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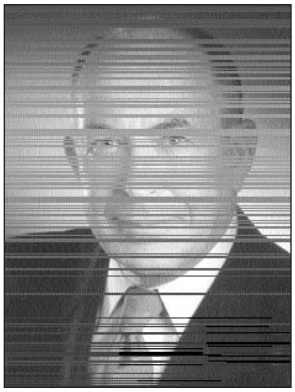
L&E Newsletter

A publication of the Labor and Employment Law Section
of the New York State Bar Association

A Message from the Chair



On April 26-28, the Section held its Spring Program at The Sagamore, in Bolton Landing, New York. One hundred forty-two members attended (a very good turnout considering this was a rescheduling of the Fall 2001 Program which had been cancelled because of the September 11 disaster). There were eight hours of plenary sessions and workshops on a wide variety of subjects. Program Co-Chair Jacquelin Drucker (now Section Chair-Elect), with the help of numerous Committee Chairs, developed a content-rich program which was well received and noted by many, with great approval and requests for more of the same in the future. Between cool and wet days on Friday and Sunday we enjoyed a beautiful spring day on Saturday which permitted golf and tennis events and a perfect setting for strolling, antiquing and shopping in the Saratoga-Adirondack area for Section members and their guests.

At its meeting on Sunday morning, the Section's Executive Committee voted to reorganize the CLE Committee to increase its operating efficiency. Committee Chairs were asked to undertake and incorporate leadership opportunities and succession planning for the respective Committees. The Executive Committee approved a proposal by Bob Simmelkjaer, Chair of the Law School Liaison Committee, to expand the visibility of the Section among law students by enhancing the essay-writing competition in a number of ways.

NYSBA staff discussed the new NYSBA Web site, including capabilities for Section announcements, discussion groups and a case law search device which will automatically update developing case law information on selected search inquiries. I have appointed Gary Johnson, Co-Chair of the Ad Hoc Committee on Public Sector Book, to be our Section's liaison to NYSBA for Web site use. I expect that we will be able to post program events, announcements, Committee minutes and other information useful to our members.

In June, I attended a two-day NYSBA Leadership Seminar for Section leaders. This was the second year for the seminar, which I found very useful. In addition to presentations by NYSBA staff to inform us of resources available to the Sections, NYSBA-elected officers and leaders spoke of the inner workings and objectives of the

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Association. I found the shared experiences of former Section Chairs most helpful, particularly with regard to membership matters and enhancement of services for members. I intend to explore the possibility of our Section's conducting a membership survey (within the next six to nine months) to obtain your input on what we do well, what we can do better, and what new initiatives you would like us to undertake.

Richard N. Chapman

From the Editor

My thanks to John Gaal, Paul Keneally and Beth Anne Diodato, Michel Lee, Rachel Minter and Geraldine Reilly for the fine articles in this issue.

Is it my imagination, or is it true that most of the articles I have received for publication in the past year have been about employment law? I am wondering whether anyone else has noticed this phenomenon and whether there is less of an interest in traditional labor law right now. I would welcome comments about this, as I would welcome some labor law articles.

In the meantime, there is an interesting case on the Supreme Court's docket for the fall term. In *Nevada Dep't of Human Resources v. Hibbs*,[1] the Court will decide whether state workers may sue their employers for violations of the Family and Medical Leave Act. This case has the potential to restrict further the scope of federal laws that affect state governments.

Mr. Hibbs took 12 weeks of FMLA leave, and additional paid leave donated by co-workers, to take care of his wife. The employer, however, decided that the time he took off under the state's "catastrophic leave" program would count against the 12 weeks of leave he was entitled to take under the FMLA. Hibbs was fired when he refused to return to work, and filed suit against the Department. The Ninth Circuit found for the employee, saying that the family care provision of the FMLA was a valid exercise of congressional authority to eliminate gender discrimination based on the stereotype that only women are family caregivers.[2]

The issue implicates the states' sovereign immunity from lawsuits under the Eleventh Amendment to the Constitution, which can be superseded by the enforcement section of the Fourteenth Amendment, which guarantees due process and equal protection to all citizens. The question here is whether the FMLA family care provision meets the tests necessary to defeat state sovereign immunity.

Janet McEneaney

Endnotes

1. No. 01-1368.
2. 273 F.3d 844 (9th Cir. 2001).

Did You Know?

Back issues of the *L&E Newsletter* (2000-2002) are available on the New York State Bar Association Web site.

(www.nysba.org)

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For your convenience there is also a searchable index. To search, click on "Edit/ Find on this page."

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Who Gets the Deference? Judicial Review of a Public Employer's Discipline of a Civil Servant

By Paul F. Keneally and Beth Anne Diodato

> The reasons assigned for the removal must appear, upon their face, to justify the action; in other words, they must be substantial and not frivolous, but when they appear to be sufficient to justify the determination, the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department.[1]

Introduction

Civil Service Law § 75(1) provides that a person holding a position governed by the Civil Service Law, or otherwise eligible for civil service protection, "shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated charges."[2] Based on the evidence submitted at the hearing, the Hearing Officer determines the guilt or innocence of the accused employee and issues a recommendation for punishment. The Hearing Officer only has the power to make a recommended decision to the Civil Service Commission or Personnel Board or Officer; the decision is not binding or final.[3]

The employing agency or officer has the option to adopt, reject, or modify the recommendation made by the Hearing Officer. Where an aggrieved employee appeals an unfavorable decision, the employer's determination and consequential action, as it relates to the Hearing Officer's recommendation, will influence the procedure by which the courts will review the appropriateness of the disciplinary action as a matter of law. This article will examine the standards used by reviewing courts in assessing the appropriateness of disciplinary measures taken by public employers regarding civil servants.

Adoption

By adopting the recommendation in its entirety, the public employer defers all decision-making responsibility to the Hearing Officer in disciplining a civil service employee. An employee's ability to scrutinize that determination comes in the form of an appeal.

Aggrieved employees can appeal to the Civil Service Commission pursuant to section 76 of the Civil Service Law.[4] Where an employee elects to appeal to the Commission, that body may, pursuant to Civil Service Law § 76(3), in the exercise of its discretion, vacate or modify the punishment imposed by the employer.[5] Although Civil Service Law § 76 provides that "the decision of (the) civil service commission shall be final and conclusive, and not subject to further review in any court," appeals to the courts have been permitted in the form of CPLR Article 78 proceedings.[6] Here, the aggrieved party is seeking relief solely to set aside the Commission's determination. The focus of the review is the penalty as modified by the Commission rather than the original penalty imposed by the employer. The test to be applied is whether the Commission's exercise of its discretion, in modifying the penalties imposed by the employer, was "purely arbitrary."[7]

Alternatively, employees may bring their grievance directly to the courts. In that instance, the test is whether the employer arbitrarily imposed punishment; that is, was it "so disproportionate to the offense . . . as to be shocking to one's sense of fairness."[8] Courts have limited power to overturn employer and Commissioner determinations on appeal.[9] That power is most often sought where the employer has rejected and/or modified the Hearing Officer's recommendation.

Rejection and Modification

Creating a clear record is essential to assuring meaningful review in disciplinary cases. Civil Service Law § 75(2) requires that the disciplining officer or body must review both the record made before and the recommendation made by the Hearing Officer.[10] Typically, a penalty cannot be based upon evidence or information outside the record.[11] However, in rejecting the entire recommendation of the Hearing Officer, the employing agency (or officer) can do one of the following in making its own findings of fact and assessing a penalty: (1) rely on or limit its determination to the evidence presented at the hearing; or (2) present new and substantial evidence to support a finding of guilt.[12] Where the employing agency summarily rejects the Hearing Officer's findings and recommendation, as per the latter option, it is required to make new findings of fact and provide a clear record for the reviewing court, outlining the grounds upon which it based its determination.[13]

The issue to be resolved is whether the employer's determination, on review of the entire record, was supported by substantial evidence and was not made arbitrarily.[14] This issue is one of law to be decided by the court. The evidence upon which the determination is based cannot rise from "bare surmise, conjecture, speculation or rumor."[15] There must substantial proof within the whole record of such "quality and quantity as to generate conviction in and persuade a fair and detached fact finder."[16] The agency or officer determination will be upheld unless the record as a whole fails to provide a rational basis to support the findings of fact upon which it was based. Certainly, the court need not agree with the agency's or officer's decision to uphold it.

Where credibility is a central issue, significant weight is generally given to the Hearing Officer's findings in determining whether substantial evidence exists to support the charges.[17] This is not to say that the agency or officer is bound by the Hearing Officer's assessment of credibility or determination of innocence. Rather, the agency (or officer) is free to make its own such determination as long as the determination is supported by substantial evidence.[18] When an agency or officer summarily rejects the Hearing Officer's assessment of credibility, there must be clear findings of fact for judicial review that are neither arbitrary nor capricious.[19]

The courts exercise "a genuine judicial function" and are not to "confirm a determination simply because it was made by such an agency."[20] However, the courts may not interfere in the exercise of discretion by an agency or officer on a question of fact, unless there is no rational basis for the exercise or the action taken.[21] As the Court of Appeals stated in *Weber v. Cheektowaga*,

> in case of dereliction of an employee in the performance of duty, the determination upon the facts is for the Town Board,[22] and such determination will not be set aside by the courts unless it is unsupported by proof sufficient to satisfy a reasonable man, of all the facts necessary to be proved in order to authorize the determination, or unless there is such a preponderance of proof against the existence of any of the facts necessary to be proved as would require the setting aside of the verdict of a jury.[23]

In reviewing the rationality behind an agency's or officer's decision-making process, courts utilize the "arbitrary and capricious" test.[24] This test assesses whether a particular action was justified and/or soundly based in the facts. Thus, a court cannot substitute its judgment for that of the agency or officer unless the decision, upon review, is deemed randomly made and an abuse of discretion.[25] The test is the same for a modification, which differs from rejection in that only a part, rather than the whole, of the Hearing Officer's determination is rejected by the agency or officer.

Assessing guilt and/or punishment therefore is generally a valid exercise of an agency's or officer's discretion.[26] The dissenting justices in *Johnson v. Board of Trustees* seemed to indicate that penalty determinations deserve more deference by stating that the exact nature of the penalty imposed should particularly be left to the discretion of the agency.[27] Regardless, when assessing guilt or imposing punishment, the agency or officer must act rationally, making a decision based on facts in the record.

The agency or officer need not make new findings of fact when it deviates only from the Hearing Officer's recommended disciplinary measures.[28] The agency's or officer's determination in such cases will not be annulled for failing to state reasons for upward deviation, as long as the Hearing Officer's findings provide ample support for and are consistent with the severity of the penalty imposed by the agency or officer.[29] Presumably, new written findings would also not be necessary if the agency's or officer's divergent factual findings are obvious from the record.

The standard utilized to review the appropriateness of penalties is one of excessiveness. Thus, the relevant inquiry is not whether the punishment is supported by substantial evidence, but rather whether, in light of all the facts and circumstances, the penalty was proportionate to the offense such that it would not shock a reasonable person's sense of fairness.[30] It is irrelevant whether the aims of the discipline could have been achieved through less severe sanctions.[31] In assessing the severity of the sanctions, the court considers, inter alia, whether the imposed sanction is too grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, or insubordination.[32] Reviewing courts will also consider such mitigating factors as the prospect of deterrence, the length of employment of the employee, the probability that a dismissal may leave the employee without any alternative livelihood, potential loss of retirement benefits, and the effect upon the employee's family in assessing whether or not a penalty is unfairly excessive.[33] These factors will be specifically considered only when assessing the appropriateness of the sanction and deciding whether the court should interfere.[34]

Deference remains quite important. For example, in *NYC Housing Authority v. NYC Civil Service Commission*, the Supreme Court, Special Term, held that the discipline imposed by the Civil Service Commission, in mod-

ification of the decision of the Housing Authority, was not purely arbitrary, and thus was upheld, even though the court was of the opinion that the authority's punishment was appropriate under the circumstances.[35] The court, in its limited judicial review, was forced to uphold the Commission's imposed penal deviation regardless of the fact that the Housing Authority acted within its discretion, following appropriate procedures.[36] The factors mentioned above will not be considered in cases where the petitioner acted without concern for life or property,[37] or, certainly, where the misconduct or insubordination is sufficiently serious.

Conclusion

When an employment decision is made regarding an employee eligible for civil service protection, whether it be an adoption, rejection, or modification of the Hearing Officer's recommendation, and the person has acted within his or her jurisdiction and power following lawful procedure, the courts have no alternative but to confirm the decision.[38] In essence, the ultimate discipline imposed, whether made by the employer or the Civil Service Commission, will not be reversed unless there is clear proof that the findings were not supported by substantial evidence or the decision was made arbitrarily.

Endnotes

1. *Griffin v. Thompson*, 202 N.Y. 104, 110-111 (1911).
2. N.Y. Civil Service Law § 75 ("Civ. Serv. Law").
3. 24 Am. Jur. *Trials* § 421 (1977).
4. Civ. Serv. Law § 76.
5. Civ. Serv. Law § 76(3).
6. *Id.*; *see New York City Housing Auth. v. New York City Civil Serv. Comm'n*, 94 Misc. 2d 183, 403 N.Y.S.2d 966 (Sup. Ct., N.Y. Co. 1978).
7. *N.Y.C. Housing Auth.*, 403 N.Y.S.2d at 967.
8. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 233 (1st Dep't 1974).
9. *See James v. Carter*, 209 A.D.2d 522 (2d Dep't 1994).
10. Civ. Serv. Law § 75(2); *see Smith v. Bd. of Educ.*, 221 A.D.2d 755 (3rd Dep't 1995).
11. *See Simpson v. Wolansky*, 38 N.Y.2d 391, 396 (1975); *Smith,* 221 A.D.2d at 758; *Johnson v. Town of Arcade*, 281 A.D.2d 894, 895 (4th Dep't 2001).
12. *See generally Stevens v. Axelrod*, 162 A.D.2d 1025 (4th Dep't 1990); *Close v. Hammond*, 166 A.D.2d 845 (3d Dep't 1990); *Benson v. Bd. of Educ.*, 183 A.D.2d 996 (3d Dep't 1992); *Smith,* 221 A.D.2d 755.
13. *Id*.
14. CPLR 7801, 7803(4).
15. *Amalgamated Transit Union v. Newman*, 78 A.D.2d 105, 106 (4th Dep't 1980).
16. *Id.*
17. *See James*, 209 A.D.2d 522; *Stevens,* 162 A.D.2d 1025.
18. *See Stevens,* 162 A.D.2d 1025.
19. *See supra*, note 12.
20. *Amalgamated*, 78 A.D.2d at 106.
21. *See Pell*, 34 N.Y.2d 222.
22. Some municipal employees are hired and fired by other town supervisory staff. *See, e.g.,* 1980 Ops. St. Compt. File #18 (Highway Department).
23. *Weber v. Town of Cheektowaga*, 284 N.Y. 377, 380 (1940).
24. *Id.*; *see Stevens*, 162 A.D.2d 1025; *James*, 209 A.D.2d 522.
25. *See generally Pell*, 34 N.Y.2d 222; *Amalgamated*, 78 A.D.2d 105; *N.Y.C. Housing Auth.*, 403 N.Y.S.2d 966.
26. *See Miller v. State Dep't of Tax. & Fin.*, 263 A.D.2d 604 (3d Dep't 1999); *Close v. Hammond*, 166 A.D.2d 845 (3d Dep't 1990).
27. *See Johnson v. Board of Trustees*, 97 A.D.2d 413 (2d Dep't 1983).
28. *Id*.
29. *Id.*
30. *See Santarella v. N.Y.C. Dep't of Correction*, 53 N.Y.2d 948 (1981); *Miller,* 263 A.D.2d 604; *Gunther v. Cahill*, 90 A.D.2d 995 (4th Dep't 1982); *D'Aurizio v. Greece Cent. School Dist.*, 229 A.D.2d 987 (4th Dep't 1996).
31. *See Santarella*, 53 N.Y.2d 948 (1981).
32. Incompetency, misconduct, and insubordination are separate matters. *Weatherlow v. Bd. of Educ.*, 236 A.D.2d 855 (4th Dep't 1997). Misconduct requires a showing of "willfulness or intentional conduct." *Id.* at 856. To support a finding of incompetency, there "must be evidence of some dereliction or neglect of duty." *Id.* Insubordination by a civil service employee requires "intentional, willful disobedience" or a "'persistent unwillingness to accept the directives of his superiors.'" *Id.*
33. *See Pell*, 34 N.Y.2d 222; *N.Y.C. Housing Auth.*, 403 N.Y.S.2d 966; *Smith*, 221 A.D.2d 755; *Weatherlow,* 236 A.D.2d 855; *Lane v. County of Fulton*, 249 A.D.2d 750 (3d Dep't 1998); *Ross v. Oxford Academy and Cent. School Dist.*, 187 A.D.2d 898 (3d Dep't 1992).
34. *Id.*
35. *N.Y.C. Housing Auth.,* 403 N.Y.S.2d at 968.
36. *See Pell*, 34 N.Y.2d 222; *Stevens,* 162 A.D.2d 1025; *Amalgamated*, 78 A.D.2d 105.
37. *See id.*
38. *See id.*

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Religion at Work: The Unique Issues of Religious Discrimination Law

By Michel Lee

Introduction

Religious discrimination has traditionally been something of a trailer of employment civil rights causes of action, overshadowed both in media coverage and sheer volume by sex harassment, race discrimination and age discrimination cases. However, three factors are likely soon to propel workplace religious issues into the spotlight.

The first is simple demographics. While the United States has long been a religiously and ethnically diverse nation, former generations of Americans and immigrants from Europe have largely been followers of the "Western" religions of Christianity and Judaism. However, an influx of immigrants in recent decades from Asia, Africa and the Mid-East has resulted in a sharply rising number of adherents to Islam, Hinduism, Jain, the Sikh religion, Buddhism, Shintoism, Taoism and Bahais. Many New Age religions and splinter sects now also fill the landscape. These include groups such as Scientology, Wicca, the Hare Krishna movement, the Rev. Sun Myung Moon's Unification Church, the Winners' Church and fringe Hasidic groups. For many Americans, the tenets, customs and observances of these religions remain alien.

The second factor is the rise of religious conservatism and—in tandem—a rise of the expression of spirituality in the workplace. A poll by the Gallup Organization, for instance, reports that 95 percent of Americans say they believe in God or a universal spirit, and 48 percent say they talked about their religious faith at work that day.[1]

The third factor is the September 11, 2001, terrorist attack on the United States and the ensuing flood of TV and newspaper coverage of militants who espouse identification with Islam. Nationwide, this has resulted in a considerable increase in retaliatory attacks and harassment against Muslims and individuals of South Asian and Mid-Eastern descent who are *believed* to be Muslims.[2] This broader social outlash has, not surprisingly, been reflected in the workplace.[3] Notably, in the seven months following the terrorist attack, the EEOC received more than double the number of religious discrimination filings than during a similar period in 2000.[4]

New York—a hub of immigration—has a proud history of religious and ethnic tolerance. However, it was New York that bore the brunt of the terrorist attack, and New Yorkers who experienced the unfolding terror firsthand. There simply can be no question that the anger, stress, and anxieties stemming from September 11 will have an impact upon the New York workplace.[5] It is further beyond cavil that kindled prejudices and animosities will play out in the form of employment discrimination.[6] Attorneys who practice in New York, and particularly those who advise employers, therefore, need to familiarize themselves with the law on religious discrimination. This article will focus on the unique features of both the legal analysis and fact patterns of religious discrimination cases.[7]

Analytical Framework—in Brief

The prohibition against religious discrimination in employment is codified in Title VII of the Civil Rights Act.[8] As with the other classes protected by Title VII, a case can proceed under disparate treatment and harassment theories.[9]

Accordingly, in order to make out a claim for disparate treatment, an employee must satisfy the four requirements of the *McDonnell Douglas* test.[10] Under this framework, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination by showing that (1) he belongs to a protected class; (2) he was qualified for the job position at issue; (3) he was discharged or otherwise suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination.[11] To prevail on a hostile environment claim, a plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment."[12]

Once the plaintiff demonstrates a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions.[13] If the defendant meets this burden of production, then the plaintiff must prove that the proffered reason was a pretext for discrimination.[14]

Uniquely in the area of religion, however, Title VII goes beyond equal treatment and places an affirmative duty on employers to accommodate the religious practices of their workers.[15] Thus Title VII religious bias cases may proceed under the conceptually distinct "failure to accommodate" theory.

To establish a prima facie case under this theory, plaintiff must demonstrate that (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he informed the employer of this belief or practice; and (3) he was disciplined for failing to comply with the conflicting employment requirement.[16] The burden then shifts to the employer to show that it made or offered a reasonable accommodation to the employee or was not able to accommodate the employee without undue hardship.[17] Whether accommodation would cause an employer undue hardship "must be determined based on the particular factual context of each case."[18]

Discordant Notes in the Pluralistic Workplace

A distinguishing characteristic of religious discrimination cases is the degree to which they involve the competing rights and clashing sensibilities of different segments of the workforce. One highly publicized case illustrating this dynamic is *Gunning v. Runyon*.[19]

In *Gunning*, the employer, a branch of the U.S. Postal Service, had discontinued the airing of Christian radio broadcasts transmitted over a public address sound system at work, after receiving complaints from employees who found the broadcasts annoying or offensive.[20] In response, a group of workers who sought to continue to listen to the Christian broadcasts via loudspeaker brought suit under, *inter alia*, Title VII. The court found in favor of the employer, holding that there was no religious discrimination as there was no evidence that the employees were treated less favorably in the terms and conditions of their employment as a result of not being able to listen to Christian music over a loudspeaker.[21] The court further found that the postal service had presented a legitimate nondiscriminatory reason for discontinuing the broadcasts; to wit: avoiding further conflict over music at the workplace.[22]

Another case which ensued from discordant religious sentiment was *Corry v. Analysts International Corp*.[23] The plaintiff in *Corry* was a Buddhist database consultant who apparently had a tendency to use colorful language often laced with epithets using the words "Jesus Christ" and "God."[24] After a devout Christian coworker complained, an Analysts International manager reprimanded Corry. At a subsequent staff meeting, Corry and others were asked to refrain from saying "God" and "Jesus Christ."[25] When Corry objected, saying he was not a Christian, he was allegedly asked to conduct himself in accordance with the Ten Commandments.[26] Corry wrote his employer a letter of complaint about the incident and soon thereafter his contract was terminated. Corry thereupon filed a religious discrimination claim on the ground that he had been discharged for objecting to being told to follow the tenets of another religion.[27]

The caution with which the employer must approach the intersection of workplace behavior and religion is also evidenced by *Ramprasad v. NYC Health & Hospitals Corp*.[28] In that case the plaintiff, an East Indian, "born again" Christian, had been working as an executive secretary receiving excellent performance evaluations for six years when she suddenly received the "baptism of the Holy Spirit."[29] The divine imparting inspired her to "speak in tongues" in the office, both when she was alone and when colleagues were present.[30] During outbursts of prayer and prophecy she was also, in her own words, moved to weep "intensely as if suffering."[31]

After plaintiff began to engage in these expressions of religious fervor, her boss issued memos alleging plaintiff's poor performance. Ultimately, Ramprasad was fired. Upon reading her termination letter, Ramprasad told the personnel director, "I love my job, I need my job, the Lord sent me here. This is contrived. Is someone trying to undo me? . . . this is not what God wants for me," and advised the director that she was "a minister,"[32] to which he responded "keep your ministry outside!"[33] A Brooklyn federal judge ruled that Ramprasad could proceed with a claim under Title VII on the grounds that plaintiff's termination for allegedly unsatisfactory job performance could be considered contrived, and pretextual for religious discrimination.[34]

Disparate treatment claims in this area, of course, are also based on straightforward perceptions of religious bias, as evidenced by allegations that remarks made in the workplace reflect religious prejudice[35] and allegations that an employee's treatment differed from that of similarly situated co-workers having other religious affiliations.[36]

Yet cases also arise involving assertions of *intra*faith discrimination. In *Krantz v. College of Staten Island*,[37] for example, an adjunct lecturer brought suit against his employer college for its failure to interview and hire him for an assistant professorship on the grounds of his being a non-observant Jew married to a Catholic. Krantz maintained that observant Jews were favored in the hiring process and that the teaching position was given to a more religious Jew.[38]

Indeed, the kaleidoscopic composition of the New York population provides an especially favorable environ for intrafaith discrimination claims. These can stem not only from tensions between secularized and highly devout members of the same religion, but between members of different sects (e.g., Shiite and Sunni Muslims), as well as between individuals who may share the same religious affiliation, but little else in the way of ethnic, racial or cultural identity.[39]

The New York Times, for example, recently reported that the growing population of Latino Muslims face discrimination from Muslim immigrants from the Arabic

world who consider the Latino Muslims inauthentic because they do not speak Arabic (the language of the Koran) and fail to follow certain religious practices.[40] Muslim immigrants from Arab and Asian countries can also react negatively to Latino Muslims because of stereotypes of Hispanics as hot-tempered or promiscuous.[41] At the same time, Latino Muslims face hostility from Catholic Hispanics who view conversion to Islam as an abandonment of their culture in which Catholicism is deeply ingrained.[42]

This highlights another distinctive feature of religious discrimination: the degree to which religious discrimination is interwoven with ethnic, racial or national origin biases.[43] *Smitherman v. Williams-Sonoma Inc.*[44] is illustrative of this hybrid kind of case. Smitherman was a sales associate at Pottery Barn (a division of Williams-Sonoma), a practitioner of the Rastifarian religion and a black woman. Following a tenet of the Rastafarian religion, Smitherman wore her hair in a style commonly known as dreadlocks. Comments allegedly directed toward plaintiff by managers at the store included a statement that her hair "smelled musty" and needed to be washed, "people like you should be working in McDonalds," and "most Rastifarians are homophobic."[45] Smitherman sought a Senior Sales Associate position, but open positions were filled instead by an Hispanic Catholic woman, and by a black man and black woman who were of unknown religious beliefs, but not Rastafarian. Although the defendant articulated a legitimate nondiscriminatory reason for its failure to promote Smitherman, the court denied summary judgment, finding plaintiff established genuine issues of material fact as to whether discriminatory animus motivated its decisions.[46]

What may set certain religious hybrid cases aside from other cases in which discrimination based on several characteristics is alleged (such as race discrimination and sex discrimination, or national-origin discrimination and age discrimination) is the degree to which the characteristic biases are melded. This may particularly hold true in cases involving Muslims of Mid-Eastern origin. In the minds of many, "Muslim" and "Arab" are virtually conceptually interchangeable. Thus Indonesian-Muslim and Philippine-Muslim workers might escape discrimination in the same workplace where an Iranian-Christian is subjected to anti-Islamic animus.

Moreover, homegrown religious-ethnic prejudices are amply supplemented in the workplace by workers of multivarious national origins who import their own global animosities. This is the dynamic that played out in *Jalal v. Columbia University in the City of New York,*[47] a case brought by a Pakistani-born Muslim associate professor of history at Columbia University who contended that discriminatory animus toward Pakistanis and/or Muslims motivated a decision to deny her tenure. The case primarily rested on statements made by two Indian Hindu professors, one of whom allegedly remarked to a colleague: "You can't expect a Pakistani to teach the history of India."[48] The other allegedly asked a graduate student "how do you feel about working with a Pakistani?"[49] and said "I have heard that [plaintiff] holds and expresses distinctly anti-Indian views."[50] At deposition that particular professor also conceded that she believed that she had been unfairly passed over for promotion in favor of a Muslim man.[51]

Harassment

Animosities, of course, can also lead to an abusive work environment. As with other Title VII causes of action, religious harassment claims are based on examples of ridicule, insults, epithets and other manifestations of enmity, and judicial analysis focuses on whether such incidents are sufficiently frequent, numerous or severe as to alter the conditions of a plaintiff's employment.[52]

Religious harassment fact patterns, however, can involve complicating factors which do not exist in other kinds of harassment cases. For example, different individuals (or groups) in the workforce can claim counter-harassment by each other when clashing religious views are ardently expressed. In a similar vein, an employee may claim harassment because another employee is proselytizing for his own religion or otherwise making unwelcome religious advances. Yet the employer cannot simply demand cessation or take disciplinary measures without leaving itself open to a potential religious discrimination claim by the harasser.[53] Such a claim might derive directly from the employer's endeavor to suppress the employee's religious expression. A claim could also arise at some later time when an adverse employment action is taken and the employee then endeavors to show discriminatory motive by linking it to the employer's previous criticism or restraint of that employee's religiously motivated speech.

An employer, nevertheless, does have the right to demand that employees' religious communications and other activities do not unduly disrupt the harmony or productivity of its workplace. The question is whether it can accomplish the balancing act of furthering workplace goals and preventing religious harassment, while avoiding a religious discrimination-based lawsuit.

Accommodation and Proselytizing

The issue of the employer's role in dealing with proselytizing in the workplace arises most often in the context of failure to accommodate cases. Title VII provides that an employer must reasonably accommodate all aspects of an employee's religious beliefs, observanc-

es and practices unless such accommodation would impose an undue hardship on the conduct of the employer's business.[54]

The first inquiry in an accommodation case is whether the conduct or belief even falls within the ambit of Title VII. Protectable observances, practices and beliefs need not be associated with a traditional religion. Nonetheless, they do need to be sincerely held and veritably religious (at least within the context of the employee's own scheme of things).[55] Accordingly, in *Gunning v. Runyon*[56] the court also dismissed a failure to accommodate cause of action asserted by the postal workers who wanted public address system broadcasts of Christian music to be resumed as an "accommodation," on the grounds that listening to Christian music was not a bona fide religious requirement. Likewise in *Smith v. Revival Home Health Care, Inc.*,[57] the failure to accommodate the claim of a plaintiff who disliked kosher food and objected to a policy banning non-kosher food at her workplace was rejected on the grounds that there was no tenet of her religion that prohibited the eating of kosher food.[58]

However, where the observance or practice springs from a legitimate religious need, the employer must determine whether any accommodation is feasible, and, if so, the extent of the accommodation. Notably, while an employer may refuse to provide accommodation if it can show that accommodation would create an "undue hardship,"[59] in practical effect, undue hardship analysis is a loop that simply returns to the basic question: what is reasonable?

Court rulings and federal guidelines do not offer a precise answer. The Supreme Court has held that, while Title VII requires the employer to make a reasonable accommodation, the employer needn't make the *most* reasonable accommodation, nor agree to the *employee's* proposed accommodation.[60] As a general rule, the reasonableness inquiry focuses primarily on two factors: (1) the amount of additional cost the employer would have to incur to facilitate accommodation, and (2) the effect going forward with the accommodation might have upon other workers.

Employers accordingly can be required to accommodate religious expression, including proselytizing,[61] if it occurs infrequently and does not cause workplace disruption or offend co-workers.[62] However, where an employee's religious activities or requirements have a genuine negative impact upon the workplace—be it upon organizational objectives, productivity, smooth functioning or morale—accommodation is not reasonable and an employer can successfully assert an undue hardship defense.

A recent case in point is *Knight v. State of Connecticut Department of Public Health*,[63] wherein two born-again Christians brought suit arguing for the right to discuss their religious beliefs with clients, after having been disciplined for evangelizing. Plaintiff, Knight, was a nurse consultant for the Connecticut Department of Public Health whose duties included interviewing Medicare patients at their homes. During a visit to the home of a same-sex couple, one of whom was in the end stages of AIDS, Knight and the two men started to converse about religion whereupon Knight felt called by the "Holy Spirit" to talk with the men about their salvation.[64] She told them that "although God created us and loves us, He doesn't like the homosexual lifestyle."[65] Following Knight's visit, the two men filed complaints against the Department with the State Commission on Human Rights and Opportunities alleging discrimination on the basis of sexual orientation in the provision of state services. The other plaintiff, Quental, felt the need to evangelize her beliefs while performing her duties as a sign language interpreter for the State of Connecticut Commission on the Deaf and Hearing Impaired.

The Second Circuit held that Knight and Quental's Title VII rights were not violated, reasoning that permitting plaintiffs to proselytize while providing services to clients would jeopardize the state's ability to provide services in a proper (religion-neutral) manner. Further, the state reasonably accommodated plaintiffs' beliefs, as the restrictions applied only while working with clients on state business.[66]

Scheduling Conflicts

Probably the major area of dispute in accommodation actions concerns scheduling. Typically scheduling problems occur when employees refuse to work weekend shifts that interfere with Sabbath observance, or when employees request time off for religious holidays or to attend prayer services.

A well-publicized dispute involving Sears, Roebuck and Company, for instance, arose when an Orthodox Jew, Katz, was denied employment as an in-home product repair technician because he could not work on Saturday Sabbath days. Katz offered to work on Sundays or evening shifts, but was rebuffed.[67] Ultimately, Sears entered into a settlement agreement with the New York attorney general's office under which Sears agreed to create a work schedule which would accommodate employees who observed the Sabbath on Saturdays, as well as to train Sears employees who performed hiring and training functions to better handle religious accommodation issues.[68]

The U.S. Supreme Court considered scheduling in *Ansonia Board of Education v. Philbrook*.[69] The plaintiff in that case was a high school teacher who needed to be absent from school six days a year to celebrate religious

holidays recognized by the Worldwide Church of God. Under the collective agreement governing his school, teachers were allowed to take three paid days off for religious holidays and three paid personal days for reasons not otherwise identified in the collective bargaining agreement. The U.S. Supreme Court remanded the case, with the guidance that "requiring respondent to take *unpaid* leave for holy day observance that exceeded the amount allowed by the collective bargaining agreement, would generally be a reasonable one."[70] The Second Circuit has also written approvingly of accommodating employees by permitting voluntary shift swaps.[71]

Yet a difficult problem arises when other workers will not swap shifts or cover a religious employee's absences with alacrity. While some grumbling by coworkers about an accommodation might not be enough to establish undue hardship,[72] where an accommodation demands other employees to do more than their share of work or would have a genuinely adverse effect on workplace morale, undue hardship will probably be found.[73] The focal point of any inquiry is the *degree* to which an accommodation might negatively impact the employer's business or impose burdens on other workers.[74]

Appearance Issues

Accommodation can also become an issue when religious customs conflict with workplace rules on apparel and grooming. Whether appearance policies amount to discrimination mostly depends on their underlying rationale and importance. Courts will nearly always uphold rules based on valid safety concerns such as the banning of headscarves and long skirts for employees working near heavy machinery, or requirements to wear protective gear.[75] On the other hand, purely preference-based appearance rules are likely to be trumped by religious needs.[76]

Religion, Morality or Politics?

A final unique and difficult question that can emerge in religious discrimination cases is whether a conviction is anchored in a religious, a moral or a political belief system.

The determination can make all the difference for the viability of a religion-based discrimination claim. A male Orthodox Jew who is disciplined for refusing to sit beside female colleagues at meetings clearly has no claim if he is simply a sexist, but may have one if he was abiding by his religious beliefs. A Muslim employee of a private concern discharged after voicing his antipathy toward the stationing of U.S. troops in Saudi Arabia would have no claim if his statements were mere political opinion, but might well have a case if he believed it was a sacrilege for non-Muslim soldiers to be in the country containing the Islamic holy sites of Mecca and Medea. A worker fired for having an extramarital affair with a co-worker has no claim if the reason for his dismissal was that the behavior was wrong and disruptive, but could assert a claim if the reason was because his fundamentalist Christian boss believed the worker committed a transgression against Christ.

Further complicating the matter is the fact that, while moral doctrine is not generally protected,[77] there is precedential authority for the argument that certain beliefs are held so profoundly as to be tantamount to religious conviction.[78] The Third Department, for example, has ruled that the complaint of two nurses who claimed they had been discharged because of letters sent to their employer announcing their moral stance against abortion stated a cause of action under the New York Human Rights Law. In reaching its determination, the court concluded that the nurses' "moral belief [with respect to abortion] constitutes an expression held with the strength of traditional religious conviction."[79]

Conclusion

Considering the fact that religious conflict can cause wars, it is no small wonder that it can create problems in the workplace. Indeed, the exceptionally pluralistic and diverse New York workplace may present the ultimate arena of religious concord and conflict.

For better or for worse, it is the employer who has been given the role of mediator who must try to enable workers to engage in protected religious activity while ensuring such activity does not intrude upon the rights of other employees or compromise workplace functioning.

Endnotes

1. Michelle Conlin, *Religion in the Workplace—The Growing Presence of Spirituality in Corporate America*, Business Week, Nov. 1, 1999, at 153 (Islam is widely considered to be America's fastest-growing religion).
2. People mistaken for Muslims include Mid-Eastern Christians, Sephardic Jews, Indian Hindus and Sikhs. *The Immigrants—More Insulted and Attacked After Sept. 11*, The New York Times, Mar. 11, 2002, at A12. *See also Bias Incidents Against Muslims Are Soaring, Islamic Council Says*, The New York Times, May 1, 2002, at A22.
3. *Id.* Sikhs, whose men wear beards and turbans, are often thought to be Muslim and report facing rising discrimination in the aftermath of Sept. 11. Susan Saulny, *In Aftermath of Temple Fire, Sikhs Pray and Share Sorrow*, The New York Times, Mar. 10, 2002, at 40. Some 300,000 Sikhs reside in the New York metropolitan area. *Id.*
4. *For Many Muslims, Complaints of Quiet but Persistent Bias*, The New York Times, Apr. 25, 2002, at A16 (also reporting on escalation of discrimination complaints by Sikhs and dramatic rise in bias complaints from Arabs and Muslims to the New York State Division of Human Rights).
5. *Even 6 Months Later 'Get Over It' Just Isn't an Option*, The New York Times, Mar. 11, 2002, at B1 (reporting on the deep psychic

wounds inflicted upon New Yorkers by the World Trade Center attacks).

6. The rise in religious discrimination is likely to extend beyond discrimination against Muslims and individuals believed to be Muslim. During times of war and national security threat from outside forces, particularly ones with an avowed religious agenda, it is a natural human tendency to start viewing people of different faiths and national origins as "the other." Moreover, the fire of Anti-Semitism has been fanned by the perception of some that the Israeli-Palestinian conflict has increased America's vulnerability to terrorism.

7. While this article focuses on Title VII and parallel New York statutory based claims, cases involving public employers will also, of course, frequently implicate constitutional free speech and free exercise issues. *See, e.g. Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990); *Knight v. State of Connecticut Department of Public Health*, N.Y.L.J., Jan. 2, 2002, p. 23, col. 1 (2d Cir. 2002); *Genas v. State of New York Department of Correctional Services*, 75 F.3d 825 (2d. Cir. 1996).

8. 42 U.S.C. § 2000e-2(a)(1). Title VII forbids an employer from discriminating against an employee because of that employee's "race, color, religion, sex or national origin." Title VII, however, exempts religious organizations—including religious corporations, associations, educational institutions or societies—from its prohibition against discrimination on the basis of religion. 48 U.S.C. § 2000e-1(a). Relying on the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution, courts have additionally recognized a "ministerial exemption" which exempts the employment relationships between religious institutions and their ministers from the coverage of Title VII. See *E.E.O.C. v. The Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000); *Little v. Wuerl,* 929 F.2d 944, 947 (3d Cir. 1991); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.); *cert. denied*, 409 U.S. 896 (1972). However, Title VII is still deemed to bar discrimination on non-religious grounds by religious organizations toward their non-minister employees. *Little*, 929 F.2d at 947. The key inquiry for a court seeking to apply Title VII to such an employment relationship is whether the position involved has any religious significance. *Ticali v. Roman Catholic Diocese of Brooklyn*, 41 F. Supp. 2d 249, 259 (E.D.N.Y. 1999).

9. Disparate impact theory—which challenges practices that are neutral on their face but, in practice, adversely disproportionately impact a class of protected persons, *see, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)—is available as well, but rarely addressed by the religious discrimination case law.

10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515 (1993).

11. *See id.*; *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994); *Rosen v. Thornburgh*, 928 F.2d 528, 532 (2d Cir. 1991) (plaintiff claimed that defendant's proffered reason for failing to hire him was pretextual and the real reason was anti-Jewish bias).

12. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) (quoting *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21 (1993)).

13. *See Texas Dep't Of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981); *McDonnell-Douglas Corp.*, 411 U.S. at 802-03.

14. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000); *Fisher v. Vassar College*, 114 F.3d 1332, 1336-37 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075, 118 S. Ct. 851 (1998). For the most part, the standards of proof governing an employment discrimination case raised under the New York State Human Rights Law (NYHRL), New York State Executive Law §§ 290 *et seq.*, and the New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York §§ 8-101 *et seq.*, are the same as for a Title VII claim. *Kravitz v. The New York City Transit Authority*, 2001 WL 1646513, at *5 (E.D.N.Y. 2001); *Sogg v American Airlines, Inc.*, 193 A.D.2d 153, 155-56, 603 N.Y.S.2d 21 (1st Dep't 1993), *leave to appeal denied*, 83 N.Y.S.2d 754, 612 N.Y.2d 109 (1994).

15. 42 U.S.C. § 2000e(j); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Note, however, that some courts have held that under the NYHRL and the NYCHRL an employer has no obligation (except in the limited case of Sabbath observers) to accommodate an employee's religious practices. *See Engstrom v. Kinney System, Inc.*, 241 A.D.2d 420, 661 N.Y.S.2d 610, 613 (1st Dep't 1997), *leave to appeal denied*, 91 N.Y.2d 801, 666 N.Y.S.2d 563 (1997). *See also Alie v. NYNEX Corp.*, 158 F.R.D. 239, 244 (E.D.N.Y. 1994) (NYCHRL claims analyzed in same way as NYHRL claims).

16. *Sable v. Stickney*, 1993 WL 267337, at *7-*8, (S.D.N.Y. 1993) (citation omitted).

17. *See Sable*, 1993 WL 267337, at *7 (citing *Ansonia,* 479 U.S. at 67-68). However the Supreme Court has interpreted Title VII's duty to make reasonable accommodations narrowly, holding that any accommodation imposing "more than a *de minimis* cost" amounts to an undue hardship. *Trans World Airlines, Inc.*, 432 U.S. at 84.

18. *Gordon v. MCI Telecomm. Corp.*, 791 F. Supp. 431, 435 (S.D.N.Y. 1992).

19. *Gunning v. Runyon*, 3 F. Supp. 2d 1423 (S.D. Fla. 1998).

20. Employees were free to listen to the broadcasts with individual devices such as radios.

21. *Id*. at 1428-29.

22. *Id.* at 1429.

23. *Corry*, 215 F.3d 1336, 2000 WL 725476 (10th Cir. 2000) (unpublished disposition).

24. *Id.* at *1.

25. *Id*. at *1-*2.

26. *Id*. at *2.

27. *Id.* A jury found that Corry failed to prove his claims of religious discrimination and retaliation. *Id.* at *2.

28. *Ramprasad*, 1999 WL 294787 (E.D.N.Y. 1999).

29. *Id.* at *1.

30. *Id.*

31. *Id.*

32. *Id.* at *2.

33. *Id.*

34. *Id.* at *4. *Compare with Quinones v. R. H. Macy & Co., Inc.*, N.Y.L.J., Feb. 23, 1999, p. 33, col. 3 (E.D.N.Y. 1999), where a Jehovah's Witness of Hispanic descent was fired by Macy's department store for allegedly engaging in sexual harassment. Plaintiff had requested a schedule change to accommodate his religious practices shortly prior to his discharge and sued claiming discrimination based on religion and national origin. The court found plaintiff failed to make out even a prima facie case, especially since his religion and national origin were never an issue during his 12-year employment at Macy's.

35. However, to support a religious discrimination claim, judges will usually require a showing of a nexus to the challenged employment action. For instance, in *Lenhoff v. Getty*, 2000 WL 977900 (S.D.N.Y. 2000), a record company manager asserted she was fired because of anti-Semitism. Plaintiff alleged that her boss, the record company owner, had made the remarks: "Every company needs a Jew, but you can never trust them"; "Jews are despicable"; "Jews control the music industry"; and "Hitler should have killed all the Jews." *Id.* at *1. Nevertheless, the court granted summary judgment in favor of the defendant on the bases that: (1) there was no temporal proximity between the

comments and plaintiff's discharge; (2) plaintiff's boss hired her with full knowledge that she was Jewish less than one year before he fired her (same-actor defense was applicable); and (3) plaintiff did not deny she had had frequent temper outbursts at work and exceeded her budget. *Id*. at *5-*6. In *Kazin v. Metro-North Commuter R.R.*, 1994 WL 68167 (S.D.N.Y. 1994), a Jewish plaintiff alleged that a decision-maker distributed a Jewish joke, told the plaintiff that he "did not fit the corporate culture," and said that he did not want the plaintiff to explain something in "talmudic detail." *Id*. at *14. The court deemed these statements insufficiently concrete to defeat defendant's motion for summary judgment because they were facially neutral and did not specifically refer to the fact that plaintiff was Jewish or to the suitability of plaintiff or Jews in general for employment. *Id.* at *16-*19. Similarly, in *Bottini v. Sadore Mgmt. Corp*., 1987 WL 16147 (S.D.N.Y. 1987), the plaintiff, a Jehovah's Witness, alleged his supervisor made disparaging remarks about his religious beliefs and practices when he referred to the plaintiff as a "holy roller," which he defined as one who is a religious fanatic. *Id*. at *11. The court held that the characterization did not reflect adversely upon the Jehovah's Witnesses, "admittedly, a respected religious sect." *Id.*

36. *See Bengard v. United Parcel Service*, 2001 WL 1328551 (E.D.N.Y. 2001) (rejecting claim of Jewish UPS mechanic fired for falsifying time records because other mechanics who had violated UPS policies but were not discharged were not similarly situated; also one retained mechanic was, in fact, also Jewish); *Stephen v. Maximum Security & Investigations, Inc.*, 2000 WL 1774849 (S.D.N.Y. 2000) (rejecting the claim of a Jehovah's Witness security guard because his history of no-shows at work was a legitimate non-discriminatory reason for his termination and noting that defendant had several other Jehovah's Witnesses in its employ); *Jaffe v. Aetna Casualty and Surety Co.*, 1996 WL 337268 (S.D.N.Y. 1996) (plaintiff's contention he was not selected for a managerial position because of his Jewish religion did not give rise to an inference of discrimination where the employer's legitimate non-discriminatory reason was supported by the record).

37. *Krantz*, 2000 WL 516888 (E.D.N.Y. 2000).

38. *Id.* The court ruled against Krantz on his discrimination claim, finding that he was not qualified for the position at issue because he did not have the requisite tax experience, though he was allowed to proceed on a retaliatory constructive termination claim. *See also Banez v. New York Foundling Hospital*, 2001 WL 1035142 (S.D.N.Y. 2001) (religious discrimination claim brought by Catholic accounting clerk against Catholic hospital); *Ticali*, 41 F. Supp. 2d 249 (religious discrimination claim of lay Catholic teacher brought against Catholic parochial school).

39. See, for example, *Reznick*, 1999 WL 287724 (E.D.N.Y. 1999), where plaintiff was a black, Jamaican, Orthodox Jew who worked as a clerk/typist at a Sephardic Jewish home for the aged. One can't resist mentioning that an incident that was an issue in the *Reznick* fact pattern involved a kosher Chinese restaurant luncheon order. *Id.* at *3-*4. Another case that could be fodder for a Mel Brooks routine is *Smith v. Revival Home Health Care, Inc.*, 2000 WL 335747 (E.D.N.Y. 2000) which arose, in part, as a result of the plaintiff's unhappiness with a rule prohibiting non-kosher food in the workplace because she found kosher food unpalatable.

40. Daniel J. Walkin, *Ranks of Latinos Turning to Islam Are Increasing*, New York Times, Jan. 2, 2002, at B1.

41. *Id.*

42. *Id.*

43. There is some authority that, where religion is tied to ancestry, a claim under 42 U.S.C. § 1981 may lie. *See Krantz*, 2000 WL 516888 at *3 (the definition of race discrimination under Section 1981 is broad enough to include persons of Jewish descent, provided the underlying discrimination was based on ancestry).

44. *Smitherman v. Williams-Sonoma Inc.*, 1999 WL 608781 (S.D.N.Y. 1999)

45. *Id.*

46. *Id.*

47. *Jahal*, 4 F. Supp. 2d 224, 1999 WL 608781 (S.D.N.Y. 1998).

48. *Id.* at 228.

49. *Id.* at 236.

50. *Id*.

51. *Id*. at 237. The court determined that there was no evidence that any bias on the part of these professors materially influenced the deliberations of the faculty committee which recommended against plaintiff's tenure. *Id*. at 238-40. Significantly, the court's analysis was heavily informed by the freedom of unfettered discourse considerations that exist in discrimination cases arising in academia. *Id.* at 234-35.

52. *See, Kravitz*, 2001 WL 1646513 (comments by individual who at one point served as manager over plaintiff auditor that "you Jew [b*******] are all alike" and "Jews work you hard and bleed you dry," while clearly inappropriate in any work environment, were not sufficiently frequent, numerous, or severe as to alter the conditions of plaintiff's employment); *Bengard*, 2001 WL 1328551 (statements at workplace referring to another employee as "the other Jew" and plaintiff's "brother," plaintiff's exclusion from office football games, and comment "this [f******] Jew is lucky to have a job," amounted to harassment, but employer took swift, appropriate, responsive action and conduct did not occur within 300-day filing deadline); *Mitchell v. Fab Industries*, 990 F. Supp. 285 (S.D.N.Y. 1998) (textile manufacturer clerk who was a Pentecostal missionary established *prima facie* case of hostile work environment by alleging she was repeatedly subject to religious profanity by her supervisor, who purportedly made comments like "Jesus, Jesus," "[f***] you," "kiss my [a**]" and who shook his buttocks in her face, all within a four-month period).

53. *Cf., Corry*, 215 F.3d 1336; *Gunning*, 3 F. Supp. 2d at 1423; *Ramprasad*, 1999 WL 294787. *See also, Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996) (upholding firing of evangelical Christian who shared her religious views in letters to her co-workers and supervisor, accusing them of immoral conduct, but warning that "a rule justifying discharge of an employee because she has disturbed co-workers requires careful application in the religious discrimination context (as many religious practices might be perceived as 'disturbing' to others")).

54. 42 U.S.C. § 2000e(j).

55. *See Jackson v Mann*, 196 F.3d 316, 320 (2d Cir. 1999); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *Burns v. The Warwick Valley Central School District*, 166 F. Supp. 2d 881, 889 (S.D.N.Y. 2001) (addressing the need to engage in a sincerity analysis); *Eatman v. United Parcel Service*, N.Y.L.J., Apr. 11, 2002, p. 27, col. 3 (S.D.N.Y. 2002) (finding no religious discrimination where plaintiff conceded that wearing dreadlocks was a "personal choice," and not a "mandate" of his religion). *Cf*., *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 185, 85 S. Ct. 850 (1965) (draft exemption case wherein the Court noted the need to "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious").

56. *Gunning*, 3 F. Supp. 2d at 1430.

57. *Smith*, 2000 WL 335747 at *5-*6.

58. *See also Hussein v. The Pierre Hotel*, 2001 WL 406258 (S.D.N.Y. 2001) (holding that plaintiff failed to show his wearing of a beard resulted from a bona fide, sincerely held religious belief).

59. 42 U.S.C. § 2000e(j). *See E.E.O.C. v. Townly Engineering & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988). Undue hardship includes more than *de minimus* financial costs to the employer, 29 C.F.R. § 1605.2(e)(1) and (2), but any assessment necessarily involves an examination of the cost in relation to the size and operating budget of the employer, the numbers of employees who may

require accommodation, and the dynamics of the business or organization.

60. *Ansonia Bd. of Ed.*, 479 U.S. 60; *see Elmenayer v. ABF Freight Systems*, 2001 WL 1152815, *3 (E.D.N.Y. 2001) (employer's accommodation offer satisfied Title VII, despite fact it was not the accommodation plaintiff requested); *Durant v. NYNEX*, 101 F. Supp. 2d 227, 234 (S.D.N.Y. 2000) ("Title VII only requires that the employer propose a reasonable accommodation and does not require that the employer offer the specific accommodation the employee seeks").

61. An argument can be made that an obligation to try to accommodate proselytization is heightened with respect to employees, such as evangelical Christians, whose religious theology imposes a duty to "spread the word" of their faith.

62. *See, e.g., Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996) (finding termination of supervisor who allowed prayers in his office during several department meetings and referred to Bible passages on slothfulness and work ethics discriminatory, as employees failed to show how accommodation presented undue hardship).

63. *Knight*, N.Y.L.J., Jan. 2, 2002, p. 23, col. 1 (2d Cir. 2002).

64. *Id.*

65. *Id.*

66. *Id.*

67. Jayson Blair, *Sears Agrees to change Sabbath Work Policy*, The New York Times, Apr. 5, 2000, at B8.

68. *Spitzer v. Sears, Roebuck and Co.*, Agreed Final Judgment (Sup. Ct., Kings Co., April 4, 2000). *The New York Times* reports two other similar settlements recently attained by New York's attorney general. *Virgin Airlines Settles Case, Allowing Time Off for Religion*, The New York Times, Apr. 26, 2002, at B6. One involved an Orthodox Jew denied a job as a food equipment repair technician by the Hobart Corporation because he would not work Saturdays. Under the settlement, Hobart agreed to create a "Sabbath friendly" work schedule for one in every four repair technician positions and to implement training on religious accommodation requirements for all N.Y. staff involved in recruitment and hiring. *Id.* The other settlement requires Virgin Atlantic Airlines to develop special work schedules to accommodate employee requests for time off for religious observance whenever feasible. The settlement covers all passenger service employees at John F. Kennedy International Airport. *Id.*

69. *Ansonia*, 479 U.S. 60.

70. *Id.* at 70 (emphasis added). Nevertheless, courts are extremely reluctant to require accommodations at odds in any way with collective bargaining agreements, and will not require employers to alter existing, bona fide seniority-based provisions of collective bargaining agreements. *See Trans World Airlines Inc.*, 432 U.S. at 82 ("absent a discriminatory purpose, the operation of a [collectively bargained for] seniority system cannot be an unlawful employment practice . . ."); *Genas*, 75 F.3d at 831 ("it has not been established that an employer acting under the terms of a collective bargaining agreement must do more to accommodate religious preferences than is required by the agreement").

71. *Genas*, 75 F.3d at 832. *See also Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997) (finding that a Sabbatarian who was willing to work an equal number of undesirable shifts in exchange for having his Sabbath off could be accommodated at an inspection center that was open 24 hours a day, seven days a week, without causing the employer undue hardship); *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589 (11th Cir. 1994), *cert denied*, 514 U.S. 1128, 115 S. Ct. 2001 (1995) (allowing employees to voluntarily swap shifts is a reasonable accommodation); *Elmenayer*, 2001 WL 1152815 (offering Muslim employee who wished to attend Friday congregational prayer non-conflicting evening shifts was reasonable accommodation offer).

72. *See Opuku-Boateng*, 95 F.3d at 1473 ("[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship"). *C.f., Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519 (6th Cir. 1975) (stressing courts should be "somewhat skeptical" of assertions of defendants that untested accommodations will produce "chaotic personnel problems").

73. *See Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982). *Cf., Hardison*, 432 U.S. at 81.

74. Accordingly, an employer might be obliged to accommodate an employee who requests leave to attend his church's annual religious convocation, *Jones v. New York City Department of Correction*, 2001 WL 262844 (S.D.N.Y. 2001), but not to accommodate a request for long-term leave (such as to enable a Muslim to make a month-long hajj pilgrimage to Mecca) which would create significant coverage problems.

75. The case of *Kalsi v. New York City Transit Authority*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), for example, concerned the conflict between the personal religious views of a Sikh subway car inspector (whose religion requires men to wear turbans and forbids them to be covered) and a New York City Transit Authority ("TA") hard hat safety policy. After being fired for refusing to follow the policy, plaintiff brought a religious discrimination suit, but lost on summary judgment. Noting the many hazards of the job, not the least of which being head contact with electrified parts on subway car undersides, the court found the policy legitimate and nondiscriminatory. *Id*. at 756. The court then determined that plaintiff's proposed accommodation of transferring him to another position would violate the TA's collectively bargained seniority system and allowing him to work *sans* hard hat or to only perform duties not requiring a hard hat would impose significant costs on the TA and place other workers at increased risk. Accordingly all proposed accommodations constituted an undue hardship. *Id*. at 759-60. *See also Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (policy banning facial hair that could prevent respirators from achieving a gas-tight face seal and expose workers to toxic gas was legitimate and it would be an undue hardship to require employer to revamp system of duty assignments and ask other employees to assume plaintiff's share of the hazardous work).

76. The EEOC, for example, filed a lawsuit against the law firm of Mayer, Brown & Platt after a firm personnel manager rejected a temporary receptionist for wearing a Muslim head scarf. Darryl Van Duch, *Chi. Firm Sued Over Religious Scarf*, Nat'l L.J., Oct. 12, 1998.

77. *Cf., International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (an individual's "intellectual" concerns are not protected).

78. *See Patrick*, 745 F.2d at 158 (acts "prompted by dictates of conscience as well as those engendered by divine commands" are safeguarded, provided plaintiff "conceives of the beliefs as religious in nature").

79. *Larson v. Albany Medical Center*, 252 A.D.2d 936, 676 N.Y.S.2d 293 (3d Dep't 1998) (citing *Welsh v. United States*, 398 U.S. 333, 340).

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Employer Retaliation in Discrimination Cases

By Rachel Minter

Introduction

The federal discrimination statutes (Title VII, ADEA and ADA), as well as the New York State and New York City Human Rights Laws, all contain provisions prohibiting retaliation against individuals who have opposed discriminatory practices or have filed a charge, testified or assisted in an investigation or proceeding.[1] With minor variations, the anti-retaliation language is virtually identical, and claims of retaliation under each of these statutes are analyzed in the same manner.[2]

Retaliation cases most frequently arise when there is a change in the conditions of current employment; an employee files a charge with the EEOC or a state agency, or a civil lawsuit, and then alleges that he or she has been demoted, transferred, harassed or terminated. However, there is an evolving body of law regarding retaliation claims that arise in different contexts. One is retaliation against former employees in a manner which impacts upon their ability to secure subsequent employment, e.g., bad references, "blacklisting" and disclosure to subsequent employers of the discrimination charge. Another is retaliation through the legal system: filing civil suits against the employee who filed a charge, interposing counterclaims of dubious merit in response to an action alleging discrimination, or initiating criminal prosecution.

I. Post-Employment Retaliatory Actions

A threshold issue that arose in the evolution of the case law on retaliation claims by former employees was whether the word "employees" in section 704(a) of Title VII was intended to encompass former employees.[3] Although the Second Circuit had resolved this issue some years before,[4] it was not until 1997 that the Supreme Court ruled on post-employment retaliation claims. In *Robinson v. Shell Oil Company*,[5] the Court considered a claim by a plaintiff that his former employer gave a negative reference to a potential subsequent employer, in retaliation for his having filed an EEOC charge. While the word "employees" in section 704(a) is ambiguous, the Court reasoned that it would be more consistent with the broader context of Title VII and the remedial purpose of the anti-retaliation provision to hold that former employees are included within the protection of section 704(a); otherwise, an employer could undermine the effectiveness of Title VII by using the threat of post-employment retaliation to deter victims from complaining to the EEOC, and there would be a "perverse incentive" for employers to fire employees in order to remove them from Title VII protection.

Robinson was decided on the discrete issue of statutory interpretation. The opinion did not address the standard of proof that would be required for a post-employment retaliation claim, and the Second Circuit has not directly addressed that issue. In the Southern District, Judge Patterson has held that a plaintiff need not demonstrate that her difficulties in obtaining future employment were the result of inability to obtain a reference, noting the absence of any mention in *Robinson* of a requirement that a plaintiff show how the negative reference affected the decisions of potential future employers.[6] In contrast, Judge Elfvin in the Western District dismissed a retaliation claim by a doctor who alleged that her former employer failed to respond to inquiries from prospective employers regarding past malpractice or misconduct charges, although the refusal to answer conveyed a negative connotation, where she failed to allege that she suffered any adverse consequences from the failure to respond.[7]

A. Particular Actions

1. References

As with negative references, an employer's refusal to give any post-employment references at all regarding a former employee may also constitute retaliation.[8]

In *Hecht v. GAF Corporation*,[9] the court employed somewhat tortured reasoning in extending the post-employment reference protection to a claim that an allegedly fraudulent evaluation of a former employee constituted a retaliatory adverse action, on the basis that the evaluation would be relied on by the employer in providing employment references, and that a jury might find that the evaluation would have an impact on the plaintiff's future employment prospects.

"Blacklisting" a former employee is also an act of retaliation.[10]

Lytle v. Household Manufacturing, Inc., incidentally, offers a historical perspective on the changes in reference policies over the last decade. Lytle's complaint alleged that the company had retaliated against him for his race discrimination case by providing "inadequate" references to prospective employers—that his job search was unsuccessful because the company provided prospective employers only with Lytle's dates of employment and his job title. In 1990, such a reference was sufficiently uncommon to have raised a "red flag" to a prospective employer seeking more substantive information about the employee. Now "neutral" references, limited to exactly that information, are so much the corporate norm that it is difficult to imagine a court entertaining a claim that such a reference, however unhelpful, would constitute a retaliatory action.

2. Disclosure of Prior Charges or Confidential Information

In *Rutherford v. American Bank of Commerce*,[11] the court held that plaintiff's former employer had retaliated against her for filing a discrimination charge when it gratuitously disclosed that fact to prospective employers, given the reality that a subsequent employer may be loath to hire an employee who brought a discrimination case against a prior employer.[12]

Breach of a settlement agreement which limits the information which can be disseminated may constitute an additional, separate act of retaliation. In *Ruedlinger v. Jarrett*,[13] the court held that plaintiff had stated a cause of action for retaliation, where her former employer breached a settlement agreement by disclosing to plaintiff's subsequent employer information that, under the terms of the agreement, was to be kept confidential. And in *Toney v. St. Francis Hospital*,[14] the defendant hospital was found to have retaliated against plaintiff when it breached an agreement settling her prior race discrimination charge. The agreement provided, *inter alia*, that she would be "laid off" effective as of a specified date, but the hospital denied that plaintiff had been laid off, and gave inaccurate dates of employment to a potential employer, who then rescinded the job offer to plaintiff because the information provided was inconsistent with what she had given.

3. Refusal to Rehire

In *Weissman v. Dawn Joy Fashions*,[15] the plaintiff was terminated while on disability leave, with the promise that the company would find him another position when he was ready to work. The company's president initially responded to plaintiff's letter that he was ready to return, but halted efforts to rehire him after learning that he had filed a charge with the NYCCHR. The court held that refusal to rehire an individual following the filing of an employment discrimination charge may be a basis for a claim of retaliation.[16]

However, at least one district court judge has expressed reservations about the holding in *Weissman*. In *Carr v. Health Insurance Plan of Greater New York, Inc.*,[17] plaintiff, a physician, alleged that his former group practice refused to rehire him unless he dropped his lawsuit. While Judge Buchwald noted that she was constrained to follow binding precedent, she did so "reluctantly and with serious doubts about the efficacy of the *Weissman* rule" because of two concerns about extending the definition of an "adverse employment action" to include a failure to rehire an individual in litigation with his former employer: first, that the rule invites the manufacture of frivolous claims, i.e., that a plaintiff might "bootstrap" additional and non-meritorious claims to a discrimination lawsuit merely by reapplying for his former job and being rejected; and second, that rehiring an individual whose relationship with the former employer had broken down to the point of litigation would have a negative impact on the workplace. Specifically as to Carr, the court also noted that the practice of medicine, in particular, requires an even greater degree of trust and cooperation.

4. Other Retaliatory Actions

In *Passer v. American Chemical Society*,[18] the D.C. Circuit held that the employer's cancellation of a public symposium in honor of the plaintiff, who had filed an action alleging that he was forced to retire, could amount to an adverse retaliatory action, even though plaintiff was no longer employed by defendant and incurred no financial loss from cancellation of the symposium, where plaintiff was humiliated by the last-minute cancellation of a highly public and prestigious honor. In *Charlton v. Paramus Board of Education*,[19] the court, citing *Passer*, held that plaintiff could pursue a claim of retaliation against the school board which sought revocation of her teaching license, two years after her employment had ended, only after plaintiff recommenced pursuit of her discrimination case.

In *EEOC v. Die Fliedermaus, L.L.C.*,[20] after employees filed charges with the EEOC, their employer distributed fliers in their buildings and neighborhoods which falsely accused them of being prostitutes, drug dealers, and/or child molesters. The court held that the flyers could possibly affect the employees' ability to find jobs; while the likelihood of that happening was not great, it was sufficient for the complaint to survive a motion to dismiss. And in *Catalina Beach Club v. State Division of Human Rights*,[21] the employer was held to have retaliated against a former employee for filing a sex discrimination complaint by hiring a private detective to investigate her when she later applied for an eight-week summer job.

B. Evidence of Retaliation

While retaliation claims regarding efforts to find subsequent employment arise relatively infrequently, because an applicant may never learn the true reason why he or she was rejected, when they do the use of allegedly retaliatory statements can pose evidentiary issues under Federal Rule of Evidence 408.

A plaintiff may seek to admit conversations or documents as evidence of a separate retaliatory act, or as evidence of retaliatory motive for other acts. The defendant, on the other hand, may seek to exclude such evidence, under FRE 408, on the basis that conduct or statements made in the course of settlement negotiations are inadmissible to prove liability. However, under Rule 408 the evidence is admissible if "offered for another purpose" other than liability for the claim under discussions. Thus, while the proffered statements or documents cannot be admitted as evidence of the underlying discrimination charge, they are admissible for the "other purpose" of establishing a subsequent, independent retaliatory act or

establishing liability for making, or later acting upon, threats of retaliation.[22]

C. Damages

In the majority of reported decisions on this issue the cases are before the court on a motion to dismiss or motion for summary judgment and thus those decisions offer little guidance as to what quantum of damages might be awarded for a post-employment claim of retaliation. However, the comments of one district court judge suggest that a court may view the assessment of damages for retaliation against a former employee differently than for current employees. In *Roberts v. Texaco, Inc.*,[23] the court adopted the recommendation of a special master in the damages phase of a class action race discrimination case, upholding a substantially lower award to a plaintiff who was no longer employed by Texaco. In a decision that was surprising in light of the serious allegations which emerged during litigation of the case, the rationale for awarding lower damages to former employees was predicated on an assumption of good faith at the higher levels of the corporation. The court drew a distinction between retaliation experienced on the job by persons filing complaints of discrimination, which is perpetuated by co-workers or lower level supervisors, and post-employment retaliation, which

> can only be effected by personnel managers and the like serving at a much higher level in the company, who are well aware of their legal obligations not to retaliate and who are undoubtedly familiar with the *Robinson* case. . . . In a large organization such as Texaco the likelihood of illegal retaliation after employment has ceased should be regarded in this day and age as effectively nil.[24]

II. Retaliation Through Legal Processes

A. Counterclaims

Under some circumstances, a counterclaim interposed or a separate legal action initiated by a defendant employer may constitute adverse retaliatory action.

In *Yankelevitz v. Cornell University*,[25] the plaintiff alleged that he was retaliated against for having given information to the employer's counsel that was adverse to its position in a discrimination case brought by one of his colleagues. In response the employer interposed a counterclaim which accused Yankelevitz of violating faculty practice procedures and sought an accounting of all his clinical practice income for the past six years.

Judge Leisure analogized the negative professional aspersions in the counterclaim against Yankelevitz to giving negative references about a former employee, which have been held to constitute "employment action" for purposes of a retaliation claim, because "[t]he allegations and implications of the counterclaim shed a negative light on plaintiff's professionalism and ethics in a profession that holds such qualities in high regard."[26] The court held that even a compulsory counterclaim can constitute an act of retaliation where it is brought only for the purposes of retaliation; in this instance, defendants did not bring the claim against Yankelevitz until after he initiated his lawsuit, even though they had prior opportunity to pursue it.

In *Ginsberg v. Valhalla Anesthesia Associates, P.C.*,[27] the plaintiff sued for sex and pregnancy discrimination and the employer counterclaimed for recovery of benefits paid to plaintiff while on maternity leave and for alleged failure to perform adequately under her contract prior to her leave. The court held that plaintiff had failed to establish that asserting the counterclaims constituted an adverse employment action, where she did not allege the required element of impact on her employment or prospective employment as a result. Distinguishing *Yankelevitz*, the court held that the counterclaims asserted by Valhalla were based on "a simple breach of contract that does not reflect negatively on plaintiff's ethical or professional reputation." In *Jacques v. DiMarzio, Inc.*,[28] the court found that the employer's $500,000 counterclaim—the nature of which is not specified in the opinion—appeared to be "nothing more than a naked form of retaliation against Jacques, a vulnerable plaintiff who suffers from a significant mental impairment, for filing her lawsuit." Warning against "*in terrorem* tactics" by which it was "deeply troubled," the court ordered defendant to submit legal authority and evidence to justify its counterclaim, or face Rule 11 sanctions. Judge Block's unusually strong language may have been a function of the nature of plaintiff's disability, although it is difficult to judge from the opinion how frivolous the counterclaim appeared to be.

State courts may be less hospitable to claims of retaliation based on an employer's legal strategies. In *Klein v. Town & Country Fine Jewelry Group, Inc.*,[29] the court rejected an argument that a letter from the employer's attorney to the plaintiff's attorney asserting that the attorney's letter was libelous, and a counterclaim for libel filed in plaintiff's action for discriminatory termination, were retaliatory. Although it declined to rule that interposition of a counterclaim for libel in an action for discrimination can never constitute retaliation, the court noted that anti-retaliation provisions are designed principally to deal with retaliatory conduct that occurs outside the judicial system, and that it would be a "rare" case where the filing of a counterclaim can serve as the basis for a retaliation claim. One would think, however, that a counterclaim alleging defamation would be more analogous to the one interposed in *Yankelevitz* in terms of the impact on employment or reputation than the one asserted in *Ginsberg*, and the result might have been different had this

case been brought in another forum.

B. Threats of Legal Action

An employer's requests that an employee drop his or her case may constitute actionable retaliation if they rise to a level of intimidation or coercion that explicitly or implicitly could impact conditions of employment.[30]

For example, in *Lovejoy-Wilson*, the employer responded to an employee's letter alleging that it had failed to promote her because of her disability, and suggesting accommodations that could be made, with a letter from its president, as follows:

> Please note the ADA is not for intimidating employers to change non-discriminatory operational policies. Given our past record of accommodating employees with disabilities, I find your position weak at best. After review with counsel, we feel very strongly about our position. . . .
>
> Additionally, your allegations contained within the letter are slanderous. If you continue this behavior, we will have no choice but to address your behavior through legal channels. This is NOCO's final position on this matter and [it] will not be entertaining further communication on this matter.

The Court of Appeals reversed the district court's entry of summary judgment for defendant, holding that a jury could reasonably find that the letter served to "intimidate" or "threaten" plaintiff in the assertion of her right to make complaints or file charges under the ADA, violating both the provision making it unlawful for an employer "to coerce, intimidate, threaten, or interfere with" exercise of rights under the ADA, 42 U.S.C. § 12203(b), as well as the anti-retaliation provision.

In contrast, the court held in *Torres* that two requests to plaintiff to drop her EEOC charge did not support a retaliation case, where plaintiff could not establish that she suffered an adverse action. While the court recognized that a demand to withdraw an EEOC charge could constitute retaliation, it would have to have had so great an effect on the plaintiff as to alter the conditions of her employment in a material way. "For instance, repeated and forceful demands accompanied even by veiled suggestions that failure to comply would lead to termination, discipline, unpleasant assignments or the like, might in some circumstances affect an employee's working conditions."[31] While Torres claimed that the requests left her feeling "frightened" and "intimidated," she did not establish the requisite element of "a materially adverse change in the terms and conditions of employment."[32] A similar result was reached in *Meckenberg* (two requests to plaintiff to drop her EEOC charge, which were neither forceful nor accompanied by veiled threats, did not constitute retaliation).

C. Initiating Civil Actions or Criminal Prosecutions

The Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*[33] offers an interesting perspective on retaliation by litigation; while not a discrimination case, the LMRA contains a comparable provision against retaliation for exercise of statutory rights. After a waitress at the restaurant filed unfair labor practice charges alleging that she had been fired for her efforts to start a union, she and other waitresses picketed the restaurant and distributed leaflets. The employer then filed a suit for damages and injunctive relief against the charging party and the other demonstrators in state court, alleging that the defendants had harassed customers, blocked access to the restaurant, created a threat to public safety, and made false and libelous statements in the leaflets. The Court held that the filing and prosecution of a *well-founded* lawsuit may not be enjoined as an unfair labor practice, even if that lawsuit would not have been commenced but for the employer's desire to retaliate against the employee(s) for exercising rights protected by the Act. However, it is an enjoinable unfair labor practice to prosecute a *baseless* lawsuit for the purposes of retaliation.

The EEOC has taken the position in at least one case that initiation of legal action against former employees, even though unrelated to an employment condition, can constitute an adverse employment action.[34] In a similar vein, an employer's instigation of criminal proceedings may be an unlawful adverse action where motivated by retaliatory intent.[35]

Gonzalez v. Bratton,[36] offers a particularly colorful example of the abuse of criminal process. A former police officer who had previously filed discrimination charges against the NYPD and other officers brought an action for retaliation which included a claim involving post-employment retaliation. Gonzalez, who had a very high personal profile as a result of publicity about her charges, was arrested for a routine traffic violation two months after she resigned from the NYPD. When she was brought into the station house, she was recognized by the precinct commander, who then ordered that she be strip-searched and given a breathalyzer test (although the arresting officer did not believe she was under the influence of alcohol). He also directed that additional charges be filed—which were subsequently found to be without merit—including possession of marijuana allegedly found during a search of Gonzalez's car and criminal impersonation of a police officer. The court rejected motions to set aside a verdict against the precinct commander on the retaliation claim, holding that his role in initiating a felony charge could be considered an adverse action that would

"unquestionably" have a negative impact on Gonzalez's subsequent ability to obtain employment.

D. Defensive Legal Measures

In *United States v. New York City Transit Authority*,[37] the Second Circuit held that an employer's "reasonable defensive measures" do not violate the anti-retaliation provision of Title VII, even though such steps are "adverse to the charging employee" and result in differential treatment. Therefore, the NYCTA could choose to terminate internal EEO proceedings, and transfer the matter to its law department, once the complainant had filed litigation, even if that action "deprived" the employee of the right of access to an internal process.

In *Roman v. Cornell University*,[38] the court, relying on *Transit Authority*, held that the employer's opposition to plaintiff's application for unemployment benefits did not constitute an adverse employment action; without more, e.g., evidence that the employer did not oppose such applications by non-Latinos, opposition to the claim was merely a reasonable legal position, although adverse to plaintiff. However, in *Electchester Housing Project, Inc. v. Rosa*,[39] the court held that the employer's opposition to the plaintiff's unemployment claim was an adverse employment action taken solely to retaliate because she filed an age discrimination complaint, where it had previously assured the employee that she would be entitled to benefits.

Endnotes

1. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a); Executive Law § 296(a)(7); Administrative Code § 8-107(7).
2. *Weinstock v. Columbia University,* 224 F.3d 33 (2d Cir. 2000); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462 (2d Cir. 1997); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.,* 183 F.3d 155 (2d Cir. 1999).
3. "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 USC § 2000e-3 (a).
4. *See, e.g., Pantchenko v. C. B. Dolge Company, Inc.*, 581 F.2d 1052 (1978).
5. 519 U.S. 337 (1997).
6. *Hecht v. GAF Corporation*, 1999 WL 249711 (S.D.N.Y.).
7. *Niroomand v. Erie County Medical Center*, 1998 WL 401678 (W.D.N.Y.).
8. *Pantchenko*, 581 F.2d 1052; *Hawkins v. Astor Home for Children,* 1998 WL 142134 (S.D.N.Y.).
9. *Supra*, n. 6.
10. *Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090 (2d Cir. 1979), *rev'd on other grounds,* 447 U.S. 807 (1980); *cf. Lytle v. Household Manufacturing, Inc.,* 494 U.S. 545 (1990).
11. 565 F.2d 1162 (10th Cir. 1977)
12. *See also Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990) (unlawful retaliation under Title VII to persuade former employee's new employer to fire the employee); *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 873-74 (6th Cir. 1991), *cert. denied,* 502 U.S. 1013 (1991) (hospital retaliated against a nurse when it refused to grant her hospital privileges after learning that she had filed a discrimination suit against another hospital).
13. 106 F.3d 212 (7th Cir. 1997).
14. 2001 WL 428154 (N.D. Ill., Eastern Division).
15. 214 F.3d 224 (2d Cir. 2000).
16. *See also Shah v. New York State Department of Civil Service*, 168 F.3d 610 (2d Cir. 1999).
17. 2001 WL 563722 (S.D.N.Y.).
18. 935 F.2d 322 (D.C. Cir. 1991).
19. 25 F.3d 194 (3d Cir. 1994).
20. 77 F. Supp. 2d 460 (S.D.N.Y. 1999).
21. 95 A.D.2d 766, 463 N.Y.S.2d 244 (2d Dep't 1983).
22. *Pace v. Paris Maintenance Company*, 7 Fed. Appx. 94, 2001 WL 327102 (2d Cir.), *unpublished decision affirming, on other grounds,* 107 F. Supp. 2d 251 (S.D.N.Y. 2000); *Carr v. Health Insurance Plan of Greater New York, Inc., supra* n. 17; *Yankelevitz v. Cornell University*, 1997 WL 115651(S.D.N.Y.).
23. 979 F. Supp. 185 (S.D.N.Y. 1997).
24. 979 F. Supp. at 187-88. Of course, if the court's optimism were warranted, we would all be out of a job.
25. 1996 WL 447749 (S.D.N.Y.).
26. 1996 WL 447749 at *5.
27. 971 F. Supp. 144 (S.D.N.Y. 1997).
28. 2002 WL 336966 (E.D.N.Y.).
29. 283 A.D.2d 368, 725 N.Y.S.2d 42 (1st Dep't 2001).
30. *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001); *Meckenberg v. New York City Off-Track Betting,* 42 F. Supp. 2d 359, (S.D.N.Y. 1999); *Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997).
31. 116 F.3d at 639-40.
32. *Id*.
33. 461 U.S. 731 (1983).
34. *EEOC v. Virginia Carolina Veneer Corp.,* 495 F. Supp. 775 (W.D. Va. 1980) (retaliatory civil defamation action filed by former employer).
35. *See Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (employer's instigation of meritless criminal charges against a former employee constituted unlawful retaliation for filing an EEOC charge) and *Beckham v. Grand Affair, Inc.*, 671 F. Supp. 415 (W.D.N.C. 1987) (ex-employee prosecuted for trespass on former employer's premises after filing EEOC complaint).
36. 47 F. Supp. 2d 180 (S.D.N.Y. 2001).
37. 97 F.3d 672 (2d Cir. 1996).
38. 53 F. Supp. 2d 223 (N.D.N.Y. 1999).
39. 225 A.D.2d 772, 639 N.Y.S.2d 848 (2d Dep't 1996).

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New York State Labor Legislation During the 2002 State Legislative Session

By Geraldine Reilly

The following report of various labor-related legislative initiatives is intended to acquaint practitioners and other interested readers with new developments in state labor law. It is not intended to be conclusive, and given the legislative calendar, new developments occur in this area quite often. Obviously, some of these proposals, while having passed both the Assembly and Senate, have not yet been signed by the Governor, and are not yet law.

The author will endeavor to inform readers in the next legislative update regarding the status of the proposals. The author cautions readers from reliance on the summaries alone, and advises that copies of the proposals should be obtained through the Legislative Section, local legislators, via the public information offices, McKinney's Session Laws by chapter number, or Internet links, for a more thorough understanding of the bills. The Web site for the New York State Assembly is www.assembly.state.ny.us and copies of the bills are available online at that address.

A.169 (Christensen)/S.2070 (Balboni): This bill would increase the amount of the civil penalty designated in the Labor Law for an employer's failure to pay an employee's salary, or for paying the employee a different salary rate, because of the employee's gender. Under the terms of the legislation the fine would increase from $50 to $500. The bill passed the Senate on June 18, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been delivered to the Governor.

A.2329 (Ortiz)/S.6595 (Espada): This bill reinforces the present authority of the state Commissioner of Labor to post notices concerning the labor rights of apparel workers in the various predominant languages of the industry. The bill passed the Senate on June 3, 2002, and passed the Assembly on April 29, 2002. As of this writing it has not yet been delivered to the Governor.

A.6167 (Nolan)/S.2402 (Seward): This bill clarifies the status of independent insurance agents regarding the coverage of workers' compensation and unemployment insurance benefits. It passed the Senate on July 2, 2002, and the Assembly on June 20, 2002. As of this writing it has not yet been delivered to the Governor.

A.9002-A (Rules/Nolan)/S.6862 (Velella): This bill would include services rendered by medical residents, interns and fellows within the definition of covered employment for purposes of unemployment insurance benefit coverage and potential entitlement. It passed the Senate on June 19, 2002, and the Assembly on June 17, 2002. As of this writing it has not yet been delivered to the Governor.

A.9454 (Rules/Nolan)/S.3259-B (Spano): This bill is referred to as the Health Care Worker Whistle-blower Act, and will provide increased statutory protections for health care employees who report illegal or dangerous situations concerning their workplace. While New York state does have labor law whistle-blower provisions in law, they have generally proven inadequate in protecting workers. It has been signed into law, as Chapter 24 of the Laws of 2002.

A.9699 (Magee)/S.6154 (Meier): This bill would allow certain workers who were paid under piecework conditions to receive unemployment insurance if all other eligibility elements had been met. The bill passed the Senate on April 24, 2002, and the Assembly on June 25, 2002. As of this writing it has not yet been delivered to the Governor.

A.9707 (Nolan)/S.6426 (Velella): This bill, similar to recently passed New Jersey legislation, prohibits employers from discriminating against employees who wear the American flag at work, or display it at their work station, and provides compensation for those employees who have been discriminated against. This bill passed the Senate on June 19, 2002, and the Assembly on June 25, 2002. As of this writing it has not been delivered to the Governor.

A.10129-B (Tonko)/S.6318-B (Skelos): This bill enacts the New York State Professional Employer Act, and imposes strict registration requirements on the employee leasing industry. It is a variation of model legislation now being implemented in several other states. New York's version is conspicuous for the increased worker protection offered under its statutory terms. It was passed by the Senate on June 20, 2002, and the Assembly on June 26, 2002. As of this writing, it has not yet been delivered to the Governor.

A.10632-C (Tocci)/S.7226-C (Velella): This bill establishes a presumption under the Workers' Compensation Law that either state or local correction officers who

have been exposed to a bloodborne pathogen at work and subsequently contract certain bloodborne diseases, have contracted the disease on the job. The bill passed the Senate on June 20, 2002, and the Assembly on June 25, 2002. As of this writing, it has not yet been delivered to the Governor.

A.11022 (Rules/Nolan)/S.7353 (Spano): This bill clarifies that last year's amendments to the standards for plumbing materials do not apply to cities within the state which have a population of over 1 million people. The bill is intended to recognize the situation in New York City, which has its own strict building code. It passed the Senate on June 3, 2002, and the Assembly on June 10, 2002. As of this writing it has not yet been delivered to the Governor.

A.11041 (Rules/Nolan)/S.4155 (Spano): This bill strengthens the Labor Law's payment-of-wages provisions, by including limited liability companies within the definition of employer. Thus, limited liability companies will be treated by the law as fully responsible employers for actions regarding the payment of wages. It passed the Senate on May 8, 2002, and the Assembly on June 20, 2002. As of this writing , it has not yet been delivered to the Governor.

A.11044 (Rules/Nolan)/S.6476 (Velella): This bill provides that bona fide, federally recognized Indian tribe employers are entitled to the option of paying unemployment insurance benefits under the same favorable conditions as a municipal employer. It passed the Senate on June 18, 2002, and the Assembly on June 19, 2002. This bill was signed into law as Chapter 102 of the Laws of 2002 on June 28, 2002.

A.11045 (Rules/Nolan)/S.4161 (Spano): This bill, required under the Federal Unemployment Tax Act, amends the state Labor Law as it relates to unemployment insurance, and eliminates the labor law provision prohibiting the Department of Labor from considering the duration of employment in determining factors relevant to an applicant's job search. It passed the Senate on June 12, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been presented to the Governor.

A.11250 (Rules/Nolan)/S.7329 (Velella): This bill imposes a penalty for the failure of an employer to keep legally sufficient payroll records. The penalty instituted would be a fine of not less than $500 nor more than $20,000 and a potential imprisonment of not more than one year. It passed the Senate on May 15, 2002, and the Assembly on June 20, 2002. As of this writing it has not yet been presented to the Governor.

A.11251-A (Rules/Nolan)/S.7330-A (Velella): This bill allows employees to recover underpayments of the prevailing wage from performance bonds on public work projects from the contractor, the subcontractor or the issuer of the bond, within one year of the date of the filing of an order by the Commissioner of Labor or other fiscal officer. The bill passed the Senate on June 11, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been transmitted to the Governor.

A.11306 (Rules/Nolan)/S.6863-A (Velella): This bill requires municipalities to provide notice to employees and their bargaining unit before the reclassification of laborers, workmen or mechanics to other job titles. In certain cases such reclassification could result in the significant loss of wages or benefits. It was passed by the Senate on June 20, 2002, and the Assembly on June 26, 2002. As of this writing it has not yet been delivered to the Governor.

A.11307 (Rules/Nolan)/S.7685 (Rules): This bill would enable those surviving domestic partners of workers killed in the course of their employment as a result of the terrorist attacks of September 11, 2001, to file for workers' compensation benefits. It passed the Senate on June 4, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been delivered to the Governor.

A.11308-B (Rules/Nolan)/S.7716 (Rules): This bill would provide survivor benefits to the domestic partners of certain firefighters killed in the line of duty on September 11, 2001, and classifies certain retired firefighters who died while performing firefighting services on September 11, 2001, as having died in active service and reinstates those retirees to active service; it also improves the benefits for surviving dependent parents of firefighters killed in the line of duty on September 11, 2001. It passed the Senate on June 4, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been delivered to the Governor.

A.11401 (Rules/Nolan)/S.7378 (Velella): This bill requires construction contracts entered into by a third party, which is acting on behalf of a public entity pursuant to any lease, permit or other agreement between such third party and the public entity to contain a stipulation concerning the working conditions of those performing the contracted work. The bill passed the Senate on June 4, 2002, and the Assembly on June 19, 2002. As of this writing it has not yet been delivered to the Governor.

A.11582 (Rules/Nolan)/S.7562 (Velella): This bill provides employee organizations with legal standing to file complaints regarding enforcement of the prevailing

wage law on behalf of employee members of the organization. It passed the Senate on June 19, 2002, and the Assembly on June 20, 2002. As of this writing it has not yet been delivered to the Governor.

A.11784-A (Rules/Nolan)/S.7822 (Velella): This bill prohibits the use of state funds when received by private employers from being diverted from programmatic use for the purpose of being utilized to either encourage or discourage union organizing drives. It passed the Assembly on June 26, 2002, and the Senate on July 2, 2002. As of this writing it has not yet been delivered to the Governor.

A.11822 (Rules/Nolan)/S.7741 (Rules): This bill provides that all moneys accumulated in the Public Work Enforcement Fund shall be utilized to pay for the training and labor costs of those charged with enforcement of the prevailing wage law, and requires a maintenance of effort so that the inspector workforce would not be diminished. Previously, this fund was capped at $1.5 million. It also provides for notice to the Commissioner of Labor of public works projects costing over $1 million so that the Department could initiate audits to ensure payment of the prevailing wage. It passed the Senate on June 20, 2002, and the Assembly on June 25, 2002. As of this writing it has not yet been delivered to the Governor.

A.11831-A (Rules/Nolan)/S.7791-A (Velella): This bill, entitled "The New York State Apparel Workers Fair Labor Conditions and Procurement Act," establishes a preference in the purchase of apparel by the state, for that manufactured by those employers adversely impacted by the economic consequences of the terrorist attacks of September 11, 2001. It does not disturb preferences presently in the law for veterans, the blind or disabled. It passed the Assembly on June 26, 2002, and the Senate on July 2, 2002. As of this writing it has not yet been delivered to the Governor.

Geraldine Reilly serves as Associate Counsel for the Labor Committee, and Analyst for the Governmental Employees Committee of the New York State Assembly. The views expressed in this article are the author's own, and do not necessarily reflect the views of the Assembly nor any member of the Assembly. She is a magna cum laude graduate of Seton Hall University School of Law, and holds a Masters Degree in Industrial and Labor Relations from the Cornell University School of Industrial and Labor Relations.

For Your Information

Member News in Brief

The New York State Public Employment Relations Board will soon release a new publication, *The Taylor Law and the Duty of Fair Representation*, by Philip L. Maier, New York City Regional Director. Written for attorneys, public employees, and public employee organizations and employer representatives, this book explains the rights and obligations of the various parties in this area of the law. This comprehensive publication details the various aspects of the duty of fair representation (DFR) as it is applied by PERB, and is a valuable reference for cases on virtually all areas of the DFR that have been decided by the administrative law judges and the Board. With the ever-increasing number of *pro se* litigants in employment cases filing charges in both administrative and judicial forums, this reference will be a useful source for both dispensing advice to clients and preparing for conferences and hearings at PERB.

Correction

Please note that a provision of the statute mentioned in the article, "Navigating the Filing of Employment Claims," by Gregory Mattacola, in the last issue of the *Newsletter* has been repealed.

A more accurate statement would be that "[a] complaint must contain the full name and address of both the complainant and respondent and a statement of the alleged unlawful discriminatory practice, the dates and times of the alleged discriminatory acts and a description of any other actions or pending administrative proceedings based on the same grievance as alleged in the complaint and the status of same." 9 N.Y.C.R.R. § 465.3(c).

The New York State Division of Human Rights has corrected the error on its Web site by posting the current and applicable version of its Rules of Practice.

Upcoming Meeting

The Section's Annual Meeting will be held at the New Yorker Hotel in New York City on Friday, January 24, 2003.

Ethics Matters

By John Gaal

Q My opponent electronically sent me a document the other day. The "techies" in my office tell me that there is a way to "look behind" the visible document he sent me and possibly discover earlier versions of the document which may have been drafted, who else he may have sent the document to for review, and comments they may have made regarding the document. Since he obviously "intended" for me to have the document in this electronic form, is it ethical for me to take advantage of this technology to look behind the document?

A According to the New York State Bar Association Committee on Professional Ethics, the answer is "no." In recently issued Formal Opinion 749 (2002), believed to be the first ethics decision on this topic, the Committee has determined that surreptitiously using technology to examine electronically received communications from an adversary (or electronically "bugging" and tracing communications sent to an adversary) is a violation of the Code of Professional Responsibility because it may lead to discovery of your adversary's client's confidences and secrets.

The Committee's decision is premised in part upon DR 4-101, which requires the protection of client confidences and secrets, and which at least implicitly prohibits an attorney from trying to exploit access to the confidences and secrets of an opponent. In reaching this conclusion, the Committee explicitly referenced prior authorities holding that it is improper for an attorney to attempt to invade the attorney-client confidentiality of an adversary.[1] The Committee also concluded that such conduct would violate DR 1-102(A)(4), which prohibits an attorney from engaging in deceitful, dishonest or fraudulent conduct, and DR 1-102(A)(5), which prohibits conduct prejudicial to the administration of justice. It rejected the notion that an attorney's obligation to zealously represent his client could overcome the sacrosanct nature of privileged communications.

In the Committee's view, while the sender of an electronic document intends the recipient to receive the "visible" document, absent an explicit direction to the contrary from that sending party, he "plainly does not intend [his adversary] to get 'hidden' material." Thus, as in other situations in which an attorney has "inadvertently" provided his opponent with access to confidential information, the receiving attorney may not make any effort to exploit that inadvertence, which in this context means technologically looking behind the visible document.

In its earlier Formal Opinion 709, the Committee had opined that generally the transmission of confidential information electronically (e.g., via e-mail) is not a *per se* violation of an attorney's duty to maintain his client's secrets and confidences. It did caution attorneys, however, that in certain circumstances or in cases of particularly sensitive information, electronic transmission of information may not provide adequate protection to ensure compliance with DR 4-101. Especially as it relates to electronic transmission of documents to an adversary, an attorney would be well advised to either retype the text of the final version before sending to an adversary or consult your own in-house counsel on the availability of using the "cut" and "paste special" functions of your word processing program as a means of sanitizing the document of its "history," to minimize and/or eliminate the risk of another party being able to go behind the visible contents.

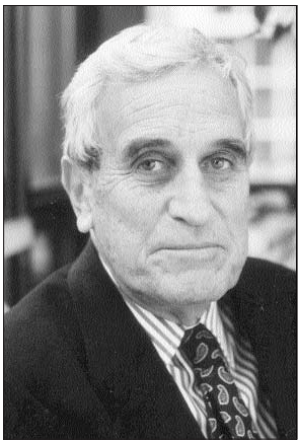
Endnote

1. *E.g.*, *Dubois v. Gradco Sys., Inc.*, 136 F.R.D. 341 (D. Conn. 1991) (counsel must not seek to solicit privileged attorney-client information from former corporate employees even though ex parte contact with such employees is otherwise generally permissible); ABA Formal Opinion 92-368 (improper to take advantage of inadvertently or improperly disclosed confidences and secrets of an adversary); NYSBA Formal Opinion 700 (improper to exploit willingness of another to disclose an opponent's confidential communications).

John Gaal is a partner at Bond, Schoeneck & King, LLP, in Syracuse, New York.

In Memoriam

Daniel G. Collins



Daniel G. Collins, Professor Emeritus at New York University School of Law and labor arbitrator, died of cancer at his home on Sunday, June 16, 2002.

Dan joined the N.Y.U. faculty in 1961, seven years after graduating *cum laude* from the law school, where he had been editor-in-chief of the *Law Review*. It is estimated that he taught over 5,000 students during those 40 years, in Contracts, Labor Law, Arbitration and Sports Law classes. Many of his former students are members of our Labor and Employment Law Section.

Dan was also an eminent labor arbitrator who gained a national reputation. His public and private sector arbitration decisions, which spanned industries as varied as aerospace, heavy industry and sports, numbered in the thousands.

For more than 10 years he was the sole arbitrator between Actors Equity and the League of American Theatres and Producers; from 1990 to 1997 he was the impartial arbitrator for the N.Y.C. Transit Authority and the Transport Workers Union. He served in the same capacity for the NBA and the Players Association from 1988 to 1996, and was an arbitrator for the United States Postal Service under many agreements. Most recently, he was the Chair of the fact-finding panel that recommended terms for the new contract between the Board of Education and the United Federation of Teachers. It was typical of Dan that he was determined to finish the complex and lengthy award despite his illness.

From 1980 until his death, Dan was one of the impartial members of the New York City Board of Collective Bargaining, where he helped shape labor policy in the public sector. He was also an active and long-time member of the National Academy of Arbitrators and a former member of its Board of Governors.

Dan will be remembered for his contributions to labor law and the teaching of law; for working tirelessly on high-profile cases, without seeking recognition or attention; for his lack of pretension and his ability to reach consensus; for his wry, quiet wit and gentle nature; for his courtesy and kindness to all he encountered. He was a brilliant but unassuming master of impartiality, respected and remembered fondly by students and colleagues.

Dan is survived by his wife, Anne Weld Collins; his sister, Muriel Collins; and four children from his first marriage: Caitlin Ahl, Deirdre, Charles and Geoffrey.

There will be two memorial services. The first was held on Friday, September 20th, at 11 a.m. at the Madison Avenue Presbyterian Church, on Madison Avenue between East 73rd Street and East 74th Street in Manhattan. The second will be held on Wednesday, October 16th, at 4 p.m. at the New York University School of Law, 40 Washington Square South in Manhattan. Please RSVP for the second service by October 9th to Mary Kimble at (212) 998-6179.

Janet McEneaney

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You are encouraged to participate in the programs and on the Committees of the Section.
Feel free to contact any of the Committee Chairs for additional information.

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After we've discussed it, the article should be submitted by regular mail with one copy on a disk and one copy on paper, along with a letter granting permission for publication and a one-paragraph bio. Article length should be no more than ten double-spaced pages. The Association will assume your submission is for the exclusive use of this *Newsletter* unless you tell me otherwise in your letter.

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Deadlines for submission are the 1st of January, April, July and October each year. If I receive your article after that date, it will be considered for the next edition.

Thank you for your cooperation.

Janet McEneaney
Editor

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