

EQUALITY | JUSTICE | UNITY

2011 ANNUAL REPORT



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The National Employment Lawyers Association advances employee rights and serves lawyers who advocate for equality and justice in the American workplace.

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It is an honor to present the 2011 Annual Report of the National Employment Lawyers Association (NELA). We are proud to share with you the collective accomplishments of the NELA family—more than 3,000 employee rights advocates from across the United States. Your fierce commitment to our common vision propels us forward even in a year like 2011, which saw unrelenting attacks on workers' rights by corporations, legislatures, and the courts. With the generous support and active involvement of our individual members and NELA law firms, NELA Affiliates, foundations, coalition partners, and other allies, no challenge we face is insurmountable.

The theme of this year's Annual Report is "Equality, Justice & Unity." These words represent what always has been and what will remain at the heart of NELA. Our mission to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace drives everything we do—including providing exceptional continuing legal education, technical assistance, resources, and support to employee rights advocates, as well as carrying out a full agenda of advocacy initiatives such as our Legislative & Public Policy, Judicial Nominations, and *Amicus* Programs. Guiding NELA from the very beginning was the understanding that we all stand together, united as "the largest plaintiffs' employment law firm on the planet."

The entire NELA Executive Board and staff joins us in extending our deepest gratitude for all that you do to protect and promote employee rights. We look forward to our ongoing partnership to bring equality and justice to the American workplace.


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Equality, Justice & Unity: NELA 2011

In opening NELA's 2011 Annual Convention, "Charting The Future Of Employee Rights Advocacy," in New Orleans in June, NELA President Patricia A. Barasch reminded the 500 employee rights advocates gathered there that we draw our strength from coming together in the face of adversity. There is no doubt that 2011 was a year of significant challenges. We witnessed outrageous attacks on the rights of workers to organize and collectively bargain crop up in states across the country, a U.S. Supreme Court that seemed intent on erecting barriers to workers' access to justice, a Congress so deeply divided on partisan grounds that it made any progress on legislation nearly impossible, and continued mistreatment of employees in the name of economic necessity.

Never to be deterred, however, thanks to the passion, dedication, courage, perseverance, and generosity of the NELA family, NELA is stronger and more capable than ever as we work in unity to advance equality and justice in the American workplace. Since its founding in 1985, NELA, with its 68 circuit, state, and local Affiliates, has grown to a membership of more than 3,000 employee rights advocates. In 2011, we welcomed 371 new members to NELA, 93 of them through our annual Membership Phone-A-Thon, *Connect And Inform*, which took place in May. They join a vibrant community of employee rights advocates who not only are on the frontlines for workers every day but also contribute thousands of volunteer hours each year so that NELA remains a strong and powerful voice for employee rights in our nation's capital and courtrooms.

Even before NELA opened its Washington DC Office in 2006, NELA was at the forefront of efforts to advance equality and justice in the American workplace through federal legislation and public policy. With Congress earning an annual average approval rating of 17% in 2011, it was not a good year for key civil rights or employment legislation. Nevertheless, thanks to NELA's efforts, two of our major legislative priorities, the Arbitration Fairness Act (AFA) and the Civil Rights Tax Relief Act (CRTRA), were reintroduced. Both bills were the focus of NELA's 2011 "Working For Change: Lobby Day." More than 50 participants from all over the country joined NELA in Washington, DC on October 20 to lobby their Senators and Representatives to support these important pieces of pro-employee legislation. Many of those unable to attend Lobby Day in person took part in "Virtual Lobby Day" by contacting their Congress members to advocate for passage of the AFA and CRTRA.

With partisanship virtually deadlocking Congress, NELA's Legislative & Public Policy Program focused a good deal of attention on improving worker protections through administrative advocacy. By submitting comments on a variety of workplace issues to federal agencies such as the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Merit Systems Protection Board, in addition to participating in meetings with representatives from the DOL's Office of Federal Contract Compliance Programs and the EEOC throughout the year, NELA made sure that the voices of employees were being heard by federal officials responsible for enforcing our nation's employment laws.

Judicial vacancies in the federal courts mounted in 2011, another consequence of partisan gridlock in Congress as Senate confirmations of President Barack Obama's judicial nominees were stalled throughout the year. Never daunted, NELA pressed forward with our work advocating for independent and fair-minded federal judges who are committed to equal justice under law for all Americans, and

who do not place the interests of employers over the rights of employees. NELA's Judicial Nominations Committee (JNC) continued to assess candidates nominated for federal judgeships, as well as individuals interested in becoming candidates for such vacancies.

In 2011, three NELA-endorsed candidates took their seats on the federal bench as district court judges. Confirmed by the Senate in December 2010 following a protracted confirmation process, former NELA member William J. Martínez was sworn in as a district judge for the U.S. District Court for the District of Colorado in February. In May, the Senate confirmed Kevin H. Sharp, also a former NELA member, for a seat on the U.S. District Court for the Middle District of Tennessee and U.S. Magistrate Judge Edward M. Chen for the Northern District of California. NELA also celebrated the elevation of U.S. District Judge Bernice B. Donald (W.D. Tenn.) to the U.S. Court of Appeals for the Sixth Circuit. A frequent speaker at NELA continuing legal education programs, Judge Donald is the first African-American woman to serve on that court.

With NELA's active involvement, in November 2011 the U.S. Judicial Conference's Advisory Committee on Civil Rules (Advisory Committee) adopted the *Initial Discovery Protocols for Employment Cases Alleging Adverse Actions* (Protocols) as an important step toward reforming discovery in employment litigation. The Protocols level the playing field for employees by providing for an early exchange of information and minimizing opportunities for employers to use expensive delay tactics. They are the result of an 18-month process by the Advisory Committee in which NELA's Federal Rules Task Force collaborated with a group of respected management-side attorneys to develop new pre-trial procedures for certain types of employment cases that would curtail unnecessary costs and delays.

Through our *Amicus* Program, NELA promotes the interests of individual employees, assists the lawyers who represent them, and provides our unique perspective in significant employment cases. In 2011, NELA filed or signed on to fourteen *amicus curiae* briefs, including two in the U.S. Supreme Court, ten in the federal circuit courts of appeals, one before the National Labor Relations Board, and one before the DOL Administrative Review Board. Our 2011 briefs involved the most pressing issues in employment and related civil rights laws, including proper interpretations of the law, forced arbitration, a panoply of wage and hour issues, and the ability of workers to bring class actions in federal court. Our 2011 *amicus* briefs may be found at www.nela.org/amicus.

NELA's advocacy initiatives are supported in part by our Annual Gala Fundraiser, held each year in conjunction with the Annual Convention. During our 2011 Gala, Equality | Justice | Unity, we proudly honored NELA member Eric Schnapper, Professor of Law at the University of Washington School of Law, the leading advocate for plaintiffs in employment discrimination cases before the U.S. Supreme Court. A total of 260 NELA members, law firms, Affiliates, coalition partners, and allies contributed more than \$215,000 to support our Legislative & Public Policy, Judicial Nominations, and *Amicus* Programs.

NELA's formal acknowledgement of Professor Schnapper in 2011 was especially timely. He argued three cases before the Supreme Court that term, resulting in victories for employees in *Staub v. Proctor Hospital* and *Thompson v. North American Stainless*. In *Staub*, the Court unanimously announced a favorable, new standard to resolve so-called "cat's paw" cases, which deal with the extent of employer liability where a biased company official, such as a supervisor, influences the decision of another company official, like a human resources director, who took an adverse action against the plaintiff. The decision in *Thompson* protects family, friends, and other loved ones who are co-workers of employment discrimination plaintiffs from reprisals by their mutual employers. Professor Schnapper also served as co-counsel in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court case won by NELA Executive Board Member James H. Kaster (MN). *Kasten* reaffirmed that oral complaints of wage and hour violations are enough to protect employees from retaliation. Workers were also victorious in the Supreme Court win in *CIGNA Corp. v. Amara*, which offered new arguments to enable employees to recover money for violations by those with responsibility for overseeing pension plans, as well as to shield workers from unlawful retaliation.

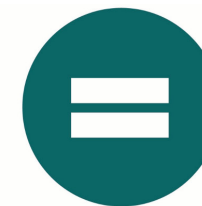
The U.S. Supreme Court also dealt some harsh blows to employees in 2011 to which NELA promptly responded. In *AT&T Mobility LLC v. Concepcion*, the Court ruled that arbitration agreements can bar class action lawsuits. In response, NELA redoubled our efforts to pass the AFA, which would ban forced arbitration in employment, consumer, franchise, and civil rights disputes. Eliminating forced arbitration also is one of the priorities of NELA's public interest organization, The Employee Rights Advocacy Institute For Law & Policy (The Institute), which focuses on keeping the courthouse doors open to individuals whose workplace rights have been violated.

NELA and The Institute joined together in response to the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, in which the Court erected significant barriers that make it more difficult for aggrieved employees to join together in class action lawsuits. NELA and The Institute assembled the *Wal-Mart* Task Force to provide technical and strategic assistance to employee rights advocates facing potential *Dukes* issues in their cases.

As NELA's capacity and reach have grown, our renowned continuing legal education (CLE) programs remain at the center of our commitment to employee rights advocacy. Uniquely produced by and for plaintiffs' employment lawyers, NELA's educational programs served nearly 1,000 attorneys in 2011, and many more benefitted from our online CLE programs, which are available through NELA's website. The capstone of our year is always our three-day Annual Convention, which as noted above, drew 500 employee rights advocates to New Orleans for "Charting The Future of Employee Rights Advocacy." We also held two seminars, "Trial Advocacy For The Plaintiffs' Employment Lawyer" and "Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions Under The FLSA," and a webinar, "Using New Developments In Whistleblower Laws To Your Client's Advantage."

Through The Employee Rights Advocacy Scholarship Program, NELA and The Institute make these educational opportunities accessible to employee rights advocates who otherwise would not be able to attend them without financial assistance. With the support of our generous donors, in 2011 NELA and The Institute awarded \$17,980 in scholarships to 24 employee rights advocates, including 18 public interest and legal services lawyers as well as 6 private attorneys.

Working side-by-side with NELA in everything we do are our 68 circuit, state, and local Affiliates. United by a shared mission, we stand together proudly, building our NELA family—a community that is more powerful together than any one part could be alone. Thank you for joining us for another year of equality, justice, and unity.



Judicial Nominations Program

NELA advocates for independent and fair-minded federal judges who are committed to equal justice under law for all Americans, and who do not place the interests of employers above the rights of employees. Through our Judicial Nominations Committee (JNC), NELA takes an active role in assessing candidates nominated to federal judgeships, as well as individuals interested in becoming candidates for such vacancies. We promote candidates who possess excellent professional and legal credentials, are faithful to the progress made on civil rights and individual liberties, and have an understanding of the real world circumstances that employees face on the job and in vindicating their workplace rights when they are violated.

In 2011, the country continued to be plagued by a federal judicial vacancy crisis, with more than 10% of judgeships unfilled, affecting thousands of cases and millions of Americans. While the Obama Administration set a record for the nomination and confirmation of women and minorities to the federal judiciary, it lagged behind its predecessors in seeing its nominees confirmed to the federal bench. Partisan gridlock was the order of the day in Congress, delaying (or in some cases, thwarting) the confirmation of highly qualified candidates to the federal bench.

Additionally, the federal judiciary remained overwhelmingly homogenous in terms of professional diversity, and consisted primarily of those who were prosecutors, corporate lawyers, law professors, and state court judges (and, for appellate judges, federal district court judges). NELA believes that preserving the credibility of the federal judiciary means taking concrete steps to level the playing field for all litigants that come before our nation's courts. Achieving this requires embracing a federal bench that better reflects the professional diversity of attorneys across the country, which includes those who represent workers, the poor, and disenfranchised members of our society.

Despite significant hurdles on the road to confirmation, NELA celebrated the elevation and installation of four NELA-endorsed judicial candidates to the federal bench in 2011: U.S. Magistrate Judge Edward M. Chen (N.D. Cal.) for the U.S. District Court for the Northern District of California, U.S. District Judge Bernice B. Donald (W.D. Tenn.) for the U.S. Court of Appeals for the Sixth Circuit, former NELA member William J. Martínez for the U.S. District Court for the District of Colorado, and former NELA member Kevin H. Sharp for the U.S. District Court for the Middle District of Tennessee. These extraordinary individuals exemplify the type of candidates whom NELA promotes as part of our efforts to diversify the bench in terms of professional background. Among other positions held during their illustrious careers, Judge Chen served as an attorney for a public interest organization, Judge Donald worked as a legal aid attorney, Judge Martínez was a regional attorney for the Equal Employment Opportunity Commission, and Judge Sharp spent a significant portion of his career representing workers in private practice.

The NELA members who generously volunteer to serve on the JNC continue to evaluate and recommend candidates for federal judgeships, undaunted by the obstructionist atmosphere in Washington, DC. We are grateful for their tireless support of our critical work to ensure a fair and independent judiciary.

Judicial Nominations Committee

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Barry D. Roseman (CO)

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Eric M. Gutiérrez, *Legislative & Public Policy Director*

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Mark Hammons, Sr. (OK)
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Tenth Circuit State Representative
Lauren I. Scholnick (UT)

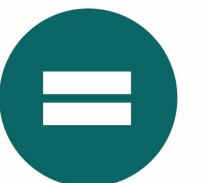
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Cyrus Mehri (DC)



Reforming The Discovery Process In Employment Litigation

Since 2010, NELA has played a leading role in a project to streamline the discovery process in employment litigation and ensure that employees can more easily acquire the information they need to prove their claims in federal court. Under the auspices of the U.S. Judicial Conference’s Advisory Committee on Civil Rules (Advisory Committee), NELA’s Federal Rules Task Force partnered with a group of lawyers who represent employers’ interests to develop new pre-trial procedures for certain types of employment cases. These efforts, which were supervised by The Honorable John G. Koeltl of the U.S. District Court of the Southern District of New York, culminated in the Advisory Committee’s November 2011 adoption of the *Initial Discovery Protocols for Employment Cases Alleging Adverse Actions* (Protocols).

The Protocols stem from a proposal made in May 2010 by Joseph D. Garrison (CT), former NELA President and Chair of NELA’s Federal Rules Task Force, who was among the first to suggest a way to address the high cost of litigation that took into account the unique nature of employment claims. In most of these cases, the employer has sole custody of nearly all of the files, documents, and other information that an aggrieved employee needs to prove discrimination. The existing rules were largely ineffective at facilitating the exchange of this information, which added delay and expense without moving the case toward resolution. Under the Protocols, both the employee and the employer will be able to obtain the information that is held exclusively by the other much earlier than under current practice. This will allow the parties to evaluate the strengths and weaknesses of the case more accurately, and potentially avoid the filing of unnecessary motions.

The Federal Rules Task Force currently is working with the federal judiciary and other interested groups to encourage individual federal judges to adopt the Protocols as part of a pilot project organized by the Federal Judicial Center. The Task Force, in conjunction with NELA’s public interest organization, The Employee Rights Advocacy Institute For Law & Policy (The Institute), also has created resources to inform interested employee rights advocates about the Protocols and suggest ways in which they can help NELA promote participation in this important project.

Federal Rules Task Force

Chair

Joseph D. Garrison (CT)

Staff

Rebecca Hamburg Cappy, *Program Director*

Matthew C. Koski, *Paul H. Tobias Attorney Fellow,*

The Employee Rights Advocacy Institute For Law & Policy

Members

Kathryn Burkett Dickson (CA)

Herbert Eisenberg (NY)

Margaret A. Harris (TX)

Jonathan J. Margolis (MA)

Ellen J. Messing (MA)

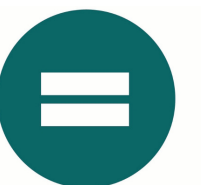
Protecting Older Workers And Other Employees From Employment Discrimination After Gross

Ever since the Supreme Court issued its misguided 2009 ruling in *Gross v. FBL Financial Services, Inc.*, NELA has been working on multiple fronts to counteract that decision and ensure that older workers are treated equitably in the workplace. In this case, the Court made it more difficult for employees who bring claims under the Age Discrimination in Employment Act to vindicate their rights by requiring them to prove that their age was the “but for” cause of the discriminatory act, thus setting a higher bar for older workers than those who are discriminated against on other bases prohibited by law.

Throughout 2011, NELA advocated for the Protecting Older Workers Against Discrimination Act (POWADA), which would overturn *Gross*, but the bill was not reintroduced in Congress by the end of the year. POWADA remains one of NELA’s top legislative priorities.

NELA also has been taking steps to limit the reach of *Gross* beyond age discrimination claims by participating as *amicus curiae* in relevant cases. In *Breeden v. Novartis Pharmaceuticals Corp.*, a case before the U.S. Court of Appeals for the D.C. Circuit, NELA attempted to prevent the application of *Gross* to the Family and Medical Leave Act (FMLA). Our brief, joined by AARP and AARP Foundation Litigation, responded to the employer’s argument that *Gross* precluded a mixed-motive jury instruction under the FMLA. We called for the court to defer to the longstanding Department of Labor regulation, 29 C.F.R. § 825.220(c), articulating a “motivating factor” standard in cases of retaliation for taking FMLA leave, and asked the court to recognize that any analogy to *Gross* is inappropriate. Because the D.C. Circuit reaffirmed the district court’s grant of judgment as a matter of law to Novartis, the court did not reach this issue. NELA’s brief was written by NELA Executive Board member and Vice President of Public Policy Daniel B. Kohrman (DC) with contributions from NELA member Stephen Z. Chertkof (DC).

In another case before the D.C. Circuit, *Ponce v. Billington*, NELA, joined by the Metropolitan Washington Employment Lawyers Association and AARP, urged the court to reject a district court decision requiring a federal employee to prove that discrimination was the “sole reason” for not being selected for a senior level position at the Library of Congress. The plaintiff alleged discrimination on the basis of sex, race, and national origin. NELA’s *amicus* brief argued that while there is some variation in wording among statutes and different courts regarding the proper standard, with one limited exception, “sole cause” is never the proper standard under federal anti-discrimination statutes. We contended that the Supreme Court long ago held in *McDonald v. Santa Fe Trail Transportation Co.* that nothing in Title VII requires a plaintiff to “show that he would have in any event been rejected or discharged solely on the basis of” a protected characteristic. The district court in *Ponce* affirmed this holding, but nonetheless upheld the jury verdict against Mr. Ponce. Because the jury also rejected Mr. Ponce’s claim under an alternative “because of” standard of liability, the court concluded that including the improper “sole cause” language in the jury instructions did not constitute reversible error. NELA members Yuval Rubinstein (DC), Thomas W. Osborne (DC), Jonathan C. Puth (DC), and Stephen Z. Chertkof (DC) authored the brief.



Legislative Efforts To Advance Equality For Workers

Civil Rights Tax Relief Act (CRTRA) Of 2011

(S. 3195/H.R. 1781)

In an important development in NELA's efforts to level the playing field for employment plaintiffs, the Civil Rights Tax Relief Act (CRTRA), NELA's signature legislation, was introduced in both chambers of Congress in the fall of 2011 by Senators Jeff Bingaman (D-NM) and Susan Collins (R-ME), and Congressmen John Lewis (D-GA) and Jim Sensenbrenner (R-WI). NELA has been advocating for the CRTRA since 1997. As part of the American Jobs Creation Act of 2004, Congress—with NELA leading the charge—passed the provision of the CRTRA that ended the double taxation of attorneys' fees in employment and civil rights cases.

The CRTRA of 2011 includes the remaining two components of the original bill still requiring Congressional action: 1) eliminating the tax an employee must pay on damages for non-economic harm that he or she suffered (e.g., due to egregious sexual harassment); and 2) allowing income averaging of lump sum recoveries that employees receive for multiple years of back pay, which are unfairly taxed entirely in the year of receipt.

Under current law, people who suffer non-economic damages as a result of illegal employment practices pay taxes while those who suffer non-economic damages as a result of physical injuries (such as from car accidents) do not. The CRTRA would remedy this unfairness in the tax code by excluding from gross income non-economic damages received by plaintiffs in employment and civil rights cases. Similarly, employees who recover lost wages must pay taxes on the lump sum recovery that represents multiple years of back pay. Under the CRTRA, lump sum payments would be taxed as if they were received in the year earned. Thus, the CRTRA would benefit aggrieved workers by ensuring that they actually are made whole, while keeping settlement and litigation costs down for employers.

Paycheck Fairness Act

(S. 797/H.R. 1519)

The Paycheck Fairness Act (PFA) was reintroduced in both houses of Congress in April 2011. Updating the Equal Pay Act of 1963, the PFA addresses income disparity between men and women. The current bill would require employers to justify wage differences between employees on legitimate reasons other than sex. It would also prohibit retaliation against employees who ask questions about their employer's wage practices or discuss their wages with co-workers and ensure that women who are discriminated against on the basis of sex have access to the same remedies as those plaintiffs who base their discrimination claims on race or national origin. NELA advocates for the passage of the PFA in concert with other civil and employee rights organizations and women's groups.

Employment Non-Discrimination Act

(S. 811/H.R. 1397)

NELA lobbied for the passage of the Employment Non-Discrimination Act (ENDA), which was reintroduced in the 112th Congress in April to provide basic protections against workplace discrimination on the basis of sexual orientation and gender identity.

Improving Workplace Protections Through Administrative Advocacy

Leave As A Reasonable Accommodation For Disabled Workers

NELA is committed to ensuring that laws protecting the rights of disabled workers, like the Americans with Disabilities Act (ADA) and its 2008 amendments, are broadly construed and vigorously enforced. An important aspect of promoting equal opportunity for disabled workers is preserving access to "reasonable accommodations" based on the worker's particular disability. In appropriate cases, the type of accommodation that is reasonable is for the employee to be allowed to take a leave of absence. In such cases, the employee is entitled to take leave unless the employer can prove that granting leave would cause the employer "undue hardship." As one might expect, these are fact-intensive inquiries that do not lend themselves to hard-and-fast rules.

When the Equal Employment Opportunity Commission (EEOC) held a public meeting to discuss the issue of leave as a reasonable accommodation, NELA submitted comments urging the EEOC to affirm that the questions of whether allowing leave in a given case is a reasonable accommodation and whether undue hardship exists must be evaluated on a case-by-case basis. NELA's advocacy on behalf of workers was essential as employers sought "bright line" rules that would prevent the individualized factual determination required by the ADA, and undermine the enforcement of the ADA's protections.

Proposed Department Of Labor Regulations Defining "Fiduciary" Under ERISA

When making decisions that could have significant impact on their future financial security, workers need the highest quality advice available. Ensuring that investment advisors hold a fiduciary duty to the employees they are advising assures the worker both that the advisor will align his/her advice to the specific interests of the worker and that the advisor will be accountable for the consequences of failing to act in the best interests of the employee. The existing rules governing fiduciary duties were adopted in 1975, and had not been updated to reflect the substantial changes that had occurred in the retirement and investment world over the intervening years. As responsibility for making decisions about how to structure one's investments has shifted from sophisticated financial professionals to the workers themselves, and as the array of available investment vehicles have increased in number and complexity, the need to provide safeguards for the employees being advised was urgent. To promote greater accountability, NELA joined the Pension Rights Center in submitting comments to the Department of Labor's Employee Benefits Security Administration supporting regulations that expand the definition of "fiduciary" under the Employee Retirement Income Security Act (ERISA), and give workers the protections they need to make informed investment decisions.

Strengthening The Government's Ability To Address Compensation Discrimination

NELA endorsed comments of the National Partnership for Women & Families, one of our coalition partners, which supported the Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP's) proposed rescission of two 2006 guidance documents regarding compensation discrimination. The two guidance documents had unnecessarily hampered the OFCCP's ability to investigate, identify, and rectify compensation discrimination, and repealing them would strengthen OFCCP's efforts to unearth and address instances of pay discrimination.

Ending Forced Arbitration Of Employment Claims

NELA and The Employee Rights Advocacy Institute For Law & Policy (The Institute), our charitable public interest organization, lead the national movement against the forced arbitration of employment claims. Although alternative dispute resolution, when fully voluntary and properly designed, is an appropriate way to resolve employment disputes, forced arbitration compels workers to give up their right to seek redress through our civil justice system and accompanying legal safeguards as a condition to get or keep a job. Accordingly, NELA has designated the fight against forced arbitration as one of our top public policy priorities. Our work on this important issue in 2011 included lobbying Congress for the passage of the Arbitration Fairness Act (AFA), *amicus curiae* advocacy, and providing technical and strategic support to employee rights advocates. To complement NELA's efforts, The Institute engaged in several activities to heighten public awareness of the injustices of forced arbitration.

Concepcion And The Arbitration Fairness Act Of 2011 (S. 987/H.R. 1873)

The practice of forced arbitration is insidious and has become increasingly pervasive. It affects nearly all Americans in almost every facet of their lives—whether it is finding or keeping a job, purchasing a cell phone, using a credit card, or obtaining health care. In the employment context, individuals are denied their right to go to court to seek redress for violations of our country's civil rights and employment laws. An ever-growing number of employers use pre-dispute binding forced arbitration to resolve employment disputes with their employees, foreclosing the civil justice system to millions. Forced arbitration language is written into employment applications, employment contracts, employment handbooks, pension plans, and even emails.

In a blow to individuals seeking redress of their rights against corporate interests, the U.S. Supreme Court in April 2011 handed down its decision in a consumer case, *AT&T Mobility LLC v. Concepcion*, ruling that arbitration agreements can bar class action lawsuits. In a 5–4 decision, the Court held that the Federal Arbitration Act preempted a California law prohibiting forced arbitration clauses that ban customers from joining class actions. NELA submitted an *amicus curiae* brief in 2010 in this case expressing our concern that the use of class action waivers has become increasingly common in the labor and employment context, often on a “take it or leave it” basis.

Following on the heels of *Concepcion*, the Arbitration Fairness Act (AFA) of 2011 was introduced in Congress. The AFA would prohibit the forced arbitration of employment, consumer, and civil rights disputes. Among other things, it would make it unlawful for employers to impose arbitration on employees except when knowingly and voluntarily agreed to after the dispute arises or prior to a collective bargaining agreement.

On May 17, 2011, NELA participated in a press briefing on the introduction of the AFA, which included the bill's sponsors, Senators Al Franken (D-MN) and Richard Blumenthal (D-CT) and Congressman Hank Johnson (D-GA). In submitting our public statement in support of the AFA, we distributed copies of The Institute's 2009 national study finding that a solid majority of Americans (59%) opposes forced arbitration clauses in the fine print of employment and consumer contracts, including men and women, as well as majorities of Democrats, Independents, and Republicans. Strong majorities (59%) also support the AFA, with such support crossing traditional gender and political lines. The Institute's “National Study of Public Attitudes on Forced Arbitration” may be found on its website at www.employeerightsadvocacy.org/forcedarbitration.

On October 14, 2011, Senator Franken presided over a Senate Judiciary Committee hearing entitled, “Arbitration: Is It Fair When Forced?” NELA submitted a press statement in support of the AFA and made The Institute's report available to the

media. Testifying at the hearing was a client of NELA member Nancy O'Mara Ezold (PA), Dr. Deborah Pierce, Associate Director, Department of Emergency Medicine, Einstein at Elkins Park Hospital in Elkins Park, PA. One of five witnesses at the hearing, Dr. Pierce attempted to sue her employer for gender discrimination but was compelled to arbitrate after inadvertently signing a forced arbitration clause in her employment contract.

NELA's Amicus Brief In D.R. Horton, Inc.

Meanwhile, the National Labor Relations Board (NLRB) in a case against D.R. Horton, Inc., one of the nation's largest home-builders, poised itself to decide the question of whether an employer's contractual ban on class and collective actions violates workers' rights to engage in concerted activities under the National Labor Relations Act (NLRA) and thus constitutes an unfair labor practice. NELA, along with The Institute and 26 other organizations, submitted an *amicus* brief urging the NLRB to hold that preventing employees from pursuing workplace-related claims by banning the use of a joint, class, or collective action in any forum—whether in court or in arbitration—as part of a forced arbitration clause violates both Section 7 and Section 8(a)(1) of the NLRA.

Working For Change: Lobby Day 2011

On October 20, 2011 more than 50 NELA members and their clients from all over the country took part in NELA's “Working For Change: Lobby Day” in Washington, DC. The focus of our lobbying efforts on Capitol Hill were the CRTRA (see page 10) and the AFA. Many more NELA members and allies participated in “Virtual Lobby Day” by contacting their Congress members by phone, fax, or email to advocate for passage of the CRTRA and AFA. In addition, NELA sent delegations to the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL). At the EEOC, our representatives met separately with Commissioner Stuart J. Ishimuru and Commissioner Victoria A. Lipnic to discuss NELA members' concerns about the agency's investigation and charge-processing procedures. At the DOL, NELA members had the opportunity to address a number of important issues with high level staff of the Wage & Hour Division and the Office of the Solicitor, Division of Fair Labor Standards.

A Multi-Faceted Approach To Addressing Wal-Mart Stores, Inc. v. Dukes

In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the Ninth Circuit certifying a nationwide class of approximately 1.5 million women alleging gender discrimination in pay and promotions by the nation's largest private employer. Supporting the plaintiffs in *Dukes* for the entirety of the decade-long litigation, NELA had filed *amicus* briefs at numerous stages of the case, including before the Supreme Court in affirmance of the Ninth Circuit's ruling.

While the Court's decision in *Dukes* was disappointing, NELA refused to allow this setback to undermine our efforts to ensure justice and equality in the American workplace, which includes preserving workers' ability to challenge employment discrimination as a group. NELA's multi-pronged response to the ruling in *Dukes* is an example of NELA's ability to marshal the resources at its disposal to address unexpected challenges as they arise quickly and effectively.

Although the full ramifications of the Court's ruling will present themselves over time, it was clear that NELA had a leading role to play in ensuring that the decision would not substantially undermine the ability of employee rights advocates to help workers who seek to band together to challenge systemic discrimination. An essential step in this process was to assist NELA members and other groups understand the implications of different aspects of the Court's decision. In this regard, NELA and The Institute

tapped into the expertise of the NELA membership and launched the *Wal-Mart* Task Force, which is comprised of some of the most successful and experienced class action practitioners in NELA.

One important aspect of the Task Force's response to *Dukes* has involved working closely with our partners in the civil rights community, as well as members of Congress, to monitor potential legislative responses to *Dukes*. Members of the Task Force provided advice to a coalition of groups that was working to draft legislation to remedy some of the most potentially harmful aspects of the Court's decision.

NELA also submitted written testimony on behalf of our members and their clients for the June 2011 U.S. Senate Judiciary Committee hearing entitled, "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior." The testimony focused on the serious implications that the *Concepcion* and *Dukes* decisions would have for the enforcement of workplace discrimination laws and reminded the Judiciary Committee that cases "prosecuted by public interest organizations and the private bar have been the driving force for federal civil rights enforcement since *Brown v. Board of Education*." NELA described previous instances where the Supreme Court "erected jurisdictional and procedural obstacles to the enforcement of Title VII protections," and Congress, recognizing that its intent in adopting anti-discrimination laws was being thwarted by the judiciary, intervened with new legislation to rectify the problem. Our testimony was drafted by members of the *Wal-Mart* Task Force, specifically NELA Executive Board member James M. Finberg (CA) and NELA members Bill Lann Lee (CA) and Paul W. Mollica (IL), with assistance by NELA Program Director Rebecca Hamburg Cappy and NELA Legislative & Public Policy Director Eric M. Gutiérrez.

The *Wal-Mart* Task Force also has developed resources analyzing the decision in *Dukes*, identifying portions of the ruling that may present obstacles for workers' rights lawyers going forward, and presenting suggestions for responding to the more problematic aspects of the Court's reasoning. In order to ensure that NELA members had access to any help they might need in defeating *Dukes*-related motions in their cases, NELA and The Institute partnered to create a technical support program for employee rights advocates. The Institute's Paul H. Tobias Attorney Fellow Matthew C. Koski acted as a conduit between individual practitioners and the *Wal-Mart* Task Force to help lawyers respond to *Dukes*-based arguments from defense counsel in ongoing cases and prevent their clients from suffering the same fate as the plaintiffs in *Dukes*.

Wal-Mart Task Force

Co-Chairs

James M. Finberg (CA)
Cyrus Mehri (DC)

Staff

Terisa E. Chaw, *Executive Director*
Rebecca Hamburg Cappy, *Program Director*
Eric M. Gutiérrez, *Legislative & Public Policy Director*
Matthew C. Koski, *Paul H. Tobias Attorney Fellow*,
The Employee Rights Advocacy Institute For Law & Policy

Members

Teresa Demchak (CA)
Ellen L. Eardley (DC)
Barry Goldstein (CA)
Thomas J. Henderson (DC)
Katherine M. Kimpel (DC)
Daniel B. Kohrman (DC)

Jocelyn D. Larkin (CA)
Bill Lann Lee (CA)
Paul W. Mollica (IL)
David Sanford (DC)
Eric Schnapper (WA)
Richard T. Seymour (DC)

Protecting Collective And Class Actions In Wage & Hour Cases

NELA's *Amicus* Program amplifies the voice of the employee in our nation's courtrooms. Preventing wage theft has long been a priority of our *Amicus* Program, including protecting the rights of workers to band together in class or collective actions to challenge their employers' unfair and illegal wage and hour practices. (See p. 18 for a full list of NELA's 2011–2012 *Amicus* Priorities.) Over the last several years, NELA has been participating in a number of cases across the country involving the question of whether federal and state wage and hour claims may be heard together in federal court. We have brought about positive developments in this area as a number of federal appellate courts have followed the position of the U.S. Courts of Appeals for the Ninth and D.C. Circuits that employees may use both collective actions under the Fair Labor Standards Act (FLSA) to protect their federal wage and hour rights as well as class actions pursuant to Federal Rule of Civil Procedure 23 to vindicate violations of state law in the same case.

In January 2011, in *Ervin v. OS Restaurants*, the U.S. Court of Appeals for the Seventh Circuit explicitly cited NELA's 2009 *amicus* brief, written by Kenneth J. Sugarman (CA), in reaching its conclusions about the meaning of the FLSA and the intent of its drafters. NELA then submitted *amicus* briefs addressing the issue in *Shahriar v. Smith & Wollensky* before the Second Circuit, and in *Fisher v. Rite-Aid Corp.* and *Knepper v. Rite-Aid Corp.* before the Third Circuit, with rulings in favor of the employees in these cases. NELA's brief in *Shahriar* was written by NELA members Rachel M. Bien (NY), Mariko Hirose (NY), and Justin M. Swartz (NY). NELA member David Borgen (CA), along with Roberto Concepción, Jr. (CA) and Jason Tarricone (CA), authored our brief in the related *Fisher* and *Knepper* cases.

Seeking Justice For Whistleblowers

Another focus of NELA's *Amicus* Program in 2011 was shielding from reprisal those workers who reported fraud or otherwise blew the whistle on misconduct by their employers. For instance, NELA supported the whistleblower before the U.S. Court of Appeals for the Tenth Circuit in *Lockheed Martin Corp. v. Department of Labor & Andrea Brown*. After complaining that her supervisor had been misappropriating defense contractor Lockheed Martin's funds for personal expenses and that those costs were being passed on to the government, Andrea Brown was retaliated against and forced to resign. She won her case before the Department of Labor's Administrative Review Board (ARB), which ordered Ms. Brown to be reinstated and awarded her \$75,000 in damages. Lockheed Martin appealed.

Written by NELA member Michael T. Anderson (MA), our *amicus* brief focused on two issues of law related to 18 U.S.C. §1514A, which provides whistleblower protection for employees of publicly traded companies: 1) whether the five corporate violations enumerated in the statute—mail fraud, wire fraud, bank fraud, securities fraud, or violations of any Securities & Exchange Commission rules—are limited to fraud against shareholders; and 2) whether a whistleblower must recite the relevant statute and prove up all of its elements in order to enjoy the legal protections of §1514A. NELA asserted that the answer in both cases is no.

Joined by the National Whistleblowers Center, NELA weighed in on the employee's side in *Villanueva v. Core Laboratories NV*, a case before the ARB raising the question of whether the Sarbanes-Oxley Act (SOX) applies outside the United States. While Core is a publicly traded company based in Texas, the whistleblower was the chief executive officer of its Columbia-based subsidiary. In a brief written by NELA members R. Scott Oswald (DC) and Nicholas Woodfield (DC), NELA argued that the claims in this case did not require the ARB to determine the extraterritoriality of SOX, but even if it was required to reach that decision, SOX extends to all subsidiaries of companies traded on U.S. stock markets. In a 3-2 decision, a sharply divided ARB limited the application of whistleblower protections under SOX to activities that take place within the United States.

The False Claims Act (FCA) was the subject of the third *amicus* brief NELA filed in 2011 supporting a whistleblower. Brett Strong was fired by his employer, MedVance Institute, after uncovering and reporting fraudulent practices to his supervisor. MedVance had been under investigation by the General Accounting Office for false and deceptive business practices relating to government-insured student loans. In *Strong v. KIMC Investments, Inc. d/b/a MedVance Institute*, the U.S. Court of Appeals for the Eleventh Circuit was called on to interpret the 2009 amendment to the FCA to include "efforts to stop one or more violations"

of the FCA as protected activity. NELA's *amicus* brief, written by NELA member Mark A. Kleiman (CA), urged the court to follow the U.S. Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville*, which held that "opposition" could include "standing pat" by refusing a supervisor's order to engage in prohibited conduct, and that an employee need not prove that he said he intended to assist in an FCA investigation in order to be covered by it.

A Unique Voice For Workplace Equality And Justice: NELA's Amicus Program

NELA's *Amicus* Program is a vital component of our efforts to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA appears as *amicus curiae* in significant employment and civil rights litigation where we can make a unique contribution. NELA participates in those cases which present emerging issues in employment and civil rights law, seek to extend current law to new situations involving clients of our members, or challenge adverse aspects of an existing body of law. In 2011, we filed twelve *amicus* briefs authored by NELA members and joined two others written and submitted by our coalition partners. In addition to the cases discussed throughout this Annual Report, NELA appeared in the following cases.

Coleman v. Maryland Court of Appeals

NELA and ten other organizations signed on to an *amicus* brief written by the National Partnership For Women & Families in this U.S. Supreme Court case involving the intersection of the Eleventh Amendment and the Family and Medical Leave Act (FMLA). Daniel Coleman was an employee of the Maryland state court system until his termination after he requested leave for a serious medical condition. The U.S. Court of Appeals for the Fourth Circuit concluded that the state of Maryland was immune from suit because Congress did not validly abrogate states' Eleventh Amendment immunity when it passed the self-care leave provision of the FMLA. With Justice Anthony Kennedy writing for the majority, the Court affirmed the Fourth Circuit's decision by a narrow 5-4 margin.

Grant v. Metropolitan Government of Nashville & Davidson County, Tennessee

This employment discrimination class action before the U.S. Court of Appeals for the Sixth Circuit involved the proper interpretation of the disparate impact provision of Title VII of the Civil Rights Act of 1964. The trial court had ruled that the plaintiff class suffered racial discrimination under the adverse impact theory, even though a defense jury verdict was returned on the disparate treatment claim. NELA's *amicus* brief contended that disparate impact claims are not negated by evidence of intentional discrimination because the same evidence can support both types of claims. A divided Sixth Circuit ignored these arguments and ruled against the class. NELA's brief was authored by NELA members Christy B. Bishop (OH), Bruce B. Elfvin (OH), Dennis R. Thompson (OH), and Stuart G. Torch (OH).

Delodder v. Aerotek, Inc.

NELA supported the plaintiffs, a group of recruiters, before the U.S. Court of Appeals for the Ninth Circuit in their appeal of a lower court's denial of class certification of claims that their employer misclassified them as exempt from California's overtime requirements. In an unpublished decision that relied heavily on the facts of the case, the Ninth Circuit affirmed the denial of class certification. NELA's *amicus* brief was written by NELA member Jahan C. Sagafi (CA) with Anne B. Shaver (CA).

Lopez v. Pacific Maritime Association

In this Ninth Circuit case, NELA joined an *amicus* brief submitted by The Legal Aid Society-Employment Law Center and the Burton Blatt Institute in support of the plaintiff's motion for rehearing or rehearing *en banc*. The Lopez court had ruled that a plaintiff claiming he was screened out by an eligibility criterion under section 12112(b)(6) of the Americans with Disabilities Act (ADA) must set forth the same type of statistical showing that is required in the context of disparate impact claims brought under sex, age, and race discrimination statutes. The panel denied the plaintiff's motion.

Rhodes v. R+L Carriers, Inc.

In this case, NELA submitted an *amicus* brief to the U.S. Court of Appeals for the Sixth Circuit in support of the plaintiff's challenge to the dismissal of his age and retaliation claims pursuant to the twin decisions of *Bell Atlantic Corporation v. Twombly*

and *Ashcroft v. Iqbal*. Despite a complaint that appeared to be an ordinary federal and state law complaint alleging discrimination and retaliation, the lower court found the claims implausible. NELA argued that nothing in *Twombly* or *Iqbal* requires a plaintiff to plead legal theories, plead evidence, or—most certainly—plead in excess of what is required by the underlying substantive law. The Sixth Circuit agreed with our assessment of the proper standard and found that the employee's claims of age discrimination and retaliation were deserving of a hearing because they were plausible. NELA member Paul W. Mollica (IL) authored our brief.

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Matthew C. Koski, Paul H. Tobias Attorney Fellow,
The Employee Rights Advocacy Institute For Law & Policy

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Anne Golden (NY)

Third Circuit

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Fourth Circuit

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Andrew S. Golub (TX)

Sixth Circuit

Bruce B. Elfvin (OH)

Seventh Circuit

Paul W. Mollica (IL)

Eighth Circuit

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Identity Discrimination
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Seth M. Marnin (NY)

Wage & Hour Practice Group

David Borgen (CA)

Whistleblower Practice Group

Mark A. Kleiman (CA)

NELA's 2011–2012 Amicus Priorities

NELA's *amicus* priorities are established bi-annually, based upon significant and/or emerging issues in employment and civil rights law. Our current priorities are to:

- Challenge rulings on dispositive motions in order to combat summary judgment abuse strategically, particularly where decisions rely on what have been identified as judicially created “doctrines” that increase the barriers for plaintiffs in getting to a jury and defending verdicts post-trial.
- Fight sanctions motions against NELA members; support any sanctions motions brought against defense counsel for improper motions for summary judgment, discovery abuses, and/or answers with bad-faith denials or bad-faith statements of want of knowledge; and support attorney fee petitions for employees and their attorneys.
- Oppose forced arbitration clauses as they relate to workplace disputes.
- Contest wage theft, including compensable time violations, fluctuating work week violations, abuse of exemptions, and independent contractor misclassification; as well as collective and class action issues that impede enforcement of federal and state wage protection statutes.
- Ensure that courts follow both the language and the intent of the ADA Amendments Act.

Volunteer Amicus Brief Writers

We are grateful to the following individuals who either authored or contributed significantly to the *amicus curiae* briefs NELA filed in 2011.

Michael T. Anderson (MA)	Roberto Concepción, Jr. (CA)	Mark A. Kleiman (CA)	Jahan C. Sagafi (CA)
Joan M. Bechtold (CO)	Pamela Coukos (DC)	Daniel B. Kohrman (DC)	Eric Schnapper (WA)
Rachel M. Bien (NY)	Kelly M. Dermody (CA)	Ann Lugbill (OH)	Anne B. Shaver (CA)
Christy B. Bishop (OH)	Bruce B. Elfvin (OH)	Cyrus Mehri (DC)	Michael C. Subit (WA)
David Borgen (CA)	Alan B. Epstein (PA)	Paul W. Mollica (IL)	Justin M. Swartz (NY)
Alejandro Caffarelli (IL)	Michael L. Foreman (PA)	Thomas W. Osborne (DC)	Jason Tarricone (CA)
Janelle M. Carter (DC)	Mark Hanna (DC)	R. Scott Oswald (DC)	Dennis R. Thompson (OH)
Stephen Z. Chertkof (DC)	Mariko Hirose (NY)	Jonathan C. Puth (DC)	Stuart G. Torch (OH)
		Yuval Rubinstein (DC)	Nicholas Woodfield (DC)

Amicus Program Coalition Partners

We also acknowledge the following organizations with whom NELA collaborated on *amicus curiae* briefs.

AARP	Defense Fund	National Disability Rights Network
AARP Foundation Litigation	Disability Rights Legal Center	National Employment Law Project
AFSCME International	Drug Policy Alliance	National Federation of the Blind
The Katharine & George Alexander Community Law Center	El Comité de Apoyo a Los Trabajadores Agrícolas–The Farmworker Support Committee	National Health Law Program
American Association of People with Disabilities	The Employee Rights Advocacy Institute For Law & Policy	National Lawyers Guild Labor and Employment Committee
American Civil Liberties Union	Epilepsy Foundation of America	National Partnership for Women & Families
American Diabetes Association	Equal Justice Center	National Senior Citizens Law Center
Asian American Justice Center	Equal Justice Society	National Whistleblowers Center
Asian American Legal Defense and Education Fund	Equal Rights Advocates	National Women’s Law Center
Asian Law Caucus	Friends of Farmworkers, Inc.	New York Branch of the International Dyslexia Association
Asian Pacific American Legal Center	The Impact Fund	9to5
Association on Higher Education and Disability	Juntos	North Carolina Justice Center
Judge David L. Bazelon Center for Mental Health Law	Lawyers’ Committee for Civil Rights of the San Francisco Bay Area	Northwest Workers’ Justice Project
A Better Balance	The Lawyers’ Committee for Civil Rights Under Law	Public Justice Center, Inc.
Burton Blatt Institute	The Legal Aid Society	Public Justice, PC
CASA de Maryland, Inc.	Legal Aid Society–Employment Law Center	Service Employees International Union
Catholic Migration Services	Low Wage Workers Legal Network	Maurice & Jane Sugar Law Center for Economic & Social Justice
Centro Legal De La Raza	Make the Road New York	Swords to Plowshares
Cornell Law School Labor Law Clinic	MFY Legal Services Inc.	University of Texas School of Law– Transnational Worker Rights Clinic
D.C. Employment Justice Center	The MinKwon Center for Community Action	Women’s Employment Rights Clinic
Disability Independence Group	National Association of Working Women	The Workers’ Rights Law Center of New York, Inc.
Disability Rights Advocates		Working Hands Legal Clinic
Disability Rights Education and		Worksafe, Inc.

Promoting High Quality Legal Representation For All Employees— Continuing Legal Education & The Employee Rights Advocacy Scholarship Program

Access to justice for America’s workers includes access to knowledgeable and skilled legal counsel. One of NELA’s priorities under our 2008–2013 Strategic Plan is to ensure that more employees receive high quality representation from their advocates. One of the primary ways we fulfill this ongoing commitment is through NELA’s nationally renowned continuing legal education (CLE) programs, which are uniquely produced by and for plaintiffs’ employment lawyers. In 2011, NELA served nearly 1,000 attorneys through our CLE programs, and many more employee rights advocates took advantage of our online CLE opportunities, which are available through NELA’s website.

For our Annual Convention, the highlight of every year, NELA returned to New Orleans in 2011 for “Charting The Future Of Employee Rights Advocacy,” where 500 workers’ rights attorneys enjoyed three days of exceptional educational programming along with invaluable opportunities for networking, camaraderie, celebration, and inspiration. “Trial Advocacy For The Plaintiffs’ Employment Lawyer,” our spring seminar, provided two days of hands-on skills-based training guided by some of NELA’s leading trial attorneys. In the fall, NELA presented “Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions Under The FLSA” in response to the ever-growing significance of private enforcement of federal and state wage and hour laws. We are very proud of the positive feedback we receive from the participants of our CLE programs:

- “EXCELLENT PROGRAMMING. There cannot be any other legal organization that does a better job of nurturing new lawyers through the teachings of some of the best in the profession. I sincerely appreciate their taking the time from their busy schedules to do so in the interest of justice. THANK YOU.”
(Trial Advocacy For The Plaintiffs’ Employment Lawyer)
- “I have been practicing for about 22 years and this was my first NELA conference. It met and exceeded my wildest expectations. The energy, companionship, and content were fantastic.”
(2011 Annual Convention)
- “Thank you for an excellent seminar. Well planned and well executed. Great topics, terrific speakers, and fabulous written materials.”
(Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions Under The FLSA)

Through The Employee Rights Advocacy Scholarship Program, NELA and The Institute are able to make these CLE offerings accessible to employee rights advocates who otherwise would not be able to attend them without financial assistance. This enables us to reach some of the most vulnerable members of our nation’s workforce. In 2011, NELA and The Institute awarded \$17,980 in scholarships to 24 employee rights advocates, including 18 public interest and legal services lawyers and 6 private attorneys. We also measure the success of the Scholarship Program through the comments of scholarship recipients:

- “Overall, the conference was incredibly valuable, especially during this difficult time for workers. I’ll use what I learned to continue fighting for workers’ rights; thank you for giving me the opportunity to attend.”
- “[U]pon return to the real world, I had tools I never had which have paid off immediately.”
- “[My organization] and I are grateful for The Institute’s continued support of nonprofit employment law firms. Both the substantive content of the presentations and the networking and brainstorming we did with our colleagues in private and nonprofit practices were invaluable for me professionally and for our organization.”

We gratefully acknowledge the Kazan, McClain, Abrams, Fernandez, Lyons, Greenwood, Harley & Oberman Foundation, Inc. and Bloomberg BNA for their longstanding commitment to the Scholarship Program. The 2011 Scholarship Program also was made possible by a *cy pres* designation to The Institute by Schneider Wallace Cottrell Brayton Konecky LLP and individual gifts from NELA members to the Scholarship Program.

Audio recordings and written materials for NELA’s CLE programs are available for purchase at www.nela.org.

On July 1, 2011, NELA honored Eric Schnapper, Professor of Law at the University of Washington School of Law, as part of our 2011 Annual Gala Fundraiser, **Equality | Justice | Unity**. During his illustrious career, Professor Schnapper has made extraordinary contributions to advancing employee rights and to supporting NELA members and other employee rights advocates. He is the leading advocate for plaintiffs in employment discrimination cases in the U.S. Supreme Court, having argued dozens of employment and civil rights cases before the Court. Since 1973, he has represented plaintiffs in more than 80 cases in the Court and provided his services on a pro bono basis to plaintiffs and their lawyers. Professor Schnapper also is a steadfast volunteer for NELA, serving as a regular speaker for our continuing legal education programs, participating on various committees and task forces for NELA and The Institute, authoring and advising on *amicus* briefs, and always answering NELA’s call for assistance.



The Supreme Court’s docket in 2011 highlighted Professor Schnapper’s invaluable contributions to the American workplace. He argued three cases before the Court during its 2010–2011 term, resulting in victories for employees in *Staub v. Proctor Hospital* and *Thompson v. North American Stainless*. Professor Schnapper also served as co-counsel in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court case won by NELA Executive Board Member James H. Kaster (MN).

For the Court’s 2011–2012 term, Professor Schnapper wrote NELA’s *amicus* brief in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, which raised the question of whether the First Amendment’s so-called “ministerial exception” bars a claim that a parochial school teacher was dismissed in retaliation for stating that she was going to assert her rights under the Americans with Disabilities Act (ADA). NELA’s brief argued that for two centuries American courts have heard and resolved employment-related claims of ministers, that the First Amendment right of free expression applies in equal measure to religious and non-religious organizations, and that adoption of the proposed “ministerial exception” would force lower courts to face a plethora of vexing constitutional questions.

2011 NELA Events

Using New Developments In Whistleblower Laws To Your Client’s Advantage
March 10, 2011

Trial Advocacy For The Plaintiffs’ Employment Lawyer
March 25–26, 2011
Los Angeles, CA

Justice For Working Women At Wal-Mart—Reflections On The Supreme Court Oral Argument In Wal-Mart v. Dukes: Where Are We Headed?
April 28, 2011
Oakland, CA

Co-Sponsored with Alliance for Justice, American Constitution Society Bay Area Lawyers Chapter, Equal Rights Advocates, and National Center for Lesbian Rights

Membership Phone-A-Thon: Connect and Inform
May 2–6, 2011

2011 Affiliate Leadership Workshop & Forum
June 29, 2011
New Orleans, LA

2011 Annual Convention
Charting The Future Of Employee Rights Advocacy
June 29–July 2, 2011
New Orleans, LA

Gala Fundraiser
Equality | Justice | Unity
July 1, 2011
New Orleans, LA

Class Actions: Dead Or Alive? Class Action Litigation In The Wake Of Recent Supreme Court Decisions
August 30, 2011
San Francisco, CA

Co-Sponsored with Alliance for Justice, American Constitution Society Bay Area Lawyers Chapter, The Employee Rights Advocacy Institute For Law & Policy, Equal Rights Advocates, The Impact Fund, and Legal Aid Society–Employment Law Center

Working For Change: Lobby Day 2011
October 20, 2011
Washington, DC

Securing Wages, Protecting Hours: Representing Workers In Individual & Collective Actions Under The FLSA
October 21–22, 2011
Washington, DC

We know the ties that bind the NELA family. We see them in courthouse rows filled with friendly faces at oral argument; in conference rooms three states away arranged for you at no charge by fellow members you have never met; in the selfless sharing of strategies, tips, and knowledge that distinguishes a NELA Annual Convention; and in many other large and small ways. But if we had to name what holds us together, what would we call it? One name is commitment. The NELA family’s commitment to advancing equality and justice in the American workplace and to helping each other achieve that mission is our core.

The Benefits Of NELA Membership

NELA is the largest plaintiffs’ employment law firm in the country. Our strength comes from working together on behalf of our nation’s employees. Our members are at the heart and soul of everything we do, and we are proud to serve them. NELA members are incredibly generous, responding enthusiastically whenever another member seeks help. They also provide the financial resources that make our advocacy initiatives possible, and contribute thousands of volunteer hours to NELA each year. With our 68 circuit, state, and local Affiliates, the NELA family now has more than 3,000 members across the United States, enabling us to accomplish more for workers’ rights together than we could do alone.

In 2011, NELA welcomed 371 new members, including 93 who joined us during the annual Membership Phone-A-Thon, *Connect And Inform*, held in May. To see a full listing of membership benefits, or to join, renew, or upgrade your membership, please visit NELA’s website at www.nela.org/membership or contact Colleen Goodin, Membership Director (Tel: (415) 296-7629, ext. 104; Email: cgoodin@nelahq.org). A listing of NELA’s 2011 Enhanced Members, who generously augment their annual dues to provide greater resources for NELA and receive added benefits, appears on page 26.

Membership Committee

<i>Co-Chairs</i>	<i>Staff</i>
Bruce A. Fredrickson (DC)	Colleen Goodin, <i>Membership Director</i>
Aaron B. Maduff (IL)	Karen Maaki, <i>Affiliate Liaison</i>

Members

- Josh F. Bowers (MD)
- Amy L. Coopman (MO)
- Victor R. Farrugia (LA)
- Mark Hammons, Sr. (OK)
- James H. Kaster (MN)
- David L. Kern (TX)
- David L. Lee (IL)
- Edgar Fabrice Ndjatou (DC)
- Rebecca L. Salawdeh (WI)
- Brooke Timmer (IA)

Standing Up For Employee Rights Advocates: The Ethics & Sanctions Committee

NELA's Ethics & Sanctions Committee is a perfect example of how NELA members stand up for one another. The Committee provides crucial support to fellow employee rights advocates on a range of ethics topics, keeps NELA members abreast of new developments through reports in *The Employee Advocate*, NELA's quarterly magazine, and educates NELA members at the Annual Convention, among other ways. It also offers assistance to those facing efforts by defense counsel to obtain bar discipline, reduce or "reverse" attorneys' fees, or seek court-imposed sanctions. The Committee monitors and provides guidance through NELA's Service Hotline For Ethics Requests (SHOFER), postings to our online community, and direct requests from NELA members.

The Committee administers NELA's Sanctions Assistance Fund For Emergency Relief (SAFER), which is available to help NELA members defray the costs and expenses associated with defending against sanctions motions and fee awards that can devastate an attorney's practice. In 2011, NELA distributed over \$13,000 from SAFER, which is made possible through voluntary contributions from NELA members.

Ethics & Sanctions Committee

Co-Chairs:

Ellen J. Messing (MA)
Janet E. Wise (FL)

Staff:

Rebecca Hamburg Cappy, *Program Director*

Members:

Susan E. Babb (NJ)	Allan N. Karlin (WV)
Jonathan A. Bernstein (NY)	Denise J. Knecht (OH)
Heather Borlase (CA)	Paul H. Merry (MA)
Harris D. Butler, III (VA)	Richard R. Renner (DC)
Carrie Herschman (IL)	Jeffrey S. Wrage (IN)
John F. Karl (DC)	Bennet D. Zurofsky (NJ)

Strengthening Our Commitment To Our 68 NELA Affiliates

In 2011, NELA and our Affiliates reaffirmed our mutual commitment to our shared goals through a Memorandum of Understanding that articulates our common educational and advocacy purposes and identifies how we will combine resources and knowledge, create a well-informed membership, and enhance membership development and retention for both NELA and Affiliates. This Memorandum is a significant component of NELA's 2008–2013 Strategic Plan that will carry us into the future as an even stronger unified body.

One crucial platform for information sharing and networking is the annual Affiliate Leadership Workshop & Forum presented by NELA's Affiliate Relations Committee. The 2011 Affiliate Leadership Workshop & Forum, held on June 29, 2011 in conjunction with the Annual Convention, brought together 50 Affiliate leaders from around the country, NELA Executive Board members, and NELA Staff members for a full-day program of practical insights and discussions on topics including developing a budget, legal considerations for Affiliates, recruiting and motivating Board members, and evolving issues with listserve usage.

The Affiliate Leadership Workshop & Forum is also an acknowledgment of the hundreds of hours leaders devote to their circuit, state, and local NELA communities. We extend our special thanks to current and past Affiliate leaders for their vision and action in leadership.

New leaders who stepped forward in 2011 are:

Michelle Bushman, Utah Employment Lawyers Association
Drew M. Capuder, West Virginia Employment Lawyers Association
Antoinette Choate, NELA-Illinois
Andrew M. Dansicker, Maryland Employment Lawyers Association
Loren B. Donnell, Florida NELA
Toni J. Jaramilla, California Employment Lawyers Association
Robert G. Johnson, Eighth Circuit NELA
Roger E. Kohn, Vermont Employment Lawyers Association
Cheryl B. Legare, NELA-Georgia
Jennifer B. Morton, Tennessee Employment Lawyers Association
Rosemary Orsini, Colorado PELA
Scott M. Pollins, NELA-Eastern Pennsylvania
Christina M. Royer, Cleveland Employment Lawyers Association
Julie M. Weiner, NELA-Georgia
Ferne Wolf, St. Louis NELA

Affiliate Relations Committee

The mission of NELA's Affiliate Relations Committee (ARC) is to create, build, and support strong state and local Affiliates by working closely with Affiliate leaders. To accomplish its mission, the ARC holds the annual Affiliate Leadership Workshop, maintains and updates a resource manual for Affiliate leaders, provides organizational assistance to Affiliates, and facilitates regular communication between local Affiliates and the national organization.

Co-Chairs

David L. Lee (Seventh Circuit)
Nina T. Pirrotti (Second Circuit)

Staff

Karen Maoki, *NELA Affiliate Liaison*

Members:

Amy L. Coopman (Eighth Circuit)
Kathryn Burkett Dickson (Ninth Circuit)
Randy A. Fleischer (Eleventh Circuit)
Mark Hammons, Sr. (Tenth Circuit)
Ann Luginbill (Sixth Circuit)
Paul H. Merry (First Circuit)
Trang Q. Tran (At-Large)

Open seats: Third, Fourth & DC, and Fifth Circuits

For more information about a NELA Affiliate in your area, or to update your Affiliate's information, please contact Karen Maoki, Affiliate Liaison, (Tel: (415) 296-7629, ext. 203; Email: kmaoki@nelahq.org).

2011 Enhanced Members

NELA extends our heartfelt gratitude to our members who joined or renewed at these enhanced levels of membership in 2011.

Champion Members (\$5,000)

Joseph V. Kaplan	Sonja Deyoe	Walt Auvil
Sandra D. Mazliah	Cletus Ernster	Alan Banov
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	Jordan Thomas	Lindy Korn	
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		Judith A. Lonquist	
		Ann Lugbill	

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David M. deRubertis		Paul H. Merry
		Ellen J. Messing

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Every effort was made to ensure the accuracy of the individuals, firms, and other organizations acknowledged in this Annual Report. We apologize for any errors or omissions.

2011 Donors

NELA acts collectively to advance equality and justice in the American workplace. Our work is made possible by the generous contributions of our members, Affiliates, coalition partners, and institutional and other individual supporters. We extend our deepest gratitude to the following organizations, law firms, and individuals for their financial support to further NELA's mission in 2011.

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G. Todd Withy
Christopher H. Whelan
Brad Yamauchi

NELA & The Institute: Partners In Employee Rights Advocacy

NELA's sister organization, The Employee Rights Advocacy Institute For Law & Policy (The Institute), continues to be our indispensable partner in supporting employee rights advocacy and advancing equality and justice in the American workplace. You can read more about The Institute's recent accomplishments in its 2011 Annual Report, which may be downloaded at www.employeeightsadvocacy.org/annualreport.

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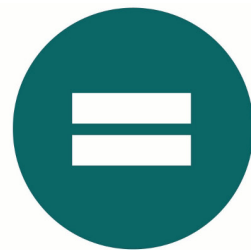
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Karen Maoki
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Nareeya Nalivka
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Gustavo Sanchez
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EQUALITY | JUSTICE | UNITY

Honoring Professor Eric Schnapper

The Employee's Voice In The United States Supreme Court

It is with deepest gratitude that we thank our generous sponsors of NELA's 2011 Gala Fundraiser.

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The Engelhardt Family Foundation
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Collins Law Firm
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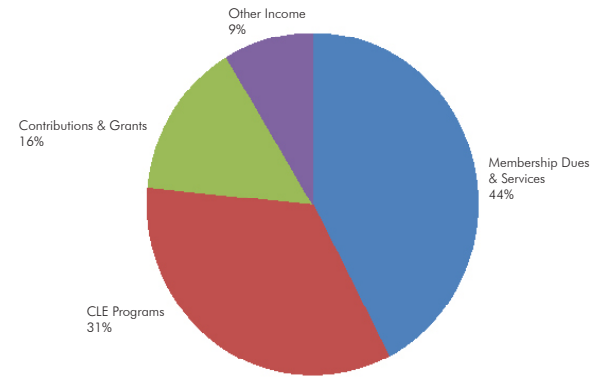
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Williams Law Firm, PC
Wisconsin Employment Lawyers Association
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2011 Annual Financial Statement

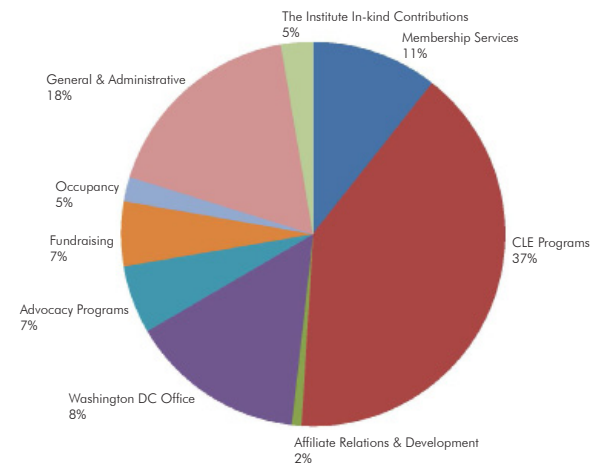
Revenue

Membership Dues & Services	\$ 681,501
CLE Programs	\$ 492,659
Contributions & Grants	\$ 45,592
Other Income	\$ 44,600
Total	\$ 1,564,352



Program & General Expenditures

Membership Services	\$ 166,680
CLE Programs	\$ 538,157
Affiliate Relations & Development	\$ 24,947
Advocacy Programs	\$ 105,792
Washington DC Office	\$ 108,568
Fundraising	\$ 105,096
Occupancy	\$ 5,212
General & Administrative	\$ 263,036
The Institute (In-Kind Contributions)	\$ 78,911
Total	\$ 1,466,400



Net Revenue Over Expenditures \$ 97,952

Reserves (12/31/2011) \$ 851,394



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417 Montgomery Street
Fourth Floor
San Francisco, CA 94104
Tel: (415) 296-7629

Washington DC Office
1828 L Street, NW
Suite 600
Washington, DC 20036
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