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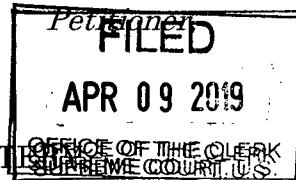
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In the  
Supreme Court of the United States

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ZELMA RIVAS,

NEW YORK STATE LOTTERY



Respondent.

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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MAY 21, 2019

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## QUESTIONS PRESENTED

Plaintiff asserts the continuing violation exception to the Title VII limitation period. If a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an on-going policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone. The plaintiff alleges both the existence of an ongoing policy of discrimination and some non-barred acts of discrimination taken in furtherance of that policy. The Court is asked to re-examine the averments of the plaintiff in their entirety, and to find that she established a prime facie case of racial discrimination, harassment, retaliation, hostile work environment under Title VII as timely and plausible.

## QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion?
2. Did the Complaint fail to state a prima facie case of retaliation?

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### **OPINIONS BELOW**

This action was commenced on August 23, 2016 by filing a complaint with the U.S. District Court for the Northern District. The complaint alleged discrimination and harassment based upon race, deprivation of property interest and liberty interest in violation of the First and Fourteenth Amendments, Title VII and 42 U.S.C. §§ 1981, 1983 and 1985. Jurisdiction was founded upon 28 U.S.C. §§ 1331, 1343, 1346, 1651, 2201 and 2202. The Defendants motioned to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The District's Court in a MEMORANDUM-DECISION AND ORDER, dated and entered, March 15, 2018, granted the Defendant's motion. (App.7a). A Notice of Appeal was filed on March 26, 2018. The Second Circuit Court of Appeals issued its SUMMARY ORDER on December 18, 2018. (App.1a).



### **JURISDICTION**

A timely filed Petition for Rehearing en Banc was denied by the Second Circuit Court of Appeals on January 29, 2019. (App.31a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

- **U.S. Const. amend. XIV (Due Process Clause)**

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

- **STATUTES**

- 42 U.S.C. § 1981
- 42 U.S.C. § 1983
- 42 U.S.C. § 1791(b)(8)
- 42 U.S.C. §§ 2000e to 200e-17, Title VII

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## STATEMENT OF THE CASE

This action is brought on by, Zelma Rivas, a career civil servant who began her career for the Employer in 1981, to redress grievances based on racial harassment, retaliation, deprivation of property interest and liberty interest, permitting and allowing a hostile work environment, the denial of due process and, other rights. Plaintiff states the deprivations and menacing began immediately after she complained of discrimi-

nation and harassment to the New York State Lottery (NYS Lottery)<sup>1</sup> management.

In 1996, the plaintiff complained to Lottery officials and her union and advised them she was subjected to discrimination and harassment by her supervisor. In October 1997, the plaintiff filed a complaint with the NYS Division of Human Rights and the Lottery. In response to her complaint, Lottery officials ordered the plaintiff to be examined by the NYS Dept. of Civil Service, Employee Health Service (EHS). On October 15, 1997, Dr. Peter Andrus, NYS Dept. of Civil Service, Employee Health Service (EHS) states:

"It appears from review of the material enclosed that much of the friction described, both by Mrs. Ely (Rivas) and those at work, is between members of her and the office. In Mrs. Ely's (Rivas) previous employment with the State during the 14 years that she was employed with the State Health Dept. she apparently had no difficulty there, for no such problems occur as documented in her chart" (App.36a).

In April 1998, the plaintiff filed another complaint with Lottery officials because she was facing retaliation for having engaged in a protected activity. The plaintiff's co-workers harassed her in the hostile work environment. In retaliation for her complaint, Lottery officials,

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<sup>1</sup> On February 1, 2013, the New York Division of the Lottery was merged into the New York State Gaming Commission, which thereby assumed its functions, powers and duties. *See L. 2012, c. 60, part A; N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 117, 120, 121, 122 and 125; N.Y. Tax Law §§ 1602, 1603.*

again, ordered the plaintiff to be examined by the (EHS). Every time the plaintiff complained her co-workers harassed her, Lottery officials responded by berating her in front of employees, escorting her out of the Lottery building and ordering her to be examined by the (EHS). Lottery officials used the NYS Dept. of Civil Service, Employee Health Service (EHS), as a means to punish the plaintiff.

On May 27, 1998, Dr. Peter Andrus, states:

"Again, in conclusion Mrs. Ely (Rivas) is fit for duty with no significant psychopathology. Addendum: In spite of the above summary I would state to the Agency concerned, namely the NYS Lottery, that they continue to keep a supervised but distant watch on Zelma Ely (Rivas) because of a noticed borderline tendency on one of her psychological tests, namely the MMPI-2. Although this does not correlate with the remainder of her psychological testing, it is important enough for her to be watched, although my basic tenant is that she is still capable and fit for duty"

(App.47a)

Andrus identified the problem at the Lottery as friction between the plaintiff and the employees. However, six-months later, Andrus, retaliated against the plaintiff and directed Lottery officials to keep the her under surveillance and monitor her because of his interpretation of the results of the MMPI—2. A questionnaire many argue is valid for people who are English speaking people of European descent and not valid across cultural, ethnic and language barriers. Andrus's directive that the plaintiff be kept under

surveillance and monitored by Lottery officials, instituted an agency-wide hostility directed towards the plaintiff.

Lottery officials warned employees not to associate with the plaintiff because she was a threat. The plaintiff was blacklisted and, the target of relentless harassment by Lottery officials. The plaintiff was deprived of her liberty, her freedom and a due process right to a hearing. Dr. Andrus's employment action injured the plaintiff's professional reputation. Plaintiff alleges the Defendant's violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution "nor shall any State deprive any person of life, liberty, or property, without due process of law". Consequently, Lottery officials constructed an isolation room, next to security staff on the ground floor lobby. On July 28, 1998, the plaintiff was ordered to work in the isolation room. Plaintiff alleges, Lottery officials, discriminated against her because of her race and color; and, they retaliated against her because of her minority status and because she engaged in protected activity. While in isolation, the plaintiff, a union member paying dues, was denied access to the agency bulletin board. The board posted union information, promotional opportunities, job vacancies, agency events and various announcements. Plaintiff alleges, the Lottery's Officials disparate treatment is evidence sufficient to prove that a discriminatory intent was a determining factor in their decision adversely affecting the plaintiff.

On February 21, 2001 at the U.S. District Court of the Northern District of New York, Examination Before Trial (EBT) of Plaintiff, Zelma Rivas, held at

the State Office of Attorney General, The Capitol, Albany New York. Assistant Attorney General (“AAG”) Roger W. Kinsey represented the Defendants in that action. *See Rivas v. N.Y. Lottery*, No. 00-cv-746, Dkt. No. 58 (N.D.N.Y. Mar 26, 2002), *aff’d*, *Rivas v. N.Y. State Lottery*, 53 F. App’x. 176 (2d Cir. 2002). Kinsey confirms the plaintiff was confined in the isolation room the Defendants specifically constructed to confine her in, from July 20, 1998 thru March 6, 2000. Kinsey states:

“Why don’t we do this: Why don’t you draw the booth for me. And we’ll stipulate on the record that this will not be to scale, but is simply representation so we know what we’re talking about. Plaintiff: Is this going to be used? Kinsey: Yes, I’m going to have it marked?” . . . (App.118a)

Kinsey harassed the plaintiff and used her drawing to evoke contemptuous laughter during the (EBT). Kinsey attached a map of the Lottery building with the exact dimensions of the isolation room, where the plaintiff was held, as an Exhibit in his (EBT) Reply. Kinsey states:

“the office area is fifteen feet by nine and one half feet and has immediate access to the security desk” (App.118a). “ . . . Now, let’s go back to the booth, ma’am. What was your function in the booth?” Plaintiff: “My function in the booth? They brought down work and left it on the security table for me to get. And I had to type it up and leave it on the security table and call on the phone and let them know when the work was done . . . ”

Kinsey: "I didn't ask you about the work station. I said, during-at any time during your placement with the Lottery, was there information available on how to file a Civil Rights claim or grievance? Plaintiff: You said on the bulletin board? Kinsey: Yes, on the bulletin board. Plaintiff: I had no access to a bulletin board during that time. Kinsey: You certainly had access prior to the 20 months you went into that . . ." (App.118a-119a).

The plaintiff could not be seen by anyone because the isolation room was hidden from sight. The plaintiff was situated behind a door used only by non-lottery security who had to walk past her to get to the lobby desk. Plaintiff was instructed by Lottery officials to leave her completed work assignment on the lobby desk and call the Marketing office, located on the 5th floor. A Lottery employee picked up the plaintiff work from the lobby desk. Plaintiff was denied access to all Lottery offices. When Lottery officials wanted to meet with the plaintiff, the plaintiff was escorted by a Lottery employee to the 5th floor and, when the meeting was over, she was escorted back to the isolation room. The plaintiff was humiliated and treated like a criminal. As a result of the forgoing, the plaintiff filed a complaint regarding the violation of her Civil Rights and disparate treatment with the NYS Division of Human Rights, the EEOC and Federal Court (App. 58a).

On March 3, 2000, Lottery officials gave the plaintiff her evaluation for the period May 19, 1998 to May 19, 1999. The evaluation was written as if she worked in an office with other employees and, was

not confined in the isolation room. The plaintiff refused to sign the evaluation. On March 6, 2000, the day before the plaintiffs scheduled NYS Division of Human Rights hearing, the Lottery attorney and the Lottery Affirmation Action Officer, moved the plaintiff out of the isolation room into the Press and Community Relations Office. On March 7, 2000 at the NYS Division of Human Rights hearing, Lottery officials were asked to provide a "list of all employees in the office in which Complainant works, to include, in chart form, name, date of hire, and race" (App.100a). Lottery officials concealed the egregious fact that the plaintiff was moved out of the isolation room into an office, the day before the civil rights hearing. Plaintiff claims the Defendants action resulted in the deprivation of her Constitutional rights in violation of 42 U.S.C. §§ 1981 and 1983. Pursuant to § 1983, plaintiff alleges she has proven (1) that the Defendant was a "person" acting under color of state law and (2) that the actions taken resulted in the deprivation of her constitutionally-protected rights. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 692 (1978). Pursuant to § 1981, Plaintiff alleges she has established the following elements: (1) she is a member of a racial minority; (2) an intent to discriminate on the basis of race by the named Defendant; and, (3) the discrimination concerned one or more activities enumerated in the statute (*i.e.*, security of persons and property as enjoyed by white citizens).

Plaintiff alleges, Kinsey repeatedly violates Title VII unlawful employment practices which prohibits employment discrimination on the basis of race, color, religion, sex or national origin when he asked the Plaintiff to answer the following questions.

"Kinsey: Are you married? Plaintiff: I'm divorced. Kinsey: Children? Plaintiff: Yes. Kinsey: How many? Plaintiff: Two. Kinsey: Boy and a girl. Two boys. Two girls? Plaintiff: A boy and a girl. Kinsey: And, ma'am, your ethnic background? Plaintiff: Hispanic. Kinsey: And are you a citizen of the United States? Plaintiff: Yes, I am. Kinsey: Naturalized or born here? Plaintiff: Born here; Kinsey: And where were you born? Plaintiff: I was born in New York City. Kinsey: And do you have other family in New York City? Plaintiff: Yes, I do. Kinsey: Do you have other family here in the area? Plaintiff: Yes, I do. Kinsey: Where do you currently reside, ma'am? Plaintiff: I reside in Ghent, New York. Kinsey: And that is at 16 Old . . . Plaintiff: Talerico. Kinsey: Thank you. Road? Plaintiff: That's correct. Kinsey: Okay. And it's T-A-L-E-R-I-C-O Road? Plaintiff: That's correct. Kinsey: Okay. And how long have you been living there? Plaintiff: Three years. Kinsey: Do you own or rent? Plaintiff: I just live there. Kinsey: Does the house belong to a relative? Plaintiff: Yes, it does . . . Kinsey: Are you currently being treated by a psychologist or psychiatrist? Plaintiff: No, I'm not. Kinsey: Have you ever been treated by a psychologist or psychiatrist? Plaintiff: NYS Health—I need a moment please. No. Kinsey: You've never been treated—Plaintiff: No. Mr. Harris (plaintiff's attorney): "Just for appoint of clarification, the health—CSEA did have

the health department examine, but it's not treatment." . . . (App.119a-120a)

Mr. Harris (plaintiff's attorney): "I'm sorry, Civil Service Department, not CSEA." Kinsey: Maybe I can clarify this. Ma'am, you were examined by a Civil Service Health Services doctor by the name of Dr. Andrus? Plaintiff: That's correct. Kinsey: And that would have been in October 15th, 1997? Plaintiff: I'm not sure of the date. I'd have to look that up for you. Kinsey: And again, a second time he examined you on or about May 21st, 1998? Plaintiff: He examined me a second time, but I'm not sure of the day. I'll also have to look that up. Kinsey: Can you tell us, ma'am, when your last physical examination occurred? Kinsey: Could you clarify exactly what type of physical—just a regular physical exam? Plaintiff: Just a regular physical examination? Mr. Harris (plaintiff's attorney): "Just an overall general health exam?" Kinsey: "Yes." Plaintiff: I'm not sure of the date, but it was within a year. Kinsey: Okay. And that was not for a specific problem, medical or—. Plaintiff: Just a general exam. Kinsey: And you have no current medical problems? Plaintiff: No, I do not. Kinsey: Any past medical problems? Plaintiff: No. Excuse me, I had my tonsils removed . . . . Kinsey: And no past history of emotional or psychological problems? Plaintiff: No. Kinsey:—beyond the examinations order by Civil Service. Plaintiff: No, Kinsey: Okay. Any past problems with memory loss? Plaintiff: No. Kinsey: Any

current problems with memory loss? Plaintiff: No . . . . (App.120a-121a).

According to the EEOC, questions regarding a person's marital status, the number and/or ages of children, are frequently used to discriminate against women and is viewed as non-job-related and problematic under the Civil Rights Act of 1964—Title VII.

Prior to commencing a Title VII action in federal court against a defendant, a plaintiff must file a charge with the EEOC or the New York State Division of Human Rights naming that defendant. *See Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991) (citing 42 U.S.C. § 2000e-5(e)). Plaintiff did not charge Defendant CSEA in her EEOC and Division of Human Rights Complaint. "So as to not frustrate Title VII's remedial goals [,] . . . courts have recognized an exception to the general rule that a defendant must be named in the EEOC complaint." *Id.* (citation omitted); *see also Gilmore v. Local 295, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 798 F. Supp. 1030, 1038 (S.D.N.Y. 1992). This exception, referred to as the "identity of interest" exception, "permits a Title VII action to proceed against an unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge". *Johnson*, 931 F.2d at 209 (citations omitted).

The Third Circuit in *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977), set out a four-part test, which the Second Circuit adopted in *Johnson*, to determine whether an "identify of interest" exists, thereby excusing a plaintiff's omission of a defendant from her EEOC charge.

The four factors are:

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

*Johnson*, 931 F.2d at 209-10 (quoting *Glus*, 562 F.2d at 888).

The Plaintiff provided the EEOC with a copy of the legal proceeding of U.S. District Court of the Northern District of New York, Examination Before Trial (EBT) of Plaintiff, Zelma Rivas, held at the State Office of Attorney General, The Capitol, Albany New York on February 21, 2001, conducted by Assistant Attorney General ("AAG") Roger W. Kinsey, representing the Defendants. Plaintiff alleges, the (EBT) provides evidence of discriminatory acts against her by the Defendants; as well as, Federal law violations. Plaintiff alleges, the EEOC had reasonable cause to believe discrimination occurred based on this evidence. In a letter dated April 9, 2013 addressed to the plaintiff

from David Ging, Investigator, U.S. Equal Employment Opportunity Commission (EEOC), Buffalo Local Office, Ging states:

"I have reviewed the investigative folder 525-2011-00284 (previously filed by you) and I have spoken with the investigator who was assigned to that case. I learned that the NYS Lottery made the initial decision to fire you years ago and never changed their position. The 300-day clock is not stopped while you exhaust appeals. The decision has still been made. Whether you win or lose any appeals NYS Lottery's decision was made. In addition, you have had your chance to have NYS Lottery's actions investigated. You previously filed an EEOC charge of discrimination regarding this issue. The fact that you did not agree with EEOC's decision in that case does not mean that you can keep applying for more administrative investigations. For these reasons it is unlikely we would conduct an investigation into your complaint if you were to go forward with filing a formal charge of discrimination. Nevertheless, if you choose to, you may still file a charge of discrimination. Though it is likely that the EEOC will dismiss your charge without investigation . . ." (App.51a-52a).

In response to the plaintiff's complaint, Ging, confirmed the NYS Lottery's decision to fire the plaintiff many years ago. This decision proves the Defendant intended to discriminate against the plaintiff. Plaintiff, alleges, Ging obstructed government administration.

Plaintiff alleges, Ging attempted to intimidate the plaintiff by telling her the EEOC would not conduct investigations into her complaints and her charge would be dismissed without investigation. The immediate negation of the plaintiffs EEOC complaints, renders her request for assistance from the EEOC futile.

In a letter dated May 24, 2016 addressed to the plaintiff from Beth Anne Breneman, Investigator Support Assistant, she signed the letter for: John E. Thompson, Jr., Director, U.S. Equal Employment Opportunity Commission (EEOC), Buffalo Local Office. Breneman states:

"The Equal Employment Opportunity Commission (hereinafter referred to as the "Commission"), has reviewed the above-referenced charge according to our charge prioritization procedures. These procedures, which are based on a reallocation of the Commission's staff resources, apply to all open charges in our inventory and call for us to focus our limited resources on those cases that are most likely to result in findings of violations of the laws we enforce.

In accordance with these procedures, we have evaluated your charge based upon the information and evidence submitted. In the initial documentation that you sent the Commission you stated that the Respondent is stalking you at your current place of employment. The Respondent has engaged a third governmental agency to harass you during the work day. You allege that you

have been subjected to these actions in retaliation for filing a charge of discrimination against them in the past in willful violation of Title VII of the Civil Rights Act of 1964, as amended. Based upon an analysis of the information submitted to us, the Commission is unable to conclude that the information establishes a violation of Federal law on the part of Respondent. This does not certify that Respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge".

Plaintiff alleges Ms. Breneman's comments constitutes evidence of discriminatory bias.

On February 8, 2006, at a NYS Division of Human Rights hearing, Assistant Attorney General ("AAG") Gregg T. Johnson, appeared for the Defendants. Johnson said he would not conciliate with the plaintiff. (App.100a). The plaintiff filed a timely complaint with the EEOC. However, Johnson's denial hindered the plaintiff's ability to comply with the precondition to filing a Title VII claim in federal court, to pursue available administrative remedies. As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC". *Hardaway v. Hartford Pub. Works Dep't*, 879 F.3d 486, 489 (2nd Cir. 2018). The plaintiff was denied the opportunity to negotiate or resolve the issue before proceeding to court. The plaintiff could not initiate the prescribed administrative procedure, pursue them to their appropriate conclusion and await the final outcome before

seeking judicial intervention. Plaintiff alleges, Johnson acted in an arbitrary capricious manner; and, he failed in his duty to serve as the “People’s Lawyer”. The guardians charged with the statutory and common law powers to protect the civil rights of all New Yorkers and promote equal justice under law. The Defendants negation of conciliation confirms the furtherance of the on-going policy of discrimination, retaliation and hostile work environment(s). Plaintiff alleges she is entitled to the benefit of the continuing violation exception, which provides that, “if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone (internal quotation marks omitted)”. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d. 135, 155-156 (2d Cir. 2012). (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993), abrogated on other grounds by *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011). “To trigger such a delay, the plaintiff ‘must allege both the existence of an ongoing policy of discrimination and some non-time barred acts taken in furtherance of that policy.’” *Fahs Constr. Grp. Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013) (quoting 2013) (quoting *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999)). Although the Title VII exhaustion requirements, and their filing deadlines, operate as an affirmative defense, Title VII exhaustion cannot be proven when the Defendants intentionally obstruct the pursuit of administrative remedies. Plaintiff’s complaint alleges sufficiently that the Defendant’s conduct was part of a discriminatory policy and/or mechanism. Plaintiff

establishes and alleges the incidences of discrimination, retaliation and hostile work environment occurred within the limitation period.

In 2007, a Secretary II's job duties, were transferred to the Plaintiff. The Secretary II, Grade 15, was getting trained for a Web position, while still physically working, in the Communication's Office. The Plaintiff, a Secretary I, requested an upgrade to a grade 15 Secretary II. The plaintiff had the highest score on the Secretary II, eligible list in the NYS Lottery. Lottery officials denied her request. The plaintiff received outstanding evaluations. In 2009, NYS Lottery officials created and posted an in-house Web position, with specific requirements. The Secretary II, who received the Web training was the only employee in the NYS Lottery that had the required qualifications for the position. The Secretary II was hired and appointed to the grade 18 Administrative Assistant (Web) traineeship position. The plaintiff, was issued duties of a grade 18. The plaintiff was responsible for responding to over 10,000 emails a year from the questions@lottery email mailbox. The plaintiff, again, requested a grade 15 Secretary II upgrade. The plaintiff was on several grade 18 eligible lists. Lottery officials denied her request. The plaintiff continued to receive outstanding evaluations. Plaintiff alleges she has proven by a preponderance of evidence that she qualified for an upgrade but was rejected under circumstances that give rise to an inference of unlawful discrimination. The Plaintiff establishes a *prima facie* case of racial discrimination. The plaintiff is a racial minority. Plaintiff's complaint sufficiently attests that the Defendants action was part of an ongoing discriminatory policy and/or mechanism.

The plaintiff complained to her employer that she continued to be harassed by Correction Officers (CO) with inmates in their care at the NYS Lottery. Some of the (CO's) pursued and stalked the plaintiff when she left the Lottery, at the end of the work day, all the way to her home. On one occasion, a (CO) and an inmate in his care were working on the office furniture in the office. Two female Lottery employees and the plaintiff were the only employees in the office. When the plaintiff realized her rollaway desk was not next to her, she stood up and caught the (CO) with her purse and, her rollaway desk was next to him. The plaintiff yelled and the (CO) threw her purse to the ground and ran out of the office, leaving the inmate behind. The inmate ran out after the (CO). Plaintiff immediately called security and, she was told they could not assist her. The Lottery's Personnel Director, followed up with a memo to the plaintiff and advised her no action would be taken, because the (CO) did not take anything out of her purse. Plaintiff believes the (CO) was attempting to place contraband in her purse. Law enforcement was not called to the scene and no charges were filed. Lottery officials covered up the incident.

The plaintiff reported she was harassed and discriminated against to the NYS Lottery, NYS Inspector General's Office, the United States Department of Justice, various NYS Agencies and local law enforcement. As a result of the plaintiff's complaint, on February 1, 2010, the Lottery Personnel Director and Lottery officials hand delivered a letter to the plaintiff and, again, ordered her to be examined by Employee Health Service (EHS); and, in front of employees, escorted her out of the NYS Lottery building. In a letter dated

March 26, 2010, the Lottery Personnel Director advised the plaintiff it was (EHS) medical opinion that she was fit to perform her job duties. Plaintiff was advised to return to work on April 1, 2010. The plaintiff reported to work and Lottery officials commenced an interrogation proceeding against her to secure her constructive dismissal because they were not able to discharge her from employment on medical grounds by means of their repeated use of the NYS Dept. of Civil Service (EHS). An unlawful pattern of practice, Lottery officials exploited as a means to harass the plaintiff for many years.

On August 23, 2010, Charles Essepian, Administrative Law Judge, Unemployment Insurance Appeal Board states:

"Over the course of the claimant's employment, the claimant reported several incidences that she believed violated her human rights, civil rights, employee rights and rights that she had through her union. On January 23, 2010, the claimant wrote a letter to her employer notifying them that her complaints have gone unanswered and that there are continuing acts by the employer causing her and her family to suffer. The claimant cited specific acts of what she believed were violations of her rights, discrimination, harassment among other things. As of the result of the letter, the employer suspended the claimant with pay beginning February 2, 2010, and required her to get a mental health evaluation to see if she was fit for work. The claimant complied with the employer's directive

and after undergoing her evaluations was found to be fit for work. By Confidential Memorandum dated March 26, 2010, the claimant was ordered to return to the work site on April 1, 2010, where she would undergo an interrogation by the employer. The memorandum notified the claimant that "Your participation is mandatory, failure to appear may result in disciplinary action against you, including termination of your services. No other instructions or warnings were provided to the claimant. On April 1, 2010, the claimant reported to the interrogation and was represented by two union officials. At the interrogation the human resource manager for the department for whom the claimant worked as the claimant a series of questions about statements and accusations made in her January 23, 2010. The claimant replied to all questions asked of her, except one "No comment". The claimant was subsequently discharged for failing to cooperate in the interrogation process on April 1, 2010. Opinion: Pursuant to Labor Law Section 593(3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with employment. Pursuant to Labor Law Section 527, the wages paid in such employment cannot be sued to establish future claim for benefits. The credible evidence establishes that the claimant was discharged for failing to cooperate in an interrogation with her employer on April 1, 2010. Based on the testi-

mony and evidence before me, I find that there is no evidence that the claimant was aware her failure to cooperate in the interrogation would be grounds for dismissal. Significantly, the claimant was only placed on notice by letter dated March 26, 2010, that her participation at the interrogation was mandatory. Furthermore, the transcript from the interrogation on April 1, 2010 is devoid of warning the claimant that her failure to cooperate or failure to answer questions could be or would result in her dismissal. Accordingly, I find that the claimant's actions do not rise to the level of misconduct under the Unemployment Insurance Law". (App.103a).

Essepien determined the plaintiff's actions in the interrogation did not rise to the level of misconduct under the Unemployment Insurance Law".

On September 21, 2010, at Arbitration, the NYS Lottery officials, presented the plaintiff with a "consent award". (App.106a). The consent award demanded the plaintiff resign and agree never to work for her Employer. This demand deprived the plaintiff of her liberty and denied her equal opportunity for employment. The plaintiff refused to resign. In a letter dated October 12, 2010, a senior counsel for (CSEA), urged the plaintiff to accept the consent award and resign. (App.105a). The (CSEA) senior counsel reminded the plaintiff, the arbitrator indicated at the hearing he would terminate her from State service. The arbitrator and the Lottery officials charged the plaintiff with misconduct because she refused to accept the consent award and resign. The consent award is evi-

dence the Lottery official's explanation to terminate the plaintiff is factually false. The consent award as an alternative to the charge of misconduct against the plaintiff is inconsistent and contradicts Lottery officials proffered legitimate reasons for their employment action. Plaintiff alleges pretext was established because Lottery officials changed their reason for the termination as an after-the-fact justification. *Jaramillo v. Colo. Judicial Dep't.*, 427 F.3d 1303, 1310 (10th Cir. 2005). Lottery officials offered the plaintiff a consent award to cover up their discriminatory practice.

The plaintiff maintains that the evidence provided at arbitration negates the validity of the false charges imposed by the Lottery officials and refutes their allegations. The plaintiff plausibly alleges that the employer took an adverse employment action against her because she opposed the unlawful employment practice. Furthermore, had the plaintiff succumbed to the duress forced upon her by the (CSEA) senior attorney and Lottery officials and resigned, her eligibility for unemployment insurance benefits would have been forfeited and she and her children would have been forced into homelessness. It is inconceivable Lottery officials would offer the plaintiff a consent award if the serious allegations levied against her were true. This proves intentional discrimination by indirect evidence, that the Defendants offered a false explanation for its decision adversely affecting the plaintiff. Plaintiff alleges the Defendants' reason for terminating her employment was "pretextual", offered by the Defendant only to cover up their discriminatory intent.

After the plaintiff's termination from NYS Lottery, in July 2010, she was hired as temporary employee

by Kelly Services. The plaintiff was assigned to work as a secretary for the NYS Dept of Health. The plaintiff was targeted and harassed by the employees. Kelly Services advised the plaintiff that it was becoming increasingly difficult for them to find her employment because NYS Lottery personnel were providing prospective employers with negative job references. In an attempt to assist the plaintiff to continue finding employment, Kelly Services omitted NYS Lottery from the plaintiff's resume. The plaintiff contends the Defendants harassed her continually after leaving the NYS Lottery by creating hostile work environments in her subsequent jobs and "blacklisting" her in order to hinder her efforts to secure employment. Plaintiff alleges the Defendant's post-employment conduct toward her falls within the scope of Title VII. "A negative reference or similar actions taken with respect to a new prospective employer can be considered an adverse action and therefore provide support for a retaliation claim". *Shakeridge v. Tradition Fin. Servs., Inc.*, No.16-cv-01940, 2017 WL 4273292, at \*5, 2017 U.S. Dist. LEXIS 157346, at \*13-14 (D. Conn. Sept. 26, 2017); *see also Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090 (2d Cir. 1979) (post-employment blacklisting falls within the scope of retaliatory provisions of Title VII), *rev'd on other grounds*, 477 U.S. 807, 814 n.17 (1980); *Patchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (finding that Title VII "prohibits discrimination related to or arising out of an employment relationship; whether or not the person discriminated against is an employee at the time of the discriminatory conduct"); *Wannamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("[P]laintiffs may be able to state a claim for retaliation, even though

they are no longer employed by the defendant company, if for example, the company ‘blacklists’ the former employee, wrongfully refuses to write a recommendation to prospective employers, or sullies the plaintiff’s reputation.”). Plaintiff plausibly alleges that the employer took an adverse employment action against her because she opposed unlawful employment practices. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015). The plaintiff pleads causation. The plaintiff alleges the retaliation was the “but-for” cause of the employer’s adverse action, *i.e.*, that “the adverse action would not have occurred in the absence of the retaliatory motive”. *Id.* at 90-91 (quoting *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013)).

In August 2010, the plaintiff applied for a job with Homeland Security, FEMA, in Albany, New York. In September 2011, plaintiff was interviewed by Homeland Security and hired for an administrative assistant position. Plaintiff was sent to Human Resources (HR) for fingerprinting. (HR) was advised the plaintiff was hired for the position. (HR) advised the interviewer the plaintiff could not be hired for the position; and, there were other candidates who could be hired for the position. Plaintiff left Homeland Security and immediately called the NYS Inspector General’s Office (IG). Plaintiff advised the (IG’s) office, Lottery officials were thwarting her efforts to obtain employment and remain employed.

In September 2010, Kelly Services, assigned the plaintiff to work a claims position at M & T Bank. The plaintiff was physically threatened and harassed.

Out of concern for her safety, the plaintiff quit the job.

In December 2010, plaintiff was hired by the NYS Office of Temporary and Disability Assistance (OTDA). The plaintiff is targeted and harassed.

The plaintiff alleges Lottery officials harassed her after she left the NYS Lottery by, *inter alia*, facilitating hostile work environments at her subsequent jobs and by “blacklisting” her. Plaintiff alleges facts that lend conclusory contentions that the ongoing harassing conduct was carried out by Lottery officials and employees from the (AAG’s) office.

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#### REASONS FOR GRANTING THE PETITION

Plaintiff alleges the District Court abused its discretion. The discretion exercised to an end not justified by the evidence submitted by the plaintiff in her Complaint. “An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgement that is clearly against the logic an effect of the facts as are found”. *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted); *see also In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011).

Plaintiff asserts that the NYS Lottery officials and employees from the (AAG) office continued to harass her after she left the NY Lottery in 2010. Plaintiff asserts this adverse employment action entitles her to the benefit of the continuing violation exception,

which provides that, "if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone (internal quotation marks omitted)". The continuing violation doctrine provides that a claim alleging a pattern of ongoing discrimination "is timely so long as one act contributing to the claim occurred within the statutory period." *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004). To survive a motion to dismiss "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiff alleges she establishes direct evidence of Defendant's retaliatory animus through correspondence linking the alleged unlawful act to protected activity. The Plaintiff provides factual allegations enough to raise a relief above the speculative level. In deciding a motion for summary judgment, the facts must be read in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

The plaintiff provides enough facts to state a claim to relief that is plausible on its face. The plaintiff pleads and establishes sufficient facts to make out a prime facie case under Title VII and Sections 1981 and 1983. The court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

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## CONCLUSION

Plaintiff establishes proof of causation through direct evidence of retaliatory animus directed against her by the Defendants. In April 1998, the plaintiff complained to Lottery officials she was subjected to discrimination and harassment by her supervisor. The Defendants responded by ordering the plaintiff to be examined by (EHS). Plaintiff was placed on administrative leave without pay. While the appellant was out on leave, Lottery officials constructed an isolation room, next to non-lottery security staff on the lobby. Upon plaintiffs return to work, she was ordered to work in the isolation room. If not for the plaintiff's request for a civil rights hearing, Lottery officials would have never moved her out of the isolation room into an office. Lottery officials falsified documents to conceal the evidence that the plaintiff was forced to work in isolation for almost two years. This evidence suggests that the workplace was permeated with discriminatory conduct so severe and pervasive as to alter the conditions of the plaintiff's employment. This evidence establishes that the plaintiff was subjected to a hostile work environment. The Defendant's, adverse employment action, intentional misconduct, violated the plaintiff's civil rights and constitutional rights. Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits discrimination and retaliation against any employee who asserts his or her rights under Title VII. 42 U.S.C. § 2000e-3(a).

On September 21, 2010, at Arbitration, the NYS Lottery officials, presented the plaintiff with a "consent

award". The consent award demanded the plaintiff resign and agree never to work for her Employer. The senior counsel for (CSEA), urged the plaintiff to accept the consent award and resign. The arbitrator and the Lottery officials charged the plaintiff with misconduct because she refused to accept the consent award and resign. The consent award is evidence the Lottery official's explanation to terminate the plaintiff are factually false. The consent award as an alternative to charges of misconduct against the plaintiff is inconsistent and contradicts Lottery official's reasons for termination. Lottery officials changed their reason for the termination as an after-the-fact justification. *Jaramillo v. Colo. Judicial Dep't.*, 427 F.3d 1303, 1310 (10th Cir. 2005). Plaintiff has successfully shown that the reasons proffered by the Lottery officials for her discharge are false and unworthy of credence. The anti-retaliation provision of Title VII prohibits employers from "discriminat[ing] against any of his employees or applicants for employment" in retaliation for reporting, making a charge or testifying regarding unlawful employment practices under Title VII." *Burlington*, 548 U.S. at 61-62.

In October 2007, the plaintiff moved from a private residence to an apartment in a different County. Immediately after moving into the apartment, the plaintiff and her family were harassed. Plaintiff's vehicle was damaged and there were, and still are, numerous incidences of unlawful entry into her apartment. The plaintiff was advised by local law enforcement, she and her family are targeted. The plaintiff lives in a suburban neighborhood. The plaintiff has filed numerous police reports complaining of theft and repeated food poisoning's in her apartment. As a deter-

rent, the plaintiff purchased security cameras. However, the cameras were remotely disabled; which the plaintiff also reported to law enforcement. The plaintiff's landlord has changed the locks on the door to her apartment dozens of times, to no avail. Plaintiff alleges, these criminal actions are not "mere coincidences". Plaintiff alleges the aforesaid acts are intentional and motivated by a prohibited invidious discriminatory animus coordinated by the Defendants.

Petitioner now seeks a writ of certiorari from this Court on the questions presented in this case.

Respectfully submitted,

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