FEDERAL

A. Summary Judgment Standard

The standard which applies to summary judgment motions is by no means controversial, nor is it foreign to this tribunal. See *Raskin v. Wyatt Co*, 125 F.3d 55 (2d Cir. 1997); *Cronin v. Aetna Life Insurance Co.*, 46 F.3d 196 (2d Cir. 1995). Summary judgment is warranted when "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." Fed. R. Civ. R. Civ. P. Rule 56(c). See *Raskin*, 125 F.3d at 60. This guiding principle applies with no less force in cases such as this where employment discrimination claims come under scrutiny on a motion for summary judgment. See *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14 (2d Cir. 1995); *LaFond v. General Pysics Services Corp*., 50 F.3d 165 (2d Cir. 1995); *Cronin*, 46 F.3d at 202-203; *Galla v. Prudential Residential Services, Ltd. Partnershipial Residential Services, Ltd. Partnership*, 22 F.3d 1219 (2d Cir. 1994).

When analyzing a motion for summary, it is incumbent upon the court to determine, as a threshold matter, whether there exists an issue of material fact requiring trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-243, 106 S. Ct. 2505, 2511 (1986). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.; *Rovtar v. Union Bank of Switzerland*, 852 F. Supp. 180, 182 (S.D.N.Y. 1994). In determining whether such a question of fact is raised, the court must make all credibility assessments, resolve any ambiguities, and draw all inferences, in favor of the non-moving party, and may grant the

motion only if the evidence, taken in that light, reflects that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cirri. 1997); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cirri. 1994). As noted, summary judgment should be cautiously granted in cases involving employment discrimination claims. *Schwapp*, 118 F.3d at 110.

It is by now well established that Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. sec. 2000e et sego., can give rise to a hostile work enviornment claim based upon race. Schwapp, 118 F.3d at 10-111; West v Philadelphia Electric Co., 45 F.3d 744 (3d Cirri. 1995); Erebia v. Chrysler Plastic Products Co., 772 F.2d 1250 (6th Cirri. 1985), cert. denied, 475 U.S. 1015, 106 S. Ct. 1197 (1986). See alsoTorres, 116 F.3d at 630-31; 29 C.F.R. sec. 1604.11 (EEOC Guidelines on Discrimination Because of Sex). n.1. Indeed, courts have long recognized that under Title VII "an employment has a right to a working environment free of racial harassment." Snell v. Suffolk County, 782 F.2d 1094, 1096 (2d Cir. 1986).

In its initial decision concerning claims of harassment in the workplace, the Supreme Court held that to be actionable under a hostile work enviornment theory the conduct at issue "must be sufficiently servere or pervasive to alter the conditions of [the victim's] employment and create an abusive working enviornment>" Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986). More recently, the Supreme Court clarified that in making this determination the factfinder must view the totality of the circumstances both from subjective and objective standpoints. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 370 (1993). See Schwapp, 118

F.3d at 110. In other words, taking into account the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating or instead merely an offensive utterance, the plaintiff must show not only that the alleged harasser engaged in conduct which the plaintiff found to be hostile and abusive, but in addition that a reasonable person would perceive the conduct to be such. Id. Obviously, this type of analysis is generally laden with questions of facts.

In support of her hostile work environment claim plaintiff adduced proof. primarily in the form of her affidavit, that she was subject to repeat and continuous racial harassment. In plaintiff's affidavit, she detailed specific incidents of a racial nature occurring, all in her presence.

Plaintiff's claims concerning the racially hostile environment, which existed, was substantiated not only by the many incidents which she suffered, but indeed the record of her complaints to supervisors.

In Torres, supra, the court "emphatically" rejected the defendant-employer's claim that the plaintiff, who alleged sexual and race-based harassment occurring on a regular basis, but who could not only recall five specific incidents, was not entitled to avoid summary judgment and have a jury decide whether the conduct was sufficiently severe or pervasive as to constitute an abusive or hostile work enviornment. 166 F.3d at 631-33. In so ruling this court noted:

> The fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases

Harassed employers do not have to be Jakie Robinson, nobly turning the other cheek and remaining unaffected in the face of constant degradation. They are held only

to a standard of reasonableness. Whenever the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse. it is actionable under Title VII, so long as the employee subjectively experienced a hostile work environment. 116 F.3d at 631-32 (citations and footnotes omitted). The Torres court concluded that there existed a jury question as to whether or not the conduct alleged created a hostile work environment. Id. As can be seen, plaintiff's allegations as to the working conditions which she faced in this case far surpass those involved in Torres in both number and seriousness. This case, by contrast, is analogous to Erebia v. Chrysler Plastics Products Corp., 772 F.2d 1250 (6th Cir. 1985) cert. denied. 475 U.S. 1015, 106 S. Ct. 1197 (1986) and Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982).

Use by the Supreme Court of the disjunctive "serve or pervasive" rather than the conjunctive "severe and pervasive" test implies that even a single incident, if sufficiently invidious, may suffice to establish the existence of an unlawful hostile working enviornment, as indeed many courts have recognized. E.g., Torres,. 116 F.3d at 631 n.4; Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991); Taylor v Metzger, ____ A.2d ___, 1998 WL 63084 (N.J. Sup. Ct. 1998) (discussing state and federal cases and finding that singular use of the term "jungle bunny" in the workplace was sufficient to avoid summary judgment). See also Robert J. Gregory, "You Can Call Me A 'Bitch' Just Don't Use The 'N-Word': Some Thoughts On Galloway v. General Motors Servicee Parts Operations and Rogers v. WesternSouthern Life Insurance Co.", 46 DePaul L. Rev., 741, 748, (1997) ("courts have viewed racist epithets as beyond the pale, regardless of the prevalence of these epithets in the workplace."). As the Seventh Circuit observed in

Daniels:

> The number of instanes of harassment is but one factor to be considered in the examination of the totality of the circumstances. A Title VII plaintiff does not prove racial harassment or the existence of a hostile working enviornment by alleging some 'magic' threshold number of incidents. Conversely, an employer may not rebut a claim simply by saying that the number of incidents alleged is too few.

Daniel v. Essex Group, Inc., 937 F.2d 1264, 1273-74 (7th Cir. 1991)

While it is plausible that a jury hearing the evidence presented, might find that objectively it does not rise to the level of sufficiently severe or pervasive as to constitute an abusive working environment, the teaching of Torres and Schwapp is that it is for the jury, rather than the court as a matter of law, to make that determination.

The courts having addressed the issue of employer liability for hostile work environment harassment claims have generally resorted to traditional agency principles, by imperfect analogy, for guidance. See Torres, 116 F.3d at 633. See also. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992); Karibian v. Columbia University, 14 F.3d 733, 780 (2d Cir. 1994), cert. denied, 512 U.S. 213, 114 S. Ct. 2693 (1994). The test which has been formulated imputes liability to an employer in such circumstances where a) the harassment was performed by a sufficiently high ranking supervisor; b) the harassment was performed by a supervisor who used his or her actual or apparent authority to further the harassment in order to aid in the accomplishment of it; c) the employer provided no reasonable avenue for complaint concerning harassment; or d) the employer knew or should have known of the harassment, but unreasonably failed to stop it. Torres, 116 F.3d at 634.

In this instance, without conceding non-applicability of the first two, for purpose

of this appeal plaintiff relies principally upon the last two of the four articulated bases for imputing liability, maintaining that the record in this case reveals the lack of an reasonable avenue for complaint and that management officials clearly knew, or at a very minimum certainly should have known, what was occurring to the plaintiff, and yet failed to take steps necessary and reasonably calculated to prevent the harassment from recurring, plainly providing a basis for finding employer liability on the part of the government Torres, 116 F.3d at 634; Reed v. A. W. Lawrence & Co. Inc., 95 F.3d 1170, 1180 (2d Cir. 1996); 29 C.F.R. sec. 1604.11(f) (EEOC Guidelines). Clearly, because reasonableness is at the very heart of the issue under these prongs of the test, summary judgment is inappropriate in all but the clearest of cases. See Reed, 95 F.3d at 1181 ("The question of whether an employee has provided a 'reasonable avenue of complaint' is a question for the jury" [citation omitted].

With regard to avenues available to plaintiff for complaint, it is clear that although they may have existed they were totally ineffective. In response to many of the incidents involved the plaintiff complained on separate occasions to employees at various levels within the agency. And yet, never was an effective strategy developed and implemented for dealing with the situation. The fact that the agency knew, or certainly should have known, that the conduct was occurring on an ongoing basis similarly is established in the record. Many of the incidents complained of were committed in the presence of employees. In addition, plaintiff's repeated, specific complaints to management, as detailed above, plainly placed the agency noticed of the existence of a course of conduct which could give rise to a claim of racial harassment.

The record is also plainly reflective of the fact that no course of conduct was

undertaken which was at all reasonably calculated to end the abuse. Perhaps the clearest indication of this is the fact that the abuse endured by the plaintiff persisted unabated over an extended period of time, literally extending until she could take it no longer.

The agency apparently suggested that because it took some steps to address one or two of the many racial incidents which took place, this should insulate it from liability. This clearly is not case. The fact that modest action was taken to address some (though clearly not all) of the harassment's toward plaintiff does not provide a defense if the action was not reasonably calculated to end it, and in fact did not have that effect. See Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992). Obviously, the meager action taken by the government in response to plaintiff's repeated complaints was wholly lacking in the element of deterrence.

As in the case of harassment, co.-worker harassment which is retaliatory for having made complaints under Title VII is actionable, provided that there is a basis for imputing employer liability. Knox v. State of Indiana, 93 F.3d 1327, 1334-35 (7th Cir. 1996). As the Seventh Circuit observed in Knox:

> There is nothing in the lawof retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action, as we have often held. . . As the discussion in [Smart v. Ball State University, 89 F.3d 437 (7th Cir. 1996)] reminded us, adverse actions can come in many shapes and sizes. . . No one would question the retaliatory effect of many actions that put the complaint in a more unfriendly working environment. . . Nothing indicates why a different form of retaliation -- namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII -- does not fall within the statute. The law deliberately does not make a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will

permit.

93 F.3d at 1334.

The continuous harassment suffered by the plaintiff plainly emanated from plaintiff's prior complaints, as is made clear from its context alone. The extent of the hostility which she endured distinguishes this case from those involving only minor inconveniences alleged to be retributory in nature. See, e.g. Wanamaker v. Columbia Rope Company, 108 F.3d 462 (2d Cir. 1997).

With reference to the issue of job assignment the courts attention is called to Taylor v The Safeways Stores, Inc. , 365 F. Supp. 468, affirmed in part and reversed in part on other grounds, 524 F. 2D 263 (C.A. 10 Colo). When the court found that the evidence of manipulation of a black employee's job assignments in order to deliberately restrict his production, it was sufficient to show that the employers claim, that the employees discharge was based on his low production, was a mere pretext to a racial discrimination. While the employees training had been approximately equivalent to that of white employees there was evidence that his foreman disliked blacks. Employee showed that his assignments were markedly below average in size, so that in order to keep up to a normal production figure he would have to select and fill orders that are at a much higher rate than normal. The fact that the employer accepted the supervisors claim of low production without further inquiry rendered the company libel for an unlawful employment practice violative of Title V11.

In Robinson v. Lorillard Corp. 444 F. 2D 791, cert dismd 404 U.S. 1006, 92 S. Ct. 573 cert dismd 404 U.S. 1007, (1971), it was held that an employer system of restrictions on interdepartmental transfers and seniority accumulation, combined with a

former practice of over racial discrimination in hiring and job assignment, had the impermissible consequence of discriminatory“ locking in” Negro employees to less desirable and lower paying jobs.

In this case the factual pattern as set forth by the plaintiff, clearly and appropriately demonstrates that the plaintiffs supervisor and the employer continually refrained from placing the plaintiff in a position where she would be able to undertake appropriate work so as to seek future promotions during the course of her employment. She was held to menial and minor tasks, which were inappropriate for her training and status.