02-6102L

02 – 6112 Con, 02 – 6122 Con, 02 – 6124 Con, 02 – 6126 Con, 02 – 7405 Con

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, NORMA COLON,

Plaintiff-Appellants,

MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN, TONJA MCGHEE,

Intervenor-Plaintiff-Appellants,

- v. -

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT NORMA COLON AND INTERVENOR-PLAINTIFF-APPELLANT TAMMY AUER

Jennifer K. Brown
Yolanda S. Wu
Timothy J. Casey
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Fl.
New York, NY 10014
(212) 925-6635

Marc Cohan
Anne Pearson
Welfare Law Center
275 Seventh Avenue
Suite 1205
New York, NY 10001- 6708
(212) 633-6967

Attorneys for Plaintiff – Appellant NORMA COLON

(Additional counsel listed on reverse)

Jennifer K. Brown
Yolanda S. Wu
Timothy J. Casey
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Fl.
New York, NY 10014
(212) 925-6635

Daniel D. Leddy, Jr.
5 Parkview Place
Staten Island, NY 10310
(718) 448-4735

Attorneys for Intervenor – Plaintiff – Appellant TAMMY AUER

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MISCELLANEOUS

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BRIEF FOR PLAINTIFF-APPELLANT NORMA COLON AND INTERVENOR-PLAINTIFF-APPELLANT TAMMY AUER

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Preliminary Statement

Intervenor-Plaintiff-Appellant Tammy Auer ("Ms. Auer") was sexually harassed by her supervisor while working as an office worker for the New York City Department of Sanitation in exchange for public assistance under the City's Work Experience Program. Plaintiff-Appellant Norma Colon ("Ms. Colon"), who worked as a file clerk for New York City's Human Resources Administration in exchange for public assistance under the same

program, was also sexually harassed by her supervisor. Ms. Auer and Ms. Colon ("individual plaintiffs") appeal a district court decision by Judge Richard Conway Casey erroneously holding that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (2001) ("Title VII") is per se inapplicable to workfare workers because the cash payments, workers' compensation and other benefits they receive for their work do not qualify as "remuneration" within the meaning of this Court's Title VII precedents. Ms. Colon further appeals the resulting dismissal of her pendent state and local claims.

The district court's decision is contrary to this Court's holding that the receipt of any significant financial benefits in exchange for work -- whether or not in the form of a traditional salary -- satisfies this Court's remuneration requirement. The decision flies in the face of federal agency determinations that workfare workers are to be treated like other workers under Title VII, and of Congress' conscious and deliberate refusal to exclude workfare workers from Title VII's protections. The decision below should therefore be reversed.

Jurisdictional Statement

The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The order and judgment of the district court below disposes of all claims.

Judgment was entered on March 15, 2002 (Colon) and on March 19, 2002 (U.S. case). Ms. Auer filed her appeal on May 10, 2002. Ms. Colon filed her appeal on April 10, 2002.

Issue Presented for Review

Did the district court err in determining as a matter of law that workers in New York City's Work Experience Program are not "employees" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.?

STATEMENT OF THE CASE

A. Factual Background

1. The Structure of the WEP Program

New York State law authorizes the City to condition payment of public assistance upon the performance of work in the City's Work Experience Program ("WEP"), which is administered by the City's Human Resources Administration ("HRA"). N.Y. Soc. Serv. Law § 336-c. Those placed in WEP jobs work for a maximum number of hours calculated by dividing the public assistance payment (and any Food Stamp benefits) for which they are eligible by the minimum wage. Id. at § 336-c(2)(b). If a WEP worker performs her job, payment continues, with typical monthly payments ranging from $352 for a single adult to $688 for a household of four. Id. at § 131-a; 18 N.Y.C.R.R. § 352.3(a).

If a WEP worker refuses to work without good cause, she loses eligibility for continued payments: "[A]n individual who

is required to participate in work activities shall be ineligible to receive public assistance if he or she fails to comply." N.Y. Soc. Serv. Law § 342(1). If a non-complier is a parent, her share of the grant is eliminated by reducing the household grant pro-rata, e.g., by one-third in the case of a single parent with two children. Id. at § 342(2). If a non-complier is an adult without children, her share of the grant is eliminated by reducing the household grant pro-rata, e.g., by one-half if her spouse is a household member, and by 100% if she is a single adult. Id. at § 342(3).

WEP workers are reimbursed for their child care and commuting expenses. Id. at § 332-a. They are provided workers' compensation on the same basis (but not necessarily at the same benefit level) as salaried employees performing the same or similar work. Id. at § 336-c(2)(c).

In June 2002, there were 17,829 workers in the City's WEP program.[1] About 68% of the City's adult public assistance recipients are women and over 80% are Hispanic or non-Hispanic Black.[2]

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[1] Calculated from data reported in HRA, Public Assistance - Caseload Engagement Status, http://www.nyc.gov/html/hra/pdf/citywide.pdf; HRA, Family Assistance Caseload Engagement Status, http://www.nyc.gov/html/hra/pdf/familyassistance.pdf.

[2] Calculated from data in HRA, New York City Public Assistance Fact Sheet, http://www.nyc.gov/html/hra/pdf/ncyfact_oct2001.pdf. The HRA web site does not report gender or race/ethnicity specifically for those public assistance recipients who are WEP workers.

2. The Sexual Harassment Suffered by Tammy Auer

In January 1997, Ms. Auer, a single mother of three, was assigned by HRA's WEP program to work for the City Department of Sanitation ("DOS"). See (Joint Appendix ("JA") 50 ¶¶ 35, 36.)[3] Ms. Auer worked for DOS for approximately one and a half years, performing general office duties which were generally the same as those performed by salaried DOS office workers, including answering phones, teletyping, radio dispatching, filing papers and faxing documents. (JA 51 ¶ 37).

Among Ms. Auer's supervisors was James Soto, the DOS Assistant Borough Superintendent. (JA 51 ¶ 38). From the outset, Mr. Soto made inappropriate sexual comments to Ms. Auer. (JA 12 ¶ 34; JA 51 ¶ 39). He repeatedly urged her to move in with him. (JA 12 ¶ 36; JA 51 ¶ 41). Mr. Soto regularly told Ms. Auer to leave her usual work area, come into his office, and turn around so that he could see what she was wearing and comment on her appearance. (JA 12 ¶ 38; JA 51 ¶ 43).

In Spring 1998, Mr. Soto began touching Ms. Auer inappropriately on a regular basis. (JA 13 ¶ 42; JA 52 ¶ 47). This included pinching her ribs and buttocks and putting his hands down her pants. (JA 52 ¶ 47). Ms. Auer repeatedly told

[3] Citations in this form are to the Complaints reproduced in the Joint Appendix.

Mr. Soto not to touch her, but he persisted. (JA 13 ¶ 43; JA 52 ¶ 48).

Some time in 1998, Ms. Auer complained to James Wynne, the DOS Borough Commissioner, about Mr. Soto's unwanted behavior. (JA 13 ¶ 45; JA 52 ¶ 49). However, the City took no action in response to her complaint. (JA 13 ¶ 46; JA 52 ¶ 50). In July 1998, Ms. Auer went to DOS' central offices to complain about Mr. Soto's behavior. (JA 13 ¶ 47; JA 52 ¶ 51). Following this complaint, the City transferred her to work at another DOS office. (JA 13 ¶ 48; JA 52 ¶ 52). But Mr. Soto had supervisory authority over Ms. Auer at the new work site as well. (JA 13 ¶ 49; JA 52 ¶ 53). Mr. Soto drove there and screamed at her, subjecting her to a verbal barrage laced with expletives. (JA 13 ¶ 50; JA 53 ¶ 54). Subsequently, terrified, distraught, and physically shaking as a result of Mr. Soto's conduct, Ms. Auer left the building in fear for her safety. Reeling from shock, she slipped as she left DOS and broke her foot. (JA 53 ¶ 56).

As a result of this hostile work environment, Ms. Auer sustained substantial physical, emotional, and financial damages, including the loss of public assistance funds and Medicaid coverage which, among other harm, deprived her of the ability to continue the mental health counseling and medication she needed to address the consequences of Mr. Soto's behavior.

(JA 53 ¶ 58). She experienced long periods of severe depression and medication withdrawal during which she was unable to leave her home and, on most days, even her bedroom. (JA 53 ¶ 58). She was in constant anguish over how she would provide for her family. (JA 53 ¶ 58).

Ms. Auer filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on November 11, 1998. (JA 14 ¶ 54; JA 53 ¶ 59). The EEOC determined that there was reasonable cause to believe that Ms. Auer's allegations were true, and referred the matter to the United States Department of Justice. (JA 14 ¶ 55; JA 54 ¶ 60).

3. The Sexual Harassment Suffered by Norma Colon

In May 1997, Ms. Colon, a single mother of two, was assigned by HRA's WEP program to work as a file clerk in the HRA Office of Employment Services ("OES"). (JA 101 ¶ 27). She performed the same tasks as salaried OES clerical employees. (JA 102 ¶ 31). Her job tasks were determined by her supervisor. (JA 101 ¶ 24).

Ms. Colon's supervisor, George Santiago, stared at her body throughout her initial orientation and then arranged for Ms. Colon's desk to be placed alongside his own desk. (JA 102 ¶¶ 34, 38). Santiago made repeated inappropriate and unwanted sex-based comments directed at Ms. Colon and attempted to commence a romantic relationship with her. (JA 102 ¶ 41). For example, on

one occasion he returned from judging a beauty contest and told Ms. Colon that he had a good time judging beautiful women with "big boobs". (JA 103 ¶ 47). His unwanted approaches culminated in a proposition that they spend the night together in a motel. (JA 103 ¶ 49). Ms. Colon was extremely upset by this and ultimately felt she had no choice but to leave her workfare placement. (JA 103-04 ¶¶ 51, 60).

In response to Ms. Colon's timely charge of discrimination, the EEOC found reasonable cause to believe that the City had subjected Ms. Colon to sexual harassment and constructively discharged her. (JA 99 ¶ 5). The EEOC issued her a right to sue letter. (JA 99 ¶ 8).

B. Proceedings in the Court Below

1. Proceedings Before the District Court's Decision

On May 31, 2001, the United States filed suit for discrimination in violation of Title VII against the City of New York and the New York City Housing Authority, naming as individual complainants four women who had participated in the WEP program, one of whom was Ms. Auer. The case was assigned to Judge Richard Conway Casey.

On July 12, 2001, Ms. Auer served a motion to intervene and an intervenor's complaint, asserting sex discrimination in violation of Title VII, the New York State Human Rights Law, N.Y. Exec. Law §§ 290 et seq., and the New York City Human

Rights Law, N.Y.C. Code §§ 8-101 et seq.[4] (JA 43-56). On July 27, 2001, defendant New York City Housing Authority served a memorandum in opposition to Ms. Auer's motion. (Record Document No. 11). The memorandum opposed intervention only with respect to the state and local claims, stating that "Auer should be permitted to intervene as a plaintiff only as to the Title VII Claim." (Id. at 6).

On July 20, 2001, the City served a motion to dismiss the case brought by the United States. The City's supporting memorandum asserted that WEP workers are not "employees" under Title VII and, consequently, that there was no subject matter jurisdiction and no federal claim upon which relief could be granted.

On September 28, 2001, Ms. Colon filed suit against the City of New York, HRA Commissioner Jason Turner, and her work supervisor for sex discrimination in violation of Title VII, the New York State Human Rights Law, N.Y. Exec. Law §§ 290 et seq., and the New York City Human Rights Law, N.Y.C. Code §§ 8-101 et seq.

Ms. Colon's case was assigned to Judge Laura Taylor Swain. On November 13, 2001, the City filed a motion to dismiss. The City asserted that Plaintiff-Appellant Colon had not been its

[4] The motion was filed on or about August 3, 2001 pursuant to Judge Casey's practice rule that motion papers are to be filed together with

"employee" within the meaning of Title VII and, consequently, that there was no subject matter jurisdiction and no federal claim upon which relief could be granted.

By letter dated January 14, 2002, the City requested that the Colon case be treated as related to U.S. v. City of New York. By order dated January 24, 2002, Judge Casey accepted the Colon case as related to the U.S. case for pre-trial purposes, including deciding the City's pending motion to dismiss.

2. The District Court's Decision

Without having held oral argument, by Order and Decision dated March 8, 2002, the district court granted the City's motion to dismiss plaintiffs' claims, holding that WEP workers are not employees for Title VII purposes. (JA 63-75). In a brief and cursory opinion, the district court rested its holding exclusively on the conclusion that plaintiffs received no economic remuneration from the City. (JA 71-75). The district court discussed but declined to decide the City's argument that the federal welfare law placed WEP workers outside the scope of Title VII. (JA 68-71). The district court also declined to review Ms. Auer's motion to intervene, concluding that it was moot, and declined to exercise supplemental jurisdiction over Ms. Colon's state and local law claims. (JA 75). Judgment was

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the response from the opposing parties.

entered on March 15, 2002 (Colon) and on March 19, 2002 (U.S. case). Plaintiffs timely filed notices of appeal.

Standard Of Review

This Court should review the district court's dismissal of plaintiffs' complaints de novo, applying the same standard a district court is required to apply in ruling on a defendant's motion to dismiss. Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 202 (2d Cir. 1999). Under de novo review, this Court will "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." Id. This Court "will not affirm the dismissal of a complaint unless 'it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.'" Id. (citation omitted). Moreover, in evaluating complaints raising Title VII or other civil rights claims, this Court has cautioned that courts must be especially hesitant to grant motions to dismiss. See, e.g., Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995); Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991); Escalera v. New York City Hous. Auth., 425 F.2d 853, 857 (2d Cir. 1970); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968). Consistent with this protective approach, the Supreme Court

recently clarified that, under the Federal Rules' simplified pleading standard, employment discrimination plaintiffs need not plead a prima facie case of discrimination to survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

SUMMARY OF ARGUMENT

The district court's decision is contrary to this Court's case law and to statutory language and congressional intent. If left standing, it could leave thousands of vulnerable low-income women, mostly women of color, without protection against sexual harassment in the workplace.

The district court's ruling flouts this Court's Title VII precedents and rests on faulty reasoning. The cash payments, workers' compensation coverage, and reimbursement for child care and commuting expenses that WEP workers receive in exchange for their work constitute remuneration from their City employer, and plaintiffs meet this Court's common law agency test for who is a Title VII employee. See point I A, infra. The district court also erred in failing to defer to an EEOC determination that Title VII applies to workfare workers in the same way it applies to other workers. See point I B, infra. In addition, the federal welfare law's text, legislative history, and implementing regulations make clear that the federal welfare law does not place WEP workers outside of Title VII. See point II, infra. Finally, the district court's dismissal of plaintiff

Colon's state and local claims should be reversed. See point III, infra.

ARGUMENT

I. WEP WORKERS QUALIFY AS EMPLOYEES UNDER TITLE VII

A. The District Court Misapplied Settled Precedent in Erroneously Concluding that Plaintiffs Are Not Employees Under Title VII

1. Plaintiffs Meet This Court's Remuneration Test

The district court erred by failing to follow this Court's well-established test for analyzing whether a person is an employee under Title VII. "[T]he question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received direct or indirect remuneration from the alleged employer." Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999). The Pietras Court held: "[W]e think it is clear that an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits." Id. More recently, in York v. Ass'n of the Bar of the City of New York, 286 F.3d 122 (2d Cir. 2002), this Court reiterated that the key issue is whether the putative employee received a "financial benefit" such as "salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing." Id. at 125-26. Such "benefits must meet a minimum level of 'significance,' or

substantiality, in order to find an employment relationship in the absence of more traditional compensation." Id. at 126.

Plaintiffs are clearly remunerated by their City employer. As WEP workers, plaintiffs' receipt of their cash benefits depended on performance of their WEP work. Indeed, the number of hours they worked was calculated based on the amount of their benefit payments. N.Y. Soc. Serv. Law § 336-c(2)(b). Just like employees who receive a traditional paycheck, WEP workers perform work that benefits their City employer and are no longer paid if they stop working without good cause. The City in turn treats WEP workers like other employees, and ceases payment if a WEP worker stops working without good cause. As such, the cash payments plaintiffs received as WEP workers constituted remuneration, qualifying them as employees under Pietras and York.

The district court found that plaintiffs were not employees under Title VII in part because public assistance benefits are continued for other family members if a non-compliant WEP worker resides with eligible children and/or an eligible spouse. (JA 74). But that does not alter the fact that 100% of the benefit a WEP worker receives in her own right is directly tied to compliance with WEP and is terminated for non-compliance. N.Y. Soc. Serv. Law § 342(1).

The district court also based its ruling on the conclusory statement that "welfare benefits are not considered wages." (JA 74-75). But that fails to account for this Court's holding that individuals who receive significant remuneration yet no wages can be Title VII employees. Pietras, 180 F.3d at 473. Moreover, it is the substance of the relationship, not its labeling, that is controlling. See Jones v. Mega Fitness, Inc., 1996 U.S. Dist. LEXIS 6875, at ** 8-9(S.D.N.Y. May 21, 1996) ("Workers are often incorrectly classified . . . in order to shield the availing interests of their employers; thus, the court must look beyond convenient labels to the substance of the employment relationship."), modified in part, 1996 U.S. Dist. LEXIS 8654(S.D.N.Y. June 21, 1996); cf., In re Shulman Transp. Enter. Inc., 744 F.2d 293, 295 (2d. Cir. 1984) ("An employee does not become an independent contractor simply because a contract describes him as such").

The district court also erred in holding that WEP workers "did not receive employment-related benefits from [the City]." (JA 73). In fact, as WEP workers, plaintiffs were also remunerated with other employment benefits comparably "significant" to those found by this Court in Pietras to confer employee status.

The plaintiff in Pietras was an unsalaried volunteer firefighter who received no cash payments at all – only life

insurance, death benefits, disability insurance, some medical benefits, and potentially a retirement pension. Pietras, 180 F.3d at 470.[5] Yet, this Court upheld the district court's determination that Pietras was an employee under Title VII because she received significant benefits. Id. at 473. Similarly, in a case this Court cited with approval in Pietras and in O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998), the Fourth Circuit Court of Appeals reversed a grant of summary judgment in Haavistola v. Community Fire Co., 6 F.3d 211, 221-22 (4th Cir. 1993), because it found that a reasonable factfinder could decide that an unpaid volunteer firefighter who received benefits such as a disability pension, survivors' benefits, group life insurance, and scholarships for dependents upon death, was an employee under Title VII. Haavistola, 6 F.3d at 221.

WEP workers likewise receive significant employment-related benefits. State law requires the City to provide WEP workers with workers' compensation coverage for on-the-job injuries equivalent to that provided to salaried workers by New York's

[5] While the volunteer firefighter in Pietras might qualify for a retirement pension, the payment of such pension is deferred to the future and contingent upon many years service, and the pension payments themselves may not be very large in amount. Municipal contributions to defined contribution plans for volunteer firefighters range from $10 to $40 per month. N.Y. Gen. Mun. Law § 218(b). Benefits under defined benefit plans for a retired firefighter with 20 years volunteer service range from $100 to $400 a month. Id. at § 219(b).

Workers' Compensation Law. N.Y. Soc. Serv. Law § 336-c(2)(c). That law confers substantial benefits: disability benefits, death benefits, survivors' benefits, medical care and reimbursement, and monetary compensation for functional loss due to illness or injury. N.Y. Workers' Comp. Law §§ 10-48, 200-242. Reimbursement for transportation costs and child care expenses augments the remuneration to which WEP workers are entitled.

Plaintiffs' remuneration as WEP workers thus surpasses the remuneration that qualified the volunteer firefighters in Pietras and Haavistola as employees under Title VII. Just like the volunteer firefighters, WEP workers (through workers' compensation) are entitled to receive death benefits, disability benefits, some medical benefits, and survivors benefits. See, e.g., Hughes v. Steuben County Self-Insurance Plan, 248 A.D.2d 757, 669 N.Y.S.2d 716 (3d Dep't. 1998) (WEP worker in Steuben County WEP program who was injured on job awarded workers' compensation); Quick v. Steuben County Self-Insurance Plan, 242 A.D.2d 833, 662 N.Y.S.2d 608 (3d Dep't. 1997) (same), appeal dismissed, 91 N.Y.2d 866 (1997). In addition, WEP workers – unlike volunteer firefighters – also receive cash for their work. Thus, the district court's statement that WEP workers do not receive benefits comparable to those received by the volunteer firefighter in Haavistola, (JA 74), is plainly

incorrect. Moreover, contrary to the district court, nothing in the case law suggests a litmus test of benefits for determining employee status.

Notwithstanding that it was deciding a motion to dismiss, the district court apparently made a finding of fact unfavorable to plaintiffs: that the City has chosen to provide a lesser level of workers' compensation for WEP workers than for salaried workers.[6] There is nothing in the record to support this finding nor anything in the record detailing the differences between the two supposed levels. Reaching this issue on a motion to dismiss is error. See Desiderio v. National Ass'n of Sec. Dealers, Inc., 191 F.3d at 202 (in deciding a motion to dismiss, a court must "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff"). However, even assuming *arguendo* that this finding was correct, nothing in this Court's Title VII precedents supports the conclusion that a benefit cannot constitute remuneration if the putative employee receives a lesser level of the benefit than some other employee. Indeed, in many

[6] The relevant section in New York's Social Service Law states that WEP recipients "are provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar

employment situations, some salaried employees receive less than other salaried employees who are performing similar work, but the lesser level of compensation does not place them outside of Title VII.

Similarly, the district court erred in suggesting that workers can be employees under Title VII only if they receive sick pay, health insurance and vacation time. (JA 74). Vast numbers of workers do not receive sick pay, health insurance, or vacation time. In 1999, 47% of workers in private industry had no health insurance, 47% had no paid sick leave, and 20% had no paid vacation. Bureau of Labor Statistics, United States Department of Labor, Employee Benefits In Private Industry, 1999 (Dec. 19, 2001), http://stats.bls.gov/ncs/ebs/sp/ebnr0006.pdf. The district court should have followed this Court's precedents and evaluated the significance of Ms. Auer and Ms. Colon's benefits. Moreover, Pietras affirmed that unsalaried volunteer firefighters were Title VII employees even though they did not receive health insurance, sick pay, or vacation time. Pietras, 180 F.3d at 473.

The district court also mischaracterized this Court's ruling in O'Connor v. Davis, 126 F.3d 112, as requiring plaintiffs to have alleged that they were "hired." (JA 72-3).

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positions, while participating in work experience activities under this section." N.Y. Soc. Serv. Law § 336-c(2)(c).

Nothing in O'Connor suggests that the analysis of plaintiffs' employment status ends because they failed to use the magic word "hired" in their complaints. The O'Connor court discussed the issue of whether a person is "hired" to highlight the point that the "essential condition of remuneration" lies at the heart of an employment relationship. O'Connor, 126 F.3d at 116. Indeed, two years after O'Connor, this Court's explanation of the O'Connor decision in Pietras did not even mention the term "hire." Pietras, 180 F.3d at 468. Similarly, the sole mention of the term "hire" in this Court's recent York decision is again linked with the remuneration requirement, as in O'Connor. York, 286 F.3d at 125-26.

Indeed, taken to its logical extreme, the district court's reasoning leads to the conclusion that workers assigned to a firm by a temporary agency can not be employees of that firm because they are "assigned" rather than "hired." Yet many cases have held that such workers can be employees of the firm to which they are assigned. See, e.g, Reynolds v. CSX Transp., Inc., 115 F.3d 860, 869 n.12 (11th Cir. 1997), vacated on other grounds, 524 U.S. 947 (1998); Freeman v. State of Kansas, 128 F. Supp. 2d 1311, 1314-15 (D. Kan. 2001), aff'd, 2001 U.S. App. LEXIS 24795 (10th Cir. Nov. 16, 2001); DeWitt v. Lieberman, 48 F.Supp.2d 280, 288 (S.D.N.Y. 1999); Amarnare v. Merrill Lynch, 611 F.Supp. 344, 348-49 (S.D.N.Y. 1984), aff'd, 770 F.2d 157 (2d

Cir. 1985).

The situation of WEP workers contrasts sharply with that of the persons this Court has held not to be employees under Title VII's remuneration requirement. In York, this Court affirmed the district court's holding that an unpaid volunteer who received no employee benefits did not satisfy the remuneration requirement because she received no significant economic benefit of any kind from the putative employer. York, 286 F.3d at 125-26. The Court rejected the plaintiff's effort to characterize clerical support and networking opportunities as remuneration, reasoning that treating these mere incidents of any volunteer activity as remuneration would convert all volunteer work into covered employment. Id. In contrast, Ms. Auer and Ms. Colon do not argue that the administrative support they received to perform their clerical work nor their opportunity to network with other City workers constitutes remuneration.

The only other case in which this Court has held that the remuneration requirement was not satisfied, O'Connor v. Davis, is easily distinguishable from the instant case. In O'Connor, this Court held that an unpaid student intern who received no employee benefits did not satisfy the remuneration requirement because she received no economic benefits of any kind from the putative employer. O'Connor, 126 F.3d at 119. By contrast, WEP workers do undisputedly receive cash payments, workers'

compensation coverage and reimbursements for child care and commuting expenses from their putative employer.

2. Plaintiffs' Status As Welfare Recipients Is Irrelevant to Their Status as Employees Under Title VII

The district court's conclusion that "[e]very benefit Plaintiffs received resulted from their status as welfare recipients," (JA 74), is both legally irrelevant and factually incorrect. This assertion is legally irrelevant because Title VII contains no exemption for welfare recipients. Title VII defines an "employee" as someone who is "employed by an employer." 42 U.S.C. § 2000e(f). Title VII creates a "broad rule of workplace equality," Harris v. Forklift Sys. Inc., 510 U.S. 17, 22 (1993), and is best understood as a "broad remedial measure" designed "to assure equality of employment opportunities." Pullman-Standard v. Swint, 456 U.S. 273, 276 (1982) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)). The Supreme Court has cautioned that courts must take care to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy." County of Washington v. Gunther, 452 U.S. 161, 178 (1981). Thus, plaintiffs' status as welfare recipients simply has no relevance under Title VII.

The district court's conclusion is factually incorrect because once plaintiffs were assigned to WEP, their receipt of benefits depended on their performance of work for their City

employers. N.Y. Soc. Serv. Law § 342(1). At that point, plaintiffs' "status as welfare recipients" no longer entitled them to benefits – their work did. Once assigned to WEP, WEP workers enter into an employment relationship with the City because their benefits are conditioned on the performance of work. Moreover, contrary to the district court's assertion, WEP workers' entitlement to workers' compensation in no way stems from their status as a welfare recipient.

While it is true that participation in the WEP program is limited to those who meet public assistance eligibility guidelines, restrictions on who may participate in a work program are irrelevant to the question whether the work performed by the program participants qualifies as employment. For example, eligibility for the Pathways to Employment ("PTE") work program at issue in Archie v. Grand Cent. P'ship, Inc., 997 F.Supp. 504, 507-08 (S.D.N.Y. 1998) was limited to the homeless poor. Yet Judge Sotomayor held that the homeless persons participating in the PTE program qualified as employees for minimum wage purposes. Id. at 508. Similarly, eligibility for subsidized employment with federal funds provided under the Comprehensive Employment and Training Act program of 1973 ("CETA") was generally limited to individuals meeting CETA's unemployment or low-income eligibility guidelines. Yet many cases have treated CETA workers as Title VII employees. See,

e.g, Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111 (6th Cir. 1987); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986); Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986); Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982); Members of the Bridgeport Hous. Auth. Police Force v. City of Bridgeport, 646 F.2d 55 (2d Cir.), cert. denied, 454 U.S. 897 (1981).

Judge Sotomayor's decision in Archie noted that "the question of whether such a [work] program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make. . . . The Court, however, cannot grant an exemption [from minimum wage requirements] where one does not exist in law." Archie, 997 F. Supp. at 508. The same reasoning applies here. As discussed below, see infra Point II, both Congress and the Executive Branch have made clear that employment laws apply to WEP workers in the same manner they apply to other workers.

3. Plaintiffs Meet the Common Law Employee Test

Where, as here, plaintiffs have received remuneration from the entity for whom they perform work, their status as employees under Title VII is determined according to common law agency doctrine. Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 113 (2d Cir. 2000); Frankel v. Bally, 987 F.2d 86, 89 (2d Cir. 1993). The test emphasizes the putative employer's

"right to control the manner and means by which the product is accomplished." Frankel, 987 F.2d at 89 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989)); Eisenberg, 237 F.3d at 113-15.[7] Plaintiffs have more than sufficiently alleged facts to show that they meet this test. The City employer exercised extensive control over their work. HRA determined what site to assign them to and whether their assistance would be terminated if they were discharged by their work site supervisor. Their work site supervisors determined their job tasks, and they performed generally the same tasks as salaried employees.

As discussed above, plaintiffs were remunerated by their City employer and met the common law agency test. This Court should therefore hold that plaintiffs are Title VII employees and reverse the district court's determination to the contrary.

B. The District Court Erred In Failing to Defer to an EEOC Interpretation That Title VII Covers Workfare Workers Just as it Covers Other Workers

Disregarding this Court's directive that the EEOC's interpretation of Title VII is "'entitled to respect' to the extent that it has the 'power to persuade,'" McMenemy v. City of

[7] See also Rivera v. Puerto Rican Home Attendants Servs., Inc., 922 F. Supp. 943, 949 (S.D.N.Y. 1996) (summarizing Second Circuit law on determination of Title VII employment relationship and stressing that common law test variants focus on "the amount of control or supervision a defendant exerts"); Jones v. Mega Fitness, Inc., 1996 U.S. Dist. LEXIS 6875, at *14 ("[a] worker who is required to comply

Rochester, 241 F.3d 279, 284 (2d Cir. 2001) (internal citation omitted), the district court erred in failing to defer to the EEOC. In a Guidance issued in 1997 ("EEOC Guidance") following the 1996 enactment of a new federal welfare law, see infra Point II, the EEOC stated that "welfare recipients would likely be considered employees in most of the work activities described in the new [welfare] law, including . . . work experience." EEOC, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, No. 915.002 (Dec. 3, 1997), available at http://www.eeoc.gov/docs/conting.html. Another EEOC directive, the Compliance Manual, states: "A welfare recipient participating in work-related activities as a condition of receipt of benefits will likely be an 'employee.' The fact that an entity does not pay the worker a salary does not preclude the existence of an employer-employee relationship." EEOC Directives Transmittal No. 915.003, at § 2-III(2), available at http://www.eeoc.gov/docs/threshold.html. Consistent with applicable law, see supra at 24-25, the EEOC Compliance Manual notes that the analysis is fact-specific and focuses on employer control over the means and manner of the employment. Id. at § 2-III(1).

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with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee") (internal citation omitted).

In a footnote, the district court claimed to find a conflict between the EEOC interpretation of Title VII and this Court's precedent and summarily dismissed the EEOC's interpretations as "unpersuasive." (JA 75 n.5). This cryptic footnote does not explain the purported conflict but rather simply recites the statement in O'Connor that the common law agency test applies only if the putative employee was "hire[d]." As discussed above, supra at 19-20, O'Connor's discussion of whether a person was "hired" merely highlighted the central importance of remuneration. Moreover, the EEOC Compliance Manual so casually dismissed by the district court explicitly refers to the "significant remuneration" requirement, citing this Court's decision in Pietras. EEOC Directives Transmittal No. 915.003, at § 2-III(1)(c) & n.73, available at http://www.eeoc.gov/docs/threshold.html.

Contrary to the district court's determination, the EEOC's interpretation fully comports with this Court's precedent applying the fact-based remuneration and common law agency tests to analyze employee status under Title VII. See Pietras, 180 F.3d 468; Eisenberg, 237 F.3d 111. The district court erred in refusing to defer to the EEOC's reasoned judgment. Compare Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (deferring to the EEOC's interpretation of "employee" as including "former employees").

II. THE TANF STATUTE DOES NOT EXCLUDE WORKFARE WORKERS FROM TITLE VII

This Court should also reject defendants' argument, which the court below did not decide, that the federal welfare statute excludes WEP workers from Title VII.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (2001) replaced the Aid to Families with Dependent Children public assistance program with the much more work-oriented Temporary Assistance for Needy Families ("TANF") program. States must require adult TANF Family Assistance participants to work. 42 U.S.C. § 602(a)(1)(A)(ii). Two of the permissible work activities are "work experience," id. at § 607(d)(4), and "community service," id. at § 607(d)(7), terms customarily used for workfare programs such as the City's WEP program.

The City argues that TANF-funded workfare workers are excluded from Title VII because one of the TANF statute's provisions, 42 U.S.C. § 608(d), references four federal anti-discrimination laws but not Title VII. TANF participation, according to the argument, thus excludes WEP workers from coverage under Title VII. But the City's argument directly contradicts the principle disfavoring repeals, amendments, or preemptions by implication. See United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976) ("It is, of course, a

cardinal principle of statutory construction that repeals by implication are not favored."); United States v. Welden, 377 U.S. 95, 103 n.12 (1964) ("Amendments by implication, like repeals by implication, are not favored."); United States v. General Dynamics, 19 F.3d 770, 774 (2d Cir. 1994)(there is "well-established jurisprudence that strongly disfavors preemption of federal statutory law by another federal statute absent express manifestations of preemptive intent") (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)).

Promoting work is a purpose of both Title VII and TANF, see 42 U.S.C. § 601(a)(2), and the two programs can and should operate together to achieve that goal. As illustrated by the plaintiffs' experiences, sexual harassment may force WEP workers to quit their jobs. Thus, by preventing, deterring, and remedying sexual harassment and other forms of employment discrimination, enforcement of Title VII reduces the likelihood that TANF's work promotion goal will be undermined.

The City's argument leads to at least two consequences that Congress simply could not have intended. First, the argument would also place many salaried workers outside of Title VII because participants in TANF work programs may also engage in "unsubsidized employment," "subsidized public sector employment," and "subsidized public sector employment." 42 U.S.C. §§ 607(d)(1)-(3). Of the 1.59 million adult TANF

recipients nationwide in an average month in FY 2000, 24.1% were in "unsubsidized employment," 0.2% were in "subsidized private employment," 0.3% in "subsidized public employment," 3.9% in "work experience," and 2.6% in "community service." Department of Health and Human Services, Temporary Assistance for Needy Families Program Information Memorandum TANF-ACF-IM-2002-1, Table 6-C (Feb. 14, 2002), available at http://www.acf.dhhs.gov/programs/opre/particip/im00rate/table6c.htm.

Second, the City's argument would leave Title VII applicable to state-funded WEP workers but inapplicable to federally-funded TANF WEP workers. Only about a third of the City's WEP workers are TANF participants.[8]

Fortunately, the TANF program's text, legislative history, and implementing regulations make clear that Congress did not intend such peculiar results but rather intended that Title VII

[8] New York's public assistance program has two categories of recipients: "Family Assistance" (formerly "Aid to Dependent Children")recipients, parents and children whose aid *may* be paid for with federal TANF funds, N.Y. Soc. Serv. Law § 349; and "Safety Net Assistance" (formerly "Home Relief") recipients, mostly single adults, whose aid *may not* be paid for with TANF funds, N.Y. Soc. Serv. Law § 158. In June 2002, 5,649 (32%) of the City's 17,829 WEP workers were Family Assistance/TANF recipients, and 12,180 (68%) were Safety Net Assistance/non-TANF recipients. HRA, Public Assistance - Caseload Engagement Status, http://www.nyc.gov/html/hra/pdf/citywide.pdf; HRA, Family Assistance Caseload Engagement Status, http://www.nyc.gov/html/hra/pdf/familyassistance.pdf

apply to TANF recipients in the same way it applies to other individuals.

A. The Text of the TANF Statute Contemplates That Title VII Applies

Defendants argue that Title VII is inapplicable to WEP workers because it is not listed in a TANF provision that addresses discrimination, 42 U.S.C. § 608(d), which states:

> Nondiscrimination provisions. The following provisions of law shall apply to any program or activity which receives funds provided under this part:
> (1) The Age Discrimination Act of 1975
> (2) Section 504 of the Rehabilitation Act of 1973
> (3) The Americans with Disabilities Act of 1990
> (4) Title VI of the Civil Rights Act of 1964.

However, defendants' argument misconstrues the provision's significance. The non-discrimination statutes listed by § 608(d) are statutes which prohibit discrimination in particular programs and activities, principally those that receive federal funds.[9] The provision's apparent purpose is simply to clarify that the funds provided by the new TANF program will trigger these protections. Title VII, however, is in an entirely different category of law. Title VII is one of

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[9] The Age Discrimination Act of 1975 prohibits discrimination on the basis of age "in programs or activities receiving Federal financial assistance," 42 U.S.C. § 6101; Section 504 of the Rehabilitation Act of 1973 prohibits discrimination "under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794; Title VI of the Civil Rights Act of 1964 prohibits discrimination under "any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d; and The Americans with Disabilities Act of 1990 prohibits discrimination in "programs, or activities of a public entity," 42

the statutes, like the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and the Equal Pay Act, 29 U.S.C. § 206(d), that apply to employment relationships, without regard to whether such relationships occur in particular programs or activities and without regard to whether federal funds are involved. It would have been anomalous and incorrect for the TANF statute to list Title VII or these other laws as applying to a "program or activity."

Another TANF provision, 42 U.S.C. § 604a, does reference Title VII. Section 604a allows churches to accept TANF funds to provide employment or other services to TANF participants. Title VII generally exempts churches from its ban on religious discrimination. 42 U.S.C. § 2000e-1. Paragraph (f) in § 604a provides that churches that accept TANF funds do not forfeit their exemption from Title VII's ban on religious discrimination. There would be no reason for TANF to provide this assurance unless Title VII does apply to employment relationships in the TANF context.

B. TANF's Legislative History Confirms That Title VII Applies

As explained below, in 1997, shortly after enacting TANF and with full discussion and debate, Congress deliberately ratified the federal agency interpretation that federal

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U.S.C § 12132, and also generally prohibits employment discrimination,

workplace protection laws -- including Title VII -- apply to TANF workfare workers in the same way they apply to other workers.

In May 1997, in response to the new work-oriented TANF program, the United States Department of Labor ("DOL"), the agency responsible for enforcing the Fair Labor Standards Act and other workplace protection laws, issued a Guidance, "How Workplace Laws Apply to Welfare Recipients." Daily Lab. Rep. 103, at E-3 (May 29, 1997) ("DOL Guidance").[10] The DOL Guidance addressed the applicability of workplace laws to welfare workers in a question and answer format. The first and the twelfth question/answers stated as follows:

> Employment Laws
>
> 1. Do federal employment laws apply to welfare recipients participating in work activities under the new welfare law in the same manner they apply to other workers?
>
> Yes. Federal employment laws, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), Unemployment Insurance (UI), and anti-discrimination laws apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws.
>
> …
>
> Anti-Discrimination Laws
>
> 12. Would federal anti-discrimination laws apply to welfare recipients who participate in work activities under the new law?

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id. § 12112.

[10] The 1997 Guidance, as revised in 1999 by the addition of a thirteenth question/answer is available at http://www.dol.gov/asp/w2w/welfare.htm

> Yes. Anti-discrimination issues could arise -- primarily under titles VI and VII of the Civil Rights Act, the Americans with Disabilities Act, section 504 of the Rehabilitation Act, the Age Discrimination in Employment Act, and the Equal Pay Act. Furthermore, if participants work for employers who are also federal contractors, discrimination complaints could be filed under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, or the Vietnam Era Readjustment Assistance Act. As with the other laws discussed above, these laws would apply to welfare recipients as they apply to other workers.

Id. (emphasis added).

On June 24, 1997, about a month after the DOL Guidance was issued, the proposed Balanced Budget Act of 1997 was reported to the House as H.R. 2015.[11] The following day, the House debated and passed H.R. 2015. 143 Cong. Rec. H4606 (daily ed. June 25, 1997).

Sections 5004 and 9004 of H.R. 2015 as passed by the House included a provision that was intended to overturn the DOL Guidance by amending the TANF statute to state that the public assistance provided to workfare workers was not "compensation for work performed."[12] Several House members spoke against the §§ 5004/9004 TANF amendment during the House debate on the Balanced Budget Act, complaining that it would strip workfare

[11] On the same day Representative Kasich submitted a substitute version as an "Amendment". See 143 Cong. Rec. H4364-H4375 (daily ed. June 24, 1997). On June 25, the House Rules Committee issued a rule for the consideration of H.R. 2015 providing for the Kasich Amendment to be considered as adopted. H.R. Rep. No. 105-152 (1997).

[12] The amendment was included in both § 5004 and § 9004 of H.R. 2015 because two House committees had TANF jurisdiction.

workers of their existing protections under Title VII and other workplace protection laws. Representative Mink's remarks illustrated the opponents' fears about the impact the amendment would have had if Congress had not rejected it, as Congress ultimately did:

> Under the bill before us today, welfare recipients who are forced to go to work in public service agencies and nonprofit organizations to work off their welfare benefits will not be treated as employees. The compensation they receive will not be considered wages or salary and they will not be afforded the same rights and protections under labor laws as other employees in this Nation. Under this legislation, welfare recipients, virtually all of whom are women, will not be protected against sexual harassment and sex discrimination as in Title VII of the Civil Rights Act. They will not be protected under OSHA, the Fair Labor Standards Act, nor the Family and Medical Leave Act.

143 Cong. Rec. H4575 (daily ed. June 25, 1997)(emphasis added). Statements by Representatives Levin, Engel, Clayton, Owens, Vento, Conyers, Barry and Johnson echoed these concerns and objections. Id. at H4569, H4573, H4582, H4583, H4587, H4590 and H4591.

On June 25, 1997, the Senate passed H.R. 2015, after replacing all the House provisions with the provisions of S. 947, the Senate's Balanced Budget Act of 1997 counterpart. 143 Cong. Rec. S6144-S6145 (daily ed. June 25, 1997). The Senate bill did not include the protection-stripping TANF amendment that was in §§ 5004/9004 of the House bill.

While the House did pass the protection-stripping TANF amendment in §§ 5004/9004, this TANF amendment was but one provision in an omnibus budget bill. Subsequent House action suggests that most of those who had voted in favor of the House version of the omnibus bill nevertheless had opposed the protection-stripping TANF amendment. On July 10, 1997, prior to the House-Senate Conference that would resolve the differences between the two versions of the bill, the House passed a motion, by an overwhelming vote of 414 to 14, instructing the House Conferees on H.R. 2015 to "reject the provisions contained in sections 5004 and 9004 of the bill, as passed by the House." 143 Cong. Rec. H5031 (daily ed. July 10, 1997)(text of motion); Roll No. 257, 143 Cong. Rec. H5039 (daily ed. July 10, 1997)(Vote). Representative Clay explained that the intent of the motion was to instruct "the conferees to recognize that workfare recipients are worthy of the same dignity and equal protection afforded other workers." 143 Cong. Rec. H5036.

Not surprisingly then, the final version of the bill as reported by the House/Senate Conference Committee, did not include the protection-stripping TANF amendment. See H.R. Rep. No. 105-217 (1997). This omission was deliberate, as the Committee explained:

Workfare Rules for Community Service and Work Experience Programs

CURRENT LAW

States may establish work experience and community service programs in which TANF recipients may be required to work as a condition of receiving their grant. These programs are often called "workfare." The Department of Labor has held that workfare participants may be considered "employees" and thus would be covered by the Fair Labor Standards Act (FLSA), which sets hour and wage standards, and other employment laws.

HOUSE BILL

Work experience and community service programs are designed to improve the employability of participants through actual work experience or training … . Participants engaged in work experience and community service programs are not entitled to a salary or work or training expenses and are not entitled to any other compensation for work performed.

SENATE AMENDMENT

No provision.

CONFERENCE AGREEMENT

The conference agreement follows the Senate amendment (no provision).

See H.R. Rep. No. 105-217 at 934 (1997) (emphasis added). Thus the final version of the bill rejected the attempt to exclude TANF workfare workers from the protection of fair employment laws, including Title VII.

The Conference Committee report was passed by the House on

July 30 and by the Senate on July 31.[13] President Clinton signed the bill into law on August 5, 1997 as Pub. Law No. 105-33, the Balanced Budget Act of 1997.

The direct and explicit reference to the DOL Guidance in the Conference Committee report's description of "Current Law" makes unmistakably clear that Congress was aware of DOL's position that federal workplace protection laws apply to TANF workfare workers in the same way they apply to other workers. Congress ratified that interpretation by deliberately declining to overrule it. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (citation omitted); North Haven Board of Educ. v. Bell, 456 U.S. 512, 529 (1982) ("[D]eletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact'"). Thus, legislative history demonstrates that Congress did not intend to exclude TANF workfare workers from Title VII's protections.

[13] Roll No. 345, 143 Cong. Rec. H6342 (daily ed. July 30, 1997); Roll No. 209, 143 Cong. Rec. S8386-8410 (daily ed. July 31, 1997).

C. The Federal TANF Agencies Have Construed TANF as Permitting Title VII Coverage.

The United States Department of Health and Human Services ("HHS") and DOL, the two federal agencies charged with TANF administration, promulgated regulations pursuant to notice and comment acknowledging the applicability of federal worker protections, including Title VII, to TANF recipients. See 64 Fed. Reg. 17,720 (Apr. 12, 1999) (HHS); 66 Fed. Reg. 2690 (Jan. 11, 2001) (DOL). The HHS regulations state that the TANF statute "does not limit the effect of other Federal laws, including Federal employment laws . . . and non-discrimination laws. These laws apply to TANF beneficiaries in the same manner as they apply to other workers." 45 C.F.R. § 260.35(b).[14] The HHS regulatory preamble makes clear that HHS specifically considered and rejected the interpretation that 42 U.S.C. § 608(d) places TANF participants outside of Title VII:

[14]In addition, in August 1999, HHS' Office of Civil Rights issued a two-part guidance on how civil rights laws apply to welfare reform. Office for Civil Rights, HHS, Civil Rights Laws and Welfare Reform - An Overview, available at http://www.hhs.gov/ocr/overview1.htm (Aug. 30, 1999) and Technical Assistance for Caseworkers on Civil Rights Laws and Welfare Reform, available at http://www.hhs.gov/ocr/taintro.htm (Aug. 30, 1999). The OCR Guidance explicitly states that "[e]mployers are subject to the same Federal laws that prohibit discrimination when they employ welfare participants as when they employ other individuals," Technical Assistance at § II, and even describes sexual harassment suffered by a welfare-to-work worker as one example of a potential Title VII violation, Overview at § E. These interpretations are also entitled to deference. See Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (stating that "deference is particularly warranted with respect to [HHS's] interpretations of the Social Security Act, because of the Act's intricate nature").

> [T]he four Federal laws that are cited in section 408(d) of the Act [42 U.S.C. § 608(d)] are not the only Federal nondiscrimination and employment laws that are applicable to, and relevant for, the TANF program. Other laws that may come into play include the Fair Labor Standards Act (which covers issues like minimum wage and hours of work), the Family and Medical Leave Act, the Occupational Safety and Health Act, title IX of the Education Amendments of 1972, title VII of the Civil Rights Act of 1964 (title VII), and the Equal Pay Act.

64 Fed. Reg. 17748 (Apr. 12, 1999) (emphasis added).

The DOL regulations similarly state that complaints "alleging discrimination in violation of any Federal, State or local law, such as Title VII . . . shall be processed in accordance with those laws and the implementing regulations." 20 C.F.R. § 645.255(c) (emphasis added). The DOL regulatory preamble makes clear that DOL also specifically rejected the interpretation that § 608(d) places TANF participants outside of Title VII.[15]

This Court should defer to the HHS and DOL interpretations of the TANF statute. HHS and DOL are the agencies charged with TANF's administration; they adopted these interpretations in their initial rulemaking under the TANF statute; they carefully and thoroughly considered the underlying issue; they have substantial experience in the administration of welfare and of nondiscrimination laws; their intepretations are consistent with TANF's text, legislative history, and purposes, and their

interpretations are embodied in regulations issued pursuant to the formal notice and comment procedure. See United States v. Mead Corporation, 533 U.S 218, 227-228 (2001)(discussing the factors which entitle an agency interpretation to deference).

III. PLAINTIFF COLON'S STATE AND LOCAL CLAIMS SHOULD BE REINSTATED

This Court should also reverse the district court's dismissal of Plaintiff Colon's state and local law claims, as that dismissal was premised on dismissal of her Title VII claim. (JA 75). See Sherlock v. Montefiore Medical Center, 84 F.3d 522 (2d Cir. 1996) (reinstating state law claims in light of reinstatement of Title VII and ADEA claims); Lyons v. Legal Aid Society, 68 F.3d 1512, 1517 (2d Cir. 1995) (finding that a "reversal of the dismissal of federal claims requires the reinstatement of state law claims . . . dismissed for lack of supplemental jurisdiction"). The recent New York State trial court decision in an individual action that WEP workers are not "employees" under the state and local anti-discrimination laws that Ms. Colon has invoked, McGhee v. City of New York, 2002 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct., August 5, 2002), is not binding on this Court or the district court below because it is not a decision by the highest court of the state. See Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S.

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[15] See 66 Fed. Reg. 2698-99 (Jan. 11, 2001).

456, 465 (1967) ("If there be no decision by [the highest state] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."). Should this Court reverse the district court with respect to plaintiffs' Title VII claim, on remand the district court will presumably give little weight to the state court decision, as the state court in construing state law relied extensively upon the district court's Title VII holding. McGhee, 2002 N.Y. Misc. LEXIS 1065.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Dated: New York, New York
September 20, 2002

Jennifer K. Brown
Yolanda S. Wu
Timothy J. Casey
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Fl.
New York, NY 10014
(212) 925-6635

Marc Cohan
Anne Pearson
Welfare Law Center
275 Seventh Avenue
Suite 1205
New York, NY 10001
(212) 633-6967

Attorneys for Plaintiff-Appellant NORMA COLON

Jennifer K. Brown
Yolanda S. Wu
Timothy J. Casey
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Fl.
New York, NY 10014
(212)925-6635

Daniel D. Leddy, Jr.
5 Parkview Place
Staten Island, NY 10310
(718) 448-4735

Attorneys for Intervenor-Plaintiff-Appellant TAMMY AUER