THE CURRENT STATE OF EMPLOYMENT LAW IN 2012

Critical Issues And Best Practices

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POINT I

THE COURTS CONTINUE TO SHAPE THE SEXUAL HARASSMENT LAWS NEARLY FORTY FIVE YEARS AFTER THEIR ENACTMENT

A. HISTORY

Sexual harassment made its historic emergence into mainstream consciousness in 1991 at the height of the Anita Hill and Clarence Thomas controversy. Suddenly every headline, tagline and soundbite centered around the word "sex." A remarkable change had taken place in America and sexual harassment law was at its epicenter, despite that concept's dubious origin. The hype and publicity surrounding the recent lawsuit brought by Anucha Browne Sanders against Isaiah Thomas and Madison Square Garden illustrates sexual harassment has not left our collective consciousness.

In 1964, during the debates surrounding the Civil Rights Act, a profound segregationist and Dixiecrat from Virginia, Howard W. Smith, proposed sex as a last minute amendment in an effort to defeat the bill. The thrust of Title VII was to eliminate racial discrimination and Smith incorrectly calculated that legislators were not prepared to give women similar rights. Smith's disingenuousness was readily apparent. During the introduction of the amendment he opined that it would "protect our spinster friends in their right to a nice husband and family." The entire bill passed by a mere 36 votes and thus began the evolution of private causes of action for the violation of individual civil rights.

More than a decade passed before the phrase "sexual harassment" was coined at a conference in Cornell University in 1975. It took an additional two years for the Courts to recognize a viable cause of action under the Civil Rights Acts as a result of alleged sexual harassment. An additional two decades lapsed before the Supreme Court offered any guidance to this body of law with the decisions rendered in the summer of 1998.

B. *ELLERTH* AND *FARAGHER'S* PROGENY

It has been more than a decade since the United States Supreme Court rendered the *Ellerth and Faragher* decisions which sent reverberations throughout the business communities

nationwide. Since then, the lower courts continue to grapple with the open-ended questions the Court left open for interpretation.

The Courts continue to interpret the following issues:

(i) definition of a supervisor

(ii) definition of a tangible employment consequence

(iii) the first prong of the affirmative defense

(iv) the second prong of the affirmative defense

The EEOC Guidelines defines these terms for the public.

SUPERVISOR

According to the EEOC, an individual will qualify as supervisor if:

- the individual has the authority to make "tangible employment decisions," affecting the employee; or
- the individual's recommendations about such matters would be given serious weight; or
- the individual has the authority to direct the employee's daily work activities; or
- the employee reasonably believed the individual possessed these powers.

THE LOWER COURT'S INTERPRETATION OF "SUPERVISOR"

Since *Ellerth* and *Faragher*, the Courts have generally adopted the EEOC's interpretation of "supervisor." Overall, the critical question the Courts debate, is the degree in which an individual can affect the terms and conditions of employment. The classic examples of supervisory authority, continuing to present day, are the power to hire, fire, demote, transfer, evaluate or discipline employees. However, with businesses creating multiple layers of

supervisory staff, even individuals whose authority is limited to scheduling daily activities and evaluating employees to make recommendations to upper management about promotional opportunities and termination can be considered a supervisor.

The Supreme Court has not specifically defined the term "supervisor" for purposes of determining an employer's liability for a hostile work environment but described the power to supervise in *Faragher* as "to hire and fire, and to set work schedules and pay rates." Moreover, the Second Circuit has not voiced an opinion on the criteria used to identify a supervisor versus a co-employee. However, in the Second Circuit case of *Mack v. Otis Elevator Co*., 326 F.3d 116 (2d Cir. 2003), the Court looked at "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates" in order to determine whether the senior employee was a supervisor. The Court in *Mack* looked at the senior employee's ability to direct the employees' work days and assignments. Thus, the Second Circuit drew support from the historical definition of a supervisor, and broadened it to include situations where tangible employment actions were not present.

While they have yet to follow the standard set forth by the Second Circuit in *Mack*, numerous New York trial Courts have also attempted to clarify the "supervisor v. co-worker" analysis. The crux of the Courts' analysis is whether the employee at issue has the power to affect the terms of an employee's day-to-day working conditions. For example, in *Borrero v. Collins Building Services*, No. 01 Civ. 6885 (AGS), 2002 WL 31415511 (S.D.N.Y. October 25, 2002), the Court explained that a supervisor:

> "may have power to make a 'tangible employment decision' with regards to the employee...includ[ing] 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' Thus, a supervisor has some power to alter the terms or conditions of their victim's employment"

In *Borrero*, the Plaintiff was a temporary office cleaner who began work as a Vacation Replacement staff member in several Manhattan buildings. At the start of her tour, the Plaintiff would check in with the alleged harasser and ask for her duties for the night. The Court concluded this was insufficient to demonstrate the alleged harasser was Plaintiff's supervisor because there was no evidence the alleged harasser could change Plaintiff's work schedule, alter her benefits or change any other "tangible" condition of her employment. Conversely, the outcome of this case would have been entirely different at the EEOC. As noted above, the EEOC deems individuals as supervisors when the alleged victim reasonably believes the individual possessed supervisory powers.

Not all courts have adopted the *Borrero* or *Mack* definitions of "supervisor." In formulating its definition of "supervisor," the Eastern District of New York borrowed from the EEOC in stating that "[i]n the Title VII context, a supervisor is an individual who has the actual or apparent authority to alter the terms, conditions, and privileges of the Plaintiff's employment." *Perks. v. Town of Huntington*, 251 F. Supp. 2d 1143 (E.D.N.Y. 2003). In theory, then, under the *Perks* standard, a Plaintiff who reasonably believes that the harasser has the authority to alter the terms and conditions of the Plaintiff's employment — even if the harasser is merely a co-worker without any actual supervisory authority — can defeat a motion for summary judgment on this point.

However, the Northern District of New York's take on the "supervisor v. co-worker" analysis is similar to that found in *Mack*. In *Giminiani v. City of Albany*, No. 1:99 CV 2161 (GLS) (RFT), 2005 WL 2039197 (N.D.N.Y. Aug. 24, 2005), the Court went a step further by holding that supervisory "status can be found even where the employee does not take tangible employment action, but instead, has authority sufficient to enable or materially augment his ability to create a hostile work environment by, for example, affecting the subordinate's daily activities." Under this logic, a co-worker lacking the authority to hire or fire whose actions nevertheless substantially affect another's daily activities can be deemed a supervisor.

TANGIBLE EMPLOYMENT ACTION

The EEOC Guidelines defines a tangible employment action as "a significant change in employment status." These actions are those which:

- Would usually require official action by the company;
- Are documented in official company records;
- Are subject to review by higher level supervisors;
- Require the formal approval of the company and use of its company policies; and
- Inflict direct economic harm.

The EEOC mentions hiring, firing, promotion, demotion, undesirable reassignment, and changes in compensation or work assignment as tangible employment actions. Furthermore, according to the EEOC the presence of such a consequence renders the employee's claim actionable regardless of whether it resulted in a detriment or benefit to the employee and even in the absence of a change in salary or benefits.

THE LOWER COURT'S INTERPRETATION OF "TANGIBLE EMPLOYMENT ACTION"

The Courts have generally limited the category of "tangible employment action" to include: "a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

For example, the Second Circuit held in a disturbing sexual harassment case, *Jin v. Metropolitan Life Insurance*, 310 F.3D 84 (2d Cir. 2002), that withholding paychecks was a tangible employment action. In *Jin*, the Plaintiff was required to engage in sex acts proposed by her supervisor or face possible termination of her employment. The Court determined the lost use of wages for a period of time, even though the Plaintiff was fully compensated at some future date, was an economic harm to the individual and therefore qualified as a tangible employment action. The Court further concluded that the fact that the Plaintiff's supervisor used his authority to make Plaintiff submit to weekly sexual abuse in order to retain her employment was a "tangible employment action." The Court reasoned that it was Plaintiff's supervisor's empowerment by his employer, as an agent who could make economic decisions affecting employees under his control, that enabled him to force the Plaintiff to submit to his sexual abuse.

It is clear the Court applies a broad range of actions included in its definition of a tangible employment action. However, the Second Circuit held in *Mack* that a constructive discharge does not constitute a tangible employment action for the purposes of establishing an employer's liability in a sexual harassment claim. Thus, the standard does have its limitations.

THE FIRST PRONG OF THE AFFIRMATIVE DEFENSE

The EEOC describes in detail what steps employers are to take in order to demonstrate whether they have exercised reasonable care to promptly prevent and correct any sexually harassing behavior. Specifically, the EEOC recommends employers establish an anti-harassment policy complete with a complaint procedure, distribute it to every employee, post it in central locations, update and redistribute it on a regular basis and, where possible, provide training.

The EEOC identifies the following components as necessary for an effective anti-harassment policy and complaint procedure:

- A clear definition of what constitutes harassment.
- A clear description of the complaint procedure with multiple avenues of access for the employee.
- Time frames for the formal filing of complaints with the administrative agencies including the EEOC.
- A guarantee of a prompt, thorough and impartial investigation.
- An assurance that immediate, proportional and appropriate measures will be taken to stop the offending behavior, prevent its recurrence and remedy the effects on the victim.
- An assurance the victim or participants in the investigation will be protected from retaliation.
- An assurance the complaints will be kept confidential to the extent possible.

- A description of interim steps to be taken during the pendency of the investigation.

The EEOC also encourages employers to implement the following precautionary measures to avoid harassment in the workplace:

- Periodically train managers and supervisors on anti-harassment policies;
- Effectively screen applicants for managerial positions;
- Monitor behavior;
- Keep accurate and confidential records of the complaints; and
- Require management to report any incidents of harassment and correct offending conduct whether or not a complaint has been brought.

THE LOWER COURT'S INTERPRETATION OF THE FIRST PRONG OF THE AFFIRMATIVE DEFENSES

A. PREVENTING SEXUAL HARASSMENT

Generally, the Courts find that employers have exercised reasonable care to prevent the harassment if they instituted and distributed effective anti-harassment policies, established clear reporting procedures with sufficient levels of access, monitored supervisors' conduct and provided training on harassment issues. However, such actions are not dispositive. For example, in *Ferraro v. Kellwood Company*, 440 F.3d 96 (2d Cir. 2006), the Court acknowledged a sexual harassment policy is an important — but not exclusive — consideration in determining whether the employer has effectively prevented and corrected sexual harassment.

Indeed, the more important consideration for a court is whether the policy is an effective tool to root out unlawful behavior. In *Williams v. Consolidated Edison Corporation of New York*, 255 Fed. Appx. 546 (2d Cir. 2007), clearly it was not because the employer did not follow its own policy. There, the employer launched an investigation into Plaintiff's complaints of a sexually and racially hostile work environment, where the Plaintiff's co-workers verified her allegations. However, the report summarizing the investigation did not discuss these co-worker

accounts, and reached the conclusion that there was no record of discriminatory work assignments. Moreover, the employer gave no indication of whether it took any action as a result of its investigation. On that basis, the Court denied the employer's motion for summary judgment and held that "a reasonable juror could find that [the employer] failed to take prompt and appropriate remedial action in response to substantiated allegations of sexual and racial hostility in the workplace."

On the flip side, *Chenette v. Kenneth Cole Productions, Inc.*, No. 05 Civ. 4849 (DLC), 2008 WL 3176088 (S.D.N.Y. Aug. 6, 2008) is instructive on how an employer can properly avail itself of the *Faragher/Ellerth* affirmative defense. In moving for summary judgment on the Plaintiff's hostile work environment claim, the employer pointed to its Employee Handbook and Code of Conduct, which "outlined specific reporting procedures for employees who witnessed or were subjected to discriminatory conduct." More importantly, the employer prevailed on the first prong of the affirmative defense —establishing that the employer exercised reasonable care to prevent and promptly correct any harassing behavior — because it demonstrated the efficacy of the policy. As soon as the Plaintiff reported discriminatory statements to her supervisor, which she was obligated to do under the terms of the sexual harassment policy, the employer "took actions to end any inappropriate behavior ..." and the Plaintiff was not subjected to any further instances of inappropriate conduct. Thus, the Court determined that the employer's harassment policy satisfied the first prong the *Faragher/Ellerth* affirmative defense. The Court also determined that the employer had established the second element of the *Faragher/Ellerth* affirmative defense — showing that the employee unreasonably failed to utilize the employer's anti-discrimination policy. Accordingly, the Court rendered judgment in the employer's favor.

In *O'Dell v. Trans World Entertainment Corp.*, 153 F. Supp. 2d 378 (S.D.N.Y. 2001), the Court acknowledged that an employer has latitude in deciding how to handle and respond to discrimination claims. There, the employer allegedly refused to communicate with the Plaintiff's attorney and failed to keep the harassment complaints confidential. The Plaintiff argued that her employer's investigation and sexual harassment procedures were ineffective and, therefore, could not satisfy the first prong of the *Faragher/Ellerth* defense. The Court rejected this argument. It noted that the employer had a sexual harassment policy which the Plaintiff received and reviewed when she was hired. That policy explicitly informed employees that sexual

harassment would not be tolerated and it was Plaintiff's responsibility to advise management of potential sexual harassment. The policy provided three harassment reporting mechanisms: notify a supervisor, call the appropriate Human Resources representative, or contact the Loss Prevention Hotline. Moreover, once Plaintiff made the complaint, it was immediately investigated. Thus, the Court concluded, no reasonable jury could find the policy was ineffective.

Even if an employer has an anti-harassment policy, some Courts have been reluctant to dismiss a discrimination lawsuit where the policy is "only on paper." For example, in *Lamere v. New York State office for the Aging*, No. 03 CV 356, 2005 WL 1174068 (N.D.N.Y. April 27, 2005), the Court denied summary judgment on a *Faragher /Ellerth* defense because it found a material question of fact existed as to whether the sexual harassment policy was distributed to employees in a manner that reasonably informed employees of their rights and how to report sexually harassing conduct. In *Pugni v. Reader's Digest Associates*, No. 05 Civ. 8026, 2007 WL 1087183 (S.D.N.Y. April 9, 2007), the Court denied summary judgment because a genuine issue of fact existed as to whether the procedures detailed in the employer's policy were actually followed by management. The Court held that a Plaintiff does not have to exhaust all of the employer's internal remedies in order to satisfy a notice requirement. Thus, it behooves an employer not only to have policies, but to distribute, publicize and enforce such preventative policies as much as possible and keep of record of all complaints and remedial actions in order to preclude the possibility of evidence to the contrary.

B. CORRECTING SEXUAL HARASSMENT

In general, the Courts have held employers exercised reasonable care to promptly correct any sexually harassing behavior if they confront the harasser with the allegations, conduct an investigation and minimize the contact between the employee and the alleged harasser. As long as employees effectuate an investigation promptly and the remedy prevents further incidents, Courts will defer to the employer's decision on how to conduct the investigation and what remedial actions are necessary. For example, in *Garone v. United Parcel Service, Inc.*, 436 F.Supp.2d 448 (E.D.N.Y. 2006), the Eastern District held that the employer satisfied the first prong of the *Faragher/Ellerth* defense where it immediately investigated the Plaintiff's harassment complaints and took action to prevent further harassment. The Court held that the employer also satisfied the second prong of the defense because the Plaintiff waited 18 months

before reporting harassing conduct to her supervisors. Indeed, the Court held that this delay was unreasonable.

THE SECOND PRONG OF THE AFFIRMATIVE DEFENSE

The EEOC relaxes the employee's obligation to use the company's internal complaint procedure. According to the EEOC, the employee's failure to comply may be reasonable, if the employee reasonably believed using the complaint procedure would result in retaliation or the complaint system was ineffective. Moreover, the EEOC permits employees to bypass the internal procedures and file directly with the administrative agencies or the union, thus usurping the employer's ability to correct the problem.

THE LOWER COURT'S INTERPRETATION OF THE SECOND PRONG OF THE AFFIRMATIVE DEFENSE

In contrast to the EEOC's philosophy, the Courts generally hold employees have a duty to report misconduct in accordance with company policy. Once an employer has an established complaint procedure, the Courts look to see if the employees fulfilled their obligation to disclose the offending behavior. Moreover, the employee's fear of retaliation does not justify his or her failure to report the harassment. This proposition played out in *Cruz v. Liberatore*, 582 F. Supp. 2d 508 (S.D.N.Y. 2008). In that case the Plaintiff, a police officer, failed to report inappropriate conduct out of a generalized (and well-founded) fear of retaliation. However, he was transferred to an inferior assignment — indisputably a form of retaliation — after he filed a charge with the EEOC. Thus, the issue before the Court was "whether an employee who offers no objective, *ex ante* evidence to substantiate his fear of retaliation may nonetheless establish a credible fear based on *subsequent* retaliation (unconnected to the supervisor whose discriminatory conduct is at issue)." The Court held that an employee can not. Underlying the Court's reasoning was the prophylactic nature of Title VII — its primary objective is "not to provide redress but to avoid harm." One can presume that the Plaintiff would have prevailed on this point had he complained about the allegedly unlawful conduct before his transfer to the inferior assignment.

In *Brewster v. The City of Poughkeepsie*, 447 F.Supp.2d 342 (S.D.N.Y. 2006), the Southern District discussed at length, what is required to satisfy the second prong of the

Faragher/Ellerth affirmative defense in a sexual harassment case. First, the defendant-employer bears the ultimate burden of proving the employee acted unreasonably in failing to avail herself of the company's internal complaint procedures. Second, once the employer has satisfied this initial burden, the burden of production shifts to the employee to come forward with one or more reasons why he or she did not make use of the procedures. The reason for not reporting must be "based on a credible fear that [the employee's] complaint would not be taken seriously or that [the employee] would suffer some adverse employment action as a result of filing a complaint." An employee's subjective belief is insufficient to establish a credible fear. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

In *Brewster*, the Court held the Plaintiff employee's vague, subjective belief that one previous sexual harassment complaint by a different employee had not been handled correctly (and provided no further details to this complaint) and the action taken (a reprimand) was not as strict as she would have thought warranted, falls far short of her evidentiary burden of showing that prior complaints were "ignored or resisted." Assertions that she would be fired for speaking up, and that a co-worker's vague and ambiguous complaint was not taken seriously, were insufficient. Furthermore, she could not establish credible fear by testifying that she did not know of any complaints that were handled inappropriately. Rather, she must affirmatively show that she knew of complaints that were ignored or resisted. Thus, the Plaintiff failed to establish her burden of production so as to preclude employer's *Faragher/Ellerth* affirmative defense to vicarious liability.

The fact that an employee who believes he or she is a victim of harassment fears ostracization by co-workers or embarrassment does not alleviate the employee's duty to report misconduct. The Second Circuit has definitively stated, "We do not doubt that there are many reasons why a victimized employee may be reluctant to report acts of workplace harassment, but for that reluctance to preclude the employer's affirmative defense, it must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers." *Caridad v. Metro-North Commuter R.R.*, 191 F. 3d 283 (2d Cir. 1999).[1]

[1] Cited in *Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 481 (S.D.N.Y. March 21, 2005).

In *Caen v. Medina*, 537 F. Supp. 2d 471 (E.D.N.Y. 2008), the Court held that the Plaintiff's failure to avail herself of any of the employer's reporting procedures was fatal to her claim of a hostile work environment. And in *Caen* there were many avenues to report misconduct. The employer provided a handbook to all of its employees; encouraged employees to "to talk to managers and local human resources representatives if they have any problems in the workplace"; established an "Ethics Hotline' that employees can call to make anonymous complaints about workplace harassment." Here the Plaintiff failed to use any of them to report what she believed was inappropriate conduct by a co-worker. Accordingly, the Court held that the employer had satisfied its burden under the *Faragher/Ellerth* affirmative defense and was entitled to summary judgment.

THE CURRENT TREND IN DISTRICT COURTS CONCERNING THE ESTABLISHMENT OF HOSTILE WORK ENVIRONMENT

It is clear the Supreme Court set forth a pattern of conduct expected of all employers. Simply put, employers are required to maintain a comfortable office setting free of discrimination and harassment. Over the years, Courts have alternately narrowed and expanded the definition of a hostile work environment. Despite this expansive mandate, Courts have maintained a narrow definition of hostile work environment that has been evident since at least 2002. Courts are increasingly narrowing the definition of hostile work environment with some surprising results.

In order to prevail on a claim of sexual harassment and a hostile work environment, the employee must establish the two following conditions:

> ... the workplace was permeated with "discriminatory intimidation, ridicule, and insult...that is sufficiently severe or pervasive to alter the conditions of victim's employment and create and abusive work environment. Second, the Plaintiff must show that a "specific bases exists for imputing the conduct that created the hostile work environment to the employer."

Howley v. Town of Stratford, 217 F.3d 141 (2d Cir. 2000).

In evaluating a hostile work environment claim, Courts may only examine conduct prompted by Plaintiff's membership in a protected class. *Montgomery v. Chertoff*, No. 03 CV 5387, 2007 WL 1233551 (E.D.N.Y. April 25, 2007). Personnel decisions that are not linked or correlated to discrimination are excluded from analyzing hostile work environment claims because the federal courts are not courts of personnel appeals. Similarly, the Court in *Feliciano v. Alpha Sector, Inc. and Kingsman Group*, No. 00 CV 9309 (AGS), 2002 WL 1492139 (S.D.N.Y. 2002) distinguished between the ordinary socializing in the workplace and the discriminatory conditions of employment. The Court specifically stated:

> Stepping out of one's home into the working world means, to some extent, subject oneself to the slings and arrows of daily life. Title VII does not codify Emily Post's rules of etiquette.

Following this approach, the Court in *Sabra v. Shafer*, No. 04 Civ. 2759 (LTS)(KNF), 2008 WL 2787964 (S.D.N.Y. July 17, 2008) granted the employer summary judgment on the Plaintiff's claim of a hostile work environment. Specifically, the Plaintiff, an Arab Muslim born in Egypt, alleged that his supervisor made several discriminatory comments toward him. "These comments included twice asking Plaintiff if he supported Al-Qaeda, and once calling Plaintiff 'Saddam.'" The Plaintiff also alleged that another supervisor discriminated against him on two occasions. "The first occasion occurred when the Plaintiff received a phone call and [the supervisor] said to Plaintiff, 'Sabra, immigration is looking for you,' in front of co-workers who then laughed. On the second occasion, several employees were watching a television report on an attempt to shoot the New York City Mayor and [the supervisor] said 'Sabra here?'" The Court conceded that the foregoing comments were offensive and inappropriate, but held nevertheless that they failed to "rise to the level of severe or pervasive abuse necessary to establish a claim of hostile work environment."

Similarly, in *Ford v. New York City Department of Health and Mental Hygiene*, 545 F. Supp. 2d 377 (S.D.N.Y. 2008), the Court held that a Plaintiff who was subjected to unkind comments on a daily basis for four months that were not physically threatening or severe had failed to establish a hostile work environment claim.

And in *Garone v. United Parcel Service*, 436 F.Supp.2d 448, (E.D.N.Y. 2006) the Court granted summary judgment to the employer when Plaintiff failed to establish that the prevalence of pictures of naked women and pornographic films at work, being asked to participate in a threesome and her buttocks being grabbed, which resulted in black and blue marks created a hostile work environment. The Court reasoned that although the behavior of her co-workers was coarse and should not be condoned, it nonetheless was not sufficiently severe to alter the Plaintiff's work conditions. Similarly, the Court of Appeals in *Alfano v. Costello, et al.*, 294 F.3rd 365 (2d Cir. 2002), held that three occasions where the Plaintiff found carrots arranged in a suggestive manner in her work area and a graphic cartoon on one occasion were sporadic and lacked sexual overtones.

Even in cases where the acts complained of intensified, the Courts adopted a surprisingly conservative approach. In *Figueroa v. The City of New York*, No. 00 Civ. 7559 (SAS), 2002 WL 31163880 (S.D.N.Y. Sept. 27, 2002), the Plaintiff's hostile work environment included a beating threat, an attempted collision by a fellow co-worker seeking to strike her with his car and the placement of rotten fish under her seat. The Court held these incidents were facially gender neutral and could not demonstrate any discrimination based on her gender. In *Baron v. Winthrop University Hospital*, 211 Fed. Appx. 16 (2d Cir. 2006), the Plaintiff failed to. establish a hostile work environment claim despite her supervisor's disparaging comments about women including "women should not be in health care," "females should not be making any decisions," and "[all females] should have their tubes tied." The Court found these remarks were not sufficiently severe or pervasive to alter the terms or conditions of Plaintiff's employment.

Ironically, throughout the dicta in these cases, the Courts persistently reiterated a single act of harassment with exceptional severity could trigger protection under Title VII. In one case in particular, *Yerry v. Pizza Hut of Southeast Kansas*, 186 F.Supp.2d 178 (N.D.N.Y. 2002), the Court unequivocally held the isolated incident where a manager forced the 18 year old employee Plaintiff to say a prayer, lower his pants and spank himself with a belt was severe enough to alter the terms and conditions of his employment.

The juxtaposition of the cases in this section demonstrate the delicate balance the Courts are attempting to strike between the rights of the employees and the employers' right to manage its operation as they deem appropriate.

POINT II

CONGRESS APPLIES THE BRAKES TO THE SUPREME COURT'S NARROWING OF THE PROTECTIONS OF THE AMERICANS WITH DISABILITIES ACT NEARLY A QUARTER OF A CENTURY AFTER ITS ENACTMENT

INTRODUCTION

On September 25, 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), overturning several Supreme Court decisions that narrowed the scope of the ADA's protections. Indeed, on January 1, 2009, the effective date of the revised ADA, *Sutton v. United Air Lines* and *Toyota v. Williams* ceased to be "good law."

According to the EEOC, the revised ADA retains the basic definition of disability "as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment." In analyzing the Amendments, the EEOC has concluded that the revised ADA:

- Expands the definition of "major life activities" to include, among other 'things, bending, reading, and communicating;
- Creates a new list of "major bodily functions" that includes, among other things, bowel, bladder and circulatory functions;
- States that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Provides that an individual subjected to an action prohibited by the ADA (for example, failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;

- Provides that individuals covered only under the "regarded as" prong are not entitled reasonable accommodation; and

- Emphasizes that the definition of "disability" should be interpreted broadly.

As defined in the ADAAA, "major life activities," for purposes of determining whether or not a person has a disability under the first prong of the definition, include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Additionally, for purposes of the third prong in the definition of a disability, an individual is "regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Moreover, an impairment does not qualify as a disability if it is transitory and minor (with an actual or expected duration of 6 months or less).

THE SUPREME COURT DECISIONS

Raytheon Company v. Hernandez

Congress' enactment of the ADA Amendments did not expressly overturn the Supreme Court's decision in *Raytheon Company v. Hernandez*, 540 U.S. 44 (2003). In that case the Supreme Court held that a Court cannot apply disparate impact analysis when examining a claim for disparate treatment.

In *Raytheon*, a former employee, Hernandez, who was terminated for violating company policy by testing positive for cocaine, applied to be rehired. Raytheon had an unwritten company policy that it would not rehire any employees who were terminated for violating company policy. Raytheon maintained that the Labor Department made the decision not to re-hire Hernandez before finding out that he was a drug addict.

Hernandez initially only brought a claim of disparate treatment. It was not until his response to Raytheon's motion for summary judgment that he raised a claim of disparate impact.

The District Court granted Raytheon's motion for summary judgment on disparate treatment and found Hernandez's claim of disparate impact had been timely pled or raised. The Ninth Circuit agreed as to the disparate impact claim, but found that under the burden-shifting approach of *McDonell Douglas*, Hernandez established a prima facie case of discrimination and Raytheon had not met its burden to produce a legitimate, non-discriminatory reason for its re-hiring policies. The Ninth Circuit found the policy, although facially lawful, was unlawful as applied to employees who were legitimately forced to resign for illegal drug use but had since undergone rehabilitation.

The Supreme Court held the Ninth Circuit improperly applied disparate impact analysis to Hernandez's disparate treatment claim. The Supreme Court restated that disparate impact and disparate treatment were separate and distinct causes of action. In disparate treatment claims, liability depends on whether the protected trait actually motivated the employer's action. Disparate impact claims involve facially neutral employment practices that fall more harshly on one group than another and cannot be justified by business necessity. Such practices may be deemed illegal without any evidence of discriminatory intent by the employer. The Supreme Court remanded the case on the issue of whether there was sufficient evidence from which a jury could conclude that Raytheon made its decision not to re-hire Hernandez based on his disability rather than the proffered explanation.

Clackamas Gastroenterology Associates, P.C. v. Wells

The ADA Amendments also left intact the Supreme Court's decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). There, the Supreme Court issued a decision clarifying what test would be employed to determine if director-shareholder physicians of a professional corporation would be counted as employees in determining whether the professional corporation was covered by the Americans With Disabilities Act ("ADA"). The Court adopted the view advocated by the EEOC to use the common-law element of control as the principal guidepost to make this determination.

Clackamas is a medical clinic in Oregon. Deborah Anne Wells was employed there as a bookkeeper from 1986 to 1997. After she was terminated, she filed this action under the ADA. The Court's opinion did not address her specific disability. It was undisputed that if the four

physician-shareholders who owned the corporation and constituted its board of directors were counted as employees, then the professional corporation would be covered by the ADA.

The District Court, adopting the Magistrate Judge's findings and recommendations, granted Clackamas' motion for summary judgment on the grounds that it was not covered by the ADA because it did, not employ 15 or more employees for the 20 weeks required by the statute. The District Court applied an "economic realities" test previously adopted by the Seventh Circuit in *EEOC v. Dowd & Dowd* and found the four doctors were. "more analogous to partners in a partnership than to shareholders in a general corporation," and therefore were not employees for the purposes of federal anti-discrimination laws.

THE LOWER COURT'S APPLICATION OF *CLACKAMAS*

In determining whether a medical group or similar business entity has the requisite number of employees triggering coverage under the ADA, the lowers courts are instructed to consider the following six factors set forth in *Clackamas*:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individuals work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- Whether the individual shares in the profits, losses, and liabilities of the organization.

There is a paucity of cases in the Southern and Eastern Districts of New York that confronted the same issue that was before the Supreme Court in *Clackamas*. But the six factors identified in *Clackamas* were critical in a recent Title VII case, *Fitzgibbons v. Putnam Dental Associates*, P.C., 368 F. Supp. 2d 339 (S.D.N.Y. 2005). Like the ADA, Title VII is inapplicable to businesses that employer fewer than 15 employees. At issue in *Fitzgibbons* was whether several individuals affiliated with the dental practice were employees, thus bringing it within the reach of Title VII. The Court applied the six factors to each individual alleged to be an employee, and ultimately concluded that many of them were not. Consequently, the Court held that the dental practice did not employ at least 15 individuals and was thus not subject to the provisions of Title VII.

Spector v. Norwegian Cruise Line LTD.

Finally, the ADA Amendments do not appear to disturb the 2005 decision by the Supreme Court in *Spector v. Norwegian Cruise Line LTD.*, 545 U.S. 119 (2005), a narrowly focused case concerning the interaction of a company's obligations under the ADA and the International Convention for the Safety of Life at Seas (SOLAS) or any other international legal obligation.

Numerous disabled passengers and their companions brought suit against Norwegian Cruise Line claiming that many areas of the cruise ships were not readily accessible to disabled patrons and disabled passengers were denied access to some of the best rooms on a ship. The Court found that foreign-flagged cruise ships operating in American waters were places of "public accommodation" and "specified public transportation" within the meaning of Title II of the ADA. However, the Court held that a Title III barrier removal requirement would bring the vessel into non-compliance with SOLAS. Thus, barrier removal was not "readily achievable" under Title III. The Court also stated that any modification had to take into consideration the modification's effect on shipboard safety and the ship's seaworthiness. Title III's non-discrimination and accommodation requirements do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures." The Court opined that it would be inconsistent to hold that Congress intended to require modifications threatening others' safety simply because the threat

comes from the accommodation rather than disabled individual. This decision demonstrates that employers may be able to escape the ADA's requirements to conform to international law.

CONCLUSION

The Amendments to the ADA were enacted to provide broader protections to individuals with disabilities. But the infancy of the Amendments will create instability for individuals, employers and the courts, as the full impact of the Amendments begin to take hold.

POINT III

RETALIATION: THE DANGERS OF STRIKING BACK

Retaliation is one of the most unnerving aspects of a discrimination case. Its very nature eludes a successful defense leading to incongruent findings. Indeed, often times, employers facing this claim are not found culpable for the underlying discrimination but are held liable for retaliation. Moreover, juries have an emotional response to retaliation and often punish employers through punitive damages. In a recent national origin and retaliation case, the jury awarded de minimus compensatory damages and a whopping sixteen million dollars in punitive damages for the retaliation. Even more unsettling is the dramatic increase in claims. The number of retaliation claims filed with the EEOC have doubled since 1997.[2] There are methods to avoiding liability and the first step in achieving this goal is to recognize the elements of retaliation.

ELEMENTS OF A RETALIATION CLAIM

To make out a prima facie case of retaliation, the employee must show

- the employee is engaged in a statutorily protected activity;
- the employer took an adverse action against the employee; and
- a causal connection exists between the employee's activity and the adverse employment action.

PROTECTED ACTIVITY

According to the EEOC and the Courts, opposition and participation are the two main categories of protected activity concerning retaliation. Opposition occurs when the employee opposes the employer for an unlawful practice under the employment discrimination laws. Participation refers to the filing of a charge, testifying, assisting or participating in an investigation, proceeding or hearing under the applicable laws.

[2] In 1997, the EEOC recorded 18,198 retaliation charges and 37,334 in 2011.

The EEOC recognizes implicit and explicit communications to an employer concerning the violation of the discrimination laws as "opposition." In cases where there is ambiguity, the EEOC will continue to interpret the complaint as protected opposition as long as it is reasonably related to employment discrimination. Protected opposition can take many forms including the following:

- Threatening to file a charge or formal complaint alleging discrimination;
- Making an informal complaint or protest about alleged employment discrimination.

In *Gregg v. New York State Department of Taxation & Finance*, 97 CV 1408 (MBM), 1999 WL 988234 (S.D.N.Y. 1999), the Court held that a direct complaint to his supervisor, the harasser, remained protected opposition. Specifically, the Court stated there was "no reason that an employer should be insulated from liability when an employee seeks, first, to resolve a problem informally with the alleged offender."

However, in *Cruz v. Coach Stores, Inc.*, 202 F. 3d 560 (2nd Cir. 2001), the Court found the employee's act of slapping the alleged sexual harasser after an offensive incident was not "protected activity" within meaning of Title VII's retaliation provision. The Court reasoned the employee had numerous options such as leaving the room and reporting the incident. The Court noted that although opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive statutory protection, "opposition" includes activities such as "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support -of co-workers who have filed formal charges." citing *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).[3]

ENGAGING IN PICKETING OR PUBLICIZING DISCRIMINATORY PRACTICE

In *Copeland v. Rosen*, 38 F. Supp. 2d 298 (S.D.N.Y. 1999), the Court found that a teacher's participation in an off-campus meeting with students and their families concerning the

[3] See also *Correa v. Mana Products, Inc.*, 550 F. Supp. 2d 319, 326 (E.D.N.Y. 2008).

termination of a black teacher constituted opposition to perceived discrimination. In *Copeland*, the Court, citing to *Sumner v. United States Postal Service*, 899 F.2d 203 (2d Cir. 1990), recognized "less formal types of opposition are also protected 'including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges'" are protected activity.

- Refusing to comply with an order which the employee reasonably believes is unlawful employment discrimination;
- Requesting a reasonable accommodation under the Americans with Disabilities Act and Title VII (for religious observances).

Although retaliation has a vast net and implicates employers under many theories, there are some limits to protected opposition.

- The complaint or protest must relate to discrimination in the workplace.

The Southern District recently held that filing a report about witnessing two coworkers having sex is not a protected act because no person could, objectively or subjectively, possess a reasonable, good faith belief that the sexual act she witnessed constituted sexual harassment. *De Los Santos v. City of New York*, 482 F.Supp.2d 346 (S.D.N.Y. 2007). Since the Court found this complaint was not related to unlawful employment practice, there was no retaliation evident.

CASUAL ACCUSATIONS OF DISCRIMINATION

In order to qualify for a protected activity, the Plaintiff must have a reasonable good faith belief the subject of his protest was unlawful discrimination. There is no requirement the incident he is complaining about actually constitutes unlawful conduct amounting to a violation of Title VII. In *Sanders v. Madison Square Garden. L.P.*, 525 F. Supp. 2d 364 (S.D.N.Y. September 5, 2007), the Court held that as long as the "employee acts in good faith when she brings a discrimination complaint, she is absolutely protected against relation for her complaint, even if the employer's alleged conduct does not actually violate Title VII." The Court further stated that "although employees who make up false complaints of discrimination are not protected by the

act, if an employer chooses to fire an employee for making false or bad faith accusations, he does so at his peril, and takes the risk that a jury will later disagree with his characterization." In a recent Southern District case, a .casual comment between two supervisors did not constitute retaliation.

In *Spadola v. New York City Transit Authority*, 242 F.Supp.2d 284 (S.D.N.Y. 2003), immediately after being called "[h]oney, sweetie, dear" by a supervisor, the Plaintiff pointed his finger and stated "[i]f you call me that again I will write you up for sexual harassment." During his testimony, Plaintiff admitted he did not intend to set forth a complaint unless the supervisor repeated the names because he did not feel humiliated, intimidated or offended. Indeed, it was only after Plaintiff became aware he was going to receive disciplinary charges for his outburst, that he immediately filed a complaint against the supervisor. The Court ultimately held the informal threat and the filing of the complaint were not protected because there was no reason to believe the Plaintiff had a good faith belief the name calling was unlawful discrimination.

PARTICIPATION CATEGORY

It is unlawful to discriminate against someone who has made a charge, testified, assisted or participated in the investigation, hearing, proceeding or litigation under Title VII, the ADEA, the EPA or the ADA. This protection applies to all unlawful discrimination challenges brought in the administrative agencies including the EEOC, the State Division of Human Rights, and state and federal Courts. Unlike the opposition clause which requires the Plaintiff to have a reasonable good faith belief in the unlawfulness of the practice, Plaintiffs under the participation clause need only to participate in the statutory processes at the administrative or Court levels. This is without regard to the reasonableness, timeliness and conclusory nature of the underlying charge. In this vein, internal investigations prior to the filing of a charge are not subject to the participation clause.

In *Bick v. City of New York*, 1997 U.S. Dist. LEXIS 15897 (S.D.N.Y. 1997),[4] a police sergeant sued the defendant for retaliation because of statements she made to an investigator concerning her failure to report a sexual harassment complaint. Since these statements were

[4] Cited in *Casper v. Lew Lieberbaum & Co., Inc.*, 182 F. Supp. 2d 342, 350 (S.D.N.Y. 2002).

made during the investigation of the sergeant's internal disciplinary hearing, the Court did not find Title VII retaliation.

Recently, in 2011, the Supreme Court in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), expanded the range of individuals who are included in engaging in a statutorily protected activity, and thus have standing to sue under Title VII's retaliation provision. The Court held that anyone within the "zone of interest" may sue, which includes any plaintiff with an interest "arguably sought to be protected by [Title VII]." In *Thompson*, Thompson and his fiancée, Miriam Regalado, were employees of the respondent employer. Three weeks after the respondent employer found out that Regalado filed a charge with the EEOC alleging sex discrimination, the employer fired Thompson. Thompson filed an action with the District Court, alleging that his employer fired him in order to retaliate against Regalado. The District Court held that Thompson did not engage in any statutorily protected activity, so he was not included in the class of persons for whom Congress intended to be protected against retaliation. The Supreme Court cited *Burlington* (discussed below), and held that the Title VII antiretaliation provision must be construed to cover a broad range of employer conduct. The Court reasoned that it was obvious that a reasonable worker would be dissuaded from engaging in protected activity if she knew her fiancé would be fired, and thus firing Thompson was the unlawful act by which the employer punished Regalado. Thus, the Court found that Thompson was protected under Title VII and had standing to sue.

MATERIALLY ADVERSE ACTION

In 2006, the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), expanded the application of Title VII's retaliation provision beyond employer actions affecting terms, conditions or status of employer or those that occur at work. The Court held that Title VII's retaliation provision is broader than Title VII's substantive discrimination provision. The Court announced that Title VII's retaliation provision contains a materiality requirement and an objective standard, *i.e.*, a Plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" The Supreme Court left it to the various Circuit Courts to determine what

might dissuade a reasonable employee from filing a discrimination complaint. As seen below, the Second Circuit has continued to be aggressive in denying summary judgment on retaliation claims.

In *Kessler v. Westchester County Department of Social Services*, 461 F.3d 199 (2nd Cir 2006), the Second Circuit specifically cited to *Burlington* in vacating the District Court granting defendants' motion for summary judgment on retaliation and remanding the retaliation issue. In June 2002, Plaintiff filed a complaint with the EEOC alleging defendants violated Title VII with regard to Plaintiff's race, gender and religion. In January 2003, the EEOC issued Plaintiff a right to sue letter. After discussing the right to sue letter with a supervisor, Plaintiff's duties began to be curtailed and he was transferred to the Yonkers Office. Although Plaintiff kept his title as a Department of Social Services ("DSS") Assistant Commissioner after the transfer, his responsibilities were severely curtailed. Subsequent to the transfer, Plaintiff no longer had responsibility for policy formulation, resource allocation, planning and evaluation of programs and procedures, financial and personnel management. In addition, subordinates no longer reported to Plaintiff and he was responsible for work normally performed by clerical and lower-level personnel. The Second Circuit found that Plaintiff's transfer could curtail a reasonable DDS Assistant Commissioner from filing a complaint.

In *Edwards v. Town of Huntington*, No. 05-CV-339, 2007 WL 2027913 (E.D.N.Y. July 11, 2007), the Court denied defendants' motion for summary judgment on retaliation claims. The Court declined to dismiss Plaintiff's retaliation claims because defendants (1) criticized Plaintiff for taking too long to perform certain work; (2) selected an employee less qualified than Plaintiff to teach a class about obtaining a commercial driver's license, for which that employee earned $7,000; (3) selected employees less senior to Plaintiff to serve as acting foreman; and (4) failed to provide Plaintiff with training provided to others. Once again, the District Court cited *Burlington* in rejecting defendants' assertions that the above acts were not adverse actions under a retaliation claim.

In *Patane v. Clark*, 508 F.3d 106 (S.D.N.Y. 2007), the Second Circuit vacated a summary judgment granted in favor of the employer on the Plaintiff's retaliation claim. The Court held that the Plaintiff had presented enough facts to state a claim for retaliation under the *Burlington*

standard, specifically, that after she had complained to her supervisors about workplace harassment, she was stripped of virtually all of her secretarial duties.

CAUSAL CONNECTION

In order to establish a viable retaliation claim, Plaintiffs must prove the adverse employment action was the result of their protected activity. Plaintiffs typically establish this through timing of the event and the employer's knowledge of the protected activity. Specifically, retaliation is shown when the employer knew of the employee's protected activity before taking the adverse action and the act took place shortly after the protected activity occurred. The Second Circuit has repeatedly held that there is no bright line time period governing temporal proximity establishing causal connection.

In *Woods v. Enlarged School Dist. of Newburgh*, 473 F.Supp.2d 498 (S.D.N.Y. 2007), the Court held the Plaintiff failed to establish a prima facie case of retaliation because her discharge came five months after she filed a racial harassment complaint with management. In *O'Reilly v. Consolidated Edison Co. of New York, Inc.*, 173 Fed.Appx. 20 (2d Cir. 2006), the Court found the three month period between the end of the Plaintiff's Family Medical Leave Act leave and her termination in light of Con Ed's leave policy, which was more generous than FMLA, retaliation.

Even in the face of causation, employers can avoid liability by demonstrating there was a legitimate reason for the adverse employment action. In a recent Second Circuit case, the Court found there was no pretext involved in Plaintiff's termination. Specifically, in *Pointdujour v. Mount Sinai Hosp.*, 121 Fed.Appx. 895 (2d Cir. 2005), Pointdujour presented her harassment complaint in a sufficiently unprofessional and disruptive manner to raise concerns about the propriety of her continuing to work in the hospital emergency room. Mount Sinai did not, however, propose to terminate her employment or even transfer her to another department. Rather, it requested that, before returning to the emergency room, she participate in the Employee Assistance Program ("EAP") or, at least, secure confirmation from the EAP that she was psychologically fit to resume her responsibilities. Only when Pointdujour failed to provide proper documentation from the EAP did Mount Sinai terminate her employment.

CONCLUSION

The Court's broad interpretation of retaliation unnerves many employers when facing these claims. Certain methods can be used to minimize the impact and employers are encouraged to take the following steps:

- Ensure proper documentation
- Deliberate the employment action with care
- Slow down the process leading up to the employment action
- Ensure retaliation will not occur following complaints
- Provide training for managers

Care must be taken when implementing some of these steps especially since it can implicate an employer in other areas of discrimination. The Court clearly requires employers to take immediate action when faced with a complaint of discrimination or harassment. As a result, employers must navigate through treacherous waters and ultimately achieve a delicate balance to avoid liability.

POINT IV

ARBITRATION - AN ALTERNATIVE TOOL FOR EMPLOYMENT LITIGATION

ADR

Recent discrimination cases have gone beyond addressing substantive interpretations of the statutes and regulations. Courts are also concerned about balancing employee rights with the overwhelming burden placed on the judicial system by employment litigation. Alternative Dispute Resolution (ADR) has become a meaningful way for employers to limit high jury verdicts and litigation costs. Accordingly, whether an employer may require an employee to agree to mandatory arbitration to resolve all employment-related disputes has been hotly disputed during the last few terms of the Supreme Court and in state Courts as well. New York and New Jersey Courts have given their blessings to mandatory arbitration as a means to resolve state claims arising from employment-related disputes — claims of breach of contract as well as discrimination and harassment. *E.g.*, *Bruno v. Mark MaGrann Associates, Inc.*, 388 N.J.Super. 539 (App. Div. 2006).); *O'Neill v. Krebs Communications Corp.*, 790 N.Y.S.2d 451 (1st Dept., 2005).

On the federal level, the most important recent arbitration decision was *EEOC v. Waffle House Inc.*, 534 U.S. 279 (2002), where the Court held by a 6-3 vote arbitration clauses do not restrict the EEOC's right to pursue an independent enforcement lawsuit on an employee's behalf. However, this ruling has a silver lining. *Waffle House* demonstrates a clear acceptance by the Supreme Court of ADR in resolving disputes in the workplace, even for claims arising under federal statutes designed to protect employees. While disagreeing over the EEOC's authority to seek victim-specific relief, all of the justices upheld an employer's right to require its employees to arbitrate claims under the ADA and the Age Discrimination in Employment Act ("ADEA"). In doing so, the Court implies an employer may require employees to arbitrate claims under other federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964. Thus, it seems clear the Court accepted that arbitration is an alternative form to resolve a dispute.

CONCLUSION

Based upon the Supreme Courts rulings employers should keep in mind the following practical recommendations:

- Evaluate the need for an ADR policy.
- Decide whether and how the organization should implement an ADR program and mandatory arbitration.
- Create or review an ADR policy — establish balanced procedures for implementing ADR or review the existing policy to ensure its fairness is defendable in Court and before the EEOC.
- Place greater importance on EEOC charges — invest resources in seeking a no-cause finding from the EEOC.
- Affirmatively seek EEOC deferral to an ADR policy.

This is by no means an exhaustive list of precautions employers should take in the workplace. However, taking these measures can certainly assist in lessening the impact an employment case invariably has on the company and its resources.

POINT V

THE LILLY LEDBETTER FAIR PAY ACT -- EXPANDING THE SCOPE OF EMPLOYER LIABILITY

The enactment in January 2009 of the Lilly Ledbetter Fair Pay Act marks one of the boldest developments in employment law, as it will undoubtedly leave more employers vulnerable to pay discrimination claims.

Signed into law on January 29, the Act overturns the Supreme Court's 2007 decision in *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, 550 U.S. 618, which shut the courthouse door to lawsuits based on pay discrimination claims filed more than 180 days after an employer's decision to pay a worker less than a counterpart doing the same work. The new law expands the scope of employer liability by giving an employee 180 days to bring a pay discrimination claim each time the employee receives a paycheck that is the product of an employer's unlawful decision or policy concerning pay.

The Act further amends Title VII of the Civil Rights Act of 1964 to permit a prevailing Plaintiff to recover up to two years in back pay from the date a charge is filed with the EEOC if the employee can show similarities between the employer's conduct before the filing and during the pendency of the EEOC charge. Employees also have more flexibility to bring lawsuits pursuant to the Age Discrimination Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act under the new law.

The Act is named after Lilly Ledbetter, who was employed at a Goodyear plant in Alabama from 1979 until 1998. She submitted a questionnaire to the EEOC in March 1998, and brought a lawsuit eight months later in which she asserted, among other claims, violations of the Equal Pay Act and Title VII. The Court of Appeals ruled that Ledbetter's pay discrimination claim was time-barred because Goodyear's decisions, as they related to Ledbetter's compensation, occurred more than 180-days before the filing of her EEOC paperwork.

At the Supreme Court, Ledbetter unsuccessfully argued that each paycheck which she alleged was discriminatory — should start the 180-day filing clock. She lost at the Supreme Court, but pressed her point at numerous public appearances following the decision.

Her arguments gained traction during the presidential campaign and won strong support from Democrats, who shepherded the Act through Congress, and, ultimately, on to President Barack Obama's desk.

The Second Circuit has applied the Lilly Ledbetter Fair Pay Act, and held that it does not apply to a generalized discrimination claim. For example, the Ledbetter Act will not apply to a claim based upon the failure to promote an employee. *Miller v. Kempthorne*, 357 Fed. Appx. 384 (2d Cir. 2009). Indeed, this issue has been ruled upon on various occasions, where courts have held that the Ledbetter Act applies only to discriminatory employment decisions specifically related to pay, and not other employment decisions, even where such decisions directly affect pay. *Zambrano-Lamhaouhi v. New York City Board of Education*, 2011 U.S. Dist. LEXIS 133863 (E.D.N.Y. 2011). Thus, the Ledbetter Act only applied where the plaintiff claims that she was paid less than other employees for similar work, not generalized discrimination claims, including a failure to promote. *Matthews v. Corning Inc.*, 737 F. Supp 2d 133 (W.D.N.Y. 2010).