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Mihalik v. Credit Agricole Cheuvreux: An Object Lesson in Summary Judgment Litigation

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In **Mihalik v. Credit Agricole Cheuvreux No. America,** 715 F.3d 102 (2d Cir. 2013),[1] the Second Circuit recently reversed the summary dismissal of a plaintiff's gender discrimination and retaliation claims, brought under the New York City Human Rights Law. The decision represents the appellate court's strongest declaration to date that the NYCHRL is more protective than federal law of employment discrimination victims. But **Mihalik** is perhaps even more important for the guidance it provides as to how courts should weigh the evidence in a motion for summary judgment.

The Second Circuit's opinion, in the way it focused attention on evidence the importance of which was minimized by the lower court, restored for consideration evidence ignored below, and appreciated the nuances of the workplace, is a model for adjudicating a summary judgment motion. Had the district court

See SUMMARY JUDGMENT, next page

Women's Equality Act Fails to Pass As N.Y. Legislative Session Ends

By By Joni Kletter
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In his State of the State address on January 9, 2013, Gov. Andrew Cuomo introduced the omnibus Women's Equality Agenda, a ten-point initiative intended to break down barriers to women's full participation in society and to further advance their health and well-being. Five out of the ten proposals directly relate to employment issues that are relevant to NELA/NY lawyers and the clients they serve. NELA/NY signed on as a coalition member, and NELA/NY attorneys have been actively involved in drafting, promoting and lobbying for this legislation, which includes:

- Ensuring New York's abortion law reflects federal protections and current medical practice
- Achieving pay equity by strengthening the equal pay act law
- Strengthening sexual harassment laws
- Allowing for the recovery of attorneys' fees in employment and credit and lending cases
- Strengthening human trafficking laws
- Strengthening family responsibility discrimination laws

See WOMEN'S EQUALITY ACT, page 4

NELA/NY President Darnley Stewart addresses rally for women's rights

The NELA/NY
Calendar of Events

August 6th
Bar Talk
(Co-hosted by the Judiciary Committee)

Location TBA

October 11
NELA-NY Fall Conference
Yale Club

"In addition to our great and active Gender Committee which you will read about in this edition, NELA-NY has a number of excellent committees. We are always looking to add additional members who interests are aligned with the various committees' missions. Please feel free to contact me at any time for more information and ways you can get involved."

—Alix Ford,
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A Word from Your Publisher

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SUMMARY JUDGMENT, from page 1

faithfully followed the dictates of Fed. R. Civ. P. 56, as the Court of Appeals' analysis shows, the plaintiff would have survived summary judgment, regardless of whether the NYCHRL or federal law governed.

The Facts of the Case[2]

Renee Mihalik was hired as a Vice President, selling Cheuvreux's electronic equity trading services to institutional clients, and working under the CEO, Ian Peacok. Within months of her hire, Peacock frequently commented on Mihalik's appearance and the sexiness of her attire, once saying that her wearing red shoes meant she was "promiscuous." He also asked her intrusive questions about her personal life and questioned her about a sexual position. Peacock twice propositioned Mihalik, and after she turned him down, he would no longer sit next to her at the trading desk, excluded her from meetings, publicly berated her and criticized her work.

With Peacock in the lead, the Cheuvreux office took on the atmosphere of a "boys club." Talk about strip clubs and rating female colleagues' appearances were favorite pasttimes among the male employees. Pornography was frequently found on computer screens and transmitted among the staff, with Peacock showing Mihalik pornography once or twice a week. An attitude of male domination at Cheuvreux was reflected by Peacock's telling Mihalik to "respect" a recently hired male employee because, as a "male," he was more "powerful" than she was.

Mihalik twice complained internally about Peacock, first, regarding his demeaning criticisms of her work, and subsequently, about his critiques of her appearance and inappropriate sexual comments. In response, she was told on one occasion that no one would believe her since he was the CEO, and on another, that she undoubtedly would be fired if she criticized Peacock.

Complicating what would have been a straightforward sexually hostile environment case was Mihalik's poor work performance. Her sales commissions were substantially lower than her colleagues, she had failed to follow up on some sales prospects and had been absent 35 days. After Mihalik failed to complete an assignment, Peacock met with her, intending only to give her a performance warning. But when, at the meeting, Mihalik alluded to Peacock' having propositioned her,[3] she was fired.

The District Court's Decision

The district court began its discussion of Mihalik's gender discrimination claims by citing to **Williams v. New York City Hous. Auth.**, 61 A.D.3d 62, 74-75 (1st Dep't 2009), for the rule that in deciding sexual harassment claims under the NYCHRL, courts should not use Title VII's analytical framework, but should "examine broadly whether 'different terms, conditions and privileges of employment [were imposed] based, inter alia, on gender.'" **Mihalik, 2011 WL 358606 *6, quoting Williams**, 61 A.D.3d at 75. Yet, noting the Second

See SUMMARY JUDGMENT, page 6

Guest Column: Paula Deen discrimination case sheds light on race relations

By Margaret McIntyre
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Over the weekend before the major Supreme Court cases came down, another employment discrimination case made big news, in a completely different context but in a way that sheds some light on where we are as a society on race relations. News broke that food show host Paula Deen had admitted, in a deposition, to using the n-word, followed quickly by news that her television show was being canceled and her food empire might be crumbling. This was quickly followed by clarifications that Ms. Deen only admitted to one actual use of the n-word and it was in the context of her report to her husband about having had a gun pointed at her in a robbery, in 1986.

Much air time was expended on whether or not a single use of the n-word made Paula Deen a bad person and justified so much economic loss for her. Soon conservative commentators were alleging that she was the victim, and there was a lot of partisan banter on that question. Largely glossed over were the allegations of overtly racist and sexist behavior made in the lawsuit in which the deposition was taken. Perhaps journalists were more comfortable quoting from the deposition than they were from a complaint in which the allegations have not yet been proven, but just a little context shows how wrong it is for the media to convey, intentionally or not, the impression that the lawsuit was about occasional use of the n-word.

The case was brought by Lisa Jackson, a white woman, a former General Manager in Paula Deen's food empire who had responsibility for turning around the struggling Savannah, Georgia, restaurant called Uncle Bubba's Seafood and Oyster house, jointly owned by Paula Deen and her younger brother, Earl "Bubba" Hiers, but primarily run by Bubba Hiers.[1] The complaint alleges that Ms. Jackson was brought in as General Manager because the previous GM, a man, had been sleeping with a staff member, and Ms. Deen was worried about being sued. The complaint says Ms. Deen told Ms. Jackson she was hiring "a woman for a man's job" to fix the situation at the restaurant. At her deposition, Ms. Deen admitted that the previous GM had been involved with an "underage server" and that she had said to her brother, as alleged in the complaint: "If you think I have worked this hard to lose everything because of a piece of pussy, you better think again."[2]

The complaint alleges that as soon as Ms. Jackson started her job in 2005, Bubba Hiers began making sexist remarks to her and that throughout her employment at the restaurant he created an environment filled with overtly sexist and racist comments and behavior, including different rules (and doors, and bathrooms) for black and white employees, and even a physical assault on an African-American employee, all of which caused the staff to "live in fear" of Bubba Hiers. The complaint reads like a textbook example of the interrelationship of race, gender and class bias, exacerbated by alcohol. Most of the allegations describe actions by Bubba Hiers and sound like they could be from the pre-civil rights era (except that the pornography permeating the environment was downloaded from the Internet onto a shared computer). The crux of the complaint against Paula Deen herself is that the plaintiff complained repeatedly to her (and to others) to put an end to the hostility, to no avail.

At her deposition, Ms. Deen admitted to saying to the plaintiff that she wanted to host a "southern style plantation wedding" for her brother, with African-American male waiters (they had to be men and be "black," that was the point) dressed in white shirts and bow ties, but the reason she could not do so was that people "would misinterpret." P. 125. In that instance, she specifically denied using the n-word to describe the wait staff: "No, because that's not what these men were. They were professional black men doing a fabulous job." P. 129. She did acknowledge that the atmosphere she was hoping to evoke at the wedding was the pre Civil War era, when the black men and women who waited on white people were slaves, though she did not mean that in a derogatory way. Pp. 130-31.

That will be a lot for the jury to chew on. It is ironic that in these times where plaintiffs' lawyers often struggle to prove implicit bias, here is a case where the alleged racist and sexist comments and behavior are overt, and yet news coverage has reduced the story to a single use of the n-word by one person, who is not the person accused in the suit of creating the hostile environment, but of condoning it. Lawyers and judges are supposed to consider the totality of the circumstances and yet the public discussion of this case, based on bits and pieces, shows how easy it can be to lose focus on what was actually happening in the workplace to actual people.

The Paula Deen news story fits right into a time when the conservative majority on the Supreme Court fusses over making sure retaliation is not too easy to prove and that employers are not (unfairly!) held accountable for abusive acts of low-level supervisors even if they do control the day-to-day activities of other employees. As plaintiffs' lawyers, we have a lot of work to do. ■

Endnotes

1 The original state court complaint can be found on-line at http://www.atlawblog.com/wp-content/uploads/2012/03/Jackson-v.-Deen-et-al.-Complaint.pdf. The case was later removed to the United States District Court, Southern District of Georgia, where an amended complaint was filed. The index number is 12 Civ 0139.

2 Deposition of Paula Deen, taken on May 17, 2013, and filed electronically in Lisa T. Jackson v. Paula Deen, et al., United States District Court, Southern District of Georgia, 4:12-CV-0139, p. 121. Subsequent page references are to the deposition transcript.

WOMEN'S EQUALITY ACT, from page 1

- Ending source of income discrimination
- Ending housing discrimination for victims of domestic violence
- Strengthening pregnancy discrimination and accommodation laws
- Strengthening order-of-protection laws for victims of domestic violence

In terms of the equal pay provision, the new law would tighten current exceptions so that pay differentials are only allowed when the employer can show that the differential is based on something other than sex and is related to job performance and consistent with business necessity. The law would also prohibit employers from terminating or retaliating against employees who share salary information.

The law would also allow sexual harassment victims to sue their employers under the Human Rights Law even if they employed fewer than four people.

On June 4, 2013, approximately 500 women descended on Albany to rally and lobby for the Women's Equality Act. The rally was a culmination of months of grassroots organizing by 850 coalition members, including labor groups, women's advocacy organizations, religious groups, health care associations and concerned New Yorkers. NELA/NY President Darnley Stewart was one of the featured speakers at the rally.

In discussing the proposed attorneys' fees provision for employment cases, Ms. Stewart emphasized that "the vast majority of the women we represent are not the Meg Whitmans of the world. When our clients seek our help in discrimination cases, they are up against employers who can pay $700 or $800 dollars an hour to a big law firm for their defense." She noted that while attorneys' fees are available under Title VII and the New York City Human Rights Law, fees are still not available to a successful plaintiff under the New York State Human Rights Law.

"In New York, if you are a woman or from another protected class, living outside a jurisdiction with local protection, you cannot get make-whole relief," Ms. Stewart stated."Many individuals simply cannot afford to pay an attorney so there is no recourse for the discrimination they suffered on the job. If you are a low wage worker in New York, our State Human Rights Law as it stands today, is virtually meaningless."

The Women's Equality Act would provide for attorneys' fees for women who prevail in their gender discrimination claims under the State Human Rights Law. However, Ms. Stewart expressed dismay that the current version of the Act only grants attorneys' fees in sex discrimination cases: "As a civil rights lawyer and the president of NELA/NY, I hope that that protection is expanded to all discrimination claims under the human rights law – not just for certain women. We can't leave out our black clients, our disabled clients, and our older clients."

On June 20, 2013, the State Assembly easily passed the omnibus Act, which included all 10 provisions, by a vote of 97-47.

However, Senate Republican Leader Dean Skelos, who along with Independent Democratic Conference ("IDC") leader Jeff Klein shares veto power over what legislation reaches the floor of the chamber, made it clear that he would not allow the abortion plank to be put up for a vote on the Senate floor. "We are prepared to do nine of the ten points and believe that women should not be forced to wait any longer for progress on these important issues," IDC leader Sen. Klein, D-Bronx, said in a statement.

Rather than vote on the omnibus Act, the Senate, on June 21, voted on individual bills and approved the 9 items that did not relate to abortion. The WEA therefore did not pass. Some advocates of the legislation now want the Assembly to come back and approve the non-abortion measures, even while hoping to strengthen abortion law at some other time. However, many Democratic Assemblywomen are insisting that the abortion provision has to remain part of the women's equality package.

Rally for women's rights, Albany, N.Y.

Some Senate insiders expect that Speaker Silver will ultimately call his house back to take up the nine bills, given his own problem with women following the scandal regarding Assemblyman Vito Lopez, who quit the Assembly after his sexual harassment of staffers was exposed.

"The bottom line is the other nine points provide important protections for women in the workplace and in the community," said Donna Lieberman, the executive director of the New York Civil Liberties Union, "and it's a disappointment that with such broad support, and such broad bipartisan support, those have yet to become law." ■

Supreme Court To Take Up Age Discrimination Claims Under Section 1983

By Stephen Bergstein
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The Supreme Court has agreed to decide whether employment discrimination plaintiffs may proceed under 42 U.S.C. § 1983 in addition to the Age Discrimination in Employment Act. The case is **Madigan v. Levin**, arising from the Seventh Circuit. The Supreme Court granted certiorari in March 2013. The case will be heard and decided in the 2013-14 Term.

As employment discrimination attorneys know, in order to proceed under the ADEA, plaintiffs in New York must timely file an EEOC charge within 300 days of the discriminatory act. Once the plaintiff receives the Notice of Right to Sue Letter, she may bring a federal action within two months. The outside time limit for bringing the lawsuit is 90 days. The plaintiff can only sue the employer, not individuals. Unlike the ADEA, Section 1983 claims do not require any filing prerequisites, and they carry a longer statute of limitations.

Plaintiffs' lawyers rely on Section 1983 in age discrimination cases, in part, when their clients have blown the shorter statute of limitations governing ADEA claims. The procedural and timing limitations under the ADEA are relaxed under Section 1983, which in New York gives plaintiffs three years to sue individuals in federal court to redress civil rights violations against government officials. In the age discrimination context, the plaintiff would file under Section 1983 to enforce the Equal Protection Clause. Against this background, the certiorari petition asks the following question for Supreme Court review:

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

The Supreme Court from time to time decides when plaintiffs may proceed under Section 1983 to enforce a right that Congress has addressed in a federal statute. Not every federal right may be enforced through Section 1983. Under the so-called "**Sea Clammers**" doctrine, courts determine whether Congress intended that the statute provide the only basis to enforce that right. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."[1] In 2005, the Court held that Congress intended that the Telecommunications Act could not be enforced under Section 1983 because the TCA was sufficiently comprehensive that Congress intended that the TCA was the exclusive means to enforce the rights under that statute.[2] However, in 2009, the Court held that, although Title IX of the Civil Rights Act allows students to recover damages for peer-on-peer harassment in the public schools, that relief is also available under the Equal Protection Clause, enforced through Section 1983, in part, because of the differences between the protections guaranteed by Title IX and the Equal Protection Clause.[3]

The Circuit courts have split on whether plaintiffs may sue for age discrimination in employment under the Equal Protection Clause. In **Levin v. Madigan**,[4] the case now before the Supreme Court, the Seventh Circuit stated that "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims."[5] However, the court stated, "[d]istrict courts located in other circuits, however, are split on the issue."[6] The Second Circuit has not addressed this issue, though Southern District Judge Rakoff in 2008 held that the weight of authority in this Circuit holds that the ADEA does not preclude a § 1983 claim.[7] The Seventh Circuit, including conservative Judge Richard Posner, concluded,

> Although the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to **Sea Clammers** and **Rancho Palos Verdes**, we find that it does not preclude a § 1983 claim for constitutional rights. While admittedly a close call, especially in light of the conflicting decisions from our sister circuits, we base our holding on the ADEA's lack of legislative history or statutory language precluding constitutional claims, and the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim.[8]

In other words, although the ADEA comprehensively prohibits age discrimination in employment, "the ADEA does not purport to provide a remedy for vio-

See SECTION 1983, page 10

1 *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

2 *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005).

3 *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009).

4 692 F.3d 607 (7th Cir. 2012).

5 *Id.* at 616.

6 *Id.* (citing *Shapiro v. N.Y. City Dep't of Educ.*, 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008) (weight of authority in the Second Circuit holds that the ADEA does not preclude a § 1983 claim); *Mustafa v. State of Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 (D. Neb. 2002) (the ADEA does not impliedly repeal § 1983 constitutional claims); *Kelley v. White*, 2011 U.S. Dist. LEXIS 108092, 2011 WL 4344180, at *3 (E.D. Ark. Sept. 15, 2011) (the ADEA is the exclusive remedy for age discrimination claims) and *Phillis v. Harrisburg Sch. Dist.*, 2010 U.S. Dist. LEXIS 31413, 2010 WL 1390663, at *10 (M.D. Pa. Mar. 31, 2010) (same)

7 Shapiro, 561 F. Supp. 2d at 420.

8 692 F.3d at 617.

SUMMARY JUDGMENT, from page 2

Circuit's lack of guidance on the issue, the district court nonetheless used Title VII's traditional *quid pro quo* and hostile environment framework to analyze plaintiff's gender discrimination claim.

The court dismissed Mihalik's *quid pro quo* sexual harassment claim for her failure to present any evidence of a causal connection between her rejection of Peacock's sexual propositions and her termination four months later. The court found that the four-month gap was too extended to create an inference that the events were linked.[4] The fact that, in the interim period, Mihalik was subjected to a series of potentially discriminatory acts – given menial job duties, publicly criticized and excluded from meetings – did not save the claim in the court's eyes. And, in any event, the court held, Mihalik's poor performance was a legitimate nondiscriminatory reason for her termination.

As to plaintiff's hostile environment claim, the district court acknowledged that a plaintiff's burden under the NYCHRL was less demanding than under Title VII. In particular, a plaintiff did not have to show that the conduct was "severe and pervasive" to establish liability. But, according to the court, Mihalik could not even meet this more forgiving standard. The district court's description of the evidence of hostile work environment is quoted here in full:

> First, Mihalik testified that Peacock showed her pornography once or twice a month from July to December 2007. However, Mihalik concedes that she asked to view the images in question on at least one occasion, and presents no details about the circumstances of the other occasions. Mihalik relies on *Patane v. Clark* [citation omitted] for the proposition that the presence of pornography in the workplace supports a hostile work environment claim, but the plaintiff in *Patane* was required to handle pornographic videotapes for her supervisor regularly and discovered that her supervisor was viewing pornographic websites on the plaintiff's own computer, and is therefore distinguishable.
>
> Mihalik also testified that Peacock commented repeatedly on her appearance in an objectifying and demeaning manner and propositioned her twice in December 2007. Specifically, Mihalik testified that Peacock commented she looked 'very sexy' once a week and made other sporadic comments from July to December 2007, including one remark suggesting that Mihalik was promiscuous and one question whether she enjoyed a particular sexual position. These comments are certainly boorish and offensive, but are not so grave or objectionable that they would have altered the conditions of Mihalik's employment. Additionally, the alleged sexual advances involved instances of propositioning in December 2007, and Plaintiff does not contend that any further comments or intrusive behavior took place during the four months afterwards.

Stressing that the NYCHRL is not a "general civility code," 2011 WL 3586060 *10, quoting **Williams**, 61 A.D.3d at 79, the court dismissed Mihalik's hostile environment claim.

As to plaintiff's retaliation claim, the district court held that there was no causal link between the termination and either her internal complaints or her rejection of Peacock's sexual advances. The court noted there was no evidence that Peacock was aware of her complaints. Finally, the court repeated that Mihalik's poor performance was a legitimate, non-biased reason for her discharge.

The Second Circuit's Decision

In an opinion written by Judge Denny Chin, the Second Circuit took issue both with the district court's legal and factual analysis. The Second Circuit held that the district court erred in dividing up Mihalik's gender discrimination claim into q*uid pro quo* sexual harassment and sexually hostile work environment. The Court pointed out that *quid pro quo* and hostile work environment are federal law constructs, foreign to the NYCHRL. Instead, following **Williams,** the Second Circuit held that the correct standard to review any gender discrimination claim, including sexual harassment claims, was whether the plaintiff was "treated less well than other employees because of her gender." **Mihalik,** 715 F.3d at 110, quoting **Williams**, 872 N.Y.S.2d at 39. Once the plaintiff established that she was "treated less well," the employer may escape liability only by proving, as an affirmative defense, that the allegedly offensive conduct was nothing more than "'petty slights and trivial inconveniences.'" **Mihalik**, 715 F.3d at 111, quoting **Williams**, 872 N.Y.S.2d at 41

The decision represents the Second Circuit's strongest declaration that the NYCHRL is more protective than federal law of employment discrimination victims.

Having established the correct standard to analyze Mihalik's gender discrimination claim, the appellate court's decision was easy. The evidence, as described by the court, straight forwardly showed that Mihalik was "treated less well" because of her gender. It is instructive to compare the Second Circuit's summary of the evidence of the hostile work environment with the district court's summary quoted above:

> Mihalik presented evidence that men in the Cheuvreux office 'objectified' women by openly viewing and sharing pornography, discussing their jaunts to strip clubs, rating the female employees' appearances, and making lascivious comments about women's outfits and bodies. . . . There was even evidence that Peacock explicitly told Mihalik that male employees should be respected because they were 'male' and thus 'more powerful' than women.

See SUMMARY JUDGMENT, next page

SUMMARY JUDGMENT, from page 6

Id. at 113.

While the Second Circuit plainly wrote that the men at Cheuvreux "'objectified' women by openly viewing and sharing pornography," the district court's discussion was full of qualifications and limitations -- Peacock showed Mihalik pornography, but only once or twice a month for just four months; one time, plaintiff had asked to see the video and could not give details about the other times; she was not made to handle pornographic videotapes and her computer was not used to show pornography. The district court understated the evidence of male employees' frequent comments (some lascivious) about plaintiff's and other female employees' appearances, as well as questions about her sex life and preferred sexual positions,[5] as "boorish and offensive" conduct, "not so grave or objectionable [to] alte[r] the conditions of Mihalik's employment." 2011 WL 3586060 *10. The district court, in addition, qualified the seriousness of Mihalik's unwanted sexual propositions, by noting that the two incidents were "isolated" and occurred in December, without "further comments or intrusive behavior" during the following four months. *Id*. Finally, the district court simply omitted telling evidence of a hostile workplace, namely that Peacock's statement to Mihalik that male employees should be respected because they were "male" and thus "more powerful" than women.[6]

Similarly, the district court gave a cramped presentation of the facts underlying Mihalik's *quid pro quo* sexual harassment and retaliation claims. Evidence of the adverse treatment suffered by Mihalik between her rejection of Peacock's sexual advances and her termination was highly relevant to both claims. For the *quid pro quo* claim, the adverse treatment was evidence of a continuing causal connection culminating in her discharge, and as to the retaliation claim, the adverse treatment was actionable itself. *Id*. at 116. Yet the district court explained away the interim hostile treatment. The court noted that the one task the plaintiff had considered menial she later conceded was not; there was evidence of her being excluded from just one meeting; and criticism of an employee's job performance did not constitute "tangible job detriments." 2013 WL 3586060 *7.

Contrast the Second Circuit's view of the same evidence:

> Mihalik testified in her deposition that, after she rejected Peacock's propositions…, he began to tell her – in front of her mostly male colleagues – that "she add[ed] nothing of value," that she has no fucking clue what [she was] doing," and that she was "pretty much useless." Mihalik also alleges that Peacock stopped sitting next to her at the front desk and instructed the staff to exclude her from meetings. [7]

715 F.3d 115-16. The court took note of "workplace realities," and stated that Mihalik's boss' "publicly humiliating her in front of her male counterparts and otherwise shunning her was likely to deter a reasonable person from opposing his harassing behavior in the future." *Id*. at 116 (inner quotations and citations omitted).[8]

Finally, the district court over-emphasized the legal significance of the plaintiff's poor work performance. The Second Circuit agreed that evidence of Mihalik's poor performance was "substantial." *Id*. at 117. However, the court also called attention to evidence never discussed in the lower court's opinion from which it could be inferred that Mihalik's work performance was not the true reason for her discharge: Peacock had never criticized Mihalik's work before she turned him down, and Peacock had not intended to terminate the plaintiff at his final meeting with her until she questioned whether his criticisms were motivated by the rejection he suffered. Such evidence, the Second Circuit states, would allow a reasonable jury to determine Cheuvreux was using Mihalik's poor performance as a pretext for retaliation. Moreover, Mihalik's work performance did not excuse the harassment she suffered: "Even a poorly-performing employee is entitled to an environment free from harassment." *Id*. at 114.

Mihalik as an Object Lesson

The district court's decision in **Mihalik**, granting summary judgment in the face of substantial evidence of discrimination and retaliation, is not an outlier. Plaintiffs' employment lawyers know that decisions like the lower court's are not so unusual within the federal judiciary. What is unusual is a reversal by an appellate court so clearly demonstrating how a trial court misinterpreted the evidence presented on a motion for summary judgment, leading to the undeserved denial of the plaintiff's right to a jury trial.

The federal courts' all too ready use of summary judgment, and since **Twombly** and **Iqbal**, of motions to dismiss, to dispose of employment cases without a trial has received increasing notice from academics. The dean of federal civil procedure, Arthur Miller, as part of a broad critique of the "deformation of civil procedure" over the past 30 years, argues that the motion for summary judgment "has taken on an Armageddon-like significance; it has become both the centerpiece and end-point for many (perhaps too many) federal cases."[9] According to Miller, the federal courts' abuse of summary judgment is one of a number of changes to the Federal Rules over the past 30 years that have restricted plaintiffs' ability to reach a determination of their claims' merits, limit citizens' access to the courts, interfere with private litigation to enforce various public policies, such as employment discrimination, and reflect the strong pro-business and pro-government bias of the federal judiciary.

The Federal Judicial Center found that summary judgment is granted disproportionately to dismiss civil rights and employment cases. In its most recent study, the Center reported that 77% of summary judgment motions are granted, in whole or in part, in employment discrimination cases and 70% in other civil rights cases, compared to 61% in torts cases, and 59% in contracts cases. Further, 15% of employment discrimination cases and 6% of other civil rights cases were terminated by summary judgment, as compared with 3% of torts and 4% of contracts cases.[10]

The former U.S. District Court Judge, Nancy Gertner, has written that the prevalence of summary judgment in employment discrimination cases is

See SUMMARY JUDGMENT, page 9

Bonito v. Avalon and Personal Liability of Corporate Officers Under the New York Labor Law

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In a case garnering the attention of the Attorney General of New York and numerous workers' rights agencies, a New York appellate court has unanimously ruled that a corporate officer is liable for failing to pay employee wages if he qualifies as an employer under the New York Labor Law (NYLL).

Background

The case, **Bonito, et al v. Avalon Partners, Inc., et al.**[1], involves former stockbrokers of the now-defunct firm Avalon Partners. The stockbrokers allege that they were not paid overtime and were subjected to impermissible pay deductions, in violation of the NYLL. Plaintiffs named both Avalon Partners and Vincent Au, Avalon's president, as defendants and alleged that both the firm and Mr. Au were their employers under the law.[2]

Defendants moved to dismiss, arguing in part that Mr. Au could not be held personally liable for unpaid wages. In support, defendants cited case law that corporate officers were not individually liable under the NYLL unless a piercing of the corporate veil was justified. As plaintiffs did not assert facts in support of a piercing of the corporate veil, defendants insisted that Mr. Au should be dropped from the lawsuit.

In response, plaintiffs emphasized that they were not bringing a claim against Mr. Au due to his status as a corporate officer; rather, they were suing him as their former employer. Plaintiffs pointed to legal precedent recognizing that a corporate officer who qualified as an employer under the NYLL was subject to personal liability.

Rejecting plaintiffs' arguments, the trial court ruled that a corporate officer was exempt for individual liability, regardless of whether the officer qualifies as an employer under the NYLL. At the heart of the court's decision was the case **Stoganovic v. Dinolfo**.[3]

Stoganovic v. Dinolfo

In the *Stoganovic* case, soccer players sued the president of their former corporate employer alleging that they were not paid all of their wages.[4] However, unlike in **Bonito**, the **Stoganovic** plaintiffs' claims were brought under the Labor Law's criminal provisions.[5] The soccer players argued that the criminal provisions gave rise to a private right of action against corporate officers. Under the players' theory, the company president was civilly liable for their unpaid wages due to his status as a corporate officer. Dismissing the claims, the Fourth Department ruled that there was nothing in the NYLL criminal provisions "suggesting that the Legislature intended that the section[s] should impose civil liability as well."[6]

The trial court in **Bonito** broadly interpreted **Stoganovic** to prohibit individual wage claims against anyone who held a corporate officer position.

Bonito v. Avalon Appeal

After an unsuccessful motion for reconsideration, the **Bonito** plaintiffs appealed the trial court's decision. The plaintiffs pointed out that under the NYLL, employees have a private right of action against their employers, and the definition of "employer" includes both individuals and companies. The plaintiffs cited to numerous cases in which individuals – including corporate officers – had been found personally liable as employers under the NYLL pursuant to the "economic reality" test. Further, plaintiffs stressed that the New York Department of Labor had issued an opinion letter advising that, notwithstanding **Stoganovic**, a corporate officer who satisfies the economic reality test is personally liable for failing to pay employee wages.

Economic Reality Test

Under the economic reality test, courts look to the economic realities of the relationship between the alleged employer and employee to determine whether the alleged employer had the power to control the workers. Relevant factors include whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.[7]

Plaintiffs alleged that Mr. Au hired and fired stockbrokers, supervised and controlled their work schedules and approved vacations, determined the method and rate of stockbrokers' pay and kept employment records. Accordingly, plaintiffs argued that they had sufficiently alleged that Mr. Au was their employer under the NYLL.

Amicus Curiae

The New York Attorney General and multiple workers' rights organizations were granted permission by the Appellate Division to file briefs as *Amicus Curiae* in support of the plaintiffs. In their briefs, *Amici Curiae* emphasized that the denial of personal liability for individual employers would hamper the

See NYLL, page 10

1 2013 NY Slip Op 03775 (1st Dep't 2013).

2 See NYLL §§ 198, 663 (recognizing that an employee could bring a claim against his employers for the underpayment of wages).

3 92 A.D. 2d 729 (4th Dep't 1983), aff'd, 61 N.Y.2d 812 (1984).

4 92 A.D. 2d at 729.

5 Id.See alsoNYLL §§ 198-a, 198-c (criminal penalties for officers whose company failed to properly compensate employees).

6 92 A.D. 2d at 729-730.

7 See, e.g. Herman v. RSR Sec. Services Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (applying the economic reality test to determine whether an individual was an employer under the federal Fair Labor Standards Act).

NELA/NY'S Gender Discrimination Committee

By Geoffrey Mort
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NELA/NY has a number of committees, such as the Conference Committee and Judiciary Committee, but few deal with substantive legal areas. One that does is the Gender Discrimination Committee, an active committee that is concerned with one of the more dynamic, changing and topical areas of employment law.

The committee has sponsored a NELA/NY Spring Conference panel presentation and a NELA Nite program, and plans to step up such activities in the future. The committee meets once each month between September and May, and currently is co-chaired by Ashley Normand of Brill & Meisel LLP and Geoff Mort of Kraus & Zuchlewski LLP. It has approximately fifteen active members in addition to others who attend meetings and take part in projects periodically.

The committee was initially organized as the Sexual Harassment Committee in the 1990s, at roughly the time Faragher v. City of Boca Raton and Ellerth v. Burlington Industries were granted certiorari by the U.S. Supreme Court. To my knowledge, the committee's first co-chairs were Laura Schnell and Larry Solotoff. Some years later, after Ashley Normand became its chair, the committee widened its scope to become the Gender Discrimination Committee.

Most recently, the committee sent a number of its members to Albany to participate in the NELA/NY lobbying effort for Governor Cuomo's proposed Women's Equality Act. One of the committee's more long-term projects is "Know Your Rights," an outreach effort designed to inform interested women in the City about their rights relating to gender discrimination under federal, state and city law. A powerpoint presentation has already been developed, and the committee expects to conduct a "Know Your Rights" program in the early fall, possibly in lower Manhattan. In addition, of course, the committee provides a forum for members to discuss developments in gender discrimination law as well as their own cases involving gender discrimination issues.

New members are always welcome, and should feel free to contact Ashley Normand or Geoff Mort about the committee. ■

SUMMARY JUDGMENT, from page 7

aided by judge's employing "shorthand, descriptive tools" that often substitute for rigorous analysis of the evidence, and even more disturbing, "provide new opportunities for the stereotypes and assumptions of judges to filter cases out of litigation at early stages." Most of us are familiar with these tools: stray remarks, same actor, honest belief or business judgment.[11]

What is a plaintiff's lawyer to do knowing the federal judiciary's proclivity for granting summary judgment in employment discrimination cases? NELA National has prepared some excellent papers on defeating motions for summary judgment.[12] Here is another thought. Instead of the standard section of the brief setting forth the summary judgment standard, a section that judges and their clerks probably skip over in any event, how about explicitly discussing, in a non-accusatory way, how summary judgment, particularly in employment cases, has been abused, citing the many academic studies on the subject, a few of which have been mentioned here. For plaintiffs' lawyers to put the issue out in the open on a consistent basis may alert judges to beware of their biases against employment cases, and *may* lead to better decisions. Perhaps with the issue out front and center it won't be necessary, as in *Mihalik*, to have to win a terrific appellate decision reversing an improvident grant of summary judgment for your client to try his or her case to a jury.

Endnotes

1 The case was brought by NELA/NY member Brian Heller, of Schwartz & Perry, LLP.

2 This summary of the case comes from the Second Circuit's opinion, since, as discussed in the text, the district court's opinion omitted some pertinent facts.

3 Mihalik asked Peacock, "What's not working out [?] Me and you or me at the company?"

4 *But see Bernhardt v. Interbank of N.Y.*, 18 F. Supp. 2d 218 (EDNY 2008) (11-month gap);

258 F.Supp.2d 264 (S.D.N.Y. 2003) (9 months); *Salerno v. City Univ. of New York*, No. 99 Civ. 11151 (NRB), 2003 WL 22170609 (S.D.N.Y. 2003) (3-year gap where there was other evidence of retaliatory motive).

5 The district court wrote that Peacock asked "one question about whether she enjoyed a particular sexual position," 2011 WL 3586060 *10, while the Court of Appeals described Peacock's inquiry of Mihalik more graphically, asking whether she "fanc[ied] dogging." *Id*. at 106.

6 The Second Circuit underlined the seriousness of Peacock's remark by quoting *Williams*, 872 N.Y.S.2d at 41, n.30, that "a single comment that objectifies women… made in circumstances where the comment would, for example, signal views about the role of women in the workplace [may] be actionable." 715 F.3d at 113.

7 Without offering an opinion as to whether rejecting a boss' sexual proposition is protected activity under federal and state law, the Second Circuit made clear that such conduct is considered protected under the NYCHLR. *See* 715 F.3d at 116, n.12.

8 On this point, the court, 715 F.3d at 116, cited Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 332 (asserting that if "the cost of opposing discrimination would be the loss of all future social intercourse with other employees, the workplace reality would be that some people – indeed, many people – would become less likely to oppose discrimination than they otherwise would be.")

9 Arthur R. Miller, A., "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedures," 86 NYU L. Rev. 286, 331 (April 2013) (http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-1-Miller.pdf).

10 See Schneider, Elizabeth M., The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 549 (2010).

11 Gertner, Nancy, "Implicit Bias in Employment Discrimination Litigation," Legal Studies Research Paper, Working Paper, No. 12-07, June 7, 2012.

12 *See* NELA's 2009 Surviving Summary Judgment in Employment Cases Bundle, on the NELA website, and available on the Employee Rights Advocacy Institute for Law and Policy, Mathew C. Koski, "Preserving the Right to a Jury Trial by Preventing Adverse Credibility Inferences at Summary Judgment"; Mathew C. Koski, "Securing the Right to a Jury Trial: Attacking 'Stray Remarks' At Summary Judgment; and "Top 10 Tips to Make Your Case "Summary Judgment Proof."

SECTION 1983, from page 5

lation of constitutional rights. Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself."[9]

In support of its holding, the Seventh Circuit further examined the differences between ADEA claims and constitutional claims under Section 1983. ADEA plaintiffs can only sue their employers. But under Section 1983, the plaintiff may sue an individual. A Section 1983 plaintiff may sue the employer, such as a municipality, only if the constitutional violation was caused by an express municipal policy; a widespread, though unwritten, custom or practice; or a decision by a municipal agent with final policymaking authority.[10] "These divergent rights between the ADEA and a § 1983 constitutional claim seriously affect a plaintiff's choice of defendants and his strategy for presenting a prima facie case."[11]

In addition, ADEA limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. The statute also prohibits claims by employees under the age of 40 or those bringing so-called "reverse age discrimination" claims. Section 1983 equal protection claims do not similarly limit the plaintiffs' options.[12] And, the Seventh Circuit noted, under Supreme Court precedent, "state employees suing under the ADEA are left without a damages remedy, as such claims are barred by Eleventh Amendment sovereign immunity. In contrast, '[m]unicipalities do not enjoy any kind of immunity from suits for damages under § 1983.' Without the availability of a § 1983 claim, a state employee (like Levin) who suffers age discrimination in the course of his employment is left without a federal damages remedy."[13]

In many of its cases, the Supreme Court these days is stuck in a 5-4 split, with five conservatives on one side and four liberals on the other. In their certiorari petition, the defendants in **Levin v. Madigan** used the following language in appealing to the conservatives' preference for limiting the scope of the civil rights laws, including Section 1983:

> With the ADEA, Congress decided that these disputes, specifically, should be resolved wherever possible through prompt notice and informal conciliation rather than litigation. Under the Seventh Circuit's rule, however, the more than one million state and local workers located in Illinois, Indiana, and Wisconsin may bypass the ADEA's dispute resolution process and go straight to court, undercutting the Act as a means of securing voluntary compliance with federal age discrimination laws. The decision below also deprives States and local governments of the ADEA's prompt notice requirement and emphasis on conciliation.

Any instinct that the Supreme Court might side with the defendants in this case overlooks what the Court did in 2009, when it held that Title IX's prohibitions against peer-on-peer sexual harassment cases in the public schools did not preclude a Section 1983 remedy under the Equal Protection Clause.[14] Although Title IX is a comprehensive statute that addresses discrimination in the public schools, the Court reached that decision unanimously, reasoning, "[a]

See SECTION 1983, page 15

9 *Id.* at 619. See also, id ("[i]n sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims").

10 *Id.* at 621.

11 *Id.*

12 *Id.*

13 *Id.* (citing, inter alia, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000)).

14 *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246 (2009).

NYLL, from page 8

enforcement of the NYLL, especially in cases like **Bonito** where the corporate defendant had discontinued its operations.

Defendants' Response

In their responding brief, defendants argued that the lower court had properly interpreted **Stoganovic** and that the legislature did not intend for individual officers to be personally liable under the law. In further support, defendants cited cases in which courts had relied upon **Stoganovic** to find that corporate officers were not individually liable under the NYLL.

Michael D. Palmer is the founder of The Palmer Law Firm and will be joining the firm of Sanford Heisler, LLP as senior litigation counsel in July 2013. After graduating from New York University Law School in 2004, Mr. Palmer worked eight years for the employment boutique firm Joseph & Kirschenbaum LLP. He has acted as lead counsel in numerous individual and class action lawsuits and represented thousands of individuals who have suffered employment discrimination, harassment, and unpaid wages. Mr. Palmer argued the Bonito case on behalf of the plaintiffs.

First Department Decision

On May 28, 2013, the First Department overturned the lower court and ruled that "[a]lthough there is no private right of action against corporate officers for violations of article 6 of the Labor Law, plaintiffs here bring suit against Au as an employer, not as a corporate officer. Therefore plaintiffs are not precluded from asserting claims against Au under article 6."[8] Based upon the same reasoning, the court ruled that the plaintiffs could bring a claim for unpaid overtime against Au as their employer. *Id.* Adopting the economic reality test, the court found that "plaintiffs have stated a cause of action against Au, as an 'employer' within the meaning of Labor Law . . . ."[9] "Accordingly, plaintiffs were not required to show that the corporate veil should be pierced or allege that Au exercised complete domination and control over the corporation."[10]

Conclusion

Bonito makes it clear that individual employers cannot hide behind officer titles to avoid liability under the NYLL. Any individual who meets the "economic reality" test is legally responsible for failing to pay his employees their wages and will be held, along with any corporate employer, jointly liable under the NYLL. ■

8 Bonito, 2013 NY Slip Op 03775, at *1 (internal citations omitted).

9 Id.

10 Id. at *1-2.

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You're Fired! Why Companies May Soon Follow The Donald's Ways

By Rebecca Nathanson
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U.S. Supreme Court's 5-4 decision in Vance v. Ball State University holds only those with the authority to take tangible employment actions against the victim are a supervisor for the purpose of finding an employer to be liable under Title VII.

It's been a few years since I've watched the Celebrity Apprentice, but I'm guessing that two things happen at the end of almost every episode: 1) someone gets fired and 2) Donald Trump is the one doing the firing. After this week's Supreme Court decision in **Vance**, employers – in attempts to escape liability under Title VII – may soon follow his lead by limiting hiring and firing authority to a select few, or in the Celebrity Apprentice world, just to one. And by making this simple change in management, they may be able to avoid liability under Title VII altogether.

In October 2006, Maetta Vance brought claims of a hostile work environment and retaliation in the Southern District of Indiana against her former employer, Ball State University. Vance, an African American dining services employee, alleged that a Caucasian employee, Saundra Davis, among others, harassed and discriminated against her on the basis of race by creating a hostile work environment. Vance considered Davis to be her supervisor because Davis had direct oversight over her and gave her day-to-day assignments. Both Vance and Ball State University moved for summary judgment, claiming each was to prevail based on the standard the Supreme Court set out in companion cases **Faragher v. City of Boca Raton**, 524 U.S. 775 (1998), and **Burlington Industries Inc. v. Ellerth**, 524 U.S. 742 (1998). Depending on the circuit, both sides were correct.

In these landmark cases, commonly referred to as **Faragher/Ellerth** or the **Faragher/Ellerth defense**, the Supreme Court set out an employer's liability: when an employee takes an employment action, the employer is strictly liable; if no tangible employment action is taken, the employer is vicariously liable for harssment by supervisory employees; for all other employees, the employer is only vicariously liable for harassment if the victim reports the harassment and the company is negligent, i.e., fails to take appropriate actions. The underlying rationale for this was that an employee is more susceptible to, and more traumatized by, harassment by someone in a superior position who has the authority to punish an employee with unfavorable assignments or changing the work atmosphere in objectionable ways. Thus, cases across the country, including Vance's, hinged on the status of the harasser as a supervisor or co-worker. This exact issue left the circuits divided and was the basis on which the Supreme Court granted certiorari to review.

The Supreme Court majority, led by Justice Alito, stated that the court was simply resolving the question, "Whether, as the Second, Fourth, and Ninth Circuits have held, the **Faragher** and **Ellerth** "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim." Unfortunately for the realities of the workplace and for victims of harassment by those persons with oversight and assignment responsibilities but without hiring/firing/promoting/reassigning authority, the court adopted the latter rule.

The decision makes it more difficult for victims of harassment to sue their employer for hostile work environment claims by limiting the pool of persons for which an employer will be vicariously liable; employers may now simply empower a limited few with hiring/firing/promoting/reassigning authority, *e.g.*, the Donald Trump model. It also makes it harder for a victim to make his/her *prima facie* case by shifting the burden from the employer – who pre-*Vance* had to assert and prevail on its affirmative defense that it was not negligent – back to the plaintiff, who now has to sufficiently plead that the employer was

The Supreme Court has made it easier for employers to avoid liability for sexual harassment.

See YOU'RE FIRED, page 14

ANNOUNCEMENT

Don't you have an article or case for the "Filings, Trials and Settlements" column you'd like to share with your NELA/NY members?

If you have any announcements or if you an article you'd like to share with your NELA/NY colleagues,

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We will include it in our the next issue of the newsletter.

Attorneys' Fees Squibbs

By Illiana Kondaris
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In **Torres v. Gristede's Operating Corp.**, 12-3336, 2013 U.S. App. LEXIS 10266 (2d Cir. May 22, 2013), the Second Circuit affirmed the attorneys' fees award of $3,415,450.00. Defendants argued that the district court abused its discretion by (1) failing to review plaintiffs' counsel's billing records adequately; (2) relying on Gristede's aggressive litigation strategy as justification for the award; and (3) permitting a disproportionate fee award that far exceeded the customary one-third recovery in contingency fee cases. The court rejected each of these arguments. In dismissing the first argument, the court found that in fee-shifting cases, the goal with respect to fees is to achieve "rough justice" and not "auditing perfection." With respect to the third argument, the court also found that the reasonableness of an award rested on "the degree of success obtained," which here was summary judgment on FLSA liability, significant monetary recovery, and injunctive relief. In its analysis, the Second Circuit noted that the district court was "free to pick and choose" between the lodestar and percentage methods, and while the court was permitted to cap fee requests at the standard one-third rate, it was not required to do so where it found that higher fees were warranted. The hourly rates awarded to Outten & Golden attorneys ranged from $300.00 to $550.00.

In **Matter of Solla v. Berlin**, 961 N.Y.S.2d 55 (N.Y. App. Div. 2013), the First Department overturned a 2002 ruling and adopted the "catalyst theory" as a basis for awarding attorneys' fees under the State Equal Access to Justice Act ("State EAJA"). The court held that a litigant may recover attorneys' fees in actions against the State, even where the State voluntarily provides the relief sought and moots the litigant's claims. In the underlying action, the City issued a Notice of Decision reducing the petitioner's shelter payments by $200 per month. The petitioner, a disabled woman, requested a fair hearing before the New York State Office of Temporary or Disability Assistance ("OTDA") to challenge this reduction. At the hearing, the City respondents stipulated that they would withdraw the Notice of Decision and restore any benefits. The OTDA ordered the City respondents to comply with this stipulation, but the City respondents failed to do so. Petitioner commenced an Article 78 proceeding seeking enforcement as well as attorneys' fees, which prompted the City to comply and restore petitioner's benefits two weeks later. While finding that petitioner's proceeding was the "catalyst" for the State's favorable decision, the Article 78 court nonetheless rejected the petitioner's argument that she was the prevailing party. On appeal, the court reversed, finding that the State EAJA never intended to eliminate attorneys' fees under the catalyst theory but instead sought to "level the playing field" by providing those with limited resources the ability to challenge State action. In scrutinizing legislative intent, the appellate court also noted that the State EAJA imposed limits on availability to fees to parties with a net worth of less than $50,000 or to employers with fewer than 100 people.

In **Short v. Manhattan Apts., Inc.**, 11-5989, 2013 U.S. Dist. LEXIS 83347 (S.D.N.Y. June 7, 2013), the Fair Housing Justice Center and an individual plaintiff brought a housing discrimination suit against two realtors for disability and source of income discrimination. (The plaintiff had obtained a subsidy from New York City HIV/AIDS Services Administration.) After a bench trial, the court awarded plaintiffs $25,000 each in damages as well as injunctive relief. Plaintiffs sought over $500,000 in fees and costs. The court examined two main issues with respect to attorneys' fees. First, the court examined how to allocate the fees between the two defendants. Plaintiffs' counsel suggested one of two approaches: apportioning the entirety of the award evenly between the defendants, or allocating liability fifty-fifty for the common fees and costs, then adding the individual fees for each defendant. One of the Defendants argued that fees common to both defendants should not be reimbursed at all. The court rejected this view and instead ordered a fifty-fifty split, since the same claims were brought against both defendants and both defendants were required to pay equal compensatory damages. Second, Defendants argued that plaintiffs' fees should be reduced, since they obtained limited financial relief in comparison with the amount sought. The court also rejected this argument in light of the novelty of the decision and the equitable relief, noting that plaintiffs had obtained a significant social benefit in the first housing discrimination case brought on behalf of an individual with AIDS. The court awarded plaintiffs' counsel, their requested hourly rates of $525 for an attorney with over twenty-five years experience in fair housing law and $500 for an attorney with over twenty years experience. The court also awarded $150 per hour for paralegals.

In a short minute entry in a malicious prosecution and false arrest case, **Mitchell et al v. City of New York et al.**, 11-CV-03952 (E.D.N.Y. June 6, 2013) (Levy), plaintiffs' counsel was sanctioned for discovery delays. The court found it a "fair and just" sanction would be compensation for the three hours the Assistant Corporation Counsel ("ACC") spent seeking compliance with discovery orders. The ACC had nine years of experience and was awarded an hourly rate of $350 per hour. ■

Gender Discrimination Squibbs

By Marisa Warren
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Fattoruso v. Hilton Grand Vacations Co., LLC, 873 F. Supp. 2d 569 (S.D.N.Y. 2012) aff'd, 12-2405, 2013 WL 2123088 (2d Cir. May 17, 2013) (summary order)

Plaintiff, Thomas Fattoruso appealed from an Opinion and Order from the District Court granting Defendant-Appellee Hilton's motion to dismiss the complaint under Rule 12(b)(6). In his Complaint, Fattoruso alleged that Hilton violated the New York City Human Rights Law ("NYCHRL") by retaliating against him for complaining about his male supervisor's inappropriate consensual relationship with and preferential treatment of a female subordinate. The Second Circuit affirmed the lower court's dismissal of the retaliation claim and concluded that Fattoruso failed to "implicitly or explicitly alert Hilton that he was complaining about disparate treatment based on sex." Although the Complaint alleged that Fattoruso had engaged in protected activity by complaining about gender discrimination and a hostile work environment which was in violation of Hilton *company policy*, under Title VII a "'paramour preference' does not constitute unlawful discrimination based on gender." Since the conduct Fattoruso complained of was not itself unlawful under the discrimination laws, his complaints did not implicitly give Hilton notice that he was engaging in or reasonably believed he was engaging in a protected activity. "Hilton cannot be expected to have understood Fattoruso was complaining about disparate treatment *based on sex* and therefore engaging in protected activity." (*emphasis in original*).

As exhibited by this case, when pleading claims of discrimination it is essential to adequately allege that plaintiff both had a good faith belief that this conduct was discriminatory, *and* that he relayed to the employer his good faith belief that the conduct was *illegal* under the anti-discrimination laws, not just in violation of company policy. This case is also indicative that the NYCHRL's "uniquely broad and remedial purposes" may not tolerate claims of gender discrimination (and retaliation) based upon a consensual romantic relationship between other employees--even if this preference resulted in an employee being treated "less well than other employees because of [his] gender." *Williams v. City of New York Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009). ■

YOU'RE FIRED, from page 12

negligent.

While Justice Alito and the majority claim to be clearly answering the question left open by **Faragher/Ellerth** – by defining who is a supervisor – the resultant standard, perhaps, as often is the case, has opened another door leading to dozens more questions. The first few that come to mind are: How to adequately plead the negligence standard? How to obtain information related to an employer's negligence – or know whether information exists – without the benefit of discovery? How to challenge an employer's classification of employees as supervisors and coworkers? For example, a company that organizes to restrict tangible employment actions to limit liability to very few (or one) are going to have The Donald's structure. Did the Supreme Court intend to uphold such an illusionary structure for employers to keep from liability? Because while The Donald is the only one who is authorized to say "You're Fired", in reality, how can he utter those two words without reliance and input from George, Ivanka, Eric and/or Don Jr.? They are the ones with the eyes and ears who see and hear an employee's performance. Without their feedback, how can Donald possibly determine who should be fired?

In her dissent, Justice Ginsburg talks about some of these issues and more. But the majority rejects their existence or refuses to see them as problematic. The answer used to be found by looking to a more preferable Donald (the Duck) but no longer, because now, if it looks like a duck and walks like a duck…it's not a duck unless vested with tangible employment authority.

[It should be noted that Vance essentially usurps the holding in **Faragher/Ellerth** because at least one, if not both, employees were not supervisors under the new definition (had that defense been raised).] ■

Supreme Court Imposes Heightened Burden in Title VII Retaliation Claims

By Kevin Mintzer
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Among the attention-grabbing decisions the Supreme Court issued at the close of its most recent term was an important but little noted decision regarding the causation standard applicable to claims under Title VII's retaliation clause. *See* 42 U.S.C. § 2000e-3. In **Univ. of Texas Sw. Med. Ctr. v. Nassar**,[1] the Court, in a 5-4 decision authored by Justice Kennedy, held that a Title VII retaliation plaintiff must show that retaliation was a "but for" cause of an alleged retaliatory action. This is a potentially significant change in the law for plaintiffs in the Second Circuit, where it had previously been settled law that a plaintiff need only prove that retaliation was a "motivating" or "substantial" factor in an adverse employment decision. *See, e.g.,* **Raniola v. Bratton**, 243 F.3d 610, 625 (2d Cir. 2001).

In essence, the Court extended the holding of **Gross v. FBL Fin. Servs., Inc.**,[2] to Title VII retaliation claims. In *Gross*, the Court held that the ADEA, which imposes liability when an employer discriminates "because" of age, requires a plaintiff to prove that his age was a "but for" cause of the challenged employment action.[3] This "but for" standard does not apply to the discrimination prohibitions of Title VII because, as part of the 1991 Amendments to Title VII (the "1991 Act"), Congress codified the "motivating factor" standard for claims of discrimination based on "race, color, religion, sex, or national origin."[4] However, section 2000e-2(m) does not expressly refer to retaliation. Therefore, according to the Court, Congress must have intended to create a different standard of causation for Title VII retaliation claims than it created for Title VII discrimination claims.[5]

In dissent, Justice Ginsburg argued that it made little sense to hold that the 1991 Act, which Congress passed to restore and strengthen protections against discrimination, somehow raised the causation requirement for Title VII retaliation claims.[6]

Employee advocates may find it disheartening that the majority in **Nassar** cited the doubling of retaliation claims filed with the EEOC in the period between 1997 and 2012, and the need to deter "frivolous" claims of retaliation as additional justifications for its decision.[7] The Court also was concerned about employees who make "unfounded" charges of discrimination in order to forestall anticipated adverse employment actions, and who then claim retaliation in order to save their jobs.[8] The Court cited no evidence that this was an actual problem in the workplace, but the Court was clear that it sought to streamline the dismissal of "dubious [retaliation] claims" at the summary judgment stage.[9] Indeed, Justice Ginsburg went so far to say the majority was guided neither by precedent nor the aims of Congress, but instead by "zeal to reduce the number of retaliation claims filed against employers."[10] ■

End Notes

1 2013 WL 3155234 (U.S. June 24, 2013).

2 557 U.S. 167, 178 (2009).

3 *Id*. at 178.

4 42 U.S.C. § 2000e-2(m).

5 *Nassar,* 2013 WL 3155234, at *10-11.

6 *Id*. at *17, 21-22.

7 *Id*. at *13.

8 *Id*.

9 *Id*.

10 *Id*. at *30.

SECTION 1983, from page 10

comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends further support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way," Congress did not see Title IX "as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."[15]

In illustrating the differences between suits under Title IX and Section 1983, the Court in Fitzgerald noted that "Title IX reaches institutions and programs that receive federal funds, which may include nonpublic institutions, but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals. The Equal Protection Clause reaches only state actors, but § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities."[16] This reasoning will certainly form the basis for the plaintiff's arguments in Madigan v. Levin before the Supreme Court. ■

15 *Id*. at 256.

16 *Id*. at 257.