NELA THE NEW YORK EMPLOYEE ADVOCATE

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

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NYC Health and Hospital Corporation Settles Whistleblower Suit for $100,000 and Rehires Employee

Catalino Ramirez, a maintenance worker assigned to Gouverneur Hospital, operated by the New York City Health and Hospital Corporation (HHC), settled his federal "whistleblower" and retaliation case for $100,000, in addition to re-hire and assignment to another City hospital.

According to the suit, Ramirez was directed by his supervisor, while on City time and using City tools and materials, to leave the hospital premises and to attend to personal business, including providing carpentry work at the synagogue where the supervisor was a member. The suit further alleges that patients' official medical records were kept in the unsecured and accessible basement of the supervisor's apartment building.

Ramirez made several complaints to the HHC Inspector General about the actions of his supervisor. As a result of reporting these incidents, Ramirez was subjected to a series of false, frivolous and bogus disciplinary charges of misconduct (including possession of a firearm) with the intention of having Ramirez terminated from his position with the

See WHISTLEBLOWER, page 12

Morgan Stanley Pays $54 Million to Settle Discrimination Case

(EEOC/Schieffelin v. Morgan Stanley)

On July 12, 2004, Morgan Stanley agreed to pay $54.0 million to settle a gender discrimination case brought by the United States Equal Employment Opportunity Commission and Allison Schieffelin.

The case started in November 1998 when Ms. Schieffelin filed a Charge of Discrimination against Morgan Stanley alleging that she was discriminated against based on her gender in promotion, compensation, and terms, conditions and privileges of employment. Her charge was filed on behalf of herself and other similarly situated women. Ms. Schieffelin later filed supplemental charges of discrimination and retaliation, including a charge of retaliation based on Morgan Stanley's termination of her employment in October 2000.

The EEOC investigated the charges and then issued letters of determination finding discrimination against Ms. Schieffelin and other professional women worldwide in Morgan Stanley's Institutional Equity Division ("IED") and finding retaliation against Ms. Schieffelin. In September 2001, the EEOC and Ms. Schieffelin sued Morgan Stanley in federal court, alleging a pattern and practice of discrimination against professional women in Morgan Stanley's IED and alleging discrimination and retaliation against Ms. Schieffelin.

After extensive discovery and substantial motion practice, the trial of the EEOC's pattern-and-practice case was scheduled to start on July 12, 2004. The part of the EEOC's case dealing with individual determinations of liability and damages was bifurcated for later proceedings. Ms. Schieffelin's part of the case was severed for later trial.

The EEOC intended to show at trial that women in the IED were promoted slower and less often than similarly-situated male colleagues, were paid less than such male colleagues, and were subjected to adverse terms, conditions, and privileges of employment. To prove its case, the EEOC intended to introduce statistical evidence of gender discrimination, supported by anecdotal evidence from more than 20 women. The EEOC planned to introduce evidence of men-only sports outings and trips to strip clubs, which allowed male employees in the IED to have greater opportunities to mingle with company clients and with senior company executives. The EEOC also intended to introduce evidence of subjective decision-making processes that allowed stereotypical assumptions to affect promotion and compensation decisions. Of course, Morgan Stanley planned to introduce evidence and to make arguments to rebut the EEOC's case.

On the eve of the trial, the entire case was settled. Morgan Stanley agreed to pay $54.0 million : $2.0 million to fund diversity programs; $12.0 million to Ms. Schieffelin for her retaliatory discharge claim; and $40.0 million into a pool to be allocated among women in the class pursuant to a claims process.

A former federal judge, Abner Mikva, will serve as the Special Master for the claims process. He will allocate the $40.0

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Post of the Month

From: Jonathan Ben-Asher
[*jb-a@bmbblaw.com*]

Sent: Thursday, August 12, 2004
7:58 PM

To: nelanewyorkstate@
yahoogroups.com

Subject: Re: [nelanewyorkstate] Paying for confidentiality—what cases should we take?

If we all only took cases we thought were strong enough to try to verdict, a great many of our clients would have no remedy for the issues they have in the workplace.

Most employees do not come to us with strong discrimination claims. Employers have become savvy and the workplace has become more diverse. For every client who meets with us about a discrimination issue, there are several more for whom the issues are different. Maybe the issues revolve around contractual or non-compete claims; maybe the client is a victim of pure corporate politics; maybe the client has played the political game poorly; maybe the client is just doing a poor job, or a job that's not up to current snuff.

Most importantly, clients have different points to which they are willing to push a case. Many of them know that there is only so far they can go with a claim before making themselves pariahs in their field.

I am not saying that strong claims should not be aggressively prosecuted. But that has to be done with a focus on what the client wants and what's good for the client. I often tell clients: you have your case, and you have your life Your life is more important than your case, and your case is only a tool to make your life better.

The NELA/NY Calendar of Events

October 22
NELA/NY Fall Conference
Yale Club of NYC
(see brochure)

November 18 • 6:00 pm
NELA Seventh Annual Dinner
101 Club
101 Park Avenue @ 40th Street

December 14 • 6:00 pm
NELA/NY Holiday Party
(SAVE THE DATE)

December 15 • 6:00 pm
Board of Directors Meeting
3 Park Avenue—29th floor
(Open to all Members in Good Standing)

New Members

Prof. Vivian Berger
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Work: 212-595-3317
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Matthew Porges, Esq.
264 17th Street, 2nd Floor
Brooklyn, NY 11215
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mporges@hotmail.com

POSITION WANTED

NELA/NY member will consult with law firms on in-house or client-based labor and employment law issues.
22+ years of experience representing plaintiffs and defendants.
Will also do temporary litigation support. Hourly Basis.
Barbara G. Lifton
femlawye@sprynet.com

A Word from Your Publisher

The New York Employee Advocate is published quarterly by the National Employment Lawyers Association, New York Chapter, NELA/NY, 3 Park Ave., 29th Floor, New York, New York 10016. (212) 317-2291. E-mail: *nelany@nelany-com*. Unsolicited articles and letters are welcome but cannot be returned. Published articles do not necessarily reflect the opinion of NELA/NY or its Board of Directors, as the expression of opinion by all NELA/NY members through this Newsletter is encouraged.

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Items for the calendar may be submitted by calling Shelley Leinheardt:
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President's Column

by Herb Eisenberg, President, NELA/NY

The views and opinions expressed here are my own and not those of NELA or NELA/NY.

This is a strange time that will be remembered historically as one where compassion has been replaced by fear, and community has been upended by polarization. Whatever happens in the coming election, we have an enormous task ahead.

There are countless specific instances of federal policy run amuck. The Bush administration, ruling with a narrow view of economic justice, and forsaking working people, has limited by regulation the overtime rights of millions. As exemplified by the Patriot Act, erosion of civil rights and liberties has been justified by reference to national security and the use of fear to legitimize overreaching conduct.

All this occurs while assault weapon bans expire, the deficit spirals out of control, and tax reductions for Fortune 500 corporations and wealthy individuals are seen as positive fiscal policy.

At the same time, elimination of double taxation of attorney fees in employment discrimination cases moves slowly through Congress and elimination of taxation of emotional damage awards is not part of any legislative proposal.

There can be no doubt that the horror of 9/11 has affected each of us in a profound way. Safety and security are of prime importance. But using safety and security to justify policies having little or no connection to 9/11 is deceptive and wrong. We must reinvigorate the way people talk in our country. The administration has not only hurt working people by their policies but their actions too will have a much longer impact in the way we are able to litigate and prove our cases. This impact will be felt in the way jurors and jurists hear our arguments, hear our clients, hear the truth, and accept pretextual rationalizations for unlawful conduct.

The diminution of the spirit of community is palpable. Post 9/11, we all came together as did much of the international community in our support. Now we are divided, not only between blue and red states, but between the bigger "us" and "them." The administration exacerbates the problem by further polarizing the country. The "them" are fundamentalists, Islamists, the French and Germans, any country that doesn't support "us," anybody who doesn't support faith based initiatives, anyone who is against the war or anyone who doesn't support the present administration.

The Republican convention was driven by intolerance. The "us" and "them" became the Republicans and "everybody else." While critical analysis of public policy is a linchpin of democracy, criticism of the policies of our country was demonized as treason. As stated by Paul Krugman in the New York Times after the convention in our City, "… the vitriol also reflects the fact that many of the people at that convention, for all their flag-waving, hate America. They want a controlled, monolithic society; they fear and loathe the nation's freedom, diversity and complexity."

It is our job as lawyers representing employees to fight to protect that freedom, diversity, and complexity. It is our job to make it possible to be heard in support of those ideals. It is our job to speak loudly so that others are not only encouraged to do the same but also so that people can hear our clients' claims without derision, and with an open and hopefully sympathetic ear. There have been similar struggles in the not too distant past. The labor movement in the early to mid 20th century, the civil rights movement of the fifties and sixties, the anti war movement of the sixties, and the women's movement of the seventies all changed the way we think and speak. We must actively make those struggles live on in our daily work.

On another note: (with credit to Bruce Frederickson for text)

I have just returned from the Fall NELA Board meeting and wanted to report on a number of the many important activities NELA is engaged in to enable us all to be the best employee advocates that we can be. Here is a short list of some of the things NELA is doing:

1. Federal Employee Rights Seminar. This fall's NELA seminar will be held in Washington, D.C. on October 1 and 2, 2004. The speakers include many of NELA's (and MWELA's) most effective federal employee advocates. Don't miss it if you represent federal employees. If it's anything like every other NELA seminar I have ever attended, there's bound to be a ton of sharing of some very practical tips by both the speakers and those who attend.

2. Legislative Agenda. This fall, NELA will be reexamining our legislative agenda to determine our highest priorities. Our top priority remains the Civil Rights Tax Relief Act, and hopefully, we will have at least the attorneys' fees component of the CRTRA behind us by that time. In November, we will be looking forward to addressing other compelling needs of our clients, and your thoughts and ideas are most welcome.

3. Amicus Work. NELA continues to brief the important employee rights issues of the day. Most recently, we have filed an amicus brief, drafted by Doug Huron and Steve Chertkof, arguing against the double taxation of the award of attorneys' fees in Banks v. Commissioner, now pending at the Supreme Court. Cathy Ventrell-Monsees wrote NELA's amicus brief in Smith v. City of Jackson, a case in which the Supreme Court will determine whether disparate impact claims may be brought under the Age Discrimination in Employment Act (ADEA). Check out these superb briefs on the NELA web page.

4. Washington Office Task Force. NELA has established a task force chaired by David Cashdan to study the feasibility of setting up a Washington office to enhance our ability to implement public policies which promote workers' rights.

5. Workplace Fairness. Our sister organization continues to grow and inform workers of their rights through its dynamic web site. I am convinced this organization can be a major player in shaping both the

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Successful Challenges To Mandatory Arbitration Agreements

Robert Lewis, Esq.

Introduction

On April 3, 2003, NELA submitted a position paper to the EEOC concerning recommended due process procedures relating to mandatory arbitration. In its paper, NELA reiterated its opposition to mandatory arbitration and identified minimum rights that mandatory agreements should meet to be enforceable. It specifically addressed the issues of costs, fees, remedies, discovery, statute of limitations, written decisions, class actions, severability, confidentiality, dispositive motions, and procedural fairness. This article reviews these issues in the light of recent court decisions.

I. Arbitration Agreements

We begin with the most extreme example of an agreement biased in favor of an employer, **Hooters of America v. Phillips**, 173 F.3d 933 (4th Cir. 1999). Hooters is a restaurant chain based in Atlanta, Georgia. Annette Phillips was employed as a bartender in its Myrtle Beach, South Carolina restaurant. When she threatened to sue the company for sexual harassment, the company preemptively sought enforcement of an arbitration agreement she had signed. The agreement stated that: The employee and the company agree to resolve any claims pursuant to the company's rules and procedures for alternative resolution of employment-related disputes, as promulgated by the company from time to time ("the rules"). Id at 933

The conservative Fourth Circuit refused enforcement, stating that "Hooters… promulgat[ed] rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith." Id. At 938. Among the clause's failings, the court cited the following:

- The employee had to provide the company with a list of fact witnesses and a summary of facts known to each witness, but the company did not have to provide the same information.
- Upon 30 days' notice, Hooters could cancel the agreement, but the employee could not.
- Hooters selected the persons on the list of arbitrators.
- Hooters could change the rules at any time, even in the middle of an arbitration proceeding. Id.

Following the Fourth Circuit's decision, the company advised the employees at its 64 privately held restaurants that the arbitration program was terminated. 17 Alternatives 94 (May 1999), CPR Institute for Dispute Resolution.

II. Selection of Arbitrators

More recently, the Sixth Circuit also struck down a one-sided arbitration agreement in **Wendy McMullen v. Meijer, Inc.**, 92 Fair Empl. Prac. Cas. (BNA) 619 (6th Cir. July 25, 2003).

Meijer, a mid-west supermarket chain, had hired Wendy McMullen as a detective at its store in Flint, Michigan. She was terminated following an incident involving her pursuit and confrontation of a juvenile shoplifter in the store parking lot. She challenged her discipline through the company's termination appeal procedure, which included arbitration as the final step.

The appeal procedure provided that, once an arbitration hearing is requested, the company would select five arbitrators from a standing panel of potential arbitrators. Counsel for both sides would then select an arbitrator from that pool by alternatively striking names until one remained. Following this procedure, coun-

See CHALLENGES, next page

From NELA/NY Member Robert Davis …

I am pleased to announce victory for the plaintiff in the action, *Dr. Althea T. Davis v. Adelphi University, Dr. Dominick Cavallo, Dr. Kathleen Bond & Stefni Bogard, 01 Civ. 5941 (DRH)(ETB)*. On July 19, 2004, my client accepted defendants' FRCP Rule 68 Offer of Judgment allowing judgment to enter against defendants in favor of plaintiff in the amounts of $350,000 in damages, $20,000 in costs, and $230,000 in attorney's fees. This was a race discrimination and retaliation case brought under §1981 and SHRL by a former Associate Professor in Adelphi's School of Nursing ("SON"), Nurse Practitioner Program against Adelphi, the former Acting Provost, former SON Dean, an Assistant SON Professor, and the former Associate Dean who settled before summary judgment was denied. By Decision dated March 31, 2004, Judge Denis Hurley denied defendants' motion for summary judgment on the discrimination claims. On May 27, 2004 defendants served a Rule 68 Offer of Judgment for $250,000 plus fees to be determined by the Court. Plaintiff declined this Offer. After extensive negotiations, defendants served a final settlement agreement and a second Rule 68 Offer of Judgment, both in the amount of $600,000. Plaintiff declined the settlement agreement and accepted the second Offer of Judgment. An interesting footnote is that much of Dr. Davis' scholarship focuses on civil rights issues. Shortly before her hire at Adelphi in 1999, her book *Early Black American Leaders in Nursing: Architects for Integration and Equality* was published.

The wise counsel of several NELA members was invaluable in formulating strategies around the Rule 68 Offer, as well as in practicing before Judge Hurley and Magistrate Boyle. Thanks to Janice Goodman, Herb Eisenberg, Laura Schnell, Danny Alterman, and Lee Bantle. And thanks to veterans of Eastern District practice Gregory Lisi, Bob Rosen, David Fish, David Lira, and David Gabor for generously sharing their experiences with me. ■

Fish Says:

"THIS is another shout-out for any and all submissions on employment law and/or the practice of law in general. Please share your thoughts, questions, and victories with your NELA/NY friends."

"HOMER or Homer Simpson? Thomas Hobbes or The Hobbit? James Watson & Francis Crick or Mary-Kate & Ashley Olsen? Today's pop culture MTV world is not your father's Oldsmobile. We have a new audience to communicate with, and it expects different things. And communication is all about the audience.

As lawyers, we are communicators. The spoken and written word are our tools, and the context and manner in which we deliver our message is incredibly important. We want to make the listener/reader feel smart, and we want them to feel like we are like them. At trial, this concept may be most important.

Today, to try cases effectively, we need to know our jury. Our juries are becoming younger and younger (well, actually, we are becoming older and older), and we may be out of touch with what they see, hear, and feel in their everyday lives. That's a problem if we wish to be effective communicators.

Quoting Shakespeare, referring to what you read in the Economist or Wall Street Journal, or what you saw on Meet the Press is not going to connect you to your Generation X (or younger) jury. The most popular magazines are People and Sports Illustrated, and our top prime time shows are American Idol, Friends, and Fear Factor, just to name a few. Do you think more people know Brittany Spears or Ruth Ginsberg? At the time of writing this, the number one song in the country (according to Billboard.com) is "Lean Back" by the Terror Squad. Familiar with that one? I think not.

So what does all of this mean? Do we need to start hitting the nightclubs on a Tuesday night and reading Vogue in order to be a good lawyer? No. However, I suggest that an occasional look at "what people are watching" is a good idea. If you're going to spend a dollar on the New York Times, skim all of the sections, even those you are not otherwise interested in. From time to time, read the tabloids—it's not going to kill you.

I recently spoke with a colleague about a case he was trying that involved a race claim by a coach at a University. Because I watch ESPN News religiously, I knew that there was a story repeated throughout the prior day about the decision on a race discrimination claim by former University of Arkansas Basketball Coach. Certainly, many others—including prospective jurors—saw this story as well. What impression would that story leave (particularly considering the manner in which it was reported) on a potential juror in my colleague's case? Good question. Even better to be in the position to know that you need to ask that question.

What do you think?"

"WHAT you put into it is what you get out of it." ■

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sel for McMullen and Meijer selected an arbitrator. However, before the scheduled hearing McMullen filed an action challenging the fairness of the arbitrator selection process. Meijer removed the action to a federal court and moved for summary judgment. The court granted its motion.

On appeal, the Sixth Circuit reversed. The court framed the issue as "whether Meijer's exclusive control over the pool of potential arbitrators renders the arbitration forum so fundamentally unfair as to prevent McMullen from effectively vindicating her statutory rights." Id. At 622.

Noting that the selected arbitrator in the instant case had previously served in seven arbitrations involving Meijer, the court held that the type of control exercised by Meijer over the potential arbitrators was analogous to that exercised by the employer in Hooters, supra. Concluding that the procedure created a "symbiotic relationship" between Meijer and its arbitrators, the court reversed the district court and denied enforcement of the agreement. Id. At 626.

III. Attorneys Fees, Cost-Splitting, and Severability

Fee and cost splitting clauses have been frequently included in mandatory agreements. A typical clause reads: Each party may retain legal counsel and shall pay its own costs and attorney's fees, regardless of the outcome of the arbitration. Each party shall pay one-half of the compensation to be paid to the arbitrator(s), as well as one-half of any other costs relating to the administration of the arbitration proceeding (e.g. room rental, court reporter. etc.)

In **Spinetti v. Service Corp. International**, 91 Fair Empl. Prac. Cas. (BNA) 745 (3rd Cir. 2003), the Third Circuit held this clause illegal but, as later discussed, severed it in order to uphold the remainder of the agreement.

Addressing the first sentence, the court stated that "the proviso requiring each party to pay its own attorneys fees-regardless of the outcome of the arbitration-runs counter to statutory provisions under Title VII and ADEA that permit an award of attorney's fees and costs to a prevailing party." Id. At 749.

In also finding the second sentence unlawful, the court quoted from the Sixth Circuit in **Morrison v. Circuit City Stores**, Inc. 2003 WL 1934110, 23 (6th Cir. Jan. 30, 2003): When the cost-splitting provision is in the arbitration agreement, potential litigants who read the arbitration agreement will discover that they will be liable, potentially, for fees if they bring their claim in the arbitral forum and thus may be deterred from doing so. 91 Fair Empl. Prac. Cas. (BNA) at 751, n.

The main issue in the case concerned the severability of the illegal clauses.

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A Small Firm's Small Guide to Federal Campaign Contributions

Tarik F. Ajami and Piper Hoffman

If your firm plans to provide financial or other assistance to a federal candidate or political committee during this election cycle, election laws may limit or bar the contribution outright, apportion some or all of the contribution to the firm's lawyers personally, impose reporting requirements, or not apply at all.

Unlawful Contributions Can Lead to Civil Penalties Against the Contributor

Because civil penalties attach to unlawful or excessive donations of any kind and from any source, it is important to have at least a working knowledge of the Byzantine campaign finance laws. On the other hand, by reading this article, you could increase your exposure: while the penalty for an unknowing violation generally cannot exceed the full value of the contribution, the penalty for a knowing and willful violation can be up to *double* the amount of the unlawful contribution. *See* 11 C.F.R. § 111.24. Readers beware.

As a General Rule, Corporations Cannot Make *Any* "Contributions or Expenditures" Connected with Federal Elections

The Federal Election Campaign Act ("the Act")—and specifically 2 U.S.C. § 441b(a)—prohibits corporations from making any "contribution or expenditure" of *any size* "in connection with" federal elections:

> It is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

See 2 U.S.C. § 441b(a); *see also* 11 C.F.R § 114.2(b).

Professional Corporations May Not Make Contributions.

Professional Corporations are "corporations" within the meaning of the Act and supporting regulations, and are therefore subject to 2 U.S.C. § 441b(a)'s absolute prohibition against corporate donations to candidate or political committees. *See, e.g.*, Federal Election Commission Advisory Opinion ("FEC Adv. Op.") 1995-8 ("As a corporation, Bart T. Stupak, P.C., would be prohibited from making any contribution to [a candidate] committee.").

Like any corporation, however, a professional corporation may set up its own political action committee or PAC, referred to in election laws as a separate segregated fund, or "SSF." In general, the corporation can solicit contributions to its SSF only from certain people: stockholders; executive and managerial employees; and their families. 11 C.F.R. § 114.1(c). The SSF can then make contributions and expenditures of the collected "hard money" that the connected corporation otherwise could not, including contributions to candidate or political committees of up to $5000. SSFs can also make "independent expenditures" and unlimited contributions to so-called "527 groups," which are discussed in greater detail below. *See, e.g.*, 11 C.F.R. §§ 110.1 and 110.5.

Any SSF that will make contributions at the federal level, no matter how small, must register with the Federal Election Commission ("FEC") within 10 days of its establishment. 11 C.F.R. § 102.1(c). Every SSF must also comply with myriad filing, reporting, recordkeeping, and other rules. *See, e.g.*, 11 C.F.R. § 102.7(a) and (b) (SSF must have a treasurer), 11 C.F.R. § 103.3(a) (treasurer must deposit SSF's receipts in specifically designated bank within 10 days); 11 C.F.R. § 102.14(c) (name of SSF must include name of connected corporation or clearly recognizable abbreviation or shortening thereof); 11 C.F.R. § 102.9 (SSF must keep records and accounts of financial activities for three years). Many large corporations choose to set up SSFs, but because of the restrictions on who may be solicited by corporate SSFs, they are probably not a useful option for smaller firms. *See, e.g.*, FEC Adv. Op. 2003-14 (addressed to The Home Depot Better Government Committee ("Home Depot PAC")); FEC Adv. Op. 2001-04 (addressed to the Morgan Stanley Dean Witter & Co. Political Action Committee ("MSDWPAC")); FEC Adv. Op. 1999-3 ("Microsoft PAC").

Partnerships May Make Contributions, Subject to Strict Limitations

Partnerships, unlike corporations, may make small contributions in amounts that mirror those permitted to individuals. 11 C.F.R. § 110.1(e). Partnerships cannot set up SSFs. *See* FEC Adv. Ops. 1994-09 and 1990-20; *see also* **California Medical Association v. Federal Election Commission**, 453 U.S. 182 (1981).

Hybrid entities filing an IRS form 1065, such as New York Limited Liability Partnerships, will most likely be considered subject to partnership rules. A multi-member Limited Liability Company will be treated as a partnership if it does not have publicly traded shares and does not elect to be treated as a corporation by the Internal Revenue Service. 11 C.F.R. § 110.1(g)(2) and (3).

Partnerships can make contributions according to the following schedule:

- $2,000 per candidate, per "election," to candidates for federal office;
- $25,000 annually to a national party committee; and

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nature of the debate and the implementation of public policy concerning workers' rights nationwide. Check out www.workplacefairness.org and see all the new content, including practical guidance for workers on such topics as saving your job, building your case, and determining whether you need a lawyer.

6. Mandatory Arbitration. Cliff Palefsky reported on NELA's ongoing fight against mandatory arbitration and for the 7th Amendment to the U.S. Constitution. NELA is active in many jurisdictions on this issue, and in particular, we are looking for cases where employees have been fired for refusing to sign mandatory arbitration provisions. Please notify NELA HQ if you have encountered this situation.

7. Membership. NELA membership continues to grow and we are now 2200 strong, up by 200 members over last year. We need to enlist every single lawyer committed to fighting for employee rights if we are to succeed in the good fight that we engage in every day. On a personal note, I would urge all of you who are members of MWELA to join NELA and help us do the work that needs to be done.

8. Meetings with EEOC and MSPB. On September 30, 2004, NELA President Janet Hill, Past Presidents Fred Gittes and Steve Platt, and our Executive Director Teri Chaw will be meeting with both the Chair of the EEOC and the acting Chair of the MSPB to take up a number of issues of concern for our clients.

9. Judicial Oversight Committee. This hard-working committee continues to scrutinize the records of every nominee to the U.S. Circuit Courts of Appeals to do our best in a difficult environment to insure that the Senate has all the pertinent information before confirmation decisions are made.

10. Officers. NELA officers for the coming year are: President Janet Hill; Vice Presidents Kathy Bogas and Margie Harris; Vice President of Public Policy Bruce Fredrickson; Secretary Ellen Messing; and Treasurer Pat Shiu.

Please let me know if you have any questions, would like to share your thoughts and ideas, or wish to help out with any of these important tasks. ■

The Corporate Officer/Employee's Rights under the New York Business Corporation Law

By Gary Trachten

Even the client who was an officer or director of the employer that she is now suing typically finds it difficult to match the employer corporation's litigation resources. That is especially so if she was deprived of her entitlement to a substantial bonus or severance, and her former employer chooses to "defend" against her complaint by launching a scorched earth war of attrition. Sometimes an employer will employ the-best-defense-is-a-good-offense tactic of filing a meritless counterclaim (*e.g.*, under the faithless servant doctrine, for recoupment of compensation earlier paid) in order to leverage for settlement (or to convince your client to go away) the embarrassment and added litigation expense to your client. How do you counter that? One way may be to stay on the offense by moving under Bus. Corp. Law § 724(c) for a court ordered allowance, *during the pendency of the litigation*, of all her reasonable litigation expenses (including attorneys' fees) in defending the counterclaim.

BCL §§ 721-726 sets forth the statutory scheme for permitted and mandated indemnification by a corporation of those who are sued because they are, or were, officers or directors of that corporation. The scheme contemplates three types of relief: (a) indemnification, *i.e.* the corporation's ultimate bearing of the expense of the director's or officer's costs of defending and satisfying a claim for which indemnification may be available—including for his costs of settlement and reasonable attorney's fees;[1] (b) advancement, *i.e.* a corporation's voluntary payment of defense expenses in advance of the final disposition of the law suit;[2] and (c) allowance, i.e. a court order allowing the director or officer his reasonable expenses including attorneys' fees, during the pendency of the litigation.[3] Repayment of advancements or allowances is required in the absence of an ultimate finding that the director or officer is entitled to indemnification.[4]

If someone is sued "by or in the right a corporation" based on his acts as a director or officer of a corporation, the corporation is permitted to indemnify him if he "acted, in good faith, for a purpose he reasonably believed to be in…the best interests of the corporation."[5] If he is adjudged liable to the corporation, the corporation may not indemnify him unless and only to the extent a court determines that he is "fairly and reasonably entitled to indemnity."[6] However, he "shall be entitled to indemnification" if he successfully defends against the claim.[7] Thus, the resolution of the underlying claim is a condition precedent to any determination of a right to indemnification.[8]

A corporation may voluntarily pay a director's or officer's defense expenses in advance of the final disposition of the lawsuit, but only upon the receipt of an undertaking on behalf of the director or officer to repay those expenses if he is not ultimately found to be entitled to indemnification.[9] Needless to say, a corporation is not likely to advance such expenses in lawsuits that are authorized by its own Board.[10] In fact, corporate bylaws that authorize such advancements typically exclude from their scope lawsuits authorized by the corporation's Board. Advancements are generally paid in shareholder derivative actions or third party actions naming directors or officers.

Nonetheless, when a corporation chooses to not advance expenses voluntarily, the statute permits a court to allow expenses to a former officer or director during the pendency of the litigation concerning his acts in that capacity "if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law."[11] Although the statute speaks in permissive language, providing that "the court may allow" such expenses, most courts have construed the statute liberally. Thus,

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Anne's Squibs

by Anne Golden

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

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Further note: Of course, these squibs are by no means exhaustive, nor should you rely upon them as a substitute for doing your own research and actually reading the cases. Thanks to Douglas C. James and Tarik Ajami, associates with Outten & Golden LLP, for help in the preparation of these squibs

AGE DISCRIMINATION

See **Schreiber v. Worldco, LLC**, discussed under "Summary Judgment," below.

ARBITRATION

"Manifest Disregard"

In an action by investors against their brokerage house, the arbitration panel had found the brokerage house and three control persons liable for compensatory and punitive damages of over $1,700,000. The award decision set forth essentially no factual findings and no legal authority." (None of the three arbitrators was a lawyer, and the arbitration agreement said a "reasoned" award was not required.) The parties moved and cross-moved to vacate and to confirm the award, respectively, in the Southern District of New York. The district court (Robert Sweet, J.) identified the issue as being whether the panel could properly have found the three control persons liable for the fraud committed by the broker who had recommended the bad investments to the investor. Judge Sweet held that the award showed manifest disregard of both the law and the facts, since there was no evidence that the control persons had acted with intent to defraud or had had any involvement with the transactions at issue. The court of appeals, reversing, said that the district court had taken "too broad a view of these grounds for vacatur"—manifest disregard of both the law and the facts. The doctrine of manifest disregard of law should be limited to use as a "last resort" in "exceedingly rare instances," when the arbitrators knew of a governing legal principle but refused to apply it. "Manifest disregard of fact," said the court, is not recognized at all as a basis for vacating an arbitration award. (If a factual conclusion is erroneous as a matter of law, however, because there is *no* colorable justification for it, it apparently still may morph into "manifest disregard of law.") In this case, North Carolina law provides such a "barely colorable justification" for the award, and the court of appeals reinstated it. The opinion was written by Judge Rosemary Pooler and joined by Judges Jacobs and Wesley. **Wallace v. Buttar**, 378 F.3d 182 (2d Cir. 8/5/04).

"Prohibitively Expensive"

An employee who was discharged after complaining about racial and sexual incidents in the workplace filed a retaliation lawsuit in state court against her employer (which provided technical services to a law school) and against the school, for which she had previously worked. When she was outsourced to the support company, however, she had signed an arbitration "agreement." The employer filed a demand for arbitration with the AAA, along with its $375 filing fee, but the plaintiff did not pay her portion of the fee, which under the AAA rules was capped at $125 for arbitration pursuant to an "employer-promulgated plan." Accordingly, the AAA returned the file. The plaintiff pointed to the agreement, which said that the parties would bear the costs (other than counsel fees) equally, but the court found that the AAA's rule capping her share at $125 governed, so her costs would not be prohibitive. The court accordingly granted the employer's motion to compel arbitration and dismissed the plaintiff's complaint. **Perry v. New York Law School**, —– F. Supp. 2d —-, 2004 WL 1698622 (S.D.N.Y. 7/28/04).

Scope of Arbitration Provision

Although it is unfortunately well established that pre-dispute arbitration "agreements" are enforceable in discrimination cases, Justice Alice Schlesinger (Sup. Ct. N.Y. Cty.) has given that principle a somewhat encouraging spin. A woman had signed an employment agreement containing a broad arbitration provision ("In the event a dispute shall arise with respect to the provisions hereof or otherwise in connection with your employment with us …"). Her employment was terminated three years later, and she sued in state court alleging discrimination and wrongful refusal to give her stock options that had been promised. She had also signed a confidentiality agreement when she was terminated and was offered a short-lived consulting position. Neither agreement specifically said that the arbitration provision related to the stock options, and the court further noted that the company had not "disputed" that the plaintiff was entitled to the options—it simply had not given them to her. Accordingly, only the discrimination claims were arbitrable. They were severed, on the condition that the company pay all expenses over $5000, but the claims for the options continued in litigation. **Res v. Masterworks Development Corp.**, —– Misc. 2d —–, —– N.Y.S.2d —-, N.Y.L.J. 8/5/04, p. 18 col. 1 (Sup. Ct. N.Y. Cty. approx. 7/28/04).

BANKRUPTCY

Discharge of Debt from Sexual Harassment Verdict

A man who sexually harassed an employee escaped liability for a $430,233 default judgment (the number was fixed by a jury verdict at an inquest on damages after the default) by declaring bankruptcy. The plaintiff in the sexual harassment action filed an adversary proceeding to

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except the debt from discharge under 11 U.S.C. § 523(a)(6), which provides that "[a] discharge … does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity." The court (Robert E. Littlefield, Jr., B'cy Ct., N.D.N.Y.) found that there was no proof that the debtor's conduct, though "deplorable," was meant to cause psychological or economic harm. The opinion concedes that this holding results in a "grave injustice" but states that the outcome is dictated by the decision of the U.S. Supreme Court in Geiger in **Kawaauhau v. Geiger**, 523 U.S. 57 (1998), which held that the debtor must have intended to cause the plaintiff's injuries in order for the debt not to be dischargeable under this section. Since the harasser allegedly acted without malevolent intent to cause injury, and in fact he denied having sexually harassed the plaintiff at all, the bankruptcy court held that the default judgment did not result in collateral estoppel and the requisite "willful and malicious" elements were not proved. **In re Busch**, 311 B.R. 657 (N.D.N.Y. 6/21/04).

CLASS ACTIONS

ERISA

See **Crosby v. Bowater Inc. Retirement Plan**, discussed under "ERISA," below.

CONFIDENTIALITY

In June 2003, Judge Harold Baer (S.D.N.Y.) ordered a file unsealed that contained information about what appeared to be systemic sex discrimination at a major New York bank. He did this after the parties filed a stipulation of settlement and dismissal. The ensuing flap about whether the district court had continuing jurisdiction to unseal the information after the dismissal resulted in a decision by Judge Baer holding that the court had such jurisdiction. Deutsche Bank appealed. The Second Circuit Court of Appeals (Sack, C.J., joined by McLaughlin and Sotomayor, C.J.J.) has now affirmed the unsealing of everything except the settlement amount, and it left unsealed Judge Baer's remark in the "Unsealing Order" referring to a "multi-million-dollar settlement." The court of appeals noted that, at the conference where the parties advised the court that the matter was settled confidentially, "The district court judge wondered aloud why the public should not know about discrimination at a major banking institution." It agreed that the district court had had continuing jurisdiction to unseal the file and noted that there is a presumptive right of public access to judicial documents (i.e., documents that the court used in considering the motion for summary judgment; these documents were exhibits to the motion papers). The parties "cannot expunge the public interest by the simple expedient of filing a stipulation of dismissal with the court," said the court of appeals. NELA/NY member Deborah Raskin represented the plaintiff below, but the plaintiff did not take a position in this appeal. **Gambale v. Deutsche Bank AG**, 377 F.3d 133 (2d Cir. 8/2/04).

CONTINUING VIOLATION

A college, sued for race, sex, and age discrimination and retaliation by a professor, asked Judge Shira Scheindlin (S.D.N.Y.) to dismiss the complaint, and the motion was granted in part. The court first noted that at this stage of litigation, the issue is not whether a plaintiff is likely to prevail ultimately, but whether she is entitled to offer evidence to support her claims. The plaintiff alleged acts by the college and its agents going back to 1995. Examining **National R.R. Passenger Corp. v. Morgan**, 536 U.S. 101 (2002), the court found that the only act of which she complained that had occurred within the 300-day pre-EEOC-filing period was a "meanspirited parting letter" from her department chair. Finding that the letter may have been offensive but that the plaintiff had failed to show how it contributed to a "discriminatorily hostile or abusive environment," the court held that it could not "resuscitate" her hostile work environment claim. **Dahbany-Miraglia v. Queensboro Community College**, —- F. Supp. 2d —-, 28 NDLR ¶ 123, 2004 WL 1192078 (S.D.N.Y. 5/27/04).

See also **Hughes v. United Parcel Service**, discussed below under "Race Discrimination."

DISABILITY DISCRIMINATION

Compensatory and Punitive Damages

The Seventh Circuit Court of Appeals has read the retaliation section of the ADA to preclude recovery of both compensatory and punitive damages and to preclude a jury trial. The court affirmed the district court's decision in this regard. An employee claiming retaliation under the ADA looks to 42 U.S.C. § 12117 for damages, which in turn provides that the available remedies are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-5(g)(1). That section provides that a court may order certain equitable relief, including back pay, but does not provide for compensatory or punitive damages. The 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expands the remedies available under subsection 5(g)(1) for, among other things, a plaintiff suing "under … section 102 of the [ADA] [42 U.S.C. § 12112] or … section 102(b)(5) [42 U.S.C. § 12112(b)(5)] of the [ADA]." The retaliation section of the ADA, however, is 42 U.S.C. § 12203. The court of appeals found the case of **Brown v. City of Lee's Summit**, 1999 WL 827768 (W.D. Mo. 1999), "thorough and particularly persuasive" and agreed with its conclusion that "a meticulous tracing of the language of this tangle of interrelated statutes reveals no basis for plaintiff's claim of compensatory and punitive damages in his ADA retaliation claim." *Id.* at *3. This may be an oversight on the part of Congress—yes, that body has been known to err—but courts will not expand remedies that are specifically provided by statute. Since the plaintiff was entitled only to equitable remedies, she also was not entitled to a jury trial, even though the defendant also had demanded a jury. **Kramer v. Banc of America Securities, LLC.**, 355 F.3d 961 (7th Cir. 1/20/04).

DISCOVERY

Immigration Status

A number of recent decisions have made it clear that certain areas of inquiry

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are off limits with respect to defendants' hunt for after-acquired evidence. The Ninth Circuit Court of Appeals, on an interlocutory appeal, adopted the reasoning of the Second Circuit concerning defendants' inquiries into plaintiffs' immigration status. Twenty-three Latina and Southeast Asian women filed a lawsuit against their former employer alleging disparate impact discrimination based on national origin under Title VII and the California Fair Employment and Housing Act. In response to questions regarding one plaintiff's immigration status, the plaintiffs sought a protective order barring further discovery on the subject. The magistrate held that there was no legitimate dispute that the plaintiffs were members of the protected class, and as a result, the defendant could not inquire into the subject. The defendant could conduct an independent investigation into their immigration status, but allowing it to dig for after-acquired evidence of this type through the discovery process would unnecessarily chill legitimate Title VII claims of undocumented workers. On appeal, the defendant sought a bifurcated proceeding wherein once liability was determined, the court would hold an *in camera* proceeding regarding each defendant's immigration status in order to protect their anonymity. In rejecting this proposal, the court of appeals found that permitting inquiries into immigration status would have a chilling effect on complaints from undocumented and documented workers alike, both of whom may fear retaliation or changes in the immigration status. Most importantly, perhaps, the court also held that Supreme Court's decision in **Hoffman Plastic Compounds, Inc. v. NLRB**, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002), was not meant to preclude recovery for undocumented workers regardless of the statute under which is was brought, and that the **Hoffman** opinion did not apply to cases brought under Title VII, which was clearly intended to protect undocumented workers from national origin discrimination. **Rivera v. Nibco, Inc.**, 364 F.3d 1057 (9th Cir. 4/13/04).

ERISA

Class Actions

The Sixth Circuit has reversed a grant of summary judgment in favor of a class of 350 ERISA plaintiffs and ordered the complaint dismissed. Relying on **Great-West Life & Annuity Ins. Co. v. Knudson**, 534 U.S. 204 (2002), the court held that plaintiffs seeking monetary redress for *statutory* violations of ERISA itself—as opposed to violations of a plan—face dismissal on jurisdictional grounds. Crosby was a participant in a defined benefit retirement plan. When he was laid off at age 43, he had elected under the terms of the plan a lump-sum distribution of his retirement benefit. In calculating the amount due him, the plan administrator applied a "mortality discount factor" that reduced his lump-sum payment by about 10%. Crosby filed a class action complaint alleging that this practice caused a partial forfeiture of accrued benefits and therefore violated ERISA § 203(a). He brought his complaint under ERISA § 502(a)(3), which allows for "appropriate equitable relief" to enjoin practices that violate ERISA, rather than under § 502(1)(b), which allows a participant to sue for recovery of benefits due under the terms of the plan itself. The district court granted class certification and entered summary judgment for Crosby and the class, ordering the plan to cease the practice and recalculate benefits for class members who had already been paid lump-sum benefits. The court of appeals reversed and directed that the complaint be dismissed. Because ERISA § 502(a)(3) allows only for "appropriate equitable relief," Crosby's claim for money damages was a jurisdictional nullity. "But what if the benefits are not claimed to be due under the plan . . . but under the terms of a statute . . . that the plan must satisfy?" the court asked. The answer, it said, is that such claims are not cognizable unless they seek relief in equity only. The Court recognized that perhaps the demand that the plan "recompute" the amount owed Crosby was equitable in nature - but "Mr. Crosby and his advisors have already performed the recomputation themselves, and Crosby's complaint specifies the amount claimed to be due him down to the last penny. Equity, as the pertinent equitable maxim goes, does not require the doing of a vain act." As the monetary damages sought by Crosby and the class were, in the court's view, legal rather than equitable, it held that the district court never had subject matter jurisdiction over Crosby's complaint. Accordingly, the court held, "[i]t

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follows that there is no class action." **Crosby v. Bowater Inc. Ret. Plan**, —- F.3d —-, No. 03-1044 (6th Cir. 9/9/04).

EVIDENCE

After-Acquired Evidence

See **Rivera v. Nibco, Inc.**, discussed under "Discovery," above.

INDEMNIFICATION OF OFFICER

The former president and CEO of a corporation sued for severance pay and other compensation that he alleged was due under his employment agreement, and the company counterclaimed for damages including return of salary, bonuses, stock options, and benefits allegedly due to the plaintiff's unauthorized use of his corporate card and other alleged wrongs. The plaintiff alleged that he had acted in his capacity as a member of the board of directors, and demanded that the company indemnify him and advance his defense costs during the litigation pursuant to the BCL, but his request was denied. The court noted that the company's legal expenses would be a corporate expense with respect to both his claim and its counterclaim and ordered the company to set aside an equal amount in an escrow fund to cover the plaintiff's legal expenses if he should prevail. NELA/NY member Gary Trachten represented the plaintiff. **Sauvigne v. Andrea Electronics Corp.**, —- Misc. 2d —-, —- N.Y.S.2d —-, N.Y.L.J. 4/15/04, p. 19 col. 3 (Sup. Ct. Nassau Cty. approx. 4/12/04). For more on the topic, see Gary's article on page 15.

NEW YORK CITY COMMISSION ON HUMAN RIGHTS

Justice Alice Schlesinger blasted the New York City Commission on Human Rights after it not only failed to investigate a complainant's allegations but apparently "buried" her complaint for two years after the lawyer for the respondent wrote to a staff attorney objecting to the investigator's proposed finding in the complainant's favor. The respondent was the Board of Education, where the complainant, a black woman, had worked at the Division of School Facilities. She alleged that she had been let go because of her gender and race. The court noted that she and her shop steward, as well as 19 co-workers who signed a petition, would state that her work was good, but that the Commission's investigators had never contacted any of them and had simply issued, after some five years, a "no probable cause" finding that merely "parrot[ed] the Board's Answer and their long overdue … letter and then accuse[d] Ms. David of failing to supply evidence substantiating her claim. This, in the face of never having given her any opportunity to do that, is not only unreasonable but is grossly unfair as well." The court went so far as to say, "Frankly, it is hard to refrain from a finding here that Ms. David experienced discrimination at the hands of the Commission, itself." **Matter of David v. Commission on Human Rights**, —- N.Y.S.2d —-, N.Y.L.J. 4/27/04, p. 18, col. 3 (Sup. Ct. N.Y. Cty. approx. 4/23/04).

NEW YORK STATE LABOR LAW

Executive Exemption

In a careful and thorough opinion, Judge Victor Marrero (S.D.N.Y.) has determined that the "executive exemption" in N.Y. Labor L. §§ 192(2) and 198-c applies only to the "cash payment" requirement in § 192 itself and to the requirements concerning payment of benefits and wage supplements in § 198-c—but not to other sections of the Labor Law. Two definition sections, §§ 190 (6) and (7), also exclude "supervisory, managerial, executive, or administrative" employees, and Judge Marrero found those exclusions limited to those definitions only. Accordingly, "employee" elsewhere in Article 6 of the Labor Law refers to all employees, *i.e.*, "any person employed for hire by an employer." The court distinguished or

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LawHelp.org/NY: Helping low-income New Yorkers solve their legal problems

What is LawHelp?

LawHelp (http:/www.LawHelp.org/NY) is an online, legal-information clearinghouse that provides low-income people throughout the State of New York with referrals to free legal services, information about their legal rights, links to social services and government agencies, and information about the court system. The website matches a potential client with appropriate referrals and materials, based on place of residence and type of legal problem, and has the most comprehensive and up-to-date database of New York legal services providers available. LawHelp is a collaborative project of: the City Bar Fund, Legal Services for New York City, Pro Bono Net, The Legal Aid Society and Volunteers of Legal Service, the Greater Upstate Law Project, and the Legal Aid Society of Northeastern New York.

Who should use LawHelp?

Legal services and social services organizations should use LawHelp/NY to provide referrals to clients who they are unable to assist, and to distribute legal education materials and other information to those seeking assistance. Individuals who have access to a computer with an Internet connection can use LawHelp/NY independently.

What legal topic areas does LawHelp cover?

LawHelp/NY provides referrals and information the following areas: consumer, disability, education, family & juvenile, health, housing, immigration & naturalization, individual rights, life planning, public benefits, taxes and workers' rights. During the next year we will also be posting legal education materials in a number of new areas. ■

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rejected state court decisions reading the executive exemption to apply throughout Article 6 and approved decisions reading it more narrowly, and consequently denied the employer's motion for summary judgment on claims that it had failed to pay her in a timely manner, made illegal deductions from her wages, and was liable for 25% liquidated damages and attorneys' fees. **Miteva v. Third Point Management Co., L.L.C.**, —- F. Supp. 2d —-, 2004 WL 1494758 (S.D.N.Y. 7/1/04).

RESTRICTIVE COVENANTS

A doctor who had signed an employment agreement containing noncompete and arbitration clauses, and who had opened an office within three miles of his ex-employer less than a year after leaving, found himself on the receiving end of a temporary restraining order (TRO) and a motion for an injunction in state Supreme Court. Justice Robert J. Gigante (Sup. Ct. Richmond Cty.) ruled against the defendant doctor on the preliminary issues of whether the covenant was still applicable, whether the court was the proper forum in light of the arbitration clause, and whether the one-year, three-mile restriction was objectively unreasonable. However, the court went on to deny the preliminary injunction because "[a] restrictive covenant against a former employee will be enforced only to the extent necessary to protect the employer from unfair competition which stems from the employee's use [or] disclosure of trade secrets or confidential customer lists." This employer had asserted vaguely that the defendant doctor had solicited his patients, but the defendant refuted this unsubstantiated claim. The plaintiff had failed to make a showing that he would suffer irreparable injury without a preliminary injunction or that he was likely to succeed on the merits, so the TRO was dissolved and the preliminary injunction was denied. The court noted that the plaintiff could proceed in an arbitration proceeding on the merits if wanted. **Leuzzi v. Roussis**, —- Misc. 2d —-, —- F. Supp. 2d —-, N.Y.L.J. 8/12/04, p. 19 col. 3).

Preliminary Injunction Granted

In Judge Peter K. Leisure's courtroom (S.D.N.Y.), a corporation succeeded in enjoining two ex-employees from engaging in certain business activities in violation of the noncompete provisions incorporated in their employment contracts by alleging that they were misappropriating trade secrets. The plaintiff corporation provided technical services to clients with complex electrical systems and needs. The alleged trade secrets consisted of confidential customer information, pricing methods, customer lists and customer preferences. The court enjoined the defendants for one year (from their last day of employment) from soliciting clients that they had served or solicited during their employment with the plaintiff (unless their new employer already had a relationship with the client), finding that absent an injunction, the plaintiff might suffer irreparable harm in the permanent loss of those clients. However, with respect to the plaintiff's efforts to enjoin the defendants from utilizing their acquired expertise and talents, the court held that the plaintiff lacked a protectable interest sufficient to justify an injunction. The court's ruling was based on its determination that aside from information specific to certain clients, the defendants did not possess any trade secrets or proprietary confidential information. The court noted that simply labeling information "confidential" did not render it protectable, and an employee's knowledge of the intricacies of his employer's business alone does not constitute a trade secret. **Johnson Controls, Inc. v. A.P.T. Critical Systems, Inc.**, —- F.Supp.2d —-, 2004 WL 1432582 (S.D.N.Y. 6/24/04).

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Hospital. All of the disciplinary charges were eventually dismissed or withdrawn. On March 22, 2002, Mr. Ramirez was terminated from employment with HHC.

Ramirez hired NELA/NY attorney, Philip Taubman, Esq., of Taubman Kimelman & Soroka, who filed suit on behalf of Ramirez and successfully negotiated his settlement. ■

RETALIATION

A 46-year-old securities analyst, terminated 36 days after his attorney sent his employer a letter complaining about alleged age discrimination, nevertheless had no retaliation case, held Judge Shira Scheindlin (S.D.N.Y.). This was because the employer's adverse actions had begun before he made his complaint. (Of course, this will generally be the case; otherwise there would be no reason to complain.) In March 2001 he was removed as lead manager of the fund he worked for but was retained as a research analyst; a new lead manager was hired in June and began work July 23, 2001, and the employer did not assign the plaintiff-to-be any work after that date. The previous month, he had begun preparing to start his own hedge fund in case he was discharged, and on July 20 he told his employer that his attorney would call, which he did the same day. On August 27, the plaintiff's lawyer wrote to the employer stating that the plaintiff had been relieved of his duties because of his age and alleged constructive discharge. The discharge became formal on October 2, 2001. The district court noted that the employer proffered two legitimate non-discriminatory reasons for discharging the plaintiff and stated, "Given that significant adverse employment actions pre-dated Luxenberg's complaint of age discrimination, temporal proximity [alone] cannot establish a causal nexus." The court noted that the employer allegedly had considered discharging the plaintiff five months before he engaged in any protected activity and found that there was no evidence of retaliation other than the temporal proximity, which did not support an inference of retaliation under these circumstances. Summary judgment was granted. **Luxenberg v. Guardian Life Insurance Co.**, —- F. Supp. 2d —-, 2004 WL 385116, No. 02 Civ. 9116 (S.D.N.Y. 3/2/04).

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SUMMARY JUDGMENT

Age Discrimination

Two employees who alleged termination in violation of the ADEA have survived summary judgment before Judge Denny Chin (S.D.N.Y.), even though they were fired only a short time after they were hired, and even though they were fired by the same person who had hired them. The district court cited so-called "stray remarks," noting that they could constitute evidence of discriminatory motivation if they are related to the decision to discharge an employee or are otherwise "considered within the totality of the evidence." Moreover, the "same actor defense" was not conclusive here because the decision-maker stated to one plaintiff, after the employee had been hired but not permitted to join the trading group he had been hired for, that it was true that he had decided that they "did not want older people in the group" and that "older people do not have the same energy level as younger persons," along with a number of other plainly discriminatory comments and other evidence. Resolving all conflicts in the evidence and drawing all reasonable inferences in the plaintiffs' favor, the court found that a reasonable jury could find that the plaintiffs' ages were a factor in the denial of training to them and in their dismissal. The defendants' allegation that they were fired for poor performance could also be a result of the denial of training. The "stray remarks," "same actor," and "poor performance" arguments were issues of fact for the jury. NELA/NY member Daniel Kaiser represented the plaintiffs. **Schreiber v. Worldco, LLC**, 324 F. Supp. 2d 512 (S.D.N.Y. 7/9/04).

Family and Medical Leave Act

An executive assistant who took maternity leave and wanted to return to work part-time was replaced during her leave by a full-time employee. Before the end of the twelve-week leave, the plaintiff concluded that the employer would not give her a part-time position, so—unaware that she had been replaced—she arranged for full-time child care and prepared to return. Only then was she told that her job had been filled. When she contacted a lawyer who wrote to the employer, the employer claimed that she had resigned because she was not given a part-time job. However, the employer did not contest her unemployment benefits and completed her COBRA form stating that her employment had been terminated on the date her FMLA leave expired. She sued under both the "interference" and the "retaliation" provisions of the FMLA, and the employer moved for summary judgment. The court (William Conner, S.D.N.Y.) focused on each claim separately, noting that the "interference" section, § 2612(a)(1), does not require a showing of intent on the part of the employer but provides for strict liability if the employee is not reinstated in her job or a comparable job at the end of her leave, unless the employer shows (and it is the employer's burden to show) that she would not have been reinstated anyway because of some intervening business consideration unrelated to her FMLA leave. A plaintiff's case under the "retaliation" section, § 2615(a)(1), is analyzed according to the **McDonnell Douglas** standard. The court found that the plaintiff had shown material disputed issues of fact concerning whether she had resigned, as well as whether the employer reasonably believed she had resigned (which could avoid liquidated damages under the "interference" clause). NELA/NY member Gary Trachten represented the plaintiff. **Arminio v. United States Tennis Ass'n Inc.**, —– F. Supp. 2d —–, 2004 WL ——— (S.D.N.Y. approx. 6/1/04).

New York State Labor Law

See **Miteva v. Third Point Management Co.**, discussed above under "New York State Labor Law."

Pregnancy Discrimination

When an employee returned from maternity leave, having had a successful employment history under one supervisor, her new supervisor immediately began closely documenting everything she did and put her on a "performance improvement plan" two months later, offering severance as an alternative (which she declined). A month later she was fired. Justice Walter B. Tolub denied the employer's motion for summary judgment. The court cited, among other evidence, an article from the Wall Street Journal about Ms. Woods, the employer's CEO, in which Ms. Woods attributed her success to her ability to "stay … in touch with trends," which in turn she attributed to various factors including the fact that she did not have children. The court noted

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million among the class members after receiving written submissions from the EEOC and the class members and from Morgan Stanley. Ms. Schieffelin is eligible to participate in the claims process for her pre-termination claims of discrimination and retaliation. Any money left undistributed after that process will be used for scholarships for women interested in pursuing careers on Wall Street.

In addition, Morgan Stanley agreed to make extensive changes to its policies and practices and to institute comprehensive diversity education and training programs. An internal ombudsperson and an outside monitor will supervise Morgan Stanley's compliance for three years.

Allison Schieffelin was represented by Outten & Golden LLP of New York City, including Wayne Outten, Adam Klein, Piper Hoffman, Scott Moss, and former partner Gerry Filippatos. The EEOC was represented by its New York Regional Attorney's Office, including Kathy Bissell, Elizabeth Grossman, and Michelle Caiola, and by its General Counsel's office, including Eric Dreiband and James Lee. Morgan Stanley was represented by Kirkland & Ellis, including Emily Nicklin and Helen Witt, and Morgan Lewis & Bochius, including Mark Dichter and Drew Schaffran. ■

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the absence of documentary evidence supporting the employer's purported reasons for the termination and found that the plaintiff had submitted enough evidence for a reasonable jury to find discrimination. NELA/NY member J. Patrick DeLince represented the plaintiff. **Koizumi v. J. Crew Group, Inc.**, --- N.Y.S.2d ---, Index No. 120275/2000 (Sup. Ct. N.Y. Cty. 7/2/03).

Race Discrimination, Retaliation

Two African-American employees of UPS (still working there at the time of the decision) alleged that they had experienced acts of race discrimination, including a racially hostile work environment, a pattern and practice of disparate treatment, and retaliation for their complaints about discrimination, all in violation of the New York City Human Rights Law, N.Y. Admin. Code § 8-107(1)(a) and (7)(i). Both plaintiffs alleged that they had been passed over for promotions numerous times in favor of Caucasian employees who were less qualified, and that they were harassed, denied training, unfairly reprimanded, humiliated, and treated worse in numerous other ways than their Caucasian co-workers. A short time after discovery began, UPS moved for partial summary judgment dismissing as untimely all claims that had occurred more than three years before the complaint was filed. Justice Joan A. Madden (Sup. Ct., N.Y. Cty.) analyzed the applicability of the continuing violation doctrine to both (a) hostile work environment claims and (b) discriminatory pattern and practice claims. In a thorough opinion, the court found that the claims of hostile work environment, as distinguished from "discrete acts," were sufficient to survive the motion for summary judgment, including those based on acts prior to the three-year statute of limitations, wince "the complained-of conduct although perpetuated by a number of different managers involved … similar types of employment actions." With respect to whether the pattern-and-practice claims satisfied the continuing violation doctrine, the court noted that courts since **Morgan** had so held. When specific acts of discrimination "are permitted by an employer to go unremedied for so long … as to amount to a policy or practice," they constitute a pattern or practice, bringing all such acts within the statute of limitations. **Hughes v. United Parcel Service**, —- Misc. 2d —-, —- N.Y.S.2d —-, N.Y.L.J. 7/26/04, p. 18 col. 1 (Sup. Ct. N.Y. Cty. approx. 7/20/04). ■

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judges for the most part appear to regard their discretion as guided solely by whether the party applying for the allowance has raised a genuine issue of fact or law concerning whether he will ultimately be entitled to indemnification.[12] That is usually an easy burden to meet. Notably, unlike in the case of a voluntary corporate advancement, there is no requirement that an allowance be conditioned on the corporation's receipt of an undertaking.[13]

A corporation's tactical decision to file a meritless (even if colorable) counterclaim against a former officer-employee will backfire if it finds itself having to finance not only the prosecution of the counterclaim but also the plaintiff's defenses against the very same counterclaim. So if you or your client can demonstrate a genuine issue of fact or law concerning the merits of the counterclaim or your client's good faith, by all means make a BCL § 724(c) application for an allowance of your client's ongoing expenses in defending against the counterclaim. Be sure to document in detail your client's actual and fairly expected attorneys' fees. Keep careful records separating, as best as you can, the time spent on prosecuting your client's complaint, on defending the counterclaim, and on pursuing an allowance and indemnification. (You client's fees on the latter are not recoverable, except, perhaps, as incident to prevailing on the main claim if it is predicated on a statute which provides for fee shifting.)

Finally, a note on directors and officers liability insurance policies:[14] While such policies generally provide ongoing costs of defense against claims made against an officer, including claims made derivatively on behalf of the corporation, they often exclude claims made by the corporation under Board authority. Nonetheless, it would be prudent to obtain and examine the policy to determine whether the carrier may be obligated to pay for your client's defense against the counterclaim.

Footnotes

[1] BCL § 722

[2] BCL § 723(c).

[3] BCL § 724(c).

[4] BCL § 725(a).

[5] Under BCL § 721, corporate indemnification may be broader but cannot extend to where the director or officer's acts are found to have been "committed in bad faith or were the result of active and deliberate dishonesty."

[6] BCL § 722(c).

[7] BCL § 723(a).

[8] BCL § 724(a); **Booth Oil Site Administration Group v. Safety-Kleen Corporation**, 137 F.Supp.2d 228, 236 (W.D.N.Y. 2000)

[9] BCL § 723(c).

[10] *E.g.*, White, New York Corporations, Form No. 723:4

[11] BCL § 724(c).

[12] **Booth Oil Site Administration Group**, *supra*, 137 F.Supp.2d at 236 (former officer entitled to allowance upon his affidavit denying liability and asserting his good faith); **Sequa Corporation v. Gelmin**, 828 F. Supp. 203, 206-07 (S.D.N.Y. 1993) (rejecting an argument an allowance requires a showing comparable to one made to support a summary judgment, noting that on an allowance application a party need merely raise genuine issues). Also see **Professional Insurance Company of New York v. Barry**, 303 N.Y.S.2d 556 (NY County) *aff'd*, 302 N.Y.S.2d 722 (1st Dep't 1969). But see **Sauvigne v. Andrea Electronics Corporation**, (Nassau, Warshawsky, 2004) N.Y.L.J., April 15, 2004, p. 19, column 3, appeal pending, (exercising its equitable discretion to require corporate counterclaimant to place into escrow its own ongoing litigation expenses in prosecuting counterclaim during pendency of litigation).

[13] **Sequa Corporation**, *supra*, 828 F. Supp. at 207(declining to condition allowance on the posting of a bond).

[14] See generally BCL § 726. ■

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- $10,000 annually to any other political committee.

See 11 C.F.R. § 110.1(a) and (e).

As noted, this schedule of limitations is identical to that applied to individuals. And, importantly, a portion of any contributions or expenditures from the partnership must be attributed to partners individually as well. The contribution counts against the partnership's limit *and* against the individual limit of every participating partner. Bear in mind that an individual (and therefore a partnership) must also limit her *total* federal contributions to $95,000 every two years ($37,500 of which may go to candidates, and $57,500 to PACs and parties). *See* 11 C.F.R. § 110.5.

If all partners are participating in a contribution from a partnership, it should be attributed to each individual partner according to his or her equity stake. For example, assume a partnership has two equal partners, and the partnership makes a contribution of $2000 to a candidate committee. The contribution exhausts the partnership's limit for that candidate in that election. In addition, a contribution of $1000 is attributed to each partner individually, and each may now personally contribute only another $1000 to that candidate in that election.

Partnership contributions are not subject to detailed reporting requirements; however, with any contribution, the partnership must send a written notice listing the names of all contributing partners and the amount to be attributed to each. *See* 11 C.F.R. § 110.1(e)(1). Be aware that if any partners are "foreign nationals," they are precluded from making federal contributions and no portion of the contribution should be attributed to them. 2 U.S.C. § 441e(a)(1)(A); 11 C.F.R. § 110.20(b). Likewise, if any partner is a corporation, the corporate partner may not contribute. 11 C.F.R. §§ 110.1(e), 110.1(g)(2) and 114.2. If fewer than all partners are contributing, the contribution must be drawn against only the participating partners' profits (or losses) and no partner may exceed her individual limit by virtue of the contribution. 11 C.F.R. § 110.1(e).

The Definition of "Contribution" Under the Act is Broad, Encompassing Donations of Labor, Services, and Space

Your firm needn't cut a check to make a contribution within the meaning of the law. A "contribution" is "anything of value" given to influence a federal election. 2 U.S.C. §§ 441b(b)(2) and 431(8)(A)(i); 11 C.F.R. 100.52(a). The regulations take an expansive view, defining "*anything of value*" to include "the provision of goods or services without a charge or at a [reduced] charge . . . ." 11 C.F.R. § 100.52(d)(1). While this definition obviously encompasses cash payments, it also includes less obvious "in kind" contributions, such as labor or space (even if offered at only a slight discount), loans, and even endorsements of loans.

Donating Labor

For example, your firm may wish to give employees a few days off with pay to volunteer for the committee or candidate of their choice. In doing so, your firm is

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making a contribution that may be strictly limited or completely prohibited. FEC regulations clearly state that "[t]he payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose…is a contribution." *See* 11 C.F.R. § 100.54.

This general rule has two notable exceptions. First, in the case of hourly and salaried employees expected to work a particular number of hours per period, "no contribution results if the employee engages in political activity during what would otherwise be a regular work period, provided that the taken or released time is made up or completed by the employee within a reasonable time." *See* 11 C.F.R. § 100.54(a). Second, "no contribution results where the time used by the employee to engage in political activity is *bona fide*, although compensable, vacation time or other earned leave time." *See* 11 C.F.R. § 100.54(c). If your firm wishes to grant leave for employees to work for a committee or a candidate, it must insist that employees either take accrued, earned leave time; take unpaid leave; or make up any time taken within a fairly short period.

There are some additional corporate-specific exceptions to donations of labor or services worth noting. A corporation may pay expenses associated in setting up, administering, and fundraising for its own SSF without triggering the restrictions on "contributions." 11 C.F.R. § 114.1(a)(2)(iii). A corporation may also provide free *legal or accounting services* to: (a) a *party* committee, so long as such services are not devoted to furthering the election of any candidate; or (b) a *candidate* committee, solely for purposes of assisting the committee in complying with the Act and FEC regulations. *See* 11 C.F.R. § 100.7(b)(13) and (14). But then, if your firm is qualified to assist a candidate committee in complying with federal election law, you probably don't need to be reading this article.

Space, Office Equipment, and Other Goods

Like free or discounted labor, "anything of value" includes space or facilities (conference rooms, townhouses, offices), office equipment (copiers, faxes), access to mailing lists, and office supplies. All of these can be contributions within the meaning of the election laws if they are provided without charge or at a rate below the "usual and normal charge" for such items. *See* 11 C.F.R. § 100.52(d)(1); FEC Adv. Op. No. 1996-13; FEC Adv. Op. No. 1995-8. The value of such goods and services is "their usual and normal" value, derived from the price they would fetch on the open market at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

Loans and Guarantees of Loans

Likewise, a loan to a candidate or political committee is a contribution in the full amount of the loan at the time it is made. 11 C.F.R. § 100.52(b)(2). Therefore, a loan from an individual, partnership, or corporate PAC cannot exceed the dollar limitations on contributions set forth above. 11 C.F.R. § 100.52(b)(1). A loan remains a contribution until it is repaid. 11 C.F.R. § 100.52(b)(2).

Guaranteeing or endorsing a loan is the same as making a loan. 11 C.F.R. § 100.52(b)(3). In the case of multiple guarantors, each guarantor has made a contribution up to the amount for which she has agreed to be liable. 11 C.F.R. § 100.52(b)(3).

Individuals, Partnerships and SSFs May Make "Independent Expenditures"

The campaign finance laws do not completely strip individuals or organizations of basic First Amendment freedoms. Very broadly, corporate or labor union SSFs, as well as individuals and partnerships, are free to spend unlimited amounts of their own funds to communicate their political beliefs—so long as they do not, in doing so, coordinate the message with a candidate, party, campaign or agents thereof. 11 C.F.R. §§ 109.20 and 109.1(b)(4). If the candidate or her agents approve, request, solicit or weigh in on the expenditure, it is deemed an in-kind contribution. 11 C.F.R. § 109.1(a) and (c). Likewise, if the expenditure involves simple distribution of candidate-prepared materials, it, too, is a contribution. 11 C.F.R. § 109.1(d). And be mindful that organizations that cannot make contributions—corporations, labor unions, foreign nationals, and federal contractors—cannot make independent expenditures, although corporations and labor unions may do so using "hard money" raised through their SSFs.As discussed immediately below, these "independent expenditure" rules contemplate only "express advocacy" for election or defeat of a "clearly identified" federal candidate, that is, use of clear terms such as "vote for," "support," or "cast your ballot." 11 C.F.R. § 100.22(a). But note that expenditures made too close to an election can become "electioneering communications" subject to heightened scrutiny and reporting requirements. Roughly, "electioneering communications" are television and radio ads made within 60 days of a general election and merely "identify" a federal candidate. 11 C.F.R. § 100.29(b). Anyone spending over $10,000 on such an ad must make detailed disclosures to the FEC within 24 hours of its distribution. 2 U.S.C. § 434(f)(1); 11 C.F.R. § 100.19(f).

Contributions to Certain "527 Groups" Are Not Subject to FEC Regulation at All

So what is a politically-minded firm to do? It doesn't take long to hit the limit on contributions—then what?

The answer, at least this year, is § 527 groups. Swift Boat Veterans for Truth, MoveOn.org, Americans Coming Together—they are all, at least in part, so-called "527 groups," and their influence on this presidential campaign has already been enormous.

Interestingly, § 527 is not found in any election law. Rather, it is a section of the Internal Revenue Code ("I.R.C.") that allows for the creation of organizations that can "accept contributions" and "make expenditures" for certain enumerated "exempt purposes." *See* 26 U.S.C. § 527(e)(a). Among these exempt purposes is the "function of influencing or attempting to influence" a federal election. *See* 26 U.S.C. § 527(e)(2).

I.R.C. § 527 is a broad, generic tax classification. Almost every political committee registered with the FEC and subject to campaign finance regulations enjoys

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§ 527 tax status. Despite the right's condemnation of § 527 organizations, even Bush-Cheney '04, Inc., is a "527 organization" within the strictest sense of the term. But as the term has come to be used, it refers to organizations performing public-interest, grassroots, and civic-minded but inherently *political* tasks that "charitable" tax-exempt organizations would be prohibited from carrying out under 501(c)(3) of the I.R.C.[1] Such tasks include sponsoring get-out-the-vote ("GOTV") drives that have some degree of bias in targeting the vote to be got out, and funding mass-media advertisements designed to inject certain issues into an election. When Bush decries the proliferation of "527 groups" operating outside the reach of campaign finance laws, he is referring to this subclass of § 527 groups, which do not have to register with the FEC.[2] The MoveOn.org Voter Fund (*www.moveonvoterfund.org*) and AmericaVotes (*www.americavotes.org*), which primarily concentrate on demographically targeted GOTV efforts in battleground states, are classic examples.

These groups enjoy the flexibility that they do because the FEC has not taken jurisdiction over, and the usual contribution limits do not apply to, all § 527 groups—only those that are Federal "political committees" within the meaning of 2 U.S.C. § 431(9)(A). For many years, the accepted legal definition of a "political committee" has required that the organization have the primary purpose of making "expenditures" of over $1000 per year for the purposes of influencing a federal election. 2 U.S.C. § 431(4). But money spent on a communication qualifies as an "expenditure" only if the communication is "express advocacy," meaning advocacy of the election or defeat of a "clearly identified candidate." *See* **Buckley v. Valeo**, 424 U.S. 1, 42-44 (1976). That is why, for example, Swift Boat Veterans for Truth can pay more than $1,000 for advertisements that accuse a specific candidate of lying: (a) the advertisements do not "expressly advocate" for Kerry's defeat; and (b) they (allegedly) have not been coordinated with Bush's or another political committee, and are therefore not considered an in-kind contribution subject to dollar limits.

As a general rule, § 527 groups that are not "political committees" within the meaning of the Act may accept donations of any size and from any source, free from detailed FEC reporting rules[3] and other restrictions. But there are exceptions. Notably, even § 527 organizations not otherwise under FEC jurisdiction are prohibited by recent amendments from using corporate or union treasury funds—"soft money"—to make "electioneering communications," and must quickly report any such communications to the FEC like anyone else. *See* 2 U.S.C. §§ 434(f), 441b(a)(2) and 441b(c); *accord* **McConnell v. FEC**, 540 U.S. ___ (2003). These recent amendments—part of the Bipartisan Campaign Reform Act of 2002—and the Supreme Court's endorsement thereof in McConnell have thrown the long-standing definition of "political committee" into some doubt. The FEC may undertake rulemaking intended to broaden this definition, though that won't happen in time to affect the upcoming presidential election. For the immediate future, therefore, small firms can give more or less freely to "527 groups" not registered with the FEC.

* * *

The laws governing election contributions and expenditures may not be user-friendly, but the consequences of violating them can be substantial. It is imperative to keep track of your personal and firm contributions, so that you do not make unlawful contributions. The legality of a contribution will depend in large part on who is contributing and whether the organization you are contributing to is a "political committee" under the jurisdiction of the FEC. In general, the usual limits apply to contributions you make to candidates and parties, but may not apply to contributions to independent organizations such as MoveOn.org, AmericaVotes, America Coming Together (*www.actforvictory.org*), and ElectionProtection Volunteer.org (*www.electionprotection. org*).

Footnotes

[1] Donations to charitable 501(c)(3) organizations are tax-deductible; the policy quid pro quo for this is that such organizations must stay out of partisan political processes. *See, e.g.*, **Branch Ministries v. Rossotti**, 211 F.3d 137 (D.C. Cir. 2000).

[2] Indeed, many organizations being referred to as "527s" may in fact be structured, at least in part, as "social welfare" organizations under I.R.C. § 501(c)(4). For example, MoveOn operates three different organizations simultaneously: MoveOn.org under I.R.C. § 501(c)(4); MoveOnPAC, a federal political committee; and the MoveOn.org Voter Fund under I.R.C. § 527.

[3] § 527 organizations must nevertheless make reports to the IRS. ■

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Spinetti argued they were unseverable and tainted the entire agreement. Disagreeing, the court enforced the agreement without the clauses. 91 Id. At 753-755. In a signal to the plaintiffs' bar, the court stated that "the increasing awareness by claimants' counsel of their severability will at least ensure that employees who inquire about remedies will be given appropriate advice by counsel." Id. At 755.

A word of caution. While other circuits have held similarly to the Third (that the clauses are illegal per se), see Ninth Circuit in **Circuit City Stores, Inc. v. Adams**, 270 F. 3d 889, 894 [87 Fair Empl. Prac. Cas. (BNA) 1509, 1512] (9th Cir. 2002), on remand from the U.S. Supreme Court, 532 U.S. 105 (2001), not every court agrees. Some prefer to treat the issue on a case-by-case analysis, weighing the cost of the arbitration and the ability of the claimant to pay against the cost of potential court litigation. See **Musnick v. King Motor Co. of Fort Lauderdale**, 91 Fair Empl. Prac. Cas. (BNA) 771 (11th Cir. 2003), holding that "the Agreement's 'loser pays' provision denied Musnick a remedy he would have under Title VII if allowed to proceed under the statute, but applied a case-by-case analysis as above stated." 91 Fair Empl. Prac. Cas. (BNA) at 773.

In this circumstance, the claimant has the initial burden to come forward with proof of the likely arbitration fees required in his specific arbitration and inability to pay. See Musnick, 91 Fair Empl. Prac. Cas. (BNA) at 775 and **Blair v. Scott Specialty Gases**, 88 Fair Empl. Prac. Cas. (BNA) 464, 473 (3rd Cir. 2002). Significantly, in **Blair**, the court suggested discovery procedures concerning fees to meet claimant's burden. 88 Fair Empl. Prac. Cas. (BNA) at 474, 475.

There is one further variation to the case-by-case approach. In **Morrison**, *supra*, at 5, the Sixth Circuit held that a reviewing court should look to more than the deterrent effect of a cost-splitting provision on a particular plaintiff, but rather to its chilling effect on similarly situated plaintiffs as a class, by factoring in the average or typical costs of arbitration. Id. 193410 at 5.

POSITION WANTED

I am a recent graduate having passed the New York Bar Exam, and having been admitted to practice as of January 28, 2004. I have very good writing and research skills, particularly with on-line research. In addition, I helped edit a book about employment discrimination where I did extensive cite-checking and editing. I am seeking full-time employment.
Steve Pipinger
steve_pipinger@comcast.net

IV. Mutuality

Numerous courts have refused to enforce an arbitration agreement that requires only employees to arbitrate their claims against the employer, but does not require the employer to arbitrate claims it may have against the employees. The leading case is **Armendariz v. Foundation Health Pschcare Svcs, Inc.**, 6 P.3d669 [83 FEP Cases 1172] (Cal. 2000).

V. Limitation of Remedies

Another default provision the discerning plaintiff's attorney will find to be a basis for denying enforceability concerns the limitations of penalties. In **Circuit City v. Adams**, supra, the dispute resolution agreement limited remedies to one year of back pay, two years of front pay, and punitive damages to the greater of $5,000 or an amount equal to the sum of the front and back pay awards. The Ninth Circuit held the agreement unenforceable, as did the Sixth Circuit, in **Morrison v. Circuit City Stores, Inc.**, supra, in interpreting the same clause.

VI. Handbook Provisions Allowing Modification

Some mandatory arbitration agreements included in employee handbooks provide that the company has the right to modify or cancel provisions in the handbook. The courts have uniformly refused enforcement of the arbitration provision. See e.g. Dumais v. American Golf Corp., 299 F 3d 1216 (10th Cir. 2002), Phox v. Atriums Management Co. Inc., 90 Fair Empl. Prac. Cas. (BNA) 1741 (D.Kan. 2002) and Gourley v. Yellow Transportation LLC, 88 Fair Empl. Prac. Cas. (BNA) 1286 (D Col. 2001).

VII. High Pressure Tactics to Obtain Employee Signature

A challenge to enforceability may prove successful where the employee was coerced into signing the agreement. Such a scenario was considered by the Southern District of New York. **Brennan v. Bally Total Fitness**, 88 Fair Empl. Prac. Cas. (BNA) 335 (S.D. 2002). Following an employer-sponsored presentation on sexual harassment, the employees were given a sixteen-page, single-spaced Employee Dispute Resolution Procedure and were told to review and return it fifteen minutes later. The court denied enforcement, characterizing the situation as the use of high pressure tactics to coerce signatures. 88 fair Empl. Prac. Cas. (BNA) 335.

VIII. Unreasonable Discovery Limitations

The need for adequate discovery by plaintiff's counsel is self-evident. Where the agreement's rules limited each side to one deposition, and provided other bilateral rules, the Sixth and Seventh Circuits refused enforcement. Penn v. Ryan's Family Steak Houses, Inc. 18 Individual Employment Rights 1114 (BNA) 1114 (7th Cir. 2001); Floss v. Ryans' Family Steak Houses, Inc. 211 F. 3d 306 (6th Cir. 2000).

Conclusion

While the plaintiffs' bar has been generally unsuccessful in resisting mandatory arbitration (see Michael H. LeRoy and Peter Feuille, Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future, 18 OHIO ST. J. ON DISP. RESOL. 249, 299 (2003)), there have been successes as the above cases illustrate.

If the EEOC promulgates new rules on fairness and due process in employment arbitration, it should look to these decisions for guidance. ■

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