

VISION + ACTION

Inside The Institute

The Employee Rights Advocacy[®]
INSTITUTE
For Law & Policy

Welcome to the Fall 2011 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.

In This Issue:

- Save The Date For The Institute's Symposium: Trial By Jury Or Trial By Motion? Summary Judgment, *Iqbal*, And Employment Discrimination
- Technical And Strategic Assistance Available To Address *Wal-Mart v. Dukes* Issues
- The Institute Bids A Fond Farewell To Matt Koski
- The Employee Rights Advocacy Scholarship Program Ensures Low Wage Workers Have Access To High Quality Legal Representation
- The Institute Receives Sixth *Cy Pres* Award To Advance Employee Rights

Save The Date For The Institute's Symposium: Trial By Jury Or Trial By Motion? Summary Judgment, *Iqbal*, And Employment Discrimination

The Institute is pleased to present, along with New York Law School Law Review (NYLS), **Trial By Jury Or Trial By Motion? Summary Judgment, *Iqbal*, And Employment Discrimination**, a symposium

scheduled to take place at NYLS on April 23, 2012. Federal judges, practitioners, and legal scholars will examine the high failure rates of plaintiffs on pre- and post-trial motions in employment discrimination cases. The increasing prevalence of pre- and post-trial dispositive motions in litigation has had a demonstrably unique effect in cases alleging violations of employment discrimination laws. A substantial and growing body of evidence, both

empirical and anecdotal, shows that cases alleging employment discrimination are disproportionately susceptible to dismissal before trial as well as to unfavorable JNOV motions after trial.

Encouraging this movement towards pre-trial adjudication of employment discrimination cases are the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, through which the Supreme Court appeared to raise the quantum of facts that a plaintiff must plead to avoid successfully a motion to dismiss. As summary judgment is a primary mechanism for evaluating a case, these rulings raise questions as to whether the Court has blurred the line between motions to dismiss and motions for summary judgment. The program will explore potential strategies to reverse this growing trend.



Join Us In Making Our Vision Of Equality And Justice A Reality: Support The Institute's 2011 Vision + Action Campaign

The Institute has a bold vision for the future, one in which workers are paid at least a living wage in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employers fulfill their promises to provide retirement, health, and other benefits; and workers' safety and livelihood are not compromised for the sake of corporate profit and interests. Everything we do is directed to making America's promise of equal justice under law a reality for all workers. The Institute's current programs and activities level the playing field for employees, ensure access to the courts, and strengthen workplace protections.

Our 2011 Vision + Action Campaign will provide us with resources to ensure that individuals have effective legal counsel to enforce their rights to a fair and just workplace, adequate remedies, and a right to trial by jury. By making a tax-deductible charitable contribution to The Institute, you will be taking a powerful stand for equality and justice in the American workplace.

Contributions of any amount are welcome and will make a difference to our work toward workplace equality and justice. If you make a pledge or gift of \$1,000 or more, you will be recognized as part of The Institute's 2011-2012 Visionary Circle. We extend our deep gratitude to the current members of the Visionary Circle.

Eileen M. Bissen
Terisa E. Chaw & James A. Hendriksen
Wade B. Cowan
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Bruce A. Fredrickson &
Kristin L. Fredrickson
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The Texas FLSA Posse
Paul H. Tobias

We also gratefully acknowledge these donors to the Vision + Action Campaign:

Colorado PELA
Brian East

The Honorable Denny Chin of the U.S. Court of Appeals for the Second Circuit is scheduled to deliver the keynote address during the symposium. The full program, speaker information, and on-line registration is available at www.nyslawreview.com/trialbymotion.

The fee to attend is \$25 and 9.5 transitional CLE credits in Professional Practice will be available for \$50. (No charge for New York Law School students, faculty, staff, and alumni.) Questions may be directed to law_review@nyls.edu or (212) 431-2109.

Technical And Strategic Assistance Available To Address *Wal-Mart v. Dukes* Issues

As reported in the last issue of VISION + ACTION: Inside The Institute, The Institute and NELA have formed a Wal-Mart Task Force to assist employee rights attorneys and their clients in responding to the U.S. Supreme Court's decision in *Wal-Mart v. Dukes*. The Task Force also is engaged in advocacy initiatives to support legislative and/or regulatory fixes contemplated by Congress and other federal entities.



We have been developing and collecting materials that will help NELA members and other employee rights advocates with post-*Dukes* issues. Toward that end, The Institute is offering technical and strategic assistance in pending cases involving the *Dukes* case. If you face a *Dukes*-related motion and would like assistance in identifying proposed responses, please send an e-mail with the subject line "*Wal-Mart v. Dukes Motion*" to The Institute's Paul H. Tobias Attorney Fellow Matt Koski at pht_fellow@employeeightsadvocacy.org.

In addition, we are continuing to collect and monitor decisions after the *Dukes* case. Please send us information you think we should know about, including successful briefs in response to *Dukes* challenges and published or unpublished decisions interpreting *Dukes* or rejecting *Dukes*-related arguments. Such materials may be e-mailed to Matt Koski at pht_fellow@employeeightsadvocacy.org.

The Institute Bids A Fond Farewell To Matt Koski

In 2009, The Institute launched The Paul H. Tobias Attorney Fellowship Program to cultivate the next generation of employee rights advocates. The Fellowship is named in honor of Paul H. Tobias, the Founder and first Executive Director of NELA, who has inspired countless employee rights advocates through his pioneering and tireless contributions to the field of plaintiffs' employment law. The "PHT Fellowship" offers a new lawyer who embodies Paul's spirit the opportunity to work on cutting-edge initiatives at The Institute.



The Institute's Director of Development Leah A. Hofkin and Executive Director Terisa E. Chaw with PHT Attorney Fellow Matthew C. Koski

It seems like almost yesterday that Matthew C. Koski was appointed to be The Institute's first PHT Attorney Fellow. Matt joined The Institute in January 2010, and will complete his two-year Fellowship in January 2012. Some of you have had the opportunity to work with and to get to know Matt over the past 22 months, but many more of you have benefitted from his work, including his articles on

Judy Mansfield & Vince Treacy
Jonathan C. Puth
Dan Siegel
Henry L. Strong

To make a charitable donation, [click here](#) or contact Leah A. Hofkin, our Director of Development (lhofkin@employeeightsadvocacy.org; (415) 296-7629, ext. 221).

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[Securing The Right To A Jury Trial: Attacking "Stray Remarks" At Summary Judgment and Preserving The Right To A Jury Trial By Preventing Adverse Credibility Inferences At Summary Judgment.](#)

Matt has enabled The Institute to implement our core substantive programmatic initiative, the National Litigation Strategy Project. The goal of the Project is to ensure that individuals whose workplace rights are violated have their day in court by reforming summary judgment abuse. In this regard, Matt's portfolio includes:

- Developing a summary judgment survey that was administered to NELA members in April 2010;
- Organizing a two-part webinar in November 2010, co-hosted with NELA, on defeating summary judgment in employment litigation; and
- Planning a symposium titled, "Trial By Jury Or Trial By Motion? Summary Judgment, *Iqbal*, And Employment Discrimination," which The Institute will be co-sponsoring with New York Law School on April 23, 2012.

We want to take this opportunity to acknowledge Matt's invaluable contributions to The Institute and to the cause of workers' rights. Although Matt is leaving us as our PHT Fellow, he will always be a member of The Institute/NELA family. We bid him a fond farewell and wish him all the best as he continues to advance equality and justice in the American workplace.

Click here to view The Institute's video, "[Charting The Future Of Employee Rights Advocacy With The Paul H. Tobias Fellowship.](#)"

The Employee Rights Advocacy Scholarship Program Ensures Low Wage Workers Have Access To High Quality Legal Representation

NELA and The Institute are proud to announce the award of \$10,765 in scholarships to enable 15 employee rights advocates from across the country to attend NELA's 2011 Fall Seminar, *Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions Under The FLSA*, on October 21 – 22, 2011 at the Omni Shoreham Hotel in Washington DC. Thirteen scholarships were awarded to legal services/public interest attorneys, and two were provided to attorneys in solo private practice.

The scholarships were awarded through The Employee Rights Advocacy Scholarship Program, a project of The Institute, which ensures that NELA's nationally renowned continuing legal education programs are accessible to those who would otherwise not be able to attend without financial assistance. The Scholarship Program reflects our commitment to provide employee rights advocates with the continuing legal education they need to support workers in their fight for equality and justice in the workplace.

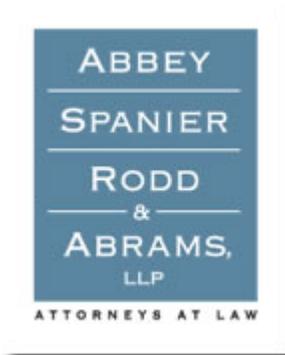


NELA and The Institute gratefully acknowledge BNA Books, the Kazan, McClain, Abrams, Fernandez, Lyons, Greenwood, Harley & Oberman Foundation, Inc., as well as individual NELA members, including the "Texas FLSA Posse," for their generous support of The Employee Rights Advocacy Scholarship Program. Funding for the Scholarship Program is also made possible by a *cy pres* designation to The Institute by Schneider Wallace Cottrell Brayton Konecky, LLP.

If you would like to support The Employee Rights Advocacy Scholarship Program and become part of the fight for employee rights by equipping advocates with the tools they need to represent their clients, please contact Leah A. Hofkin, Director of Development, at lhofkin@employeeightsadvocacy.org or (415) 296-7629 or visit The Institute's website at www.employeeightsadvocacy.org

The Institute Receives Sixth *Cy Pres* Award To Advance Employee Rights

The Institute is delighted to announce that it has received a generous *cy pres* award of \$22,343.32 from a class action recently settled by NELA member Nancy Kaboolian (New York, NY) of Abby Spanier Rodd & Abrams, LLP. This award will help sustain and grow The Institute's programs advancing equality and justice in the American workplace, including the National Litigation Strategy Project, which targets summary judgment abuse, and a public education campaign to support the elimination of forced arbitration of employment claims.



Nancy and her firm join the growing list of distinguished NELA members and their law firms who have designated *cy pres* awards to The Institute. This is the sixth *cy pres* award The Institute has received just this year. *Cy pres* awards have been and will continue to be crucial to The Institute's ability to achieve its mission. The Institute was founded in 2008 after receiving a number of significant *cy pres* awards, and we are extremely grateful to have been the recipient of nearly \$670,000 in *cy pres* funds over the last three years. If you would like more information about designating The Institute as a *cy pres* recipient in an upcoming class or collective action, please contact Leah Hofkin, The Institute's Director of Development at (415) 296-7629, or lhofkin@employeeightsadvocacy.org.