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EMPLOYMENT LAW

Thomas G. Eron

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INTRODUCTION

This *Survey* year was marked by several significant legislative enactments. There were three substantial revisions to the New York State Human Rights Law,¹ adding prohibitions against sexual orientation discrimination and against military status discrimination, as well as revising the religious discrimination provisions to expand accommodation requirements.² The Legislature also significantly expanded the scope of the Clean Indoor Air Act.³

During the *Survey* year, the New York Court of Appeals spoke again on the scope of the employment-at-will doctrine in New York.⁴ There were also significant developments in employment-related tort law,⁵ and, at both the state and federal level, the legal principles proscribing employment discrimination.⁶

1. *See generally* N.Y. EXEC. LAW § 290 (McKinney 2001 & Supp. 2004).

2. *See infra* Part IV.A.

3. N.Y. PUB. HEALTH LAW § 1399-n-x (McKinney 2002 & Supp. 2004); *see infra* Part III.A.

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part IV.

I. EMPLOYMENT AT WILL

In *Wieder v. Skala*,⁷ the Court recognized an exception to the traditional employment-at-will doctrine in the employment of an attorney by a firm engaged in the practice of law.⁸ The Court held that the plaintiff's duties as a lawyer and as an employee were "so closely linked as to be incapable of separation."⁹ It reasoned that he and his firm were engaged in a common professional enterprise, namely the practice of law, which they were obligated to conduct in accordance with the ethical standards of the profession.¹⁰ To require the plaintiff, as a condition of employment, to breach the reporting requirements of the Code of Professional Responsibility (DR 1-103(A)), would prevent him from carrying out the inherent terms of his employment—the ethical practice of law.¹¹ Thus, the plaintiff's claims that this ethical obligation was an implied term of his employment and that his firm had breached this standard of conduct in his discharge were sufficient to state a cause of action for breach of an implied contract.¹²

In *Horn v. New York Times*,¹³ the Court narrowly construed *Wieder* and refused to extend its holding to the employment of a physician in her capacity as medical director for a commercial employer.¹⁴ The plaintiff was the associate medical director in the medical department of the *New York Times*.¹⁵ She provided medical care to the company's employees and determined whether employees' injuries were work-related and therefore qualified for workers' compensation coverage.¹⁶ According to the plaintiff, company human resources personnel directed her to provide them with employee medical records without the employees' consent.¹⁷ Plaintiff contended that the records were confidential medical records and their release could result in the violation of "several provisions of state law, the Code of Ethical Conduct of the American College of Occupational and Environmental Medicine, the Americans with Disabilities Act, and various federal regulations."¹⁸ As a result, the plaintiff refused to share the

7. 80 N.Y.2d 628, N.E.2d 105, 593 N.Y.S.2d 752 (1992).

8. *Id.* at 638, 609 N.E.2d at 110, 593 N.Y.S.2d at 757.

9. *Id.* at 635, 609 N.E.2d at 108, 593 N.Y.S.2d at 755.

10. *Id.* at 635-36, 609 N.E.2d at 108, 593 N.Y.S.2d at 755.

11. *Id.* at 636-38, 609 N.E.2d at 108-10, 593 N.Y.S.2d at 756-57.

12. *Id.* at 637-38, 609 N.E.2d at 109-10, 593 N.Y.S.2d at 756-57.

13. 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003).

14. *Id.* at 89, 790 N.E.2d at 754, 760 N.Y.S.2d at 379.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

employee medical information with non-medical personnel.¹⁹

The *New York Times* subsequently restructured its medical department and eliminated the plaintiff's position.²⁰ Plaintiff claimed that the real reason for her termination was her refusal to release confidential medical information.²¹ She alleged a breach of contract based on her theory that legal and ethical requirements for the confidentiality of patient records should have been implied into the terms of her employment.²²

The trial court and the appellate division denied the employer's motion to dismiss the contract claim, holding that plaintiff stated an actionable claim under *Weider*.²³ The Court of Appeals reversed.²⁴ In rejecting the claim, the Court found that the plaintiff could not maintain a breach of contract action because of the absence of a "common professional enterprise" between the plaintiff and her employer.²⁵ The Court reasoned that the plaintiff called on her knowledge as a physician, not only to treat employees, but also to assist corporate management in making employment decisions.²⁶ The Court in *Horn* construed the *Weider* exception to apply only if the employee can demonstrate that his or her provision of the professional services to the employer occupies the "very core" or constitutes the "only purpose" of the employee's employment.²⁷ Considering that the plaintiff had other responsibilities besides treating the employees, the Court concluded that the ethical standards she was allegedly ordered to violate were "not central to . . . [the] 'conduct of her practice on her employer's behalf.'"²⁸

Finally, the majority in *Horn* re-confirmed the narrow scope of the judicially-crafted exceptions to the employment-at-will principle in New York:

The only exceptions to the employment-at-will rule ever adopted by this Court have involved very specific substitutes for a written employment contract: in *Weiner [v. McGraw-Hill Inc.]*²⁹ the employer's express, unilateral promise on which the employee

19. *Id.* at 90, 790 N.E.2d at 754, 760 N.Y.S.2d at 379.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See Horn v. New York Times*, 186 Misc. 2d 469, 469, 719 N.Y.S.2d 471, 471 (Sup. Ct. N.Y. Co., 2000), *aff'd*, 293 A.D.2d 1, 739 N.Y.S.2d 679 (1st Dep't 2002).

24. *Horn*, 100 N.Y.2d at 97, 790 N.E.2d at 759, 760 N.Y.S.2d at 384.

25. *Id.* at 96, 790 N.E.2d at 759, 760 N.Y.S.2d at 384.

26. *Id.* at 95, 790 N.E.2d at 758, 760 N.Y.S.2d at 383.

27. *Id.*

28. *Id.*

29. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

relied; in *Weider*, the parties' mutual undertaking to practice law in compliance with DR1-103(a), a rule so fundamental and essential to the parties' shared professional enterprise that its implication as a term in their employment agreement aided and furthered the agreement's central purpose. We have consistently declined to create a common-law tort of wrongful or abusive discharge, or to recognize a covenant of good faith and fair dealing to imply terms grounded in a conception of public policy into employment contracts, as the dissent would have us do, and we again decline to do so.³⁰

II. EMPLOYMENT TORTS

A. Defamation

In *Hudson v. Goldman Sachs & Co.*, the plaintiff had sued his employer for an allegedly unlawful termination.³¹ He subsequently amended his complaint to assert a cause of action for defamation after a newspaper report, pertaining to the litigation and citing unnamed employees, stated that the employer had terminated the plaintiff for denying his extramarital affair with a co-worker and not because of the affair.³² According to the plaintiff, such statements impugned his honesty.³³

In rejecting the defamation claim, the court held that the statements to the newspaper about the basis for the plaintiff's termination were privileged as reports of judicial proceedings under New York Civil Rights Law section 74.³⁴ Here, defendant, in answering the defamation claim, had asserted that the newspaper's report was true.³⁵ While the court had declined to resolve this issue on a pre-answer basis,³⁶ it also held that the protections of Civil Rights Law section 74 apply to statements concerning

30. *Horn*, 100 N.Y.2d at 96, 790 N.E.2d at 759, 760 N.Y.S.2d at 384.

31. 304 A.D.2d 315, 757 N.Y.S.2d 541 (1st Dep't 2003).

32. *Id.* at 316, 757 N.Y.S.2d at 542.

33. *Id.*

34. *Id.* Civil Rights Law Section 74 establishes the following privilege in libel actions: "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

N.Y. CIV. RIGHTS LAW § 74 (McKinney 1992).

35. *Hudson*, 304 A.D.2d at 316, 757 N.Y.S.2d at 542.

36. *Hudson v. Goldman Sachs & Co.*, 283 A.D.2d 246, 247, 725 N.Y.S.2d 318, 320 (1st Dep't 2001).

the lawsuit made prior to the filing of an answer.³⁷

In *Williams v. Moreno*, an employee commenced an action for defamation against her co-workers.³⁸ She alleged that the co-workers wrote libelous memos to their supervisor concerning her allegedly inappropriate behavior while on the job.³⁹ The court held that the defamation cause of action could not be maintained.⁴⁰ The co-workers' reports of plaintiff's on-the-job misconduct were protected by a qualified privilege that extended to a communication made by one person (the co-worker) to another (the employer) concerning the subject in which both have an interest (employment misconduct).⁴¹ The shield provided by the qualified privilege cannot be pierced absent a showing of malice.⁴² The plaintiff could not make the requisite showing against her co-workers and, therefore, the cause of action for defamation was dismissed.⁴³

In contrast, in *Skarren v. Household Finance Corp.*, plaintiff's defamation claim survived a motion to dismiss.⁴⁴ The plaintiff had been discharged after his employer received an anonymous letter implicating plaintiff in a kickback scheme.⁴⁵ In support of his defamation claim, the plaintiff alleged that the company president had made defamatory statements about him to certain co-workers and that the company had made statements to other individuals, including former and prospective customers.⁴⁶

While the court recognized that statements may be protected by a qualified privilege if they are made by the employer to its employees on a topic of common interest, in the present case, the plaintiff sufficiently pleaded actual malice as to overcome the qualified privilege asserted as to the communication with co-workers.⁴⁷ The court also found that the alleged defamatory statements made to customers were not protected by the qualified privilege because "they were disseminated to those who did not have either a common interest in them, or a legal, moral, or social duty to speak upon the subject of the communications."⁴⁸

37. *Hudson*, 304 A.D.2d at 316, 757 N.Y.S.2d at 542.

38. 195 Misc. 2d 270, 757 N.Y.S.2d 214 (Sup. Ct. App. T., 2d Dep't 2002).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 271, 757 N.Y.S.2d at 216.

43. *Id.*

44. 296 A.D.2d 488, 488, 745 N.Y.S.2d 556, 556 (2d Dep't 2002).

45. *Id.* at 489, 745 N.Y.S.2d at 557.

46. *Id.*

47. *Id.*

48. *Id.* at 489-90, 745 N.Y.S.2d at 557-58.

B. Tortious Interference With Contract

In *Cantor Fitzgerald Associates, L.P. v. Tradition North America, Inc.*, the plaintiff brought an action against its competitor, alleging tortious interference with contract arising from the competitor's alleged inducement of three employees to breach their employment contracts.⁴⁹

In analyzing the claim, the court reasoned that, on a claim for tortious interference with contract, an employer must demonstrate, *inter alia*, proximate cause, that is, that the breach of contract would not have occurred but for the activities of the defendant.⁵⁰ It is not sufficient for the employer merely to demonstrate that the competitor was aware that the contractual relationship existed between plaintiff and its employees.⁵¹ Here, evidence that the employees were dissatisfied with their current employment, were determined to breach their contracts, actively sought new employment prior to any involvement by the competitor, and dictated the terms under which they would work for the competitor defeated the employer's attempt to establish proximate causation.⁵² The fact that the competitor "welcomed the breaching employees" and agreed to their requests for better terms of employment did not satisfy the plaintiff's burden of proof on causation.⁵³

C. Intentional Infliction of Emotional Distress

During this *Survey* year, as in the past, courts have continued to hold plaintiffs to a strict standard of proof on claims of intentional infliction of emotional distress.⁵⁴

For example, in *Fama v. American International Group, Inc.*, the plaintiff asserted a cause of action for intentional infliction of emotional distress against her former employer, alleging that her manager had sabotaged her performance, made sexually offensive remarks to her, and suggested that she give sexual favors to her clients to improve business.⁵⁵ Plaintiff also alleged that her supervisor refused to take any action in

49. 299 A.D.2d 204, 749 N.Y.S.2d 249 (1st Dep't 2002).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. See *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 122, 612 N.E.2d 699, 702, 596 N.Y.S.2d 350, 353 (1993) ("of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous") (internal citations omitted); *Fischer v. Maloney*, 43 N.Y.2d 553, 557-58, 373 N.E.2d 1215, 1217, 402 N.Y.S.2d 991, 992-93 (1978).

55. 306 A.D.2d 310, 310-11, 760 N.Y.S.2d 534, 535-36 (2d Dep't 2003).

response to her complaints about the behavior of the manager.⁵⁶ The appellate division concluded that neither the conduct of the manager nor the supervisor's alleged acquiescence to such behavior constituted the type of extreme and outrageous conduct necessary to sustain an intentional infliction of emotional distress claim.⁵⁷ The court also recognized that the "act of terminating the plaintiff's employment may not form the basis of an intentional infliction of emotional distress cause of action in circumvention of the at-will employment rule in New York."⁵⁸ Accordingly, the court dismissed the plaintiff's claim.⁵⁹

Similarly, in *Hanford v. Plaza Packaging Corp.*, the plaintiff commenced a suit against her former employer and one of her co-workers for intentional infliction of emotional distress.⁶⁰ According to the plaintiff, her co-worker had placed video equipment in the company's locker room so he could videotape her while she was showering.⁶¹ Plaintiff claimed to have suffered psychological injuries as a result of this incident and filed a workers' compensation claim.⁶² The Workers' Compensation Board granted plaintiff's claim for benefits.⁶³ It determined that her condition (post-traumatic stress) was compensable because, with regards to the employer, the injuries she suffered through the videotaping arose in the course of employment and were accidental, not intentional.⁶⁴

The court deferred to the determination of the Workers' Compensation Board and dismissed the plaintiff's intentional tort claim against the employer.⁶⁵ The court also dismissed the plaintiff's intentional tort claim against her co-worker on the grounds that the determination of the Workers' Compensation Board was res judicata as against the co-worker as well.⁶⁶

In *Priore v. New York Yankees*, the plaintiff, a staff employee of a professional baseball team, admitted to giving team T-shirts to employees at a fast-food restaurant and to moving damaged bats into his personal area

56. *Id.* at 311, 760 N.Y.S.2d at 536.

57. *Id.*

58. *Id.* (internal citations omitted).

59. *Id.*

60. 305 A.D.2d 241, 760 N.Y.S.2d 31 (1st Dep't 2003).

61. *Id.* at 241-42, 760 N.Y.S.2d at 32 (Tom, J., dissenting).

62. *Id.* at 242, 760 N.Y.S.2d at 32.

63. *Id.*

64. *Id.*; see N.Y. WORKERS' COMP. LAW § 10(1) (McKinney 1992 & Supp. 2004); see also *Bell v. Utica Corp.*, 306 A.D.2d 604, 606, 759 N.Y.S.2d 614, 616 (3d Dep't 2003) (injury from altercation with co-workers is compensable unless injury was solely caused by injured employee's willful intent, or altercation arose from purely personal animosity).

65. *Hanford*, 305 A.D.2d at 241, 760 N.Y.S.2d at 31.

66. *Id.*

in the equipment room without permission.⁶⁷ As a result, the plaintiff was terminated for petty larceny.⁶⁸ He brought suit on several theories including a claim for intentional infliction of emotional distress caused by the manner in which the incidents were investigated and the way his discharge was carried out.⁶⁹

The court held that an employer has a right to question an employee about allegations of theft in the workplace.⁷⁰ Furthermore, an employer has the right to dismiss the employee where there is an admission of guilt.⁷¹ According to the court, "[t]his key ingredient of the at-will relationship cannot be subverted by the discharged employee's resort to a claim for intentional infliction of emotional distress, no matter how distressing that discharge may have been, unless it can be shown that the employer acted in a reckless manner."⁷² The plaintiff in this case could not make the requisite showing.⁷³ Accordingly, the court dismissed his claim for intentional infliction of emotional distress.⁷⁴

D. Failure to Protect Third Parties

In *N. X. v. Cabrini Medical Center*, the New York Court of Appeals reversed, in part, the appellate division's grant of summary judgment for the defendant medical center on the plaintiff's claim that the medical center was liable for sexual assault by a physician as she recovered from surgery.⁷⁵ The Court rejected plaintiff's claim of vicarious liability against the medical center because it concluded that the physician's sexual assault was personally motivated and was not committed in furtherance of the hospital's interests or within the scope of his employment.⁷⁶

The Court, however, reinstated her negligence claim against the hospital based on her theory that the hospital's employees failed to protect her from the assault.⁷⁷ "A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons."⁷⁸ This duty

67. 307 A.D.2d 67, 70, 761 N.Y.S.2d 608, 611 (1st Dep't 2003).

68. *Id.* at 70, 761 N.Y.S.2d at 611.

69. *Id.* at 69, 761 N.Y.S.2d at 610.

70. *Id.* at 71, 761 N.Y.S.2d at 611.

71. *Id.*

72. *Id.* (internal citation omitted).

73. *Id.*

74. *Id.* at 75, 761 N.Y.S.2d at 614.

75. 97 N.Y.2d 247, 251, 765 N.E.2d 844, 847, 739 N.Y.S.2d 348, 351 (2002).

76. *Id.* at 251, 765 N.E.2d at 847, 739 N.Y.S.2d at 351.

77. *Id.* at 252, 765 N.E.2d at 848, 739 N.Y.S.2d at 352.

78. *Id.*

extends only to reasonably foreseeable risks.⁷⁹ The Court held that “observations and information known to or readily perceivable by hospital staff that there is a risk of harm to a patient under the circumstances can be sufficient to trigger the duty to protect.”⁸⁰

In *Cabrini*, there was a confluence of factors—including that the physician was not involved in the patient’s care, that several nurses were present in the small recovery room, and that the hospital had a policy requiring the presence of a female staff member during a male physician’s pelvic exam of a female patient—that provided a sufficient basis to conclude that the nurses unreasonably disregarded the circumstances that should have alerted them to the risk of misconduct against the plaintiff by a male resident.⁸¹ Under those circumstances, the risk was reasonably foreseeable and a jury could find that proper vigilance by the nurses could have prevented the assault.⁸² Thus, plaintiff stated a viable negligence claim against the hospital.⁸³

III. NEW YORK STATUTORY DEVELOPMENTS

A. Clean Indoor Air Act

On March 26, 2003, Governor Pataki signed a sweeping amendment to New York’s Clean Indoor Air Act, Article 13-E of the New York Public Health Law, which bans smoking in virtually all indoor areas statewide.⁸⁴ The legislation is designed to prohibit exposure to second-hand smoke in the workplace and in other indoor areas.⁸⁵ The legislation was effective as of July 24, 2003.⁸⁶

The Clean Indoor Air Act, which was initially enacted in 1989,⁸⁷ prohibited, *inter alia*, smoking in most common areas in places of

79. *Id.* at 253, 765 N.E.2d at 848, 739 N.Y.S.2d at 352.

80. *Id.* at 255, 765 N.E.2d at 849, 739 N.Y.S.2d at 353.

81. *Id.* at 253-54, 765 N.E.2d at 848-49, 739 N.Y.S.2d at 352-53.

82. *Id.* at 254, 765 N.E.2d at 849, 739 N.Y.S.2d at 353.

83. *Id.*; see also *Dia CC. v. Ithaca City Sch. Dist.*, 304 A.D.2d 955, 956, 758 N.Y.S.2d 197, 200 (3d Dep’t 2003). Plaintiff’s negligence claim against a school district, based on alleged sexual abuse of a student by a teacher, was dismissed because although the district had a duty to supervise students in its care, there were no facts to show that the alleged assault was reasonably foreseeable. *Id.* The district had checked the teacher’s employment record before hiring him, and he had worked for 15 years at the district without incident. *Id.* Thus, the court held that one-on-one supervision was not unreasonable. *Id.*

84. Act of March 26, 2003, ch. 13, 2003 McKinney’s Sess. Laws of N.Y. 29 (codified as N.Y. PUB. HEALTH LAW §§ 1399-n—1399-x (McKinney 2002 & Supp. 2004)).

85. See N.Y. PUB. HEALTH LAW § 1399-o.

86. See *supra* note 85.

87. See Act of July 5, 1989, ch. 244, 1989 McKinney’s Sess. Laws of N.Y. 632.

employment, but allowed workplace smoking in designated smoking rooms, in work areas where all employees consented, and in portions of employee cafeterias and lounges.⁸⁸ Employers were required to establish smoking policies and to enforce the statutory restrictions within their workplaces.⁸⁹ The statute also prohibited smoking in many other indoor areas open to the public.⁹⁰

The 2003 legislation significantly expanded the scope of the Clean Indoor Air Act. The amended statute extends the ban on smoking in the indoor areas of covered entities, including places of employment, bars, food service establishments, public transportation facilities, youth centers, childcare centers, other homes and institutions for children, colleges and universities, hospitals and health care facilities, commercial establishments, indoor arenas, zoos, and bingo facilities.⁹¹

Under the statute, places of employment include "any indoor area or portion thereof under the control of an employer in which employees of the employer perform services."⁹² These areas include, but are not limited to, company vehicles, offices, hallways, restrooms, elevators, employee cafeterias, lounges, and copy rooms.⁹³ Similarly, any establishment at which employees work, such as retail stores, banks, factories, and warehouses, constitutes a place of employment where smoking is prohibited.⁹⁴ The term "employer" is also broadly defined to include "any person, partnership, association, limited liability company, corporation, or non-profit entity" that employs one or more persons, including state and local government employers.⁹⁵ The Act does not ban smoking in outdoor areas of places of employment.⁹⁶

The legislation contains specific provisions to address smoking in bars and restaurants. For example, smoking is permitted in cigar bars existing as of December 31, 2002, that meet certain other tobacco revenue

88. See N.Y. PUB. HEALTH LAW § 1399-o(6) (McKinney 2002) (amended 2003).

89. *Id.* §§ 1399-o(6), 1399-s(3).

90. *Id.* §§ 1399-o(1)-(2), (4)-(5), (7).

91. N.Y. PUB. HEALTH LAW § 1399-o. The smoking ban does not apply to private homes, private residences, and private automobiles. *Id.* § 1399-q(1). Nor does it apply to hotel or motel rooms rented to one or more occupants. *Id.* § 1399-q(2). There are also certain other narrow exceptions for membership associations that have no employees, for certain cigar bars, and for certain tobacco-related businesses and conventions. *Id.* §§ 1399-q(3)-(7).

92. *Id.* § 1399-n(5).

93. *Id.*

94. *Id.*

95. *Id.* § 1399-n(2).

96. *Id.* § 1399-n(5).

requirements.⁹⁷ Likewise, although smoking is permitted without restriction in outdoor areas in places of employment, it is permitted in outdoor dining areas of restaurants only if those areas have no roof or other ceiling enclosure.⁹⁸ If there is a roof or ceiling enclosure, then up to twenty-five percent of the outdoor seating area may be designated for smoking.⁹⁹

The Clean Indoor Air Act prohibits smoking in indoor areas of hospitals, residential health care facilities, and other health care facilities licensed by the state in which persons reside.¹⁰⁰ Patients of residential health care facilities, adult care facilities, community mental health residences, and day treatment programs, however, may smoke in separately enclosed rooms designated for that purpose.¹⁰¹

The 2003 legislation also amended section 409 of the Education Law to prohibit the use of tobacco on school grounds.¹⁰² Section 409 does not define the term "tobacco use," but that term would appear to encompass more than just the smoking of tobacco. Previously, tobacco use by faculty and staff in designated smoking areas during non-school hours was permitted.¹⁰³ This proviso has been eliminated. The statute defines "school grounds" as any building and the surrounding outdoor areas within the legally defined property boundaries of any public or private pre-school, nursery, elementary or secondary school, as well as school vehicles.¹⁰⁴ The prohibition applies to any person and is not limited to school employees.¹⁰⁵

Under the Clean Indoor Air Act, it is unlawful for any covered entity to permit smoking in areas where smoking is prohibited.¹⁰⁶ The Act requires covered entities to post no-smoking signs in all non-smoking areas and to designate an agent responsible for informing individuals who smoke in prohibited areas that they are violating the law.¹⁰⁷ It is also unlawful for any person to smoke in an area where smoking is prohibited.¹⁰⁸

97. *Id.* § 1399-q(5).

98. *Id.* § 1399-q(6).

99. *Id.* § 1399-q(6).

100. *Id.* § 1399-o(14).

101. *Id.*

102. N.Y. EDUC. LAW § 409(2) (McKinney Supp. 2004).

103. *See* N.Y. EDUC. LAW § 409(2).

104. N.Y. PUB. HEALTH LAW § 1399-n(6) (McKinney Supp. 2004); N.Y. EDUC. LAW § 409(2).

105. N.Y. EDUC. LAW § 409(2).

106. N.Y. PUB. HEALTH LAW § 1399-s(2).

107. *Id.* §§ 1399-p(1), 1399-t(4).

108. *Id.* § 1399-s(3). While the Clean Indoor Air Act requires employers to prohibit all indoor smoking, Section 201-d of the New York Labor Law continues to protect employees from being disciplined or otherwise discriminated against for engaging in legal activities

An employer may defend an alleged violation of the statute by proving that it made good faith efforts to ensure that employees complied with the law.¹⁰⁹ Non-employer owners or managers may establish an affirmative defense to an alleged violation by showing that they did not exercise active control of the premises, but rather that a lessee, sublessee, or other person exercised actual control.¹¹⁰

The Clean Indoor Air Act is generally enforced at the county level by the county board of health,¹¹¹ which has authority to impose a civil penalty of up to \$1,000.¹¹² The statute also provides that the enforcement officer is not prohibited from pursuing injunctive relief to compel compliance with the Clean Indoor Air Act.¹¹³

Enforcement officers are permitted to grant waivers from a provision of the statute, if the applicant for a waiver establishes that compliance would cause an undue financial hardship or that "other factors exist which would render compliance unreasonable."¹¹⁴ If a waiver is granted, the enforcement officer is required to impose conditions and restrictions "necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose" of the statute.¹¹⁵

B. Employee Protection for Displaying the American Flag

The New York Labor Law was amended, in 2002, to add section 215-c,¹¹⁶ which prohibits public and private employers from discharging or discriminating against any employee for displaying the American flag on the employee's person or at his or her workstation, provided that the display of the flag does not substantially or materially interfere with the employee's job duties.¹¹⁷

The Commissioner of Labor is authorized to enforce this provision and to assess a fine of \$200 to \$2,000.¹¹⁸ In addition, an employee may

(including smoking) away from the employer's premises during non-working hours; see N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2002).

109. N.Y. PUB. HEALTH LAW § 1399-s(2). In cities with over one million residents, the city department of health and mental hygiene is the enforcing agency. *Id.* § 1399-t(1).

110. *Id.* § 1399-s(1).

111. *Id.* § 1399-t(1).

112. *Id.* §§ 1399-t(2), 1399-v, and 309(1)(f).

113. *Id.* § 1399-t(2).

114. *Id.* § 1399-u.

115. *Id.* § 1399-u(2).

116. Act of September 17, 2002, ch. 511, 2002 McKinney's Sess. Laws of N.Y. 1286 (codified at N.Y. LAB. LAW § 215-c(1) (McKinney Supp. 2004)).

117. N.Y. LAB. LAW § 215-c(1).

118. *Id.*

commence a civil action to enforce the American flag discrimination statute.¹¹⁹ The statute of limitations for such a claim is two years.¹²⁰ The employee may seek reinstatement, back pay, damages, and attorneys' fees.¹²¹ As a prerequisite to such a claim, the employee must provide notice of the action to the New York State Attorney General.¹²²

IV. EMPLOYMENT DISCRIMINATION

A. *Statutory Amendments to the New York Human Rights Law*

1. *Religious Discrimination*

While the New York Human Rights Law has long prohibited religious discrimination in employment and obligated employers to accommodate their employees' religious beliefs,¹²³ on September 17, 2002, Governor Pataki signed an amendment to the Human Rights Law that significantly expanded the obligation to reasonably accommodate employees' and prospective employees' sincerely held religious observances or practices.¹²⁴ The amendment became effective on November 16, 2002.¹²⁵

Prior to the 2002 amendments, section 296(10) of the Human Rights Law prohibited employers from discriminating against an employee or applicant because of the individual's observance of a sabbath or holy day in accordance with the requirements of the individual's religion.¹²⁶ In addition, the law prohibited an employer from requiring an employee to remain at work during a time that the employee observed a sabbath or holy day as a religious requirement, unless required by an emergency, or where the employee's presence was indispensable to the orderly transaction of business.¹²⁷ Section 296(10) also exempted (1) any position dealing with health and safety where the person holding the position was required to be available for duty whenever needed and (2) any position where the nature and quality of the duties were such that the personal presence of the

119. *Id.* § 215-c(2).

120. *Id.*

121. *Id.*

122. *Id.*

123. *See* N.Y. EXEC. LAW § 296(1)(a) (McKinney 2001) (prohibiting employment discrimination based on creed); *see also* N.Y. EXEC. LAW § 296(10).

124. *See* Act of September 17, 2002, ch. 539, 2002 McKinney Sess. Laws of N.Y. 1343.

125. *Id.* § 3.

126. N.Y. EXEC. LAW § 296(10).

127. *Id.* § 296(10)(b).

employee was regularly essential.¹²⁸

Prior to the 2002 amendment, section 296(10) did not apply to any private employer for which the uniform application of terms and conditions of attendance was essential to prevent undue economic hardship.¹²⁹ The term "undue economic hardship" was not defined in the statute, but the Court of Appeals had interpreted the term to mean "a palpable increase in costs or risk to industrial peace."¹³⁰ This standard for showing undue economic hardship under the prior law was not substantial. For example, the *Carnation* Court held: "[i]f designating a qualified substitute [employee] would entail any significant increase in costs, that would be enough to establish undue economic hardship."¹³¹

The 2002 religious discrimination amendments create several significant new employee rights and employer obligations.¹³² The statute eliminates the established exemptions and also significantly changes the state law standard for showing undue economic hardship.¹³³

First, the amendments expand the general prohibition against religious discrimination in the Human Rights Law by making it unlawful to require an employee to violate or forego a sincerely-held practice of his or her religion as a condition of obtaining or retaining employment, including any promotions or transfers.¹³⁴ Thus, the Human Rights Law's non-discrimination provision now encompasses more than the observance of religious holy days. The provision also includes the observance of any sincerely-held practice of the employee's religion,¹³⁵ which would likely include those relating to dress, hair style, beards and prayer requirements. An employer may only require an employee to violate a sincerely-held religious practice if (1) it engages in a bona fide effort to try to reasonably accommodate the religious practice, and (2) it is unable to reasonably accommodate the religious practice without undue hardship on the conduct of its business.¹³⁶ While Title VII has previously been applied to these

128. *Id.* § 296(10)(c).

129. *Id.*

130. *State Division of Human Rights v. Carnation Co.*, 42 N.Y.2d 873, 875, 366 N.E.2d 869, 870, 397 N.Y.S.2d 781, 782 (1977).

131. *Id.* The Human Rights Law standard was similar to the standard under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, which permits a showing of undue economic hardship by more than a de minimis increase in cost to provide time off. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 63 (1977).

132. *See* Act of September 17, 2002, ch. 539, 2002 McKinney Sess. Laws of N.Y. 1343.

133. *Id.*

134. *Id.* at §1.

135. N.Y. EXEC. LAW § 296(10)(a).

136. *Id.* An example of an employer's efforts to reasonably accommodate an

various practices and also requires an employer to show undue hardship to justify a refusal to accommodate practices, the new state law provision applies a more restrictive standard on employers because undue hardship under the Human Rights Law requires a showing that the accommodation would cause "significant expense or difficulty."¹³⁷

The amendment defines an "undue hardship" as one that requires "significant expense or difficulty."¹³⁸ Undue hardship may exist where the accommodation significantly interferes with the safe or efficient operation of the workplace or where it would violate the requirements of a bona fide seniority system.¹³⁹ Factors to be considered in determining whether a particular accommodation constitutes an undue economic hardship include (1) the cost of the accommodation in relation to the size and operating cost of the employer, including the cost of lost productivity and replacement employees; (2) the number of employees who will need the accommodation; and (3) for employers with multiple facilities, the degree to which separateness of the facilities, in geographic, administrative or fiscal terms, will make the accommodation more difficult or expensive.¹⁴⁰

In addition, an accommodation will constitute an undue hardship where it will prevent the employee from performing the essential functions of his position.¹⁴¹ It appears from the statutory text that an accommodation that would preclude the employee from performing the essential functions of the position is a per se undue hardship regardless of the multi-factor analysis set forth for other accommodations.¹⁴²

Several provisions of the 2002 amendments address employees' rights to time off for religious observance.¹⁴³ First, the amendment retains

employee's religious practices recently arose in *Cosme v. Henderson*, a case decided under Title VII. 287 F.3d 152 (2d Cir. 2002). In *Cosme*, the plaintiff, whose religious beliefs prohibited him from working on Saturdays, nonetheless bid on and was awarded a position that he knew would require work on his Sabbath. *Id.* at 155. The U.S. Postal Service, his employer, offered the plaintiff multiple accommodations in the form of proposed job transfers which did not include Saturday work. *Id.* Plaintiff rejected all of the proposed accommodations for various reasons, including that he would have suffered a loss of seniority for ninety days following the transfer. *Id.* at 156. Ultimately, plaintiff was disciplined when he failed to report for work on Saturday in his new position. *Id.* The Second Circuit held that the postal service had fulfilled its obligations under Title VII by offering the multiple, reasonable accommodations to the plaintiff. *Id.* at 160. The court further found that the discipline did not constitute unlawful religious discrimination. *Id.*

137. N.Y. EXEC. LAW § 296(10)(d)(1).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* § 296(10)(a).

language from the prior law requiring an employer to grant time off for the observance of a sabbath or other holy day required by the employee's religion.¹⁴⁴ In addition, the amendment adds section 296(10)(c), which expressly states that it is an unlawful employment practice to refuse to permit an employee to utilize leave solely because the leave will be used to accommodate a sincerely-held religious belief or practice.¹⁴⁵ The 2002 amendments also permit an employer, in the exercise of reasonable judgment, to require that the employee make up lost work time where practicable, at a mutually convenient time, or to charge the time against paid leave time, other than sick time.¹⁴⁶ In the event neither of those options are applied, the time may be treated by the employer as leave without pay.¹⁴⁷

Where the employee makes up the time by working additional hours as part of a reasonable accommodation, the statute does not require that the employee receive any premium pay or benefits, for example, shift differential, or holiday pay, that would normally be paid for working those hours.¹⁴⁸ It is unlikely, however, that this statutory provision would supercede any employment agreement or labor contract providing for premium pay.¹⁴⁹

2. *Sexual Orientation Discrimination*

On December 17, 2002, Governor Pataki signed legislation that adds sexual orientation as a protected classification under the New York Human Rights Law, New York Civil Rights Law, and New York Education Law.¹⁵⁰ The law, which became effective January 16, 2003,¹⁵¹ implements, for the first time, a statewide ban on discrimination against individuals based on their sexual orientation.¹⁵² Previously, similar protection was provided only through local laws in various counties and cities;¹⁵³ federal law provides no such protection.

The legislation, the Sexual Orientation Non-Discrimination Act, amends each sub-section of the anti-discrimination provisions of the New

144. *Id.*

145. *Id.* § 296(10)(c).

146. *Id.* § 296(10)(b).

147. *Id.*

148. *Id.* § 296(10)(a).

149. *See id.* ("Nothing in this paragraph or paragraph (b) . . . shall alter or abridge the rights granted to an employee concerning the payment of wages . . .").

150. Act of December 17, 2002, ch. 2, 2002 McKinney's Sess. Laws of N.Y. 48.

151. *Id.* § 18.

152. *Id.* § 1.

153. *See, e.g.,* N.Y.C. ADMIN. CODE §§ 8-101 (CCH 2003).

York Human Rights Law, section 296 of the New York Executive Law, including the section applicable to employers, by adding the term "sexual orientation" to the list of individual characteristics that serve as the basis for unlawful employment discrimination.¹⁵⁴ The Human Rights Law, including this amendment, applies to all employers with four or more employees.¹⁵⁵ The amendment does not change the Human Rights Law proviso permitting religious institutions to make employment decisions that promote the religious principles for which they are established or maintained.¹⁵⁶

The statute defines the term "sexual orientation" to mean "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived," but expressly states that the statute is not designed to protect conduct otherwise proscribed by law.¹⁵⁷ Notably absent from the definition are transvestism and transsexuality. The Legislature rejected an amendment to the Sexual Orientation Non-Discrimination Act that would have included protection for trans-gendered individuals.¹⁵⁸

The Sexual Orientation Non-Discrimination Act also provides that the opportunity to obtain employment, education, the use of places of public accommodation, and the ownership and use of real property without discrimination because of sexual orientation are now civil rights.¹⁵⁹ This recognition is codified into an amendment to section 40-c of the New York Civil Rights Law, which prohibits any person, corporation, institution, the state, or any state agency from subjecting any individual to discrimination or harassment in his or her civil rights because of his or her race, creed, color, national origin, sex, marital status, sexual orientation, or disability.¹⁶⁰

3. *Military Service*

The third statutory amendment to the substantive provisions of the

154. Act of Dec. 17, 2002, ch. 2, §15, 2002 McKinney's Sess. Laws of N.Y. 48. In each substantive provision of section 296 in which the prohibitant against discrimination is established, sexual orientation has been added. *Id.* For example, it is now unlawful for employment agencies, labor organizations, public accommodations, landlords, real estate brokers, and education corporations to discriminate based on an individual's sexual orientation. *Id.*

155. N.Y. EXEC. LAW § 292(5) (McKinney 2001).

156. *Id.* § 296(11).

157. *Id.* § 292(27) (McKinney Supp. 2004).

158. *See id.*

159. Act of December 17, 2002, ch. 2, § 15, 2002 McKinney's Sess. Laws of N.Y. 48 (codified at N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 2003)).

160. *See Id.*

Human Rights Law was contained in the "Patriot Plan."¹⁶¹ This legislation, which enacted an array of benefits for individuals engaged in active military service,¹⁶² amended Human Rights Law section 296 to add military status as a classification protected from discrimination, including employment discrimination.¹⁶³ "Military status" is defined as a person's participation in the United States military, or the New York State military, including the Armed Forces of the United States, the Army National Guard, the Air National Guard, the New York Naval Militia, and the New York Guard.¹⁶⁴ Service in the reserve armed forces is separately defined, but is not included in the definition of military service and is not a basis for unlawful employment discrimination under the Human Rights Law.¹⁶⁵

B. Individual Liability Under the New York Human Rights Law

An individual corporate employee may be personally liable under the Human Rights Law if (1) the individual has an ownership interest in the corporation or (2) the individual has significant supervisory authority with the "power to do more than carry out personnel decisions made by others."¹⁶⁶ Recent decisions have expanded the circumstances supporting individual liability.

In *Heinemann v. Howe & Rusling*, plaintiff's employment was terminated by the unanimous vote of her employer's executive committee, which consisted of five senior managers.¹⁶⁷ None of the managers individually had authority over plaintiff's employment, but rather it was the executive committee that controlled the terms of her employment.¹⁶⁸ Subsequently, the plaintiff commenced a suit against her employer and the five individual members of the committee.¹⁶⁹ Among other causes of

161. See Act of July 1, 2003, ch. 106, 2003 McKinney's Sess. Laws of N.Y. 551 (codified at N.Y. HUM. RIGHTS LAW § 296 (McKinney Supp. 2004)).

162. See *id.* The benefits under the Patriot Plan include a military scholarship program, hunting and fishing license benefits, public employment retirement benefits, educational benefits, tax benefits, and other initiatives. *Id.*

163. *Id.* The prohibition against employment discrimination is codified in Human Rights Law section 296(1)(a). *Id.*

164. *Id.*

165. *Id.* Public employees who serve in the reserve armed forces (as well as those who serve on active military duty) have employment protection under the Military Law. N.Y. MIL. LAW § 242 (McKinney 1990).

166. *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 542, 473 N.E.2d 11, 12, 483 N.Y.S.2d 659, 660 (1984); *Cirillo v. Muss Dev. Co.*, 278 A.D.2d 353, 355, 717 N.Y.S.2d 638, 640 (2d Dep't 2000).

167. 260 F. Supp. 2d 592, 594 (W.D.N.Y. 2003).

168. *Id.*

169. *Id.* at 593-94.

action, the plaintiff claimed that her termination was motivated by unlawful sex discrimination in violation of New York Human Rights Law.¹⁷⁰

The court recognized the established principle that "an individual, who *has* significant supervisory authority, such as the power to hire and fire, *can be* [individually] liable under the [Human Rights Law]."¹⁷¹ The court rejected the individual defendants' argument that they were not subject to liability under the Human Rights Law.¹⁷² The court found that for liability to attach, the individual need not have the sole power of making employment decisions.¹⁷³ As long as the individual is a part of a group that has such power, and the individual is not merely carrying out personnel decisions made by others, the person may be liable for the decisions of the group.¹⁷⁴ According to the court, a contrary holding would encourage individuals with supervisory and managerial authority to avoid liability under the Human Rights Law by acting through group decision making.¹⁷⁵

In *Lee v. Overseas Shipholding Group, Inc.*, the court held that a supervisor could be liable under the Human Rights Law for his role in a company-wide reduction in force.¹⁷⁶ In response to a request from senior management that he recommend staff reductions, the plaintiff's supervisor recommended elimination of several positions in his department, including plaintiff's position.¹⁷⁷ Ultimately, thirty-two employees, including plaintiff, were terminated in the reduction in force.¹⁷⁸ The court concluded that the supervisor's recommendation that the plaintiff's position be eliminated alone was sufficient to establish the supervisor's control over the plaintiff's position and to demonstrate that the supervisor had power to do more than carry out personnel decisions made by others.¹⁷⁹ Accordingly, the court denied the individual defendant's motion for summary judgment on the plaintiff's Human Rights Law claim.¹⁸⁰

170. *Id.* at 594.

171. *Id.* at 595.

172. *Id.* at 595-96.

173. *Id.*

174. *Id.*

175. *Id.*

176. No. 00 CIV. 9682, 2002 U.S. Dist. LEXIS 15355, at *21 (S.D.N.Y. Aug. 21, 2002).

177. *Id.* at *5-6.

178. *Id.* at *6.

179. *Id.* at *22.

180. *Id.*

*C. Sexual Harassment**1. Sexual Orientation Harassment and Sex-Stereotyping*

Title VII does not prohibit employment discrimination on the basis of sexual orientation.¹⁸¹ The courts, however, have acknowledged the potential for a claim based on sex-stereotyping, or failure to conform to gender norms.¹⁸² For example, in *Samborski v. West Valley Nuclear Services*, the court dismissed plaintiff's action for harassment related to her co-workers' perception that she was a lesbian, citing *Simonton* for the proposition that Title VII does not cover sexual orientation.¹⁸³ The court also read the complaint to assert a claim of sex-stereotyping based on plaintiff's allegations of being "harassed by male co-workers . . . because she was a woman engaged in a 'male' profession."¹⁸⁴ Such a claim is actionable as sex discrimination under Title VII and the Human Rights Laws because "harassment in the form of being called a 'lesbian' or 'homosexual' is on account of sex where it is based, not on a perception of true sexual orientation, but rather as a means of denigrating a person because of a sexual stereotype."¹⁸⁵ The court noted that the plaintiff bears the burden of proving that the harassment was because of her sex and not because of some other factor such as personal animus.¹⁸⁶ Ultimately, the *Samborski* court dismissed this claim because the employer established its affirmative defense under *Faragher* and *Ellerth*.¹⁸⁷

2. Defining a Tangible Employment Action

Under Supreme Court precedent, a supervisor's sexual harassment of an employee renders the employer vicariously liable if the harassment results in a "tangible employment action."¹⁸⁸ As defined by the Supreme Court, a tangible employment action "constitutes a significant change in

181. See *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (finding that a gay postal worker who suffered severe harassment and "appalling persecution" for a prolonged period of time could not seek recourse under Title VII because the abuse was based on sexual orientation).

182. *Id.* at 37-38.

183. No. 99-CV-0213E, 2002 U.S. Dist. LEXIS 12745, at *9-*10 (W.D.N.Y. June 25, 2002).

184. *Id.* at *10.

185. *Id.* at *11.

186. *Id.*

187. *Id.* at *22-23, 27-28; see discussion *infra* at notes 189-90 and accompanying text.

188. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998); see John Ohlweiler and Julie A. Levy, *Employment Law, 1997-98 Survey of New York Law*, 49 SYRACUSE L. REV. 413, 431-33 (1999).

employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹⁸⁹ In the typical case, a tangible employment action inflicts direct economic harm on the employee.

The Second Circuit recently clarified that “tangible employment action” also includes coerced submission to sexual abuse as a condition of continuing employment, where the employee’s submission is the basis for *avoiding* economic harm.¹⁹⁰ The Second Circuit held that a former employee, who claimed that she was forced to submit to unwanted sexual acts to keep her job, stated a tangible employment action that could lead to employer liability.¹⁹¹ The court ruled that the jury instructions limiting the definition of tangible employment action to “economic harms,” defined the term too narrowly.¹⁹² Instead, the court found that the jury instructions defining “tangible employment action” should have included her supervisor’s explicit conditioning of her continued employment on her submission to his sexual demands.¹⁹³ The court rejected the employer’s argument that there was no tangible employment action because the threat to fire the plaintiff was not carried out.¹⁹⁴ Instead, the court held that the fact the plaintiff submitted to the sexual abuse of her supervisor to avoid the threatened termination was sufficient to state a tangible employment action, creating potential liability for the employer.¹⁹⁵

3. *Definition of a Supervisor for Sexual Harassment Claims*

In upholding plaintiff’s sexual harassment hostile work environment claim, the Second Circuit in *Mack v. Otis Elevator Co.* held that an employee need not have “tangible employment authority” over another employee to be classified as her “supervisor” for purposes of the employer vicarious liability analysis.¹⁹⁶ In so holding, the court reasoned that, while the alleged harasser did not have authority to hire, fire, promote or reassign plaintiff (and, thus, did not have “tangible employment authority” over her), he did regularly oversee plaintiff’s daily work assignments.¹⁹⁷ According to the court, in considering whether an employee is a supervisor, the question is “whether the authority given by the employer to the

189. *Ellerth*, 524 U.S. at 761.

190. *Min Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002).

191. *Id.* at 92.

192. *Id.* at 93.

193. *Id.* at 94.

194. *Id.* at 96-97.

195. *Id.*

196. 326 F.3d 116, 125 (2d Cir. 2003).

197. *Id.* at 127.

employee enabled or materially augmented the ability of the [harassing employee] to create a hostile work environment for his or her subordinates.”¹⁹⁸ In *Mack*, the harasser was the senior employee at the work site which was remote from the company office.¹⁹⁹ In addition, the labor agreement gave him authority to “direct the work force,” and oversee assignments, quality and safety practices.²⁰⁰ On these facts, he had sufficient authority for the court to hold his employer vicariously liable for his conduct.²⁰¹

4. *Effect of Corrective Action on Employer Liability*

In *Yerry v. Pizza Hut of Southeast Kansas*, a supervisor accused plaintiff, a delivery driver, of stealing money and subjected him to punishment.²⁰² Specifically, the supervisor forced the employee to lower his pants and spank himself with a belt while the supervisor watched.²⁰³ After plaintiff’s complaint to the manager, the supervisor was immediately suspended and never returned to work.²⁰⁴ In litigation, the employee claimed that while he continued to work at the restaurant his manager and co-workers were unfriendly and treated him differently than they had before the incident.²⁰⁵

The court held the incident was a severe and humiliating one which, by itself, constituted a hostile work environment.²⁰⁶ Despite this finding, however, the court held the employer did not breach its duty to prevent the supervisor’s conduct since the employer acted promptly and appropriately in response to the employee’s complaint, and there was no basis to conclude the employee was subjected to any adverse tangible employment action.²⁰⁷

D. *National Origin Discrimination*

1. *EEOC Guidance*

The U.S. Equal Employment Opportunity Commission (EEOC) has issued new guidance, in the form of a revised section in its Compliance

198. *Id.* at 126.

199. *Id.* at 125.

200. *Id.* at 120.

201. *Id.* at 127.

202. 186 F. Supp. 2d 178, 182 (N.D.N.Y. 2002).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 185.

207. *Id.* at 185-86.

Manual, on the prohibition against national origin discrimination under Title VII of the Civil Rights Act of 1964.²⁰⁸ Recognizing that the number of workers in the United States who are not native English speakers has increased dramatically, a substantial portion of the new guidance addresses language issues such as accent discrimination, English-fluency requirements, and English-only rules.²⁰⁹

In defining national origin discrimination, the EEOC recognizes two categories.²¹⁰ National origin discrimination includes discrimination because a person or her ancestors came from a particular place, which may be a country or another identifiable place whose people share common language, culture, ancestry, or other social characteristics.²¹¹ It also includes discrimination against an "ethnic group" (e.g., Hispanics, Asians, or Native Americans) or against a person who is perceived to be a member of an ethnic group.²¹²

In the Compliance Manual, the EEOC provides extensive guidance on language issues, which are components of national origin claims.²¹³ An employment decision based on an individual's foreign accent or English fluency may violate Title VII, unless the individual's speech materially interferes with his or her ability to perform the job.²¹⁴ The assessment depends upon the specific duties of the position and the extent to which the individual's accent or fluency affects his or her ability to perform those duties.²¹⁵ When effective oral communication in English is required to perform a job, and an individual's foreign accent or inability to speak English fluently makes him or her unable to effectively communicate in English, an employer may base an employment decision on these factors.²¹⁶ According to the EEOC, positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing.²¹⁷ Even for these positions, however, the

208. EEOC Compl. Man. (BNA) § 13 [hereinafter EEOC Compliance Manual].

209. *Id.* § 13-V. Approximately 45 million Americans speak a language other than English in the home. *Id.* at n.42. Of those, about 10.3 million speak little or no English at all. *Id.*

210. *See id.* § 13-II.

211. *Id.* § 13-II(A). *But see* Pasic v. Eatzi's Texas Holding Corp., No. 01 Civ. 1114, 2003 U.S. Dist. LEXIS 305, at *1 (S.D.N.Y. Jan. 9, 2003) (rejecting national origin claim of Bosnian Muslim plaintiff based on alleged discrimination because he was from a communist or Eastern Bloc country, and from a "communist culture").

212. EEOC Compliance Manual § 13-II(B).

213. *Id.* § 13-V.

214. *Id.* § 13-V(A).

215. *Id.* § 13-V(A)-(B).

216. *Id.*

217. *Id.* § 13-V(A).

EEOC asserts that an employer must still determine on a case-by-case basis whether a particular individual's English language skills interfere with the ability to perform the required job duties.²¹⁸

The EEOC also recognizes that employers may adopt English-only rules on a non-discriminatory basis where the rule is justified by "business necessity," such as the need to operate safely or efficiently.²¹⁹ The EEOC notes that a policy that prohibits speaking some, but not all, foreign languages in the workplace, such as a no-Spanish rule, would be unlawful.²²⁰

Among the examples cited by the EEOC as acceptable justifications for an English-only rule are: the need to communicate with customers, co-workers, or supervisors who only speak English; emergencies or other situations in which workers must speak a common language to promote safety; cooperative work assignments in which the English-only rule is needed to promote efficiency; or to enable a supervisor who only speaks English to monitor the performance of an employee whose job duties require communication with co-workers or customers.²²¹

The EEOC also evaluates national origin harassment claims, which have become one of the most common claims asserted in EEOC charges.²²² The number of national origin harassment charges has doubled in the last ten years and, in 2002, 30% of all private sector national origin charges included a harassment claim.²²³ National origin harassment, like any other type of workplace harassment, can take many forms—ethnic slurs, workplace graffiti, offensive conduct based on an individual's birthplace, ethnicity, culture, or accent—and may be created by supervisors, co-workers, or non-employees.²²⁴ The EEOC recognizes that the principles established for analyzing sexual harassment claims apply to national origin claims as well.²²⁵

For example, in *Arias v. NASDAQ/AMEX Market Group*, plaintiff, a Hispanic of Ecuadorian origin, alleged that he was harassed by co-workers

218. *Id.*

219. *Id.* § 13-V(C)(1). Some relevant considerations include: evidence of safety justifications for the rule; evidence of other business justifications for the rule, such as supervision or effective communication with customers; the likely effectiveness of the rule in carrying out workplace objectives, and the English proficiency of workers affected by the rule. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* § 13-IV.

223. *Id.*

224. *Id.*

225. *Id.* § 13-IV(A) & nn.36 & 38.

and non-employees who worked on the NASDAQ trading floor.²²⁶ In particular, he was allegedly referred to as a "Columbian drug lord."²²⁷ The court applied the legal standard established in the Second Circuit's sexual harassment precedent: "where the alleged harassment is attributable to the plaintiff's co-worker or low-level supervisor, employer liability can be established only where the employer is negligent – namely, where the employer (1) 'provided no reasonable avenue for complaint' or (2) 'knew of the harassment but did nothing about it.'"²²⁸ In *Arias*, the plaintiff unreasonably failed to report the alleged harassment to the company, so he could not show that the employer provided no reasonable avenue of complaint.²²⁹ The court, however, denied summary judgment to the employer because plaintiff's supervisor acknowledged in his deposition that the Columbian drug lord claims rang "a little bit of a bell" with him and thus created a factual issue as to whether the employer had knowledge of the harassment and failed to respond to it.²³⁰

E. Disability Discrimination Claims

1. Issues Concerning Employees' Physical and Mental Impairments

The Americans with Disabilities Act of 1990 (ADA)²³¹ protects "qualified individual[s] with a disability"²³² and defines "disability" as follows:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.²³³

226. No. 00 Civ. 9827, 2003 U.S. Dist. LEXIS 166 at *2, *7 (S.D.N.Y. Jan 7, 2003).

227. *Id.* at *13.

228. *Id.* at *20-21 (quoting *Murray v. N.Y.U. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995)).

229. *Id.* at *22-26.

230. *Id.* at *29-30.

231. See generally 42 U.S.C. § 12101 (2003).

232. *Id.* § 12112(a).

233. *Id.* § 12102(2). Disability discrimination cases decided in New York continue to distinguish the broader definition of "disability" under the New York Human Rights Law from the definition under the ADA, causing greater potential liability to employers under state law. See N.Y. EXEC. LAW § 292(21) (McKinney Supp. 2004). Essentially, any medically demonstrable physical or mental impairment can establish a protected disability under state law—there is no requirement that the impairment substantially limit a major life activity. *Id.*

For example, in *Anyan v. New York Life Ins. Co.*, plaintiff, who was terminated for failing to meet production standards, brought suit alleging violations of the ADA and the

traffic lines in the road to ensure that he drove straight.²⁴³ Furthermore, according to the plaintiff, his monocular vision caused him "difficulty walking, navigating stairs, and playing sports with his grandchildren."²⁴⁴ The court, however, found that these restrictions did not establish a substantial impairment of plaintiff's sight, particularly in light of the evidence that plaintiff was licensed to drive, had worked as an iron worker and a security guard, and was an excellent marksman.²⁴⁵

In *Stalter v. Board of Cooperative Educational Services*, the plaintiff was employed as a school custodian.²⁴⁶ The plaintiff suffered from cerebral palsy, and as a result of this illness, he had a "diminished ability to speak coherently."²⁴⁷ The plaintiff, however, learned to communicate by using audible sounds, written signs, hand spelling, and directional movements.²⁴⁸ Furthermore, the plaintiff used an "augmentative communication device" that enhanced his ability to communicate.²⁴⁹ After being denied a request for a transfer to a more desirable assignment, the plaintiff sued his employer for disability discrimination in violation of the ADA.²⁵⁰

The court addressed the issue of whether cerebral palsy substantially limited the plaintiff in performing a major life activity.²⁵¹ The employer relied on the Supreme Court's decision in *Sutton v. United Airlines, Inc.*,²⁵² to argue that the plaintiff was not disabled within the meaning of the ADA because he was able to communicate through written signs, hand spelling, and a communication device.²⁵³ The court, however, rejected this argument because the major life activity at issue was speaking, not communicating.²⁵⁴ According to the Court, "remedial measures [that plaintiff] takes may allow him to *communicate*, but they do not allow him to *speak*."²⁵⁵ The court also found an issue of fact as to whether the employer regarded the plaintiff as disabled based on the allegation that plaintiff's supervisor told him he could not have the desired job because he

243. *Id.* at 168.

244. *Id.*

245. *Id.* at 167-70.

246. 235 F. Supp. 2d 323, 327 (S.D.N.Y. 2002).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 327-28.

251. *Id.* at 329.

252. 527 U.S. 471, 482 (1999). In *Sutton*, the Court found that the plaintiffs were not disabled because corrective lenses gave them 20/20 vision. *Id.*

253. *Stalter*, 235 F. Supp. 2d at 330.

254. *Id.*

255. *Id.* (emphasis in original).

could not speak.²⁵⁶

In *EEOC v. Yellow Freight System, Inc.*, the employer, a large trucking company, employed the plaintiff as a truck driver.²⁵⁷ While driving, the plaintiff's pneumatic seat collapsed under him and he sustained compression fractures of the vertebrae in his back.²⁵⁸ As a result, plaintiff allegedly suffered from constant low-level pain and could not sit for more than 45 minutes at a time without aggravating his back condition.²⁵⁹ The plaintiff could not return to his position as a road truck driver and asked to be assigned to a position as a yard jockey.²⁶⁰ After Yellow Freight rejected his request, plaintiff complained to the EEOC, who ultimately commenced an action on his behalf under the ADA.²⁶¹

The court considered whether the plaintiff's back injury substantially limited him in the major life activity of sitting.²⁶² In answering this question, the court examined a number of decisions from different circuits and concluded that even though there is no single bench mark against which to test all sitting limitations, the "courts have generally found that the inability to sit for periods of an hour or less may constitute a substantial limitation on the ability to sit, while the ability to sit for periods longer than an hour does not."²⁶³ Since evidence in this case showed that the plaintiff could sit, at most, for 45 minutes at a time, the court concluded that the plaintiff was substantially limited in his ability to sit.²⁶⁴

2. *Perceived Disability Issues*

a. *Mandatory Counseling as the Basis for a Perceived Disability Claim*

One component of the definition of disability is whether the individual is perceived or regarded as suffering from a physical or mental impairment that substantially limits one or more of the major life activities.²⁶⁵ Thus, even if the individual does not actually suffer from an "impairment" that substantially limits a major life activity, the individual may nevertheless qualify for ADA protection, if the employer regards the individual as

256. *Id.*

257. No. 98 Civ. 2270, 2002 U.S. Dist. LEXIS 16826 at *4 (S.D.N.Y. Sept. 4, 2002).

258. *Id.* at *5.

259. *Id.* at *9, *24.

260. *Id.* at *19-*20.

261. *Id.* at *33.

262. *Id.* at *39.

263. *Id.* at *40.

264. *Id.* at *53-*57.

265. 42 U.S.C. § 12102(2)(c) (2000).

having such an impairment and discriminates on that basis.²⁶⁶

In *Eustace v. South Buffalo Mercy Hospital*, the Second Circuit ruled that the employer did not violate the ADA when it terminated the plaintiff following her refusal to submit to a non-confidential counseling session with the employer's employee assistance program (EAP).²⁶⁷ The court noted that plaintiff's performance issues justified the employer's inquiry into her health.²⁶⁸ The fact that the employer required an assessment of her health and fitness indicated only that plaintiff's condition was "an open question" and did not establish that the employer regarded her as substantially impaired in a major life activity.²⁶⁹

b. Employment Standard for Prescription Drug Use

In *EEOC v. J.B. Hunt Transport, Inc.*, the employer refused to "employ over-the-road truck drivers who used prescription medications with side effects that might impair driving ability."²⁷⁰ The Equal Employment Opportunity Commission filed suit on behalf of applicants who were denied over-the-road positions because of their medications, arguing that under the ADA, J.B. Hunt regarded the rejected applicants as disabled, i.e., substantially limited in a major life activity.²⁷¹

The Second Circuit rejected the EEOC's argument and held that Hunt's refusal to hire over-the-road truck drivers who took prescriptions that could impair their ability to drive was not an ADA violation because the company did not perceive the applicants to be substantially limited in a broad range of jobs.²⁷² The court recognized that "working" may constitute a "major life activity."²⁷³ The activity of working is substantially limited only when "an individual cannot perform the activity that an average person in the general population could perform or faces significant restrictions in the 'condition, manner, or duration under which the individual can . . . perform [the] activity.'"²⁷⁴ Based on these principles, the court concluded that the EEOC could prevail on its ADA claim only if it could demonstrate that J.B. Hunt perceived the applicants in question as precluded from a class of jobs or a broad range of jobs.²⁷⁵

266. *See id.*

267. 36 Fed. Appx. 673, 675 (2d Cir. 2002).

268. *Id.*

269. *Id.*

270. 321 F.3d 69, 71 (2d Cir. 2003).

271. *Id.* at 73.

272. *Id.* at 76.

273. *Id.* at 75.

274. *Id.* at 74-75 (quoting 29 C.F.R. § 1630.2(j)(i)-(ii) (2003)).

275. *Id.* at 75.

According to the court, the EEOC could not make such a showing because driving freight-carrying tractor-trailer trucks over long distances for an extended period of time does not constitute a "class of jobs" or a "broad range of jobs."²⁷⁶ This is so because "the fact that one may not be able to perform the specific job of a Hunt OTR driver does not mean that one could not successfully engage in other types of truck driving, let alone in other kinds of safety-sensitive work."²⁷⁷ Furthermore, the court did not find any ADA violation because "the basis for the exclusion from employment was the use of a listed drug, not any potential 'disability' created by the treated disease."²⁷⁸

c. Reasonable Accommodation in a Perceived Disability Claim

The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."²⁷⁹ Thus, if an employee's disability prevents him or her from being able to perform the essential functions of the job, the question shifts to whether a "reasonable accommodation" exists which would allow the employee to perform those functions.²⁸⁰ One open question is whether an individual who is "regarded as" disabled is entitled to reasonable accommodation.

In *Jacques v. DiMarzio, Inc.*, the district court initially held that, if the plaintiff could establish that she was perceived as disabled, then she would be entitled to a reasonable accommodation.²⁸¹ In light of an Eighth Circuit decision which held that "perceived as" disabled plaintiffs are not entitled to reasonable accommodations under the ADA, the court reconsidered its decision.²⁸²

Taking a position contrary to the Eighth, Fifth and Sixth Circuits, the district court adhered to its original decision, finding that the ADA did not distinguish between "regarded as" plaintiffs and actually disabled plaintiffs in defining "qualified individual."²⁸³ The court relied on the legislative history of the ADA to find reasonable accommodations should be available to employees who are regarded as disabled, as a means of redressing

276. *Id.*

277. *Id.*

278. *Id.* at 78.

279. 42 U.S.C. § 12111(8) (2000).

280. 42 U.S.C. § 12111(9).

281. 200 F. Supp. 2d 151, 161-62 (E.D.N.Y. 2002).

282. *Id.* at 163.

283. *Id.* at 166.

employer bias.²⁸⁴ The court reasoned that even though the plaintiff is not actually disabled, the employer's misperceptions may prevent the plaintiff from performing his job in the same way that an actual disability would.²⁸⁵ Therefore, such plaintiffs are entitled to "reasonable accommodations" necessary to eliminate the effect of those prejudices on the employee's ability to perform the essential functions of the job.²⁸⁶ The court noted the employer's duty to engage in an "interactive process" with the employee to determine an appropriate accommodation was also applicable in this context.²⁸⁷

The court's reasoning suggests that where the plaintiff is perceived as disabled, the duty to accommodate the plaintiff does not necessarily extend to accommodating the non-disabling impairment, but rather extends only to eliminating whatever discriminatory conduct in the workplace was causing the plaintiff to be treated as having a disabling impairment, so the plaintiff is allowed to perform his or her job like any other non-disabled employee.²⁸⁸

3. *Determining Essential Job Functions and the Duty to Reasonably Accommodate*

a. *Employer Standards Establish Essential Functions*

In *Shannon v. New York City Transit Authority*, the New York City Transit Authority discovered that the plaintiff, a bus driver, was color blind.²⁸⁹ Accordingly, the Transit Authority asked the plaintiff to resign his position.²⁹⁰ The plaintiff commenced a lawsuit against the Transit Authority alleging that he was constructively discharged in violation of ADA.²⁹¹ The issue presented was whether the ability to distinguish the colors of traffic lights constituted an essential function of being a bus driver.²⁹² The court reasoned that, assuming he was regarded as substantially limited in his sight (a major life activity), plaintiff was required to show that he was "otherwise qualified" for his position, that is, that he was able to perform the essential functions of his job with or

284. *Id.* at 166-68.

285. *Id.* at 168.

286. *Id.*

287. *Id.*

288. *See id.*

289. 332 F.3d 95, 97 (2d Cir. 2003).

290. *Id.*

291. *Id.*

292. *Id.* at 101.

without reasonable accommodation.²⁹³ In making this determination, the court relied on EEOC guidelines which instruct the courts to decide (1) “whether the employer actually require[d] the employees in the position to perform the functions that the employer asserts are essential;” and (2) “whether removing the function would fundamentally alter that position.”²⁹⁴ Furthermore, courts must take into account “an employer’s description of a job’s essential functions, including pertinent medical standards.”²⁹⁵

The court concluded that the Transit Authority required its employees to differentiate among colors and considered such differentiation to be an essential function of the bus driver position.²⁹⁶ The court also concluded that, even if the plaintiff could cite to New York State regulations that permitted a bus driver who was unable to distinguish between red and green to drive a bus, this fact alone would not deprive the Transit Authority from enforcing higher standards for its own drivers.²⁹⁷ According to the court “[c]olor differentiation is a qualification that NYCTA may properly deem essential for driving a bus because . . . it serves to limit NYCTA’s tort liability in situations where color-blindness might cause an accident.”²⁹⁸

b. Overtime As An Essential Job Function

In *Zaborowski v. Sealright Co.*, the court dismissed plaintiff’s disability discrimination claim on summary judgment.²⁹⁹ The plaintiff had worked as a shipping supervisor, a position that required a regular workweek in excess of forty hours.³⁰⁰ When he was diagnosed with fibromyalgia (a disease much like chronic fatigue syndrome), the plaintiff requested that the employer accommodate his medical condition by allowing him to work forty hours per week.³⁰¹ The employer, who had held plaintiff’s job open for him for six months, declined to accommodate the plaintiff’s request because the overtime work was a critical element of the shipping supervisor’s position.³⁰² In the employee’s disability discrimination action, the employer argued that the employee was unable to

293. *Id.* at 99-100; see 42 U.S.C. § 12111(8) (2000).

294. *Shannon*, 332 F.3d at 101 (quoting 29 C.F.R. § 1630.2(n)).

295. *Id.* at 101.

296. *Id.* at 101-02.

297. *Id.* at 102.

298. *Id.* at 103.

299. No. 5:00-CV-771, 2002 U.S. Dist. LEXIS 12396, at *1 (N.D.N.Y. July 9, 2002).

300. *Id.* at *1-2.

301. *Id.* at *2.

302. *Id.* at *2, 3, 6.

perform the essential functions of the position because he was unable to work extensive overtime hours.³⁰³ The court held that, at the time of the alleged discrimination, working extensive overtime was an essential function of the shipping supervisor's position that plaintiff was unable to perform with or without reasonable accommodation.³⁰⁴ The evidence established that plaintiff regularly worked more than fifty hours per week and his replacement worked as much as eighty hours per week.³⁰⁵

Similarly in *Rodal v. Anesthesia Group of Onondaga, P.C.*, the plaintiff, a board certified anesthesiologist, sued his employer, a group of anesthesiologists, alleging a violation of the ADA in connection with their refusal to grant him reduced hours to accommodate his metastatic islet tumor.³⁰⁶ The court found that a metastatic islet tumor can constitute an impairment.³⁰⁷ Furthermore, the court concluded that, in this case, the impairment substantially limited the plaintiff's major life activity of working and, as such, constituted a disability within the meaning of the ADA.³⁰⁸

Next, the court considered whether the refusal to accommodate the plaintiff by permitting him to work without being required to take night calls or weekend coverage amounted to unlawful discrimination.³⁰⁹ According to the court, night call and weekend coverage constituted essential functions of the plaintiff's employment, and his employer was not required to create a part-time position at plaintiff's request.³¹⁰ Further, granting the plaintiff's request would require the employer to re-allocate job duties to other employees.³¹¹ Because the ADA does not require an employer to implement accommodations that would result in the transfer of an essential function to other employees who then have to work harder or longer, the court dismissed the plaintiff's ADA claim.³¹²

c. Causal Nexus Required Between Impairment and Accommodation

In *Felix v. New York City Transit Authority*, the plaintiff was employed as a Railroad Clerk, and worked in a token booth in a subway

303. *Id.* at *10.

304. *Id.* at *11.

305. *Id.* at *12.

306. 250 F. Supp. 2d 78, 80 (N.D.N.Y. 2003).

307. *Id.* at 82.

308. *Id.*

309. *Id.* at 82-83.

310. *Id.* at 83.

311. *Id.*

312. *Id.* (citing 29 C.F.R. § 1630.2(p)(2)(v)).

