NELA

The New York Employee Advocate

VOLUME 18, NO. 1 SPRING 2018 Co-Editors—Robert B. Davis, Zachary J. Liszka & Michael J. Pospis

President's Column

Miriam F. Clark
President NELA NY
Ritz Clark & Ben-Asher LLP
mclark@rcbalaw.com

We at NELA NY look forward to a new year filled with new initiatives, and revitalization of prior ones, such as this Newsletter. Thanks to Co-Editors Bobby Davis, Zach Liszka, Michael Pospis, our Executive Director, Roseni Plaza, and the authors, for all their hard work in making this happen.

None of us needs reminding of the unique threats to employee and civil rights that we face on the national level. Here at NELA NY we view combating these threats to be the very core of our mission. Especially in these times, we urge all our members to pitch in and get involved in our wide-ranging initiatives.

Last month, more than 60 of us participated in the DEI (Diversity, Equality and Inclusion) Committee's thought-provoking program on Subconscious Bias, organized by Chairs Saranicole Duaban and Cyrus Dugger and DEI Officer Rita Sethi. We've also implemented a new DEI Policy designed to increase diversity throughout our organization and look forward to more DEI programming and initiatives.

Members of our Legislative Committee and Task Force spent the latter part of March engaged in intense

See PRESIDENT'S COLUMN, page 4

Does New York's Wage Payment Law Have a Gaping Loophole?

By Scott A. Lucas, Esq.
scott@lucasemploymentlaw.com

Article 6 of the New York Labor Law (Labor Law §§190-199-a) is a fee-shifting statute, the overall intent of which is to protect employees from having their rightful wages kept from them.[1] The statute "reflects the state's 'longstanding policy against the forfeiture of earned but undistributed wages.'"[2] To protect employees and remedy the imbalance of power between employers and employees,[3] it allows prevailing plaintiffs to recover unpaid wages, attorney's fees and, unless the employer proves a good faith basis to believe that its underpayment of wages was legal, liquidated damages.[4]

Although passed "to strengthen and clarify the rights of employees to the payment of wages," [5] Article 6 is poorly drafted, and courts have struggled to discern its meaning.[6]

Two of Article 6's key provisions are Labor Law §§193 and 198. Labor Law §193 prohibits any unauthorized deduction from an employee's wages unless the deduction is authorized and for the employee's benefit.[7] Labor Law §198 provides that "All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages accrued during the six years previous to the commencing of such action[.]"[8]

Some courts narrowly construe §193 by drawing a purported distinction between deducting and failing to pay wages. These courts also overlook §198's rights-affirming language. As a result, these courts have concluded that Article 6 does *not* give all employees the right to recover unpaid wages.

The purported distinction between deduction and failing to pay wages is illusory and contrary to Labor Law §193's text and purpose. Although "deduction from wages" is suggestive of a deduction

See WAGE PAYMENT LAW, page 3

1. *In re CIS Corp.*, 206 B.R. 680, 687 (Bankr. S.D.N.Y. 1997).
2. *Dreyfuss v. eTelecare Global Solutions-US, Inc.*, 2010 WL 4058143, at *5 (S.D.N.Y. 2010) (citations omitted).
3. *Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp. 2d 314, 317 (S.D.N.Y. 2003) ("The New York Labor law was enacted to protect employees, and to remedy the imbalance of power between employers and employees.") (citation omitted).
4. N.Y. Lab. L. §198(1-a), (3).
5. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 583-84, 825 N.Y.S.2d 674, 676 (2006), citing, *inter alia, Truelove v. Northeast Capital & Advisory*, 95 N.Y.2d 220, 223, 715 N.Y.S.2d 366 (2000) and Mem. of Indus. Commr., June 3, 1966, Bill Jacket, L. 1966, ch. 548, at 4.
6. *Cf. Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp. 2d 314, 316 (S.D.N.Y. 2003) (stating that "[some] cases that deal with different provisions of Article [6] … do so narrowly, without looking at other provisions of Article [6] of the New York Labor Law.").
7. N.Y. Lab. Law §193 (2012); *See also Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 616, 861 N.Y.S.2d 246, 249-50 (2008) (holding that executives are covered by the provisions of Article 6 unless expressly excluded).
8. N.Y. Lab. L. §198(3) (2010).

Calendar of Events

NELA Nite on Tax Issues: 4.18.18
at Outten & Golden

NELA Nite on ZARDA: 4.30.18
at Outten & Golden

Spring Conference: 5.11.18
Cornell Club,
6 East 44th St., NY, NY
more information to follow

NELA Nite on Pay Equity: 5.23.18
at Outten & Golden

NELA Nite on Mediation: 6.13.18
at JAMS

Solo Nite on Lessons Learned: 6.20.18
at Outten & Golden

NELA Nite on Pursuing Actions at NYCCHR: 9.18 date & place tba

Fall Conference: 9.28.18
more information to follow

NELA/NY 21st Annual Gala,
fall 2018, stay tuned

Upcoming Board Meetings:
May 2, June 6

Upcoming NELA Nites and Solo Committee Events

April 18, 2018: Tax Issues (especially pertinent with the passage of the federal law making settlements and related attorney's fees non-deductible if the settlement contains a non-disclosure agreement). NELA Nite Committee member, Michael Pospis, is organizing the Nite.

ZARDA! will be presented as a NELA Nite on **April 30th** at Outten and Golden by the NELA Solo Support Committee. As we all know, NELA members Greg Antollino and Stephen Bergstein brought the case of **Zarda v. Altitude Express** in the Second Circuit Court of Appeals. Initially, a three judge panel of the Second Circuit ruled against them, but Greg and Steve were victorious after the entire court reheard the appeal *en banc* in September, 2017. This consequential ruling, which says claims of sexual orientation discrimination are actionable under Title VII, was handed down on February 28, 2018. We are very proud of Greg and Steve and are looking forward to hearing them recount their experiences in the **Zarda** case as well as forecast what they think the outcome of a future Supreme Court decision might be.

May 2018: A NELA Nite on **Pay Equity**. Nina Pirotti, of Garrison, Levin-Epstein, Fitzgerald, & Pirrotti, P.C. and Alison Greenberg, and perhaps one other speaker will be speaking. The Nite was prompted by a discussion about the issue. Date to be announced.

On **June 13** NELA/NY's Gender Discrimination Committee will present a NELA Nite CLE program at JAMS on **Mediation**. The program will focus on the Southern and Eastern District mediation programs, private mediation and mediation at the EEOC. Panelists will discuss ways in which mediation of sexual harassment cases is different than other mediations. Geoffrey Mort of Kraus & Zuchlewski will moderate the program; the panelists are SDNY ADR Director Rebecca Price, EDNY ADR Administrator Robyn Weinstein, JAMS mediator Steve Sonnenberg and EEOC Mediator Deborah Reik.

The NELA Solo Support Committee's annual wine and cheese fete will be held on **June 20, 2018** at Outten and Golden, which will accompany "**Lessons Learned from Losing A Case or Dispositive Motion.**" "Post-mortem" assessments/evaluations have long been a learning method valued by medical schools and physicians, and it seems that attorneys might learn at least as much from a loss as from a win. The Solo Support Committee has been operating long enough that attendees seem to come in with an open and generous spirit, so it was decided that now is the right time to try this. Both Deborah Karpatkin and Megan Goddard have said they will present. At least one additional speaker is anticipated to join the panel.

Date in **September 2018** to be announced for a program postponed due to weather, **Pursuing Discrimination Actions at the New York City Commission** on Human Rights (NYCHR), with these speakers: Elizabeth Saylor of Emery, Celli Brinckerhoff & Abady LLP; Elizabeth Shampnoi of the NYCCHR; and Amy Hong of the Legal Aid Society.

If you have an idea for a NELA Nite or want to join the NELA Nite Committee please contact John Beranbaum, Special Hagan, Michael Pospis, or Rita Sethi.

A Word from Your Publisher
The New York Employee Advocate is published on a biannual basis by the National Employment Lawyers Association/New York Chapter, 39 Broadway, Suite 2420 New York, NY 10006. 212.317.2291
e-mail: *nelany@nelany.com*
website: *www.nelany.com*

Unsolicited articles and letters are welcome but will not be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this newsletter is encouraged.

Calendar announcements may be submitted by contacting Roseni Plaza at *nelany@nelany.com*.

Co-Editors:
Robert B. Davis, *robert@rbdavislaw.com*
Zachary J. Liszka, *z@lglaw.nyc*
Michael J. Pospis, *mike@pospislaw.com*
Special thanks to Lisa Lipman

Send potential articles or ideas for articles to any co-editor.

NELA NY Board of Directors
Miriam F. Clark, *President*
Robert B. Davis, *Vice-President*
Amy Shulman, *Secretary*
Arnold H. Pedowitz, *Treasurer*
Rita Sethi, *Diversity, Equity & Inclusion Officer*
John A. Beranbaum, *Member*
Saranicole Duaban, *Member*
Megan Goddard, *Member*
Special Hagan, Member
Deborah H. Karpatkin, *Member*
Troy L. Kessler, *Member*
Melissa Lardo Stewart, *Member*
Lisa R. Lipman, *Member*
Daniela Nanau, Member

Executive Director
Roseni Plaza, *nelany@nelany.com*

Advertise in the New York Employee Advocate
Contact Roseni Plaza at *nelany@nelany.com* or 212.317.2291
The following is our rate schedule:

$350/page	$180/quarter-page
$250/half-page	$145/eighth page

WAGE PAYMENT LAW, from page 1

notation on a paystub, the purported distinction between "deducting" and neglecting to pay wages was implicitly rejected by the Court of Appeals in **Ryan v. Kellogg Partners Institutional Services.**[9]

The plaintiff in Ryan sued under Labor Law §193 to recover an unpaid, nondiscretionary $175,000 bonus and attorney's fees under Labor Law §198(1-a). The plaintiff won at trial, and the Appellate Division affirmed, as did the Court of Appeals, which held, *inter alia*, "Since Ryan's bonus…constitutes 'wages' within the meaning of Labor Law §190(1), Kellogg's neglect to pay him the bonus violated Labor Law §193…"[10]

Not all courts agree with **Ryan's** holding, however. As a result, there is uncertainty about whether §193—the law that prohibits employers from taking even a small part of an employee's wages—has a gaping loophole that exempts employers who take *all* of an employee's wages.[11] As detailed herein, Article 6 does contain any such loophole, gaping or otherwise.

Before exploring whether there is a meaningful distinction between deducting and failing to pay wages, one must ask whether it matters.

Does It Matter Whether There Is a Distinction Between Deducting and Failing to Pay Wages Under Labor Law §193?

No. A different section of Article 6, §198, was amended in 1997 as part of the Unpaid Wages Prohibition Act to include the following rights-affirming or rights-creating language:

> *All employees shall have the right to recover full wages, benefits and wage supplements* accrued during the six years previous to the commencing of such action[.][12]

Why was that amendment necessary? Four years earlier, in **Gottlieb v. Kenneth D. Laub & Co.**,[13] the Court of Appeals concluded that the then-existing version of Labor Law §198 was not "substantive." **Gottlieb** held that an employee who asserted a common-law contract claim but did not allege a violation of any substantive provision of Article 6, could not collect attorneys' fees under Labor Law §198(1–a).[14]

The narrow holding in **Gottlieb** was understandable because §198's rights-affirming language did not yet exist, and because the plaintiff apparently never invoked Labor Law §193. But **Gottlieb** caused much confusion by implying in *dicta* that Article 6 does not protect the right of employees to receive the fruits of their labor (i.e., the wages owed under their employment agreement) *unless* the plaintiff is covered by §191, which regulates the frequency of wage payments for certain classes of employees.[15]

That *dicta* was incorrect. With limited exceptions,[16] the earnings (wages) protected by Article 6 are determined by the parties' employment agreement.[17] Thus, a contractual right to the wages at issue is not a *bar* to a Labor Law §193 claim, but a *prerequisite*.

In its first post-**Gottlieb** amendment to Article 6, the Legislature enacted the "Unpaid Wages Prohibition Act." Among other things, it amended §198 to make clear that "*All* employees *shall* have the r*ight to recover* full wages, benefits and wage supplements accrued during the six years previous to the commencing of such action[.]" McKinney's Labor Law §198(3) (emphasis added).[18] The Legislature later enacted the Wage Theft Protection Act[19] which, *inter alia*, added "liquidated damages" to the list of things "[a]ll employees shall have the right to recover" in §198(3).

Since Labor Law §198(3) is part of Article 6 and mandates full payment of wages, §198(1-a)'s reference to the "failure to pay the wage *required by this article*" encompasses §198(3)'s mandate that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]"

While the much narrower version of Labor Law §198 in effect in 1993 was purely remedial, i.e., non-substantive, that does not mean the current version is as well. The Court of Appeals has explained that labels such as remedial, substantive, etc. are not very important in construing statutory amendments.[20] Thus, "even so-called 'remedial' statutes may in effect impose a liability where none existed before[.]"[21]

Bearing this in mind, it is hard to imagine a clearer expression of rights-affirming or rights-creating language than "*All employees shall have the right to recover* full wages, benefits and wage supplements and liquidated damages[.]"[22] It does not really matter what label one attaches to Labor Law §198, however. Courts must give effect to a statute's "plain meaning,"[23] and §198(3)'s meaning could hardly be plainer.

Further, statutes are to be harmonized and not interpreted in a way that would

See WAGE PAYMENT LAW, page 5

9. 19 N.Y.3d 1, 16, 945 N.Y.S.2d 593, 602 (2012).

10 *Ryan, supra*, 19 N.Y.3d at 16, 945 N.Y.S.2d at 602 (citation omitted).

11. *See, e.g., Gold v. American Medical Alert Corp.*, 2015 WL 4887525, at *2-5 (S.D.N.Y. 2015) (Stating that "Plaintiff has not pled 'any deduction' from wages because the deduction Plaintiff claims is merely the total withholding of wages, which is the essence of the breach of contract claim").

12. *See* Labor Law—Unpaid Wages Prohibition Act, 1997 Sess. Law News of N.Y. Ch. 605 (S. 5071–C) (McKinney's) (emphasis added); *See also* Labor Law—Wage Theft Prevention Act, 2010 Sess. Law News of N.Y. Ch. 564 (S. 8380) (McKinney's) (adding the words "and liquidated damages" to Labor Law §198(3)).

13. 82 N.Y.2d 457, 462, 605 N.Y.S.2d 213 (1993).

14. *See Pachter v. Bernard Hodes Group, Inc.*, 861 N.Y.S.2d 246, 250, 10 N.Y.3d 609, 616 (2008) (discussing limitation of holding in *Gottlieb*).

15. *Gottlieb,* 82 N.Y.2d at 462 (implying that agreed upon wages are not "statutory wages" protected by Article 6, and incorrectly stating that some employees are "in all … respects … excluded from wage enforcement protection under … article 6."

16. *See, e.g.*, McKinney's Labor Law §194 (2016) (prohibiting unequal compensation between the sexes for substantially equal work).

17. *See, e.g., Hammond v. Lifestyle Forms and Display Co., Inc.*, 2009 WL 10313837, at *3 (E.D.N.Y. 2009).

18. Labor Law—Unpaid Wages Prohibition Act, 1997 Sess. Law News of N.Y. Ch. 605 (S. 5071–C) (McKinney's).

19. Labor Law—Wage Theft Prevention Act, 2010 Sess. Law News of N.Y. Ch. 564 (S. 8380) (McKinney's).

20. *Becker v. Huss Co., Inc.*, 43 N.Y.2d 527, 540-41, 402 N.Y.S.2d 980, 984, 373 N.E.2d 1205, 1209 (1978), citing Judge Cardozo's "penetrating discussion" of the issue in *Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 268, 130 N.E. 288, 289 (1921).

21. *Anonymous v. Anonymous*, 40 Misc.2d 492, 498, 243 N.Y.S.2d 630, 636-37 (N.Y. Fam. Ct. 1963), citing *Jacobus v. Colgate*, 217 N.Y. 235, 111 N.E. 837 (1916).

22. N.Y. Lab. L. §198(3) (2010) (emphasis added).

23. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 968 (1998).

PRESIDENT'S COLUMN, from page 1

lobbying on state sexual harassment legislation, both in Albany and New York City. We also used the listserve to organize a successful grassroots lobbying effort, all of which resulted in amplification of our position and contributed to positive modifications to the legislation.

This year, we've also created a Wage and Hour Committee chaired by Melissa Stewart and Troy Kessler, and ramped up our excellent NELA Nite and Solo Nite programming. The Task Force continues to partner with colleagues at NELA National and affiliates across the country to block federal judicial nominees who would roll back employee rights and benefits, while the Amicus Committee supports important cases in federal and state court.

It's a challenging but exciting time to be a plaintiffs' side employment lawyer and a member of NELA NY. As we saw so clearly during the state legislative campaign, every voice makes a difference. ■

NELA Nite and Solo Committees Joint Report

We've had a lot of NELA Nites:

In October 2017, in an evening co-sponsored by the NELA/NY Task Force, there was a NELA Nite on *Representing Undocumented Workers in the Age of Trump*. Our panelists were Jonathan Bernstein, a partner at Levy Davis & Maher, LLP; David Colodny, Director of Legal Services at of Catholic Migration Services; and Rebecca Nathanson, the Director of the Anti-Retaliation Unit and Counsel to Labor Standards at the New York State Department of Labor. Rita Sethi was the moderator. We had a full house (and videotape attendees), and people went away thinking that they had learned vital information in representing this vulnerable group of workers.

On January 25, 2018, we held a NELA Nite on *Non-Disclosure Agreements in Sexual Harassment Cases*. The speakers were Margaret McIntyre, State Sen. Brad Holyman, and Rick Seymour (coming up from D.C.), with Special Hagan moderating. It was a scintillating night with about 40 attendees. Among other things, the panel discussed the pros and cons of legislation introduced by Senator Hoylman which would make unconscionable non-disclosure agreements in employment cases, including sexual harassment, discrimination, retaliation, and wage and hour matters.

On February 21, 2018, Allegra Fishel, of the Gender Equality Law Center, and Molly Weston Williamson, of A Better Balance, spoke on New York State's recently enacted *Paid Family Leave Act*. All who attended found the discussion very helpful for our practices.

On March 8, 2018, the Solos Committee sponsored a NELA Nite on *Unemployment Insurance*, attended by 17 attorneys. Topics included an overview of the structure of the state's unemployment insurance system, and the process for making and appealing claims. Panelists discussed dismissal pay, total unemployment, voluntary quit, capability and availability, misconduct, willful misrepresentation, and the availability of attorneys' fees and unemployment insurance for clients with other claims. Panelists were Jacob Korder, Julie Salwen, Bernadette Jentsch and Lisa R. Lipman moderated.

And a lot of Solo Committee events:

Sandra Cohen, the "409A Whisperer", presented on *Executive Compensation at Termination of Employment* on October 16, 2018. Section 409A is the IRS section that deals with taxation of deferred compensation. The NELA Solo Support Committee hosted the event at Sandra's office, which is at 200 Park Avenue. Many NELA members know Sandra as the go-to attorney for everything executive-compensation related. Sandra discussed tricky Section 409A issues with severance and releases and shared war stories from representing CEOs and management teams in negotiating employment matters. Most NELA attorneys don't usually deal with Section 409A in their practices, but Sandra Cohen is available to assist them if ever they need her help.

On February 7, 2018, the Solo Support Committee hosted a *"State-Federal Court Smack Down"* to answer the burning question, of whether State Court or Federal Court is the preferred venue to bring an employment law claim. Danny Alterman and Delmas Costin advocated filing in State Court while Geoff Mort and Marjorie Mesidor were proponents of suing in Federal Court. State Court advantages included the fact that there is less formality and no caps on damages, while Federal Court was described as being more efficient as well as offering plaintiffs the opportunity to mediate for free. In spite of the dogged determination of each side to prove their point, the atmosphere was congenial and a good time was had by all!

If you have an idea for a NELA Nite or want to join the NELA Nite Committee contact John Beranbaum, Special Hagan, Michael Pospis, or Rita Sethi. If you have an idea for a Solo Committee event or want to join, contact Joan Lenihan or Felicia Nestor.

WAGE PAYMENT LAW, from page 3

leave one section without meaning or force.[24] Labor Law §198(3)'s rights-affirming language would be left without force unless one or more of Article 6's "substantive" provisions could be harmonized with §198(3)'s command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]" If the "[a]ll employees shall have the right to recover" language of §198(3) did not create substantive rights, then §193 would be left as the *only* "substantive" Article 6 provision through which employees not covered by §191 could recover unpaid wages. Therefore, excluding the failure to pay earned wages from the universe of "any [unauthorized] deduction" from wages under §193 would nullify §198(3)'s guarantee that "[a]*ll employees shall have the right to recover full wages benefits and wage supplements and liquidated damages*"—an unacceptable result.

Although **Gottlieb** was effectively superseded by 1997's Unpaid Wages Prohibition Act, and criticized as "ambiguous" and as having "perhaps unintended" consequences,[25] the confusion it caused was not contained until the Court of Appeals held in **Pachter v. Hodes**[26] that employees are covered by Article 6's provisions except where expressly excluded.[27]

Nonetheless, while some courts now acknowledge Labor Law §198 as a source of substantive rights,[28] few seem to notice that it now has unequivocal rights-affirming language. And one court that did notice §198's unequivocal language (**Malinowski v. Wall Street Source, Inc.**[29]) apparently did not realize it was added *after* ***Gottlieb*** was decided, and, as a result, it cited **Gottlieb** for the proposition that this *post*-**Gottlieb** statutory language does not mean what it says.[30]

Since there is no telling how long it will take before most courts give effect to Labor Law §198(3)'s rights-affirming language, one must still explore the purported distinction between deducting and failing to pay wages under §193—it is the only other Article 6 provision through which employees not covered by §191 can recover their unpaid wages and liquidated damages.

The Purported Distinction Between Deducting and Failing to Pay Wages Contravenes §193's Purpose

"[Labor Law §193] was derived from former sections 10–13 of the Labor Law (L. 1909, ch. 36, §§10–13), which required employers to '*full[y]* and prompt[ly]' *pay earned wages*."[31] "[T]he inequity that the Legislature sought to prevent" in enacting §193 was employers benefitting from employees' earned wages.[32]

This begs the question: What could be more destructive of Labor Law §193's purpose than to exempt from liability employers who benefit the most from employees' wages, i.e., those who *keep* all of an employee's earned wages? If one were to accept the purported distinction between deducting and failing to pay wages, the employer in Ryan that owed a $175,000 nondiscretionary bonus could be liable for withholding $10, $1,000 or even $174,999 from the bonus paycheck (at least if those sums were noted on a paystub), but *not* for withholding the entire $175,000.

Courts adopting this myopic view of Labor Law §193 fail to ask the critical question—"*Why?*" As in, "*Why* is it wrong for an employer to make an unauthorized deduction from an employee's wages?" Surely it is not because deducting part of the employee's paycheck is worse than taking the entire paycheck. Rather, it is because an employee's wages represent the fruits of her/his labor and have been deemed worthy of special protection. The idea that §193 exempts total wage deprivations is irreconcilably inconsistent with the law's goal of preventing employers from benefitting from employees' wages.

Mistaking the "Shadow on the Wall of the Cave" for the Real Thing

The purported distinction between deducting and failing to pay wages misapprehends the concept of a "deduction" and the intangible nature of what is being deducted. As a result, it wrongly assumes a deduction is something that can be seen—like a notation on a paystub.[33] While the phrase "deduction from … wages" in Labor Law §193 is suggestive of a notation on a paystub denoting a subtraction from wages, a paystub notation is not a "deduction" at all; it is only a *manifestation* of a deduction—a proverbial shadow on the wall of the cave.

Upon further analysis, one can see why deducting and failing to pay wages are really the same thing. "A 'deduction' is literally an act of taking away or subtraction."[34] How are wages taken away or subtracted? To answer that one must answer a more basic question: What are wages?

Wages are "a specialized type of property"[35] that "belong to the wage earner until they are pledged or committed to another."[36] Labor Law §190(1) defines "wages" as the "earnings" of

See WAGE PAYMENT LAW, next page

24. McKinney's Cons.Laws of New York, Book 1, Statutes, §98; *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 530, 369 N.Y.S.2d 655 (1975).

25. *Hart v. Dresdner Kleinwort Wasserstein Securities, LLC*, 2006 WL 2356157, at *4 (S.D.N.Y. 2006), *quoting Miteva v. Third Point Management Co., L.L.C.*, 323 F. Supp. 2d 573, 581 (S.D.N.Y. 2004); *See also Monagle v. Scholastic, Inc.*, 2007 WL 766282, at *1 (S.D.N.Y. 2007) (observing that "Judge Marrero's scholarly analysis in [*Miteva*], has persuaded most courts that th[e] position [set forth in Gottlieb] is incorrect[.]").

26. 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008).

27. *Id.*, 10 N.Y.3d at 616, 861 N.Y.S.2d at 250.

28. *See, e.g., Tini v. AllianceBernstein, L.P.*, 108 A.D.3d 409, 410, 968 N.Y.S.2d 488, 489 (1st Dep't 2013) ("as unpaid salary and commission constitute [w]age under Labor Law §190(1), plaintiff has stated a claim under Labor Law §198.") (citation omitted).

29. 2012 WL 279450, at *2 (S.D.N.Y. 2012).

30. Id.

31. *Marsh v. Prudential Securities Inc.*, 770 N.Y.S.2d 271, 274, 1 N.Y.3d 146, 153 (2003) (Emphasis added), citing *Matter of Hudacs v. Frito–Lay, Inc.*, 90 N.Y.2d 342, 347, 660 N.Y.S.2d 700 (1997).

32. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 586 825 N.Y.S.2d 674, 678 (2006).

33. *See, e.g., Strohl v. Brite Adventure Center, Inc.*, No. 08–CV–259, 2009 WL 2824585, at *9 (E.D.N.Y. Aug. 28, 2009) (dismissing claim where the plaintiff alleged the defendant violated §193 by adjusting her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time because the "defendants did not 'deduct' any amount from [the plaintiff's] wages, but simply failed to pay her all the wages she had earned.").

34. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 584 (2006).

35. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

36. *Epps v. Cortese*, 326 F.Supp. 127, 133 (E.D. Pa. 1971), *vacated on different grounds, Fuentes*

an employee for labor or services rendered. "Earnings," in turn, means "'any economic good to which a person becomes entitled for rendering economic service.'"[37]

"As a right, claim or interest against the employer, wages yet to be received are intangible property."[38] The question then is: How does one "take away" something with no physical existence?

The word "take" has several meanings, including "to deprive one of the use or possession of; to assume ownership."[39] Since a "deduction" is "an act of taking away or subtraction,"[40] and a "taking" is a deprivation, an employee's earned and due wages are "deducted" when the employee is "deprived" of them.[41]

The Term "Any Deduction" Is Sweeping in Its Scope, and Encompasses "Indirect" And "Constructive" Deductions

Even if one assumes a failure to pay earned wages is an "indirect" rather than "direct" deduction (a dubious assumption), the deductions barred by Labor Law §193 are not limited to "direct," "specific" or "payroll" deductions. Instead, §193 bars "*any* deduction from the wages of an employee" except for deductions that are authorized and for the employee's benefit.

As the Court of Appeals has observed, "the word 'any' means 'all' or 'every' and imports no limitation,"[42] and "is as inclusive as any other word in the English language."[43] In this regard, the Second Circuit has concluded:

> "[T]he word 'any' has an expansive meaning," and thus, so long as "Congress did not add any language limiting the breadth of that word," *the term 'any' must be given literal effect.*"[44]

Since the word "any" generally indicates a legislative "intent to sweep broadly to reach *all varieties of the item referenced,*"[45] it encompasses "indirect" or "constructive" varieties of the items referenced. Accordingly, just as a law concerning "'any payment' is clearly sweeping in its scope and embraces both direct and indirect payments,"[46] the phrase "any deduction" is clearly sweeping in its scope and embraces both direct and indirect deductions.[47]

Further, Article 6's drafters were familiar with the more restrictive term "payroll deductions" because it is found in Personal Property Law Article 3-a, which is referenced in Labor Law §193(4).[48] But they chose not to use that more restrictive term when drafting §193's prohibition against "any deduction from the wages of an employee[.]"

In addition, Article 6's substantive provisions should be liberally interpreted in favor of the employee.[49]

Finally, one must give the term "*any* deduction" its plain meaning to maintain the consistency of purpose between Labor Law §193(1) and §193(3[a]) (formerly subdivision (2)), which was added in 1974 to "prohibit wage deductions by *indirect means* where direct deduction would violate the statute."[50]

The Idea That a Specific Mental State Must Be Proved to Establish a §193 Violation

The purported distinction between

---

v. Shevin, 407 U.S. 67 (1972); *see also U.S. v. Larson*, 2013 WL 6196292, at *2 (W.D.N.Y. 2013) ("'wages and benefits pursuant to a labor contract constitute extortable property" because, *inter alia*, "a contract and contractual rights can be assigned, and therefore constitute something of value that can be exercised, transferred or sold.")

37. *Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 576 (7th Cir. 1980), citing Webster's New International Dictionary (2d ed., unabridged 1937).

38. *American Standard Life & Accident Co. v. Speros*, 494 N.W.2d 599, 605, n. 9 (N.D. 1993).

39. *Black's Law Dictionary* (6th ed. 1990) p. 1453 (defining "take" to mean, i*nter alia*, "to deprive one of the use or possession of; to assume ownership."); *State v. G.C.*, 572 So. 2d 1380, 1382 (Fla. 1991) ("Deprive is defined as 'to take away;' 'to take something away;' 'to keep from the possession, enjoyment, or use of something.'"), citing *Webster's Third New Int'l Dictionary* 606-607 (1986); *People v. Banks*, 75 Ill. 2d 383, 389, 388 N.E.2d 1244, 1247 (1979) ("*Webster's Third New International Dictionary* 606 (1971) defines 'deprive' as 'to take away: remove, destroy; to take something away from: divest, … to keep from the possession, enjoyment, or use of something.'"); *State v. Smith*, 2001 WL 283388, at *5 (Conn. Super. Ct. Mar. 7, 2001) ("*Webster's Third New International Dictionary* defines 'take away' as meaning … 'to cause deprivation of,' …'") (emphasis added).

40. *Angello, supra*, 7 N.Y.3d at 584.

41. *See, e.g., Ryan, supra*, 945 N.Y.S.2d at 602, 19 N.Y.3d at 16 (employer's neglect to pay nondiscretionary bonus violated Labor Law §193); *Tuttle v. Go. McQuesten Co., Inc.*, 227 A.D.2d 754, 642 N.Y.S.2d 356, 357-58 (3d Dep't 1996) ("…withheld moneys constituted 'wages' pursuant to Labor Law §190 and, thus, under Labor Law article 6, defendant was not entitled to withhold these payments as a matter of law.") (Citing §193).

42. *Zion v. Kurtz*, 50 N.Y.2d 92, 104, 428 N.Y.S.2d 199, 205 (1980).

43. *New Amsterdam Casualty Co. v. Stecker*, 3 N.Y.2d 1, 5, 163 N.Y.S.2d 626 (1957); *see also Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131-32 (2002) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'").

44. *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174 (2d Cir. 2005) (emphasis added; citation omitted).

45. *Cohen v. JP Morgan Chase & Co..*, 498 F.3d 111, 117 (2d Cir.2007) (emphasis added), citing, *inter alia, United States v. Gonzales*, 520 U.S. 1, 5 (1997).

46. *U.S. v. Lanni*, 466 F.2d 1102, 1108-09 (3d Cir. 1972); *see also Charles v. Diamond*, 47 A.D.2d 426, 430, 366 N.Y.S.2d 921, 926 (4th Dep't 1975) (law conferring jurisdiction over claims for the appropriation of "any real or personal property" extends to a claim arising out of an unconstitutional "de facto appropriation of private property") (citation omitted); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 118-19 (2d Cir. 1984) (phrase "any false description or representation" in Lanham Act embraces false "innuendo, indirect intimations, and ambiguous suggestions"); *Ennabe v. Manosa*, 319 P.3d 201, 212, 168 Cal.Rptr.3d 440, 453, 58 Cal.4th 697, 714 (Cal. 2014) ("Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions."); *U.S. v. Quong*, 303 F.2d 499, 503 (6th Cir. 1962) ("The term 'any interest' must be defined in the broadest sense and includes any interest whatsoever, direct or indirect"); *Grogan v. Hillman*, 930 So.2d 520, 523 (Ala.Civ. App. 2005) ("Given its natural and plain meaning, the term 'any possession' includes 'constructive possession.'"); *State v. Bradley*, 782 N.W.2d 674, 679, (S.D. 2010) (phrase "any custody" includes "constructive" custody), citing *Murphy v. United States*, 481 F.2d 57, 61 (8th Cir. 1973); *Harris v. New Castle County*, 513 A.2d 1307, 1309 (Del. 1986) (phrase "any recovery" includes "indirect" recovery of damages from a third party).

47. *See, e.g., Martinez v. Alubon, LTD.*, 111 A.D.3d 500, 501, 978 N.Y.S.2d 119, 121 (1st Dep't 2013) ("The protections of section 193 extend not only to completed deductions, but also to 'attempted wage deductions' that would violate the statute if consummated") (citations omitted).

48. *See* Personal Property Law §§46.2 and 48-d. Personal Property Law Article 3-a is referred to in Labor Law §193(4), which means that §193's drafters were presumably familiar with the more restrictive term "payroll deductions" and chose not to include it in §193(1).

49. *See, e.g., Samiento v World Yacht Inc.*, 10 N.Y.3d 70, 78, 854 N.Y.S.2d 53 (2008) ("[Section 196-d] should be liberally construed in favor of the employees."); *Martinez v. Alubon, LTD.*, 111 A.D.3d 500, 501, 978 N.Y.S.2d 119, 121 (1st Dep't 2013) ("The protections of section 193 extend not only to completed deductions, but also to 'attempted wage deductions' that would violate the statute if consummated.") (citations omitted).

50. *Angello v Labor Ready, Inc.*, 7 N.Y.3d 579, 585, 825 N.Y.S.2d 674 (2006) (emphasis added; citations omitted).

educting and failing to pay wages seems to assume that the statute is violated only when the employer is shown to have acted with a culpable mental state[51]—one that apparently can only be shown by a deduction notation on a paystub.[52] However, even employers who prove they acted in good faith are subject to Article 6 liability for unpaid wages and attorney's fees (but not liquidated damages).[53]

A wage is either owed or it isn't. Employers have a statutory duty to provide employees with enough information to know what they will be paid for the work they perform.[54] An employer is thus actually or constructively aware that an employee's wages will not be paid unless certain conditions are met, and that ignoring those conditions will cause the employee's wages to be unpaid and the employer to be correspondingly enriched by the fruits of the employee's labor.

Even if Labor Law §193 had an intent requirement, it is naïve to suppose an employer that enriches itself by keeping the fruits of another person's labor does so with no intent. "[T]he common law rule [is] that a man is held to intend the foreseeable consequences of his conduct,"[55] and it is foreseeable that an employee's wages will not be paid if the employer fails to carefully define, keep track of, and honor its wage payment obligations.

Finally, grafting an intent requirement onto Labor Law §193 would make §193 incongruous with Article 6's other provisions which contain no such intent requirement.[56]

Even if Labor Law §193 had an intent requirement, it is naïve to suppose an employer that enriches itself by keeping the fruits of another person's labor does so with no intent.

Case Law Outside the Article 6 Context

Case law outside the Article 6 context also casts doubt on the purported distinction between deducting and failing to pay wages. For example, in the due process case of **Sniadach v. Family Finance Corp. of Bay View**,[57] the Supreme Court found an employer's "interim freezing" of wages pursuant to a wage garnishment to be a "taking of one's property [that] is so obvious[.]"[58]If a "taking away" is a "deduction,"[59] and a temporary wage deprivation of indefinite duration is an obvious "taking," then the *permanent* deprivation of one's earned wages is an even more obvious "taking," i.e., "deduction."

Similarly, courts interpreting federal wage and hour laws generally refuse to distinguish between a deduction and a failure to pay. Typical in this regard is **De Leon-Granados v. Eller & Sons Trees, Inc.**[60] In holding an employer liable for willfully violating federal wage and hour laws, the **De Leon-Granados** Court explained that "Department of Labor officials made clear that there was no difference between deducting an expense and failing to reimburse the expense."[61]

Likewise, a California appeals court in **Grier v. Alameda-Contra Costa Transit Dist**. held that "to withhold wages for work actually performed… constitutes a deduction from wages."[62]

Examples Showing Why The Distinction Between Deducting and Failing to Pay Wages Is Illusory

To illustrate why the distinction between deducting and failing to pay wages is illusory and leads to uncertain and indefensible results, consider the variations on the following fact pattern:

Joy is hired as a warehouse manager for her employer, Acme Corp., a glassware manufacturer. Acme agrees to pay Joy an annual salary, plus an end-of-year performance-based commission equal to $1 for each and every crate of glassware she ships from the warehouse.

51. *See, e.g., Gold v. American Medical Alert Corp.*, 2015 WL 4887525, at *4 (S.D.N.Y. 2015) (conceding that §193 "is plausibly susceptible to a broader interpretation" that encompasses an employer's failure to pay earned wages, but rejecting that "broader interpretation" because it "would include an employer withholding the entire amount of a salary because it contends, as here, that it fired an employee for good cause").

52. *See, e.g., Strohl v. Brite Adventure Center, Inc.*, No. 08–CV–259, 2009 WL 2824585, at *9 (E.D.N.Y. Aug. 28, 2009) (dismissing an improper deduction claim where the plaintiff alleged the defendant violated §193 by adjusting her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time because the "defendants did not 'deduct' any amount from [the plaintiff's] wages, but simply failed to pay her all the wages she had earned").

53. N.Y. Lab. L. §198(1-a).

54. *See* N.Y. Lab. L. §195.

55. *Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. N. L. R. B.*, 347 U.S. 17, 45 (1954) ("This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct"); *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 583, n.6 (2010) ("If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent"). In *Jerman,* the Supreme Court approvingly cited W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 110 (5th ed. 1984) for the proposition that "[I]f one intentionally interferes with the interests of others, he is often subject to liability notwithstanding the invasion was made under an erroneous belief as to some ... legal matter that would have justified the conduct[.]" 559 U.S. at 583. *Jerman* also approvingly cited the Restatement (Second) of Torts §164, and Comment e (1963–1964) for the proposition that the intentional tort of trespass can be committed despite the actor's mistaken belief that she has a legal right to enter the property. *Id.*

56. *See, e.g., People v. Vetri*, 309 N.Y. 401, 406 (1955) (construing predecessor to §191) (citations omitted); *Polyfusion Electronics, Inc. v. Promark Electronics, Inc.*, 108 A.D.3d 1186, 1187-88, 970 N.Y.S.2d 651, 652-53 (4th Dep't 2013) (construing Labor Law §191-c). Section 194 is also a strict liability statute because it is analyzed under the same standards as the federal Equal Pay Act. *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).

57. 395 U.S. 337 (1969).

58. *Sniadach, supra*, 395 U.S. at 342.

59. *Angello v. Labor Ready, Inc.*, 7 N.Y.3d at 584.

60. 581 F. Supp. 2d 1295 (N.D. Ga. 2008).

61. *Id.*, 581 F. Supp. 2d at 1315; *See also Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002) ("there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear.")

62. 127 Cal.Rptr. 525, 532, 55 Cal.App.3d 325, 335 (Cal.App. 1976).

Throughout the year she ships 11,000 crates of glassware. 1,000 of these are later found to have contained broken glassware when they left the warehouse.

Wage Deprivation 1

Joy's paystub notes the following:
Commission: $11,000
Damaged merchandise deduction: -$1,000
Wages included in this check: $10,000

Wage Deprivation 2

Joy's paystub simply notes "Commission: $10,000." In other words, the $1,000 Acme deducted is not noted on Joy's paystub. When Joy asks about the $1,000 shortfall, Acme's owner tells her he "*decided to subtract*" $1 for each crate that contained broken glassware.

While there is no difference to either Joy or Acme in these two examples, the mere absence of a deduction notation on Joy's paystub in Deprivation 2 could lead at least some judges to deny Joy's §193 claim on the ground that it involves "merely a failure to pay wages."[63]

However, if confronted with Deprivations 1 and 2 side by side, most jurists who believe a failure to pay is not a deduction would presumably retreat to a more "defensible" position, perhaps arguing that Acme's verbal reference to a "subtraction" is the equivalent of a paystub notation.

OK then, let us slightly alter the facts of Wage Deprivation 2. Let us now suppose the following:

Wage Deprivation 3

Upon being sued for violating §193, Acme denies the conversation about a "subtraction" ever happened (as it likely would), and falsely claims that Joy's commission was purely discretionary. What then? The jurists who had taken a step away from the wall of the cave and towards the outside world might then retreat back to the safety of the wall of the cave, asserting that "[t]his dispute as to the calculation of the net amount does not reflect a deduction from wages within the meaning of section 193[.]"[64]

But let us suppose some of these jurists would be willing to take another step away from the wall of the cave and towards the outside world, and allow a jury to decide whether Acme's owner mentioned the word "subtract." And let us suppose that at trial it was proved that Acme's owner didn't use the word "deduct" or "subtract," but simply told Joy she "*didn't deserve*" $1 for each crate with broken glassware. Or something vaguer still, like he "*expects more from her.*" Where does one draw the line?

Next consider this example:

Wage Deprivation 4

Acme's owner tells Joy her work is outstanding and that he has elected to exercise his (alleged) discretion to pay her a $10,000 commission. When Joy points out that she is owed $11,000, Acme's owner says he disagrees. Since Joy's wages (i.e., her right to be paid her earnings) are $11,000, when Joy receives a check for gross wages of only $10,000 can it be said that $1,000 has *not* been deducted from her wages?

If a deduction from wages is something other than a deprivation of the wages due and owing, then what is it? Must there be a deduction notation on a paystub before the employer can be liable for violating Labor Law §193? If so, why? Must there be some trace of employer rumination about damaged goods? If so, why? What quantum of cognition would be needed? How would that quantum of cognition be verified? What if the employer's disappointment about damaged goods was one of two reasons motivating the employer (or one of three, four, or five reasons)?

What if the employer is not thinking about damaged goods, but simply prefers to keep Joy's earned wages because it can? Even if intent were an issue, isn't the employer's intent to keep Joy's property readily inferable by the employer enriching itself with the fruits of Joy's labor?

Or what if Acme is cash-strapped and promises Joy a $30,000 bonus if she meets certain performance targets. When Acme makes that promise to induce added labor on Joy's part, doesn't it have a duty to ensure it is not making a promise it cannot keep?[65]

Next consider this example:

Wage Deprivation 5

Acme's owner never pays Joy any commission, but issues her a check for $0 and a paystub with the following notations:

$11,000
-$11,000

A deduction, right? So what's the difference if Joy receives the same amount ($0) without receiving the piece of paper? One could argue that pairing the written manifestation of a deduction with a written admission of the wages otherwise due and owing (i.e., a paystub listing both gross pay and the sum deducted) proves the employer's awareness that $11,000 was owed. But even if that were true, it wouldn't make the reverse true, i.e., the absence of an "$11,000" notation wouldn't prove the employer was not aware it owed $11,000.

Conversely, the written deduction notation by itself does not prove the deduction was from "wages."[66] A deduction notation on a paystub may be helpful, but is by no means necessary, to prove a deduction from wages.

Now let us suppose Acme is determined to withhold 50% of Joy's wages from the next two paychecks. Knowing this, Acme's counsel advises Acme to try to avoid Labor Law §193 liability by withholding one of the two paychecks altogether. Is that a defensible outcome?

Limiting principles are nowhere to be found in the ill-fated quest to distinguish a deduction from a failure to

63. *See Kane v. Waterfront Media, Inc.*, 2008 WL 3996234 (Sup. Ct., N.Y. Co. 2008) ("The court rejects plaintiff's contention that defendants' reduction of the commission percentages to which she was entitled under the contract supports a claim under Labor Law §193. At most, plaintiff only alleges a failure to pay wages. To state a claim for violation of Labor Law §193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages.") (citation omitted).

64. *See Kletter v. Fleming*, 32 A.D.3d 566, 567, 820 N.Y.S.2d 348, 349-50 (3d Dep't 2006).

65. *See, e.g., Polyfusion Electronics, Inc. v. Promark Electronics, Inc.*, 108 A.D.3d 1186, 1187-88, 970 N.Y.S.2d 651, 652-53 (4th Dep't 2013) (imposing double damages against manufacturer under §191-c where, due to financial difficulties, it failed to pay earned commissions within five days of the date the parties' contract was terminated).

66. *See, e.g., Pachter v. Bernard Hodes Group, Inc.*, 861 N.Y.S.2d 246, 252, 10 N.Y.3d 609, 618 (2008).

pay wages. That is because oft-cited examples of unauthorized deductions are only particularized manifestations of the inequity sought to be remedied, namely, employers benefitting from employees' earned wages.

Conclusion

All courts construing Article 6 should respect the Legislature's command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[,]"[67] and bid farewell to the false dichotomy between deducting and failing to pay wages. Only then will Article 6's goal of protecting earned wages be fully realized. ■

67. N.Y. Lab. L. §198(3).

Reprinted with permission from the Labor and Employment Law Journal, Fall 2016, Vol. 41, No. 1, published by the New York State Bar Association, One Elk Street, Albany, New York 12207. A more expansive law review article appears at 80 Alb. L. Rev. 1355.

Scott A. Lucas is the principal of the Law Offices of Scott A. Lucas.

A Practitioner's Guide: A Review of Recently Passed Laws and Policies Impacting New York Women in the Workplace

By Lauren Betters

In its latest action to dismantle barriers to pay equity, New York City passed legislation prohibiting all employers from inquiring about a job applicant's salary history. This law, effective October 31st, 2017, reduces the likelihood that women will be prejudiced by prior salary levels and helps to close the gender wage gap. This action encouraged a proposal of similar legislation at the state level, which perhaps comes as no surprise since over the last three years New York State has passed a variety of laws that profoundly impact women in the workplace.

This article is meant to be a quick reference to several of those laws, including the Women's Equality Act ("WEA") and New York State's Paid Family Leave Act ("PFLA"), as well as enhanced local safeguards under the New York City Human Rights Law ("NYCHRL") that provide anti-discrimination protections for pregnant workers and employees on the basis of caregiver status. The National Employment Lawyers Association of New York played a critical role in the passage of various pieces of legislation by providing testimony to local bodies, issuing letters of support, and getting involved in policy campaigns.

Enhanced Protections in New York State

The Women's Equality Act

In 2015, New York Governor Cuomo signed the Women's Equality Act, a collection of eight bills, five of which strengthen protections for New York women in the workplace.[1]

A. Achieve Equal Pay Act

Women make up nearly half the workforce in the United States,[2] yet still only earn 80 cents for every dollar a man makes.[3] African American women earn only 63 cents while Hispanic women only 54 cents, for every dollar white men earn.[4] The Achieve Equal Pay Act ("AEPA"), an amendment to the New York Labor Law, takes a big step toward closing the gender wage gap in New York by amending the State's existing equal pay law in several significant ways.[5]

Before the AEPA was passed, the New York Labor Law, similar to the federal Equal Pay Act,[6] provided that an employer could pay a man more than a woman for the same job if the employer could establish the difference in pay was based upon seniority, merit, quantity or quality of production, or on *any factor other than sex*. The AEPA changes that.

First, an employer can no longer rely on "any factor other than sex" to justify a difference in pay between a man and a woman doing the same job. Instead, an employer must show that the difference is based on "a bona fide factor other than sex, such as education, training and experience"[7] and the bona fide factor "shall not be based upon or derived from a sex-based differential in compensation." The defense will be unsuccessful if the employee demonstrates that the employer uses a practice that: (a) causes a disparate impact on the basis of sex, (b) an alternative employment practice exists that would serve the same purpose and not produce a differential, and (c) the employer has refused to adopt the alternative practice.[8]

Second, the AEPA clarifies that differentials in pay are prohibited even if two employees whose pay rates are compared work in different physical locations.[9] It expands the meaning of "same establishment" by defining it to include workplace locations that are in

1. These laws became effective January 19, 2016.
2. U.S. Bureau of Labor Statistics, 2016.
3. American Association of University Women, *The Simple Truth About the Gender Wage Gap* at 4, Spring 2017 Edition, available at *http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth*
4. Id. at 11.
5. N.Y. Lab. Law §194.
6. The Equal Pay Act of 1963, 29 U.S.C. §206.
7. N.Y. Lab. Law §194(1)(d).
8. Id.
9. Id. at §194(1).

the "same geographic region," no larger than a county. This is a departure from the EPA that limits comparisons only to jobs within the same establishment, defined as the distinct physical place of business.[10]

Third, the AEPA restricts an employer from prohibiting an employee from "inquiring about, discussing, or disclosing" the employee's wages or the wages of another employee.[11] Employers are permitted to create policies that establish reasonable limitations on the time, place and manner for discussion about wages, for instance, prohibiting an employee from disclosing the wages of another employee without the employee's permission.

Fourth, the AEPA significantly increases the statutory damages for willful violations of the law. While previously, employees could be awarded 100% of unpaid wages as liquidated damages, the AEPA now provides up to 300% of unpaid wages as a penalty for willful noncompliance.[12]

B. End Family Status Discrimination Act

The End Family Status Discrimination Act ("EFSDA") amends the New York State Human Rights Law ("NYSHRL") to include "familial status" to the list of protected classes.[13] "Familial status" includes any person who is pregnant, has a child or is in the process of securing custody of an individual under the age of eighteen. This means that employees or applicants for employment are protected from discrimination on the basis that they are, or are in the process of becoming, the parent or guardian of one or more children.

The New York State Division on Human Rights' "Guidance on Familial Status Discrimination for Employers in New York State"[14] provides several examples of familial status discrimination in the workplace, to include failure "to hire or promote an employee because the employee has children or 'too many' children," or because of the belief or assumption that an employee is unreliable because she is pregnant or she or he is a parent. In addition, it is unlawful for any employer to retaliate against an employee who has complained of familial status discrimination.

Notable, too, is what EFSDA does *not* offer. The familial status protection amendment explicitly states that it does not create a right to a reasonable accommodation.[15] Therefore, an employer is not required to accommodate the needs of the employee's children, and is not required to grant time off for the parent because of a child's needs, or to attend school meetings or events.

However, because the employer cannot discriminate against an employee because of her familial status, the employer must grant time off or permit other workplace changes to the same extent that it is granted to other employees. For example, an employer who routinely grants workplace adjustments (including leaves of absences) for an employee's academic responsibilities should not deny the same to employees based on familial status.

C. Protect Victims of Sexual Harassment Act

The NYSHRL defines a covered "employer" as one that employs four or more employees. The Protect Victims of Sexual Harassment Act ("PVSHA"), however, expands the definition of "employer" to make workplace sexual harassment unlawful by employers of any size, including those with less than four employees. This change is significant because more than 60% of New York's private employers have fewer than four employees.[16]

The four-employee minimum continues to apply to claims of discrimination or harassment based upon other protected classes. Of note, all domestic workers are protected from sexual harassment and harassment based on gender, race religion or national origin, regardless of the number of employees employed by a single employer.[17]

D. Protect Women from Pregnancy Discrimination Act

The NYSHRL was amended in 2015 to include the Protect Women from Pregnancy Discrimination Act ("PWPDA"). This amendment makes explicit that employers are required to provide reasonable accommodation for pregnancy-related conditions unless doing so would impose an undue hardship on the employer. The law applies to employers with four or more employees and protects employees regardless of tenure and number of hours worked.[18]

The amendment defines a "pregnancy-related condition" as a "medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is [medically] demonstrable" and prevents a pregnant employee from fully performing her job duties without a reasonable accommodation.[19]

The PWPDA requires that employers perform a reasonable accommodation analysis for pregnant workers and their pregnancy-related conditions and requires that these conditions be treated as a temporary disability.[20] The pregnancy accommodation requirement is consistent with the reasonable accommodation requirements for disabled employees under the NYSHRL.

E. Remove Barriers to Remedying Discrimination Act

The Remove Barriers to Remedying Discrimination Act ("RBRDA") amends the NYSHRL to allow employees who are subjected to sex discrimination at work to pursue otherwise costly litigation by shifting attorneys' fees to the defendant-employers.[21] This law gives victims, most

---

10. The Equal Pay Act of 1963, 29 U.S.C. §206.

11. N.Y. Lab. Law §194(4)(a).

12. N.Y. Lab. Law §198(1)(a).

13. N.Y. Exec. Law §296.

14. New York State Division on Human Rights, *Guidance on Familial Status Discrimination for Employers in New York State*, available at *https://dhr.ny.gov/sites/default/files/pdf/guidance-familial-status-employers.pdf.*

15. N.Y. Exec. Law §296.3(c).

16. Thomas P. DiNapoli New York State Comptroller, *The Role of Small Business in New York State's Economy*, 2010 available at *https://www.osc.state.ny.us/reports/other/smallbusinessreport091510.pdf*

17. New York State Division of Human Rights, *Guidance on Sexual Harassment for All Employers in New York State*, available a *https://dhr.ny.gov/sites/default/files/pdf/guidance-sexual-harassment-employers.pdf.*

18. N.Y. Exec. Law §§292.21(f), 296.

19. Id.

20. New York State Division of Human Rights, *Guidance on Pregnancy Discrimination and Reasonable Accommodation of Pregnancy-Related Conditions for Employers in New York State*, available at *https://dhr.ny.gov/sites/default/files/pdf/guidance-pregnancy-discrimination-employers.pdf.*

21. N.Y. Exec. Law §297.10.

of whom are women, the opportunity to vindicate their rights and be made whole in cases where they prevail.

Pursuant to RBRDA, attorneys' fees can be awarded in cases involving sex discrimination in employment where "sex" is the reason for: failure to hire or promote, termination, unequal pay, or unequal terms and conditions of employment, and in all cases of sexual harassment. In employment cases, the fee award is limited only to claims of sex discrimination or sexual harassment (and in appropriate circumstances, related retaliation claims). In other words, legal work related to claims of discrimination on a basis other than sex are not subject to this fee-shifting amendment.

Attorneys' fees may be awarded whether the complaint was brought to an administrative body, or in court. Defendants are entitled to obtain fees and costs from a complainant but only in sex discrimination cases where they can show that the allegations in the complaint were frivolous.

F. Paid Family Leave Insurance Act

In March of 2016, New York State not only raised the minimum wage to $15 by 2018,[22] but passed the nation's newest — and its strongest and most comprehensive — law mandating paid family leave.[23] Once effective on January 1st, 2018, the Paid Family Leave Insurance Act ("PFLIA") will provide workers with up to eight weeks of paid leave. By 2021, workers in New York will be eligible to up to 12 weeks of paid leave.

Under PFLIA, both male and female employees will be entitled to paid leave to: (a) care for a family member (including a child, parent, grandparent, grandchild, spouse or domestic partner) with a serious health condition; (b) bond with a newborn or adopted or foster child during the first 12 months following birth or placement; and/or (c) address issues relating to a spouse, domestic partner, child or parent who is serving in the military. Distinct from the Family and Medical Leave Act ("FMLA"), the PFLIA does not include paid family leave related to a pregnant worker's self-care, including recovery from childbirth. Presumably, the latter will correspond with baby bonding time permitted under the law.

Beginning in 2018, all full- and part-time New York employees who have been working at their jobs for at least six months will be eligible for paid leave. The payment or "benefit" will initially consist of up to 50% of an employee's weekly wage, capped at 50% of the New York Statewide Average Weekly Wage ("SAWW"). The benefit will increase each year until 2021, when workers will be entitled to receive benefits up to 67% of their weekly salary, capped at 67% of the SAWW. Employees out on paid family leave will also be entitled to continued health insurance benefits according to the same terms they received while on the job. The benefits under the PFLIA are significant when compared to what eligible workers currently receive under New York State's Temporary Disability Insurance ("TDI") program, which caps benefits at $170 per week.

Notably, the law relies solely on employee payroll deductions to fund the benefit. The maximum employee contribution in 2018 is 0.126% of an employee's weekly wage capped at the annual SAWW, which is currently a maximum of $1.60. Although this contribution will fluctuate each year, an important premise behind the legislation is that employee contributions should represent a very small deduction from each employee's weekly paycheck.

If employers violate the law, employees will be entitled to reinstatement and back pay. Unfortunately, there is no private right of action to go into Court. Instead, claims will be reviewed and decided by the New York Worker's Compensation Board.

Enhanced Protections Under the New York City Human Rights Law

A. Prohibiting Employers from Inquiring About a Prospective Employee's Salary History

Effective October 31, 2017, all New York City employers will be prohibited from inquiring about, relying upon, and verifying a job applicant's salary history.[24] This amendment to the New York City Administrative Code brings private employers in New York City in line with city agencies, which have been barred from inquiring into prior salary histories since Mayor de Blasio's executive order in November of 2016.

Once enacted, employers may not ask about and must refrain from relying on prior salary to determine "the salary, benefits or other compensation for [an] applicant during the hiring process, including the negotiation of a contract."[25] Employers are additionally prohibited from seeking salary history through alternative means. However, applicants themselves are not prohibited from voluntarily disclosing their prior salary his-

Pursuant to Remove Barriers to Remedying Discrimination Act (RBRDA), attorneys fees can be awarded in cases involving sex discrimination in employment . . . [however] legal work related to claims of discrimination on a basis other than sex are not subject to this fee-shifting amendment.

22. In New York City, the minimum wage will increase $2 on the last day of each year until it reaches $15 in 2018. In Westchester County and Long Island, it will increase $1 each year before hitting $15 in 2021.

23. New York became the fifth state to mandate paid family leave, after California, Washington, New Jersey and Rhode Island.

24. N.Y.C. Admin. Code §8-107(25), effective October 31st, 2017.

25. Id.

tory, and if an applicant chooses to do so, an employer may use that information to determine salary and benefits.

There are several important exceptions, including that disclosure is permitted if employers are acting pursuant to any federal, state, or local law that authorizes the disclosure of salary history, or when an applicant is a current employee. The law does not apply to public employees whose salaries are determined by collective bargaining agreements, nor does it prohibit an employer from conducting a background check, so long as salary history, if discovered, is not used to inform the hiring or contracting process.[26] Furthermore, employers are allowed to ask about objective markers of performance, such as revenue or sales reports.

Of note, New York State is working to advance similar legislation, A.2040C/S.6737, which would restrict an employer's ability to ask job applicants about their salary histories. If passed, the legislation would amend the NewYork Labor Law and apply to all New York State public and private employers. The bill has not yet gone through Committee in the New York State Senate. In addition, on April 10, 2018, Governor Cuomo introduced a separate piece of legislation to prohibit salary history inquiries by employers. This bill seeks to help close the gender wage gap and is part of larger efforts to advance women's equality in New York, including supporting women's return to or advancement in the workplace and combatting sexual harassment.

B. Discrimination on the Basis of Caregiver Status

As of May 4, 2016, the NYCHRL has included prohibitions against "employment discrimination on an individual's actual or perceived status as a caregiver."[27] Before this new cause of action, employees who were discriminated against by their employers for having caregiving responsibilities had to bring claims based on unlawful gender-based stereotypes.

Under this new law, employees or job applicants cannot be discriminated against if they are a parent with a child under the age of 18 to whom they provide direct care, including adopted or foster children; or they provide direct and ongoing care to a parent, sibling, spouse, child (of any age), grandparent, or grandchild with a disability or a person with a disability who lives with them, and that person relies on them for medical care or needs of daily living.

Employers are not required to provide reasonable accommodations to caregivers. However, employers must not deny these benefits to employees with caregiving responsibilities if the employer provides these benefits to other employees. The NYCHRL requires employers to provide leave time and workplace flexibility equally and not to make assumptions about an employee's commitment or ability to do their job based on their caregiving responsibilities.

C. The New Guidelines Under the Pregnant Workers Fairness Act

The New York City Pregnant Worker's Fairness Act ("PWFA") became effective in 2014 and mandates that employers reasonably accommodate not only the medical conditions of pregnant workers, but pregnancy-related needs that do not have to be documented by a medical provider.[28]

In May of 2016, the New York City Commission on Human Rights released enforcement guidance ("Guidance") to help employees and employers understand their rights and obligations under the PWFA.[29] The Guidance defines violations of pregnancy protections under the law to include discrimination not only in employment but also in the context of housing and public spaces.

The Guidance gives examples of reasonable accommodations ranging from modest job modifications for women enjoying a healthy pregnancy (such as minor changes in work schedules, allowing for drinking water, snacking and bathroom breaks, providing seating, and arranging for light duty or desk duty assignment) to more extensive accommodations (such as transferring the employee to a new position, reducing their work hours, or allowing them to work from home). If an employee's medical condition prevents her from working at all, an employer may even have to place an employee on leave while keeping her job open.

The Guidance clarifies that employees undergoing fertility treatment, who have had abortions or miscarriages, or who are breastfeeding are also entitled to reasonable accommodations under the NYCHRL. As such, an employer must provide a more flexible schedule to attend fertility appointments, additional unpaid leave to recover from a procedure and a reasonable time period for a woman to pump breast milk at work in a clean, sanitary and private location.

The Guidance requires pregnant employees and their employers to enter into what the Commission calls a "Cooperative Dialogue" which is a time-sensitive discussion about temporary job modifications needed to keep the employee working. It also clarifies that an employer may not retaliate against employees for requesting a reasonable accommodation. The only limitations on the scope of what an employer must provide is if an employee would not be able to satisfy the essential requisites of a job even with a reasonable accommodation or if it would cause "undue hardship" to the employer. ■

Lauren Betters is an attorney at the Gender Equality Law Center who litigates cases of gender-based discrimination in employment and education and strategizes public policy and advocacy initiatives on critical gender issues.

26. *Id.*

27. NY.C. Admin. Code §8-101.

28. N.Y.C. Admin. Code §8-107(22).

29. New York City Commission on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* available at *http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf*

Claws at Work: Second Circuit's *Vasquez* Decision Strengthens Cat's Paw Hold on Employment Law

By Onya Brinson, Esq.
onya.brinson@live.law.cuny.edu

No doubt Aesop never imagined one of his fables would have such important meaning in employment law.

The Second Circuit Court of Appeals gave its seal of approval to the Cat's Paw liability theory, which holds a negligent employer liable for adverse employment action against an employee based on another employee's discriminatory or retaliatory motives.

The Cat's Paw theory is based on an Aesop fable "The Monkey and The Cat," where the deceptive monkey tricks the cat into pulling chestnuts out of a fireplace for both to enjoy. However, the monkey consumes all of the chestnuts and the cat is only left with singed paws. The moral of the fable is "the flatterer seeks some benefit at your expense."

The moral is perfectly imputed into the **Vasquez v. Empress Ambulance Serv.**, 835 F.3d 267 (2d Cir. 2016) case.

According to plaintiff Andrea Vasquez's lawsuit, Empress hired her as a medical emergency technician in July 2013.[1] In October 2013, she began receiving unwanted sexual advances from her co-worker, Empress Dispatcher Tyrell Gray.[2] "Gray constantly asked Vasquez out on dates, attempted to flirt with her, and… repeatedly put his arm around her or touched her shoulder."[3] Gray also made comments to Vasquez like, "I bet I can make you leave your man" and promised to "send… something between you and me."[4] Gray sent Vasquez a photo of his erect penis and asked, "What do you think?"[5] Vasquez immediately reported this to an Empress Field Supervisor, and was assured by several supervisors that they would investigate.

Gray witnessed Vasquez filing a complaint, and concerned that his job was in peril, allegedly doctored text messages on his iPhone to make it appear that Vasquez had engaged in inappropriate sexual conduct. Not only did Vasquez vehemently deny any kind of sexual relationship with Gray, but she also offered to show supervisors and an Empress Human Resources representative evidence of the texts Gray sent to her telephone. They refused to examine the texts.[6] Vasquez was terminated from her job at Empress the same day Empress supervisors and a Human Resources representative accused her of sexual harassment.

Vasquez sued Empress, claiming that Empress was negligent by allowing the co-worker's accusation of wrongful conduct to influence their decision to terminate Vasquez's employment.

The Second Circuit ruled that Empress was a negligent employer by failing to exercise due diligence to fully investigate Vasquez's allegations of sexual harassment because Empress "knew or should have known" that the co-worker's accusations "were a product of retaliatory intent and thus should not have been trusted."[7] Specifically, the court noted that co-worker Gray knew the plaintiff accused him of sexual harassment, only six hours elapsed between Vasquez's complaint and Gray's complaint, and that Gray conveniently printed copies of the alleged sexual exchanges between him and the plaintiff. This provided Empress reason to distrust the co-worker's account.[8] Because Empress failed to properly investigate the plaintiff's allegations, "the employer plays credulous cat to the malevolent monkey, and, in doing so, allows itself to get burned-i.e., successfully sued."[9]

Vasquez was also the first time that the Second Circuit fully embraced and expanded the Cat's Paw doctrine that other courts (including its sister circuits and the Supreme Court), had already adopted as a legal principle of employment discrimination.

However, it was a long, winding road for the Second Circuit to fully endorse Cat's Paw. This article will explore this, and the history of this employment law doctrine.

Origins of Cat's Paw Doctrine

The Cat's Paw theory originated from Judge Richard Posner's Seventh Circuit decision over twenty-five years ago.[10] In **Shager**, the court ruled that if an employee's age discrimination bias influenced the employee's termination, the company could be held liable for discriminatory bias by approving a supervisor's adverse employment action of firing the employee.[11] Judge Posner went on to detail how the supervisor's discriminatory bias may have influenced the plaintiff's employer to terminate him by writing, "Lehnst (the supervisor) not only set up Shager (plaintiff) to fail… but influenced the committee's decision by portraying Shager in the worst possible light. Lehnst's influence may well have been decisive."[12] This was the first case that coined the Cat's Paw theory that an employer could be held liable for engaging in an adverse employment action based on a supervisor's discriminatory bias.

1. Vasquez, 835 F.3d at 267.
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. *Vasquez*, 2016 U.S. App. LEXIS 15889, 2016 WL 4501673 at *7.
8. *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016), see also *Boston v. Taconic Eastchester Mgmt. LLC*, 2016 U.S. Dist. LEXIS 135683 (S.D.N.Y. Sept. 30, 2016).
9. *Vasquez*, 835 F.3d at 267.
10. *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990).
11. Id.
12. Id.

Supreme Court Weighs In

The U.S. Supreme Court decision in **Staub v. Proctor Hospital.**, 562 U.S. 411 (U.S. 2011) gave its blessing to the Cat's Paw theory of employer liability in 2011.[13] In **Staub**, the Supreme Court endorsed the Cat's Paw theory that "when a supervisor performs an act motivated by discriminatory 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, even where the ultimate decision maker may be unaware of the other supervisor's animus, then the employer may be held liable."[14] The Supreme Court did not address whether the discriminatory animus of a low-level employee could be imputed to an employer under a cat's paw theory. Likewise, the sister circuits have not addressed the low level employee paw issue either. Even Judge Posner, who adopted the Cat's Paw theory, distinguished holding a company liable for the discriminatory bias of a supervisor versus that of a lower level employee because "his [low-level employee] conduct is so unrelated to the employer's business that the employer will ordinarily be excused from liability under the doctrine of respondeat superior."[15]

Respondeat Superior Theory

The legal theory of respondeat superior is the grandfather of Cat's Paw. Holding a negligent employer liable for an employee's tort is not a new legal precedent. Cat's Paw already had its claws codified in law by allowing employers to be held liable for employee torts committed outside of the scope of employment in a hostile work environment.[16] The Restatement (Second) of Agency states that an employer can be held liable for an employee's tortious conduct outside the scope of employment in a hostile work environment, and would not ordinarily be deemed agents of the employer "if the master was negligent or reckless…"[17] This means that while sexual harassment would certainly be outside of the scope of employment, a negligent employer can he held liable if they knew or should have known about the wrongful conduct, but failed to prevent the harm.

Under respondeat superior, an employer can also be held vicariously liable for torts committed by an employee within the scope of employment and in furtherance of the employer's business.[18] In order to meet the burden of establishing respondeat superior, a plaintiff must show "the purpose in performing such actions is to further the employer's interests, or to carry out duties incumbent upon the employee in furthering the employer's business.[19] In many ways, Cat's Paw grew out of the respondeat superior theory of holding employers liable for tortious acts within and outside of the scope of employment.

In **Staub**, The Supreme Court not only endorsed the Cat's Paw theory, but also stressed the importance of the principles of agency involving the relationship between an employer and a supervisor. "In **Staub,**" the Employer tried to assert the defense that the Plaintiff could only prove liability if the ultimate decision maker, or the agent for whom the ultimate decision maker was the cat's paw, was motivated by discriminatory animus. However, The Supreme Court ruled that even if there was some removal between the Plaintiff's supervisors and the ultimate decision maker, "animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct."[20]

The Supreme Court in **Staub** also stressed that it is irrelevant how attenuated an adverse employment decision might seem as long because that supervisor is acting as an agent of the employer, "since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a "motivating factor in the employer's action."[21] The Second Circuit takes this a step further by ruling that the discriminatory motive of an employee with no decision making authority can be used to establish liability if used in the final adverse employment action.

The Supreme Court in the **Staub** case was helped in a clearer analysis of agency by the fact that the Plaintiff commenced an action based on the violation of a statute that codified that the discrimination be "a motivating factor in the adverse action."[22] In **Vasquez**, the Second Circuit again took its cue from The Supreme Court in **Staub** in using the principles of agency to expand the reach of employer liability in Cat's Paw to lower-level employees by "deriving

***Vasquez** is so remarkable because it not only accepted, but also expanded, the Cat's Paw doctrine. The decision specifically states that the cat's paw theory applies even if the employee who had the unlawful animus is a non-decision making employee.*

13. *Staub v. Proctor Hosp.*, 562 U.S. 411 (U.S. 2011).

14. Id.

15. Id.

16. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (U.S. 1998); see also Restatement (Second) of Agency §219(2).

17. Restatement (Second) of Agency §219 (2)(b).

18. See *Abelhamid v. Altria Grp.*, Inc., 515 F. Supp. 2d 384, 394 (S.D.N.Y. 2007); see also *Nerey v. Greenpoint Mortgage Funding, Inc.*, 116 A.D.3d 1015, 1016 (2d Dep't 2014).

19. *Guzman v. United States*, No. 11 Civ. 5834 (JPO), 2013 U.S. Dist. LEXIS 131684, 2013 WL 543343, at *9 (S.D.N.Y.Feb. 14, 2013) (quoting *Beauchamp v. City of New York*, 3A.D.3d 465, 466, 771 N.Y.S.2d 129 (2d Dep't 2004).

20. *Staub v. Proctor Hosp.*, 562 U.S. 411 (U.S. 2011).

21. Id.

22. Id.

Cat's Paw liability from general principles of … agency law."[23]

It is an interesting phenomenon that this extension of Cat's Paw has not been made prior to **Vasquez** because in the Restatement (Second) of Agency, a "servant" is defined as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."[24] A non-supervisory employee fits the definition of a "servant" just as much as a supervisor does, maybe more because a supervisor has more independence in terms of carrying out job functions than an employee with no decision making authority at all. It could be argued that **Vasquez** was not an extension of Cat's Paw, just a correct application of agency. The question now is will the Supreme Court and sister circuits catch up to this application of agency in cat's paw cases.

Federal and NYCHRL Standard

In **Vasquez**, the Second Circuit ruled that the Plaintiff's employer was liable because they knew or should have known about the employee's retaliatory motives. The Second Circuit relied on Supreme Court precedent in a case which laid out the legal framework for proving a hostile work environment on the basis of sexual harassment.[25]

The Supreme Court in **Ellerth** invoked the standards of agency by ruling, "thus although a[n employee's] sexual harassment is outside the scope of employment . . ., an employer can be liable, nonetheless, where its own negligence is a cause of the harassment[, . . . i.e.,] if it knew or should have known about the conduct and failed to stop it."[26]

While this is used to establish a hostile work environment on the basis of a protected status, the New York City Human Rights Law has already codified the "knew or should have known" standard, as well as holding an employer liable for discriminatory bias based on conduct of an agent or an employee when the employer knew or should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct."[27]

Since it appears that the Second Circuit is willing to broaden the standard of employer liability in Cat's Paw cases, it may be easier for employment plaintiff attorneys to advocate in cat's paw cases in federal courts. Local practitioners have had greater success prosecuting discrimination claims under the City law because it is more favorable to plaintiffs than other anti-discrimination laws. Now that **Vasquez** has applied this standard in cat's paw cases, plaintiffs' attorneys may be more amenable to commencing these types of actions under federal and city law rather than having to choose between the two.

Retaliation Legal Test

It is important to note that several circuits struggled with the test for retaliatory animus as being "but-for" or "a motivating factor" of an adverse employment action. In **Univ. of Tex. Southwestern Med. Ctr. v. Nassar**, 133 S. Ct. 2517 (2013), the Supreme Court raised the bar on the causation test for retaliation, writing that "Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation."[28] This is now the standard for any Title VII retaliatory bias employment discrimination case. Certainly it is an easier hurdle for plaintiffs' attorneys to be able to establish a cognizable Cat's Paw claim by being able to prove that the employee engaging in a protected activity such as reporting discrimination was a motivating factor of the adverse employment action vs. having to establish that but-for the plaintiff engaging in the protected activity, the retaliation would never have occurred. The "but-for" causation standard makes the plaintiff's burden much harder in Title VII retaliation and Cat's Paw retaliation cases.

Second Circuit's Reticence

The Second Circuit's jurisprudence had never explicitly endorsed the Cat's Paw theory prior to **Vasquez**. However, there were Second Circuit cases that hinted that there was an audience for such an argument.

In **Holcomb v. Iona College**, 521 F.3d 130 (2d Cir. 2008), the Second Circuit found that the employer's decision to terminate the plaintiff, a White man, was based on the associational discriminatory bias of supervisors based on race because the plaintiff was married to a Black woman. This was evidenced by the plaintiff's supervisors making racially disparaging comments of the most egregious kind involving the n-word, as well as racial stereotypes that frame Black people in a negative light in reference to the plaintiff marrying a black woman.[29] The court held that a plaintiff can succeed in proving employer negligence even if the decision maker did not have a discriminatory or retaliatory bias "so long as the individual is shown to have the impermissible bias played a meaningful role in the... process."[30]

In **Nagle v. Marron**, 663, F.3d 100, 117, (2d. Cir. 2011), the Second Circuit wrote that an employer cannot escape liability by using an independent person to "rubber stamp a discriminatory employee's unlawful design."[31] However, the Second Circuit still did not embrace cat's paw in the way its sister circuits had.[32] These sister circuits have imputed retaliatory animus on an employee's termination during an independent investigation on unrelated charges because the

23. *Vasquez v. Empress Ambulance Serv*., 835 F.3d 267 (2d Cir. 2016)

24. Restatement (Second) of Agency §220.

25. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

26. Id. at 758-59.

27. NYCHRL 8-107(13)(b); also see *Bailey v. Brooklyn Hosp. Ctr*., 2017 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. Jan. 4, 2017).

28. *Univ. of Tex. Southwestern Medical Ctr v. Nassar*, 133 S.Ct. 2517 (2013).

29. *Holcomb v. Iona Coll*., 521 F.3d 130 (2d Cir. 2008).

30. Id. at 143, (quoting *Bickerstaff v. Vassar Coll*., 196 F.3d 435, 450 (2d Cir. 1999)).

31. See also *Dedmon v. Staley*, 315 F.3d 948, 949 n.2 (8th Cir. 2003).

32. *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d. Cir 2011); *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1069-70 (6th Cir. 2015); *Hicks v. Forest Preserve Dist., of Cook County., Ill.*, 677 F.3d 781, 789-90 (7th Cir. 2012); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013); *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015).

employee spoke out against discriminatory treatment of Black police officers.[33] Similarly, in **Zamora v. City of Houston**, 798 F.3d 326 (5th Cir. 2015), the Fifth Circuit found the plaintiff's Cat's Paw claim viable in finding a causal connection by plaintiff having joined his father's discrimination lawsuit and the adverse action of his suspension.[34]

Vasquez is so remarkable because it not only accepted, but also expanded, the Cat's Paw doctrine. The decision specifically states that the cat's paw theory applies even if the employee who had the unlawful animus is a non-decision making employee. "Only when an employer in effect adopts an employee's unlawful animus by acting negligently with respect to the information provided by the employee, and thereby affords that biased employee an outsized role in its own employment decision, can the employee's motivation be imputed to the employer and used to support a claim under Title VII."[35] The supervisor requirement is stripped from Cat's Paw; at least it is in the Second Circuit.

Recommendations to Employees

The most important things for employees to be aware of in **Vasquez** is that if they make a claim of discriminatory bias to a Human Resources Department or an Equal Opportunity Department, the employee is entitled to a fair and impartial investigation by the respective department into the alleged discriminatory acts. If an employee not only believes that a department is not doing due diligence and conducting an impartial investigation, but also suffers an adverse employment action because of it, the employee has due process rights to either commence an action in court or take the matter to an external government agency (e.g., Equal Employment Opportunity Commission). In some cases, employees prefer these rights to internal investigations due to fear of retaliatory bias.

An employee should always keep dated notes or tape recordings of any alleged discrimination that occurs in the workplace.[36] This information will be critical if the employee wishes to pursue an internal/external discrimination complaint or c ommence an action in court. In the context of cat's paw, dates are also important if a supervisor or employee uses retaliatory animus to accuse the employee of similar discriminatory conduct in close proximity to the employee's report of discrimination within.

Employers in the Second Circuit's jurisdiction can no longer argue that the employee with animus was not a supervisor, so the employer is not negligent for taking an adverse employment action based on that information. Employees should know that an employer is required to vet a respondent's rebuttal to an employee's claims of discrimination, and not to accept them at face value without a thorough investigation.

The Future of Cat's Paw

While it is difficult to tell how the Supreme Court and sister circuits may respond to the Second Circuit's expansion of Cat's Paw, it is important that while none of the sister circuits have had such an expansive reading of Cat's Paw, they have not foreclosed the possibility of expanding Cat's Paw to include low-level employees. It is also important that much has changed in employment law since the **Shager** decision, in that now federal appellate courts are much more willing to hold employers accountable for discriminatory or retaliatory bias if it influences an adverse employment action to the plaintiff. Furthermore, because this is a relatively new phenomenon in employment law, especially to the Supreme Court and sister circuits outside the 7th Circuit, the Second Circuit may be able to sway sister circuits to expand the reading of Cat's Paw.

While Courts holding employers liable for rubber stamping a supervisor's bad acts inside or outside of the scope of their employment if the employer is negligent or reckless is nothing new, the Second Circuit's **Vasquez** analysis extends this precedent to protect plaintiffs from discriminatory or retaliatory conduct instigated by other employees whether supervisory or not. It is my hope that the Supreme Court and other sister circuits will follow suit. ■

An employer is required to vet a respondent's rebuttal to an employee's claims of discrimination, and not to accept them at face value without a thorough investigation.

33. *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d. Cir. 2011)

34. *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015).

35. *Vasquez v. Empress Ambulance Serv.,* 835 F.3d 267 (2d Cir. 2016).

36. An employee should always keep dated notes or tape recordings, depending on if the employee lives in a one-party rule state. Under New York Penal Law §§ 250.00, 250.05 it is a crime to record an in-person or telephone conversation if at least one party to the conversation does not consent to the recording.

Breaking Barriers in *Pesce v. NYPD*

Brad Conover, Esq. and Molly Smithsimon, Esq., Conover Law Office
brad@conoverlaw.com / molly@conoverlaw.com

When we took on Jonathan Pesce's case in 2010, I recalled, as a child, the hushed voices of adults talking about a family member with epilepsy. In May 2016, when Mr. Pesce proceeded to trial against the NYPD, his fate rested largely on the ability of his neurological expert to dispel such outdated fears and stereotypes about the condition.

Jonathan Pesce was diagnosed with epilepsy at age 13. As he grew into early adulthood, his doctors directed that he go off his medication to determine if it was still needed. When he did, he experienced seizures again. Despite his illness, he dreamed of a career in law enforcement. As a young man, he became an Eagle Scout and, later, earned awards for his dedication as a volunteer firefighter in his hometown. He took the civil service exam to be a police officer and trained to become an EMT and then a paramedic, working for a private ambulance company.

When Mr. Pesce submitted his job application to the NYPD in January 2010, he had been seizure free for two years and had never had a seizure while taking medication. The NYPD, however, had a long-standing policy against hiring anyone with epilepsy, claiming they posed an imminent threat to the safety of themselves and others in the highly sensitive field of law enforcement. Mr. Pesce's appeal to the Civil Service Commission affirmed the ban. He was turned down by other law enforcement and firefighting agencies, although he was medically cleared and served as both a volunteer firefighter and a paramedic.

Our canvassing of case law revealed that previously under the ADA, epilepsy controlled by medication had not been deemed by the courts to be a disability, and no plaintiff had successfully challenged such a ban in law enforcement. While the 2009 amendments to the ADA broadened the definition of a disability to include epilepsy, the EEOC, after a full briefing of Mr. Pesce's claim, was "unable to conclude" that the NYPD had violated the Americans with Disabilities Act Amendments Act (ADAAA). 42 U.S.C.A. §12102.

After a federal action was filed, during fact discovery, the NYPD's Chief Surgeon, in his deposition, explained the NYPD ban this way:

Q: So it's your belief that there is no safe way for somebody to serve as a police officer and be maintained on anticonvulsant medication?

A: It's not a belief. Fact.

Two other NYPD doctors offered similar testimony. At the conclusion of fact discovery, Mr. Pesce retained an expert in epilepsy, Dr. Sheryl Haut, Director of Adult Epilepsy at Montefiore Medical Center. In opposing NYPD's motion for

After Pesce v. NYPD, the ban on persons with epilepsy is effectively history. NYPD applicants can demand that their qualifications be assessed on individual merit and current medical knowledge, not stereotypical fears.

Prevailing plaintiff Jonathan Pesce with his attorneys Molly Smithsimon and Brad Conover.

summary judgment, Dr. Haut explained why NYPD's ban was not medically justified:

> The lifetime incidence for a person to experience a seizure is 10% (Hauser 1996), which means that one in ten individuals in the United States will experience at least one seizure at some point in their lives. This fact does not preclude persons without epilepsy from holding jobs such as a police officer. The risk of a breakthrough seizure for someone with well-controlled epilepsy is lower than 10%, as discussed above.

After a decision on summary judgment was pending for more than six months, the case was reassigned to Judge Denise Cote. Judge Cote denied the NYPD's summary judgment motion finding that "the parties have offered conflicting medical evidence as to whether Pesce would be a threat to the health and safety of others if he were to serve as a police officer" and scheduled a trial for early May 2016.

Pesce v. N.Y. City Police Dep't, 159 F. Supp. 3d 448, 458 (S.D.N.Y. 2016).

In the weeks before trial, we encountered several set backs. Months earlier, corporation counsel had indicated that they would stipulate to admissibility of the entire medical record. Several days before trial, counsel disavowed that agreement, forcing us to subpoena the medical records on the eve of trial. Although an NYPD officer salary and benefits are publically available information, Judge Cote ruled that the information would be inadmissible without an economic expert. We had to locate and retain an economic expert and disclose a report within days.

Judge Cote further ruled that we could not disclose to the jury that Mr. Pesce had been seizure free for seven years, as it would be unfairly prejudicial. In addition, although the NYPD had failed to disclose an expert or report, Judge Cote at trial permitted the NYPD to offer as "experts" the three doctors who were involved in the disqualification decision. Finally, at a pretrial mediation before Magistrate Fox just days before the trial, Mr. Pesce had trouble responding to a question by the judge. A speech impediment that was often imperceptible in conversation became more pronounced with the stress of speaking in a federal courtroom.

Several jurors effectively excused themselves from the trial by conceding that they were so grateful to the NYPD that they could never find against it, and others shared emotional stories about loved ones who had suffered from epilepsy. The pool that remained included a diverse group of mostly professionals, and a few with clear preferences for employers, who were eliminated through preemptory challenges.

Mr. Pesce wasted no time in disclosing his minor speech impediment and fully controlled seizure condition to the jury and presented himself as the determined young man he is, dedicated to a life of public service. Dr. Haut gave compelling testimony about medical advances in epilepsy prognosis and treatment and the broad spectrum of the condition, with some, like Mr. Pesce, posing virtually no risk of seizure greater than the general public.

Corporation counsel, on cross, attempted to exaggerate minor discrepancies in his medical records; mistakenly suggested that Mr. Pesce, a Nassau County resident, was not eligible to be a NYPD officer; and, then, falsely insinuated he would have been otherwise disqualified as a police officer. Plaintiff called the NYPD's Chief Surgeon on direct to establish that Mr. Pesce was disqualified based on a blanket ban, not an individualized assessment as required by the ADAAA. The NYPD then attempted to offer expert testimony through its Chief Surgeon that Mr. Pesce's candidacy posed an imminent threat to public safety. However, the Chief Surgeon's unfamiliarity with the most basic advances in epilepsy research and his use of outdated terminology, such as grand mal and petit mal seizures, were painfully obvious, and the NYPD rested its case without calling its two other doctors.

Plaintiff's expert gave compelling testimony about medical advances in epilepsy prognosis and treatment and the broad spectrum of the condition, with some, like Mr. Pesce, posing virtually no risk of seizure greater than the general public.

The jury took only a few hours to come back with a verdict finding that the NYPD had failed to conduct an individual assessment and awarded Mr. Pesce all his lost back pay of $257,762. After consultation with counsel, Judge Cote referred the claims for equitable relief to Magistrate Cott for mediation. After a lengthy mediation, the NYPD entered into an interim agreement agreeing to complete Mr. Pesce's application process and, if he passed, hire him as an NYPD officer. After completion of the four month application process, Mr. Pesce was accepted to the police academy, and the City agreed to pay the jury verdict, additional back pay of $26,629, interest of $1,585 and attorney's fees of $367,179.

After **Pesce v. NYPD**, the ban on persons with epilepsy is effectively history. NYPD applicants can demand that their qualifications be assessed on individual merit and current medical knowledge, not stereotypical fears. ■

Needlework: Did the Second Circuit Err in *Stevens v. Rite Aid Corporation*?

Onya Brinson, Esq. / onya.brinson@live.law.cuny.edu

Can an employer terminate an employee that suffers from trypanophobia, which is defined as a fear of needles, without providing a reasonable accommodation to that employee?

Yes. At least, that is the way the Second Circuit answered this question. In **Stevens v. Rite Aid Corporation**, 851 F.3d 224 (2d Cir. 2017), the Second Circuit reversed a district trial court verdict that found Mr. Stevens (a pharmacist) had been the victim of disability discrimination when his employer terminated him for refusing to administer vaccinations to customers because of his fear of needles. The Second Circuit decision overturned a jury verdict in favor of the Plaintiff, which awarded Mr. Stevens back-pay damages of $485,633.00, front-pay damages of $1,227,188.00 to cover a period of 4.75 years, and emotional damages of $900,000, later reduced to $125,000 when the Plaintiff agreed to a remittitur. Judgment was entered on January 27, 2015.

There are two questions central to this case (1) whether administering vaccinations was an essential job function, and (2) whether the defendant could have provided Mr. Stevens with a reasonable accommodation. This article will explore these legal questions.

Whether administering vaccinations was an essential job function.

The Americans with Disabilities Act prohibits discrimination in employment against "a qualified individual on the basis of disability." 42 U.S.C. §12112 (a) A qualified individual is defined as one who, "with or without a reasonable accommodation, can perform the essential functions of the job of the employment position that such individual holds or desires." 42 U.S.C. 12111 (8); see also **Sista v. CDC Ixis N. Am., Inc.**, 445 F.3d 161, 169 (2d Cir. 2006) (citation and internal quotation marks omitted). If an employee can perform the essential functions of the job, the employer cannot discriminate. However, if the employee has a disability that prevents them from carrying out the essential functions of the job, that employee is rendered unqualified under the ADA.

The Second Circuit ruled that because Rite Aid revised its job description for pharmacists in 2011 to require immunization certification and licensure, that administering vaccinations was an essential function of Plaintiff's job. However, the Second Circuit is belied by a Rite Aid executive who testified at trial that at the time Mr. Stevens's employment was terminated in 2011, "Rite Aid Pharmacists spent relatively little time performing customer immunizations when the new policy was first put into place..." i.e., S**tevens,** 851 F.3d at 229. Usually essential functions of the job are a common part of a 'qualified individual's' employment in a particular position.

The Second Circuit has spoken definitively on distinguishing essential and non-essential job functions. It has, for example, ruled that "Essential functions are defined under EEOC regulations to mean the 'fundamental duties' to be performed in the position in question, but not functions that are merely 'marginal.'" **Shannon v. New York City Transit Auth.**, 332 F.3d 95, 100 (2d Cir. 2003) (citing **Stone v. City of Mt. Vernon**, 118 F.3d 92, 97 (2d Cir. 1997).

The Second Circuit weighs the following factors in determining an essential job function: (1) "the employers judgment, (2) written job descriptions, (3) the amount of time spent on the job performing the function, (4) the mention of the function in a collective bargaining agreement, (5) the work experience of past employees in the position, and (6) the work experience of current employees in similar positions." **McMillan v. City of New York**, 711 F.3d 120, 126 (2d Cir. 2013) (citing **Stone v. City of Mount Vernon**, 118 F.3d 92, 97 (2d Cir. 1997)). Courts are charged with conducting "a fact specific inquiry into both the employer's description of a job and how the job is actually performed in practice." **McMillan**, 711 F.3d at 126.

Since the Second Circuit treats EEOC Guidelines as authoritative, the Guidelines for determining an essential job function are as follows: "A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential

It could be argued that at the time of plaintiff's termination, administering vaccinations was a non-essential, marginal job function. Defendant could have reallocated the marginal functions of administering needles to other pharmacists as a possible job restructuring.

because of the limited number of employees available among whom the performance of that job can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform that particular function." 29 C.F.R. §1630.2(n).

Analyzing the case under these guidelines, it could be argued that at the time Mr. Stevens was terminated, the act of administering vaccinations was merely marginal. First, Plaintiff was employed at the Defendant's pharmacy for 34 years. During this period he performed the essential job functions of handling medications and counseling customers regarding their medications. *See,* **Stevens,** 851 F.3d at 227. There was no evidence presented that the purpose for being a pharmacist was to administer vaccinations, particularly since at the time of the Plaintiff's termination, a Rite Aid executive testified that there were low immunization numbers in 2011. While he stated the public was not aware of the immunization program yet and it has since grown, the courts only base essential function analysis on the status of the function at the time of the employee's termination.

While it could be argued that there may be a limited number of employees available among whom this job can be distributed, it certainly cannot be argued that administering vaccinations is so highly specialized that the Plaintiff was hired for his expertise in this position. The Plaintiff in this case was hired over 30 years before the Defendant's vaccination policy ever became a part of the job functions of being a pharmacist. Furthermore, all Rite Aid pharmacists had to complete a training to administer vaccinations, meaning that it is likely that none of these pharmacists were hired for their expertise in administering vaccinations. This is especially true because Rite Aid offered training for pharmacists from 2011 to administer vaccinations.

In weighing the Second Circuit factors in determining an essential job function, there is a great deal of deference given to the employer's judgment. The Second Circuit notes that courts "must give considerable deference to an employer's judgment regarding what functions are essential for service in a particular position," **Shannon** (citation and internal quotation marks omitted); *see also,* e.g., 42 U.S.C. §12111(8) ("[C]onsiderations shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, the description shall be considered evidence of the essential functions of the job."). However, the Second Circuit is also clear that while employer's judgment and written description of the job are important factors "no one listed factor will be dispositive." **Stone**, 118 F.3d at 97.

In **Stevens**, it appears that the Second Circuit made the employer's judgment factor dispositive in determining what functions were essential for the job of a pharmacist. Certainly after 2011, administering injections became a part of the written job description of being a Rite Aid pharmacist. *Id.* However, in this case it is instructive to examine past written job descriptions. The jury may have weighed the fact that when the Plaintiff applied to be a pharmacist at Rite Aid, administering vaccinations was not an enumerated job function. It may be an unreasonable exercise to only examine Rite Aid's job description from 2011, a description put into place well after the Plaintiff was hired.

At the time Rite Aid began to administer its vaccination program, Mr. Stevens was not a Rite Aid applicant. If Mr. Stevens was applying for the job in 2011, then it would be reasonable to argue that Mr. Stevens was well aware that a condition of being hired was the ability to administer vaccinations and that given his fear of needles, it would make it difficult to perform the essential function of administering vaccinations. However, here Plaintiff was an employee for years without having to administer any vaccinations as a pharmacist. It is critical to consider written job descriptions as one factor among several here since Plaintiff was not a job applicant but rather a long standing Rite Aid employee.

The jury may have weighed the fact that when Plaintiff applied to be a pharmacist at Rite Aid, administering vaccinations was not an enumerated job function. It may be an unreasonable exercise to only examine Rite Aid's job description from 2011, a description put into place well after Plaintiff was hired.

There was no evidence presented that the purpose for being a pharmacist was to administer vaccinations, particularly since at the time of the Plaintiff's termination, a Rite Aid executive testified that there were low immunization numbers in 2011. While he stated the public was not aware of the immunization program yet and it has since grown, the courts only base essential function analysis on the status of the function at the time of the employee's termination. Past employees were also not required to administer vaccinations prior to 2011. After 2011, all Rite Aid pharmacists were mandated to administer vaccinations, which certainly weighed in the plaintiff's favor.

It is telling that the Second Circuit only seemed to weigh two factors: the employer's judgment and the 2011 revised pharmacist job description. Since no single factor is dispositive and taking the totality of circumstances in this case, it could reasonably be asked whether at the time of Plaintiff's termination administering vaccinations was an essential job function in view of the following: a. administering vaccinations was such a

small part of his job, b. the Plaintiff had worked as a pharmacist at Rite Aid decades before the revised job description, and c. that past employees did not have to administer vaccinations.

Whether Defendant could have provided Plaintiff with a reasonable accommodation.

The Second Circuit also analyzed the question of whether Defendant could have provided Plaintiff with a reasonable accommodation. The ADA stipulates that a reasonable accommodation can involve "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. §12111(9).; see also **Lovejoy-Wilson v. NOCO Motor Fuel**, Inc., 263 F.3d 208, 217 (2d Cir. 2001).

While "job restructuring" is not defined in the ADA, EEOC Guidelines under the ADA explain that "[a]n employer or other covered entity may restructure a job by reallocating or redistributing *nonessential, marginal* job functions." 29 C.F.R. pt. 1630, App. §1630.2 (o). However, EEOC regulations note that an employer "is not required to reallocate essential functions." In this case, the Plaintiff spent over 30 years as a pharmacist when administering vaccinations was not an essential job function. Furthermore, it could be argued that at the time of the Plaintiff's termination, administering vaccinations was a non-essential, marginal job function because even Defendant acknowledges that while they changed the pharmacist job description to add administering vaccinations in 2011, it was a marginal part of the job because the public was just becoming aware of Defendant's vaccination program. If this were the case, Defendant could have reallocated the marginal functions of administering needles to other pharmacists as a possible job restructuring.

The Second Circuit dismissed Plaintiff's argument that Defendant could have provided him with desensitization therapy. Desensitization therapy is defined as a type of therapy used to help individuals overcome phobias and other psychological disorders. The Second Circuit cited case law in **Emerllahu v. Pactiv, LLC**, No. 11-CV-6197 (MAT), 2013 WL 5876998, at *4 n.2 (W.D.N.Y. Oct. 30, 2013); **Desmond v. Yale-New Haven Hospital, Inc.**, 738 F. Supp. 2d 331, 351 (D. Conn.2010) to support the proposition that employers are not obligated to provide employees medical treatment for employees as a reasonable accommodation. While the District Court of Connecticut in **Desmond** agreed that an employer is not required to provide medical treatment, there is a case that indicates that medical treatment can be used as a possible reasonable accommodation.

In **Dunlap v. Association of Bay Area Gov'ts.**, 996 F. Supp. 962 (N.D. Cal. 1998), a plaintiff sued an insurer after he was injured on the job for refusing to provide him a reasonable accommodation that required medical treatment, a recommended surgical procedure, and other necessary medical care under Title III of the ADA. **Dunlap**, 996 F. Supp. 962. Title III of the ADA applies to public accommodations and provides in relevant part that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns… or operates a place of public accommodation." 42 U.S.C. §12182(a).

In **Dunlap**, the U.S. District Court for the Northern District of California ruled that Defendant denying Plaintiff medical care as a reasonable accommodation could be a basis for a disability discrimination claim under the ADA. Furthermore, the court noted that often McDonnell-Douglas burden shifting is used for non-employment ADA discrimination cases such as **Rothman v. Emory Univ.**, 123 F.3d 446, 451 (7th Cir. 1997) (applying **McDonnell-Douglas** burden-shifting in a case brought under Title III of the ADA).

Since **McDonnell-Douglas** can be used as a burden shifting standard in Title III ADA cases, why can't a reasonable accommodation request of medical treatment be used in employment cases? Federal circuit courts have noted that the McDonnell-Douglas burden-shifting test is applicable to Title III ADA non-employment discrimination case to determine whether denial of medical treatment could be cognizable in a failure to accommodate case. Therefore, why is it unreasonable to say that if an employer denies medical treatment in certain cases, that would potentially be a failure to accommodate? The courts could apply the undue hardship test and make the employer prove their legal burden of establishing that the request for medical treatment would be an undue hardship.

There is nothing in the record to suggest that the employer in the **Stevens** case was even questioned on this issue. While 2nd Circuit case law is on the side of the employer on this point, perhaps it is time for the courts to revisit this issue. In the **Stevens** case, a strong argument certainly could have been made that providing medical treatment to a valued employee who had been employed with the Defendant for 34 years would have benefitted the employer as much as it would the employee. While I am not saying that the Second Circuit necessarily got its analysis totally wrong; however, it does not appear that they carefully weighed all of the factors in determining whether administering vaccinations was an essential job function and if there could have been a reasonable accommodation for Mr. Stevens. One thing is very certain: twelve citizens in a box believed Mr. Stevens. ■

Reprinted with permission from the May 12, 2017 edition of the New York Law Journal© 2017 ALM Media Properties, LLC. All rights reserved.

Further duplication without permission is prohibited. ALMReprints.com – 877-257-3382 - reprints@alm.com.

Emotional Distress Damages in Employment Discrimination Cases: Principles & Examples

Michael J. Pospis, Esq.
Pospis Law, PLLC
mike@pospislaw.com

Emotional distress damages may be the most significant aspect of an employment discrimination case, particularly where the plaintiff has sustained modest to low economic losses. This article is intended as a guide for assessing them.

The Law

Legal Basis

The anti-discrimination statutes provide for a wide range of remedies meant to make an aggrieved plaintiff "whole." These include lost wages, liquidated damages, punitive damages, emotional distress damages (a subset of "compensatory damages"), and attorney fees.

Emotional distress damages are recoverable under a number of statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981, the New York State Human Rights Law, and the New York City Human Rights Law. *See* 42 U.S.C. §1981a(b)(3) (referring to "compensatory damages … for … emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"); **Bouveng v. NYG Capital LLC**, 175 F. Supp. 3d 280, 328 (SDNY 2016) (availability under NYSHRL and NYCHRL).[1] Courts have held that such damages are available for retaliation claims under the Fair Labor Standards Act (**Greathouse v. JHS Sec. Inc.**, 2015 WL 7142850, at *3 (SDNY 2015)) and the Sarbanes-Oxley Act of 2002 (**Sharkey v. J.P. Morgan Chase & Co.**, 2018 WL 1229831, at *11 (SDNY 2018)), but not for claims under the Age Discrimination in Employment Act of 1967 (**Ferguson v. Lander Co., Inc.**, 2008 WL 921032, at *21 (NDNY 2008)).[2]

Such damages are more subjective, less empirically quantifiable, and hence less predictable than economic damages. *See, e.g.*, **Stevens v. Rite Aid Corp.**, 2015 WL 5602949, at *21 (NDNY 2015) (characterizing them as "inherently speculative"). Nevertheless, the case law provides some analytical structure for evaluating them.

Proving Emotional Distress Damages

Causation

"Damages for emotional distress ... cannot be assumed simply because discrimination has occurred." **Makinen v. City of New York**, 167 F. Supp. 3d 472, 489 (SDNY 2016); *see also* **McIntosh v. Irving Trust Co.**, 887 F. Supp. 662, 665 (SDNY 1995) ("[I]t does not follow that simply because there was retaliation, there must be an award of compensatory damages; rather, the compensatory damages must be proven and not presumed.").

It is thus not uncommon for defendants to argue that the claimed emotional distress was not caused by the alleged wrongful conduct.

In **Makinen**, for example, defendants argued the jury's compensatory damage award could not be sustained because plaintiffs "did not establish a 'causal link' between Defendants' conduct and plaintiffs' emotional distress and … failed to show that 'other stressors in their lives' were not the true causes of their emotional distress." 167 F.Supp.3d at 489. Judge Carter disagreed, noting that plaintiffs "established both their emotional distress and that their distress 'flowed' from Defendants' conduct and not outside aspects of their lives" in that they, inter alia, "clearly attributed a host of physical and mental symptoms to their interactions with the CSU, and … rejected invitations to attribute those symptoms to outside stressors, like their romantic relationships." *Id.*

In **Simmons v. New York City Transit Authority,** 2008 WL 2788755 (EDNY 2008), defendant challenged the jury's compensatory damages award by arguing that "plaintiff's emotional distress largely stemmed from personal issues not chargeable to" defendant. *Id.* at *9. The court disagreed, explaining that "[a]lthough jurors heard testimony about issues plaintiff was facing in her personal life, they were instructed not to consider these personal issues in determining an award for compensatory damages" and that "there was sufficient evidence for the jury to attribute plaintiff's pain and suffering to the actions of" defendant (including testimony by plaintiff's treating psychologist that plaintiff's employment situation was the "main stressor" in plaintiff's life during the relevant time period).

Corroboration & Medical Proof

Many courts say that emotional distress damages may be established through the plaintiff's uncorroborated testimony. *See, e.g.,* **Matter of Amg Managing Partners, LLC v. New York State Div. of Human Rights**, 148 A.D.3d 1765 (NY App. Div. 4th Dept. 2017) ("[P]roof of mental anguish may be established through the testimony of the complainant alone."); **Bouveng**, 175 F. Supp. 3d at 328 ("[A] court is not required to remit a large non-economic damage award, even where evidence of emotional dam-

1. While compensatory damages under Title VII are subject to a cap based on the size of the employer (42 U.S.C. §1981a(b)(3)), there is no such cap on such awards under 42 U.S.C. §1981, the NYSHRL, and the NYCHRL. *See Hill v. Airborne Freight Corp.*, 212 F.Supp.2d 59, 77 n.11 (EDNY 2002).

2. There is some authority for assessing such damages via the common-law tort of intentional infliction of emotional distress. *See Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 163 (2d Cir. 2014) (upholding a jury's $1.32 million award for "egregious" racial harassment, but questioning, without deciding, "whether New York law allows an IIED claim in the light of the simultaneous pursuit by the plaintiff of statutory causes of action for the same or similar injury to the plaintiff.").

age consists solely of plaintiff's testimony."); **Manson v. Friedberg**, 2013 WL 2896971, at *7 (SDNY 2013).

Other cases appear to require at least some degree of corroboration. *See*, *e.g.*, **Santana v. G.E.B. Medical Management**, 2017 N.Y. Slip Op. 32289(U), 2017 WL 4927181, at *2 (N.Y. Sup. Ct. Bronx Cty. 2017) ("Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct."); **Laboy v. Office Equip. & Supply Corp.**, 2016 WL 5462976, at *11 (SDNY 2016) ("A plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages. Rather, the plaintiff's testimony of emotional injury must be substantiated by other evidence that such an injury occurred, such as the testimony of witnesses to the plaintiff's distress, or the objective circumstances of the violation itself.") (**quoting Patrolmen's Benevolent Ass'n of City of N.Y. v. City of N.Y.**, 310 F.3d 43, 55-56 (2d Cir. 2002)).

Courts appear to agree that medical treatment is not necessary in order to obtain emotional distress damages. *See*, *e.g.*, **Santana**, 2017 WL 4927181, at *2 ("[P]sychiatric or other medical treatment is not a precondition to recovery."); **Laboy,** 2016 WL 5462976, at *11 ("Evidence that a plaintiff has sought medical treatment for the emotional injury, while helpful, is not required ... [nor are] physical symptoms of emotional distress.").

That said, medical proof may be necessary to justify higher awards. *See*, *e.g.*, **Brady v. Wal-Mart Stores, Inc.**, 455 F.Supp.2d 157, 199 (EDNY 2006) ("[Plaintiff] corroborated his claims of pain and suffering with testimony by family members who witnessed it and the psychiatrist who treated him for it. Neither is required to sustain an award of some compensatory damages, but the presence of both distinguishes this case from others that resulted in lower awards"); **Najnin v. Dollar Mountain, Inc.**, 2015 WL 6125436, at *3 (SDNY 2015) ("citing lack of medical documentation in awarding less than the requested amount").

Expert Testimony

While helpful, expert testimony is not required in order to support a claim for compensatory damages. *See*, *e.g.*, **Zakre v. Norddeutsche Landesbank Girozentrale**, 541 F. Supp. 2d 555, 568 (SDNY 2008).

If offered in federal court, such evidence must pass muster under FRE 702 and the standard established by the U.S. Supreme Court in **Daubert v. Merrell Dow Pharmaceuticals**, Inc., 509 U.S. 579 (1993). For example, in **Matthews v. Hewlett-Packard Company**, 2017 WL 6804075 (SDNY 2017), plaintiff offered the expert report of a psychologist who examined plaintiff and concluded that the alleged harassment at work caused plaintiff to suffer from Major Depressive Disorder ("MDD"). *Id.* at *1. The court granted defendant's motion *in limine* to preclude this evidence, finding the report unreliable and hence inadmissible under FRE 702/**Daubert**. The court noted, inter alia, that plaintiff's expert did not review plaintiff's medical records or relevant psychological literature before forming his opinion, merely recited facts about plaintiff's personal history, and "appears to have concluded that Defendant's workplace caused Plaintiff's MDD without performing a differential diagnosis or other analysis to rule out potential alternative factors." *Id.* at *3. This was significant, since "[p]laintiff had recently experienced a number of stressful life events that presumably could have also contributed to his MDD." *Id.*

Discovery Issues

Medical/Mental Examination

A discrimination plaintiff seeking emotional distress damages should consider that doing so may result in defendant's demand for a mental examination of plaintiff under FRCP 35 or, if state law applies, NY CPLR 3121.

There is authority for the proposition that where only "garden variety" emotional distress damages are sought, a plaintiff need not submit to a medical examination. *See* **Kelly v. Times/Review Newspapers Corp.**, 2016 WL 2901744, *1 (EDNY 2016) (explaining that "in the Rule 35 analysis courts draw a distinction between those cases where 'garden variety' emotional distress damages are sought, and therefore no examination may be required, and other cases, where more substantial damages are claimed, rendering an examination appropriate.").

Where more severe emotional distress is claimed, courts are more likely to require a plaintiff to submit to a mental examination. For example, in **Clark v. Allen & Overy**, LLP, 125 A.D.3d 497 (App. Div. 1st Dept. 2015), plaintiff asserted claims of sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. *Id.* at 497. The court held that a mental examination was warranted pursuant to CPLR 3121:

> Although plaintiff denies that defendant's actions caused any diagnosed psychiatric condition and does not anticipate presenting an expert in support of her emotional distress claims, she testified at her deposition that her emotional distress has included experiencing eczema all over her body, hair pulling, anxiety, depression and suicidal feelings. Under these circumstances, the court providently exercised its discretion in determining that defendant had demonstrated that plaintiff had placed her mental condition 'in controversy' by alleging unusually severe emotional distress, so that a mental examination by a psychiatrist is warranted to enable defendant to rebut her emotional distress claims. … Although plaintiff asserts that an examination would be unduly intrusive into private matters, she did not propose conditions or seek a protective order limiting the scope or extent of the examination.

Id. at 497-98. *See also* **Kelly**, 2016 WL 2901744, at *4 (holding that a FRCP 35 examination was warranted, where plaintiff sought "damages relating to Defendant's intentional conduct allegedly causing him a severe emotional injury, which he may prove by trial through the testimony of his treating therapist" and noting that "the failure to direct that Plaintiff appear for such an examination would be fundamentally unfair as it would leave [defendant] with no way to challenge [plaintiff]'s claim for emo-

tional distress damages at trial.").

Social Media

So-called "social media" evidence has become increasingly prevalent in litigation generally, and employment discrimination cases, particularly with respect to the issue of emotional distress damages. While such material is subject to discovery, defendants' ability to obtain such material is not limitless.

For example, in **Moll v. Telesector Res. Grp., Inc.,** 2016 WL 6095792 (WDNY 2016), the court offered this guidance:

> [A] plaintiff's entire social networking account is not necessarily relevant simply because he or she is seeking emotional distress damages … [U]nfettered access to Plaintiff's social networking history will not be permitted simply because Plaintiff has a claim for emotional distress damages. … [R] outine status updates and/or communications on social networking websites are not, as a general matter, relevant to [plaintiff's] claim for emotional distress damages, nor are such communications likely to lead to the discovery of admissible evidence regarding the same. … Thus, it is not appropriate to permit unrestricted access to social media for the purpose of identifying photographs, postings or private messages that may appear inconsistent with someone experiencing emotional distress … However, posts specifically referencing the emotional distress plaintiff claims to have suffered or treatment plaintiff received in connection with the incidents alleged in her complaint and posts referencing an alternative potential source of cause of plaintiff's emotional distress are discoverable. … In addition, posts regarding plaintiff's social activities may be relevant to plaintiff's claims of emotional distress and loss of enjoyment of life. *Id.* at *5.

It remains to be seen how these issues will be addressed in light of the New York Court of Appeals' recent decision in **Forman v. Henkin**, 2018 WL 828101, 2018 NY Slip Op 01015 (Feb. 13, 2018).

Categorization

The Second Circuit sorts emotional distress claims into three categories: "garden variety," "significant," and "egregious." In **Bouveng**, Judge Gardephe explained:

> In 'garden variety' emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration. 'Garden variety' emotional distress claims generally merit $30,000 to $125,000 awards.
>
> 'Significant' emotional distress claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses.
>
> Finally, 'egregious' emotional distress claims generally involve either 'outrageous or shocking' discriminatory conduct or a significant impact on the physical health of the plaintiff. In 'significant' or 'egregious' cases, where there is typically evidence of debilitating and permanent alterations in lifestyle, larger damage awards may be warranted.

Bouveng, 175 F. Supp. 3d at 328; accord **Miller v. City of Ithaca**, N.Y., 2015 WL 9223755 (NDNY 2015) (explaining the three-tiered framework and noting that "garden variety" claims "merit[] awards in the range of $30,000 to $125,000.").[3]

3. There is a line of cases that cite a lower range (e.g., $5,000-$35,000) for the "garden variety" category. *See, e.g., Munson v. Diamond*, 2017 WL 4863096, at *8 (SDNY 2017); *Drice v. My Merchant Services, LLC*, 2016 WL 1266866, at *7 (EDNY 2016); cf. *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659 (SDNY 2005) (remitting a $500,000 jury award to $120,000 for plaintiff's "considerable" distress, and noting that "[t]he range of acceptable damages for emotional distress in adverse employment action cases lacking extraordinary circumstances seems to be from around $30,000 to $125,000.").

Examples

Having reviewed some "black letter" principles, we turn now to some representative examples of how courts have assessed emotional distress damages in practice.[4]

$10,000, on default (sexual harassment)

– **Rodriguez v. Express World Wide**, LLC, 2014 WL 1347369 (EDNY 2014) (M.J. Levy): Plaintiff testified as to the sexual harassment and the effect on her emotional health. She stated that the sexual advances made her feel uncomfortable and uneasy, that she was intimidated by the harasser's actions, and that she felt humiliated, scared, and afraid. She also asserted that she suffered "severe emotional distress and physical ailments." She did not submit any medical or mental health records. While describing plaintiff's emotional distress as "significant," the court noted that her allegations were "stated as conclusions drawn by plaintiff herself [and did] not address the duration of her emotional distress" and the brief duration of plaintiff's employment.

$15,000, remittitur[5] from $75,000 (sexual harassment, retaliation)

– **Carter v. Rosenberg & Estis, P.C.**, 1998 WL 150491 (SDNY 1998) (J. Cote): The evidence consisted largely of plaintiff's testimony that after her

4. Some caveats: Initially, the below values are not adjusted for inflation. *See Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157 (EDNY 2006) (citing older cases as guidance as to an appropriate award and noting "that the amounts awarded over a decade ago are worth far less now than they were then"); *Turley*, 774 F.3d at 163 (considering inflation in upholding a $1.32 million jury verdict). Furthermore, due to spatial constraints the below summaries do not include all of the facts addressed by the court, nor do they include subsequent litigation developments (e.g., the adoption of a Magistrate's Report & Recommendation, damages retrial results, or the reversal on the merits or for reasons otherwise unrelated to the court's emotional distress damages analysis). As such, one should thoroughly review and cite-check any decision herein before using it for any purpose.

5. "Where a jury's damages verdict is impermissibly excessive, remittitur is the process by which a Court compels a plaintiff to choose between reduction of [the] verdict and a new trial." *Perez v. Progenics Pharm., Inc.*, 204 F.Supp.3d 528, 562-63 (SDNY 2016).

firing she was "very upset" and "a mess," and that she engaged in "uncontrollable crying." While plaintiff also said that she participated for about one year in weekly treatment sessions with a "sexual harassment expert," she "offered no testimony as to the emotions she experienced while attending the group sessions, or whether they had any beneficial impact on her mental state." Plaintiff also "suffered minimal, if any, physical manifestations of her alleged mental anguish."

$20,000, on default (sexual harassment)

– **Drice v. My Merch. Servs., LLC**, 2016 WL 1266866 (EDNY 2016) (M.J. Go): Plaintiff stated that as a result of defendants' conduct she "felt then, and still continue[s] to feel, offended, disturbed, and humiliated by [defendant's] actions," that she suffered "from severe anxiety and depression as a result of Defendants' sexual harassment and discrimination during [her] employment," that "following this episode, there were days when she felt worthless and could not get out of bed," and that the emotional distress affected her ability to eat and sleep. Plaintiff did not provide any medical or mental health records. While the court found plaintiff's testimony credible, it noted that "despite the substantial distress she may have felt at the time, the duration of her employment was brief" and that she "did not testify to seeking professional help or having prolonged, severe symptoms."

$20,000, remittitur from $219,428 (retaliation)

– **McIntosh v. Irving Trust Co.**, 887 F.Supp. 662 (SDNY1995) (J. Koeltl): The only evidence of the extent of mental anguish or emotional injury came from the plaintiff. Plaintiff testified about "highly subjective feelings" he experienced at work, that he "felt humiliated" during a meeting when his supervisor "interrogated" him in an "accusatory manner," that he "felt like dirt," and that the employer's treatment "resulted in limited and short-lived physical manifestations of his mental distress during his employment." Plaintiff did not testify in detail with respect to the magnitude or duration of mental distress or that his life activities were curtailed in any way. He also offered no evidence that he sought any medical or psychological help other than one visit to a doctor while he was still employed, or of any medical or professional treatment for alleged emotional distress in the several years between plaintiff's termination and the trial.

$25,000, on default (race discrimination)

– **Laboy v. Office Equip. & Supply Corp.**, 2016 WL 5462976 (SDNY 2016) (M.J. Peck): "Laboy's allegations that he suffered an anxiety attack, loss of appetite, insomnia, depression, mental strain and low self-esteem are, for the most part, generic and standing alone would not support a substantial award of emotional distress damages. There is no evidence that Laboy sought psychological or other medical treatment as a result of defendants' actions, nor any indication of the duration of the negative consequences. On the other hand, the objective circumstances of Laboy's treatment are disturbing, to say the least. Laboy states that he regularly was referred to as the [racial slur] over a lengthy period of time. … Considering the limited record of Laboy's emotional distress together with the egregious discrimination he suffered, Laboy should be awarded the $25,000 he requested in emotional distress damages. This figure is well within the range of awards in comparable cases and appropriately compensates [plaintiff] for 'garden variety' emotional distress."

$25,000, on default (sexual harassment)

– **Najnin v. Dollar Mountain, Inc.**, 2015 WL 6125436 (SDNY 2015) (J. Pauley): Plaintiff testified that she felt uncomfortable, shocked, disgusted, and intimidated as a result of defendants' sexual harassment and that she began taking Xanax to combat stress. The court noted, however, that plaintiff's emotional distress allegations were "stated as conclusions drawn by [plaintiff] herself" and unsupported by medical documentation.

$25,000, NYSDHR award of $65,000 deemed excessive (sexual harassment)

– **Matter of AMG Managing Partners, LLC v. N.Y. State Div. of Human Rights**, 2017 WL 1187641 (N.Y. App. Div. 4th Dept. 2017): While acknowledging that petitioners' conduct was "reprehensible," the court was wary of the need for the award to be "compensatory and not punitive in nature." It concluded that "[b]ased on the evidence …, including evidence of complainant's own sexually inappropriate conduct at the workplace, the short duration of the conduct, and the severity of the conduct, we conclude that the … award is excessive and must be reduced to $25,000[.]"

$25,000, remittitur from $125,000 (disability discrimination)

– **Kinneary v. City of N.Y.**, 536 F.Supp.2d 326 (SDNY 2008) (J. Marrero): Plaintiff "felt embarrassment and disappointment over losing his position and having to rely on the financial support of family members after his discharge, and he was upset over having to move his daughter out of school." However, plaintiff "did not establish by medical evidence … that he suffered from extreme objective physical manifestations, that he sought psychological or medical treatment, that any particular life activities of his were curtailed due to the emotional distress, or that other circumstances prevailed which might differentiate his situation from the self-described garden variety non-economic damages situation." Upon reviewing other cases, the court held that $125,000 was excessive.

$30,000, on default (arrest/ conviction record discrimination)

– **Berdini v. Nova Sec. Grp.**, 2015 WL 5540735 (EDNY 2015) (M.J. Pollack): "[A]part from plaintiff's claim that his doctor 'increased' his dosage of Xanax, there has been no evidence presented that the plaintiff sought psychological treatment or any medical evidence offered that would warrant finding the plaintiff suffered other than garden-variety emotional distress."

$30,000, remittitur from $125,000 (race discrimination)

– **MacMillan v. Millennium Broadway Hotel**, 873 F. Supp. 2d 546 (SDNY 2012) (J. Gardephe): Plaintiff did not offer any testimony concerning his emotional distress, and testified only that working for his supervisor was "horrible." Plaintiff offered no evidence that he ever sought medical or psychological treatment, that he missed work, that he had any difficulty sleeping, that he lost his appetite, or that his alleged emotional distress had any physical manifestation or disrupted other aspects of his daily life. He remained at work throughout the period of the alleged discriminatory acts. Plaintiff's daughter testified that, e.g., while working under the supervisor in question her father was "always sad," "wasn't his same self," and that his temperament changed. "Given the conclusory nature of McMillan's and his daughter's testimony and the lack of any supporting detail or specific examples of emotional injuries suffered by McMillan, the Court finds that the evidence warrants only a modest award of emotional distress damages." Upon reviewing plaintiff's evidence and the case law, the court held that $30,000 was the maximum supportable award.

$30,000, assessed by Court/Special Master (race discrimination)

– **United States v. City of N.Y.**, 2015 WL 7421994 (EDNY 2015) (S.M. Peace): "Claimant testified that he suffered mental anguish and could no longer enjoy activities he enjoyed prior to the City's discrimination. He described the severity and consequences of the emotional distress he suffered after learning he would not continue in the process of becoming a firefighter … and left him in a 'dark place.'" Claimant also provided testimony, which was partly corroborated by his mother, as to how the discrimination negatively impacted his personal relationships. The court concluded that $30,000 was appropriate, noting that he provided no supporting testimony from a medical or mental health professional or any supporting evidence of medical or mental health treatment.

$50,000, on default (race, sexual orientation discrimination; retaliation)

– **Moore v. Houlihan's Restaurant**, Inc., 2011 WL 2470023 (EDNY 2011) (M.J. Reyes): Plaintiff testified, inter alia, that he suffered from depression, loss of sleep, decreased motivation, and weight loss, and that he no longer accepts his sexual orientation identification as a result of the incidents in question. In recommending an award of $50,000, the court cited the employer's "egregious" conduct, plaintiff's testimony regarding loss of enjoyment in his personal and professional life, and a psychologist's report diagnosing plaintiff with depression.[6]

$50,000, on default (race discrimination)

– **Holness v. National Mobile Television, Inc.**, 2012 WL 1744847 (EDNY 2012) (M.J. Levy): Plaintiff provided extensive testimony about how the harassment affected emotional and physical health. Plaintiff received few work assignments despite his experience and endured comments by his supervisors such as "[y]ou're a slave and I'd rather work and be placed in the bathroom than to be working with you." Plaintiff testified that as a result, he became withdrawn from his family and unable to converse with others. He was under the care of a psychologist who treated him for anxiety, stress, and depression. At one point plaintiff had an emotional breakdown with severe physical manifestations, including chest pains. However, plaintiff failed to present medical documentation or corroborating testimony, and his physical health was not significantly affected.

$50,000, remittitur from $100,000 (disability discrimination)

– **Ruhling v. Newsday, Inc.**, 2008 WL 2065811 (EDNY 2008): "Here, the evidence establishing plaintiff's emotional distress was not limited to the plaintiff's testimony, but was corroborated by the testimony of her physician and physical therapist, who provided ample testimony concerning both the severity, duration and the physical manifestation of the distress suffered by plaintiff as well as the aggravation of her [medical condition]." However, the court found the jury's $100,000 award excessive, noting (inter alia) that plaintiff did not prevail on all of her claims.

$60,000, remittitur from $375,000 (race, religious discrimination; retaliation)

– **Wharton v. County of Nassau**, 2015 WL 4611974 (EDNY 2015) (J. Seybert): Evidence included testimony from plaintiff, his wife, and his minister about the emotional distress plaintiff suffered. However, plaintiff was not demoted, fined, or terminated as a result of any of defendants' actions. Plaintiff and his wife testified that defendants' actions caused him to feel "ostracized," "betrayed" and concerned about his safety; plaintiff's wife also testified that he "wasn't as interactive with the family," was less intimate, developed headaches, and had trouble sleeping. A reverend who provided plaintiff with "spiritual counseling" testified that plaintiff became "depressed;" however, the reverend acknowledged that he had no clinical training and conceded that plaintiff never discussed physical manifestations of his unhappiness. Plaintiff did not seek medical attention for emotional distress and did not provide testimony from a medical professional.

$65,000, jury verdict upheld (sexual harassment)

– **Anderson v. YARP Restaurant, Inc.**, 1997 WL 27043 (SDNY 1997) (M.J. Ellis): "[P]laintiff presented testimony that she was subject to sexual harassment for over six months and that she suffered sufficient anguish from her experiences at the [defendant] to cause her to seek counselling from a therapist. Plaintiff's therapist, [name omitted], testifying as an expert witness, further testified that plaintiff suffered from emotional trauma – including a sense of powerlessness, panic attacks, trouble sleeping, and dif-

6. *Cf. Cross v. New York City Transit Authority*, 417 F.3d 241, 259 (2d Cir. 2005) (upholding a $50,000 jury verdict; while neither plaintiff sought medical treatment for mental anguish, they testified to specific humiliation, anger, and frustration they experienced).

ficulty maintaining employment – as a result of the harassment she experienced at [defendant]. Such testimony was buttressed by plaintiff's own testimony that, for at least three years following her employment at [defendant], she was unable to maintain employment, had trouble sleeping, and continued to fear she would be subjected to harassment again."

$75,000, jury verdict upheld (discrimination based on perceived disability/alcoholism)
– Makinen v. City of N.Y., 167 F. Supp. 3d 472 (SDNY 2016) (J. Carter): Plaintiff testified that she suffered from continuing anxiety, depression, restless legs, sleeplessness, and panic attacks as a result of Defendants' conduct. She described the physical symptoms of her panic attacks, including cramping in arms and legs, swelling tongue, racing heart, tunnel vision, and shortness of breath. She testified that she was prescribed anti-anxiety medication to treat her symptoms and that she continues to take the medication. She testified about being "terrified" of drinking and being in the presence of alcohol, and about how she was not in a photograph at her brother's wedding due to this fear. Plaintiff's testimony supported the jury's $75,000 award for her "garden variety" emotional distress claim.[7]

$80,000, remittitur from $250,000 (race discrimination, retaliation)
– Johnson v. Strive E. Harlem Employment Grp., 990 F. Supp. 2d 435 (SDNY 2014) (J. Baer): Plaintiff relied on her own testimony regarding seeing two therapists, her "immediate emotional reaction" to being called a racial slur, and on the lingering effects that her supervisor's treatment had on her emotional state. The court noted that being subjected to racial epithets and regular harsh treatment was "undoubtedly distressing." However, although plaintiff testified that she saw a therapist and was prescribed medication, she declined to take it and did not explain its purpose or intended effect. Plaintiff described in vague terms why she needed therapy, noted only that she lacked energy and confidence as a result of the treatment at her employer, and did not testify as to any physical manifestation of her distress. In addition, the fact that plaintiff recorded her interactions with her supervisor operated to reduce the damages award; the recordings "clearly reveal Plaintiff's efforts to invite a confrontation with [her supervisor] and fail to bolster support for an award that is founded on extreme emotional distress." The court concluded that the $80,000 figure, "falling within the upper half of the range for garden variety emotional distress, recognizes the continuous, egregious behavior that [plaintiff's supervisor] displayed toward Plaintiff, along with Plaintiff's resulting therapy" but "also recognizes the limited evidence of any lasting physical or emotional impact on Plaintiff as well as the lack of corroborative testimony."

$100,000, jury verdict upheld (retaliatory discharge
– Mugavero v. Arms Acres, Inc., 680 F.Supp.2d 544 (SDNY 2010) (J. Gardephe): Plaintiff testified that her emotional distress from being terminated had specific consequences in the form of increased anxiety and insomnia, and provided corroborating medical evidence. The court also noted that the defendant's conduct "went far beyond typical discipline imposed in the workplace, and threatened Plaintiff's ability to earn a living and practice her profession."

$100,000, jury verdict upheld (gender discrimination, retaliation)
– Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35 (EDNY 2009) (M.J. Boyle): As to one of three plaintiffs (Cribbin)[8] the evidence included testimony that plaintiff sought therapy on a weekly basis, began taking antidepressants, began seeing a clinical social worker from whom she continued to seek treatment as of the time of trial, had less patience and difficulty concentrating, took her feelings of anger and frustration at her work situation out on her family, experienced feelings of disappointment, depression, anger, frustration and stress, suffered from feelings of anger and powerlessness, experienced difficulty sleeping and lack of motivation, was very short-tempered, cried often, was diagnosed with adjustment disorder and posttraumatic stress. The social worker attributed plaintiff's symptoms to the behavior plaintiff was being subjected to at work and to plaintiff's feelings that she was being treated differently because she was female.

$100,000, jury verdict upheld (gender discrimination, retaliation)
– Zakre v. Norddeutsche Landesbank Girozentrale, 541 F. Supp. 2d 555 (SDNY 2008) (J. Sweet): Plaintiff testified that the promotion denial resulted in her being depressed, having difficulty sleeping, being tense about going to work, and being "short" with her family. Plaintiff also sought psychological counseling, and continued to receive treatment through the trial date. Plaintiff's husband testified that plaintiff was upset, short-tempered, and more combative towards her family, and that plaintiff was humiliated, embarrassed, and did not want to engage in social activities as they had normally done. Upon reviewing the case law, Judge Sweet held that the jury's award was "within a reasonable range and supported by the evidence."[9]

$125,000, remittitur from $900,000 (disability discrimination)
– Stevens v. Rite Aid Corp., 2015 WL 5602949 (NDNY 2015) (J. McAvoy): "[T]here was no medical testimony or evidence corroborating the emotional

7. *See also* **Legg v. Ulster County**, 2017 WL 3668777 (NDNY 2017) (remitting a $200,000 jury verdict to $75,000, where plaintiff produced only vague testimony regarding her alleged emotional distress, there was no testimony from a medical professional or any other person to corroborate plaintiff's allegations, and plaintiff did not establish that the medication she took was directly related to the hostile work environment).

8. The *Olsen* case appears three times in this article, once for each of three plaintiffs.

9. *See also* **Ettinger v. SUNY College of Optometry**, 1998 WL 91089 (SDNY 1998) (J. Sweet) (upholding a $100,000 jury verdict based on evidence submitted by a psychiatrist that plaintiff's depressive disorder and post-traumatic stress disorder "resulted from stress-inducing harassment at work.").

distress that Plaintiff suffered, nor was there evidence of any medical or psychological treatment obtained by Plaintiff to address his distress and its symptoms. While Plaintiff's and his wife's testimony about the emotional effects of a discharge at age 57 was compelling, it did not elevate it beyond the 'garden variety' category."[10]

$150,000, jury verdict upheld (gender discrimination, retaliation)

– **Lore v. City of Syracuse**, 670 F.3d 127 (2d Cir. 2012): Plaintiff and her mother testified that plaintiff suffered, inter alia, tension headaches, abdominal pain, insomnia, anxiety, and depression, and that while plaintiff "had been a gregarious and vivacious person" before the relevant events, she thereafter suffered from stress, had stomach problems, and became reclusive. Plaintiff received medical treatment, the physical side effects of which included vomiting and diarrhea. In addition, plaintiff's physician insisted that she remain out of work to receive treatment for her depression. Further supporting the award was the fact that plaintiff's suspension was made public in a way that gave the false impression that plaintiff, a police officer, had stolen other officers' paychecks.

$150,000, remittitur from $500,000 (sexual harassment, retaliation)

– **Bouveng v. NYG Capital LLC**, 175 F. Supp. 3d 280 (SDNY 2016) (J. Gardephe): Plaintiff described her emotional distress in vague or conclusory terms, without relating either its severity or consequences in a meaningful way. The emotional distress plaintiff suffered as a result of her termination appeared to be brief and transitory, and there was no evidence of continued shock, nightmares, sleeplessness, weight loss, or humiliation, or of an inability to apply for a new position or to enjoy life in general. Plaintiff offered no medical corroboration and did not seek mental health treatment (other than once, several months before trial). Defendants' expert psychiatrist testified, inter alia, that plaintiff did not describe even minor psychiatric symptoms, and concluded that plaintiff did not suffer from any continued depression, anxiety, phobias, or emotional distress as a result of defendants' conduct. Upon reviewing the case law, the court held that the remitted sum "will compensate Plaintiff for the emotional distress, humiliation, embarrassment, and stress she suffered for a number of months as a result of [defendant]'s outrageous sexual harassment, but recognizes the absence of evidence suggesting any long-term effects or consequences."

$150,000, awarded by court (same-sex sexual harassment)

– **Caravantes v. 53rd St. Partners, LLC**, 2012 WL 3631276 (SDNY 2012) (J. Patterson): Plaintiff restaurant worker testified that, as a result of the harassment, he "felt dirty," "felt bad," "wouldn't want to speak to anyone," "had no strength," felt "dead" every day, "didn't want to do anything else anymore," would no longer play soccer or socialize with friends, had trouble sleeping, had nightmares, and that he "want[ed] to go to sleep and never wake up again." The harassment affected plaintiff's marriage and family life (including inability to have sexual relations with his wife). Plaintiff was also admitted to the hospital for a week with suicidal thoughts. His testimony was corroborated by his wife and by a psychologist, who diagnosed plaintiff as suffering from Major Depressive Disorder (MDD) (a diagnosis with which defendants' expert agreed). While plaintiff was entitled to "substantial" damages, the $400,000 he requested was deemed excessive; the court noted that plaintiff's condition is treatable, and that plaintiff was currently working at a restaurant.

$150,000, jury verdict upheld (sex discrimination)

– **Petrovits v. New York City Transit Auth.**, 2003 WL 22349676 (SDNY 2003) (M.J. Eaton): The jury could have found that plaintiff's emotional distress became more pronounced with the passage of time; plaintiff began to see a psychologist in 1995, and had monthly sessions until 2000, all of them discussing only her case and her work at the Transit Authority. Plaintiff testified that the situation made her unable to sleep, made her sick, and made her cry all the time. A long-term friend testified that plaintiff "always had a very happy demeanor and is a very well-controlled person, but she became more and more distressed" and that plaintiff "felt very humiliated at her not being able to be advanced."

$150,000, jury verdict upheld (disability discrimination)

– **Simmons v. N.Y. City Transit Auth.**, 2008 WL 2788755 (EDNY 2008): "Plaintiff testified that as a result of being out of work for [1.5] years she lost income, could no longer contribute to her grandson's schooling or afford to pay for her apartment, and had to move. She also testified that during this time period she felt and looked depressed, frustrated, and helpless. Her testimony was supported by the testimony of her colleague, who stated that she appeared fatigued following her removal from the train operator position, and her sister, who stated that she appeared exhausted and depressed. In addition, [plaintiff]'s treating psychologist [name omitted] testified that the main stressor in "[plaintiff]" life during the time period in question was her employment situation."

$170,000, on default (sexual harassment)

– **Maher v. All. Mortgage Banking Corp.**, 2010 WL 3516153 (EDNY 2010) (M.J. Lindsay): The court noted that plaintiff was humiliated as a result of the repeated inappropriate touching and defendant's failure to address her complaints, was only 18, was extremely upset by the harassment, dreaded going to work, had difficulty sleeping, and endured aggravation of her irritable bowel syndrome and temporomandibular joint disorder requiring her to seek medical attention. She also sought psychological counseling, and presented a report based on two psychological visits not-

10. *See also Campbell v. Cellco Partnership*, 2012 WL 3240223 (SDNY 2012) (remitting a $200,000 verdict to $125,000, noting that plaintiff "testified that he felt financially strained, had difficulty sleeping, was unnerved, and suffered a loss of dignity.").

ing that she was suffering from clinical depression and anxiety and concluding that there was "little doubt that the months of sexual harassment [she] suffered … have had a significant, adverse impact on her mental health." However, the court also noted that plaintiff did not continue to receive psychological treatment (contrary to the report's recommendation), the lack of evidence that her emotional distress was ongoing, and that she was able to secure other employment. The court concluded that $170,000 was appropriate, noting that $2 million was excessive and that plaintiff's damages were limited by Title VII's statutory cap.

$200,000, reduced from NYSDHR award of $850,000 (hostile work environment/ gender, sexual orientation)

– **Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights**, 53 A.D.3d 823 (App. Div. 3d Dept. 2008): Evidence included testimony from the victim and others that as a result of the discriminatory actions, she suffered from increased stress, sleeping and eating difficulties, nosebleeds, and that she was physically, mentally and emotionally upset and needed counseling for what her counselor diagnosed as "adjustment disorder with depressive features." However, the complainant attended only four counseling sessions, and did not claim that she took any leave or was prescribed any medication due to the resulting distress. Upon reviewing other cases, the court determined that $850,000 was excessive and that $200,000 was appropriate.

$260,001, jury verdict upheld (retaliation / Notice of Discipline)[11]

– **Miller v. City of Ithaca, N.Y.**, 2015 WL 9223755 (NDNY 2015) (J. Sharpe): Plaintiff offered proof that, as a result of defendants' conduct in connection with the issuance of a disciplinary notice, he suffered sleeplessness, hypervigilance, depression, anger, erectile dysfunction, agoraphobia, anxiety, panic attacks, incontinence, shaking, headaches, fearfulness, weight loss, and drinking problems. He sought medical treatment and was prescribed medication in connection with his symptoms.

$300,000, upholding NYSDHR award (sexual harassment)

– **Rensselaer Cty. Sheriff's Dep't v. N.Y. State Div. of Human Rights**, 131 A.D.3d 777 (N.Y. App. Div. 3d Dept. 2015): "[Plaintiff] testified that the male coworkers' harassment led to extensive psychological trauma that included suicidal ideations and required medication. [Plaintiff]'s psychiatrist confirmed these reports and testified that he had diagnosed [plaintiff] with posttraumatic stress disorder and major depressive disorder. The psychiatrist opined that the causes of such conditions were [plaintiff]'s frequent and recurring thoughts regarding the harassment that she suffered at the correctional facility. Considering [plaintiff]'s testimony and the medical proof elaborating on the severe effects that the discrimination had on her, the award is reasonably related to the wrongdoing, supported by substantial evidence and comparable to awards for similar injuries."

$300,000, remittitur from $500,000 (retaliation)

– **Quinby v. WestLB AG**, 2008 WL 3826695 (SDNY 2008) (J. Pauley): Plaintiff testified that she felt stressed, crushed, shocked and devastated, was subject to extreme public scrutiny, suffered from headaches, developed hives and welts, endured "crushing" and "stressful" litigation costs (resulting in the loss of her life savings), and was terminated twice. Curiously, the court found $300,000 appropriate notwithstanding its observation that plaintiff's distress "largely resembles the 'garden variety' … claims that courts have found to merit reduction" and noting the jury's finding that plaintiff's injuries were not permanent.

$400,000, jury verdict upheld (sexual harassment)

– **Katt v. City of New York**, 151 F.Supp.2d 313 (SDNY 2001) (J. Lynch): Evidence included testimony by plaintiff that the harassment caused her to suffer severe headaches, stomach ailments, diarrhea, increased upper respiratory allergies and infections, feeling continually run down, difficulty sleeping, vomiting, insomnia, nightmares, flashbacks, and difficulty with sexual intimacy. This testimony was corroborated by a licensed clinical psychologist who concluded that because of the sexual harassment plaintiff suffered from Post-Traumatic Stress Disorder. Upon reviewing comparable cases, the court held that $400,000 was reasonable and did not shock the court's conscience, particularly in light of "ample testimony … that the … pervasive and sexually hostile work environment has caused the plaintiff substantial and permanent psychological damage."

$400,000, remittitur from $1.5 million (pregnancy discrimination)

– **Santana v. G.E.M. Medical Management**, 2017 N.Y. Slip Op. 32289(U), 2017 WL 4927181 (NY Sup. Ct. Bx. Cty. 0305261/2008 Oct. 20, 2017) (J. Tuitt): "All three of the plaintiffs here were found to suffer post-traumatic stress disorder … by plaintiffs' expert [name omitted], a clinical psychologist[.] … Each plaintiff was diagnosed with clinically elevated levels of depression and anxiety and long-term PTSD, i.e., five years after the fact. However, that award as compared to cases with similar facts is excessive and the award should be reduced to $400,000 per plaintiff."[12] Plaintiffs' expert's testimony was unrebutted, and defendants retained an expert but never called them to testify.

$400,000, jury verdict upheld (retaliation)

– **Phillips v. Bowen**, 278 F.3d 103 (2d Cir. 2002): "Plaintiff submitted evidence of ongoing harassment by each defen-

11. The *Miller* court additionally remitted a $220,000 jury verdict to $50,000 in connection with a separate retaliation claim, noting, e.g., the "minimal symptoms" and plaintiff's "subjective testimony" as to that claim. *Id.* at *6-7.

12. The court elsewhere refers to "decreasing the amount awarded to each of the plaintiffs … to $500,000." 2017 WL 4927181, at *3.

dant over a five-year period. Phillips and her boyfriend testified in detail about her emotional distress, physical illness, and the effects of defendants' conduct on her lifestyle and relationships. Phillips' co-workers testified about the deterioration they observed in Phillips. Other less direct indicia of plaintiff's damages came from the defendants themselves, who unapologetically described their treatment of plaintiff. Those hearing this evidence at trial and in the best position to evaluation witness credibility … each determined that $400,000 was a fair assessment of plaintiff's damages. On this record the award was not excessive."

$400,000, jury verdict upheld (gender discrimination, retaliation)

– **Olsen v. Cty. of Nassau**, 615 F. Supp. 2d 35 (EDNY 2009) (M.J. Boyle): Plaintiff Ketcham testified that the discrimination she suffered affected her "immensely," and about work-related stress and anxiety, which affected her relationships with her husband and children. Plaintiff suffered arm pain, chest pain, fatigue, sleeplessness, migraine headaches, shingles, nightmares, and feelings of powerlessness. Plaintiff was treated by a clinical social worker/psychotherapist, who testified that she diagnosed plaintiff with generalized anxiety disorder and that plaintiff "attributed her anxiety to the discrimination she was being subjected to at work."

$491,706, jury verdict upheld (perceived-as sexual orientation discrimination, retaliation)

– **Albunio et al. v. City of N.Y.**, 67 A.D.3d 407 (App. Div. 1st Dept. 2009): Plaintiff Sorrenti, a police sergeant, presented testimony of his treating psychiatrist testified that the cause of his major depression was his being stereotyped as a pedophile. Plaintiff testified to the damage to his reputation and professional career caused by his being perceived as a gay man and stereotyped as a child molester. He endured anxiety and panic attacks, experienced suicidal ideation, and took numerous medications to combat depression and anxiety.

$500,000, jury verdict upheld (gender discrimination, retaliation)

– **Olsen v. Cty. of Nassau**, 615 F. Supp. 2d 35 (EDNY 2009) (M.J. Boyle): Plaintiff Olsen testified that the discrimination affected her eating and exercise habits, causing her weight to fluctuate; that she avoided having friends and family over to her house, which affected her relationships; that her sleeping patterns were affected; and that she experienced difficulty concentrating. Plaintiff treated with a psychologist, with whom she met with on a weekly basis, and with whom she was still undergoing treatment at the time of trial. The psychologist diagnosed plaintiff with depression and anxiety, dysthymia (i.e., a chronic depressive neurosis), and ultimately adjustment disorder with mixed emotional features. Plaintiff's symptoms included palpitations and a rapid heartbeat, for which she took the prescription medication Xanax. Plaintiff also suffered from, inter alia, migraine headaches, diminishing tolerance with resulting irritability, diminished self-esteem, and impaired energy levels and ability to concentrate.

$600,000, remittitur from $2.5 million (disability discrimination)

– **Brady v. Wal-Mart Stores, Inc.**, 455 F.Supp.2d 157 (EDNY 2006) (M.J. Orenstein): The discrimination caused plaintiff "great suffering" and affected plaintiff's relationship with his family; plaintiff's parents testified that plaintiff "started getting loud and nasty and cursing at his mother and sister" and that he "lost interest in school, experienced a loss of appetite, cried for no apparent reason, paced in his room unable to sleep at night, and displayed an overall demeanor that steadily worsened over time." At one point plaintiff suffered a "total breakdown" which led to plaintiff being taken to a hospital ER where he was referred to a psychiatrist; plaintiff was diagnosed as suffering from "generalized anxiety disorder" and treated by a psychiatrist with a combination of psychotherapy and the anti-anxiety drug Buspar, which plaintiff took for over two years. Upon reviewing the case law, the court determined that there was "at least a possibility that the jury in this case based its award on an impermissible blurring of the line between compensation and punishment, found $2.5 million excessive, and concluded that the maximum permissible award was $600,000.

Conclusion

Clearly, emotional distress awards in employment discrimination cases vary greatly. That said, the case law reveals certain factors that courts consider relevant to the analysis.

These include: the egregiousness of defendants' conduct; the duration of plaintiff's employment; the extent and duration of the emotional distress; the presence/absence of physical manifestations of the distress (e.g., headaches, trouble sleeping, loss of appetite, stomach pain, chest pain); plaintiff's age; whether the distress has resulted in suicidal thoughts; whether plaintiff has received treatment for the distress in the form of counseling/therapy, medication, and/or hospitalization; the effect of the distress on plaintiff's personal relationships; the effect of the distress on plaintiff's sex life; reputational harm; distress arising from financial hardship; and whether plaintiff has themselves engaged in "improper" conduct.

Finally, as a practical matter, cases in which courts remit jury awards – particularly those where the differential is significant – can and should be used to frame/facilitate a candid discussion with clients about, e.g., how to approach settlement negotiations and/or whether to proceed to trial. ■

James A. Brown Mediation Services

Former Labor and Employment Lawyer for over 25 years is offering discounted mediation services to the NELA/NY community.

Full-time arbitrator and mediator since 2011 specializing in employment-related disputes.

Serve on 20 different arbitration and mediation panels, including the S.D.N.Y., E.D.N.Y. "Wage and Hour," and American Arbitration Association Mediation Panels. Also serve as arbitrator on the AAA Employment Law Arbitration Panel.

Issues Addressed as a Mediator:

- Overtime and minimum wage claims;
- Constructive discharge arising from hostile work environment;
- Same-sex sexual harassment;
- Retaliation involving claims of transgender bullying;
- Gender discrimination and sexual assault;
- Race discrimination concerning less visible retail assignments;
- National origin discrimination and lost promotions; and
- Reasonable accommodations based on disability and religious belief.

Rates: NELA/NY discounted rates available on request.

Contact: P.O. Box 24611, Brooklyn, N.Y. 11202.
Telephone: (718) 578-2900; jabrownlaw@aol.com