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NELA Touro Conference 1999 Selected Second Circuit Cases of Interest

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NELA TOURO CONFERENCE 1999 SELECTED SECOND CIRCUIT CASES OF INTEREST

Lawrence Solotoff¹

The Second Circuit was busy in 1999, weighing in on a number of open and unanswered questions of interest to the Labor and Employment bar.

I. MANDATORY STATUTORY ARBITRATION

I draw your attention to the circuit court's decision on September 22, 1999 in *Desiderio v. National Ass'n of Securities Dealers, Inc.*² On January 15, 1997, the plaintiff filed a complaint in federal district court, before Judge Leisure, against the National Association of Securities Dealers ("NASD") and the Securities and Exchange Commission ("SEC"), seeking to invalidate the mandatory arbitration provision of Form U-4, which she was required to sign in order to register with the NASD for employment as a securities broker.³ She refused to sign the agreement which mandated arbitration of employment-related disputes, and she refused to waive her right to a jury trial under Title VII.⁴ The NASD informed her prospective employer, who had no trouble with the plaintiff modifying the agreement, that the plaintiff could not be registered as a broker.⁵ As a result, her offer of employment was revoked.⁶

The district court dismissed the plaintiff's case on the grounds that she failed to state a claim pursuant to the Federal Rules of Civil Procedure ("FRCP").⁷ The issue on appeal was "whether a

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² 191 F.3d 198 (2d Cir. 1999).

³ *Desiderio v. Nat'l Assoc. of Sec. Dealers, Inc.*, 2 F. Supp. 2d 516, 518 (S.D.N.Y. 1998).

⁴ *Desiderio*, 191 F.3d at 200.

⁵ *Id.* at 201.

⁶ *Id.*

⁷ *Desiderio*, 2 F. Supp. 2d at 522. FED. R. CIV. P. 12(b)(6) and 12(b)(1). Rule 12(b)(6) provides:

pre-dispute agreement requiring compulsory arbitration, such as Form U-4, was enforceable with regard to Title VII claims.”⁸ The SEC was dismissed as a defendant in the case, which resulted in the NASD being the only appellee.⁹ The Second Circuit affirmed the lower court’s determination to dismiss plaintiff’s case.¹⁰ While a large majority of circuit courts have held that Form U-4 validly applies to Title VII claims,¹¹ the Ninth Circuit held that the Form U-4 compulsory arbitration clause was unenforceable with regard to Title VII claims.¹²

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Id. Rule 12(b)(1) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter

Id.

⁸ *Desiderio*, 191 F.3d at 203.

⁹ *Id.* at 201. The appeal against the SEC was stipulated to be withdrawn. *Id.*

¹⁰ *Id.* (citing *Desiderio*, 2 F. Supp. 2d at 522).

¹¹ See *Rosenberg v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Koveleskie v. SBC Capital Mkts., Inc.* 167 F.3d 361, 365 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 44 (1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997).

¹² *But see Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998). See POLICY STATEMENT ON

The conflict in the circuit courts originates from varying interpretations of *Gilmer v. Interstate/Johnson Lane Corp.*¹³ The Second Circuit adopted the *Gilmer* principle, as has a majority of the circuits.¹⁴ This principle states that, “arbitration agreements are enforceable with regard to statutory claims ‘unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue’”¹⁵ Title VII, as amended by the Civil Rights Act of 1991,¹⁶ specifically “encouraged” the use of arbitration to supplement, not supplant, the rights and remedies in Title VII.¹⁷ Effective January 1, 1999 the NASD adopted a rule change that abolished mandatory NASD arbitration of statutory employment discrimination claims.¹⁸ Following the Second Circuit’s ruling in *Desiderio*, plaintiffs with currently pending

MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, 3 EEOC Compl. Man. (BNA) N:3101 (July 10, 1997).

¹³ 500 U.S. 20 (1991).

¹⁴ *Desiderio*, 191 F.3d at 203. See *supra* note 11-12 and accompanying text.

¹⁵ *Id.* at 204 (quoting *Gilmer*, 500 U.S. at 26).

¹⁶ 42 U.S.C. § 1981-A (2000). This section provides in pertinent part:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title

Id.

¹⁷ *Id.*

¹⁸ 63 Fed. Reg. 35299 (June 22, 1998). This regulation provides in pertinent part:

The proposed rule change will modify the current requirement that associated persons arbitrate all disputes arising out of their employment or termination of employment with a member broker/dealer. The proposed rule provides that associated persons are no longer required, solely by virtue of their association or their registration with the NASD, to arbitrate claims of statutory employment discrimination. Associated persons still will be required to arbitrate other employment-related claims, as well as any business-related claims involving investors or other persons.

Id.

statutory discrimination claims that were filed before January 1, 1999 are still compelled to arbitrate.¹⁹ The NASD amendment²⁰ and the SEC's Order Granting Approval²¹ only apply to claims filed on or after January 1, 1999.²²

II. AGE DISCRIMINATION

In *Cooper v. New York State Office of Mental Health*,²³ three separate cases were heard in tandem for the purpose of the circuit court's consideration of the issue as to whether federal courts had subject matter jurisdiction over claims alleging violations of the Age Discrimination in Employment Act ("ADEA"), brought by individuals against state agencies or officials.²⁴ The Second Circuit held, "the Eleventh Amendment did not deprive the district courts of jurisdiction over ... ADEA claims because the Congress abrogated the States' sovereign immunity through a valid exercise of its power under § 5 of the Fourteenth Amendment."²⁵ The court held that Congress may abrogate the States' sovereign immunity if it (1) provides a "clear legislative mandate" of its intent to abrogate, and, (2) legislates pursuant to a valid exercise of its enforcement power under § 5 of the Fourteenth Amendment.²⁶

¹⁹ *Desiderio*, 191 F.3d at 202.

²⁰ 63 Fed. Reg. 35299. See *supra* note 18 and accompanying text.

²¹ See *id.* at 35300 (order granting approval).

²² See *id.* at 35301.

²³ 162 F.3d 770 (2d Cir. 1998).

²⁴ *Cooper*, 162 F.3d at 772. See 29 U.S.C. § 621-634 (1994). Section 621(b) provides:

It is therefore the purpose of this Act [29 U.S.C. §§ 621 et seq.]; to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

²⁵ *Id.* at 773. U.S. CONST. AMEND XIV, § 5 provides in pertinent part: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

²⁶ *Id.* (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 59 (1996)).

The 1974 amendments to the ADEA extended its scope by adding the States and their agencies to the definition of “employer,”²⁷ and by adding “employees subject to the civil service laws of a State government” to the definition of “employee.”²⁸ The 1974 amendments did not alter the ADEA enforcement provisions in 29 U.S.C. § 626(c).²⁹ “The ADEA simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as ‘employers.’”³⁰ The Second Circuit agreed “with the overwhelming weight of authority holding that the ADEA was adopted pursuant to § 5 of the Fourteenth Amendment.”³¹

However, the United States Supreme Court vacated the Second Circuit’s holding in *Cooper*³² in light of *Kimel v. Florida Board of Regents*.³³ In *Kimel*, the Supreme Court held, “the ADEA does contain a clear statement of Congress’ intent to abrogate the States’ immunity, but that the abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment.”³⁴ The Court found that Congress had no reason to believe that the state and local governments were unconstitutionally discriminating against their employees because of their age.

III. RACE DISCRIMINATION, RACIAL HARASSMENT, RETALIATION

²⁷ Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, § 28(a)(2) (amending 29 U.S.C. Section 630(b)).

²⁸ *See id.* § 28(a)(4) (amending Section 29 U.S.C. Section 630 (f)).

²⁹ *See Cooper*, 162 F.3d at 775.

³⁰ *Id.* (quoting *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996)).

³¹ *Id.* at 777 (referring to *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296, 304-05 (6th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 500-03 (5th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057-58 (9th Cir. 1998); *Goshtasby v. Board of Tr. of the Univ. of Ill.*, 141 F.3d 761, 768 (7th Cir. 1998); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1544-46 (10th Cir. 1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. (1996); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700 (1st Cir. 1983)).

³² *Id.* at 772.

³³ 120 S. Ct. 631 (2000).

³⁴ *Id.* at 637.

In *Richardson v. New York State Department of Correction Services*,³⁵ the plaintiff, an African-American female and former Department of Corrections employee, brought claims under Title VII of the Civil Rights Act of 1964,³⁶ alleging that she was subjected to a racially hostile work environment and was retaliated against when she protested and filed a lawsuit to remedy that discrimination.³⁷ The court reversed, in part, the dismissal, by the lower court, of her hostile work environment and retaliation claims.³⁸

The issue before the circuit court was whether Richardson's allegations of racial slurs and abuse should be evaluated to determine whether a reasonable person who is the target of discrimination would find the working conditions so severe or pervasive as to alter the terms and conditions of employment for the worse.³⁹ The circuit court "rejecte[d] the view of those courts that look to the perspective of the particular ethnic or gender group, for example, a 'reasonable African-American' or a 'reasonable Jew.'"⁴⁰ The court articulated, "[w]e believe that examining hostile environment claims from the perspective of a 'reasonable person who is the target of racially or ethnically oriented remarks' is the proper approach."⁴¹ The court stated:

First, Title VII seeks to protect those that are the targets of such conduct, and it is their perspective, not that of bystanders or the speaker, that is pertinent. Second, this standard makes it clear that triers of fact are not to determine whether some ethnic or gender groups are more thin-skinned than others.⁴²

³⁵ 180 F.3d 426 (2d Cir. 1999).

³⁶ 42 U.S.C. § 2000e-2(a)(1), 3(a) (2000), N.Y. EXEC. LAW § 290 *et seq.* (McKinney 2000).

³⁷ *Richardson*, 180 F.3d at 432.

³⁸ *Id.* at 449-50. (reversing *Richardson v. New York State Dep't of Correction Servs.*, 1997 U.S. Dist. LEXIS 20719 (N.D.N.Y. Dec. 22, 1997).

³⁹ *Id.* at 436.

⁴⁰ *Id.* at 436, n.3.

⁴¹ *Id.* at 436, n.3.

⁴² *Id.* at 436.

Furthermore, the court held “[t]here is neither a threshold ‘magic number’ of harassing incidents that give rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.”⁴³ The court stated that Richardson, in order to prevail on her Title VII hostile environment claim, must show more than isolated comments, for instance, “Black inmates look alike.”⁴⁴ Instead, “she must produce evidence that she was discriminated against because of her race”⁴⁵ and must prove that “the conduct complained of was prompted by victim’s status.”⁴⁶

IV. AMERICANS WITH DISABILITIES ACT, JURY INSTRUCTIONS

In *Norville v. Staten Island University Hospital*,⁴⁷ the plaintiff, a 56 year old black female nurse, suffered a spinal injury while at work.⁴⁸ This injury required that she avoid heavy lifting, stretching, and bending.⁴⁹ Following an extended leave of absence and requests for accommodations, Norville was offered an alternative position that would have required her to lose her seniority rights, frozen her pension benefits, increased her vulnerability to layoffs, and provided fewer opportunities with respect to new openings and assignments.⁵⁰ After rejecting the assignment, she was offered part-time employment.⁵¹ Norville then submitted an application for a position for which she was

⁴³ *Richardson*, 180 F.3d.at 439 (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993); *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (noting that hostile environment analysis “is not, and by its nature cannot be, a mathematically precise test”).

⁴⁴ *Id.* at 440.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989).

⁴⁷ 196 F.3d 89 (2d Cir. 1999).

⁴⁸ *Id.* at 93.

⁴⁹ *Id.*

⁵⁰ *Id.* at 94.

⁵¹ *Id.*

qualified, however, the hospital awarded the position to an individual who had less seniority than Norville.⁵² The hospital terminated her employment after she rejected the part-time offer.⁵³ The case went to trial before Judge Melancon on Norville's Americans with Disabilities Act ("ADA") and other civil rights claims.⁵⁴ The jury entered judgment for the hospital on the ADA claims, and the court entered judgment for the hospital on all the other claims pursuant to FRCP Rule 50(a).⁵⁵

Norville argued on appeal that the jury verdict for the hospital on her ADA claims rested on an erroneous jury charge.⁵⁶ The court pointed out, "[s]pecifically, she claimed that the court erred in failing to instruct the jury that an employer's offer of an inferior position does not constitute 'reasonable accommodation' under the ADA when jobs comparable to the employee's former position are vacant."⁵⁷ The Second Circuit held that, in order for the ADA plaintiff to prevail where the employer has offered reassignment as a reasonable accommodation, "the employee must offer evidence showing both that the position offered was inferior to her former job and that a comparable position, for which the employee was qualified, was open."⁵⁸ The employer may demonstrate that no position was available, that the employer need not create a position to accommodate, or that the employee was not qualified for the vacant position.⁵⁹ The burden is on the employee to prove

⁵² *Norville*, 196 F.3d at 94.

⁵³ *Id.*

⁵⁴ *Id.* at 93.

⁵⁵ *Id.* FED. R. CIV. P. 50(a)(1) states:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Id.

⁵⁶ *Norville*, 196 F.3d at 98.

⁵⁷ *Id.*

⁵⁸ *Id.* at 99.

⁵⁹ *Id.*

qualification under the ADA,⁶⁰ and the employer may prove undue hardship.⁶¹

The challenged jury instruction reads as follows:

The defendant has an obligation to reasonably accommodate the plaintiff. A reasonable accommodation is one that does not impose an undue hardship upon the defendant; in this case, the defendant's nursing department. The law does not require the employer to provide every accommodation the disabled employee may request, as long as the accommodation provided is reasonable. The plaintiff does not have the right to choose her reasonable accommodation.⁶²

⁶⁰ *Id.* See 29 C.F.R. 1630.2(o) (2000). This section provides:

The term reasonable accommodation means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Id.

⁶¹ *Norville*, 196 F.3d at 99. See 42 U.S.C. § 12112(b)(5)(A) (2000). This subsection provides in pertinent part:

As used in subsection (a) of this section, the term "discriminate" includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity

Id.

⁶² *Id.* at 100.

The Second Circuit disagreed with the district court's rejection of the above instruction and adopted Norville's counsel's proposed instruction, that "it was not a reasonable accommodation to attempt to assign a disabled employee to a worse position where they would suffer in some way, either by being segregated or receiving less benefits."⁶³ The court added that the jury should have been instructed that, "an offer of an inferior position does not qualify as a reasonable accommodation when a comparable position is available."⁶⁴ Moreover, the jury should determine "whether the positions proposed were in fact inferior and whether a comparable position was vacant."⁶⁵

V. RETALIATORY TERMINATION

In *Holava-Brown v. General Electric, Co.* ("G.E."),⁶⁶ the plaintiff was a temporary leased female employee, working on a computer-assisted design project and assignment pursuant to a written contract for an anticipated duration of six months.⁶⁷ She testified, however, that her supervisor told her the assignment would last for a year to a year and a half.⁶⁸ She complained about her supervisor's sexual advances shortly after arriving on the job in October 1991.⁶⁹ Her job assignment was scheduled to end in April 1992.⁷⁰ In April 1992, she was terminated.⁷¹ *Holava Brown* brought suit against GE, where she had been assigned to work, TAD Resources International, the temporary employment agency, and Lockheed Martin Corporation.⁷² The district court granted the defendants' motion to dismiss all her claims including her claim of retaliatory discharge, but did allow her sexual

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 1999 U.S. App. LEXIS 20146 (2d Cir. 1999).

⁶⁷ *Id.*, at *2.

⁶⁸ *Id.*, at *2-3.

⁶⁹ *Id.*, at *3.

⁷⁰ *Id.*

⁷¹ *Id.*, at *3

⁷² *Holava-Brown*, 1999 U.S. App. LEXIS 20146, at *4.

harassment claims to go to a jury trial.⁷³ The jury awarded a verdict on behalf of G.E.⁷⁴ The issue on appeal was whether the district court properly granted summary judgment on the issue of retaliatory discharge and punitive damages.⁷⁵

Specifically, the Second Circuit was asked to determine whether “failure to renew an employee’s contract, when an oral commitment had been made two or three months after that employee had complained of sexual harassment, could allow a reasonable jury to infer that the decision not to renew the contract was retaliatory.”⁷⁶ The court answered affirmately, stating, “[w]here an employee has engaged in continuing protected activity, all of that activity should be taken into account in analyzing its causal relationship to the adverse employment action.”⁷⁷ However, the court determined, that though evidence suggested the pretextual nature of her termination, GE articulated a “legitimate, non-discriminatory” reason for her termination.⁷⁸ That is, that her job had been completed and the position she vacated was no longer needed or filled.⁷⁹ Holava-Brown was unable to demonstrate that GE’s claim of non-discriminatory discharge was indeed a pretext for retaliation.⁸⁰ Her allegations that her contract would have been extended for a year or more was insufficient, without more, to meet her burden of retaliatory animus.⁸¹ She was unable to prove, for example, that work remaining unfinished was work that could only be done by her.⁸²

VI. BACK PAY, FRONT PAY, LOST PENSION RIGHTS, AND REDUCTION IN FORCE IN ADEA CLAIM

⁷³ *Id.*, at *5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*, at *11-12.

⁷⁷ *Id.*, at *12.

⁷⁸ *Holava-Brown*, 1999 U.S. App. LEXIS 20146., at *13.

⁷⁹ *Id.*

⁸⁰ *Id.*, at *14.

⁸¹ *Id.*, at *15.

⁸² *Id.*, at *16.

In *Banks v. The Travelers Cos.*,⁸³ the issues before the district court were whether the plaintiff, who was terminated in January, 1994, and was awarded \$77,127 in damages for age discrimination under the Age Discrimination in Employment Act (“ADEA”), was eligible for back pay between April 1, 1996, the date of a reduction in force subsequent to her illegal termination for age discrimination and the jury verdict and district court judgment, and whether she was eligible for front pay after judgment.⁸⁴ The district court ruled that Banks’ retention after a reduction in force was too speculative for the jury and denied her damage claims.⁸⁵ The Second Circuit reversed, and remanded the case to the district court holding that the district court should have instructed the jury that it could award damages for the period from April 1, 1996 to the date of the verdict.⁸⁶ Banks was entitled to argue that, “but for the earlier act of discrimination, she would have been retained amid the employer’s subsequent layoffs.”⁸⁷ The court stated, “[a] jury would be permitted but not necessarily required to accept that inference.”⁸⁸

The Second Circuit reasoned that, “[b]ecause reinstatement and front pay are forward looking remedies, they are inappropriate where the employment would already have ended by the time of judgment.”⁸⁹ In this regard, the district court erred in concluding that plaintiff had not introduced sufficient evidence to allow an inference that she would have been retained after April 1996 had

⁸³ 180 F.3d 358 (2d Cir. 1999).

⁸⁴ *Id.* at 361.

⁸⁵ *Id.* at 363.

⁸⁶ *Id.* at 368.

⁸⁷ *Id.* at 363.

⁸⁸ *Id.* at 363 (stating, “the evidence presented at trial would have permitted a reasonable trier of fact to conclude that Banks would have been retained following the April 1996 reduction in force had she not been discriminatorily discharged in January 1994.”). *Id.* at 361.

⁸⁹ *Banks*, 180 F.3d at 365. (referring to *Kirsch v Fleet Street, Ltd.*, 148 F.3d 149, 169; *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980) (finding reinstatement unwarranted where plaintiff had been hired only for a one-year term and that term had expired)).

she not been discharged discriminatorily in 1994.⁹⁰ Prospective relief for front pay was therefore not precluded altogether.⁹¹

Finally, because lost pension rights fall within the category of equitable relief,⁹² the district court erred in ruling that the issue of lost pension benefits should have been presented to the jury.⁹³

VII. CONSTRUCTIVE DISCHARGE, TANGIBLE EMPLOYMENT ACTION

In *Caridad v. Metro-North Commuter Railroad*,⁹⁴ the plaintiff, an African-American woman, claimed sexual harassment and constructive discharge as a “tangible employment action.”⁹⁵ The circuit court ruled that a constructive discharge is not a tangible employment decision.⁹⁶ The court stated: A tangible employment decision requires an official act of the enterprise, a company act . . . For these reasons, a tangible

⁹⁰ *Id.* at 365.

⁹¹ *Id.*

⁹² *Id.* at 365 (quoting *Geller*, 635 F.2d at 1036).

⁹³ *Id.* at 361.

⁹⁴ 191 F.3d 283 (2d Cir. 1999).

⁹⁵ *Id.* at 293-94. Pursuant to the precedent of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), an employer is strictly liable without regard for affirmative defenses for tangible employment actions. In *Caridad*, the plaintiff claimed she was sexually harassed by her supervisor when she worked with an all male crew as an electrician for Metro-North. She also stated in her deposition that she was subjected to a hostile work environment by her male co-workers. Plaintiff did not follow established company procedures for sexual harassment complaints, but admitted to it at a disciplinary hearing held to address her absenteeism. She did not mention the sexual harassment to Metro-North’s Director of Affirmative Action, during her meeting with him; she simply complained that she was being “treated poorly.” She continued to refuse to give Metro North the details of her sexual harassment, yet Metro-North offered a transfer to another shift and to another position. She refused these offers. She resigned a few months later and her complaint with the Affirmative Action department was officially closed. Based on the above facts, Metro-North moved for summary judgment on their liability in the sexual harassment claim, and won. *Caridad*, 191 F.3d at 290-91.

⁹⁶ *Id.* at 294-95.

employment action taken by the supervisor becomes for Title VII purposes the act of the employer⁹⁷

Co-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer.⁹⁸ Thus, although, we have stated in another context that 'when a constructive discharge is found, an employee's resignation is treated . . . as if the employer had actually discharged the employee,'⁹⁹ constructive discharge is not a tangible employment action warranting the imposition of strict liability under the Ellerth/Faragher standard."¹⁰⁰

Under this standard, the court found that strict liability did not apply, and then analyzed Metro-North's entitlement to an affirmative defense.¹⁰¹ The court concluded that Metro-North could assert the affirmative defense, given that it had policy and procedures to deal with sexual harassment, and that the plaintiff did not avail herself of the opportunity to report her sexual harassment, as well as other facts.¹⁰² Hence, the Second Circuit dismissed Caridad's sexual harassment claim against Metro-North.¹⁰³

VIII. BENIGN COMMENTS: SEXUAL HARASSMENT

In *Leopold v. Baccarat, Inc.*,¹⁰⁴ the plaintiff asserted claims of age discrimination and hostile work environment. The district

⁹⁷ *Id.* at 294 (quoting *Ellerth*, 524 U.S. at 762).

⁹⁸ *Id.*

⁹⁹ *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987).

¹⁰⁰ *Caridad*, 191 F.3d at 295 (quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987)).

¹⁰¹ *Id.* An employer may make out an affirmative defense if it demonstrates that "a) it exercised reasonable care in preventing and correcting any sexually harassing behavior, and b) the plaintiff -employee unreasonably failed to take advantage of any preventive or corrective opportunities." *Id.*

¹⁰² *Id.* at 295-96.

¹⁰³ *Id.* at 296.

¹⁰⁴ 174 F.3d 261 (2d Cir. 1999). Plaintiff claimed age discrimination pursuant to ADEA, 29 U.S.C. § 621 *et seq.* (2000), and New York Human Rights Law, N.Y. EXEC. LAW § 290 *et seq.* (2000). The plaintiff complained that

court granted the defendant's motion for judgment as a matter of law,¹⁰⁵ dismissing the hostile work environment claim. The Second Circuit looked to *Faragher*,¹⁰⁶ which held that a defense to liability or damages comprises two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹⁰⁷ The employer argued that the key to these issues was the plaintiff's subjective belief and whether she suffered an adverse impact on her work performance.¹⁰⁸ The Second Circuit reasoned, in reversing the Rule 50 dismissal, that the EEOC regulations defined "sexual harassment" in the disjunctive to include conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁰⁹ The lower court did not consider the challenged conduct, that is, the "young and sexy"¹¹⁰ comment as sufficient to demonstrate a hostile work environment.¹¹¹ The circuit court disagreed.¹¹² The circuit court concluded that, "however benign the mere use of the term 'sexy' might seem, its incorporation into a threat of employment termination could reasonably be viewed

she was fired because of her age (62 years), and while she was working, she was subjected to a hostile work environment. She stated that her supervisor commented often that he wanted to hire a "young and sexy" sales staff and had screamed at them at a Christmas party. On the age discrimination claim, plaintiff sought to prove that she was terminated despite her positive evaluations, because of her age. She brought in testimony of two ex-workers who were also terminated at age 62. *Id.* at 265-66.

¹⁰⁵ *Id.* at 264.

¹⁰⁶ 524 U.S. 775.

¹⁰⁷ *Leopold*, 174 F.3d at 267-68 (quoting *Faragher*, 524 U.S. 775 (1998)). The defense is subject to proof by a preponderance of the evidence. *Id.* at 268.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *Meritor Savings Bank FSB v. Kinson*, 477 U.S. 57, 65 (1986)). *Meritor* quotes 29 C.F.R. S 1604.11(a) (2000)).

¹¹⁰ See *supra* note 104 and accompanying text.

¹¹¹ *Leopold*, 174 F.3d at 266.

¹¹² *Id.* at 271.

as a form of discriminatory intimidation.”¹¹³ The court found that issues of “continuous and concerted,” that is, pervasive, as opposed to “episodic” or “sporadic” conduct are factual questions when viewed from a FRCP Rule 50 point of view.¹¹⁴ Facts are required to be viewed most favorable to the non-moving party.¹¹⁵

IX. NLRB JURISDICTION AND BACK PAY CLAIMS, DISCRIMINATION, AND UNION ACTIVITY

In *National Labor Relations Board* (“NLRB”) v. *Thalbo Corp.*,¹¹⁶ the plaintiff was an open supporter of a union campaign seeking to organize the corporation.¹¹⁷ The plaintiff, after having been on sick leave, requested reinstatement to work.¹¹⁸ The employer denied her request.¹¹⁹ The NLRB, in *Thalbo I*,¹²⁰ found that the denial of her request for reinstatement was in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (“NLRA”).¹²¹ In July 1994, Thalbo was ordered to reinstate immediately.¹²² Thalbo was moved to enforcement, in *Thalbo II*, in May 1995.¹²³ By 1997, as a result of non-compliance, in *Thalbo III*, the NLRB issued a remedial order requiring the employer to pay the plaintiff \$40,410.00 in back

¹¹³ *Id.* at 269.

¹¹⁴ *Id.*

¹¹⁵ *Id.* See FED R. CIV. P. 50(a). See *supra* note 55 and accompanying text.

¹¹⁶ 171 F.3d 102 (2d Cir. 1999)

¹¹⁷ *Id.* at 105.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 314 N.L.R.B. 367 (1994).

¹²¹ *Id.* at 370. See 29 U.S.C. §§ 158(a)(1) and (a)(3) (2000). Section 158(a)(1) provides: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. *Id.* Section 158(a)(3) provides in pertinent part: “It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” *Id.*

¹²² *Thalbo I*, 314 N.L.R.B. at 370.

¹²³ *Thalbo II*, 57 F.3d 1063 (2d Cir. 1995).

pay.¹²⁴ This ruling was in direct conflict with the interim federal magistrate ruling decided in 1995 granting limited back pay of \$7,521.¹²⁵ The employer sought to preclude under Title VII, and the NLRB sought enforcement from the Second Circuit.¹²⁶

After Thalbo's initial refusal to reinstate in 1991, the plaintiff filed a sexual harassment complaint in federal court asserting the garden variety of claims under Title VII.¹²⁷ The case was tried before a magistrate in March 1995,¹²⁸ who found for the plaintiff, granting her limited "back pay" to 1991, but also held that the reason the plaintiff was refused reinstatement to work was due to the NLRA violations.¹²⁹ In *Thalbo III*, the employer argued preclusion before the NLRB Administrative Law Judge (ALJ), citing collateral estoppel.¹³⁰ The ALJ rejected this argument on the ground that the NLRB had not been a party to the Title VII action and, therefore the NLRB could not be bound by the magistrate's rulings.¹³¹ The ALJ denied Thalbo's objection holding that the NLRB is not precluded from litigating an issue involving enforcement of the NLRA.¹³² The NLRA § 10(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that had, has been or may be established by agreement, law or otherwise."¹³³ There is also the well settled principle that Congress has exclusively entrusted the Board with "the prosecution of the proceedings by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief."¹³⁴

¹²⁴ 323 N.L.R.B. 630 (1997).

¹²⁵ *DiMilta v. G.B. Motel Mgmt., Inc.*, No. 92 Civ. 6468 (S.D.N.Y. Mar. 20, 1995).

¹²⁶ *NLRB*, 171 F.3d at 105.

¹²⁷ *Id.* at 106.

¹²⁸ *Id.*

¹²⁹ *Id.* at 106-07.

¹³⁰ *Thalbo III*, 323 N.L.R.B. at 634.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (quoting 29 U.S.C. § 160(a) (2000)).

¹³⁴ *Id.*

The magistrate found that the plaintiff was retired and was not entitled to back pay past the 1991 incident.¹³⁵ The NLRB ALJ found that the plaintiff mitigated her damages and had made an effort to find employment, thus awarding her \$40,000.¹³⁶ The circuit court found in support of the NLRB ruling, rejecting Thalbo's collateral estoppel claim.¹³⁷ In support of the court's affirmation of the NLRB ruling, the court found that: (1) the issues were not identical; (2) the interests of a Title VII litigant were different from the interests of the NLRB in unfair labor practice proceedings; (3) the province of the NLRB concerned the relationship between employer and the union; (4) a finding of mitigation was relevant to the NLRA proceeding; (5) in Title VII, the issue of back pay was not essential to determining liability; and (6) failure to reinstate an employee under NLRA was relevant to discriminatory labor practice.¹³⁸

¹³⁵ *DiMita*, No. 92 Civ. 6468, slip op. at 12.

¹³⁶ 323 N.L.R.B. at 638.

¹³⁷ 171 F.3d at 109. Thalbo contended that because of collateral estoppel, plaintiff was entitled to no backpay. *Id.*

¹³⁸ *NLRB*, 171 F.3d at 109-14.