

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

<p>JELENA IVANOVIC, Plaintiff, - vs. - ANA LABORATORIES, INC., Defendant.</p>	<p>CIVIL ACTION NO. 02-CV-6129 (JEI)</p>
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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Plaintiff's Response to Defendant's Statement of Material Facts	iv
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	3
LEGAL ARGUMENT	16
I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE INNUMERABLE MATERIAL ISSUES OF FACT IN THIS CASE	16
II. PLAINTIFF HAS MADE A PRIMA FACIE SHOWING BASED ON RACE, GENDER AND NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII	18
III. PLAINTIFF HAS MADE A PRIMA FACIE SHOWING BASED ON RACE, UNDER § 1981	20
IV. DEFENDANT'S REASONS FOR FIRING PLAINTIFF ARE PRETEXTUAL	26
V. DEFENDANT IS STRICTLY LIABLE FOR THE ACTIONS OF MAGDLINE NICHOLAS	32
VI. PLAINTIFF WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT	35
VII. PLAINTIFF HAS STATED A CAUSE OF ACTION FOR RETALIATION IN VIOLATION OF VIRGINIA PUBLIC POLICY	41
VIII. PLAINTIFF HAS STATED A CAUSE OF ACTION FOR BATTERY	42
CONCLUSION	45

TABLE OF AUTHORITIES

STATUTES

Va. Code Ann. § 40.1-51.2:1 (West 2003) 41

CASES

Allen v. Michigan Dept. of Corrections, 165 F.3d 405, 411 (6th Cir. 1999) 33

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074(3d Cir.1996) 35

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16

Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994) 37

Bray v. Marriott Hotels, 110 F.3d 986 (3rd Cir. 1997) 16

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 33,34

Delli Santi v. CAN Ins. Companies, 88 F.3d 192-203-4 (3^d. Cir. 1996) 27

Etherton v. Doe, 2004 WL 1277890 (Va., 2004) 41

Faragher v. Boca Raton, 524 U.S. 775 (1998) 33,34

Fischer v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) 42,43

Gotfryd v. Book Covers, Inc., 1999 WL 20925 (N.D. Ill. Jan 07, 1999) 33

Harley v. McCoach, 928 F. Supp. 553 (E.D. Pa. 1996) 37

International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3^d Cir. 1990) 16

Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp.2d 1314 (M.D. Fla. 2002) 37

<u>Lee-Crespo v. Schering-Plough Del Caribe, Inc.</u> , 354 F.3d 34 (1 st Cir. 2004)	37
<u>McCray v. DPC Industries, Inc.</u> , 942 F. Supp. 288 (E.D. Tex. 1996)	37
<u>McDonald v. Santa Fe Transp. Co.</u> , 427 U.S. 273 (1976)	22
<u>McDonnell Douglas Corp. v. Green</u> , 411 U.S. 792 (1973)	22
<u>Meritor Savings Bank, FSB v. Vinson</u> , 477 U.S. 57, 65 (1986)	35
<u>Perryman v. West</u> , 949 F. Supp. 815 (M.D. Ala. 1996)	23
<u>Picard v. Barry Pontiac-Buick, Inc.</u> , 654 A.2d 690 (R.I. 1995)	42
<u>Rodgers v. Western- Southern Life Ins. Co.</u> , 12 F.3d 668, 673 (7 th Cir. 1993)	37, 38
<u>Ross v. Arcata Graphics Co.</u> , 788 F. Supp. 1298 (W.D.N.Y. 1992)	37
<u>Schwapp v. Town of Avalon</u> , 118 F.3d 106 (2 nd Cir. 1997)	37
<u>Serbin v. Bora Corp.</u> , 96 F.3d 66 (3d Cir. 1996)	16
<u>Shager v. Upjohn Co.</u> , 913 F.2d 398, 405 (7 th Cir. 1990)	34
<u>Waite v. Blaire, Inc.</u> , 937 F. Supp. 460 (W.D. Pa. 1995)	36
<u>West v. Philadelphia Electric Co.</u> , 45 F.3d 744 (1995)	35

PLAINTIFF'S RESPONSES TO DEFENDANT'S STATEMENT OF MATERIAL

FACTS

1. Plaintiff does not dispute Paragraph 1.
2. Plaintiff does not dispute Paragraph 2.
3. Plaintiff does not dispute Paragraph 3.
4. Plaintiff does not dispute Paragraph 4.
5. Plaintiff does not dispute Paragraph 5.
6. Plaintiff does not dispute Paragraph 6.
7. Plaintiff does not dispute Paragraph 7.
8. Plaintiff does not understand paragraph 8.
9. Plaintiff disputes Paragraph 9.
10. Plaintiff does not dispute Paragraph 10.
11. Plaintiff does not dispute Paragraph 11.
12. Plaintiff does not dispute Paragraph 12.
13. Plaintiff does not dispute Paragraph 13.
14. Plaintiff disputes Paragraph 14.
15. Plaintiff disputes Paragraph 15.
16. Plaintiff disputes Paragraph 16.
17. Plaintiff does not dispute Paragraph 17.
18. Plaintiff does not dispute Paragraph 18.
19. Plaintiff disputes Paragraph 19.
20. Plaintiff does not dispute Paragraph 20.
21. Plaintiff does not dispute Paragraph 21.
22. Plaintiff disputes paragraph 22.

23. Plaintiff disputes paragraph 23.
24. Plaintiff does not dispute Paragraph 24.
25. Plaintiff disputes Paragraph 25.
26. Plaintiff disputes paragraph 26
27. Plaintiff disputes Paragraph 27.
28. Plaintiff disputes paragraph 28.
29. Plaintiff disputes Paragraph 29.
30. Plaintiff disputes Paragraph 30.
31. Plaintiff disputes Paragraph 31.
32. Plaintiff disputes Paragraph 32.
33. Plaintiff disputes Paragraph 33.
34. Plaintiff disputes Paragraph 34.
35. Plaintiff disputes Paragraph 35.
36. Plaintiff disputes Paragraph 36.
37. Plaintiff disputes Paragraph 37
38. Plaintiff disputes Paragraph 38.
39. Plaintiff disputes Paragraph 39.
40. Plaintiff disputes paragraph 40.
41. Plaintiff Disputes Paragraph 41.
42. Plaintiff disputes Paragraph 42.
43. Plaintiff disputes Paragraph 43.
44. Plaintiff disputes Paragraph 44.
45. Plaintiff disputes Paragraph 45.
46. Plaintiff disputes paragraph 46.

47. Plaintiff disputes Paragraph 47.
48. Plaintiff disputes Paragraph 48.
49. Plaintiff disputes Paragraph 49.
50. Plaintiff disputes Paragraph 50.
51. Plaintiff disputes Paragraph 51.
52. Plaintiff does not dispute paragraph 52.
53. Plaintiff does not dispute Paragraph 53.
54. Plaintiff does not dispute Paragraph 54.
55. Plaintiff does not dispute Paragraph 55.
56. Plaintiff does not dispute Paragraph 56.
57. Plaintiff does not dispute Paragraph 56.
58. Plaintiff does not dispute Paragraph 57.
59. Plaintiff disputes Paragraph 58.
60. Plaintiff does not dispute paragraph 59.

COUNTER STATEMENT

1. An issue of material fact exists with respect to Magdline Nicholas' job title and as to the whether or not Magdline Nicholas was a supervisor who made employment decisions regarding hiring and firing. Robie Dep. Tr. at 24: 20-25.

2. A related issue of material fact exists as to whether Rob Robie made final decisions regarding personnel

matters in the Roanoke facility. See Nicholas Dep. Tr. at 32, 6-7; 75, 19-25; 76, 1-3.

3. An issue of material fact exists as to whether plaintiff was uncomfortable with having an African-American as her supervisor. See Ivanovic Depos. Tr. at 232, 7-19.

4. An issue of material fact exists as to whether plaintiff complained about discrimination in the workplace to Rob Robie. Plaintiff complained to Rob Robie in April with respect to threats Nicholas made to her regarding her job security. See Plaintiff's Interrog Responses at 3; 17; 18, as well as Nicholas' overall treatment towards her in the lab.

5. An issue of material fact exists as to whether defendant had a policy and procedure in place with respect to complaining about any kind of harassment. See Ivanovic Certification at ¶5.

6. An issue of material fact exists as to whether or not plaintiff spoke with an accent, and as to whether or not one could determine that plaintiff was a foreigner by speaking to her. See Ann Smith Certification at ¶10.

7. An issue of material fact exists as to whether Nicholas's racial, ethnic and gender-related comments and incidents were motivated by unlawful animus with respect to those traits. See Ann Smith Certif., Exhibit 1.

8. An issue of material fact exists as to whether Mag Nicholas was morely threatened by people with more education than her, or whether that was connected to the race of that person. See Exhibit B, Plaintiff's Interrog. Resp. at 1,1(d); Id. at 2,3.

9. An issue of material fact exists as to whether plaintiff willfully disobeyed procedures, and whether she refused to follow instructions. Plaintiff had legitimate safety concerns regarding the procedures Nicholas utilized, such as the potential for accidents in the lab, such as explosions. Id. at 61, 21-25; 69, 12-15; 74, 20-24.

10. An issue of material fact exists as to whether plaintiff had methods that she thought were better. Plaintiff had legitimate safety concerns regarding the procedures Nicholas utilized, such as the potential for accidents in the lab, such as explosions. Id. at 61, 21-25; 69, 12-15; 74, 20-24.

11. An issue of material fact exists as to whether plaintiff had conflicts with Craig Sibthorp. Sibthorp did not like plaintiff and verbally assaulted her for no reason. See Smith Certif. at ¶¶17-22.

12. An issue of material fact exists as to whether plaintiff was insubordinate. Plaintiff always checked with Robie to discuss her reasons for not wanting to do things

as Nicholas saw them. Robie agreed with her. Id. at 60, 1-10; 75, 22-23. In fact, defendant's Chattanooga lab, which retrained Nicholas, was following plaintiff's exact suggestions to Nicholas. Id. at 70,

13. An issue of material facts exists as to whether Dana Brewer received preferential treatment. Brewer would read the newspaper during work hours and refuse to do work. Ivanovic Dep. Tr. (2). at 90, 4-8. He would also leave the lab earlier than scheduled, but the hours in his timesheets did not reflect this. Plaintiff's Interrog. Resp. at 3. He was also paid for a full day's work for working for as little as one hour. Ivanovic Dep. Tr. (2) at 30, 17-24.

14. An issue of material fact exists as to whether the incidents plaintiff describes were racially motivated. Nicholas called plaintiff a "stupid Croatian." and told her that plaintiff could, "put your Croatian diploma in the toilet." Complaint at ¶15.; Plaintiff's Interrog. Resp. at 2. Nicholas directed these comments to the point that they became daily occurrences. Ivanovic Certif. at 2, 9-12.

15. An issue of material fact exists as to whether defendant's issues with plaintiff were merely personal conflicts. Nicholas expressed several times in front of Ann and Jelena that she wanted to "get a gun and shoot white people." Id. at 6. Nicholas "set up" plaintiff to be fired

by claiming that she did not have her SOPs. Ivanovic Dep. Tr. at 115, 1-12, and by providing disciplinary reports for false reasons.

16. An issue of material fact exists as to whether Robie terminated plaintiff. See Exhibit G.

17. An issue of material fact exists as to the date that plaintiff filed her EEOC charge. See Id. at 18.

18. An issue of material fact exists as to whether Craig Sibthorp's motivations were due to other animus other than race. See Ann Smith Cert. at ¶¶24-25.

19. An issue of material fact exists as to whether plaintiff's responses to interrogatories reveal only personal conflicts. Plaintiff alleges several ethnically charged statements that Nicholas made to her, including several comments regarding Croatia, in response to neutral questions regarding lab procedures. Plaintiff's Interrog. Resp. at 1,1(d); Id. at 2,3, 5; Further, plaintiff shows that Nicholas was abusive to Dennis Hosang, who was also of foreign descent; Id. at 2

20. An issue of material fact exists as to whether Nicholas' behavior was infrequent, minor and of no material consequence, or whether they were pervasive. Plaintiff mentions that she was subjected to derogatory statements by Nicholas during her first three months on the job from

March 2001 through June 2001, more verbal abuse from July 2001 through August 2001, and again from September 2001 through December 2001. See Plaintiff Interrog. Resp. at 1-2.

21. An issue of material fact exists as to whether Plaintiff made a phone call to Rob Robie, and whether plaintiff reported discrimination. See Id. at 8,17,18.

22. An issue of material fact exists as to the veracity of the reasons proffered for plaintiff's termination. See Plaintiff's Interrog Resp. at 19-20.

PRELIMINARY STATEMENT

Jelena Ivanovic is a chemical engineer from Croatia who came to this country as an adult to make a new life for herself. Despite her credentials, because of her situation and the struggles of mastering a new language, she was reduced to taking a low-level laboratory job for defendant, Ana Laboratories, Inc. as a lab technician. Little did she imagine that, so humbled, she would have to endure even more - that in return for a low hourly wage, she would be told to tolerate nearly constant humiliation, verbal abuse - and, eventually, even physical abuse and a staged pretext for dismissal - at the hands of a small-time supervisor. Mag Nicholas, her laboratory manager, had a problem with Jelena.

Nicholas, a black woman, had made it clear to anyone who would listen that she harbored resentment toward white people. She demonstrated it in her lab by having one set of rules for white people and one set of rules for black people. But in Jelena she found the target for her rage that she had been looking for: Someone white and weaker than she, someone with a heavy accent, someone from a comically small and troubled country. Nicholas decided to toy with the vulnerable Jelena, to exercise her petty power over her. Jelena was a target for curses, racial epithets and racial slurs. Every attempt by Jelena to assert her basic rights and to maintain a scrap of

personal pride and professionalism resulted in retaliation, which escalated - along with the racial and national-origin-based abuse and threats - until Jelena was out on the street.

Jelena brought this suit to assert her rights. Defendant now makes a summary judgment motion which can be based only on a showing that there are no material facts in dispute. It does so by submitting nearly two inches of paper - two inches of paper to show the absence of evidence.

This application is at best no more than a request that the Court try this case on a motion. At worst it is a vain attempt to make this litigation "costly" and intimidate Jelena and her lawyers into abandoning her claim. Either way, this brief demonstrates, defendant cannot possibly meet its legal burden.

STATEMENT OF FACTS

Jelena Ivanovic ("Jelena") is a 52-year old Croatian woman who immigrated to the United States in 1985. She received a Bachelor of Science degree in chemical engineering in Croatia. Ivanovic Dep. Tr. I at 9, 3. Id. at 17, 7. While working in Illinois, she met her husband Joseph Cooley ay 28,4-14. Jelena followed her husband to Virginia to take care of his ailing mother Id. at 31, 4-9.

On March 19, 2001, defendant Ana Laboratories, Inc. hired Jelena, a chemical engineer, as a laboratory technician in its

lab in Roanoke, Virginia ("the Roanoke lab"). Id. at 49, 16. At all times, the lab was staffed with one supervisor, Magdline Nicholas ("Nicholas"), and two lab technicians, including Jelena. Nicholas Dep. Tr. at 81, 6-12. Nicholas holds an Associate's degree in general science and another in computer information systems. Id. at 7, 13-17. Nicholas was responsible for training Jelena. Nicholas Dep. Tr. at 51, 8-9. Nicholas's supervisor was Rob Robie, ("Robie"), defendant's general manager at the time. The number of hours she was paid for was determined by time sheets that she completed and gave to Nicholas. Ivanovic Certif at ¶ 3. These time sheets were never returned to her. Id. at ¶ 4; Smith Certif. at ¶45.

During her first three months in defendant's employ, Jelena worked with another lab technician named Charles Ruvolis ("Ruvolis"). Plaintiff's Interrog. Resp. at 9.

Jelena is Verbally Abused by Nicholas

Almost immediately after beginning her job, Jelena was subjected to a plethora of insults and discriminatory comments based on her national origin by the lab supervisor, Magdline Nicholas. Nicholas, who is black, also made frequent racist comments to Jelena. These were not occasional, isolated outbursts but rather a regular stream of invective centering on Jelena's national origin. For example, on May 25, 2001, Nicholas called Jelena a "stupid Croatian." Complaint at ¶15.

When Jelena tried to explain to Nicholas that she had experience working in a lab, Nicholas responded, "You can put your Croatian diploma in the toilet." Plaintiff's Interrog. Resp. at 2. These comments alone would not have brought Jelena to court. But they established, early on, a hostile work environment because of her supervisor's national-origin and racial animus.

In fact, Nicholas directed these comments on a regular basis well until 2002. On several occasions, Nicholas also laughed at Jelena and yelled at her because Jelena spoke English with a Croatian accent. Complaint at ¶14. Jelena's national origin was a great source of fun at Ana Labs; Nicholas also joked about Jelena's accent with Craig Sibthorp. Smith Certif. at ¶14. Nicholas was not just a nasty person. For example, Charles Ruvolis was never subjected to any such insulting comments by Nicholas. Ivanovic Certif. at ¶ 16. But then, he is not an immigrant from Croatia.

The Hostility Escalates

In June 2001, Charles Ruvolis resigned from his position. Plaintiff Interrog. Resp. at 9. A month later, defendant hired Dennis Hosang ("Dennis") in July 2001. Id. Dennis was a Caribbean male of mixed ancestry, who, like Jelena, spoke with a foreign accent. From the period of July 2001 through August 2001, Nicholas abused Dennis by calling him names and threatened him, creating further hostility in the workplace. Id. In one

incident, Nicholas even kicked Dennis. Ivanovic Dep. Tr. (1) at 220, 21-22; Plaintiff's Interrog. Resp. at 9. Jelena complained to Robie, defendant's general manager at the time and Nicholas's supervisor, about Nicholas's abuse. Robie responded merely by telling her to train Dennis herself. Plaintiff's Interrog. Resp. at 9. Jelena followed Robie's orders to train Dennis. Id. Nicholas, in turn, accused her of trying to "control" the lab. Shortly thereafter, Dennis left the job. Ivanovic Dep. Tr. (2) at 17, 8.

During this vacancy, a woman of Bosnian descent, Jasna Jerkovic, applied for a position in the lab. In August 2001 Nicholas told Jelena that she did not want to hire Jasna Jerkovic because Ms. Jerkovic spoke with a foreign accent and spoke broken English. Complaint at ¶17. When Jelena stated that this was unlawful, Nicholas responded that it was "her lab" and that she could do whatever she wanted. Jelena responded that Ms. Jerkovic was a Bosnian refugee whose house was burned down, causing her to flee with her two small children. Nicholas responded unsympathetically that white people had done the same thing to black people. Complaint at ¶18.

Defendant hired Ann Smith ("Ann") after Dennis Hosang left the lab. Plaintiff's Interrog. Resp. at 9. Ann is a white American female who was born and raised in Virginia. Smith Certif. at ¶ 4. Nicholas bragged that she did not hire Jasna

Jerkovic because it was enough that she had Jelena to "put up with," and that she "did not need" another alien with broken English to put up with. Ivanovic Dep Tr. (2) at 211, 6-13. Even then, Nicholas referred to Jelena and Ann as "white bitches" on numerous occasions. Complaint at 21; Smith Certif. at ¶ 28.

September 12th - Lashing out at
Foreigners at Ana Labs

On September 12, 2001 - a day after the infamous attacks on New York and Washington by foreign nationals living in the U.S. - Craig Sibthorp, a representative of a client of defendant, came to the lab with results of a procedure she had provided to him fifteen minutes before, and his corrections. Sibthorp had long been an antagonist of Jelena's. As a client he had free run of the lab, and he and Jelena would often share laughs at Jelena's expense, making fun of her foreign accent and "stupidity." Smith Certif. at ¶ 14-17.

This day, Sibthorp was in a foul mood, depressed about the events of September 11th, as so many were, but particularly expressive in his comments about the damage "foreigners" were doing to America. Examining his questions, Jelena asked Sibthorp - in her broken English - a question about a procedure in the lab. Sibthorp exploded at Jelena. To Ann Smith, it was obvious from the context, the timing, and comments Sibthorp himself had made, that he was in no mood to be questioned by a "foreigner" a

day after September 11th, even one just trying to do her job and make a life for herself in a new land. Smith Certif. at 17-23. Smith Certif. at id.

Meanwhile, Nicholas's abusive treatment towards Jelena continued throughout Ann's tenure at the Roanoke facility. Ann witnessed Nicholas's abusive treatment towards Jelena and saw Jelena crying during several days. Id. at ¶ 13; Smith Diary at 7. Nicholas refused to train Ann on certain procedures, so Ann would reach out to the lab technicians in defendant's Chattanooga, Tennessee lab for guidance and assistance. Smith Certif. at ¶ 47. Ann noticed that some of the procedures that Nicholas performed were not in conformance with what she was told by the Chattanooga lab, especially Chris Murrow. Id. at ¶¶ 41-42; Ivanovic Dep. Tr. at(2) at 23, 7-22. Nicholas would become combative when Ann would point these failings out to her. Ann complained to Chris Murrow and Rob Robie about the discrimination and abuse by Nicholas. Smith Certif. at ¶¶38-39

In the fall of 2001, Nicholas was sent to defendant's Chattanooga facility for retraining. Nicholas Dep. Tr. at 52, 11-12. During that same period, Jelena also started reaching out to the Chattanooga office for assistance when Nicholas refused to train her or assist her. Plaintiff's Interrog. Resp. at 10. She complained to Chris Murrow about Nicholas's behavior.

Chris Murrow told her that other people had complained about Nicholas's behavior and to also keep notes. Id. at 4.

When she returned from her retraining in Chattanooga, Nicholas was angry and retaliatory. Id. at 7-8. Now she told Jelena that Ann wanted "to control the lab." Ivan Dep. Tr. at 16, 12-12.

Later that fall, Nicholas expressed several times in front of Ann and Jelena that she wanted to "get a gun and shoot white people." Id. at 6. Around this time she decided she simply would refuse to assist Ann and Jelena when they had questions about their work, telling them to call Rob Robie or Chris. Smith diary at 8. Nicholas forbade Jelena from assisting Ann during Ann's training period Ivanovic Dep. Tr. (2) at 16, 12-13. also Plaintiff's Interrog. Resp. at 2. Eventually, Nicholas "set up" Ann to be fired, and this time she succeeded. Ivanovic Certif. at ¶ 23; Smith Certif. at ¶¶58-59.

Nicholas and the Black Lab Technician

Defendant hired Dana Brewer, an African-American male, to replace Ann Smith. Brewer began working on January 30, 2002. Suddenly Nicholas, the office despot, softened - at least as regarded Brewer. She made sure he was paid for the Martin Luther King, Jr. holiday - despite the fact that he had not even

begun working yet! Brewer would read the newspaper during work hours and refuse to do work. Ivanovic Dep. Tr. (2). at 90, 4-8. He would also leave the lab earlier than scheduled, but the hours in his timesheets did not reflect this. Plaintiff's Interrog. Resp. at 3. In fact, he was paid for a full day's work for working for as little as one hour. Ivanovic Dep. Tr. (2) at 30, 17-24. Dana's experience demonstrated that Nicholas was not merely an angry person or a tough supervisor; black employees, apparently, would have an easy time. When Jelena discovered that Brewer was getting paid for more hours than he worked, she complained about this to Nicholas, who responded that she was a "nobody" and that Jelena could "go back to Croatia if [Jelena] didn't like it." Plaintiff's Interrog. Resp. at 5-6. Nicholas's verbal, ethnicity- and national-origin-based attacks at this point were occurring almost daily. Ivanovic Certif. at ¶ 12.

During this period, Jelena began to experience Nicholas sabotaging her work. Id. at 3. On April 9, 2001 she witnessed Nicholas trying to mix her samples, in the same way that Nicholas had done in her attempt to fire Ann Smith. Plaintiff's Interrog. Resp. at 17. After seeing this, she called Rob Robie and complained. Id.

Nicholas's First Attempt to
"Set Up" Jelena to be Fired

In April, 2001 Nicholas had approved a three-week vacation for Jelena to return to Croatia for a visit. Ivanovic Dep. Tr.

(2) at 57, 10-25; 58, 1. Jelena was scheduled to return on May 3, 2002. Before she left, Nicholas nonetheless threatened Jelena by telling Jelena that she would not have a job when she returned. Id. at 3. On May 2, 2002, Jelena received a telephone call at home from Rob Robie asking her why she had not reported to work or called the Roanoke lab. Id. at 3-4. Nicholas had told Robie that Jelena had not reported to work. Jelena then explained to Robie that she had been on approved leave and that Nicholas had approved for her to return on May 3, 2004.

There was no apparent reason for Nicholas's odd behavior. The only thing Jelena did know was that Nicholas could not stand her, and the only reason for Nicholas's oft-expressed contempt for her based on her gender and race, and foreign origin. Id.

The May 7, 2002 Incident

On May 7, 2004, Jelena refused to perform a lab procedure that she believed, based on her years of lab experience as a chemical engineer, was dangerous to her safety. Plaintiff's Interrog. Resp. at 5, 7. Her attempts to explain her reasons were met with Nicholas's usual verbal barrages of personal and ethnic insults. Having seen Ann Smith "set up" for firing by Nicholas in the past, Jelena tried to call Rob Robie to explain the situation, but Nicholas physically shoved her away from the phone so that she could not make the phone call. Ivanovic Dep.

Tr. (2) at 68, 1-25. Nicholas then whipped out an e-mail to Robie, accusing Jelena of not reading the procedure. Id. Afterwards, Robie spoke to Jelena and agreed with Jelena's position. Id. He then sent a memo asking everyone to put all procedures in writing and circulate them in the lab. — Jelena wrote out the procedure in question, indicating the appropriate approach, and gave it to Nicholas. Nicholas, however, refused to pass it on to Robie or to circulate it.

On May 8, 2002, Rob Robie sent a faxed memo to the Roanoke lab indicating that all employees should go through Nicholas before speaking to him about a problem ("the May 8 Memo"). Exhibit H. Considering that in Jelena's case the "problem" was a supervisor who was acting out her own racial and ethnic hatred on a hapless foreigner, this guaranteed that her days were numbered.

The following week, Nicholas took a vacation and notified everyone in the lab - except Jelena. Plaintiff's Interrog. Resp. at 6. On Friday, May 17, 2002, Jelena and Brewer were the only technicians in the lab. At the end of her shift, Jelena prepared to go home. Ivanovic Certif. at ¶ 47. She asked Brewer to do the last part of a procedure. When he refused to do the job, she asked him again. Brewer threatened her and told her that Craig Sibthorp had stated that it was okay to wait until Monday to do the procedure.

Jelena, however, was concerned that she would be blamed if on Monday the procedure were not completed. She came in to work on a Saturday and completed the distillation procedure. Id. at ¶ 49. There was nothing broken when she left the lab on Saturday, May 18, 2002. When Jelena returned on to the lab on Monday, May 20, 2002, she found a broken flask in the lab. She did not know how the flask had been broken, and fearing that she would be blamed for it, she informed Nicholas about it when Nicholas arrived from vacation that morning.

Brewer, Nicholas's favorite and fellow African-American, worked in the lab that Sunday, May 19, 2002. Nicholas was on vacation. Ivanovic Dep. Tr. at 50, 5-17.

Nicholas's Next Attempt to Get Jelena Fired

On the morning of Monday, May 20, 2002, before Nicholas returned from vacation, Jelena faxed a memo to Robie's office in New Jersey reporting Dana's actions. She later reported the same to Mag Nicholas when Nicholas returned from vacation. Nicholas responded by purporting to fire Jelena. Jelena immediately called Robie in his New Jersey office, who retracted the dismissal. Ivanovic Certif. at ¶ 51.

Later, that same day, Mag cut Jelena's work hours from 30 or more hours a week, plus occasional overtime, to 16 hours a week - cutting her wages in half. Jelena called the EEOC to

file a claim of discrimination. Ivan. Dep. Tr. at 91, 13-19. She called Robie to complain about the fact that she was being retaliated against for complaining about Brewer's threats to her, and that nothing was done to him. She told Robie that she believed this was discrimination and that she had filed a report with the EEOC. The company's response was to require Jelena to work every weekend for the following month. When she complained about this, Nicholas told her that Jelena could leave if she didn't like it. Ivanovic Dep. Tr. at 99, 13-17.

June 7, 2002 Incidents

On June 7, 2004 Jelena received a disciplinary report, based on allegations that she had violated the policy expressed in the May 8, 2002 memo by asking Sibthorp a question. She contested the contents of the report. Nicholas continued to sabotage her lab samples in an effort to fire her. Nicholas refused to allow Jelena to practice standardizing and calculating cell pathlength of FTIR, a key procedure in the lab. Jelena then called the Chattanooga lab to receive guidance from one of the lab technicians there.

On Friday, June 25, 2002, Jelena was not expected in the lab because it was a day off. That day, Nicholas left a message for Jelena at Jelena's home asking her to bring SOP's - written procedures - to the office immediately. (She had never taken

them home.) Her husband called Robie in New Jersey to inform him that Jelena was not home and that it was her day off. Jelena called Nicholas back to tell her that her SOP's were in the office, where they always were. She never had another discussion with Nicholas about the SOP's.

Nicholas Terminates Jelena

On Monday, June 28, 2002, Jelena came in to the office and Nicholas asked her about another lab issue - "check standards" for the "spectro test." Jelena replied that she had performed the check standards and that they came out perfect. Nicholas then informed her that she had changed the spectro standard and that Jelena's numbers should be lower. No one had informed Jelena of this. Jelena then checked Nicholas's numbers and Brewer's numbers, and saw that they were just as high as hers. She then went to show this to Nicholas. After Jelena confronted Nicholas about Nicholas's falsehood, Nicholas then went to the computer and printed out a dismissal notice that she had prepared earlier before Jelena had come in. Plaintiff's Interrog. Resp. at 20. Her ham-fisted setup sprung - however incompetently - Nicholas finally terminated Jelena. Nicholas Dep. Tr. at 187, 10-13.

LEGAL ARGUMENT

I. **DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE INNUMERABLE MATERIAL ISSUES OF FACT IN THIS CASE**

Under Fed. R. Civ. P. 56, summary judgment may be granted only when the evidence contained in the record, "including the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Serbin v. Bora Corp., 96 F.3d 66, 69 n.2 (3d Cir. 1996). In determining whether there are any disputed issues of material fact which must be reserved for trial, the court must view the record in the light most favorable to the non-moving party, and must determine whether the totality of the evidence would allow a reasonable fact-finder to conclude that bias is established. Bray v. Marriott Hotels, 110 F.3d 986 (3rd Cir. 1997). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990).

There is no serious question as to whether there are material facts in dispute with respect to plaintiff's

termination, the veracity of the reasons offered for plaintiff's termination and the nature of the work environment during plaintiff's tenure at defendant's employ. The record is rife with examples of Nicholas's intentional discrimination, calculating maneuvers to fire plaintiff, and a pattern of discriminatory treatment towards white women and/or persons of foreign origins. A motion for summary judgment should not be granted. Defendants seem to know this, which is presumably why they did not cite the Fed. R. Civ. P. 56 standard - they appear to be hoping that this Court will try the case for them rather than evaluate whether it is worthy of trial.

a. Summary Judgment in Discrimination Cases

The United States Supreme Court fashioned the McDonnell Douglas burden-shifting analysis to allow plaintiffs to proceed without direct proof of illegal discrimination where circumstances are such that common sense and social context suggest that discrimination has occurred. Under McDonnell Douglas, if an employment plaintiff can prove a prima facie case, the burden shifts to the employer to identify a legitimate, non-discriminatory reason for the adverse employment decision. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). If the employer produces affirmative evidence showing a legitimate, reason for the adverse employment decision, only then does the burden shift back to the plaintiff,

who must show that the employer's proffered explanation was merely a pretext for discrimination. Sheridan v. E.I. duPont de Nemours & Co., 100 F.3d 1061, 1066 (3d Cir. 1996).

II. PLAINTIFF HAS MADE A PRIMA FACIE SHOWING BASED ON RACE, GENDER AND NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII

A plaintiff alleging discrimination bears the burden of proving that: (1) she was in a protected class; (2) she was qualified for the position; and (3) she suffered an adverse employment decision. Pivirotto v. Innovative Sys., 191 F.3d 344, 352-53 (3d Cir. 1999). All three of these factors can be demonstrated here.

A. Plaintiff Has Standing Under Title VII to Make a Claim Of Racial Discrimination.

Defendant argues that plaintiff cannot be afforded Title VII protection because she is Caucasian. But the Third Circuit has held that in a reverse discrimination case, a prima facie case is established when the plaintiff presents "sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII" Iadimarco v. Runyon, 190 F.3d 151, 159 (3rd Cir. 1999). The fact finder makes this determination under a "totality of the circumstances." Id., 190 F.3d at 163. Thus, despite defendant's claim, Title VII most certainly proscribes racial discrimination in private employment

against whites on the same terms as racial discrimination against nonwhites. Id., at 159.

Further, under Title VII, a plaintiff's discrimination claim should not be viewed solely with respect to either race, or either gender, or national origin. Rather, in addition to the separate components of race, gender and ethnicity under which she alleges discrimination, plaintiff should be regarded as a white female, and as a white female of Croatian origin as well. Fucci v. Graduate Hospital, 969 F. Supp. 310, 316, n.9 (1997) ("A Title VII claim may be premised on alleged discrimination based on a combination of impermissible factors"), (citing Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994)) ("where two bases for discrimination exist, they cannot be neatly reduced to distinct component."). As the Lam court explained, "Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts the particular nature of [his or her] experiences." Id.

In this case, plaintiff clearly makes a prima facie case for racial discrimination. Plaintiff is a white Caucasian female of Croatian descent. She was hired as a lab technician and performed the same job functions as all other lab technicians. She was hired in March, 2001 and received two raises. Defendant never had any complaints about her work product. She was asked

to train new employees. Therefore, she was qualified for the position of lab technician. Plaintiff was terminated on June 28, 2004, which constitutes an adverse employment action.

B. Plaintiff Has Standing To Make A Claim for Discrimination Based on National Origin and Gender Discrimination under Title VII.

Plaintiff is a female, and is covered under Title VII forbidding gender discrimination. Further, a plaintiff is entitled to Title VII protection based on national origin discrimination under conditions "including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a particular national origin group . . ." 29 C.F.R. § 1606. In this case, plaintiff is an immigrant from Croatia, who does not speak English fluently and speaks English with an accent. It is precisely such a person that is one of the intended beneficiaries of Title VII.

III. PLAINTIFF HAS MADE A PRIMA FACIE SHOWING BASED ON RACE, UNDER § 1981.

Plaintiff also makes a prima facie case for her § 1981 claim. Defendant argues that plaintiff has no standing under § 1981 because she is Caucasian. Again, defendant is incorrect. In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), the United States Supreme Court ruled that the statute explicitly included white persons based on the language in the

first sentence: "All persons . . . shall have the same right . . ." *Id.*, 427, U.S. at 486. Since McDonald, § 1981 has been applied to protect the rights of white plaintiffs discriminated against because of a relationship with a person of another race. See, e.g., Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988) (white plaintiff fired in retaliation for his support of black co-workers' EEOC complaint); Osgood v. Harrah's Entertainment, Inc., 202 F.R.D. 115 (D. N.J. 2001) (Caucasian female, who alleged that she was demoted from her position as a shift manager based on her race, had standing to challenge casino's Equal Employment Business Opportunity Plan (EEBOP) under § 1981).

The federal courts analyze § 1981 claims under the same McDonnell Douglas burden-shifting framework used in Title VII discrimination cases. Pamintuan v. Nanticoke Memorial Hospital, 192 F.3d 378, 385 (3rd Cir. 1999). Under Section 1981, a plaintiff must prove that the defendant intentionally discriminated against him on the basis of race, or ethnic characteristics or ancestry. *Id.*; see also, Goodman v. Lukens Steel Co., 482 U.S. 656, 665 n. 10 (1987).

A. Nicholas Intentionally Discriminated Against Plaintiff

Disparate treatment occurs when a plaintiff is treated less favorably than another because of race, color, religion, sex or national origin. McDonnell Douglas Corp. v. Green, 411 U.S. 792

(1973). Proof of discriminatory intent can be inferred "from the mere fact of differences in treatment." Id. The United States Supreme Court has ruled that disparate treatment can be demonstrated by a showing of inequality of treatment in the application of legitimate work rules. McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976). As a white female of Croatian descent, plaintiff was treated differently from white males of American descent.

There is sufficient evidence in the record to create an inference of intentional discrimination. Plaintiff and Ann Smith have met their burden of establishing a factual issue for trial as to whether or not the purported basis of plaintiff's termination is an invention. Their testimony is that plaintiff was not insubordinate, and that from the context - defendant's toleration of Nicholas's maltreatment of a white male technician, Charles Ruvolis; the favoritism shown to Dana Brewer, an African-American male; her abusive treatment of another foreign national, Dennis Hosang; and Nicholas's treatment of Jelena - defendant treated different employees of different races in a an unlawfully disparate fashion.

Defendant argues that the incidents plaintiff cites do not have any discriminatory flavor. Def. Brief at 23. Yet these incidents show the contrary - that Nicholas would invoke racially charged language (as a clear an indication of

motivation as one can ask for) in otherwise neutral situations. For example, when plaintiff asked questions about lab procedures, Nicholas would respond with comments such as "Go back to Croatia," or "stupid Croatian." Nothing neutral justifies the invocation of the word "Croatian" in this context except to be offensive towards plaintiff because of her national origin. An African-American supervisor calling her charges "white bitch," and discussed wanting to get a gun to shoot white people, is certainly racially and ethnically incendiary definitely filled with discriminatory flavor.

In this context, even non-discriminatory abuse, such as Nicholas's comment that plaintiff was "stupid" and an "imbecile," an "idiot," a "f-cking idiot" and a "nobody" adds to the unlawful abuse and hostility. This treatment continued well over one year, including during Ann Smith's tenure at the lab. Therefore, these were not stray comments, but part of the ordinary course of business in the lab for plaintiff. Nor were they mildly humiliating, as plaintiff was driven to tears for several months as a result of Nicholas's behavior.

Defendant's reliance on Perryman v. West, 949 F. Supp. 815 (M.D. Ala. 1996), is misplaced. Here, unlike in Perryman, the evidence does not show that blacks and whites were treated badly. Plaintiff has shown just the opposite. Only white

females or persons of foreign descent were subjected to this treatment.

Defendant did more than make nasty, unlawfully racist and anti-foreigner comments. Nicholas, backed up by defendant, also discriminated against plaintiff in her application of work rules. Nicholas never disciplined either Ruvolis or Brewer for their infractions of lab procedures or rules.

Defendant tries to justify plaintiff's termination by claiming that Jelena did not provide her SOP's to Nicholas. Plaintiff testified that they were always in the office. In any event, Ruvolis, another lab technician, admitted that he does not have his own personal copy of SOP's - yet on this basis, Jelena was supposedly sacked. Ruvolis Dep. Tr. at 21, 16-25; 22, 1-4. This alone raises a fact issue because defendant relies on this fiction as a defense for an otherwise indefensible termination.

Further, both Ruvolis and Brewer were given preferential treatment by being paid for hours that they did not work. Charles Ruvolis resigned from his position in June 2001, and did not return until September or November 2003. Ruvolis Dep. Tr. at 13-15. Further, he testified that he never met and never trained Dennis Hosang. Nonetheless, Ruvolis is listed in the payroll records submitted by defendant as having worked until August 2001. Exhibit I. Additionally, plaintiff has

maintained all along that Brewer was paid for work that he did not perform. Nicholas testified that timesheets were always given back to employees. Nicholas Dep. Tr. at 85, 18-20. Both plaintiff and Ann Smith certify, however, that they were never provided with their time sheets after submitting them to Nicholas. Ivanovic Certif. at ¶ 4; Smith Certif. at ¶ 45 .

Further, when questioned about a particular time sheet bearing his name and the times that he alleged work, Brewer stated that he had not completed the time sheet bearing his name, and that it was not in his handwriting. Brewer Dep. Tr. at 11, 8-24; 12, 13-15; 13, 5-18. Plaintiff testified that Brewer's timesheets are written in Nicholas's handwriting. Ivanovic Depo. Tr. (2) at 40, 16-25.

In further support of disparate treatment, plaintiff received a disciplinary notice on June 7, 2004, which Nicholas signed. Nicholas claims that plaintiff was disciplined because she went to Sibthorp with a question, which violated a memo stating that employees were to refer to Nicholas in resolving disputes. Nicholas Dep. Tr. at 158, 25; 159, 2, 21-21. Specifically, defendant claims that Sibthorp complained that he was being asked to serve as a referee. Id. at 160, 6-8. Despite this, Nicholas admits that she had not even been in the office during the time in question for plaintiff to even come to her. Id. at 159, 6-11. When asked to explain the nature of the

insubordination for which plaintiff was written up, Nicholas replied, "I don't know." Id. at 12-14. She replied the same for the charge of improper conduct in the report. Id. at 15-17. When confronted with the fact that Brewer had himself gone to Craig Sibthorp and asked him to act as a referee, she replied that "this was because Jelena approached him." Id. at 158, 11-14. But contrary to Nicholas's testimony, the record is clear that Brewer approached Sibthorp before plaintiff. Robie Dep. Tr. at 103, 12-13; Brewer Dep. Tr. at 19-24. Further, Nicholas admits that Brewer was never disciplined for doing **the same exact thing**. Nicholas Dep. Tr. at 159, 22-23.

A supervisor may treat employees with favoritism, allowing one greater client access than another. It can even be said that if, as here, management permits that supervisor essentially to steal from shareholders by the use of phantom workdays and hours, that is not of our concern. But when that favoritism - the disparate application of work rules - is based on race or national origin, it is no longer a "management choice." Congress has decided that it is not legally permissible.

IV. DEFENDANT'S REASONS FOR FIRING PLAINTIFF ARE PRETEXTUAL

Defendant argues that plaintiff was terminated because she was insubordinate, that she had difficulty dealing with an African-American supervisor who was less educated than her, and

that she did not follow directions. Def. Brief at 13. Defendant's lack of support for its allegations, inconsistencies, and contradictions throughout the record deem its reasoning incredible and unworthy of belief.

(a) Plaintiff's Alleged Racism

Defendant offers no proof supporting its allegation that plaintiff was offended by working with African-Americans, or African-Americans who were less educated than her. In fact, plaintiff testified that she worked with African-American supervisors and co-workers before working at defendant's Roanoke lab and never encountered any problems. Ivanovic Dep. Tr. (1) at 232, 7-19. Plaintiff explained through her testimony that she did not see people with respect to their color. Id.

Further, motive or intent can be proven through circumstantial evidence, particularly through comparative evidence of "similarly situated persons." A violation of company policy can constitute pretext for unlawful discrimination if others similarly situated also violated the policy with no adverse consequence. Delli Santi v. CAN Ins. Companies, 88 F.3d 192-203-4 (3d. Cir. 1996). As already discussed in Part IIIA of this brief, plaintiff was given a disciplinary report that Brewer was not provided with, although he committed the same.

(b) Plaintiff's Alleged Insubordination

Plaintiff has testified that after April 2002, Nicholas was trying to set her up in order to fire her. Nicholas had a pattern of doing this to white female employees. For example, Nicholas bragged about how she got rid of Donna Frazier, a former white female employee. Additionally, Nicholas had Ann Smith fired by falsifying records, including changing the results of her lab samples, and placing them in Ann's file so that she could create a paper trail of false results. Further, Nicholas lied about Ann Smith's attendance. Plaintiff had witnessed Nicholas falsifying Ann Smith's file in an effort to get her fired. Therefore, she knew from past experience that Nicholas was capable of lying to Robie in order to have her fired.

Defendant's testimony regarding Nicholas's responsibilities, especially her power to terminate employees, are contradictory. Robie testified that Nicholas did not make firing decisions without management approval. Robie Dep Tr. at 25, 19-22. Contrary to Robie's testimony, Nicholas stated that she indeed had hiring and firing power with respect to the employees at the Roanoke facility, without his approval. She claims that she fired Ann Smith. _ Nicholas Dep. Tr. at 75, 19-25; 76, 1-3. Nicholas admitted hiring Ruvolis and another former employee, stating, "I hired Donna Frazier and Charles Ruvolis." Id. at 32, 6-7. Nicholas had attempted to fire

plaintiff in May 2002, when she returned from approved leave or vacation.

Plaintiff testified that Nicholas abused Dennis Hosang, an employee who spoke with a foreign accent, throughout his tenure, to the point that he resigned from his position. Nicholas claims that Charles Ruvolis trained Dennis Hosang, whom plaintiff saw Nicholas abuse and kick over a period of one month. Despite the fact that Ruvolis did not work at defendant's Roanoke facility in July and August of 2001, Magdline Nicholas claims that Ruvolis would come to the office to train Hosang because he was her "friend." Ruvolis, however, states that he never met Dennis Hosang, and that he had only heard Hosang's name mentioned. Ruvolis Dep. Tr. at 19, 9-17. Ruvolis's testimony is supported by Ann Smith, who states that Nicholas and Ruvolis would laugh about the abuse that Hosang suffered from Nicholas.

It is not credible that a former employee, who had resigned from his position, would train another employee on the weekends without pay. The inconsistent testimony on the part of two of defendant's employees tends to show that Nicholas has something to hide regarding Dennis Hosang's training, and that she is not truthful, even under oath. This lends credibility to plaintiff's claim and Ann Smith's claim that Nicholas falsified records and placed them in their file for the purpose of having

them fired. A jury should be allowed to make that inference. Further, such factual inconsistency with respect to a discriminatory act should not be dismissed on summary judgment, where the mere existence of a fact issue is all that is required to allow the case to continue.

Rob Robie fares no better with respect to his propensity to tell the truth under oath, especially with respect to plaintiff's termination, which is at issue. In testifying before the Virginia Employment Commission, Robie alleged, as he does here, that plaintiff was discharged due to misconduct, and therefore not entitled to unemployment benefits. The Commission disagreed with Mr. Robie, stating that:

[Mr. Robie] first contended that [Ms Ivanvic] was never cut back to 16 hours per week, rather this only represented the core hours she was to work on the weekends where there were other hours during the week she would be able to work. After [Jelena] testified on the matter, his story changed. He admitted that the claimant was in fact cut back to 16 hours per week; however, after she complained, he offered her additional hours in an attempt to satisfy her. Such a change in his testimony tends to undermine his overall credibility.

See Exhibit F, Decision of Virginia Unemployment Commission.

Defendant relied on Nicholas' allegation that plaintiff had not provided her with the office's standard operating procedures, or SOP, as reason to terminate her. Ivanovic Dep. Tr. at 115, 13-20. On plaintiff's day off from work, Nicholas left her a message demanding that plaintiff bring her copy of the SOPs to work. Ivanovic Dep. Tr. at 111, 3-13. Id. Nicholas accused plaintiff of not having the SOPs. Ivanovic Dep. Tr. at 114, 24-25. However, plaintiff maintains that they were always in the lab. Id. at 115, 1-12. Robie himself shows the insincerity in Nicholas' request when he testified that "[i]t would have been little use at home because I don't know too many people ... I don't know how many people have spectrometers at home or have need for standard operating procedures at home." Robie Dep. Tr. at 125, 21-25. Plaintiff told Nicholas that she did not need to know where her personal copy was because there was a copy on the wall in the lab. Ivanovic Dep. Tr. at 115, 5-8. This is the reason that Ruvolis provides for not having his own personal copy of the SOPs. Ruvolis Dep. Tr. at 22, 1-4. Ironically, Ivanovic was fired for this and Ruvolis remains employed with defendant.

(c) Plaintiff's Alleged Refusal to Follow Directions

In fact, the facts show that plaintiff - a chemical engineer - was right to question lab procedures, as Nicholas did

not herself follow them. Nicholas did not know the proper procedures for opening the laboratory. Ivanovic Dep. Tr.(2) at 10,2-3;23, 8-22. At one point, Nicholas caused an oil explosion in the lab. Smith Certif. at ¶ 41. As a result of these incidents, Nicholas was sent to defendant's Chattanooga lab in order to be retrained. Ivanovic Dep. Tr. at 23, 18-22; 79, 12-17. Further, plaintiff had legitimate safety concerns regarding the procedures Nicholas utilized, such as the potential for accidents in the lab, such as explosions. Id. at 61, 21-25; 69, 12-15; 74, 20-24. Plaintiff did not by-pass procedures, as there were many ways to get to the same answer in conducting a chemical process. As plaintiff explained, 2 times 6 makes 12, as does 3 times 4. Ivanovic. Dep. Tr.(2) at 214, 14-16. Further, plaintiff always checked with Robie to discuss her reasons for not wanting to do things as Nicholas saw them. Robie agreed with her. Id. at 60, 1-10; 75, 22-23. In fact, defendant's Chattanooga lab, which retrained Nicholas, was following plaintiff's exact suggestions to Nicholas. Id. at 70, 7.

V. DEFENDANT IS STRICTLY LIABLE FOR THE ACTIONS OF MAGDLINE NICHOLAS.

An issue of material fact exists as to whether defendant is liable for the actions of Magdline Nicholas. Employer liability for harassment committed by supervisory personnel is governed by

two United States Supreme Court decisions: Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. Boca Raton, 524 U.S. 775 (1998). Defendant cites neither case in its brief.

Ellerth and Faragher hold that an employer is vicariously liable to a victimized employee "for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." The rule in Ellerth and Faragher applies to all forms of unlawful harassment. Allen v. Michigan Dept. of Corrections, 165 F.3d 405, 411 (6th Cir. 1999) (applying Ellerth and Faragher to claims of racial discrimination); Gotfryd v. Book Covers, Inc., 1999 WL 20925 (N.D. Ill. Jan 07, 1999) (applying Ellerth and Faragher to national origin claim under Title VII).

A. Nicholas Was a Supervisor With Immediate Authority Over Plaintiff

Under Ellerth and Faragher, an individual qualifies as a "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. Discriminatory employment actions with tangible results are company acts that would generally "constitute a significant change in employment status", include hiring, firing, promotion, *compensation*, and work assignments. Faragher, 524 U.S. at 790. An individual whose job responsibilities include the authority to recommend job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have final say, as

the tangible employment decision "may be subject to review by higher level supervisors." Ellerth, at 524, U.S. at 762.

In this case, Magdline Nicholas was clearly a "supervisor" under the Ellerth and Faragher standard. Robie admits that Nicholas was the lab "supervisor." Robie Dep. Tr. at 24: 20-25. In that position, she had immediate supervisory authority over Plaintiff. She was free to make schedules without anyone's approval. Nicholas Dep. Tr. at 141, 18-21. Defendant provided Nicholas with broad authority to recommend job decisions affecting the employees in the lab. For example, Nicholas was authorized to undertake tangible employment decisions, such as hiring and firing, and creating work schedules. According to Robie, "she was my eyes and ears day-to-day." Id. at 25, 13-14. Robie claims that Nicholas did not make firing decisions without management approval. Id. at 25, 19-22. However, her role as the sole supervisor in that office, who reported to Mr. Robie, who worked from the Bellmawr, New Jersey office, provided Nicholas with strong authority, as her word was given great weight. Robie claims that he gave Nicholas authority to fire plaintiff after June 7, 2004. A strong inference of discrimination will arise whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the plaintiff. Id. citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (noting that committee rather

than the supervisor fired plaintiff, but employer was still liable for harassment because committee functioned as supervisor's "cat's paw").

VI. PLAINTIFF WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT

Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). Title VII is violated by a "work environment abusive to employees because of their race, gender, religion or national origin." West v. Philadelphia Electric Co., 45 F.3d 744 (1995) (citing Harris v. Forklift systems, Inc., 510 U.S. 17).

A plaintiff alleging hostile work environment must show that: 1) she suffered racial discrimination; 2) the discrimination was pervasive and regular; 3) the discrimination was detrimental; 4) the discrimination would detrimentally affect a reasonable person of the same race and position; and 5) respondeat superior liability. West, 45 F.3d at 753 (3d Cir.1995).

(a) Plaintiff Suffered Discrimination.

Title VII tolerates no racial discrimination, subtle or otherwise." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir.1996). As explained in Section IIIA of this brief, plaintiff suffered discrimination by Nicholas.

(b) Nicholas' Conduct Was Pervasive and Regular.

In order to be actionable under the statute, a hostile work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher, 524 U.S. at 787. The federal courts look at "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id.

Nicholas, made frequent racist comments to plaintiff that revealed her national-origin and racial animus throughout her one and half year tenure with defendant. Additionally, she made non-racial comments towards that we5re directed only at her, Ann and Dennis. These were not occasional, isolated outbursts but rather a regular stream of invective centering on Jelena's national origin. Nicholas called plaintiff a "stupid Croatian." and told her that plaintiff could, "put your Croatian diploma in the toilet." Complaint at ¶15.; Plaintiff's Interrog. Resp. at 2. These epithets were more direct than those alleged by the plaintiff in Waite v. Blaire, Inc., 937 F. Supp. 460 (W.D. Pa. 1995).

Nicholas directed these comments on a regular basis well until 2002 and they escalated to the point that they became

daily occurrences. Ivanovic Certif. at 2, 9-12. This was humiliating to the plaintiff. Plaintiff's situation is therefore unlike that of the plaintiff in Lee-Crespo v. Schering-Plough Del Caribe, Inc., 354 F.3d 34 (1st Cir. 2004), whose supervisor's statements were episodic, or that of the plaintiff in McCray v. DPC Industries, Inc., 942 F. Supp. 288, 293 (E.D. Tex. 1996). For the same reasons, plaintiff's reliance on Ross v. Arcata Graphics Co., 788 F. supp. 1298, 1301 (W.D.N.Y. 1992), Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994), Harley v. McCoach, 928 F. Supp. 553 (E.D. Pa. 1996) are misplaced, for the facts here allege more than single ambiguous slurs or sporadic racial slurs.

Further, in Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp.2d 1314 (M.D. Fla. 2002), the facts revealed that some of the racial comments were made to members of the non-minority group. This is not the case here, as Ruvolis and Brewer were never subjected to this behavior..

In determining the totality of the circumstances, the federal courts are to consider discriminatory comments that occurred outside of the plaintiff's presence. Schwapp v. Town of Avalon, 118 F.3d 106 (2nd Cir. 1997). Further, a discriminatory comment need not be directed at the plaintiff in order to contribute to a hostile work environment. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673 (7th Cir.

1993). Therefore, Plaintiff's experience with Dennis Hosang also constitutes a hostile work environment.

Additionally, Nicholas laughed at plaintiff and yelled at her for speaking English with a Croatian accent. Complaint at ¶14. Nicholas also joked about Jelena's accent with Craig Sibthorp. Smith Certif. at ¶14. No reasonable person can dispute that this was humiliating to plaintiff. Plaintiff was subjected to Nicholas stating that she wanted to shoot white people in the fall of 2001. Ann Smith Certification at ¶ 36. This was certainly intimidating to plaintiff.

In Schwapp, the United States Court of Appeals for the Second Circuit reversed the grant of summary judgment in favor of defendant by the district court, which had determined that the plaintiff failed to raise a triable issue on his claim of a violation Title VII on a theory of hostile work environment. Schwapp, 118 F.3d at 108. The district court reached its decision, in part, by excluding eight racially-hostile comments that were uttered outside of the plaintiff's presence, and two racially insensitive comments that were related in affidavits by two fellow former employees. The eight comments included one racially hostile comment made prior to the plaintiff's employment, five made while he was employed by the defendants, and two made during plaintiff's employment that were hostile towards minority groups of which the plaintiff was not a member.

Id. at 111. "The fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment." Id.

Further, plaintiff was subjected to Nicholas bragging about how she had "chased out" Donna Frazier, a Caucasian female employee who had worked at defendant's Roanoke facility before plaintiff. Plaintiff witnessed first-hand Nicholas's conniving schemes to drive out Ann Smith, including falsifying records for Ann Smith's file in order to fire her. This was no matter of spying on Nicholas or poking through the garbage, by the way. Nicholas proudly displayed her fiction to plaintiff before placing them in Ann Smith's file. CITE Certainly, this had an effect on plaintiff's belief about her own job security, thereby altering the workplace.

Ann Smith certifies that she heard numerous derogatory insulting comments made by Nicholas and Sibthorp regarding plaintiff's national origin. Specifically, Nicholas and Sibthorp made fun of defendant's foreign accent. Ann Smith Certification at ¶ 14. They also cracked jokes about foreigners during the course of different days during work hours. While these insulting comments were not made in plaintiff's presence, she was aware of them through Ann Smith, who related them to her. Id. at ¶17. These comments were offensive to Ann Smith,

and they were offensive to plaintiff. A reasonable person would find these comments objectionable.

Further contributing to the hostile work environment was plaintiff's personal experience of hearing Nicholas state that she did not want to hire Jasna Yerkovic, a Bosnian immigrant, because she did not want to hire other people who "talked like Jelena." All of these incidents were humiliating to the plaintiff, as they highlighted her language differences for which she had no control. These incidents, taken in conjunction to the racial epithets, and the insensitive comments Nicholas made to Plaintiff, under the totality of the circumstances, clearly amount to a hostile work environment.

VII. PLAINTIFF HAS STATED A CAUSE OF ACTION FOR RETALIATION IN VIOLATION OF VIRGINIA PUBLIC POLICY

While defendant characterizes plaintiff as haughty and wanting to do things her way, plaintiff was in fact complaining about the safety of the procedures in the lab. Defendant ANA Laboratories violated Virginia law when they discharged Jelena in retaliation for internal complaints she had made concerning the safety of procedures in the lab. Virginia's statute provides:

No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety

and health provisions of this title for themselves or others.

Va. Code Ann. § 40.1-51.2:1 (West 2003).

The statute specifies that employees may bring "to the attention of their employer any hazardous conditions that exist or bring the matter to the attention of the Commissioner." Id. §40.1-51.2. Therefore when plaintiff brought up her concerns internally she was exercising her rights under Title 40. Any discharge in retaliation for the exercise of those rights is therefore prohibited by the statute.

VIII. PLAINTIFF HAS STATED A CAUSE OF ACTION FOR BATTERY

On June 28, 2002, after she fired plaintiff, Nicholas asked plaintiff to return the keys to the lab. Plaintiff did not want to provide Nicholas with the keys because she was afraid that

Nicholas committed battery when she grabbed the keys away from plaintiff. The forcible removal of keys from plaintiff's hands constitutes assault and battery even where no contact was made with her person. The physical interference with "anything directly grasped by the hand" constitutes battery. Restatement (Second) of Torts § 18 (2003). While there are no cases directly on point Virginia courts have concurred with this assessment stating, "there is no requirement that the victim of such acts be physically touched." Etherton v. Doe, 2004 WL 1277890 (Va., 2004). Other courts have applied this rule in various

situations. Picard v. Barry Pontiac-Buick, Inc., 654 A.2d 690 (R.I. 1995) (camera in defendants hands); Fischer v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (plate grabbed from hand). Like the plaintiffs in Picard and Fischer, plaintiff was holding the keys in her hand when Nicholas forcibly grabbed them away. Therefore, Nicholas's actions of grabbing the keys from plaintiff's hand constituted battery.

Nicholas also committed battery when she pushed plaintiff away from the phone. Defendant describes this conduct as a "point and counter-point between two professionals in a fairly close office space and which is intuitively excused." Brief for the Defendant at 47.

Whether or not a battery is justified as reasonable under the circumstances is for the trier of fact to determine at trial. In Pike v. Eubank, 90 S.E.2d 821 (Va. 1956) the Supreme Court of Virginia held that the reasonableness of the defendant's actions in using physical force is a question of fact for the jury. Because the defendant is contending that their actions were reasonable under the summary judgment.

Nicholas was not justified in forcible repossession of the keys when she could have availed herself of the law. Self help repossession is not available if the plaintiff has rightfully come into possession of the chattel in the first instance. Prosser and Keeton on Torts §22 (5th Ed. 1985). Because

plaintiff initially obtained the keys from her employer rightfully, Nicholas was not justified in taking the law into her own hands by grabbing them away.

Defendant further contends that the battery is excused because it was done to "keep lab matters from exploding into a company-wide calamity." Id. at 48. But no one else was in the office. The only "calamity" threatened was that Jelena would get to Robie before Nicholas could. In any case, battery is not excused when done to uphold company policy. This is not medieval Europe; Jelena Ivanovic was not Ana Laboratories' serf. The privilege of committing battery to maintain order is reserved to law enforcement officers. Prosser and Keeton on Torts §26 (5th Ed. 1985). er to apprehend someone fleeing arrest for a misdemeanor. Simply stated, there is no defense of "maintenance of company order" available to batterers under Virginia law, including defendant.

CONCLUSION

For the foregoing reasons, plaintiff requests that this Court deny defendant's motion for summary.

Respectfully submitted,

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