WRONGFUL TERMINATION ACTIONS

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1 The attached paper entitled “Wrongful Termination Actions” was originally submitted by Lloyd Chinn, Proskauer Rose, LLP, for the March 2009 ABA/LEL/Employment Rights and Responsibilities Committee’s Midwinter meeting. It is re-submitted here with Mr. Chinn’s permission along with an update bulletin by Mr. Hubbard.
UPDATE BULLETIN TO WRONGFUL TERMINATION ACTIONS PAPER

This update bulletin summarizes the recent developments in case law relevant to the paper entitled “It’s Elementary...Actually, It’s Basic: Basic employment Rights & Responsibilities, Wrongful Termination Actions” (“Wrongful Termination Actions”) submitted by Lloyd Chinn, Proskauer Rose LLP, for the March 2009 Midwinter meeting of the ABA/LEL/Employment Rights and Responsibilities Committee.

Lapsley v. Columbia Univ.-Coll. was decided by the Southern District of New York in 1998 and is cited by Wrongful Termination Actions at page 14, Para. D. It has been distinguished by the Eastern District of New York’s 2009 ruling in Blanc v. Sagem Morpho, Inc. Lapsley held that when a plaintiff merely makes a casual remark about being discriminated against, such remark is insufficient to qualify as protected activity. Blanc found that the plaintiff had engaged in protected activity when the remarks included a reference to the specific type of discrimination in question (others received training who “do not look like [plaintiff]”), and the email was copied to another, who then faxed it on as well.

Wrongful Termination Actions, at page 27, cites the 2007 Supreme Court case Ledbetter v. Goodyear Tire & Rubber Co., which now has been overruled by statute. Ledbetter held that the Title VII statute of limitations for an equal pay claim begins to run when the employer decides how much to pay the plaintiff. The Supreme Court rejected the argument that the statute of limitations should essentially be reset each time a check was issued at a discriminatory rate. The Lilly Ledbetter Fair Pay Act of 2009 states that the statute of limitations begins to run when the decision is made, or when the plaintiff is affected, including when the compensation, wages or benefits are paid. Courts have ruled that the Ledbetter Fair Pay Act overruled Ledbetter. The Southern District of New York ruled that the Plaintiff in Vuong had filed a timely claim in 2009 even though the decision to pay the Plaintiff at a discriminatory rate had been made in 1998 because discriminatory payments had continued to be made.

2 999 F.Supp. 506.
5 2009 WL 1813236 at 7.
6 See Id at 15.
7 550 U.S. 618.
8 550 U.S. 618 at 628.
9 550 U.S. 618 at 624 – 625.
10 See 42 USC 2000e-5(e).
IT’S ELEMENTARY . . . ACTUALLY, IT’S BASIC:
BASIC EMPLOYMENT RIGHTS & RESPONSIBILITIES

WRONGFUL TERMINATION ACTIONS

ABA Section of Labor & Employment Law
Employee Rights & Responsibilities Committee

2009 Midwinter Meeting

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TERM OF EMPLOYMENT

A At-Will

For over 100 years, New York courts have adhered to a judicially created at-will doctrine that provides that individuals employed pursuant to a contract of indefinite duration can be terminated for any reason, or no reason, so long as the termination does not violate public policy or statutory law. Absent a constitutionally impermissible purpose, statutory proscription, or an express limitation in the individual contract of employment, a New York employer's right to terminate its employee at-will remains unrestricted. See Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235 (1983) ("where an employment is for an indefinite term it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason"), rev'd on other grounds, 136 A.D.2d 229, 527 N.Y.S.2d 1 (1st Dep't 1988).

B Employment Not At-Will

A former employee may be able to state a claim against the employer for discharge without cause based upon an implied-in-fact contract arising from promises contained in an employee handbook, provided that the employee detrimentally relied on the promises. See Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982) (discussed below). See also Lapidus v. N.Y. City Chapter of N.Y.S. Ass'n for Retarded Children, 118 A.D.2d 122, 504 N.Y.S.2d 629 (1st Dep't 1986) (reinstating plaintiff's claim for breach of employment contract where plaintiff could present evidence of an implied limitation on the employer's right of termination and noting the similarities to the plaintiff in Weiner).

In Weiner, the employer's manual stated that “[i]t is the company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed." Id. at 460, 457 N.Y.S.2d at 194. The court then outlined rigorous reliance standards that employees must satisfy in order to succeed on a handbook-based breach of contract claim.

i Plaintiff was induced to leave his other employment with assurances that the new employer would not discharge him without cause.

ii This assurance was incorporated into the employment application.

iii Plaintiff rejected other offers of employment in reliance on the assurance.
iv Plaintiff was instructed by supervisors to proceed in strict compliance with the handbook and policy manuals saying that employees could only be discharged for cause. *Id.* at 465-66, 457 N.Y.S.2d at 195-96.

3 To minimize the risk that an employee handbook will be construed as modifying the employment at-will doctrine, employers should include disclaimers in their handbooks notifying their employees that the employer is in no way limiting its generally unfettered right to terminate its employees.

4 New York courts have also recognized a very narrow implied-in-law contractual exception to the employment at-will doctrine. See *Wieder v. Skala*, 80 N.Y.2d 628, 593 N.Y.S.2d 752 (1992). In *Wieder*, the court held that a law firm associate could bring a lawsuit against his law firm employer for breach of an implied contract because it was implicit in his employment relationship with his law firm that both associates and partners would engage in their “common professional enterprise” in accordance with the Code of Professional Responsibility. In *Horn v. N.Y. Times*, 100 N.Y.2d 85, 760 N.Y.S.2d 378 (2003), the court refused to apply this limited exception for the legal profession to the medical profession. In other words, the court refused to hold that the employment contract “implied the fundamental understanding, which requires no written expression, that the physician will conduct her practice on the employer’s behalf in accordance with the ethical standards of the medical profession.” *Horn*, 100 N.Y.2d at 90, 760 N.Y.S.2d at 379.

C Contract for Term

1 Unless an employee has a written agreement establishing a fixed duration, the New York courts will generally presume that employment is at-will and can be terminated at any time by either party. However, where the boundaries (i.e., the beginning and end of the employment period) are sufficiently ascertainable, the presumption of at-will employment can be overcome. For example, an oral contract between a professional boxer and a fight trainer to train the boxer “for as long as the boxer fights professionally” was held to be a contract for a definite duration because the term was ascertainable by objective benchmarks. *Rooney v. Tyson*, 91 N.Y.2d 685, 694, 674 N.Y.S.2d 616, 621 (1998).

2 Where an express agreement of employment for a fixed term exists, the contract “may not lawfully be terminated by the employer prior to the expiration date in the absence of just cause.” *Alpern v. Hurwitiz*, 644 F.2d 943, 945 (2d Cir. 1981) (citing *Crane v. Perfect Film & Chem. Corp.*, 38 A.D.2d 288, 291, 329 N.Y.S.2d 32, 34 (1972)). “Just cause” is required even when the contract provides the employer with the right to terminate an employee at-will or for any reason. See, e.g., *Rothenberg v. Lincoln*
Farm Camp, Inc., 755 F.2d 1017, 1021 (2d Cir. 1985) (just cause requirement applies “even where the employment contract, by its terms, purports to reserve to the employer the right to terminate the contract at-will”); Gallagher v. Savarese, No. 99 CV 4181, 2001 U.S. Dist. LEXIS 18112 (S.D.N.Y. Nov. 6, 2001) (same); Carter v. Bradlee, 245 A.D. 49, 50, 280 N.Y.S. 368, 370 (1st Dep’t 1935) (where contract reserved employer’s right to terminate “for any reason,” appellate court nonetheless required a showing of “reasonable” grounds and good faith), aff’d, 269 N.Y. 664 (1936).

3 Unless the employment contract defines “just cause,” courts generally afford broad discretion to employers’ decisions. An employer can satisfy the requirement by demonstrating dissatisfaction with the employee’s work or ethics. See Harris v. McGraw-Hill Cos., No. 98 CV 2083, 2001 U.S. Dist. LEXIS 20234 (S.D.N.Y. Dec. 6, 2001) (finding that employee had been terminated for just cause where plaintiff had a record of performance and acted unprofessionally); Hadden v. Consol. Edison Co., 45 N.Y.2d 466, 410 N.Y.S.2d 274 (1978) (just cause found where former employee received bribes and secret gifts from firms doing business with employer). See Rodgers v. Lenox Hill Hosp., 239 A.D.2d 140, 657 N.Y.S.2d 616 (1st Dep’t 1997) (noting that the employee’s dishonesty is a valid defense to a wrongful discharge claim where the employee’s actions seriously affect the employer’s interest).

D Independent Contractor

1 For budgetary and other reasons, employers label some workers independent contractors without regard to the various legal tests that differentiate between independent contractors and employees.

i In the Second Circuit, courts follow the standard enunciated in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992): “where a statute containing the term “employee” does not helpfully define it, the common-law agency test should be applied.” Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993). The agency test focuses on “the hiring party’s right to control the manner and means by which the product is accomplished.” Peck v. Democrat & Chronicle/Gannett New Papers, 113 F. Supp. 2d 434, 436 (W.D.N.Y. 2000) (internal quotations omitted).

ii New York State courts also determine employee status under a control test; “[a] determination that an ‘employer-employee’ relationship exists must rest upon evidence that a petitioner exercises control over the results produced by its [employees] or the means used to achieve the results.” In re 12 Cornelia St., Inc., 56 N.Y.2d 895, 897, 453 N.Y.S.2d 402, 403 (1982) (determining that salespersons were not employees because petitioner did not
exercise sufficient control over the results they produced). See Scott v. Mass. Mut. Life Ins. Co., 86 N.Y.2d 429, 433, 633 N.Y.S.2d 754, 756 (1995) ("Minimal or incidental control over one’s work product without the employer’s direct supervision or input over the means used to complete it is insufficient to establish a traditional employment relationship").

II WRONGFUL TERMINATION ACTIONS

A Breach of Contract (See Section I Above)

B Quasi-Contractual Claims

1 Unjust Enrichment

To succeed in a claim for unjust enrichment, a plaintiff must show that the defendant was: (1) enriched; (2) the enrichment was at plaintiff’s expense; (3) the circumstances were such that equity and good conscience require defendant to make restitution. See Phansalkar v. Andersen Weinroth & Co., L.P., No. 00 Civ. 7872, 2002 U.S. Dist. LEXIS 11764, at *52 (S.D.N.Y. June 26, 2002), aff'd in part, rev'd and vacated on other grounds, 344 F.3d 84 (2d Cir. 2003); citing Universal Acupuncture Pain Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 196 F. Supp. 2d 378, 387 (S.D.N.Y. 2002), rev'd on other grounds, 360 F.3d 256 (2d Cir. 2004); see also Kaye v. Grossman, 202 F.3d 611 (2d Cir. 2000).

Because claims for unjust enrichment seek quasi-contractual relief, they are generally not permitted when an express agreement exists that covers the dispute at issue between the parties. Bridgeway Corp. v. Citibank, 132 F. Supp. 2d 297, 305 (S.D.N.Y. 2001); see also Violette v. Armonk Assoc., L.P., 872 F. Supp. 1279, 1282 (S.D.N.Y. 1995) ("[A] quasi contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved," quoting Clarke-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 655 (1987). In Maalouf v. Salomon Smith Barney, Inc., No. 02 Civ. 4770, 2003 U.S. Dist. LEXIS 5913 (S.D.N.Y. Apr. 9, 2003), the court ruled that a plaintiff could plead claims for both breach of contract and unjust enrichment, but could only could recover under one of them.
3 Breach of Promissory Estoppel


4 Good Faith and Fair Dealing

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (N.Y. 2002) (stating that the covenant of good faith and fair dealing “embraces a pledge that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’”) The covenant of good faith and fair dealing is particularly true in relationships where the parties “do not deal as equals either in terms of access to information or business acumen and thus ... often lack equal bargaining power.” *Id.* at 154.

C Tort Claims

1 Wrongful Discharge

New York does not recognize the tort claim of wrongful discharge. *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235 (1983) (stating that tort liability for wrongful discharge must await legislative action and that to recognize the tort would “alter our long-settled rule that where an employment is for an indefinite term it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason”), *rev’d on other grounds*, 136 A.D.2d 229, 527 N.Y.S.2d 1 (1st Dep’t 1988). *See also Horn v. N.Y. Times*, 100 N.Y.2d 85, 96, 760 N.Y.S.2d 378, 384 (2003) (“[w]e have consistently declined to create a common-law tort of wrongful or abusive discharge”).

2 Intentional Infliction of Emotional Distress

The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.
Generally, a claim for wrongful termination alone will not give rise to the type of conduct "extreme and outrageous" enough. See, e.g., Ranieri v. Lawlor, 211 A.D.2d 601, 622 N.Y.S.2d 30 (1st Dep't 1995) (finding that plaintiff's claim did not set forth the requisite extreme and outrageous conduct and that plaintiff's claim was properly dismissed because the cause of action "may not be interposed as a means of circumventing this jurisdiction's continuing refusal to recognize a cause of action for wrongful discharge"); McCain v. Eaton Corp., 213 A.D.2d 462, 463, 623 N.Y.S.2d 626, 627 (2d Dep't 1995) ("cause of action to recover damages for intentional infliction of emotional distress . . . cannot be pleaded for the purpose of circumventing the rule prohibiting an at-will employee from suing for wrongful discharge").

There are, however, factual scenarios that may satisfy the tort’s elements in the employment setting. In Kaminski v. United Parcel Service, 120 A.D.2d 409, 501 N.Y.S.2d 871 (1st Dep't 1986), the court did not dismiss the plaintiff’s claim of intentional infliction of emotional distress in an employment context. Plaintiff claimed that he had been held against his will by supervisors and accused of theft and was subjected to abusive and obscene language and gestures. The court found that if the facts pleaded were assumed to be true, "the acts complained of could be found by a trier of fact to amount to extreme and outrageous conduct." Id. at 412, 501 N.Y.S.2d at 873.

3 Defamation

Defamation consists of "the twin torts of libel and slander" and "is the invasion of the interest in a reputation and good name." Albert v. Loksen, 239 F.3d 256, 265 (2d Cir. 2001) (quoting Hogan v. Herald Co., 84 A.D.2d 470, 474, 446 N.Y.S.2d 836, 839 (4th Dep't), aff'd, 58 N.Y.2d 630, 458 N.Y.S.2d 538 (1982)).

To sustain a defamation claim, a plaintiff "must set forth the particular words complained of" (in haec verba). See Piccini v. Myers, 9 Misc. 2d 169, 171, 173 N.Y.S.2d 181, 183 (Sup. Ct. 1957) ("[i]t is elementary that, in an action of libel or slander, the defamatory words must be alleged in haec verba. If the defamation is accomplished by photographs, they should be made part of the cause of action"). The complaint must also state the particular person or persons to whom the allegedly defamatory statements were made. See N.Y.C.P.L.R. § 2016(a); Gill v. Pathmark Stores, 237 A.D.2d 563, 655 N.Y.S.2d 623 (2d Dep't 1997).
In New York, an action for libel is established by proof of five elements: “(1) a written defamatory statement of fact regarding the plaintiff; (2) published to a third party by the defendant; (3) defendant’s fault, varying in degree depending on whether plaintiff is a private or public party; (4) falsity of the defamatory statement; and (5) injury to plaintiff.” DiBella v. Hopkins, 403 F.3d 102, 110 (2d Cir.), cert. denied, 126 S. Ct. 428 (2005).

Where a plaintiff is disparaged in a professional/business capacity, injury is assumed. Id. (stating that disparagement of plaintiff in his professional capacity is libel per se and injury is assumed).

A cause of action for slander requires: “(i) a defamatory statement of fact; (ii) that is false; (iii) published to a third party; (iv) of and concerning the plaintiff; (v) made with the applicable level of fault on the part of the speaker; (vi) either causing special harm or constituting slander per se; and (vii) not protected by privilege.” Albert, 239 F.3d at 265-66. Slander “per se” refers to specific types of defamatory claims where a plaintiff need not plead special damages. For example a statement will constitute slander per se if it entails: disparagement in office, profession or trade; imputation of a crime; imputing that one has a loathsome disease, or; imputing unchastity to a woman. See, e.g., Herlihy v. Metro. Museum of Art, 214 A.D.2d 250, 633 N.Y.S.2d 106 (1st Dep’t 1995) (“[w]ords which have a tendency to disparage an individual ... in the way of her office, profession, trade or business are slanderous per se”).

Truth is an absolute defense to a defamation claim. Silver v. Mohasco Corp., 94 A.D.2d 820, 462 N.Y.S.2d 917 (3d Dep’t 1983), aff’d, 62 N.Y.2d 741, 476 N.Y.S.2d 822 (1984). If, however, the plaintiff is a public figure, the burden is on him to prove falsity by clear and convincing evidence. DiBella, 403 F.3d at 112.


In the employment termination context, defamation claims have been dismissed because the statements made were privileged; “[e]valuations of employees made by their superiors enjoy a qualified privilege in defamation actions.” Shamley v. ITT Corp., 869 F.2d 167, 173 (2d Cir. 1989). Under New York law, “a communication enjoys a qualified privilege where it is made: ‘... bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty ... if made to a person having a corresponding interest or

To overcome a qualified privilege, “employee-plaintiffs must allege malice on the part of their superiors, and these allegations must be supported by sufficient evidentiary facts.” *Shamley*, 869 F.2d at 173.

4 Tortious Interference with Contractual Relations

The elements of the claim are: (1) a valid contract exists; (2) that a “third party” had knowledge of the contract; (3) that the third party intentionally and improperly procured the breach of contract; and (4) that the breach resulted in damage to the plaintiff. *See Albert v. Loksen*, 239 F.3d 256, 274 (2d Cir. 2001); *Ives v. Guilford Mills, Inc.*, 3 F. Supp. 2d 191, 197 (N.D.N.Y. 1998). Thus, “a plaintiff bringing a tortious interference claim must show that the defendants were not parties to the contract.” *Id.*

Claims for tortious interference with contractual relations arising out of an employee’s discharge have been recognized in the federal courts in New York. *See Albert*, 239 F.3d at 274 (stating that a claim for interference may be established where plaintiff demonstrates that “a ‘third party used wrongful means to effect the termination such as fraud, misrepresentation, or threats, that the means used violated a duty owed by the defendant to the plaintiff, or that the defendant acted with malice.’” (quoting *Cohen v. Davis*, 926 F. Supp. 399, 403 (S.D.N.Y. 1996)).

claim for tortious interference with contract of employment even
where employment is at-will if plaintiff shows that “defendant
employed wrongful means, such as fraud, misrepresentation or
threats to effect the termination of employment”).

The Second Circuit stated that a plaintiff “may maintain an action
for tortious interference against a co-employee by showing that the
co-employee ‘acted outside the scope of [his or her] authority.’”
Id. at 275 (quoting Kosson v. Algaze, 203 A.D.2d 112, 113, 610
N.Y.S.2d 227, 227-28 (1st Dep’t 1994), aff’d, 84 N.Y.2d 674
(1994)).

5 Fraudulent Misrepresentation and Negligent Misrepresentation

Fraudulent Misrepresentation

(a) The elements of a claim of fraudulent misrepresentation
are:
the defendant made a material false representation of fact;
intended to defraud the plaintiffs thereby;
the plaintiffs reasonably relied upon the representation; and
suffered damage as a result of their reliance. J.A.O.
Acquisition Corp. v. Stavitsky, 18 A.D.3d 389, 390, 795
N.Y.S.2d 569, 570 (1st Dep’t 2005), appeal granted, Mo.
No. 357, 2006 N.Y. LEXIS 1486 (N.Y. June 12, 2006).

(b) Termination of at-will employment will not, by itself,
provide a basis for a claim of fraudulent misrepresentation.
See Culver v. Merrill Lynch & Co., Inc., No. 94 Civ. 8124,
1995 U.S. Dist. LEXIS 10017, at *11 (S.D.N.Y. July 17,
1995) (noting that courts routinely dismiss fraud claims
where those claim are “no more than inartful attempts to
dodge” the long-settled general rule that that there is no
action in tort in New York for wrongful discharge). See
Marino v. Oakwood Care Cir., 5 A.D.3d 740, 741, 774
N.Y.S.2d 562, 563 (2d Dep’t 2004) (“since the plaintiff
was offered only at-will employment, she cannot establish
reasonable reliance, a necessary element to recover
damages on theories of fraudulent misrepresentation”).

Negligent Misrepresentation

(a) There are four elements to a negligent misrepresentation
cause of action:
carelessness in making an incorrect statement;

making such a statement directly and with knowledge, notice, and expectation that another will rely upon it;

reliance by the complaining party on the statement to his or her detriment; and


(b) Where employment is at-will, claims for negligent misrepresentation will generally fail. See *Bower v. Atis Sys., Inc.*, 182 A.D.2d 951, 582 N.Y.S.2d 542 (3d Dep't) (dismissing claim of negligent misrepresentation and finding that the fact that plaintiff was an at-will employee negated her claim of reasonable reliance), appeal denied, 80 N.Y.2d 758, 589 N.Y.S.2d 309 (1992).

6 Prima Facie Tort

i In order to recover for *prima facie* tort in New York, plaintiff must demonstrate:

(a) The intentional infliction of harm;

(b) Resulting in special damages;

(c) Without any excuse or justification; and

(d) By an act or series of acts which would otherwise be lawful.

(e) In addition, the complaint must allege that defendant was motivated solely by a malicious intention to injure plaintiffs. *Gilant v. NASD*, No. 96 Civ. 8070, 1997 U.S. Dist. LEXIS 12287, at *50 (S.D.N.Y. Aug. 18, 1997) (citing *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735, 737 (1985)).

D Retaliation/Whistle-blowing

1 Retaliation Overview

i Antidiscrimination laws (including Title VII, ADEA, ADA and FMLA) generally prohibit employers from taking retaliatory action or discriminating against an employee, an applicant or a former employee because the employee opposed an unlawful employment practice or the employee “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under the relevant antidiscrimination law. See, e.g., 42 U.S.C. § 2000e-3(a).

ii Employees who complain about employment practices often fear retaliation and will frequently construe all employment actions following their participation in protected activity as attributable to that activity. Because temporal proximity alone may be sufficient to create a triable issue with regard to claimed retaliation, these claims frequently proceed to trial even in instances where the underlying discrimination claim is decided in favor of the employer at the summary judgment stage.

iii As with discrimination claims, retaliation claims are analyzed in accordance with a three-step shifting burden of proof. Pronin v. Raffi Custom Photo Lab, Inc., 383 F. Supp. 2d 628, 640 (S.D.N.Y. 2005) (“[r]etaliation claims are similarly governed by the [McDonnell Douglas] burden-shifting framework”). The complainant must first establish a prima facie case of retaliation. Once the complainant meets that initial burden, the employer must present a legitimate, nonretaliatory reason for taking the action in question. If the employer articulates a nondiscriminatory reason for the employment decision, the employee bears the ultimate burden of proving that the employer’s explanation is merely a pretext for actual retaliation. See Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998); Holt v. KMI-Cont’l, 95 F.3d 123 (2d Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

2 Elements of a Prima Facie Case of Retaliation

i To establish a prima facie case, the employee must establish that:

(a) The employee participated in a protected activity;

(b) The employer was aware of that protected activity;

(c) The employee was subject to a material adverse employment action; and
(d) There was a causal connection between the protected activity and the adverse employment action. *See Holt*, 95 F.3d at 123.

3 In analyzing retaliation claims under federal statutes, courts historically applied Title VII principles.

i Section 704(a) of Title VII prohibits discrimination against any individual:

(a) Because he/she has opposed any practice made an unlawful practice by this [title]; or

(b) Because he/she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]. 42 U.S.C. § 2000e-3(a).

These two clauses are referred to as the opposition and participation clauses, respectively.

ii Recently, the Supreme Court announced that retaliation claims are permissible under Section 1981. *See CBOCS West, Inc. v. Humphries*, No. 06-1431 (May 27, 2008) (Court permits a Section 1981 retaliation claim where employee alleges retaliatory termination due to complaints made to the employer).

(a) Section 1981 provides that “[a]ll persons ... shall have the same rights ... to make and enforce contracts ... as is enjoyed by white citizens.” *See 42 U.S.C. §1981(a).* In *Humphries*, the Court concluded that although Section 1981 does not expressly provide for retaliation claims, such a claim is implied through Section 1982. The *Humphries* decision provides retaliation plaintiffs with benefits not available under Title VII.

Filing the Complaint: A plaintiff may file a Section 1981 complaint in court without first filing with the EEOC.

Filing Period: Section 1981 provides a four-year limitation period for retaliation claims, unlike the 300/180-day filing requirement post-EEOC findings under Title VII claims.

Damages: A petitioner’s Section 1981 rights to damages are unlimited; whereas, Title VII litigants are not only limited to actual damages but have legislative caps on emotional distress and punitive damages.
What is protected under the opposition clause?

Generally, the antiretaliation provisions make it unlawful to discriminate against an individual because she or he has opposed any practice made unlawful under the employment discrimination statutes. See EEOC Manual, Vol. 2, Sec. 8-II B.1.

Examples of Opposition:

(a) Informal Protests of Discrimination

The opposition clause protects informal protests of discriminatory employment practices. The EEOC guidelines state that a complaint or protest about alleged employment discrimination to anyone — including a manager, union official, coworker, company EEO official, attorney, newspaper reporter, Congressperson — constitutes protected opposition, and that the employee's opposition may be nonverbal, such as picketing or engaging in a production slowdown. EEOC Manual, Vol. 2, Sec. 8-II B.2.

See, e.g., Matima v. Celli, 228 F.3d 68, 78-79 (2d Cir. 2000) ("The law protects employees . . . in the making of informal protests of discrimination, 'including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges'").

(b) Refusing To Participate in Discriminatory Activities

An employee who refuses to participate in an employer’s discriminatory activities also may be protected by the opposition clause. See, e.g., EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) (supervisor who refused to fire African-American manager because he felt the decision was racially motivated and then was subsequently fired himself was covered under the opposition clause of Title VII); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) (employee who refused employer’s request to collect derogatory information on another employee and who complained of race discrimination was protected under the opposition clause of Title VII); Oliver v. Gen. Nutrition Cir., No. 97 Civ. 6800, 1999 U.S. Dist. Lexis 9571 (S.D.N.Y. June 22, 1999) (store manager who rejected advice of employer to testify negatively against colleague’s...
job performance and was subsequently fired is protected by the opposition clause).

(c) Threatening to File a Charge of Discrimination

Employees who threaten to file a discrimination complaint with a government agency, a union, or any other entity that receives discrimination complaints would also be protected by the opposition clause, even if the complaint is not subsequently filed. See, e.g., Burns v. Republic Sav. Bank, 25 F. Supp. 2d 809 (N.D. Ohio 1998) (female plaintiff’s conversation with supervisor where plaintiff discussed her intent to see a lawyer was a protected activity under Title VII, since a reasonable person in the position of the supervisor would understand that plaintiff was threatening to file a sex discrimination suit); Knox v. Scope Hospitality Corp., 59 FEP Cas. (BNA) 455 (E.D. Va. 1992) (the plaintiff’s letter to the defendant in which the plaintiff threatened to file an EEOC charge was a protected activity).

iii Governing Standards of the Opposition Clause

(a) Complaint Must Put Employer on Notice

When complaining internally, the employee’s complaint must be sufficiently specific as to place the employer on notice that the employee was opposing unlawful discrimination. For example, a complaint of general unfair treatment is insufficient. See, e.g., Barber v. CSX Distrib. Servs., 68 F.3d 694 (3d Cir. 1995) (plaintiff’s letter to defendant’s human resources department that complained of unfair treatment and alleged that a less qualified individual received the job he wanted did not constitute ADEA opposition since letter did not explicitly or implicitly allege that age discrimination was reason for the defendant’s conduct); Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp., 136 F.3d 276 (2d Cir. 1998) (plaintiff secretary’s opposition to doing personal work for supervisor was not an objection to any alleged sexual discrimination or harassment, so it was not a protected activity); Lapsley v. Columbia Univ.-Coll. of Physicians & Surgeons, 999 F. Supp. 506 (S.D.N.Y. 1998) (plaintiff’s casual and vague remark to supervisor that suggested she felt discriminated against by her colleague receiving a promotion was not protected activity).

But see Reed v. A. W. Lawrence & Co., 95 F.3d 1170 (2d Cir. 1996) (plaintiff’s complaints to employer about co
worker’s vulgar comments on gender roles is a protected activity).

(b) Manner of Opposition Must Be Reasonable

The employee must choose a reasonable manner of opposing unlawful discrimination. Protest that is so disruptive as to unreasonably interfere with an employer’s legitimate business concerns is not protected. Acts of opposition that are not considered reasonable include illegal activities, conduct that breaches employer confidentiality, or conduct that substantially interferes with the employee’s job performance.

See, e.g., Matima v. Celli, 228 F.3d 68, 72 (2d Cir. 2000) (“Title VII ‘does not constitute a license for employees to engage in physical violence in order to protest discrimination’” (quoting Cruz v. Coach Stores, 202 F.3d 560, 566 (2d Cir. 2000)); courts must decide “whether [oppositional] conduct was so disruptive, excessive, or ‘generally inimical to [the] employer’s interests . . . as to be beyond the [statutory] protection.’”); Folkerson v. Circus Circus Enter., 107 F.3d 754 (9th Cir. 1997) (plaintiff who punched customer as a response to an alleged physical touching lost statutory protection as the response was not reasonable).

(c) Opposition Only Has To Be Based on a Reasonable and Good Faith Belief

Under most antiretaliation statutes, an employee’s opposition is protected so long as the employee had a good faith reasonable belief that the underlying conduct he/she is challenging is unlawful, even if the conduct does not, in fact, violate an anti-discrimination statute. Wimmer v. Suffolk County Police Dep’t, 176 F.3d 125 (2d Cir. 1999), cert. denied, 528 U.S. 964 (1999); Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F.2d 590 (2d Cir. 1988).

Most courts assess whether the plaintiff’s statements or conduct are both objectively reasonable and subjectively in good faith. See, e.g., Gregory v. Daly, 243 F.3d 687, 701 (2d Cir. 2001) (If “the employee has ‘a good faith, reasonable belief that the underlying challenged actions of the employer violated the law,’” then the employee’s
activities constitute oppositional activity) (citations omitted).

Some courts focus on whether the plaintiff’s conduct or statements are objectively reasonable. See, e.g., Byers v. Dallas Morning News, Inc., 209 F.3d 419, 428 (5th Cir. 2000) (“To satisfy the ‘opposition clause,’ [the employee] need not prove that [the employer’s] practices were actually unlawful, but only that he had ‘a reasonable belief that the employer was engaged in unlawful employment practices’ . . . a showing of subjective good faith alone is insufficient”) (citations omitted).

Other courts concentrate on the plaintiff’s subjective good faith. See, e.g., Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312-13 (6th Cir. 1989) (“A person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; [rather] he or she must only have a good[ - ]faith belief that the practice is unlawful”).

(d) Cases in which plaintiff’s actions satisfied the good faith/reasonableness requirement

See, e.g., Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998) (plaintiff’s opposition was based on a good faith belief of sex discrimination, where coworker allegedly said that the plaintiff had the “sleakest ass” in the office and allegedly touched coworker’s breasts with some papers, even though these allegations were insufficient to prove sex discrimination); Reed v. A.W. Lawrence & Co., 95 F.3d 1170 (2d Cir. 1996) (plaintiff could reasonably believe that coworker’s vulgar, gender-based comments, which were made in a single incident, constituted a hostile work environment that violated Title VII).

(e) Cases in which plaintiff’s actions did not satisfy the good faith/reasonableness requirement

See Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001). In Breeden, the plaintiff’s job as a human resources administrator included reviewing pre-employment evaluation reports. In one such report, an applicant stated that he told a female coworker that “making love to you is like making love to the Grand Canyon.” Id. at 269. Significantly, plaintiff, a female, admitted that she was not bothered by the comment at the time she read it. Her male supervisor later read aloud that
comment at a subsequent meeting, looked at the plaintiff, and said, “I don’t know what that means.” Id. A male subordinate then chimed in: “I’ll tell you later.” Id. The two men laughed. The plaintiff believed that this incident constituted sexual harassment and complained internally, but did not report the incident to the officer at the company who was designated to receive sexual harassment complaints. The U.S. Supreme Court held that it was not reasonable for the plaintiff to believe that the above “isolated incident” constituted a Title VII hostile work environment claim.

5 What is protected by the participation clause?

i Overview

(a) Generally, the antiretaliation provisions make it unlawful to discriminate against any individual because she or he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under the employment discrimination statutes. EEOC Manual, Vol. 2, Sec. 8-II C.1.

(b) There is a much narrower range of activities that can fall under the participation clause as compared to the opposition clause. Partly for this reason, courts carefully assess whether a specific conduct constitutes “opposition,” but generally give “participation” exceptionally broad coverage. Glover v. S.C. Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999), cert. denied, 528 U.S. 1146.

ii Examples of Participation

(a) Filing a Charge or Suit: Good Faith or Reasonableness Usually Not Required

An employee who files a discrimination charge against his or her employer is engaging in protected activity. See, e.g., Frank Briscoe, Inc. v. NLRB, 637 F.2d 946 (3d Cir. 1981) (several black employees who were laid off alleged that they were not recalled because they had filed EEOC charges; Third Circuit held employees had engaged in protected participation under both the NLRA and Title VII, and could pursue remedies under both statutes because neither is exclusive).

Unlike with the opposition clause, most courts hold that a plaintiff does not have to act reasonably or in good faith in
filing his or her discrimination claim to be protected under the participation clause. In *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969), a much cited case, the Fifth Circuit held that even a plaintiff who makes false statements in the EEOC charge is protected. In this case, a plaintiff employee made unsupported claims that the employer had either bribed or improperly influenced federal officials. The court held that the plaintiff’s filing of the charge was still a protected activity, despite the presence of such “malicious material.” See *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994) (citing *Pettway*, court held that plaintiff who filed suit against employer, alleging sexual harassment, established a *prima facie* case of retaliation after he was discharged as charges do not have to be valid or reasonable under the participation clause of Title VII); *Proulx v. Citibank*, N.A., 659 F. Supp. 972 (S.D.N.Y. 1987) (although plaintiff conceded for purposes of summary judgment that the sexual harassment claim he filed with the New York State Division of Human Rights was both false and malicious, the court, citing *Pettway*, found that plaintiff was protected from retaliatory discharge based on the filing). See also *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 168 (2d Cir. 2005) (noting the expansive scope of the participation clause and broad sweep of the phrase “in any manner”).

But see *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 7th Cir. 2004 (stating that baseless claims should not receive protection); *Amos v. Housing Auth.*, 927 F. Supp. 416 (N.D. Ala. 1996) (court held that an employer can discipline an employee who files a charge in bad faith; court explicitly rejected proposition that “a disgruntled current employee can, with impunity, even acting with malice, file an EEOC claim with a smirk, knowing that her employer is a helpless, squirming victim”); *Fiscus v. Triumph Group Operations*, 24 F. Supp. 2d 1229, 1241 (D. Kan. 1998) (plaintiffs can establish a retaliation cause of action, so long as they have a “reasonable good faith belief that the employer discriminated”) (dictum).

(b) Testimony

Any person who testifies in any manner at a Title VII hearing or proceeding is granted “exceptionally broad protection.” *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999). The testimony can be in support of another employee’s discrimination suit. See,
e.g., Evans v. City of Houston, 246 F.3d 344 (5th Cir. 2001).

Even if the individual testifies to allegations against the employer that are made in bad faith, not reasonable, or admits to conduct that justifies termination, the individual testifying will maintain protected status. See, e.g., Glover, 170 F.3d at 414 (plaintiff who testified in a deposition for another woman’s discrimination suit, and did not limit her testimony to facts relevant to the woman’s charge, but also accused her own successor at defendant employer of dishonesty, mismanagement, and discrimination, is protected under the participation clause; “[a] straightforward reading of [Title VII’s] unrestricted language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action”).

However, if the plaintiff repeats false claims outside of the privileged context, then the plaintiff may not be protected. See, e.g., Vasconcelos v. Meese, 907 F.2d 111 (9th Cir. 1990) (plaintiff who made false claims in an internal investigation was unprotected, but plaintiff would have been protected if she said those lies in a charge or lawsuit).

(c) Assisting or participating in an investigation, proceeding, or hearing

The participation clause also protects employees who assisted, or participated in any manner in an investigation, proceeding, or hearing. See, e.g., Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) (“[W]here an employer conducts its investigation in response to a notice of charge of discrimination, and is thus aware that the evidence gathered in that inquiry will be considered by the EEOC as part of its investigation, the employee’s participation is participation ‘in any manner’ in the EEOC investigation.”); Kubicko v. Ogden Logistics Servs., 181 F.3d 544 (4th Cir. 1999) (plaintiff who discussed subordinate’s sexual harassment complaint with employer’s human resources manager and cooperated in an investigation by the county Human Relations Commission was protected by the participation clause).

However, some courts have held that not all employee participation in internal investigations or discussions with individuals in the Title VII grievance process are protected
activity. See, e.g., *EEOC v. Total Sys. Serv.*, 221 F.3d 1171 (11th Cir. 2000) (participation in an employer’s in-house investigation not protected as internal investigation was conducted apart from a formal charge with the EEOC).

iii Close associates of employee also are protected

(a) The participation clause also protects individuals who are very closely associated with the employee who is exercising his or her statutory rights. See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (finding that supervisor stated a claim against employer where supervisor was retaliated against for coworker’s complaints); *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (plaintiff who alleged that he suffered retaliation because of his relative’s protected activity is covered by the participation clause); *Thomas v. Am. Horse Shows Ass’n*, 97-CV-3513, 1999 U.S. Dist. LEXIS 6625 (E.D.N.Y. Apr. 23, 1999) (finding that plaintiff’s third-party retaliation claim involving her sister, a close relative, was properly before the court); *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934 (N.D. Ga. 1994) (plaintiff alleged retaliation because of relative’s protected activity).

(b) However, some relationships may be too attenuated to a proceeding under Title VII to be protected under the participation clause. See, e.g., *Millstein v. Henske*, 79 FEP Cas. (BNA) 176 (D.C. 1999) (plaintiff with only a professional relationship with individual who filed discrimination claim was not covered by the participation clause).

6 Required Adverse Action. The Supreme Court recently held, in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), that Title VII’s antiretaliation provision does not require the alleged retaliatory act to directly impact a term or condition of employment, or constitute an ultimate employment decision. Rather, any materially adverse treatment by an employer, either on or off the job, which is reasonably perceived by the employee as being related to a previously made complaint, is prohibited by the antiretaliation provision. *Id.* The Court emphasized that “[c]ontext matters.” Courts must determine whether a reasonable employee or job applicant would have found the challenged employer actions “materially adverse,” meaning that the actions were “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.*
In Burlington, the Court unanimously found that there was sufficient evidence to support the jury finding in favor of the employee, who was reassigned from her job as forklift operator to track laborer, after she lodged a sexual harassment claim against the company. While her new position was the job she had originally applied for and previously held, and she retained the same pay and benefits, the Court concluded that the jury could reasonably find that the reassignment was materially adverse to a reasonable employee, because the track laborer duties were dirtier and more arduous. Additionally, White had been temporarily suspended without pay, in an unrelated incident. Although White had received backpay for the suspension period through a union grievance, the Court still found that the jury also could reasonably find that such a suspension would be a serious hardship to many reasonable employees, and could act as a deterrent to filing a discrimination complaint.

There must be a causal link between the employee’s protected conduct and the alleged adverse action. A causal connection requires a showing that retaliation was a motivating factor in the decision to take the adverse action. See Padilla v. Metro-North Commuter R.R., 92 F.3d 117, 122 (2d Cir. 1996), cert. denied, 520 U.S. 1274 (1997).

This can be established directly through evidence of retaliatory animus, or indirectly by showing that the protected activity was followed closely in time by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who were similarly situated. See Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

A close correlation in time between the protected act and the alleged retaliation “supports an inference of discrimination sufficient to establish a prima facie case.” Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). For example, in Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998), the employee’s discharge ten days after she filed a sexual harassment complaint with the New York State Division of Human Rights established a causal connection, sufficient to defeat summary judgment. Longer delays of two and a half months (Ponticelli v. Zurich Am. Ins. Group, 16 F. Supp. 2d 414 (S.D.N.Y. 1998)) and eight months (Mooney v. N.Y. Times Co., No. 98 Civ. 0694, 1999 WL 553740 (S.D.N.Y. July 29, 1999)) between the filing of a complaint and adverse action, without any other evidence of a causal link, have been held insufficient to establish causation.

An employer’s comments also may supply the causal link. In McKnight v. Dormitory Auth., 89 F.R.D. 225 (N.D.N.Y. 1999), an employee filed a claim of racial discrimination, and over a year later, she took a three-month leave of absence for a disability.
While she was on leave, the employer did not accept her medical documentation that she was unable to work, did not conduct an independent evaluation, and terminated her for abandoning her job. Evidence suggested that the individual who terminated her was “angry” and “disappointed” to learn of her claim. The court held that the employee established the necessary nexus between her complaints and her eventual termination to establish a prima facie case of retaliation and to create a genuine issue of material fact.

Once an employee has established a prima facie case, the employer can rebut the presumption of retaliation by presenting any legitimate, non-discriminatory reason for the employment act. Mooney, 1999 WL 553740, at *6. The employer’s burden is generally met if it simply “explains what he has done” or “produce[s] evidence of legitimate non-discriminatory reason.” Id. However, although the burden of production is “slight,” a defendant cannot discharge its burden by merely asserting that it had a legitimate, nondiscriminatory reason for acting, but not providing any supporting evidence.

In Sprott v. New York City Housing Authority, No. 94 Civ. 3818, 1999 U.S. Dist. LEXIS 19224, at *14 (S.D.N.Y. Dec. 15, 1999), defendant attempted to explain that an allegedly retaliatory refusal to review a negative performance evaluation was in accordance with a neutral “channeling” policy. Defendant’s explanation was inadequate, however, because despite its “repeated assertion” that the policy existed, it failed to present any other evidence of such a channeling policy.

In Mooney, 1999 WL 553740, at *6, defendant met its burden in rebutting plaintiff’s prima facie case by offering affidavits demonstrating that plaintiff was not selected for the position at issue because the employer was seeking the most qualified candidate. Even the plaintiff conceded that he was not as qualified as the individual who was hired.

Plaintiff must ultimately prove that employer’s proffered reason is a pretext for retaliation. The following cases are examples of where plaintiff succeeded in creating an issue of material fact on this issue:

Employer claimed that it fired the employee for leaving her post and physically attacking her supervisor without provocation. However, the supervisor was one of the people that the employee had accused of sexual harassment in her underlying protected allegations. Additionally, the strong temporal proximity and the plaintiff’s claims that the supervisor started the fight sufficed to create an issue of pretext. Sowemimo v. D.A.O.R. Sec., Inc., 43 F. Supp. 2d 477 (S.D.N.Y. 1999), aff’d, 242 F.3d 368 (2d Cir. 2001).
An employee complained of race and gender discrimination to the Human Resources Department on several occasions, and claimed retaliatory discharge when she was later terminated. The employer presented evidence that the employee had a record of poor performance and lateness. However, her supervisor’s statements “Your days at [employer] are numbered because I hear you have been bad-mouthing me to Human Resources,” and “It won’t be long now” prior to her termination were evidence that her termination was motivated by retaliatory intent, creating an inference of pretext. Narvarte v. Chase Manhattan Bank, No. 96 Civ. 8133, 2000 U.S. Dist. LEXIS 5836, at *7 (S.D.N.Y. May 4, 2000).

After the filing of a complaint with the EEOC, an employee claimed that his supervisor gave him a “written final warning” to sign, suspended him for not signing it, and overly scrutinized his work. Defendant argued that its actions resulted from the employee taking an unauthorized break and reacting loudly and angrily to the supervisor who approached him about it. Defendant further claimed that plaintiff had been disciplined throughout his employment history. However, plaintiff’s “detailed examples of possible retaliatory actions by the defendants” were enough to create an issue of pretext. Harding v. Mem’l Sloan-Kettering Cancer Ctr., No. 96 Civ. 7351, 1999 U.S. Dist. LEXIS 9739, at *13 (S.D.N.Y. June 24, 1999).

Whistle-blowers

The New York Whistleblower law covers private employers with ten or more employees (excluding independent contractors). The law prohibits any retaliatory action against an employee because the employee has:

(a) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy or practice of the employer that is in violation of a law, rule, or regulation. Before the protection of the Act will apply, the employee must bring the activity, policy, or practice to the attention of a supervisor of the employer and allow the employer a reasonable opportunity to correct the activity, policy or practice;

(b) Provided information to, or testified before, any appropriate governmental agency or person conducting an inquiry regarding the violation of a law, rule, or regulation by the employer, or;
(c) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation. N.Y. Lab. L. §§ 740, 741.

ii Section 740 applies only where the conduct giving rise to the employee’s whistle-blowing presents a “substantial and specific danger to the public health or safety.” N.Y. Lab. L. § 740. A plaintiff will fail to state a cause of action under New York Labor Law § 740 if plaintiff is unable to demonstrate that [Columbia] actually violated a law, rule or regulation. See Khan v. SUNY Health Sci. Ctr., 288 A.D.2d 350, 734 N.Y.S.2d 92 (2d Dep’t 2001) (finding that plaintiff had not alleged actual violation of law in his complaint or affidavit and uncorroborated and unsubstantiated opinions could not support cause of action); Betz v. Memorial Sloan-Kettering Cancer Ctr., No. 95 Civ. 1156, 1996 U.S. Dist. LEXIS 10568, at *22 (S.D.N.Y. July 24, 1996) (“Summary judgment dismissing claims under Section 740 is appropriate where the plaintiff cannot point to a law, rule or regulation violated by the defendant.”).

iii New York Labor Law § 741 provides a somewhat broader protection to a health care worker who “discloses or threatens to disclose” or refuses to perform any activity that they have a good faith belief “constitutes improper quality of patient care.” Under the law, employees must give their employers “reasonable opportunity” to resolve any problems before they receive statutory protection unless the threat is imminent and the employee believes that reporting it to a supervisor would not rectify the situation appropriately.

12 The Sarbanes-Oxley Whistle-blower Provision


(a) The Act itself states that it is unlawful for a company covered by the Act (registered under Section 12 of the
Securities Exchange Act of 1934 or that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 or "any officer, employee, contractor, subcontractor or agent of such company" to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee." 18 U.S.C. § 1514(A)(a).

"Lawful acts" include: providing information, or causing information to be provided or "otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believed constitutes a violation of [the Sarbanes-Oxley Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by: (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate discover or terminate misconduct." 18 U.S.C. § 1514(A)(a)(1).

"Lawful acts" also include instances in which employees "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge from the employer) relating to an alleged violation of [the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514(A)(a)(2).

The Administrative Review Board in *Klopfenstein* ruled that SOX whistle-blower protection applies when an employee discloses any conduct that the employee reasonably believed violated any SEC rule, not just fraud.

Remedies available for violations of the whistle-blower provision include "all relief necessary to make the employee whole," including:

(a) "reinstatement with the same seniority status that the employee would have had but for the discrimination;"

(b) amount of back pay with interest; and
iii The Occupational Safety and Health Administration ("OSHA") is responsible for investigating complaints pursuant to the Sarbanes-Oxley whistle-blower provision. See Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1372 (N.D. Ga. 2004) (stating that an employee who alleges that she has been discharged or discriminated in violation of 18 U.S.C. § 1514A(b) must first file a complaint with OSHA).

iv Enforcement

(a) Must file a complaint with the Secretary of Labor within 90 days of the alleged violation.

(b) Within 60 days of receiving the complaint and after the person named in the complaint has been afforded the opportunity to respond, the Secretary shall conduct an investigation and determine if there is reasonable cause to believe the complaint has merit, and notify, in writing the person alleged to have committed the violation of the findings.

(c) If a complaint is thought to have merit, the findings should be accompanied by a preliminary order of relief.

(d) Not later than 30 days after the notification of findings, either party may file objections and request a hearing on the record.

(e) If no hearing is requested, the preliminary order is deemed final and is not subject to judicial review. 49 U.S.C. § 42121(b)(A).

v While the employer can file objections to the preliminary order and has the right to a hearing before an administrative law judge on the claims of retaliation, the filing of objections will not stay a reinstatement remedy in the preliminary order. Id. (citing 49 U.S.C. § 42121(b)(2)(A)).

vi A complaint will be dismissed unless the complainant can make a prima facie case by demonstrating that the protected conduct was a "contributing factor" to the retaliation. See 18 U.S.C. § 1514A(b)(2)(C) (discussing burdens of proof and incorporating the burdens set forth in 49 U.S.C. § 42121(b)(2)(A) burdens). Even if...
a prima facie is shown, the employer may demonstrate, “by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” *id.*

E Terminations in Violation of Federal and State Law

1 Title VII of the Civil Rights Act of 1964

i Title VII prohibits discrimination in any aspect of employment — hiring, wages, working conditions, promotions, termination and the like — on the basis of race, color, sex, national origin, or religion. Accordingly, employers cannot base decisions concerning hiring, firing, evaluations, and compensation on an employee’s or applicant’s protected characteristics. 42 U.S.C.§ 2000e et seq.

ii Title VII requires an employee to file a charge with the EEOC within 180 days (or 300 in many states) of the alleged discriminatory act. See 42 U.S.C. §2000e-5(e)(1); *Butts v. City of N.Y. Dep’t of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993) (“[w]hen a plaintiff fails to file a timely charge with the EEOC, the claim is time-barred”). When an employee alleges a discrete act of discrimination or retaliation under Title VII, the allegations are limited to the conduct that occurred during the limitations period. When an employee alleges a hostile work environment claim, however, the allegations can extend beyond those that occurred within the limitations period if they are “sufficiently related” to the acts within the charge filing period. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

iii On May 29, 2007, the United States Supreme Court rejected as untimely a discriminatory pay claim where the alleged discriminatory decision occurred prior to Title VII’s limitations period, even though the effects of that decision continued during the limitations period. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). The Court ruled that the period for filing a charge with the EEOC begins when that decision happens rather than at the time of the issuance of each paycheck during the limitations period. The *Ledbetter* decision has been a tremendous source of controversy, and is currently threatened by the *Ledbetter Fair Pay Act of 2007*, which passed in the House of Representatives and awaits a vote in the Senate. If passed, the Act would overturn the Court’s decision and clarify that so long as workers file their charges within 180 days of a discriminatory paycheck, their charges would be considered timely.
Claims for discrimination in employment based on the characteristics listed above are analyzed according to the burden shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this test, to establish a *prima facie* case of disparate treatment, a plaintiff must show that: (1) he belongs to a protected class; (2) was qualified for the position he held; (3) that he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. *Feingold v. N.Y.*, 366 F.3d 138, 152 (2d Cir. 2004) (internal citations omitted). Once a *prima facie* case is established, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse action. *McDonnell Douglas Corp.*, 411 U.S. at 802.

Title VII’s Prohibition of Harassment

(a) Sexual harassment has been defined under the Equal Employment Opportunity Commission Guidelines as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature. See 29 C.F.R. §§ 1604.11(a) and (b). Courts have recognized claims based on protected characteristics other than sex.

(b) The Supreme Court has held that when a harassing supervisor with immediate (or successively higher) authority over an employee takes a “tangible employment action” (such as discharge, demotion, or undesirable reassignment) against such employee, the defending employer will be strictly liable for the supervisor’s action under Title VII of the Civil Rights Act of 1964. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

(c) Under the two Supreme Court decisions cited above, an employer may raise as an affirmative defense to liability or damages that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 745.

2 The Pregnancy Discrimination Act of 1978 (“PDA”): The PDA amended Title VII to define discrimination on the basis of sex as including a prohibition of discrimination because of or on the basis of pregnancy, childbirth or related medical conditions. Thus, an employer may not use the pregnancy, or potential pregnancy, of an employee as the basis of its


4 The Age Discrimination in Employment Act: The Age Discrimination in Employment Act (“ADEA”) makes it unlawful for an employer to discriminate against individuals age forty and over in any aspect of employment. Accordingly, employers cannot base adverse employment decisions concerning hiring, firing, promotions, evaluations, and compensation on the fact that an employee or applicant is age forty or over. 42 U.S.C. § 621 et seq. A plaintiff alleging discharge because of age does not need to show that his or her replacement was under forty, only that his or her replacement was younger. O'Conor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); see also Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 355 (3d Cir. 1999).

i Employers’ obligations under the ADEA parallel their obligations under Title VII. Accordingly, similar defenses available in Title VII cases, i.e., legitimate business justification and/or bona fide occupational qualifications, also apply to cases of age discrimination.

ii In a recent case, Meacham et al. v. Knolls Atomic Power Laboratory et al. (No. 06-1505), the United States Supreme Court held that the employer, asserting an affirmative defense in a disparate impact claim on the basis of a reasonable factor other than age under the ADEA, bears the burden of production and persuasion. The employer must demonstrate the reasonableness of the factors relied upon when selecting employees to be laid off.

iii Under the ADEA, mandatory retirement generally is unlawful. However, a limited exception permits compulsory retirement for bona fide executives or policymakers age 65 or over, if their
guaranteed annual pension benefits equal at least $44,000. 29 U.S.C. § 631(c)(1).

5 The Family and Medical Leave Act: In general, under the FMLA, an eligible employee is entitled to up to twelve weeks of unpaid leave in a 12-month period for the birth, adoption or foster care placement of a child, to care for a spouse or an immediate family member (child or parent) with a serious health condition, or when an employee is unable to work because of his or her own serious health condition. 29 U.S.C. § 2601 et seq.; 29 C.F.R. Part 825.

i Upon return from FMLA leave, an employee, with limited exceptions, must be restored to the same or an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

ii Employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, and cannot be counted against the employee under a “no fault” attendance policy. 29 C.F.R. § 825.220(c).

iii Employer may deny job restoration under limited circumstances:

(a) If employee would have been laid off for legitimate reasons during the leave period even if he/she had not taken leave.

(b) If a shift has been eliminated or overtime decreased.

(c) If employee was hired for a specific term or for a discrete project and term or project is over.

(d) If employee is a “key employee” and restoration will cause employer substantial and grievous economic injury.

iv It is unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise FMLA rights. 29 U.S.C. § 2615(a)(1).

6 The Americans with Disabilities Act and the Americans with Disabilities Act Amendments Act of 2008: The Americans with Disabilities Act (“ADA”) makes it illegal for an employer to discriminate against any qualified individual with a disability who can perform the essential functions of the desired position, with or without reasonable accommodation, based on that disability. See 42 U.S.C. § 12101.

i In 2008, the ADA was amended by the Americans with Disability Act Amendments of the Act of 2008 (“ADAAA”). The ADAAA
rejected a number of U.S. Supreme Court rulings that narrowed the definition of “disability” under the ADA. The amendments are effective as of January 2009.

ii Under the ADA, an individual with a “disability” is defined as one who:

(a) Has a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) Has a record of such impairment; or

(c) Is regarded as having such an impairment.

iii “Physical or Mental Impairment”: The ADAAA maintains the definitions of “physical impairment” and “mental impairment” provided by the ADA. They are defined as: “(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h)(1)(2).

iv “Major life activities”: The ADAAA’s new definition of “major life activities” provides a nonexclusive list of major life activities, including: caring for oneself, performing manual tasks, eating, standing, lifting, bending, reading, concentrating, thinking, communicating, walking, seeing, hearing, speaking, breathing, learning, and working.

(a) Under the ADAAA, a “major life activity” includes the operation of “major bodily functions.” “Major bodily functions” include the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(b) Congress expressly provided that, to be considered a disability, an impairment can be episodic and need only substantially limit one major life activity. Thus, the new legislation makes it easier for people with disabilities to be covered under the ADAAA.
v  "Substantial limitation" of a "major life activity": The ADAAA does not define the terms "substantial limitation" of a "major life activity." Instead the amendment instructs courts and agencies to look to the language in the "Findings and Purposes" section of the ADAAA. This section construes the terms "substantial limitation" broadly, which favors individual employees by providing coverage to the maximum extent permitted by the Act.

(a) The language of the ADAAA also provides that:

the determination of whether an impairment substantially limits a major life activity "shall be made without regard to the ameliorative effects of mitigating measures" (e.g. medication, medical supplies, equipment, and other auxiliary aids or services)

the ADAAA rejects the EEOC's current definition and directs the EEOC to revise its regulations to define the phrase consistent with the "Findings and Purposes" section of the amendment.

vi  "Record of an Impairment": An individual who has "a record of an impairment" is an "individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." This provision is included in the definition to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited under the ADA.

vii  "Regarded" as Disabled: Under the ADAAA, an individual who is "regarded" as disabled is someone who has been subjected to prohibited action based on an actual or perceived physical impairment.

(a) Under the new law, an individual does not have to demonstrate that an impairment is "substantially limiting" under the "regarded" prong.

(b) Individuals who are "regarded as" having impairments that are minor or transitory (e.g. actual or expected duration is six months or less) are not protected.

(c) Employers need not provide reasonable accommodation to those "regarded as" having an impairment.
Generally, however, employers who are notified of an employee’s disability have a duty to make reasonable accommodations to enable that person to perform the job, unless the accommodation would place an undue hardship on the employer.

The ADAAA amends Section 102 of the ADA and conforms it with the structure of Title VII and other civil rights laws. The ADAAA now requires an individual to demonstrate discrimination “on the basis of the disability” rather than discrimination against a qualified individual “with a disability because of the disability of such individual.” Thus, the emphasis and inquiry is placed on whether a qualified person has been discriminated against on the basis of the disability, and does not unduly focus on the preliminary question of whether a particular person is a “person with a disability.” Nevertheless, the burden of proof remains with the employee to demonstrate he or she is a qualified individual with a physical or mental impairment who can perform the essential functions of the job.

The following defenses are available to an employer charged with discrimination under the ADA:

i  The criteria that the disabled person cannot satisfy are job-related, consistent with a business necessity and cannot be accomplished by reasonable accommodation. For example, an employer may refuse to hire a blind person to drive a vehicle.

ii  The individual with the disability poses a significant risk to the health or safety of the other individuals in the workplace that cannot be eliminated by reasonable accommodation. For example, an employer is not required to hire someone with active, contagious tuberculosis. See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (upholding the validity of an EEOC regulation that authorizes employers to refuse to hire an individual because his performance on the job would endanger his own health, owing to a disability). See 29 C.F.R. § 1360.15(b)(2) (2002).

iii  An employer need not accommodate a person with a disability if it would impose an undue hardship on the employer.

The definition of “disability” under New York State law is broader than under federal law, and is defined as:

“(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.” N.Y. Exec. L. § 292(21).

New York City – The New York City Human Rights Law (“NYCHRL”) prohibits discrimination based on “actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status.” N.Y.C. Admin. Code § 8-107.

Like New York State Law, the definition of “disability” under New York City Law is broader than the federal definition,

(a) The term “disability” means any physical, medical, mental or psychological impairment, or a history or record of such impairment.

(b) The term “physical, medical, mental, or psychological impairment” means:

(1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or

(2) a mental or psychological impairment.

(c) In the case of alcoholism, drug addiction or other substance abuse, the term “disability” shall only apply to a person who: (1) is recovering or has recovered; and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. N.Y.C. Admin. Code § 8-102 (16).
The Local Civil Rights Restoration Act of 2005, among other things, amended the NYCHRL, clarifying that the law is to be liberally construed, and that federal and state civil rights laws may act as “a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.” N.Y.C. Admin. Code § 8-102 Note 2.

The Restoration Act includes “partnership status” as a basis for prohibited discrimination, referring to domestic partnerships between persons registered with the City of New York or nonregistered “persons who are members of a marriage that is not recognized by the State of New York, [a] domestic partnership, or [a] civil union, lawfully entered into in another jurisdiction.” N.Y.C. Admin. Code §§ 8-102(24), 3-240(a).

The Restoration Act also contains other substantive amendments, including provisions raising the maximum civil penalties for discriminatory practices; provisions adopting the “catalyst theory” for the award of attorney’s fees; and provisions expanding the definition of “retaliation,” such that it “need not result in an ultimate action with respect to employment, . . . or in a materially adverse change in the terms and conditions of employment” so long as it is “reasonably likely to deter a person from engaging in protected activity.” The Restoration Act also expands the class of potential litigants by allowing plaintiffs to request a dismissal of their administrative charge in order to pursue their claims in court, thus limiting an employer’s election of remedy defenses.

Drug Tests/Arrests and Convictions.

1 Drug and Alcohol-related Terminations – Maintaining a drug-free workplace could potentially lead to legal action arising out of the right to privacy, negligence, due process, fourth amendment protections, contract law and antidiscrimination laws. Employers must be careful as to how they conduct drug tests and under what circumstances.

2 Drug use and the ADA – While the ADA prohibits discrimination against successfully rehabilitated drug addicts, individuals currently using drugs are not entitled to protection under the ADA.

The ADA allows employers to make certain that the workplace is free from illegal drug use and ensure compliance with other regulations and federal laws regarding the use of drugs. Under Section 12114 of the ADA, an employee or applicant who currently uses illegal drugs is not considered a “qualified individual with a disability.” 42 U.S.C. § 12114(a). Additionally, the ADA permits employers to adopt policies or procedures, such as drug testing, in order to determine whether an individual is illegally using drugs. 42 U.S.C. § 12114(b). A test to determine if an employee is illegally using drugs does not constitute a medical
Repeated drug abuse. In *Longen v. Waterous Co.*, 347 F.3d 685 (8th Cir. 2003), the Eighth Circuit held that an agreement which permitted the termination of an employee with a history of substance abuse in the event of future drug or alcohol abuse did not violate the ADA. Plaintiff had recurring substance abuse problems and underwent treatment for chemical dependency multiple times. Plaintiff entered into an agreement with defendant stating that if he successfully completed a treatment program, he could return to work without discipline.

After plaintiff experienced a few relapses and defendant learned of plaintiff’s cocaine use, plaintiff was suspended for five days, but was permitted to return to work under an additional last chance agreement. The agreement provided that “[f]uture use of any mood altering chemicals, including alcohol or violation of working rules generally related to chemical dependency will result in immediate termination of employment.” *Id.* at 687. Thereafter, plaintiff was arrested for driving while intoxicated and terminated based on this agreement. Plaintiff argued that the last chance agreement violated the ADA, because it called for his termination for any use of mood altering chemicals, regardless of whether the use was at his workplace or nonworkplace. Plaintiff also argued that the agreement subjected him to different conditions of employment than his coworkers.

The court held that all return-to-work agreements place different conditions on the returning employee. Further, “[u]nder the ADA, there are no restrictions on what type of further constraints a party may place upon himself.” *Id.* at 689. Here, plaintiff placed additional restrictions on his own conduct when he signed the agreement, such as refraining from future use of mood altering chemicals. An employee who enters this type of agreement does so in exchange for the valid consideration of continued employment and therefore, it does not violate the ADA. *Id.*

Reemployment. In *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), the Supreme Court reversed the Ninth Circuit’s holding that an employer’s unwritten policy not to rehire employees who left the company for violating personal conduct rules contravenes the ADA, the Supreme Court held that the Ninth Circuit improperly applied a disparate impact analysis to a disparate treatment claim. Plaintiff was forced to resign after taking a drug
test, which came back positive for cocaine, because his behavior violated the employer’s workplace conduct rules.

Over two years later, plaintiff applied to be rehired by his former employer. An employee from the company’s labor department rejected plaintiff’s application in accordance with company policy, after she reviewed plaintiff’s application and saw that he had previously been terminated for workplace misconduct. The labor department employee testified that she did not know that plaintiff was a former drug addict when she made the employment decision. Plaintiff subsequently filed an EEOC charge claiming that he had been discriminated against in violation of the ADA. Because plaintiff failed to raise a timely disparate impact claim, he proceeded only under a disparate treatment theory.

Applying the familiar *McDonnell Douglas* burden-shifting approach, the Court of Appeals found that although the employer’s neutral policy against rehiring employees previously terminated for violating workplace conduct rules appeared “lawful on its face,” it “held the policy to be unlawful ‘as applied to former drug addicts whose only work-related offense was testing positive because of their addiction.’” *Id.* at 51. (Citations omitted.) The Supreme Court reversed, determining that the Ninth Circuit had improperly conflated a disparate-impact analysis with its disparate treatment analysis. The Court instructed that the employer’s proffer of its neutral no-rehire policy satisfied its requirement under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent.

According to the Supreme Court, the only remaining question for the Court of Appeals to address was whether “[there was] sufficient evidence from which a jury could conclude that [the employer] did make its employment decision based on [plaintiff’s] status as disabled. . . .” *Id.* at 53. The Court vacated the Ninth Circuit’s judgment “[t]o the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact. . . .” *Id.* at 55. Importantly, the Court noted that the employer’s “no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules.” *Id.* at 54-55.

On remand, the Ninth Circuit held that “[plaintiff] has presented sufficient evidence from which a reasonable jury could determine that [the employer] refused to re-hire him because of his past record of addiction and not because of a company rule barring re-hire of previously terminated
employees." *Hernandez v. Hughes Missile Sys. Co.,* 362 F.3d 564, 570 (9th Cir. 2004). Notably, the court conceded that in its initial opinion, it had proceeded on the assumption that there was a policy in place that was uniformly applied, and the court never examined whether there was an issue of fact as to the existence of such a policy and its application. On remand, the court concluded that there was an issue of fact as to the existence of the policy. Indeed, the first time the employer mentioned its purported “unwritten policy” of refusing to re-hire individuals previously fired for misconduct occurred after EEOC conciliation efforts had terminated and plaintiff brought the instant action against the company.

3 Alcoholism and the ADA – Unlike current users of illegal drugs, current users of alcohol are not excluded from coverage under the ADA if the employee can show that the alcoholism substantially limits one or more major life activities. See *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110 (1st Cir. 2004) (finding that employee could not make out a claim under the ADA because he could not demonstrate that his alcoholism substantially limited his ability to perform work – a major life activity). An employer, however, “may hold an employee... who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to... alcoholism of such employee.” 42 U.S.C. § 12114. Moreover, employers can prohibit the use of alcohol in the workplace and require that employees not be under the influence of alcohol at work. *Id.*

4 If an employee is terminated because of his or her testing positive for drugs, the employer may run afoul of New York Executive Law. Employers may not discriminate an employee who tests positive unless such use actually impairs the employee’s ability to do the job. See *In re Claim of Atkinson*, 185 A.D.2d 415, 416, 586 N.Y.S.2d 319, 321 (3d Dep’t 1992) (finding that the employer was not liable for employment discrimination where it terminated plaintiff’s employment “based on the adverse effect on [her] integrity brought about by even casual cocaine use”). The *Atkinson* opinion stated that there had been no showing that the plaintiff had been discharged because of a disability due to drug dependency. The employer must be ready to demonstrate that the drug test results are accurate. See *Doe v. Roe, Inc.*, 160 A.D.2d 255, 256, 553 N.Y.S.2d 364, 365 (1st Dep’t 1990) (“[w]hile appellant may be legitimately entitled to discriminate against users of controlled narcotic substances, when challenged it must come forward with evidence establishing [accuracy of the test]”).
Arrests and Convictions

New York Executive Law § 296 (16) states that it is an unlawful discriminatory practice “to make any inquiry about... or act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual.”

(a) An employer may be exposed to liability if it asks employees to disclose arrests or obtain arrest records from other sources. If, however, the employer learns about a criminal proceeding through otherwise lawful means, that employer may make an inquiry as to the resolution of the proceeding. See N.Y. State Dep’t of Mental Hygiene v. N.Y. State Div. of Human Rights, 103 A.D.2d 546, 481 N.Y.S.2d 371 (2d Dep’t 1984) (“the Legislature never intended employers to be foreclosed from requiring verification of the disposition of criminal charges once the existence of such charges has been legally and properly discovered”), aff’d, 66 N.Y.2d 752, 497 N.Y.S.2d 361 (1985).

(b) An employer who discovers that there are pending charges against an employee may terminate that employee. Giles v. Lockport Sav. Bank, 142 A.D.2d 943, 530 N.Y.S.2d 367 (4th Dep’t 1988) (finding that employer had not discriminated against employee when it terminated her before criminal action pending against her was dismissed) (citing Salanger v. U.S. Air, 611 F. Supp. 427, 432 (N.D.N.Y. 1985)). The terminated employee, however, can ask to be reinstated if the charges are resolved in his or her favor. The employer can only refuse to reinstate if the decision is based on reasons other than the previously pending criminal charges. See Gonzalez v. Dynair Serv. Co., 728 F. Supp. 100, 102 (E.D.N.Y 1990) (stating that plaintiff could prove employer was liable if he could show that he was not reinstated because of arrest and there were “no bona fide business reasons for the employer’s conduct”).

Employers may not use conviction records to discriminate in employment unless the conviction is reasonably related to the job or continued employment would pose an unreasonable risk to individuals or the general public. See N.Y. Correct. L. §§ 752, 753.
(a) The following factors must be considered in determining whether the conviction is reasonably related to the job or that employment would pose an unreasonable risk:

The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

The specific duties and responsibilities necessarily related to the license or employment sought.

The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

The time which has elapsed since the occurrence of the criminal offense or offenses.

The age of the person at the time of occurrence of the criminal offense or offenses.

The seriousness of the offense or offenses.

Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public. N.Y. Correct. L. §§ 753(1)(a)-(h).