New York Supreme Court

Appellate Division—Second Department

Docket No.: 2015-06522

SUZANNE ELIZABETH KECELI,

Plaintiff-Appellant,

– against –

YONKERS RACING CORPORATION d/b/a Yonkers Raceway, SERGEANT EMILIO FILOPEI, Individually, LIEUTENANT BRIAN SCHULDER, Individually, DANETTE JORDAN, Individually and ROBERT GALTERIO, Individually,

Defendants-Respondents.

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/ NEW YORK, MFY LEGAL SERVICES, INC., A BETTER BALANCE, COMMUNITY SERVICE SOCIETY, EMPIRE JUSTICE CENTER, GENDER EQUALITY LAW CENTER, INC., LATINO JUSTICE PRLDEF, THE LEGAL AID SOCIETY, MAKE THE ROAD NEW YORK AND PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

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INTEREST OF AMICI CURIAE

NELA/NY

The National Employment Lawyers Association (NELA) is a national bar association dedicated to the vindication of individual employees' rights. NELA/NY, incorporated as a bar association under the laws of New York State, is NELA's New York chapter. With about 400 members, it is NELA's largest local chapter. NELA/NY's activities and services include continuing legal education and a referral service for employees seeking legal advice and/or representation. Through its various committees, NELA/NY also seeks to promote more effective legal protections for employees.

MFY LEGAL SERVICES, INC.

MFY Legal Services, Inc. (MFY) envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and representation to more than 10,000 New Yorkers each year. MFY's Workplace Justice Project advocates on behalf of low-income workers most vulnerable to exploitation at work.

A BETTER BALANCE

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income New Yorkers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. The workers we serve, who are often struggling to care for their families while holding down a job, are particularly vulnerable to retaliation in the form of unpredictable schedule shifts, physically grueling work assignments, and other changes to the conditions of their employment that discourage them from complaining about illegal discrimination.

COMMUNITY SERVICE SOCIETY

The Community Service Society of New York ("CSS") has led the fight against poverty in New York City for more than 172 years. CSS primarily focuses on promoting living-wage jobs and works to support and stimulate social and economic mobility among the working poor. Because mass imprisonment perpetuates the existence of a permanently poor class, CSS promotes the implementation of policies and enforcement of laws to speed the successful reentry of people with criminal records via employment, and litigates against public and private employers that violate city, state and federal antidiscrimination statutes.

CSS is proud to have been the primary legal advocate behind the New York City Fair Chance Act, among the toughest "ban the box" laws in the nation. CSS also played a crucial role in New York City's enactment of the Earned Sick Time Act, providing essential supporting research and relentless advocacy.

EMPIRE JUSTICE CENTER

The Empire Justice Center is a statewide, multi-issue, multi-strategy, public interest law firm focused on improving the "systems" within which poor and low-income families live. For more than 30 years, our advocates have worked to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through systems change advocacy, training and support to other advocates and organizations, and high quality direct civil legal representation. As part of our mission, advocates of Empire Justice Center's Workers' Rights Project represent workers who suffer from wage theft, employment discrimination and other forms of workplace exploitation, conduct community outreach and education to train workers, advocates and community members about their workplace rights, and engage in legislative advocacy and policy reform efforts to improve workplace protections and enforcement of existing laws.

GENDER EQUALITY LAW CENTER, INC.

The Gender Equality Law Center, Inc. ("GELC") is a non-profit law firm and advocacy organization. GELC's mission is to advance laws and policies to redress

gender-based discrimination and stereotyping in all spheres of private and public life. As part of the Center's work, GELC regularly advocates on behalf of employees who experience discrimination in the workplace on the basis of their gender, sexual orientation. Lawyers working at GELC, or in affiliation with the Organization, have represented hundreds of individuals experiencing gender discrimination at work and counseled even more on the need to come forward and complain before the treatment escalates to the point in which their jobs are jeopardized.

LATINOJUSTICE PRLDEF

LatinoJustice PRLDEF, founded in 1972 as the Puerto Rican Legal Defense and Education Fund, champions an equitable society. Using the power of the law together with advocacy and education, LatinoJustice seeks to protect opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities. LatinoJustice has litigated numerous landmark cases addressing issues impacting Latinos, and has successfully challenged wage theft, discriminatory practices, unfair workplace conditions and English-only language policies that limit the right of Latino immigrant workers to secure equal employment opportunities in their communities and workplaces.

THE LEGAL AID SOCIETY

The Legal Aid Society ("the Society") is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems in addition to law reform representation that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized city-wide law reform, employment law, immigration law, health law, and homeless rights practices. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination and unemployment insurance hearings, and assists vulnerable workers, many of whom are subjected to retaliation for complaining about violations in the workplace.

MAKE THE ROAD NEW YORK

Make the Road New York (MRNY) is a non-profit membership organization with over 19,000 low income members dedicated to promoting equal rights and economic and political opportunity for low-income New Yorkers through community and electoral organizing, leadership development, education, provision of legal services, and strategic policy advocacy. MRNY's Workplace Justice team

represents hundreds of low-wage workers each year whose rights have been violated on the job, including workers who have suffered various forms of unlawful employment discrimination and retaliation for asserting their rights. Many workers do not report violations due to fear of retaliation. Without strong protection against retaliation, workers will be further deterred from reporting workplace discrimination. MRNY is dedicated to advocating on behalf of workers to enforce their rights and to enhancing protection for workers under state law.

THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

The Public Advocate for the City of New York, Letitia James, is a citywide elected official, the immediate successor to the Mayor, and an ex-officio member of the New York City Council. (New York City Charter §§ 10, 24.) The Public Advocate is charged with monitoring, investigating, and reviewing the actions of City agencies. She is also responsible for identifying systemic problems, recommending solutions, and publishing reports concerning her areas of inquiry. She has the power to introduce legislation and hold oversight hearings on legislative matters. (*Id.* at § 24.) The Office of the Public Advocate was created to serve as a "watchdog" against the inefficient or inadequate operation of City government. (*Green v Safir*, 174 Misc 2d 400, 403, 664 NYS2d 232, 234 [Sup Ct, N Y County 1997].)

Prior to her election as Public Advocate, Letitia James was a member of City Council representing Brooklyn's 35th Council District for two terms. She used her office to advance the cause of human rights, champion the right of immigrants to equal justice, and to promote legislation aimed at protecting the needy. Since becoming Public Advocate, Letitia James has introduced legislation concerning employees of city contractors, has published reports on the treatment of low-wage workers, and has pushed for broader interpretations of anti-discrimination laws.

PRELIMINARY STATEMENT

Amici Curiae submit this brief in support of the plaintiff-appellant, Suzanne Elizabeth Keceli. Amici Curiae urge the Court to hold that claims of unlawful retaliation under the New York State Human Rights Law must be analyzed under the standard articulated by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v White* (548 US 53, 57 [2006]) ("*Burlington Northern*"): retaliatory actions are illegal if they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." In Amici Curiae's experience, speaking with and advocating for victims of workplace discrimination, fear of retaliation is often an overwhelming concern that inhibits not only formal assertion of rights, but also informal complaints, which might allow for resolution of concerns without resort to more formal steps.

In this case, the decision below did not follow the *Burlington Northern* standard for the retaliation claim, but instead improperly combined that inquiry with analysis of the discrimination claims, requiring for both a showing of discharge or other "tangible" employment action, constructive discharge, or hostile work environment (Decision and Order, No. 50691/2013 [Sup Ct, Westchester County, June 25, 2015]) ("Decision"). While the requirement of a "tangible" adverse action formerly applied to retaliation claims (*see Forrest v Jewish Guild*

for the Blind, 3 NY3d 295, 313, 786 NYS2d 382, 396 [2004]), in 2006 the United States Supreme Court expressly rejected that requirement, emphasizing that broad protection against retaliation is essential to give force to the prohibition on discrimination. (*Burlington Northern*, 548 US at 67.) Because in this respect a New York State Human Rights Law retaliation claim should, as the court below correctly recognized, be "analyzed in tandem with Title VII claims under federal law" (Decision at 4; *see also Margerum v City of Buffalo*, 24 NY3d 721, 731, 5 NYS3d 336, 340 [2015]), the failure to apply the governing standard was error.

Clarification of the standard for retaliation claims will help eliminate workplace discrimination, particularly for the low-wage and immigrant workers that many Amici Curiae represent and advocate for. The clarification will assure workers that they will be protected against all forms of retaliation when they report discrimination. Here, applying the correct *Burlington Northern* analysis, a reasonable fact finder could well believe that defendants took adverse actions in response to Keceli's compliant; therefore, the claim should proceed to trial.[1]

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[1] Amici's discrete focus on the retaliation claim is intended to elucidate this important point of law. It is not intended to convey *Amici*'s approval of other holdings in the decision below.

ARGUMENT

I. THE *BURLINGTON NORTHERN* STANDARD APPLIES TO NEW YORK STATE HUMAN RIGHTS LAW CLAIMS

The United States Supreme Court's holding—that a different, less stringent standard for adverse actions applies to retaliation claims under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e–3[a])—applies with equal force to retaliation claims under the New York State Human Rights Law (*see Burlington Northern*, 548 US at 57). The laws are typically interpreted in conformity: as the Court of Appeals recently stated, "We have consistently held that the standards for recovery under the New York Human Rights Law are in nearly all instances identical to title VII and other federal law." (*Margerum,* 24 NY3d at 731, 5 NY3d at 340.) Further, on this point the laws share similar statutory text, legislative history, purpose, and policy, all counselling for adoption of the United States Supreme Court's ruling.

A. The New York State Human Rights Law's Antiretaliation Provision

In 1945, New York enacted its longstanding prohibition on employment discrimination, a prohibition "declared to be a civil right." (Law Against Discrimination, L 1945, ch 118) Expanded over time, the statute today makes it unlawful:

> because of an individual's . . . sexual orientation [or other protected characteristic] . . . , to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment

(Executive Law § 296[1][a]; *Margerum*, 24 NY3d at 734, 5 NYS3d at 342 [Rivera, J., concurring in part and dissenting in part]).

The 1945 law also prohibited retaliation for complaints of employment discrimination (L 1945 ch 118 § 131[4]). That protection was subsequently expanded to complaints about other prohibited discrimination, such as in public accommodation and housing (L 1963 ch 480; Bill Jacket, L 1963 ch 480, at 5). The current provision makes it unlawful for employers and others covered by the law:

> to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(Executive Law § 296[7]).[2]

Thus, the Human Rights Law has two separate provisions: a substantive provision that bars certain types of employment actions because of a protected characteristic (Executive Law § 296[1][a]), and an enforcement provision that makes it unlawful "to retaliate or discriminate" because of a complaint of unlawful discrimination (Executive Law § 296[7]). In the Human Rights Law as in Title

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[2] The anti-retaliation provision was also amended in 2000 to add gender-inclusive pronouns (L.2000 c. 166 § 22), part of an extensive act "conforming the human rights law to gender neutral language standards and correcting certain technical errors" (*id.* preamble).

VII, the substantive provision covers a more narrow range of conduct: "words in the substantive provision—'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,'. . .—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." (*Burlington Northern*, 548 US at 62.) In contrast, "No such limiting words appear in the antiretaliation provision." (*Id.*) In this respect, the language of the statutes is identical. It must be presumed that the New York State Legislature, like Congress, intended the difference. (*See id.* at 62-63; *see also Millea v Metro-N. R. Co.*, 658 F3d 154, 164 [2d Cir 2011] [applying *Burlington Northern* standard to federal Family and Medical Leave Act, based on similar wording and purposes of that statute].)

This two-pronged enforcement scheme places appropriate limits on the reach of an antidiscrimination law, while protecting the mechanisms needed to give force to the law. (*See Burlington Northern,* 548 US at 63-64.) Reading the antiretaliation provision of the Human Rights Law to be at least as broad as its federal analog is consistent with the New York law's purpose: "to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life." (Executive Law § 290[3]; *Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 836, 988 NYS2d 86, 95 [2014].)

While the first, antidiscrimination, objective of both Title VII and the Human Rights Law is focused on "tangible" harm, the second, antiretaliation provision, is intended to "deter the many forms that effective retaliation can take," for the Human Rights Law as for Title VII. (*Burlington Northern,* 548 US at 64; *see Millea*, 658 F3d at 164.) Based on the similar statutory language and broad purposes of the Human Rights Law, the antiretaliation provision is as broad for the state law as it is for the federal Title VII.

B. New York Cases Apply *Burlington Northern* to the Human Rights Law

New York State courts, including the Appellate Division, have cited to *Burlington Northern* when construing the New York State Human Rights Law retaliation standard. (*See Cenzon-Decarlo v Mount Sinai Hosp.*, 101 AD3d 924, 927, 957 NYS2d 256, 259 [2d Dept 2012][3]; *Brightman v Prison Health Servs*., 62 AD3d 472, 472, 878 NYS2d 357, 358 [1st Dept 2009].) Federal courts, including the Second Circuit, have applied the *Burlington Northern* standard to Human Rights Law retaliation claims. (*See Hicks v Baines*, 593 F3d 159, 164 [2d Cir

[3] In *Cenzon-Decarlo*, unlike this case, there was no adverse action under that standard. (*Id.*)

2010].) As is manifest by the error in the Decision below, however, the correct standard may not emerge as clearly as it could from the case law.[4]

The confusion may arise because courts continue to cite the *Forrest* decision,[5] which remains good law as to the basic burden-shifting framework of a retaliation claim

> [P]laintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse [] action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action.

(*Forrest*, 3 NY3d at 312-13; 786 NYS2d at 396). Plaintiff's burden is *de minimis* at the prima facie stage. (*Hicks*, 593 F3d at 164.) Once a plaintiff makes this prima facie showing, the defendant must come forward with a legitimate, nonretaliatory reason for the challenged action; plaintiff may in turn demonstrate that reason is pretextual. (*See Sandiford*, 22 NY3d at 916, 977 NYS2d at 700.)

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[4] *Cf. Perez v Jasper Trading, Inc.*, 05CV1725, 2007 WL 4441062, at *3 (ED NY Dec. 17, 2007) [applying *Burlington Northern* standard, but noting that "state courts have not developed jurisprudence concerning the breadth of [retaliatory] conduct prohibited" under the New York Labor Law]).

[5] *See*, *e.g.*, *Sandiford v N.Y. Dep't of Educ.*, 22 NY3d 914, 917, 977 NYS2d 699, 701 (2013); *LaMarca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 920, 12 NYS3d 192, 195 (2d Dept 2015); *Cotterell v State of New York,* 129 AD3d 653, 655, 10 NYS3d 558, 560 (2d Dept 2015); *Lambert v Macy's E., Inc.*, 84 AD3d 744, 746, 922 NYS2d 210, 212 (2d Dept 2011).

The cases continue to cite *Forrest* because these elements still govern the prima facie claim of retaliation under the NYSHRL, except for the *Burlington Northern* modification of the third prong. At the time *Forrest* was decided, the third prong of the test required a showing of "adverse *employment* action," which was then the same as the showing required for a discrimination claim. (*Forrest*, 3 NY3d at 312-13; 786 NYS2d at 396 [emphasis added].) However, *Burlington Northern* has since modified the third prong. (*See Kessler v Westchester County Dept. of Social Services*, 461 F3d 199, 207 [2d Cir 2006] [discussing change in standard after *Burlington Northern*]; *infra* Part II.)

As the *Cenzon-Declaro*, *Brightman*, and *Hicks* cases recognize, the later-decided *Burlington Northern* decision modified the appropriate test to be applied under the third prong of the *Forrest* test for a prima facie retaliation case. A plaintiff now need only show actions "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination," not adverse employment actions such as hiring, firing, constructive discharge, or hostile work environment. (*Burlington Northern*, 548 US at 57.) Thus, while cases continue to cite *Forrest* for the burden-shifting framework, courts have recognized that *Burlington Northern* articulates the governing standard for the adverse action inquiry in retaliation cases.

C. Although Not Identical, the State and Federal Laws Are Similar and Interpreted in Conformity

The Human Rights Law is not identical to its federal counterpart, Title VII, but here it is similar and should be interpreted similarly. Courts are "mandated to read the Human Rights Law in a manner that will accomplish its strong antidiscriminatory purpose." (*Scheiber v St. John's Univ.*, 84 NY2d 120, 126, 615 NYS 2d 332, 335 [1994].) Indeed, the statutory text requires that the Human Rights Law "be construed liberally for the accomplishment of the purposes thereof." (Executive Law § 300.) Courts have relied on this statutory mandate of broad construction to adopt broader or more protective Title VII standards under the Human Rights Law, rather than state law alternatives. (*See, e.g.*, *Argyle Realty Assoc. v New York State Div. of Human Rights*, 65 AD3d 273, 282, 882 NYS2d 458, 466 [2d Dept 2009] [applying the single employer rule to find coverage under the Human Rights Law].)

The Human Rights Law's substantive coverage is broader in several respects than its federal analogs. (*Margerum*, 24 NY3d at 736, 5 NYS3d at 344 [Rivera, J., concurring in part and dissenting in part]; *State Div. of Human Rights v Xerox Corp.*, 65 NY2d 213, 218, 491 NYS2d 106, 109 [1985]) The New York law covers more protected categories (such as sexual orientation, at issue here) (Executive Law § 296; 42 USC § 2000e-2) and defines "disability" more expansively (Executive Law § 292(21); 42 USC § 12102). New York law also has procedural

provisions that for the most part have a broader sweep, including size of employer covered, limitations period, and uncapped compensatory damages.[6]

In general, however, where, as here, the statutory language is similar, courts have concluded that legislative intent is comparable. The laws "address the same type of discrimination, afford victims similar forms of redress, are textually similar, and ultimately employ the same standards of recovery, federal case law in this area also proves helpful." (*Forrest*, 3 NY 3d at 305 n.3 [citation omitted].) For example, in *Margerum*, the Court of Appeals held that the "strong basis in evidence" standard required under Title VII in *Ricci v DeStefano* (557 US 557 [2009]) was equally applicable under the Human Rights Law to a municipal employer's defense to a charge of reverse discrimination. (24 NY3d at 730-31) Here, the United States Supreme Court's conclusions about the purpose of the federal antiretaliation provision and its interaction with the substantive provision hold true for the similarly worded New York law.

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[6] Executive Law §§ 292(5), 297; CPLR § 214(2); *Murphy v Am. Home Products Corp.*, 58 NY2d 293, 306 (1983); 29 USC §§ 626(d), 633(b); 42 USC § 1981a(b)(1) & 2000e-5(k).

D. Broad Antiretaliation Protection Is Recognized as Integral to Antidiscrimination Statutes Like the Human Rights Law

Broad antiretaliation protection is an integral part of antidiscrimination laws. As the United States Supreme Court has recognized, "fear of retaliation is the leading reason why people stay silent" about the discrimination they have encountered or observed. (*Crawford v Metropolitan Government of Nashville and Davidson Cty.*, 555 US 271, 279 [2009] [internal alteration, citation, and quotation marks omitted].) Thus, statutes like the Human Rights Law and Title VII, and many others, provide separate, broader protection for those who speak up about violations, or perceived violations of the law. As another example, recognizing the importance of broad retaliation protection a year before *Burlington Northern,* New York City expressly rejected the narrower test for retaliation and adopted a "reasonably likely to deter" standard. (NYC Administrative Code § 8–107[7]; Local Law No 85 [2005] of City of N Y.)[7]

In Amici Curiae's experience, employees are reluctant to report workplace discrimination, either formally informally, because they fear retaliation, which often takes precisely the less tangible forms covered by the *Burlington Northern* standard. When employees do not make reports, egregious employers continue to

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[7] *See* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 Fordham Urb L J 255, 322 (2006).

engage in discrimination and serious civil rights violations continue, and responsible employers cannot resolve problems at an earlier stage—before the employee loses the job or before formal proceedings are initiated. Thus, prohibitions on discrimination are, in Amici Curiae's observation, given force by broader protection against retaliation.

Indeed, noting the centrality of antiretaliation provisions to enforcement, the United States Supreme Court has consistently read prohibitions on "discrimination" to include such protection, even in laws that do not prohibit "retaliation" explicitly: "[I]f retaliation were not prohibited, [the statute's] enforcement scheme would unravel." (*Jackson v Birmingham Bd. of Educ.*, 544 US 167, 180 [2005] [Title IX]; *see also*, *e.g., Gomez-Perez v Potter*, 553 US 474, 479-80 [2008] [federal-sector provision of ADEA, 29 USC § 633a(a); collecting cases]; *CBOCS W., Inc. v Humphries*, 553 US 442 [2008] [42 USC § 1981].)

II. THE COURT BELOW ERRED IN REQUIRING A "TANGIBLE" EMPLOYMENT ACTION, HOSTILE WORK ENVIRONMENT, OR CONSTRUCTIVE DISCHARGE FOR A CLAIM OF RETALIATION

As explained in Part I, the *Burlington Northern* retaliation standard is a separate, broader standard from the adverse employment action required for discrimination claims. The Decision failed to apply the correct standard. First, the court below looked for a "tangible" employment action: "a termination of

employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities." (Decision at 9-10 [citing *Forrest*, 3 NY3d 295, 306].) Next, it evaluated whether there was a constructive discharge or hostile work environment. (Decision at 10) The Decision never considered whether there was an adverse action that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." (*Burlington Northern*, 548 US at 57.) This was error.

A. The Decision Below Failed to Apply the Governing Standard to Plaintiff's Retaliation Claim

The court below, understandably but incorrectly, applied a standard that is no longer good law. Courts have long held that employment discrimination claims under Title VII and the New York State Human Rights Law must rest on an "adverse employment action," which can be of two types: (1) "tangible" employment actions, often involving some economic harm: dismissal, salary changes, or the like; or (2) hostile work environment. (*Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 64-65 [1986]; *see also State Div. of Human Rights v Stoute*, 36 AD3d 257, 263, 826 NYS2d 122, 126 [2d Dept 2006].) Courts developed the doctrine of "constructive discharge" to cover cases where the hostile environment is "ratcheted up to the breaking point," becoming "functionally the same as an actual termination in damages-enhancing respects." (*Pennsylvania State Police v Suders*, 542 US 129, 147-48 [2004].) Under both Title VII and the Human Rights

Law, if there is no "tangible" employment action, the case is analyzed under the hostile work environment framework: plaintiff must prove that the actions were severe or pervasive, and unwelcome. (*Faragher v City of Boca Raton*, 524 US 775, 786 [1998]; *Zakrzewska v New School*, 14 NY3d 469, 479 [2010].)

These same two categories of adverse action—"tangible" employment action or severe/pervasive hostile work environment—used to apply to retaliation as well as discrimination claims in New York. (*See Forrest*, 3 NY3d at 306, 310, 313, 786 NYS2d 391, 394, 396; *Kessler*, 461 F3d at 207.) *Burlington Northern* articulated a third type of unlawful adverse actions "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." (*Burlington Northern*, 548 US at 57.) Because the statutory "antiretaliation provision must be construed to cover a broad range of employer conduct" (*Thompson v N. Am. Stainless, LP*, 562 US 170, 173 [2011]), the court below should have, but did not, apply that third standard to Keceli's retaliation claim.

B. Cases Applying the Governing Standard Hold that Evidence Similar to Plaintiff's Is Sufficient to Deny Summary Judgment

Actions similar to those taken here (including retaliatory discipline and work assignments) have been held to be sufficient to make out a retaliation claim under the *Burlington Northern* standard. (*Sandiford*, 22 NY3d at 916 & n.1, 977 NYS2d at 700-01 & n.1 [firing and reinstatement with full back pay and a warning letter];

Kessler, 461 F3d at 210 [transfer to a position with diminished responsibility at the same pay]; *Millea*, 658 F3d at 164-65 [letter of reprimand]; *Hicks*, 593 F3d at 168-69 [job sabotage and punitive scheduling]; *see also Thompson,* 562 US at 174 ["We think it obvious that" firing complaining worker's fiancé is sufficient].) As the First Department held in a similar case, defendants' "alleged retaliatory acts were 'materially adverse' in that they 'well might have dissuaded a reasonable worker from making . . . a charge of discrimination" (*Brightman,* 62 AD3d at 472, 878 NYS2d at 358 [quoting *Burlington Northern*, 548 US at 68]).

Under *Burlington Northern,* small acts of retaliation like some of those that Keceli describes, even acts which "considered individually, might not amount to much," can "plausibly paint a mosaic of retaliation and an intent to punish" the complaint of discrimination. (*Vega v Hempstead Union Free School Dist.*, 801 F3d 72, 92 [2d Cir 2015] [failure to notify school teacher of curriculum change; assignment of students with higher absence rates; erroneous payroll deduction; bad evaluation].)

Indeed *Burlington Northern* itself, like this case, involved a reassignment of job duties within the same job description; there, as here, there was sufficient evidence for the jury to conclude that plaintiff had been moved to a less prestigious position with duties that were "more arduous and dirtier." (548 US at 71.) The Court held that this showing was sufficient, noting that retaliatory work

assignments are "a classic and widely recognized example of forbidden retaliation" (*id.*; citations and internal quotation marks omitted). "Common sense suggests that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable." (*Id.*) Because a reasonable jury could believe that happened in this case, the Decision below must be reversed.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court clarify that the *Burlington Northern* standard applies to Human Rights Law claims of retaliation, and reverse the Decision below accordingly.

Dated: February 19, 2016
New York, New York

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: February 19, 2016
New York, New York

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