NELA THE NEW YORK EMPLOYEE ADVOCATE

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

VOLUME 10, NO. 4 September/October 2000 Jonathan Ben-Asher, Editor

Filings, Trials and Settlements

In this space we highlight cases brought, tried and settled by members of NELA/NY. Please e-mail your news to Jonathan Ben-Asher at jb-a@bmbf.com.

You should include the case citation, the court, defendant's counsel, a brief summary of the legal claims and facts, and anything which is particularly striking about the case. If the case was tried, please note post-trial motions or appeals.

Trials

Title VII - national origin

A Brooklyn jury has awarded $1.5 million in damages to a Pakistan-born physician who was denied admittance to the residency training program of Brooklyn-Caledonian Hospital because of his national origin. **Wahid v. Brooklyn Caledonian Hospital**, Civil Court of the City of New York, Index No. 5292/97 (verdict August 10, 2000, Judge Jeffrey Wright). Ironically, the case had been transferred to the Civil Court because the expected damages were allegedly below the Supreme Court's low jurisdictional limit. The case was brought under the State Human Rights Law, since the City Human Rights Law had not been enacted at the time.

The plaintiff, Nurul Wahid, was educated and trained as a physician in Bangladesh. He applied to the

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Supreme Court to Review Arbitration under Employment Contracts

The Supreme Court is poised to decide a case that will either help or hinder employees seeking to resist mandatory arbitration. In **Circuit City Stores, Inc. v. Adams** (No. 99-1379) the Court will address whether arbitration agreements in "contracts of employment" are enforceable under the Federal Arbitration Act. The case is important not only for employees who have traditional employment contracts, but for all employees who have signed agreements with their employers to arbitrate their legal claims.

The Federal Arbitration Act provides that "a written agreement in any maritime transaction or a contract involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sec. 2. The FAA gives the federal district courts jurisdiction to enforce such agreements. 29 U.S.C. Sec. 3.

The statute exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. Sec. 1. This language might seem to preclude the federal courts from enforcing arbitration agreements in most employment contracts — after all, aren't most of our clients working in interstate commerce? However, until recently, the circuits had rejected that notion.

Instead, the courts have ruled that the FAA *only* excludes from coverage employment contracts of workers actually engaged in the movement of goods in interstate commerce. See. e.g., **Erving v. Virginia Squires Basketball Club**, 468 F.2d 1064 (2d Cir. 1972); **Cole v. Burns International Security Services**, 105 F. 3d 1465 (D.C. Cir. 1997); **Great Western Mortgage Corp. v. Peacock**, 110 F. 3d 222 (3d Cir.), *cert. denied*, 522 U.S. 915 (1997). (In **Gilmer v. Interstate/Johnson Lane Corp.**, 500 U.S. 201 (1991), the Supreme Court explicitly declined to interpret this language.)

The Ninth Circuit's decision in **Circuit City** is the only exception, holding that the FAA does not apply to individual employment contracts. The employee in **Circuit City** had signed a mandatory arbitration agreement — Circuit City's Dispute Resolution Agreement — as part of his job application. After he brought a discrimination action in state court under California law, Circuit City sued in federal court to compel arbitration under the FAA. The District Court ordered the case to arbitration.

The Ninth Circuit, reversing, ruled in a brief opinion that the FAA did not apply. The court first found that because Circuit City's Dispute Resolution Agreement was a condition precedent to the employee's employment, it was an employment contract — despite the agreement's disclaimer to the contrary and despite the fact that it did not alter the parties' at-will relationship. The Court of Appeals then ruled that the district court lacked authority to compel arbitration because the FAA does not apply to employment contracts. The court relied on its more extensive decision in

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The NELA/NY
Calendar of Events

October 24 • 6:30 pm
New Member Social
99 Park Avenue- 16th Floor
Law Office of Beldock, Levine & Hoffman

November 1 • 6:30
Bar Talk
Grand Hyatt-New York
42nd Street between Park Avenue and Lexington
(next to Grand Central Station)
Sun Garden, Level 1

November 3–4
NELA Fall Regional Conference
Yale Club of New York City
50 Vanderbilt Avenue (44th Street)
Trial Practice - Effective Advocacy: How to Win at Trial

November 29 • 6:30
Elections to the NELA/NY Board: Board of Directors Meeting
Vladeck Waldman Elias & Engelhard
1501 Broadway – 8th Floor

December 6 • 6:30
NELA Nite
530 Fifth Avenue – 14th Floor
Topic: In-House Counsel Speaks

December 12
Annual Holiday Party
Malika Restaurant
210 East 43rd Street - (2nd - 3rd Aves.)
$25 per person

December 13 • 6:30
Bar Talk
See above

Elections to Executive Board

The Executive Board of NELA/NY will meet and elect its members for the year 2001 on November 29 at 6:30 p.m. All NELA/NY members are invited to attend the meetings (as well as all other Board meetings).

The Board encourages NELA/NY members to nominate candidates for the upcoming year. Members who wish to nominate a candidate for the Board (either themselves or another member) should send or call in nominations to Shelley Leinheardt at NELA/NY; please do this by Monday November 20. NELA/NY welcomes information in support of a candidate.

Election to the Board is by majority vote of the current Board, and Board members serve for a calendar year, or longer if re-elected. (There are no term limits).

The Board will meet at Vladeck Waldman Elias & Engelhard, 1501 Broadway - 8th floor. In addition to the elections, the Board will conduct other business.

Attention E-mailers

Please let Shelley Leinheardt know your e-mail address as soon as possible. It's the quickest, easiest and most efficient way for NELA members to communicate with NELA and each other. If you want to use the new website (nelany.com) you will need to give us your e-mail address. You can either e-mail Shelley at *nelany@aol.com* or call her at 212 317-2291.

A Word from Your Publisher

The New York Employee Advocate is published bi-monthly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 880 Third Avenue, 9th Floor, New York, New York 10022. (212) 317-2291. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

Items for the calendar may be submitted by calling Shelley Leinheardt:
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Learn How to Win at Trial at NELA's Fall Conference

NELA's Fall Regional Conference will be held Friday and Saturday, November 3rd and 4th, at the Yale Club in Manhattan. Experienced NELA attorneys will show you how to effectively represent your client at trial.

Friday's program includes presentations on:

- The New Federal Rules of Civil Procedure (Richard T. Seymour)
- Preparing for Trial: Tips from the Experts (Kathryn Emmett, Mardi Harrison, James Reif and Gary E. Roth)
- Effective Opening Statements (Alan B. Epstein and Kathryn Eldergill)
- Updates on Second and Third Circuit Caselaw (Scott Moss, Judith D. Meyer, Alice W. Ballard, Patricia A. Barasch and Christopher P. Lenzo)
- Effective Direct and Cross-Examination (Anne L. Clark, Walter Lucas, Robert H. Stroup and Karen Lee Torre) and
- Ethical Issues During Trial (Maureen Binetti).

The keynote speaker at Friday's lunch will be Ron Kuby.

Saturday's program will include panels on:

- Use of an Economic Expert (Alan H. Schorr, Dr. Frank Tinari)
- Use of a Psych Expert (Dr. Susan Esquilin, Judy D. Rintoul and Jordan B. Yaeger)
- Pet Peeves of Judges at Trial (speakers to be announced), and
- Effective Opening Statements (Frederick K. Brewington, Joseph D. Garrison, Janice Goodman and Linda Wong.

Registration for NELA members is $225, for non-members $250, and for students $125. Materials, without the conference sessions, are $100. The Yale Club is at 50 Vanderbilt Avenue, at 44th Street.

Many thanks to the members of the Program Committee, who have worked so hard to organize the conference: Anne L. Clark, Victoria deToledo, Herb Eisenberg, Andrew F. Erba, Shelley Leinheardt, Glen D. Savits and Laura S. Schnell.

For more information, call Shelley Leinheardt at 317-2291.

Lawyer Assistance Program

The New York City Lawyer Assistance Program maintains a Confidential Helpline to assist members of the legal profession and their families having problems with alcohol or drugs. The Program is sponsored by the New York State Bar Association.

The New York City LAP offer free and confidential consultation and assistance, protected under 42 CFR Part 2, and New York Judiciary Law, Sec. 499

The confidential hotline number is (212) 302-5787.

Congratulations

Congratulations go to Joe Turco, who was married in France this month. Also, to Hilary Richard, who gave birth to a daughter, Violet.

Condolences

We are sad to report the death of Gail Auster's husband.

Judicial Reception

by Wylie Stecklow

NELA/NY held its first Federal Judicial Reception at the Southern District's courthouse on June 8. The reception was made possible through the hard work of Shelley Leinheardt and twenty members of the Judicial Committee. As noted by NELA Board Member Arnie Pedowitz, the reception represented the "maturation of NELA/NY from its inception as a mutual aid and support group to its current stature as a multi- faceted bar association."

More than one hundred NELA members attended this function. Judge Denny Chin spoke about summary judgment in employment cases, and answered the numerous questions that followed. Lois Bloom, the Southern District's Senior Staff Attorney, also spoke to encourage NELA members to volunteer to represent pro se employment plaintiffs in the District's mediation program. (Volunteers have been invited to a reception at the Southern District on November 2, from 5:00 to 8:00 p.m.)

NELA organized the reception to improve communication and relations between our members and the federal judges before whom we practice. We only wish that more judges had attended. The Judicial Committee and the Executive Board are working on ways to improve the judicial presence at the next reception.

The Judicial Committee is in search of a few good members to join the committee and pursue an active role in planning the next reception. Please contact me at *nylaw@pobox.com* or (212) 566-8000 to join.

Discrimination and Other Motivational Issues in the Representation of Civil Service Employees

by William A. Herbert, Senior Associate Counsel CSEA, Local 1000, AFSCME Albany, New York

In his article "Representing Civil Service Employees," (New York Employee Advocate, July-August 2000), James Brown provided a useful review of the relevant issues under Civil Service Law Sec. 75 for NELA practitioners considering representing a public employee in a disciplinary case. This article addresses the problems connected with asserting discrimination or other unlawful motivational issues in defense against Civil Service Law §75 disciplinary charges.

Although the procedures regarding misconduct and incompetence, presently contained in Civil Service Law §75, were originally enacted to prevent interference with a public employee's tenure for political, partisan or personal reasons, a Civil Service Law §75 hearing can be a dangerous place to litigate employer motivational issues. **People ex rel. Fonda v. Morton**, 148 N.Y. 156, 42 N.E. 538 (1896); **Anderson v. Dolce**, 653 F. Supp. 1556, 1560-1562 (S.D.N.Y. 1987). In fact, the statutory procedures, as well as the scope of judicial review, render it a generally inhospitable forum for litigating motivational issues surrounding the issuance of disciplinary charges.

Pursuant to Civil Service Law §75(2), the officer or body having the power to remove a civil service employee can hold the hearing or can designate a "deputy or other person" to conduct the hearing and to file recommendations. The statute does not mandate that an impartial hearing officer be appointed to hear the case. See, **Stanton v. Board of Trustees**, 157 A.D.2d 16, 550 N.Y.S.2d 16 (2nd Dept. 1990).

Most local governments, outside of New York City, do not utilize independent hearing officers. For example, in **Pollman v. Fahey**, 106 A.D.2d 771, 483 N.Y.S.2d 805 (3rd Dept. 1984), the court held that §75(2) permitted the employer to appoint its chief attorney to be the hearing officer when the chief attorney's subordinate was prosecuting the disciplinary case. Legislation to require an impartial hearing officer in a civil service disciplinary hearing has been vetoed by Governor Pataki.

To compound these problems, credibility determinations by the appointed hearing officer regarding the motivation for and substance of disciplinary charges will be granted great deference by a reviewing court in an Article 78 proceeding. **Collins v. Codd**, 38 N.Y. 2d 269, 379 N.Y.S.2d 733 (1976); **Crossman-Battisti v. Traficanti**, 235 A.D.2d 566, 651 N.Y.S.2d 698 (3rd Dept. 1997); **Brey v Board of Education of the Jefferson-ville-Youngsville Central School District**, 245 A.D.2d 613, 664 N.Y.S.2d 496 (3rd Dept. 1997)

Furthermore, adverse findings by the employer or its hearing officers may preclude the relitigation of the issue in another forum. Unlike arbitration awards in a collective bargaining context, a determination by an employer or its hearing officer in a Civil Service Law §75 hearing addressing issues of discrimination may be granted preclusive effect in future litigation. See generally, **Alexander v. Gardner-Denver Co.**, 415 U.S.36 (1974); **Syracuse City School District v. State Division of Human Rights**, 38 A.D.2d 245, 328 N.Y.S.2d 732 (4th Dept., 1972), aff'd, 33 N.Y.2d 946, 353 N.Y.S.2d 730 (1974).

Consider the travails of former Town of Huntington employee Charles Reed. In 1987, the Town brought §75 disciplinary charges against him. In defense of the charges, Mr. Reed's attorney presented some evidence that the charges were motivated by Mr. Reed's race. Mr. Reed was found guilty of misconduct and his claim of discrimination was rejected by the hearing officer and the employer.

Mr. Reed challenged his termination in two forums: an Article 78 proceeding and a charge of discrimination with the New York State Division of Human Rights. In the Article 78 proceeding, the Second Department found that there was substantial evidence in the administrative record to support the termination. **Matter of Charles Reed v. Town of Huntington**, 186 A.D.2d 745, 589 N.Y.S.2d 58 (2nd Dept. 1992).

Mr. Reed's SDHR claim took a detour to the New York Court of Appeals because his attorney had raised the discrimination issue in the disciplinary hearing. In **Town of Huntington v. New York State Division of Human Rights**, 181 A.D.2d 827, 581 N.Y.S.2d 381, (2nd Dept. 1992), rev. on other grounds, 82 N.Y.2d 783, 604 N.Y.S.2d 541 (1993), the Second Department held that the rejection of his race discrimination defense by the hearing officer and the Town's personnel director constituted collateral estoppel precluding him from pursuing his SDHR charge.

This holding was premised on the erroneous assumption that a §75 hearing constitutes a full and fair forum to litigate discrimination issues. See generally, **Ryan v. New York Telephone Company**, 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984). Although the Court of Appeals reversed the decision, the reversal was based on the procedural issue that the granting of a writ of prohibition against SDHR was inappropriate.

The Second Department's decision was not an anomaly. In **University of Tennessee v. Elliott**, 478 U.S. 788 (1986), the Supreme Court held that an unreviewed decision by a disciplinary state hearing officer that race discrimination had not motivated the employer should be given preclusive effect to the employee's federal action under the Reconstruction-era civil rights statutes. Significantly, the Supreme Court found that the administrative decision did not preclude a Title VII action.

Whistleblower Issues

Although a Civil Service Law §75 hearing, without an impartial hearing officer, is a hazardous forum to raise a motivational defense, the New York State Legislature has determined that it is the sole forum for a public employee, who is sub-

Continued on next page

Sex Discrimination and Sexual Harassment Committee

by Eugenie Gilmore and Margaret McIntyre

The Sex Discrimination and Sexual Harassment Committee met in both September and October to discuss an array of important issues.

In September, the Committee decided to change its name to the Sex Discrimination and Sexual Harassment Committee, to more accurately reflect the range of topics we address.

As part of the series of presentations by members on cases of interest, Margaret McIntyre discussed **Perdue v. City University of New York**, 13 F. Supp.2d 326 (E.D.N.Y. June,1998). There, the former women's basketball coach of Brooklyn College prevailed on claims alleging violations of the Equal Pay Act and Title VII (sex discrimination). The plaintiff recovered lost wages, an equal amount in liquidated damages, $85,000 for pain and suffering, as well as attorney's fees and costs. The jury did not find for plaintiff on her hostile environment claim.

In October, members exchanged tips for deposition preparation and discussed how participating in bar activities (including NELA) can enhance an attorney's lode star when making a fee application. Robert Felix discussed **Latoure v. International Business Machines**, in which the Second Circuit interpreted the meaning of a "contract" under Section 1981. The court rejected the argument that an at will employee could not have a 1981 cause of action.

We also discussed a Ninth Circuit case, **Ray v. Henderson,** in which the court dealt with what is an "adverse employment action" in retaliation and hostile environment cases.

The Committee continues its work on its Jury Instruction project, collecting jury instructions on sexual harassment issues. Our goal is to have a library of such material for the benefit of NELA members. Please submit your instructions and the judge's instructions, and include a short description of the case, closing arguments, summation, and the decision. Materials should be sent to Lawrence Solotoff. If you have your materials on disc, it would be appreciated.

The committee will be setting up an email communication system for committee members.

Future presenters on cases of interest will be: Lawrence Solotoff on November 14, and Rachel Levitan on December 12. Meetings scheduled for January 9, 2001 and beyond remain open for volunteers

The Committee meets on the second Tuesday of each month, providing noconflict with a major holiday. Our next meeting is scheduled for November 14, 2000. All meetings begin promptly at 6:00 p.m. and end promptly at 7:30. All members, guest attorneys and future members are welcome. The Co-Chairs are Lawrence Solotoff and Margaret McIntyre.

CIVIL SERVICE, from page 4

ject to §75 procedures, to raise a whistleblower defense.

Civil Service Law §75-b grants public employees protections against retaliation for engaging in certain protected activities. §75-b broadly prohibits retaliatory action against public employees for reporting certain governmental action, including what the employee reasonably believes to be a violation of any federal, state or local rule or regulation.

Unlike its private sector counterpart, Labor Law §740, Civil Service Law §75-b is not limited to the reporting of health and safety violations which present a substantial and specific danger to the public health and safety. See, **Remba v. Federation Employment and Guidance Service**, 76 N.Y. 2d 801, 559 N.Y.S.2d 961 (1990). Similarly, unlike Labor Law §740, Civil Service Law §75-b protects public employees who have a reasonable belief that the conduct about which they complain constitutes a violation of law, rule or regulation. See, **Bordell v. General Electric**, 88 N.Y. 2d 869, 644 N.Y.S.2d 912 (1996).

Civil Service Law §75-b(2)(a) prohibits public employers from terminating or taking other disciplinary or adverse personnel action against a public employee because the employee disclosed information to a governmental body regarding: a violation of a law, rule or regulation which creates and presents a substantial and specific danger to the public health or safety; or which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. Civil Service Law §75-b(2) broadly defines the definition of an "improper governmental action" to include any action "which is in violation of any federal, state or local law, rule or regulation."

Under §75-b(2)(b), prior to disclosing the information, the employee must have made a good faith effort to provide the employer with the information to be disclosed within a reasonable time to "take appropriate action," unless there is an imminent and serious danger to the public health and safety. The failure to report what the employee reasonably believed to be an improper governmental action is fatal to a §75-b claim. **Moore v. County of Rockland**, 192 A.D.2d 1021, 596 N.Y.S.2d 908 (3rd Dept. 1993).

The burden of proof is on the employee to demonstrate that "but for" the protected activity, the adverse personnel action by the public employer would not have occurred. §75-b(3). A Civil Service Law §75-b defense will not be sustained where the employer can demonstrate a separate and independent basis for the adverse personnel action. See, **Rigle v. County of Onondaga**, 267 A.D.2d 1088, 701 N.Y.S.2d 222 (4th Dept. 1999); **Coombs v. Village of Canaseraga**, 247 A.D.2d 895, 668 N.Y.S.2d 862 (4th Dept. 1998); **Colao v. Village of Ellenville**, 223 A.D.2d 792, 636 N.Y.S.2d 446 (3rd Dept., 1996), lv. dismissed, lv. denied, 87 N.Y.2d 1041, 644 N.Y.S.2d 137 (1996). Therefore, without proof that a termination resulted solely from the protected activity, the disciplinary action will not be disturbed. **Crossman-Battisti v. Traficanti**, supra.; **Plante v. Buono**, 172 A.D.2d 81, 576 N.Y.S.2d 924 (Third Dept., 1991).

Continued on next page

Ethics Opinion on Confidentiality Agreements

The New York State Bar Association has issued an ethics opinion concerning the propriety of settlement requests by defendants' counsel that plaintiffs' attorneys not disclose information about the defendant's business, and not represent other employees in actions against the employer. An inquiry from NELA/NY member Ranni Vassalle prompted the opinion. Brief excerpts from the opinion follow; the full text can be found at *www.nysba.org* under Ethics.

OPINION 730 (7/27/00)

QUESTION
In connection with the settlement of an employment discrimination case in which the attorney represents the plaintiff employee, may the attorney for the plaintiff-employee agree not to disclose any information concerning: (1) any matters relating directly or indirectly to the settlement agreement or its terms; (2) the business or operations of the defendant corporation; and (3) the termination of the client's employment with the defendant corporation?

OPINION
DR 2-108(B) provides, "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law."…. The rule "prohibits lawyers from making or entering agreements that restrict a lawyer's right to represent certain clients or to sue specified parties as part of the settlement of a controversy between private parties...." This rule applies equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it.

In the employment discrimination context, DR 2-108 (B) would prohibit an agreement by the employee's lawyer not to represent other employees in claims of discrimination against the defendant employer.... [S]uch a restriction is far broader than necessary to serve this purpose and may not be justified on this ground....

The specific agreements presented in this inquiry do not directly restrict the inquirer's right as a lawyer to practice law or to represent similar clients. Nevertheless, the confidentiality language is likely to restrict the inquirer in a relationship with any future client employed (or formerly employed) by the same employer, because the language is so broad that the mere representation of an employee in the future by the inquirer could raise an issue as to whether the confidentiality agreement has been breached....

[T]erms of a settlement agreement may violate DR 2-108(B) if their practical effect is to restrict the lawyer from undertaking future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose....

In this case, the proposed confidentiality terms appear to apply to some information that, ordinarily, the plaintiff's lawyer would have no duty to keep confidential under DR 4-101. For example, there is almost certainly information about "the business or operations of the defendant corporation" that is public information or that can be learned in future representations without relying on confidences or secrets of the current client.... For similar reasons, the proposed settlement term that would prohibit disclosure of "any information concerning any matters relating directly or indirectly to the settlement agreement or its terms" appears to be overbroad....

Accordingly, whether or not the proposed restrictions on disclosure are enforceable, this Committee concludes that, because they are overly broad and would have the effect of restricting the practice of law, they are prohibited by DR2-108(B).

CONCLUSION
For the reasons stated, the question is answered in the negative.

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Despite its disadvantages, a §75 hearing can provide an opportunity for free discovery for a planned Title VII action. Pursuant to §75(3), the transcript of a §75 hearing must be provided to the employee free of charge. Moreover, evidence can be developed establishing a disparate treatment or selective prosecution defense without asserting an unlawful motivation underlying the employer's actions. See, **Girard v. City of Glens Falls**, 173 A.D.2d 113, 577 N.Y.S.2d 496 (3rd Dept. 1991), mot. for lve. to app. den., 79 N.Y.2d 757, 583 N.Y.S.2d 193 (1992) (selective prosecution); **McAvoy v. Ward**, 145 A.D.2d 378, 535 N.Y.S.2d 721 (1st Dept. 1988) (disparate treatment).

Nevertheless, a §75 hearing as a discovery device is a two way street. If an employer's attorney is aware of a pending EEOC charge or if the employee asserts a motivational defense during the disciplinary hearing, the employer's attorney may seek to cross-examine your client, obtain admissions and seek to eliminate possible future motivational claims challenging the anticipated termination.

When representing a civil service employee in a §75 hearing, the numerous pitfalls and potential benefits of asserting a motivational defense must be carefully examined and weighed with your client, especially regarding whistleblower claims under §75-b. Unlike other forms of discrimination, a whisteblower defense can be waived if not raised during the Civil Service Law §75 hearing. See generally, **Matter of Obot**, 89 N.Y.2d 883, 653 N.Y.S.2d 245 (1996).

1. Portions of this article were originally contributed by Mr. Herbert to Lefkowitz, Osterman, Townley, Public Sector Labor and Employment Law, Second Edition, New York State Bar Association (1998) and its recent supplement and are used by permission.

Anne's Squibs

by Anne Golden

Note: Readers are invited to send us decisions in their cases, or in recent cases they come across, that are of wide enough appeal to be discussed in these pages. Send them directly to:

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

Thanks to Scott Moss and Nantiya Ruan Rogers, associates with Outten & Golden LLP, for their assistance with these squibs.

AGE DISCRIMINATION

Customer Preference

An apparel company is off the hook for firing an independently contracted sales representative after a buyer said that he did not want to work with the sales representative because he was senile, incompetent, and old. The defendant's motion for summary judgment was granted by Justice Shafer (Sup. Ct. N.Y. Cty.), who found that the decision to service the plaintiff's account in-house, along with accounts of other independently contracted representatives, was based upon the company's operational and fiscal needs. The court did not feel the need to submit the question of the company's motive to the jury. **Cohen v. Majestic Athletic Wear Ltd**., — N.Y.S.2d — (Sup. Ct. N.Y. Cty. approx. 9/1/00).

Employee Benefits

The Third Circuit has held that a county employer treated Medicare-eligible retirees differently because of their age, thus violating the ADEA absent application of the "safe harbor" defense. A class of over-65, retired employees appealed a district court's dismissal of their age discrimination suit, which had charged the county with discriminating against them by providing inferior health benefits. After an extensive review of the legislative history of employee health benefits in the ADEA and the OWPA, the court of appeals held that: (1) "employee benefit" encompassed health coverage provided to retirees; (2) by offering retirees a health plan inferior to the one offered to younger employees, the county treated the retirees differently because of their age; and (3) the safe harbor ("equal benefit or equal cost") applies when an employer reduces health benefits based on Medicare eligibility. A dissenting opinion contended that the court of appeals lacked jurisdiction because the district court had dismissed the state law claims without prejudice by declining to exercise supplemental jurisdiction, thereby failing to create an appealable final judgment. **Erie County Retirees Assoc. v. County of Erie**, 220 F.3d 193 (3d Cir. 8/1/00).

Mixed-Motive

After a bench trial before Judge Peter K. Leisure (S.D.N.Y.), a plaintiff who applied for a promotion was successful in his ADEA suit against the Internal Revenue Service by proving that his responses to age-based questions during his interview (which were examined by the decisionmakers) were a motivating factor in the decision not to promote him. Under the mixed-motive theory, the court treated the EEOC's finding of discrimination as having established that a discriminatory "motivating" factor existed in the employment decision. Judge Leisure then determined that because the report from the interviewer who asked the illegal age-based questions had not been purged from the plaintiff's file before the promotion process, the IRS had failed to prove its "same decision" defense by a preponderance of the evidence. The court found that the plaintiff was entitled to be made whole by being restored to the position he would have occupied, with full back pay plus interest, although it declined to award liquidated damages because it found the action not willful. **Scully v. Summers**, — F. Supp. 2d —, 2000 WL 1234588 (S.D.N.Y. 8/30/00).

ATTORNEYS' FEES

The United States Supreme Court has granted **certiorari** in a Fourth Circuit case that had restricted eligibility for attorneys' fees for individuals who sue the federal government. In a brief unpublished **per curiam** opinion, the court of appeals had denied the plaintiff's fee application. The plaintiff residential care home had brought a declaratory judgment action to invalidate a state law that was then amended to delete the challenged section while the action was pending, mooting it. The plaintiff moved for fees as a "prevailing party." The district and circuit courts read literally an earlier Fourth Circuit case restricting fee eligibility to plaintiffs who receive an enforceable judgment, consent decree, or settlement, rejecting the "catalyst theory" of eligibility. Under that theory, a plaintiff whose action is the catalyst for the relief sought would be entitled to fees regardless of how the case terminated. It is not unlikely that the grant of **certiorari** presages the Supreme Court's endorsement of this theory of fee recovery. **Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources**, No. 99-1848 (4th Cir.), **cert. granted**, — S. Ct. —, 68 U.S.L.W. 3741, 2000 WL 693249 (9/26/00).

CONTRACTS

Oral Agreements

Jill Rappaport of NBC's "Today" show sued two producers for breach of an oral employment agreement for her to host a new television series. Rappaport alleged that she and the defendants had entered into a binding preliminary agreement when they discussed the new series. Judge Barbara S. Jones (S.D.N.Y.) granted summary judgment for the defendants, finding that Rappaport had failed to show that when the parties reached the alleged oral agreement, they had negotiated all the terms of the employment contract and

intended to be bound even if a written contract was never executed. The court determined the intent of the parties by looking to their words and deeds and found that the fatal flaw in Rappaport's case was a letter that her agent had sent to the defendants after the oral agreement was made, stating that other terms and conditions would be negotiated in good faith. Judge Jones also found no fraud on the part of the defendants because the plaintiff had suffered no out-of-pocket loss. **Rappaport v. Buske**, — F. Supp. 2d. —, 2000 WL 1224848 (S.D.N.Y. 8/29/00).

DAMAGES

Grossed-Up Recovery for Increased Tax Liability

After a jury awarded front pay, back pay, and compensatory damages, the ADEA plaintiff moved to "mold the verdict" to include damages resulting from the tax consequences of receiving the economic damages in a lump sum, rather than over the number of years he would have worked but for his premature termination. Magistrate Judge Jacob P. Hart (E.D. Pa.) granted the motion in part. Judge Hart, relying on the "make-whole" purpose of the ADEA, reasoned that the plaintiff was entitled to receive the value of front and back pay that he would have received over his work life. Because that value is diminished when he is put into a higher bracket and the lump sum is taxed at a higher level, he was entitled to an award equal to the negative tax consequences on the back and front pay portions of the award. However, compensatory damages were only a product of the lawsuit, so that the plaintiff would not have received them but for the defendant's discriminatory action; accordingly, that portion of the recovery was not increased. **O'Neill v. Sears, Roebuck and Co.**, — F. Supp. 2d —, 2000 WL 1133269 (E.D. Pa. 7/31/00).

DISABILITY DISCRIMINATION

Presence of Qualifying Disability; Causation

In light of **Sutton v. United Air Lines**, 527 U.S. 471 (1999), the Supreme Court ordered the Second Circuit to reconsider whether a learning-disabled law graduate is entitled to bar exam accommodations. The plaintiff has a "cognitive disorder that impairs her ability to read" because she identifies words very slowly. Before **Sutton**, the Circuit had affirmed the finding of an ADA violation. It now has remanded for consideration of whether the plaintiff's "self-accommodations" — various reading techniques that qualify as **Sutton** "corrective or mitigating measures" — remedy her limitations or leave her still reading too slowly. After holding that "reading" and "working" were ADA "major life activities," the panel held that the plaintiff's inability to practice law "significantly restricts" her from the "class of jobs" utilizing legal training, because the few law-related jobs "available to her[] are the exception and not the rule." However, the panel remanded as to causality of the "significant restriction," **i.e.**, whether "the denial of accommodations was a substantial factor preventing her from passing the exam" or whether her failures are traceable to non-disability "factors such as her education, experience, or innate ability." Judge Thomas J. Meskill wrote the decision, which E.D.N.Y. Judge Eugene H. Nickerson joined; Judge Jose A. Cabranes concurred in part but dissented in part, finding insufficient impairment of the plaintiff's "working" activity. **Bartlett v. New York State Board of Law Examiners**, — F.3d—, 2000 WL 1228857 (2d Cir. 8/30/00).

State and City Law

A history of alcoholism, or the perception thereof, was a "disability" supporting a plaintiff's jury verdict and punitive damages in a strong "pretext" case in New York City Civil Court. Immediately after disclosing his history of alcoholism to his supervisor, the plaintiff received a note warning him to "watch his back"; that supervisor fired the plaintiff barely a week later. The jury, and the court on the defendant's post-trial motions, disbelieved the "budget reallocation" explanation because the defendant quickly hired a replacement. The court cited **Reeves v. Sanderson Plumbing Prods., Inc.**, 120 S.Ct. 2097 (2000), to hold that the "plaintiff was not required ÿ to introduce additional, independent evidence of discrimination." The jury's failure to specify whether the award was under state law or city law did not preclude punitive damages and attorneys' fees awards because the city law (the one providing punitives and fees) has broader disability standards. **Grullon v. South Bronx Overall Economic Development Corp.**, — N.Y.S.2d —, 2000 N.Y. Slip Op. 20423, 2000 WL 1341927 (N.Y.C. Civil Ct. Aug. 9, 2000).

DISCOVERY

Admission of Investigatory Notes

Judge Jed S. Rakoff (S.D.N.Y.) has ordered a defendant to disclose an investigator's notes of witness interviews, which were prepared in response to the defendant's receiving anonymous information of racial harassment and preferential treatment. The court overruled the defendant's privilege objections to production of the notes for three reasons. First, the defendant waived the attorney-client privilege when it filed the notes in a related litigation, and moreover, the purpose of the investigation was not solely or even primarily to enable its counsel to render legal advice to the defendant. Second, the defendant's work-product claim was ineffective because it had not met its burden of showing that the investigation was prompted by litigation, actual or prospective. Last, the court doubted that the "self-critical analysis privilege" should be recognized at all, but in any event, not in the instant case because the public interest would not be served by protecting an investigation that the defendant made for its own economic advantage. **Cruz v. Coach Stores, Inc.**, No. 96 Civ. 8099 (JSR), 2000 WL 1224815 (S.D.N.Y. Aug. 29, 2000).

EQUAL PAY ACT

A female Public Safety Officer at a New York State college had a claim for an Equal Pay Act violation based upon inequities in housing provided to her as compared to males in the same job. The cost of board, lodging, or other benefits is part of "wages" under the Act if they are customarily furnished to employees and not primarily for the benefit of the employer. The State moved to dismiss, based on this defense, limitations, and a claim of Eleventh Amendment immunity. The district court (Denise Cote, S.D.N.Y.) rejected the first two defenses, then held that

the Equal Pay Act effectively abrogated the states' sovereign immunity, citing 1999 Second Circuit precedent and distinguishing **Kimel v. Florida Board of Regents**, 120 S. Ct. 631 (2000). The plaintiff was represented by NELA/NY member Mary A. Wright. **Stewart v. S.U.N.Y. Maritime College**, — F. Supp. 2d —, 2000 WL 1218379 (S.D.N.Y. 8/25/00).

For a second time, Judge Thomas J. McAvoy (N.D.N.Y.) has held that the Eleventh Amendment does not bar a suit by an individual state employee under the Equal Pay Act. The court had so held in 1997 and was affirmed by the Second Circuit Court of Appeals, but the Supreme Court granted **certiorari** and vacated and remanded in light of **Kimel**. The court of appeals remanded the case back to the district court, where the state renewed its motion for summary judgment. The district court considered all the recent Supreme Court cases and reached the same conclusion it had stated before, holding that Congress had unequivocally expressed its intent to abrogate the states' immunity and, in doing so, had acted pursuant to a valid grant of constitutional authority. NELA/NY member Ronald G. Dunn represented the plaintiff; Janice Goodman wrote an **amicus curiae** brief for NELA. An appeal to the Second Circuit is pending. **Anderson v. State University of New York**, 107 F. Supp. 2d 158, 83 [BNA] F.E.P. Cas. 681 (N.D.N.Y. 7/18/00).

ERISA

Only One Pension

Under his pension plan, an employee could receive only one pension even though he worked two separate full-time jobs, Judge Miriam Goldman Cedarbaum (S.D.N.Y.) has ruled. For years, the employee worked for two different employers that contributed to the same pension fund. While the benefit plan expressly stated that no beneficiary could earn more than three months of pension credit per quarter, union officials inaccurately had told plaintiff that he would receive two pensions because he counted as two full-time positions. But the fund administrator's decision not to provide a second pension survived under Judge Cedarbaum's "arbitrary and capricious" review — which was the applicable standard because the plan expressly delegated the discretionary decision to the administrator). And the erroneous assurances by union officials could not estop the fund from denying the second pension because they were not fund officials, only union officials. **Pochoday v. Bldg. Serv. 32B-J Pension Fund**, — F. Supp. 2d ___, 2000 WL 1056321 (S.D.N.Y 8/1/00).

Severance Pay

A policy of giving severance pay according to a specific formula may be an ERISA plan even if it is not in writing. A former employee of a radiology practice, terminated while on medical leave, had already been told by Judge Colleen McMahon (S.D.N.Y.) that she was not terminated in violation of the FMLA because the no-cause determination by the New York State Division of Human Rights collaterally estopped her; now Judge McMahon has told her that she was not entitled to severance pay under ERISA. This is because the severance pay plan was not definite but only said that "appropriate severance pay" would be paid "where applicable" and also said that part-time employees (like the plaintiff) would not get severance pay. **Kosakow v. New Rochelle Radiology Associates, P.C**., — F. Supp. 2d —, N.Y.L.J. 9/25/00, p. 36, col. 2 (S.D.N.Y. approx. 9/19/00).

Termination to Avoid Paying Benefits

A judge in the Northern District of New York has applied the Supreme Court's **Reeves** decision to an ERISA case. An executive, fired for alleged misconduct, sued under Section 510 of ERISA when he was denied benefits under the company's Executive Incentive Plan, under which he would have earned a 5% equity interest in the company. The plan provided that a participant fired for misconduct forfeited all vested and unvested interest in the plan. Section 510 prohibits the discharge of a participant in a plan for the purpose of interfering with his attainment of rights under the plan, so a plaintiff must show the employer's specific intent to interfere with such rights. Judge Norman A. Mordue (N.D.N.Y.) held, following **Reeves**, that the plaintiff had shown an issue of fact concerning the employer's intent, based upon circumstantial evidence, defeating summary judgment. **Valentine v. Carlisle Leasing International Co**., 102 F. Supp. 2d 105, 2000 WL 875277 (N.D.N.Y. 6/23/00).

EVIDENCE

Expert Witness on Mitigation

Judge Robert W. Sweet (S.D.N.Y.) has excluded substantial portions of proposed testimony from a defense expert witness on mitigation. The plaintiff was an economist terminated by the State of New York. The witness, an industrial/organizational psychology Ph.D. experienced in hiring and career development consulting, was to testify that the plaintiff did not conduct a "fully active and proper job search" because he should have (a) found comparable work in 6-10 months and (b) built a consulting practice in 2 years. Judge Sweet held much of the testimony inadmissible. The job search timeframes were not reliable because the data were insufficiently calibrated to this plaintiff, e.g., they included different industries and regions. Much of the testimony had an insufficiently disclosed basis in the expert's supposed "experience." The expert could not opine whether the plaintiff's efforts were "reasonable," because that would not help jurors but would invade their province in deciding an ultimate fact question. Yet the expert could testify on "ordinary practice in industry" (**e.g**., job search tactics and considerations) and compare the plaintiff's efforts to industry practice. The plaintiff was represented by NELA/NY member John A. Beranbaum. **Roniger v. McCall**, — F. Supp. 2d —, 2000 WL 1191078 (S.D.N.Y. 8/22/00).

FAIR LABOR STANDARDS ACT

Retaliation

Although a broad "joint employer" doctrine applies to FLSA wage-and-hour claims, a defendant must be directly involved in the adverse action in an FLSA retaliation claim, Judge Denise L. Cote (S.D.N.Y.) held in granting a defendant summary judgment. The plaintiff was a garment worker "employed" by a web of subcontractors of Donna Karen International ("DKI"). After her unpaid overtime complaint against the subcontractors, she

suffered various adverse actions: workplace ostracism, layoff, and closure of one subcontractor. Judge Cote found it "not necessary to reach the issue of DKI's status as a joint employer" because "[j]oint employer status is merely a predicate for liability: a plaintiff must still establish all elements of her claim." The plaintiff did not allege that DKI knew of, nor influenced, the actions of which she complained; she thus could not prove a **McDonnell Douglas** prima facie case of retaliation. The plaintiff did not help her cause by failing to file a Local Rule 56.1 statement of disputed facts, which left "nearly all of the facts presented by DKIÿ.undisputed." **Lai v. Eastpoint Int'l, Inc**., — F.Supp.2d — , No. 99 Civ. 2095 (DLC), 2000 WL 1234595 (S.D.N.Y. 8/31/00).

PROCEDURE

Early Notice of Right to Sue [Note: See "Practice Tips"]

Judge Denise Cote (S.D.N.Y.) has joined the district judges in the Second Circuit (which has not yet ruled on the issue) holding that a notice of right to sue (NORTS) issued less than 180 days after the charge was filed is valid, despite the wording of Title VII which would seem to require a 180-day wait. The EEOC issued a NORTS, pursuant to 29 C.F.R. ' 1601.28(a)(2), only a few days after the prospective plaintiff had filed her age and sex discrimination charge, and the plaintiff promptly filed the complaint in federal district court. The employer moved to dismiss the sex discrimination claim because it had not languished 180 days in the EEOC; it moved to dismiss the age discrimination claim because the plaintiff had not waited the 60 days required by the ADEA. The court rejected these arguments and held, in addition, that any ADEA defect had been cured by an amended complaint filed more than 60 days after the ADEA charge in the EEOC. **Huang v. Gruner + Jahr USA Publishing**, — F. Supp. 2d —, 2000 WL 640660 (S.D.N.Y. 5/17/00).

Judge Eugene Nickerson (E.D.N.Y.) has followed a growing number of courts in finding that the failure of a plaintiff to wait out the 180-day period after filing a charge with the EEOC is not a jurisdictional bar to bringing a federal suit. After reviewing the split of opinions within this circuit and ultimately balancing the equities, Judge Nickerson excused the 180-day waiting period because the plaintiff had waited approximately four months before requesting a right-to-sue notice, and the EEOC certified that it would be unable to complete the administrative processing of her charge within 180 days. Because nothing suggested that the EEOC's determination was unreliable or made in bad faith, and the plaintiff's sexual discrimination and harassment claims were serious and also appeared to have been made in good faith, the court found that the charges should be heard by the court and denied the defendant's motion to dismiss. **Ferguson v. Halmar Builders of New York, Inc.**, — F. Supp. 2d. —, No. 99 CV 198 (E.D.N.Y. 8/2/00).

Jurisdiction over Foreign Employers

A Title VII plaintiff sued the Permanent Mission of Saudi Arabia to the United Nations, and the complaint survived an immunity defense in Judge Lewis Kaplan's (S.D.N.Y.) courtroom. Focusing on the specific act of the employment contract between the plaintiff and the defendant, Judge Kaplan determined that the plaintiff's employment (performing research, writing, and clerical duties) was a commercial, as opposed to a government, activity within the meaning of the Foreign Sovereign Immunities Act ("FSIA"). Because commercial activities are an exception to the sovereign immunity afforded to foreign states by the FSIA, the defendant was vulnerable to federal suit. Also, the court found that Title VII applies to foreign employers operating in the United States, and that the New York State Human Rights Law does not intrude on the foreign affairs powers reserved to the federal government. **Al Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations**, — F. Supp. 2d — , 2000 WL 1278379 (S.D.N.Y. 9/8/00).

Statute of Limitations: Continuing Violation

In an almost unreadably turgid opinion, Judge Victor Marrero (S.D.N.Y.) found a material disputed issue of fact in claims of sexual harassment and retaliation in the New York City Police Department. The plaintiff alleged that she experienced sexual harassment beginning in 1992, made her first internal complaint in 1994, and thereafter suffered escalating retaliation, first from the harasser and then from officers at the precinct to which she was transferred. Eventually she was brought up on disciplinary charges, subjected to a psychiatric evaluation, and transferred to a "dumping ground" assignment. Finally she resigned after being told that her alternative was discharge, allegedly for refusing to take a drug test. Her EEOC claims were filed in 1995 and 1996. The court held that, although the plaintiff of course knew of the separate acts claimed to be retaliatory at about the times when they happened, she plausibly may not have realized that they were part of a larger concerted campaign directed at her with the knowledge and involvement of high-ranking officials designed to force her out of the NYPD. Accordingly, the question whether there was a continuing violation was a fact issue for the jury, and summary judgment as to her earlier allegations was denied. **Gonzalez v. Police Commissioner William Bratton**, — F. Supp. 2d —, 2000 WL 1191558 (S.D.N.Y. 8/22/00).

RACE DISCRIMINATION

Section 1981 and "At-Will" Employees

Resolving a deep district court split, the Second Circuit has held that at-will employees can sue under 42 U.S.C. § 1981. Employers have argued that at-will employ features no "contract" sufficient to trigger the § 1981 "right to make and enforce contracts." The Circuit noted that the Civil Rights Act of 1991 overturned the narrow interpretation of § 1981 "contract" rights expounded in **Patterson v. McLean Credit Union**, 491 U.S. 164 (1989), which had rejected an employee's § 1981 claim of discriminatory working conditions. Given the Congressional desire to target discriminatory employment conditions broadly, including into areas uncovered by Title VII (e.g., firms with fewer than 15 employees), the Circuit declined to construe "contract" narrowly. Instead, the Circuit concluded that at-will employment is a sufficient exchange of promises and performances (payment for work)

to meet the Restatement's definition of "contract." Judge Wilfred Feinberg wrote the decision, which was joined by Judges Amalya L. Kearse and Robert D. Sack. **Lauture v. Int'l Bus. Mach. Corp.**, 216 F.3d 258 (2d Cir. 6/20/00).

Harassment — "Second-Hand Comments"

The Second Circuit Court of Appeals has reversed Judge Colleen M. McMahon's (S.D.N.Y.) grant of summary judgment on hostile environment racial harassment claims. The "stream of racially offensive comments over the span of two to three months" was sufficient to state a claim even if it "did not render the plaintiffs' jobs 'unendurable' or 'intolerable,'" as Judge McMahon had held, because "[t]he bar is not set so high" and comparison to the most egregious recorded harassment cases imposes too high a threshold. The panel held that Judge McMahon erred in excluding comments made (a) about workers other than the plaintiffs, (b) outside the plaintiffs' presence so that they only learned of them second-hand, and (c) after the plaintiffs tendered their resignation but before they left the workplace. Even if "second-hand comments" have less probative value, that is not a proper summary judgment consideration, the panel held, citing **Schwapp v. Town of Avon**, 118 F.3d 106 (2d Cir. 1997). The panel also held that "individuals may be held liable under '1981" under a standard that seems similar to state and city law individual liability: "a plaintiff must demonstrate 'some affirmative link to causally connect the actor with the discriminatory action.'" Judge Chester J. Straub wrote the decision, which Judges James L. Oakes and Jon O. Newman joined. **Whidbee v. Garzarelli Food Specialties, Inc.**, 223 F.3d 62, 2000 WL 1158758 (2d Cir. 8/14/00).

Individual Liability Under ' 1981

See **Whidbee v. Garzarelli Food Specialties, Inc.**, discussed under "Race Discrimination," above.

Summary Judgment

Judge Thomas P. Griesa (S.D.N.Y.) has denied summary judgment in a race discrimination case built solely on evidence of pretext and limited statistics. The plaintiff, an African-American, was terminated in a reduction-in-force, based on poor evaluation scores. There was no direct evidence, **e.g.**, racist comments or explicit manipulation of scores. But the scores that doomed the plaintiff and a high proportion of other minority employees were not preexisting evaluations but tools crafted solely for the terminations, Judge Griesa noted. And the validity of those scores was in dispute: "nothing in the way of details is given regarding the relative merits or demerits of plaintiff's performance," and another African-American employee received a low score that appeared to conflict with other evaluations. Judge Griesa also noted that certain informal rankings even more disproportionally disfavored minorities and that the company apparently violated its own policies by destroying records. This case may be a good citation for recalcitrant judges who, despite Reeves, still demand something approaching direct evidence. **Williams v. Eastman Kodak Co.**, No. 98 Civ. 3879 (TPG), 2000 WL 1132004 (S.D.N.Y. 8/10/00).

SECTION 1983

Substantive Due Process

Judge Barrington D. Parker (S.D.N.Y.) "assess(ed) the legal feasibility" of a plaintiff's complaint and found sufficient allegations for a violation of substantive due process, denying a motion to dismiss. The plaintiff, an employee of a county hospital, stated in her complaint that the defendants' disciplinary proceedings against her were without basis, their expressed intention was to disaffirm a hearing officer's conclusions exonerating her, and the actions were intended to force her to retire, so that they were "arbitrary, irrational and 'shocked the conscience.'" She also satisfactorily pled municipal policy, supporting a claim under 42 U.S.C. ' 1983, by alleging that high-level employees with decision-making authority created and implemented a policy to effect a Achanging of the guard" and to replace her with employees who were younger and without a disability. Judge Parker held that the applicability of immunity is a fact-specific inquiry and not suitable for determination on a motion to dismiss. **Bendel v. Westchester County Health Care Corp.**, — F. Supp. 2d —, 2000 WL 1280953 (S.D.N.Y. 8/17/00).

SEX DISCRIMINATION

Summary Judgment

Despite **Reeves v. Sanderson Plumbing Prods., Inc.** 120 S.Ct. 2097 (2000), the Second Circuit has continued to take a hard line against gender discrimination claims by professors denied tenure. A divided panel affirmed a grant of summary judgment to Columbia University in the case of a female chemistry professor denied tenure, supposedly for a sub-par research record. The majority dismissed as improper second-guessing and exaggeration all evidence of pretext, such as deviation from commonly-followed tenure procedures and an apparent tightening of standards that other tenure candidates did not face. The majority also dismissed various indicia of gender stereotyping, such as characterizations of plaintiff as "nice" and "nurturing" but a "pushover," as insufficiently gender-specific to show discrimination. The extraordinary deference the majority showed to the University's assertions flies in the face of the Rule 56 principle of resolving doubt in favor of the non-movant, Judge Richard Cardamone argued in dissent. Judge McLaughlin wrote the decision, joined by Judge Parker. **Weinstock v. Columbia University**, — F.3d —, 83 [BNA] F.E.P. Cas. 1453, 2000 WL 1200161 (2d Cir. 8/23/00).

SEXUAL HARASSMENT

See Gonzalez v. Police Commissioner William Bratton, discussed under "Procedure," above.

SEXUAL ORIENTATION

The Second Circuit has rejected the notion that **Oncale v. Sundowner Offshore Services**, 523 U.S. 75 (1998), which permitted a Title VII same-sex sexual harassment claim, might support a Title VII sexual orientation harassment claim. The plaintiff, a gay male, alleged severe harassment based on his sexual orientation. The Circuit affirmed a 12(b)(6) dismissal by E.D.N.Y. Judge Leonard D. Wexler. The panel cited cases holding that Congress never intended to ban sexual orientation discrimination nor to include sex-

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ual orientation within the Title VII concept of sex/gender. In intriguing dicta, the panel held out the possibility that sexual orientation discrimination could constitute "sexual stereotyping" within the proscription of **Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989). But the plaintiff insufficiently pleaded stereotyping, having not alleged that the discrimination stemmed from a view of him as stereotypically "feminine." Judge John M. Walker, Jr., wrote the opinion, which was joined by Judges Robert D. Sack and Robert A. Katzmann. **Simonton v. Runyon**, — F.3d —, 83 [BNA] F.E.P. Cas. 993 (2d Cir. 8/22/00).

STATE LAW

Restrictive Covenants

This case teaches us to question prospective clients carefully about the circumstances under which they left a former employer (and the e-mails about it that they may have sent). A Westchester County court granted a preliminary injunction prohibiting a former employee from working for a client of her former employer pursuant to a noncompete clause in her employment agreement. The employee admitted to accepting a job with one of the company's clients but claimed that she would not be performing the same type of services she had provided to the plaintiff. However, the court was impressed by certain circumstantial evidence: The employee had installed a zip drive and "wipe file" program on her laptop the same day she received the employment offer from the company's client (potentially enabling her to copy the company's trade secrets without this being traced); e-mail messages between her and the client in which the client requested the same services provided to the plaintiff company; and an e-mail message to her mother stating when she resigned. Because the competition clause was reasonable and misappropriation of trade secrets favors protecting an employer, the court granted a preliminary injunction prohibiting the defendant from working for the plaintiff's client or doing other similar work. **Ramsey Beirne Associates, LLC v. Flint**, — N.Y.S.2d —, N.Y.L.J. 8/24/00, p. 31, col. 6 (N.Y. Sup. Ct. approx. 9/23/00).

Another ex-employee fared better before Justice Alice Schlesinger (Sup. Ct. N.Y. Cty.). She had negotiated a long, complex employment agreement to act as a salesperson. After firing her three years later, the company sought to prevent her from servicing its clients, many of whom she asserted she had brought with her. The company claimed that the noncompete was incident to the sale of a business, since it had originally granted her an equity interest in a new subsidiary that she was hired to run. When she was fired, she was "deemed" to have sold this equity interest back to the company for a relatively small sum. The court looked behind the "label" of the transaction, found that the individual had remained an employee throughout her relationship with the company, and held that "the restrictive covenant must be scrutinized with great care, particularly when there [is] an involuntary discharge." In such cases "the former employer will often not be permitted to invoke the covenant, on the principle that the discharge of an employee without cause, constitutes a breach of the contract by the employer, thereby depriving it of the right to the enforcement of these conditions." A preliminary injunction was denied because none of the three requirements for it was met. **Carlyle Technical Services, LLC v. Viola**, — N.Y.S.2d —, N.Y.L.J. 8/24/00, p. 28, col. 3 (Sup. Ct. N.Y. Cty. approx. 8/14/00).

SUMMARY JUDGMENT

Race and Sex Discrimination

Judge John S. Martin, perhaps the most likely Southern District judge to grant a defendant's summary judgment motion, has denied significant parts of such a motion in which several plaintiffs charged race, national origin, and gender discrimination, sexual harassment, and retaliation against an employer and several individual employees under Title VII, Section 1981 and the New York State Human Rights Law. Notably, Judge Martin found: (1) individuals who actually participate in the conduct giving rise to discrimination claims may be held personally liable under the NYHRL, and that "actual participation" also encompasses an individual who does not take part in the primary violation, such as a supervisor who fails to take remedial measures; (2) a plaintiff's race/color discrimination claim not raised in his charge is reasonably related to his national origin discrimination claim, and therefore, actionable in district court; (3) ethnic discrimination is viable under Title VII; and (4) a triable issue of fact existed for a Section 1981 claim of intentional discrimination where the plaintiffs alleged specific facts giving rise to a plausible inference of discriminatory motive. **Ahmed v. Compass Group**, — F. Supp. 2d —, 2000 WL 1072299 (S.D.N.Y. 8/3/00).

WHISTLEBLOWER LAW

The Appellate Division, Second Department, has reinstated a claim under the private-sector whistleblower law, New York Labor Law § 740, even though the plaintiff could not present evidence of the specific law, rule, or regulation violated. The plaintiff needed disclosure of information about two surgical patients in order to support his claim. He had expressed concerns to the hospital about the quality of care provided to the patients by a doctor. He alleged that the doctor then induced the hospital to breach his contract, and he sued the hospital for the breach and the doctor for tortious interference. Despite the exclusivity of the Section 740 remedy, which has caused dismissal of other such cases, the Appellate Division merely dismissed the breach of contract claim as being derived from the Section 740 claim. The tortious interference claim against the doctor survived, and the whistleblower claim against the hospital was remanded for disclosure. The plaintiff was represented by NELA/NY members Cynthia Rollings and Robert L. Levy. **Bordan v. North Shore University Hospital**, — A.D.2d —, 712 N.Y.S.2d 155 (2d Dep't 8/14/00).

PRACTICE TIP

Remember that you must lay the groundwork for a fee application from the very beginning of the case, and that means from the time you sit down with each prospective client (or do any other work chargeable to the client). You must keep contemporaneous time records and keep task separate, **e.g.**: "Research statute of limitations, .8 hours; draft letter to opposing counsel, .5 hours; telephone call to client, .2 hours." If you do something that you can't charge the client for (and wouldn't be able to charge your adversary for in a fee application), for instance because it is clerical or inefficiently done, show it on the bill anyway as "no charge." This not only (hopefully) generates a feeling of gratitude on the part of your client but also shows the court later that you are not overreaching, thus maximizing your likelihood of getting fees for the rest and minimizing the chance that the court will make wholesale cuts in the fee to make up for nonbillable or inefficient work.

PRACTICE TIP

Warning for lawyers and their clients who file charges in the EEOC: The issue of validity of an early notice of right to sue (issued less than 180 days after charge filing) is likely to disappear, but for the wrong reason. A source within the EEOC has indicated that there has been a change in procedure under which virtually all charges will be "resolved" within 180 days. Once an employer's position statement has been filed, the investigator no longer notifies the charging party or asks for rebuttal evidence; he or she simply decides whether to issue a cause or a no-cause finding, based only on the information in the file. This means that you have to (a) put *all* your evidence, documentary and otherwise, into your charge and supporting affidavits, and (b) constantly pester the investigator to tell you when the position statement comes in and hopefully let you rebut anything unexpected in it. The EEOC still will not let you or your client actually see or copy the position statement, although this seems to vary with the investigator. Meanwhile, NELA/NY is trying to induce the EEOC to change its new procedure.

FILINGS, from page 1

Hospital's residency training program in internal medicine in 1985 and 1986. Although the Hospital claimed that Dr. Wahid was not as qualified as the applicants who won the 20 residency positions, Dr. Wahid's test scores were better than a majority of the successful applicants; he had already received a medical license in Massachusetts; and he had positive references from defendants' own department heads. Although the applicant pool for the program consisted of a majority of Asian/Pacific Islanders throughout the mid-1980s, only one Asian/Pacific Islander had won admission to the program in 1986, in contrast to prior years. After Dr. Wahid filed suit in 1986, the Hospital accepted a majority of Asian/ Pacific Islanders into the program in 1987 and 1988, the last year for which data was available.

At trial, the physician responsible for the final admission decision admitted that the Hospital had violated its written policy in accepting into the 1986 program at least two American-born applicants who had not received a required written certification, which Dr. Wahid had at the time of his application. He also testified that New York State was pressuring hospitals to accept only graduates of American medical schools and American-born graduates of foreign medical schools for "cultural" reasons.

After he was denied admission, Dr. Wahid completed two other training programs, including one at Columbia-Presbyterian, and received board-certification in two specialities.

The jury awarded Dr. Wahid $500,000 in back pay and $1 million in front pay damages. Defense motions concerning the verdict are expected.

Daniel J. Kaiser and Henry L. Saurborn, Jr., of New York City, represented Dr. Wahid. Alfred P. Vigorito of Bartlett, McDonough, Bastone & Monaghan in White Plains represented the Hospital.

Title VII - retaliation

A New York City Detective in the elite Executive Protection Unit of the Mayor's Detail has won a verdict on his Title VII claims that the Police Department retaliated against him after he complained about anti-Asian slurs and the loss of a promotion. **Paul Cisternino** tried the case before Judge Denise Cote (SDNY), winning a $50,000 award.

The Executive Protection Unit is responsible for ensuring the safety of the Mayor, his family and other prominent City political figures. The plaintiff, Robert Chu, worked on the team guarding Donna Hanover. In 1995 Mr. Chu was subjected to racial slurs (mocking accents and comments like "Let's send the Chinaman to get the food.") He also was not considered for a promotion to Detective Second Grade, despite a strong record and seniority over the ten officers who were eventually promoted.

When Mr. Chu complained, he was told that he should "use your Chinese to get you promoted." He complained again, and a few days later was involuntarily transferred out of the Executive Protection Unit and into a Brooklyn precinct.

The court dismissed plaintiff's claim that defendants failed to remedy a racially hostile environment, but sent the promotion and retaliation claims to the jury. The jury found for plaintiff on the retaliation claim, and for defendants regarding the failure to promote. **Chu v. the City of New York**, 99 CIV 11523 (SDNY) (verdict October, 2000).

Merit Systems Protection Board

Doris Traub won reinstatement with full back pay and attorneys fees for a U.S. Postal Service letter carrier, after a Merit Systems Protection Board Judge found that the charges lodged against the employee were unfounded and constituted reprisal for his union activity. **Siatos v. U.S. Postal Service**, Merit System Protection Board, New York Field Office

The employee had been terminated after he was charged with insubordination, creating a disturbance on the work floor and failing to follow instructions. On his appeal to the MSPB, ALJ Milagros Farnes held that the Agency failed to prove the charges against him. She also ruled the Agency had retaliated against Mr. Siatos for his union activity, including the filing of hundreds of grievances and unfair labor practice charges, and the publishing and posting of a newsletter critical of management. The Judge directed reinstatement with full back pay, which amounted to approximately $60,000. The Postal Service then agreed to pay the full amount of attorneys fees requested, approximately $21,000.

SUPREME COURT, from page 1

Craft v. Campbell Soup, Co., 177 F.3d 1083 (9th Cir. 1999), in which it had held that Congress did not intend the FAA to apply to "labor or employment contracts;" the **Craft** court had held that an arbitration agreement contained in a collective bargaining agreement could not bar the plaintiff's race discrimination claim.

In petitioning for certiorari, Circuit City argued that in enacting the FAA in 1925, Congress intended to only exclude from coverage seamen, railroad employees and other workers directly engaged in the interstate movement of goods. This construction of the FAA, it argued, furthers Congress' strong interest in favoring arbitration.

The Court will hear the case on November 6. The case has drawn a large number of amicus briefs, including, for the respondent, NELA, ATLA, and the United States.

—Jonathan Ben-Asher

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