

EMPLOYMENT DISCRIMINATION

SEX AND RACE IN THE WORKPLACE

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Brooklyn Lawyers Association
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I. (A) EMPLOYMENT AT-WILL:

New York is an EMPLOYMENT AT-WILL jurisdiction. All employees in New York are presumed to be employees at-will.

When employment is at-will, the employee may be discharged **at any at any time, for any reason, or no reason at all.** *Murphy v. American Home Products Corp.*, 58 NY2d 293; *Monsanto vs. Electronic Data Systems Corp.*, 141 AD2d 514.

An employer's right to terminate an employee is completely unimpaired as long as there is no:

- constitutionally impermissible purpose
- statutory proscription
- express limitation in a contract of employment (rare).

An employee entering into an employment relationship typically has no contract rights, either express or implied.

(B) A general tort remedy for abusive or wrongful discharge does not lie in New York. No laws embodied in statute or decisional law will support a wrongful discharge claim in NY. *Murphy v. American Home Products Corp.*, 58 NY2d 293. Some common theories of recovery that are normally rejected in New York include:

- claims of defamation that are, in reality, complaints of abusive discharge; *Patrowich v. Chemical Bank*, 63 NY2d 541.
- complaints of abusive discharge, *Ingle v. Glamore Motor Sales, Inc.*, 73 NY2d 183.
- complaints of tortious interference with contract or intentional infliction of emotional harm that are, in reality, complaints of abusive discharge, *Grynberg v. Alexander's Inc.*, 133 AD2d 667, *leave denied*, 70 NY2d 616.

An evolving exception to the unfettered employment at-will relationship may be found in situations where the at will presumption may be rebutted by establishing that the employer made the employee aware of its express written policy limiting its right to discharge and that employee detrimentally relied on the policy in accepting the employment. Restrictions, such as stating that discipline is only for good cause, could limit the employer's right to terminate, even where the application states that all employees are employees at-will. *Marfia v. TC Ziraat Bankasi*, 147 F3d 83 (2nd Circuit).

Even when there is a written employment contract, failure to explicitly fix the duration of

employment creates employment at-will. The employer may fire the employee at any time, for any reason, or no reason at all. An employer's right to terminate an at-will employee remains virtually unchecked. Various Wrongful Discharge bills such as the Unjust Dismissal Act have yet to garner much interest in the State Legislature.

(C) Intentional Infliction of Emotional Harm: An intentional infliction of emotional harm claim is stated when the following elements are alleged:

- an extreme and outrageous act by the defendant employer
- an intent to cause severe emotional distress
- resulting severe emotional distress
- caused by the defendant employer's conduct

A claim for intentional infliction of emotional distress requires a showing of **extreme and outrageous conduct that so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society**, *Murphy v. American Home Products Corp.*, 58 NY2d 293.

Clearly, very few "run of the mill" claims of intentional infliction of emotional distress in employment settings can meet the high standard of outrageousness required. The vast majority of cases will be dismissed; *see, for example, Backus v. Planned Parenthood*, 161 AD2d 1116. One First Department claim that **was upheld** involved an employee who was held *incommunicado* for several hours, subjected to threats and loud, aggressive, profane and obscene language and gestures, accused of theft, threatened with prosecution and forced to sign confessions of guilt and resignation papers relinquishing his pension plan and health benefits. *Kaminsky v. United Parcel Service*, 120 AD2d 409.

II. PROTECTED CLASSIFICATIONS

(A) For an employee to have an articulable unlawful employment practices claim, she must first assert that the adverse employment action taken (firing, demotion, failure to promote, severe and pervasive workplace harassment) was based upon one of the enumerated **protected classifications** under federal, state or local law.

The categories protected against employment discrimination are listed in the chart provided at **Appendix A**. Note that New York State and New York City provide protections to certain categories of persons unprotected by the federal government. The NY State Human Rights Law, the New York State Corrections Law and the New York City Human Rights Law prohibit discrimination based on a person's past **criminal conviction** that are unrelated to the job where the person does not pose a threat to society or property. Executive Law § 296 (16); Corrections Law § 752, and the New York City Administrative Code § 8-107 (10) (11). Additionally, the City and State Human Rights Laws protected persons with **arrest records**.

Under City and State Laws, **marital status** can similarly be a basis for a discrimination

claim.

For example, one of our recently settled cases (referred to us incidentally, by a Bay Ridge Lawyers Association officer), involved a woman whose job was adversely affected due to her **pregnancy and marital status**. The employer made reference to the fact that, as a single mother-to-be, she would do well to “rethink her career” at the offending corporation, as it was hypothesized by management that she would find it difficult to work the long hours that they were accustomed to her working with out the aid of home partner to assist her.

Additional causes of action accruing under the New York *City* Human Rights Law (covering all employment discrimination occurring within the 5 boroughs), that are not covered under federal or state law include:

- **alienage or citizenship**– defined to include citizenship of any person or the immigration status of any person who is not a citizen or national of the United States; NYC Administrative Code § 8-102 (21) and,
- **sexual orientation**; NYC Administrative Code §§ 8-102 (20) (21) and 8-107 (1).

The Federal and State employment laws are listed in the Chart at the back of this hand-out at Appendix B.

**(B) JURISDICTIONAL ISSUES AND STATUTES OF LIMITATIONS–
SEE FOLLOWING PAGE**

Entity	Time Period	Address of Entity
<p>Equal Employment Opportunity Commission (EEOC) (Federal Enforcement Agency). Defendant employer must employ at least 15 employees (20 for ADEA claims–Age– and 25 for FMLA claims),</p>	<p>Must file within 300 days of the last discriminatory act–filing with EEOC is a <i>condition precedent</i> to filing in federal court. Federal court complaint must be filed within 90 days of receipt by mail of determination letter (Right to Sue).</p>	<p>7 World Trade Center, 18th Floor, NY, NY 10048</p>
<p>New York State Division of Human Rights (State Enforcement Agency). Defendant employer must employ at least 4 individuals to be a covered entity. 4 employees are also required for claims based on local law.</p>	<p>Must file within 1 (one) year of the last discriminatory act.</p>	<p>One Fordham Plaza, 4th Floor, Bronx, NY 10458</p> <p>20 Exchange Place, 2nd Floor, NY, NY 10005</p> <p>55 Hanson Place, Suite 900 Brooklyn, NY 11217</p>
<p>New York City Commission on Human Rights (City Enforcement Agency).</p>	<p>Must file within 1 (one) year of the last discriminatory act.</p>	<p>40 Rector Place New York, NY</p>
<p>State Supreme Court–All Counties–based on locus of discrimination or residence of Plaintiff</p>	<p>Must file within 3 (three) years of the last discriminatory act.</p> <p>No administrative filing is required as a prerequisite to suit. If matter is currently pending before either the NYCCHR or the NYSDHR, Complainant must request and be granted an <i>Administrative Convenience Dismissal (ACD)</i>, as the State and City HR laws (but not Federal), have an election of remedies provision that bars private actions where the NYSDHR or the NYCCHR has rendered a final determination or is processing an administrative complaint based on the same allegations</p>	<p>May be filed in courts in all counties of New York. Before commencing a private action under the NYCHRL, Plaintiff must serve copies of the complaint on the City Commission of Human Rights and the City’s Corporation Counsel.</p>

As stated above in the Table, a federal claim commences at the administrative level by filing a Charge with the Equal Employment Opportunity Commission (See sample redacted Charge at **Appendix C**). The named employer must employ at least 15 individuals (20 for claims based on the Age Discrimination in Employment Act and 25 employees for claims based on the Family and Medical Leave Act. The Charge must remain at the EEOC for 180 days, unless the Commission issues its determination and accompanying “right to sue” letter earlier.

By its own statistics, the EEOC’s dismissal rate, or “non-reasonable cause” rate hovers between 90% -95%. Whether the EEOC finds “cause” to believe discrimination occurred or “no cause,” the result is almost always the same; namely, a “*right to sue*” letter to the “charging party” authorizing the filing of a complaint in federal court within 90 days of receipt of same.

(C) Alternative Dispute Resolution–The Holistic Approach

Employment discrimination claims are highly suited for ADR procedures, given the emotional issues that invariably inform all claims of disparate treatment. Complainant has the opportunity to swiftly have her grievances heard, she feels seen and recognized by the mediator, her counsel and her former employer and its counsel; and she is able to craft creative solutions to her challenges that would not be available to her in a judicial or arbitral forum, assuming she has the fortitude and wherewithal to stay the course for the years that such a process entails.

The EEOC has little to recommend it save for its ADR unit. Assuming the Respondent agrees to mediate, the success rate is well above 80%, and most Plaintiff’s feel vindicated and happy to reach closure of their issues, they are allowed time to “vent” while the injustice is still relatively fresh, and feel empowered to be part of the proactive, compromised solution. Apart from the EEOC, private mediators who specialize in employment matters are abundant in NYC, and some, such as *ADR Associates in Manhattan*, are unusually successful in catalyzing a settlement of even the most intractable employment cases.

(D) The New York State Division of Human Rights and The New York City Commission on Human Rights

The State Division and the City Commission have a “**work sharing**” agreement with the EEOC. Cases that are filed with either the State or City Agencies will be “**dual filed**” with the Equal Employment Opportunity Commission. While the EEOC will not undertake even a nominal investigation into a secondary “dual filed” claim, the Charging Party will be assigned a federal charge number which will toll the statute of limitations for federal claims. Should the Charging Party (Plaintiff) later choose to seek an Administrative Convenience Dismissal from either the Division or the City Commission in order to commence an action in federal court, the EEOC will issue a right to sue letter for that purpose, sometimes many years after the initial filing with the Division or the Commission.

While the State Division of Human Rights is directed by statute to determine whether an unlawful discriminatory practice has occurred within 180 days of the filing of the complaint and the City Commission is directed to reach its determination within 270 days, in practice it is not uncommon for the investigation and determination to take many years, with some matters languishing for more than a decade before a case begins to queue up for an administrative bench trial.

In one not atypical case, a hearing was initiated by the City Commission more than *11 (eleven) years* after the filing of the complaint. *Ferreza v. Monchik-Weber*, NYCCHR Complaint No. 0732222-EP (1/26/94). Often, the sole reason to file with an administrative agency is to toll the human rights statutes, with a view toward investigating the claim and negotiating or mediating a disposition prior to making a determination with respect to the litigation-worthiness of the case.

III. (A) THE INITIAL CLIENT CONTACT

Most inquiries regarding possible discrimination claims will not rise to the level necessary upon which a colorable claim may be stated. The most significant questions to ask are:

1. What was the reason the employer gave for terminating you; and,
2. What do you think the *real reason* was?

Answers to question #2 often provide a clear initial understanding of the merits, or lack thereof, of an unlawful employment practices claim. Answers such as (i) “They just don’t like me”, or (ii) “they accused me of being in a fistfight—but the other guy started it,” or, (iii) “you name it—a million reasons”, is a fairly accurate early indicator that the ostensible claim may be lacking in legal and/or factual merit.

(B) The Demand Letter

Most cases that your office decides to undertake should commence with a limited retainer for investigation, negotiation and settlement discussions only, with a view toward fully assessing the facts, speaking with witnesses and formulating a Demand Letter which will be sent to the employer via FedEx or certified mail, return receipt requested. See sample redacted letter at **Appendix D**. For reasons unique to the law practice of Plaintiff’s employment discrimination, the majority of cases will settle following the receipt of a well written, fully investigated **Demand** that outlines the causes of action and indicates a date certain by which the employer or its counsel should respond before a complaint will be filed.

(C) The Relevant Laws, Tests and Burdens

The Demand Letter and follow-up calls have borne no fruit; the EEOC has dismissed your

client's Charge and she lives and works in Staten Island, drastically reducing the potential attraction of commencing an action in State Court. Should you prosecute a federal claim?

(IV) THE LAW

(A) The essence of disparate treatment is *different* treatment. Disparate treatment is unlawful under Title VII when based upon race, color, sex religion or national origin; under the ADEA when based upon age; and under the ADA when based upon disability. *In Teamsters v. United States*, 431 U.S. 324, 335, the Supreme Court stated:

Disparate treatment....is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

The quality of the performance of a Plaintiff in a disparate treatment case—whether in the abstract the Plaintiff “deserved” the complained of treatment—is relevant but not dispositive. Consider, for example, a female Plaintiff who had four unexcused absences and was fired in accordance with a company rule that specifies that all persons with four such absences shall be discharged. Even though the Plaintiff broke the rule and received the precise sanction specified in the rule, a strong disparate treatment claim would lie if similarly situated male employees were not also discharged. The issue is not “just cause” or fairness but rather whether intentional discrimination exists. For the same reason, unfair treatment, without more, even arbitrary, seemingly random different treatment, will not prove disparate treatment under Title VII absent proof of intentional discrimination. **As the Second Circuit has held, “Discrimination does not lurk behind every inaccurate statement.” Rather, the pretext may mask some other motivation such as “back-scratching, log-rolling, nepotism, horse-trading, institutional politics, envy, spite or personal hostility.”** *Fisher v. Vassar College*, 114 F3d 1332 (2nd Circuit-1997) (en banc), cert denied, 118 S Ct.. 851 (1998).

(B) The *McDonnell Douglas-Burdine-Hicks Analysis*

- (1) The Plaintiff must first establish a *prima facie* case of discrimination;
- (2) The employer must respond with a legitimate, nondiscriminatory reason for its actions; and
- (3) In order for the Plaintiff to prevail, she must establish that the employer’s articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.

(C) The *Prima Facie Case*

“The burden of establishing a prima facie case of disparate treatment is not onerous.” *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253. The elements of a *prima facie* case was first articulated by the Supreme Court in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792. The elements of a *prima facie* claim are:

- (1) membership in a protected group;
- (2) application and qualification for a job for which the employer was seeking applicants;
- (3) rejection, despite the applicant's qualifications; and
- (4) the employer's continued solicitation of applicants with qualifications equal to the Plaintiff's.

These elements are flexible and must be tailored, on a case by case basis, to differing factual circumstances, such as the more common factual variations such as hiring, promotion, discharge, "reverse discrimination" and **retaliation**, the last being one of the most potent causes of action in and of itself.

The central inquiry in evaluating whether a Plaintiff has or may meet their initial burden is whether the circumstantial evidence presented is sufficient to create an inference (*i.e.*, a rebuttable presumption), that a basis for an employment-related decision was an illegal criterion.

Establishing a *prima facie* case under the *McDonnell Douglas-Burdine-Hicks* model creates a presumption of illegal discrimination because it eliminates the most likely legitimate explanations for the employer's adverse employment action, such as lack of qualifications and/or the absence of a job opening. Once that has been done, an inference arises that an employer's unexplained rejection or termination of a **protected class member** more likely than not was based on the consideration of impermissible factors. Hence, "if the trier of fact believes the Plaintiff's evidence, and the employer is silent in the face of the presumption, the Court must enter judgment for the Plaintiff." *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742.

(D) The Employer's Burden

In order to successfully rebut the Plaintiff's *prima facie* case, the Defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the Plaintiff's rejection."

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253. Although the employer's burden of production is light, the employer must articulate its nondiscriminatory reason for the challenged action with some specificity in order to afford the Plaintiff a "full and fair opportunity to demonstrate pretext." *Id.* at 255-56. The Defendant need not *prove* that "it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Rather, the employer need only produce such evidence of nondiscriminatory motive as is necessary to create a fact issue. Once that is done, the Plaintiff's *prima facie* case is rebutted.

(E) Plaintiff's Proof of Pretext

If the Defendant successfully presents evidence of a legitimate, nondiscriminatory reason, the Plaintiff still may prevail by proving that the proffered justification was a **pretext** for discrimination. **At this stage, the Plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that the Plaintiff has been the victim of intentional discrimination."** *Burdine* at 256. Proof of mere pretext is insufficient; what is required is proof

that the employer's stated reason is a pretext *for discrimination*. In addition to producing evidence of the falsity of the employer's stated reason, there are three categories of evidence that can be used to prove pretext:

- (1) direct evidence of discrimination, such as discriminatory statements or admissions,
- (2) comparative evidence, and
- (3) statistics

The *McDonnell Douglas-Burdine-Hicks* tripartite allocation of proof is inapplicable when a Plaintiff presents direct evidence of discrimination that is sufficient in itself to sustain the Plaintiff's burden. In such cases where the Plaintiff's direct evidence establishes a *prima facie* case of disparate treatment, the employer normally responds either by disputing the Plaintiff's showing (e.g., by adducing evidence that a biased statement was not made), or by justifying the employer's practice by demonstrating the applicability of any statutory immunities or affirmative defenses, such as are common in sexual harassment actions.

(F) New York Adopts McDonnell Douglas Formula

The New York State Court of Appeals adopted the Supreme Court's *McDonnell Douglas* decision. As a result, the burden of proof outlined in *McDonnell Douglas*, as modified by *Hicks* apply to causes of action under the New York State Human Rights Law. *Miller Brewing Company v. New York State Division of Human Rights*, 66 NY2d 937.

(V) MIXED-MOTIVE CASES

In some cases, the Plaintiff proves by direct evidence that **mixed motives** on the part of the employer existed and that an impermissible factor entered in to the employment decision. Under these circumstances, a *McDonnell Douglas-Burdine* analysis does not apply, and the Plaintiff has the burden of showing by a preponderance of the credible evidence that an adverse decision reflecting discriminatory animus was an illegitimate factor and had a "motivating" or "substantial" role in the employment decision. This theory has been codified in the Civil Rights Act of 1991, 42 USC § 2000e-2(m). If the Plaintiff makes such a showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have reached the same employment decision even in the absence of the impermissible factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (where Plaintiff female was denied partnership for a number of reasons, including that she was "too macho" and that she was "overcompensating for being a woman." Although the employer had engaged in impermissible gender discrimination, which was proven, the employer was able to show other, legitimate reasons for the decision to deny the Plaintiff a partnership. It was held that the employer could rebut Plaintiff's case and avoid liability by showing that the outcome would have been the same absent the discriminatory motive).

For the mixed motive analysis to apply, both the legitimate and illegal discriminatory motives must have existed when the employment-related decision was made. If the employer later discovers a legitimate basis for an adverse employment action, the case is not transformed into a mixed motive case, because the legitimate motive was not a basis for the decision. The later discovery however, might shield the employer from an order requiring it to reinstate the

complainant or to pay back wages for any time after the legitimate reason was discovered under the “after acquired evidence” theory. Evidence of an employee’s wrongdoing discovered after the adverse employment action that, if known, would have caused discharge, cannot be used in the liability stage of the case, but can serve to limit damages after the liability phase at trial. The burden is on the employer to prove by a preponderance of the evidence that it would have discharged the Plaintiff if it had known of the misconduct.

(VI) QUITTING IS BAD–CONSTRUCTIVE DISCHARGE–STRICT STANDARD

In cases where an employee quits her employment, it is far more difficult for her to sustain her burden of proof. Employees often quit due to harassment or some other untenable situation and then attempt to bring an action. However, courts apply a high standard of proof before making a finding of constructive discharge. Plaintiff must show that no reasonable person in the shoes of the employee would have been able to tolerate the employer’s actions, and that the **employer intended to drive the employee away**. *Stetson v. NYNEX Service Company*, 995 F.2d 355.

(VII) NO INDIVIDUAL LIABILITY UNDER TITLE VII

The prevailing view among the Circuits, including the 2nd Circuit, is that a supervisor or individual agent of the employer may **not** be held personally liable for discriminatory acts under Title VII, although an individual (co-employee, supervisor, manager, etc.), may be personally sued under the New York State Human Rights Law. *Tomka v. Seiler Corporation*, 66 F.3d 1295 (2nd Circuit-1995). This underscores the critical importance of **actually notifying** the Defendant company, in writing and as soon as possible, of all issues related to adverse treatment pursuant to one of the protected classifications; unless the company is formally apprised by the employee of her intention to file with the EEOC and the invocation of the protected activity, there may be no sustainable basis upon which a viable claim may be stated.

(VIII) SEXUAL HARASSMENT

(A) In order to state a *prima facie* case of hostile work environment, the following elements must be demonstrated by a preponderance of the evidence:

- (1) The Plaintiff is a member of a protected class;
- (2) he or she was subjected to unwelcome sexual harassment;
- (3) the harassment was based on sex;
- (4) the harassment affected “a term, condition or privilege of employment;” and
- (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

The harassment must be unwelcome, both subjectively and objectively and it must adversely affect the terms and conditions of employment. *Harris v. Forklift Systems, Inc.* 510 U.S. 17.

(B) The effect on the conditions of employment must be “**severe or pervasive,**” and be **gender motivated**.

Until 1998, the cases of sexually-motivated discrimination discussed liability in terms of “*quid pro quo*” sexual harassment (where an employee’s continued success and advancement is made dependent on agreeing to sexual demands, for example), and “*hostile work environment*,” sexual harassment, (where a display of posters and calendars showing women in sexually suggestive poses, coupled with demeaning remarks by male employees and supervisors, for example).

But in two recent Supreme Court decisions decided on the same day, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 and *Faragher v. City of Boca Raton*, 524 U.S. 775, the Court diverted attention from those categorizations and focused upon whether there was a **tangible job detriment** at the hands of a co-worker, supervisor or management.

In *Faragher*, the Court held that an employer is vicariously liable under Title VII for discrimination caused by a supervisor where a **tangible employment action (such as a firing)**, is taken. Where no tangible employment action is taken, a defending employer may raise and prove by a preponderance of the evidence a two pronged **affirmative defense** against supervisor harassment.

(C) AFFIRMATIVE DEFENSE: Where no adverse, tangible employment action is taken by a supervisor or the company, the employer may plead and prove that:

(i) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(ii) that the Plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In *Burlington Industries, Inc. v. Ellerth*, the Court held that unfulfilled threats by a supervisor were more like hostile work environment harassment than *quid pro quo* harassment, although the Court encouraged abolishing the categorization of harassment into *quid pro quo* and hostile environment. Since there was no tangible, adverse employment action taken by the company, the claim requires a showing of **severe or pervasive** conduct. The key is whether there was a **tangible, adverse employment action** taken, in which case the employer is vicariously liable for the supervisor’s acts. If there is no tangible employment action, there may still be vicarious liability where the conduct is **pervasive**, but the employer may then prove the affirmative defense.

Remember, the Court emphasized that the affirmative defense is not available in cases where the supervisor’s harassment culminated in a tangible, adverse employment action, such as discharge, demotion or undesirable reassignment.

(D) NO AFFIRMATIVE DEFENSE FOR UPPER ECHELON PERPETRATORS

With respect to liability, both *Ellerth* and *Faragher* provide a sliding scale approach to determining the standard of liability applied to the employer in sexual harassment cases. To determine which standard applies in any given case, the first step is to characterize the alleged

perpetrator as either (1) a high-echelon company official; (2) a supervisor; or (3) a co-worker. Both cases indicate that an employer will be **automatically liable** where the harassment is perpetrated by a company official high enough in rank to be treated as the organizations **proxy or alter ego**, as long as the sexual harassment was sufficiently severe or pervasive to alter the conditions of the employee's employment and create an abusive working environment. In *dicta*, the Court discussed two theories for holding the employer **automatically liable** in high echelon cases. Several Courts of Appeals have subsequently relied on this language in holdings addressing automatic liability for upper management. The Courts, as well as the EEOC Guidelines, define a high-echelon employee as either a **president, an owner, a partner or a corporate officer**. In such a situation there may be automatic liability even in the absence of a tangible employment action as long as the conduct rises to the level of severe or pervasive hostility based a protected classification such as gender.

(IX) WEAPONS FOR THE FIREFIGHT

(A) Notifying the employer of any and all complaints relating to discriminatory animus is essential; in fact, as stated above, if the employer has an employment practices handbook that delineates a zero-tolerance policy toward any form of discrimination or harassment with a specific procedure in place and this policy is disseminated to all the employees, the employer may have a winning affirmative defense if the employee does not avail herself of the internal complaint mechanism. Additionally, as there is no individual liability under Title VII against the individual discriminator, it is axiomatic that the company be made aware of the unlawful practices as soon as possible, preferably while the employee is still employed. Such notice must be formal and demonstrable.

(B) Additionally, federal, state and local law all contain statutory proscriptions against **RETALIATION** for one who complains about a protected activity. Often, the retaliation claim is far stronger than the underlying discrimination complaint, as the latter is often not corroborated; but a written complaint sent to the company while the employee is still employed forces the company to negotiate a settlement far more swiftly than it otherwise might after the employee has been fired or quit and no complaint was ever lodged internally.

(C) **Letters of complaint** addressing the specific discriminatory animus and protected activity should be sent to the appropriate person(s) delineated in the company handbook, or they should be sent to the highest ranking officer that the employee knows. Letters should be sent by certified mail, return receipt requested, or by FedEx, in order to prove receipt later on, if necessary.

(D) New York and federal law permit **tape recordings** as long as one party to the conversation (*i.e.*, the employee), consents. While it may be unethical for an attorney to advise a client to surreptitiously tape record a conversation, it is an attorney's obligation to advise each client of the full panoply of rights and remedies available to her, and a tape recording contemporaneously capturing the discriminatory animus in full flower is a powerful weapon that may level the playing field considerably.

(X) DAMAGES

In general, the relevant relief most often sought and accorded by statute are as follows:

(A) Back Pay: Back Pay is an *equitable* remedy. Damage awards are generally computed as the difference between a Plaintiff's actual earnings for the period and those that would have been received but for the discrimination. A Plaintiff is entitled to be compensated only for losses resulting from the discrimination, and thus, would not be entitled to back pay for the period when, for example, he was unable to work because of an intervening disability. *Thornley v. Penton Publishing, Inc.* 104 F3d 26 (2nd Circuit 1997).

Under Title VII and ADA, back pay and lost benefits may be obtained for the period starting two years before the timely filing of a charge. Subject to this limitation, back pay runs from the time of the discrimination to the time of judgment. *Dunlap-McCuller v. Riese Org.*, 980 F2d 153 (2nd Circuit 1992), cert denied, 510 U.S. 908.

CAVEAT: A victim of discrimination has a duty to mitigate damages by using reasonable diligence to find other suitable employment. *Padilla v. Metro-North Commuter R.R.*, 92 F3d 117, (2nd Circuit 1996). The key is whether the Plaintiff acted reasonably in attempting to obtain other employment or in rejecting proffered employment. It is the Plaintiff's duty to mitigate but it is the Defendant's burden to prove that the Plaintiff has failed to satisfy that duty. *Dailey v. Societe Generale*, 108 F3d 451 (2nd Circuit 1997).

(B) FRONT PAY

"Front pay" is monetary relief for future loss of earnings resulting from past discrimination. Front pay is frequently awarded under Title VII, the ADA and the ADEA, when Plaintiffs are entitled to reinstatement, but reinstatement is not possible under the circumstances. *Dunlap-McCuller v. Riese Org.*, 980 F2d 153 (2nd Circuit 1992), cert denied, 510 U.S. 908.

Front pay under federal law is also an **equitable remedy** intended to make a victim of discrimination "whole" in cases where the Plaintiff has no reasonable prospect of obtaining relief. The Second Circuit has affirmed front pay awards ranging from seven weeks for an employee whose office was scheduled to close seven weeks after the jury's verdict to approximately 24 years for a 43-year-old employee with no reasonable prospect of finding comparable alternative employment. *Padilla v. Metro-North Commuter R.R.*, 92 F3d 117, (2nd Circuit 1996).

(C) Compensatory Damages

Compensatory damages are intended to restore the victim of discrimination to her rightful financial position. To be compensable, the harm must be a reasonably foreseeable consequence of the discriminatory act. Compensatory damages for pain, suffering or emotional distress and punitive damages may not be recovered under the ADEA. *Johnson v. Al Tech Specialties Steel Corp*, 731 F2d 143 (2nd Circuit 1984).

(i) Caps-- Damage awards against employers under Title VII and the ADA are limited by the Civil Rights Act of 1991. CRA 91 permits the award of compensatory and punitive damages, but imposes a cap. **Punitive damages under these statutes are not available against**

public sector employers or political subdivisions, including such entities as the City and State of New York.

The cap amount depends on the size of the company, determined by the total number of employees:

- 15-100 employees: damages may not exceed \$50,000.00
- 101-200 employees: damages may not exceed \$100,000.00
- 201-500 employees: damages may not exceed \$200,000.00
- 501+ employees: damages may not exceed \$300,000.00

The CRA 91 caps govern only the compensatory and punitive damage components of an award, and are not imposed on front or back pay or benefits awards. Compensatory damages under CRA 91 include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses” resulting from the discriminatory act. *42 USC § 1981a*.

(ii) No Caps under State Law

The NY State Human Rights Law provides for unlimited compensatory damages, unlike the federal caps on damages under Title VII and ADA.

(D) Punitive Damages

Punitive Damages are discretionary. The purpose of punitive damages is to punish the Defendant for conduct that blatantly disregards the rights of others and to set an example for others to deter them from engaging in such conduct in the future. Punitive damages protect the community from willful and malicious conduct and are an expression of the jury’s indignation and outrage.

*** Punitive damages are **not** available under the NY State Human Rights Law but they **are available without caps** under the NY *City* Human Rights Law.

Relevant factors in setting the amount of punitive damages include:

- (i) the degree of willfulness, wantonness, maliciousness, and recklessness of the conduct;
- (ii) the financial resources of the defendant;
- (iii) whether the successful Plaintiff is receiving an unjustifiable gain.

- ▶ One federal court reduced the punitive damages award against one Defendant from \$150,000.00 to \$20,000.00 because it exceeded 50% of his total net worth. The \$150,000.00 award against another Defendant with more extensive resources was reduced to \$30,000.00 because it would result in a massive loss of retirement income. *Vasbinder v. Scott*, 976 F2d 118 (2nd Circuit-1992).

(E) Unlike Personal Injury Cases; Awards are Taxable and Rarely are Defendant's Insured through Employment Practices Liability Insurance

On August 20, 1996, President Clinton signed into law the *Small Business Job Protection Act of 1996*, which drastically changed the monetary damages landscape. Under the new law, punitive damage awards in most cases are now taxable, as well as damage recoveries for emotional distress. Section 104(a)(2) of the Internal Revenue Code, which previously provided for the exclusion from gross income of “*any damages received...on account of personal injuries or sickness,*” has been amended to read that “***emotional distress shall not be treated as a physical injury or physical sickness.***”

(F) Attorneys' Fees

Reasonable attorneys' fees to the prevailing Plaintiff are allowable under both Title VII and the NY City Human Rights Law but **not** under the State Human Rights Law.