NELA
THE NEW YORK EMPLOYEE ADVOCATE
*National Employment Lawyers Association/New York • Advocates for Employee Rights*
VOLUME 14, NO. 6 November 2008 Rachel Geman, Gary Trachten, Co-Editors

# President's Column

by Bill Frumkin, President, NELA/NY

As I write this column, it appears that, economically speaking, the sky is falling. Hopefully, between now and when this column is published, things will have stabilized. We can surely all agree that our clients need us now more than ever. The rest of the legal profession may be scurrying, but as I am sure many of you are noticing from the volume of calls you are receiving, the business of counseling and representing employees is booming. At the same time, this presents new challenges for us to do the needed due diligence to make certain that the employers against whom we bring our clients' claims against are in positions to satisfy any remedies we may obtain. Other challenges are resented by the fact that economic conditions may make it more difficult for many of our clients to pay reduced hourly rates or even costs. Regardless, as Paul Tobias, the founder of NELA National has always said, "We are the thin red line protecting the workforce from unlawful practices." We are certainly in a strong position to meet NELA

*See PRESIDENT'S , page 15*

# Third-Party Subpoenas - Employers' Tool for Harassmen

by Rachel Minter

> "The spirit of [F.R.C.P. Rule 26] is violated when discovery is used as a tactical weapon rather than to explore a party's claims and the facts connected therewith."
>
> *In re* **Weinberg**, 163 B.R. 681, 684 (Bankr. E.D.N.Y. 1994).

The ultimate example of a tactical weapon in the guise of legitimate discovery is the defendant employer's service of third-party subpoenas *duces tecums* (SDTs) on current, former, or prospective employers. In **McKennon v. Nashville Banner Pub. Co.**, 513 U.S. 352, 363 (1995), the Supreme Court expressed concern that employers might routinely undertake extensive discovery into an employee's background or performance on the job as a means to resist employment claims. This was prescient: In the August 11, 2008 issue of the *National Law Journal*, one management lawyer was quoted as saying that "[i]t is bordering on malpractice for the attorney not to issue a subpoena for this kind of information."

These SDTs are so common that when counseling clients on the wisdom of proceeding with litigation, it makes sense to ask whether their current employment, or future prospects, would be jeopardized if it became known that they were suing a former employer. Clients with fungible skills (e.g., financial administration or network programming) that can transfer across industry lines are generally less vulnerable to these concerns. However, in certain industries – such as finance, publishing, or fashion – there is a tight circle of people who know each other and frequent movement of personnel between employers. Clients in these industries should be most concerned that litigation regarding employment issues will become known and will affect their employability.

## Standing to Move to Quash

Ideally, defense counsel will have complied with Federal Rule 45 and given advance notice to plaintiff's counsel of intent to serve the subpoenas, *see, e.g.*, **Lucy v. Columbia Management Group**, Docket No. M 8-85 (S.D.N.Y. March 14, 2008).[1] While a party generally lacks standing to challenge an SDT, courts in employment cases have generally accepted that a plaintiff has standing to move to quash SDTs for employment or medical records.[2] Thus, SDTs in employment cases are analyzed as a discovery matter governed by Rule 26 of the Federal Rules of Civil Procedure.

## General Background

I believe that the earliest reported case in this jurisdiction on serving SDTs on an employer is **Conrod v. Bank of New York**, 1998 U.S. Dist. LEXIS 11634 (S.D.N.Y.), a gender discrimination case in which I represented the plaintiff. Defense counsel served an extremely broad SDT, seeking documents relating to plaintiff's "attendance, evaluations and discipline," on my client's then-current employer without any notice to opposing

*See THIRD-PARTY SUBPONENAS, page 10*

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**Monday, December 8, 2008**
**NELA/NY Holiday Party**
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rsvp – (212) 317-2291 or
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**December 10, 2008 • 6:30 pm**
**Executive Board Meeting**
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

**Wednesday, January 7, 2009**
**SELECTING AND INFLUENCING NEUTRALS**
Hosted by NELA/NY members
Josh Friedman &
Daniela Nanau
(Location to be Announced)

**January 14, 2009 • 6:30 pm**
**Executive Board Meeting**
3 Park Avenue – 29th Floor
(All members in good standing are welcome)

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**Editors:** Rachel Geman, Gary Trachten



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*PRESIDENT'S, from page 1*

our Board members have been willing to do more than their share to benefit the organization. I cannot thank all of them enough for all the help they have offered. I have always found there to be a tremendous degree of understanding when, due to my own schedule, I have been unable to step up to the plate. Thank you to those who have filled in for me at those times.

As I have said repeatedly, the greatest pleasure of being President of NELA/NY is to work closely with our wonderful Executive Director, Shelley Leinheardt. Although I am sad that I will not be working with Shelley as I have been, I look forward to continuing our friendship. Shelley is someone who takes her job very seriously and goes way beyond what is asked of her. NELA/NY is truly her passion and this is reflected in the way that she handles her responsibilities on a day-to-day basis. Shelley knows how to cajole to get things done. She is also extremely diplomatic. It's marvelous to watch her in action. As I've always said, harkening back to the Yankee dynasty of the 1970s, Shelley is the "Reggie Jackson" of NELA/NY, "the straw that stirs the drink." I will miss working with her as I have as President.

In many of my columns, I have given practice tips that I thought would benefit our membership, and I want to end with one here. The bane of our existence, to some degree, is dealing with inappropriately aggressive management counsel. Happily, the majority of the attorneys who handle employment matters for employers are not in that category. My hat goes off to all those that work professionally and serve their clients well. There is, however, the few who operate in a very difficult fashion. Based upon my experiences, these "bullies" are usually individuals who are actually very insecure (whether they are aware of it or not) and unable to deal with opposing counsel on an equal playing field. Therefore, their aggressiveness is usually a reaction formation (going overboard) to make sure that plaintiff's counsel capitulates. Always be aware that hostile, aggressive, management attorneys are usually either insecure in their own abilities or, even worse, covering up the fact that their case is much weaker than you may be aware of. When this syndrome presents itself, be aware that although it may feel to be the opposite, you are actually in control and should be guided accordingly. ■

*SQUIBBS, from page 14*

tected class; the fact that some teachers outside of the protected class with similar credentials to plaintiff were granted tenure; and the fact that some teachers in the protected class with similar credentials were denied tenure or otherwise treated unfavorably. The Court stated that, "[w]hile plaintiff has not produced a single, weighty piece of evidence showing pregnancy discrimination, the cumulative effect of the evidence she has produced is enough to defeat summary judgment."

**RELIGIOUS DISCRIMINATION**

***Fishman v. M.T.A. Bridges & Tunnels (July 30, 2008)(or "Shtik It To Them")*** After a five-day trial, a federal jury awarded $735,000 ($235,000 for emotional distress and $500,000 in punitive damages) to a former employee who alleged that his supervisors denied him a promotion and penalized him for taking sick days because he was Jewish. The amount of the award is currently under review by the Court (McKenna, J.).

***Note: NELA/NY member, Matthew Porges of Leeds, Morelli & Brown represented plaintiff at trial.***

**RETALIATION**

***See Ifill v. United Parcel Service, 2008 WL 2796599 (S.D.N.Y. July 17, 2008) (Swain, J.), under Hostile Work Environment, above.***

**VICARIOUS LIABILITY**

***Bianco v. Flushing Hosp. Medical Center, 863 N.Y.S.2d 453, 2008 WL 3070343 (2d Dep't 2008) (or "It's Not Miller Time")*** In a case alleging that an attending physician, Matthew Miller, had sexually harassed plaintiff, the trial court granted summary judgment on behalf of the defendant medical center on the ground that plaintiff had failed to establish that defendant had acquiesced in Miller's misconduct. Upon appeal, the Second Department reversed, finding it sufficient that the Hospital's medical director, Peter Barra, was the "individual called upon by the Hospital to handle the plaintiff's formal complaint. The plaintiff's complaint was referred to Barra by the Hospital's 'legal team' and he was responsible for organizing a committee for a 'corrective action proceeding.' In addition, "Miller's ultimate resignation letter was addressed to Barra" and "the plaintiff stated at her deposition that, prior to the filing of the formal complaint, Barra witnessed Miller trying to kiss her." The Court thus found that "triable issues of fact exist as to whether Barra knew about Miller's alleged misconduct before the plaintiff made her formal complaint and whether he acquiesced in the alleged offensive behavior by failing to take any action."

*Note: The Bianco case is being prosecuted by NELA/NY member Matthew Porges of Leeds, Morelli & Brown.* ■

*PRESIDENT'S, from page 1*

National's mantra of "doing well by doing good."

As we near the end of 2008, and political activities heighten to a crescendo, NELA/NY is also on the verge of its own election season. The By-Laws were recently changed to provide for electing Board Members and Officers every two years. The next election will take place in December of 2008. NELA/NY has already made announcements that encourage members to nominate others for Board membership. I encourage everyone who wants to serve on the Board to throw their hats in the ring, and to seek selection through either our election-by-the membership or by our election-by-the Board processes.

As many of you may be aware, I am about to complete my second term as President of NELA/NY (four years total). It is time for me to step down. Although NELA/NY does not impose term limits on its officers, it is obvious to me that it is now time for new ideas, initiatives, and energy to be generated by a new President. I welcome this change and will provide my full support and commitment to the incoming President. Since this will be my final President's Column, I want to take this opportunity to thank the Board Members who I have worked with over the last four years. I cannot think of a more supportive and energetic group. When a bar association is made up of very busy lawyers, it is not easy for them to find the time to work on bar related matters. However, this has never been a problem with the NELA/NY Board because our Board members have been willing to do more than their share to benefit the organization. I cannot thank all of them enough for all the help they have offered. I have always found there to be a tremendous degree of understanding when, due to my own schedule, I have been unable to step up to the plate. Thank you to those who have filled in for me at those times.

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# Discrimination and Retaliation Protection Under USERRA

Ossai Miazad *(omiazad@outtengolden.com)*
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Co-Chair of the USERRA Subcommittee of the Federal Labor Standards Legislation Committee of the American Bar Association

Since September 11, 2001, well over 500,000 members of the National Guard and reserve units have been deployed overseas. According to the New York State Division of Military and Naval Affairs more than 6,500 members of the New York Army National Guard have served in Iraq and Afghanistan since this time. Many of these men and women have or will be re-entering the workforce, necessitating employment lawyers to familiarize themselves with The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA prohibits discrimination against persons because of their military service or participation in training for military service. While USERRA also has a powerful reemployment provision that allows for reclaiming of civilian employment after a period of leave due to military service or training, the focus of this article is on the discrimination and retaliation provisions of USERRA.

USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the Uniformed Services. The Uniformed Services include: the Army, Navy, Marine Corp., Air Force, or Coast Guard; the reserve units of these branches of the military; the Army National Guard and Air National Guard; Commissioned Corps of the Public Health Service; and any other category of persons designated by the President in time of war or emergency.

### Section 4311(a) of USERRA provides:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

USERRA is broader than other anti-discrimination statutes in many ways. Further, Courts have repeatedly emphasized their view that provisions of USERRA should be liberally construed in favor of the uniformed service member. *See* **Gordon v. Wawa, Inc.**, 388 F.3d 78, 81 (3d Cir. 2004) ("[W]e construe USERRA's provisions liberally, in favor of the service member"); **Hill v. Michelin N. Am.**, Inc., 252 F.3d 307, 312-13 (4th Cir. 2001) ("Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries"); **McGuire v. United Parcel Serv.**, 152 F.3d 673, 676 (7th Cir. 1998) ("USERRA is to be liberally construed in favor of those who served their country"); *see also* **Coffy v. Republic Steel Corp.**, 447 U.S. 191, 196, 100 S. Ct. 2100, 65 L. Ed. 2d 53 (1980) (noting that predecessor statute to USERRA "is to be liberally construed for the benefit of the returning veteran").

### Who is covered?

The act covers nearly all employers. USERRA defines an "employer" as: "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities." 38 U.S.C. § 4303(4)(A). This definition extends to an employer regardless of size, covers public and private entities and allows for individual liability.

"Employees" under the act are "person[s] employed by the employer." 38 U.S.C. § 4303(3). USERRA protects past members, current members, and persons who apply to be a members of any branch of the uniformed services.

### "Benefits of employment" that trigger USERRA protection

In addition to protecting against discrimination in hiring, reemployment, retention in employment and promotion, USERRA's protection against discrimination in any benefit of employment has been broadly interpreted. For example, the Fourth Circuit focused on USERRA's broad reach when over-turning the lower court's decision and determining that a transfer resulting in longer and less regular work hours was a denial of a benefit of employment under USERRA. **Hill v. Michelin North America, Inc.**, 252 F.3d 307, 313 (4th Cir. 2001). In **Fink v. City of New York**, 129 F. Supp. 2d 511 (E.D.N.Y. 2001), the plaintiff claimed he was discriminated against in violation of USERRA because his employer failed to offer him a make-up promotional exam immediately upon his return from military service and later failed to provide appropriate study material. Plaintiff prevailed on all claims. The Court noted that "where a neutral employment policy provides that a promotional exam shall only be administered on a particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on the date in question to take a make-up exam upon their return from service."

While the act does not specifically address harassment and hostile work environment claims, such claims have been found cognizable under USERAA. **Steeken v. Campbell County**, 2007 U.S. Dist. LEXIS 18500 (E.D. Ky. 2007) (hostile work environment claim cognizable under USERRA because the right to be

*See USERRA, page 11*

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*SPOTLIGHT, from page 9*

**SL:** I can't say I remember coming across any lawyers, but I do know some of our NELA members are avid cyclists. I've met people from all walks of life and from all over the country (and beyond) which is a wonderful part of the whole experience.

## NELA member Amy Shulman is a board member of openhousenewyork (ohny), which hosts the largest architecture and design event in the country

**RG:** What is OHNY?

**AS:** OHNY is a non-profit organization that educates the public about and showcases the architecture and design of the unique buildings and other structures in NYC. Throughout the year, OHNY hosts behind-the-scenes tours of buildings, residences and studios of historic, engineering or architectural merit, as well as lectures and talks with architects and planners. OHNY also conducts lessons about architecture in schools in under-served neighborhoods. Every October, OHNY hosts its signature event – the "Annual OHNY Weekend" – in which approximately. 200 interesting and intriguing sites and structures throughout the city are open for the public to explore for free. It's the largest architecture and design event in the country.

**RG**: What is your role in OHNY – what do you enjoy about it?

**AS:** I'm a member of the Governing Board (the equivalent of a Board of Directors) and Chair of the Board's Organization Committee, which handles personnel matters, board recruitment, non-financial legal matters, and some organizational/ structural issues. I am also the Board's liaison to OHNY's Volunteer Council, which runs the volunteer program for approximately 600 volunteers. As a Board member, I also participate in strategizing for fundraising opportunities and the overall growth of the organization. I enjoy the strategizing process and taking an active role in the governance and growth of a non-profit – while gaining exposure to the art and architecture community and learning about fascinating architecture and design.

**RG:** Does OHNY bring people to the courthouses – what are people's response on an architectural level?

**AS:** One Annual OHNY Weekend hosted tours of the Tweed Courthouse, which is visually and architecturally stunning. It is one of my favorite interiors. We would like to do programs with working courthouses, but have run into security concerns. I am very interested in seeing how architecture has been used to reflect "the law." (A few years ago, the Center for Architecture in NYC actually had an exhibit on the architecture of federal courthouses across the country.)

**RG**: Architects have beautiful handwriting (stereotypically), and lawyers have terrible handwriting (same) – why do you think that is?

**AS:** Good observation. This is just a wild guess – architects think visually, seeing the visual and structural relationship between every detail. Their handwriting may be an extension of that thought-process. I think that lawyers are trained to constantly prioritize details, and so handwriting merely becomes a means to an end. There's actually a former architect/now lawyer on our board – I'll have to see if her handwriting has changed. ■

*THIRD-PARTY SUBPEONAS, from page 12*

to realize that harassing, intrusive SDTs are a common tactic among defendants, and to know how to respond.

*The contributions to this article of Denise Gomez-Marquez, third-year student at CUNY Law School, is gratefully acknowledged.*

*Footnotes*

1 Even if not, some plaintiffs' counsel have had success in having the subpoenas held in abeyance pending a motion to quash.

2 See, e.g., *Barrington, v. Mortgage It, Inc*., 2007 U.S. Dist. LEXIS 90555 (So. Dist. Fla.); *Chamberlain v. Farmington Savings Bank*, 2007 U.S. Dist. LEXIS 70376, 2007 WL 2786421 (D.Conn. 2007); *Smartix International, L.L.C. v. Garrubbo, Romankow & Capese*, P.C.,

3 See, e.g., *Cook v. Foundation Coal West, Inc.*, No. 07-CV-192-B, U.S. District Court, District of Wyoming (June 3, 2008); *Lucy v. Columbia Management Group*, Docket No. M 8-85 (S.D.N.Y.).

4 Beth Conrod felt that she was excluded from lucrative deals and access to desirable clients after her employer was served with the SDT by Bank of New York's counsel. She was terminated approximately 18 months later.

5 In *Outley v City of New York*, 837 F.2d 587, 591-95 (2d Cir. 1988), the Second Circuit reversed a defense verdict because the trial court had admitted testimony about other lawsuits by the plaintiff. The Court held that such evidence was inadmissible under Rule 404(b) ("[l]itigiousness is the sort of character trait with which is concerned"). See, also, *EEOC v. Lexus Serramonte*, 237 F.R.D. 220, 223 (D. N.D. Ca. 2006).

6 "We don't try people for their character."

7 "Defense counsel: He may not have gotten bonuses for the same reason at the prior employers....
"The Court: It has nothing to do with his previous performance. He could have just as easily been a hotshot for his last employer and no good for you." ■

*THIRD-PARTY SUBPEONAS, from page 10*

sweeping request for all possible documents from current or former employers "looks like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-dredging and muckraking." **Perry v. Best Lock Corp.**, 1999 WL 33494858 (S.D. Ind. 1999).

## Reasonably Calculated to Lead to Relevant and Admissible Evidence

In **Perry v. Best Lock Corp.**, 1999 WL 33494858 (S.D. Ind. 1999), the Court quashed SDTs served on the plaintiff's current, former and prospective employers, noting that the "marginal and attenuated relevance" of the evidence sought was outweighed by the adverse effect on plaintiff's employability. "The potential burdens of the proposed discovery are also substantial in terms of broadcasting to a large group of businesses that Best Lock views Perry as an untrustworthy troublemaker." *Id. at *3*.

Recently, in **Cook v. Foundation Coal West, Inc.**, No. 07-CV-192-B, U.S. District Court, District of Wyoming (June 3, 2008) (quashing subpoena on current employer and barring production of records), in which the plaintiff was successfully represented by NELA/NY member Joshua Friedman, the court applied a balancing test: the defendant must "overcome [plaintiff's concern about the subpoena affecting her employment] by presenting 'independent evidence that provides a reasonable basis' to suspect that the information sought exists, **Graham v. Casey's General Stores**, 206, F.R.D. 251, 256 (S.D. Ind. 2002)."

In **Lucy**, defense counsel sought at oral argument to justify each of the items in the previously-quoted SDTs served on plaintiff's former and subsequent employer, and the court mowed them down one by one.

First, the Court accepted my argument that information related to complaints of discrimination, retaliation or failure to accommodate made by Lucy during his employment with the companies receiving the SDTs would be inadmissible at trial; evidence of similar allegations against other employers would be character evidence under Fed. R. Evid. Rule 404(a) and would be excluded as unfairly prejudicial under Fed. R. Evid. Rule 403.[5] The Court agreed[6]. A similar result was reached in **Graham**, *supra*.

Similarly, evidence of a plaintiff's performance for other employers cannot be admitted to show that the plaintiff performed poorly in his position with the defendant, because it is impermissible "character" evidence that would be excluded under FRE 404(a), or evidence of conformity with "prior acts" that would be excluded under FRE 406. **Chamberlain v. Farmington Savings Bank**, 2007 U.S. Dist. LEXIS 70376, 2007 WL 2786421 (D. Conn. 2007); **Zubulake v. UBS Warburg LLC**, 382 F. Supp. 2d 536 (S.D.N.Y. 2005) (court refused to allow defendant to subpoena a performance appraisal from a prior employer), as impermissible "character" evidence that would be excluded under FRE 404(a), or evidence of conformity with "prior acts" that would be excluded under FRE 406. Judge Cedarbaum also denied defendant's attempt to discover evidence of Lucy's performance for prior or subsequent employers, which is not admissible to prove alleged deficiencies in performance while employed by the defendant.[7] Ultimately, the court in **Lucy** quashed the entire subpoenas issued to two of the employers, and quashed the third except for documents explaining a payment from that employer, because plaintiff could not remember the purpose for which he received the money when questioned at his deposition.

The opinion in **Collins v. Midwest Medical Records Association**, 2008 U.S. Dist. LEXIS 18368 (E.D. Wisc. Feb. 7, 2008), provides a perfect illustration of all of the elements of a motion to quash an overly-broad SDT: In **Collins**, defendant sought to serve broad SDTs seeking "all records" concerning plaintiff on her current and former employers. Like the defendant in **Lucy**, MMRA advanced a flurry of rather thin reasons why it was entitled to the records sought, while the plaintiff was similarly concerned that the proposed SDTs would jeopardize her employment. The court concluded that "[i]n sum, MMRA has not established that the documents it seeks are sufficiently relevant to any of its affirmative defenses to outweigh the harm the subpoenas would potentially cause to Collins. Rather, it appears MMRA has subpoenaed these documents to see what might be out there." The court issued a protective order, barring service of the SDTs unless defendant was unable to secure information directly from plaintiff.

## Prior Notice Under F.R.C.P. Rule 45

Rule 45(b)(1) was amended at the end of 2007 to clarify that notice must be provided prior to service of an SDT. Notice is everything when it comes to SDTs served on employers, because it provides counsel with the opportunity to intervene before service informs employers of the existence of plaintiff's lawsuit against another employer.

The **Lucy** case represented a particularly egregious violation of Rule 45(b)(1). Defendant's counsel prepared Notices of Subpoena Duces Tecum which advised that the SDTs will be issued "on or after December 19, 2007" (although the notices themselves are dated December 20 and were sent to plaintiff's counsel by regular mail on that date, according to the certificates of service). The SDTs were served by hand from the defense firm's New York office on December 20, 2007, seeking production of the documents by January 4, 2008. No other method of transmission (such as fax, messenger or overnight courier) other than regular mail was used. With the Christmas holiday mails, plaintiff's counsel did not receive the notices and SDTs until December 26, 2007. From the point of view of giving notice of plaintiff's lawsuit, the damage had already been done by the time the SDTs were quashed.

## Conclusion

As a result of the vigorous advocacy by NELA lawyers and others, the law will hopefully continue to trend well in this area in New York Federal Courts. However, plaintiffs' employment lawyers need

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# Anne's Squibs

By Darnley Stewart *(dstewart@gslawny.com)*, Joshua Friedman *(josh@joshuafriedmanesq.com)*; Margaret McIntyre *(margmac@earthlink.net)*, and Jonathan Bernstein *(jbernstein@levydavis.com)*

***Disclaimer:*** These squibs are far from exhaustive—particularly this quarter. You should not rely upon them as a substitute for doing your own research and actually reading the cases. In addition, please bring any decisions, orders or results that you think might be helpful to other NELA/NY members to the attention of Rachel Geman *(rgeman@lchb.com)* Gary Trachten (*gtrachten@kudman law.com)* or Darnley Stewart *(dstewart@gslawny.com).*

**DAMAGES**

***Quinby v. WestLB AG, 2008 WL 3826695 (S.D.N.Y. 2008) (read backward, the decision says, "Pauley's dead")(Pauley, J.):*** On remittitur, the Court reduced a $500,000 compensatory damages award, finding it "not supported by competent evidence" of the "the magnitude and duration of emotional injury" and saying that plaintiff's injuries were no more than "garden variety emotional distress claims lacking extraordinary circumstances and without medical corroboration." *Id. at *3*. The Court cited the absence of medical testimony, and the so-called "garden variety" doctrine, as factors that required remittitur. It must be noted, however, that the New York Court of Appeals has expressly held that medical testimony and treatment are not a sine qua non, and that "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct," which it plainly was in **Quinby**. *See In re* **New York City Transit Auth.**, 78 N.Y.2d 207, 577 N.E.2d 40, 573 N.Y.S.2d 49 (1991) (award of $450,000 based solely on testimony of plaintiff). Moreover, in **Meacham v. Knolls Atomic Power Laboratory**, 381 F.3d 56, 78 (2d Cir. 2004), the Second Circuit held that the "garden variety doctrine" does not apply to state law claims.

***Simmons v. New York City Transit Authority, 2008 WL 2788755 (E.D.N.Y. 2008) (Or "Antollino Joli"):*** In **Simmons**, NELA/NY powerhouse Gregory S. Antollino humbled the Transit Authority, collecting a jury verdict which included $150,000 in compensatory damages. The Court denied defendant's remittitur motion, finding the following evidence sufficient to justify the damages awarded :

> Plaintiff testified that as a result of being out of work for one and one-half years she lost income, could no longer contribute to her grandson's schooling or afford to pay for her apartment, and had to move. She also testified that during this time period she felt and looked depressed, frustrated, and helpless. Her testimony was supported by the testimony of her colleague, who stated that she appeared fatigued following her removal from the train operator position, and her sister, who stated that she appeared exhausted and depressed. In addition, Simmons' treating psychologist, Dr. Rountree, testified that the main stressor in Simmons' life during the time period in question was her employment situation.

**DISCOVERY**

***Aita v. Department of State (EEOC Hearing No. 520-2008-00383x) (or "It's An Honor But Not A Privilege"):*** Plaintiff, a correspondent at the State Department's Bureau of International Information Programs, alleged that her transfer to a different portfolio in the Agency's Washington D.C. office was the result of age discrimination and that the Agency retaliated against her when she complained about the unlawful transfer. Plaintiff's complaint was investigated by Agency attorney Mary McLeod. During discovery in the case, plaintiff sought discovery of McLeod's investigation file. Defendant opposed production on the grounds of the attorney work product doctrine and attorney-client privilege. The ALJ ordered discovery of the file, finding that plaintiff had demonstrated "substantial need" for the investigative materials, and that the attorney-client privilege had been waived by virtue of McLeod's having "interjected herself as a witness" in the matter.

***Note: NELA/NY stalwart Daniel Alterman is counsel for plaintiff in the case.***

***Rivera v. Lutheran Medical Center (Case No. 22050-2005) (Sup. Ct. Kings Co., Oct. 16, 2008 (Ambrosio, J.) (or "Ambrosio of the Gods"):*** In a disability association discrimination and retaliation case, defendant's counsel Morgan Lewis & Bockius, LLP, contacted current employees of the Medical Center and offered to represent them free of charge in their capacity as possible witnesses in the case. Plaintiff alleged that Morgan Lewis solicited these witnesses as clients in violation of DR 2-103(a)(1) in order to prevent plaintiff from exercising his right to informally interview them in accordance with **Niesig v. Team I**, 76 N.Y.2d 363 (1990). The Court agreed and disqualified Morgan Lewis as counsel to the witnesses. In his decision, Judge Ambrosio highlighted the importance – as stated in **Niesig** -- of not closing off "avenues of informal discovery of information that might serve both the litigation and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes." Moreover, the Court found that Morgan Lewis had unethically solicited the witnesses "to gain a tactical advantage" in the litigation "by insulating them from any informal contact with plaintiff's counsel." According to the Court, this was "particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effec-

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tively did an end run around the laudable policy consideration in **Niesig** in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court." The Court noted that the attorney-client relationship should have come about at the request of the employee – not the other way around.

**EMOTIONAL DISTRESS**

***Sims v. Blot, 534 F.3d 117 (2d Cir. July 18, 2008) (or "Kearses on the Court"):*** In a prisoner's rights case alleging excessive force, defendant sought plaintiff's psychiatric records based on alleged waiver (due to plaintiff's deposition testimony as to his anxiety and fear caused by defendant's actions) and because, according to defendant, plaintiff's mental state would be probative of the reasonableness of the defendant's actions. Most relevant to our practice, defense counsel also argued that even "garden variety" emotional distress claims (*i.e.*, claims not alleging damages arising from any specific psychiatric disorder caused by the defendant) require production of otherwise privileged mental health records. Adopting the reasoning of **Koch v. Cox**, 489 F.3d 384 (D.C. Cir. 2007), the Second Circuit (Cabranes, Leval, Kearse) rejected defendant's arguments, holding that a plaintiff does not forfeit his psychotherapist-patient privilege merely by asserting a claim for injuries that do not include emotional damage or by merely stating that he suffers from a condition such as depression or anxiety for which he does not seek damages. In addition, the Court stated that a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting his psychotherapist-patient privilege, and that a party's psychotherapist-patient privilege is not overcome when his mental state is put in issue only by another party. Thus, the Second Circuit has now held squarely that a civil rights plaintiff asserting garden-variety emotional distress does not thereby place his emotional state in issue so as to waive psychotherapist-patient privilege and subject his therapeutic records to disclosure.

**CONDOLENCES**

Mother of John Beranbaum, **Betty Beranbaum**, passed away on August 25, 2008

Bill Frumkin's father, **Aaron Frumkin**, passed away on November 6, 2008 in Florida

We send our heartfelt sympathy to you and your families.

**HOSTILE WORK ENVIRONMENT**

***Ifill v. United Parcel Service, 2008 WL 2796599 (S.D.N.Y. July 17, 2008) (Swain, J.) (or "Not UPS With People"):*** Plaintiff asserted claims for disparate treatment on the basis of her race and sex as well as retaliation. On summary judgment, the Court dismissed plaintiffs' race and sex-based claims due to her failure to demonstrate pretext. With respect to plaintiff's hostile work environment claim, the Court found that a supervisor's alleged "micromanagement" and "excessive monitoring" of plaintiff were not actionable – nor was a single instance of the supervisor's screaming at plaintiff about an outside real estate business that she ran because the conversation was followed promptly by a meeting in which the supervisor was instructed to be more sensitive and he apologized. The Court, however, upheld plaintiff's claim that UPS reduced her stock award in retaliation for her having submitted to HR a "Concern Memo" in which she complained about continuing disparate treatment on the part of her supervisor.

***Callahan v. Buerkle, 2008 WL 2900936 (D.Conn., July 25, 2008) (Bryant, J.) (or "The Principal is not Your Pal"):*** Plaintiff, a male public school teacher, alleged that Buerkle, his female supervisor, subjected him to a hostile work environment when she asked him out for "a drink or two" and several months later "placed her chair very close to his," "stroked" his leg from the upper thigh to the knee, and said either that he "really look[ed] good" or that he was wearing "nice pants and nice shoes." The Court dismissed plaintiffs' claims, finding them as isolated acts "not serious enough" to be actionable.

***Smith v. Cingular Wireless, 2008 WL 3855056 (D.Conn. August 18, 2008) (Hall, J.) (Or "No Cingular Sensation"):*** Plaintiff Smith asserted that she was unlawfully terminated because of her race and disability and in retaliation for complaints about discrimination. She further alleged that she was subjected to a hostile work environment prior to her termination. The Court granted summary judgment on plaintiffs' ADA claims on the basis that she was not disabled by her back injury, and with respect to her wrongful termination claims because she was unable to establish that "defendant's false explanation was proffered to mask race discrimination." The Court, however, refused to dismiss plaintiff's hostile work environment claim, finding that:

> In this case, a reasonable jury could conclude that Taylor subjected Smith to a hostile work environment. Taken individually, none of Taylor's actions would likely be enough to sustain a claim. However, a jury could find that Taylor did the following: he repeatedly refused to accommodate Smith's back injury, even after being instructed to do so by his superiors, with the result that Smith experienced significant pain; he repeatedly criticized Smith's performance, without justification; he repeatedly gave Smith reprimands that were out of proportion to any of her violations; and he intentionally overworked

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# First Litigation Fund Grant Made to Pay Expert's Fees

NELA/NY member Bernard Weinreb, Esq. was the first recipient of a Litigation Fund grant. Bernie successfully prosecuted a sexual harassment case on behalf of three restaurant employees. There were no economic injuries only compensatory damages. Bernie applied for a grant to retain a forensic psychologist to support his clients' claims of emotional distress. The Litigation Fund paid half of the cost of three expert reports. The matter has been settled and, in addition to repaying the grant, Bernie is making a contribution to support the Litigation Fund. The Litigation Fund provides grants to assist attorneys and litigants in financing employment rights litigation. Grant applications and additional information about the Fund may be obtained at our Website www.nelany.com. NELA/NY will donate ten percent of the money raised through our Commemorative Journal to the Litigation Fund. The Litigation Fund is a project of Workplace Fairness, a tax-exempt organization under 501 (c) (3) of the Intern ■

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free from a hostile work environment, broadly construed, is a benefit of employment). Harassment on account of military service must meet the severe and pervasive standard applied to Title VII discrimination claims. **Petersen v. Dep't of Interior**, 71 M.S.P.R. 227 (M.S.P.B. 1996).

### Protection against retaliation

USERRA also protects an employee from retaliation against anyone who files a complaint; testifies, assists or otherwise participates in an investigation or proceeding under the law; or exercises any right provided under USERRA. Section 4311(c)(1). The retaliation provision prohibits reprisal against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. 38 U.S.C. § 4303(3).

### Burden of Proof

An individual bringing a USERRA discrimination claim bears the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action. **Sheehan v. Department of Navy**, 240 F.3d 1009, 1013 (Fed. Cir. 2001). The employee need not make a showing that this discriminatory motive was the sole factor. Unlike the burden shifting for Title VII cases outlined in **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) and its progeny, the burden of persuasion then shifts to the employer to prove that legitimate reasons, standing alone, would have induced the employer to take the same adverse action. **Sheehan v. Department of Navy**, 240 F.3d 1009, 1013 (Fed. Cir. 2001); **Curby v. Archon**, 216 F. 3d 549, 556-57 (6th Cir. 2000). In other words, to avoid liability the employer must be able to establish that the action would have been taken despite the protected status.

Discriminatory motivation may be reasonably inferred from factors that include: (1) proximity in time between the employee's military activity and the adverse employment action; (2) inconsistencies between the proffered reason and other actions of the employer; (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. **Sheehan**, 240 F.3d at 1014.

### Enforcement

The Department of Labor's Veterans' Employment and Training Service (VETS) has authority to investigate and to work to resolve complaints. A "complainant" does not however have to file a complaint with VETS. If a complaint is filed with VETS and VETS cannot successfully resolve the matter, the complaint may be submitted to the Department of Justice for possible prosecution.

USERRA also provides a private right of action for which there is no administrative exhaustion requirement. USERRA does not state an express statute of limitations for bringing claims. Some Courts have held that such claims are subject to a general *four-year* statue of limitations applying to federal claims stemming from laws enacted after December 1, 1990. 28 U.S.C. § 1658(a); *See* **Aull v. McKeon-Grano Assocs.**, No. 06-2752 (HAA), 2007 U.S. Dist. LEXIS 13008, 11-12 (D.N.J. Feb. 26, 2007)

### Remedies

USERRA specifically provides for the following remedies:

1. lost wages and benefits;
2. liquidated damages (double the lost wages and benefits) where the violation is found to be willful;
3. attorneys fees and costs;
4. injunctive relief requiring the employer to comply with the Act;
5. temporary or permanent injunctions, temporary restraining orders and contempt orders.

38 U.S.C. § 4323(d)-(e); 38 U.S.C. § 4323(h). ■

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counsel or the court.

Judge Patterson was especially disturbed by the fact that the defendant had not first attempted to obtain the information by less intrusive means, such as in the deposition or through requests for production.[3] "Because of the direct negative effect that disclosures of disputes with past employers can have on present employment, subpoenas in this context, if warranted at all, should be used only as a last resort." *Id. at *5*. The court also held that issuing a subpoena to plaintiff's current employer amounted to "harassment" under Rule 26(c) by causing plaintiff to worry about her continued employment relationship.

Of course, although the court quashed the subpoenas, some of the damage was already done by the mere fact of the service of the SDT itself. While many judges have quashed SDTs or issued protective orders, we never know the fate of those plaintiffs whose employers or prospective employers already had been notified of the lawsuits at issue.[4]

With one exception of which I am aware, plaintiffs moving for a protective order or to quash SDTs have been successful in District Courts within the Second Circuit.

In **Gambale v. Deutsche Bank AG**, 2002 U.S. Dist. LEXIS 22931 (S.D.N.Y. 2002), the plaintiff had fortunately escaped the damage of disclosure, as defense counsel gave notice of the potential SDTs prior to actual service, a point specifically noted by Magistrate Judge Eaton as distinguishing that case from **Conrod**. However, Judge Eaton quashed "very broad" subpoenas intended for five executive search firms that plaintiff had contacted, noting defendant's "weak" argument as to relevance:

> "A search firm would probably find it an intrusive burden to produce its notes of all communications with plaintiff or with prospective employers on her behalf. Also, 2003 is a difficult time to be looking for a executive position, and I cannot lightly dismiss plaintiff's worry about anything that might cause a search firm with a good 'lead' to offer it to another client rather than to her." *Id. at *4*

Subpoenas to former and subsequent employers were also quashed in **Lucy v. Columbia Management Group**, Docket No. M 8-85 (S.D.N.Y.) (March 14, 2008) (Cedarbaum, J.); **Chamberlain v. Farmington Savings Bank**, 2007 U.S. Dist. LEXIS 70376, 2007 WL 2786421 (D.Conn. 2007) and **Smartix International, L.L.C. v. Garrubbo**, Romankow & Capese, P.C., 2007 U.S. Dist. LEXIS 85807 (S.D.N.Y.) (Eaton, M.J.).

However, in **Garrett v. Axiom International Investors**, 2008 U.S. Dist. LEXIS 34096 (D.Conn. April 25, 2008), the court allow the SDTs to be served on a company with whom plaintiff (a fund manager) interviewed but was not employed by. Defendant convinced the court that the information sought was necessary to prove its defense, that plaintiff had not been fired for a discriminatory reason but had lost interest in the company and was interviewing with other employers, causing her performance to dwindle.

The court was particularly dismissive of plaintiff's concerns about the effect of the SDT on her career. The magistrate judge rejected plaintiff's citation of **Gambale** on the basis that the subpoena in that case was directed at search firms, not employers. The court "cannot find that the enforcement of this one subpoena will cause harm to Garrett's reputation in the industry," distinguishing **Conrod** on the narrow basis that the concerns expressed in that decision were based on a subpoena issued to a *current* employer, not just a prospective one. "Furthermore, Garrett's lawsuit is already a matter of public record; the *Fairfield County Business Journal* published an article regarding the case on September 24, 2007. This article is the first link that appears when performing a Google search of **Garrett**. Presumably any employer and/or investor in today's world would, at a minimum, use Google or a similar search engine to research Garrett." 2008 U.S. Dist. LEXIS 34096 at *11.

## Over-Breadth

Many of the SDTs seek a very broad array of records. **Lucy v. Columbia Management Group**, *supra*, is one such example. While his disability discrimination case was pending in federal court in Massachusetts, I represented the Plaintiff in moving to quash three SDTs which defense counsel had served on his former and subsequent employers in New York. The SDTs called for production of:

> Any and all records relating to C. Richard Lucy, Social Security No.: XXX-XX-8957, Date of Birth: xxxxx, including, but not limited to all records of employment, including: personnel records; managers' files; suspensions; paid leave; unpaid leave; employment application; disciplinary records; performance reports; records comprising or relating to promotions or changes of status; records comprising or relating to wages, salary, or other payments; and all documents related to any formal or informal complaints by or concerning C. Richard Lucy including all formal or informal complaints of discrimination, retaliation, failure to accommodate, non-payment of wages, and wrongful termination, during his employment with [your company] from the date of his hire to the present.

The Court agreed with me at oral argument that the SDTs were overly broad.

Several courts have held that a blanket discovery request for a plaintiff's entire personnel file, or for "any and all documents" without limitations, is overly broad on its face. **Badr v. Liberty Mutual Group**, Inc., 2007 U.S. Dist. LEXIS 73437 (D. Conn.) and cases cited therein at *2; **Franzon v. Massena Memorial Hospital**, 189 F.R.D. 220, 222 (N.D.N.Y. 1999); Richards v. Convergys Corp., 2007 U.S. Dist. LEXIS 1513 (D. Utah 2007); **Premer v. Corestaff Services**, L.P., 232 F.R.D. 692, 693 (M.D. Fla. 2005). A

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> Smith, causing her to become stressed. Taken together, these actions are sufficient to constitute harassment that affected the terms and conditions of Smith's employment.

***McKenzie v. Gibson, 2008 WL 3914837 (S.D.N.Y., Aug. 25, 2008) (Pauley, J.) (Or "Dress Code Red"):*** An attorney at the DHR alleged that she was retaliated against after she complained about Commissioner Kumiki Gibson's new dress code which prohibited women from wearing jeans in the workplace, but not men. Plaintiff also claimed that the policy itself was discriminatory as it made her feel "humiliated" and "inferior" to the men. The Court disagreed, holding that the Commission's policy did not alter the terms or conditions of McKenzie's employment beyond 'just a mere inconvenience." **Id. at 3**. The Court, however, upheld McKenzie's retaliation claim, finding that she adequately alleged a series of adverse actions, including reassignment to menial tasks, hours of interrogation, and denial of sick leave, after complaining about the new policy.

***Manigault v. Good Samaritan Hosp. Medical Center, 2008 WL 4104691 (E.D.N.Y. September 2, 2008) (Bianco, J.) (Or "Custodial Battle"):*** Plaintiff custodian filed a pro se Title VII case alleging promotion and wrongful termination. The Court granted the Hospital's motion for summary judgment, finding that plaintiff's numerous Disciplinary Action Notices appropriately disqualified him for promotion and constituted a legitimate, non-discriminatory reason for his termination. The Court also dismissed plaintiff's hostile work environment claim, finding the "alleged 'harassment' by Brady in the form of (1) "picking on" plaintiff; (2) Muir's comment to plaintiff that "she could fire [plaintiff's] blak [sic] ass if [he is] not careful"; and (3) plaintiff's claim that defendant forced him to wear a gray uniform while certain white employees "wore blue jeans and white t-shirts without consequence," at best "episodic," and not "sufficiently continuous and concerted in order to be deemed pervasive." *Id. at *18.*

***Siddiqi v. New York City Health & Hospitals Corp., 2008 WL 3833869 (S.D.N.Y., Aug. 12, 2008) (McMahon, J.) (or "A Siddiqi Situation"):*** Plaintiff asserted claims for race, age, religion and national origin discrimination based on AHHC's failure to promote him, its refusal to give him days off for religious holidays, giving him negative performance evaluations and for creating a hostile work environment. The Court dismissed all but plaintiff's hostile work environment claim and his claim that defendant discriminated against him on the basis of his religion by denying him and other Muslims religious holidays off while allowing Christian and Jewish workers leave for religious observance. Although incorrectly holding *sub silentio* that the NYCHRL incorporates the *Meritor* "severe or pervasive" standard, the Court found that plaintiff had stated a viable claim:

> Based on plaintiff's description of Dr. Kaplan's behavior, as confirmed and bolstered by statements from Muslim co-workers . . . I conclude that Plaintiff has crossed the threshold. If Plaintiff proves that Dr. Kaplan "always" put his finger in Plaintiff's face, and repeatedly threatened him and other Muslim co-workers during Siddiqi's four years at Bellevue, then a trier of fact might conclude that Dr. Kaplan adversely altered the working conditions of a reasonable Muslim employee.

*Id. at * 17.*

***Barbusin v. Eastern Connecticut State Univ,, 2008 WL 4079240 (D.Conn., Aug. 28, 2008) (Chatigny, J.) (or "Police Report (Not)"):*** Plaintiff Barbusin was a state university police officer who was sexually harassed by her supervisor over a period of several months. Plaintiff did not complain about the harassment in accordance with the University's sexual harassment policy. Instead, she complained to a co-worker who, in turn, reported her complaint to a manager. The University investigated, determined there was a second alleged victim, and fired the harasser. The harasser grieved the termination and six months later the employer was required by an arbitrator to reinstate the harasser in a less senior position. The opinion explains that the "prospect of [her harasser's] return was very upsetting to [plaintiff] and she felt compelled to resign." As noted by the Court, under **Faragher/Ellerth**, "an employer is strictly liable for supervisor harassment if the harassment culminates in a 'tangible employment action, such as discharge'." The plaintiff must further show that "the conduct complained of constituted official action of ECSU, as distinct from co-worker conduct or unofficial supervisory conduct," **Id. at *4**, citing **Pennsylvania State Police v. Suders**, 542 U.S. 129, 141 (2004) and that "the conduct was even more severe and pervasive than the conduct required to support a hostile work environment claim." Id. Plaintiff's claim failed because the event that prompted the constructive termination—her harasser's return to the workplace—happened against her employer's wishes. Plaintiff's hostile work environment claim also failed because, in the absence of a tangible employment action, the employer was entitled to assert a **Faragher/Ellerth defense**. Noting that plaintiff did not dispute that ECSU had an adequate sexual harassment policy in place, and that she failed to report Miranda's harassment for a period of four months, although she knew how to do so, the Court dismissed plaintiffs' harassment claim.

## PREGNANCY DISCRIMINATION

***Infante v. Ambac Financial Group, 257 Fed. Appx. 432 (2d Cir. 2007) (or "Infante-lism") (Jacobs, Parker, Wesley) (Summary Order):*** In **Infante**, the Second Circuit affirmed the district court's grant of summary judgment (2006 U.S. Dist. LEXIS 4310 (S.D.N.Y.)) to employer. The Court found insufficient evidence to send to a jury the question whether pregnancy discrimination motivated the employer's decision to replace

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plaintiff following several extensions of her medical leave following her pregnancy. The Court also rejected plaintiffs' claims that the questions asked of her about her commitment to return to work while she was interviewing for alternative positions at Ambac were discriminatory: "The questions Infante was asked during her interviews were incidental and did not evince a direct link between gender stereotypes and Ambac's rejected of Infante for the positions."

***Joy v. Versus Kinplex Corp., 2008 U.S. Dist. LEXIS 36977 (E.D.N.Y., May 6, 2008) (Bianco, J.) (Or "The Joy of Motherhood").*** Plaintiff Joy alleged that pregnancy discrimination motivated her employer's decision to terminate her employment following an extended pregnancy leave. The Court denied the employer's motion for summary judgment, finding genuine issues of material fact regarding whether or not the defendant violated its own policy of allowing up to eight weeks off following delivery; lack of evidence of the defendant's claim to have a policy of allowing only twelve weeks total leave time; the significance of the timing of defendant's decision to terminate plaintiff, along with defendant's citation of the length of plaintiff's leave as a reason for the decision; and disputes of fact as to whether plaintiff's leave caused defendant undue hardship.

***Forde v. Beth Israel Medical Center, 546 F. Supp. 2d 142 (S.D.N.Y 2008) (Chin, J.) (or "Wasn't He a Plaintiff's Lawyer?").*** Court granted summary judgment to employer due to "overwhelming evidence" of performance issues prior to plaintiff's pregnancy. Timing of termination immediately following plaintiff's informing employer of pregnancy was insufficient to raise a genuine issue of material fact requiring trial.

***Helmes v. South Colonie Central School District, 2008 U.S. Dist. LEXIS 72960 (N.D.N.Y., July 8, 2008) (Hurd, J.) (Or "Unmerry Pop-Ins")*** Plaintiff, a teacher, alleged pregnancy discrimination motivated defendant's denial of tenure following plaintiff's return from maternity leave. As an initial matter, for purposes of determining whether or not plaintiff was in a protected category, the Court found that plaintiff was still "affected by pregnancy" when she suffered the adverse employment action nine weeks after returning to work, having first been subjected to a surprise "pop-in" evaluation only two weeks after returning to work from maternity leave. The employer's summary judgment motion was denied due to evidence of the surprise evaluation; plaintiff's receipt of a lower performance rating than she received in several evaluations prior to her maternity leave; the fact that plaintiff was replaced by a person outside of the pro-

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# Spotlight on NELA Memebers

by Rachel Geman (rgeman@lchb.com)

We know each other primarily as plaintiff-side employment lawyers – in fact, we are also much more. This occasional series will put the "spotlight" on NELA members. If you have a cherished hobby or avocation you'd like to discuss – or even a fun way to spend your time other than lawyering - we'd love to hear about it.

### NELA member David Fish is a practitioner of mixed martial arts. Nela newsletter co-editor-Rachel Geman had some questions for him:

**RG:** What is it about boxing and martial arts you enjoy?

**DF:** Boxing (and "mixed martial arts" or "MMA," which is what I primarily do) is the ultimate physical and mental challenge. You truly get to test your body's limits and learn that you are stronger than you originally believed. I've learned a great deal about myself, and I've made some wonderful relationship in boxing and martial arts. It also keeps me in shape – fighting guys up to 20 years younger than me. It's also exciting to see some of my training partners getting professional contracts and becoming successful on the national level.

**RG:** Do you find that a disproportionate share of boxers are lawyers -- if not, should more of us be putting on gloves?

**DF:** Actually, no. While I know a few who train in boxing and other martial arts, most of my colleagues are surprised, intrigued or horrified by what I do. I think everyone should experiment with some form of martial arts. It is an incredibly rewarding and life-changing activity.

**RG:** There are so many sports metaphors relevant to issues we lawyers face – how to fight, when to fight, what is fair, when to quit, etc. Are there good boxing metaphors? Why do you think they have not sunk into legalese the way baseball and to a lesser extent other sports like football have?

**DF**: Listen, Rachel, I'm in your corner for this interview, but it may be time to throw in the towel. I'm mean, your questions are a little heavy handed. You're putting me up against the ropes and hitting below the belt. I think I'm down for the count. No…saved by the bell.

**RG:** Touche! How many times have you seen the original Rocky?

**DF:** I can't count. Well, I can still count (I'm not that punch-drunk); I mean I can't remember how many times. It really is a great movie. I also recommend Raging Bull, Million Dollar Baby and Cinderella Man.

**RG:** Does your family support your fighting?

**DF:** They are nervous about it, especially when I come home with black eyes and bloody noses. But my kids support it. My 8 and 6 year old daughters have been training for years and my 6 year-old is testing for her black belt in mixed martial arts in October. If she passes, she will be one of the youngest ever. My kids inspire me to work hard.

### For NELA executive director Shelley Leinheardt, a typical bike ride is 20 miles – and a "fun" one is 30-35 miles:

**RG:** You are an avid biker. Some of us associate bikes with either (a) scary spin classes or (b) childhood play. Can you re-orient us – what does serious biking entail?

**SL:** Well, I'm not so sure I qualify as a "serious" cyclist. I just love it and while I do spin, it's a whole other experience. You may get a better work out taking a spin class, but being "outdoors" on a bike cycling is what I prefer.

**RG:** What do you love about the outdoor biking?

**SL:** Biking for me is being one with nature and the environment, while deriving the benefit of exercising. I can't say there's anything I don't love about it, except of course those long mountainous climbs. It's almost meditative for me. I generally cycle alone, as most people I know who do bike don't go the distance.

**RG:** Biking means a lot of travel. Can you tell us some of the best places?

**SL:** My very first organized bike trip was in 1996 to Provence with my son, David, which made the trip even more special for me. It was gorgeous cycling while still challenging. All my trips I'd say were challenging. All other organized bike trips I went alone. I've only been to countries where we did a lot of climbing more than flat terrain. A few years later, I went to Bali, Vietnam, and my last trip two-and-a-half years ago was to Greece. I'm not so sure I would be up for this type of strenuous cycling again, but never say never! Right now I don't have any bike trips planned. What I particularly love about taking bike trips is going to areas where tourists generally don't go. You get to be with the people, taking the back roads of travel and cycling through tiny villages. This experience gives you a small window into the world of the people and how they live. There is a support van if one chooses not to cycle on a particular day or the miles for the day, and there are always several mile options in a day, more or less. Your luggage is transported by a van while you cycle to each destination. Of course, there's no cycling in major cities -- too much traffic and too dangerous.

**RG**: Do you find a lot of bikers are lawyers or people who work in the legal field?

*See SPOTLIGHT, page 13*

*Workers Compensation*
*&*
*Social Security Disability*

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