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Second Circuit Recognizes Constitutional Right to Intimate Association

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In *Matusick v. Erie County Water Authority et al*[1], 739 F.3d 51 (2d Cir. 2014), a divided panel of the Second Circuit issued a decision favorable to plaintiffs on a number of fronts – (a) recognizing a constitutional right to intimate association, (b) reinforcing that comparators need not be identical, (c) holding an unfavorable Section 75 hearing does not preclude a discrimination claim where the discrimination issues were not necessarily litigated and (d) emphasizing the power of a single hateful word.

Addressing the last of these points first, the use of the N-word was a significant part of the case. Witnesses testified the word was frequently used, but the Plaintiff substituted the term "N" or "Ns" at trial instead. The court, in footnote 3, explained its decision to use that word in the decision:

Of course we share Matusick's

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1 I have been told this is among the longest single-plaintiff employment discrimination decisions in the Second Circuit. The majority opinion is 75 pages. There is a five-page concurring opinion and a 30 page dissent. The panel took 20 months to issue its decision. By amended decision issued February 25, 2014, the panel denied cross-motions for panel reconsideration (with a limited exception discussed below).

Settlements in Wage and Hour Class/Collective Actions

By Rachel Bien, Esq.
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Getting Your Settlement Approved: the Process

Whether settlement comes early or late in the life of a case, settlements of class and collective actions raise a host of issues that the parties must anticipate well before they sign an agreement. Although courts routinely approve class action settlements without reservation, those courts that have rejected them have done so principally because the parties failed to sufficiently account for the ways in which class action settlements differ from individual settlements both because of their size and because of the courts' role in ensuring that the due process rights of absent class members are adequately protected.

Collective Actions

Collective actions brought pursuant to Section 216(b) of the Fair Labor Standards Act ("FLSA") are approved under a less stringent standard than class actions brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. This is because FLSA settlements only bind the individuals who have joined the suit by opt-ing in and thus do not raise the due process concerns with respect to absent class members that warrant heightened scrutiny in the Rule 23 context. *See Capsolas v. Pasta Resources Inc*., No. 10 Civ. 5595, 2012 WL 4760910, at *6 (S.D.N.Y. Oct. 5, 2012).

Lynn's Food Stores, Inc. v. U.S., 679 F.2d 1350 (11th Cir. 1982) is the leading case governing settlement of FLSA claims. In that case, the Eleventh Circuit held that a private settlement that an employer entered into with its employees did not provide it with an effective release because the settlement was not the product of litigation and had not been reviewed by a court to ensure its fairness. Citing *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1947), the Circuit court held that, in order to be effective, a settlement must either be supervised by the Secretary of Labor or by a court presiding over private litigation. *Id*. at 1352-53.

Settlements reached under court supervision in the context of litigation reduced the risk of employer overreaching in several ways. First, litigation strongly suggests an adversarial relationship between the employer and employees who brought the suit. *Id*. at 1354. Second, employees engaged in litigation are more likely to be represented by counsel. *Id*. Finally, the requirement of court approval increased the odds that the settlement terms would be reasonable and fair to all parties. *Id*.

Most courts have followed *Lynn's Food Stores* in holding that private settlements of FLSA claims are unenforceable without court approval. *See, e.g*., *Wolinsky v. Scholastic Inc*., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012); *Dees v. Hydradry, Inc*., 706 F. Supp. 2d 1227, 1238 (M.D. Fla. 2010). There are strong reasons for this approach. As courts have correctly recognized:

In practice, leaving an FLSA settle-

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The NELA/NY Calendar of Events

NELA NY Annual Fundraising Gala, Honoring Anne Golden:
Wednesday, November 12,
6 – 10 PM

NELA Nite: Panel on Punitive Damages
Monday, November 17, 6-8 PM
Outten & Golden LLP

NELA Nite: Your Client's ESI: Preservation, Production, Ethics
Tuesday, December 9, 6-8 PM
Outten & Golden LLP

2014 Board Meetings
Wednesday, November 5
Wedneday, December 3
6:30-8:00 PM
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016

A Word from Your Publisher

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Items for the calendar may be submitted by calling Roseni Plaza.
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Robert Felix

"In addition to our great and active Gender Discrimination Committee, NELA-NY has a number of excellent committees. We are always looking to add additional members whose interests are aligned with the various committees' missions. Please feel free to contact me at any time for more information and ways you can get involved."
—Roseni Plaza,
nelany@nelany.com

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discomfort. Its use in the context of this opinion serves to describe accurately the severity of the behavior to which Matusick was subjected at the ECWA, as found by the jury, and not to trivialize the word's significant – and even unique – power to offend, insult and belittle. According to a Lexis search performed on May 27, 2013[2], this Circuit has use the term for similar purposes in at least fifty-five opinions. The most recent in a published opinion was in *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685 (2d Cir. 2012).

Background

Scott Matusick was a dispatcher for the Erie County Water Authority ("ECWA"). The dispatcher is the point of contact for customers with problems with water ser-

2 This was more than a year after the argument, but still more than six months before the decision was issued.

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President's Column

By Joshua Friedman, Esq.
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Our Gala, November 12, will honor Anne Golden, who is leaving the Board at the end of this year, and retiring from the practice of law in June. I cannot possibly do her justice in such as short column, but I want to share at least a few of my thoughts, and others'.

In a bar association full of wonderful people, Anne stands out for her kindness, dedication and intellect. Anne joined NELA/NY near its beginning, and in the 1990s served her first long stint on the Board, with Wayne Outten, our founder and Anne's partner, as President. Anne became a Board member again in 2004 and is an officer. Anne has also served a term on NELA National's Board, and served on its Amicus Advisory Council and other committees and task forces.

Wayne shared with me his appreciation for Anne's sense of humor, and how she has kept their entire firm amused, with "cartoons, limericks and her great wit." Anne has been a leader in educating, and amusing, her NELA colleagues. She created and wrote "Anne's Squibs" for well over a decade, which were eagerly awaited every newsletter, for their precedent and puns. NELA Nites, for which Anne has been principally responsible, have educated and entertained us with highly pertinent, and sometimes unusual, subjects.

Darnley Stewart, immediate past President, calls Anne a true "Superlawyer." Anne was lead counsel in Quaratino v. Tiffany & Co., 166 F. 3d 422 (2nd Cir. 1999), a fees case in which the Second Circuit was convinced to reverse a decision which would have gutted fee-shifting. Herbert Eisenberg, also a former NELA/NY President, and co-author of NELA's amicus brief in Quaratino, watched Anne argue. Herb recalls "She was always on the mark on issues we faced." Anne convinced the Second Circuit that without honest fee-shifting, civil rights would be hollow promise, and in so doing, made precedent we all cite.

It is important for NELA/NY and for Anne, that we join in making this year's Gala our most successful ever. What we raise will allow NELA to continue to do all of the things Anne started, and meet new challenges, such as getting meaningful employee rights passed in Albany. Please log onto our website, www.nelany.com, go to Events, and become a sponsor. And bring your Salsa shoes!

Some news that means a lot to me: we have revived our Mentor Program. Everyone joining NELA/NY with less than three years experience in employment law will be assigned a mentor, someone who has been practicing for many years, and has volunteered his or her time. Mentors provide guidance and support, in addition to answering legal questions, and encourage new members to obtain the CLE they require in order to become excellent employment lawyers. If you joined when the program was dormant, and would like to be assigned a mentor, just ask our Executive Director, Roseni Plaza.

I also want to remind everyone that the Shelley Fund, formerly the Litigation Fund — now named in honor of our beloved former Executive Director, Shelley Leinheardt — provides grants so that attorneys and their clients, who do not have the financial means to pay for experts, deposition transcripts, and other litigation costs, face a level playing field against well heeled adversaries, and can prosecute important claims. Anyone, including non-NELA/NY members, is eligible to apply. A form is available on our homepage. ■

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vice and is responsible for getting crews to the scene. Matusick is white. He began dating an African-American woman, Anita Starks – now Anita Starks Matusick – at the beginning of 2004. This became more serious later that year and then became engaged. They began living together in 2005 and were married in 2009.

Matusick's co-workers and even the Director of the ECWA were aware of his relationship with Starks, including because she frequently drove him to work. One of Matusick's supervisors, Gary Bluman, a named defendant in the lawsuit, harassed him about the relationship. For example, he threatened to kill Matusick's family and he and his crew trespassed onto Matusick's property and threw lawn equipment on the roof and duct-taped his door shut. In July 2004, Bluman put a pen to Matusick's neck while saying "you're a fucking [nigger] lover, your – your bitch is a [] [nigger], you're a fucking [nigger] now, too, and I'm going to kill all the fucking [niggers]."

Although the ECWA had EEO policies which had not been made available to him, Matusick reported the incident and Bluman was told to avoid Matusick. But he resumed the harassment within a month and a half. Other ECWA employees, including James Lisinski, the Coordinator of Employee Relations, used the N-word and other derogatory terms (including "porch monkeys' and "nigglettes" to refer to Starks' children) to harass Matusick. Although Matusick reported other incidents to the same supervisors, they failed to act. To the contrary, during a disciplinary interview, Lisinski asked Matusick "what is this I'm hearing about you disrupting the work

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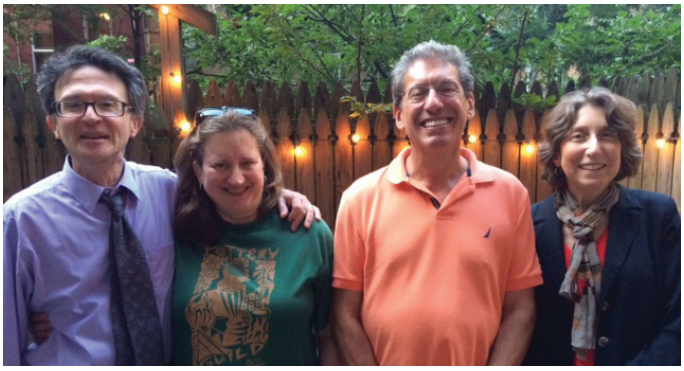
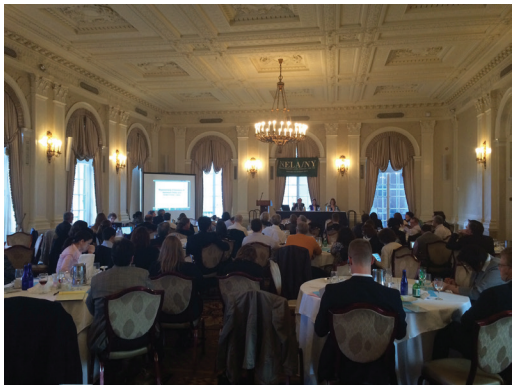
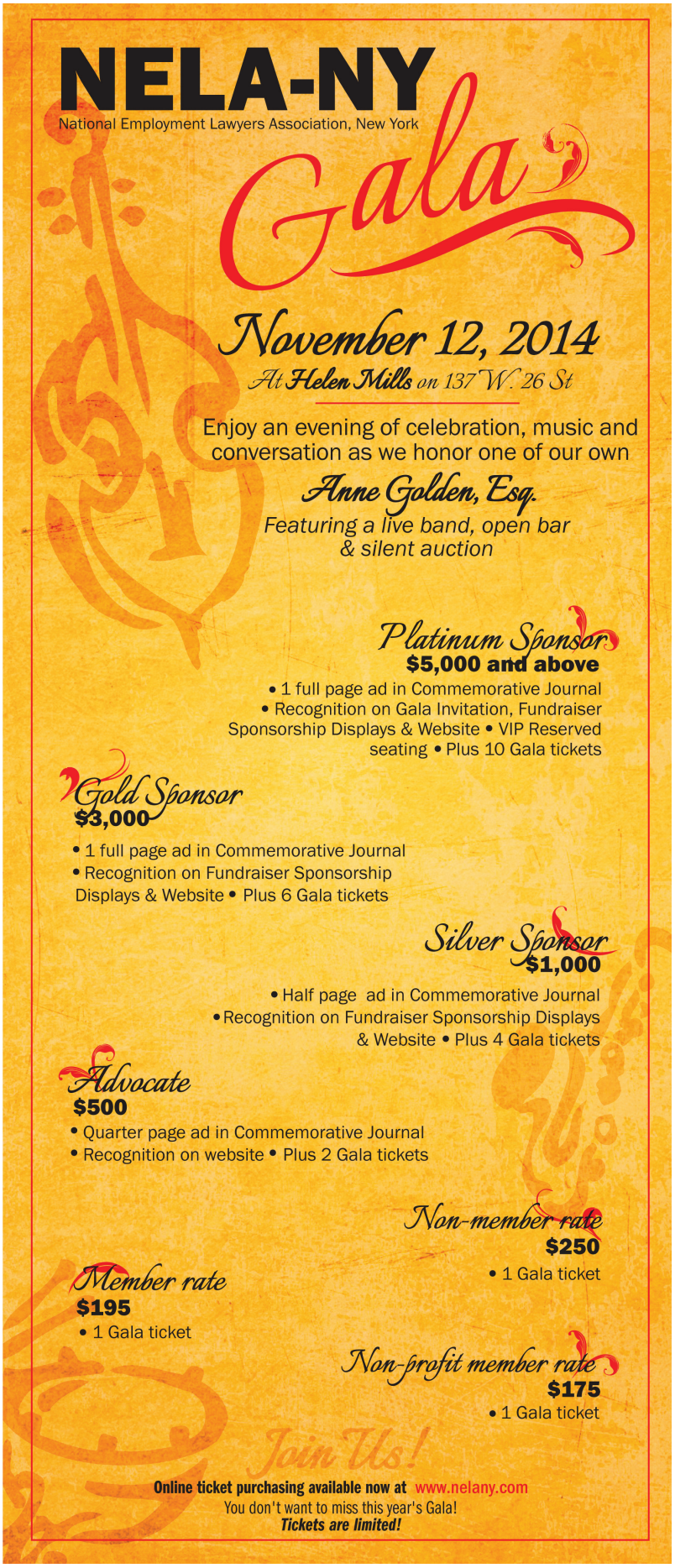
NELA/NY Central Park
8/14/14



Bar Talk
9/30/14



Fall 2014 Conference



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force and talking about, you know, black issues, white issues, sexual harassment, and so on and so forth[?]"

In November 2005, 16 months after the Bluman pen incident, Matusick was served with disciplinary charges seeking to terminate his employment for failing to properly perform his duties in connection with two customer calls in October 2005. Matusick had been previously suspended in May 2005 for 60 days for blocking a video camera in the dispatch office. Matusick admitted blocking the camera, but other employees also admittedly did so without discipline (two were disciplined).

In connection with the customer incidents, the claim was he was sleeping on the job resulting in workers not being dispatched in a timely manner. Matusick denied dozing off, claimed the workers were dispatched properly and that other employees admittedly slept on the job without discipline. One employee was not terminated even after being caught bringing in a cot and intentionally going to sleep.

After a five-day hearing, at which Matusick was represented by his union, the hearing officer issued a report and recommendation finding Matusick guilty of sleeping on the job and failing to properly respond to the customer calls, and recommending his termination. Matusick did argue that he was treated differently than others who had slept on the job, but did not argue during the hearing that he had been mistreated due to his relationship with Starks. Matusick did make a spoliation argument during that hearing, claiming that the videotape of the dispatch office concerning the October incidents had not been preserved by the employer. That argument was rejected by the hearing officer. The employer adopted the recommendation of the hearing officer and terminated Matusick on April 24, 2006. Matusick did appeal to the Civil Service Commission, which let the decision stand. Matusick did not file an Article 78 Petition

Procedural History

Matusick filed a state court complaint on June 26, 2007, against the employer and ten individual defendants, asserting race discrimination and retaliation under the N.Y. Human Rights Law, claims under Section 1983, the First and Fourteenth Amendments to the U.S. Constitution, intentional infliction of emotional distress, against all defendants, and a claim of assault and battery against Bluman.

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Defendants removed the case to federal court. After extensive discovery, the employer's motion for summary judgment resulted in dismissal of the disparate treatment claim concerning the 60-day suspension and the tort claims as barred by the statute of limitations. (The district court's decision on that motion adopted a magistrate judge's report and recommendation. The district court also denied defendants' motion for reconsideration of that decision.) The case was tried before a jury. Defendants' mid-trial motion for a judgment as a matter of law was granted solely with respect to some individual defendants. The jury returned a verdict finding the employer and some individual defendants liable for unlawful termination and hostile work environment and for violating Section 1983. The jury awarded over $300,000 in backpay and punitive damages of $5,000 against four individual defendants. The trial court denied post-trial motions under Fed. R. Civ. P. 50(b) and for a correction of the judgment.

The Weight of the Section 75 Decision

A major issue at trial was how the Section 75 hearing would be presented to the jury. Although the trial court did not allow the hearing officer's recommendation or its contents to be admitted at trial, the jury was presented with the termination decision, evidence of the hearing process and that the hearing officer's recommendation was "the strongest … towards a termination of an employee" that the decisionmaker had ever seen. But the jury was instructed that it was not bound by the hearing officer's recommendation. Even after trial, the district court rejected defendants' argument that the Section 75 hearing should preclude the plaintiff from re-litigating his discrimination claim.

The Second Circuit re-examined whether there was issue preclusion from the Section 75 hearing. The relevant question was whether there had been a "full and fair opportunity to litigate," and whether the identical issue had been actually and finally decided. The trial court had concluded that because the hearing officer's recommendation was non-binding, the issue was not finally decided, citing *Leventhal v. Knapek*, 266 F.3d 64, 72 (2d Cir. 2001). The Circuit disagreed, distinguishing that case because the parties there had settled and the hearing officer's recommendation was not adopted. The Second Circuit also rejected plaintiff's argument against issue preclusion because he was not represented by counsel – union representation was adequate. Yet the issues at the Section 75 hearing were not identical to those in the lawsuit. Whether Matusick engaged in the conduct the hearing officer found did not mean his termination was not motivated in part because of his relationship with Starks.

However, the Second Circuit did find that the factual findings by the hearing officer precluded relitigating whether Matusick had engaged in misconduct. Accordingly, the Second Circuit concluded the jury should have been instructed it could not find Matusick did not engage in misconduct. However, this error was deemed harmless because the Second Circuit concluded the jury was unlikely to find Matusick did not engage in misconduct based on the evidence. This issue preclusion did not require the conclusion that Matusick had to have been terminated for legitimate reasons.

Similarly Situated

One of the most challenging aspects of virtually every disparate treatment termination claim is finding other employees similarly situated to the plaintiff. Defendants argued that the individuals plaintiff identified were not similar in all "material respects" because of either the amount of time between the conduct and discipline, whether the other individuals admitted the conduct at issue or whether the other individuals were disciplined. Citing *Graham v. Long Island R.R.*, 230 F.3d 34, 39-40 (2d Cir. 2000), the Second Circuit reinforced that the rule "does not require a precise identicality between comparitors and the plaintiff." This is "ordinarily" a question of fact and there need only be "an objectively identifiable basis for comparability."

Right of Intimate Association

Defendants argued the employer did not violate any right to intimate association and the individual defendants had a qualified immunity because the right was not clearly established. Here, the Second Circuit found that the relationship of betrothal between Matusick and Starks, even in the absence of marriage[3], was protected by the constitutional right to intimate association recognized in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and that the jury could have concluded that right was infringed by Defendants. Because the Second Circuit found a constitutional violation, the verdict against the employer was upheld. However, the Second Circuit agreed that the constitutional right was not yet clearly established and it vacated the punitive damage award against the individual defendants[4].

Attorneys Fees

The verdict form permitted the jury to award nominal damages in the event it did not award compensatory damages. Although the jury awarded only backpay, it declined to award nominal damages. The Second Circuit concluded that the award of nominal damages was therefore required Accordingly, it remanded for the entry of a nominal damage award of one dollar. As a result, the Court rejected defendants argument that the fee award was unwarranted in the absence of monetary damages on the constitutional On the other hand, the Second Circuit rejected the cross-appeal of the district court's decision to cut the attorneys fees in half due to the lack of specificity in the records submitted. This is yet another lesson n the need for detail in fee applications and the degree to which the Circuit Court defers to district court decisions in setting fees.

The Outcome

Including prejudgment interest of 9% on the statutory claim, post-judgment interest under the federal rules and the reduced attorneys fees, the judgment on remand is expected to exceed $475,000.■

3 The Second Circuit acknowledged thatt Matusick and Starks ultimately were married. But this was not a requirement to reach its conclusion.

4 The Second Circuit was perplexed by the fact that Matusick did not assert his constitutional claim as one of racial discrimination, which it suggested would have been an easier claim and would have avoided the qualified immunity.

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> ment to wholly private resolution conduces inevitably to mischief. An employer who pays less than the minimum wage or who pays no overtime has no incremental incentive to comply voluntarily with the FLSA, if, after an employee complains, the employer privately compromises the claim for a discount- an amount less than the full amount owed under the FLSA (plus, with savvy negotiation, a confidentiality agreement to preclude the spread to other employees of information about the FLSA).

Dees, 706 F. Supp. 2d at 1236-37.

However, recently, some courts have held that court approval may not be necessary where it is clear that the settlement resolves a bona fide dispute and where the parties are represented by counsel. *See Picerni v. Bilingual Seit and Preschool Inc*., No. 12 Civ. 4938, 2013 WL 646649, at *3 (E.D.N.Y. Feb. 22, 2013) (proposed Rule 41 dismissal of individual FLSA claim did not require court approval where case had been brought in court and resolved by counsel); *Martin v. Spring Break '83 Productions, L.L.C*., 688 F.3d 247 (5th Cir. 2012) (out of court settlement reached by union resulting from a bona fide dispute did not require court approval to be effective).

Although there are no specific requirements for approval of FLSA settlements, as discussed above, courts typically approve settlements reached in the context of contested litigation involving bona fide disputes. *Lynn's Food Stores*, 679 F.2d at 1353-54; *see Capsolas*, 2012 WL 4760910, at *6 (approving settlement produced through arms-length negotiations conducted by experienced counsel). The parties must provide the court with sufficient information from which it can conclude that a bona fide dispute has been resolved. For instance, in a misclassification case, the parties should provide the court with information concerning the nature of the work performed, the basis for the employer's classification, and the reasons justifying the workers' right to overtime. *See Brumley v. Camin Cargo Control, Inc*., No. 08 Civ. 1798, 2012 WL 1019337, at *6 (D.N.J. Mar. 26, 2012); *Grove v. ZW Tech, Inc*. 2012 WL 1789100, at *5 (D. Kan. May 17, 2012) (parties provided insufficient information regarding the existence of a bona fide dispute). Some courts have evaluated both factors internal to the settlement, i.e., whether the settlement is fair and reasonable to the employee, as well as external factors, such as whether the settlement frustrates the public policy goals of the FLSA. *See id*. at *4.

Settlements reached under court supervision in the context of litigation reduced the risk of employer overreaching in several ways.

Class Actions

Class action settlements are governed by Rule 23(e), which requires court approval, the issuance of notice to apprise class members of the settlement terms, a fairness hearing, submission of the settlement terms to the court, and, if the class was certified under Rule 23(b)(3), an opportunity for class members to opt-out. Fed. R. Civ. P. 23(e). Courts follow a well-established procedure in determining whether to grant approval of a class action settlement, involving preliminary approval of the settlement and certification of the settlement class (if not certified already), the issuance of notice to potential class members, and final approval after class members have had an opportunity to be heard. *Id*. This procedure is designed to test whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

At the preliminary approval stage, the court "determine[s] whether the proposed settlement is within the range of possible approval." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (internal citations and quotation marks omitted); *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980) (the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness"); *see also Campos v. Goode*, No. 10 Civ. 0224, 2010 WL 5508100, at *1 (S.D.N.Y. Nov. 29, 2010) (granting preliminary approval where settlement was "within the range of possible settlement approval"); *Danieli v. IBM Corp*., No. 08 Civ. 3688, 2009 WL 6583144, at *4 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where the settlement "ha[d] no obvious defects" and the proposed allocation plan was "rationally related to the relative strengths and weaknesses of the respective claims asserted"). If the "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval," the court should preliminarily approve the settlement. *In re Vitamins Antitrust Litig*., No. 99-197, 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation, Third,* § 30.41 (Federal Judicial Center 1995)).

After notice has issued and class members have had an opportunity to object to the settlement, the court must determine whether to grant final approval of the settlement. At this stage, the court undertakes a more searching inquiry of the settlement's fairness, looking at both the process by which the settlement was reached and substance of the settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Procedural fairness is presumed where the "settlement [was] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation marks

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omitted); *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 852 (1999) (holding that arm's-length negotiations conducted by competent counsel after appropriate discovery are *prima-facie* evidence that the settlement is fair and reasonable); *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc*., 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") The assistance of a neutral in the settlement process may also support a finding that the settlement is non-collusive and was reached through arm's-length negotiations. *See deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440, 2010 WL 2399345, at *4 (S.D.N.Y. Aug. 23, 2010) (finding settlement to be "procedurally fair, reasonable, adequate, and not a product of collusion" after plaintiffs conducted a thorough investigation and enlisted the services of an experienced employment law mediator).

To evaluate a settlement's substantive fairness, courts consider a range of factors, including: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc*., 209 F.3d 43 (2d Cir. 2000); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992) (considering "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the state of the proceedings; the experience and views of counsel . . . and the reaction of the class to the proposed settlement").

Key Settlement Terms

Scope of the Release

Plaintiffs in a class action settlement may release claims that "were or could have been pled in exchange for settlement relief." *Wal-Mart Stores*, 396 F.3d at 106. Two doctrines – "identical factual predicate" and "adequacy of representation" – limit the scope of a class action release. *Id*. Under these doctrines, a release is permissible if it releases claims "that share the same integral facts as [the] settled claims, provided that the released claims are adequately represented prior to settlement." *Id*. "Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim." *Id*. at 106-07.

Identical factual predicate

Under this doctrine, a release is valid even if it releases claims not raised in the complaint or that could not have been raised in the complaint, so long as the released conduct arises out of the identical factual predicate as the settled conduct. *Id*. at 107. *See also In re Gen. Am. Life Ins. Co. Sales Practices Litig*., 357 F.3d 800, 805 (8th Cir. 2004) ("There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded. In fact most settling defendants insist on this."); *In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 221 (5th Cir. 1981) ("The weight of authority establishes that . . . a court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint.") (quoting *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (7th Cir. 1976); *In re Prudential Ins. Co. of Am. Sales Practice Litig*., 261 F.3d 355, 366-67 (3d Cir. 2001); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) (discussing the factual predicate doctrine); *Class Plaintiffs*, 955 F.2d at 1287-88 (same).

"[T]he overlap between elements of *claims* is not dispositive." *Wal-Mart Stores*, 396 F.3d at 108 (emphasis in original); *In re Corrugated Container Antitrust Litig*., 643 F.2d at 221 ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint.") (internal quotation marks omitted).

The identical factual predicate doctrine also permits the release of claims against non-parties, "'where . . . the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled.'" *Wal-Mart Stores*, 396 F.3d at 109 (quoting *In re Lloyd's Am. Trust Fund Litig*., 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002)); *In re Holocaust Victim Assets Litig*., 105 F. Supp. 2d 139, 143, 160-65 (E.D.N.Y. 2002) (approving class settlement with releases against non-parties, including insurance carriers, other banks, and Swiss governmental entities).

Adequacy of representation

Claims arising from a shared set of facts cannot be released, however, "where class plaintiffs have not adequately represented the interests of class members." *Wal-Mart Stores*, 396 F.3d at 109. In *Wal-Mart Stores*, the Second Circuit held that the objectors' interests were adequately represented by the class representatives because the relief obtained by the settlement was generally the same relief sought by the objectors, who had filed separate class actions against parties released by the settlement. *Id*. at 109-112. The Second Circuit rejected the notion that due process required "vigorous pursuit" of all class claims in order for them to be adequately represented during the settlement process because the interests of the class representatives and the objectors aligned. *Id*. at 113; *see also Joel A. Giuliani*, 218 F.3d 132, 142 (2d

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Cir. 2000) (release may include "claims [that] are subsumed within a more generalized claim").

It may not be permissible for a class representative to release claims on behalf of class members with whom his or her interests are not aligned. For example, a class representative bringing claims in California may not share the same interests as class members covered by other state wage and hour laws if those laws carry added or special protections. *See Kakani v. Oracle Corp*., 2007 WL 1793774, at *9 (N.D. Cal. June 19, 2007) (California class representatives were not adequate to represent residents of other states due to variations in the state wage and hour laws), *but see Davis v. J.P. Morgan Chase & Co*., 775 F. Supp. 2d 601, 608 (W.D.N.Y. 2011) (approving nationwide class and overruling arguments by proposed intervenors that New York class representatives could not adequately represent the interests of non-New York class members).

Claims Process

Unlike FLSA settlements, which are binding only on collective members who join the lawsuit, a Rule 23 release will typically apply to all members of the settlement class except those who affirmatively opt out. This can have significant implications for class members depending on how the settlement claims process is structured. For example, a process that does not require class members to submit a claim form to obtain a settlement payment, but instead authorizes settlement checks to be mailed to all class members who have not excluded themselves, has the potential to benefit the greatest number of class members. Courts have rightfully been skeptical of settlements that require class members to file a claim to obtain a payment, especially where the settlement contemplates a reversion of unclaimed funds to the employer. *See Kakani*, 2007 WL 1793774, at *5 (finding problematic the interplay between the Rule 23 release – under which class members, even those who did not submit claims, would release their claims – and the employer's right under the proposed agreement to reclaim the portion of the fund that went unclaimed while still obtaining releases from class members who failed to file claims); *Tarlecki v. Bebe Stores, Inc*., 2009 WL 1364340, at *3 (N.D. Cal. May 14, 2009) (denying final approval of claims made settlement with a reversion because, although "such an arrangement is not per se illegitimate," given the low claims rate, the defendant would only pay only a small percentage of the settlement amount that the court had preliminarily approved).

Courts have also refused to approve FLSA settlements that require the settlement agreement or key terms to be filed under seal. *See Brumley*, 2012 WL 1019337, at *6 (denying unopposed request to file settlement agreement under seal because it contravened the "purposes of the FLSA and the strong presumption in favor of judicial records being available to the public"); *Files v. Federated Payment Sys. USA, Inc*., No. 11 Civ. 3437, 2013 WL 1874602, at *1 (E.D.N.Y. Apr. 2, 2013) (noting that there is a "presumption of public access" that can only be overcome based on "a substantial showing of need") (internal quotation marks omitted). In particular, courts have held that parties seeking to redact the amount of the settlement face a steep hurdle because without that information, the public cannot evaluate the court's determination of the fairness of the settlement or determine whether the rights at issue have been sufficiently protected. *Files*, 2013 WL 1874602, at *1. *See also Bouzzi v. F & J Pine Rest.,* No. 10 Civ. 0457, 2011 WL 7004196, at *2 (E.D.N.Y. Sept. 23, 2011) (collecting cases denying requests to redact settlement figures from publicly-filed, court-approved settlement agreements).

Claims arising from a shared set of facts cannot be released, however, "where class plaintiffs have not adequately represented the interests of class members."

Allocation Formula

The allocation of the settlement fund must take into account whether certain groups of class members or subclasses have greater or different claims than others. *See* 4 Newberg on Class Actions § 12:9 (4th ed. 2002). *See Kakani*, 2007 WL 1793774, at *6 (rejecting allocation formula where it could not be discerned why certain class members received greater allocations than others based on information in the settlement agreement and notice). The chosen formula must also bear a reasonable relation to the claims. *See Cordy v. US-POSCO Indus*., No. 12-cv-00553 (N.D. Cal. Aug. 1, 2013) (rejecting allocation formula under which funds would be distributed based on weeks worked where the parties failed to explain the basis for the proposed formula and where some claims appeared to be based on factors other than weeks worked).

Confidentiality

Two provisions of Rule 23(e) appear to forbid parties from filing class action settlement agreements under seal or otherwise seeking to prevent the disclosure of key settlement terms. Under Rule 23(e)(3), the parties to a proposed class action settlement must disclose "any agreement made in connection" with the settlement to the court as part of the approval process. Rule 23(e)(1) requires notice of the settlement, including its terms, to be issued to the class in order to protect class members' due process rights.

Service Payments

"Incentive awards are not uncommon in class action cases and are within the discretion of the court." *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 187 (W.D.N.Y. 2005); *see Staton v. Boeing Corp*., 327 F.3d 938, 977 (9th Cir. 2003). Courts award incentive awards in recognition of the crucial role that

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class representatives play in bringing justice to those who would otherwise be hidden from judicial scrutiny, including low-wage workers. *See, e.g., Bowens v. Atl. Maint. Corp*., 546 F. Supp. 2d 55, 80 (E.D.N.Y. 2008) (recognizing the important role class representatives play in "enabling plaintiffs to redress wrongs . . . [w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages") (internal citations and quotation marks omitted); *Velez v. Majik Cleaning Serv*., No. 03 Civ. 8698, 2007 WL 7232783, at *7 (S.D.N.Y. June 22, 2007) ("[I]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.") (internal quotation marks omitted); see also Nantiya Ruan, Bringing Sense to Incentive Payments: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions, 10 Emp. Rts. & Emp. Pol'y J. 395 (2006); but see *Kakani*, 2007 WL 1793774, at *10 ("While there is a theoretical rationale for incentive payments, there is also a major downside. The downside is that the payments lend themselves for use as side payments to induce named plaintiffs to go along with sweetheart deals.")

When examining the reasonableness of a requested service award, courts consider: (1) the personal risk incurred by the named plaintiffs; (2) the time and effort expended by the named plaintiffs in assisting the prosecution of the litigation; and (3) the ultimate recovery in vindicating statutory rights. *Frank,* 228 F.R.D. at 187; *Roberts v. Texaco, Inc.,* 979 F. Supp. 185, 200 (S.D.N.Y. 1997); *see also Staton*, 327 F.3d at 977 (considering "'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation'") (quoting *Cook*, 142 F.3d at 1016). Courts have denied requests for service payments when they lacked sufficient information to evaluate the role the named plaintiffs played in the action. *See Grove*, 2012 WL 1789100, at *7.

In assessing the risks that class representatives undertake, courts are mindful of the unique circumstances of the employment context, where workers are often blacklisted if they are considered "trouble makers" and are particularly vulnerable to retaliation. *See Frank*, 228 F.R.D. at 187; *see also Velez*, 2007 WL 7232783, at *7 (observing that by serving as class representatives, the plaintiffs "exposed themselves to the prospect of having adverse actions taken against them by their former employer and former co-workers"); *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded.") Even where there is not a record of actual retaliation, class representatives may still merit recognition for assuming the risk of retaliation for the sake of absent class members. *See Frank*, 228 F.R.D. at 187-88 ("Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded.")

The amount of the service award will also depend on the factors discussed above. For instance, courts frequently award service awards ranging from $5,000 to $20,000 based upon evidence that the class representatives actively participated in discovery, including by responding to document requests and interrogatories, being deposed, or assisting class counsel with the investigation of the claims, took on other burdens related to the litigation, or took on significant personal risk as current employees. *See Buccellato*, 2011 WL 3348055, at *2 (awarding service award of $20,000 to one class representative where he actively participated in the litigation, including by providing documents to class counsel, discussing the facts with class counsel, and assisting class counsel to draft document requests and understand documents produced by defendant); *Willix v. Healthfirst, Inc*., No. 07 Civ. 1143, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving service awards of $30,000, $15,000, and $7,500 in wage and hour action under FLSA and NYLL where all class representatives were deposed and participated in discovery); *Khait v. Whirlpool Corp*., No. 06-6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of $15,000 and $10,000, respectively, in wage and hour class action where class representatives were deposed but they played a significant role in counsel's investigation of the claims and encouraging other workers to join the lawsuit); *Reyes v. Altamarea Group, LLC*, No. 10-6451 (Docket No. 82) (S.D.N.Y. Aug. 16, 2011) (approving awards of $15,000 each to three class representatives who were current employees throughout the litigation and rejected individual settlement offers in favor of the class).[1]

Courts also consider the relation between the requested service award and the ultimate recovery in determining whether the amount requested is reasonable. For example, courts have held that service awards amounting to between 8% and 16.6% percent of the settlement fund are reasonable. *See, e.g., Frank*, 228 F.R.D. at 187 (approving award of approximately 8.4% of the settlement

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1 *See also Glass v. UBS Fin. Servs., Inc*., No. C-06-4068 MMC, 2007 WL 221862, at *16-17 (N.D.Cal. Jan. 26, 2007) ($25,000 each to four class representatives); *Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 to one class representative); *Stevens v. Safeway, Inc*., No. CV 05-01988, 2009 U.S. Dist. LEXIS 17119, *34–37 (C.D. Cal. Feb. 25, 2008) ($20,000 and $10,000 to two class representatives); *In Re* Janney Montgomery Scott LLC Fin. Consultant Litig., No. 06-3202, 2009 U.S. Dist. LEXIS 60790, at *35-37 (E.D. Pa. July 16, 2009) ($20,000 each to three class representatives); *Wade v. Kroger Co*., No. 3:01-CV-699, 2008 WL 4999171, at *13 (W.D. Ky. Nov. 20, 2008) ($30,000 each to multiple class representatives); *Wright v. Stern*, 553 F. Supp. 2d 337, 342 (S.D.N.Y.2008) ($50,000 each to 11 class representatives); *In re* Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 374 (S.D. Ohio 1990) ($35,000-$55,000 each to five class representatives).

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fund for named plaintiff in wage and hour case); *Parker*, 2010 WL 532960, at *2 (finding that service awards totaling 11% of the total recovery are reasonable "given the value of the representatives' participation and the likelihood that class members who submit claims will still receive significant financial awards"); *Reyes*, No. 10-6451 (Docket No. 82) (approving service awards amounting to 16.6% of the settlement fund); *Minor v. FEDEX Office and Print Servs., Inc*., No. C09-1375 (N.D. Cal. July 30, 2013) (reducing request for $25,000 service payments to $15,000 where request was out of proportion to the average amounts that class members would receive from the settlement).

Attorneys' Fees

There are two ways to compensate attorneys for successful prosecution of statutory claims – the lodestar method and the percentage of the fund method. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. *Goldberger v. Integrated Res. Inc.,* 209 F.3d 43, 47 (2d Cir. 2000). Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys. *Id*.

Most courts use the percentage of the fund method in common fund cases. *See McDaniel*, 595 F.3d 411, 417 (2d Cir. 2010) (noting that the percentage of the fund method is the "trend" in the Second Circuit); *Wal-Mart Stores*, 396 F.3d at 121 (same); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. Cal. 1990) (common fund fee is generally "calculated as a percentage of the recovery"); *State of Fla. v. Dunne,* 915 F.2d 542, 545 (9th Cir. 1990) (recognizing a "recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases"); *Camden I Condominium Ass'n. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) ("[E]very Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis"); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989); *Morganstein v. Esber*, 768 F. Supp. 725, 728 (C.D. Cal. 1991); *In re Activision Sec. Litig*., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

In part, this is because the percentage of the fund method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores*, 396 F.3d at 121 (internal quotation marks omitted). By contrast, "the lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Id*. (internal quotation marks omitted) (brackets in original); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement").

The percentage method is also closely aligned with market practices because it "mimics the compensation system actually used by individual clients to compensate their attorneys." *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (the percentage method "is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients"); *In re Am. Bank Note Holographics, Inc*., 127 F. Supp. 2d 418, 432 (S.D.N.Y. 2001) (the court should "determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order"); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) (the percentage method "more accurately reflects the economics of litigation practice" which, "given the uncertainties and hazards of litigation, must necessarily be result-oriented") (internal quotation marks and citations omitted).

Courts have adopted various approaches to evaluating the reasonableness of a requested fee award in common fund cases. The Ninth Circuit looks to a "benchmark" percentage of 25% of the settlement fund. *See Vizcaino*, 290 F.3d at 1047; *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Chemical Bank v. City of Seattle* (*In re Washington Public Power Supply Sec. Litig*.), 19 F.3d 1291, 1297 (9th Cir. 1994); *Six Mexican Workers*, 904 F.2d at 1311; *Morganstein v. Esber*, 768 F. Supp. 725, 728 (C.D. Cal. 1991). In the Second Circuit, a fee award of 33% of the fund is typical. *Clark v. Ecolab, Inc*., Nos. 07 Civ. 8623, 04 Civ. 4488 & 06 Civ. 5672, 2010 WL 1948198, at *8 (S.D.N.Y. May 11, 2010) (finding class counsel's request for one-third of the settlement fund "reasonable and 'consistent with the norms of class litigation in this circuit'") (citing *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05 Civ. 3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)); *Stefaniak v. HSBC Bank USA,* No. 05 Civ. 720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) (a fee award of "33% of the Settlement Fund is typical in class action settlements in the Second Circuit").

Courts generally assess the following factors in determining whether to approve the requested fee award: the uncertainty and complexity of the litigation, the risks of recovery, the quality of class counsel's representation, time and effort expended by counsel, the relationship between the fee and the overall recovery, and the relationship between the fee and fees awarded in other cases. *See Goldberger*, 209 F.3d at 50; *Buccellato v. AT&T Operations, Inc*., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (approving award of 25% of the fund "in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary").

Courts regularly award lodestar mul-

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tipliers from two to six times lodestar. *See, e.g., In re Lloyd's Am. Trust Fund Litig*., 2002 WL 31663577, at *27 (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit"); *Maley v. Del Global Technologies Corp*., 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (the "modest multiplier of 4.65 is fair and reasonable"); *In re RJR Nabisco, Inc. Sec. Litig*., MDL No. 818 (MBM), No. 88 Civ. 7905 (MBM), 1992 WL 210138, at *6-8 (S.D.N.Y. Aug. 24, 1992) (awarding multiplier of 6); *Buccellato*, 2011 WL 3348055, at *2 (awarding multiplier of 4.3); *Steiner v. Am. Broad. Co.,* 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming award with multiplier of 6.85).[2]

Most courts approve attorneys' fees as a percentage of the total fund, even where the settlement is claims-made and the unclaimed portion of the fund will revert to defendant. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980) (class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amounts actually claimed); *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423 (2d Cir. 2007) ("[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available whether claimed or not"); *Waters v. Int'l. Precious Metals Corp*., 190 F.3d 1291, 1296-97 (11th Cir. 1999) (holding that trial court did not abuse its discretion in awarding class counsel attorneys' fees as a percentage of the total fund, rather than actual payments made to class members); *Williams v. MGM-Pathe Communs. Co*., 129 F.3d 1026 (9th Cir. 1997) (reversing district court award of 33 percent of the claimed fund and awarding attorneys' fees of 33 percent of the available fund); *but see Kakani*, 2007 WL 1793774, at *9 ("To grant attorneys' fees based on claims not submitted might wind up being perverse, for it would, as to non-claimants, reward counsel for achieving nothing more than a forfeiture of statutory and regulatory rights . . . ."); *Parker v. DeBrauwere*, 631 F. Supp. 2d 242, 266 (E.D.N.Y. 2009) (declining to award a percentage of the entire settlement fund because no fund or fixed amount of money had been established, and it was "clear from the outset that a small number of claims would be filed"). ■

2 *See also Dutton v. D&K Healthcare Res., Inc*., No. 04-147 (E.D. Mo. June 5, 2007); Meijer Inc. v. 3M, No. 04-5871, 2006 WL 2382718, at *3, 29 (E.D. Pa. Aug. 14, 2006) (approving 27.4% fee, resulting in 4.77 multiplier); *In re* Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (approving 25% fee, resulting in 4.7 multiplier); In re Aremissoft Corp. Sec. Litig., 210 F.R.D. 109, 134-35 (D.N.J. 2002) (approving 28% fee, resulting in 4.3 multiplier); *Di Giacomo v. Plains All Am. Pipeline*, Nos. 99-4137 & 99-4212, 2001 WL 34633373, at *10-11 (S.D. Fla. Dec. 19, 2001) (approving 30% fee, resulting in 5.3 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc.,* 899 F. Supp. 1297,1304 (D.N.J. 1995) (9.3 multiplier), aff'd, 66 F.3d 314 (3d Cir. 1995).

Supreme Court Rules on Rights of Public Whistleblowers

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In ruling that the First Amendment prohibits the retaliatory termination of public employees who testify truthfully about public corruption, the Supreme Court in *Lane v. Franks*[1] recently clarified the principles governing the rights of whistleblowers. The unanimous ruling may also undermine settled Second Circuit authority.

While the Supreme Court has long ruled that public employees retain some constitutional rights in the workplace,[2] those rights are not co-extensive with those afforded members of the public. As government employers need to efficiently manage their workplaces, the First Amendment only protects employees when they speak out as citizens on matters of public concern.[3]

'Garcetti v. Ceballos'

Prior to 2006, in determining whether the plaintiff engaged in protected speech, courts in the Second Circuit primarily focused on whether he engaged in speech on a matter of public concern.[4] But in 2006, the Supreme Court ruled in *Garcetti v. Ceballos* that the First Amendment only protects citizen speech in the workplace, not employee speech. The court stated, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[5]

In *Garcetti*, the plaintiff, a deputy district attorney, was disciplined after he drafted a memorandum that recommended dismissing a particular prosecution. Ruling that the plaintiff did not engage in citizen speech, the court stated that the plaintiff's speech was pursuant to his "official responsibilities." The court reasoned, "Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was

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1 134 S. Ct. 2369 (June 19, 2014).

2 *Keyishian v. Board of Regents*, 385 U.S. 476, (1967).

3 *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

4 *See, e.g., Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

5 547 U.S. at 421.

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employed to do.YThe significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[6]

Applying 'Garcetti'

The Second Circuit has narrowly interpreted *Garcetti*. In 2010, the Court of Appeals dismissed a case brought by a public school teacher who complained about the school's failure to properly discipline a student who had thrown books at him in class. Ruling that the plaintiff engaged in employee but not citizen speech, the Second Circuit held in *Weintraub v. Board of Education*:

> We join these circuits and conclude that, under the First Amendment, speech can be "pursuant to" a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer. In particular, we conclude that Weintraub's grievance was "pursuant to" his official duties because it was "part-and-parcel of his concerns" about his ability to "properly execute his duties" as a public school teacherCnamely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.[7]

Judge Guido Calabresi dissented in *Weintraub*, stating that, in too-broadly interpreting *Garcetti*, the majority's reasoning "permit[s] readings that would allow retaliation against much speech that seems to me to require protection and to remain protected after *Garcetti*. This sits uneasily with the Supreme Court's repeated assertion that 'the members of a community most likely to have informed and definite opinions' about an issue must 'be able to speak out freely on such questions without fear of retaliatory dismissal.'"[8]

Calabresi interpreted *Garcetti* to mean that "[a]n employee's speech is 'pursuant to official duties' when the employee is required to make such speech in the course of fulfilling his job duties."[9] Of course, this dissent did not carry the day. Post-*Weintraub*, courts in the Second Circuit have frequently dismissed First Amendment retaliation cases,[10] and few *Garcetti*-based dismissals have survived appellate review.[11]

'Lane v. Franks'

In *Lane v. Franks*,[12] the Supreme Court applied *Garcetti* for the first time. The plaintiff, Edward Lane, directed a statewide program (CITY) for underprivileged youth at a community college in Alabama. As director, the plaintiff "was responsible for overseeing CITY's day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances." When the plaintiff reviewed the program's expenses, he discovered that a state representative, Suzanne Schmitz, was on the payroll even though she had performed no work for the program. Plaintiff's complaints about this no-show position were ignored. He then testified against Schmitz in the Grand Jury and at her criminal trial, resulting in Schmitz's conviction for mail fraud and theft. After plaintiff was terminated from his position, he brought a '1983 action claiming that his retaliatory termination violated the First Amendment.

The Eleventh Circuit disagreed, ruling that "even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to the employee's professional responsibilities' and is a 'product that the employer himself has commissioned or created.'" Lane acted as an employee and not as a citizen because he acted pursuant to his official duties, when he investigated Schmitz's employment and terminated her. "That Lane testified about his official activities pursuant to a subpoena and in the litigation context," the Eleventh Circuit said, "does not bring Lane's speech within the protection of the First Amendment."[13]

A unanimous Supreme Court rejected the Eleventh Circuit's First Amendment analysis. Applying *Garcetti*, Justice Sonia Sotomayor held that Lane spoke as a citizen, not as an employee, when he testified. "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment."[14]

The court noted that the legal system relies on truthful testimony and that every citizen has a duty to tell the truth in court.[15] "Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and to society at large, to tell the truth."[16]

In Lane, the Supreme Court clarified its ruling in *Garcetti*. The Eleventh Circuit stated that "because Lane had learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen."[17] However, the Supreme Court stated,

> *Garcetti* said nothing about speech that simply relates to public employment or concerns information

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6 *Id*. at 421-22.

7 593 F.3d 196, 203 (2d Cir. 2010).

8 *Id*. at 206.

9 *Id*. at 208.

10 *See*, Bergstein, "*Garcetti Distinctions Abound in the District Courts*," N.Y.L.J., Dec. 4, 2012.

11 *See, Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011) (holding that police officer may proceed with First Amendment lawsuit after refusing to alter truthful report about police misconduct) (the author represented the plaintiff in Jackler); *Matthews v. City of New York*, 488 Fed. Appx. 532 (2d Cir. 2012) (where police officer spoke out against quota-based ticked practices, court remanded case for discovery to determine "whether Officer Matthews spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them").

12 2014 U.S. LEXIS 4302 (June 19, 2014).

13 *Lane v. Franks*, 523 Fed. Appx. 709, 711-12 (11th Cir. 2011).

14 2014 U.S. LEXIS 4302, at *18.

15 *Id*. at *18-19.

16 *Id*. at *18.

17 *Id*. at *19 (citing 523 Fed. Appx. at 712).

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learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee rather than citizen speech. The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.[18]

Second Circuit

How does *Lane v. Franks* affect plaintiffs in the Second Circuit? The Supreme Court has arguably made it easier for plaintiffs to show that they uttered work-related speech as a citizen and not merely as an employee.[19] The court in Lane emphasized that a public employee does not lose First Amendment protections solely because her speech arises from everyday responsibilities. Yet, over the last few years, several Second Circuit cases have affirmed the grant of summary judgment in substantial part because the plaintiff's speech drew from his job duties.

For example, in *Looney v. Black,*[20] the Second Circuit upheld summary judgment where the plaintiff who was responsible for enforcing the State Building Code for a municipality spoke to a town resident about the public health implications of wood burning and smoke discharge. The plaintiff claimed he was voicing his opinion regarding an outside agency's enforcement of a cease and desist order against town residents. The Second Circuit stated that "where the speech at issue 'owes its existence to a public employee's professional responsibilities,' it can properly be said to have been made pursuant to that party's official duties."[21]

Concluding that "the alleged speech set forth in the complaint was closely related to his work as Building Official," the court reasoned, "[t]he only sensible way to interpret Looney's allegations is that he spoke on these issues because he was in an official position that required, or at least allowed, him to do so. It follows that these statements owed their existence to his position as the Building Official. As a consequence, Looney has not adequately alleged that he spoke as a private citizen."[22]

In *Matthews v. Lynch,*[23] the plaintiff worked for the Connecticut State Police Internal Affairs unit, responsible for investigating police misconduct. In the course of his duties, the plaintiff "learned that the Connecticut State Police covered up officer misconduct, which included the commission of crimes, driving while intoxicated, and misuse of funds."[24] After the plaintiff disclosed this misconduct to the Attorney General and other public authorities, "superior officers in the Connecticut State Police allegedly retaliated against Appellant for making these disclosures."

Affirming the Rule 12 dismissal, the Second Circuit reasoned that "appellant's complaints to outside agencies were 'part and parcel' of his ability to properly execute his duties i.e., enforce the law and effectively combat police misconduct. Appellant's additional concession at oral argument that he first reported the misconduct up his chain of command further supports our determination that he was acting pursuant to his employment duties."[25]

Similarly, in *Carter v. Village of Ocean Beach,*[26] in affirming summary judgment, the Second Circuit held that "[p]laintiffs' allegations establish no more than that they reported what they believed to be misconduct by a supervisor up the chain of command misconduct they knew of only by virtue of their jobs as police officers and which they reported as part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties. As such, they were not engaging in constitutionally protected speech at any relevant time and cannot make out a First Amendment claim."[27]

As the justices typically grant certiorari to resolve inter-circuit disputes and to clarify existing doctrine, every Supreme Court ruling in some way alters the law. The next round of *Garcetti* cases will tell if *Lane v. Franks* changes the landscape in the Second Circuit. As the Supreme Court now holds that the First Amendment may protect "speech that simply relates to public employment or concerns information learned in the course of public employment,"[28] Justice Sotomayor's ruling provides ammunition for plaintiffs' lawyers to argue that prevailing Second Circuit case law has at least in part been repudiated. In response, defendants may argue that little has changed, pointing to the court's observation that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[29] ■

18 *Id.* at *20. Although the Supreme Court ruled that Lane had engaged in protected speech, it also found that the individual defendant was entitled to qualified immunity because it was not clearly established that plaintiff enjoyed the First Amendment right to testify without retaliation. Id. at *26-30.

19 At a minimum, *Lane v. Franks* probably repudiates the Second Circuit's summary order in *Kiehle v. County of Cortland*, 486 Fed. Appx. 222 (2d Cir. 2012), which held that the First Amendment did not prevent the retaliatory termination of a DSS caseworker who was fired after voluntarily testifying at a Family Court hearing about facts "she obtained during the course of her public employment." *Id.* at 223. (The author represented the plaintiff in *Kiehle*).

20 702 F.3d 201 (2d Cir. 2012).

21 *Id.* at 710-11.

22 *Id.* at 712-13.

23 483 Fed. Appx. 624 (2d Cir. 2012).

24 *Id.* at 626.

25 *Id.*

26 415 Fed. Appx. 290 (2d Cir. 2011).

27 *Id.* at 293.

28 *Id.* at *20.

29 *Id.*

Is the Lion Without Teeth?

Consideration of the New York employees' options for enforcing the breastfeeding provisions of state and federal law

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In 2010, Congress amended the Fair Labor Standards Act (FLSA)[1] to require workplace accommodations for breastfeeding employees. Passed as part of the Patient Protection and Affordable Care Act,[2] FLSA's nursing provision requires employers to provide reasonable breaks for their nursing employees up until the nursing child's first birthday. For New York employers, this requirement was hardly new: New York Labor Law (NYLL) has required such accommodations for a period of time significantly more extensive than the one-year limit identified in FLSA – namely, three years from the nursing child's birth – since 2006.[3] Both federal and state law provisions, as further discussed below, are unambiguous in imposing this mandate on employers.

However, case law has called into question whether employees are entitled to bring an action against employers who fail to comply with the breastfeeding provisions of the state and/or federal law. One of the recent cases on this issue, *EEOC v. Vamco Sheet Metals Inc*.,[4] suggests there may be avenues for bringing an action against a non-compliant employer at least under certain circumstances. This article provides an overview of those avenues in light of the language of the breastfeeding provisions, the case law preceding *Vamco*, and the language of the *Vamco* decision.

Similar yet different: the language of federal and state law breastfeeding provisions

While the breastfeeding provisions found in NYLL and FLSA are substantially similar in their import, there are important differences in the scope of rights employees enjoy under each provision. Under FLSA, employers must provide their employees with (1) reasonable break time that need not be paid to express milk (2) each time the need arises (3) in a place that is (a) shielded from view as well as (b) free from intrusion from coworkers and the public.[5] FLSA gives employers substantial latitude in identifying the appropriate space for this purpose; the single express caveat in this regard is that the room provided for lactation purposes cannot be a bathroom.[6]

The scope of FLSA's coverage is limited in several ways. First, the nursing employee's child must be under the age of one.[7] Second, employees must otherwise be subject to FLSA's wage and hour provisions.[8] Third, the employer must have both (1) an annual dollar volume of sales or gross revenue of at least $500,000 and (2) employees who are engaged in interstate commerce.[9] Lastly, FLSA offers an exception to this mandate to the employers who employ fewer than 50 employees in cases where those employers demonstrate that compliance would cause them to suffer undue hardship.[10] The factors to be used in evaluating whether the undue hardship exception applies in a particular case include "the size, financial resources, nature, or structure of the employer's business."[11]

Under NYLL, employers are required to provide (1) reasonable unpaid time or permit employee to use paid break or meal time to express milk (2) in a room or other location (3) that is private and (4) in close proximity to the work area.[12] Employees are covered under this section until their children reach three years of age.[13] In addition, no employer may discriminate against an employee for expressing milk in the workplace.[14]

Because FLSA functions as the source of minimum standards for employers' obligations towards nursing mothers, New York employers who qualify for FLSA coverage are simultaneously required to comply with any additional rights conferred under the NYLL. Likewise, New York employers who are covered under FLSA must comply with any obligations imposed under that law's breastfeeding provision even if those obligations are not expressly identified within the NYLL. Thus, although NYLL does not expressly exempt restrooms as appropriate spaces for the expression of milk, New York employers must not of-

See BREASTFEEDING, next page

1 *See* 29 U.S.C. § 201 et seq.

2 *See* Pub. L. No. 111-148 (2010).

3 *See* NYLL Art. 7 § 206-c (2006).

4 *See EEOC v. Vamco Sheet Metals Inc*., No. 13 Civ. 6088, 2014 U.S. Dist. LEXIS 77436, at *13-20 (S.D.N.Y. Mar. 4, 2014), aff'd, 2014 U.S. Dist. LEXIS 77462 (S.D.N.Y. Jun. 5, 2014) [hereinafter EEOC v. Vamco].

5 *See* 29 U.S.C. § 207 (r) (1) - (2).

6 *Id*. at § 207 (r) (1) (b).

7 *Id*. at § 207 (r) (1) (a).

8 *Id*. at § 207 (r)(1). For a more extensive discussion of what it means to be a non-exempt worker, see Mary Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 Catholic U. L. Rev. 329 (2014).

9 *See* 29 U.S.C. § 203 (s) (1). It bears noting that the employees are covered even if their employers do not satisfy these provisions if the employer engages in the activity of a public agency, as well as a health care or a school operation. Id.

10 *See* 29 U.S.C. § 207 (r) (3).

11 *Id*.

12 *See* NYLL Art. 7 § 206-c.

13 *Id*.

14 *Id*.

BREASTFEEDING, from page 15

fer bathrooms to their nursing employees for this purpose. Similarly, employers must accommodate nursing mothers whose children are two years old even though FLSA only covers employees whose children have not yet turned one because NYLL extends to all mothers whose children are under the age of three. The scope of employers' obligations towards their employees' nursing needs is thus ultimately the result of a delicate interaction between the federal and state law.

Breastfeeding provisions in action: the legal landscape pre-*Vamco*

While the case law under NYLL and FLSA is sparse, cases that were brought pre-*Vamco* questioned whether there is a private right of action under either of these provisions. The sections that follow provide a brief overview of these decisions.

The decision that involved the issue of the right of action under the NYLL, *Kratzert v. White Lodging Services*, held that private individuals cannot bring suits against employers who fail to accommodate them.[15] The decision does not specify why a private right of action cannot be implied from this provision; it simply concludes that "it is clear from the statute and the overall structure of the Labor Law that, as with a number of other statutes concerning workplace conditions, the legislative goal was to improve workplace conditions generally and not to establish a vehicle for the compensation of particular individuals." *Id*.

Similarly, in a case that involved a right of action under FLSA's nursing provision, *Saltz v. Casey's Mktg. Co*., the court held that the Department of Labor is the sole entity that may bring suits against non-compliant employers.[16] In particular, the court held that the private right of action was unavailable because the statute's provision on remedies limited employees to recovering monetary damages alone, and monetary damages could not be recovered in a case where the employer failed to provide a workplace accommodation to a nursing mother. In court's own words: "Since Section 207 (r) (2) provides that employers are not required to compensate employees for time spent express milking, and Section 216 (b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express milk provisions."[17]

Can employees sue employers who fail to comply with the breastfeeding provisions of the state and/or federal law?

The *Vamco* decision

Because the *Vamco* court declined to exercise supplemental jurisdiction over the issue, the decision does not resolve whether a private right of action exists with respect to the breastfeeding provision of the NYLL.[18] However, the decision does take a broader view of a litigant's right of action under FLSA relative to the *Saltz* holding in two key ways. First, unlike *Saltz*, the *Vamco* court recognized that private litigants might be able to obtain injunctive relief.[19] Thus, contrary to the *Saltz* court's conclusion that only the Department of Labor can seek injunctive relief against the employer who violates FLSA's nursing provision, the *Vamco* court suggested that private litigants can also pursue injunctions for as long as they bring their claims under FLSA's anti-retaliation provision.[20] Two, unlike the *Saltz* court, the *Vamco* court did not reject the possibility that a private litigant who sues under FLSA's nursing mandate might be entitled to monetary damages. As a result, it is possible that employees whose employers fail to accommodate their nursing could pursue a FLSA suit under at least two distinct sets of circumstances: (1) where the employer retaliates against the employee for asserting, or helping another employee assert, her right to a workplace accommodation for her nursing needs; and (2) where the employer does provide paid breaks to all employees but refuses to compensate those employees who use their paid breaks to nurse.

Lastly, *Vamco* concluded that plaintiffs may be able to assert their breastfeeding-related claims under Title VII.[21] Traditionally, district courts in the Second Circuit have refused to treat employers' failure to accommodate nursing mothers as cognizable grounds for establishing employment discrimination. In *Martinez v. N.B.C., Inc*., the court held that pregnancy and related medical conditions were outside of the scope of employment protections provided under the Americans with Disabilities Act.[22] Similarly, in *McNill v. N.Y. City Dep't*

See BREASTFEEDING, next page

15 *See Kratzert v. White Lodging Services*, No. 1-09-CV-597, 2010 U.S. Dist. LEXIS 20820, at *2 (N.D.N.Y. Mar. 8, 2010).

16 *See Saltz v. Casey's Mktg. Co*., No. 11-CV-3055-DEO, 2012 U.S. Dist. LEXIS 100399 (N.D. Iowa, July 19, 2012).

17 *Id*. at 7. It bears noting that there has been one more court to entertain an § 207 (r) action. *See Miller v. Roche Surety & Casualty Co*., Inc., 502 F. App'x 891, 893 (11th Cir. 2012). That court ultimately dismissed the action without addressing the issue of the existence of a right of action under § 207 (r).

18 *See EEOC v. Vamco,* at 20 (declining to exercise supplemental jurisdiction on grounds that "[this issue] presents an unsettled question of state law").

19 *Id*. at 18-19 (noting that "the FLSA's anti-retaliation provision does allow for injunctive relief . . . [but that plaintiff] does not seek to bring a retaliation claim related to Vamco's alleged failure to accommodate her breastfeeding needs").

20 FLSA's anti-retaliation provision is codified as 29 U.S.C. § 216(b). While the courts have generally rejected the idea that private litigants can seek injunctive relief under FLSA, the Eleventh Circuit has found that injunctive relief may be available to those employees who sue their employers under § 216(b). *See Bailey v. Gulf Coast Transp. Inc*., 280 F.3d 1333, 1335-36 (11th Cir. 2001) (noting that "FLSA specifically provides for equitable relief in an employee suit [for violations of the anti-retaliation provision" and that, as the result, § 216(b) "provides a private right of action to employees to seek this relief").

21 *See* 42 U.S.C. § 2000e et seq.

22 *See Martinez v. N.B.C., Inc*., 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

BREASTFEEDING, from page 16

of Corrections, the court held that the Pregnancy Discrimination Act did not cover medical conditions experienced by the employee's infant child and that plaintiff's claim that her employer ought to have provided nursing accommodations because her infant's medical condition required him to be breastfed was therefore outside of the scope of Title VII.[23]

Vamco, by contrast, asserted that plaintiff "may be able to state a claim for disparate treatment under Title VII based on discrimination in connection with her attempts to continue breastfeeding her infant" because she had "allege[d] that she was harassed for taking lactation breaks and eventually terminated."[24] This wording suggests that using Title VII to assert breastfeeding-related claims may present a viable alternative in cases where courts do not agree that employees are eligible to seek injunctive relief under FLSA's anti-retaliation provision. The most recent ruling to touch on the issue of breastfeeding-related workplace accommodations in the Second Circuit, *Wilson v. Ont. County Sheriff's Dept.*,[25] affirms this line of thinking. As the court noted in that case in express reliance on the *Vamco* holding: "Plaintiff would arguably have a claim . . . had [defendant] told her she could not use her regular breaks to pump breast milk, or if he had denied her any other benefit of her employment based on her status as a lactating mother."[26]

It bears noting that no court has yet held that Title VII might apply in cases where the employer merely refuses to accommodate a nursing employee. As a result, it is unclear whether courts would consider Title VII a viable avenue in cases where the nursing employee does not suffer adverse employment action on top of her employer's refusal to accommodate her breastfeeding needs.

Conclusion

While the case law regarding employees' right to sue employers under the breastfeeding provisions of the NYLL and FLSA has been discouraging, recent holdings suggest that several enforcing options may nonetheless be available to employees who are denied breastfeeding-related workplace accommodations. In particular, employees may be able to bring suits under either Title VII or FLSA's anti-retaliation provision in cases where the employer responds by taking an adverse action against the requesting employee. In addition, employees who can claim monetary damages might be able to bring suits under FLSA's breastfeeding provision. Whether courts will validate these theories consistent with *Vamco* in future cases remains to be seen. ■

23 *See McNill v. N.Y. City Dep't of Corrections,* 950 F. Supp. 564 (S.D.N.Y. 1996).

24 *See EEOC v. Vamco*, at 15.

25 *See Wilson v. Ont. County Sheriff's Dep't*, No. 12-cv-06706, 2014 U.S. Dist. LEXIS 110618 (W.D.N.Y. Aug. 8, 2014).

26 *Id.* at 25.

Interplay of Workers' Compensation Cases and Third Party Lawsuits

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I. Case Law

A recent decision by the New York State Court of Appeals highlights the often complex interplay between workers' compensation cases and third party lawsuits. In *Beth V. v. New York State Office of Children & Family Services*,[1] the Court affirmed that a workers' compensation carrier can take credit against a worker's third-party federal civil rights case settlement recovery where the lawsuit was compensating for the same injuries as the workers' compensation claim.

The case involved an employee ("Beth V.") at a juvenile detention facility who was raped by a co-worker.[2] As a result of the incident, she filed a workers' compensation claim and was found to be permanently partially disabled as a result of her physical and mental injuries related to the incident.[33]

Separately, she also filed a lawsuit against the employer and three of her supervisors in federal court, including claims under 42 USC § 1983, hostile work environment under the New York State Human Rights Law and 42 USC § 2000e.[44] This case subsequently settled for $650,000.00 inclusive of the attorney's fee (the "third party lawsuit").[55] Her net settlement was around $430,000.00.[66]

The workers' compensation carrier, New York State Insurance Fund ("NYSIF"), approved the third party lawsuit settlement and waived its lien on the settlement pursuant to Workers Compensation Law ("WCL") § 29(1), but reserved its right under WCL § 29(4) to take a credit against future benefits of the net recovery, which meant that her workers' compensation benefits were cut off until the credit was exhausted.[77]

Beth V. argued that NYSIF was not entitled to a credit to the proceeds of the third party settlement, because her damages stemmed from alleged violations of her constitutional and civil rights (i.e. discrimination and creation of a hostile work environment), not from personal

See WORKER'S COMPENSATION, next page

1 22 N.Y.3d 80 (2013).

2 *Beth V. v. New York State Office of Children & Family Services*, 22 N.Y.3d 80, 83 (2013)

3 *Id.*

4 *Id.* at *84.

5 *Id.*

6 *Id.* at *85.

7 *Id.*

WORKER'S COMPENSATION, from page 17

injury damages, and that WCL § 29 should not apply.[88] The Workers' Compensation Board ultimately determined that NYSIF was allowed to take a credit against the settlement proceeds in this case as the settlement compensated her for the same injuries that were the basis for the award of workers' compensation benefits.[99]

Beth V. then appealed the decision with the Appellate Division[10] The Appellate Division affirmed, holding that "when a claimant obtains recovery in a civil action for the same injuries that were the predicate for workers' compensation benefits, the carrier has a lien against any recovery, even where the action is brought against an employer or a co-employee."[11]

Beth V. was granted leave to appeal, and the Court of Appeals affirmed, finding that the settlement proceeds from the lawsuit were intended to compensate her for the same injuries for which she was awarded compensation benefits.[12] The Court did not decide whether a carrier is entitled to an offset for punitive damages.[13]

As a result, this decision makes clear that if a workers' compensation claimant files a civil action leading to a recovery due to the same injuries related to the workers' compensation claim, the insurance carrier will have a lien and offset on the recovery—even if the civil action is not framed as a personal injury case.

II. WCL Liens and Offsets

Third party recoveries for workers' compensation claimants are governed by WCL § 29.[14] Under the WCL, the underlying concept for third party actions is to prevent a double recovery for workers.[15] Therefore, the injured employee is not allowed to keep the entire amount of both his/her compensation award and the civil lawsuit damage recovery.

WCL § 29(1) gives the workers' compensation insurance carrier a lien against the employee's third party action recovery, covering both indemnity and medical benefits paid up to the date of the third party action recovery (via settlement or judgment), and any benefits payable in the future had there been no third party recovery.[16] The amount of the lien consists of both any compensation awards and medical treatment paid by the insurance carrier.

WCL § 29(4) provides that any money received by the employee from the third party action after the lien is deducted is credited by the insurance carrier against future workers compensation benefits.[17] The carrier is not responsible for future payments to the claimant until the credit is exhausted.

Separately, if a claimant seeks to resolve the third party action, it must obtain written consent from the workers' compensation carrier.[18] If the claimant does not obtain the consent, this will result in a loss of all future workers' compensation benefits.[19] This consent is required to avoid any prejudice to the workers' compensation carrier.[20]

III. Advice for Attorneys

Given that a recovery on a civil rights lawsuit can lead to a lien and offset on a workers' compensation case, attorneys must take certain steps to ensure the maximum return for their client.

First, ongoing coordination with the workers' compensation attorney is crucial. Communication between the attorneys regarding the status of both the civil lawsuit and workers' compensation case can help maximize the recovery for the worker. For example, attorney coordination can allow the parties to determine whether a settlement of the workers' compensation case is advisable before or after the third party lawsuit is resolved. Additionally, if the third party case resolves first, the workers' compensation case can later be settled via a "global settlement," which may reduce or eliminate the carrier's lien.

In some cases, the third party attorneys will attempt to resolve the lien or credit via a workers' compensation settlement, even if they're not the client's attorney for the workers' compensation case. Needless to say, this is unethical at best and if the attorney is not knowledgeable regarding the workers' compensation system, may not be maximizing the claimant's return on the settlement. Again, this issue can be avoided by simply coordinating with the workers' compensation attorney and ensuring that any negotiated settlement accounts for all outstanding issues in the workers' compensation case.

Finally, any third party settlement requires the workers' compensation carrier's written consent. If the third party attorney does not seek consent for a settlement, the right to future workers' compensation benefits may be forfeited. ■

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8 *Id.* at *85-86.

9 *Id.* at *87-89.

10 *Id.* at *89.

11 *Id.*

12 *Id.*

13 *Id.* at *92.

14 NY WCL § 29.

15 *Beth V.*, citing *Matter of Grander v. Urda* , 44 N.Y.2d 91, 97-98 (1978).

16 NY WCL § 29(1).

17 NY WCL § 29(4).

18 NY WCL § 29(5).

19 *Daly v. Michael Daly Constr. Corp*. 136 A.D.2d 798, 799 (1988).

20 *Id.*

ANNOUNCEMENT

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The Lawyer as Journalist:
How to Handle the Press Strategically and Ethically

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News is what someone wants suppressed. Everything else is advertising. The power is to set the agenda.

Katharine Graham

Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.

Thornhill v. State of Alabama, 310 U.S. 88, 95 (1940).

It is no coincidence that freedom of speech, freedom of the press, and the right to petition "for redress" in court and other government fora are discussed in the same breath in the First Amendment.[2] As lawyers who deal in "pleadings" and "complaints" daily, however, we may easily forget that the success of our advocacy stems from our abilities as storyteller and chronicler. Labor and employment attorneys, in particular, contend with some of the most complex domestic national issues of the day and must write about them intelligibly and in compelling fashion to their (legal) audiences. In many instances, plaintiff-side attorneys and other advocates take the lead in exposing private or public abuse, and it is the media that must follow the (legal) story and interpret its importance for the public agenda.

The relationship between litigation and journalism can be symbiotic, and their connections are deeply rooted in our laws and legal history. Given that court filings are presumptively public, and that counsel has already done a considerable portion of the editorial legwork, then why not invite the media to publicize a case? The advantages of early public attention to litigation may be self-evident, but many attorneys wisely exercise caution. As media consumers, we are all too familiar with the consequences of mishandling the media, which include the ever-expanding echo chambers of the Internet, or worse, a defamation counterclaim. Attorneys' instincts to remain within their "core duties" of strictly legal advocacy loom large if interacting with the press is unfamiliar territory. With sufficient knowledge and preparation, however, employment attorneys can adequately advise future clients on whether reach out to the news (or return unsolicited calls from the press). Part I discusses attorney's ethical obligations under the New York Rules of Professional Conduct with respect to Informed Consent, Competence, Confidentiality, and Extrajudicial Statements during trial. Part II discusses pragmatic techniques for handling media and crafting a message. Part III discusses the defamation counterclaim and the main privileges that shield litigants against defamation (counter)claims.

Litigation-Related Publicity and Counsel's Ethical Obligations

Employment attorneys and their clients may agree upon the importance of educating the public about workplace misconduct or abuses. When a client has already come to terms with the inherently public nature of filing a lawsuit, and the accompanying time commitment, it may seem that alerting the media to her case may be a step she is ready to take. Nevertheless, counsel should be prepared to fully discuss the risks inherent in any interaction with the media and address clients' concerns, accounting for their ethical obligations of Informed Consent, Competence, and Confidentiality. The result is that in the in vast majority of individual client cases, publicity is not in the client's best interest.

Client Objectives and Informed Consent

Attorney advice regarding whether to publicize a client's case falls squarely within the scope of representation under the Rules of Professional Conduct, including the rules regarding client objectives and duly informed clients.

Rule 1.2: Scope of Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Rule 1.0: Terminology

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Accordingly, counsel must fully explain to clients whether publicity on the balance would further their legal and personal objectives in the representation; and the benefits and risks of publicizing a case, including the risks of training a spotlight on the litigation:

See JOURNALIST, next page

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2 U.S. Const. amend. I.

JOURNALIST, from page 20

RISKS	BENEFITS
Personal	
• Possible notoriety and loss of privacy	• Public education regarding the legal rights to be enforced
• Possible retaliation by employer	• Possible interest from Defendant to resolve the dispute amicably
• Possible blacklisting by future employers	• Possible deterrence value for this type of misconduct by Defendant and other employers
• Possible negative portrayal (Defendant discloses weaknesses of case or insults Plaintiff)	• Possible interest in issue or reform from elected officials or agencies
• Certainly significant time investment from both client and attorney	
Material	
• Possible impeachment material	
• Possible entrenchment by Defendant against any amicable resolution	
• Possible exposure to defamation counterclaim	
• Possible fair-trial jury pool considerations (rare)	

Given the considerable number of risks, and potential material harm to the case, in the vast majority of individual client cases, proactive publicity is not in the client's best interest. Where publicity is certain to follow due to the high-profile nature of a case, however, counsel and the client should prepare accordingly. It is best to schedule sufficient time in this discussion to provide concrete examples of a risk or benefit if it will help client make an informed decision. Due to the highly personal and long-lasting effects of publicity, a client's decision to consent to publicity in her case is best discussed weeks in advance of the precipitating event (such as the filing of a complaint or the court handing down a substantive decision). In addition, counsel should attend all of a client's press interviews to steer the conversation from any potentially harmful or invasive lines of questioning and focus on what information should be public.

B. Competence

Each attorney must conduct a self-assessment of his or her own skill and competence, and based upon the attor ney's practice or specialty, the clients' interest in raising public awareness about their litigation may become a recurring question. Even where many of your clients are bent upon raising public awareness, for example, at a non-profit or a public-interest-oriented firm, I believe it is best to begin with a default position *against* soliciting press coverage for their case, and review in depth a list of considerations in which number of risks generally outweigh the benefits.

For example, at the Asian American Legal Defense & Education Fund (AALDEF), many employees I represented did not wish to have their legal story — e.g., the worker who worked up to seven days a week without overtime — define their lives or our legal relationship. A client once told me, "I am not doing this for the money; I am doing this so that [Defendant] knows that I have rights." Even so, while some of my clients ultimately did successfully use the media to draw attention to systemic labor violations in the domestic worker, restaurant, or nail salon industries, for this client the balance of the considerations led to the conclusion that publicity was not advisable in her situation.

Rule 1.1: Competence

A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules.

Competence under Rule 1.1(a) stresses that attorneys must possess both "skill" and "preparation" in assisting a client who is contemplating publicizing her case in the press. Even while counsel may learn discrete skills, such as those discussed in Section II below and in this panel, the additional hours of "preparation" to both obtain the client's informed consent and craft compelling, jargon-free messages pose an additional, independent obligation. Counsel should candidly assess whether, in an eleventh-hour filing — perhaps to beat a statute of limitations — there is even sufficient time in which the client can mull over losing some measure of anonymity, or her counsel may field a flurry of press inquiries sure to follow in lieu of turning to other casework.

In addition, Rule 1.1(c)'s requirement that an attorney "seek the objectives of the client" underscore that the client and her considerations — and not those of the attorney or law firm or non-profit organization — must drive the decision as to whether the case should be publicized. Thereafter, in most situations, it is the attorney who publicizes the case unless a communications consultant or sophisticated third party — such as a workers' center — is collaborating with the client in litigation. Another occasion for obtaining client consent arises where perhaps a courthouse reporter contacts the attorney unsolicited, in which case the attorney should arguably inform the client regarding the press inquiry if such an media coverage may relate to the cli-

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ent's known objectives.[3] In either case, an attorney's diligent investigation of the facts and ascertainment of the client's informed consent are necessary.

C. Confidentiality

Interacting with the media will be one of the most challenges tests of an attorney's duty to protect client confidences. Journalists are adept at ferreting out information otherwise buried in public records or online archives, or searching dockets for prior contact with the legal system. Those employed in visual media or more "human interest"-oriented media such as television or tabloids will often request access to an interview subject's home or workplace, even if your client expressly declines the access. And in cases involving a protective order regarding trade secrets, live confidentiality provisions in a client's employment agreement, or confidential terms of a settlement agreement, seasoned reporters will not necessarily respect a firm answer regarding limitations on questioning and resort to trying to catch a subject off guard by asking for the confidential information for the twentieth time.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community . . . .

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

During the course of representation, attorneys become aware of information communicated in confidence by a client that may enhance the newsworthiness or "human interest" of a particular case. Nonetheless, Comment 4A to Rule 1.6, regarding confidentiality, expressly notes that rule applies to all factual information "gained during or relating to the representation of a client," including information "has any possible relevance to the representation or is received because of the representation." In addition, as Rule 1.6(a)'s definition of "confidential information" illustrates, clients often may disclose information that may be considered "embarrassing" or detrimental — even if not formally protected by the attorney-client privilege.

Adequate preparation by counsel and client additionally requires advance identification of off-limits topics and advance talking points in response to probing questions. Attorneys should candidly discuss with their clients any sensitive information that could possibly be discovered and used in the public to their detriment. In labor and employment cases, they may include learning about the immigration status of your client, prior criminal convictions (which some journalists may be able to access even if a record has been sealed), highly personal health conditions, or other matters that would seem irrelevant to the case.

Addressing sensitive information should also become part of the risks-versus-benefits discussion with the client as a potential risk to publicizing the client's case, and the client's informed consent to assume those risks must be clear — particularly if the defendant was privy to such information. If necessary, counsel's role-playing a reporter by quizzing the client with likely questions is as invaluable as it would be to prepare the client for cross-examination.

II. Practical Advice and Tactical Considerations

With time and experience, working with the press can be more rewarding than it is nerve-wracking. Reporters are generally knowledgeable, hard-working, curious, and compassionate individuals committed to accuracy. While it is impossible to predict the kinds of media interactions a story will generate, attorneys can focus their preparations in ways that deliver the exact message they wish to communicate to a wide array of outlets.

Understanding Newsworthiness

Understanding how to garner positive media attention is a level of advocacy that attorneys can provide to their clients. What makes a case newsworthy may depend upon what is already in the public attention — for example, fast food restaurant workers organizing — or may require more targeted pitching. Generating publicity may require no more than the momentum inherent in filing a lawsuit in which the equities of the situation are compelling. In other instances, the lawsuit may be attention-grabbing because it is the first lawsuit or legal victory of its kind, because of the amount of money at stake, or because the potential number of individuals affected by this precedent, or because it may signal the beginning of a trend.

Certain stories may also garner interest because they involve classic narratives, such as those involving a David-versus-Goliath situation; a courageous whistleblower; the exposure of hypocrisy; or if the defendant is a public figure or is otherwise well known. If you believe in your client's case, the chances are that you will be able to speak compellingly about it to a reporter. It may not be the *New York Times*, but the audiences your client may wish to reach may go farther.

Intentional Levels of Access

Where the attorney and client are initiating the press coverage, a natural advantage is that they can agree upon in advance how much access to grant to journalists. The levels of access include how much time to spend with a journal-

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3 Comment to Rule 1.4 (regarding attorney-client communication, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved").

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ist or how many outlets you invite to cover the story.

With free, online access to most newspapers and other media archives, it is possible to review select journalists' recent coverage to see how they have handled similar stories or sensitive stories generally and contact only those reporters to pitch your story. If you offer an "exclusive" to single reporter, which may increase interest among competitive newspaper or television outlets, you have the undivided attention of a reporter but may be forgoing an opportunity for broader coverage of the issues.

Alternatively, or additionally (with the same amount of preparation), a press release provided by your office outlining the most important facts and possibly including quotations will steer reporters to the most essential information, provide the desired angle for the story, and save time if you must triage among calls to return but wish to avoid the lost opportunity where a party "could not be reached for comment." If the perceived visibility (or litigiousness) of the client is potentially at issue, a comment from the attorney in lieu of the client is not uncommon. Favoring print interviews over media that may require more challenging, extemporaneous commentary – such as television or radio – is another strategy for limiting media access.

Finally, if you believe that a certain outlet may be hostile to the issues in the case, you are of course under no obligation to provide access to the case and the outlet must use what is publicly available, whether it is the public filings or additionally, a press release.

Crafting Effective Messages – and Avoiding Jargon

Powerful messages are those that resonate with the broadest audiences possible. They tend to have everyday language, rather than expert-sounding or obscure jargon. Although you may expect legal terms such as "complaint" or "allegations" or "hostile work environment" may sound routine to audiences accustomed to following legal battles, the most effective messages are those that address basic experiences and motivations.

It is fairly easy to anticipate the questions that a reporter will ask. The reporter is as interested in asking your client "What made you decide to sue?" just as much as "What is this case about?" Rather than responding as you would to a judge, you and the client must be able to explain the essence of the litigation as you would to a relative who has never heard of the case or the statute that was "supposedly" violated. Crafting several natural variations of the messages in advance will also allow the interviewee to "respond to the question you wished they asked."

Assume that the reporter will read the pleadings, but needs to explain the importance of the case to the public as a possible trend or part of a necessary change in society. Try to do so in at most one or two sentences without resorting to any legal terms of art. Most of the quotes that appear in the news are the result of finely honed messages. Some examples:

> "Employers have already started to take a hard look at their internship programs," said Rachel Bien, a lawyer for the plaintiffs. "I think this decision will go far to discourage private companies from having unpaid internship programs.

Steven Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. Times, June 12, 2013, at B1.

> "We believe these restaurant owners intentionally lure vulnerable workers with false promises of dignified work, and then isolate them in remote locations to extract their labor," said [Rabin] Biswokarma's lawyer, Shirley Lin. "They must be held accountable."

Erica Pearson, *Nepali Immigrant Charges in Lawsuit That L.I. Restaurant Bosses Exploited Him*, N.Y. Daily News, Apr. 3, 2012.

The relationship between litigation and journalism can be symbiotic, and their connections are deeply rooted in our laws and legal history.

III. Defamation and the Shields of Absolute Privilege and N.Y. Civ. Rights Law §74 Privilege

Defendants' threats to sue for defamation commonly follow unflattering publicity. These reactionary counterclaims are often fail to meet the minimum pleading standards for defamation, discussed below, and with preparation plaintiff and her counsel may exercise the speech regarding litigation that is so valued by society that it is presumptively protected under common law and state statute. In planning for media coverage, counsel should familiarize themselves with the protections of the litigation privilege and New York Civil Rights Law § 74 privilege as a complete bar to defamation claims.

A. The Elements of Defamation in New York

In New York, the elements of defamation are a (1) false statement; (2) published to a third party; (3) without privilege or authorization; (4) made with constituting fault as judged by, at a minimum, a negligence standard; and (5) either causing special harm or defamation per se. *Diorio v. Ossining Union Free Sch. Dist.*[4] In addition, in a defamation action it is mandatory that "the particular words complained of . . . be set forth in the complaint." CPLR § 3016(a). The third-party "publication" element further requires that the complaint specify the time, place and manner of the false statement and to specify to whom it was made. *Arsenault v.*

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4 96 A.D.3d 710, 712 (1st Dept. 1999) (citing *Restatement of Torts* 2d § 558).

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Forquer;[5] *Vardi v. Mutual Life Ins. Co. of New York*.[6]

If the subject of the speech is a public figure, anything said of that individual is subject to a qualified privilege unless motived by "actual malice," instead of the lower standard of negligence. *James v. Gannett Co., Inc*.[7]

Finally, but most importantly, statements that constitute an opinion, rather than a "fact" susceptible of being proved as a "false statement" (the first element of defamation) enjoy the "absolute" protection under the New York Constitution. *Celle v. Filipino Reporter Enters. Inc*.[8] The New York Court of Appeals has put forth a four-factor test for distinguishing between statements of protected opinion from those asserting or implying actionable facts: (1) "an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous"; (2) "a determination of whether the statement is capable of being objectively characterized as true or false"; (3) "an examination of the full context of the communication in which the statement appears"; and (4) "a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Id.*

B. Absolute Privilege and N.Y. Civ. Rights Law § 74 Privilege As a Bar to Defamation Counterclaims

Two broad privileges automatically apply to active litigation to prospectively bar a claim of defamation: absolute privilege and New York Civil Rights Law § 74 privilege. Absolute privilege protects communications directly made during the litigation, is the least-contested of the privileges, but applies to a narrower set of statements conveyed "in-court" or during proceedings. Section 74 privilege applies to "out-of-court" statements such as press releases to the extent they present fair and true reports of the proceedings. When the privileges operate in tandem, parties and counsel may tailor their comments to publicize proceedings or update the media as contemplated by these longstanding protections.

Thus, although the New York Rules of Professional Conduct address extrajudicial statements in connection with trial in Rule 3.6, such as potentially prejudicing the proceeding through inability to select an impartial jury,[9] or impugning the credibility of a party or witness,[10] for the general purposes of comments to the press the absolute privilege and Section 74 privilege provide safe harbors.

The Absolute Privilege

Litigants and their attorneys are accorded the broadest speech protections for statements made in the course of other court proceedings, as such statements are absolutely privileged under New York common law if they are "at all pertinent to the litigation." *Mosesson v. Jacob D. Fuchsberg Law Firm*.[11] The absolute privilege applies not only to statements made at a hearing or during trial, but to every step of a proceeding, including statements in a complaint. *Daniel v. Safir*.[12] Whether a statement is "pertinent" to litigation is an exceedingly broad standard:

> The absolute privilege embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability.

O'Brien v. Alexander.[13] Assertions in oral testimony, pleadings, affidavits, and briefs, and communications among "parties, counsel, witness, and the court" also fall within the protections of the absolute privilege. *Sexter & Warmflash, P.C. v. Margrabe*.[14] Thus, a defamation claim bought by a defendant solely on the basis of untried allegations in an action instituted on behalf of a client — in good faith — will generally fail under the absolute privilege.

Notwithstanding its name, the protection of "absolute privilege" for in-court or in-proceeding statements does not extend to cases where only actual malice can explain bizarrely irrelevant remarks. Only statements made in the course of judicial proceedings "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame.'" *Martirano v. Frost*.[15] In keeping absolute privilege exceedingly broad, however, the Court of Appeals in *Martirano* dismissed an attorney's claim of slander for even a comment impugning the attorney's professionalism because "the possible harm to him as an individual is far outweighed by the need — reflected in the policy underlying the privilege here involved — to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings" and "hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires."[16]

Courts have adhered to a bright-line rule: the absolute privilege does not extend to out-of-court or out-of-filing statements "instigated by" a party or its attorneys in a press release, press conference, or other communication to third parties such as the news media.[17]As a result, when contacted by the press,

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5 197 A.D.2d 554, 556 (2d Dept. 1993).

6 136 A.D.2d 453 (1st Dept. 1998).

7 40 N.Y.2d 415, 421 (1976) (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

8 209 F.3d 163, 178 (2d Cir. 2000).

9 See Rule 3.6(a) ("A lawyer who is participating in a . . . civil matter shall not make extrajudicial an statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

10 See Rule 3.6(b)(1) ("A statement is ordinarily likely to prejudice materially an adjudicative proceeding when . . . the statement relates to . . . (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness.").

11 683 N.Y.S.2d 88, 89 (1st Dept. 1999).

12 175 F. Supp. 2d 474, 482 (E.D.N.Y. 2001).

13 898 F. Supp. 162, 171 (S.D.N.Y. 1995) (additional citation omitted). *See also, Grasso v. Mathew*, 164 A.D.2d 476, 479 (1st Dept. 1991) ("This test of pertinency is extremely liberal . . . and encompasses both words and writings") (additional citations omitted).

14 38 A.D.3d 163, 174 (1st Dept. 2007).

15 25 N.Y.2d 505, 508 (1969).

16 *Id.* at 508–09 (additional citation omitted).

17 *See Aguirre v. Best Care Agency, Inc*., 961 F.

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counsel and litigants may sometimes decline to comment and refer journalists to the publicly filed complaint or other court-related pleadings as speech incontrovertibly protected under the absolute privilege and a defendant is unable to show that the litigants initiated contact with the press.

N.Y. Civil Rights § 74 Privilege

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

The hand-in-glove nature of the absolute privilege and Section 74 privilege is apparent in *Aguirre*, where the court noted that even if multiple news articles were based upon, or instigated by, out of court statements made by plaintiff or her counsel, "such as those made at the press conference, the statements would be protected by Civil Rights Law § 74." *Id.*

Courts have consistently interpreted the "fair and true report" standard to be equivalent to a "substantially accurate" account of the litigation. *Fuji Photo Film U.S.A., Inc. v. McNulty*.[18] "All that is needed to claim the privilege is that the alleged defamatory material 'may possibly bear on the issues in litigation now or at some future time.'" *The Savage Is Loose Co. v. United Artists Theatre Circuit, Inc*.[19] Thus, an attorney or party whose remarks are confined to "the substance of the complaint" is protected by the § 74 privilege.[20] It is generally uncontroverted that § 74's "fair and accurate" standard for extrajudicial statement need to be "verbatim reproductions of source material, as the languages in resulting news accounts "should not be dissected and analyzed with a lexicographer's precision." *Tenney v Press-Republican*.[21] Similarly, where a party's attorney held a press conference during where he handed out copies of the filed complaint to reporters, the First Department has found that Section 74 privilege "extends to the release of background material" from the case such as the filing and a substantially accurate description of the case. *Fishof v. Abady*.[22]

Counsel should take precaution not to allege in extrajudicial statements any misconduct more serious than what is alleged in the complaint or filings. *D'Annunzio v. Ayken, Inc*.[23] Accordingly, even where a defendant employer counterclaims for parties' statements that they were "sexually harassed continually" and "complained to management but nothing was to stop it" as defamatory, these statements may in fact accurately reflect the allegations contained in complaint that the female restaurant employee plaintiffs were "exposed to repeated, inappropriate, offensive comments by the restaurant's male employees throughout their employment," that two experienced "unwanted touching," and that two plaintiffs alleged that the individual defendant "make the behavior stop" and Defendants did nothing to "prevent the touching and comments."[24]

For counsel who may consider providing a reporter with an advance copy of a filing, e.g., to allow a news outlet to determine whether it will grant coverage in exchange for an exclusive, the First Department has in fact interpreted Section 74 to apply prospectively.[25]

Given the considerable number of risks, and potential material harm to the case, in the vast majority of individual client cases, proactive publicity is not in the client's best interest.

The sole court-imposed limitation upon the Section 74 privilege is the situation where a party "maliciously asserts false and defamatory charges in judicial proceedings for the purpose of publicizing them in the press." *Williams v. Williams*.[26] The Williams exception only applies if a court concludes that the litigant filed suit solely to attempt to escape liability by publicizing the false and malicious statements in the proceeding post-hoc.[27] ■

Supp. 2d 427, 457, 457 n. 17 (E.D.N.Y. 2013) (in an civil labor trafficking action, noting "Defendants have not offered any evidence that Plaintiff gave statements to the authors or publishers of these five articles" and "have offered no evidence that Plaintiff contacted the media beyond her initial interview in September 2009 and the press conference in January 2011" (citing *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, No. 06 Civ. 1260, 38 Media L. Rep. 1124, 2009 WL 4547792, at *19 (E.D.N.Y. Dec. 1, 2009)).

18 669 F. Supp. 2d 405, 411 (S.D.N.Y. 2009).

19 413 F. Supp. 555, 561 (S.D.N.Y. 1976) (citing Seltzer v. Fields, 20 A.D.2d 60, 62 (1st Dept. 1963)).

20 *Id.*

21 75 A.D.3d 868, 868 (3d Dept. 2010) (additional citations omitted).

22 720 N.Y.S.2d 505, 506 (1st Dept. 2001).

23 876 F. Supp. 2d 211, 220 (E.D.N.Y. 2012).

24 *Id.*

25 *See Hudson v. Goldman Sachs & Co*., 304 A.D.2d 315, 316 (1st Dept. 2003) ("Nothing about Civil Rights Law § 74 suggests that a person served with a summons and complaint should not feel free and safe to announce its position, and otherwise make its first response to the allegations against it, *in a forum other than court*") (emphasis supplied).

26 26 23 N.Y.2d 592, 599 (1969).

27 *Id.; see, e.g., Conte v. Newsday, Inc*., 703 F. Supp. 2d 126, 147 (E.D.N.Y. 2010) (finding that allegations in third amended complaint were drafted for the "express purpose" of "protect[ing] their subsequent defamatory statements" and denying motion to dismiss defamation claim, subject to further proof).

New York Takes Steps to Protect Misclassified Workers

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New York has made inroads into addressing independent contractor misclassification in the trucking and delivery industries with a set of initiatives covering these industries. The New York legislature recently passed the New York State Commercial Goods Transportation Industry Fair Play Act ("Fair Play Act" or "Act") to address independent contractor ("IC") misclassification in the trucking industry. The Fair Play Act went into effect on April 10, 2014. The new law is a step in the right direction, but more must be done to protect misclassified workers.

Many states have passed laws to protect workers from independent contractor misclassification. Indeed, approximately half the states have put laws on the books in the past ten years drawing the distinction between employees and independent contractors. Other states use common law tests to determine whether a worker is an employee or an independent contractor. While some states, such as Massachusetts, have provided a statutory definition across all industries, New York has taken a piecemeal approach to the problem, passing a law covering the construction industry in 2010, and following with the Fair Play Act this year.

Much has been written about the scope of the problem of independent contractor misclassification and its impact on state and federal coffers. But IC misclassification also denies workers a host of workplace protections, including unemployment insurance, workers' compensation, overtime pay, protection from discrimination in employment, and protection against unlawful deductions.

Independent contractor misclassification is widespread in the trucking industry. A recent study found that 49,000 of the 75,000 port truck drivers in the United States are misclassified as independent contractors. The Fair Play Act has the potential to increase wages and protections for 28,000 misclassified workers.

The Fair Play Act

The Fair Play Act standardizes the distinction between an employee and an independent contractor in the trucking industry and provides for civil and criminal penalties for employers who violate the law.

Who is covered under the law?

The Fair Play Act covers drivers engaging in commercial goods transportation. Commercial goods transportation is defined as "transportation of goods for compensation by a driver who has a state-issued driver's license, who transports goods in New York State and who operates a commercial motor vehicle as defined by . . . the Transportation Law." In turn, the relevant section of the Transportation Law defines "commercial motor vehicle" as a vehicle that

(a) has a gross vehicle weight rating or gross combination weight of ten thousand one pounds or more, whichever is greater; or (b) is designed or used to transport more than eight passengers including the driver for compensation; or (c) is designed or used to transport more than fifteen passengers including the driver and is not used to transport passengers for compensation; or (d) is used in transporting material found by the United States secretary of transportation to be hazardous . . . .

Thus the Fair Play Act primarily covers drivers operating vehicles over 10,000 pounds (though drivers operating smaller vehicles transporting hazardous materials or passengers may also be covered if they are also transporting goods, a term undefined by the statute). Drivers transporting commercial goods in smaller vehicles are covered by a set of guidelines issued by the Department of Labor in conjunction with the passage of the Fair Play Act.

How Does the New Law Help Workers?

Perhaps most importantly, the Fair Play Act creates a presumption that a covered worker is an employee. This presumption is overcome only if the parties meet all elements of one of the tests set out in the Act. In addition, the Fair Play Act applies across agencies – the Department of Labor, Workers' Compensation Board, and Department of Taxation will all use the tests set out in the Act. A trucking company can overcome the presumption that a covered worker is an employee only by showing that it reports payments to the worker on a Form 1099 and either (1) that the worker meets what is commonly known as the ABC test, or (2) that the worker is a separate business entity, which requires meeting a list of 11 criteria.

The ABC Test

Under the ABC test, a worker must meet all three of the following in order to be considered an independent contractor:

(a) the individual [must be] free from control and direction in performing the job, both under his or her contract and in fact;

(b) the service must be performed outside the usual course of business for which the service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

Advocates consider the ABC test to be the most objective test and the least subject to manipulation by employers, and preliminary research shows that the ABC test can benefit workers.

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The first factor in the ABC test looks at the putative employer's control over the worker, both under a contract and in fact. Unless a company both lacks the right to control and does not actually control the driver, the driver will be considered an employee.

The second factor looks at the type of work performed in relationship to the business of the company. This factor looks at whether the work performed is of a type that is a significant part of the company's business. Because the Fair Play Act is an industry-specific law, governing the relationship between truck drivers and trucking companies, it is difficult to envision a worker covered by the Act who would be performing work outside the usual course of a covered company's business. .

The third factor focuses on the driver and whether he or she has an "independently established trade, occupation, profession, or business" similar to transporting commercial goods. This factor is the vaguest of the three, and appears to allow for a range of interpretations.

The Separate Business Entity Test

A company may also show that a commercial goods truck driver is an independent contractor if that worker is a "separate business entity" as defined by the statute. The separate business entity test is an eleven-factor test, and may include sole proprietors. The factors are:

(a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the commercial goods transportation contractor for whom the service is provided to specify the desired result or federal rule or regulation;

(b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the commercial goods transportation contractor;

(c) the business entity has a substantial investment of capital in the business entity, including but not limited to ordinary tools and equipment;

(d) the business entity owns or leases the capital goods and gains the profits and bears the losses of the business entity;

(e) the business entity may make its services available to the general public or others not a party to the business entity's written contract referenced in paragraph (g) of this subdivision in the business community on a continuing basis;

(f) the business entity provides services reported on a Federal Income Tax form 1099, if required by law;

(g) the business entity performs services for the commercial goods transportation contractor pursuant to a written contract, under the business entity's name, specifying their relationship to be as independent contractors or separate business entities;

(h) when the services being provided require a license or permit, the business entity pays for the license or permit in the business entity's name or, where permitted by law, pays for reasonable use of the commercial goods transportation contractor's license or permit;

(i) if necessary, the business entity hires its own employees without the commercial goods transportation contractor's approval, subject to applicable qualification requirements or federal or state laws, rules or regulations, and pays the employees without reimbursement from the commercial goods transportation contractor;

(j) the commercial goods transportation contractor does not require that the business entity be represented as an employee of the commercial goods transportation contractor to its customers; and

(k) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

All eleven factors must be met in order for a worker to be properly classified as an independent contractor. The test appears to at least partially incorporate the first (control) and third (independently established trade, occupation or business) factors of the ABC test, but not the second (outside the regular course of the company's business) factor. Two factors bear special mention.

First, in order to be a separate business entity, "the [driver's] business entity [must] ha[ve] a substantial investment of capital in the business entity, including *but not limited to* ordinary tools and equipment." Because a truck and delivery tools such as a dolly, rope, etc. are likely to be considered "ordinary tools and equipment" for a business entity that provides trucking services, this factor recognizes that in order to be a truly separate business entity, there must be a financial investment beyond a vehicle and delivery equipment.

Second, an entity (including a sole proprietorship) is a separate business entity if it "hires its own employees *without the commercial goods transportation contractor's approval*, subject to applicable qualification requirements or federal or state laws, rules or regulations, and pays the employees without reimbursement from the commercial goods transportation contractor." Thus, a company that requires a driver to seek its approval before having subcontractors or the driver's own employees do work assigned to the driver is that driver's employer under the separate business entity test.

New York has made inroads into addressing independent contractor misclassification in the trucking and delivery industries with a set of initiatives covering these industries.

Notice, Penalties, and Retaliation

The Fair Play Act requires that all commercial goods transportation contractors post a notice about the law and drivers' rights in a prominent place in

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the workplace. Companies that fail to post the notice may be subject to fines of up to $1,500 for the first violation and $5,000 for a subsequent violation.

The law also provides for civil and criminal penalties for willful violations, and for cooperation between the Department of Labor, Workers' Compensation Board, and Department of Taxation. The Fair Play Act prohibits and provides for a private right of action for retaliation.

Conclusion

While the Fair Play Act is not perfect, it goes a long way to protecting drivers in the trucking industry. Its most worker-protective features are twofold. First, it creates a presumption, which applies across state agencies, that a commercial goods transportation worker is an employee, not an independent contractor. Second, in order to rebut the presumption, a purported employer must meet *all* elements of either the ABC test or the separate business entity test. In contrast, the New York common law test and the test under the Fair Labor Standard Act look at the totality of the circumstances, weighing a set of factors, none of which are dispositive. However, the law only protects a small sliver of the workforce in New York state, albeit one where IC misclassification is a major problem.

The Fair Play Act is a tool that workers and their attorneys can use to insure that appropriate workplace protections apply to truck drivers. New York should continue to expand statutory protection from IC misclassification to all sectors of the workforce. ■