This inevitably leads to unnecessary time spent opposing the motion and convincing the Court that based on the four corners of your complaint, you have sufficiently pled a DV discrimination case.

ii. The Court's Inexperience Imposes Heavier Burden on Plaintiff

Which, leads me to the next obstacle in bringing a DV case. Not only may opposing counsel by inexperienced in this area of law, but so may be the court. Consequently, a plaintiff has imposed on her an even heavier burden to sufficiently plead, and prove, her case. For instance, in reviewing a defendant's motion to dismiss, although the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff, the plaintiff must still plead enough facts to state a claim to relief that is plausible on its face.

In a DV discrimination case, the plaintiff has the extra burden of educating the inexperienced court about the law, as well as the facts that must be plead to prove a violation of that law. When the

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Court is well-educated on the elements of a discrimination case, and has seen innumerable versions of facts to sufficiently plead those elements, the plaintiff has to put forth less effort in showing how the facts of her case have been plead in such a way as to defeat a motion to dismiss. However, when the Court has only had before it a few, if any, DV discrimination cases, the plaintiff must put forth more effort in explaining the law and how the facts set forth in her complaint are sufficient to establish the employer has violated that law. Moreover, where there are so few cases in this area of law, the ability to use caselaw to support the plaintiff's case all but disappears, and the plaintiff will be forced to use other avenues to defeat a motion to dismiss. One such avenue may be to appeal to the Court's senses and discuss the purpose of the law, rather than the enforcement of it.

If the case makes it all the way to the motion for summary judgment stage of litigation, the burden on the plaintiff to prove her case is another hurdle that may become heavier to overcome based on the court's inexperience.

iii. Opposing Counsel's Inexperience May Hinder Settlement

Another obstacle that one may face in bringing a case of discrimination based on DV victim status is that opposing counsels' inexperience may hinder settlement discussions. Litigation and settlement discussions tend to be arguments over the facts and whether the facts and evidence are such that a violation of the law can be established. Less often are attorneys arguing over the law itself. Thus, when counsel don't agree on the law, and have few cases to point to in support of their interpretation, it adds just one more issue that must be resolved before settlement can be reached.

Understandably, the better a practitioner knows the law, the more easily she can analyze her case and determine what she believes to be a fair approximation of her case's value. Knowing the value of a case, as well as the strengths and weaknesses of a case, facilitates negotiations and settlement discussions with opposing counsel. However, if opposing counsel is not well-versed in the law, he may value his claims differently, impeding on the parties' ability to compromise.

C. Sample Case

I am going to discuss one of my cases, which has now been filed in the S.D.N.Y., as an example of the practical difficulties in pleading a DV case, as well as settling one. In *Sequeya Henderson v. Boar's Head*, my client, Ms. Henderson, was a victim of domestic violence by her boyfriend, who, in this case, was also her co-worker and a named defendant. Not only did the defendant violently beat my client at the workplace, but he also sexually harassed her by sending her threatening text messages, pursuing her romantically, and treating her inappropriately solely due the fact that she was a woman. We allege that my client had complained to the company that the defendant was threatening her, and the company was aware that my client had filed a police report on him for pounding his fists into my client's car and spitting in her face on company property. Nonetheless, no action was taken, and the defendant ultimately beat my client and punched her in the face in her office.

As an attorney, it was my job to decide how to frame the facts and the case in the most advantageous way for my client. Knowing that discrimination based on DV status is not a well-established area of law, and wanting to be prepared for opposing counsel who may be inexperienced in this area of law, at the outset of the case, I decided to rely more heavily on the sexual harassment allegations, as opposed to the DV status aspect. While I alleged both types of discrimination, I believed that settlement discussions would be more productive if I focused on the sexual harassment allegations due to the likelihood that opposing counsel would be more knowledgeable of the sexual harassment claims. I was also relying on the likelihood that defendants would be more fearful of having to defend sexual harassment claims than DV status claims.

Nonetheless, the case did not settle and I got to the point of having to file the case in Court. Putting more faith in the Court's knowledge and experience, as well as its ability to correctly interpret the law prohibiting discrimination based on DV status, I redrafted my complaint to focus more heavily on the DV status discrimination allegations. The practical implications of drafting a complaint based on a law that is newer to me, is that I spent a lot of time researching caselaw to ensure that I plead the facts sufficiently. However, as already discussed, this proved to be more difficult than I originally thought due to the scarcity of caselaw out there. The case is still in its preliminary stages, where we have not yet had the initial conference, so unfortunately I do not have any insight as to how discovery or summary judgment motions will play out, but I plan on making clear throughout the remainder of the litigation that the sexual harassment claims and DV discrimination claims are two completely distinct claims that must be viewed separately.

Discrimination based on domestic violence victim status is a relatively new area of law which has been more widely litigated in the past few years.

D. Sensitivity of Subject Matter and Clients

Maybe the biggest obstacle, and also

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the one that is hardest to overcome, is the sensitivity of the subject matter of these cases, and the sensitivity of the clients. This is something that quickly became apparent to me and has proven to have the biggest impact on how my cases have proceeded.

E. The Intake

Even before a DV victim is signed up as a client, at the initial meeting with the potential client, an attorney is faced with the difficulty of speaking to the victim about what she went through in such a way to assure her that you are sympathetic and understanding of her experience. To do this successfully, it's important to note the sensitivity of the subject matter about which you are speaking.

First, read the client. Try to get an understanding of whether the client has a victim mentality and is in the process of coping with what she went through, or whether the client is angry about her experience and is out to get vengeance on her harasser. If it's the former situation, sympathize with the client. Let her know that you can only imagine that what she went through, or is going through, is traumatic and difficult, and that you are glad that she had the strength to meet with an attorney. If it's the latter situation, you can again, let her know you can only imagine her pain, but explain that the purpose of litigation is to make her whole for what she suffered as a result of the discrimination, not to get revenge on her harasser.

I have experienced both types of clients. On the one hand, I had a client come into the intake meeting petrified, speaking so softly I could barely hear her and she was hesitant to answer any of my questions regarding her experience and her employment. It took considerable coaxing for her to feel comfortable enough answer my questions fully, and to eventually offer information. On the other hand, I had a client a client come into the intake meeting ready to go to war against her harasser and seeking to use litigation as a way to "get back at" him and show him that he "didn't know what she was made of."

What you also must make clear is that there are two issues going on simultaneously. One, the discrimination claims which you are pursuing against the employer. Two, the domestic violence claims which she has, or may have, against her harasser. It is essential to ensure that the client understand that while the two issues overlap, you are bringing claims on her behalf for the wrongdoing of her employer, not her harasser. It is also important that the client knows she can, or should, seek representation for claims against the harasser and that the outcome of her case with you, will not necessarily resolve any claims she has against her harasser.

F. As the Case Proceeds

Signing the retainer agreement is a big step for the client. The next hurdle, at least for the attorney, is retaining control over the client and keeping her responsive. For me, the most difficult part of bringing the DV discrimination cases is getting the required facts from the client to be able to draft the complaint. After I had signed up a particular client, I had requested a timeline of facts to assist me in drafting her complaint – a timeline that I had also requested she bring with her to my initial meeting with her. Nonetheless, she did not bring the timeline with her, and did not respond to my numerous emails and voicemails requesting her facts for weeks after.

Finally, about one month later, my client reached out to me, offering a myriad of excuses for why she hadn't been able to send me her timeline. She also mentioned that she had considered not going forward with her case because she was scared and didn't know if she could bare the emotional distress she'd suffer as a result. The lawyer part of me wanted to insist that she proceed, and be more responsive, so that we may proceed as expeditiously as possible. The more human part of me wanted to tell her that everything would be ok, but I understood if she didn't want to proceed. Of course, I had no way of guaranteeing everything would be ok, and I didn't understand why she would not want to stand up for her rights. Nonetheless, I chose to respond to her as a human-lawyer, telling her that it was her choice whether to proceed or not, but should she choose to go forward, I would represent her zealously in my attempts to make her whole to the extent possible under the law, and that I would be there for her throughout the process should she be scared or need support.

I think the point to take away is that, while it is always prudent to advise a client of the weaknesses of her case so as to keep expectations reasonable, giving a sensitive and scared client a sense that her claims are valid, and showing her that the facts of her case may possibly prove the defendants' wrongdoing, also gives the client hope. Giving her hope makes her want to participate in her case and help you in your quest to represent her zealously.

I have yet to bring a DV discrimination case to a close, but, assuming we do not lose the case at trial, I anticipate a feeling of relief not only by my client, but also myself, knowing that I did my part in helping her move on with her life.

Conclusion

The information provided is not meant to deter practitioners from taking victims of domestic violence on as clients, but rather to assist them in navigating the hurdles associated with same. Having personally experienced the obstacles in representing a victim of DV, the reward and value given to the client is immeasurable, especially in cases that have the level of egregiousness that haunt the plaintiff to date. ■

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Less Boring Direct Examination

By Stephen Bergstein, Esq.
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A well-known lecturer on trial practice has said that direct examination is not a glamour topic. He is right. Most trial practice tutorials focus on cross examination, summation and expert witnesses. But direct examination is important, and the most important witness in the case, your plaintiff, will provide her account to the jury through direct examination. Your client is not only the most important witness in the case, but she will most likely be the first witness at trial. So her testimony will set the stage for the rest of the trial, particularly since she will likely be the only witness with personal knowledge of the full timeline.

Jurors enter the courthouse knowing little about litigation or the trial process. They also know little, if anything, about substantive law, including Title VII or the Age Discrimination in Employment Act. They will nonetheless sit in judgment of your case and your client. Once they are empaneled, the jurors will realize they are being called upon to resolve a serious dispute over which they know nothing, and they may have to master some concepts unique to the lawsuit, such as certain corporate business practices. You may never know whether the jury fully masters the case. But you can be assured the jury will have an opinion about your client, and you want that opinion to be a positive one.

Preparing your client for trial.

A credible direct examination is critical to the success of your case. The plaintiff must have a good memory of the facts and sequence of events. The best way to insure that your client connects with the jury is to thoroughly prepare him in advance of the trial. This is how I do it.

I pull out the plaintiff's deposition transcript and organize the exhibits in chronological order. Based in part on the deposition, I type out a draft direct outline with questions and answers. By now, of course, you have a theory of the case, having reviewed discovery and taken depositions. Treat direct examination preparation as laying the groundwork for a theater production. Your client is the star, and her direct examination is the main event. Preparing the outline will reacquaint you with the case and allow you to decide precisely how you will introduce the case to the jury. For this reason, as you prepare further for trial, this outline will be updated and possibly streamlined.

In the outline, the answers to the direct examination questions will have a parenthetical that identifies the relevant page from the plaintiff's deposition transcript. This is to help guide the client during preparation to ensure that she remembers precisely what she said in deposition. Of course, the trial testimony should be consistent with the deposition, to prevent embarrassing impeachment on cross examination.

After I draft the direct examination outline (complete with answers, deposition page references and exhibit references), I email it to the client and ask him to review it carefully and to also re-read the deposition transcript in advance of the first trial preparation session. When the client comes in for direct examination preparation, we do the first dry run of the direct examination. What I often find is that during this first preparation session, we learn additional facts about the case. Not everything is revealed during the plaintiff's deposition, and even plaintiff's attorney will not know every detail about the case. This "new" information often surfaces during the first preparation session. For this reason, as you go through the first dry run, you may stop the exercise to further discuss some factual matter that your client has revealed during the preparation session. This means that the first dry run is not a true practice session, since there will be frequent interruptions to talk further about the case. What you may also discover during the preparation session is that your outline structure may have to be revised. You may decide that the sequence flows better by moving certain topics to a different page of the outline, or to remove that subject matter altogether as redundant or irrelevant.

Once the first practice session is over, I return to the computer and revise the outline. I may reorganize the question sequence and include additional questions based on any new information that I learned during the practice session. I then send the revised outline to the client, and I once again advise him to review it carefully. Then I schedule a second preparation session. This session will be the real dry run. We conduct a direct examination from start to finish, wrapping it up with damages. We try to do this with minimal interruptions, so the client can experience the direct examination like she is in a courtroom. When the dry run is over, I tell the client to continue to review the written outline until the case goes to trial.

These practice session do not simply better familiarize the client with her case. We have two separate practice sessions so the plaintiff knows how I want the examination structured and where in the examination certain topics will arise. This prevents the plaintiff from prematurely volunteering certain evidence that needs to come out later on in the examination. After carefully preparing the sequence of the direct examination, you don't want to jump to different pages in your outline during the examination.

The dual-session preparation method is time-consuming, but it is often time well spent, especially if direct examination goes well at trial. The time expended on preparing the direct outline can also be extensive. But if the trial is scheduled long in advance, you have all the time in the world to prepare a good outline. Use the gift of time wisely.

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Dealing with issues during direct examination.

There is no such thing as a perfect direct examination. The plaintiff will not always "stay on script" and may even forget critical information. You may have to conduct some direct examinations in an unorthodox manner. How do you handle this when all eyes are on you and the plaintiff? Here are some special circumstances that I have handled at trial.

1. The forgetful plaintiff.

We all know you cannot ask the plaintiff leading questions. But if the plaintiff forgets something that must come in at trial, I will bite the bullet and ask a leading question that suggests the answer. This is a last-resort tactic. I don't think most judges will allow you more than one leading question per direct examination. Defendant's counsel may object, and the judge will sustain the objection, but the plaintiff will know the answer. Suggest to your client prior to trial that this scenario may happen and that if she does not remember the answer you may have to suggest it through a leading question. This way, if the objection is sustained, your client will remember the answer. Again, this is a last-gasp approach if the information must come in and there is no other way to do it.

The more traditional way to get the plaintiff to answer correctly is by refreshing his recollection. This method simply involves briefly showing the plaintiff something, like a letter or some other exhibit, and then taking it away from him and asking the question again. This way, you are literally refreshing the plaintiff's recollection. The exhibit is not introduced at this time. I did this In *Fuller v. Advanced Recovery*, a case tried in the State Division of Human Rights recently. We were trying to prove the employer had 15 employees. Fuller could not remember all of the names. I anticipated this. Prior to the hearing, I had Fuller draft a list of employees that she worked with, and I kept it handy in case she needed it at the hearing. I made sure she wrote nothing on the list that could be used against her at the hearing. Below is an excerpt from the transcript:

Q. Who else did you work with?

A. Alan Fuller.

Q. Where did he work, what did he do?

A. Warehouse and — worker and computer technician.

Q. Who else?

A. Who did I cover so far?

Q. Would anything refresh your memory about who you worked with?

A. Possibly.

Q. Okay did you send me a list of names?

A. Yes, I did. I sent you a list of names.

Q. If I show you that list of names would it refresh your memory about who you worked with?

A. Yes.

[I showed Fuller the list of names that she prepared prior to the hearing]

A. Okay, thank you.

Q. Who else did you work with?

EMPLOYER'S COUNSEL: Your Honor, may I have that exhibit identified in the record, please?

THE COURT: It's just for refreshing. ... [I]t's for refreshing the recollection, but you can show it to counsel. [W]hen you're refreshing the recollection you just look at it and then you put it aside.

MS. FULLER: Okay.

Q. Who else?

A. Chris Westby.

Q. What did Chris Westby do?

A. Chief Financial Officer for Advanced Recovery, Port Jervis, New York.

Notice how defendant's counsel objected and the hearing officer said the plaintiff could briefly see the list she had prepared to help with her testimony. I did not care that counsel was able to see the list. I told my client that the list would be useful at the hearing but that she could not include anything in the list that could be used against her.

2. Chronological order does not always work.

Not every direct examination can proceed in strict chronological order. I once tried a sexual harassment case where the plaintiff was harassed in a variety of ways. At some point during her examination, I asked her to briefly summarize the ways her boss had harassed her. That way, the follow-up questions about individual acts of harassment could not be objected to as leading, as we would have set the foundation for them through the general testimony about the nature of the harassment. There was so much harassment that the plaintiff could not remember them all in their proper time sequence. So I divided up that portion of the direct examination by the various forms of harassment. I had her describe the way her boss touched her legs, and then she testified about how her boss had groped other parts of her body. In essence, this portion of the direct examination was organized by body part.

A well-prepared client on direct examination is worth the time and effort.

3. Prepare for your client's possible impeachment.

There is no such thing as the perfect plaintiff. If you know defendant's counsel will highlight something bad about your client on cross-examination, consider asking your client about it on direct, to make the cross-examination less dramatic. This works best when your client has a criminal conviction that defendants will suggest proves t your client is untrustworthy. At some point (use your discretion when is the best time during direct to do this), ask plaintiff about the criminal conviction. Or the prior lawsuit he brought against a different employer, also for employment discrimination. If the judge does not preclude this evidence on a motion *in limine*, you want to be the lawyer who first introduces this bad information to the jury, not defense counsel, who will

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then argue that plaintiff was trying to hide something because she did not testify about it earlier.

4. Slow down for the good stuff.

Direct examination can be dry and boring. You have to pace yourself during direct to keep things interesting. Some lawyers move too fast on direct, causing the jury to lose track of what's going on. When conducting direct, slow down and listen to the plaintiff. Ask appropriate follow-up questions when necessary.

In many employment cases, the most important part of the testimony is a meeting when something bad happened to plaintiff, or when plaintiff told her supervisors that she had a disability, complained about sexual harassment or was told that she was fired. These meetings are often the heart of the case. In a wrongful discharge case I brought under the Americans with Disabilities Act, plaintiff testified that she was fired shortly after telling her supervisor that she had epilepsy and might have a seizure at work. The supervisor denied this meeting ever took place. There were no witnesses to this meeting. We established that the meeting happened by having plaintiff testify about the decor and other details unique to her supervisor's office. Plaintiff was a probationary employee and had not previously entered the office prior to the meeting. Her testimony about what her supervisor's office looked like was credible because she provided enough detail to show that the meeting had taken place. This testimony worked because we planned for it in advance and slowed down that part of the direct examination to both highlight the important conversation with plaintiff's supervisor.

In *Fuller v. Advanced Recovery*, a critical part of the case was the meeting when her boss terminated her employment. This happened on the day plaintiff brought in a name-change order from State Supreme Court. Defendant denied that anyone told Fuller that she was fired because she was transgender. For meetings like this, where credibility is paramount, slow down the questioning. That part of the transcript is reproduced below:

Q. Okay what happened?

A. Mr. Rea asked me to follow him to his office or meet him in his office and I did. I followed Mr. Rea and Mr. Westby up to Mr. Rea' s office.

Q. And what — you went inside the office?

A. Yes.

Q. Was there a conversation in the office?

A. Yes.

Q. Was the door closed, or open, or something else?

A. The door was open.

Q. And what happened during that conversation.

A. While we were moving into the off ice Mr. Rea was in front of me, Mr. Westby was to — slightly to my left. I could see him clearly, Mr. Westby. Mr. Rea had turned around and looked at me not more than a foot away. And Mr. Rea had said that now he had to — he had a problem with my condition, he had to let me go. While he spoke those words to me, Mr. Westby is standing behind me doing the wave off gesture to get Mr. Rea to stop speaking, but Mr. Rea had already spoken his course.

Q. What's the wave off gesture?

A. Wave off

Q. Running his –

A. Stop talking.

Q. Running his —

THE COURT: To get - -

Q. His hand

A. Yes, across his throat. Yes.

Q. You saw that?

A. Yes.

Q. Did you respond to what Mr. Rea said?

A. No.

Q. So you were fired?

A. Yes.

Q. Did you come back to work?

A. No.

If you keep reading that testimony, you will notice that the judge wanted to slow down that testimony even more, and she questioned plaintiff about the meeting as well, for more detail. That's how important this part of the direct examination was.

5. Listen to your client.

Having an outline in front of you is a good idea, but do not memorize it, and do not stay wedded to it. You may have to put it aside from time to time when unplanned follow-up questions are necessary. Sometimes, we are so focused on ensuring the plaintiff testifies to certain matters that we forget to further develop important testimony, and we remain focused on the script. Always brace yourself for an unexpected answer that may warrant further questions. If that happens, mark the outline (or place a sticky note) where you left off and improvise with any questions that were not part of the outline. When you complete that improvision, then return to the outline. What this means is that the direct examination is not a rigid exercise but a conversation with your client. A guided conversation, to be sure, but in many ways like all conversations, where twists and turns arise that provide a brief tangent. A conversation-like direct is more persuasive than a rigid direct, anyway.

A good example of this arose in a student bullying case I tried a few years ago. Plaintiff was one of the few black students in his rural high school. His classmates called him racial names. He was in the drama club, and an acting exercise included a black character from TV show. Plaintiff's classmates wanted him to portray that actor. This bothered plaintiff because it showed they saw him merely as a black face. He testified, "that's not who I am." When plaintiff said this (it was unplanned), I stepped back, allowed the answer to marinate before the jury, and asked, "Tell us who you are." Plaintiff gave a short and sweet answer. "My name is Anthony. I love to play football and I come from a big family." I then let that answer hang out there for a few seconds before I returned to the outline. I am sure that answer resonated with the jury.

6. If possible, ask short questions.

During direct, attention is focused on the plaintiff, not the lawyer. Keep the questions short. In *Fuller v. Advanced Recovery*, an important line of testimony concerned when the boss told her to go home and wear appropriate clothing. By this time, plaintiff was wearing a bra

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and a tank-top on a hot day. Her boss did not like this. This had potential to be a dry set of questions, so I paced it with short questions without losing important details. This portion of the transcript follows:

Q. You said earlier that, at some point, you began wearing women's clothing?

A. Yes.

Q. What kind of clothing were you wearing to work at this point?

A. Modest female attire.

Q. To work?

A. Yes.

Q. Was this in Port Jervis?

A. Yes.

Q. Did Mr. Rea ever speak to you about your clothing?

A. No.

Q. Okay in February, 2010 –

A. Yes.

Q. What happened?

A. If – that's the day that I was told to go home and change my clothes.

Q. Tell us what happened.

A. I was working on a rooftop in Newark.

Q. And what did that entail, working on the rooftop?

A. Hot, sun-driven conditions. It was quite warm and I had a pair of coveralls on.

Q. Let me stop you there. It was February?

A. Yes.

Q. How was the weather?

A. The air started out cool in the morning. By mid-afternoon it got quite hot on the roof.

Q. What kind of the roof was it?

A. Tar tarred roof.

Q. So it got warm —

A. Yes.

Q. - - because you were on a tar roof?

A. Yes.

Q. How did you dress when you came to work that da y?

A. Coveralls.

Q. And what happened when you started getting warm?

A. I had peeled the top part of the coveralls and laid them over and tied them at my waist.

Q. And what were you then wearing when that happened?

A. A crew-type shirt.

Q. Like a tank top?

A. Yes, tank top shirt. Yes, with a bra, yes.

Q. With a bra?

A. Yes.

Q. When did you start wearing a bra?

A. I've worn them for a while. They – they're covered – weren't very noticeable.

Q. They were covered?

A. Yes.

Q. Was it noticeable on this day?

A. Yes, just a little bit. Just –

Q. How so?

A.– the straps.

Q. The straps?

A. Yes.

Q. What happened with Mr. Rea that day?

A. He wasn't pleased with my attire.

Q. How do you know that?

A. He asked me to go home and change.

Q. Change what, your clothes?

A. My – yeah, my clothing.

Q. What did he say, in particular?

A. Not to wear that type of clothing again.

Q. Now this was a tank top?

A. Yes.

Q. Did other guys come to work did guys come to work wearing tank tops?

A. Not many, but a few.

Q. Was this in the afternoon?

A. Yes.

Q. When it got warmer?

A. Yes.

Q. Was it a sunny day out?

A. Yes.

Q. And what did he say?

A. He disagreed with what I was wearing, didn't think it was appropriate, and –

THE COURT: The question was what did he say. Can you recall what he said, the words?

MS. FULLER: I don't like what you're wearing.

Q. Did he tell you to go home?

A. Yes.

Q. For what purpose?

A. To change.

Q. Where were you living at the time?

A. Milford, Pennsylvania.

Q. How far from Newark was Milford, Pennsylvania ?

A. An hour and a half.

Q. Did you go home that day?

A. No.

Q. What did you do?

A. I had pulled the coveralls back up and endured the rest of the day.

Q. ... [Y]ou mentioned that men wore tank tops to work, also?

A. Yes.

Q. To your knowledge were they sent home to change their clothing?

A. No.

When you are picking a jury, the jury is picking a lawyer.

6. Re-direct: cleaning up the mess.

Cross-examination with your client on the stand is always stressful for the lawyer, and you will pray that it ends quickly. During cross, think about re-direct. While defendant's lawyer often reads back to your client portions of her deposition to show that she has changed her story, you can do the same on re-direct to place the allegedly different testimony in context. I did this in the student bullying case. The deposition was unwieldy, as defendant's counsel returned to the same subject areas throughout the deposition. An issue in the case was whether plaintiff complained to school officials about the racial harassment. Since our client was still a teenager, he was not always a model witness. In one portion of the deposition, plaintiff did not testify to all the occasions he told the principal about the harassment. This testimony was helpful to defendant. In a later portion of the deposition, he testified that he told the principal about the harassment nearly every time someone called him a racial name. On cross-examination, defendant's counsel read

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to the jury the earlier portions of the deposition that helped defendant. This tactic on cross was intended to show that our client's deposition testimony differed substantially from his trial testimony that he told the principal about the harassment on a regular basis. On re-direct, I wanted to show the jury that our client was not inconsistent, and that his deposition testimony did in fact recall that he told the principal about the harassment nearly each time it happened. I read to the jury four or five pages of plaintiff's deposition for that purpose.

7. Your credibility makes a difference also.

There's an old saying: when you are picking a jury, the jury is choosing a lawyer. You are the jury's guide to the evidence. If the case turns on credibility, the jury has no objective way to know who is telling the truth. If the jury trusts you, it is more likely to trust your client. In the book, A Civil Action, Jonathan Harr chronicles a lengthy trial over whether groundwater poisoning in Woburn, Massachusetts had caused childhood leukemia. The plaintiff's lawyer was Jan Schlichtmann. When the jury began to deliberate, they were perplexed by the complexity of the issues:

> The day they began their formal deliberations, the clerk brought all the evidence up to the jury room – it took him several trips – and the list of questions that had been devised for the to answer. [Juror] Jean Cousley studied the questions in astonishment. And she wasn't the only one surprised by them. The others looked confused and perplexed, too. ... "Something must be wrong," said Cousley. "I can't understand how Mr. Schlichtmann could let this happen."

Juror Cousley sympathized with and trusted Schlichtmann. This means that Schlichtmann had done his job. You want the jury to trust you. One way to ensure the jury's trust is to conduct an orderly and efficient direct examination. This is why careful pre-trial preparation with the plaintiff is so important. And why a good outline that allows you to pace yourself and plan the sequence of questioning is so important. You also want your exhibits in order so that you are not fumbling around looking for documents when everyone in the courtroom is wondering why you cannot get your act together. Nothing annoys the jury more than a disorganized examination, where the lawyer cannot find exhibits or takes 10 seconds between questions, shuffling through his notes in order to find a good follow-up question. If you look like you know what you are doing, the jury will see you as a credible guide to the evidence. ■

Gender Pay Discrimination: Class Action Considerations

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Class actions in cases alleging gender pay discrimination raise a host of issues for the plaintiff's lawyer to consider. The following considerations are set-forth in this article.

1. Exhaustion and Tolling: The EPA claims do not require filing a charge with the EEOC or any other body, but the plaintiffs must individually opt-in. It is advisable where possible to negotiate a tolling agreement so other collective action members' claims are protected while the early stages of the case are litigated. Alternatively, consider case law allowing for equitable tolling. The Second Circuit has not yet considered equitable tolling in a collective action, numerous lower courts in this circuit have granted tolling on a collective-wide basis. *See*, *e.g.*, *Hart v. Crab Addison, Inc*., No. 13-CV-6458, 2015 U.S. Dist. LEXIS 9197, at *15-17 (W.D.N.Y. Jan. 27, 2015); *Flood v. Carlson Rests, Inc*., No. 14-CV-2740, 2015 U.S. Dist. LEXIS 6608, at *18-19 (S.D.N.Y. Jan. 20, 2015); *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, at 170-171 (S.D.N.Y. March 19, 2014); *McGlone v. Contract Callers, Inc*., 867 F. Supp. 2d 438, at 445 (S.D.N.Y. 2012); *Yahraes v. Rest. Assocs. Events Corp*., No. 10-CV-935, 2011 U.S. Dist. LEXIS 23115, at *4-9 (E.D.N.Y. Mar. 8, 2011); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, at 199-200 (S.D.N.Y. 2006); *Leon v. Pelleh Poultry Corp*., No. 10-CV-4719, 2011 U.S. Dist. LEXIS 118350 (S.D.N.Y. Oct. 13, 2011). Yet, this is something the defendant will hotly contest. By contrast, in a class action, a named plaintiff needs to file a class charge. Employers frequently challenge claims as going beyond the "scope of the charge," but courts tend to reject hypertechnical arguments so long as the employer is basically on notice. Note that whereas certain recent cases support the logical proposition that not every named plaintiff need file an EEOC charge, the issue is not settled. For a comprehensive discussion of this issue, *see Parras v. Bashsas', Inc*., 291 F.R.D. 360 (D. Az. 2013).

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2. Attacks on the Pleading: There really should not be a lot of motion practice on the pleadings in a civil rights case. Rule 9(b) is not an issue; no one can expect the plaintiff to have access to statistical results pre-data; we all know how to plead the claims, etc. But, as they say, there are a lot of shoulds in the world. In addition to a "scope of the charge" challenge as referenced above, you may see motions to dismiss class or collective action allegations (which courts often recognize to be premature), or motions under Rule 703(h). Judge Bianco, rejecting virtually all of these challenges, had a particularly useful discussion of Rule 703(h) in *Calibuso v. Bank of Amer.*, 893 F.Supp.2d 396 (E.D.N.Y. 2013):

> Defendants also argue that the plaintiffs' disparate impact claims against defendants' commission and distribution policies must be dismissed as a matter of law because they are production and merit based systems that are protected by Section 703(h) of Title VII. (Defs.' Br. at 5-6). In response, plaintiffs argue that Section 703(h) is inapplicable. (Pls.› Opp. at 5-9.) Specifically, plaintiffs argue that Section 703(h) of Title VII does not apply because «(1) BOA›s compensation and account distribution systems are not merit or production systems, and (2) Plaintiffs have adequately pled that the compensation system is intentionally discriminatory.» (*Id*. at 6.) For the reasons set forth below, taking the allegations in the third amended complaint as true, and drawing all reasonable inferences in plaintiffs' favor, the Court denies defendants' motion on this ground and finds that plaintiffs have adequately pled that the systems challenged are not merit or production based systems and, in any event, allege intentional discrimination.

1. Applicable Law

Section 703(h) of Title VII provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(h). "Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982). "Section 703(h) thus creates an exception to the general rule that ‹a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.›» *McReynolds v. Merrill Lynch & Co., Inc*., No. 11-1957, 694 F.3d 873, 2012 U.S. App. LEXIS 19033, 2012 WL 3932328, at *4 (7th Cir. Sept 11, 2012) (hereinafter «*McReynolds II*') (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). However, a compensation scheme is not protected under Section 703(h) unless it actually measures what it purports to measure. *See Guardians Ass'n of N.Y.C. Police Dep't Inc. v. Civil Serv. Comm'n*, 633 F.2d 232, 253 (2d Cir. 1980)

Class actions alleging gender pay discrimination raise a host of issues for the plaintiff's lawyer.

2. Application

As stated *supra*, plaintiffs argue that Section 703 of Title VII does not bar their claims that the compensation and account distribution polices are not merit or production systems and because they allege that the systems intentionally discriminate. Viewing the evidence in the light most favorable to the plaintiffs, the Court finds that plaintiffs have sufficiently alleged a disparate impact claim that is not barred by Section703(h) of Title VII.

As a threshold matter, this Court agrees with the plaintiffs that "[t]he cases BOA cites in its current motion to dismiss are also inapposite because in each of those cases the district court determined, with the benefit of a full evidentiary

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record at summary judgment, that the compensation system at issue measured what it purported to measure." (Pls.' Opp. at 8 (emphasis in original) (citing Defs.' Br. at 5).) At this stage of the litigation, the inquiry is whether the plaintiffs have properly alleged a plausible disparate impact claim that is not barred by Section 703 of Title VII, and the Court concludes that they have.

Plaintiffs have properly alleged that defendants' compensation and production based policies do not measure what they purport to measure. *SeeGuardians*, 633 F.2d at 253. For example, the third amended complaint alleges that:

Defendants further cause and compound the discriminatory effects of the commission grids by permitting deviations from the grid in favor of male FAs. These deviations result from, among other things, adjustments of payments, forgiveness of excess compensation . . . and negotiation with lateral recruits of guaranteed payout from the grid for a certain amount of time.

(TAC ¶ 55.) The third amended complaint further alleges that:

By using the tainted variable of past performance as a criterion for compensation and account distribution, Defendants further perpetuate the gender-based compensation disparities and create a cumulative advantage for male FAs based on systematically documented and unvalidated criteria that has an adverse impact on female FAs.

(TAC ¶ 66). Plaintiffs clearly state their allegation that the compensation and account distribution systems are not merit or production based systems in paragraph 77 of the third amended complaint which states: "Defendants' compensation and account distribution system are not justified by business necessity because they do not compensate FAs based on actual measure of performance." (TAC ¶ 77.) In sum, the complaint alleges that the criteria used by defendants to determine compensation and account distribution have a discriminatory impact on women and, while they appear to be facially neutral, through "unstated but officially sanctioned and ubiquitous exceptions driven by favoritism, not merit," (*See*Pls.' Opp at 7 (citing TAC ¶¶ 5, 52-58, 61-65, 66, 77)), and the use of tainted criteria, compensation and account distributions do not measure what they purport to measure.

In support of their argument, defendants recently submitted the Seventh Circuit's opinion in *McReynolds II*, as supplemental authority in support of their motion to dismiss. (Defs.' Notice of Supplemental Authority, Sept. 11, 2012, ECF No. 132.) In that decision, the Seventh Circuit affirmed the district court's dismissal of plaintiffs' disparate impact claims. *McReynolds II*, 2012 U.S. App. LEXIS 19033, 2012 WL 3932328, at *1. The Court held that "[a]s described in the complaint, the retention program awarded bonuses based on race-neutral assessment of broker's prior level of production, which suffices to protect the program under § 703(h) unless it was adopted with the intent to discriminate.» *Id*. However, unlike in the case at bar, in *McReynolds II*, the court concluded that "the production-credit system is about as direct a measure of production as one could imagine in the financial[] services industry, *and the plaintiffs do not suggest otherwise*. 2012 U.S. App. LEXIS 19033, [WL] at *5 (emphasis added). Moreover, in *McReynolds II*, the Court noted that "[n]owhere does the complaint allege that the formula is actually *applied* in a discriminatory manner — only that the ‹inputs› determining a broker›s production levels were themselves the products of past discrimination.» *Id*.

Here, as described *supra*, plaintiffs allege that the criteria relied upon by the compensation and account distribution systems are tainted, and result in discrimination against women. Accordingly, at this stage of the litigation, where the Court must take the allegations in the third amended complaint as true, and draw every reasonable inference in plaintiffs' favor, the Court finds that plaintiffs have sufficiently alleged that the compensation and account distribution systems are not merit or production based systems protected by Section 703(h) of Title VII. Moreover, as plaintiffs note, unlike *McReynolds II*, "[t]he female financial advisors in this lawsuit do *not* challenge the retention bonus. Instead, they challenge account distribution, teaming and partnership, and other facets of the compensation system, like in *McReynolds I*." (Pls.' Response to Defs.' Notice of Supplemental, Sept. 13, 2012, ECF No. 133 (emphasis in original).) Thus, this case is distinguishable from *McReynolds II* and, as discussed in detail *supra*, similar to *McReynolds I*.

Accordingly, plaintiffs have adequately pled their disparate impact claims in a manner that is not barred by Section 703(h) of Title VII. Therefore, the Court denies defendants' motion to dismiss and/or strike the class claims on this ground.

Judge Bianco had a particularly useful discussion of Rule 703(h) in **Calibuso v. Bank of America**

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3. Identifying Specific Practices: Particularly in the wake of *Wal-Mart v. Dukes*, the plaintiff should be mindful of the importance of identifying specific practices being challenged. Where possible, the statistical work in the case should model the effects of the practice. Attached to this paper is Magistrate Judge Francis' opinion in our two firms' *Chen-Oster v. Goldman Sachs* case, which, while not including an EPA claim, has an instructive and detailed treatment of the work of a statistical expert in a compensation gender case (in the context of rejecting a *Daubert* challenge to Plaintiffs' labor economist), and the other experts in the case (the Court also rejected a Daubert challenge to Plaintiffs' I/O Psychologist). The companion opinion in this case, unfortunately, was a report and recommendation to deny class certification on the basis that, while commonality was satisfied, the Court held that the absence of a current employee meant a (b)(2) class could not be certified. We have moved to intervene new plaintiffs and moved to reconsider, in part, the ruling. *See also, e.g., Stockwell v. City and County of San Francisco*, 2014 U.S. App. LEXIS 7694 (9th Cir. Apr. 24, 2014): The Ninth Circuit overturned the district court's denial of class certification in an age discrimination case, remanding the matter to the district court. The court concluded that "the officers have identified a single, well-enunciated uniform policy that allegedly generated all the disparate impact of which they complain: the SFPD's decision to make investigative assignments using theQ-50 List instead of the Q-35 List. Each member of the putative class was on the Q-35 List. Each suffered the effects of its elimination, whatever they were."

4. Other Expert Issues: As suggested above, the crucial expert for an EPA collective action and a Title VII pay case is the statistical expert. Other experts that have been used include I/O Psychologists and Sociologists. Although the *Dukes* Court was dismissive of social framework analysis to say the least, courts' treatment of this sort of work has not been uniformly negative. Some recent cases are discussed below:

a. *McReynolds v. Merrill Lynch*: In support of class certification of a class of African-American financial advisors at Merrill Lynch, Dr. Bielby (the same expert criticized by Justice Scalia in *Dukes*) issued an expert report that in which he went "into detail about specific features of the company's personnel policies and practices, and I explain how social science research can assist the court in understanding the factors responsible for the disparities in workplace experiences and outcomes of African American and non-African American FAs at Merrill Lynch." http://www.merrillclassaction.com/pdfs/DrBiebyExpRep.pdf. Dr. Bielby opined and concluded as follows:

> The materials I have reviewed show that African Americans do not differ from non-African Americans in the skills, abilities, and experiences required to be a successful FA and to be a successful manager. Yet, at Merrill Lynch, African American FAs earn substantially less than do similarly situated non-African Americans, and very few have advanced into the management ranks. In this report, I have relied on a large body of research by social scientists and management scholars that helps us understand how this situation came about and persists year after year. In particular, it provides a means for identifying specific features of Merrill Lynch's personnel policies and practices that create a "success-breeds-success" system within which African American FAs face growing obstacles to equal employment opportunity. The extremely low representation of African Americans in the workforce overall and at individual complexes contributes to isolation and exclusion from social networks, and is likely to result in them receiving less support and productivity-enhancing resources than their counterparts who are not African American. One very significant manifestation of this disadvantage is African Americans' limited opportunities to participate on FA teams. Another is an account distribution system that is easily "gamed" by the non-African American FAs who benefit most from it ….Merrill Lynch's racialized approach to business development is built upon cultural stereotypes, typecasts its African American FAs in a way that limits their opportunities to excel, and engages in racial profiling of its customers in a way that reinforces stereotypes. The system the company uses to promote FAs into its field management ranks uses materials based on racial stereotypes and includes discretionary and subjective features that are structured in a way that is reinforces and reproduces the racial composition and culture of the company's management ranks. The company's diversity programs, offices and initiatives have inadequate accountability and responsibility structures, and the company has chosen to decouple its diversity efforts from both its core operations and its legal obligations not to discriminate, in effect, choosing "symbol over substance." The company's policies and practices reinforce beliefs that its African American FAs fall behind because of their own personal failings and perceived client bias, which creates resistance to diversity interventions and reinforces the biases built into the company's cumulative advantage system. Far from being a colorblind meritocracy, race permeates policy and practice in a way that creates substantial obstacles for Merrill Lynch's African-American employees.

The District Court was unpersuaded by this component of the evidence on class certification, and critical of the companion statistical evidence. Of interest in Judge Posner's opinion reversing the denial of class certification in this case was his apparent lack of interest in the dueling experts at all.

According to Judge Posner's opinion, the company's teaming and account distribution policies were common, company-wide policies. His opinion did not

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rest on, or grapple with, the role of non-statistical experts in evaluating such common policies, at least for purposes of certification. *McReynolds v. Merrill Lynch*, No. 11-3639 (7th Cir. 2012).

b. *Ellis v. Costco*, 285 F.R.D. 492, at 520 (N.D. Cal. 2012) (finding social framework analysis persuasive given the distinguishable facts of the narrow case at issue; plaintiffs used a sociologist and defendant used an I/O psychologist). The court described the expert work at some length:

> In addition to the above-identified policies and practices, Plaintiffs contend through their sociological expert, Dr. Reskin, that Costco's culture fosters and reinforces stereotyped thinking, which allows gender bias to infuse the promotion process from the top down. *See* Reskin Decl., Docket No. 670, ¶ 9 (summarizing findings). Dr. Reskin conducted a social framework analysis, examining Costco's personnel and promotion policies and practices in the context of social science literature and her expertise in workplace discrimination and "organizational policies and practices that can mitigate conscious and unconscious stereotyping, automatic and conscious ingroup favoritism, and sex bias." Reskin Decl., Docket No. 670, ¶ 5. Such bias includes, as noted above, Plaintiffs' and Dr. Reskin's charge that the CEO and other top executives employ stereotyped thinking regarding women's roles in society. *See* Reskin Decl., Docket No. 670, ¶¶ 53-60 (citing testimony from CEO Sinegal and others that women's caretaking role causes them to be less interested in promotion opportunities, as well as other stereotyped assumptions about, e.g., women's ability to be forklift drivers). She concluded that "[c]entralized control, reinforced by a strong organizational culture, creates and sustains uniformity in the personnel policies and practices throughout Costco's operational units. This common culture is characterized by unwritten rules and informal, undocumented personnel practices featuring discretion by decision makers." Reskin Decl., Docket No. 670, ¶ 9. Dr. Reskin opined that these informal, yet cohesive, practices are "likely to be tarnished by biases that operate against women." *Id*. Dr. Reskin contrasted Costco's practices with the more formal practices that, social science research indicates, "sustain or reduce barriers to women's career success." *Id*. ¶ 10. Costco has rejected such policies.*Id*.
>
> The Court finds Dr. Reskin's testimony persuasive. It is consistent with and provides further support for Plaintiffs' claim that Costco operates under a common, company-wide promotion system. *See* P*rice Waterhouse v. Hopkins,* 490 U.S. 228, 235-36, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)(accepting expert testimony on gender stereotyping and its "likely influence[]" on partnership selection process).
>
> This evidence of corporate culture also underscores the fact that adjudication of Plaintiffs' claims will require answering common questions with respect to the class as a whole. In this regard, Defendant does not disagree — or at least, presents no evidence — that Costco has no strong corporate culture that guides managers' promotion decisions companywide. *See* Landy Decl., Docket No. 655, at 51 ("It is neither remarkable, nor the subject of **expert** opinion that Costco has a culture. Fact witnesses for Costco have repeatedly acknowledged and described the Costco culture."). To the contrary, CEO Sinegal and other Costco employees and documents place strong weight on Costco's culture as an important influencer for its promotion practices. … Defendant and its experts merely disagree with Dr. Reskin as to the characteristics of that culture. … In other words, Defendant disagrees as to "whether Costco does in fact have a culture of gender stereotyping and paternalism," an issue the Ninth Circuit explicitly held the Court need not resolve at the class certification stage. *Ellis II*, 657 F.3d at 983. While the Court finds Dr. Reskin's testimony persuasive for purposes of Rule 23(a) analysis, regardless of which party is correct on the merits, the content of the companywide culture is a common question amenable to resolution on a classwide basis. Similarly, Defense psychological expert Dr. Landy's attack on Dr. Reskin's testimony is unpersuasive. While Dr. Landy purports to highlight regional differences in HR and promotion practices, the variations he highlights are largely unconnected to the AGM and GM promotion process. *See* Landy Decl., Docket No. 655, at 44-47. Nor does Dr. Landy's testimony negate commonality. To the extent his collected quotes reveal certain collateral differences between regions (*e.g*., whether a region implements a Manager-in-Training program), such differences do not negate the overarching uniformity of the process, as well as senior management's involvement in that process, as discussed at length above. In addition, while Dr. Landy criticizes Dr. Reskin's description of Costco's culture, his argument challenges her conclusions on the merits about the characteristics and effects of that culture. *See* Landy Decl., Docket No. 655, at 53 ("What is missing from Dr. Reskin's observations about the Costco culture is any evidence that the culture is somehow pathological and devoted to discriminating against women. On the contrary, various depositions of Costco representatives and the exhibits to those depositions confirm an organization determined to directly address any possible barriers to the advancement of women and minorities."); *see also id*. at 53-58 (describing further the influential aspects of Costco's culture and concluding that their ef-

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fects are positive, not negative). Again, as to commonality, both sides do not dispute that there are policies and practices *common* to the class as a whole. *See* Landy Decl., Docket No. 655, at 69-89. Thus, the experts' dispute as to the merits and impact of Defendant's promotion policies merely confirm that such a dispute is one that has an impact on the class as a whole, and its resolution on a classwide basis is apt to drive the litigation.

The Court finds Plaintiffs' evidence of culture is persuasive in light of the CEO's admitted direct involvement in company promotion practices, the relatively high level of seniority for the positions at issue in this case, and the small number of top executives involved in GM and AGM recruitment and selection. However, the Court does not place undue or dispositive weight on this factor. Unlike in *Dukes*, the evidence of Costco's culture is just one component among many pieces of persuasive evidence of companywide practices and policies that support a finding of commonality. *Cf. Dukes*, 131 S. Ct. at 2553 (rejecting social framework analysis where it was "[t]he only evidence of a general policy of discrimination") (quotation marks omitted).

c. *Houser v. Pritzker*, 2014 U.S. Dist. LEXIS 91451, 123 Fair Empl. Prac. Cas. (BNA) 1334 (S.D.N.Y. July 1, 2014). In *Houser*, a discrimination case, the court certified a class of applicants for temporary jobs with the Census Bureau for the 2010 Census, when the Bureau's use of criminal background checks presented common questions. The court noted that the dispute between the I/O experts presented common questions:

This case also presents a common question as to whether the Census Bureau's allegedly discriminatory criminal background procedures were justified by legitimate business needs. To answer this question, the Census Bureau has submitted the expert report of Dr. James Outtz, an industrial-organizational psychologist, who defends the agency's hiring procedures on the grounds that they were necessary to gain public trust and minimize public safety risks. (ECF No. 202). The Plaintiffs, in turn, have submitted a report from their own industrial-organizational expert, Dr. Kathleen Lundquist, to dispute those defenses. (ECF No. 166, Ex. B). Once again, a single nationwide answer to this question seems likely.

In the end, though both sides have spent a great deal of energy arguing the validity of their experts' analyses, the Court need not resolve such "battles of the experts" at this juncture. The question at this preliminary stage of the litigation is not whether the challenged hiring procedures actually had a disparate impact or were justified by business necessity, but merely whether those questions can be resolved on a classwide basis. See In re Magnetic Audiotape Antitrust Litig., No. 99 Civ. 1580 (LMM), 2001 U.S. Dist. LEXIS 7303, 2001 WL 619305, at *4 (S.D.N.Y. June 1, 2001) ("[O]n a motion for class certification, the Court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact."); see also In re Aftermarket Auto. Lighting Prods. Antitrust Litig., 276 F.R.D. 364, 373-74 (C.D. Cal. 2011) (post-Dukes case concluding that courts "need not cho[o]se between experts" at the class certification stage because inquiry is limited to determining whether merits issues can be resolved through "generalized proof common to the class") (internal citations omitted). Although the experts obviously reach different conclusions regarding the merits in this case, the fact that both sides' experts are able to provide class-wide answers to the liability question suffices to satisfy the commonality requirement.

In reaching this conclusion, I am mindful that class certification questions often may overlap with questions related to the merits of plaintiffs' underlying claims, and that the Court's duty to perform a "rigorous analysis" of the issues pertaining to certification is not lessened by this overlap. Dukes, 131 S. Ct. at 2551-52 (quoting Falcon, 457 U.S. at 161). Nonetheless, a district court has the obligation to "assure that a class certification motion does not become a pretext for a partial trial of the merits," and thus "should not assess any aspect of the merits unrelated to a Rule 23 requirement." In re Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). Here, the evidence strongly suggests that the Plaintiffs' liability claims are capable of class-wide resolution. It therefore would be inappropriate for me to opine as to the validity of the experts' merits conclusions at this preliminary stage.

5. Timing of Filing Motions: While the above sections discuss the substance of what is included in, and drives, the class certification motion, it is worth noting that the stage-one certification of an EPA has a less stringent standard than a Rule 23 certification.

6. Settlement: As a practice pointer, if you are settling the EPA along with the Title VII, add language that each recovering class member is opting-into the collective action as well. ■

The Fluctuating Workweek and the Need for Second Circuit Clarification

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A client recently contacted our office upset because the more overtime hours he worked, the less money he was getting paid. He asked me, "How can this be legal?" The client was paid a salary and was paid overtime pay according the Department of Labor's coefficient table. He worked a regular schedule from 8 A.M to 6 P.M. five days a week, and would work extra hours as needed. His employer justified this method of payment because they claimed his hours fluctuated weekly in that the amount of overtime he worked every week changed.

According to the Department of Labor, the coefficient table provides a method to calculate overtime at half-time or half an employee's regular rate of pay. The coefficient table can be used to calculate overtime when the employee does piecemeal work, has a bonus, commissions, or fixed salaries for varying hours – meaning the fluctuating workweek.[1]

What is the fluctuating workweek?

The fluctuating workweek ("FWW") doctrine was first discussed by the Supreme Court in the seminal case, *Overnight Motor Transport Co. v. Missel*. In *Missel,* the Plaintiff was a rate clerk for the Overnight Motor Transportation Company.[2] He was not exempt from overtime because none of his duties involved the safety operation of a motor vehicle.[3] He was paid a fixed weekly salary, which met the minimum wage for the first forty hours he worked a week and time and half of the minimum wage for all the overtime hours he worked.[4] The District Court held that this salary satisfied the requirements of the Fair Labor Standards Act ("FLSA") because the employee was paid the minimum wage for all hours work, and time and half of the minimum wage for all overtime hours worked. The Circuit Court held that the plaintiff's salary did not satisfy the requirements of FLSA and required a hearing to determine the amount of wages owed to the plaintiff[5]

The Supreme Court ("SCOTUS") clarified that FLSA unambiguously requires overtime to be paid at time and half of the regular rate of pay, not the minimum wage.[6] It then grappled with what the regular rate of pay would be for an employee that works for a fixed weekly salary but has a varying number of hours worked each week. SCOTUS determined that the employee has a "regular rate of pay" in the sense that every week the employee has the same hourly rate of pay for all the hours the employee works in that week.[7] This hourly rate could be determined by taking the employee's salary and dividing it by the number of hours actually worked by the employee.[8] The court stated that the employee's regular rate of pay would change every week depending on how many hours the employee worked.[9] More importantly for the later discussion, the court acknowledged that this arrangement would provide the employee with a lower hourly rate of pay the more hours the employee worked; however, SCOTUS held that this was not contrary to the statutory requirements of FLSA.[10]

The application of this regulation in case law has been problematic. First §778.114 was passed without formal rulemaking, and therefore is not entitled to Chevron deference.[11] Second, in practice, the application of the FWW doctrine has brought to light two important issues that have yet to be addressed by the Second Circuit or the Supreme Court.

When do an employee's hours actually fluctuate for purposes of applying the FWW overtime method?

This seems like a fairly simply question but has been interpreted differently in courts across the circuits. The central issue is does the FWW method of overtime apply when the employee's hours change every week or does the FWW method only apply when the employee's hours are fluctuating under forty hours and above forty hours in a workweek?

The ambiguity in answering this question comes from the fact that the two sources that created the FWW doctrine, the *Missel* case and the DOL regulations, never explicitly addressed this question. In *Missel,* the facts only state that the employee averaged about 65 hours a week with a maximum of 80 hours ever in his first year, and worked a maximum of 75 hours in his second year.[12] SCOTUS acknowledged that the

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1 http://www.dol.gov/whd/forms/CoefficientTableWH-134.pdf

2 *Overnight Motor Transp. Co., Inc. v. Missel,* 316 U.S. 572 (1942).

3 FLSA has a motor carrier exemption which provides an exemption from overtime for employees who are (1) employed by a motor carrier (2) whose duties affect the safety of operation of motor vehicles in transportation; and (3) are not covered by the small vehicle exemption.

4 *Id*. at 574.

5 *Id*.

6 *Id*. at 578.

7 *Id*. at 580.

8 *Id*.

9 *Id*.

10 *Id*.

11 An oversimplified explanation of the Chevron doctrine is that a court in interpreting a statute must defer to an agency's interpretation of the statute from an agency rule so long as that agency rule is reasonable. Agency rules that are not passed according to formal rulemaking are not entitled to Chervon deference. A court may give weight to the agency's rules or regulations but is not required to defer to it.

12 *Missel*, 316 U.S. at 574.

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more the employee worked the less overtime money he or she would be entitled to; however, it stated that it was not an argument against the FWW method of overtime.[13] Additionally, the DOL regulation never defines what it means for an employee's hours to fluctuate. All the regulation states is that "typically, such salaries are paid to employees who do not customarily work a regular schedule of hours are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones."[14] But the DOL regulations by no means require that an employee's hours fluctuate both below and above forty hours per workweek.

Some district courts in the Second Circuit have used both law and policy to find that the FWW method of computing overtime can only apply to an employee that works weeks that fluctuate below forty hours and above forty hours.[15] These courts state that the language in the DOL regulation mandates this finding. More importantly, these courts found that policy dictates that the FWW half-time pay for overtime hours can only apply when the employee's hours fluctuate above and below forty per workweek. "For a fluctuating work week arrangement to make sense to both parties, employees should offset the relative loss from a grueling work week far above forty hours with the benefit of full pay for weeks that clock-in at less than forty hours. Otherwise, employees have not bargained for anything but decreasing marginal pay as they work longer and longer hours at work."[16] Logically, this argument seems to be the strongest in favor of requiring that an employee's hours must fluctuate below forty hours a week and above forty hours a week. Lastly, the District Court of Connecticut went back to the District Court's findings of fact in *Missel* and found that in *Missel* plaintiff's hours varied greatly day to day and he was even paid for weeks he did not work. Therefore, the District of Connecticut believes this interpretation is consistent with the holding in *Missel*.

It seems clear to me that the FWW method of calculating overtime at the half-time rate should only apply when the employee works weeks that fluctuate below forty hours and above forty hours. If an employee's hours only fluctuate in terms of how many overtime hours are worked it should be relatively simple for an employer to calculate an employee's regular rate of pay and use that regular rate of pay to give the employee overtime at time and half their regular rate. I was shocked, in my research, to find that some courts applied the FWW to employees that worked at least forty hours every work week and just had hours that fluctuated in terms of how much overtime was worked, or some courts did not address it at all. Thus, it is time for the Second Circuit to come back to the FWW issue, and clarify the answer to this question.

Should the Fluctuating Workweek apply to Damage Calculations in Misclassification Cases?

This is the most discussed issue in district court opinions on the fluctuating workweek, yet district courts within the Second Circuit are split on how to handle it. Some district courts have held that the FWW method of overtime can never apply when calculating damages when an employee has been misclassified, and other courts have held it can apply depending on the agreement between the employer and the employee.

Distinguishing between the two positions in the district courts requires a careful understanding of the two provisions that created the FWW doctrine – the *Missel* case and the DOL regulation. Courts that hold that the FWW can apply in misclassification cases depending on the agreement state that while the FWW method of overtime can never be used to calculate damages under the DOL regulation, the *Missel* holding still allows for it to be used in certain contexts. It is important to remind ourselves that DOL regulation was not passed by formal rulemaking, and therefore not given Chevron deference.

A key case that describes this distinction is *Klein v. Torrey Point Group*. In *Klein*, Judge Failla of the Southern District of New York states that overtime damages need to be calculated regardless of whether the employee's pay agreement violated FLSA or the DOL regulation.[17] Like in all overtime pay calculations and in *Missel,* the key question is how to determine the employee's regular rate of pay. She states that *Missel* tells us that in order to determine the regular rate of pay we have to look at the agreement between the employer and the employee.[18] If the employment agreement is to be paid as a lump sum for forty hours of work and no more payment or work, then the employee's regular rate would be calculated by diving their lump sum payment by forty.[19] When this is the employee's pay agreement their damages should be paid at time and half their regular rate.[20] However, if the employee's pay agreement is for a flat sum no matter how many hours the employee works, then the employee's regular rate is the lump sum divided by all hours the employee worked.[21] It is in this later arrangement that *Missel's* holding applies and damages should be calculated at the FWW overtime method of half-time for all hours above forty worked.[22]

The other district courts focus both on policy and the DOL regulation to determine that the FWW method of calculating overtime can never be applied to determine damages for a misclassification case. A straightforward reading of the DOL regulation makes it clear that the FWW half-time overtime pay should not be applied to misclassification cases. As the regulations require for the FWW to apply there? must be "a clear mutual understanding that a fixed salary is compensation (apart from overtime premiums) for the hours worked each

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13 *Id*. at 580.

14 29 C.F.R. §778.114(3).

15 *Costello v. Home Depot USA, Inc*., 944 F.Supp.2d 199 (D. Conn. 2013); *Hasan v. GPM Investments, LLC,* 896 F.Supp.2d 145 (D. Conn. 2012); *Spataro v. Government Employers Ins. Co*., 2014 WL 3890222 (E.D.N.Y. 20140.

16 *Hasan,* 896 F.Supp.2d at 150.

17 *Klein v. Torrey Point Group, LLC*, 979 F.Supp.2d 417 (S.D.NY. 2013).

18 *Id*. at 438.

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*.

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workweek, whatever their? number."[23] Courts have interpreted this to mean that the regulations require *both* clear and mutual understanding and contemporaneous overtime payments.[24] Logically if an employee is misclassified, the agreement between the employer and the employee does not include overtime. Therefore, there can be no clear and mutual understand that the employee will be paid this way if they have never contemplated overtime at all. Additionally, courts state that in a misclassification case there is no contemporaneous overtime payments, which fails the second requirement of the DOL regulations.[25]

Some Second Circuit district courts have gone beyond just the plain reading of the DOL regulations to reason why, even under *Missel* and the policy of the FLSA, the FWW method of overtime should never be used in a misclassification case. These courts argue that if the employee and the employer were to come to an agreement that salary is meant to cover all hours worked with no mention of overtime, the employee would be waiving his or her right to overtime. As we know, an employee cannot legally waive his or her right to overtime.[26] Additionally, these courts state that even though *Missel* does not explicitly address the issue, it mentions in dicta that the failure to include a provision about overtime in an employee's pay agreement was one of the reasons the court rejected the contract at issue in *Missel*. Therefore, the DOL regulation is in line with the reasoning in *Missel* by requiring that there must be a contemporaneous contemplation of overtime for the FWW to apply. Lastly, these courts reason that if damages were allowed to be assessed in misclassification cases by the FWW method of overtime it would violate the policy of FLSA itself. It would provide "a perverse incentive to employer to misclassify workers as exempt, and a windfall in damages to an employer who has been found liable for misclassifying employees under the FLSA."[27] Thus, the policy behind FLSA dictates that the FWW half-time pay for overtime cannot be used to calculate a misclassified employee's damages.

The FWW method of paying overtime at half the regular rate contains many interesting issues for us as advocates for employees. There has been a recent increase in district court cases in the Second Circuit discussing and applying the FWW. Some of these cases have only furthered the ambiguity in this field. As many of these district court cases have acknowledged, the Second Circuit has yet to address this issues but clearly needs to. ■

23 29 C.F.R. §778.114(1)

24 *Costello*, 944 F.Supp.2d 199, at *5.

25 *Id*.

26 *Id*. at *6.

27 *Id*. at *7.

The Effect Of Administrative Agency Interpretative Materials In Litigation

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Agency interpretative material often guides a party's conduct prior to litigation.[1] When litigation ensues, both sides searches for favorable agency interpretative materials to argue deference should be given to that interpretation.[2] However, interpretive materials are sometimes ambiguous and inconsistent. Two recent cases, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (Mar. 9, 2015) ("*Perez*") and *Ramos v. SimplexGrinnell LLP*, 740 F.3d 852, *cert. question answered by*, 24 N.Y.3d 143, *vacated and remanded by*, 773 F.3d 394 (2d Cir. Dec. 4, 2014) ("*Ramos*") involve the issuance of conflicting interpretative material by the United States Department of Labor ("DOL") and the New York Department of Labor ("NYDOL"), respectively. This article discusses the facts, holding, and litigation implications of *Perez* and *Ramos*.

Perez v. Mortgage Bankers Assn.

In *Perez*, the Supreme Court was confronted with the question of whether an agency, like the DOL, must use the Ad-

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1 Federal and state agencies frequently issue opinion letters and other documents interpreting statutes and regulations *See e.g*. Administrator Interpretations, Opinion Letters, Field Handbook Field Bulletins, N.Y. Department of Labor, *available at* http://www.dol.gov/whd/flsa/index.htm; Counsel Opinion Letters for Wage and Hour Law, Public Work Projects and Prevailing Wage, and Workers Adjustment and Retraining Notification (WARN)), U.S. Department of Labor, *available at* http://www.labor.ny.gov/legal/counsel-opinion-letters.shtm. In 2010, the U.S. Department of Labor Wage and Hour Division moved away from providing opinion letters responding to "fact-specific requests submitted by individuals and organizations" to Administrator Interpretation Letters that "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue." http://www.dol.gov/whd/opinion/opinion.htm.

2 Federal courts give three types of deference to agency interpretations. *Chevron* deference applies when an agency is charged with filing in gaps of a law by issuing regulations. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984). Such "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id*. *Auer* deference applies when an agency is interpreting its own legislative regulation and that agency's interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). *Skidmore* deference applies generally to an agency's rulings, interpretations, and opinions of statutes the agency is charged to enforce and "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co*., 323 U. S. 134, 140 (1944).

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ministrative Procedure Act's ("APA") "notice-and-comment procedures when it issues a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."[3] The case arose because Mortgage Bankers Association ("MBA") challenged 2010 DOL Administrator Interpretation finding the mortgage-loan officers to be nonexempt under the administrative exemption ("2010 Admin. Interp.") that conflicted with prior DOL opinion letters.[4] MBA argued that the 2010 Admin. Interp. was procedurally invalid in light of the D.C. Circuit's decision in *Paralyzed Veterans*, 117 F.3d 579 (D.C. Cir. 1997), which held that if "'an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish' under the APA 'without notice and comment.'"[5] The district court granted summary judgment against MBA, but the D.C. Circuit reversed and vacated the 2010 Admin. Interp. under the *Paralyzed Veterans* doctrine, noting that the DOL conceded a prior conflicting interpretation existed.[6]

The Supreme Court granted certiorari and reversed, holding that the *Paralyzed Veterans* doctrine contradicted the clear text of the APA's rulemaking provisions and imposed "an obligation beyond 'maximum procedural requirements' specified in the APA."[7] After examining the APA's text, the Supreme Court explained, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule . . . ."[8]

Perez's holding makes clear that an agency has the ability to issue conflicting interpretative materials without undergoing the procedural requirements of the APA. However, as discussed later, the Supreme Court did not analyze what deference to give the 2010 Administrator Interpretation and therefore the validity of the interpretation still remains an issue to be decided by the lower court.

Ramos v. SimplexGrinnell LLP

In *Ramos*, the Plaintiffs were workers in New York who "installed, maintained, repaired, tested, and inspected fire alarm and suppression systems in public and private buildings" for Defendant SimplexGrinnell LPP ("SimplexGrinnell").[9] In 2007, the Plaintiffs brought a lawsuit against SimplexGrinnell alleging a violation of New York Labor Law § 220 ("§ 200") and a third-party breach of contract claim for not being paid prevailing wages stemming back to February 2001.[10]

During the litigation, there was one-sided communications between SimplexGrinnell and the New York Department of Labor ("NYDOL") concerning what work was covered under § 220.[11] As a result of these communications, the NYDOL adopted and posted on its website documents provided by SimplexGrinnell outlining what work covered under § 200.[12] The documents did not include test and inspection work as being covered work.[13]

SimplexGrinnell's documents were subsequently removed from the NYDOL website and the NYDOL Commissioner issued an opinion letter on December 31, 2010 concluding that testing and inspection work was considered covered work subject to § 220 ("2010 Op. Letter"). However, the 2010 Op. Letter explained that because there had been "much confusion" as to the coverage of testing and inspection, enforcement with respect to testing and inspection work would be prospective only.

Discovery closed after the 2010 Op. Letter was issued, and subsequently both sides moved for summary judgment.[14] SimplexGrinnell relied on NYDOL December 31, 2010 opinion letter in its motion.[15] The district court granted SimplexGrinnell's motion for summary judgment, finding that deference was due to both the NYDOL's substantive interpretation and decision to enforce that interpretation prospectively.[16] The district court reasoned that "[t]here was nothing irrational or unreasonable about the Commissioner's decision to classify [testing and inspection] work as covered but to require that prevailing wages be paid only prospectively."[17]

On appeal to the Second Circuit, the court "held that the Department's 'substantive construction of the statute (as covering testing and inspection work)' is entitled to deference"[18] but "was in doubt" as to whether it should defer to the [NYDOL's] decision to apply the interpretation prospectively.[19] Instead of determining the issue, the Second Circuit certified the issue to the New York Court of Appeals, asking:

What deference, if any, should a

See AGENCY MATERIALS, next page

3 *Perez*, 135 S. Ct. at 1203.

4 *Id*. at 1205. "[T]he Department's 2010 Administrator's Interpretation concluded that mortgage-loan officers 'have a primary duty of making sales for their employers, and, therefore, do not qualify' for the administrative exemption." *Mortgage. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 201 (D.D.C. 2012).

5 *Perez*, 135 S. Ct. at 1205 (quoting *Alaska Professional Hunters Assn., Inc. v. FAA*, 177 F. 3d 1030, 1034 (D.C. Cir. 1999)).

6 *Id*. at 1205-06.

7 *Id*. at 1206 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U. S. 519, 524 (1978)).

8 *Id*. at 1206.

9 *Ramos*, 740 F.3d at 853-54.

10 *Id*. at 854.

11 *Id*.

12 *Id*.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*. at 854-55.

18 *Ramos*, 24 N.Y.3d at 146 (quoting *Ramos*, 740 F.3d at 856).

19 *Id*.

ANNOUNCEMENT

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> court pay to an agency's decision, made for its own enforcement purposes, to construe section 220 of the NYLL prospectively only, when the court is deciding the meaning of that section for a period of time arising before the agency's decision?[20]

The New York Court of Appeals "answered the [] question narrowly, holding that it 'will not give the agency more deference than it claims for itself.'"[21] The NYDOL in its amicus brief took the position that the prospective application of the interpretation of § 220 "was intended to apply only to [NY]DOL's own enforcement efforts" and not to the private contract litigation.[22] The New York Court of Appeals stated that it would not give the NYDOL agency more deference than it is asking for, which the Court explained is "inherent in the very idea of deference to an administrative agency that the agency has determined that its view of the law merits deference."[23] Applying the answer to the certified question, the Second Circuit vacated the dismissal of Plaintiffs' claims and remanded to the district court.[24]

Ramos is an example of both an agency having a conflicting interpretation with respect to the substantive interpretation as well as the scope of enforcement. While the New York Court of Appeals did not need to resolve whether the NYDOL's enforcement decision was entitled to deference, as discussed in the next section, it noted some skepticism to the contrary substantive and enforcement positions.

Litigation Implications

Although *Perez* and *Ramos* do not place limitations on an agency's ability to issue a conflicting interpretation, the cases discuss some inherent restrictions and effect of an agency's interpretations. First, an agency's interpretation, even if conflicting from a prior interpretation, does not amend the text of the statute or regulation it interprets. Second, both cases remind litigators that the courts ultimately decide what deference to give an agency's interpretation. Finally, *Perez* discuss two potential safeguards when an agency makes unilateral and unexpected changes in an interpretation that upsets reliance interests on the prior interpretation.

An Agency Interpretation Does Not Amend a Regulation or Law

An agency interpretation cannot amend the statute or regulation it interprets. The Supreme Court in *Perez* specifically rejected MBA's argument that the DOL's new interpretation "effectively amended" the regulation since the regulation had a prior, definitive interpretation.[25] The Supreme Court distinguished the terms "amending" and "interpreting" and noted MBA's inability to explain how the interpretation had amended the text of the regulation.[26] Additionally, the Supreme Court stated that MBA's amendment argument contradicted "the longstanding recognition that interpretive rules do not have the force and effect of law."[27] Thus, *Perez* reinforces that an agency's interpretative material cannot amend the regulation or statute it is interpreting.

Courts Determine What Deference to Give an Agency Interpretation

Whether a court will give deference to an agency's interpretation, especially one that conflicts with a prior interpretation, is ultimately the decision of the court based on factors such as the reasonableness of the interpretation and whether it comports with the text and legislative history of the statute or regulation it is interpreting.[28] *Perez* and *Ramos* both highlight this point.

In *Perez*, the Supreme Court noted that even where an agency interpretation receives deference, "it is the court that ultimately decides whether a given regulation means what the agency says."[29] In *Ramos*, the New York Court of Appeals noted that while was not reviewing the correctness of the assumption of the NYDOL that it may seek deference of a decision not to enforce administratively while renouncing that deference in private litigation, "the fact that [the court] will not give an agency more deference than it seeks does not mean that it cannot be given less."

Perez and *Ramos* are therefore a reminder that courts ultimately have the final determination on the whether an agency's interpretation will be given deference and this power can serve as a check on an agency's ability to issue an arbitrary or irrational conflicting interpretation.

Safeguards on Reliance Interests

The Supreme Court in *Perez* discussed two measures designed to protect reliance interests that are affected by unexpected changes in an agency interpretation.[30] First, the Supreme Court explained that a regulated entity would have a basis to challenge a new interpre-

See AGENCY MATERIALS, next page

20 .Id.

21 *Ramos*, 773 F.3d at 395 (quoting *Ramos*, 24 N.Y.3d at 146).

22 *Ramos*, 24 N.Y.3d at 147.

23 *Id*.

24 *Ramos*, 773 F.3d at 395

25 *Perez*, 135 S. Ct. at 1207.

26 *Id*. at 1207-08. The Supreme Court explained the difference in meaning between amending and interpreting as follows:

> The act of "amending," however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of "interpreting." Compare Black's Law Dictionary 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of" or "formally alter . . . by striking out, inserting, or substituting words"), with *id., at 943* (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words").

Id.

27 *Id*. at 1208.

28 *See e.g. Christopher v SmithKline Beecham Corp*., 132 S. Ct 2156, 2168-69 (2012) ("Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here. We instead accord the Department's [interpretation a measure of deference proportional to the interpretation a measure of deference proportional to the " 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.") (citation and quotation marks omitted).

29 *Perez*, 135 S. Ct. at 1208 n.4. The recent Supreme Court case of *Young v. United Parcel Service* is another example a refusal to apply deference. Slip. Op. at 16-17. The Supreme Court refused to apply the interpretation offered by the agency based on issues it found with the timing, consistency, and thoroughness of consideration of the agency's interpretation. *Id*.

30 *Perez*, 135 S. Ct. at 1209.

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tation as arbitrary and capricious if there is not "more substantial justification" for the change from a prior interpretation that has "engendered serious reliance interests."[31]

Second, the Supreme Court discussed statutory safe harbor provisions and how they can protect a regulated entity that has in-good faith relied on an agency interpretation.[32] The Supreme Courted explained that these safe harbor provisions "will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position."[33]

When an agency issues an interpretation that conflicts with a prior interpretation, the above two safeguards can serve as a basis to challenge a new conflicting interpretation or a means to protect against liability.

Conclusion

Perez and *Ramos* illustrate the substantial amount of litigation that can exist over the interpretations of a statute or regulation. While an agency interpretation may be helpful to as an initial guide to evaluate lawful conduct, attorneys should take into consideration an agency's ability to issue a conflicting interpretation of statutes or regulations and that ultimately a court will decide if an agency interpretation is correct. ■

31 *Id*. The same standard is required when there are changes to the factual findings that supported a prior interpretation. *Id*.

32 *Id*. The Supreme Court explained that these safe harbor provisions are evidence of an awareness by Congress that agencies "sometimes alter their views in ways that upset settled reliance interests" and are a means to protect regulated entities from liability when they in good-faith follow an agency's interpretations. The Supreme Court used as an example the Portal-to-Portal Act of 1947, which includes a provision that protects employers from liability if it "demonstrates that the 'act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation' of the Administrator of the Department of Labor's Wage and Hour Division, even when the guidance is later 'modified or rescinded.'" *Id*. (quoting 29 U.S.C.S. § 259(a), (b)(1)).

33 *Id*.