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Supreme Court Upholds Cat's Paw Liability

By Stephen Bergstein
steve@tbulaw.com

Making it a bit easier for plaintiffs to prevail in their discrimination claims, the Supreme Court holds that the employer may be liable even if the decisionaker did not harbor any discriminatory bias toward the plaintiff. This ruling sustains the so-called Cat's Paw theory of discrimination.

The case is Staub v. Proctor Hospital, decided on March 1. In this case, the plaintiff sued under USERRA, the law that prohibits discrimination against employees with military obligations. Two supervisors made it clear they did not like Staub's military commitments, and they prepared reports that criticized his violation of company policy. Staub argued at trial that these reports were false. The decisionmaker terminated Staub's employment, in part, because of these negative reports. Although the jury found in Staub's favor, the Seventh Circuit threw out the verdict, holding that the nondecisionmaker supervisors did not exercise "singular

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Corporate Charades

By Anne Golden
(ag@outtengolden.com)

When corporations play games with employees, the employees do not have fun. We are talking about corporate policies and practices that may appear superficially neutral or even employee-friendly but turn out to be unfair and harmful to our clients' interests. This article is part of a two-part series on corporate gamesmanship. Part I outlines some of the charades that we have seen played to our clients' detriment, in which employers make the rules, change them at will, and always win. Part II will cover some strategies for employees and their attorneys to use when encountering these charades. It will be published in the next *New York Employee Advocate*.

1. Administrative Leave. Many employers use paid or unpaid administrative leave to remove a "problem employee" from the workplace, often before firing him. This may occur if the employee has allegedly violated the company's code of conduct, for example, or if someone has lodged a complaint against the employee. The employee sits at home while the company in theory decides on next steps.

Collecting a paycheck without having to work may look employee-friendly, even generous, and being out of the fray can come as a relief. The trouble starts once the employee is offsite. The corporation starts snooping around her cubicle, computer, and emails, without her knowledge, consent, or involvement. Once the company has built a case against the employee, it informs her, often by telephone or even email, that she is being fired. Meanwhile, the leave can drag on for weeks, marginalizing the employee, causing speculative gossip, and destroying all chance of mounting a defense. Out of contact with colleagues and without access to the workplace, the employee is vulnerable. She never returns to work, often has to fight to get severance, and may be denied unemployment benefits and have to appeal.

2. HR "Investigations." When an employee makes a complaint to Human Resources, HR usually promises to investigate. But when HR is conducting an investigation, it has a vested interest in establishing that the company's policies are fair and its practices legal, and that nothing bad happened – in fact, the employee who complained is a problem. HR investigators are often coached by management counsel on whom to question, what questions to ask, and how to limit the scope of the investigation. We have never seen an investigative report that concludes that a law was violated, that illegal discrimination or harassment has occurred, or that an actionable hostile environment existed. It is not in the employer's interest to issue such a report. HR is under intense pressure to minimize the complaint and attribute bad conduct to an isolated incident, a rogue manager, or miscommunication. It can be a hugely frustrating process for the employee who filed the complaint.

3. Investigations by Counsel. When the facts of an employee complaint are

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The NELA/NY
Calendar of Events

NELA Nite
6:30 – 8:30 pm
Wednesday, April 13
3 Park Avenue – 29th Floor
(Hosted by the Gender Discrimination Committee)
Save the Date

Executive Board Meeting
Wednesday, April 27
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome)

NELA Spring Conference
Friday, May 20
8:45-5:15 pm
Yale Club of NYC
(Details to follow)

NELA Nite
6:30 – 8:30 pm
Wednesday, June 8
3 Park Avenue – 29th Floor
(Advocating for Employees While Keeping Your Law License-Part II)
Save the Date

Executive Board Meeting
Wednesday, June 15
6:15 pm
3 Park Avenue, 29th floor
(All members in good standing are welcome)

NELA National Convention
June 29-July 2
The Marriott New Orleans
Save the Date

NELA Fall Conference
Friday, October 21
8:45-5:15 pm
Yale Club of NYC
Save the Date

NELA Fourteenth Annual Gala Event
Thursday, November 18
Club 101
Mark Your Calendar

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(212) 317-2291
Fax: (212) 977-4005
3 Park Avenue, 29th Floor
New York, NY 10016
E-mail: nelany@nelany.com
Editors: Stephen Bergstein
Jonathan Bernstein
Molly Brooks

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President's Column

by Darnley D. Stewart,
President, NELA/NY,
dstewart@gslawny.com

WHAT WOULD MARGARET MCINTYRE DO?

A couple years ago, in a very contentious case against a certain unnamed law firm, I said to a soon-to-be partner at that firm while in the midst of a heated argument, "Barry (the names have been changed to protect the guilty), your problem is that you are so full of sh^%t." At this point, I was trying to aggressively prosecute the case while simultaneously trying to settle the case in front of Judge Ellis. A few days later, Barry threatened to tell Judge Ellis that I called him a "piece of sh^%t." At this point, I had to say to my adversary: "I did NOT call you a piece of sh^%t. I said you were full of sh^%t." Anyway, the case settled nicely, and my outburst was no harm no foul. However, depending on the judge, it could have been a problem and, in any event, it was nasty and made me feel bad afterwards.

There has been a lot of talk in the weeks since the shootings in Tucson about civility in political debate. In fact, the University of Arizona has just established the National Institute of Civil Discourse. I can hardly imagine receiving a certificate or degree in civil discourse, but I do agree that civility matters.

First, economists note that civility causes society to work more efficiently -- with fewer "transaction costs" – because there is less unnecessary conflict and disruption. The same is true in our cases. Think of how much petty motion practice and other unnecessary costs arise out of simply not getting along with our adversaries. In the instance I related above, my comments may have worked against my client's interest had they come into the negotiations with the judge. They also may have worked against my own self-interest in that it is unlikely I will ever get a referral from that now-partner or his firm because of my lack of professionalism in dealing with him.

Beyond that, however, civility is a moral virtue in and of itself. We feel better about ourselves when we offer a seat to someone else on the subway that we'd really prefer taking. Conversely, we ultimately feel badly when we say, for instance, that another is full of sh^%t, notwithstanding how good and right it might feel at the moment.

We now have more members in our organization than we have ever had. Our members include all kinds of lawyers with very different ideas about things. Conflict necessarily arises out of different ideas, but conflict does not mean we stop respecting each other and each other's opinions. As the President said in his speech after the shootings in Tucson on January 12, when we discuss difficult issues, "let each of us do so with a good dose of humility….let us use this occasion to expand our moral imaginations, to listen to each other more carefully, to sharpen our instincts for empathy, and remind ourselves of all the ways our hopes and dreams are bound together."

I called this column "What Would Margaret McIntyre Do?" not because Margaret is the nicest person I know, but because Margaret is someone known in our organization whom I have never heard speak an uncivil word even in discussing contentious issues. She is certainly not the only person who fits that bill, but she came to mind first. So, before you tell your adversary that he's full of sh^%t, or haul off and post a nasty or sarcastic email to the listserv, stop and think, "WWMMD?" We need to remember that our hopes and dreams are bound together, and we all want the same things for ourselves and our clients. It is not always easy to be civil but it is the right thing.

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particularly damaging or senior managers are implicated in violating employment laws or important company policies, employers often bring in outside counsel to conduct the investigation. HR's hope is that the attorney-investigator can cloak the investigative process in the attorney-client privilege, the work product doctrine, or both.

Of course an attorney-investigator is actually a fact witness and should be subject to examination. Yet even employers who are savvy on this point may still prefer to have attorneys conduct difficult investigations, because attorneys know how to limit the employer's legal exposure by the questions they ask and the answers they obtain. An attorney's investigation is more focused on providing a defense to the employer rather than uncovering any wrongdoing. The employee who made the original complaint will probably never know what happened in the investigation, and the company has no legal duty to tell her. Ironically, the company is unlikely to discipline or fire the perpetrator unless and until the employee who complained has settled her claim. This is because discipline or termination would look like an admission that the perpetrator did something very bad, and because the company wants to keep him under its control in case of litigation.

4. Performance Improvement Plans (PIPs). Employers use PIPs to document employee performance deficiencies. They are supposedly a neutral tool to address and improve employee performance. In reality, a PIP is often created after the manager has asked to fire the employee and HR and/or counsel have insisted on documentation to support the decision.

The PIP is a perfect tool to "paper" the employee's file. It also puts the employee on notice that her job is in jeopardy. First, the employee's manager creates a set of objectives that the employee must achieve by a certain deadline. The objectives are typically unrealistic (e.g., increase sales by 25% in two months) or impossible to measure (e.g., improve client satisfaction). It does not matter in most cases what the objectives are, because too frequently, no one expects the objectives to be met within the PIP deadline, usually within 90 days.

Once placed on a PIP, the employee is under unbearable scrutiny. Her manager will hold frequent meetings with her to review the status of each PIP item. It is not surprising that many employees quit because of high levels of stress induced by a PIP. PIPs are simply a nightmare for employees.

5. "Open Door" Policies. Employees are encouraged and sometimes required to report complaints and concerns up the management chain. One such policy, the "Open Door Policy," states that every manager from the mailroom supervisor to the CEO is open to employee complaints. This is presented as a positive for employees – their concerns and opinions appear to be valued. However, the purpose of the policy is not to solve the employee's problems but to uncover risks to the corporation and find out what the employee knows and what evidence he has. The employee providing information to management gets no information in return. In fact, he may never know what happened to his complaint. Managers are given no special training on handling these complaints or reports. The employee is particularly vulnerable if he is a whistleblower or if the report concerns his supervisor, because the person who received the complaint either goes directly to HR or already works for HR. Retaliation is a very real possibility.

"Performance Improvement Plans are supposedly a neutral tool to address and improve employee performance. In reality, a PIP is often created after the manager has asked to fire the employee and HR and/or counsel have insisted on documentation to support the decision."

6. Workplace Dispute Resolution ("WDR"). Employers often institute workplace dispute resolution programs. They are presented as a corporate benefit to encourage employees to resolve their disputes early and amicably. They are not exactly a benefit, at least not to employees.

WDR programs often have a four-step process: (1) the employee complains to her manager; (2) the employee complains to her manager's manager; (3) the employee and employer participate in nonbinding mediation; (4) the employee and employer participate in mandatory arbitration. WDR programs are not voluntary. To remain employed, the employee must sign a form acknowledging her agreement to participate.

On its face, WDR looks like an opportunity for the employee to have her claims heard conveniently and at minimal cost and disruption. Often employers pay most or all of the cost of participation; some even pay a portion of the employee's attorney's fees.

However, we have encountered the downside of these programs. The employer controls the process and can reject claims that it considers improper or untimely. The employer decides when a claim has been resolved, whether the employee can advance to the next level, and whether the offered relief meets the employee's demand.

The program sets strict deadlines for the employee's submission of a complaint or a rebuttal, and appears to set equally strict deadlines for the company's responses. But once an employee files a complaint through the program,

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The Medicare Secondary Payer Statute — An Introduction

John A. Beranbaum
(jberanbaum@nyemployeelaw.com)

The Medicare Secondary Payer (MSP) statute, 42 U.S.C. § 1395y(b), guarantees that Medicare will be a "secondary" payer whenever a Medicare beneficiary has another primary source of medical coverage. In enacting the MSP, Congress intended in particular that workers compensation, not Medicare, be the primary source of health coverage for injured workers.

At this point, the MSP is still peripheral to our practice as plaintiffs' employment lawyers. For the most part, the statute will concern us only when our client simultaneously brings an action directly against the employer and pursues a workers compensation claim. Most often this will occur when an employee has suffered such emotional distress from the employer's wrongful conduct that she has a claim for a compensable injury under the workers compensation laws. Workers compensation disputes between claimants and insurers frequently are resolved through settlements that provide for a lump sum payment meant to satisfy the claimant's claims for future benefits, including future medical care related to the workplace injury. Relying on the authority of the MSP, Medicare will review the workers compensation settlement or award to assure that the carrier has assumed responsibility for the claimants' medical care for the workplace injury and that Medicare's role is strictly secondary.

Conditional Payments

Medicare is the federal health care program that provides medical coverage to individuals over the age of 65, or under 65 who have received Social Security Disability benefits for at least two years. As noted, under the MSP, Medicare is precluded from paying for a beneficiary's medical expenses when payment "has been made or can reasonably be expected to be made under a workers' compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance."[1]

If a workers compensation claim is disputed, the claimant will not be able to receive medical coverage from the carrier pending the dispute. Assuming the claimant is eligible, he or she will need to rely on Medicare coverage while awaiting the disposition of the workers compensation claim. In such a situation, if the medical services sought by the claimant are reimbursable under Medicare rules, the agency will make "conditional payments" claimant's medical providers, subject to later recovery if there is a subsequent workers compensation settlement or award.[2]

The workers compensation claimant, carrier, and even the parties' attorneys have an affirmative duty to protect Medicare's interests. The workers compensation settlement must provide for the reimbursement of conditional payments to Medicare. If Medicare is not reimbursed its conditional payments prior to the disbursement of the settlement funds, the agency may terminate the claimant's future Medicare coverage or have his or her Social Security Disability benefits offset by the amount of Medicare benefits received. Medicare also has the option of bringing a legal action, and seek double damages, against the insurer for not assuming primary coverage.[3]

Medicare Set-Asides

When a workers compensation settlement or award has been achieved, and the parties anticipate that a portion of the settlement or award will be used to pay for the claimant's future, workplace injury-related medical expenses, the parties must take into account Medicare's interests. This is done by carving out a Medicare Set-Aside (MSA) from the settlement or award for the payment of future medical expenses.

To establish a MSA, the parties must estimate the cost of the claimant's future injury-related medical expenses, and the claimant must agree to "set-aside" that amount of money from the settlement to pay for future medical expenses relating to the workplace injury.[4] In order to determine the amount of the MSA, the parties need to consider such factors as the claimant's past course of

See MEDICARE, next page

"At this point, the Medicare Secondary Payer Statute is still peripheral to our practice as plaintiffs' employment lawyers. For the most part, the statute will concern us only when our client simultaneously brings an action directly against the employer and pursues a workers compensation claim."

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medical treatment, current condition, future medical needs and life expectancy. The general standard for calculating a set-aside is a "reasonable allocation."[5] There are vendors available that specialize in preparing MSAs.[6] The claimant may set-aside the money by making a lump sum or structured annuity payment to an account from he or she will pay the medical providers. Only after the claimant has exhausted the MSA funds, will Medicare then pay medical expenses related to the injury.

Not all settlements or awards require a MSA. A MSA is required where the settlement is greater than $25,000 and the claimant is already a Medicare beneficiary, or when the settlement is greater than $250,000 and the claimant is reasonably expected to be on Medicare within 30 months after the settlement.[7]

There is no law or regulation that authorizes the CMS to approve a parties' proposed MSA. Nonetheless, Medicare has taken the position that it may disregard any settlement that, in the agency's view, does not protect its interests. The parties, therefore, ordinarily present their proposed MSA to the CMS for its approval. The earlier the better. It is not uncommon for settlements to be delayed while the parties' await CMS approval. Further, if CMS does not approve the proposed MSA, the settlement may be in danger of falling apart.

Where a settlement does not include a MSA, the Center for Medicare and Medicaid Services (CMS), the entity in charge of administering Medicare, may treat the entire settlement as being for the payment of future medical expenses, and not pay injury-related medical expenses until all of the settlement proceeds are exhausted. Alternatively, the agency may terminate the claimant's eligibility for Medicare.[8]

Are MSAs Required in Third-Party Actions Against an Employer?

As of now, the parties to a lawsuit or dispute directly between the employee and employer are not required to take into account Medicare's interest by establishing a MSA as part of a settlement or judgment. Plaintiffs' personal injury attorneys, who are more versed in the world of MSA than plaintiffs' employment lawyers, are concerned that in the future CMS will extend the MSA requirement to third-party liability actions, which would include employment actions.[9]

Notably, Medicare has no statutory or regulatory authority for extending the MSA requirement to third-party actions. But, for that matter, Medicare also lacks statutory or regulatory authority to require MSAs, and their approval by the CMS, in Workers Compensation cases. Thus, the absence of legal authority will not necessarily stop CMS from requiring MSAs in employer-employee settlements and judgments, and the temptation to do so will be keener as Medicare funding becomes tighter.

The ABA has expressed concern about the MSP statute being used by Medicare to require CMS-approved MSAs without proper authority. The ABA has observed that the CMS' MSA and approval requirements of workers compensation settlements, "has led to unprecedented disruption and, confusion among practitioners, tribunals, employers, claimants and payers."[10] The ABA is supporting legislation to establish clear standards for MSAs and CMS approval. Any such legislation will likely also determine whether the MSA process will be required in third party and employment actions.

Where a client's employment lawsuit proceeds in tandem with his or her workers compensation claim, for instance, in a case of severe sexual harassment, the employment lawyer must be attuned to the MSA requirement, if for no other reason than that it has the distinct potential of obstructing and delaying the settlement. This brief introduction touches on the complexities of MSAs, but should the CMS extend its reach to employment lawsuits, practitioners will need to become well versed in them. ■

End Notes

1. 42 U.S.C. § 1395y(b)(2); § 1862(b)(2)(A)(ii).
2. 42 U.S.C. § 1395y(b)(2)(A) and (B)(i); 42 C.F.R. § 411.24(2)(h).
3. 42 C.F.R. § 411.24(g).
4. Voelker, James, "Medicare Secondary Payer Statute, Jan. 21, 2006, Peoria County Bar Assn., 2006 Continuing Legal Education Series.
5. Garretson, Mathew, "Making Sense of Medicare Set-Asides," Trial Lawyers Resource Center, www.tlrcblog.com.
6. See, e.g., Medval; EPI MediSolutions.
7. 42 C.F.R. § 411.46.
8. 42 C.F.R. §§ 411.24(g); 411.50.
9. See Gilbert, Richard, "Medicare 'Set-Aside' Requirements in Third Party Liability Cases; Panic: No/Prepare: Yes," June 5, 2009. http://www.rgilbertadr.com/medicaresetasides.html.
10. ABA, "Health Care Law: Medicare Set-aside Process in Workers' Compensation Cases," http://www.abanet.org/poladv/priorities/medicaresertaside/.

ANNOUNCEMENTS

Save the Date!

NELA'S Spring Conference is on Friday, May 20th, at the Yale Club of NYC. You can look forward to interesting and informative panels – so mark your calendars! The brochure will be mailed shortly with all the details.

We are excited to announce the formation of the NEW LAWYERS COMMITTEE- co-chaired by Karen Kranson & Delyanne Barros. The committee is geared to lawyers who have been in practice for under seven years. Karen & Delyanne have great plans for this committee. Keep an eye out for e-mails announcing their events.

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she may have to wait long past the company's "deadline" to get a response.

If the parties advance to mediation, the employee is at a disadvantage with the mediator because the employer pays the mediation fees and is often a repeat customer. Finally, mandatory arbitration means the employee loses her right to a jury trial. Accordingly, WDR is not employee-friendly. It wears down employees, who eventually give up on the process and walk away empty-handed. Often they simply resign, which is the best-case scenario for the employer.

7. Ombudspersons. Many corporations promote an ombudsperson as an employee advocate – a friendly stranger to whom employees can turn for confidential help and advice. Theoretically, this is a good idea. True ombudspersons are independent of corporate management and of HR. Ideally they report only to the CEO and never divulge any individual employee information, because they are trained to hold true to the tenets of their profession – independence, neutrality, and confidentiality.

The problems arise when corporations designate ombudspersons but fail to grant them the independence, neutrality, and confidentiality essential for their roles. Some ombudspersons wear two hats – HR generalist and ombudsperson. They are not true ombudspersons, because they lack independence, may not be neutral, and cannot protect confidentiality. Yet employees can be lulled into believing they are in a safe place in their offices.

8. Anonymous Employee Hotlines. Many employers widely advertise hotlines where employees can lodge complaints or report wrongdoing anonymously. Employees may not realize that someone in HR or Legal receives and acts on these hotline reports. Although the individual's name is not stated directly, often the reports are so fact-specific that it is not difficult to determine who made the complaint. There is always a risk of harassment and retaliation inherent in calling the hotline.

9. Severance Plan Appeal Process. An employee who challenges her severance package or challenges the employer's denial of severance may be diverted by HR into the appeal procedure in the corporate severance plan. The purpose of an appeal procedure is to shift the risk of interpreting the severance plan from HR to a severance committee, usually a group of managers with no expertise in severance. The employee, already fired and given only 21 or 45 days to sign a severance agreement, is given a deadline to file her complaint. The employer can often take months to respond, so the employee has to be ready to lose the severance package in order to pursue her claim.

Although the severance committee has power, it will take advice from HR and Legal. Virtually always, the severance committee merely rubber-stamps the company's original severance decision. The process for most employees is a big waste of time. By the time the severance committee makes its decision, the employee is unemployed and desperate to accept what is offered.

10. Employee Assistance Plans (EAPs). Employers offer EAPs as a supposedly confidential employee counseling service. When employers lay off employees, they include information on EAP services and encourage employees to contact the EAP if they are distressed (as of course they are). But the EAP vendor has a contract with HR, and it often provides information to HR about users of its services, unbeknownst to the users. Therefore anyone who uses the EAP must recognize that it cannot really be trusted. Even if the literature says its services are confidential, meetings with an EAP counselor may become part of the company's records and be offered in evidence at trial.

"Anyone who uses the Employee Assistance Plan must recognize that it cannot really be trusted. Even if the literature says its services are confidential, meetings with an EAP counselor may become part of the company's records and be offered in evidence at trial."

11. Outplacement. Employers offer outplacement services to laid-off employees as a severance benefit. Indeed, some employees benefit from outplacement, where they can polish their resumes and develop a job search plan.

The trouble is that outplacement vendors have contractual agreements with the employer, not with the employee using the service. We have found that outplacement vendors often report on employee usage of the services and in one case provided evidence that an employee was breaching her non-solicitation agreement. Again, employees cannot trust outplacement; if they use the service, they should be on their guard.

These are just a few of the troublesome games employers play. We would love to hear about your experiences with these corporate charades. Stay tuned for Part 2 of this series, where we discuss strategies for beating employers at their own game. ag@outtengolden.com ■

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influence" over the termination decision.

The Supreme Court rejects the Seventh Circuit's narrow standard and sets forth the following rule: "if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, then the employer is liable under USERRA." This holding will certainly apply under Title VII and the Age Discrimination in Employment Act, among other employment laws.

First, what does Cat's Paw mean? It derives from one of Aesop's fables, where "a monkey induces the cat by flatter to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." The Cat's Paw theory recognizes that many workplaces have multiple decisionmakers and that supervisors with discriminatory animus may influence an otherwise neutral final decisionmaker. That nefarious influence allows the plaintiff to win.

But, read closely, this decision requires the plaintiff to show that the biased supervisors intended that the plaintiff suffer an adverse employment action. The Court writes: "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did cause, an adverse employment action." This rule compliments the Court's observation that "when a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision; but it seems to us a considerable stretch to call it a 'motivating factor.'" To win under the Cat's Paw, the plaintiff has to show the biased supervisors used their influence on an unsuspecting decisionmaker to get the plaintiff fired (or demoted).

Confirming that the lower-level supervisor's discriminatory actions may be imputed to the company only when the supervisor intended that the plaintiff suffer an adverse action, analyzing the Cat's Paw rule to the evidence, the Supreme Court finds that the Seventh Circuit should not have vacated the verdict because there was evidence that the two supervisors who disliked Staub's military obligations and wrote up negative reports about his employment "had the specific intent to cause Staub to be terminated" based on testimony that they wanted to "get rid of" Staub. The Court concludes that "a reasonable jury could infer that [the supervisor] intended that Staub be fired."

In the Second Circuit, relevant language in this area reads like this: "We recognize that the impermissible bias of a single individual at any stage of the promoting process may taint the ultimate employment decision in violation of Title VII. This is true even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the promotion process." Bickerstaff v. Vassar College, 196 F.3d 435, 450 (2d Cir. 1999). This language may run afoul of the new rule set forth in Staub, which requires more than just a discriminatory link in the chain leading to the plaintiff's termination. ■

The New NYCHRL Sexual Harassment Standard

Clif Bennette
(cbennette@optonline.net)

The most recent interpretation of New York City's Restoration Act1 makes it easier for employees to win sexual harassment claims, requiring a more liberal and separate construction of the New York City Human Rights Law ("NYCHRL") than state and federal law.[2] For example, questions of an alleged harassment's "severity" and "pervasiveness" are now only relevant to consider the scope of permissible damages, not the question of underlying liability. *Williams* at 76. In fact, the NYCHRL only requires that a plaintiff show "more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." *Williams* at 80.

In *Diaz*, the court found that "petty slights and trivial inconveniences" are not actionable.[3] Indeed, the court added that "the law cannot operate as a "general civility code" *(Williams* at 79). Instead, "liability should be determined by the existence of unequal treatment."[4]

However, even though employees must prove that any claimed harassment rises above the level of "petty slights," the new threshold for a claim is considerably lower than the former "severe" or pervasive" standard. The *Hwang* court found that hostile work environment claims should "be construed more broadly than federal civil rights laws and the New York State Human Rights Law"[5] to accomplish the "uniquely broad and remedial purposes" of the NYCHRL. *Williams* at 74 - 75. To that end, courts must conduct an "independent liberal construction analysis" of claims brought under the NYCHRL. Id. at 66.

The Second Department has also acknowledged the more liberal standard in dictum,[6] and one Kings County Supreme Court Justice has held that Williams is binding on lower courts in the Second Department unless that department reaches a contrary construction of the NYCHRL.[7]

Similarly, the Second Circuit has endorsed the *Williams* standard stating that the legislative intent animating the Restoration Act is to abolish "parallelism" between the NYCHRL and federal and state anti-discrimination law. It added that *there is now a one-way ratchet*: Interpretations of similarly worded provisions of New York State or federal statutes may be viewed "as a *floor* below which the NYCHRL cannot fall." (emphasis added).[8]

The bottom line is, sexual-harassment claims that rise above the "petty slights and trivial inconveniences" threshold, put employers in danger of liability. ■

End notes

1 Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005) ("Restoration Act").

2 *Williams v New York City Hous. Auth.*, 61 A.D.3d 62, 66 (1st Dept 2009) (*"Williams"*).

[Note: The LEXIS pagination used here is subject to change pending release of the final published version.]

3 *Diaz v. The Cayre Group Ltd., et al.*, 2009 NY Slip Op 32922U at 8, citing Williams at 80 ("Diaz").

4 *Selmanovic v. NYSE Group, Inc.*, 2007 WL 4563431, 4 (S.D.N.Y. 2007).

5 *Hwang, v. DQ Marketing and Public Relations Group*, Supreme Court of New York, N. Y. County NY Slip Op 32387U at 14; 2009 N.Y. Misc. LEXIS 5581("*Hwang*").

6 *Barnum v. New York City Transit Authority*, 62 A.D.3d 736, 739, 878 N.Y.S.2d 454, 456 (N.Y.A.D. 2d Dep't 2009) ("the current liberalized standards of interpretation (see. . . . Local Civil Rights Restoration Act. . . .)").

7 *Lampner v. Pryor Cashman*, 10894/07 Nov. 6, 2009 (Law Journal 11/12/09) (available at http://docs.google.com/View?id=dmnhqtn_136f2njv9dt).

8 *Loeffler v. Staten Isl. Univ. Hosp.*, 582 F.3d 268, 278 (C.A.2 N.Y. 2009) citing *Williams* quoting Restoration Act §1.

Our Condolences to Larry Moy and family on the passing of his father, Jack, last October.

Psychological Consideration in the Mediation of Employment Disputes

by William D. Frumkin, Esq.
(wfrumkin@sapirfrumkin.com)

Mediation of employment disputes is commonplace, and its ultimate success is often dependent upon not just the merits of the case, but the psychological perspectives the parties bring to it. To reach resolution it is imperative that each party consider the psychological considerations confronting the other side. This article is an attempt to illuminate the perspectives of the parties leading up to the mediation and during its course.

SETTING THE SCENE:

Consider the following hypothetical situation: the lawyers about to be involved in an age discrimination case know each other well from bar activities and have mutual respect for each other. Plaintiff's counsel has written a detailed demand letter (not knowing that the employer is represented by his/her colleague). Upon receipt, the employer's counsel calls the plaintiff's counsel to discuss the case in some depth. After a frank discussion, they convince each other that if the case does not settle at this point it will probably be a long and arduous road ahead. The plaintiff believes that the case has significant merit, is worth a fair amount of money and will most certainly overcome a motion for summary judgment. The employer's counsel believes that the case is not frivolous, but hardly sees the same merit that the plaintiff's counsel does, and does not agree that the case is worth anything near plaintiff's counsel's assessment. In addition, the lawyers disagree on how recent case law will be applied to the case. Ultimately, defense counsel believes that the case will not pass muster at summary judgment. No shock there! Regardless, based on the fact that each believe their clients are in for a long battle, they agree to bring the case to mediation. They collectively come to the conclusion that an employment neutral they both respect would be perfect to mediate the case and arrangements are made relatively quickly for this to occur (another advantage of active membership in this Section).

Behind the Scenes Leading Up to the Mediation Session (Plaintiff's Camp):

Thankfully for plaintiff's counsel, the plaintiff who is a fifty-nine year old mid-level executive at a large corporation has agreed to accept his recommendation to go to mediation. Plaintiff's counsel has met several times with his client to prepare for the mediation which has included a full discussion of the facts, claims, defenses, as well as potential economic, and emotional distress damages. Plaintiff's counsel has worked hard to communicate realistic expectations about the value of the case. As usual, the plaintiff values the case greater than does plaintiff's counsel. Just as typically, they both value the case greater than the defendant's counsel, who values the case greater than his client. As the weeks leading up to the mediation pass it has become the focal point of the plaintiff's life (as he remains unemployed and his job search goes poorly). The plaintiff's wife will be attending the mediation session as well and she has also been involved in some of discussions with plaintiff's counsel. Moreover, the plaintiff's brother in California has been consulted, as well as the plaintiff's adult children and other members of his extended family. The day of the mediation will indeed be a "watershed" day for the plaintiff. Not surprisingly he is angry that he was let go from the company after a ten plus year tenure. The plaintiff has also discussed the situation thoroughly with his mental health therapist and has spent considerable time on the web learning about lawyers, litigation, mediation, arbitration, the EEOC, and any other relevant topic. He has been on every conceivably relevant Internet site and then some. As the mediation date comes closer, he has not been sleeping well, has not been eating particularly well, and has had little desire to socialize with friends. His relationship with his wife has become strained because they are not in agreement concerning how the plaintiff should be compensated to settle the case. The plaintiff and his wife realize that reinstatement is out

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"The day of the mediation will indeed be a 'watershed' day for the plaintiff. Not surprisingly he is angry that he was let go from the company after a ten plus year tenure. The plaintiff has also discussed the situation thoroughly with his mental health therapist."

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of the question, but they disagree with respect to the amount of money that he should receive. They both want to know what can be done about getting assistance from his former employer to help him get his career on track, something which he believes is owed to him.

Behind the Scenes Leading Up To The Mediation Session (Employer's Camp):

The defendant's attorney who has been interacting with plaintiff's counsel is outside counsel that is working with his "client" who is the in-house counsel. The in-house attorney has finally prevailed upon his business people to focus on the mediation. They have decided that in addition to the outside counsel, the inside counsel will be present at the mediation, as well as the business person who supervised the plaintiff and who was also responsible for the decision to terminate him. In the days just before the mediation, outside counsel has set up a conference call with everyone involved to discuss the case, and the parameters for settlement. This has been a very busy time at the corporation due to restructuring of its manufacturing plant in the Midwest. Therefore, it has not been easy for the in-house counsel to get the central business person to focus on the mediation. In fact, the business person learns two days before the mediation that he must participate in a conference call scheduled that day from 2:00-3:00 p.m., which cannot be rescheduled. He will also have to read and respond to a multitude of e-mails leading up to the conference call. There will also be some post-conference call e-mails that he will have to attend to if the mediation has not been completed by then. Regardless, the in-house counsel and the business person want to settle the case because they have been informed by their outside counsel that plaintiff's counsel is competent and if the case proceeds, it will be both a financial drain and a distraction for the business person to deal with. This is especially so at a time when the needs of the business require his full attention. During the conference call the day before the mediation, the parameters for settlement are set and the business person has been briefed concerning what he should and should not say at the mediation. While the outside counsel is extremely well-prepared for the mediation, he would have like to have had more time with not only the in-house counsel, but with the business person prior to the mediation.

The Pre-Mediation Call with the Mediator:

During the pre-mediation conference call, which was subsequent to the parties submitting confidential position statements to the mediator, a discussion was held regarding what the lawyers think is the best way to proceed, i.e., should there be a joint session. There is also some discussion about their respective positions and how recent caselaw could impact the case. The call is quite cordial and informative. Being an experienced mediator, she explains that she needs to speak to each of the attorneys in separate calls and the attorneys have no problem with proceeding in this manner.

During the call with plaintiff's counsel, he expresses to the mediator how important a day this is to his client, and discusses the difficulties his client has had leading up to the mediation. These include the strained relationship with his wife, his problems with eating and sleeping, his discussions with extended family, (particularly the brother in California), and anything else the plaintiff's counsel feels could be an impediment toward settlement. Plaintiff's counsel also makes it clear that the plaintiff expects that a resolution include some assistance to help his client jump-start his career.

In his call with the mediator defense counsel does not expressly indicate that he wished his client had been more involved and more ready for the mediation, but does let the mediator know that the business person will not be available from 2:00-3:00 p.m. to take his conference call. He also mentions that his client may be distracted by the call but doesn't believe this will have a serious impact upon the mediation. He expresses the desire to settle, but emphasizes his view that the case will not get past summary judgment and that his client is not going to write a "big check." The mediator appreciates the candor.

"In the days leading up to the mediation, defense counsel will be working with in-house counsel. "Outside counsel has set up a conference call with everyone involved to discuss the case, and the parameters for settlement. This has been a very busy time at the corporation due to restructuring of its manufacturing plant in the Midwest."

The day before the mediation Plaintiff's counsel and outside Defense counsel exchange e-mails with the mediator confirming that "all systems are go" and expressing their collective desires to amicably resolve the case.

The Day/Evening Before the Mediation:

During the day before the mediation, the Plaintiff's Counsel has taken care of many issues in other cases and can now focus on the final preparation for the mediation. He brings home the media-

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tion statement, has a lengthy conversation with the Plaintiff and his wife that evening, and encourages the Plaintiff to get a good night's sleep. Unfortunately, this does not occur. The Plaintiff is up half the night pacing, worrying, keeping his wife awake, (she is a poor sleeper anyway), and ultimately gets very little sleep.

Defense counsel, similar to Plaintiff's counsel, finally clears the deck with respect to issues related to other cases sometime in the late afternoon, and stays in the office late reading over his submission. He calls the in-house attorney before leaving the office, but does not reach him. He also e-mails but gets no response. At 10:00 p.m. he gets a return call on his cell phone and they chat for approximately half an hour about the case.

The Morning of the Mediation:

Plaintiff's counsel meets the plaintiff and his wife for coffee at approximately 8:30 a.m., with the mediation set to begin at 10:00 a.m. It becomes apparent to plaintiff's counsel that his client is sleep deprived and nervous. It takes all of the plaintiff's counsel's skills to calm him down. He encourages his client to be optimistic, realistic and most of all attentive and open to the advice that the plaintiff's counsel and the mediator will provide to him during the course of the mediation. They get to the offices of the mediator about a half an hour prior to the start of the scheduled mediation. Defense counsel is scheduled to meet the in-house counsel and the business person at approximately 9:30 in the lobby of the mediator's office building and he is there about ten minutes early. Just about the appointed time, the in-house counsel arrives. The two of them then spend approximately 20 minutes waiting for the business person to arrive and he does so about ten minutes before the start of the mediation. He apologizes for his lateness, but issues related to the 2:00 p.m. scheduled conference call come up very early that morning which caused his lateness.

How the Differing Psychological Perspectives Could Affect the Potential Outcome:

What should now be clear from the hypothetical is that the plaintiff and defendants' perspectives from a psychological standpoint are at opposite ends of the spectrum. The plaintiff believes the success or failure of his professional life is on the line. While the mediation is of significant importance to the defendant, the same is hardly true. In fact, the mediation may not even be the most important issue the business representative has to deal with that day! The totally divergent perspectives loom over the process and cannot be ignored if the mediation is to be successful. Any attempt to "throw around numbers" without taking these perspectives into account will be counter-productive. The usual factors that are considered by the parties, i.e. the strengths and weaknesses of the case, the defense costs, the distraction to business, the length of time the case may proceed, the potential success of a dispositive motion, and trial will be filtered by the aforementioned psychological perspectives.

By way of example, take the parties opening settlement positions. The plaintiff always faces the danger of the "non-starter," meaning conveying a number that is much more than the plaintiff's counsel believes the plaintiff could ever expect to settle for at that particular phase of the process. The attitude of, "I will start at a high number and work down from there because there is nothing to lose," will most likely also lead to a very short, unsuccessful day. If plaintiff's counsel starts with a demand that is going to cause him or her to have to drop more than $100,000.00 in the next round to keep the mediation going, then he or she should consider how this will effect his client's credibility as the mediation proceeds. Of course, getting the plaintiff to agree to a reasonable starting point is a major mountain that the plaintiff's counsel must climb. There is no magic answer as to how to get the plaintiff to be realistic, but the best advice is to start counseling the plaintiff to be realistic in the initial case consultation, not just before or on the day of the mediation. Plaintiff's counsel needs to be aware of their client's psychological "gestalt" from the first minute that they meet. This has to be addressed through every additional interaction, i.e., via telephone, e-mail, in-person conference, etc.

"On the morning of mediation, "it becomes apparent to plaintiff's counsel that his client is sleep deprived and nervous. It takes all of the plaintiff's counsel's skills to calm him down."

On the other hand, the defendant's response to the initial demand will most likely have an even greater effect on the potential success of the mediation than the plaintiff's opening demand. For example, if the defendant comes to the mediation knowing that they have authority up to $75,000.00, it has to carefully consider what the opening response to the plaintiff's settlement demand should be. Of course, communicating the position that the initial demand is too high and must be lowered in order to respond at all a "non-starter" as far as the plaintiff is concerned. If the case is to settle, the totally unreasonable nature of the initial demand should be communicated, but something has to be offered in return. If the philosophy is that we will start very low, so as not to encourage the plaintiff,

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Anne's Squibs

by Anne Golden
(*ag@outtengolden.com)*

Note: Of course, these squibs are by no means exhaustive, nor should you rely upon them as a substitute for doing your own research and actually reading the cases.

If you have (or come across) a decision that may be interesting or useful to members of NELA/NY, send it to me: ag@outtengolden.com, or fax 646-509-2061.

AGE DISCRIMINATION

Federal Employees

We have all been feeling pretty discouraged about age discrimination cases since **Gross v. FBL Financial Services Inc.**, 129 S. Ct. 2343 (2009), held that an employee had to show that age was "the 'but-for' cause" of the challenged actions and that mixed-motive analysis did not apply in a case brought under § 623(a) of the ADEA. A man born in 1940 who was working for the Navy, and who applied for a position with NAVSEA (the Naval Sea Systems Command), was turned down in favor of a much younger applicant and sued the Secretary of the Navy under § 633a, which prohibits discrimination based on age in federal employment. The district court (D.D.C.) had agreed that a mixed-motive analysis would be appropriate but concluded that the plaintiff had failed to meet his threshold burden, saying, "It does not strike me as inappropriate, unlawful, or even non-PC for the Navy to take a look at the resources it has to deal with technical problems and to decide for itself whether those resources are aging, and to decide for itself that it needs to replenish those resources with younger people. I don't understand what the problem is with that." The D.C. Circuit Court of Appeals noted that § 633a is worded differently from § 623(a) and says, "All personnel actions ... shall be made free from any discrimination based on age." Accordingly, a federal plaintiff under § 633a need only show that the challenged personnel action involved "any discrimination based on age." **Ford v. Mabus**, — F.3d —, 2010 WL 5060998 (D.C. Cir. 12/10/10).

See also **Locicero v. New York City Transit Authority**, discussed under "Summary Judgment."

ALTERNATIVE DISPUTE RESOLUTION

Even the Sixth Circuit Court of Appeals could not stomach the dispute resolution procedure imposed by the Huron Valley Ambulance Inc. (HVA) on everyone who applied for a job with the company. The application said that the employee agreed to submit all employment-related claims to HVA's internal Grievance Review Board, which would be the employee's exclusive remedy for any employment-related claims. There was a four-step grievance process: discussion with the employee's immediate supervisor, then the departmental vice-president, then the president and C.E.O., and then the Grievance Review Board (GRB). The GRB consisted of two members chosen by the employee (including one line-level employee and one supervisor), two chosen by the C.E.O. (including one line-level employee and one supervisor), and one representative chosen jointly by the employee and the C.E.O. Proceedings were to be recorded by the HR manager, and the GRB had to reach a majority decision. Its decision would be final, binding, and enforceable in court. There was a six-month statute of limitations. New employees also had to sign an acknowledgment stating that they agreed to this procedure. A married couple began work with HVA and both signed the application and the acknowledgment. The husband was terminated for allegedly lying about attendance at Army National Guard training and testing positive for a prescription painkiller after he suffered a medical emergency at work. The GRB upheld his termination, and he filed an EEOC charge and then a suit in federal district court. The wife had taken maternity leave a year earlier and returned to work but joined her husband's lawsuit, alleging hostile work environment. The district court dismissed all their claims, finding that they had knowingly and willingly waived a judicial forum and that the six-month limitations period controlled. The court of appeals reversed, finding that when the employees signed the waivers, they were not told the details of the GRB process; they did not find out until a month after they began working for HVA. Accordingly, their waivers were not knowing and voluntary. For the same reason, their statute of limitations waivers were invalid. Between the lines of this decision, however, the court of appeals seems to be saying that if the employer had done it properly, all the waivers would have been valid and enforceable, a disturbing conclusion. **Alonso v. Hudson Valley Ambulance Inc.**, 374 Fed. Appx. 487, 2010 WL 1644233 (6th Cir. 4/26/10).

ARBITRATION

Unconscionability

See **Banus v. Citigroup Global Markets, Inc.**, discussed under "Attorneys' Fees."

ATTORNEYS' FEES

Contemporaneous Time Records

When a class of current and former employees of the New York City Police Department was awarded $900,000 for the City's willful violation of the Fair Labor Standards Act's overtime compensation requirements, the plaintiffs submitted a fee application pursuant to section 216(b) of the FLSA. One of the attorneys applied for $2,035,867.50 in fees, based upon "an hourly rate of between $750 and $1,000 and a 96-page attachment of time entries totaling 2,090.87 hours of compensable time." Unsurprisingly, the City objected, pointing to anomalies such as some entries' referring to attendance at trial on dates when there was no trial (including some after the jury had rendered its verdict) and "a significant number of entries, identical in punctuation, spacing, and even in typographical errors, appear[ing] as many as four times in cyclical patterns." The challenged attorney admitted that he did not make the time entries contemporaneously; rather,

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the entries had been prepared "by my office working with outside paralegal assistance under my general supervision." The district court (Shira Scheindlin, J., S.D.N.Y.) awarded him roughly 25% of the fees he had sought, and both sides appealed. The Second Circuit Court of Appeals held that pursuant to **New York State Association for Retarded Children, Inc. v. Carey**, 711 F.2d 1136 (2d Cir. 1983), fee applications must be supported by actual contemporaneous time records except "in the rarest of cases." Since the district court had not made findings concerning the facts justifying such an exception, the court remanded the case for such findings. Scott v. City of New York, 626 F.3d 130 (2d Cir. 12/1/10) (per curiam).

See also **Alejo v. Darna Restaurant**, discussed under "Fair Labor Standards Act."

Fees to Employer

Six securities brokers were hired by Citigroup Global Markets, Inc., and were given "signing bonuses" which were really forgivable loans, to be forgiven in equal yearly amounts over a period of seven years. The promissory notes accompanying the loans said that the unforgiven balance would be accelerated if the brokers' employment ended "for any reason or no reason." Each of the brokers' employment ended – at least one voluntarily – and Citi demanded repayment of the prorated balances of the loans and initiated arbitration with FINRA, the Financial Industry Regulatory Authority (created in 2007 by the merger of the NASD and certain functions of the NYSE). The lead plaintiff, after 18 months of pre-arbitration participation, changed attorneys on the day of the hearing and began what was described as a class action, attacking the arbitrability and enforceability of the agreements and notes. Judge Lewis A. Kaplan (S.D.N.Y.), after noting sloppy paragraph numbering in the second amended complaint, granted Citi's motion to dismiss on two alternative grounds: that the agreement was arbitrable and that the complaint failed to state a claim. **Banus v. Citigroup Global Markets, Inc**., —- F. Supp. 2d —-, 2010 WL 1643780 (S.D.N.Y. 4/23/10). Citi, represented by Sam Shaulson and Melissa Kelly of Morgan, Lewis & Bockius, then moved for attorneys' fees under 28 U.S.C. § 1927, and Judge Kaplan granted them. The court explicitly found bad faith, in that (it determined) "[t]he lawsuit was completely without merit [and] amounted to an attempt to use the judicial process for the quite improper purpose of simply stalling [Citi's] effort to collect the money it is owed." (Internal quotation marks omitted.) The court considered the agreements clear and "freely signed," and had no problem with the concept that Citi could discharge an employee without cause and then immediately demand repayment – and considered it sanctionable to so argue. **Banus v. Citigroup Global Markets, Inc.**, — F. Supp. 2d —, 2010 WL 5158642 (S.D.N.Y. 12/20/10).

DEFAMATION

A truck driver who arrived late for a random drug test — because he had stopped along the way to have sex with a woman he knew — lied about why he had not arrived promptly and was caught in the lie; he was discharged for the lie and for poor attendance, since he had not gone back to work after the drug test. He applied for unemployment benefits and received them. Subsequently, he worked briefly for another trucking company, then applied for a job with a third company and also registered with a placement service. The first company, when asked for a reference, told the third company and the placement service that he had failed or refused a drug test. He tried to go back to the second company and found that the first company had said the same thing to them, so they too refused to hire him. When he finally found a job with a fourth trucking company, it terminated him after a week for the same reason, and filed a report to that effect with the U.S. Investigations Services (USIS) database, which provides background information to employers in the industry for three years. The employee was unable to get a job with the U.S. Postal Service because the first company also refused to provide the Postal Service with his driving history. Finally, he sued for defamation. Judge John Gleeson (E.D.N.Y.) held that each publication of the defamatory statement gave rise to a new cause of action with a new limitations period. He also rejected the first trucking company's arguments based on qualified privilege, authorizations that the employee had signed permitting the release of information (but not false information), and D.O.T. regulations. The court also held that a rational juror could find that the company's actions were based on retaliation against the plaintiff for pursuing his successful application for unemployment benefits. The company's motion for summary judgment was denied in all respects. Deborah Karpatkin represented the employee. **Liverpool v. Con-Way , Inc.**, — F. Supp. 2d —, 2010 WL 4791697, 2010 U.S. Dist. LEXIS 122419 (E.D.N.Y. 11/18/10).

EEOC

Duty to Conciliate

Judge Loretta A. Preska (S.D.N.Y.) dismissed the EEOC's Title VII retaliation action against Bloomberg LP because, she said, the Commission had failed to conciliate those claims in a "reasonable and flexible manner" before litigating them. The court held that this violated the agency's statutory duty that justified dismissing the claims. The EEOC's original lawsuit alleged a pattern or practice of sex and pregnancy discrimination, and it had made adequate attempts to conciliate those claims, but it had failed to do the same with later allegations that the company had retaliated against employees. The court said that the Commission had proposed a settlement of the retaliation claims that would have totaled more than $41 million and its representatives "stonewalled" the employer and denied reasonable requests for more information about the basis of the proposal. **EEOC v. Bloomberg LP**, — F. Supp. 2d —, 2010 WL 4237077 (S.D.N.Y. 10/25/10).

EVIDENCE

After-acquired Evidence of Misconduct

A Muslin-American citizen of Egyptian descent who was fired three weeks

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after he complained that a co-worker had called him a "Terrorist Muslim Taliban" had made out a prima facie case but, without evidence that the employer's asserted reason for firing him was a pretext, could not defeat summary judgment. Judge Denny Chin (then still S.D.N.Y.) held that summary judgment was appropriate because the *pro se* plaintiff admitted that he had omitted certain employment history from his job application, and did not dispute the employer's allegation that the omission was grounds for termination under its employment policies. The fact that the employer claimed it discovered the omission after the plaintiff had made the complaint (almost surely as a result of prospecting for after-acquired evidence of misconduct under **McKennon v. Nashville Banner Publishing Co.**, 513 U.S. 352 (1995) did not avoid either the district court's grant of summary judgment or the court of appeals' affirmance (Judges Joseph McLaughlin, Rosemary Pooler, and Richard Wesley). **El Sayed v. Hilton Hotels Corp.**, 627 F.3d 931, 2010 WL 5129093 (2d Cir. 12/17/10) (per curiam).

"Pretext-Plus"

See **Locicero v. New York City Transit Authority**, discussed under "Summary Judgment."

"Stray Remarks"

The "stray remarks" doctrine is alive and well in Judge Lawrence E. Kahn's courtroom (N.D.N.Y.). A woman who was 78 when hired and 88 when fired lost a motion for summary judgment in spite of age-related remarks by her then manager including "You know, you're too old to work. Why don't you quit?" and by a Personnel Supervisor who said more than once that the plaintiff should "go to Florida." The employer, a store that sold food, fired her after learning that she had vomited into a bucket at her food demo cart. (Evidently she had been distraught after her husband passed away and had not been eating properly.) Employees who were ill were not supposed to come to work, but the plaintiff had had only one previous write-up, not three as stated in the disciplinary policy. After her termination, the plaintiff saw a younger woman apparently doing her former job and filed a charge with the EEOC, then a complaint in federal court. She also moved for sanctions, based on alterations in company documents; she had originals, and the company used apparently altered versions in support of its summary judgment motion. She won the sanctions motion but lost the summary judgment motion, because the court found that she had not established a prima facie case because her evidence concerning her replacement was too vague. The ageist remarks were considered "stray remarks" by the court because the plaintiff did not show that they were made by decisionmakers or in the context of her termination. **Riordan v. BJ's Wholesale Club, Inc.**, — F. Supp. 2d —, 2011 WL 124500 (N.D.N.Y. 1/14/11).

ANNOUNCEMENTS

Don't you have an article or case for the "Filings, Trials and Settlements" column you'd like to share with your NELA/NY members?

If you have any announcements or if you an article you'd like to share with your NELA/NY colleagues,

Please e-mail Shelley nelany@nelany.com

We will include it in our the next issue of the newsletter.

Waiver of Defense

A bookkeeper who worked long hours for a restaurant group had various duties in addition to bookkeeping, such as managing the cash register, opening bank accounts, processing new employees, and maintaining the menus. She did not get overtime pay and sued for it, and the defendant raised various affirmative defenses in its answer – but not the defense of the administrative exemption to the FLSA. A summary judgment motion, which also did not mention the administrative exemption, was denied. In the Joint Pretrial Stipulation, the defendant raised that exemption for the first time in one line of the stipulation, and the plaintiff objected that this defense had been waived. It was not mentioned again until the defendant included one instruction on the administrative exemption in its proposed jury instructions, to which the plaintiff objected again. At the close of the defendant's case, it moved to conform its answer to the alleged evidence to include the administrative exemption; the district court granted the motion over the plaintiff's objection, allowing the defendant to amend its answer and allowing the jury instructions and verdict form to be altered accordingly. The jury found that the plaintiff worked more than 40 hours per week for which she was not compensated but that she was exempt from the requirements of the FLSA as an administrative employee. She appealed, and the Eleventh Circuit Court of Appeals reversed, in a decision including this sentence: "If ever there were a classic case of waiver, this is it!" Since the jury had already found for the plaintiff on all the facts other than the exemption, the court of appeals reversed and ordered a trial on damages. **Diaz v. Jaguar Restaurant Group**, LLC, 627 F.3d 1212 (11th Cir. 12/13/10).

FAIR LABOR STANDARDS ACT

Class Certification

A proposed class of exotic dancers at the Penthouse Executive Club was granted conditional class certification by Judge Naomi Reice Buchwald (S.D.N.Y.) over various objections by the Club, which argued, among other things, that they were independent contractors. The plaintiffs alleged that they did not receive minimum wage or overtime, that the Club encouraged customers to tip them in discounted "house scrip" rather than cash, and that they had to purchase their own uniforms and pay a "house fee" for each shift they danced. The court found that the plaintiffs had offered evidence of sufficient facts to meet their burden at the "notice" stage, and ordered the defendants to provide contact information (subject to a confidentiality agreement) for the putative class members. The plaintiffs were represented by NELA/NY members Justin

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M. Swartz and Sonia Lin. **In re Penthouse Executive Club Compensation Litigation**, —- F. Supp. 2d —-, 2010 WL 4340255 (S.D.N.Y 10/27/10).

Similarly, a class of adult entertainers was conditionally certified by Judge John G. Koeltl (S.D.N.Y.) upon a showing that they were employees and not independent contractors. The court used the "economic reality" theory and found that under the totality of the circumstances, the plaintiffs were employees. The court disposed of the defendants' argument that the plaintiffs had not sufficiently pleaded that they were paid less than the statutory minimum wage by pointing out that the plaintiffs had alleged that they worked for the defendants and were paid "no wages." The court noted drily, "These facts are sufficient to state a claim for failure to pay the minimum wage under the FLSA." The court also rejected the defendants' argument that the plaintiffs had to plead specifically which hours they had worked for less than the minimum wage. The court easily found sufficient numerosity, commonality, typicality, and adequacy of representation. Finally, the court exercised supplemental jurisdiction over the plaintiffs' state law claims. **Hart v. Rick's Cabaret International Inc.**, — F. Supp. 2d —, 2010 WL 5297221 (S.D.N.Y. 12/20/10).

At the other end of the scale, Judge Paul A. Crotty dismissed under Fed. R. Civ. P. 12(b)(6) "four related cases, brought by different plaintiffs against different defendants, but all containing strikingly similar allegations and deficiencies." The court noted that "[t]he same boilerplate complaint, with only minor alterations, has been filed in at least eight other cases in the metropolitan area" as well as four in Massachusetts. The complaints, putative class and collective actions, sought "to recover unpaid wages allegedly due to hourly employees [of groups comprising hundreds of hospitals and health care institutions] for unspecified meal periods and breaks during which they worked," and for other costs. The complaints also asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), New York Labor Law, fraud, and various common-law claims. The court briefly described the sketchy factual allegations of each of the four complaints, then slogged through each of the claims and explained the defects of each, including failure to provide details of overtime hours worked, pay, and other facts, failure to allege exhaustion of remedies under the collective bargaining agreement, incorrect citations under the state labor law, failure to plead fraud with requisite particularity, failure to allege RICO predicate acts with any specificity, etc. In an amazing show of patience, the court held that the plaintiffs would be permitted to amend their complaint to replead the FLSA and state labor claims if they could do so "with the requisite factual specificity, including the fact that the claims are not preempted by the collective bargaining agreement[s], which should be attached. The plaintiffs' law firm was not identified and probably would not want to be; cases like this give us all a bad name. **Nakahata v. New York-Presbyterian Healthcare System, Inc.**, — F. Supp. 2d —, 2011 WL 321186 (S.D.N.Y. 1/28/11).

Tip Credit

At an inquest after the default of a restaurant whose employees allegedly did not receive either tips or minimum wage, Magistrate Judge Andrew J. Peck (S.D.N.Y.) recommended judgment for the three plaintiffs. The restaurant owner was not entitled to take a tip credit under 29 U.S.C. § 203(m), because an employer may not use a tip credit against the federal minimum wage if the tip pool does not comply with the FLSA. (In addition, in order to take the tip credit, the employer must first notify employees of its intention to do so; this employer had failed to give notice.) Without evidence from the employer of hours worked or tips collected, the recollection and estimates of the employee are presumed to be correct. Here, however, the plaintiffs' counsel had provided inadequate information, so (in rather testy language) the court said all it could do was to award the plaintiffs the hourly minimum wage, with no credit to the defendants for the occasional tips the plaintiffs did receive. When it came time to award fees to plaintiffs' counsel, the court noted that counsel had provided a spreadsheet of time devoted to each task, but no contemporaneous time records as required by **New York State Ass'n for Retarded Children, Inc. v. Carey**, 711 F.2d 1136 (2d Cir. 1983). Accordingly, the magistrate judge recommended no award of attorneys' fees instead of the $32,525 requested. As a practical matter, plaintiffs' counsel are likely to take a contingent fee out of the plaintiffs' recovery, penalizing their clients for their own failure to keep records; the magistrate judge did not think to prohibit this in his order. **Alejo v. Darna Restaurant**, — F. Supp. 2d —, 2010 WL 5249383 (S.D.N.Y. 12/17/10).

FAMILY & MEDICAL LEAVE ACT

In order to count employees for purposes of determining FMLA coverage, Judge John Gleeson (E.D.N.Y.) had to decide whether to aggregate some or all of the bargain stores owned by six corporations, all of which were owned by one man. The owner's cousin owned several similar stores, and the two men shared an office. One of the managerial employees worked for a single store for ten years, then asked for two weeks off to care for his ailing parents in Pakistan. He got permission, but as soon as he returned, his own manager (who reported to the owner) fired him, and he sued under the FMLA. The court first decided that on the facts presented, it was unnecessary to decide whether the two cousins' stores should be aggregated together, since even taken alone, the employees of the plaintiff's store plus the employees of the other stores owned by the same owner employed at least 50 people during at least 20 full workweeks in the year before the plaintiff was fired. The court then held that "[the plaintiff] worked as the manager of the Willoughby store for ten years before being fired immediately upon his return from Pakistan. These facts alone give rise to an inference of retaliatory intent, and a reasonable jury could make that inference" even though there was other evidence that the defendant had a legitimate reason to fire him. **Ghaffar v. Willoughby 99 Cent**, Inc., — F. Supp. 2d —, 2010 WL 3420642 (E.D.N.Y. 8/27/10).

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NEW YORK CITY HUMAN RIGHTS LAW

"Joint Employers"

A plaintiff who worked for a service providing community outreach services at a hospital sued both the service and the hospital for sexual harassment under the New York City Human Rights Law, alleging that his male immediate supervisor, a hospital employee, constantly leered at him and made suggestive comments. The plaintiff had resigned and alleged constructive discharge. The hospital moved to dismiss under CPLR 3211(a)(1) and (7), claiming that it was not the plaintiff's employer because it could not hire or fire him, did not pay him, and did not control his employment terms or benefits. The New York State Supreme Court, Kings County (Mark J. Partnow, J.) held that both the service and the hospital could be seen as joint employers, and denied the motion to dismiss. **Santos v. Brookdale Hospital Medical Center**, 39 Misc. 3d 1207(A), 2010 WL 3911396 (Sup. Ct. Kings Cty. 9/17/10).

PRIVACY

In 2004, a recommendation by the 9/11 Commission resulted in new, uniform identification standards for federal employees, including contractor employees. This involved requiring that contract employees with long-term access to federal facilities complete a standard background check, typically the National Agency Check with Inquiries (NACI). Accordingly, NASA modified its contract with Cal Tech, and the Jet Propulsion Laboratory — staffed exclusively with contract employees, and operated by Cal Tech under a government contract — told all its employees to complete the NACI process or be discharged. The NACI questionnaire seeks basic biographical information such as name, address, prior residences, etc., but also asks whether the employee has "used, possessed, supplied, or manufactured illegal drugs" in the last year. If so, the employee must provide details, including information about "any treatment or counseling received." The employee also must sign a release authorizing the government to obtain personal information from schools, employers, and others, including factors such as indecent exposure, voyeurism, indecent proposals, carnal knowledge, homosexuality, adultery, and illegitimate children. Certain Cal Tech employees of JPL sued, charging that the background check process violated a constitutional right to information privacy. The Ninth Circuit Court of Appeals granted an injunction with respect to the drug question and the related investigation inquiry from schools, employers, etc., holding that they were likely unconstitutional. The Supreme Court disagreed and said that such questions "are part of a standard employment background check of the sort used by millions of private employers" and that the government has been using the same system for non-contract employees for a long time. Since the government said it would not disclose the results publicly, the Court (8-0) held the inquiries constitutional and permitted. **National Aeronautics & Space Administration v. Nelson**, 131 S. Ct. 746 (1/19/11).

RELIGIOUS SCRUPLES ("CHURCH AMENDMENT")

The so-called Church Amendment, 42 U.S.C. § 300a-7(c), states that no entity receiving federal funds may discriminate against a health care employee either because he performed or assisted in performing an abortion or sterilization procedure, or because he refused to do so based on religious beliefs or moral convictions. An operating room nurse sued a hospital because, she alleged, she had indicated her unwillingness to participate in abortions but was compelled by her supervisors to assist at a late-term abortion, causing her serious emotional harm. She filed a grievance and then, she alleged, her supervisors tried to coerce her into signing a form stating that she was willing to assist in emergency abortions in the future. The district court (E.D.N.Y.) granted summary judgment, holding that the statute did not provide a private right of action, and the Second Circuit Court of Appeals agreed. The statute contains no language explicitly providing a private right of action, and the plaintiff-appellant's argument that one was implicit in the heating "Individual Rights" did not persuade the court of appeals. The court examined the legislative history and said, "While there may be some colorable evidence of intent to confer or recognize an individual right, there is *no* evidence that Congress intended to create a right of *action*" (italics in original). **Cenzon-DeCarlo v. Mount Sinai Hospital**, 626 F.3d 695, 2010 WL 4723205 (2d Cir. 11/23/10) (per curiam).

RESTRICTIVE COVENANTS

Since noncompetes are so disfavored in New York, many employers have switched over to non-solicit provisions in their employment agreements. (It used to be a good thing to have an employment contract. Now, though, almost all employment contracts say the employee is employed at will anyway, and they are replete with provisions benefiting only the employer, such as restrictive covenants, non-disparagement, and garden leave provisions. Most are not for a specific term and many lack any severance pay, even if the employee is discharged without cause.) Courts have begun to look at non-solicits suspiciously too, however, especially when they operate as a form of noncompete. Two judges of the U.S. District Court for the Southern District of New York have said as much, in **Nisselson v. DeWitt Stern Group, Inc. (In re UFG International, Inc.)**, 225 B.R. 51, 55-56 (S.D.N.Y. 1998) (Miriam Goldman Cedarbaum, J.) and more recently in a decision last August by Judge Paul A. Crotty. In the more recent case, the employee was discharged without cause, and the court specifically found that as a result, both the noncompete and the non-solicit provisions of her contract were unenforceable as a matter of law. **Arakelian v. Omnicare, Inc.**, — F. Supp. 2d —, 2010 WL 3260061, at *16 (S.D.N.Y. 8/18/10) (Paul A. Crotty, J.).

SANCTIONS

Fees to Employer

See **Banus v. Citigroup Global Markets, Inc.**, discussed under "Attorneys'

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Fees," and **Riordan v. BJ's Wholesale Club, Inc.**, discussed under "Evidence."

SEX DISCRIMINATION

See **Locicero v. New York City Transit Authority**, discussed under "Summary Judgment."

SUMMARY JUDGMENT

Sex and Age Discrimination

A 60-year-old woman who was passed over for promotions in favor of a younger man sued under Title VII, the ADEA, and the New York State and City Human Rights Laws. Judge Frederic Block (E.D.N.Y.) held that a showing that the employer's asserted reason was false, in combination with the plaintiff's prima facie case, was sufficient to defeat summary judgment on her non-promotion and retaliation claims. The court thus came down on the side of no-pretext-plus – in other words, the prima facie case plus a showing of falsity of the employer's asserted reason is enough, without more, to defeat summary judgment. The court granted summary judgment on the plaintiff's hostile work environment and constructive discharge claims, however, because most of the actions that she alleged constituted the hostile environment were taken by another person (the younger man who got the job), and she had not shown that he was motivated by discrimination. Since the threshold for constructive discharge is higher than that for hostile environment, the court granted summary judgment on that claim as well. The court held that the New York City and State Human Rights Law claims for hostile work environment were analyzed the same way as the federal claims and dismissed them accordingly. NELA/NY member Kenneth Goldberg represented the plaintiff. **Locicero v. New York City Transit Authority**, — F. Supp. 2d —, 2010 WL 5135875 (E.D.N.Y. 12/9/10).

TORTIOUS INTERFERENCE

A chemist consultant who was hired by a pharmaceutical company that had contracted with two rival companies to produce the same drug was accused by one of them of disparaging its product, a depression medication. The company claimed that the consultant had urged the plaintiff company to immediately produce large batches of the drug despite knowing that its production was defective. When the second company had the same problem, the consultant allegedly advised it to resolve the problem before engaging in full-scale production batches. Both companies had contracted to produce the drug for the same pharmaceutical company, PGx. The complaint by the first company also alleged that the consultant gave the second company its technical information, while simultaneously withholding technical information from the plaintiff. It alleged that the consultant breached his fiduciary duty to act in good faith, accurately transmit information, and give advice for the plaintiff's benefit. It alleged that because of the consultant's breaches, PGx terminated its contract with the plaintiff. The court (Lawrence E. Kahn, J., N.D.N.Y.) found that the plaintiff had failed to allege facts supporting a fiduciary relationship; to the contrary, the plaintiff and the consultant had entered into an agreement relating to confidential treatment and use of the company's confidential information, and it stated that no additional obligation of any kind was assumed or implied. The court noted that the plaintiff had not hired the consultant at all – the pharmaceutical company had – and his relationship with the plaintiff was arm's length. The claims for tortious interference with contract and tortious interference with business relations, however, survived, since the consultant was not acting as an agent for PGx when he allegedly undercut the plaintiff's contractual relationship with it. **Albany Molecular Research, Inc. v. Schloemer**, — F. Supp. 2d —, 2010 WL 5168890 (N.D.N.Y. 12/14/10).

UNEMPLOYMENT INSURANCE

See **Liverpool v. Con-Way, Inc.**, discussed under "Defamation."

PRACTICE TIPS

When you are having trouble keeping your patience with a panicky, irrational client, remember that she is in crisis and not at her best. Work is not just how we spend most of our waking time or the source of our income; it is also how we define and value ourselves. "So, what do you do?" is a universal conversation starter. We internalize our employers' valuation of ourselves. If a company pays us $100,000 a year, we feel we are worth $100,000 a year. But then when the company says, "No, on second thought, you're not worth that – you're worth nothing, and we're better off without you," what does that do to your self-image, your self-worth, your self-respect? What has happened to your expectations and hopes for your future and your career? A person whose sense of self is under that kind of attack should be forgiven for a certain amount of panic, anger, and irrationality.

Employees very often use their company email systems, and company-issued laptops, cell phones, BlackBerries, and other devices as their own. It seldom occurs to them that this exposes them to the possibility of surveillance. Best practices for a plaintiff's employment lawyer dictate that as soon as you pick up the phone when a prospective client calls you, you should ask who owns the equipment she is calling on. If she emails you, make sure she is not accessing her gmail, yahoo, or optonline account over the company server. If you get a message to call a prospective client back, and you discover that the phone number is a work number, do not leave a message, or leave a cryptic one such as "This is your friend Anne, returning your call." Put a warning about using company equipment right in your retainer letters and on your website. Put a warning about discussing the (prospective) client's employment situation on social networking media in the same places. You cannot be too paranoid, because whatever you can think of in the way of surveillance, employers have thought of first, and many are already doing it. ■

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consider how this may effect the plaintiff psychologically, and if that is actually what the defendant wants to happen. Remember the plaintiff has been waiting for this offer for weeks, months or years. This isn't just a business deal. Its often viewed as a make it or break it life altering event. If the defendant's counsel counters with $5,000.00, it will likely have the impact of "a shot" to the plaintiff's "solar plexus." This may destroy any confidence the plaintiff has in the process and may very well prevent him or her from focusing on anything that happens after that opening "shot across the bow" is communicated. This may cause feelings of helplessness, hopelessness and dread, not a good thing for the defendant if the goal is to settle. On the other hand, if the opening response is something greater, i.e., $20,000.00 to $25,000.00, although it is much lower than what the plaintiff hoped to receive (possibly $200,000.00), it is at least something that the plaintiff's counsel can work with by telling his client that in his experience, this is a good faith starting point. The plaintiff's counsel can support this by expressing that in his experience sometimes the opening counteroffer is usually something less than $5,000.00, so this is actually not too bad a start. An opening counter of $5,000.00 versus $20,000.00 can have a monumental affect on the plaintiff's ability to thoughtfully participate in the mediation as the day proceeds. Therefore the defendant should think carefully about this before low-balling, if in fact it is their true desire to settle. If both the parties were businesses the amount of the initial counter-offer would not have this all encompassing affect, but the plaintiff is not a business. The defendant should not lose sight of who is on the other side. Likewise, the plaintiff's attitude that a multi million dollar business can afford to pay him a lot of money will not advance the process. It is often helpful to explain to the plaintiff that a departmental budget may be the source of the settlement funds and that the individual responsible for it cares as much about that as the plaintiff cares about his own personal finances. This will hopefully ameliorate this unproductive way of thinking.

As far as addressing the non-monetary concern that the plaintiff has with respect to assisting him to jump-start his career, this may or may not be possible. However, if the defendant makes it known at the outset that it would consider playing some role, whatever that might be (preferably early on in the mediation), this will go a long way toward resolution rather than taking the position that there is no way the defendant has any interest in doing so. Even if the defendant cannot ultimately agree to something along these lines just the expression of the defendant's recognition of the plaintiff's plight will be helpful.

To a great extent, the mediator's knowledge and appreciation of the psychological factors impacting both parties will be critical. For example, it may be helpful (with respect to the aforementioned hypothetical) if the mediator explains to the plaintiff's counsel in front of the plaintiff that the two o'clock conference call is unavoidable. In the event the call causes some delay in the process, this will hopefully prevent the plaintiff from feeling that his case is not important enough to the defendant to focus on. While the plaintiff's concern may seem like a picayune, unimportant issue to the defendant, it isn't to the plaintiff and could become a sticking point affecting the outcome if it's not addressed early on.

There is no question that the plaintiff, in most cases, will end up being the harder party to please. It is quite evident that the plaintiff usually has a lot more "psychological capital" riding on the case than the defendant. This being the case, the mediator can and should be the difference maker. This task is secondary to only one other and it is related. That is, establishing credibility with the plaintiff and his or her counsel. If that is not established early on in the process, the mediation will be an exercise in futility.

"The psychological perspectives of the parties cannot be ignored in the mediation of an employment dispute."

Conclusion

The psychological perspectives of the parties cannot be ignored in the mediation of an employment dispute. While the strengths and weaknesses of the case, costs involved, distraction, etc. are all critical factors, none of these can be examined without a critical eye toward the psychological perspective of not only the plaintiff, but the defendant as well. The mediator is the conduit or lighting rod for dealing with these issues and, if great attention is paid to them, the likelihood of success will increase dramatically. ■

Workers Compensation
&
Social Security Disability

PETER S. TIPOGRAPH, ESQ.

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

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

and

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

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