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Mihalik v. Credit Agricole Cheuvreux: An Object Lesson in Summary Judgment Litigation

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In **Mihalik v. Credit Agricole Cheuvreux No. America,** 715 F.3d 102 (2d Cir. 2013),[1] the Second Circuit recently reversed the summary dismissal of a plaintiff's gender discrimination and retaliation claims, brought under the New York City Human Rights Law. The decision represents the appellate court's strongest declaration to date that the NYCHRL is more protective than federal law of employment discrimination victims. But **Mihalik** is perhaps even more important for the guidance it provides as to how courts should weigh the evidence in a motion for summary judgment.

The Second Circuit's opinion, in the way it focused attention on evidence the importance of which was minimized by the lower court, restored for consideration evidence ignored below, and appreciated the nuances of the workplace, is a model for adjudicating a summary judgment motion. Had the district court

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Women's Equality Act Fails to Pass As N.Y. Legislative Session Ends

By By Joni Kletter
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In his State of the State address on January 9, 2013, Gov. Andrew Cuomo introduced the omnibus Women's Equality Agenda, a ten-point initiative intended to break down barriers to women's full participation in society and to further advance their health and well-being. Five out of the ten proposals directly relate to employment issues that are relevant to NELA/NY lawyers and the clients they serve. NELA/NY signed on as a coalition member, and NELA/NY attorneys have been actively involved in drafting, promoting and lobbying for this legislation, which includes:

- Ensuring New York's abortion law reflects federal protections and current medical practice
- Achieving pay equity by strengthening the equal pay act law
- Strengthening sexual harassment laws
- Allowing for the recovery of attorneys' fees in employment and credit and lending cases
- Strengthening human trafficking laws
- Strengthening family responsibility discrimination laws

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NELA/NY President Damley Stewart addresses rally for women's rights

The NELA/NY
Calendar of Events

August 6th
Bar Talk
(Co-hosted by the Judiciary Committee)

Location TBA

October 11
NELA-NY Fall Conference
Yale Club.

"In addition to our great and active Gender Committee which you will read about in this edition, NELA-NY has a number of excellent committees. We are always looking to add additional members who interests are aligned with the various committees' missions. Please feel free to contact me at any time for more information and ways you can get involved."

—Alix Ford,
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A Word from Your Publisher

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faithfully followed the dictates of Fed. R. Civ. P. 56, as the Court of Appeals' analysis shows, the plaintiff would have survived summary judgment, regardless of whether the NYCHRL or federal law governed.

The Facts of the Case[2]

Renee Mihalik was hired as a Vice President, selling Cheuvreux's electronic equity trading services to institutional clients, and working under the CEO, Ian Peacok. Within months of her hire, Peacock frequently commented on Mihalik's appearance and the sexiness of her attire, once saying that her wearing red shoes meant she was "promiscuous." He also asked her intrusive questions about her personal life and questioned her about a sexual position. Peacock twice propositioned Mihalik, and after she turned him down, he would no longer sit next to her at the trading desk, excluded her from meetings, publicly berated her and criticized her work.

With Peacock in the lead, the Cheuvreux office took on the atmosphere of a "boys club." Talk about strip clubs and rating female colleagues' appearances were favorite pasttimes among the male employees. Pornography was frequently found on computer screens and transmitted among the staff, with Peacock showing Mihalik pornography once or twice a week. An attitude of male domination at Cheuvreux was reflected by Peacock's telling Mihalik to "respect" a recently hired male employee because, as a "male," he was more "powerful" than she was.

Mihalik twice complained internally about Peacock, first, regarding his demeaning criticisms of her work, and subsequently, about his critiques of her appearance and inappropriate sexual comments. In response, she was told on one occasion that no one would believe her since he was the CEO, and on another, that she undoubtedly would be fired if she criticized Peacock.

Complicating what would have been a straightforward sexually hostile environment case was Mihalik's poor work performance. Her sales commissions were substantially lower than her colleagues, she had failed to follow up on some sales prospects and had been absent 35 days. After Mihalik failed to complete an assignment, Peacock met with her, intending only to give her a performance warning. But when, at the meeting, Mihalik alluded to Peacock' having propositioned her,[3] she was fired.

The District Court's Decision

The district court began its discussion of Mihalik's gender discrimination claims by citing to **Williams v. New York City Hous. Auth.**, 61 A.D.3d 62, 74-75 (1st Dep't 2009), for the rule that in deciding sexual harassment claims under the NYCHRL, courts should not use Title VII's analytical framework, but should "examine broadly whether 'different terms, conditions and privileges of employment [were imposed] based, inter alia, on gender.'" **Mihalik, 2011 WL 358606 *6, quoting Williams**, 61 A.D.3d at 75. Yet, noting the Second

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Circuit's lack of guidance on the issue, the district court nonetheless used Title VII's traditional *quid pro quo* and hostile environment framework to analyze plaintiff's gender discrimination claim.

The court dismissed Mihalik's *quid pro quo* sexual harassment claim for her failure to present any evidence of a causal connection between her rejection of Peacock's sexual propositions and her termination four months later. The court found that the four-month gap was too extended to create an inference that the events were linked.[4] The fact that, in the interim period, Mihalik was subjected to a series of potentially discriminatory acts – given menial job duties, publicly criticized and excluded from meetings – did not save the claim in the court's eyes. And, in any event, the court held, Mihalik's poor performance was a legitimate nondiscriminatory reason for her termination.

As to plaintiff's hostile environment claim, the district court acknowledged that a plaintiff's burden under the NYCHRL was less demanding than under Title VII. In particular, a plaintiff did not have to show that the conduct was "severe and pervasive" to establish liability. But, according to the court, Mihalik could not even meet this more forgiving standard. The district court's description of the evidence of hostile work environment is quoted here in full:

> First, Mihalik testified that Peacock showed her pornography once or twice a month from July to December 2007. However, Mihalik concedes that she asked to view the images in question on at least one occasion, and presents no details about the circumstances of the other occasions. Mihalik relies on *Patane v. Clark* [citation omitted] for the proposition that the presence of pornography in the workplace supports a hostile work environment claim, but the plaintiff in *Patane* was required to handle pornographic videotapes for her supervisor regularly and discovered that her supervisor was viewing pornographic websites on the plaintiff's own computer, and is therefore distinguishable. Mihalik also testified that Peacock commented repeatedly on her appearance in an objectifying and demeaning manner and propositioned her twice in December 2007. Specifically, Mihalik testified that Peacock commented she looked 'very sexy' once a week and made other sporadic comments from July to December 2007, including one remark suggesting that Mihalik was promiscuous and one question whether she enjoyed a particular sexual position. These comments are certainly boorish and offensive, but are not so grave or objectionable that they would have altered the conditions of Mihalik's employment. Additionally, the alleged sexual advances involved instances of propositioning in December 2007, and Plaintiff does not contend that any further comments or intrusive behavior took place during the four months afterwards.

The decision represents the Second Circuit's strongest declaration that the NYCHRL is more protective than federal law of employment discrimination victims.

Stressing that the NYCHRL is not a "general civility code," 2011 WL 3586060 *10, quoting **Williams**, 61 A.D.3d at 79, the court dismissed Mihalik's hostile environment claim.

As to plaintiff's retaliation claim, the district court held that there was no causal link between the termination and either her internal complaints or her rejection of Peacock's sexual advances. The court noted there was no evidence that Peacock was aware of her complaints. Finally, the court repeated that Mihalik's poor performance was a legitimate, non-biased reason for her discharge.

The Second Circuit's Decision

In an opinion written by Judge Denny Chin, the Second Circuit took issue both with the district court's legal and factual analysis. The Second Circuit held that the district court erred in dividing up Mihalik's gender discrimination claim into *quid pro quo* sexual harassment and sexually hostile work environment. The Court pointed out that *quid pro quo* and hostile work environment are federal law constructs, foreign to the NYCHRL. Instead, following **Williams**, the Second Circuit held that the correct standard to review any gender discrimination claim, including sexual harassment claims, was whether the plaintiff was "treated less well than other employees because of her gender." **Mihalik**, 715 F.3d at 110, quoting **Williams**, 872 N.Y.S.2d at 39. Once the plaintiff established that she was "treated less well," the employer may escape liability only by proving, as an affirmative defense, that the allegedly offensive conduct was nothing more than "'petty slights and trivial inconveniences.'" **Mihalik**, 715 F.3d at 111, quoting **Williams**, 872 N.Y.S.2d at 41

Having established the correct standard to analyze Mihalik's gender discrimination claim, the appellate court's decision was easy. The evidence, as described by the court, straight forwardly showed that Mihalik was "treated less well" because of her gender. It is instructive to compare the Second Circuit's summary of the evidence of the hostile work environment with the district court's summary quoted above:

> Mihalik presented evidence that men in the Cheuvreux office 'objectified' women by openly viewing and sharing pornography, discussing their jaunts to strip clubs, rating the female employees' appearances, and making lascivious comments about women's outfits and bodies. . . . There was even evidence that Peacock explicitly told Mihalik that male employees should be respected because they were 'male' and thus 'more powerful' than women.

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Id. at 113.

While the Second Circuit plainly wrote that the men at Cheuvreux "'objectified' women by openly viewing and sharing pornography," the district court's discussion was full of qualifications and limitations – Peacock showed Mihalik pornography, but only once or twice a month for just four months; one time, plaintiff had asked to see the video and could not give details about the other times; she was not made to handle pornographic videotapes and her computer was not used to show pornography. The district court understated the evidence of male employees' frequent comments (some lascivious) about plaintiff's and other female employees' appearances, as well as questions about her sex life and preferred sexual positions,[5] as "boorish and offensive" conduct, "not so grave or objectionable [to] alte[r] the conditions of Mihalik's employment." 2011 WL 3586060 *10. The district court, in addition, qualified the seriousness of Mihalik's unwanted sexual propositions, by noting that the two incidents were "isolated" and occurred in December, without "further comments or intrusive behavior" during the following four months. *Id.* Finally, the district court simply omitted telling evidence of a hostile workplace, namely that Peacock's statement to Mihalik that male employees should be respected because they were "male" and thus "more powerful" than women.[6]

Similarly, the district court gave a cramped presentation of the facts underlying Mihalik's *quid pro quo* sexual harassment and retaliation claims. Evidence of the adverse treatment suffered by Mihalik between her rejection of Peacock's sexual advances and her termination was highly relevant to both claims. For the *quid pro quo* claim, the adverse treatment was evidence of a continuing causal connection culminating in her discharge, and as to the retaliation claim, the adverse treatment was actionable itself. *Id.* at 116. Yet the district court explained away the interim hostile treatment. The court noted that the one task the plaintiff had considered menial she later conceded was not; there was evidence of her being excluded from just one meeting; and criticism of an employee's job performance did not constitute "tangible job detriments." 2013 WL 3586060 *7.

Contrast the Second Circuit's view of the same evidence:

> Mihalik testified in her deposition that, after she rejected Peacock's propositions..., he began to tell her – in front of her mostly male colleagues – that "she add[ed] nothing of value," that she has no fucking clue what [she was] doing," and that she was "pretty much useless." Mihalik also alleges that Peacock stopped sitting next to her at the front desk and instructed the staff to exclude her from meetings. [7]

715 F.3d 115-16. The court took note of "workplace realities," and stated that Mihalik's boss' "publicly humiliating her in front of her male counterparts and otherwise shunning her was likely to deter a reasonable person from opposing his harassing behavior in the future." *Id.* at 116 (inner quotations and citations omitted).[8]

Finally, the district court over-emphasized the legal significance of the plaintiff's poor work performance. The Second Circuit agreed that evidence of Mihalik's poor performance was "substantial." *Id.* at 117. However, the court also called attention to evidence never discussed in the lower court's opinion from which it could be inferred that Mihalik's work performance was not the true reason for her discharge: Peacock had never criticized Mihalik's work before she turned him down, and Peacock had not intended to terminate the plaintiff at his final meeting with her until she questioned whether his criticisms were motivated by the rejection he suffered. Such evidence, the Second Circuit states, would allow a reasonable jury to determine Cheuvreux was using Mihalik's poor performance as a pretext for retaliation. Moreover, Mihalik's work performance did not excuse the harassment she suffered: "Even a poorly-performing employee is entitled to an environment free from harassment." *Id.* at 114.

Mihalik as an Object Lesson

The district court's decision in **Mihalik**, granting summary judgment in the face of substantial evidence of discrimination and retaliation, is not an outlier. Plaintiffs' employment lawyers know that decisions like the lower court's are not so unusual within the federal judiciary. What is unusual is a reversal by an appellate court so clearly demonstrating how a trial court misinterpreted the evidence presented on a motion for summary judgment, leading to the undeserved denial of the plaintiff's right to a jury trial.

The federal courts' all too ready use of summary judgment, and since **Twombly** and **Iqbal**, of motions to dismiss, to dispose of employment cases without a trial has received increasing notice from academics. The dean of federal civil procedure, Arthur Miller, as part of a broad critique of the "deformation of civil procedure" over the past 30 years, argues that the motion for summary judgment "has taken on an Armageddon-like significance; it has become both the centerpiece and end-point for many (perhaps too many) federal cases."[9] According to Miller, the federal courts' abuse of summary judgment is one of a number of changes to the Federal Rules over the past 30 years that have restricted plaintiffs' ability to reach a determination of their claims' merits, limit citizens' access to the courts, interfere with private litigation to enforce various public policies, such as employment discrimination, and reflect the strong pro-business and pro-government bias of the federal judiciary.

The Federal Judicial Center found that summary judgment is granted disproportionately to dismiss civil rights and employment cases. In its most recent study, the Center reported that 77% of summary judgment motions are granted, in whole or in part, in employment discrimination cases and 70% in other civil rights cases, compared to 61% in torts cases, and 59% in contracts cases. Further, 15% of employment discrimination cases and 6% of other civil rights cases were terminated by summary judgment, as compared with 3% of torts and 4% of contracts cases.[10]

The former U.S. District Court Judge, Nancy Gertner, has written that the prevalence of summary judgment in employment discrimination cases is

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NELA/NY'S Gender Discrimination Committee

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NELA/NY has a number of committees, such as the Conference Committee and Judiciary Committee, but few deal with substantive legal areas. One that does is the Gender Discrimination Committee, an active committee that is concerned with one of the more dynamic, changing and topical areas of employment law.

The committee has sponsored a NELA/NY Spring Conference panel presentation and a NELA Nite program, and plans to step up such activities in the future. The committee meets once each month between September and May, and currently is co-chaired by Ashley Normand of Brill & Meisel LLP and Geoff Mort of Kraus & Zuchlewski LLP. It has approximately fifteen active members in addition to others who attend meetings and take part in projects periodically.

The committee was initially organized as the Sexual Harassment Committee in the 1990s, at roughly the time Faragher v. City of Boca Raton and Ellerth v. Burlington Industries were granted certiorari by the U.S. Supreme Court. To my knowledge, the committee's first co-chairs were Laura Schnell and Larry Solotoff. Some years later, after Ashley Normand became its chair, the committee widened its scope to become the Gender Discrimination Committee.

Most recently, the committee sent a number of its members to Albany to participate in the NELA/NY lobbying effort for Governor Cuomo's proposed Women's Equality Act. One of the committee's more long-term projects is "Know Your Rights," an outreach effort designed to inform interested women in the City about their rights relating to gender discrimination under federal, state and city law. A powerpoint presentation has already been developed, and the committee expects to conduct a "Know Your Rights" program in the early fall, possibly in lower Manhattan. In addition, of course, the committee provides a forum for members to discuss developments in gender discrimination law as well as their own cases involving gender discrimination issues.

New members are always welcome, and should feel free to contact Ashley Normand or Geoff Mort about the committee. ■

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aided by judge's employing "shorthand, descriptive tools" that often substitute for rigorous analysis of the evidence, and even more disturbing, "provide new opportunities for the stereotypes and assumptions of judges to filter cases out of litigation at early stages." Most of us are familiar with these tools: stray remarks, same actor, honest belief or business judgment.[11]

What is a plaintiff's lawyer to do knowing the federal judiciary's proclivity for granting summary judgment in employment discrimination cases? NELA National has prepared some excellent papers on defeating motions for summary judgment.[12] Here is another thought. Instead of the standard section of the brief setting forth the summary judgment standard, a section that judges and their clerks probably skip over in any event, how about explicitly discussing, in a non-accusatory way, how summary judgment, particularly in employment cases, has been abused, citing the many academic studies on the subject, a few of which have been mentioned here. For plaintiffs' lawyers to put the issue out in the open on a consistent basis may alert judges to beware of their biases against employment cases, and *may* lead to better decisions. Perhaps with the issue out front and center it won't be necessary, as in *Mihalik*, to have to win a terrific appellate decision reversing an improvident grant of summary judgment for your client to try his or her case to a jury.

Endnotes

1 The case was brought by NELA/NY member Brian Heller, of Schwartz & Perry, LLP.

2 This summary of the case comes from the Second Circuit's opinion, since, as discussed in the text, the district court's opinion omitted some pertinent facts.

3 Mihalik asked Peacock, "What's not working out [?] Me and you or me at the company?"

4 *But see Bernhardt v. Interbank of N.Y.*, 18 F. Supp. 2d 218 (EDNY 2008) (11-month gap); 258 F.Supp.2d 264 (S.D.N.Y. 2003) (9 months); *Salerno v. City Univ. of New York*, No. 99 Civ. 11151 (NRB), 2003 WL 22170609 (S.D.N.Y. 2003) (3-year gap where there was other evidence of retaliatory motive).

5 The district court wrote that Peacock asked "one question about whether she enjoyed a particular sexual position," 2011 WL 3586060 *10, while the Court of Appeals described Peacock's inquiry of Mihalik more graphically, asking whether she "fanc[ied] dogging." *Id.* at 106.

6 The Second Circuit underlined the seriousness of Peacock's remark by quoting *Williams*, 872 N.Y.S.2d at 41, n.30, that "a single comment that objectifies women... made in circumstances where the comment would, for example, signal views about the role of women in the workplace [may] be actionable." 715 F.3d at 113.

7 Without offering an opinion as to whether rejecting a boss' sexual proposition is protected activity under federal and state law, the Second Circuit made clear that such conduct is considered protected under the NYCHLR. *See* 715 F.3d at 116, n.12.

8 On this point, the court, 715 F.3d at 116, cited 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, 332 (asserting that if "the cost of opposing discrimination would be the loss of all future social intercourse with other employees, the workplace reality would be that some people – indeed, many people – would become less likely to oppose discrimination than they otherwise would be.")

9 Arthur R. Miller, A., "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedures," 86 NYU L. Rev. 286, 331 (April 2013) (http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-1-Miller.pdf).

10 See Schneider, Elizabeth M., The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 549 (2010).

11 Gertner, Nancy, "Implicit Bias in Employment Discrimination Litigation," Legal Studies Research Paper, Working Paper, No. 12-07, June 7, 2012.

12 *See* NELA's 2009 Surviving Summary Judgment in Employment Cases Bundle, on the NELA website, and available on the Employee Rights Advocacy Institute for Law and Policy, Mathew C. Koski, "Preserving the Right to a Jury Trial by Preventing Adverse Credibility Inferences at Summary Judgment"; Mathew C. Koski, "Securing the Right to a Jury Trial: Attacking 'Stray Remarks' At Summary Judgment; and "Top 10 Tips to Make Your Case "Summary Judgment Proof."