Workshop A: Switching to Offense in Employment Cases

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Labor & Employment Law Section

Switching to Offense in Employment Cases

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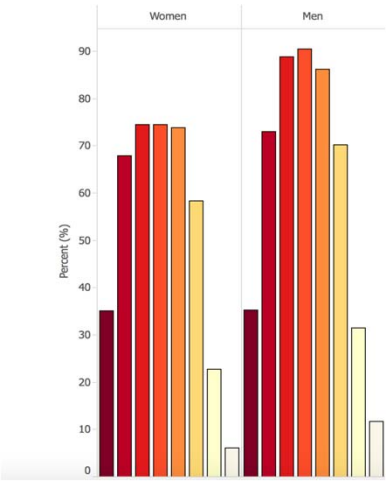
Agenda

- Equal Pay Act
- Class Action Waivers
- Responding to Attorney Letters & Mediation
- Counterclaims, and the Threat Thereof
- Fee Shifting

Unequal Pay Disputes under Equal Pay Act in #Me Too Era – How to Avoid Litigation

Statistics about Women in the Workforce

- 56.8% of eligible women are currently in the U.S. workforce (as compared to 69.2 % of men)
- Most women range from 25-34; 35-44; and 45-54 years old
- Most common industries women work in include education, nursing, secretary/administrative assistants, and customer service



The Pay Gap

- In 1963, women earned 59 cents to every $1 a man made
- Although the wage gap is getting smaller, today women still only earn 80 cents to every $1 a man earns
- The average woman must work far into the next year to earn what the average man earns the previous year.
- The difference in pay amounts to $10,086 per year and $403,440 over a 40-year career.

Equal Pay Day 2018

- Tuesday, April 10, 2018
- The average woman must work far into the next year to earn what the average man earns the previous year.
- Equal Pay Day is the approximate day the typical woman must work into the new year to make what the typical man made at the end of the previous year. Based on ACS Census data, the 2018 wage gap between women and men is $.80 (cents).

Old Time "Justifications" for Pay Gap

Education Disparities- more men than women had college degrees

Workforce Numbers- more men worked than women

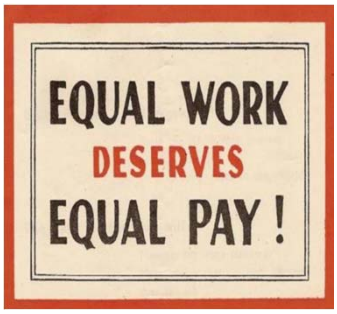
Industry Differences- more men work in certain industries that pay more

Child Care Obligations- more women tend to family matters than men

History of the Fight for Equal Pay

- In 1869, a resolution to **ensure equal pay to government employees** passed the House but was ultimately watered down by the time it passed the Senate in 1870.
- In 1911, **New York teachers** were granted pay equal to that of their male counterparts, after a long and contentious battle with the Board of Education.
- Women made up **a quarter of the American workforce** by the early 20th century, but they were traditionally paid far less than men, even in cases where they performed the same job.
- Efforts to correct the wage gap escalated during **World War II when thousands of American women entered factory jobs in place of men** who had enlisted in the military. In 1942, for example, the **National War Labor Board endorsed policies to provide equal pay** in instances where women were directly replacing male workers.

- In 1945, the U.S. Congress introduced the **Women's Equal Pay Act**, which would have made it illegal to pay women less than men for work of "comparable quality and quantity." The measure **failed to pass**, however.
- After the war ended, the demand for equal pay seemed to lose some steam. In 1947, **Secretary of Labor Lewis Schwellenbach tried to get an equal pay amendment** passed that would apply to the private sector. But as **veterans needed work after the war** and women were increasingly expected to stay in the home, Schwellenbach's bid was unsuccessful.
- By 1960, women still earned **less than two-thirds** of what their male counterparts were paid.
- In 1963, the **Equal Pay Act** was passed.
- In 1964, **The Civil Rights Act of 1964**, which prohibited discrimination on the basis of race, origin, color, religion or sex was passed.



The Equal Pay Act

- Signed into law on June 10, 1963 by **President John F. Kennedy**
- Part of the **Fair Labor Standards Act** of 1938 (FLSA)
- Administered and enforced by the **Equal Employment Opportunity Commission** (EEOC)
- Prohibits **sex-based wage discrimination** between men and women in the same **establishment** who perform jobs that require equal **skill**, **effort** and **responsibility** under similar **working conditions**.

- **Establishment**: a **distinct physical place of business** rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment.
- **Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is **what skills are required for the job, not what skills the individual employees may have**.
- **Effort**: The amount of **physical or mental exertion** needed to perform the job.
- **Responsibility**: The degree of **accountability** required in performing the job. Minor differences in responsibility would not justify a pay differential.
- **Working Conditions** This encompasses two factors: (1**) physical surroundings** like temperature, fumes, and ventilation; and (2) **hazards**.

Title VII of the Civil Rights Act

- Signed into law by **President Lyndon B. Johnson** on July 2, 1964
- Title VII prohibits **discrimination in pay and all other aspects of employment** based on **sex** (as well as, race, color, national origin, religion, or retaliation).
- Under Title VII, the question is **whether you were paid less because of your sex.** If an employer pays women less than men in the same situation, and its explanation (if any) does not adequately explain the difference, then there is indirect proof of pay discrimination under Title VII.
- Title VII only applies to employers with **15 or more employees** whereas EPA applies to all employers regardless of number of employees.

Violations of EPA and Title VII

- In 2017, the EEOC received **996 equal wage discrimination charges**. Yet just a fraction of these charges go beyond the initial filing. Last year, 65.1% were found to have "no reasonable cause" for action. But 18.7% were meritorious and resulted in collecting $9.3 million in monetary benefits.
- Under the EPA, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit.
- The EPA is **intent-neutral**. In other words, it doesn't matter whether you meant to pay an employee less because of gender—the fact that you did it is enough.
- In 2017, **25,605 Title VII charges** were filed with the EEOC alleging sex-based discrimination. 16.2%% were merit resolutions collecting monetary benefits of $135.1 million in monetary benefits.

Statue of Limitations

- Under the **EPA**, you generally have **two years from the date of payment** to go to the EEOC or directly to court. The only exception is if you can show that the employer intentionally disregarded the legal requirements of the EPA; then, you have three years from the discriminatory payment.
- You must file a **Title VII** charge within **180 days** of when you received the discriminatory pay. (This 180-day deadline may be extended to 300 days if your charge also is covered by a state or local anti-discrimination law and you filed with the local agency. Once you receive a right to sue letter, you can then file with the U.S. District Court but it must be filed within 90 days from the date you received the right to sue letter.
- To challenge pay discrimination by the federal government, you only have 45 days to contact your agency's EEO counselor.

Employer's Affirmative Defenses

1. Seniority System
2. Merit System
3. Pay System based on quantity or quality of output
4. Any other factor other than sex

While the first three factors are pretty straightforward, that last **"catch-all" category** is where employers get creative. They may say the higher paid employee has more experience or training, or that he was simply a better negotiator

Prior Salary History

Aileen Rizo v. Jim Yovino, No. 16-15372 (9th Circuit, April 9, 2018) (en banc decision)

- Court held: employers fighting claims under the federal Equal Pay Act can't rely on workers' **past salaries** to justify paying women less than men.
- **"Prior salary alone or in combination with other factors cannot justify a wage differential**," Judge Reinhardt said. "To hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum — would be contrary to the text and history of the Equal Pay Act."
- Prior salary therefore is not "a factor other than sex" affirmative defense
- This is first Circuit Court to impose strict prohibition against use of prior salary as a factor.
- The Second Circuit requires the fourth factor to be job-related but hasn't to date banned reliance on prior salary as one factor to consider. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

Prior Salary History – Philadelphia Statute

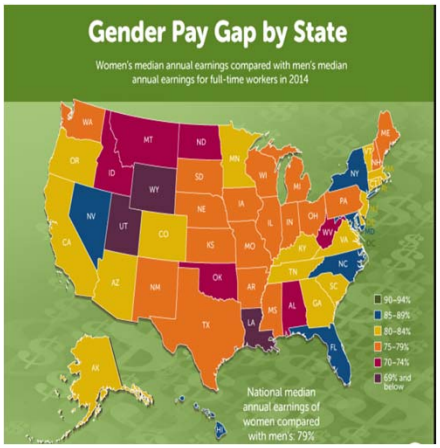
- Philadelphia passed the first law prohibiting inquiry about salary history.
- Chamber of commerce sought to invalidate and enjoin the law on basis that prohibiting inquiry into prior salary history violates an employer's free speech rights under the First Amendment. **The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia, No. 2:17-cv-01548 (U.S. District Court, Eastern Dist. Pennsylvania)**
- District Court Judge Mitchell Goldberg on April 30, 2018 granted preliminary injunction on the portion of the law banning the inquiry about prior salary on basis that there is a likelihood that the Chamber would prevail on a First Amendment ground that ran afoul of an employer's free speech rights.

Prior Salary History – Philadelphia Statute (continued)

- The district court upheld the portion of the law that prohibited an employer from relying on the wage history of an applicant unless the applicant knowingly and willingly disclosed it.
- An appeal is pending before the Third Circuit.
- The validity of the Philadelphia law and other similar laws such as NYC law, and recent Mass. Law banning inquiry of prior salary will await further litigation. Philadelphia lawsuit is likely to be the test case.

State Laws that Prohibit Unequal Pay

- **All states** except for seven of them have specific legislation that prohibits employers from paying a female employee less than a male employee.
- The exceptions are North Carolina, South Carolina, Utah, Wisconsin, and D.C. which do have **general employment discrimination laws**, but no specific pay gap laws.
- Alabama and Mississippi have no legislation regarding this matter, but follow the federal legislation



NYS - Achieve Pay Equity Law

- Signed in Oct. 2015 by Governor Cuomo, it provides greater workplace protections than the federal Equal Pay Act.
- Applies to all public and private employees in New York State.
- First – it broadens the term "same establishment" by defining it to include "workplaces in the "same geographic region"
- Second – It replaces the "any other factor other than sex" defense with the more limited defense of "bona fide factor other than sex, such as education, training, or experience"
- The Employer must demonstrate that this factor is
  - Not based on or derived from a sex-based differential in compensation
  - Is job related with respect to the position in question

NYS – Achieve Equal Pay Law (continued)

- Is consistent with a business necessity (defined as "a factor that bears a manifest relationship to the employment in question")
- Further, even if the employer can satisfy its burden with respect to these three elements, the defense will not be allowed if the employee can then demonstrate that:
  - The Employer uses an employment practice that causes a disparate impact on the basis of sex
  - An alternative employment practice exists that would serve the same purpose without causing a disparate impact; and
  - The employer has refused to adopt the alternative practice.

NYS - Achieve Equal Pay Act (continued)

- Two additional revisions to the Equal Pay Act provide:
  - Pay Transparency – Employers may not prohibit employees from inquiring about, discussing or disclosing wage information, except under limited circumstances.
    - Many employees already have this protection – those covered by NLRA and/or employed by federal contractors.
  - Increased Damages: The amount of liquidated damages for failure to pay equal wage is increased from 100% to 300% of wages due, but only in the case of a willful violation.

Mass. Equal Pay Act

- Effective July 1, 2018
- Goes further than NYS Law by prohibiting discrimination based on gender, if employee is performing **comparable work** rather than pay disparity between genders if performing **equal work** as set forth by the Equal Protection Act**.**
- Compare with New York Equal Pay Provision Section 194 that retains the same standard as the EPA in prohibiting a lesser wage "**for employees of the opposite sex employed in the same establishment if performing equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions"**

Governor Cuomo's Equal Pay Executive Orders (effective June 1, 2017)

- Exec. Order #161: all state agencies are prohibited from asking an applicant for current or prior salary before a conditional offer of employment with compensation is made to applicant.
- Exec. Order #162: new reporting requirements for state contractors and subcontractors – submission of job title and salary for each employee working on a contract (including sex, race, and ethnicity, already required).
- State agencies are prohibited from relying on prior salary history to determine salary, unless required by law or a collective-bargaining agreement.

Cuomo's Proposal to Restrict Job Applicant Inquiry in New York State

- Proposed on April 10, 2018 (Equal Pay Day)
- Statute would ban employers from asking job applicants about past salaries under an amendment to the NYS Human rights Law.
- Governor Cuomo: "The gender pay gap exists across the economic spectrum, across all industries, and can follow women throughout their careers. By banning salary history, we can break the weight of this unfair, unequal cycle and work to achieve fair pay for all women in this state"
- Not passed as of now but let's watch further.

Mayor De Blasio's Equal Pay Executive Order

- Order 1253 took effect on Oct. 31, 2017.
- **Prohibits all employers in New York City (public and private) from inquiring about an applicant employee's salary history.**
- Public Advocate Letitia James: "This law is a major step toward achieving pay equity … By prohibiting employers from asking about salary history during the hiring process, we will ensure that being underpaid once does not condemn anyone to a lifetime of inequity."
- This law protects not only women but also immigrants, minorities, older women, among others.

Proactive Steps to Avoid Gender-Based Unequal Pay Litigation

Get ahead of the curve . . .

- Voluntarily follow the NYC law (even if not covered) and refrain from asking applicants about prior salary.
- Voluntarily adopt proactive approach called for by the Mass Equal Pay Act (MEPA), which provides an affirmative defense for employers who conduct a good faith pre-litigation self-audit of pay practices and take steps to remedy unjustified gender pay disparities.
  - Hire outside experts to conduct the pay study.
  - Self-correction - pay increases to correct gender-based differentials.
  - Study could also be used to address wages disparities for other protected groups.

Proactive Steps to Avoid Gender-Based Unequal Pay Litigation

- Evaluate processes:
  - Engage an HR consultant or I/O psychologist to study validity of evaluations and other systems for determining initial pay, merit increases, bonuses, and promotions.
  - Design systems based on objective, job-related criteria and not based on subjective determinations made by supervisors or HR personnel.
- Train supervisors and managers:
  - Frame of reference training.
  - Implicit bias training.
  - Engage business managers and leadership in equal pay efforts.
- Increase transparency:
  - Pay structure, salary ranges within job classifications, information on methodology supervisors use to grant pay increases, merit increases, bonuses, and promotions
  - European models: British, Australian, German laws requiring public disclosure of gender-based salary disparities
- Re-build the workplace culture:
  - Engage business-side leaders (not just HR) to promote gender equity
  - Incentivize managers to promote positive outcomes

Proactive Steps to Avoid Gender Based Unequal Pay Litigation in NYS

- Increase communications:
  - Review employee performance at least twice a year so employees are made aware of areas that need improvement, areas where they are performing in a satisfactory manner, and areas where their performance is commendable or even outstanding.
  - Regular reviews will motivate employees and ensure them that the system of remuneration is fair and objective.
- Create an effective complaint mechanism:
  - Appoint a committee or task force (not a direct supervisor of the complainant) to review pay discrimination complaints.
  - Maintain complaints electronically and report issues to leadership.
  - Institute periodic follow-up procedure after complaint to ensure no adverse action.
  - Establish a mediation program to address pay issues.

Class Action Waivers

- *Epiq Systems v. Lewis* (2018) – the U.S. Supreme Court upheld an employer's use of class action waivers in arbitration agreements

Class Action Waivers

Pros

- May discourage expensive, prolonged class action litigation
- Less publicity and exposure of litigation documents in arbitration
- Some plaintiff's attorneys are more willing to take class action lawsuits over arbitration proceedings
- To bring multiple arbitrations, plaintiffs must have employees "signed up"

Cons

- Time-consuming battles about threshold issues
- Potential for hundreds of individual arbitration proceedings, resulting in costly arbitrator and administration fees
- Lack of coordination to handle similar issues/discovery
- Possibility of claim/argument preclusion against the employer
- Different arbitration results on similar issues which could lead to uncertainty for business practices
- Media attention and public backlash against arbitration, confidentiality, class waivers, and general fairness.

Class Action Waivers

- Enforceability of Class Action Waivers
  - It is insufficient to state that the parties agree to arbitration—there must be an explicit provision stating that arbitration proceedings will be on an individual basis
  - Employers may also have a provision explicitly prohibiting class/collective claims
  - NY State Law prohibits arbitration of sexual harassment claims

Responding to Attorney Letters & Mediation

- What are the pros/cons of pre-suit or early mediation?
- How much factual information or documentation should each party share?
- Should the parties agree to tolling pending mediation?
- Share mediation statement with the other side? Include case citations?
- How do we ensure the mediation will be the most effective?

Counterclaims: Employer Playing Offense

"Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting." – Sun Tzu, The Art of War

- Counterclaims are sometimes available in employment cases, however, employers should be cautious and not pursue frivolous counterclaims because they have been found by some courts to be retaliatory.

Compulsory Counterclaims

- As explained in *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991):
  - Under Fed. R. Civ. P. 13(a), a pleading must state as a counterclaim any claim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.
  - The test for determining whether a counterclaim is compulsory is whether a logical relationship exists between the claim and counterclaim and whether the essential facts of the claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.
- *E.g.*, counterclaims based on a contract are compulsory in actions relating to the same contract.

Counterclaims

- Meritorious counterclaims cannot be deemed retaliatory
- *Marchuk v. Faruqi & Faruqi, LLP*, 100 F. Supp. 2d 302, 311-312 (S.D.N.Y. 2015) - holding that counterclaims cannot "form the basis for a Title VII retaliation claim" unless they are "completely baseless".

Faithless Servant Doctrine

- Common-law theory that when an employee is disloyal to an employer (*e.g.*, unfair competition, insider trading, theft), the employer is entitled to all compensation paid to the employee during the time of disloyalty.
- Applies to many different types of employee misconduct:
  - *Morgan Stanley v. Skowron*, (S.D.N.Y. 2013) (insider trading);
  - *Colliton v. Cravath, Swaine & Moore, LLC* (S.D.N.Y. 2008) (off-duty sexual misconduct);
  - *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, (1st Dep't 1984) (unfair competition);
  - *Astra USA v. Bildman*, (Mass. 2009) (sexual harassment).

New Life to an Old Doctrine

In *William Floyd Union Free Sch. Dist. v. Wright* (2d Dep't 2009), the court ordered two District employees who had stolen money from the District to forfeit the compensation paid to them since their **first disloyal act**, and all of their life and health insurance premiums that the District would otherwise be obligated to pay them into retirement. This resulted in a judgment of almost $1.6 million in the District's favor.

Faithless Servant Doctrine

- *Salus Capital Partners, LLC v. Moser* (S.D.N.Y. 2018) – after terminating CEO without cause, the company reviewed former CEO's emails and uncovered evidence of that he attempted to conceal unauthorized personal charges on the corporate credit card. Court upheld arbitrator's award which found that the CEO had:
  - Spent $90,000 in questionable CC charges, including:
    - Patio furniture
    - Watches
    - Family travel expenses
    - Boston Bruins gear

Salus & the Faithless Servant Doctrine

- Arbitrator also found CEO:
  - Falsified an AV vendor's invoices totaling $100,000 with the intent to deceive Salus as to the true nature of the expenses incurred – since the AV work was actually done for his personal home, *not Salus*
  - Spent $35,000 in personal use of the company's NetJets account
- Arbitrator awarded $879,514 to the employer under the FSD and $748,155 in attorneys' fees for the investigation conducted after the CEO's employ ended

Faithless Servant Doctrine & Insider Trading

- *Morgan Stanley v. Skowron*, 989 F. Supp. 2d 356 (S.D.N.Y. 2013) – ordering disgorgement of compensation following a single instance of insider trading, lying to regulators, and failing to disclose the misconduct to the employer
  - "In addition to exposing Morgan Stanley to government investigations and direct financial losses, Skowron's behavior damaged the firm's reputation, a valuable corporate asset"
  - 100% of the compensation he received during the period of disloyalty because he was not paid on a "task-by-task" basis

Faithless Servant Doctrine

Task-by-task forfeiture for salaried employees, like defendant, would not only run afoul of New York's strict application of the forfeiture doctrine…, but would also have the ill effect of embroiling the courts in deciding how much general compensation should be forfeited, where the general compensation was awarded while the agent was acting disloyally in some, but not all, of his [or her] work…For these reasons, we decline to relax the faithless servant doctrine so as to limit plaintiff's forfeiture of all compensation earned by defendant during the period in which he was disloyal.

- *City of Binghamton v. Whalen,* (3d Dep't 2016) (internal citations and quotations omitted).

Faithless Servant Doctrine

- Compare: *Astra USA, Inc. v. Bildman*, 455 Mass. 116 (Mass. 2009) and *Colliton v. Cravath, Swaine & Moore, LLP*, 2008 U.S. Dist. LEXIS 74388 (S.D.N.Y. 2008), *aff'd*, 356 F. App'x 535 (2d Cir. 2009) with *Pozner v. Fox Broadcasting Co.*, 2018 N.Y. Misc. LEXIS 1149 (Sup. Ct. N.Y. Cnty. April 2, 2018).

Faithless Servant Doctrine as a Counterclaim

- In *Markbreiter v. Feinberg*, (S.D.N.Y. 2010), a former physician's office manager/secretary filed a claim for recovery under the FLSA and NYLL for unpaid overtime.
- The Court ruled the employer's counterclaim under the faithless servant doctrine was compulsory – finding it arose out of the "same transaction or occurrence."
  - "Here, the counterclaim seeks to recover compensation defendants paid to plaintiff for hours during which she allegedly was acting on behalf of competing physicians to attract defendants' patients where plaintiff seeks, at a minimum, to count those same hours in determining her entitled to overtime compensation."
- *Cf. Sanders v. Madison Square Garden, L.P.*, 2007 U.S. Dist. LEXIS 48126 (S.D.N.Y. 2007) ("[T]he alleged misconduct [tax fraud] here is so far removed from [plaintiff's] job responsibilities that it cannot be said that the misconduct "substantial[ly]" interfered with her job performance.")

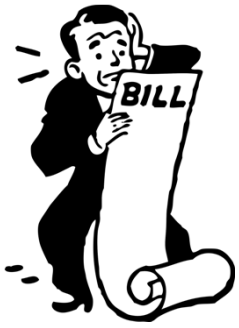
Fee Shifting

Sun Tzu: "If we do not wish to fight, we can prevent the enemy from engaging us even though the lines of our encampment be merely traced out on the ground. All we need to do is to throw something odd and unaccountable in his way."

- A defense attorney may move for fee-shifting against a plaintiff's lawyer who has been put on notice that the plaintiff's claim is frivolous.

Fee Shifting

- *Capone v. Pachogue-Medford Union Free Sch. Dist.*, (E.D.N.Y. 2006) (imposing full fee-shifting against plaintiff's counsel in an employment case).
- The EEOC was found to be liable for attorney's fees where the agency should have known by pretrial conference that it did not have enough evidence to establish a prima facie case of discrimination. *EEOC v. West Customer Mgmt. Group, LL*C, (N.D. Fl. 2015).



Sanctions

"By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b).

- *LaVigna v. WABC Television*, (S.D.N.Y. 1995) (requiring the employee's attorney to pay $250 and attend CLE courses after finding the plaintiff's Title VII and FLSA claims were "wholly frivolous and objectively unreasonable").

Treble Damages

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

(N.Y. Judiciary Law § 487).

Offer of Judgment

- Rule 68 of the Federal Rules of Civil Procedure permits defendants, 14 days prior to the date set for trial, to make an offer of judgment to the plaintiff to dispose of the case for a certain amount.
- If the plaintiff rejects or does not respond to the offer within 14 days, and the plaintiff receives a judgment at trial which is less than defendant's pre-trial offer, plaintiff must pay the defendant's post-offer costs.
- Depending on the claim and what constitutes "costs" under the applicable statute (FLSA, Title VII, etc.), there may be a limit on plaintiff's post-offer attorney's fees.

Offer of Judgment

- An offer of judgment in a Title VII discrimination case will cut off the accrual of attorney's fees post-offer because the statute defines "costs" to include reasonable attorney's fees. *See, e.g., Tai Van Le v. University of Pennsylvania*, 321 F.3d 403, 411 (3d Cir. 2003).
- An offer of judgment in an FLSA, ADA or ADEA case will not cut off the accrual of attorney's fees post-offer because the statutes do not define costs as including attorney's fees. *See, e.g., Grochowski v. Ajet Construction Corp.*, 2002 U.S. Dist. LEXIS 5031, at *6 (S.D.N.Y. Mar. 27, 2002).