UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHRISTINE C. ANDERSON,
Plaintiff,

07cv9599 (SAS)

-against-

THOMAS J. CAHILL, SHERRY K. COHEN, And DAVID SPOKONY,
Defendants.

NOTICE OF MOTION

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PLEASE TAKE NOTICE that upon the accompanying affirmation, plaintiff Christine C. Anderson will move this Court before the Honorable United States District Court Judge Shira A. Scheindlin, at the United States Courthouse, 500 Pearl Street, New York, New York 10007, at a date and time to be determined by the Court, for an order:

(1) granting a new trial; and

(2) for such other and further relief as the Court may find just and proper.

Dated: New York, New York
November 16, 2009

Christine C. Anderson, *plaintiff*
227 Riverside Drive – Suite 2N
New York, New York 10025
917-817-7170 tel

To: Lee Alan Adlerstein, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Christine C. Anderson,

Plaintiff,

- against -

Doc. No. 07-cv- 09599 (SAS)

THOMAS J. CAHILL, SHERRY K. COHEN, and DAVID SPOKONY,

Affirmation

Defendants.

I, Christine C. Anderson, make the following affirmation under penalties of perjury:

I, Christine C. Anderson, am the plaintiff in the above entitled action, and respectfully move this court to issue an order granting a new trial pursuant to Rule 59, Fed.R.Civ.P.

The reasons why I am entitled to the relief I seek are the following:

I. Introduction

Because of the unique perspective of the trial judge, the decision as to whether to grant a new trial is committed to the court's sound discretion and will be reversed only for a clear abuse of that discretion. *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706, 716 (7th Cir. 2005); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir.1995).

Fed.R.Civ.P. 59 does not list the grounds for which a new trial may be granted. (Wright § 95). In federal courts, common law must be looked to in determining the available grounds. Of the numerous grounds justifying a grant of new trial, one is that the "interests of justice" require a new trial. See e.g., *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d

1373, 1379 (7th Cir. 1990) (affirming grant of new trial after a three-week jury trial). Among the grounds cited for seeking new trials are the following:

(1) Irregularity of the proceedings;
(2) Misconduct of jury;
(3) Accident or surprise;
(4) Newly discovered evidence;
(5) Insufficient evidence;
(6) Verdict against law;
(7) Error in law;
(8) Excessive or inadequate damages.

In ruling on a motion for a new trial, "the judge may consider the credibility of the witnesses, the weight of the evidence, and any other matter which justice requires." *Spanish Action Committee of Chicago v. City of Chicago*, 766 F.2d 315, 321 (7 Cir. 1985). Moreover, the judge can order a new trial *sua sponte*. Rule 59(d), Fed.R.Civ.P.

A key question is whether a new trial should be granted to avoid a miscarriage of justice. See *Beckman v. Mayo Foundation*, 804 F.2d 435, 439 (8th Cir.1986) ("The district court can only disturb a jury verdict to prevent a miscarriage of justice.").

A court has broad discretion in considering a Rule 59(e) motion. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). Rule 59(e) was adopted to clarify that "the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982) (internal quotations omitted). A Rule 59(e) motion may be granted to correct a manifest error of law or fact, or to consider newly-discovered evidence. See *Hagerman*, 890 F.2d at 414.

The granting of a new trial is within the discretion of the district court. *Larson v. Farmers Cooperative Elevator of Buffalo Center*, 211 F.3d 1089, 1095 (8th Cir. 2000). A new trial should be granted "if the verdict is against the weight of the evidence and if allowing it to stand would result in a miscarriage of justice." *Manus v. American Airlines, Inc.*, 314 F.3d 968, 973 (8th Cir. 2003).

Although the issue is rarely raised, the district courts' grants of motions for new trials have been repeatedly affirmed. E.g., *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 288 (7th Cir. 1982); *Juneau Square Corp. v. First Wisconsin Nat. Bank of Milwaukee*, 624 F.2d 798, 809 (7th Cir. 1980).

Based on these established precedents, Plaintiff turns to several different bases which, individually, or in tandem, warrant a new trial.

II. Irregularity of Proceedings: State of New York Attorney General's Representation of Defendants Unduly Prejudiced Plaintiff and Denied Her Due Process Rights

In this action, plaintiff Anderson was confronted with an unquestionably unfair set of circumstances. She brought her complaint against three individuals, who, although employed by the State of New York, were ultimately sued in their individual capacities. These defendants in turn were defended by the New York State Attorney General. Thus, while the plaintiff charged the defendants with serious violations of law, the Attorney General stood before the jury defending these very same actions as proper and within the law. This arrangement seriously prejudiced the plaintiff, as jurors could and likely did conclude that the State of New York supported fully the conduct of the defendants.

Furthermore, not only did the Attorney General's representation of the defendants unduly prejudice the plaintiff, but it also raised serious conflict of interest issues with respect to the defendants themselves. To protect their own rights, each of the defendants had to have their own attorneys in order to permit them to cross claim or make admissions. Under New York State and federal conflict of interest rules, each of the defendants must be free to undertake these independent actions. To do so, they must have their own counsel. (See NYS Code of Professional Conduct Cannon 5 Conflict of Interest Rules.[1]) The Attorney General as a state attorney is bound by these rules as well. [2]

This constitutes New York State law, and the attorney who violates these safeguards must be immediately removed from the case. Further, should the defendants seek to waive the conflict- they would have to submit an affidavit to that effect to the court. Notwithstanding a defendant's attempt to waive his right to independent counsel, the court can deny the waiver, based on a finding that ultimately this conflict cannot properly be waived.

As a result of these conflict of interest issues, the Attorney General cannot properly represent the defendants, either as a group or individually. Each defendant must have the right to cross claim against the others, and to bring a counterclaim against the State. These actions most certainly could not be undertaken in a case where the Attorney General

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[1] **http://www.law.cornell.edu/ethics/ny/code/NY_CODE.HTML ; Conflict of Interest Disciplinary Rule 6 http://www.law.cornell.edu/ethics/ny/code/**

[2] As head of the Department of Law, the Attorney General is both the "People's Lawyer" and the State's chief legal officer. As the "People's Lawyer," the Attorney General serves as the guardian of the legal rights of the citizens of New York, its organizations and its natural resources. In his role as the State's chief legal counsel, the Attorney General not only advises the Executive branch of State government, but also defends actions and proceedings on behalf of the State**http://www.oag.state.ny.us/our_office.html**

represents all the named defendants. All defendants clearly are in conflict with each other, especially their individual capacities. Without question, the Attorney General violated its ethical rules and the public trust in undertaking to represent all of the defendants. This would be the case, even were it established that the defendants had sought to consent to such representation,

The involvement of the New York Attorney General in refuting plaintiff's allegations, which involved serious violations of federal and state law and ethical standards, and in presenting the case of each defendants, denied plaintiff's due process and equal protection guarantees, and right to a fair and impartial trial. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") and *Eldridge v. Williams*, 424 U.S. 319 335 (1974) [3]

The conflict here is particularly acute given the nature of the claims brought by plaintiff Anderson. Plaintiff's charges warranted an independent investigation by the New York State Attorney General Office to review the basic claims given that Anderson was formerly a Departmental Disciplinary Committee staff attorney with considerable experience. The fact is that these are not allegations from a lay person.

While at the DDC, Plaintiff Anderson was charged with investigating cases involving possible criminal and civil misconduct. She carried out her duties as a duly authorized officer

[3] **The Supreme Court set out the following balancing test for applying procedural due process protections: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."**

of the Court. The New York State Attorney General Office was therefore obligated to protect her and to investigate her claims of serious misconduct against the named parties. For no reason, the New York State Attorney General Office failed to do so.

The Attorney General is a publicly funded arm of the State. It was conflicted from the outset of this case because it could not possibly defend any of the defendants, while simultaneously investigating plaintiff 's claims of serious ongoing misconduct by the defendants. Indeed, no explanation has ever been provided as to why the Attorney General did not represent plaintiff Anderson *against* any of the original defendants. This was itself a misappropriation of public funds by a state investigatory agency with prosecution powers. Federal law mandates that a special prosecutor be substituted into the case, and this was not done. The actions of the Attorney General here confused, misled and confounded the jury, by creating a false impression that the acts were officially sanctioned by the state.

Furthermore, Christine Anderson's allegations have substantial impact on the public, the bench and bar, and cannot be ignored by the New York State Attorney General Office just because they were motivated to defend this lawsuit. This serious conflict demanded independent counsel for the defendants as a matter fairness and high ethical conduct to all involved, particularly to Christine Anderson. Having denied independent counsel to the defendants, the Attorney General prejudiced plaintiff by making it appear to the jury that the State of New York and the New York State Attorney General Office supported defendants' conduct. This was a burden Christine Anderson could never overcome and, at a minimum, warrants a new trial.

Additionally, the Court was concerned about the aforestated conflict of interest and in

one of its last instructions to the jury, the Court warned the jury not to draw a negative inference adverse to the defendants for their joint representation by the New York State Attorney General Office. That instruction was injurious to the plaintiff, Christine Anderson, in that it prejudiced the jury against her and in and of itself warrants a new trial for the following reasons:

1. It was one of the last instructions to the jury and was thus ingrained in the minds of the jury as a lasting impression. Furthermore, as one of the last instructions to the jury. it elevated its importance over and above all prior instructions as something that had to be considered in deference to all else.

2. There was no countervailing instruction not to draw a negative inference of the joint representation by the New York State Attorney General Office adverse to the plaintiff. This failure prejudiced the jury against the plaintiff by implying at a minimum, that the state supported all of the defendants' conduct and found that it was within the bounds of the law.

3. Had the Court even given the jury an instruction not to draw a negative inference of the joint representation of the defendants by the New York State Attorney General Office as against either or both the plaintiff and the defendants, such an instruction only demonstrates the proof that there is an impermissible conflict of interest in the manner in which this case was conducted, that can only hurt one party over another. Further, the representation by the New York State Attorney General Office made it appear as though New York State supported the defendants' conduct and that it was within the bounds of the law.

4. By the Court issuing the jury instruction not to draw a negative inference adverse to the defendants for their joint representation by the New York State Attorney General Office, the court preserved the argument to be raised in this motion and/or appeal.

5. Allowing all of the defendants to be represented jointly by the same counsel and by the New York State Attorney General Office created an impermissible conflict of interest. Indeed, the conflict was so strong, that had the jury ruled against any one or all of the defendants, they would have been entitled to seek a new trial for impermissible conflict of interest, as they would be entitled to their own independent counsel. The court is thus faced with the fact any unsuccessful litigant in this case could be expected to move for and would be entitled to a new trial because of the impermissible conflict of interest, as all of the defendants are required to have their own independent counsel, and to not be represented by the New York State Attorney General's Office.

The American Bar Association's Code of Professional Responsibility elaborates on the duty of a public prosecutor such as the New York Attorney General to seek justice as follows:

> "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and *those affecting the public interest should be fair to all* ...." (ABA Code of Prof. Responsibility, EC 7-13, emphasis added.)

Therefore, a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, the prosecutor, in this case the Attorney General, is a representative of the sovereign, and consequently must act with the impartiality required of those who govern. Second, the Attorney General can at all times call upon the vast power of the government, and therefore must refrain from abusing that power by failing to act evenhandedly.

These key duties are not limited to criminal prosecutions, but must also be observed in civil cases as well. These safeguards are included in the ABA Code. "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, *and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.*" (Id., EC 7-14, emphasis added.)

In the present case, the Attorney General was under the ethical duty to withdraw in order to preserve plaintiff's right to a fair and impartial trial. In a case such as this, not only is the Attorney General's neutrality essential to a fair outcome for the plaintiff, it is critical to the proper function of the judicial process as a whole. Our system of justice relies for its validity

on the confidence of society. Without a continuing belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See id., EC 9-1, 9-2.)

The New York State Attorney General is a public official elected by statewide ballot [4]. The American Bar Association's Code of Professional Responsibility addresses the special considerations applicable to a lawyer who is also a public official as follows: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." (ABA Code of Prof. Responsibility, EC 8-8.) "[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." (ABA Committee on Prof. Ethics, opn. No. 192 (1939); see also *People v. Conner*, 34 Cal.3d 141, 146.)

The government's investigative and prosecutorial interests must be balanced against the public interest in insuring that the individuals and organizations receive effective representation, and are accorded their full constitutional rights and protections.

There are at least two reasons why a court should satisfy itself that no conflict exists or at least provide notice to the affected party if one does.

First, a court is under a continuing obligation to supervise the members of its Bar. E.g., *In re Taylor*, 567 F.2d at 1191; see *Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir.1980) (per curiam) (district court obligated to take measures against unethical

4 **The fact that the Attorney General is elected by the voters of New York State raises a question with respect to the qualification of the jurors. No juror in the present case was asked whether he or she had voted for Attorney General Andrew Cuomo at the last election, or, for that matter, whether they supported the actions undertaken by him since assuming office, or further, whether they, as a general matter, agree with the general or specific policies of or initiatives undertaken and/or advocated by his office.**

conduct occurring in proceedings before it). Second, trial courts have a duty "to exercise that degree of control required by the facts and circumstances of each case to assure the litigants of a fair trial." *Koufakis v. Carvel*, 425 F.2d 892, 900-01 (2d Cir.1970); see ABA Code of Judicial Conduct, Canon 3(A)(4).

For example, when a litigant's statutorily appointed counsel is acting against that person's interests because of a conflict that the party has not been informed of and cannot be expected to understand on his own, it can be concluded that the litigant is not receiving a fair trial. Cf. *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) (divided loyalties of counsel may create due process violation).

Attorneys are officers of the court, *Clark v. United States*, 289 U.S. 1, 12, 53 S.Ct. 465, 468, 77 L.Ed. 993 (1933), and are obligated to adhere to all applicable disciplinary rules, and to report incidents of which they have unprivileged knowledge involving violations of a disciplinary rule. ABA Code of Professional Responsibility, DR 1-102(A), 1-103(A); see *In re Walker*, 87 A.D.2d 555, 560, 448 N.Y.S.2d 474, 479 (1st Dep't 1982) (as officers of court, attorneys required to notify parties and court of error in court order).

Occupying a position of public trust, the Attorney General, as any public prosecutor is 'possessed ... of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (Professional Responsibility: Report of the Joint Conference (1958) 44 A.B.A.J. 1159, 1218.) The duty of a government attorney has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner,' is of high order." (Id. at p. 871.)

Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," has been invoked by this Court in attorney conflict cases. See, e.g., *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 234-35 (2d Cir.1977). The Model Rules of Professional Conduct, adopted by the ABA House of Delegates on August 2, 1983 contain similar provisions and language. See Rules 1.7, 8.4.

Furthermore, and central to the issue of preventing prejudicial influence of government attorneys on court proceedings, it is common for states to adopt statutes or regulations that prohibit those holding the office of Attorney General, as well as their deputies and staff attorneys, from participating as attorneys in private litigation matters. (see e.g. Arizona Revised Statutes §41-191[5] Attorney general; Florida Statutes, Section 27.51(3), [6] Maryland Statutes and Procedures Governing Pro Bono Services of Attorney General Office[7] .)

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[5] **B. The attorney general and his assistants shall devote full time to the duties of the office and shall not directly or indirectly engage in the private practice of law or in an occupation conflicting with such duties, except:**
1. Such prohibition shall not apply to special assistants, except that in no instance shall special assistants engage in any private litigation in which the state or an officer thereof in his official capacity is a party.
2. Assistant attorney general may, but in no circumstances shall be required to, represent private clients in pro bono, private civil matters under the following circumstances:
(a) The representation will be conducted exclusively during off hours or while on leave and the attorney will not receive any compensation for such services.
(b) The client is not seeking an award of attorney fees for the services.
(c) The services are for an individual in need of personal legal services who does not have the financial resources to pay for the professional services or for a nonprofit, tax exempt charitable organization formed for the purpose of providing social services to individuals and families.
(d) The representation will not interfere with the performance of any official duties.
(e) The subject matter of pro bono representation is outside of the area of practice to which the attorney is assigned in the attorney general's office and the activity will not appear to create a conflict of interest.
(f) The activity will not reflect adversely on this state or any of its agencies.
(g) *The assistant attorney general's position will not influence or appear to influence the outcome of any matter.*
(h) The activity will not involve assertions that are contrary to the interest or position of this state or any of its agencies.
(i) The activity does not involve a criminal matter or proceeding or any matter in which this state is a party or has a direct or substantial interest.
(j) The activity will not utilize resources that will result in a cost to this state or any of its agencies.
(k) The attorney's supervisor may require the attorney to submit a prior written request to engage in pro bono work which includes a provision holding the agency harmless from any of the work undertaken by the attorney.

[6] **Florida Statutes,Section 27.51 provides:"Each public defender shall serve on a full-time basis and is prohibited from** engaging in the private practice of law while holding office.*Assistant public defenders* shall give priority and preference to their duties as assistant public defenders and *shall not otherwise engage in the practice of criminal law.*" (e.s.)

[7] **Private practice of Law and Pro Bono Representation.**
http://new.abanet.org/divisions/govpub/PublicDocuments/MD%20AG%20Pro%20bono%20policy.pdf

The reason for adopting these restrictions is most obvious. For the Attorney General or any member of the staff to participate in a civil trial involving a private litigant will create the prejudicial inference that the state has reviewed and approved the position advocated by the government attorney. Such an inference can and likely will influence the outcome of the matter to the detriment of the opposing party.

It is for the above stated reasons that no Attorney General or staff member should be permitted to represent a private litigant in any adversarial proceeding. Only such an outright prohibition will properly preserve the standards of fairness and impartiality guaranteed to all litigants under federal and state constitutions. The present lack of statutory and/or ethical policy guidelines barring the participation of state law officers from representing private litigants in civil proceedings which must be addressed by courts and policy makers.

III. Irregularity of Proceedings: Confusing, Misleading and Prejudicial Instructions to the Jury.

The Court issued detailed Verdict Sheets to the jury addressing the plaintiff's allegation of retaliation and the related issues of deprivation of a federal right and plaintiff's acts of speech. **(Attached hereto as Exhibit "A").**

During the jury's deliberation, the foreman submitted a question to the court for review. The question **(Attached as Exhibit "B")** sought the Court's guidance with respect to instruction number 1b which was described as "ambiguous." The Court provided an answer (see Exhibit "B") to the question which addressed the fact that the plaintiff had made certain statements rather than the way in which the "DDC responded (investigated) properly to the statements [plaintiff] made."

In answering the jury, the court addressed only the initial question, which dealt with the critical issue of the lawsuit, i.e., whitewashing. This key issue was specifically removed from consideration by the jury, when the Court circled the question as to whether the plaintiff had made statements to her superiors and not whether those statements averred that the DDC was not diligently prosecuting allegations of misconduct by respondent attorneys.

Having circled that question for consideration, the succeeding questions were dealing only with plaintiff's statements [not defined] and NOT with issue of whitewashing. Thus, the succeeding questions were asked in a vacuum and expected to be answered in a vacuum.

Also, by structuring the questions as the court did, the jury never reached other issues of retaliation or damages, even after it found in plaintiff's favor in Question 1. The jury was confused by the unclear, very puzzling and convoluted nature of the instructions.

This confusion on the part of the jury resulted in a verdict which is in a word repugnant.

By eliminating whitewashing from Question 1, the court effectively excised the key gravamen of the complaint , i.e., retaliatory discharge, as a result of plaintiff's complaints of whitewashing and corruption. This constitutes judicial error of the highest order.

It has been established that both inconsistent or equivocal instructions and incorrect statements of the law may be prejudicially erroneous. *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350 (1946); *United States v. Neilson*, 471 F.2d 905, 908 (9th Cir. 1973); *Bolden v. Kansas City Southern Ry. Co*, 468 F.2d 580; *Ratay v. Lincoln National Life Ins. Co.*, 378 F.2d 209 (3d Cir.), cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465

(1967). said shortly before the jury retires are critical. *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966).

It is generally assumed that juries "act in accordance with the instructions given them...and that they do not consider and base their decisions on legal questions with respect to which they are not charged." *Dist. Council 37 v. New York City Dept. of Parks and Recreation* 113 F3d 347,356 (2d Cir. 1997).

The test for determining whether the district court's error in providing the answer to the jury's question was harmless is whether this Court can, " 'with fair assurance,' [say] that the procedural error in the handling of the jury's inquiries did not affect the verdict." Ronder, 639 F.2d at 935 (quoting *United States v. Schor*, 418 F.2d 26, 30 (2d Cir.1969)).

Juries only get to see and use the instructions for a short time, thus it is crucial that they be clear and understandable to the laymen and laywomen. The court and counsel have the luxury of days to craft and understand the instructions as professionals. The instructions presented in this case are unclear, quite confusing and simply impossible to apply to the facts adduced at trial .

There is also no record that the role of the Attorney General as defense counsel was properly and adequately explained to the jury. This also constitutes another reversible error by the Court which could have been rectified.

IV. Newly Discovered Evidence

The court gave the jury above-referenced instructions and its members adjourned to the jury room to deliberate at approximately 1:25 pm on Thursday, October 29. After the jury left the courtroom, Judge Scheindlin first announced that she had denied the defendants'

pending motion for a directed verdict. She next stated words to the effect that she found that , "....Cahill was aware of the whitewashing allegations..."[8] The judge read this statement related to defendant Cahill's conduct into the record as part of her order denying defendant's directed verdict. **This fact alone requires a new trial.**

In addition, Courts have an obligation to report and order investigation into official and at times criminal misconduct. This is a duty of the Court. There is no record to date as to any action having been undertaken by the Court regarding this central question. (See also recent decisions on spoliation of evidence which are state and federal crimes. *Acorn v. Nassau County* - cv052301 (2009 USDistLEXIS 19459) and *Gutman v. Klein*, 03cv1570. 2008 WL 5084182, 2008 WL 4682208. **The Court's finding of culpability on the part of Defendant Cahill constitutes newly discovered evidence, which directly supports the fundamental allegations of Plaintiff.**

It has been uniformly held that according to Rule 59 of Civil Procedure, 28 U.S.C.A., a motion for new trial is addressed to the sound discretion of the trial judge. Such a motion grounded upon newly discovered evidence will be granted where it is determined that (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching. .. *COMPASS TECHNOLOGY v. TSENG LABORATORIES*, 71 F.3d 1125 (3d. Cir. 1995) (citing *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir.1991)). ; *U.S. Xpress Enter. Inc. v. J.B.Hunt Transp.* Inc., 320 F 3dd 809(8th Cir.); *Girault v. U.S.* 135 F. Supp. 521(Ct Cl.)

[8] As of the submission of this Motion, neither the written decision or the transcript of the proceedings have been made available via the PACER reporting system.

Clearly the newly discovered fact that defendant Cahill, as the head of the DDC and supervisor of the other named defendants, had full knowledge of whitewashing activities would in all likelihood have changed the outcome of the case. This central fact establishing the liability of all named defendants could not have been discovered earlier and is not merely cumulative or impeaching. (See *Farragher v. Boca Raton* , 524 U.S. 775, 18 S. Ct. 2275 (1998) which imputes liability to supervisors in any event. In *Farragher*, the Supreme Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor. All defendants are jointly and severally liable here. In fact, the State of New York is liable under *Faragher.*

Rule 59(e) serves a particular, narrow function. "[T]he narrow purpose of [a Rule 59(e) motion is to] allow a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989). "A Rule 59(e) motion is appropriate 'if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (citing *Sch. Dist. No. 1J, Multnomah County v. A C and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) "[A] Rule 59(e) motion is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Dean v. Gilette*, 2005 WL 1631093 at *2 (D. Kan. 2005) (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000).

A court has broad discretion in considering a Rule 59(e) motion. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.), cert. denied, 488 U.S. 820 (1988). Rule 59(e) was adopted to clarify that "the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of*

Employment Sec., 455 U.S. 445, 450 (1982) (internal quotations omitted). A Rule 59(e) motion may be granted to correct a manifest error of law or fact, or to consider newly-discovered evidence. See *Hagerman*, 890 F.2d at 414 (citation omitted).

Here, the new evidence establishes that in the view of the Court, Defendant Cahill, the head officer of the DDC and the supervisor of Cohen, had full knowledge of the practice of whitewashing as alleged by Plaintiff, leading to the parallel conclusion that whitewashing was accepted as a common practice by the defendants, and presumably other staff members of the DDC. Had such facts been confirmed during the trial stage, the jury would have come to know and understand the illegal activities that were accepted as everyday practice by the DDC staff, a finding totally consistent with a main element of Plaintiff's case. The Court's statement after the close of trial accepting the establishing the whitewashing activities by Defendant Cahill must be found to constitute grounds for granting the instant motion.

V. Witness Tampering – Threat on Witness In a Federal Proceeding

Based on information heretofore submitted in this proceeding, the court is aware that one of Plaintiff's witnesses, DDC staff attorney Nicole Corrado, was confronted by her DDC supervisor on the street just prior to her deposition in this proceeding. As this court is also aware, plaintiff's former counsel, John Beranbaum, advised the court of this incident in a letter to the court dated October 24, 2008. **(See Exhibit "C")** In the Beranbaum submission, it was made clear to the court that Ms. Corrado was given a "'warning' about the testimony she was to gave at the deposition[,]" and further advised that "Ms. Corrado is very upset about the entire experience."

Mr. Beranbaum again raised the issue on the record four days later on October 30, 2008. **(See Exhibit, "D" – Transcript of October 30, 2009 hearing, Page 26 (lines 17-25),**

and page 27 (lines 1-8)). The court, in responding to the letter advising of the threat on plaintiff's witness, commented, "You [Mr. Beranbaum] seem to want to tell me something or report it to me. Okay. You report it to me." It is plaintiff's belief that the court had an obligation to report the matter to federal agents and, further, to interview Ms. Corrado concerning the incident. Plaintiff believes she has been severely prejudiced by the threat upon witness Corrado, and, as the court is aware, Ms. Corrado did not appear at a witness in this proceeding. While plaintiff is aware that counsel within the Office of the New York Attorney General's office offered to "fully" compensate Mr. Beranbaum for ALL of his legal fees, expenses, etc., if plaintiff settled her case, I am unaware of the exact timing of when the compensation offer, believed to be between $120,000.00 and $150,000.00, was actually made.

VI. Conclusion

For the reasons set forth in detail herein, Movant respectfully requests that this Court in the interest of justice grant a new trial. As noted, the participation of the Attorney General in failing to investigate the charges submitted by plaintiff against the defendants, and subsequently representing these same persons in the instant court proceedings, denied plaintiff's constitutionally protected right to a fair and impartial trial. This denial of basic rights was compounded by unclear, confusing and convoluted instructions to the jury, discovery of new evidence and serious allegations of intimidation of witnesses, which all support the instant motion for a new trial. For all of the reasons set forth herein, the plaintiff is entitled and warrants being accorded a new trial. Furthermore, Movant is Ready willing and able to go to trial immediately and no delay, harm, or prejudice will occur to the other parties as a result of Movant's motion. Inasmuch as the Attorney General should even be denied the opportunity to answer, and as justice demands, the court should *sua sponte,* grant the herein sought relief. I declare under penalty of perjury that the foregoing is true and correct.

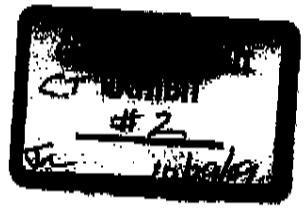
Wherefore, Movant respectfully requests that after notice and hearing, the judgment rendered in this case be set aside and the Movant be granted a new trial.

Respectfully submitted,

Dated: New York, New York
November 16, 2009

Christine C. Anderson, *plaintiff*
227 Riverside Drive – Suite 2N
New York, New York 10025
917-817-7170 tel

Exhibit "A"



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTINE C. ANDERSON,

Plaintiff,

- against -

THOMAS J. CAHILL, SHERRY K. COHEN, and DAVID SPOKONY,

Defendants.

VERDICT SHEET

07 Civ. 9599 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

RETALIATION

Deprivation of a Federal Right: Plaintiff's Acts of Speech

1. Has plaintiff proven, by a preponderance of the evidence, that she made statements that the DDC failed to diligently prosecute complaints of misconduct made by the public against attorneys?

YES ✓ NO _____

If "YES," proceed to Question 2. If "NO," you are done and this is your verdict.

Deprivation of a Federal Right: Motivating Factor

2. Has plaintiff proven, by a preponderance of the evidence, that her statements were a motivating factor in any defendant's decision to terminate her?

   a. Thomas J. Cahill: YES ____ NO ✓

   b. Sherry K. Cohen: YES ____ NO ✓

   c. David Spokony: YES ____ NO ✓

If "YES" to Cahill and/or Cohen and/or Spokony, proceed to Question 3 as to that defendant.

If "NO" to Cohen and/or Spokony, you are done and this is your verdict as to that defendant.

If "NO" to Cahill, proceed to Question 6, *unless* you answered "NO" to Cohen, in which case you are done and this is your verdict as to Cahill.

Deprivation of a Federal Right: Intent

3. Has plaintiff proven, by a preponderance of the evidence, that any defendant acted with an intent to deprive the plaintiff of her right to freedom of speech or with reckless disregard of that right?

   a. Thomas J. Cahill: YES ____ NO ____

   b. Sherry K. Cohen: YES ____ NO ____

   c. David Spokony: YES ____ NO ____

If "YES" to Cahill and/or Cohen, and/or Spokony, proceed to Question 4 as to that defendant.

If "NO" to Cohen and/or Spokony, you are done and this is your verdict as to that defendant.

If "NO" to Cahill, proceed to Question 6, *unless* you answered "NO" to Cohen in this Question or Question 2, in which case you are done and this is your verdict as to Cahill.

Deprivation of a Federal Right: Affirmative Defense

4. Has any defendant proven, by a preponderance of the evidence, that he or she would have made the same decision even if plaintiff's speech had never occurred?

a. Thomas J. Cahill: YES ____ NO ____

b. Sherry K. Cohen: YES ____ NO ____

c. David Spokony: YES ____ NO ____

If "YES" as to Cohen and/or Spokony, you are done and this is your verdict as to that defendant.

If "YES" to Cahill, proceed to Question 6, *unless* you answered "YES" to Cohen or "NO" to Cohen in Questions 2 or 3, in which case you are done and this is your verdict as to Cahill.

If "NO" to Cahill and/or Cohen, and/or Spokony, proceed to Question 5 as to that defendant.

Proximate Cause

5. Has plaintiff proven, by a preponderance of the evidence, that any defendant's acts were a proximate cause of any damages claimed by plaintiff?

   a. Thomas J. Cahill: YES ____ NO ____

   b. Sherry K. Cohen: YES ____ NO ____

   c. David Spokony: YES ____ NO ____

If "YES" to Cahill and/or Cohen and/or Spokony, proceed to Question 7 as to that defendant.

If "NO" to Cohen and/or Spokony, you are done and this is your verdict as to that defendant.

If "NO" to Cahill, proceed to Question 6, *unless* you answered "NO" to Cohen in this Question or Questions 2 or 3, or "YES" to Cohen in Question 4, in which case you are done and this is your verdict as to Cahill.

Supervisor Liability

6. Has plaintiff proven, by a preponderance of the evidence, that Thomas Cahill created a policy or custom that permitted Cohen to deprive Anderson of her right to free speech? Answer this question if, and only if, you answered "YES" to each of Questions 1-3 and 5 and "NO" to Question 4 with regard to Cohen.

YES ____ NO____

If "YES," proceed to Question 7.

If "NO," you are done and this is your verdict as to Cahill.

DAMAGES

7. Has plaintiff proven, by a preponderance of the evidence, that she has suffered damages the following categories?

   Economic Damages NO

   Pain & Suffering NO

8. By what amount, if any, do you find that defendants have proven, by a preponderance of the evidence, that plaintiff's award should be reduced for her failure to exercise reasonable diligence and care in seeking suitable employment or self employment after her termination?

   Amount, if any 0

Your foreperson must now sign and date the verdict sheet.

Signature of foreperson

10/29/09
Date

Exhibit "B"

VERDICT SHEET

WE ARE UNCERTAIN AS TO HOW QUESTION #1 IS TO BE READ ON THE V. SHEET -- IT SEEMS AMBIGUOUS.

IS THE QUESTION SPEAKING TO WHETHER OR NOT SHE (ANDERSON) MADE THE STATEMENTS OR IS THE QUESTION DIRECTED TOWARD WHETHER OR NOT THE DOC RESPONDED (INVESTIGATED) PROPERLY TO THE STATEMENTS SHE MADE?

THANK YOU

Mavadi's Explanation of Above

ANDERSON NOTE:

① The Honorable Shira A. Scheindlin wrote,

"The circled statement is correct
Judge Scheindlin"

② The circled section reads,

"Is the Question speaking to whether or not she (Anderson) made the statements"

Exhibit "C"

October 24, 2008

BY FAX
Honorable Shira A. Scheindlin
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: Anderson v. State of New York et al
07 Civ. 9599 (SAS) (AJP)

Dear Judge Scheindlin:

This law firm represents the plaintiff, Christine Anderson, in the above matter.

I am writing regarding a sensitive matter concerning possible witness tampering. As you know, Ms. Anderson is suing the State of New York for her wrongful termination as an attorney with the First Judicial Department's Departmental Disciplinary Committee ("DDC"). During discovery, plaintiff deposed a former co-worker, an attorney currently working at the DDC, Nicole Corrado. Ms. Corrado recently contacted my client to tell her that a DDC supervisor, shortly before her deposition, had given her "warning" about the testimony she was to give at the deposition. Ms. Corrado reported this matter to the New York State Supreme Court, Appellate Division, First Department, and spoke with Kay-Ann Porter Campbell, Managing Inspector General for Bias Matters, Office of the Inspector General, New York State Unified Court System. As related to me by Ms. Corrado, Ms. Campbell advised Ms. Corrado that either she or plaintiff's attorney – myself – report this matter to the presiding judge in this action.

I have no basis to believe that Ms. Corrado's deposition testimony regarding the merits of this case was altered as a result of the warning she received. From what I can tell, the supervisor in question was more concerned about what Ms. Corrado might say about the supervisor rather than about what she might say about the substance of this case. Nonetheless, I believe this is a

serious matter, the Office of the Inspector General has recommenced that I advise the Court about it, and Ms. Corrado is very upset about the entire experience. For all these reasons, I am now alerting the Court as to this matter.

A court conference is scheduled in this case on October 30, 2008. I would suggest that the parties discuss the matter at that time. Of course, if the Court wants me to provide additional information before that date, I will do so.

Thank you for your attention to this matter.

Respectfully submitted,

John A. Beranbaum

cc: Lee Alan Adlerstein, Assistant Attorney General

Exhibit "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHRISTINE ANDERSON,

Plaintiff,

v. **07 Civ. 9599 (SAS)**

THE STATE OF NEW YORK, et al.,

Defendants.

----------x

October 30, 2008

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

JOHN BERANBAUM
Attorney for Plaintiff

ANDREW M. CUOMO
Attorney General of the State of New York
BY: LEE ADLERSTEIN
WESLEY BAUMAN
Assistant Attorney General

(Case called)

THE COURT: Good morning, Mr. Beranbaum.

MR. BERANBAUM: Yes, your Honor.

THE COURT: That's you.

And Mr. Adlerstein?

MR. ADLERSTEIN: Yes, your Honor.

THE COURT: And Mr. Bauman.

MR. BAUMAN: Yes, your Honor.

THE COURT: Okay. Is there also -- no, there is no person named Sherry Cohen -- those are the clients. Okay. That's who is here.

I received four letters in preparation for today's conference; an October 3rd letter from defendant's counsel in response to this Court's requirement that a letter be submitted on, for every pre-motion conference saying that the defendant would like to move for summary judgment and explaining why the defendants think they could prevail, and then on October 23rd plaintiff's response with respect to the potential defendant's summary judgment motion, and then the letter dated October 24th from plaintiff's counsel expressing a concern about a deponent's testimony, and then a response dated 10/27 -- October 27th from the defendants responding to the plaintiff's October 24th letter regarding that deponent's testimony.

I would like to, of course, start with the discussion about summary judgment. And while -- oh. I'm sorry to

interrupt myself but I want to thank you for coming early. You were on for 1:30 and managed to change to 10:30 and the Court appreciates that.

So, without asking you to repeat your entire letter since I don't usually take oral argument on a motion, I do it up front, so to speak, by having the pre-motion process this becomes the equivalent of the oral argument. So, it is a good chance for me to hear a little bit more about this proposed motion even though it might, to some extent, repeat the letter.

So, with that, Mr. Adlerstein or your colleague, do you wish to be heard?

MR. ADLERSTEIN: Yes, your Honor. I can speak to and I want to just mention again if my voice defects me to some extent, I know that the Court will understand.

THE COURT: Yes.

MR. ADLERSTEIN: We think that we have a strong motion on various grounds and, essentially, there are three claims here. There is a discrimination claim based on racial discrimination, there is a whistle-blowing claim that's based on things that the plaintiff said that she was telling people during the course of events that led to her dismissal, and then finally there is a retaliation claim which kind of, I guess, blends into the whistle-blowing claim in very large measure.

The reason we think we have a strong motion for summary judgment is that when the record is examined as a

whole -- and we would expect in a motion, your Honor, to of course delve into the record and show your Honor the specific deposition testimony and documentation which pertains here and there is a fair amount of deposition testimony and also a substantial amount of documentation which relates to the case because there was intraoffice communications of various kinds that went on -- we think that the discrimination claim just will not hold up to scrutiny on a summary judgment basis.

We think that Mr. Beranbaum, in his own letter I think, in effect, acknowledges that he has some heavy lifting because he relies on precedent to the effect that the person who allegedly was the source of the racial animus, Sherry Cohen or such is the allegation, through communications that she made, infected other people who were decision makers in having Ms. Anderson discharged from her position. And on the basis of that infection, as it were, the decision as a whole to dismiss Ms. Anderson should be regarded as resulting from racial discrimination.

So, you have kind of a double thing that is a result from the racial discrimination. There is kind of a proximate cause relationship there. And I think we're going to be able to show that the decision on the part of the Office of Court Administration Personnel as well as the Court personnel who made the decision to discharge Ms. Anderson, was not affected by any kind of racial discrimination.

THE COURT: But what I am worried about is whether that's a fact issue. I can't comb the record and then decide facts.

MR. ADLERSTEIN: Well, your Honor, I think again that gets me to my next point, that there is simply no evidence by which a fact finder could infer that there was racial discrimination.

THE COURT: What if Ms. Cohen's behavior shows it?

MR. ADLERSTEIN: Ms. Cohen's behavior or alleged behavior --

THE COURT: Yes.

MR. ADLERSTEIN: -- we think is based solely on unsubstantiated conjecture --

THE COURT: Wait. Wait.

MR. ADLERSTEIN: -- and speculation.

THE COURT: What does that mean? A plaintiff can create an issue of fact.

If a plaintiff says -- not taking this case now and making up a hypothetical case, a typical case of sex discrimination, let's say -- he touched me, he said, he did. Whatever that plaintiff says is evidence. It is not conjecture or speculation. If the plaintiff says that the defendant -- and I said I'm making up a difference case so you won't think it is this one -- but you know, he did something inappropriate. That's her version. And in that case that would be enough to

get to a jury.

MR. ADLERSTEIN: Except the plaintiff's own language doesn't link it to race and the only evidence that the plaintiff even attempted to link that allegation to race is based on conjectural testimony from other employees which will not hold up both on a matter of fact that it would not be admissible evidence and also that it is unsubstantiated and speculative.

THE COURT: Well, wait. Ms. Anderson testified that she heard Ms. Cohen making racially derogatory remarks about Black people and Hispanics?

MR. ADLERSTEIN: I don't believe that that is actually an accurate portrayal of what's in the record.

THE COURT: Oh. Well, I don't -- I didn't study the deposition but that's what was represented to me in the letter.

MR. ADLERSTEIN: Right.

THE COURT: Did Mr. Beranbaum lie in the letter? Did you lie in the letter or did she say in her deposition that she personally heard Ms. Cohen making racially derogatory remarks about Black people and Hispanics?

MR. BERANBAUM: That's correct. She has told me that.

THE COURT: I didn't ask you what she told you, I said what did she say in her deposition under oath? Is it there or not there in the transcript?

MR. BERANBAUM: There is -- some of it is there and

some of it was not asked and so it was not -- and so, she didn't need to answer it but she will provide an affidavit that's not inconsistent with a deposition.

THE COURT: Right. An affidavit can't be inconsistent. It will be completely discounted.

MR. BERANBAUM: It won't be.

THE COURT: That means it will open up another deposition. I mean, if she's going to say things that are new that are in an affidavit here, we haven't gotten very far.

MR. BERANBAUM: Well, these are remarks that Ms. Cohen said about Black people and about Hispanics.

THE COURT: I know, but Mr. Adlerstein doesn't know about this. This is not in the record. I thought the record was closed. Now she wants to submit an affidavit in support of defending defendant's summary judgment motion.

MR. BERANBAUM: Some of it isn't in the deposition and, as I said, it is not going to be inconsistent.

THE COURT: I heard him saying that but it is new and if Mr. Adlerstein did know about it he wouldn't have made the motion. So, I'm wondering if you shouldn't just do the affidavit right now and find out what it is that she's going to say that's not in the deposition and Mr. Adlerstein can look at the deposition and he can analyze for himself whether he thinks it is inconsistent and write a letter to the Court saying you can't accept the affidavit, it is only inconsistent, or you can

say, well, I agree that wasn't asked, it is not inconsistent. If that's what she's going to say in opposition to the motion I can't move on that one claim.

Anyway, you were starting to say?

MR. BERANBAUM: I would be happy to do that.

THE COURT: Then do it. When can you get the affidavit out?

MR. BERANBAUM: Next week.

THE COURT: What day? Close of business Wednesday?

MR. BERANBAUM: Sure.

THE COURT: Okay. So, in any event, let's say she did say what he put in his letter that she heard Ms. Cohen making racially derogatory remarks about Black people and Hispanics, and then another witness would say -- and maybe this isn't good enough -- but Black investigators of the DDC, you would say Ms. Cohen discriminates against employees of color by routinely harassing, demeaning and micro-managing them until they eventually are forced out of their jobs.

Do you know about that testimony, this DDC investigator or, again, this is new and not in the record right now?

MR. ADLERSTEIN: Well, there is testimony from co-workers where they make blanket statements to that effect. However --

THE COURT: Do you know who this actual person is, a

former Black investigator at the DDC that he quotes in the letter? Do you know who that is?

MR. ADLERSTEIN: Yeah. The person was -- there were two people.

THE COURT: As long as you know who it is.

MR. ADLERSTEIN: There were two people who were deposed.

THE COURT: Okay.

MR. ADLERSTEIN: And what we have done is we have taken a look at that deposition testimony which the plaintiff took and that deposition testimony is wholly conclusory. There is no specifics where the individual says that they were able to see how the conduct toward individuals they claimed who were treated differently was related to race. It was a totally conclusory fact.

I would ask the Court to consider the fact that we will be able to cite case law. We just received a decision from Judge Sifton in a case that we didn't cite in our letter, a case called Moore v. New York State Division of Parole, 2008 U.S. District Lexis 72260, where a similar testimony was offered in opposition to a motion for summary judgment. And Judge Sifton cited case law rejecting the import of that testimony to the effect that this was wholly conclusory statements, that the impression of the person who was being asked was that there was discrimination going on saying that I

don't like how this particular person was treated and because I didn't like how this person was treated it must have been because of race.

That kind of testimony has been rejected under case law and I think that irrespective of what Mr. Beranbaum is going to be coming up with, I doubt very much that it is going to be able to be linked to specific conduct on Ms. Cohen's part or anyone else's part which demonstrates in any way, shape, or form that race was in any way linked to the decision that was made with respect to Ms. Anderson.

THE COURT: As for this recent decision, there are hundreds and hundreds of District Court opinions on employment discrimination cases. It is really best to cite controlling law which is Circuit or Supreme Court. One can get lost in the thicket of District Courts so I think the most persuasive authorities for me usually are of course starting with the United States Court; second, the Second Circuit Court of Appeals; and third, if I have said it in a prior opinion I guess I should be reminded. But, other than that, you know, the plethora of District Court cases are not too fascinating.

MR. ADLERSTEIN: Judge Sifton does cite a District Court case.

THE COURT: Then you should too.

MR. ADLERSTEIN: A case called Schwab v. Toufayon.

THE COURT: Yes. I remember that case.

MR. ADLERSTEIN: He cites that case.

THE COURT: That's fine.

MR. ADLERSTEIN: And I think the prevailing law is along those lines.

So, I would submit to the Court that there is at least a very serious issue here about a link to racial discrimination which your Honor ought to take a look at on summary judgment as to whether you have more than speculative and conclusory testimony as well as whether or not there is a real link between anything Ms. Cohen would have thought or said or done and the actual decision to have dismissed --

THE COURT: Okay. Let's go to retaliation.

MR. ADLERSTEIN: So that's on that.

THE COURT: Can we go to retaliation?

MR. ADLERSTEIN: Absolutely. Opinion on the whistle-blowing or retaliation claim, there I know your Honor has recently written on it in the Fiero case. We took a look at Fiero as well as other cases. We cited the Routolo case.

THE COURT: Oh yeah, Fiero. They're appealing that. Somebody is appealing Fiero. They don't like what I did.

MR. ADLERSTEIN: Okay.

THE COURT: You didn't like it.

MR. ADLERSTEIN: Routolo.

THE COURT: No, no. Fiero.

MR. BERANBAUM: In Fiero your Honor decided that the

speech involved was, in effect, citizen speech, it wasn't because the person was actually saying that the employee was saying that they had been asked to do specifically dishonest acts.

THE COURT: It was a teacher dispute.

MR. ADLERSTEIN: Right. Right. And what the Routolo case instructs, as well as other cases, is that essentially which side of the fence the speech is on that was allegedly linked to the firing --

THE COURT: Right.

MR. ADLERSTEIN: -- is to be determined by a Court as a matter of law.

THE COURT: Okay.

MR. ADLERSTEIN: And so, we think that the motion for summary judgment will provide an opportunity. It will be our position, your Honor, that the record shows that the alleged speech was essentially linked to the plaintiff's job and her job duties. What she claims to have done was to have said to some superiors, I think that you are going too easy on some people in some cases and as a result of that we are not fulfilling our mission. However, at the same time she doesn't go beyond the small circle of people that she's talking to. There is allegations in the complaint that somehow this was an allegation relating to corruption that was going on. When the plaintiff was asked about corruption inside the agency in her

deposition, the plaintiff was unable to point to any specific instance of corruption or any real patterns of corruption. It just didn't hold up.

And so, we think that we are going to be able to show in this motion, through a combination of all the circumstances which the Courts have said contribute to a decision on what kind of speech it is, whether it is in effect citizen speech or whether it is job-related speech, we think we are going to be able to show, your Honor, that clearly here what happened was that it was job-related speech and that it was not speech as a citizen.

We understand that the plaintiff is --

THE COURT: Therefore it doesn't have the same First Amendment protection.

MR. ADLERSTEIN: That's right. That's right.

THE COURT: How does that help us with the retaliation claim itself?

MR. ADLERSTEIN: Well, because the retaliation claim is essentially that the plaintiff was dismissed as a result of having told Katherine Wolf, who was the chief clerk, as well as some other vague claims that the plaintiff has made about perhaps telling others as Mr. Beranbaum said in his letter, about such things. However, we have not seen substantiation of that in the record. And even though Ms. Wolf denies that the plaintiff made any of those kinds of comments to her, we think

that even if she had said what she claims to have said to Ms. Wolf, it wouldn't have comprised the kind of speech which is protected. And also --

THE COURT: Once the speech isn't protected, let's say it is in the course of her job, it is not a citizen job, then they can fire her for the speech.

MR. ADLERSTEIN: That even if they had fired her for the speech that it would have been permissible. However, we, at the same time we are going to be able to show that the firing itself was not linked to that speech and so that the causation hasn't been shown. That's essentially the first step is to show that.

THE COURT: You have a two-prong attack.

MR. ADLERSTEIN: Yes. And basically it is a two-prong attack and that under Routolo, because it is an issue of law, it provides the Court the opportunity to weigh into that particular issue.

THE COURT: Well, except you are saying even if it was protected speech it doesn't matter.

MR. ADLERSTEIN: Right.

THE COURT: She wasn't fired based on the speech now as a matter of law, not issue of fact.

MR. ADLERSTEIN: Right. And we also think we are going to be able to show that there was a lack of temporal proximity because the conversation with Ms. Wolf took place in

August of '06, the firing took place in June of '07; that this would not have been linked to the -- so, there is various instances that we would like to be able to present to the Court on that particular issue.

THE COURT: Okay.

MR. ADLERSTEIN: And I would submit, on that basis, the motion for summary judgment will be of at least substantial assistance to the Court.

THE COURT: There is no such thing as substantial assistance. Either you win it or you lose it. You think you can win it.

MR. ADLERSTEIN: We think we can.

THE COURT: Because I don't need any assistance.

MR. ADLERSTEIN: No, but I mean in terms of the parties involved in shaping the case and we think we will win.

THE COURT: Mr. Beranbaum, do you want to respond?

MR. BERANBAUM: Yes.

In terms of the race discrimination case, as the Court well knows race discrimination, the determination is one of intent and that's a province usually reserved for the jury to make that decision in summary judgment.

THE COURT: There has to be some evidence on which they can make it. What the summary judgment motion is saying on the discrimination case is the record has no evidence; not only little evidence but no evidence.

MR. BERANBAUM: Yes. And I think that that's just an incredible position to take.

THE COURT: Why?

MR. BERANBAUM: I will explain.

THE COURT: Okay, but yes, but here is my question. Because a supervisor can harass an employee for all kinds of other reasons, they just don't like the way they dress or they don't like I don't know what else, they don't like the way they speak or something or other. And while it is not a nice thing, it is not actionable. This has to be linked to race.

MR. BERANBAUM: That's right.

THE COURT: Okay.

MR. BERANBAUM: And here a jury could make a reasonable inference linking the adverse action, the hostility, the hostile environment and the recommendation for firing --

THE COURT: Based on what.

MR. BERANBAUM: -- with race.

THE COURT: Because the plaintiff is a minority? That's not enough.

MR. BERANBAUM: It is certainly not my position.

THE COURT: Okay. So what is the evidence?

MR. BERANBAUM: The evidence is that she has been heard by co-workers, including my client, of making racially insensitive maybe racist remarks, that she has an animus towards minorities and Black people in particular as reflected

by those remarks.

The remarks, it is contrary to counsel's characterization that these remarks are simply conclusory. The individual I quoted, and his name is Mr. Van Loo, and the defendant took his deposition, not the plaintiff, he, in his affidavit spoke specifically about disparate treatment that he received --

THE COURT: That he himself received?

MR. BERANBAUM: Correct.

THE COURT: Not reporting about what he thinks she said to others.

MR. BERANBAUM: That's correct, your Honor. And, candidly, that's an issue. If we can show, which I think we can, a generalized racial animus reflected in both her treatment and disparate treatment to my client and others and racially insensitive remarks, if we can show that she had that animus and we can show that she was the prime mover in the termination of my client, I think that's enough to get to a jury and that's our case.

THE COURT: Funny, you don't really disagree much with Mr. Adlerstein, you just think the law is broader in accepting that kind of generalized proof than he does.

MR. BERANBAUM: No, I --

THE COURT: I mean, she can't say that this supervisor said to me or wrote to me or did anything to me that was

explicitly race discrimination so it is more of a generalized allegation: She didn't treat me very well and, by the way, she is a racist.

MR. BERANBAUM: She didn't treat me very well and, in fact, she treated me differently than White people.

THE COURT: Right.

MR. BERANBAUM: She made ably insensitive remarks in my presence.

THE COURT: We don't have that here. That's going to be this affidavit.

MR. BERANBAUM: We do have that. I'm being perfectly on the safe side. I didn't review the deposition. They might all be in there but I want to be on the safe side and if there is anything that is not in there I will have an affidavit but, trust me, there is remarks in the deposition. And thirdly, what she said to other people and how she -- minorities and how she acted towards other people. That's our evidence.

THE COURT: Okay. It sounds like a difficult case.

MR. BERANBAUM: Can I just make one other point?

THE COURT: Yes.

MR. BERANBAUM: On top of that, there was extraordinary efforts made against this woman and some of which I referred to, these biased evaluations, not letting her respond to them, keeping her in the supervision of a woman who she feared because she had been assaulted. And there is case

law, as I'm sure your Honor recognizes, that this kind of irregular treatment one can infer in combination with other evidence was caused by discriminatory animus.

THE COURT: All right. This may be one of the rare cases where the discrimination claim may survive and the retaliation won't. We often have the opposite outcome at the end of the day. Do you want to address the retaliation claim briefly?

MR. BERANBAUM: Sure.

The retaliation claim, and you know I think Mr. Adlerstein and I agree that the issue here is under Garcetti. She was speaking as a disgruntled employee.

THE COURT: He goes one step farther and says even if the speech was protected, there is no proof she was fired.

MR. BERANBAUM: Yes, and that's a fact question.

THE COURT: Not necessarily. There, again, has to be some facts in the record from which a reasonable juror could find that she was fired because of her speech. There has to be something to support it. A jury can't just pluck it out of the air.

MR. BERANBAUM: Well, I can show temporally --

THE COURT: He said the opposite. He said temporally, no, no, no, but he gave me some dates, for his part of the record and I will have the transcript to look at. What do you have to say? Surely the date of termination is the same. What

did you tell me it was?

MR. ADLERSTEIN: June of '07, your Honor.

THE COURT: That must be agreed upon.

MR. BERANBAUM: Right. And the assault that I mentioned that grew out of her complaint was in June of '06. And thereafter there was a series of adverse -- of negative and hostile actions on the part of this woman.

THE COURT: I know, but her speech, the complaining speech. What was the complaining speech? By the way, because you don't pause so there is no use talking to you.

MR. BERANBAUM: I'm sorry.

THE COURT: Mr. Adlerstein, when is the complaining speech.

MR. ADLERSTEIN: When I was alleging to this alleged whistle-blower speech, in August of '06.

MR. BERANBAUM: Right.

THE COURT: So a year.

MR. BERANBAUM: In September of '06.

THE COURT: Still close to a year earlier.

MR. BERANBAUM: But I think the record will make it clear that she continued to make complaints. Then she spoke to Mr. Cahill and there are --

THE COURT: What is the most recent speech to the termination that you have in the record?

MR. BERANBAUM: In the record, she submitted a

grievance in which she referred to the retaliation for her complaints about the soft treatment that the DDC was according attorneys and that was in the spring.

THE COURT: She was fired when again? June? June.

MR. BERANBAUM: Yes. Truly, the Garcetti issue I think is really what's key.

THE COURT: I don't know about that. It may mean there is not enough of a link no matter what.

Okay. I think I get the argument. If there is nothing you wish to add I thank you both for coming in early.

We need to go over the schedule, or do we?

MR. ADLERSTEIN: Well, I think it would be helpful to have a schedule.

THE COURT: But I'm saying we don't have one yet.

MR. ADLERSTEIN: No, we do not.

THE COURT: That's the next step, to set the schedule.

I have one other question. Have you tried to mediate this employment dispute in the building? I send the case to a magistrate judge or the Court Annexed Mediation Program. Did I do either here?

MR. BERANBAUM: I suggested it. We had suggested it.

THE COURT: I don't wait for your consent other than which one do you want, magistrate judge or Court Annexed Mediation Program which of course is free, but you have to go to one or the other.

MR. BERANBAUM: I see.

THE COURT: Maybe you didn't do that because at one time Ms. Anderson had a different lawyer, I think it was a different setting. In any event, I didn't send you. Is that it?

MR. BERANBAUM: Correct.

THE COURT: Do you want to go to magistrate judge or the Court Annexed Mediator?

MR. ADLERSTEIN: I think the magistrate judge.

THE COURT: Fine. What month would you like to?

MR. BERANBAUM: Your Honor, may I say something?

THE COURT: No. Not really. It is going to go to the magistrate judge.

MR. ADLERSTEIN: Would that be the same magistrate judge because my --

THE COURT: As what?

MR. ADLERSTEIN: As has been handling the discovery.

THE COURT: In the Anderson case?

MR. ADLERSTEIN: Yes.

THE COURT: Who is that?

MR. ADLERSTEIN: Judge Peck. And the only reason I say so, Judge Peck is in my eyes is great but we've had some sort of discovery run ins. My client feels a little weary and I don't think it would be productive in that case.

THE COURT: I don't know. I have to speak to the, I

guess, the chief magistrate judge whether they can assign it to a different one for settlement purposes only. So, I will fill out the form and then I will look into that but I do want to make sure it gets done. So, I will put down November. If you are going to talk settlement you might as well talk. Discovery is pretty well known so I will put down November and we will see who it will be.

MR. ADLERSTEIN: Your Honor, perhaps if -- no, that's okay.

THE COURT: I want to get you a schedule for the summary judgment so I can move on to the remaining cases and get out on time.

MR. ADLERSTEIN: Your Honor, may I make a suggestion about the schedule?

THE COURT: All right.

MR. ADLERSTEIN: We were going to ask your Honor for a January date for submission of the motion. There is a couple of things going on. First, my hours have been curtailed because of the fact that I haven't been feeling well, I'm under some medication with what I have been dealing with; and secondly, both Mr. Bauman and I have a trial in front of Judge Sifton scheduled for December the 8th, and so we think that we would be able to get a motion in by the early part of January.

THE COURT: Today is October 30th. I thought you meant that that would be fully submitted by then. Moving

papers would be before and the response papers and reply papers.

MR. ADLERSTEIN: I respectfully request that for those factors, my hours have been curtailed and also we do have that trial that we need to concentrate on. In that case there is a fair amount of pretrial activity that judge Sifton has ordered, and it just happens that Mr. Bauman and I are both involved in that trial. And so, I would respectfully request that the Court allow us to see clear to --

THE COURT: But you have a big, big, big office. In other words, are you not the only two people there. To ask basically that the case go on hold for two and a half months is what you are saying. You know, once the papers are filed in summary judgment from the moment the first person files and then the next response and then reply and then waiting for the Court, it almost always takes half a year. That's my experience from beginning to end and that's a long time so I just wanted to start the process. I'm not saying it has to be filed in a week or 10 days, but to ask for two and a half months to file papers, I understand the reasons that you two are but you have a big, big office.

MR. ADLERSTEIN: Well, the fact is, your Honor that --

THE COURT: And your case before Judge Sifton may settle. That happens all the time.

MR. ADLERSTEIN: I don't expect that case is going to

settle. That hasn't been successful before and also there is a fair amount of ground to cover here and I'm just looking to try to be realistic and not have the kind of pressure which I think would be very difficult to deal with under the circumstances.

THE COURT: What is your view?

MR. ADLERSTEIN: I had mentioned that to Mr. Beranbaum.

THE COURT: Mr. Beranbaum, what is your view?

MR. BERANBAUM: I'm certainly going to accommodate Mr. Adlerstein's not feeling well and he's always extended me courtesies and so I don't feel like I'm going to object to his needs and trust what he has to say.

THE COURT: But, Mr. Adlerstein, since I'm not a great fan of this proposal in the first place I'm not going to give any adjournment. I don't see how you are better off putting it the day after your trial.

MR. ADLERSTEIN: No, the trial is December 8.

THE COURT: I know.

MR. ADLERSTEIN: So if your Honor gave us --

THE COURT: How long is it supposed to last?

MR. ADLERSTEIN: Probably a week or a little bit more. If your Honor gave us an early January date it would be my expectation -- I'm not going away in the holiday period.

THE COURT: Okay. But, I'm telling you now I'm not going to adjourn it, it is a no adjournment schedule. January

7th for the moving papers.

MR. ADLERSTEIN: Thank you.

THE COURT: No adjournments.

Mr. Beranbaum, how long do you need to respond to it?

MR. BERANBAUM: I would like four weeks, please.

THE COURT: February 4th.

How long do you need to reply, Mr. Adlerstein?

MR. ADLERSTEIN: Three weeks, your Honor.

THE COURT: See my point? February 25th.

MR. BERANBAUM: I think two weeks is the ordinary.

THE COURT: There is no ordinary. February 25th is it. This is a no adjournment schedule: January 7th, February 4th, February 25th, all page limits apply. Exhibit limits, don't tinker with them they're out there in the rules. They're out there in the internet. That's it. Or you can get them off the court website. Thank you.

MR. BERANBAUM: Your Honor, would you want to address my second letter?

THE COURT: Oh, right. Your second letter.

You know, I don't think there is much to address. I read the letter. I'm not sure that you are asking me anything. You just seem to want to tell me something or report it to me. Okay. You reported it to me. You are not really asking me to do anything, are you? If so, your letter didn't make that clear. Do you want me to do anything? We don't need names, I

know you are concerned about privacy. What do you want me to do?

MR. BERANBAUM: As an officer of the court I wanted to apprise the Court of it and, if the Court felt necessary, to refer it to anybody.

THE COURT: I don't.

MR. BERANBAUM: Thank you.

THE COURT: Thank you.

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