NELA/NY Spring 2023 Conference

Fordham Law School
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Representing Asian-Americans in Claims of Unlawful Discrimination in Employment

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Panelists: William Li, Bernadette Jentsch, Glenn D. Magpantay, and Karen K. Yau

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The Panel

William Li, Bernadette Jentsch, Karen K. Yau, and Glenn D. Magpantay

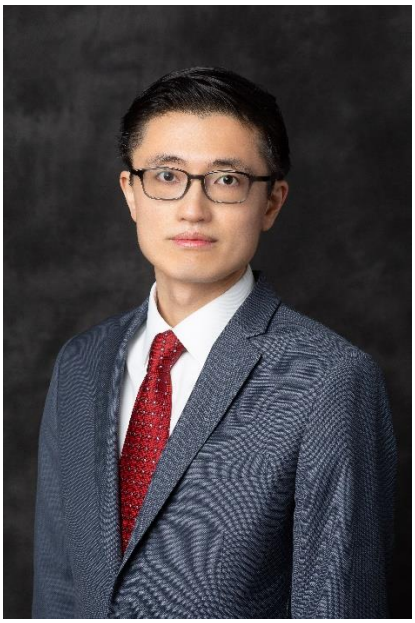
William Li, Esq.

William Li is the founder and principal of William K. Li Law, PLLC.

William has mostly practiced labor and employment in his career since graduating from St. John's University School of Law in 2009. William represents clients in employment matters relating to unlawful termination, discrimination, harassment, retaliation, covenants not to compete, wage and hour violation disputes, and traditional labor union disputes. William furthermore helps clients negotiate employment and departure agreements.

William was born in China and immigrated to New York when he was in elementary school. William's parents worked for a number of years in jobs that paid minimum wage or less. William shared the childhood experience and financial challenges of many immigrant families but worked his way into being accepted by Brooklyn Technical High School and mostly paid for his own college and law school.

William speaks both Cantonese and Mandarin Chinese.



Bernadette Jentsch, Esq.

Bernadette Jentsch is the Supervising Attorney for the Mobilization For Justice's Workplace Justice ("MFJ") and Driver Protection projects, which provide legal assistance to low-wage and immigrant workers with employment issues, including workers with criminal histories and for-hire vehicle drivers who face fines and penalty points on their licenses.

Prior to joining the supervisory staff, Ms. Jentsch was a Staff Attorney in both projects. In 2007 she implemented MFJ's reentry initiative to assist and represent individuals with a criminal conviction record in removing barriers to employment and obtaining licenses. She was the recipient of the New York City Bar Association's Legal Services Award in June 2014 and the Office of Administrative Trials and Hearings' Pro Bono Service Award in September 2020.

Ms. Jentsch is also a mediator and conflict coach for the NY Peace Institute and is currently a Supervising Attorney-Mediator/Adjunct Professor in the Mediation Clinic at CUNY School of Law. She has been a member of the Mediation Panel for the U.S. District Court for the Southern District of New York since 2017, and was appointed to the U.S. Court of Appeals Second Circuit Pro Bono Appellate Mediator Panel in 2021. Ms. Jentsch is a graduate of the Catholic University of America, Columbus School of Law (JD), the Eastman School of Music (DMA, MM), and the University of Connecticut (BM).

Karen K.Yau, Esq.

Karen dedicates her work to vindicating the rights of employees and workers. She has over two decades of legal experience working with employees, workers, and immigrants, including over nine years as an Assistant Attorney General in the Labor Bureau at the New York State Attorney General, where she led investigations into labor violations in numerous industries, including the agricultural, greengrocer, moving, restaurant, and taxi industries.

In addition, Karen has had varied law teaching and policy-related experiences. She was a recipient of a Skadden Fellowship at the National Employment Law Project and a Robert M. Cover Teaching Fellowship at Yale Law School and held an assistant professorship at Syracuse University College of Law. Karen also worked in management and leadership positions in not-for-profit policy and advocacy organizations.

Karen is active in bar associations and community organizations. She is on the board of directors of the Asian American Law Fund of New York (AALFNY). She was a director of the board of the Asian American Bar Association of New York (AABANY). Karen co-chaired AABANY's Pro Bono and Community Service Committee and spearheaded its Pro Bono Advice and Referral Clinic, a recipient of the New York State Bar Association's Bar Leaders Innovation Award. In addition to AABANY, Karen is also a member of the Federal Bar Association, the National Employment Law Association/National and New York Chapter, and the New York City Bar Association.

Karen has been honored by the National Asian Pacific American Bar Association (NAPABA) and the Chinese-American Planning Council – Brooklyn Community Services for her *pro bono* work and contributions to the Asian American Pacific Islander community.

Karen frequently conducts training, speaks, and writes on employment matters, Asian America, cross-cultural competencies, and immigrants' rights. Most recently, she has taught Asian Americans and the Law and Professional Responsibilities at CUNY Law School.

Karen received her law degree from Northeastern University School of Law and graduated from Stony Brook University and Brooklyn Technical High School. She is admitted in New York, Massachusetts, and Connecticut.

Karen emigrated from Hong Kong and speaks Cantonese Chinese. A proud daughter of garment workers who toiled long hours and the exasperated mother of two children who excel in argument as an artform, Karen now lives in Brooklyn and Kingston, New York.

Glenn D. Magpantay, Esquire

Glenn D. Magpantay, Esq. is a long-time civil rights attorney, professor of law and Asian American Studies, and LGBTQ rights activist. Glenn has been organizing in the community for over 30 years. Today, he is principal at Magpantay & Associates: a nonprofit consulting and legal services firm. He was selected for a prestigious George Soros Equality Fellowship from the Open Society Foundations.

In 2023, the United States Senate appointed Glenn to the U.S. Commission on Civil Rights to advise Congress and The White House on the enforcement of civil rights laws and develop of national civil rights policy.

Glenn co-founded and served as the Executive Director of the National Queer Asian Pacific Islander Alliance (NQAPIA), a national federation of Asian American, South Asian, Southeast Asian, and Pacific Islander lesbian, gay, bisexual, and transgender organizations for nearly a decade. His efforts were recognized by the National Asian Pacific American Bar Association (NAPABA) with its Trailblazer Lifetime Achievement Award (2020) and Walter & Evelyn Haas, Jr. Fund Outstanding LGBTQ Leadership Award for Immigrants' Rights (2017).

Before, Glenn was a nationally recognized civil rights attorney at the Asian American Legal Defense and Education Fund (AALDEF) for nearly 20 years. He is an authority on the federal Voting Rights Act and expert on Asian American political participation, bilingual ballots, elections, and census. His efforts earned him the prestigious Haywood Burns Memorial Award from the NYS Bar Association Committee on Civil Rights (2015).

Instinct Magazine showcased Glenn as one of the nation's "25 Leading Men" in 2004. He organized the first-ever LGBTQ testimony before The White House Initiative on Asian Americans & Pacific Islanders in 2000. She spoke at the National March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation in 1993.

Glenn is a renowned thought-leader. He has brought 15 briefs to the United States Supreme Court; testified before the United States Congress; published 20 scholarly legal and academic articles; authored impactful public reports; and has given commentary to *The New York Times*, *Washington Post*, *USA Today*, Associated Press, MSNBC-TV, NBC Asian America, and *The Advocate*.

Always giving back, Glenn served as a Trustee to the Boehm Family Foundation, and currently serves on the Gold Futures Challenge Selection Committee of Asian American Futures Fund. He chairs the LGBT Committee of the Asian American Bar Association of New York and is an Advisor to U.S. Commission on Civil Rights.

Glenn attended the State University of New York (SUNY) at Stony Brook on Long Island, and as a beneficiary of affirmative action, graduated *cum laude* from the New England School of Law, in Boston.

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ASIAN AMERICANS AND THE LAW

In 1750,a small group of Filipino sailors landed in what would later become Louisiana. Scholars believe these were the first Asians to settle in the United States. [1] The first Chinese, principally merchants, seamen, and students, arrived in the United States in 1820. By 1848, there were only approximately 325 Chinese--all men--in the United States. Within just a few years, their numbers jumped, with some 20,000 Chinese arriving in San Francisco in 1852 alone. The numbers continued to grow. Some came to escape the Taiping Rebellion in China, some dreamed of making a fortune in the California Gold Rush, and others came to work on the First Transcontinental Railroad or on southern plantations after the Civil War. [2] The Japanese first started immigrating to Hawaii in the mid-to-late 1800s, to work as laborers on sugar plantations. [3]

Over the years, people of Asian descent continued to make up only a small fraction of the American population. By 2010, although they were the fastest growing racial group in the United States, Asian Americansstill were only 5.6% of the U.S. population. [4] In New York in 2010, Asians were 8.2% of the population. [5]

Despite these small numbers, Asian Americans have played a prominent role in America's legal history. They have been at the center of many legal controversies, including important Supreme Court cases involving:

***7** • Exclusionary immigration laws: The Chinese Exclusion Act of 1882 and subsequent laws barred virtually all Chinese from entering this country, and the Immigration Act of 1924 essentially excluded all Japanese. The Supreme Court upheld these discriminatory laws in decisions such as *Chae Chan Ping* [6] and *Fong Yue Ting*. [7]

• City ordinances restricting the operation of laundries in wooden buildings: *Yick Wo v. Hopkins* [8] was a rare win for the Chinese, as the Supreme Court overturned such a law and held that the Equal Protection Clause applied to even the Chinese.

• Limitations on the privilege of being naturalized as a U.S. citizen: A federal statute provided that only free white persons and individuals of African descent could be naturalized as U.S. citizens. The "African descent" element was added after the Civil War because so many slaves fought for the North. But where did that leave Asians? And what about individuals of mixed blood, who were both white and Asian? In a pair of cases decided by the Supreme Court in the 1920s, *Ozawa* and *Thind*, the Supreme Court held that a Japanese man and a South Asian man were not white and therefore not eligible to be naturalized. [9]

• Laws segregating public schools based on race: In *Gong Lum v. Rice*, a 9-year-old Chinese girl in Mississippi was prohibited from attending public school because she was not white; in 1927, the Supreme Court held that the law was constitutional because the little girl could attend a "colored school" or private schools. [10]

***8** • Alien land laws: These were laws prohibiting aliens, and in particular Japanese Americans, from owning land. These statutes were upheld by the Supreme Court in *Terrace v. Thompson* [11] in 1923.

• And perhaps most notoriously, the orders subjecting Japanese Americans, even those who were born in this country, to curfews, exclusion, and internment, without any due process of law and based solely on their Japanese ancestry: In *Korematsu*, *Hirabayashi*, and *Yasui*, the Supreme Court upheld these orders based on the concept of military necessity. [12] But in *Ex parte Endo*, without addressing the constitutionality of the exclusion order, the Supreme Court held that the Government could not continue to detain a U.S. citizen who was "concededly loyal" to the United States. [13]

The issues presented by these cases continue to confront us today: questions about race, civil and human rights, due process, national security, federalism, how our courts respond to public pressure, and how judges handle high profile cases. These issues and the principles they implicate continue to be important, not just for Asian Americans, but for all Americans.

For the past nine years, the Asian American Bar Association of New York has been presenting reenactments of important cases involving Asian Americans. Each program has had its debut at the annual conference of the National Asian Pacific American Bar Association. The reenactment team takes excerpts from transcripts of court proceedings and other historic documents and stitches them together with original narration to develop hour-long scripts, accompanied by historic photographs. [14]

Our scripts have been performed all over the country, including by the American Bar Association, the New York City Bar Association, local Asian-American bar associations, the ***9** Department of Justice, and many student organizations at colleges and law schools. We have presented eight programs, focusing on:

• the trial of Minoru Yasui in 1942 in Portland, Oregon; [15]

• the murder of Vincent Chin in 1982 in Detroit; [16]

• the Massie trials--one a rape case and one a murder trial--in Hawaii in the 1930s; [17]

• the trial of Iva Toguri, otherwise known as Tokyo Rose, in 1949 in San Francisco; [18]

• the Supreme Court arguments in the naturalization cases, *Ozawa* and *Thind*, in the 1920s; [19]

• the Heart Mountain draft resisters, who were tried for draft evasion in the 1940s; [20]

• 22 Lewd Chinese Women, which involved a trial in 1874 in San Francisco; [21] and

• *Wards Cove*, a Title VII case that began in the early 1970s involving Filipino and other Asian workers in the salmon canneries in Alaska; [22] and

• a civil suit by the Vietnamese Fisherman against the Ku Klux Klan in Houston in 1981. [23]

In this article, we will discuss four of these cases: 22 Lewd Chinese Women, Tokyo Rose, the Heart Mountain Draft Resisters, and the murder of Vincent Chin. [24]

22 Lewd Chinese Women

This case, also known as *Chy Lung v. Freeman*, may be the first decided by the Supreme Court of the United States involving a Chinese litigant. [25] The story unfolded at a time when ***10** regulation of immigration was left largely to the states. In the mid-19th century, California state legislators began passing measures designed to "check the tide of Asiatic immigration." These measures included a special foreign-miners tax, a tax on vessels carrying persons who were ineligible to be US citizens, and a statute that simply excluded all persons of "the Chinese or Mongolian races" from entering the state.

When the Chinese kept coming, California legislators passed a statute in 1870 that prohibited Chinese passengers from disembarking until the State Commissioner of Immigration had determined that they had come voluntarily and were of good moral character. The statute was later modified to apply to prostitutes of all national origins, although in practice the principal target remained Chinese women. The legislators thus addressed two problems at once: the increase in prostitution in San Francisco and the continuing influx of Chinese. It is this statute that the State sought to apply to the 22 Lewd Chinese Women.

The story begins on Monday, August 24, 1874, when the steamship *Japan* arrived in the port of San Francisco. On board were some 600 Chinese passengers, including 89 women, 22 of whom were travelling alone. As soon as the ship docked, the Immigration Commissioner came aboard, examined the 89 women, decided that the 22 who were travelling alone were prostitutes, and demanded that a $500 bond be posted for each. By the next morning, the ship's owner had refused to pay the bonds, but a Chinese man named Ah Lung, described by some as a local merchant and by others as a trafficker in Chinese prostitutes, hired a lawyer to file a petition for a writ of *habeas corpus* on behalf of the women.

The next day, testimony began in the Fourth District Court of San Francisco before Judge Robert Morrison. The proceedings were largely transcribed, and there was daily extensive newspaper coverage. The question of fact that was presented to the court was whether these ***11** women were prostitutes, and the women and their lawyer were clearly determined to put up a good fight. When one witness called the women prostitutes, the newspapers reported that they screeched at the top of their lungs, forcing the Judge to cover his ears and retire to his chambers. Their lawyer, Leander Quint, was a well-known attorney in San Francisco, formerly a judge. On the other side was the District Attorney of San Francisco.

As the testimony unfolded, the question of whether these women were prostitutes was treated from several angles. The District Attorney called to the stand as an "expert" on Chinese prostitution a Methodist minister, the Reverend Otis Gibson, who had served as a missionary in China and had established a Missionary Society in California to elevate and save the souls of heathen women. Gibsontestified as to the customs of the Chinese in China and the manner in which prostitutes generally dressed. His description of typical prostitute dress led to a scene where the Judge approved of the lawyers peering up the sleeves of the various witnesses to see if the gaudy colors of a courtesan lurked beneath the plainer garments the women were wearing.

Another witness was a police officer, a member of the so-called Chinatown Squad--who testified as to the habits of Chinese he had observed on his beat. In addition to the dress of the women, Officer Woodruff spoke about the number of marriage licenses found in the County Clerk's office and the fact that some Chinese had second wives.

When the women testified, they all told essentially the same story: they were either married or about to be married and had come to California either to join their husbands or to meet and marry their husbands. Indeed, their stories were so similar that after nine women had testified, the parties stipulated that the remaining women would all swear to essentially the same facts.

***12** On Saturday morning, August 29, 1874, the Judge announced his ruling to a packed courtroom. He rejected the argument that the California law was unconstitutional, concluding that the State had the power to exclude lewd and immoral individuals, and then further ruled on the factual question. He determined that the women were all prostitutes and sent them back to the steamship *Japan*, with instructions to the Captain to take them back to China.

Before the ship could sail, counsel for the women arrived with another writ of *habeas corpus*, issued by the California Supreme Court. A week later, that court also ruled against the women. [26] The women then moved on to federal court, where the case was heard by a three-judge panel that included U.S. Supreme Court Justice Stephen Field, who was riding circuit in San Francisco. [27] On September 21, 1874, Justice Field held for the panel that the California statute was unconstitutional, ruling that Congress, not the states, had authority to regulate immigration. In this opinion, for the first time, a court explicitly held that the Fourteenth Amendment applied to aliens (such as the Chinese) as well as citizens, ruling that no state may deprive "any person" (not just "any citizen") of life, liberty or property without due process of the laws. [28] All the women were released except one, Chy Lung, who remained in custody so that she would continue to have standing to challenge the California statute. On March 20, 1876, the United States Supreme Court unanimously ruled the California statute unconstitutional in a decision based not on equal protection, but on the Commerce Clause and the federal government's power to regulate immigration. [29]

The final decision looked like a victory for the women, but what did it really mean? The decision did not result in any less-restrictive policy towards Chinese immigrants. To the contrary, by effectively putting an end to state-based immigration legislation, the Supreme Court decision helped pave the way for federal immigration policy and ultimately the first Federal ***13** Chinese Exclusion Act, which remained in effect until 1943. [30] As for the 22 women themselves, all we know is that they won their freedom; but that may have meant only lives of misery for them, as they probably *were* prostitutes. In the 1870s the more-fortunate prostitutes were purchased by wealthy Chinese in San Francisco to serve as concubines or mistresses; most, however, were sold as slaves to brothels, relegated to shacks where they served a racially mixed, poorer clientele.

As for the questions raised by the case, our society continues to struggle with issues of race, gender, sexuality, stereotyping, and profiling. Human trafficking and the exploitation of women persist. State versus federal control of immigration continues to be an issue; we saw shadows of that issue as recently as 2014, when states reacted to the Ebola outbreak, and in 2012, the Supreme Court cited *Chy Lung* when holding unconstitutional a large part of an Arizona statute expanding state law enforcement's authority to stop and detain individuals suspected of being in the country illegally. [31]

On June 18, 2012, just a few days after the Supreme Court decision in the Arizona case, the House of Representatives passed a resolution expressing regret for the passage of laws that adversely affected the Chinese in the United States, including the Chinese Exclusion Act. The House resolution was sponsored by Judy Chu, the first Chinese American woman elected to Congress. She stated as follows:

> [This] expression of regret ... is for my grandfather and for all Chinese Americans ... who were told for six decades by the U.S. Government that the land of the free wasn't open to them. We must finally and formally acknowledge these ugly laws that were incompatible with America's founding principles.
>
> We must express the sincere regret that Chinese Americans deserve. By doing so, we will acknowledge that discrimination has no place in our society, and we will reaffirm our strong commitment to preserving the civil rights and constitutional protections for all people of every color, ever[y] race, and from every background. [32]

***14** **Tokyo Rose**

During World War II, Allied servicemen in the Pacific heard the sultry, seductive voice of a woman speaking English on Japanese radio. [33] She was a siren. She would draw them to her broadcast by playing American music, and then she would taunt and torment and tease them, asking them, for example, "Do you know where your wife is tonight?" The servicemen called her "Tokyo Rose."

In fact, Tokyo Rose was a myth; there was no Tokyo Rose. The U.S. government would later acknowledge that Tokyo Rose was "strictly a G.I. invention." While the Japanese government did use English-speaking women to broadcast shows--some 20 of them--none used the name Tokyo Rose.

One of the women was Iva Toguri. She was born in Los Angeles, the daughter of Japanese immigrants. She was raised a Methodist, joined the Girl Scouts, played varsity tennis, and graduated from UCLA with a degree in zoology. She spoke no Japanese and did not like Japanese food.

In July 1941, she was sent to Japan to help a sick aunt. When Pearl Harbor was attacked and war broke out, she was stranded. Many Japanese-Americans in similar circumstances at the time were pressured into renouncing their U.S. citizenship, but Iva refused. She had to support herself, and she found work as a typist at Radio Tokyo, a Japanese government radio station. Her family in the United States could not help her--her relatives were sent to internment camps; her mother would die in one of the camps.

At Radio Tokyo, three Allied prisoners of war--two American and one Australian--had been forced to produce radio shows targeted at Allied servicemen. This was supposed to be propaganda, but the POWs did their best to undermine the intended purpose.

***15** Iva was pressed into service as a disk jockey. After all, she spoke perfect English. She read scripts written by Major Cousens and Captain Ince, two of the POWs, and she followed their instructions. She also smuggled food and medicine and blankets to Allied POWs at great personal risk.

Iva performed under the name Orphan Ann and appeared on a show called Zero Hour. She participated in 340 broadcasts, the last in August 1945, two days before the Japanese surrendered.

Some recordings of her broadcasts have survived, but they are of poor quality. She typically opened her show with the following:

> Hello there, Enemies -how's tricks? This is Ann of Radio Tokyo, and we're just going to begin the Zero Hour for our Friends - I mean our Enemies! - in Australia and the South Pacific. So be on your guard, and mind the children don't hear! All set? O.K., here's the first blow at your morale - the Boston Pops playing "Strike Up the Band!" [34]

Iva would then play the Boston Pops doing "Strike Up the Band!" Of course, this was patriotic marching music, and it was hardly demoralizing to the Allied servicemen.

When the war ended, there was a clamor to bring "Tokyo Rose" to justice. Hundreds of journalists descended on Japan, intent on finding the infamous Tokyo Rose. Two reporters for Cosmopolitan magazine found Iva. They promised her $2,000, an enormous sum under the circumstances, and she agreed to give them an exclusive interview. Perhaps for the money, perhaps for the attention, Iva represented to them that she was "the one and original Tokyo Rose."

When word got out that Tokyo Rose had been located, Iva found herself at a press conference attended by scores of correspondents. Shortly thereafter, she was arrested and charged with treason, for giving aid and comfort to the enemy, and imprisoned pending trial. ***16** Because of her notoriety, the prison guards asked for her autograph. She complied, signing as "Iva Toguri-Tokyo Rose."

After a year, she was released. The Department of Justice attorney who eventually became the lead prosecutor in the case against her, Thomas DeWolfe, initially concluded that there was insufficient evidence to make out a prima facie case. DeWolfe' smemowas sent up the chain of command at the Department of Justice, all the way to Attorney General Tom Clark. The Assistant

Attorney General noted "all the publicity given to the case," and the Attorney General wrote back the next day, May 28, 1948: "prosecute it - vigorously."

And so the Government did. She was arrested again and brought back to the United States. She was tried in San Francisco, starting on July 6, 1949 and continuing for two and a half months. The trial transcript is 6,000 pages long. Iva wore the same gray outfit every day of the trial; she washed it on Fridays.

The indictment charged only one count of treason, but eight overt acts. Iva was found not guilty on seven of the overt acts. The jury, however, convicted her on overt act number 6, which charged that during one broadcast Iva spoke about the loss of ships.

Iva was sentenced to ten years' imprisonment and a $10,000 fine. She was also stripped of her U.S. citizenship. [35] Major Cousens and Captain Ince, whose scripts she read and instructions she followed, were never charged.

After serving some six and a half years, Iva was released for good behavior. She had been a model prisoner. She learned to take x-rays, prescribe glasses, and draw blood, and she even scrubbed up and assisted in surgery. She became a pharmacist's assistant and volunteered in the dental clinic. In her spare time she made leather goods that won her ribbons at local county fairs. When she left prison, it took four people to replace her in all her jobs.

***17** In the mid-1970s, the media took up her cause. A reporter tracked down two of the principal witnesses against her at trial, who confessed that they had committed perjury under pressure from the U.S. government; in fact, Iva never said anything treasonous. In January 1977, when President Ford granted her executive clemency and restored her U.S. citizenship, she became the only American ever pardoned for treason.

Iva died in Chicago in 2006, from natural causes, at the age of 90, still a U.S. citizen, but still identified in her obituary as the notorious Tokyo Rose. [36]

Heart Mountain

The story of the Heart Mountain draft resisters begins, as did the story of Tokyo Rose, with the attack on Pearl Harbor. [37] In the next three days, the FBI arrested nearly 1,300 Issei, first generation Japanese immigrants who could not be naturalized as U.S. citizens because of their race. [38] Their children, the Nisei, had been born in this country, and they at first believed that as citizens, they would be treated differently from their parents. They were mistaken.

On February 19, 1942, President Roosevelt signed Executive Order 9066, and shortly thereafter a proclamation was issued forbidding any person of Japanese ancestry in the Western halves of California, Oregon, and Washington and the Southern half of Arizona to leave these areas without military permission. By the end of March 1942, Japanese American families were being told to prepare for removal from the designated areas, and that they could bring with them only what they could carry. The exodus was well chronicled, including in wrenching photographs taken by the great Dorothy Lange and Ansel Adams.

These families were housed temporarily at assembly centers, which included horse stables at race tracks. Some 120,000 people, nearly two-thirds of them U.S. citizens, spent the ***18** summer of 1942 in these centers as the Federal government built ten concentration camps in more remote areas. They were shipped to the camps in the late summer and fall of 1942.

Japanese Americans reacted in different ways to this treatment by the U.S. Government. To prove their loyalty, some pressed the government for the right to fight for the United States and in 1943, President Roosevelt announced approval of a new all-Nisei unit, the 442nd Regimental Combat Team. Some Japanese Americans were disappointed by the creation of this segregated volunteer unit, and pressed for reinstatement of the draft. On January 20, 1944, the War Department announced that the Nisei would be reclassified by their Selective Service Boards and called for induction if physically qualified. Many volunteered, including many interned in the camps.

But at the Heart Mountain camp, one detainee started writing about the injustices of Japanese Americans being drafted to fight while they and their families were detained, and he created the Fair Play Committee, a collective effort to openly resist the draft. The FPC was careful to limit its membership to Japanese American citizens who were willing to serve in the military once their

civil rights were restored. The FPC message was spread beyond the camp by the *Rocky Shimpo*, a newspaper based in Denver, Colorado. Jimmie Omura, the *Shimpo's* English language editor, printed editorials that questioned the lawfulness and propriety of the draft. In March 1944, young men at Heart Mountain began to refuse to get on the bus for the pre-induction physicals. By the end of that month, 41 were in Wyoming county jails and Jimmie Omura was forced to resign as his newspaper was told that it would be closed unless Omura was removed as English language editor.

Two indictments were filed with respect to the Heart Mountain draft resisters, resulting in two trials. The first was *United States v. Fujii*, also known as the mass trial, where 63 draft ***19** resisters were tried together on the charge of evading the draft. The second was *United States v. Okamoto*, also known as the conspiracy trial, where seven of the FPC leaders were tried together with Jimmie Omura, who was indicted solely on the basis of his newspaper columns.

The mass trial took place from June 12 to June 17, 1944. On the first day of trial, Judge Blake Kennedy addressed the 63 defendants in open court as "you Jap boys." [39] The government was represented by Carl Sackett, the U.S. Attorney for the District of Wyoming, while the FPC hired a prominent civil rights lawyer from Denver to represent all 63 defendants. The government's task was straightforward: it only had to prove that the defendants received notices but failed to report for a pre-induction physical exam, facts that were not contested. On the other side, the defendants' counsel sought to paint a picture of injustice and unfairness by eliciting testimony as to the defendants' loyalty to the United States, their loss of freedom, and their willingness to serve in the Army once their rights had been restored. On June 26, 1944, the Judge found each defendant guilty as charged and sentenced each to prison for a term of three years.

At the conspiracy trial, a civil rights attorney from Los Angeles, A.L. Wirin, represented the defendants. During that trial, Wirin requested a so-called "test case" jury instruction, recognizing that the Supreme Court would soon hear a case determining whether the desire to test the legality of laws could operate as a defense to charges of draft evasion. The proposed jury instruction was denied, and the jury returned a verdict convicting all seven leaders of the FPC. Only Jimmie Omura was acquitted. The Judge sentenced the four defendants he saw as the most culpable to four years' imprisonment; the others were sentenced to two years.

The draft resistance movement at Heart Mountain has been described as the most articulate of the ten concentration camps' movements. [40] Other cases were brought, with results that varied little from the Heart Mountain experience, with one remarkable exception. The ***20** Honorable Louis E. Goodman of the Northern District of California was a brand new judge when he travelled to Eureka, California to hear the case of the draft resisters from the Tule Lake camp. Eureka had been well known for its anti-Asian sentiment since 1885, when all Chinese were expelled from the county and banned forever. Fearing a lynching, with his car idling outside the courtroom, Judge Goodman read his opinion from the bench on Saturday, July 22, 1944. He found that it was shocking to the conscience that an American citizen could be confined on the ground of disloyalty and then, while under duress and restraint, be compelled to serve in the armed forces or be prosecuted for not yielding to that compulsion. Citing due process, he dismissed the proceeding with respect to all 26 defendants before him.

Judge Goodman's decision was not appealed by the Government. As for the Heart Mountain resisters, the 10th Circuit affirmed the convictions of all 63 resisters in the mass trial. [41] The FPC leaders fared better. By the time their appeal was argued, the Supreme Court had upheld the test case defense, [42] and, based on the Supreme Court decision, the 10th Circuit reversed as the trial judge had declined to give an instruction on the test case defense. [43]

On April 29, 1945, the Fighting 442nd freed prisoners at the Dachau concentration camp. Shortly thereafter, Germany and then Japan surrendered. The Heart Mountain camp closed on November 10, 1945, but the draft resisters continued to serve their sentences. On Christmas Eve 1947, President Truman granted them full Presidential pardons. Many went on to fight in the Korean War.

For Japanese Americans and for Americans generally, it was the heroism of the Fighting 442nd that inspired, not the principles of the draft resisters. Only recently did the resisters begin to tell their stories. Now, even the heroes of the 442nd, including the late Senator Daniel Inouye, have acknowledged their contributions. Senator Inouye described the draft resisters as follows:

> ***21** In this climate of hate, I believe that it took just as much courage and valor and patriotism to stand up to our government and say you are wrong. I am glad there were some who had the courage to express some of the feelings that we who volunteered harbored deep in our souls. [44]

Heart Mountain is a difficult tale to tell, for it surely suggests that our system of justice does not always work as it should, despite the best efforts of dedicated individuals. Perhaps the only true lesson is the need for vigilance, and the need to remember. In times of war, it is all too easy to trample on individual rights.

Vincent Chin

On June 19, 1982, Vincent Chin and two friends were at a strip joint, the Fancy Pants Lounge, just outside Detroit.[45] Vincent was 27 years old, an American citizen of Chinese descent. He was to be married the following week.

Two men, Ronald Ebens and Michael Nitz, were sitting across the bar. They were auto workers; one was out-of-work. The U.S. auto industry had been under pressure from Japanese imports, and in Detroit there was much hostility against the Japanese. Words were exchanged, and witnesses in the bar heard Ebens and Nitz call Vincent and his friend Jimmy Choi "Nips."

Things got out of hand. The altercation spilled out onto the street. Ebens and Nitz ran to their car and retrieved a bat. Vincent and Jimmy Choi ran off. Ebens and Nitz got into their car and drove around looking for Vincent. They found him a few blocks away, outside a McDonald's.

Ebens and Nitz caught Vincent, and beat him with the bat. They split his head open. Vincent died four days later.

Ebens and Nitz were prosecuted for murder in the Wayne County Circuit Court. They were permitted to plead guilty to manslaughter. The prosecutors did not come to the sentencing, ***22** and Vincent's family was given no notice of the sentencing hearing. This was not uncommon in Wayne County at the time. Judge Charles Kaufman sentenced Ebens and Nitz each to three years' probation, a $3,000 fine, and court costs.

Outraged by the murder and sentence, Asian Americans joined together to seek justice for Vincent Chin. There were protests and demonstrations, and Vincent's mother--an immigrant from China who spoke very little English--was suddenly a reluctant but effective civil rights activist.

A coalition of Asian Americans persuaded the United States Department of Justice to bring a federal criminal civil rights case against Ebens and Nitz. The key question was race: the Government would have to prove that race was a motivating factor. There was no dispute that the two men had killed Vincent, but the Government would be required to prove that they did so because of Vincent's race.

The case was tried before Judge Anna Diggs Taylor, one of the first African-American women to be appointed a federal judge in the country. Nitz was acquitted, but Ebens was convicted. Judge Taylor sentenced Ebens to 25 years in prison.

On appeal, Ebens argued that the civil rights laws only protected blacks. Citing *Yick Wo v. Hopkins*, the Chinese laundry case in which the Supreme Court held that the Equal Protection Clause applied to the Chinese, the Sixth Circuit ruled otherwise, holding that the civil rights laws indeed applied to "Orientals."[46] Nevertheless, the Sixth Circuit reversed the conviction, holding that Ebens was denied due process because the prosecutor made inflammatory remarks during summations and because the trial judge made certain erroneous evidentiary rulings. On remand, because of all the publicity that had been generated, the case was moved to Cincinnati for retrial.[47] The change in venue was significant, as the case was moved from Detroit, a city with a ***23** black majority and a history of civil rights, to Cincinnati, a city known for its Southern sensibilities.[48] In voir dire, the vast majority of the prospective jurors answered that they had never met an Asian American person. This time, Ebens was acquitted, as the jury was not persuaded that race was a motivating factor.

Vincent's mother was so disheartened by the verdict she moved back to China. She remained there for 13 years, until she became ill and returned to the United States for medical treatment. In 2002, she died in Farmington Hills, Michigan, at the age of 82.

Despite the disappointment of many in the final verdict, the Vincent Chin case had a great impact for all Americans. It sparked a public discourse on the practice of Wayne County prosecutors not to appear for sentencings. The case showed how important

it was for victims of crimes and their families to be given notice of court proceedings and an opportunity to be heard. In the years following the Vincent Chin case, plea-bargaining and sentencing procedures were altered, laws were passed giving crime victims more rights, and hate crime laws were passed. [49]

As for Asian Americans, the Sixth Circuit's holding that Asian Americans are protected by this country's civil rights laws was significant, and the murder of Vincent Chin and its aftermath galvanized Asian Americans and brought them together as a community to seek social justice. [50]

Conclusion

We conclude with a few observations, with respect to both the past and the future.

As for the past, surely there are lessons to be drawn from these cases.

First, unfortunately, the arc of justice does seem to bend under the pressure of national crisis. War certainly creates such pressure, as it did in the Japanese curfew and internment cases, as well as in the cases of Iva Toguri and the Heart Mountain draft resisters. In the Vincent Chin ***24** case, it was a different kind of pressure: economic pressure, due to the financial crisis in Detroit in the 1970s. While we must always be vigilant when it comes to protecting civil rights, we must recognize the particular challenges presented when we are subjected to such pressures.

Second, a double standard has been applied to Asian Americans. Iva Toguri was prosecuted for treason, but not Major Cousens or Captain Ince, whose orders she followed. The California statute that restricted immigration in 1870 seemingly applied to prostitutes of all national origins, but in practice the principal target was Chinese women. And while the military orders during World War II did not subject U.S. citizens of German and Italian descent to curfews, exclusion, and internment, they applied to all persons of Japanese descent, including U.S. citizens.

Third, we see the importance of lawyering. The lawyers played such a critical role in these cases. Lawyers have a duty to help to right injustices, to see that justice is done. Lawyers can make a difference.

Fourth, we see the power of the media, good and bad. In the case of Tokyo Rose, public pressure led the Government to bring the case against Iva, but in the end media recognition of her innocence led to her pardon. We saw the impact of the media in the Vincent Chin and 22 Lewd Chinese Women casesas well.

Finally, we see the importance of community. This was perhaps most evident in the Vincent Chin case, where the injustice of the sentences given to his killers brought the community together. We continue to see the impact of community in cases today, whether on a street in Ferguson, Missouri, or a sidewalk in Staten Island, New York, or in a parking lot in Chapel Hill, North Carolina. [51]

What about going forward?

***25** We live in a different time and the world is a different place from what it was when these cases took place. Progress has been made with respect to the civil rights of Asian Americans and others. We would like to think that today *Korematsu* would be decided differently, although there are many who still believe it is good law. [52] The Department of Justice surely operates differently today, and defendants have more protections.

Economically, things have changed for Asian Americans as well. For many years, Asians in America were unskilled laborers, paid low wages to work on the railroads or in laundries and restaurants. Recent studies show, however, that Asian Americans have become, as a group, the highest-earning, best-educated, and fastest-growing racial group in the United States. Statistics show that, as of 2010, the median household income was substantially higher for Asian Americans than for all other racial groups, including whites. [53]

Despite this progress, there are still important issues to address. There is much disparity in income among Asian Americans, as with other groups, and in particular the immigrant poor continue to encounter barriers. There are still double standards, and

discrimination has not been eradicated. In many work places, including in the law, there are still glass--or bamboo--ceilings to crack. There are still acts of violence directed at individuals solely because of their race or religion.

And there will always be crises that challenge us, that test us, and when they do, we must do better than we have done in the past, not just for Asian Americans, but for all Americans.

Footnotes

a1 Denny Chin is a United States Circuit Judge for the Second Circuit. Kathy Hirata Chin is a partner at Cadwalader, Wickersham & Taft LLP. This article is based on a presentation given by the authors at the New York City Bar Association on December 15, 2014, as part of the Stephen R. Kaye Memorial Program. The presentation was followed by a conversation among the first three Asian American judges in New York: Randall T. Eng, who was appointed to the New York City Criminal Court in 1983 and is now Presiding Justice of the Second Department; Peter Tom, who was appointed to the New York City Civil Court in 1985 and is now an Associate Justice of the First Department; and Dorothy Chin-Brandt, who was elected to the New York City Civil Court in 1987 and is now an Acting Justice of the New York State Supreme Court, Queens County.

1 Sucheng Chan, *Asian Americans: An Interpretative History* 25 (1991); Gary Y. Okihiro, *The Columbia Guide to Asian American History* xv, 178 (2001); Asian Nation, *The First Asian Americans*, http:/www.asian-nation.org/first.shtml (last visited Mar. 18, 2015).

2 Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth Century America* 1-2 (1994); Okihiro, *supra* note, at xiii-xiv (2001); George Anthony Peffer, *If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion* 121 (1999).

3 Library of Congress, Immigration: Japanese, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/japanese.html (last visited Apr. 13, 2015).

4 This is the figure for "Asian alone or in combination." U.S. Census Bureau, C2010BR-11, The Asian Population: 2010, at 4 tbl.1 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf.

5 *Id.* at 7 tbl.2.

6 *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

7 *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

8 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

9 *United States v. Thind*, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).

10 *Gong Lum v. Rice*, 275 U.S. 78 (1927).

11 *Terrace v. Thompson*, 263 U.S. 197 (1923).

12 *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

13 *Ex parte Endo*, 323 U.S. 283 (1944).

14 Over the years our teams have included: Vincent Chang, Hon. Kiyo Matsumoto, JanicelynnAsamoto, John B. Bajit, Ben Chan, Christopher W. Chan, Yang Chen, Theodore Cheng, Francis H. Chin, James Chou, John Flock, Andrew Hahn, Reiko Kaji, Jane Kim, Jenny Kim, Jean Lee, Lauren U.Y. Lee, Vinny Lee, Robert W. Leung, Linda S. Lin, Anna Mercado, Concepcion A. Montoya, Susan Moon, Esther Nguonly, Clara Ohr, Justin Ruaysamran, Yasuhiro Saito, Liza Sohn, Betsy Tsai, Vinoo P. Varghese, Ona T. Wang, Jessica C. Wong, David Weinberg, and Michael Yap. For the *Ozawa*/*Thind* presentation, one part was played by a special guest: Mr. Ozawa's granddaughter, Carol Ing Leonard.

15 *Yasui v. United States*, 320 U.S. 115 (1943).

16 *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986); United States v. Ebens, 654 F. Supp. 144 (E.D. Mich. 1987).

17 *See* David E. Stannard, *Honor Killing: How the Infamous "Massie Affair" Transformed Hawaii* (2005); Peter Van Slingerland, *Something Terrible Has Happened* (1966).

18 *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 945 (1952).

19 United States v. Thind, 261 U.S. 204 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922).

20 *Okamoto v. United States*, 152 F.2d 905 (10th Cir. 1946); *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *United States v. Fujii*, 55 F. Supp. 928 (D. Wyo. 1944).

21 *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

22 *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

23 *Vietnamese Fisherman Ass'n v. Knights of Klu Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981).

24 The summaries are drawn in part from the scripts, which were developed with other members of the Asian American Bar Association of New York. Frank H. Wu, now Dean of the Hastings College of the Law, was a co-author of the Vincent Chin script and in general has been enormously helpful in the development of these programs.

25 The facts in this section are drawn primarily from the trial transcript and newspaper articles published in The Daily Alta and San Francisco Chronicle in August and September 1874, as well as the following sources: Chy Lung v. Freeman, 92 U.S. 275 (1876); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination*

in Nineteenth-Century America (1994); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995); Kelly Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 651 (2005); Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, *in Entry Denied: Exclusion and the Chinese Community in America* (Sucheng Chan ed., 1991); Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 Signs 3 (Autumn 1979).

26 *Ex parte Ah Fook*, 49 Cal. 402 (1874). The writ had the effect of staying Judge Morrison's decision, and permitting the women to remain, until the California Supreme Court could rule.

27 The court was the United States Circuit Court for the District of California, one of the original federal intermediate courts established by the Judiciary Act of 1789. The circuit courts had both trial and appellate jurisdiction. The appellate jurisdiction was transferred to the United States Courts of Appeals when they were created by the Judiciary Act of 1891.

28 *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874).

29 *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

30 *See* Chinese Exclusion Act of 1882; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

31 *Arizona v. United States*, 132 S. Ct. 2492 (2012).

32 158 Cong. Rec. H3715-02 (daily ed. June 18, 2012) (statement of Rep. Judy Chu), *available at* https://www.congress.gov/crec/2012/06/18/CREC-2012-06-18-pt1-PgH3715-2.pdf (last visited May 25, 2015).

33 The facts in this section are drawn largely from the trial transcript as well as the following: Frederic P. Close, *Tokyo Rose/An American Patriot: A Dual Biography* (2010); Rex B. Gunn, *They Called Her Tokyo Rose* (2d ed. 2008); Russell W. Howe, *The Hunt for Tokyo Rose* (2008); Eric L. Muller, *Betrayal on Trial: Japanese-American "Treason" In World War II*, 82 N.C. L. Rev. 1759 (2004).

34 *See* Hans Sherrer, *Iva Toguri Is Innocent!*, 28 Justice Denied 22 (Spring 2005), http://justicedenied.org/issue/issue_28/toguri_jd28.pdf (last visited Apr. 9, 2015).

35 The conviction was affirmed by the Ninth Circuit. D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 945 (1952).

36 *See* Richard Goldstein, *Iva Toguri D'Aquino, Known as Tokyo Rose and Later Convicted of Treason, Dies at 90*, N.Y. Times, Sept. 28, 2006.

37 Heart Mountain is another re-enactment that we have performed several times. In June 2014, we travelled to Cody, Wyoming for a performance that took place only a few miles from the site of the actual Heart Mountain concentration camp. We went at the invitation of the National Consortium on Racial and Ethnic Fairness in the Courts and more specifically of Professor Eric Muller, who wrote the book *Free to Die for Their Country: The Story of the Japanese American Draft Resisters in World War II* (2001). He put together a cast that included two of the draft resisters

themselves, both in their 90s, one of whom played himself. It was a great honor to work with them and with, indeed, a whole new cast drawn from Consortium participants.

38 The facts in this section are drawn from the transcripts of the trial and hearings as well as from the following: *Okamoto v. United States*, 152 F.2d 905 (10th Cir. 1946); *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *United States v. Fujii*, 55 F. Supp. 928 (D. Wyo. 1944); Mike Mackey, *Heart Mountain: Life in Wyoming's Concentration Camp* (2000); Muller, *supra* note 37; Michi Nishiura Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (2008 ed.);Frank Seishi Emi, *Draft Resisters at Heart Mountain*, *in Only What We Could Carry: The Japanese American Internment Experience* (Lawson Inada ed., 2000).

39 Muller, *supra* note 37, at 104.

40 *See* Muller, *supra* note 37, at 76 ("Heart Mountain quickly gave birth to the best-organized and most articulate resistance movement that ever took shape on any issue at any of the ten WRA camps.").

41 *Fujii*, 148 F.2d at 299-300.

42 *Keegan v. United States*, 325 U.S. 478 (1945).

43 *Okamoto*, 152 F.2d at 907.

44 *See* Muller, *supra* note 37, at xi.

45 The facts in this section are drawn largely from the transcripts of court proceedings as well as: *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986); *United States v. Ebens*, 654 F. Supp. 144 (E.D. Mich. 1987); Stewart Kwoh, *Building Bridges to Justice*, 9 Asian L.J. 201 (2002); Frank H. Wu, *Embracing Mistaken Identity: How the Vincent Chin Case Unified Asian Americans*, 19 Harv. Kennedy Sch. Asian Am. Pol'y Rev. 17 (2010).

46 *Ebens*, 800 F.2d at 1422.

47 *Ebens*, 654 F. Supp. at 146.

48 *See* Helen Zia, *Asian American Dreams: The Emergence of an American People* 79 (2001) ("Located across the Ohio River from Kentucky, Cincinnati is known as a conservative city with Southern sensibilities.").

49 Michael Chang, *Bridging the Gap: The Role of Asian American Public Interest Organizations in the Pursuit of Legal and Social Remedies to Anti-Asian Hate Crimes*, 7 Asian L.J. 139 (2000); Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, Cheating, and Who Killed Vincent Chin?,* 5 Asian L.J. 41 (1998);Frank H. Wu, *Why Vincent Chin Matters*, N.Y. Times, June 22, 2012.

50 *See* Frank Wu, *Yellow: Race in America Beyond Black and White* (2002); Zia, *supra* note 48; Sheila A. Bedi, *The Constructed Identities of Asian and African Americans: A Story of Two Races and the Criminal Justice System*, 19 Harv. Blackletter L.J. 181 (2003); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 Mich. J. Race & L. 347 (1996); Stewart Kwoh, *Building Bridges to Justice*, 9 Asian L.J.

201 (2002); Jeehoo Lee, *One Step Closer: Understanding the Past and Potential Work and Influence of Asian American Interest Groups in Claiming A Space for Asian Americans in America's Democracy*, 14 Asian L.J. 123 (2007).

51 Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. Times, Aug. 10, 2014; Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. Times, July 18, 2014; Jonathan M. Katz & Richard Perez-Pena, *In Chapel Hill Shooting of 3 Muslims, a Question of Motive*, N.Y. Times, Feb. 11, 2015.

52 The Supreme Court has never overruled *Korematsu* or the other internment cases. *See generally* William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 203-09, 211 (1998) (arguing that judicial review is inappropriate to determine "military necessity" and that there was a real fear of Japanese attack on West Coast); William H. Rehnquist, *When the Laws Were Silent*, 49 Am. Heritage (1998); *see also* Alfred C. Yen, *Praising with Faint Damnation: The Troubling Rehabilitation of Korematsu*, 40 B.C. L. Rev. 1, 2 (1998).

53 *See generally* Pew Research Center, *The Rise of Asian Americans* (Apr. 4, 2013 ed.), http://www.pewsocialtrends.org/files/2013/04/Asian-Americans-new-full-report-04-2013.pdf (last visited Apr. 9, 2015).

11 JUDNOT 6

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AGENCY PLAN

U.S. DEPARTMENT *of* LABOR

The U.S. Department of Labor (DOL) fosters, promotes, and develops the welfare of the wage earners, job seekers, and retirees of the United States; improves working conditions; advances opportunities for profitable employment; and assures work-related benefits and rights.

BUILDING ON DOL'S ACCOMPLISHMENTS

- **EXPANDING LANGUAGE ACCESSIBILITY:** DOL's Wage and Hour Division (WHD) developed fact sheets and other resources to provide information about the Fair Labor Standards Act and employee rights and protections and translated those documents into Chinese, Hindi, Hmong, Korean, Nepali, Punjabi, Samoan, Tagalog, Thai, Urdu, and Vietnamese.
- **ENFORCING HEALTH AND SAFETY, WORKPLACE DISCRIMINATION, AND WAGE AND HOUR LAWS:** In May 2021, DOL entered into a conciliation agreement with Conduent Inc. to resolve alleged systemic hiring discrimination against Black, Asian, Native Hawaiian and Pacific Islander applicants for customer care assistant positions at its Yukon facility. In the agreement, Conduent agreed to pay $395,000 in back wages and interest to 1,624 applicants and take steps to ensure its personnel practices, including recordkeeping and internal auditing procedures, meet legal requirements.
- **ENSURING THAT MEMBERS OF THE AA AND NHPI COMMUNITY WHO ARE LIMITED ENGLISH PROFICIENT (LEP) HAVE MEANINGFUL ACCESS TO GOVERNMENT SERVICES:** In September 2021, DOL's Civil Rights Center (CRC) and the Hawai'i Department of Labor and Industrial Relations (DLIR) entered into a voluntary settlement agreement to ensure LEP persons and eligible non-U.S. citizens seeking to file claims for unemployment insurance (UI) benefits have better access to services.
- **CONDUCTING TARGETED ENGAGEMENT WITH THE AA AND NHPI COMMUNITIES:** DOL has engaged in listening sessions, events, partnerships, and educational webinars with the AA and NHPI communities throughout the country. For instance, the Occupational Safety and Health Administration (OSHA) conducted 111 outreach activities that included a focus on the AA and NHPI community, reaching 119,726 employers and workers.

PRIORITY PROGRAM GOALS FOR THE ASIAN AMERICAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER COMMUNITIES

Per Executive Order 14031, DOL has identified five high-priority goals that will span the next two years. These goals will advance equity, justice, and opportunity for AA and NHPI communities.

GOAL 1

Publish labor force data disaggregated for AA and NHPI subgroups: The Bureau of Labor Statistics (BLS) will evaluate the quality of monthly and/or quarterly data on labor force estimates for AA and NHPI ethnic subgroups, including data on key economic metrics, such as the unemployment rate, employment-population ratio, and the labor force participation rate. If BLS determines the data meet quality standards, BLS will start publishing monthly or quarterly data, which will provide the federal government, state and local entities, policymakers, workers, employers, and the broader public with timely measures to see how AA and NHPI subgroups are faring in the labor market.

GOAL 2

Increase language access for AA and NHPI workers to DOL programs and services: DOL will update its existing language access plan to strengthen department-wide standards for ensuring equitable access for LEP workers, including providing technical assistance and training to DOL sub-agency staff responsible for implementing agency specific LEP plans, supporting the translation of vital information on DOL's website and elsewhere, and surveying departmental agencies to better understand language needs, including AA and NHPI language needs, among the communities DOL serves.

GOAL 3

Build and strengthen partnerships with AA and NHPI communities to more effectively reach vulnerable AA and NHPI workers: DOL agencies will work closely with the WHIAANHPI Regional Network and community stakeholders to improve access or services (i.e., job training and placement programs and programs protections for AA and NHPI workers), increase the numbers of AA and NHPI workers and communities served by DOL, expand the applicant pool for open DOL positions, and inform policy priorities of the department.

GOAL 4

Increase equitable access for AA and NHPI organizations to competitive DOL grants and funding opportunities: DOL will conduct increased outreach to AA and NHPI organizations to ensure accessibility of DOL grants and funding program materials. This will entail a targeted webinar for AA and NHPI organizations on "DOL Grants 101" and targeted outreach emails to the attendees of this webinar and through the networks of WHIAANHPI.

GOAL 5

Fostering the recruitment, development, and retention of AA and NHPI employees in the DOL workforce: DOL will expand outreach and recruitment to underserved communities, including, but not limited to, Asian American and Native American Pacific Islander-Serving Institutions (AANAPISIs), professional associations, labor unions and other worker organizations, and community organizations that serve potential AA and NHPI candidates; identify potential barriers at each point in the lifecycle of an employee's career; and engage regularly with DOL affinity groups, including its Asian Pacific American Council.

Contact WHIAANHPI@hhs.gov if you have any accessibility issues with the document.

AGENCY PLAN

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The U.S. Equal Employment Opportunity Commission (EEOC) prevents and remedies unlawful employment discrimination and advances equal opportunity for all in the workplace.

BUILDING ON EEOC'S ACCOMPLISHMENTS

- **RESPONDING TO BIAS INCIDENTS AGAINST AA AND NHPIS:** The EEOC held a virtual hearing in April 2021 on workplace civil rights issues related to the COVID-19 pandemic. The hearing included testimony highlighting pandemic-related violence, harassment, and discrimination targeting AAs and NHPIs, disparities within AA and NHPI communities, and job losses and salary reductions for people of color.
- **ADVANCING CIVIL RIGHTS THROUGH LITIGATION:** In April 2021, Saipan-based Imperial Pacific agreed to pay $105,000 and furnish other relief to resolve a lawsuit alleging that the company permitted its customers to sexually harass AA and NHPI employees, subjected female employees to different terms and conditions of employment, and retaliated against them. And in May 2021, the EEOC recovered $4.8 million to satisfy a judgment in a lawsuit filed against Maui Pineapple alleging labor trafficking, harassment, discrimination, and retaliation against 54 Thai workers.
- **PROMOTING TARGETED OUTREACH STRATEGIES:** The EEOC's Office of Enterprise Data and Analytics released a new data visualization tool for internal agency staff that will improve the agency's ability to conduct targeted outreach by enabling agency users to analyze AA and NHPI demographic information and identify national origin groups experiencing high rates of limited English proficiency.
- **BUILDING RELATIONSHIPS WITH AA AND NHPI COMMUNITIES ACROSS THE COUNTRY:** EEOC staff actively participated in over 287 roundtables, webinars, and listening sessions nationwide as part of the WHIAANHPI Regional Network to help facilitate the exchange of information across offices, coordinate interagency efforts, and conduct outreach to AA and NHPI communities. These efforts have reinvigorated federal partnerships and led to new relationships and initiatives.

PRIORITY PROGRAM GOALS FOR THE ASIAN AMERICAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER COMMUNITIES

Per Executive Order 14031, EEOC has identified three high-priority goals that will span the next two years. These goals will advance equity, justice, and opportunity for AA and NHPI communities.

GOAL 1

Increase outreach to AA and NHPI communities: The EEOC will develop a plan to increase outreach to AA and NHPI communities, such as expanding the use of ethnic media outlets; strengthening contacts with AA and NHPI-serving business and community organizations through stakeholder roundtables and other informational events; and helping underserved AA and NHPI populations better access EEOC's resources.

GOAL 2

Increase language access for AAs and NHPIs to better assist limited English proficient individuals who are often more vulnerable to discrimination: The EEOC will review and update its website to ensure that the most important and frequently reviewed materials can easily be accessed in additional languages; reconvene its language access working group to ensure that EEOC's materials are accessible, understandable, and relevant to AAs and NHPIs with limited English proficiency; and ensure that interpretation services meet demands placed on the agency, including for requests involving AA and NHPI language assistance.

GOAL 3

Expand the data collected by the agency for AA and NHPI populations and improve analysis of AA and NHPI workforce and charge data to better target outreach efforts: The EEOC will explore expanding the national origin group data collected for AA and NHPI populations during the private sector intake and charge processes. The agency will also provide staff with data assistance and train outreach staff to use a new data visualization tool to better understand where national origin groups are located, levels of limited English proficiency, and other demographic characteristics.

The Positive Stereotype web link page

Jennifer Y. Kim, Caryn J. Block, Debunking the 'model minority' myth: How positive attitudes toward Asian Americans influence perceptions of racial microaggressions, Journal of Vocational Behavior, Volume 131, December 2021
https://www.sciencedirect.com/science/article/abs/pii/S0001879121001202

The Negative Impact of Positive Stereotyping: Relationship Between Positive Stereotypes, Perceived Competence and Perceived Potential for Leadership (July 2019)
https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1084&context=studentpub_uht

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The "bamboo ceiling" at Goldman Sachs, JPMorgan, Morgan Stanley and Bank of America, *Nathan Risser,* efinancialcareers.com (May 10, 2022)
https://www.efinancialcareers.com/news/2022/05/goldman-sachs-bamboo-ceiling
(*citing* Aisanomics in America: Contributions and Challenges (May 2, 2022)
https://www.goldmansachs.com/insights/pages/gs-research/asianomics-in-america/report.pdf)

Jin Zhao v. State Univ. of N.Y.

United States District Court for the Eastern District of New York

January 8, 2007, Decided

No 04-CV-0210 (JFB) (RML)

Reporter
472 F. Supp. 2d 289 *; 2007 U.S. Dist. LEXIS 1568 **

JIN ZHAO, Plaintiff, VERSUS STATE UNIVERSITY OF NEW YORK, RESEARCH FOUNDATION OF THE STATE UNIVERSITY OF NEW YORK, AND DR. OLCAY BATUMAN, Defendants.

Subsequent History: Motion granted by *Zhao v. State Univ. of N.Y., 2008 U.S. Dist. LEXIS 110369 (E.D.N.Y., July 15, 2008)*

Core Terms

laboratory, termination, stereotyping, summary judgment, funding, manuscript, assays, hiring, summary judgment motion, argues, apparent authority, national origin, Hypoxia, ethnic, blood, quotations, interview, reasons, cells, experiments, cytometry, salary, cases, discriminatory, employees, at-will, primate, promise, hostile work environment, instant case

Case Summary

Procedural Posture

Plaintiff former employee sued defendants, a state university, one of its medical centers, its research foundation, and a particular professor, alleging national origin discrimination and a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C. § 2000e et seq.*, *42 U.S.C.S. § 1981*, and *N.Y. Exec. Law § 296 et seq.*, and breach of an employment contract. Defendants moved for summary judgment.

Overview

The employee, a woman of Chinese origin, was employed as a postdoctoral associate in a research laboratory operated by a certain professor, who hired laboratory assistants using funding provided by grants made through the university's research foundation. Although the professor directly hired her laboratory assistants, the foundation administered the assistants' employment. The employee contended that, during her employment interview, the professor indicated that she was favorably impressed by the work ethic of Chinese people, that the professor imposed a higher work standard on her due to this stereotyping, and that she was terminated for failing to live up to unrealistic expectations, rather than for poor work performance, as contended by the professor. The court granted summary judgment as to the Title VII claims against the professor individually and the breach of contract claim against her, but otherwise denied the motion. There were numerous disputed issues of material fact, including whether the employee was terminated due to unlawful stereotyping and whether the acts and statements of the professor created a hostile work environment based on the employee's national origin.

Outcome

The court granted the professor's motion for summary judgment as to the Title VII claim against her individually

and the breach of contract claim, but denied her motion as to the state law claim. The court denied the summary judgment motions by the remaining defendants in their entirety.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1 **Summary Judgment, Entitlement as Matter of Law**

Pursuant to Fed. R. Civ. P. 56(c), a court may not grant a motion for summary judgment unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2 **Burdens of Proof, Movant Persuasion & Proof**

A moving party bears the burden of showing that he or she is entitled to summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN3 **Summary Judgment, Evidentiary Considerations**

A court is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4 **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is unwarranted if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

HN5 **Burdens of Proof, Nonmovant Persuasion & Proof**

Once a moving party has met its summary judgment burden, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. A nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. As the U.S. Supreme Court stated, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. The mere existence of some alleged factual dispute between the parties alone will not defeat a properly supported motion for summary judgment. A nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth concrete particulars" showing that a trial is needed. It is insufficient for a party opposing summary judgment "merely to assert a conclusion without supplying supporting arguments or facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Labor & Employment Law > Discrimination > General Overview

HN6 **Summary Judgment, Entitlement as Matter of Law**

The U.S. Court of Appeals for the Second Circuit has provided additional guidance regarding summary judgment motions in discrimination cases: An extra measure of caution is merited in affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions. Nonetheless, summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact.

Labor & Employment Law > ... > Civil Actions > Exhaustion of Remedies > Filing of Charges

HN7 **Exhaustion of Remedies, Filing of Charges**

The filing of a complaint with the Equal Employment Opportunity Commission (EEOC) or an authorized state agency, that names a defendant, is a prerequisite to commencing a Title VII action. *42 U.S.C.S. § 2000e-5(f)(1)(a)*. However, courts have recognized an exception to the general rule that a defendant must be named in the EEOC complaint.

Labor & Employment Law > ... > Civil Actions > Exhaustion of Remedies > Filing of Charges

HN8 **Exhaustion of Remedies, Filing of Charges**

The "identity of interest" exception allows a Title VII action to proceed against a party that was not named in an the Equal Employment Opportunity Commission (EEOC) complaint where there is a clear identity of interest between an unnamed defendant and the party named in the administrative charge. In order to determine whether the "identity of interests" exception is applicable, there are four factors that a court should consider: (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; and (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN9 **Burdens of Proof, Burden Shifting**

Where a plaintiff presents no direct evidence of discriminatory treatment based on her national origin, a court reviews her claim under the three-step, burden-shifting framework established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green. To establish a prima facie case of racial discrimination under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, a plaintiff must show (1) membership in a protected class; (2) satisfactory job performance; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. The U.S. Courts of Appeals for the Second Circuit has characterized the evidence necessary for a plaintiff to satisfy this initial burden as "minimal" and "de minimis."

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN10 **Burdens of Proof, Ultimate Burden of Persuasion**

Once a plaintiff establishes a prima facie case, the

burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the termination. If the defendant carries that burden, the burden shifts back to the plaintiff to demonstrate by competent evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > ... > Disparate Treatment > Evidence > Circumstantial & Direct Evidence

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN11 **Burdens of Proof, Burden Shifting**

To meet its burden of persuasion, a plaintiff may rely on evidence presented to establish her prima facie case as well as additional evidence. Such additional evidence may include direct or circumstantial evidence of discrimination. It is not sufficient, however, for a plaintiff merely to show that he or she satisfies McDonnell Douglas's minimal requirements of a prima facie case and to put forward evidence from which a factfinder could find that the employer's explanation was false. The key is whether there is sufficient evidence in the record from which a reasonable trier of fact could find in favor of plaintiff on the ultimate issue, that is, whether the record contains sufficient evidence to support an inference of discrimination. The way to tell whether a plaintiff's employment discrimination case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove--particularly discrimination.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN12 **Burdens of Proof, Burden Shifting**

The fact that an employee disagrees with the results of an employer's decision regarding termination, or even has evidence that the decision was objectively incorrect, does not demonstrate, by itself, that the employer's proffered reasons are a pretext for termination.

Labor & Employment Law > ... > Gender & Sex Discrimination > Employment Practices > General Overview

Labor & Employment Law > ... > National Origin Discrimination > Employment Practices > General Overview

Labor & Employment Law > ... > Racial Discrimination > Employment Practices > General Overview

HN13 **Gender & Sex Discrimination, Employment Practices**

In the sex discrimination context, both the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit have held that decisions resulting from "stereotyped" impressions or assumptions about the characteristics or abilities of women violate Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* These same principles undoubtedly apply with equal force to racial and ethnic stereotyping.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN14 **Burdens of Proof, Burden Shifting**

If it is demonstrated that an employer is making any employment decisions based upon impermissible stereotypes and an employee subsequently suffers an adverse employment action that potentially implicates such stereotypes, a jury may reasonably infer that the adverse employment action resulted from the impermissible stereotyping, as opposed to a proffered

nondiscriminatory reason for the action.

Business & Corporate
Compliance > ... > Discrimination > Harassment > National Origin Harassment

Labor & Employment
Law > ... > Harassment > Racial Harassment > Hostile Work Environment

HN15 **Harassment, National Origin Harassment**

A hostile work environment, in violation of Title VII, 42 U.S.C.S. § 2000e et seq., is established by a plaintiff showing that his or her workplace was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Isolated instances of harassment ordinarily do not rise to this level. Simple teasing, offhand comments, isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment. To meet his burden, a plaintiff must show more than a few isolated incidents and evidence solely of sporadic discrimination does not suffice. A collection of administrative mix-ups, minor annoyances, and perceived slights cannot be considered severe or pervasive harassment.

Business & Corporate
Compliance > ... > Discrimination > Harassment > National Origin Harassment

Labor & Employment
Law > ... > Harassment > Racial Harassment > Hostile Work Environment

HN16 **Harassment, National Origin Harassment**

For a hostile work environment claim, the conduct in question must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive. Other factors to consider include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The U.S. Court of Appeals for the Second Circuit has noted that while the standard for establishing a hostile work environment is high, the environment need not be "unendurable" or "intolerable." Although a hostile work environment generally consists of "continuous and concerted" conduct, a single act can create a hostile work environment if it in fact works a transformation of a plaintiff's workplace.

Business & Corporate
Compliance > ... > Discrimination > Harassment > National Origin Harassment

HN17 **Harassment, National Origin Harassment**

To succeed on a hostile work environment claim, a plaintiff must link the actions by a defendant to her national origin. Although facially neutral incidents may be included among the totality of the circumstance that courts consider in any hostile work environment claim, a plaintiff nevertheless must offer some evidence from which a reasonable jury could infer that the facially-neutral incidents were in fact discriminatory. Hostility or unfairness in the workplace that is not the result of discrimination against a protected characteristic is simply not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

HN18 **Title VII Discrimination, Employers**

The U.S. Court of Appeals for the Second Circuit has held that separate corporate entities, if they are sufficiently interrelated, can be held to be joint or integrated employers under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. In analyzing this issue, the Second Circuit has instructed district courts to consider four factors: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

HN19 **Title VII Discrimination, Employers**

The U.S. Court of Appeals for the Second Circuit has emphasized that the single or joint employer" test has been confined to two corporate contexts: first, where a plaintiff is an employee of a wholly-owned corporate subsidiary; and second, where a plaintiff's employment is subcontracted by one employer to another, formally distinct, entity. The Second Circuit cautioned that extending this theory to cases involving the complex relations between levels of government would be impracticable and would implicate constitutional concerns.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

HN20[] Title VII Discrimination, Employers

Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., itself explicitly recognizes that "any agent" of an employer will be liable for discriminatory behavior.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

Labor & Employment Law > ... > Harassment > Racial Harassment > Hostile Work Environment

HN21[] Title VII Discrimination, Employers

In hostile work environment cases, it is well-settled that once a plaintiff has established the existence of a hostile workplace, she must then demonstrate that the harassing conduct which created the hostile situation should be imputed to the employer. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., an employer need not have actual knowledge of the harassment; an employer is considered to have notice of sexual harassment if the employer--or any of its agents or supervisory employees--or any of its agents or supervisory employees-- new or should have know of the conduct. The question of when an official's actual or constructive knowledge will be imputed to an employer is determined by agency principles.

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

HN22[] At Will Employment, Duration of Employment

It is settled law in New York, that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at-will terminable at any time by either party. However, this presumption can be rebutted by proof that an employer expressly agreed to limit its right to discharge an employee. In making this determination, any single act, phrase or other expression is insufficient to demonstrate such a limitation. A court must look to the totality of the attendant circumstances to determine whether an employer agreed to terminate only for cause.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

HN23[] Consideration, Adequate Consideration

The presence of consideration is a fundamental requisite to any valid contract. Consideration consists of either a benefit to the promisor or a detriment to the promisee, and it is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him. The value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

Labor & Employment Law > ... > Conditions & Terms > Duration of Employment > Fixed Term

HN24[] Consideration, Adequate Consideration

If an employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him "at will" after the employee has begun or rendered some of the requested service or has given any other consideration. This is true even though the employee has made no return promise and has retained the power and legal privilege of terminating the employment "at will." The employer's

promise is supported by the service that has begun or rendered or by the other executed consideration.

Business & Corporate Compliance > ... > Consideration > Enforcement of Promises > Forbearance

HN25 **Enforcement of Promises, Forbearance**

Courts have found that consideration for a contract may be supplied by actual forbearance from exercising one's rights to unilaterally cancel a contract terminable at will; even though there was no obligation to continue the at-will relationship in the first instance.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN26 **Offers, Definite Terms**

There is no enforceable agreement if the parties have failed to agree on all of its essential terms or if some of the terms are too indefinite to be enforceable. Under New York law, an agreement is enforceable if a meeting of the minds has occurred as to the contract's material terms. It is rightfully well settled in the common law of contracts that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.

Business & Corporate Compliance > ... > Contract Formation > Offers > Definite Terms

Contracts Law > Contract Interpretation > General Overview

HN27 **Offers, Definite Terms**

The first step then is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract. Definiteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do. Not all terms of a contract need be fixed with absolute certainty; at some point virtually every agreement can be said to have a degree of indefiniteness. While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be "pedantic or meticulous" in interpreting contract expressions.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN28 **Authority to Act, Apparent Authority**

A principal cloaks an agent with apparent authority when it allows that agent to operate in a manner that causes a third party to reasonably believe that the agent is authorized to enter into the transaction at issue. Apparent authority requires a third party to demonstrate two facts: (1) the principal was responsible for the appearance of authority in the agent to conduct the transaction in question, and (2) the third party reasonably relied on the representations of the agent. An agent's conduct alone cannot be the basis for apparent authority: Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. An agent cannot by his own acts imbue himself with apparent authority.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN29 **Authority to Act, Apparent Authority**

The existence of apparent authority is normally a question of fact, and therefore inappropriate for resolution on a motion for summary judgment.

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

HN30 **Title VII Discrimination, Scope & Definitions**

It is axiomatic that Title VII of the Civil Rights Act of

1964, *42 U.S.C.S. § 2000e et seq.*, does not provide a cause of action against individual defendants.

Labor & Employment
Law > Discrimination > Actionable Discrimination

HN31 **Discrimination, Actionable Discrimination**

Under New York State Human Rights Law an individual may be liable where an individual actually participates in the conduct giving rise to a discrimination claim.

Constitutional Law > State Sovereign Immunity > General Overview

Education Law > Civil Liability > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Governments > State & Territorial
Governments > Employees & Officials

HN32 **Constitutional Law, State Sovereign Immunity**

For *Eleventh Amendment* purposes, the State University of New York is an integral part of the government of the State of New York and when it is sued the state is the real party. Moreover, a claim against a state official acting in an official capacity is a claim against the state that is likewise barred by the *Eleventh Amendment*.

Counsel: **[**1]** For plaintiff is Susan C. Warnock, Esq., of Hockert, Warnock & Donnelly, New York, New York.

For State University of New York and Dr. Batuman are Eliot Spitzer, Attorney General of the State of New York and David B. Diamond, Esq., Assistant Attorney General, New York, New York.

For Research Foundation of State University of New York are Cathleen Ann Giannetta, Esq., Michael J. D'Angelo, Esq., and Rebecca R. Embry, Esq. of Landman Corsi Ballaine & Ford PC, New York, New York.

Judges: JOSEPH F. BIANCO, United States District Judge.

Opinion by: JOSEPH F. BIANCO

Opinion

[*295] MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiff Dr. Jin Zhao ("Dr. Zhao") brings this action alleging employment discrimination on the basis of her national origin and a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 as amended, *42 U.S.C. § 2000e et seq.*, ("Title VII"), the Civil Rights Act of 1866, *42 U.S.C. § 1981*, and the *New York State Human Rights Law, Executive Law § 296 et seq.* ("NYSHRL"), against defendants State University of New York ("SUNY"), SUNY Downstate Medical Center, the Research Foundation of **[**2]** SUNY, and Dr. Olcay Batuman ("Dr. Batman"). In addition, plaintiff alleges breach of employment contract against the Research Foundation of SUNY and Dr. Batuman. [1]

Defendants now move for summary judgment on all claims, pursuant to *Fed. R. Civ. P. 56(c)*. For the following reasons, Dr. Batuman's motion for summary judgment as to the Title VII and breach of contract claims is granted and her motion as to the NYSHRL claim is denied. The motions by defendants SUNY and the Research Foundation **[**3]** are denied in their entirety.

I. BACKGROUND

[1] Plaintiff's complaint also named the Health Science Center at Brooklyn Foundation, Inc. ("the Health Science Center") as a defendant. However, on November 5, 2004, the case against the Health Science Center was dismissed pursuant to a stipulation. In addition, counsel for plaintiff also withdrew the following claims: (1) the retaliation claim; and (2) the state claims against SUNY for breach of contract and violation of the NYSHRL. (Transcript of August 11, 2006 Oral Argument, at 5.)

A. THE FACTS

1. The Parties

SUNY is a state-created public university system established under the Education Law of the State of New York. (Defs.' Joint Rule 56.1 Statement ("Defs.' 56.1") P 1.) [2] SUNY Downstate Medical Center ("SUNY DMC") is a state university healthcare facility established as a part of SUNY under the Education Law of the State of New York. [3] (*Id.* P 2.)

[4]** The Research Foundation of SUNY ("the Research Foundation") is a private, nonprofit corporation established by the New York State Board of Regents, pursuant to *Section 216 of the Education Law of the State of New York*, and is a corporate entity separate from SUNY. (*Id.* PP 4-5.) The mission of the Research Foundation since its inception in 1951 has been to administer research grants awarded to SUNY and its faculty, and to provide other services in support of the research, instruction and public service missions of SUNY. (Declaration of James R. Dennehey PP 4-5.)

[*296] Dr. Batuman is an Associate Professor of Medicine and an Associate Professor of Anatomy and Cell Biology at SUNY DMC, and has held those positions since 1992 and 1997, respectively. (Defs.' 56.1 P 3.) The primary focus of Dr. Batuman's scientific research since joining SUNY DMC has been to understand the role of blood vessel cells, also known as endothelial cells, in various blood cancers, including the form of blood cancer known as multiple myeloma. (*Id.* P 9.)

Plaintiff Dr. Jin Zhao is a woman of Chinese national origin, who was employed as a post-doctoral associate in a scientific research **[**5]** laboratory run by Dr. Batuman at SUNY DMC, from January 14, 2002, until she received a formal termination letter from Dr. Batuman on October 25, 2002. (*Id.* P 6.)

2. Dr. Batuman's Laboratory

In connection with her role as an academic physician-scientist, Dr. Batuman operates a research laboratory located at SUNY DMC. (*Id.* P 14.) Funding for the research conducted in Dr. Batuman's laboratory is provided through grants obtained from public and private health institutions, such as the National Institute of Health, the Veterans Administration, the American Cancer Society, the American Heart Association, the American Lung Association (Brooklyn Chapter), the Multiple Myeloma Research Foundation, and through grants provided by private pharmaceutical companies. (*Id.* P 15.) Grants for Dr. Batuman's laboratory are obtained through a competitive application process pursuant to which Dr. Batuman, as the principal investigator on a proposed research project, submits a grant proposal in the appropriate form to one of the public or private institutions from which funding for such projects is available. (*Id.* P 16.) The operation **[**6]** of Dr. Batuman's laboratory is strictly dependent on the receipt of funds from such grants, and the production of publishable research by the laboratory is essential to obtaining new grants, as well as extensions or renewals of existing grants. (*Id.* P 17.)

Applications for the grants are made through the Research Foundation, which holds and administers the funds that scientists at SUNY campuses obtain from sources other than SUNY to conduct their research activities (hereinafter, "extra-mural funding"). (*Id.* PP 18-19.) At Dr. Batuman's request, and pursuant to prescribed procedures, the Research Foundation disburses funds and makes payments for expenses related to the research for which Dr. Batuman has obtained extra-mural funding. (*Id.* P 20.)

Part of Dr. Batuman's role as a member of the faculty at SUNY DMC is to provide research training for medical students, graduate and undergraduate students, and post-graduate clinical residents. (*Id.* P 21.) Therefore, at any one time, one or more of these types of research trainees may be participating in ongoing research in Dr. Batuman's laboratory. (*Id.* P 22.) **[**7]** The funds that Dr. Batuman obtains from grants, as administered by the Research Foundation, may be used to pay salaries for post-graduate research fellows or associates, technicians, or other individuals, for their assistance with the laboratory's research. (*Id.* P 25.) When Dr. Batuman hires an individual to work full-time in the laboratory using funds she has obtained from grants administered by the Research Foundation, the individual's

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[2] Where only one party's 56.1 Statement is cited, the facts are taken from that party's 56.1 Statement, and the other party does not dispute the fact asserted or has offered no admissible evidence to refute that fact.

[3] Because SUNY Downstate Medical Center is a State university health care facility established under New York law as a part of SUNY, *see* *N.Y. Educ. Law §§ 350(5)*, ***352(1)***, ***352(3)***, the only proper institutional State defendant in this action is SUNY. Accordingly, the caption shall be amended to eliminate SUNY Downstate Medical Center as a separate defendant.

employment is administered by the Research Foundation. (*Id.* P 26.) The individual's salary and benefits are provided by the Research Foundation and, prior to commencing work, the individual is required to provide the Research Foundation with written acknowledgment that his or her employment is at-will **[*297]** and governed by the Research Foundation's policies. (*Id.* P 27.)

From August 2000 to August 2001, Dr. Hong Zhang, a woman of Chinese national origin, was employed in Dr. Batuman's laboratory as a post-doctoral associate to assist with the laboratory's research. (*Id.* P 28.) During the spring of 2001, while Dr. Zhang was working in Dr. Batuman's laboratory, she participated in initial research **[**8]** in the lab concerning a relationship between endothelial cells and multiple myeloma. (*Id.* P 31.) In connection with this initial research, Dr. Zhang utilized a process known as flow cytometry to identify and quantify endothelial cells in patient blood samples. (*Id.* P 32.) The findings that resulted from Dr. Zhang's flow cytometry work and other research work in Dr. Batuman's lab in 2001 led Dr. Batuman to make a grant application to the Multiple Myeloma Research Foundation for a Senior Research Award of $ 100,000 to study the relationship between endothelial cells and the development of mutliple myeloma ("MMRF Research"). (*Id.* P 34.) That grant application was approved in or around October 2001. (*Id.* P 35.) Before receiving notice of the grant approval, Dr. Zhang accepted a higher paying position in the Department of Surgery at SUNY DMC. (*Id.* P 36.)

3. Hiring of Dr. Zhao

After Dr. Zhang left Dr. Batuman's laboratory, Dr. Batuman placed an advertisement in the October 2001 issue of *Science,* seeking post-doctoral associates to assist in the MMRF research and other ongoing research in her lab. (**[**9]** *Id.* P 39.) Dr. Zhao responded to the advertisement by sending a copy of her resume and, on or about November 6, 2001, Dr. Zhao appeared for an interview at Dr. Batuman's request for one of the advertised positions. (*Id.* PP 40-43.) During the interview, Dr. Batuman broadly explained to Dr. Zhao the research that she was conducting and intended to conduct in her laboratory. (*Id.* P 44.) At Dr. Batuman's request, plaintiff was interviewed for a second time on or about November 22, 2001. (*Id.* P 47.)

According to Dr. Zhao, at the interviews, she was given the impression from Dr. Batuman's statements that she admired Chinese people because of their capacity to work, that Chinese people had been employed by her in the past and she admired their work ethic, and that she was impressed by the recommendation letter from a doctor which mentioned that on one occasion Dr. Zhao had "slept in the lab" to ensure the proper time course for an experiment. (Zhao Decl. PP 8-9.) For example, Dr. Zhao testified that, during the interview, Dr. Batuman stated, "I know Chinese students work very hard, long, so I like to employ Chinese." (Zhao **[**10]** Dep., at 154.) Dr. Zhao also testified that, during the interviews, Dr. Batuman "said Chinese work very hard and for a long time, and the people who really produce results are these Chinese people." (Zhao Dep., at 155.)

On November 26, 2001, Dr. Batuman sent Dr. Zhao a letter, via regular mail and email offering her a position as a post-doctoral research associate at a salary of $ 45,000 per year. (Defs.' 56.1 P 53.) The letter stated:

> This letter is to offer you a postdoctoral research associate in my laboratory with a salary of $ 45,000 a year for at least two and at most three years.

(Defs.' Ex. 13; *see also* Defs.' Ex. 12.) On or around November 30, 2001, Dr. Zhao contacted Dr. Batuman and accepted the position. (Defs.' 56.1 P 54.)

On December 4, 2001, prior to commencing work in Dr. Batuman's laboratory, Dr. Batuman escorted plaintiff to the offices of the Research Foundation where Dr. Zhao **[*298]** completed and signed the Research Foundation application form and the employee assignment form. (Defs.' 56., 1 P 58.) The application form contained the following representations immediately above "Applicant's Signature" line that Dr. **[**11]** Zhao signed at the bottom of the first page:

> I understand that if hired by the Research Foundation, my employment is terminable at will, with or without cause, based on the employment needs of the Research Foundation as it may determine in its sole discretion.

(*Id.* P 59; Defs.' Ex. 14.) The employee assignment form contained the following language immediately above the "Employee Signature" line that Dr. Zhao signed in the middle of the second page:

> I accept the position indicated above as an employee of The Research Foundation of State University of New York. I understand this position is subject to final approval by the Research Foundation and is terminable at will. I have read the Patient Waiver and Release Agreement and accept it as a condition of employment. I also agree to abide by all policies and regulations of the Research Foundation.

(*Id.* P 60; Defs.' Ex. 15.) Dr. Zhao claims to have signed these forms without examining their content, and did not read these statements "in a very small type face." [4] (Zhao Decl. PP 14-15.)

[12]** 4. The Research Foundation Letter

On or around February 19, 2002, after Dr. Zhao began working in Dr. Batuman's laboratory, she received a letter from Anthony Selvadurai ("Selvadurai") of the Research Foundation. (Defs.' 56.1 P 64.) Selvadurai's letter stated that plaintiff had been appointed "to the position of Postdoctoral Associate with the Research Foundation" and that, pursuant to the policies of the Research Foundation, her appointment "may be terminated with or without cause or notice at any time at either [her] option or that of the Research Foundation." (*Id.* P 65; Defs.' Ex. 20.) According to Dr. Zhao, when she received this letter, it was the first time she became aware that she was not considered Dr. Batuman's employee and that her appointment could be terminated with or without cause or notice at any time. (Zhao Decl. P 17.) Zhao further alleges that she became upset by this letter because she accepted the position in Dr. Batuman's laboratory with the understanding it would be guaranteed for a two-year term. (*Id.*)

In late February or early March 2002, Dr. Zhao met with Dr. Batuman and expressed concern about the representation in the **[**13]** letter stating that she could be terminated "with or without cause or notice at any time." (Defs.' 56.1 PP 66-67.) According to Dr. Zhao, Dr. Batuman told her, in substance, (1) that Dr. Batuman's grants paid Dr. Zhao's salary, (2) that Dr. Zhao was not actually being paid by the Research. Foundation, and (3) that, because it was Dr. Batuman's grants and her funds that paid Dr. Zhao, Dr. Zhao had a guaranteed position for at least two years. (Zhao Decl. P 18.) Dr. Zhao alleges that **[*299]** she had received another offer of employment from Sophie Davis School of Biomedical Education, City University of New York and had until March 29, 2005 to accept the job offer. (Zhao Decl. PP 20-21; Pl.'s Ex. G.) During this discussion, in light of the Selvadurai letter and the existence of another job opportunity, Dr. Zhao requested that Dr. Batuman provide her with a written document guaranteeing the employment for a two-year term. (Zhao Decl. P 19.)

In response, on March 25, 2002, Dr. Batuman provided Dr. Zhao with a letter intended to address Dr. Zhao's concern. (Defs.' 56.1 P 72.) The letter stated, in relevant part:

> I had thought that our two conversations in the last four weeks **[**14]** had cleared the issues we were speaking about and that is why I did not write to you. But I am happy to do so now.
>
> I am happy that the lab is working and it is your doing. Regarding the job security as I told you before we have funding for you for two years for sure. In May we will know if we have funding for the third year as well. As I also said you will get a cost of living increase of 3% at the second year. This week we should also know if we can afford a technician, and if you decide we need one we can give an ad to the paper and you can start interviewing people. As long as my laboratory is here at SUNY you have a position in it.
>
> * * *
>
> I have a feeling that you may be looking for another position, and if you decide to leave please let me know some months in advance. I would like to say that I would like you to stay here and give our experiments a chance to develop into an area and an academic career for you. I think we work well and the worst is over in the sense of getting started.

(Defs.' Ex. 21.)

5. Dr. Zhao's Performance on the Laboratory Projects

According to the defendants, Dr. Batuman learned later in 2002 that Dr. Zhao's performance with respect to **[**15]** three laboratory projects was unsatisfactory. Dr. Zhao disputes that her performance was deficient in any respect. A summary of the evidence on these three projects is set forth below.

(a) The MMRF Research

During April through July 2002, in connection with the MMRF Research, plaintiff performed the flow cytometry process on blood samples from patients with and without multiple myeloma to identify and count

[4] The Research Foundation seeks to have the Court disregard Dr. Zhao's declaration because it is inconsistent with her prior deposition testimony. (The Research Foundation Reply Brief, at 2-3.) In particular, the Research Foundation argues that, contrary to her declaration, Dr. Zhao testified in her deposition that she read the employment forms before signing them. (*Id.*) The Court need not resolve this issue because resolution of this factual issue is unnecessary for purposes of deciding the summary judgment motions. To the extent that the Research Foundation is seeking to have the declaration disregarded in its entirety, they have not pointed to any other inconsistencies with prior testimony or set forth any basis for doing so with respect to the other statements in the declaration.

endothelial cells in those samples. (Defs.' 56., 1 P 73.) According to Dr. Batuman, she discovered that Dr. Zhao's results were flawed because, in performing the process, she made the following mistakes: (1) she "did not analyze four sub-samples of patient blood stained with unique antibody combinations to accurately identify endothelial cells"; (2) she "did not incorporate control information into the process to establish a baseline for flow cytometer's detection of the antibodies used in the process"; (3) she "did not record the volumes of the patient blood samples and the white blood cell samples from which she had obtained her results to allow calculation of the absolute number of endothelial cells per microliter of patient blood"; and (4) she "did not print out **[**16]** her results of the process using a dot plot display suitable for publication." (Batuman Decl. PP 125, 130; Defs.' Exs. 22-37.)

On or about May 17, 2002, Dr. Batuman provided Dr. Zhao with a memo summarizing the experimental plans for the laboratory for the next six months. (Defs.' 56. 1 **[*300]** P 78.) In the May 2002 memo, Dr. Batuman explained to Dr. Zhao that her "hope" was that "we" -- meaning Dr. Batuman, plaintiff, and the other individuals involved in the lab's research -- could conduct the experimental plans described in the memo "and get at least 3" manuscripts ready for submission to scientific journals "in the next 4 months." (Batuman Decl. P 134; Defs.' Ex. 38.)

On or about August 1, 2002, Dr. Batuman reviewed Dr. Zhao's flow cytometry results again to assess her progress on that work. (Defs.' 56. 1 P 81.) When Dr. Batuman conducted this review, she concluded that the results from the flow cytometry process were flawed because she had not corrected the flaws that Dr. Batuman had pointed out to her and, thus, the results could not be used to publish a scientific manuscript concerning the MMRF Research. (Defs.' 56.1 PP 82, 84; Batuman Decl. PP 147, 152.)

[17]** Dr. Zhao disputes that her work on the flow cytometry process was flawed. According to Dr. Zhao, she had arguments with Dr. Batuman on several occasions because (1) Dr. Zhao questioned the number of samples she was asked to process because there were not enough samples for a control group, which would enable her to obtain a statistically relevant result; (2) despite the fact that a series of flow cytometry experiments had been conducted by Dr. Zhang prior to Dr. Zhao's arrival, there were no written protocols to use for experiments and she was expected to reconstruct the experiments without protocols; and (3) Dr. Batuman expected "results" which supported her theories, did not care about the process used to obtain them and, in one instance, threw a printout containing data back in Dr. Zhao's face. (Zhao Decl. PP 37-39.) Dr. Zhao also claims to have pointed to a number of problems in the operation of the laboratory. (*Id.* P 43.) In particular, Dr. Zhao asserted that the number of people working in Dr. Batuman's laboratory was "inconsistent and fluctuated with each academic term," and that there were inexperienced students in the laboratory. (*Id.*)

(b) The Primate **[**18]** Research Project

In March 2002, in connection with a research project in Dr. Batuman's laboratory know as the "primate research project," Dr. Zhao was asked by Dr. Batuman to perform a test known as an ELISA assay to measure the levels of certain proteins in blood samples from infant primates that had been obtained after a 16-week experimental cycle. (Defs.' 56.1 P 99.) The ELISA assays Dr. Zhao was asked to perform were purchased as kits from one of several companies that provide materials to commercial and research laboratories. (*Id.* P 100.) Dr. Batuman instructed Dr. Zhao to perform the assays in accordance with the directions contained in the instruction booklet included in the assay kits, reviewed with Dr. Zhao the steps of the ELISA assay as detailed in the booklet, and asked Dr. Zhao to study the booklet carefully. (*Id.* P 104.) Dr. Batuman claims that, when asked to perform the assays, Dr. Zhao assured Dr. Batuman that she was familiar with the ELISA assay process and that performing the assays was "easy." (Batuman Decl. P 206.)

According to Dr. Batuman, the majority of the results Dr. Zhao obtained from the ELISA assays were unreliable because, **[**19]** when Dr. Zhao performed the assays, she failed to create reliable baseline curves for the measurement of the proteins in the infant primate blood samples. (*Id.* P 208.) Dr. Batuman further asserts that, because infant primate blood samples similar to those Dr. Zhao used up in performing the ELISA assays could not be obtained without repeating the entire 16-week experimental cycle of the primate research project **[*301]** again, Dr. Zhao's alleged improper execution of the ELISA assays "resulted in an enormous waste of time and resources." (*Id.* P 214.) Dr. Batuman also claims that, because funding and other resources were unavailable to obtain similar samples by repeating the entire 16-week experimental cycle, the primate research project was never completed and Dr. Batuman and her collaborator, Dr. Smith, were unable to use results from the project to apply for a grant of funds from the

National Institutes of Health to conduct further research. (*Id.* PP 215-16.)

According to Dr. Zhao, this project was tangential to the research focus of Dr. Batuman's laboratory and was not mentioned in the description of duties and responsibilities in the advertisement for the position Dr. Zhao filled. **[**20]** (Zhao Decl. P 49; Pl.'s Exs. A, B, and H.) Moreover, contrary to Dr. Batuman's statements, Dr. Zhao denies ever claiming or assuring Dr. Batuman that performing the assays was easy. (Zhao Decl. P 52.) Dr. Zhao also asserts that there were two other people in the laboratory performing ELISA assays and, thus, it is improper to ascribe blame to her for the purported poor results. (*Id.* P 52.) Dr. Zhao claims that Dr. Batuman never complained about the results she obtained from these experiments nor mentioned that there was a limited number of primate blood samples. (*Id.* PP 50, 52.) In short, Dr. Zhao disputes that her actions caused the depletion of the entire reserve of primate blood samples. (*Id.* P 53.)

(c) The Hypoxia Manuscript

During the period from January to December 2001, before plaintiff began working in Dr. Batuman's laboratory, Dr. Batuman and other individuals associated with her laboratory conducted research on the effect of reduced oxygen (also known as hypoxia) on the function of certain blood cells in relation to the growth of cancerous tumors. (Defs.' 56.1 P 111.) That research led to the laboratory's preparation and submission of a manuscript **[**21]** to the *Blood Journal* (the "Hypoxia manuscript") on or about February 26, 2002. (*Id.* P 112.) On April 1, 2002, Dr. Batuman received an email from the *Blood Journal* containing peer-review criticisms of the Hypoxia manuscript. (*Id.* P 113.) The peer review criticisms indicated that revisions to the text of the Hypoxia manuscript and to data Figures 1 through 6 in the manuscript would have to be made by the laboratory in response to the criticisms. (*Id.* P 114.) A few days after Dr. Batuman received the April email from the *Blood Journal,* she met with Dr. Zhao and explained that she expected Dr. Zhao to complete the revisions to one of the data figures in the Hypoxia manuscript -- Figure 1 -- in response to the peer-review criticisms in the email. (*Id.* P 115.) To revise Figure 1, Dr. Zhao needed to perform experiments to isolate two proteins present in the endothelial cells under hypoxic conditions at various time points, and display her results from those experiments using a technique known as a Western Blot. (*Id.* P 116.)

According to Dr. Batuman, Dr. Zhao told her that producing the Western **[**22]** Blot for the revisions to Figure 1 of the Hypoxia manuscript would be simple and that she would be able to complete it easily. (Batuman Decl. P 228.) Dr. Batuman asserts that, during May and June 2002, she reviewed the Western Blots made by Dr. Zhao and found that none of them was of the requisite quality for publication in the Hypoxia manuscript because they contained flaws that occurred during their production. (*Id.* PP 230-40.) Dr. Batuman further claims that, during the first two weeks of August 2002, Dr. Zhang and Dr. Batuman produced a Western Blot of the quality needed for publication in the Hypoxia **[*302]** manuscript. (*Id.* PP 257-59.) The Hypoxia manuscript was later published in the March 15, 2003 issue of *Blood Journal.* (Defs.' 56. 1 P 136.)

According to Dr. Zhao, although she mentioned that she was familiar with Western Blots generally and they involved a simple technique, she never advised Dr. Batuman that producing the Western Blot for revisions to Figure 1 of the Hypoxia manuscript would be simple or that she would be able to complete it easily. (Zhao Decl. P 58.) Dr. Zhao points to the scathing and critical evaluation of the manuscript from the reviewers **[**23]** at *Blood Journal* which stated that, among other things, the following:

> Although the reviewers found merit in your paper, there is shared concern that your results lack statistical validation and that considerably more work must be done in order to strengthen your conclusions regarding the importance of Smadl and Smad2 in the hypoxic response. Moreover, your paper contains a large number of errors which significantly detract from the impact of your work. These problems preclude your paper in Blood. If you think you can adequately respond to these substantive issues as well as other problems noted in review, we are willing to consider a revised paper, which we will carefully re-evaluate. Please be aware that this invitation by no means guarantees eventual acceptance of your manuscript.

(Defs.' Ex. 51.) Dr. Zhao stated that, based upon these criticisms, she realized that she would have to repeat the experiment many times before obtaining a usable result and Dr. Batuman's expectations about producing results in such a short time frame were unrealistic. (Zhao Decl. PP 57, 60.) Dr. Zhao asserts that even highly experienced researchers frequently have to repeat the Western **[**24]** Blot numerous times in order to get good data. (*Id.* P 59.) Dr. Zhao further claimed that her Western Blot results represented the truth of

her experiments and that she could not produce the image that Dr. Batuman wanted in the short time frame she was given. (*Id.* P 60.) Dr. Zhao also claims that Dr. Batuman and Dr. Zhang used her Western Blot results in order to troubleshoot the data and produce the Western Blot "image" that they wanted to publish. (*Id.* P 62.) Moreover, Dr. Zhao points out that Dr. Batuman and Dr. Zhang were unable to produce a Western Blot of publishable quality in the second round of review. (*Id.* P 64.)

6. Dr. Batuman's Alleged Treatment of Dr. Zhao

In addition to disputing that her performance on these projects was defective, Dr. Zhao also submits evidence which she believes demonstrates that Dr. Batuman's expectations about her job performance were unrealistic and were caused by Dr. Batuman's stereotypical view that employees of Chinese origin should work harder than other workers. In particular, Dr. Zhao points to the following: (1) when Dr. Zhao went to use the flow cytometry machine in another room, Dr. Batuman complained that Dr. Zhao did **[**25]** not spend enough time in the laboratory, taunted her about the statement in the recommendation letter that mentioned that Dr. Zhao had slept in the laboratory in a prior job, and questioned why she did not have that same dedication in the laboratory (Zhao Decl. P 30); (2) once at lunch, Dr. Batuman told a story about her Chinese babysitter's husband who would pitch in when the babysitter did not come or could not show up (*Id.* P 31); (3) on one occasion, when Dr. Zhao was on her way to the ladies' room, Dr. Batuman shouted at her to return to the laboratory and, as a result, Dr. Zhao became fearful of leaving the laboratory to **[*303]** use the ladies' room (*Id.* P 32); (4) Dr. Zhao seldom, if ever, left the laboratory to eat her lunch (*Id.* P 33); (5) Dr. Zhao was not permitted to use the library to review citations in scientific literature, but, instead, was given a laptop to use at home to look up the citations (*Id.*); (6) when Dr. Batuman got really angry at Dr. Zhao, she would ridicule Dr. Zhao's heavy accent, which would embarrass Dr. Zhao (*Id.* P 34); and (7) even though Dr. Batuman had placed an advertisement for two positions, Dr. Zhao was the only person hired to work **[**26]** in the laboratory, which did not even employ a full-time technician. (*Id.* P 44.)

7. Dr. Zhao's Termination

On August 27, 2002, Dr. Batuman sent Dr. Zhao an email in which she informed Dr. Zhao that she was dissatisfied with her work and her contributions to the laboratory's research. (Defs.' 56. 1 P 138.) In that email, Dr. Batuman told Dr. Zhao that, unless she saw "a significant change in [Dr. Zhao's] work habits, productivity, and attitude," her employment would be terminated. (*Id.* P 139; Defs.' Ex. 59.) Approximately one month later, on October 4, 2002, Dr. Batuman met with Dr. Zhao to discuss Dr. Zhao's progress on the MMRF Research. (*Id.* P 143.) Dr. Batuman outlined in that meeting how she was dissatisfied with Dr. Zhao's work. (*Id.* PP 144-47.) Dr. Zhao insisted that there was no problem with her progress on the MMRF research, that she should be listed as an author on the Hypoxia manuscript, and that Dr. Zhang should not be listed as an author. (*Id.* P 148.)

Following the meeting, on October 4, 2002, Dr. Batuman decided to terminate Dr. Zhao's employment in her laboratory. (*Id.* P 150.) **[**27]** Specifically, according to Dr. Batuman, she terminated Dr. Zhao's employment based on, among other things, the following: (1) Dr. Zhao's failure to properly perform flow cytometry work for MMRF Research in accordance with her requirements; (2) Dr. Zhao's failure to correct errors that she made in performing the flow cytometry process for the MMRF Research which Dr. Batuman had pointed out to her; (3) Dr. Zhao's failure to make sufficient progress on the MMRF Research which resulted in the non-renewal of the grant for that research for funding in 2003; (4) Dr. Zhao's failure to create reliable baseline curves in performing ELISA assays for the primate research project that resulted in an enormous waste of time and resources, as well as the loss of potential funding for Dr. Batuman's laboratory; (5) Dr. Zhao's failure to produce a publishable Western Blot for her revisions to the Hypoxia manuscript, which then required Dr. Batuman and Dr. Zhang to assume responsibility for that task and resulted in a waste of the laboratory's resources and delayed the publication of the manuscript; (6) Dr. Zhao's attitude in response to Dr. Batuman's comments and criticisms regarding her work; and (7) **[**28]** Dr. Zhao's insistence that the results she obtained from experimental tasks she conducted in the laboratory were correct or publishable. (Batuman Decl. P 290.)

B. PROCEDURAL HISTORY

Plaintiff initially filed the complaint in this action in the Supreme Court of the State of New York, Kings County, and, on January 20, 2004, the case was removed to this Court. The case was originally assigned to the Honorable Nina Gershon and, on February 10, 2006, the case was reassigned to the undersigned. Defendants subsequently moved for summary judgment. Oral argument was held on August 11, 2006.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

The standards for summary judgment are well settled. ***HN1***[] Pursuant to *Federal Rule of Civil Procedure 56(c)*, **[*304]** a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*; *Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 170 (2d Cir. 2006).* **[**29]** ***HN2***[] The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones, 396 F.3d 53, 69 (2d Cir. 2005)*. ***HN3***[] The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (***HN4***[] summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

HN5[] Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial."* *Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. As the Supreme Court stated in **[**30]** *Anderson,* "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson, 477 U.S. at 249-50* (citations omitted). Indeed, "the mere existence of *some* alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. *Anderson, 477 U.S. at 247-48*. Thus, the nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth "concrete particulars" showing that a trial is needed. *R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984)* (internal quotations omitted); *Tufariello v. Long Island R.R., 364 F. Supp. 2d 252, 256 (E.D.N.Y. 2005)*. Accordingly, it is insufficient for a party opposing summary judgment "merely to assert a conclusion without supplying supporting arguments or facts." *BellSouth Telecomms., Inc. v. W.R. Grace & Co., 77 F.3d 603, 615 (2d Cir. 1996)* (internal quotations omitted). ***HN6***[] The Second Circuit has provided additional guidance regarding summary judgment motions in discrimination cases:

> We have sometimes noted that an extra **[**31]** measure of caution is merited in affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions. *See, e.g. Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994)*. Nonetheless, "summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact." *McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997)*; *see also Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir. 2001)* ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases.").

Schiano v. Quality Payroll Sys., 445 F.3d 597, 603 (2d Cir. 2006) (quoting *Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001))*.

[*305] B. SUBJECT MATTER JURISDICTION

The Research Foundation argues that the Court does not have subject matter jurisdiction over Dr. Zhao's Title VII claims against the Research Foundation because Dr. Zhao failed to name the Research **[**32]** Foundation as a respondent in her February 14, 2003 Charge of Discrimination filed with the New York State Division on Human Rights ("SDHR"), which was cross-filed with the Equal Employment Opportunity Commission ("EEOC"). As set forth below, the Court finds this argument unpersuasive.

HN7[] The filing of a complaint with the EEOC or an authorized state agency, that names the defendant, is a prerequisite to commencing a Title VII action. *42 U.S.C. § 2000e-5(f)(1)(a)*; *accord Johnson v. Palma, 931 F.2d 203, 209 (2d Cir. 1991)*. However, courts have recognized "an exception to the general rule that a defendant must be named in the EEOC complaint." *Id.* The Second Circuit has articulated the rationale for this exception:

> Because these charges generally are filed by parties not versed in the vagaries of Title VII and its jurisdictional and pleading requirements, we have

> taken a "flexible stance in interpreting Title VII's procedural provisions," *Egelston v. State Univ. College at Geneseo, 535 F.2d 752, 754, 755 (2d Cir. 1976)*, so as not to frustrate Title VII's remedial goals.

Id. This exception, which is referred **[**33]** to as ***HN8***[⬆] the "identity of interest" exception, allows a Title VII action to proceed against a party that was not named in the EEOC complaint "where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge." *Id.*

In order to determine whether the "identity of interests" exception is applicable, there are four factors that a court should consider:

> (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; [and] (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id. at 209-10 (quoting *Glus v. G.C. Murphy Co.,* 562 F.2d 880, 888 (3d Cir. 1977)). **[**34]**

As to the first factor, although the Research Foundation could have been named in the EEOC complaint, the roles of the Research Foundation and SUNY, as it relates to employees, are substantially intertwined. In particular, the Research Foundation acts as the employer, but delegates the hiring and other employment decisions to the SUNY representative. Thus, it is not surprising that an employee might not understand, in filing an EEOC complaint, that both the Research Foundation and SUNY should be named.

With respect to the second factor, the relationship between the Research Foundation and SUNY creates nearly "identical interests with respect to conciliation and compliance." *Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1242 (2d Cir. 1995)*. Specifically, although the Research Foundation is a separate entity from SUNY, the purpose for its existence is to administer grants awarded to SUNY and **[*306]** to provide other services in support of SUNY's mission. Thus, SUNY's grant money flows through the Research Foundation and the Research Foundation employees operate under the direction of SUNY employees. Under such circumstances, the intertwined relationship between SUNY and **[**35]** the Research Foundation and accompanying identity of interests with respect to conciliation and compliance result in this factor weighing heavily in Dr. Zhao's favor. *See Fox v. City Univ. of New York, No. 95-CV-4398 (CSH), 1996 U.S. Dist. LEXIS 9594, 1996 WL 384915, at *7 (S.D.N.Y. July 10, 1996)* ("The whole purpose of the [CUNY Research] Foundation was to streamline the process of procuring and implementing grants for the colleges of the City University. In that goal, the Foundation acted as a single integrated unit with the University, and the individual colleges.").

The third factor -- namely, whether there has been prejudice to the Research Foundation -- also strongly favors Dr. Zhao. In particular, the Research Foundation received notice of the Discrimination Charge filed at the EEOC *before* SUNY was put on notice. In fact, it was the Research Foundation that transmitted the charge to SUNY via a memorandum dated January 27, 2003. (Pl.'s Ex. J.) Therefore, the Research Foundation cannot claim that they were unaware of the discrimination charge from its inception and has failed to demonstrate any prejudice resulting from not being specifically named in that charge.

The fourth factor **[**36]** favors the Research Foundation. There is no indication that the Research Foundation represented to Dr. Zhao that its relationship with Dr. Zhao should be through the named party. To the contrary, Dr. Zhao was advised by SUNY, in its position statement to the SDHR, that Dr. Zhao was "an employee of the Research Foundation, a non-state, private entity" and that SUNY DMC was "unable to respond to those allegations concerning the Research Foundation" since the Research Foundation was "not a party to this matter." (Defs.' Ex. 77.)

Having carefully considered these factors, the Court finds that the "identity of interest" exception is applicable here, especially given the close, intertwined relationship between the two entities and the lack of prejudice to the Research Foundation. *See Fox, 1996 U.S. Dist. LEXIS 9594, 1998 WL 273049, at *6* (finding identity of interest under the four-factor *Johnson* test between CUNY and the Research Foundation of CUNY and, thus, denying motion to dismiss Title VII claims against the

Foundation, even though the EEOC complaint did not name the Foundation). Accordingly, the Court refuses to dismiss the Title VII claims against the Research Foundation for lack of subject **[**37]** matter jurisdiction.

C. DISCRIMINATION CLAIM

Defendants argue that Dr. Zhao's discriminatory termination claim fails as a matter of law because the undisputed facts demonstrate that she was terminated for legitimate, non-discriminatory reasons. For the reasons set forth below, the Court finds that summary judgment on that ground is unwarranted. [5]

1. Legal Standard

HN9[] Because plaintiff presents no direct evidence of discriminatory treatment based on her national origin, the Court reviews her claim under the three-step, **[*307]** burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).* **[**38]** To establish a *prima facie* case of racial discrimination under Title VII, a plaintiff must show (1) membership in a protected class; (2) satisfactory job performance; (3) an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Cruz v. Coach Stores, Inc., 202 F.3d 560, 567 (2d Cir. 2000)*. The Second Circuit has characterized the evidence necessary for the plaintiff to satisfy this initial burden as "minimal" and "de minimis." *See Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 381 (2d Cir. 2001)*.

HN10[] Once plaintiff establishes a *prima facie* case, the burden shifts to the defendant to "'articulate some legitimate, nondiscriminatory reason for the' termination." *Patterson v. County of Oneida, 375 F.3d 206, 221 (2d Cir. 2004)* (quoting *O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996)* (quoting *McDonnell Douglas, 411 U.S. at 802*))). If the defendant carries that burden, "the burden shifts back to the plaintiff to demonstrate by competent evidence that 'the legitimate reasons offered **[**39]** by the defendant were not its true reasons, but were a pretext for discrimination.'" *Patterson, 375 F.3d at 221* (quoting *Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*). "'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Patterson, 375 F.3d at 221* (quoting *Texas Dep't of Cmty. Affairs, 450 U.S. at 253*).

HN11[] To meet this burden, the plaintiff may rely on evidence presented to establish her *prima facie* case as well as additional evidence. Such additional evidence may include direct or circumstantial evidence of discrimination. *Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-101, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003)*. It is not sufficient, however, for a plaintiff merely to show that he or she satisfies "*McDonnell Douglas'* s minimal requirements of a prima facie case" and to put forward "evidence from which a factfinder could find that the employer's explanation . . . was false." *James v. N.Y. Ass'n, 233 F.3d 149, 157 (2d Cir. 2000)*. Instead, the key is whether there is sufficient **[**40]** evidence in the record from which a reasonable trier of fact could find in favor of plaintiff on the ultimate issue, that is, whether the record contains sufficient evidence to support an inference of discrimination. *See id.; Connell v. Consolidated Edison Co. of N.Y., Inc., 109 F. Supp. 2d 202, 207-08 (S.D.N.Y. 2000)*.

As the Second Circuit observed in *James,* "the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove -- particularly discrimination." *233 F.3d at 157*; *see Lapsley v. Columbia Univ., 999 F. Supp. 506, 513-16 (S.D.N.Y. 1998)* (advocating elimination of *McDonnell Douglas* test in favor of simplified approach focusing on ultimate issue of whether sufficient evidence exists to permit jury to find discrimination); *see also Norton v. Sam's Club, 145 F.3d 114, 118 (2d Cir. 1998)* ("The thick accretion of cases interpreting this burden-shifting framework should not obscure the simple principle that lies at the core of anti-discrimination cases. In these, as in most **[**41]** other cases, the plaintiff has the ultimate burden of persuasion.").

[*308] 2. Application

At the outset, the Court finds that plaintiff has made out the *prima facie* case required by *McDonnell Douglas,* based upon, as discussed more fully below in

[5] In addition to alleging claims under Title VII, plaintiff alleges discrimination under New York State Human Rights Law. Claims of discrimination brought under New York state law are analyzed using the same framework as claims brought under Title VII, and the outcome under state law will be the same as the outcome under Title VII. *See Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714-15 (2d Cir. 1996)*.

connection with prong three, plaintiff's membership in a protected class, as well as evidence relating to the circumstances of her hiring, her work at the laboratory, and her termination. In response, defendants have established a legitimate non-discriminatory reason for her dismissal, namely, plaintiff's failure to perform her job adequately. Hence, the Court proceeds directly to the ultimate question of whether plaintiff has presented sufficient evidence from which a reasonable jury could find discrimination on the basis of national origin by examining each party's evidence individually and then proceeding to evaluate the evidence as a whole. *See Tomney v. Int'l Ctr. for the Disabled, 357 F. Supp. 2d 721, 742 (S.D.N.Y. 2005)*; *Stern v. Trustees of Columbia Univ., 131 F.3d 305, 314 (2d Cir. 1997)*; *see also Siano v. Haber, 40 F. Supp. 2d 516, 520 (S.D.N.Y.)*, *aff'd mem., 201 F.3d 432 (2d Cir. 1999)*; **[**42]** *Lapsley, 999 F. Supp. at 515*.

In response to defendants' motions for summary judgment, plaintiff points to several pieces of evidence in support of her argument that a reasonable jury could find that defendants' proffered non-discriminatory reason for the termination was a pretext for discrimination based on national origin. First, Dr. Zhao points to statements she alleges were made to her by Dr. Batuman at the time of her interview indicating that she was making hiring decisions based upon ethnic stereotyping. In particular, according to Dr. Zhao, Dr. Batuman told her that she liked to employ Chinese people because they work very hard and very long hours. For example, Dr. Zhao testified that, during the interviews, Dr. Batuman "said Chinese work very hard and for a long time, and the people who really produce results are these Chinese people." (Zhao Deposition, at 155.) In addition, Dr. Zhao alleges that Dr. Batuman stated that she was impressed by the recommendation letter of a doctor from one of Dr. Zhao's previous jobs, which mentioned that on one occasion Dr. Zhao had "slept in the lab" to ensure the proper time course for an experiment. (Zhao Decl. at PP 8-9.)

[43]** Second, Dr. Zhao alleges the use of this type of ethnic stereotyping by Dr. Batuman in employment decisions, including her termination, is further evidenced by her treatment of Dr. Zhao in the laboratory, as well as other ethnic comments relating to national origin. Specifically, Dr. Zhao points to the following evidence: (1) when Dr. Zhao went to use the flow cytometry machine in another room, Dr. Batuman complained that Dr. Zhao did not spend enough time in the laboratory, taunted her about the statement in the recommendation letter that mentioned that Dr. Zhao had slept in the laboratory in a prior job, and questioned why she did not have that dedication in the laboratory (Zhao Decl. P 30); (2) once at lunch, Dr. Batuman told a story about her Chinese babysitter's husband and how the husband would help out when the babysitter did not come or could not show up (Zhao Decl. P 31); (3) on one occasion, when Dr. Zhao was on her way to the ladies' room, Dr. Batuman shouted at her to return to the laboratory and, as a result, Dr. Zhao became fearful of leaving the laboratory to use the ladies' room (Zhao Decl. P 32); (4) Dr. Zhao seldom, if ever, left the laboratory to each her lunch **[**44]** (Zhao Decl. P 33); (5) Dr. Zhao was not permitted to use the library to review citations in scientific literature, but, instead, was given a laptop to use at home to look up the citations (Zhao Decl. P 33); (6) when Dr. Batuman got **[*309]** really angry at Dr. Zhao, she would ridicule Dr. Zhao's heavy accent, which would embarrass Dr. Zhao (Zhao Decl. P 34); and (7) when Dr. Zhao attended a party at Dr. Batuman's apartment in August 2002 with several Turkish guests, Dr. Batuman asked Dr. Zhao whether she though Turkish people are "more lovely" than Chinese people (Zhao Dep. 636-39, 749-50).

Third, not only does Dr. Zhao dispute defendants' claim that her performance was defective, but she also points to evidence regarding a lack of resources and staffing in the laboratory, which she also attributes to Dr. Batuman's unrealistically high expectations regarding her performance based on ethnic stereotyping of individuals of Chinese origin. For example, Dr. Zhao points to evidence that, even though Dr. Batuman had placed an advertisement for two positions, Dr. Zhao was the only person hired to work in the laboratory, which did not even employ a full-time technician. (Zhao Decl. P 44.)

Defendants **[**45]** argues that such evidence is insufficient to defeat the motions for summary judgment. The Court recognizes that ***HN12***[↑] the fact that an employee disagrees with the results of an employer's decision regarding termination, or even has evidence that the decision was objectively incorrect, does not demonstrate, by itself, that the employer's proffered reasons are a pretext for termination. *See, e.g., Rorie v. UPS, 151 F.3d 757, 761 (8th Cir. 1998)* (stating that "the relevant inquiry was whether [plaintiff] created a genuine issue of material fact as to whether her discharge was gender-based and not whether her termination was reasonable" and noting that "[i]t is not the task of this court to determine whether [the investigator's] investigation was sufficiently thorough or fair"). Moreover, the Court notes that, in the instant case,

there is certainly much evidence in the record from which a jury could reasonably conclude that Dr. Zhao was terminated not because of her national origin, but rather because she failed to perform her job in a competent manner. However, having carefully examined the evidence contained in the record, the Court concludes that, **[**46]** when viewed as a whole and in the light most favorable to plaintiff, the evidence creates genuine issues of material fact as to whether defendants' stated reason for terminating plaintiff was pretextual, and whether Dr. Zhao's national origin was a factor in the termination decision. In particular, the Court relies on, among other things, the evidence regarding statements allegedly made by Dr. Batuman at the time she hired Dr. Zhao which reflect that she may have higher performance expectations for individuals of Chinese origin because of her belief in certain ethnic stereotypes. The evidence regarding such statements combined with other evidence -- including evidence that Dr. Batuman made other statements during her employment relating to Dr. Zhao's national origin and also that Dr. Batuman may have imposed work requirements and expectations that would not have been imposed on a non-Chinese employee -- provides a factual basis from which a jury could infer discriminatory intent and, thus, creates genuine issues of material fact that defeat defendants' motions for summary judgment.

The Court finds defendants' arguments in support of the motions for summary judgment unpersuasive. ***HN13***[⬆] In **[**47]** the sex discrimination context, both the Supreme Court and the Second Circuit have held that decisions resulting from "stereotyped" impressions or assumptions about the characteristics or abilities of women violate Title VII. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 708, 98 S. Ct. 1370, 55 L. Ed. 2d ***[*310]*** 657 & 708 n.13 (1978); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1284 & n.20 (11th Cir. 2000) (finding that employer could be held liable under Title VII where it "deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambiance' with all-male food service") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)); *see also* Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 289 (2d Cir. 1998) ("Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender."); Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991) (finding that sex-stereotyping comments suggested that employer made promotion decision on the basis of stereotypical images of **[**48]** men and women). These same principles undoubtedly apply with equal force to racial and ethnic stereotyping. *See, e.g.,* Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-61 (1st Cir. 1999) (applying principles regarding sex stereotyping, including discussion of Supreme Court's *Price Waterhouse* decision, in racial discrimination context).

Nor does it matter that the stereotyping involved positive attributes that could have initially favored a plaintiff at the time of hiring. If an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day. This type of stereotyping in employment decisions, if proven, is precisely the type of evil that Title VII is designed to prevent and that is exactly what Dr. Zhao alleges happened here. In other words, Dr. Zhao argues that Dr. Batuman was making employment decisions motivated by ethnic stereotyping -- namely, that Chinese individuals work harder and longer than non-Chinese individuals -- which subsequently led to an adverse employment action **[**49]** in the form of termination because of unrealistic expectations regarding performance. Even if the stereotyping initially helped Dr. Zhao in the hiring process, that fact would not immunize her employer if such stereotyping subsequently resulted in a negative view of her by her employer which led to her termination. Moreover, to the extent that defendants argue that statements at the time of hiring are irrelevant to the reasons for termination, the Court disagrees. ***HN14***[⬆] If it is demonstrated that an employer is making any employment decisions based upon these impermissible stereotypes and an employee subsequently suffers an adverse employment action that potentially implicates such stereotypes, a jury may reasonably infer that the adverse employment action resulted from the impermissible stereotyping, as opposed to the proffered non-discriminatory reason for the action. As the Supreme Court stated in *Price Waterhouse* with regard to sex stereotypes, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, **[**50]** Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Price Waterhouse v. Hopkins, 490 U.S. at 251 (internal quotation marks omitted), *superceded by statute on other grounds.* That same rationale applies to the type of ethnic stereotyping alleged in this case.

Other courts have refused to grant summary judgment in cases where these type of allegations were made and had evidentiary support. For example, in Kang v. U. Lim America, Inc., 296 F.3d 810, 817 (9th **[*311]** Cir. 2002), the plaintiff alleged that he was terminated due to unrealistic job expectations placed on him because of stereotyping about his Korean heritage. The Ninth Circuit reversed the district court's decision to grant summary judgment on a disparate treatment claim. Id. at 819. Specifically, the court found that there were sufficient facts from which a jury could find that his former employer's reasons for firing him were pretextual where employee presented direct evidence that his supervisor abused him and required him to work longer hours because he believed Korean workers were superior to Mexicans **[**51]** and Americans, and that he was ultimately fired for failing to conform to the purported ethnic stereotype. Id. at 818-19.

Similarly, in Dow v. Donovan, 150 F. Supp.2d 249 (D. Mass. June 19, 2001), the court denied summary judgment on a gender discrimination claim by an associate attorney who had been terminated following denial of a partnership position at a law firm. Part of the evidence relied upon by plaintiff to defeat the summary judgment motion was the affidavits of several law partners in which they admitted that they considered plaintiff's gender as a positive attribute in making their employment decision. Id. at 265. Although the court found such statements to be ambiguous on the issue of pretext, the court found that, "[i]nterpreting these comments in the light most favorable to the plaintiff, a reasonable jury could find that plaintiff was evaluated and judged on account of her gender, and that the decision to deny her partnership was affected by negative gender stereotypes." *Id.*

In sum, although defendant has pointed to portions of the record that undermine the strength of various aspects of Dr. Zhao's proffered **[**52]** evidence of discrimination as it relates to her termination, the evidence is sufficient for Dr. Zhao to survive defendants' summary judgment motions.

D. HOSTILE WORK ENVIRONMENT CLAIM

Defendants also argue that they are entitled to summary judgment on the hostile work environment claim because Dr. Zhao has failed to establish a *prima facie* case.

HN15[] A hostile work environment, in violation of Title VII, is established by a plaintiff showing that his or her workplace was "permeated with 'discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Howley v. Town of Stratford, 217 F.3d 141, 153 (2d Cir. 2000) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)); *accord* Terry v. Ashcroft, 336 F.3d 128, 147 (2d Cir. 2003). "Isolated instances of harassment ordinarily do not rise to this level." Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (holding that "simple teasing . . . offhand **[**53]** comments, isolated incidents (unless extremely serious)" will not amount to discriminatory changes in the "terms and conditions of employment") (internal citations and quotations omitted); Brennan v. Met. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999) (holding that "[i]solated, minor acts or occasional episodes do not warrant relief"); Williams v. County of Westchester, 171 F.3d 98, 100 (2d Cir. 1999) (holding that "to meet his burden, the plaintiff must show more than a few isolated incidents" and "evidence solely of sporadic" discrimination does not suffice) (internal quotations omitted); Knight v. City of N.Y., 303 F. Supp. 2d 485, 500 (S.D.N.Y. 2004) (denying hostile work environment claim where incidents were "too remote"); Ruggieri v. Harrington, 146 F. Supp. 2d 202, at 217-18 (holding that a **[*312]** "collection of administrative mixups, minor annoyances, and perceived slights cannot be considered severe or pervasive harassment"); Francis v. Chem. Bank. Corp., 62 F. Supp. 2d 948, 959 (E.D.N.Y. 1999) (dismissing hostile work environment claim where plaintiff only alleged four incidents).

HN16[] The conduct in question **[**54]** must be "severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." Feingold v. N.Y., 366 F.3d 138, 150 (2d Cir. 2004). Other factors to consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Terry, 336 F.3d at 148 (quotation marks omitted). The Second Circuit has noted, however, that "[w]hile the standard for establishing a hostile work environment is high, . . . [t]he environment need not be 'unendurable' or 'intolerable.'" *Id.* (quoting Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 70 (2d Cir. 2000)). Moreover, although a hostile work environment generally consists of "continuous and concerted" conduct, "a single act can

create a hostile work environment if it in fact work[s] a transformation of the plaintiff's workplace." *Feingold, 366 F.3d at 150* (quotations and citation marks omitted) (alternation in **[**55]** original).

Further, ***HN17***[] to succeed on a hostile work environment claim in the instant case, plaintiff must link the actions by defendants to her national origin. Although "[f]acially neutral incidents may be included, of course, among the 'totality of the circumstance' that courts consider in any hostile work environment claim," plaintiff nevertheless must offer some evidence from which a reasonable jury could infer that the facially-neutral incidents were in fact discriminatory. *Alfano v. Costello, 294 F.3d 365, 378 (2d Cir. 2002)*; *see also Nakis v. Potter, No. 01-CV-10047 (HBP), 2004 U.S. Dist. LEXIS 25250, 2004 WL 2903718, at *20 (S.D.N.Y. Dec. 15, 2004)* (holding that "[h]ostility or unfairness in the workplace that is not the result of discrimination against a protected characteristic is simply not actionable" under Title VII) (citing *Brennan v. Met. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999)* ("A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class.")).

In the instant case, Dr. Zhao asserts that certain remarks related to her national origin were made by Dr. Batuman during her employment **[**56]** resulting in a hostile work environment. In particular, as outlined earlier with respect to the discrimination claim, Dr. Zhao claims the following: (1) on at least two occasions, Dr. Batuman mimicked her accent (Zhao Decl. P 34; Zhao Dep. 644-45, 756); (2) Dr. Batuman made a comment at a party in August 2002 asking Dr. Zhao to compare Turkish people to Chinese people (Zhao Dep. 636-39, 749-50); and (3) Dr. Batuman made a comment at a lunch in front of students in July or August 2002 about her Chinese babysitter bringing her husband to help out (Zhao Dep. 641-42). Dr. Zhao states that these comments resulted in great embarrassment and humiliation. For example, with respect to the Chinese babysitter comment, Dr. Zhao stated she was "embarrassed and ashamed" because she was "insinuating that I did not measure up to the standards of my people and at the same time making it seem as if we were slaves." (Zhao Decl. P 31.) If these remarks were the only evidence being offered, such evidence alone would not be sufficiently severe or pervasive to establish **[*313]** a hostile work environment under well-settled Second Circuit case authority.

However, Dr. Zhao also relies on facially neutral incidents **[**57]** in support of her hostile work environment claim, including the fact that she was expected to stay at her laboratory bench and to eat her lunch at the laboratory, was yelled at for going to the bathroom and leaving the laboratory, and was told she was not permitted to use the library to review citations, but rather was given a laptop to use at home for that work.

Defendants argue that the Court should not consider these facially neutral incidents because there is no circumstantial evidence or other basis from which a jury could infer these incidents were based on Dr. Zhao's national origin. The Court finds that argument unpersuasive and is unable to conclude as a matter of law that these facially neutral incidents should not be considered. Although it is not the only inference that can be drawn from these facts, these facially neutral incidents could be consistent with an employer who is punishing an employee for not achieving a standard of performance that has been improperly inflated due to impermissible ethnic stereotyping. Thus, if Dr. Zhao is able to prove from Dr. Batuman's alleged comments during the interview process and period of employment that Dr. Batuman believed that **[**58]** Chinese employees should work longer and harder than anyone else, a jury could infer that these incidents, relating to pervasive restrictions on her working conditions, were caused by the ethnic stereotypes that Dr. Batuman allegedly harbored. Defendants may be able to prove that these working conditions were not imposed by Dr. Batuman or, even if they were, they were based on Dr. Zhao's inability to perform her job in a competent manner under an objective standard, rather than based on ethnic stereotyping. However, there is sufficient evidence on both sides of this issue to raise an issue of material fact that should be resolved by a jury. Accordingly, defendants' motions are denied as to Dr. Zhao's hostile work environment claim.

E. TITLE VII LIABILITY OF THE RESEARCH FOUNDATION

The Research Foundation also argues that, because Dr. Zhao does not claim that any employee of the Research Foundation was involved in the creation of the alleged hostile work environment, the Research Foundation is entitled to summary judgment as a matter of law. In particular, the Research Foundation asserts that any acts by Dr. Batuman cannot be imputed to the Research Foundation under Title VII. The **[**59]** Court disagrees.

As a threshold matter, the Court notes that the relationship between the Research Foundation and

SUNY is so close that at least one court has found that they operated as joint, integrated employers for purposes of Title VII. *See* Pemrick v. Stracher, 67 F. Supp. 2d 149, 165 (E.D.N.Y. 1999). **HN18**[] The Second Circuit has held that separate corporate entities, if they are sufficiently interrelated, can be held to be joint or integrated employers under Title VII. *See* Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2d Cir. 1995). In analyzing this issue, the Second Circuit has instructed district courts to consider four factors: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." Cook, 69 F.3d at 1240 (internal quotation marks omitted); *accord* Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 378 (2d Cir. 2006). In *Pemrick,* the court applied this test and found the Research Foundation and SUNY to be joint, integrated employers under Title VII:

> **[*314]** [T]he defendant State University of New York and the **[**60]** Research Foundation of SUNY are inseparable in terms of their mission and their money. The Research Foundation of SUNY does not exist but for SUNY, and no research grants flow to SUNY except through the Research Foundation of SUNY. Defendants admit that the employees of the Research Foundation of SUNY operate under the direction and control of SUNY faculty members. Under the facts in this record, the Court has no hesitancy in declaring that SUNY and the Research Foundation of SUNY are joint, integrated employers for purposes of Title VII, and that both are properly deemed Pemrick's employer for the purposes of this action.

67 F. Supp.2d at 164-65 (citation omitted).

Similarly, in Fox v. City Univ. of N.Y., 94-CV-4398 (CSH), 1996 U.S. Dist. LEXIS 9594, 1996 WL 384915 (S.D.N.Y. July 10, 1996), the court denied the Research Foundation of the City University of New York's motion for summary judgment where it claimed it had no involvement in the alleged discriminatory conduct in connection with a program which was funded by the Research Foundation of CUNY, but was run by CUNY. In denying that motion, the court made the following determination:

> There is . . . substantial **[**61]** evidence that the Foundation, the University, and the College should be characterized as a single integrated employer with respect to the Program. Considering the four factors-interrelatedness of operations, central control of labor relations, common management, and common ownership--in turn, it is clear that the Foundation, the University and the College significantly shared employer responsibilities. The key issue, centralized labor relations, supports this conclusion. In terms of labor relations, the overlap between the Program and the Foundation was analogous to the relationship between a subsidiary and its parent corporation.

1996 U.S. Dist. LEXIS 9594, [WL] at *6. The court further noted that "[t]he whole purpose of the Foundation was to streamline the process of procuring and implementing grants for the colleges of the City University," and "[i]n that goal, the Foundation acted as a single integrated unit with the University and the individual colleges." 1996 U.S. Dist. LEXIS 9594, [WL] at *7.

Although the circumstances of the instant case are closely analogous to both *Pemrick* and *Fox,* **HN19**[] the Second Circuit has recently emphasized that the "single or joint employer" test "has been confined to two corporate **[**62]** contexts: first, where the plaintiff is an employee of a wholly-owned corporate subsidiary; and second, where the plaintiff's employment is subcontracted by one employer to another, formally distinct, entity." Gulino, 460 F.3d at 378 (footnotes omitted). The Second Circuit cautioned that "[e]xtending this theory to cases involving the complex relations between levels of government would be impracticable and would implicate . . . constitutional concerns." *Id.* (footnote omitted). The instant case does not include two levels of government because the Research Foundation is a private corporation. Moreover, the Research Foundation operates with SUNY within a framework that is similar to a parent/subsidiary relationship. However, the Court still heeds the Second Circuit's general guidance and believes it must proceed with great caution in expanding this test beyond the parent/subsidiary context, especially where a government entity is involved. In the instant case, the Court need not decide this issue of whether there can be a finding of employer liability under this "single or joint employer" theory because liability can be **[*315]** analyzed in the instant case under traditional **[**63]** indicators of common law agency.

As the Second Circuit has noted, **HN20**[] "Title VII itself explicitly recognizes that 'any agent' of an employer will be liable for discriminatory behavior." Gulino, 460 F.3d at 378-79 (citing 42 U.S.C. § 2000e(b)). For example, **HN21**[] in hostile work

environment cases, it is well-settled that "[o]nce a plaintiff has established the existence of a hostile workplace, she must then demonstrate that the harassing conduct 'which created the hostile situation should be imputed to the employer.'" *Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir. 1998)* (quoting *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 63 (2d Cir. 1992))*. More specifically, "[u]nder Title VII, an employer need not have actual knowledge of the harassment; an employer is considered to have notice of sexual harassment if the employer -- or any of its agents or supervisory employees -- or any of its agents or supervisory employees -- knew or should have know of the conduct." *Id. at 63*. "The question of when an official's actual or constructive knowledge will be imputed to the employer **[**64]** is determined by agency principles." *Id.*

In the instant case, as discussed *supra,* there is substantial evidence suggesting that the Research Foundation delegated much of the employment responsibilities as it relates to Dr. Zhao -- including hiring decisions, job assignments, and the day-to-day management of the Research Foundation employees -- to Dr. Batuman. Given such evidence, this Court cannot conclude as a matter of law that Dr. Batuman was not functioning as an agent of the Research Foundation as it related to Dr. Zhao's employment conditions and the termination decision regarding Dr. Zhao. Accordingly, the Research Foundation's request for summary judgment on that ground is denied. [6]

[65]** F. BREACH OF CONTRACT CLAIM

The Research Foundation argues that Dr. Zhao's breach of employment contract claim against the Research Foundation must be dismissed on several grounds. Research Foundation asserts that Dr. Zhao was an at-will employee under New York law and that there is no factual or legal basis for the existence of an employment contract. In particular, the Research Foundation argues that Dr. Zhao's reliance on Dr. Batuman's letter regarding Dr. Zhao's employment is misguided because (1) the letter was not a valid contract in that there was no consideration, no offer, and no meeting of the minds; and (2) the letter was not a modification to plaintiff's at-will employment status. For the reasons set forth below, the Court concludes that there are material issues of fact that preclude summary judgment on the issues of whether there was an employment contract between the parties establishing an employment relationship for a minimum of two years and, if so, whether that contract was improperly breached.

HN22[⬆] "It is settled law in New York, that absent an agreement establishing a **[*316]** fixed duration, an employment relationship is presumed to be a hiring at-will terminable at any **[**66]** time by either party." *Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209, 211 (N.Y. 1987)*. However, this presumption can be rebutted "by proof that an employer expressly agreed to limit its right to discharge an employee." *Yaris v. Arnot-Ogden Memorial Hospital, 891 F.2d 51, 52 (2d Cir. 1989)* (citing *Murphy v. American Home Prods., 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 235, 448 N.E.2d 86, 89 (N.Y. 1983))*.

In making this determination, "'[a]ny single act, phrase or other expression' is insufficient to demonstrate such a limitation." *Yaris, 891 F.2d at 52* (quoting *Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 467, 457 N.Y.S.2d 193, 198, 443 N.E.2d 441 (N.Y. 1982)* (citations and quotations omitted). Instead, "a court must look to the totality of the attendant circumstances to determine whether an employer agreed to terminate only for cause." *Yaris, 891 F.2d at 52* (citation omitted); *accord Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 852-53 (2d Cir. 1985)*.

The Court concludes that an issue of fact exists as to whether the March 25, 2002 letter delivered by Dr. Batuman **[**67]** to Dr. Zhao constitutes an express limitation on the "terminable at-will" employment relationship articulated in Dr. Zhao's employment application with the Research Foundation. As indicated in that letter, it was specifically written in response to concerns expressed by Dr. Zhao about the term of her employment, which were prompted by a statement in a

[6] The Research Foundation also suggests in a summary fashion that it is entitled to summary judgment on the hostile work environment claim based upon the affirmative defense articulated by the Supreme Court in *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)* and *Faragher v. City of Boca-Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*. (Research Foundation Br., at 17-18.) However, there is simply not a sufficient factual record from which the Court could conclude as a matter of law that the Research Foundation (1) exercised reasonable care to prevent and correct promptly the alleged harassing behavior, and (2) the employee unreasonably failed to take advantage of the employer's preventive or corrective procedures. Accordingly, summary judgment based upon the affirmative defense is denied.

February 12, 2002 letter from the Research Foundation to Dr. Zhao confirming her appointment and stating that it was terminable with or without cause or notice. That statement by the Research Foundation was inconsistent with Dr. Zhao's understanding that she had an agreement to work for at least two years for Dr. Batuman, which was based upon the written offer of employment from Dr. Batuman received several months earlier, which stated, "[t]his letter is to offer you a postdoctoral research associate in my laboratory at a salary of $ 45,000 a year for at least two and most likely three years." (Defs.' Ex. 12.) In order to assure Dr. Zhao not to worry about the absence of such language in the Research Foundation letter, Dr. Batuman's March 25 letter stated:

> Regarding the job security as I told you before we have funding for you **[**68]** for two years for sure. In May we will know if we have funding for the third year as well. As I also said you will get a cost of living increase of 3% at the second year. This week we should also know if we can afford a technician, and if you decide we need one we can give an ad to the paper and you can start interviewing people. As long as my laboratory is here at SUNY you have a position in it.

(Defs.' Ex. 21.) This letter, as well as the other evidence regarding additional assurances given to Dr. Zhao by Dr. Batuman regarding the term of her employment, are sufficient to defeat the summary judgment motion and create issues of fact regarding whether the at-will employment relationship was altered.

1. Consideration

Although the Research Foundation argues that there is no evidence of any consideration for the modification Dr. Zhao's at-will relationship, the Court finds that argument unpersuasive. It is well-settled that ***HN23***[] "the presence of consideration . . . is a fundamental requisite" to any valid contract. *Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 464, 443 N.E.2d 441, 457 N.Y.S.2d 193 (N.Y. 1982)*. Consideration "consists of either a benefit to the promisor or a detriment to the promisee, **[**69]** " and **[*317]** "[i]t is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him." *Id.* (alteration in original). Moreover, "the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee." *Id.*

The Research Foundation argues that there is no possibility of valid consideration between Dr. Zhao and her employer with respect to the March 25 letter. However, Dr. Zhao argues that, in consideration of a modification of an "at will" employment relationship to a term of employment of at least two years, she rejected a job offer from another laboratory and continued her employment with the Research Foundation. Dr. Zhao's argument regarding consideration is well-supported under New York law. In particular, in *Weiner,* the New York Court of Appeals cited *Corbin on Contracts* for the proposition that an employee's continued employment or relinquishing of another job opportunity can constitute consideration in exchange for the conversion of an "at will" employment into a definite term of employment:

> ***HN24***[] "[I]f the employer made a promise, **[**70]** either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him 'at will' after the employee has begun or rendered some of the requested service or has given any other consideration * * * This is true even though the employee has made no return promise and has retained the power and legal privilege of terminating the employment 'at will'. The employer's promise is supported by the service that has begun or rendered or by the other executed consideration."

Weiner, 57 N.Y.2d at 465, 457 N.Y.S.2d 193 (quoting 1A Corbin, Contracts § 152, p 14). As one court has noted, "[i]n a number of cases, both within and without New York, ***HN25***[] courts have found that consideration for a contract may be supplied by actual forbearance from exercising one's rights to unilaterally cancel a contract terminable at will; even though there was no obligation to continue the at-will relationship in the first instance." *Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 58 F. Supp. 2d 228, 254 (S.D.N.Y. 1999)* (collecting **[**71]** cases); *see also Stern v. eSpeed, Inc., No. 06-CV-958, 2006 U.S. Dist. LEXIS 68655, 2006 WL 2741635, at *2 (S.D.N.Y. Sept. 22, 2006)* (holding that "continuation of employment alone is sufficient consideration to enforce" a post-employment arbitration agreement); *Kaplan v. Aspen Knolls Corp., 290 F. Supp. 2d 335, 339 (E.D.N.Y. 2003)* ("[T]he continued service by an employee is sufficient consideration to support an employer's promise to pay an at-will employee a bonus."); *Shebar v. Sanyo Business Systems Corp., 544 A.2d 377, 383, 111 N.J. 276, 289 (N.J. 1988)* (ample consideration for enforceable contract existed where employee turned down job offered by another employer when current

employer agreed to modify an "at will" employment into an employment with termination for cause only).

2. Meeting of the Minds

The Research Foundation's arguments that the Court should find as a matter of law that there was no offer and no meeting of the minds in connection with the March 2002 letter are similarly unpersuasive.

HN26[] "There is no enforceable agreement if the parties have failed to agree on all of its essential terms or if some of the terms are too indefinite to be enforceable. **[**72]** " Durante Bros. and Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 252 (2d Cir. **[*318]** 1985); *see also* Michael Coppel Promotions Pty. Ltd. v. Bolton, 982 F. Supp. 950, 954 (S.D.N.Y. 1997) ("Under New York law, an agreement is enforceable if a meeting of the minds has occurred as to the contract's 'material terms.'") (citing Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 317, 515 N.Y.S.2d 1, 6 (N.Y. App. Div. 1987)); *accord* Int'l Paper Co. v. Suwyn, 966 F. Supp. 246, 254 (S.D.N.Y. 1997). Thus, "it is rightfully well settled in the common law of contracts . . . that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." Martin Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109, 417 N.E.2d 541, 436 N.Y.S.2d 247 (1981). The New York Court of Appeals has explained:

> HN27[] The first step then is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract (Martin Delicatessen, Inc. v. Schumacher, supra, 52 N.Y.2d at 109, 436 N.Y.S.2d 247, 417 N.E.2d 541). As we **[**73]** emphasized in *Martin Delicatessen,* "definiteness as to material matters is of the very essence of contract law. Impenetrable vagueness and uncertainty will not do." Of course, not all terms of a contract need be fixed with absolute certainty; "at some point virtually every agreement can be said to have a degree of indefiniteness . . . While there must be a manifestation of mutual assent to essential terms, parties also should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions." (Cobble Hill Nursing Home v. Henry & Warren Corp., 74 N.Y.2d 475, 548 N.Y.S.2d 920, 548 N.E.2d 203) [sic].

Express Indus. and Terminal Corp. v. New York State Dep't of Transportation, 93 N.Y.2d 584, 589-90, 693 N.Y.S.2d 857, 715 N.E.2d 1050 (N.Y. 1999); *see also* 1 E. Allan Farnsworth, Farnsworth on Contracts, § 3.10, at 235 (2d ed. 1998) ("Conduct that would lead a reasonable person in the other party's position to infer a promise in return for performance or promise may amount to an offer.").

In the instant case, Dr. Zhao points to material matters contained in the March 25, 2002 letter from Dr. **[**74]** Batuman, which she believes demonstrate an offer and meeting of the minds, including length of time (*i.e.,* "two years for sure" and "[i]n May, we will know if we have funding for a third year as well") and salary (*i.e.,* "a cost of living increase of 3% at the second year"). The letter also refers to a belief that Dr. Zhao is considering other employment and encourages her to stay in her current position. This letter must be viewed in the context of the initial offer of employment from Dr. Batuman in November 2001 which established "a salary of $ 45,000 a year for at least two and at most three years." Having reviewed this evidence, the Court finds that there are genuine issues of material fact created by the documentary evidence and deposition testimony in the record as to whether there was an offer and subsequent meeting of the minds on material terms of an employment contract based upon the March 25 letter.

3. Apparent Authority

The Research Foundation also argues that, even if the March 25 letter constituted a modification to plaintiff's employment at-will status, Dr. Batuman had no authority to modify the terms of plaintiff's employment status with the Research Foundation. **[**75]** Specifically, the Research Foundation asserts that Dr. Batuman had no actual authority to modify the terms of Dr. Zhao's employment with the Research Foundation because the necessary elements of an agency relationship have not **[*319]** been established and Dr. Batuman did not possess apparent authority. For the reasons set forth below, the Court finds that there is a genuine issue of material fact as to whether Dr. Batuman had the apparent authority to modify the terms and conditions of Dr. Zhao's employment with Research Foundation.

HN28[] A principal cloaks an agent with apparent authority when it allows that agent to operate in a manner that causes a third party to reasonably believe that the agent is authorized to enter into the transaction at issue. *See* Hallock v. State, 64 N.Y.2d 224, 231, 485 N.Y.S.2d 510, 513, 474 N.E.2d 1178 (N.Y. 1984); Ford v. Unity Hospital, 32 N.Y.2d 464, 299 N.E.2d 659, 346 N.Y.S.2d 238 (N.Y. 1973). Thus, apparent authority requires the third party to demonstrate two facts: "(1) the principal was responsible for the appearance of

authority in the agent to conduct the transaction in question, and (2) the third party reasonably relied on the representations **[**76]** of the agent." *Herbert Constr. Co. v. Continental Ins. Co., 931 F.2d 989, 993-94 (2d Cir. 1991)* (citations and quotations omitted); *accord FDIC v. Providence College, 115 F.3d 136, 140 (2d Cir. 1997)*. The New York Court of Appeals has emphasized, as embodied in the first requirement, that an agent's conduct alone cannot be the basis for apparent authority:

> Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority.

Hallock, 64 N.Y.2d at 231; *accord Fennell v. TLB Kent Co., 865 F.2d 498, 503 (2d Cir. 1989)*. ***HN29***[↑] The "existence of apparent authority is normally a question of fact, and therefore inappropriate for resolution on a motion for summary judgment." *Graffman v. Delecea, No. 96-CV-7270 (SWK), 1997 U.S. Dist. LEXIS 15525, 1997 WL 620833, at *4 (S.D.N.Y. Oct. 8, 1997)*; *see also Herbert Constr. Co., 931 F.2d at 994* ("The existence of apparent authority is a question **[**77]** of fact.") (citations and quotations omitted).

Here, Dr. Zhao claims that, although she signed an "at will" employment agreement with the Research Foundation and it administered her salary and benefits, the Foundation cloaked Dr. Batuman with apparent authority to modify the terms of employment by delegating to her all other aspects of the employment relationship. In support of this position, Dr. Zhao points to evidence that Dr. Batuman placed the advertisement for Dr. Zhao's employment, designated the funding source for her salary, applied for and obtained the funds which paid her salary, interviewed her, hired her, and supervised her. (Defs.' Ex. 3 at 26-30, 58-60; Zhao Decl. P 16.) Moreover, there is evidence that the Research Foundation allowed the employment forms containing the "at will" employment language, which was contrary to Dr. Batuman's oral and written representations of employment for at least two years, to be administered through Dr. Batuman. Specifically, Dr. Batuman sent an email to Dr. Zhao on November 29, 2001, after offering her the position, stating:

> In order for you to start here I have to fill a form that you will have to take to the research office. **[**78]** Please tell me when you will be available and I will have the forms ready for you. The research office will give you the date to start. Anytime in December is good for me.

(Pl.'s Ex. F.) In addition, Dr. Batuman approved Zhao's Employee Assignment Form as the "Project Director/Co-Project Director." (Defs.' Ex. 15.)

[*320] Under these circumstances, the Court concludes that summary judgment on the issue of apparent authority is unwarranted. There are clearly material issues of disputed fact relating to whether the Research Foundation created an appearance that Dr. Batuman had apparent authority to make decisions regarding and/or modify the terms and conditions of employment, and whether Dr. Zhao's reliance on any such appearance was reasonable.

G. INDIVIDUAL LIABILITY OF DR. BATUMAN

Dr. Batuman argues that both the Title VII claims and breach of contract claim against her, as an individual, must be dismissed as a matter of law. With respect to the Title VII claims, Dr. Batuman argues that the claims must be dismissed because Title VII does not provide a cause of action against individual defendants. With respect to the breach of contract claim, Dr. Batuman argues that the claims **[**79]** against her in her official capacity as a state employee are barred by the *Eleventh Amendment*. For the reasons that follow, the Court finds that summary judgment in favor of Dr. Batuman is appropriate on both the Title VII and breach of contract claims.

HN30[↑] It is axiomatic that Title VII does not provide a cause of action against individual defendants. *Wrighten v. Glowski, 232 F.3d 119, 120 (2d Cir. 2000)* (citing *Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1994)*, *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)*; *accord Cook, 69 F.3d at 1241 n.2*. There is no question that Dr. Zhao's attempt to sue Dr. Batuman under Title VII is contrary to this well-established law. Accordingly, Dr. Batuman's motion for summary judgment on the Title VII claims is granted. [7]

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[7] However, ***HN31***[↑] under New York State Human Rights Law an individual may be liable where that individual "actually participates in the conduct giving rise to a discrimination claim." *Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995)*, *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)*; *see also Briggs v. Mercedes-Benz Manhattan, Inc., No. 04-CV-7094 (RMB), 2006 U.S. Dist. LEXIS 70489, at *31 (S.D.N.Y. Sept. 27, 2006)*. Here, as described *supra,* Dr. Zhao

[80]** As to the breach of contract claim, there is no question that SUNY is a state agency entitled to *Eleventh Amendment* immunity. *See Dube v. State Univ. of New York, 900 F.2d 587, 594 (2d Cir. 1990)* (***HN32***[⬆] "For *Eleventh Amendment* purposes, SUNY is an integral part of the government of the State [of New York] and when it is sued the State is the real party.") (quotation omitted) (alteration in original). Moreover, a claim against a state official acting in an official capacity is a claim against the state that is likewise barred by the *Eleventh Amendment*. *See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*; *see also Garcia v. State Univ. of N.Y. Health Scis. Ctr., 280 F.3d 98, 107 (2d Cir. 2001)* ("Insofar as [plaintiff] is suing the individual defendants [who are SUNY administrators and professors] in their official capacities, he is seeking damages from New York, and the *Eleventh Amendment* therefore shields them to the same extent that it shields SUNY."). Therefore, as a SUNY official, any breach **[*321]** of contract claims against Dr. Batuman are barred by the *Eleventh Amendment*.

Dr. Zhao seeks to avoid application of the *Eleventh* ***[**81]*** *Amendment* by arguing that there is a triable issue of fact as to whether Dr. Batuman is a "state actor" for purposes of the *Eleventh Amendment*. In particular, Dr. Zhao claims that "there is an issue of fact as to whether Dr. Batuman, although ostensibly an employee of SUNY, was, for the purposes of running her laboratory, acting as an agent/employee of the Research Foundation, a private entity." (Pl.'s Opp. Br., at 5.) The Court finds this argument to be without merit. It is undisputed that any actions by Dr. Batuman with respect to the alleged contract were performed by Dr. Batuman in her official capacity as SUNY's employee and representative. (Defs.' 56.1 Stmt P 93.) Although Dr. Zhao concedes that Dr. Batuman was acting "as representative of SUNY," she argues that Dr. Batuman was also operating as an agent of the Research Foundation. (Zhao 56.1 Stmt. P 93.) However, even assuming that to be true, Dr. Batuman is still entitled to *Eleventh Amendment* immunity because there is no question that any actions that she took as an agent of the Research Foundation also were performed as part of her official capacity as a SUNY employee.

III. CONCLUSION

For the reasons set forth above, defendants **[**82]** SUNY and the Research Foundation's motions for summary judgment are DENIED. Dr. Batuman's motion for summary judgment as to the Title VII claims and breach of contract claims is GRANTED, and as to the NYSHRL claim is DENIED.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: January 8, 2007

Central Islip, New York

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has created sufficient issues of fact with respect to whether Dr. Batuman "actually participated" in any alleged discrimination. *See e.g., Feingold v. New York, 366 F.3d 138, 158 (2d Cir. 2004)* ("[Plaintiff] has presented sufficient evidence to create a triable question as to whether each of the named individual defendants "actually participate[d]" in the conduct giving rise to [plaintiff]s claim of unlawful discrimination in violation of the NYSHRL.").

Kang v. U. Lim Am., Inc.

United States Court of Appeals for the Ninth Circuit

October 18, 2001, Argued and Submitted, Pasadena, California ; July 15, 2002, Filed

No. 00-55583

Reporter
296 F.3d 810 *; 2002 U.S. App. LEXIS 14158 **; 89 Fair Empl. Prac. Cas. (BNA) 566; 83 Empl. Prac. Dec. (CCH) P41,152; 2002 Cal. Daily Op. Service 6259; 2002 Daily Journal DAR 7855

SOO CHEOL KANG, Plaintiff-Appellant, v. U. LIM AMERICA, INC., TAE JIN YOON, DOES 1-100, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. D.C. No. 99-0659 JM(RBB). Jeffrey T. Miller, District Judge, Presiding.

Disposition: Summary judgment for defendant, U. Lim America, Inc., was reversed and remanded for further proceedings.

Core Terms

employees, termination, summary judgment, national origin, us citizen, harassment, abroad, enterprise, integrated, subjected, purposes, verbal, statute of limitations, counting, hostile, genuine issue of material fact, equitable tolling, work environment, labor relations, physical abuse, stereotypes, coverage, entities

Case Summary

Procedural Posture
Plaintiff employee filed suit in state court for national origin discrimination and harassment in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and state law. He also brought claims for wrongful termination and breach of contract. Defendants removed the case to federal court, and the United States District Court for the Southern District of California granted summary judgment to defendants. The employee appealed.

Overview

On appeal, the court found that Title VII applied because the employer's operations in the U.S. and Mexico were an integrated enterprise which employed a combined total of more than 15 employees. Also, as to the employee's harassment claim, the court found that the employee alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. He alleged that Mexican workers were not subject to abuse, creating a genuine issue of material fact as to whether the abuse and imposition of longer working hours was based on the employee's national origin. Further, the employee raised genuine issues of material fact as to whether a continuing violation occurred and if so, whether any act fell within the statutory period. As to the disparate treatment claim, the employee raised a genuine issues of material facts as to whether he would have been required to work as much overtime if he had not been Korean, and as to whether similarly situated non-Korean employees were treated more favorably. Finally, the employee presented evidence sufficient to invoke equitable tolling as to his state law claims.

Outcome
The judgment of the district court was reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] Standards of Review, De Novo Review

Appellate courts consider a district court's summary judgment decision de novo.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Employers

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN2[] Title VII Discrimination, Employers

Title VII of the Civil Rights Act of 1964 applies to an employer, engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. *42 U.S.C.S. § 2000e(b)*.

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN3[] Title VII Discrimination, Scope & Definitions

The United States Court of Appeals for the Ninth Circuit applies a four-part test to determine whether two entities are an integrated enterprise for purposes of Title VII of the Civil Rights Act of 1964 coverage. The four factors are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control.

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Extraterritorial Application

Business & Corporate Law > Foreign Corporations > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN4[] Title VII Discrimination, Extraterritorial Application

Title VII of the Civil Rights Act of 1964 uses these factors to determine whether a foreign corporation is controlled by a U.S. corporation and therefore the foreign corporation is subject to Title VII: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control. *42 U.S.C.S. § 2000e-1(c)*.

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN5[] Title VII Discrimination, Scope & Definitions

The third factor, centralized control of labor relations, is the most critical for determining whether two entities are an integrated enterprise for purposes of Title VII of the Civil Rights Act of 1964 coverage.

Business & Corporate Law > Foreign Corporations > General Overview

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

Labor & Employment Law > Discrimination > Racial Discrimination > Scope & Definitions

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > Employees & Independent Contractors

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Extraterritorial Application

HN6 **Business & Corporate Law, Foreign Corporations**

For purposes of Title VII of the Civil Rights Act of 1964, the statutory definition is inclusive rather than restrictive. The term "employee" is defined to include U.S. citizens employed by U.S. companies in foreign countries rather than to prohibit counting non-U.S. citizens. 42 U.S.C.S. § 2000e(f).

Civil Rights Law > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > Amendments

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > Employees & Independent Contractors

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

HN7 **Civil Rights Law**

Courts broadly interpret ambiguous language in civil rights statutes to effectuate the remedial purpose of the legislation.

Business & Corporate Law > Foreign Corporations > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employees

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > Employees & Independent Contractors

HN8 **Business & Corporate Law, Foreign Corporations**

Title VII of the Civil Rights Act of 1964's definition of "employee" does not prohibit counting the foreign employees of U.S.-controlled corporations for determining coverage.

Labor & Employment Law > ... > Title VII Discrimination > Remedies > Costs & Attorney Fees

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > Employees & Independent Contractors

HN9 **Remedies, Costs & Attorney Fees**

The fact that some of the employees of an integrated enterprise are not themselves covered by federal antidiscrimination law does not preclude counting them as employees for the purposes of determining Title VII of the Civil Rights Act of 1964 coverage. The nose count of employees relates to the scale of the employer rather than to the extent of protection.

Business & Corporate Compliance > ... > Discrimination > Harassment > National Origin Harassment

Labor & Employment Law > ... > Harassment > Racial Harassment > Hostile Work Environment

Labor & Employment Law > ... > Racial Harassment > Burdens of Proof > General Overview

Labor & Employment Law > ... > Racial Harassment > Burdens of Proof > Employee Burdens of Proof

Labor & Employment Law > ... > Burdens of Proof > Standards of Proof > Pervasive & Severe Standards

Labor & Employment Law > Discrimination > National Origin Discrimination > Scope & Definitions

HN10 **Harassment, National Origin Harassment**

To prevail on a harassment on the basis of national origin claim, an employee must show: (1) that he was subjected to verbal or physical conduct because of his national origin; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment. Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace.

Labor & Employment Law > Discrimination > National Origin Discrimination > Scope & Definitions

HN11 **National Origin Discrimination, Scope & Definitions**

In an action for harassment based on national origin, the victim must perceive the environment as offensive.

Labor & Employment Law > Discrimination > National Origin Discrimination > Scope & Definitions

HN12 **National Origin Discrimination, Scope & Definitions**

The more outrageous the conduct, the less frequent must it occur to make a workplace hostile.

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

HN13 **Procedural Matters, Statute of Limitations**

Title VII of the Civil Rights Act of 1964 requires a complainant to file his charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the last alleged discriminatory act. *42 U.S.C.S. § 2000e-5(e)(1)*. However, if the complainant initially files proceedings with a state agency, the time limit for EEOC filing is extended to 300 days.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN14 **Entitlement as Matter of Law, Genuine Disputes**

When an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purpose of determining liability.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

Labor & Employment Law > ... > Disparate Treatment > Evidence > General Overview

HN15 **Summary Judgment, Burdens of Proof**

To make out a prima facie case of disparate treatment, an employee must show that: (1) he belonged to a protected class; (2) he was qualified for his job; (3) he was subjected to an adverse employment action; and (4) similarly situated employees not in his protected class received more favorable treatment. The amount of proof needed to establish a prima facie case on summary judgment is minimal and does not even need to rise to the level of preponderance of the evidence.

Labor & Employment
Law > ... > Evidence > Burdens of Proof > Burden Shifting

HN16[] **Burdens of Proof, Burden Shifting**

An employee must present "very little" direct evidence of discrimination to show pretext.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Wrongful Termination > Public Policy

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > Wrongful Termination > General Overview

HN17[] **Statute of Limitations, Time Limitations**

In California, the governing statute of limitations on a wrongful termination in violation of public policy claim is one year.

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN18[] **Statute of Limitations, Tolling**

Under California law, the statute of limitations on a tort claim may be equitable tolled while the plaintiff pursued his administrative remedies. Equitable tolling applies if: (1) the defendants had timely notice of plaintiff's first claim; (2) the defendants were not prejudiced in gathering evidence to defend against the second claim and (3) the plaintiff acted in good faith and engaged in reasonable conduct in filing the second claim.

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John S. Battenfeld and Melissa M. Mulkey, Morgan, Lewis & Bockius LLP, Los Angeles, California, for the defendants-appellees.

Judges: Before: James R. Browning, Ferdinand F. Fernandez, and Raymond C. Fisher, Circuit Judges. Opinion by Judge Browning; Dissent by Judge Fernandez.

Opinion by: James R. Browning

Opinion

[*813] BROWNING, Circuit Judge:

Soo Cheol Kang (Kang) appeals summary judgment in favor of his employer on Title VII and state law tort claims. We reverse and remand for further proceedings.

[*814] I Background

Kang is a United States citizen of Korean national origin. In April 1994, he began working for a California corporation called U. Lim America, Inc. All of U. Lim America's employees shared Korean heritage. Tae Jin Yoon (Yoon) was Kang's supervisor. Yoon subjected Kang and other Korean workers to verbal and physical abuse and discriminatorily long work hours. The verbal abuse consisted of Yoon screaming at Kang for up **[**2]** to three hours a day and calling him "stupid," "cripple," "jerk," "son of a bitch," and "asshole." The physical abuse consisted of striking Kang in the head with a metal ruler on approximately 20 occasions, kicking him in the shins, pulling his ears, throwing metal ashtrays, calculators, water bottles, and files at him, and forcing him to do "jumping jacks." [1] Kang began to cut back on the required overtime in order to spend time with his pregnant wife; Yoon fired him. [2]

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[1] Yoon also abused Kang's co-workers Soon Wan Park (Park) and Jae Ho Cho (Cho). Yoon called Park names such as "son of a bitch" and "son of a vagina" (apparently an offensive epithet in the Korean language), and subjected Park to physical abuse, punching him in the nose, striking him in the face with metal rulers, throwing a crystal ashtray at him, pulling his ears, and kicking him. Yoon also yelled at Cho and threw things at him.

[2] There is some dispute as to whether Yoon fired Kang or

[3]** U. Lim America had six or fewer employees. However, the U.S.-based company owned and operated U. Lim de Mexico, an electronics manufacturing company in Tijuana, Mexico. All of U. Lim America's employees worked at the Tijuana factory. U. Lim de Mexico employed between 50-150 workers -- all citizens of Mexico. [3]

U. Lim de Mexico was organized under the laws of Mexico and existed for the sole purpose of assembling parts for televisions and computer monitors for sale to U. Lim America at cost plus a one percent surcharge. U. Lim America was U. Lim de Mexico's only customer. Yoon was the Vice-President of U. Lim America and the President of U. Lim de Mexico. His father, Ki Hwa Yoon, owned both U. Lim America and U. Lim de Mexico. He was Chief Executive Officer of both companies and President of U. Lim America.

II Proceedings Below

Kang filed suit in California state court against U. Lim America and Yoon for national origin discrimination **[**4]** and harassment in violation of Title VII and the California Fair Employment and Housing Act. Kang also brought state law claims for wrongful termination in violation of public policy and breach of contract. Defendants removed the case to the United States District Court for the Southern District of California. The district court granted summary judgment to U. Lim America and Yoon on all Kang's causes of action.

Kang's appeal focused on four issues: (1) the applicability of Title VII, (2) national origin harassment, (3) national origin discrimination, and (4) equitable tolling.

HN1[] We consider the district court's summary judgment decision de novo. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

III Application of Title VII

At the threshold, we must determine whether Title VII applies to U. Lim America. **[*815]** U. Lim America argued it was not covered by Title VII because it employed fewer than fifteen people. [4] We hold that Title VII applies because U. Lim America and U. Lim de Mexico were an integrated enterprise which employed a combined total of more than fifteen employees.

[5]** HN3[] This circuit applies a four-part test to determine whether two entities are an integrated enterprise for purposes of Title VII coverage. Childs v. Local 18, Int'l Bhd. of Elec. Workers, 719 F.2d 1379, 1382 (9th Cir. 1983). The four factors are: "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control." *Id*. [5] Considering these factors we conclude that U. Lim de Mexico and U. Lim America were an integrated enterprise employing more than the necessary fifteen employees.

1. Interrelation of Operations

The first factor, interrelation of operations, weighs in favor of finding the two companies to be an integrated enterprise. U. Lim America and U. Lim de Mexico shared a facility **[**6]** in Mexico; neither had a facility in the United States. All of U. Lim America's employees worked in the Tijuana factory, commuting across the border each day. U. Lim America kept U. Lim de Mexico's accounts, issued its paychecks and paid its bills. *See* Hukill v. Auto Care, Inc., 192 F.3d 437, 443 (4th Cir. 1999) (examining such factors as whether the companies operated at separate locations, filed separate tax returns, held separate director and shareholder meetings, conducted separate banking, purchased goods separately, entered into lease agreements separately, and were separately managed).

2. Common Management

The second factor, common management, also favors finding the two companies to be integrated for Title VII purposes. Yoon was the Vice-President of U. Lim America and President of U. Lim de Mexico. U. Lim de

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Kang quit. For purposes of summary judgment, U. Lim America conceded that Yoon fired Kang.

[3] Only one of U. Lim de Mexico's workers was of Korean descent.

[4] HN2[] Title VII applies to an employer, "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

[5] HN4[] Title VII uses these same factors to determine whether a foreign corporation is controlled by a U.S. corporation and therefore the foreign corporation is subject to Title VII. 42 U.S.C. § 2000e-1(c).

Mexico supervisors reported directly to U. Lim America's managers. *See* Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2d Cir. 1995) (finding common management where the two companies had a "common management structure" and the President of the subsidiary operated out of the parent's office).

3. Centralized Control of **[**7]** *Labor Relations*

HN5[] The third factor, centralized control of labor relations, is the "most critical." Hukill, 192 F.3d at 442; Cook, 69 F.3d at 1240; *see also* Childs, 719 F.2d at 1382 (holding that since the local branch of the union conducted its own labor relations the two entities were not an integrated enterprise). This factor too favors finding the two companies to be an integrated enterprise.

U. Lim America had the authority to hire and fire U. Lim de Mexico employees. The Mexican supervisors reported to U. Lim America management. U. Lim America had essentially complete control over U. Lim de Mexico's labor relations.

[*816] *4. Common Ownership or Financial Control*

The fourth factor also weighs in favor of finding the two companies to be an integrated enterprise. U. Lim America and U. Lim de Mexico were owned and controlled by the same person, Yoon's father Ki Hwa Yoon. Furthermore, U. Lim de Mexico essentially made no profit and transferred all its funds to U. Lim America. *See* Cook, 69 F.3d at 1241 (finding the common ownership requirement met where one company was a wholly owned subsidiary of the other).

U. **[**8]** Lim America argued that the definition of employee in Title VII prohibits counting foreign employees of U.S. controlled corporations for purposes of Title VII coverage. HN6[] The statutory definition is inclusive rather than restrictive. The term "employee" is defined to *include* U.S. citizens employed by U.S. companies in foreign countries rather than to prohibit counting non-U.S. citizens. *See* 42 U.S.C. § 2000e(f). The definition arose out of Congress's amendments to Title VII in the 1991 Civil Rights Act to legislatively overturn the result in EEOC v. Arabian American Oil Co., 499 U.S. 244, 259, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) (holding that U.S. citizens working for U.S. companies abroad were not covered by Title VII).

Morelli v. Cedel, 141 F.3d 39, 42 (2d Cir. 1998), interpreted similar definitional language in a related statute, the Age Discrimination in Employment Act (ADEA). The *Morelli* court explained that Congress amended the ADEA to specify that the term employee included U.S. citizens working for U.S. companies outside the U.S., not to exclude counting foreign employees. Id. at 42-44. **[**9]**

The purpose of the Civil Rights Act of 1991, which amended the definition of employee, was to restore civil rights protections that had been limited by the Supreme Court and to strengthen the protection and remedies of Federal civil rights laws. H. Rep. No. 102-40 (I), at 4 (1991). Since HN7[] we broadly interpret ambiguous language in civil rights statutes to effectuate the remedial purpose of the legislation, *see* Griffin v. Breckenridge, 403 U.S. 88, 97, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971); *see also* H. Rep. No. 102-40 (I), at 88 (stating that "remedial statutes, such as civil rights laws, are to be broadly construed"), we hold that HN8[] Title VII's definition of "employee" does not prohibit counting the foreign employees of U.S.-controlled corporations for determining coverage.

HN9[] The fact that some of the employees of the integrated enterprise are not themselves covered by federal antidiscrimination law does not preclude counting them as employees for the purposes of determining Title VII coverage. *See* Morelli, 141 F.3d at 44-45. "The nose count of employees relates to the scale of the employer rather than to the extent of protection." Id. at 45. **[**10]** The *Morelli* court so concluded due, in part, to the policies behind limiting Title VII coverage to employers with fifteen or more workers including "the burdens of compliance and potential litigation costs, 'the protection of intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the constitutionality of Title VII under the Commerce Clause.'" Id. at 45 (citation omitted). U. Lim America combined with its large Mexican operation is not a small business of the type Congress intended to protect with the minimum employee limitation. [6]

[6] U. Lim America argued that if the court found U. Lim America and U. Lim de Mexico to be an integrated enterprise, Kang's claim still failed because he did not name U. Lim de Mexico as a defendant in this lawsuit. However, Kang does not seek to impose liability on U. Lim de Mexico. U. Lim de Mexico's connection to U. Lim America is as a labor pool and production facility. Its role in this lawsuit is solely to demonstrate the scale of U. Lim America's operations. Because U. Lim de Mexico and U. Lim America's managing officers are the same, for all practical purposes, U. Lim de Mexico has been involved in this suit from the beginning.

[11] [*817] IV National Origin Harassment**

We reverse summary judgment for the employer on Kang's harassment claim.

HN10[] To prevail on his harassment claim, Kang must show: (1) that he was subjected to verbal or physical conduct because of his national origin; (2) "that the conduct was unwelcome"; and (3) "that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." *See* Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998). Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace. Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed. *See* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that a plaintiff proved harassment "because of sex" where he was harassed because he failed to conform to male stereotypes).

Kang presented evidence **[**12]** that Yoon abused him because of Yoon's stereotypical notions that Korean workers were better than the rest and Kang's failure to live up to Yoon's expectations. On numerous occasions, Yoon told Kang that he had to work harder because he was Korean; he contrasted Koreans with Mexicans and Americans who he said were not hard workers; and although U. Lim de Mexico employed 50-150 Mexican workers, Yoon did not subject any of them to physical abuse. This evidence created a genuine issue of material fact as to whether Yoon's abuse and imposition of longer working hours was based on Kang's national origin.

Kang also presented evidence that the physical and verbal abuse and long working hours were in fact unwelcome. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) (discussing the HN11[] requirement that the victim perceive the environment as offensive).

Kang's evidence further showed that the verbal and physical abuse and discriminatory working hours created a work environment that was "objectively offensive … one that a reasonable person would find hostile or abusive." *Id.* HN12[] "The more outrageous the conduct, the less frequent **[**13]** (sic) must it occur to make a workplace hostile." Gregory, 153 F.3d at 1074. After considering all the circumstances including the frequency and severity of the conduct, the fact that the abuse was frequently "physically threatening or humiliating" and that it unreasonably interfered with Kang's work performance, we conclude that Kang presented evidence sufficient to survive summary judgment that Yoon subjected Kang to an objectively hostile environment. Nichols, 256 F.3d at 872 (citation omitted).

U. Lim America argued that Kang's claim of hostile work environment based on national origin, was grounded on time-barred conduct because much of the conduct complained of occurred more than 300 **[*818]** days before Kang filed a complaint with the Equal Employment Opportunity Commission (EEOC). [7] Kang filed his EEOC complaint on November 13, 1998. 300 days prior to that date was January 17, 1998. Kang was terminated on February 2, 1998. Thus, only incidents occurring during the last two and a half weeks of Kang's employment could form the basis of a hostile work environment claim unless Kang demonstrated that the conduct constituted a continuing violation. *See* **[**14]** Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472, 1475 (9th Cir. 1989).

HN14[] When "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purpose of determining liability." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, (2002) (Slip Op. at 14). To survive summary judgment, therefore, Kang was required to demonstrate only that genuine issues of material fact exist as to whether the **[**15]** acts about which he complained were "part of the same actionable hostile work environment practice, and if so, whether any act [fell] within the statutory time period." *See* 536 U.S. 101, 122 S. Ct. 2061 at , 153 L. Ed. 2d 106 (Slip Op. at 18).

Kang alleged that Yoon's acts established a continuing

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[7] HN13[] Title VII requires a complainant to file his charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the last alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). However, if the complainant initially files proceedings with a state agency, as Kang did here, the time limit for EEOC filing is extended to 300 days. *Id.; see also* Green v. Los Angeles County Superintendent of Schs., 883 F.2d 1472, 1473 (9th Cir. 1989).

violation because they were part of a "pattern of discriminatory treatment." Kang did not recall specific acts of verbal or physical harassment during his last two and a half weeks of work, although the evidence reflected such acts prior to that time. However, Kang alleged that the discriminatorily long working hours were required until his termination and that his termination itself, arguably the culmination of the harassment, fell within the defined period. Because this case comes to us at summary judgment, we draw all inferences in the light most favorable to Kang. We conclude that Kang raised genuine issues of material fact as to whether a continuing violation occurred and if so, whether any act fell within the statutory period.

V Disparate Treatment

We also reverse summary judgment for the employer on Kang's disparate treatment claim. ***HN15***[⬆] To make out a prima facie case of disparate treatment, Kang must show that: **[**16]** (1) he belonged to a protected class; (2) he was qualified for his job; (3) he was subjected to an adverse employment action; and (4) similarly situated employees not in his protected class received more favorable treatment. *Chuang v. Univ. of California Davis, 225 F.3d 1115, 1123 (9th Cir. 2000)*; *see also Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)* (holding that the amount of proof needed to establish a prima facie case on summary judgment "is minimal and does not even need to rise to the level of preponderance of the evidence").

Kang established membership in a protected class -- people of Korean national origin. Although the parties dispute whether Kang was qualified for the position when he was terminated since he was unwilling to work as much overtime as Yoon wanted, Kang raised a genuine issue of material fact as to whether he would have been required to work as much overtime if he had not been Korean. Yoon **[*819]** allegedly subjected Kang to a number of adverse employment conditions, including severe verbal and physical abuse, discriminatory overtime, and termination, that constituted "a material change in the terms and conditions" **[**17]** of Kang's employment. *See Chuang, 225 F.3d at 1126* (finding an involuntary relocation of plaintiffs' laboratory space to be an adverse action). Finally, Kang raised genuine issues of material fact as to whether similarly situated non-Korean employees were treated more favorably.

Although U. Lim America presented legitimate nondiscriminatory reasons for its conduct, *see Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256-57, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*, Kang has set forth sufficient facts from which a jury could find that U. Lim's reasons are pretextual. Kang presented direct evidence that Yoon abused him and required Koreans to work longer hours because Yoon believed that Korean workers were superior to Mexicans and Americans. Specifically, Yoon allegedly said that American workers were lazy and that he took pity on them; that Mexicans were lazy and that they would rather spend money than work; and that "Koreans must work hard because Mexicans [are] unreliable and you have to watch out for them." This evidence is sufficient for a jury to conclude that Kang was subjected to adverse employment conditions, and ultimately fired, **[**18]** based on his failure to conform to ethnic stereotypes. *See, e.g., Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991)* (holding that it was impermissible to base hiring decisions on stereotypes about a protected class).

Since ***HN16***[⬆] Kang must present "very little" direct evidence of discrimination to show pretext, summary judgment should not have been granted for the employer. *Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998)*.

VI Equitable Tolling of the State Law Claim

We also reverse summary judgment for the employer on Kang's state tort law claim. Kang argued that his claim for wrongful termination in violation of public policy was timely filed. ***HN17***[⬆] The governing statute of limitations is one year. *Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988)*. Kang was terminated from his employment on February 2, 1998. He filed his complaint on February 16, 1999 -- 14 days late. However, he filed charges with the EEOC and the California Department of Fair Employment and Housing (DFEH) complaining of the same conduct.

HN18[⬆] Under California law, the statute of limitations on Kang's tort claim may be equitable **[**19]** tolled while he pursued his administrative remedies. Equitable tolling applies if: (1) the defendants had timely notice of plaintiff's first claim; (2) the defendants were not prejudiced in gathering evidence to defend against the second claim and (3) the plaintiff acted in good faith and engaged in reasonable conduct in filing the second claim. *Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993)*.

The record indicates that: (1) defendants had timely notice of Kang's first claim which was filed within the one year statute of limitations; (2) defendants were not prejudiced by Kang's late filing of his wrongful termination claim because their investigation of Kang's EEOC and DFEH charges would have allowed them to gather evidence to defend against the wrongful termination claim grounded on the same conduct, *see* Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1138 (9th Cir. 2001); and (3) the time between Kang's receipt of a right-to-sue letter and **[*820]** the filing of his complaint was not unreasonable. Because there are genuine issues of disputed fact as to whether Kang's complaint was timely filed, summary judgment was inappropriate. **[**20]** [8]

VII Conclusion

Kang presented evidence sufficient to invoke equitable tolling and raise genuine issues of material fact as to the merits of his federal harassment and discrimination claims.

REVERSED and REMANDED.

Dissent by: Ferdinand F. Fernandez

Dissent

FERNANDEZ, Circuit Judge, Dissenting:

I dissent because Title VII does not apply to this case at all and Kang did not file his California wrongful termination claim on time.

A. *Title VII*

In order for an employer to **[**21]** be covered by Title VII, it must have at least 15 employees during at least a portion of the year. *See* 42 U.S.C. § 2000e(b). U. Lim America never had more than 5 employees. Thus, on its face, Title VII does not even apply to U. Lim America.

Kang recognizes as much, but he argues that the employees of U. Lim de Mexico should be swept into the count, and it would then be far over the 15 employee requirement. It is true that there are times when the employees of two separate entities can be treated as if they belonged to one entity for Title VII purposes. *See, e.g.,* Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995); Childs v. Local 18, Int'l Bhd. of Elec. Workers, 719 F.2d 1379, 1382 (9th Cir. 1983); Armbruster v. Quinn, 711 F.2d 1332, 1337-39 (6th Cir. 1983); *cf.* Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir.) (Worker Adjustment and Retraining Notification Act), *cert. denied*, *534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001)*; Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999) (Family and Medical Leave Act). **[**22]** But, we need not consider whether the structure of the various U. Lim enterprises would allow us to combine the employees of U. Lim America with those of U. Lim de Mexico for Title VII purposes [1] because it would not advance Kang's claim, if they were combined.

The plain language of 42 U.S.C. § 2000e(f) which, while generally unhelpfully defining an employee **[**23]** as "an individual employed by an employer," goes on to state that "with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." Thus, it is apparent that "unless an American citizen, a person employed abroad is not an 'employee' under Title VII." Russell v. Midwest-Werner & ***[*821]*** Pfleiderer, Inc., 955 F. Supp. 114, 115 (D. Kan. 1997). In other words, the definition of employee does not automatically include all persons working abroad because, if it did, there would be no reason to expressly include United States citizens. Rather, non-United States citizens, who are working abroad, are not employees within the meaning of Title VII and cannot be counted when we decide if an entity is an employer pursuant to 42 U.S.C. § 2000e(b).

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[8] Kang asserted that he submitted his complaint to the DFEH on September 23, 1998, the date the charge was signed. Although U. Lim America disputed this date, at summary judgment the court views evidence in the light most favorable to Kang. Therefore, we assume he filed the charge on September 23, 1998. Using that date, the statute of limitations on Kang's wrongful termination claim should be equitably tolled for 34 days because his administrative charges were pending with the DFEH for 27 days and with the EEOC for 7 days.

[1] I do note that the test has been used in an attempt to make the "affiliated" corporation liable for the acts of the immediate employer. *See* Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1069-70 (10th Cir. 1998). Here, Kang does not seek that -- U. Lim de Mexico has not even been joined in this action. Kang seeks to make the immediate employer liable and to count the employees of an alleged affiliate for the purposes of meeting the requirements of 42 U.S.C. § 2000e(b) only. There is no need to decide that question. *But see* Rogero v. Noone, 704 F.2d 518, 520-21 (11th Cir. 1983).

The above reasoning is compatible with and underscored by the reasoning of the Supreme Court on the related question of whether aliens working in the United States are covered by Title VII. The Court pointed out that because *42 U.S.C. § 2000e-1(a)* provides that Title VII does not apply "'with respect to the employment of aliens outside **[**24]** any State,'" it must apply "with respect to the employment of aliens inside any State." *Espinoza v. Farah Mfg. Co. Inc., 414 U.S. 86, 95, 94 S. Ct. 334, 340, 38 L. Ed. 2d 287 (1973)*. Similarly, if Congress has declared that employee does include "an individual who is a citizen of the United States," working abroad, [2] it must mean that it does not include "an individual who is [not] a citizen of the United States," working abroad. Each instance is encompassed by the hypostasis of that old rule of construction (rather than of logic): inclusio unius est exclusio alterias.

I recognize that this may conflict with a holding of the Second Circuit under the Age Discrimination in Employment Act. *See Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998)*. In *Morelli*, the court addressed an argument that only the domestic employees of a foreign employer should be counted for ADEA purposes. *Id. at 44-45* . It would seem that the court could have answered **[**25]** that question by pointing to the fact that United States citizens employed abroad are included in the ADEA definition of an employee (just as they are included under Title VII), even if they are not located domestically. *29 U.S.C. § 630(f)*. The court went further, however, and stated that if Congress intended to "exclude a foreign employer's foreign workers," it could have said so. *Morelli, 141 F.3d at 44*. That seems to turn matters upside down; as I have already indicated, it seems pellucid that Congress included United States citizens working abroad because, otherwise, they would be excluded along with other persons who work abroad. In a further dictum, the court declared that "a U.S. corporation with many foreign employees but fewer than 20 domestic ones would certainly be subject to the ADEA." *Id. at 45*. With all due respect, I am unable to embrace that alleged certainty.

As I see it, the root of the Second Circuit's decision is a belief that the purpose of the employee numerosity requirement is to protect smaller employers, and companies with a number of foreign employees in a foreign land are not small employers. *Id. at 45*. **[**26]** [3] Maybe not, but Congress could easily have put *that* concept in the statute, if that was what it meant. Moreover, the statute speaks with enough clarity to permit (nay require) one to stop with its own words, rather than undertaking to stravage in a wilderness of possible legislative purposes. *See Or. Natural Res. Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996)*. In fine, to the **[*822]** extent that the Second Circuit's holding differs from my view, I disagree with it.

Kang, who felt oppressed by his employer, which hired only Koreans and thought of him and other Koreans as a kind of working elite, seeks to maintain a Title VII action against that employer, U. Lim America. However, U. Lim America had a very slight presence in this country, and very few United **[**27]** States citizens working for it anywhere. In fact, over the whole time he was with the company, it had a total of seven employees (five at any one time) and of those no more than two were United States citizens. Even were we to consider the employees of U. Lim de Mexico, no United States citizens would be added. Thus, the total of employees in the United States and United States citizen employees abroad never came even close to the 15 employees required before Title VII applies. *See 42 U.S.C. § 2000e(b)*. None of Kang's arguments can immask that fact. [4]

B. *California FEHA*

The district court dismissed Kang's wrongful termination claim because California's one year statute of limitations barred it. *See Cal. Civ. Proc. Code § 340*; *Funk v. Sperry Corp., 842 F.2d 1129, 1133 (9th Cir. 1988)*. **[**28]** I agree with that.

Kang was terminated on February 2, 1998, and did not file his action until February 16, 1999. He perceives the difficulty, but believes that the statute should have been tolled while proceedings under Title VII, and under the California Fair Housing and Employment Act, *Cal. Gov't Code § 12940*, were pending. Of course, California does apply equitable tolling principles when a party is pursuing one avenue of relief and others are possible. *See Arnold v. United States, 816 F.2d 1306, 1312 (9th*

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[2] *42 U.S.C. § 2000e(f)*.

[3] *See also, Wells v. Clackamas Gastroenterology Assocs., 271 F.3d 903, 908-09 (9th Cir. 2001)* (Graber, J., dissenting), *cert. granted*, ***536 U.S. 990, 153 L. Ed. 2d 893, 123 S. Ct. 31 (U.S. 2002)*** (No. 01-1435).

[4] Because U. Lim America is not covered by Title VII, neither is Yoon. In addition, individual defendants are not liable under Title VII. *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993)*.

Cir. 1987); Addison v. California, 21 Cal. 3d 313, 319, 578 P.2d 941, 943-44, 146 Cal. Rptr. 224, 227 (1978).

I am satisfied that California would not apply equitable tolling here because the few days that an administrative proceeding was pending [5] ended long before the wrongful termination statute of limitations ran. Those proceedings did not interfere with his filing of the wrongful termination action; he could have filed it in a timely manner with no difficulty whatsoever. He was sent the last of his right to sue letters November 20, 1998, and, even without tolling he had until February 2, 1999, to file his action.

[29]** The California Supreme Court has pointed out that nothing actually impedes a person from filing his tort claim in a timely fashion and then amending to join a delayed FEHA claim later. *See* Rojo v. Kliger, 52 Cal. 3d 65, 88, 801 P.2d 373, 388, 276 Cal. Rptr. 130, 145 (1990). It would, undoubtedly, look with a jaded eye upon Kang's assertion that he did not have to file his tort claim, even though he had his right to sue letter long before the statute of limitations expired. Kang cites no authority to the contrary. *Cf.* Elkins v. Derby, 12 Cal. 3d 410, 413, 525 P.2d 81, 83, 115 Cal. Rptr. 641, 643 (1974) (statute of limitations expired while first action pending); Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 268, 502 P.2d 1049, 1063, 104 Cal. Rptr. 761, 775 (1972) (same); **[*823]** Addison, 21 Cal. 3d at 319, 578 P.2d at 943-44, 146 Cal. Rptr. at 227 (same). Moreover, I do not see Kang's pro forma filings with the agencies and wait of months before filing his action as anything approaching "reasonable and good faith conduct" on his part. Addison, 21 Cal. 3d at 319, 578 P.2d at 943, 146 Cal. Rptr. at 227. **[**30]**

Finally, even if the 12 days [6] during which his claims were before the public agencies tolled the statute of limitations, his wrongful termination action was still filed 14 days later, which was one day too late. As is too often the case, Kang, or his advisors, played chicken with the statute of limitations, and lost.

Thus, I respectfully dissent.

End of Document

[5] Kang expressly asked that there be no actual administrative proceeding and, thus, his claim was pending before the Equal Employment Opportunity Commission for a mere seven days and before the California Department of Fair Employment and Housing for an even shorter five days.

[6] Kang asserts that because his DFEH complaint purports to have been signed by him on September 23, 1998, it must be taken as filed on that date, but the department's stamp shows it was actually received on October 15, 1998. The notice to sue states that as the date of filing, and because he asked for an immediate right-to-sue notice, it gave it to him on October, 1998.

Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality, *Joan C. Williams*, 37 *Harv. J.L. & Gender* 185 (2014)
https://repository.uclawsf.edu/faculty_scholarship/1278 or https://nwlc.org/wp-content/uploads/2021/03/Double-Jeopardy_-An-Empirical-Study-with-Implications-for-the-Deb.pdf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS CHIN,

Plaintiff,

v.

CITY OF NEW YORK; RICHARD CONDON (sued in his individual capacity); SUSAN LAMBIASE (sued in her individual capacity); ANASTASIA COLEMAN (sued in her individual capacity); MICHAEL BISOGNA (sued in his individual capacity),

Defendants.

Civ. No. 19-5905

FIRST AMENDED COMPLAINT

Plaintiff Thomas Chin, by and through his attorney Karen Kithan Yau, Law PLLC, as and for his First Amended Complaint, alleges as follows:

Preliminary Statement

1. Plaintiff Thomas Chin (a/k/a Tom Chin) (hereafter referred to as "Plaintiff" or "Investigator Chin"), a Confidential Senior Investigator with the Office of the Special Commissioner of Investigation for the New York City School District (hereafter referred to as "SCI"), brings this action against Defendants City of New York; Richard Condon, former Special Commissioner of Investigation for SCI, in his individual capacity; Susan Lambiase, former Acting Special Commissioner of Investigation for SCI, in her individual capacity; Anastasia Coleman, Special Commissioner for SCI, in her

individual capacity; and Michael Bisogna, Chief Investigator for SCI, in his individual capacity (collectively hereafter referred to as "Defendants"). Plaintiff alleges that Defendants racially discriminated against him and created a hostile work environment in violation of his rights under the law. Specifically, Plaintiff alleges that he was discriminated against, not promoted, not offered any meaningful opportunity to apply for promotions or transfers, discriminatorily disciplined, suspended from work, and forced to work in a racially-hostile work environment because he is Chinese-American. Plaintiff further alleges that, after Plaintiff filed a complaint with the New York State Human Rights Division (NYSDHR), he was unjustly and unlawfully reprimanded and disciplined in retaliation for complaining about such discrimination in further violation of his rights under the law.

2. To remedy these legal violations, Plaintiff brings this action under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution ("Equal Protection clause") and 42 U.S.C. § 1983 ("Section 1983"); the New State Human Rights Law, N.Y. Exec. Law § 290 et seq. ("State Law"); and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 et seq. ("City Law"). To further remedy the unlawful retaliation, Plaintiff also brings claims under 42 U.S.C. § 2000e *et seq.* ("Title VII").

Jurisdiction and Venue

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

4. The Court has jurisdiction over Plaintiff's pendant State and City Law claims under supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Plaintiff's State and City law claims are parts of the same case or controversy as Plaintiff's federal claims.

5. Venue is proper in this district pursuant to 28 U.S.C. §1391. A substantial part of the acts and/or omissions giving rise to the claims alleged in this Complaint occurred within this district.

6. Defendants reside and/or do business in this district.

Parties

7. Investigator Chin is a resident of Queens county in New York State who has been employed by Defendants since October 16, 2006. At all times relevant to this action, Plaintiff has been an "employee" of the Defendants within the meaning of Section 1983, Title VII, the State Law, and the City Law.

8. Defendant City of New York is and has been at all times relevant to this action an "employer" of Plaintiff within the meaning of Section 1983, Title VII, the State Law, and the City Law since SCI is a New York City agency with its principal place of business located at 80 Maiden Lane, 20th Floor, New York, NY 10038. It was established as a result of the findings and recommendations of the 1990 Joint Commission on Integrity in Public Schools to investigate criminal activity or misconduct, including corruption, unethical conduct, or sexual abuse of students within the New York City Department of Education (DOE).

9. Defendant former Special Commissioner Condon had been at all times relevant to this action until his retirement in October 2017 an "employer" of Plaintiff within the meaning of Section 1983, Title VII, the State Law, and the City Law.

10. Defendant former Acting Special Commissioner Lambiase had been at all times relevant to this action until her departure in November 2018 an "employer" of Plaintiff within the meaning of Section 1983, Title VII, the State Law, and the City Law.

11. Defendant Special Commissioner Coleman has been at all times relevant to this action since her appointment and reinstatement an "employer" of Plaintiff within the meaning of Section 1983, Title VII, the State Law, and the City Law.

12. Defendant Chief Bisogna has been at all times relevant to this action an "employer" of Plaintiff within the meaning of Section 1983, Title VII, the State Law, and the City Law.

Factual Allegations

13. Plaintiff Thomas Chin is currently a Confidential Senior Investigator at SCI and began working there on October 16, 2006. Investigator Chin is Chinese-American and was born in the Bronx.

14. Before working for SCI, Investigator Chin worked in the New York Police Department ("NYPD") for 20 years. Investigator Chin had worked in many of NYPD's major squads, including Queens Homicide Squad, Queens Major Case Squad, and the Asian Crime Investigative Unit of the Queens Robbery Squad. During his time with the NYPD, Investigator Chin gained substantial investigatory experience, including significant experience working with sex-crime victims from working in the prestigious Special Victims Squad in Queens. After only 12 years in the NYPD, Investigator Chin was promoted to Detective – First Grade, an elite designation for NYPD's most senior and experienced investigators that is usually achieved after many more years of experience. Over the course of his career at NYPD, Investigator Chin received numerous medals and awards. Investigator Chin retired from NYPD in July 2004.

15. In October 2006, Investigator Chin left his work as a private investigator and returned to public service and began working for SCI.

SCI Failed to Promote Investigator Chin and Discriminately Disciplined Him because of His Race

16. During his employment with SCI, Investigator Chin has been assigned to Team 1, a team that exclusively investigates sex-related crimes involving DOE students, which are considered the highest priority among SCI cases. Thus Investigator Chin has been assigned a significant caseload of sensitive matters. Historically investigators who are in Team 1, like Investigator Chin, are highly-trained and have experience working with sex crime victims.

17. When he joined SCI in 2006, Investigator Chin was one of two Chinese-Americans who held the title "Investigator," out of approximately three-dozen investigators at SCI at the time. The other Chinese-American Investigator was a woman auditor who passed away while she was employed at SCI. Upon information and belief, she was a part of the founding staff at SCI and was never promoted.

18. Currently, Investigator Chin is again the only one of two Chinese-American investigators, out of approximately 30 investigators at SCI. The other Chinese-American who holds the title "Investigator" now is another woman auditor in her 20's.

19. Through the 12 years of Investigator Chin's employment at SCI, upon information and belief, in addition to these two auditors, there have been only two other Chinese-American investigators, both men. Neither received a promotion during the time they were employed at SCI. Upon information and belief, during this period, SCI only employed one other Asian-American investigator, a South Asian man.

20. Upon information and belief, during the 12 years of Investigator Chin's employment, and at all times relevant to this action, the vast majority of SCI investigators who were hired were non-Chinese-American.

21. Upon information and belief, during the 12 years of Investigator Chin's employment, and at all times relevant to this action, the vast majority of SCI investigators who have been promoted were non-Chinese-American.

22. Upon information and belief, during the 12 years of Investigator Chin's employment, and at all times relevant to this action, the vast majority of SCI investigators who were given opportunities for job promotions or transfers were non-Chinese-American.

23. Investigator Chin's investigatory work at SCI has been lauded. His work has led to numerous arrests of teachers who were credibly accused of raping, sexual abusing, and coercing sexual relationships with students. Many of Investigator Chin's cases were deemed newsworthy and arrests in cases he worked on were extensively covered in the media.

24. Investigator Chin's superior performance has been noted by other professionals. In one instance, around November 23, 2016, Senior Attorney Samuel J. Finnessey, Jr. of the Office of School Personnel Review and Accountability (OSPRA) of the New York State Department of Education wrote to former Commissioner Condon to thank SCI for its assistance, and particularly commended Investigator Chin for his "thorough and professional investigation." Attorney Finnessey, calling Investigator Chin "one of the top investigators [he has] come across in terms of his investigative skills, preparededness, and testimony" went on to say that OSPRA could not have achieved the successful outcome without Investigator Chin's "complete and thorough investigation" and "his live testimony."

25. Despite his good performance, Investigator Chin was never promoted at SCI. The real reason or a motivating factor for the failure of SCI to promote Investigator Chin was discrimination because of Investigator Chin's race.

26. Despite his good performance, Investigator Chin was never given opportunities for job promotions or transfers. The real reason or a motivating factor for the failure to SCI to give Investigator Chin opportunities for job promotions or transfers was discrimination because of Investigator Chin's race.

27. Investigator Chin was never made aware of any meaningful opportunities for promotion or transfer into another position at SCI, unlike non-Chinese-American investigators. This had the same effect as if it were represented to Investigator Chin that any promotions or job transfers were not available to him because he was Chinese-American. Had he known about openings available to the SCI investigators, Investigator Chin would have applied for them.

28. Before around May 2018 (after Plaintiff's filing of a complaint with the NYSDHR), SCI only openly advertised an available position at SCI once it has already identified the person whom it would hire or promote. By then, the purpose of these postings was almost always only to obtain approval, known as a "waiver," to hire the selected candidate who often already had a public pension. Without this "waiver," public employers such as SCI may not hire someone who already has a public pension for any position above a certain earnings level. Once SCI met this minimum requirement, it quickly took off any advertising of openings. Unless SCI Investigators were constantly monitoring openings on the SCI website or job boards, they usually only learned of vacancies once the positions have already been filled and the promotions are announced.

29. Instead of openly advertising available positions at SCI when there were promotional opportunities, SCI supervisors, including then-Chief Investigator of SCI, Thomas Fennell and Chief Bisogna, would quietly approach the candidates whom they favor with these opportunities. This practice, although unwritten, was so persistent and widely known that nearly all SCI investigators knew that applying for a vacancy was futile unless the Chiefs had raised the possibility first.

30. Chief Investigators Fennell and Bisogna's acts of handpicking investigators and informing only them of the vacancies, rather than openly publicizing vacancies and employing a transparent, competitive process of interviewing applicants and evaluating each applicant's qualifications for these vacancies, were performed pursuant to this unwritten but persistent and widespread practice, policy and custom, and resulted in only non-Chinese-American SCI investigators being promoted. Upon information and belief, Commissioners Condon, Lambiase, and Coleman, as the heads of SCI, were aware of this practice and allowed Chiefs Fennell and Bisogna to continue it, and did not require them to change it or reevaluate it.

31. SCI does not conduct regular evaluations of investigators' performance or regularly give merit raises. As a result, Investigator Chin has never received a formal evaluation of his work at SCI and has ever only received contractual raises.

32. In September 2012, for the first time, Investigator Chin was disciplined in the workplace. Investigator Chin was disciplined for interviewing the subject of one of his investigations over the phone and inaccurately stating in a case memorandum and written report that the interview took place in person. Investigator Chin had made several attempts to interview the subject in person by visiting his home to no avail. Investigator

Chin then interviewed him over the phone when the subject called in response to Investigator Chin's visits. Chief Investigator Fennell met with Investigator Chin and warned him that another similar instance would lead to the termination of his employment, even though Chief Fennell also acknowledged that this was a common practice among investigators at SCI. Investigator Chin admitted his error and promised that he would not commit this mistake again.

33. A memorandum memorializing the meeting was placed in Investigator Chin's personnel file. Investigator Chin was not subject to any other penalty.

34. Upon information and belief, non-Chinese-American employees were not disciplined for similar actions.

35. Around nine months later, in or around May 2013, in a meeting that included then-Leader Louis Torrellas for Team 1, Chief Fennell told Investigator Chin to look for another job. When Investigator Chin asked him for the reason, Chief Fennell declined to say. When Investigator Chin asked how he should improve his performance, if poor performance was the reason for SCI's desire for him to leave, Chief Fennell then stated that Investigator Chin's work performance was not "a key issue," and that Chief Fennell didn't "care about good work or arrests." Chief Fennell also told Investigator Chin that he was not "following the unwritten rules." Investigator Chin understood that to mean he did not fit in the clubby culture that existed among the SCI investigators, who were nearly all non-Chinese and mostly white.

36. Upon information and belief, in 2014, a new investigator was warned by her supervisor that she risked being on "the radar" or "the sh-t list," if she were to partner with Investigator Chin and go into the field with him because he was always closely

scrutinized. At SCI, investigators are not officially given partners. However, SCI requires that investigators always go into the field in pairs when they interview witnesses and subjects. When she asked why Investigator Chin was watched so closely, she was not given a clear reason, except the refrain that Investigator Chin was always on "the radar" and "the sh-tlist." She was not told that Investigator Chin's performance was a concern. That investigator was not warned about going into the field with any other non-Chinese-American investigator.

37. Cases that were investigated by Investigator Chin were more closely monitored than the investigations conducted by his non-Chinese-American peers. Investigator Chin's investigations were more likely than those of his non-Chinese-American peers to be designated unsubstantiated, contrary to Investigator Chin's recommendations. His other recommendations were also more likely to be rejected than recommendations from other non-Chinese-American investigators. For example, in 2017, Investigator Chin conducted an investigation. He recommended to Jeff Anderson, Investigator Chin's supervisor at the time, then Chief Bisogna, and then-Deputy Commissioner Regina Loughran that SCI issue a subpoena to gather more information. Deputy Commissioner Loughran soundly rejected Investigator's recommendation when SCI routinely approved such subpoenas in other investigators' cases on lesser evidence. When Investigator Chin confronted Supervisor Anderson about this denial of the issuance of a subpoena, Anderson responded, "It is you. It is because of you." However, Anderson would not clarify what it was about Investigator Chin that elicited such disfavor. Investigator Chin's performance or the quality of investigative techniques were not mentioned.

38. On or around June 24, 2016, it was announced via email that the then-Commissioner Richard Condon had promoted Noemi Baez Martin to be an Assistant Supervisor for Team 1. Martin, a Latina, had worked at SCI since in or around 2014 only. Upon information and belief, prior to working at SCI, Martin worked at the Civilian Complaint Review Board (CCRB) and had no prior sex-crime-related investigatory or supervisory experience. When Martin first started as an investigator at SCI, she was assigned to shadow Investigator Chin as he worked on his investigations of sex-related crimes and interviewed witnesses.

39. Upon information and belief, pursuant to the unwritten but widely known policy and practice, then-Chief Fennell had approached Investigator Martin and told her that she would be promoted without ever publicizing the vacancy openly.

40. Investigator Chin was as qualified, if not more qualified, as Martin for this promotion. Had Investigator Chin known about this opportunity, he would have applied for this position. The real reason or a motivating factor behind investigator Chin not being considered or obtaining this promotion was discrimination because of Investigator Chin's race.

41. Similarly, on December 1, 2016, it was announced via email that the then-Commissioner Richard Condon had promoted Investigator Ronald Connors to be an Assistant Supervisor for Team 1. Upon his information and belief, Connors did not have any significant supervisory experience prior to this promotion. Connors is a white male.

42. Investigator Chin was as qualified, if not more qualified, as Connors for this promotion. Had Investigator Chin known about this opportunity, he would have applied for this position. The real reason or a motivating factor behind investigator Chin

not being considered or obtaining this promotion was discrimination because of Investigator Chin's race.

43. On or about January 4, 2018, Michael McGarvey retired from SCI as the Fleet Services Manager, a position that was then responsible for the vehicles and other technical equipment used in investigations. Again, there was no posting of this position that would be vacant when McGarvey retired. Although this position was not considered a supervisory position, upon information and belief, it paid more than Investigator Chin's position. Steven King, who is South Asian and had joined SCI only in the prior year, was transferred to this position. The position was eventually split into two positions. Ralph Gerard, a Black male, who previously had worked in SCI's administrative department, became the Agency Fleet Director. King retained the portion of responsibilities associated with technical equipment.

44. Investigator Chin was as qualified, if not more qualified, as King for this job transfer. Had Investigator Chin known about this opportunity, he would have applied for this position. The real reason or motivating factor behind investigator Chin not being considered or obtaining this promotion was discrimination because Investigator Chin is Chinese-American..

SCI Created and Tolerated a Severe and Continuous Hostile Work Enviroment

45. SCI created and tolerated a severe and continuous racially hostile work environment. Throughout his employment at SCI, Chief Bisogna, who was promoted by the then-Commissioner Condon and reappointed by Commissioner Coleman, has never addressed Investigator Chin by his first name. In contrast, Bisogna addressed most of the other investigators by their first names. Bisogna, when he did address Investigator Chin,

called him "Chin-man." Bisogna did not address other investigators by similar pejorative nicknames. Investigator Chin founded this nickname, particularly since it was so close to the racial slur "Chinaman," offensive, demeaning, and embarassing. Bisogna continued to address Investigator Chin as "Chin-man" even after he was promoted to the position of Chief Investigator.

46. After watching Gran Torino, a movie directed by Clint Eastwood, Investigator William LaVasseur, for years intermittently made derogatory remarks about Asian Americans and used terms such as "chink," "gook," and "fish-head" in conversations with Investigator Chin and other investigators. At least once, instead of calling Investigator Chin by his actual name, LaVasseur referred to Investigator Chin as a "fish-head." Although LaVasseur tried to make these comments outside of the presence of supervisors, SCI supervisors, including the-then Team 1 Leader Louis Torrellas, heard these comments and did not stop them. LaVasseur was later promoted to be a Team Leader in 2015.

47. Chief Bisogna and Team Leader LaVasseur and others' conduct rose above the level of lobbing petty slights and posing trivial inconveniences. Investigator Chin felt humiliated, demeaned, and powerless to stop their comments without further alienating his supervisor and colleagues.

48. In 2017, around the time the Department of Investigation ("DOI") was pursuing greater control over SCI, SCI staff were given mandatory EEO seminars. In or around August 2017, Chantal N. Senatus, the EEO Officer for DOI, conducted a mandatory EEO seminar on basic employment policies and protections. This was the first time since he was hired that Investigator Chin could remember he was trained on his

rights as an employee. Investigator Chin learned from the seminar that similarly-situated employees must be treated similarly, regardless of race.

49. After the EEO seminar, DOI staff sent the entire staff at SCI the written EEO policy as a follow-up.

50. In late November 2017, EEO Officer Senatus also confirmed to the SCI staff that she was the Acting EEO Officer for SCI and that Rich Marin, Ann Ryan, and Jessica Villanueva, employees at SCI, were EEO Counselors. This was the first time that Investigator Chin could remember being told that Marin, Ryan, or Villanueva were EEO Counselors for SCI.

51. Shortly after this email, Investigator Chin contacted EEO Officer Senatus and asked to see her. Senatus met with Investigator Chin in her office shortly thereafter. Investigator Chin explained to her that he believed that promotions at SCI should be made based on merit, but that he was discounted because he was Chinese-American. At one point, Senatus responded to the effect that, "You are really pushing this Asian thing." Investigator Chin confirmed that he believed that he was being discriminated against because he was Chinese-American. Eventually Senatus said that Investigator Chin was better off filing a complaint of discrimination on his own.

52. On December 6, 2017, Investigator Chin filed a complaint of discrimination with the NYSDHR, alleging that SCI discriminated against him and failed to promote him because of his race (and age).

53. On or around April 17, 2018, SCI submitted a Verified Answer in response to his NYSDHR complaint and claimed that Investigator Chin was unqualified for any promotion because of his "serious misconduct [in 2012] for which he narrowly

averted termination of employment", and that act "rendered him unqualified for a supervisory position."

54. However, other non-Chinese-American employees who had committed serious misconduct, or who had been accused of such, were nevertheless promoted. In this way, Investigator Chin was treated differently from and more harshly than non-Chinese-American employees.

55. For example, Investigator William LaVasseur was promoted, first to an Assistant Team Leader and then to a Team Leader, although he had acted aggressively toward his fellow investigators and even provoked physical fights with his fellow investigators, in addition to making derogatory comments about Asians as set forth in paragraph #46. Prior to his promotions, LaVasseur was an investigator at SCI and, upon information and belief, did not have any supervisory experience.

56. Rather than because of any misconduct, the real reason or a motivating factor behind Investigator Chin not being promoted or offered a job transfer was discrimination based upon or because he is Chinese-American.

SCI Retaliated Against Investigator Chin After He Complained of Discrimination

57. After Investigator Chin filed the NYSDHR complaint in December 2017, SCI was ever more critical of Investigator Chin's work.

58. In or around September 2017, the subject of one of Investigator Chin's investigations ("Investigation #1") complained that the investigation over his alleged misconduct was still unresolved even though he was told, "his case was closed." The complaining subject did not allege that it was Investigator Chin who divulged this information.

59. Although the subject did not mention Investigator Chin when he complained, Brisogna, Anderson, and Deputy Chief Investigator Anthony Continanzi met with Chin and warned him that he should not inform subjects of his investigations that their cases were unsubstantiated and would be closed by SCI. Investigator Chin unequivocally denied that he had informed the subject that the investigation was closed, and objected to the warning. Nevertheless Brisogna and Anderson verbally reprimanded Investigator Chin despite Investigator Chin's denials. Other than the verbal reprimand, they did not take any other action.

60. In or around January 2018, shortly after he filed his NYSDHR complaint in December of 2017, Investigator Chin was accused again that he had informed a subject of an investigation ("Investigation #2") that his case would be closed by SCI because the allegations against the subject were unsubstantiated. Investigator Chin again unequivocally denied this accusation. Nevertheless, Brisogna, Continanzi, and Anderson disregarded Investigator Chin's denials or explanation and gave him an oral warning.

61. Upon information and belief, other non-Chinese-American investigators were not disciplined for infractions similar to those Investigator Chin was accused of.

62. For example, New York Post reported on or around October 16, 2018 that Investigator Miguel Ruiz, joined by Martin, who had been promoted to be an Assistant Supervisor, informed a student witness in an investigation of a high school teacher who was accused of having excessive text contact with him that the case would be closed because "nothing happened." Upon information and belief, Investigator Ruiz was not reprimanded or disciplined for providing this information, and neither was Supervisor Martin who did not correct Investigator Ruiz.

63. In or around February 2018, a witness emailed Investigator Chin in a case involving a teacher who was accused of being inappropriately friendly with his students ("Investigation #3"). The witness was upset when the subject of the investigation contacted her directly and that her identity as a cooperating witness might have been compromised. The witness had provided Investigator Chin access to her social media account to review photographs of the subject and his students.

64. Bisogna, Continanzi, and Anderson met with Investigator Chin about Investigation #3 and admonished Investigator Chin for not redacting materials that were provided by the witness and shown to this subject during questioning. Investigator Chin conceded that it would have been more prudent that information was redacted. However, Investigator Chin also pointed out that SCI attorneys had overseen his investigations and did not ask him to redact. Moreover, during nearly 12 years of employment, although his investigations were always overseen by SCI attorneys, he had never been asked or instructed to redact a document previously. Other non-Chinese American investigators similarly did not make redactions and were not admonished.

65. On or around March 15, 2018, Bisogna, Continanzi, and Anderson convened a disciplinary meeting, during which they reprimanded Investigator Chin concerning his performance and in particular his failure to redact a document in Investigation #3. During this short meeting, they showed Investigator Chin a lengthy write-up that was highly critical of his performance. Although Investigator Chin requested a copy of this write-up, they declined to give him one.

66. Upon information and belief, non-Chinese-American employees were not disciplined or written up for failure to redact a document. The real reason or motivating

factor for Investigator Chin being disciplined was discrimination based upon or because of his Chinese-American race.

67. On or about May 23, 2018, NYSDHR dismissed Investigator Chin's complaint for untimeliness.

68. On June 6, 2018, then-Acting Special Commissioner Susan Lambiase, issued a memorandum to Investigator Chin that he would be suspended without pay for 14 days. Lambiase cited as the basis for this suspension Investigator Chin's supposed disclosures about case status in September 2017 (Investigation #1) and January 2018 (Investigation #2) and the February 2018 incident regarding the failure to redact a document (Investigation #3). Lambiase wrote that the "effective dates of [Investigator Chin's] suspension [would] take place in the near future and [would] be worked out with the Department of Education." Investigator Chin was given no further notice and his suspension without pay started a day later and lasted from June 7, 2018 through June 20, 2018.

69. Upon information and belief, SCI has rarely, if ever, suspended a non-Chinese-American investigator from work without pay even though other investigators commit similar or more egregious misconduct. The real reason or motivating factor for Investigator Chin's work suspension without pay was discrimination based upon or because of his Chinese-American race.

70. Upon information and belief, SCI timed this action and waited until such time when the NYSDHR complaint was dismissed and SCI was no longer under legal scrutiny before issuing the written memorandum and effectuating Investigator Chin's work suspension without pay immediately.

71. Defendants' disciplinary actions toward Investigator Chin were different from and harsher than the actions taken against other similarly-situated employees who were not Chinese-American. Defendants' actions showed that they were aware that Investigator Chin was engaging in protected activity and they disciplined and treated him more harshly because of this activity.

72. Investigator Chin was deeply embarrassed and humiliated by this disciplinary action and suffered severe mental anguish and emotional distress.

73. In response to this work suspension, Investigator Chin sought to provide SCI corroboration that he did not inform subjects of his investigations that their cases would be closed or he had deliberately or carelessly revealed the identity of a complainant or witness.

74. Altogther these actions by Bisogna and other supervisors at SCI constituted retaliation and were the type of action that would dissuade employees from making or supporting a charge of discrimination in the first place.

75. In or around February 2019, Investigator Chin filed a Charge of Discrimination with the Equal Employment opportunity Commission (EEOC) for retaliation in violation of Title VII on the basis that SCI suspended him from work and took other selective disciplinary actions once he filed the NYSDHR complaint of discrimination.

76. On or around June 18, 2019, Investigator Chin received notice from EEOC that SCI had submitted a response and position statement to his charge of retaliation on or around April 12, 2019.

77. On or around August 15, 2019, EEOC issued to Investigator Chin a Notice of Right to Sue (please see attached Exhibit A), because more than 180 days have passed since the filing of the charge of retaliation.

78. Defendants' actions were intended to – and did – discriminate against Investigator Chin based upon or because of his status as a Chinese-American.

79. Defendants treated Investigator Chin more harshly than his peer investigators or other similarly-situated counterparts based upon or because of his status as a Chinese-American.

80. Defendants undertook all of the actions and omissions alleged above either directly, or through their agents who were authorized to undertake such actions and omissions.

81. The actions and omissions alleged hereinabove were willful.

82. As a result of Defendants' discriminatory and retaliatory conduct toward Plaintiff, Plaintiff has suffered economic harm including loss of past and future income, mental anguish and emotional distress.

83. Because of Defendants' malicious, willful, and outrageous conduct, which was undertaken with full knowledge that such actions were illegal, Plaintiff seeks, and is entitled to, punitive damages from the Defendants.

FIRST CAUSE OF ACTION
Against All Defendants
(Discriminatory Discipline, Failure to Promote, and Subjecting a Hostile Work Environment in Violation of Fourteenth Amendment Equal Protection Clause and Section 1983)

84. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

85. By the actions set forth above, among others, Defendants have discriminated against the Plaintiff in violation of Equal Protection clause of the United States Constitution and Section 1983, by failing to promote Plaintiff, offering him any meaningful opportunity to apply for promotions or transfers, discriminately disciplining him, suspending him without pay, and subjecting Plaintiff to a hostile work environment because of his race as a Chinese-American.

86. At all times relevant times, individual Defendants acted within scope of their employment and under color of law.

87. Defendants Condon, Lambiase, Coleman, and Bisogna each violated Plaintiff's rights by direct participation, or by being informed of the violations and failing to remedy them, or by creating a custom or policy under which violations of Plaintiff's rights were likely to occur, or by being aware of such custom or policy and allowed it to continue, or by being grossly negligent in supervising subordinates who violated Plaintiff's rights or caused those rights to be violated.

88. As the result of being subject to Defendants' illegal actions, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, humiliation, embarrassment, mental anguish, and emotional distress for which he is entitled to damages.

89. Individual Defendants' actions were malicious, willful, and wanton in violation of Equal Protection clause and Section 1983 for which Plaintiff is entitled to an award of punitive damages.

SECOND CAUSE OF ACTION
Against All Defendants
(Retaliation in Violation of Fourteenth Amendment Equal Protection Clause and Section 1983)

90. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

91. At all times relevant times, individual Defendants acted acted within scope of their employment and under color of law.

92. By the actions set forth above, among others, Defendants have retaliated against the Plaintiff in violation of Equal Protection clause and Section 1983 for his complaints of discrimination because of his race as a Chinese-American by disciplining him for alleged infractions or instances of misconduct and suspending him without pay that non-Chinese-American investigators were not similarly disciplined for.

93. Defendants Condon, Lambiase, Coleman, and Bisogna each violated Plaintiff's rights by direct participation, or by being informed of the violations and failing to remedy them, or by creating a custom or policy under which violations of Plaintiff's rights were likely to occur, or by being aware of such custom or policy and allowed it to continue, or by being grossly negligent in supervising subordinates who violated Plaintiff's rights or caused those rights to be violated.

94. As a result of being subject to Defendants' illegal retaliation, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, humiliation, embarrassment, mental anguish, and emotional distress for which he is entitled to damages.

95. Defendants' retaliatory actions were malicious, willful, and wanton in violation of in violation of Equal Protection clause and Section 1983 for which Plaintiff is entitled to an award of punitive damages.

THIRD CAUSE OF ACTION
Against the City of New York Only
(Retaliation in Violation of Title VII)

96. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

97. Defendant City of New York retaliated against Plaintiff in violation of Title VII for his complaints of discrimination because of his race as a Chinese-American by disciplining him for alleged infractions or instances of misconduct and suspending him without pay that non-Chinese-American investigators were not similarly disciplined for.

98. As a result of Defendant's illegal retaliation, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

99. Defendant's retaliatory actions were malicious, willful, and wanton in violation of Title VII for which Plaintiff is entitled to an award of punitive damages.

FOURTH CAUSE OF ACTION
Against All Defendants
(Discriminatory Discipline, Failure to Promote, and
Subjecting a Hostile Work Environment
in Violation of New York State Human Rights Law)

100. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

101. By the actions set forth above, among others, Defendants have discriminated against the Plaintiff in violation of the New York State Human Rights Law, Executive Law § 290 et. seq.

102. Among other actions, Defendants failed to promote Plaintiff or offer him any meaningful opportunity to apply for promotions or transfers, discriminately disciplined him, suspended him without pay, and subjected Plaintiff to a hostile work environment because of his race as a Chinese-American.

103. Defendants' actions were in direct violation of the New York State Human Rights Law.

104. As a result of Defendants' willful and illegal actions, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

105. Defendants' actions were malicious, willful, and wanton in violation of the State Law for which Plaintiff is entitled to an award of punitive damages.

FIFTH CAUSE OF ACTION
Against All Defendants
(Retaliation in Violation of New York State Human Rights Law)

106. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

107. Defendants retaliated against Plaintiff for his complaints of discrimination because of his race as a Chinese-American by disciplining him for infractions or instances of misconduct that non-Chinese-American investigators were not similarly disciplined for and suspending him without pay, an action that Defendants did not subject

non-Chinese-American investigators to for similar level of misconduct even if it was in fact committed.

108. As a result of Defendants' illegal retaliation, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

109. Defendants' retaliatory actions were malicious, willful, and wanton in violation of the State Law for which Plaintiff is entitled to an award of punitive damages.

SIXTH CAUSE OF ACTION
Against Defendants Condon, Lambiase, Coleman, and Bisogna Only
(Aiding and Abetting in Violation of New York Human Rights Law)

110. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

111. By the actions described above, Defendants Condon, Lambiase, Coleman, and Bisogna each knowingly or recklessly aided and abetted and directly participated in the unlawful discrimination against the Plaintiff.

112. Defendants Condon, Lambiase, Coleman, and Bisogna's actions were in direct violation of the State Law.

113. As a result of Defendants Condon, Lambiase, Coleman, and Bisogna's illegal actions, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

114. Defendants' actions were malicious, willful, and wanton in violation of the State Law for which Plaintiff is entitled to an award of punitive damages.

SEVENTH CAUSE OF ACTION
Against All Defendants
(Discriminatory Discipline, Failure to Promote, and Subjecting a Hostile Work Environment in Violation of the City Law)

115. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

116. By the actions set forth above, among others, Defendants have discriminated against the Plaintiff in violation of the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 et seq.

117. Among other action, Defendants failed to promote Plaintiff or offer him any meaningful opportunity to apply for promotions or transfers, discriminately disciplined him, suspended him without pay, subjected Plaintiff to a hostile work environment, treated him more harshly because of his race as a Chinese-American.

118. As a result of Defendants' illegal actions, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

119. Defendants' actions were malicious, willful, and wanton violations of the City Law for which Plaintiff is entitled to an award of punitive damages.

EIGHTH CAUSE OF ACTION
Against All Defendants
(Retaliation in Violation of the City Law)

120. Plaintiff realleges and incorporates by reference the foregoing allegations as if set forth fully here.

121. Defendants retaliated against Plaintiff in violation of the City Law for his complaints of discrimination because of his race as a Chinese-American by disciplining him for alleged infractions or instances of misconduct and suspending him without pay

that non-Chinese-American investigators were not similarly disciplined for and treating him more harshly than non-Chinese-American investigators.

122. As a result of Defendants' illegal retaliation, Plaintiff has suffered, and continues to suffer, economic harm including loss of past and future income, mental anguish, and emotional distress for which he is entitled to damages.

123. Defendants' retaliatory actions were malicious, willful, and wanton violations of the City Law for which Plaintiff is entitled to an award of punitive damages.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a trial by jury as to all issues so triable.

WHEREFORE, Plaintiff requests that this Court enter an Order:

a. assuming jurisdiction over this action;

b. declaring Defendants violated Fourteenth Amendment Equal Protection Clause and Section 1983, State Law, and City Law;

c. permanently enjoining Defendants from further violations of Fourteenth Amendment Equal Protection Clause and Section 1983, the State Law, and City law;

d. granting judgment to Plaintiff on his Fourteenth Amendment Equal Protection Clause and Section 1983, State Law, and City Law claims in amounts to be determined at trial;

e. awarding Plaintiff punitive damages as allowable by law;

f. awarding Plaintiff prejudgment and postjudgment interest as allowed by law;

g. awarding Plaintiff his costs and reasonable attorneys' fees; and

h. granting such further relief as the Court deems just and proper.

DATED: New York, NY
October 18, 2019