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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 126981/2002

SORRENTI, ROBERT

VS

CITY OF NEW YORK

Sequence Number : 005

VACATE

INDEX NO. 126981/02

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

AUG 21 2007

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 16, 2007

MARTIN SHULMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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ROBERT SORRENTI,

Plaintiff,

Index No: 126981/02

-against-

Decision and Order

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, INSPECTOR JAMES HALL, INDIVIDUALLY AND AS AN EMPLOYEE, FREDERICK PATRICK, INDIVIDUALLY AND AS AN EMPLOYEE,

Defendants.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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CAPTAIN LORI ALBUNIO AND LIEUTENANT THOMAS CONNORS,

Index No. 113037/02

Decision and Order

Plaintiffs,

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, INSPECTOR JAMES HALL, INDIVIDUALLY AND AS AN EMPLOYEE, FREDERICK PATRICK, INDIVIDUALLY AND AS AN EMPLOYEE,

Defendants.

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Hon. Martin Shulman, J.:

Defendants, City of New York (the "CITY"), The New York City Police Department ("NYPD"), Inspector James Hall ("Hall")(collectively, "defendants"), bring separate motions for an order seeking the following relief in relation to a jury verdict rendered on November 22, 2006:[1] 1) dismissing the respective complaints of plaintiff,

[1] Normally, a motion to challenge a jury verdict pursuant to CPLR §4404(a) is governed by the 15-day time limit of CPLR §4405. This court permitted the parties to stipulate to extend their time to present written arguments. *See Brown v. Two Exchange Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept.,1989), *affd* 76

former NYPD Sergeant Robert Sorrenti ("Sorrenti"), plaintiff, former NYPD Captain Lori Albunio ("Albunio") and plaintiff, former NYPD Lieutenant Thomas Connors ("Connors")(collectively "plaintiffs"); 2) setting aside the jury verdict rendered after joint trials which granted plaintiffs an aggregate award of $1,478,377.00 as being against the weight of the evidence (CPLR §4404[a]); or 3) alternatively, seeking remittitur. Plaintiffs oppose the motions which are consolidated for disposition.

BRIEF NATURE OF THE COMPLAINTS AND VERDICT

Essentially, Sorrenti sued defendants claiming Hall discriminated against him on the basis of his perceived sexual orientation by denying his application to transfer to the NYPD Office of Community Affairs' Youth Services Section ("YSS") and that defendants retaliated against him for formally challenging the denial of his transfer (*inter alia* his filing of an internal complaint against Hall with NYPD's Office of Equal Employment Opportunity ["OEEO"], denial of subsequent transfers to other assignments, hostile work environment, etc.). Albunio and Connors' respective complaints allege that defendants retaliated against them for opposing Hall's discrimination of Sorrenti which led to their being constructively discharged from the NYPD.

The trial commenced on October 23, 2007 and the jury rendered its verdict the evening of November 22, 2006. In its verdict, the jury **unanimously** found that: Hall discriminated against Sorrenti because of his perceived sexual orientation; CITY/NYPD employees retaliated against Sorrenti for filing his OEEO complaint and/or commencing this action; and Hall, individually, retaliated against both Albunio and Connors for

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N.Y.2d 172, 556 N.Y.S.2d 991 (1990), citing CPLR §2004 and 4 Weinstein, Korn & Miller, *New York Civil Practice*, § 4405.05.

opposing Hall's discriminatory conduct towards Sorrenti and/or filing OEEO complaints. However, the jury did not find that Hall, individually, retaliated against Sorrenti for filing an OEEO complaint and/or this action, and did not find that either former Deputy Commissioner Frederick Patrick or CITY/NYPD employees retaliated against both Albunio and Connors for challenging Hall's discriminatory conduct and/or filing OEEO complaints. The jury awarded Sorrenti compensatory damages[2] (emotional damages award) of $491,706.00 and assessed these damages only against the CITY. The jury did not award Albunio and Connors compensatory damages but did grant them loss of earnings awards respectively of $479,473.00 and $507,198.00.

DISQUALIFICATION/RECUSAL

In their post-trial motions, defendants' lead counsel devotes the bulk of her supporting affirmation (8 of 15 pages) to accusing this court of judicial bias based upon: 1) certain adverse evidentiary rulings (*viz.*, permitting hearsay, speculative and prejudicial testimony supportive of plaintiffs and precluding probative, relevant testimony supportive of defendants); 2) rulings precluding certain defense witnesses from testifying, whose exclusion was claimed to be prejudicial to the defense (e.g., April Brantley, Sgt. DeMaris Diaz, Hall's brother, an NYPD Legal Bureau employee, etc.); and this court's ultimate ruling rejecting defendants' request for a mistrial. Counsel thus claimed that this court's "clear bias throughout this trial necessarily deprived defendants of a fair trial and, accordingly, the verdict should be reversed and Judge Shulman

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[2] Sorrenti withdrew his liability claims against Mr. Patrick during the trial. Parenthetically, he also withdrew his constructive discharge claim against defendants and spent June, 2006 - June, 2007 using up his accrued leave time and then voluntarily retired from the NYPD in June, 2007.

precluded from any further proceedings in this case." (Calistro Supporting Aff. at ¶ 20).

Not surprisingly, plaintiffs' counsel has argued that: defendants' disagreement with the court's evidentiary rulings cannot support a judicial bias charge; defendants' counsel has "excised, abstracted, mischaracterized and misrepresented the totalities and context of the rulings to which. . . [she] refer[s]. . ." (Plaintiffs' Memorandum in Opposition to Defendants' Post-Trial Application for Relief ["Plaintiffs' Memo"] at p. 7) and, contrarily, such rulings were proper (illustrative were rulings throughout the trial sustaining objections to defense testimony introducing certain hearsay communications which were not being proffered to establish Hall's state of mind but rather purported facts to ostensibly justify Hall's denial of Sorrenti's transfer to YSS); and the court permitted at least four defense witnesses to testify over plaintiffs' strenuous objections (i.e., Carl Calderone, Gerald Nicholson, Theodore Emmanuel and Edward Thompson [the latter on a limited basis]).

Based upon trial rulings, defendants seek to either disqualify this court from "any further proceedings in this case" or implicitly request this court's recusal. Judiciary Law § 14 requires a judge to disqualify himself/herself from a case where he/she: is a party; has been the attorney or counsel; has an interest; is related by consanguinity or affinity to the controversy within the sixth degree. Defendants do not allege any violation of Judiciary Law § 14 and cannot affirmatively seek a statutory disqualification as a matter of law. Defendants' implicit request for recusal is solely within the court's discretion as "a Trial Judge is the sole arbiter of recusal. . ." (*see Ogust v. 451 Broome Street Corp.*, 4 A.D.3d 109, 770 N.Y.S.2d 864 [1st Dept., 2004], quoting from the seminal Court of Appeals decision in *People v. Moreno*, 70 N.Y.2d 403, 405, 521 N.Y.S.2d 663, 665

[1987]); *see also*, *People v. McCann*, 202 A.D.2d 968, 609 N.Y.S.2d 495 (4th Dept., 1994), *affd* 85 N.Y.2d 951, 626 N.Y.S.2d 1006 (1995). This discretionary determination for a judge to recuse himself/herself is largely a matter of personal conscience when an "alleged appearance of impropriety arises from inappropriate awareness of 'nonjuridical data' . . ." *Gabay v. Bender*, 34 A.D.3d 207, 823 N.Y.S.2d 389, 390 (1st Dept., 2006). Stated more strongly, the Court of Appeals held that "'[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case' (*United States v. Grinnell Corp.*, 384 U.S. 563, 583; *see also, Berger v. United States*, 255 U.S. 22, 31 ['**bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case**'])" (emphasis added). *People v. Moreno*, 70 N.Y.2d at 407, 521 N.Y.S.2d at 666.

On this extensive trial record, defendants solely rest their claim on their disagreement with various rulings which appear to have been "cherry picked" out of context to prove judicial bias. A review of the voluminous trial transcript discloses that every evidentiary ruling involving extensive colloquy between the parties' counsel and this court was made out of the jury's presence. Moreover, defendants cannot point to any portion of the trial transcript where this court allegedly engaged in any improper conduct in the presence of the jury (e.g., verbalized repeated, baseless criticisms of defense counsel during the trial, gratuitous comments on the credibility of any defense witness, etc.) to unduly influence the jurors and prevent them from considering "the issues in a fair, calm and unprejudiced manner. . ." *Salzano v. City of New York*, 22

A.D.2d 656, 253 N.Y.S.2d 138, 139 (1st Dept., 1964). Neither can defendants marshal any judicial statements made during colloquy throughout this lengthy trial to credibly demonstrate that this court's conduct actually had the cumulative effect of "divert[ing] the jurors' attention from the issues to be determined . . . or depriv[ing] [defendants] of a fair trial. . ." (bracketed matter added). *Desinor v. New York City Transit Authority*, 34 A.D.3d 521, 522, 823 N.Y.S.2d 680, 681 (2nd Dept., 2006). In sum, defendants have not submitted any proof of judicial bias to warrant either this court's disqualification or recusal and that branch of defendants' post-trial motions seeking this relief is denied. *Kupersmith v. Winged Foot Golf Club, Inc.*, 38 A.D.3d 847, 849, 832 N.Y.S.2d 675, 677 (2nd Dept., 2007).

CPLR §4404(A) RELIEF

Notwithstanding their allegations of judicial bias which defendants implicitly claim influenced the jury to render a verdict totally outcome-determinative[3] against them warranting a mistrial and this court's removal from this case, nonetheless, defendants incredibly and inconsistently urge this court to set aside the liability verdicts and dismiss each of plaintiffs' causes of action as a matter of law or, alternatively, set aside the verdicts as being against the weight of the evidence. To that end, lead counsel's supporting affirmation makes reference to three points: (1) Albunio failed to prove Hall retaliated against her by directing any adverse employment action against her after she engaged in protected activity (i.e., when she filed her OEEO complaint on January 12,

[3] Notably, in response to Interrogatories Nos. 2, 6, 7,11,12 (liability questions), 8 and 13 (damages questions) on the Verdict Sheet, the jury rendered favorable defense verdicts.

2003); (2) both Connors and Albunio failed to prove their claim of constructive discharge because Albunio voluntarily retired from the NYPD 2½ years after she engaged in protected activity and Connors voluntarily retired from the NYPD a little more than 3 years after engaging in protected activity (and prevailing case law "does not permit a claim for constructive discharge when intolerable activity lasted more than six months. . ." [Calistro Supporting Aff. at ¶ 28]); and (3) Sorrenti's claim of retaliation by CITY/NYPD employees rests on "conclusory and speculative statements [which] are insufficient to establish an adverse employment action for retaliation." (Calistro Supporting Aff. at ¶ 31).

Defendants further object to Sorrenti's damage award of $491,706.00 as being excessive as a matter of law and challenge this court's jury instruction (an alleged product of judicial bias) as to what constitutes an adverse employment action.

In opposition, plaintiffs make the following arguments:

- the court properly instructed the jury with the proper statutory standard (*see* New York City Human Rights Law[4] ["HRL"] § 8-107[7]) to apply when considering whether defendants retaliated against plaintiffs by subjecting them to adverse employment actions after they engaged in protected activity;

- the weight of the plaintiffs' respective liability evidence clearly established that defendants jointly/severally violated the HRL and, in its totality, such evidence comported with *McDonnell-Douglas Corp's*[5] three-step burden shifting analysis; and

- Sorrenti's award of $491,706.00 for compensatory damages for his mental and emotional injuries on his discrimination/retaliation claims was adequate and does not deviate materially from what would be reasonable compensation.

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[4] *See* N.Y.C. Adm. Code § 8-107 *et seq.*, as amended by the Local Civil Rights Restoration Act of 2005 ("LCRRA"). *See* discussion, *infra*.

[5] *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

DISCUSSION

In challenging this court's definition of an adverse employment action contained in its jury instruction based on an HRL amendment which occurred after defendants' retaliatory conduct complained of, defense counsel advances the notion that "[i]t is a well established tenet of civil law that conduct not considered improper at the time of its happening cannot later be deemed improper. . ." (Calistro Supporting Aff. at ¶ 33). Defendants are mistaken.

The LCRRA amended HRL 8-107(7) and states, in relevant part:

> Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such a person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint. . . under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter . . . The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment. . . or in a materially adverse change in the terms and conditions of employment. . . provided, however, **that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity**. (emphasis added) (*See* text of the LCRRA as Addendum A to Plaintiffs' Memo.)

While it is true that New York courts apply the same federal court standards to state court employment discrimination claims, nonetheless, the preamble to the LCRRA (i.e., Section 1) made it perfectly clear that:

> [t]he purpose of this. . . [LCRRA] is to clarify the scope of New York City's Human Rights Law. It is the sense of the Council that. . . [the HRL] has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through passage of this local law, the Council seeks to underscore that the provisions of. . . [the HRL] are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretation of New York state or

> federal statutes with similar wording may be used to aid in interpretation of the. . . [HRL], viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the the local law cannot rise.

These HRL amended provisions are required to be construed liberally to accomplish its broad and remedial purposes (*see Farrugia v. North Shore Univ. Hosp.*, 13 Misc.3d 740, 749, 820 N.Y.S.2d 718, 725, n. 3 [Sup. Ct., N.Y. Co., 2006]). Thus, under the LCRRA, retaliatory conduct was not required to be materially adverse (e.g., termination without cause for engaging in protected activity). Rather, the City Council enacted a less restrictive standard to trigger a HRL violation in that it is now illegal to retaliate in any manner. Moreover, these amended provisions also were to be retroactively applied. "Defendant[s] argue[ ] that the LCRRA is inapplicable to the instant action, as it did not take effect until October 3, 2005, when it was enacted. However to the extent. . . [the amended provisions] are intended to 'clarify' the legislative intent and construction of the City's Human Rights Law as originally enacted in 1991, they do not create new rights, but are consistent with the meaning and enforcement of pre-existing rights, and as such are entitled to retroactive application. . ." (bracketed matter added). *See Yanai v. Columbia Univ.*, 2006 N.Y. Misc. LEXIS 2407 (Sup. Ct., N.Y. Co., Madden, J.). Against the backdrop of this analytical framework, this court will consider defendants' post-trial motions.

"A court may set aside a jury verdict and grant judgment as a matter of law to the losing party only 'where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' (*Cohen v. Hallmark Cards*, 45 NY2d

493, 499) . . . " *Brewster v. Prince Apts., Inc.*, 264 A.D.2d 611, 612, 695 N.Y.S.2d 315, 318 (1st Dept., 1999); *see also*, *Smolinsky v. 46 Rampasture Owners, Inc.*, 230 A.D.2d 620, 646 N.Y.S.2d 110 (1st Dept., 1996); and *Niewieroski v. National Cleaning Contractors*, 126 A.D.2d 424, 425, 510 N.Y.S.2d 127 (1st Dept.,1987). Upon the court's review of the trial record, it must construe the evidence in the light most favorable to the non-moving party (*see Mirand v. City of New York*, 84 N.Y.2d 44, 50, 614 N.Y.S.2d 372 [1994]).

Restating the latter standard more broadly:

> To be entitled to a judgment as a matter of law, the defendant must demonstrate that the plaintiff failed to make out a prima facie case; the plaintiff's evidence must be accepted as true, and the plaintiff must be given the benefit of every favorable inference which can reasonably be drawn from the evidence (*Windisch v Weiman*, 161 AD2d 433, 437). The motion should be granted only if there is no rational process by which the jury could find for plaintiff as against the moving defendant (*supra*, at 437; *Harding v Noble Taxi Corp., supra,* at 369).

Campbell v. Rogers & Wells, 218 A.D.2d 576, 631 N.Y.S.2d 6 (1st Dept., 1995).

Under a different standard, "[w]hile the trial court has the power to set aside the jury's verdict if contrary to the weight of the evidence (CPLR 4404 [a]), the court must first conclude 'that the jury could not have reached its verdict on any fair interpretation of the evidence' (*Delgado v. Board of Educ.*, 65 A.D.2d 547, *affd* 48 N.Y.2d 643) . . ." *Wiseberg v. Douglas Elliman-Gibbons & Ives, Inc.*, 224 A.D.2d 361, 638 N.Y.S.2d 82 (1st Dept., 1996). In this context, the court's analysis will not involve a question of law, but rather will require a discretionary balancing of many factors. *See Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2nd Dept.,1985). Thus, the trial court may not set

aside the jury verdict "merely because it disagrees with the result. Its power in this area must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict. Fact-finding is within the province of the jury, not the trial court . . ." *Brown v. Taylor*, 221 A.D.2d 208, 209, 633 N.Y.S.2d 170, 171 (1st Dept., 1995).

Evidence Before the Jury

It is unnecessary to recite all the marshaled testimonial and documentary evidence comprising the trial record. The following summaries should suffice:[6]

Albunio always enjoyed excellent performance evaluations throughout her career in the NYPD and experienced a meteoric rise achieving the rank of Captain and her own command at YSS. Albunio had the privilege of wearing civilian attire and enjoyed the use of a car, a secretary, a scenic office overlooking picturesque Brooklyn Heights and regular weekday hours. Based on the history of her predecessors in this position, there was a real possibility for Albunio to receive a discretionary promotion to Deputy Inspector and retire after 25 years of service with an unblemished record.

The jury concluded that Hall's retaliatory conduct changed the course of her career. In the Fall/Winter of 2002, Hall made unilateral command decisions at YSS without Albunio's approval (e.g., ordered the retrieval of YSS personnel files, directed employee transfers to YSS, etc.). Hall fostered a hostile work environment by "freezing" her out of the Community Affairs Office which oversaw YSS. The jury believed Hall influenced the OEEO investigation which ultimately impugned Albunio's credibility within

[6] A narrative format of the factual points contained in the record is being utilized without repeatedly referencing these points to specific portions of the trial transcript.

the NYPD and belatedly gave her a negative performance evaluation for the first time in her career. The jury also believed Hall orchestrated Albunio's transfer to Transit District One and *de facto* demotion as an Executive Officer (a second in command position) where Albunio was again required to wear a uniform at all times, occupy a subway station office without windows and work a 4 pm to 12 am shift with markedly reduced supervisory responsibilities. She sought to transfer to the NYPD's Internal Affairs Bureau where she served earlier in her career, but to no avail. The jury concluded that Hall's retaliatory decision to transfer Albunio to a relatively "dead end" position and its attendant work conditions ultimately led to her constructive discharge, i.e., her forced, earlier retirement after 20 years of service.

Connors, too, enjoyed a good reputation within the NYPD, rising to the rank of Lieutenant and became an executive officer under Albunio's eventual command at YSS. Evidently, the jury believed Connors personally heard comments Hall made about Sorrenti enabling him to conclude that Hall perceived Sorrenti to be gay and a "child molester." After learning that Albunio was being transferred out of YSS for promoting Sorrenti's candidacy for a YSS position, Connors attempted to voluntarily transfer to the Detective Bureau and filed an OEEO complaint against Hall for discriminatory conduct against Sorrenti. Connors believed the OEEO investigation was compromised and when Hall learned Connors had engaged in this protected activity, he retaliated against him. Among other actions, Hall fostered hostility between Connors and other NYPD personnel at YSS and the Office of Community Affairs, made counterproductive decisions affecting the scope of Connors' duties at YSS, tainted his relationship with his new commanding officer which led to unwarranted disciplinary

action as to Connors' changed tours of duty which virtually rendered him a "paper" field supervisor over YSS officers. The jury learned Connors expected to obtain a transfer position as Commanding Officer of a Detective Squad. Instead, Connors was relegated to being an Integrity Control Officer for the Detective Bureau with the unenviable job of ensuring the police officers within that bureau walk "the straight and narrow" or suffer disciplinary consequences and without any possibility of obtaining a discretionary promotion to Lt. Commander. His transfer requests to the Arson and Explosion Squad were turned down as well. Connors similarly contemplated achieving the rank of Lt. Commander and retiring after 25 years of service. The jury concluded that Hall's retaliatory conduct towards Connors for filing the OEEO complaint about Hall's treatment of Sorrenti led Connors down a "dead end" career trail and ultimately led to his constructive discharge, i.e., his forced, earlier retirement after 20 years of service.

The jury concluded that although Sorrenti was qualified for the YSS Sergeant position, Hall discriminated against him because of his perceived sexual orientation and deprived him of a career opportunity to work with youth because of Hall's stereotyped views of gay men. The jury further concluded that Sorrenti was then subjected to retaliatory conduct by CITY/NYPD employees reasonably likely to deter a person from engaging in protected activity after he filed an OEEO complaint of discrimination against Hall and commenced this civil action. They include, but were not limited to, repeated denials of change of assignment requests to other NYPD units, isolation from his fellow officers in the work place, repeated denials of annual leave requests, unjustified change of duty status to restricted duty and removal of his firearm, harassment from a fellow

officer and his forced retirement after 20 years of service to escape further retaliation (see Plaintiffs' Memo at p. 29).

Based on the trial record, this court finds there were valid lines of reasoning and permissible inferences for the jury to draw upon that would lead these rational jurors to reach their conclusions based upon the testimonial and other admitted evidence presented at trial and decide that each plaintiff made out his/her respective prima facie case and that: (1) Hall discriminated against Sorrenti based upon his perceived sexual orientation and CITY/NYPD employees retaliated against him for engaging in protected activity resulting in emotional damages; and (2) Albunio and Connors engaged in protected activity on behalf of Sorrenti (i.e., opposition activity) when they respectively learned Hall was discriminating against Sorrenti because the former perceived the latter to be gay and a "child molester" and Hall retaliated against them leading to their constructive discharge from the NYPD. *Cohen v. Hallmark Cards, supra*. This ample trial record does not justify a judgment notwithstanding the verdict dismissing any of the complaints as a matter of law. *LePatner v. VJM Home Renovations, Inc.*, 295 A.D.2d 322, 744 N.Y.S.2d 337 (2nd Dept., 2002); *cf.*, *Carnavalla v. Osso*, 301 A.D.2d 620, 753 N.Y.S.2d 887 (2nd Dept., 2003). The branch of defendants' post-trial motions for this relief is denied.

In making the foregoing ruling with respect to Albunio and Connors, this court has considered the elements of a successful cause of action for constructive discharge. To sustain a typical constructive discharge claim, a person must prove that the employer intentionally created such an intolerable workplace environment where it would compel a reasonable person to involuntarily end his/her employment. *Morris v.*

Schroder Capital Management Int'l., 7 N.Y.3d 616, 622, 825 N.Y.S.2d 697, 701 (2006). It does not necessarily require temporal proximity between the retaliatory conduct complained of and the forced resignation. *See Gonzalez v. Bratton*, 147 F.Supp.2d 180, 198 (S.D.N.Y., 2001) ("the passage of time by itself is not dispositive in a constructive discharge claim. . ."); *see also*, *Dortz v. City of New York*, 904 F.Supp.127 (S.D.N.Y., 1995). It was for the jury to determine whether a temporal relationship between the retaliatory conduct and plaintiffs' resignations was too distant. *Sui generis* to this case, it was reasonable for the jury to conclude that Albunio and Connors simply could not afford to give up valuable pension rights and would have otherwise suffered a valuable loss of pension benefits had they left prior to completing 20 years of service. For these plaintiffs, "financial constraints. . . operate[d] to render an immediate departure inopportune, even against the pressure of unpleasant working conditions. . . [Here, Albunio and Connors had] to suffer abuse a little longer until . . . [this] auspicious moment arrive[d]." (bracketed matter added). *Gonzalez, supra*.

Having found sufficient evidence in the trial record to support the verdicts for each plaintiff, this court must then inquire as to whether the conflicting testimonial and documentary evidence presented by the parties and which resulted in "verdict[s] for the [plaintiffs] . . . so preponderate[d] in favor of the [defendants] that [the verdicts] could not have been reached on any fair interpretation of the evidence. . ." *Moffatt v. Moffatt*, 86 A.D.2d 864, 447 N.Y.S.2d 313 (2nd Dept., 1982), *aff'd* 62 N.Y.2d 875, 478 N.Y.S.2d 864 (1984), and quoted with approval, with bracketed matter added, in *Lolik v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 631 N.Y.S.2d 122 (1995). In conducting a factual

inquiry of the trial record, this court further finds no basis to set aside the verdict as against the weight of the evidence and direct a new trial, thus, that branch of defendants' post-trial motions for this relief is denied.

Without any factual analysis of the trial record or citations to reported verdicts of lower awards for comparable emotional injuries, defendants' request for remittitur rests on a conclusory assertion that Sorrenti's compensatory damages award was excessive.[7]

CPLR §5501[c] states, in relevant part:

> In reviewing a money judgment in an action in which an itemized verdict is required in which it is contended that the award is . . . inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is . . . inadequate if it deviates materially from what would be reasonable compensation.

Trial courts may also apply this material deviation standard in overturning jury awards but should exercise their discretion sparingly in doing so. *Shurgan v. Tedesco*, 179 A.D.2d 805, 578 N.Y.S.2d 658 (2nd Dept., 1992); *Prunty v. YMCA of Lockport, Inc.*, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dept., 1994); see also, *Donlon v. City of New York*, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dept., 2001) (implicitly approving the application of this standard at the trial level). For guidance, a trial court will typically turn to prior verdicts approved in similar cases, but must undertake this review and analysis

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[7] Parenthetically, plaintiffs' expert's calculations of Albunio's loss of earnings ($479,473.00) and Connors' loss of earnings ($507,198.00) which presumably formed the basis for these jury awards were essentially unchallenged and fully supported by the extensive trial record. *Diaz v. West 197th Street Realty Corp.*, 290 A.D.2d 310, 736 N.Y.S.2d 361 (1st Dept., 2002).

with caution not to rigidly adhere to precedents (because fact patterns and injuries in cases are never identical) and/or substitute the court's judgment for that of the jurors whose primary function is to assess damages. *So v. Wing Tat Realty, Inc.*, 259 A.D.2d 373, 374, 687 N.Y.S.2d 99, 101 (1st Dept., 1999).

This court finds that the jury, among other proven factors, was able to assess the long term effects of Hall's harmful stereotyping of Sorrenti and discriminatory denial of Sorrenti's career opportunity with YSS has had on his mental and emotional state and which was compounded by CITY/NYPD employees' ongoing retaliatory acts of "abuse, intimidation and humiliation. . . " (Plaintiffs' Memo at p. 44), Sorrenti's episodes of suicidal ideation and current diagnosis of major reactive depression and Sorrenti's ongoing need for psychotropic medication. After considering the foregoing as well as appellate case law reporting verdicts ranging from $450,000.00 - $650,000.00, this court finds Sorrenti's emotional damages award of $491,706.00 did not deviate materially from what would be reasonable compensation under the circumstances. *Barrowman v. Niagara Mohawk Power Corp.*, 252 A.D.2d 946, 675 N.Y.S.2d 734 (4th Dept., 1998). Thus, the branch of defendants' post-trial motions for remittitur is denied.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
August 16, 2007

HON. MARTIN SHULMAN, J.S.C.