

VISION + ACTION

Inside The Institute

The Employee Rights Advocacy
INSTITUTE
For Law & Policy

Welcome to the Summer 2010 edition of VISION + ACTION: Inside The Institute, published by the National Employment Lawyers Association (NELA) and The Employee Rights Advocacy Institute For Law & Policy (The Institute). Established in 2008, The Institute is NELA's public interest organization and shares NELA's mission of advancing equality and justice in the American workplace. The Institute furthers employee rights through innovative legal strategies, policy development, grassroots advocacy, and public education.

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The Institute Supports Workers and Employee Rights Advocates

Every worker whose rights have been violated on the job deserves high quality legal representation. For more than 20 years, NELA's Annual Convention has provided excellent, one-of-a-kind training geared specifically for attorneys who represent employees. Through the **Employee Rights Advocacy Scholarship Program**, The Institute makes the Annual Convention and NELA's other continuing legal education programs accessible to employee rights advocates who could not otherwise participate in these highly acclaimed activities. Recognizing the economic challenges faced by lawyers representing employees, the Scholarship Program considers applications from private practitioners, in addition to public interest and legal services attorneys.



The Scholarship Program awarded \$5,200 in direct financial assistance to eight participants for NELA's 2010 Convention, **NELA at 25: Don't Stop Believing**, held in Washington, DC in June. Because The Institute received many more scholarship requests than it could meet, NELA offered discounted registration to 21 additional scholarship applicants, and subsidized the registration fees for 12 of them. Together, The Institute and NELA

granted \$6,800 in financial support.

Here's what some of our scholarship recipients said about the Annual Convention:

- "The Convention was inspiring and very informative. Thank you so much for making it possible for me to attend."
- "I had a wonderful time at the NELA Convention. I met a lot of very skillful and generous people and I look forward to joining NELA!"
- "I am very thankful for having the opportunity to attend the Convention. They are always full of updated information and provide immeasurable help to my practice. I will be there next year after purchasing my own ticket. Thanks so much!"

Support The Institute and Honor
NELA Founder Paul H. Tobias



Paul H. Tobias meets Matthew C. Koski,
The Institute's first
Paul H. Tobias Attorney Fellow,
at NELA's 2010 Annual Convention.

For more than fifty years, Paul H. Tobias, NELA's visionary Founder, has inspired countless employee rights advocates and made tremendous contributions to the field of plaintiffs' employment law. It was in his honor that The Institute established one of our core programs, the Paul H. Tobias Attorney Fellowship Program. The Fellowship offers a new lawyer committed to employee rights the opportunity to work on cutting-edge projects at The Institute for two years, enhancing the organization's capacity to carry out our important activities.

Earlier this year, Matthew C. Koski, joined The Institute's staff as the first Paul H. Tobias Attorney Fellow. Matt's efforts on initiatives like the National Litigation Strategy Project is helping us to level the playing field for employees whose rights have been violated while transforming the American workplace.

To sustain these important efforts, we invite you to consider a tax-deductible gift to the Paul H. Tobias Attorney Fellowship Program. It is a wonderful opportunity to honor Paul, while at the same time investing in the next generation of employee rights lawyers and advancing equality and justice in the American workplace. To make your gift, [click here](#) or contact Leah A. Hofkin, our Director of Development (E-mail: lhofkin@employeeightsadvocacy.org; Tel: 415-296-7629, ext. 221).

For More Information, Contact Us:

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- The Denise Abrams and David Harrington Fund
- BNA Books
- Kazan, McClain, Abrams Fernandez, Lyons, Greenwood, Harley & Oberman Foundation, Inc.

The Institute's 2009 Annual Report: Advancing Equality & Justice in the American Workplace



We are very pleased to present The Institute's 2009 Annual Report which highlights the important strides we have taken toward achieving our mission of advancing equality and justice in the American workplace. In 2008, The Institute's inaugural year, we laid the groundwork for The Institute to emerge as a strong and vibrant organization. Last year, we focused on developing The Institute's programs to further workers' rights. We know that none of our work would be possible without the tremendous support we have received from a growing

network of individuals, law firms, foundations, and coalition partners that share our unwavering commitment to employee rights. The Board and staff of The Institute extend our sincere gratitude to our volunteers, donors, and other supporters for helping to guarantee that our nation's promise of equal justice under law is a reality for all workers.

[Download The Institute's 2009 Annual Report](#)

Nichols Kaster, LLP Designates *Cy Pres* Award to The Institute

The Institute recently received a generous *cy pres* distribution from NELA member **Michele R. Fisher** (MN) and her firm, **Nichols Kaster, LLP** as a result of class settlement in *Casas v. Conseco Finance Corp.* Nichols Kaster had initiated this action in 2000 on behalf of loan officers denied overtime compensation in violation of the Fair Labor Standards Act. The case was settled several years ago on behalf of more than 2,200 plaintiffs for \$21 million.



NELA and The Institute are tremendously grateful to Michele and Nichols Kaster for their significant contributions to and support of The Institute's work. The firm designated The Institute for a \$75,000 *cy pres* award in 2008, enabling The Institute to hit the ground running as a brand new organization.

Cy pres awards have been and will continue to be instrumental in The Institute's ability to achieve its bold agenda. By designating The Institute as a *cy pres* award recipient in your next class or collection action settlement, you too can help ensure success of The Institute's efforts to transform the American workplace.

The Institute provides free counsel on securing and structuring *cy pres* awards upon request. For more information, please contact Leah Hofkin, Director of Development, at Tel: 415.296.2629; E-mail: lhofkin@employeeerightsadvocacy.org.

The Institute Works To Keep The Courthouse Doors Open

By **Rebecca M. Hamburg**, Director of Programs and **Matthew C. Koski**, Paul H. Tobias Attorney Fellow

Working hand in hand, The Institute and NELA seek to create a future in which individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to trial by jury. The Institute's National Litigation Strategy Project is central to our efforts to ensure that workers have access to the civil justice system to redress violations of their rights. Our initiatives originally focused on ending summary judgment abuse by defendants and unwarranted dismissals by judges, but have since been expanded based on recent Supreme Court decisions.

In [Bell Atlantic v. Twombly](#) and [Ashcroft v. Iqbal](#), the U.S. Supreme Court has made it harder for employees to access the civil justice system to vindicate their rights. The Institute now aims to limit the reach of these rulings.

In these cases, the Court replaced five decades of notice pleading jurisprudence with a new framework that dramatically alters the landscape for pleading employment discrimination cases in federal courts. Now, in order to survive a motion to dismiss, a plaintiff must "plead factual content that allows the trial court to draw the reasonable inference that the defendant is liable for the conduct alleged." This requires judges at the outset of civil cases to separate facts from "legal conclusions" and to utilize "judicial experience and common sense" in determining whether the allegations contained in a complaint are "plausible." The Court's new plausibility standard thereby invites subjective judicial decision-making and is closing the courthouse doors to plaintiffs.

By adopting heightened fact requirements for pleadings, motions to dismiss now bear a striking resemblance to motions for summary judgment. This development is especially disconcerting for plaintiffs in employment discrimination cases, who are well aware of the uniquely destructive impact that the expansion of summary judgment has had in preventing victims of discrimination from having their cases decided by a jury.

The Institute is taking a number of steps in response to preserve aggrieved workers' access to the courts. To restore the notice pleading standard affirmed in the 2002 Supreme Court decision of *Swierkiewicz v. Sorema, Inc.*, Institute Director of Programs Rebecca M. Hamburg and Paul H. Tobias Attorney Fellow Matthew C. Koski are working with a coalition of groups, including NELA, on federal legislation to overturn *Twombly* and *Iqbal*.



In addition, the [Federal Judicial Center \(FJC\)](#) conducted a survey of NELA members in late 2009. Based on the results of the survey, Rebecca and Matt authored a [report](#) that included a discussion of pleading practice in the wake of *Twombly* and *Iqbal*. The report, which was presented at the Civil Rules Advisory Committee May 2010 Civil Litigation Conference, concluded that "by limiting the ability of private litigants to access the courts, heightened pleading standards pose a substantial risk of closing the courthouse doors to meritorious claims. This will have harmful effects, not only on the litigants themselves, but also on our broader system of justice."

Recent [data](#) compiled by the FJC confirms that motions to dismiss under *Twombly* and *Iqbal* will have a detrimental impact on employment discrimination claims. Since discrimination claims often require the plaintiff to prove discriminatory motive using evidence that resides solely in the hands of the defendant-employer, the new pleading rules leave plaintiffs facing the "Catch-22" paradox of needing discovery in order to plead the facts now required to get to discovery.

The Institute and NELA continue to work collaboratively with our coalition partners to find a solution that reopens the courthouse doors to litigants. We will keep you updated on the progress of these efforts and encourage you to contact us at info@employeeightsadvocacy.org if you would like more information about our work.