DECEMBER 08, 2006
POLYGRAPH EXAMINATION OF: KATHRYN JORDAN

On December 08, 2006, Kathryn Jordan voluntarily submitted to a polygraph examination at the offices of A-1 Investigations, located at 2500 Hollywood Boulevard, Suite 309, Hollywood, Florida, 33020.

Before the pre-test interview, Ms. Jordan signed a form stating that she had been advised of her rights and was taking this examination voluntarily. This form is a voluntary consent form incorporated as part of our office file.

Ms. Jordan was born on December 12, 1 in Manhattan, New York.

Ms. Jordan has an address of Florida. Beach,

Ms. Jordan's' social security number is

Ms. Jordan s' Florida driver's license number is

Ms. Jordan took medication for MS prior to this examination. Regarding her health, she stated that she is in good health. She had hours 6 of restful sleep. Her blood pressure was 117 over 72, and her pulse was 60.

2500 HOLLYWOOD BLVD. · SUITE 309 · HOLLYWOOD, FL 33020 · (954) 929-1919 · FAX (954) 929-7171 · 1-800-330-6064 · E-mail: a1pi@bellsouth.net

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The facts of this case were provided by Ms Jordan, in the form of e-mail memos and a meeting at the offices of A-1 Investigations. The facts are as follows:

Ms Jordan seeks to prove, that she was telling the truth when she recently attested to improper ex-parte discussions between her former attorney, Larry Lebowitz, and the trial judge Rolando Acosta. Ms Jordan was present at one of these meetings on April 3, 2006 and wanted to attest to two ultimatums that were delivered to her by the Judge:

1) That Judge Acosta threatened to act as a "fact witness" on any malpractice or breach of contract case that Ms Jordan might bring against Mr. Lebowitz and;

2) That Judge Acosta might adjudicate the same.

Ms Jordan believes these threats were intended to intimidate her into acceding to the Judge's desires and Mr. Lebowitz demands for contingent legal fees, which the Judge knew Jordan disputed. While the Judge went on record as stating that he knew the dispute was not before him, his actions were to involve himself in the dispute and allow himself to be influenced by Mr. Lebowitz. He went as far as labeling Jordan as "contemptuous" when she communicated her concerns to him about the continued ex parte role Mr. Lebowitz played in the case, after he was terminated and had no sanctioned role.

Ms Jordan felt that because of the Judge's position that any issue of fact might be unfairly biased in the Judge's favor. Ms Jordan hopes her submission to this voluntary polygraph test, administered by an objective third party expert, might corroborate the truthfulness of her statements.

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Following the pre-test interview and a thorough review of the questions to be used on the examination, the following pertinent test questions were propounded to the subject during the course of the polygraph examination:

R9) "On or about 3, April, 2006, were you asked to be present during an ex-parte meeting with Judge Acosta and Mr. Lebowitz?"
"Yes."

R3) "Did Judge Acosta threaten to act as a "fact witness against you" in any case you might bring against Mr. Lebowitz if you pursued your dispute about the contingent fees?"
"Yes."

R5) "Did Judge Acosta advise you that he would adjudicate this case if it went to trial in regard to Mr. Lebowitz?"
"Yes."

R8) "Did Judge Acosta criticize you for calling his clerk and complaining about Mr Lebowitz's ex-parte discussion on or about 3 April 2006 as "inappropriate"?"
"Yes."

In view of the foregoing, it is the Examiner's opinion, based upon the subject's polygraph charts, that there was no deception involved in any of the pertinent test questions.

Respectfully submitted,

Samuel Streiner
Polygraphist

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STATE OF NEW YORK
DIVISION FOR WOMEN

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January 18, 1994

Kathryn Jordan
422 East 72nd Street, Suite 4D
New York, New York 10021

Dear Kathryn:

I am taking this opportunity to thank you for your input and serious commitment to the work of the Governor's Task Force on Sexual Harassment.

Enclosed is a copy of the final report of the Task Force. The report represents eighteen months of public hearings and meetings, research and discussion. We welcome your critical review of the report, and invite you to make your comments known to us.

We believe that it is essential that all of us through our various spheres of influence - individuals and religious organizations, public and private employers, unions and professional organizations, educational institutions and community groups - act in unison to eliminate sexual harassment.

Thank you for your commitment on this very important issue, and best wishes for a happy and healthy 1994!

Sincerely,

Jackie

Jacquelyn J. Hawkins
Deputy Director
Governor's Task Force on
Sexual Harassment

encl.

New York County Clerk's Index 118785-99

Court of Appeals

COPY

for the

State of New York

KATHRYN JORDAN,

APPELLANT-PLAINTIFF-RESPONDENT

--VERUS—

BATES ADVERTISING HOLDINGS INC , D/B/A AC&R ADVERTISING INC

BATES ADVERTISNG HOLDINGS USA

APPELLEE-DEFENDANT

MOTION TO RE-ARGUE LEAVE TO APPEAL

KATHRYN GRACE JORDAN
340 ROYAL POINCIANA WAY
SUITE 317-360
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COURT OF APPEALS
STATE OF NEW YORK, COUNTY OF NEW YORK

----------x

KATHRYN JORDAN,

Appellant-Plaintiff-Respondent,

v. **Index No. 118785/99**

NOTICE OF MOTION TO RE-ARGUE LEAVE TO APPEAL

BATES ADVERTISING HOLDINGS, INC,

f/k/a AC&R ADVERTISING, INC,

Appellee-Defendants,

PLEASE TAKE NOTICE that, upon the annexed statement pursuant to Rules 500.21 and 500.22 of the Court of Appeals Civil Rules of Procedure, signed September 10th, 2008, Appellant-Plaintiff-Respondent Pro Se Kathryn Jordan, will move this Court at the Court of Appeals Hall, Albany, New York, on September 22nd, 2008 for an Order granting leave to Re-Argue the Motion for Leave to Appeal from the Order of the Appellate Division of the First Department dated December 27th, 2007.

Pursuant to the Court's Rules answering papers, if any, must be served and filed in the Court of Appeals ono or before the return date of the Motion.

By:

Kathryn Jordan
APPELLANT-PLAINTIFF
340 Royal Poinciana Way
Suite 317-360
Palm Beach FL 33480
917 596 4617

TO: Clerk of the Court of Appeals
Court of Appeals Hall
290 Eagle Street
Albany NY 12207

Gregory Homer
Drinker Biddle
1500 K Street, NW, Suite 1100
Washington DC 20005
Counsel for Appellee-Defendants

And Klein Zellman
485 Madison Avenue
New York NY 10022
Non Party Intervenor Respondent

STATEMENT IN SUPPORT OF MOTION

PROCEDURAL CONTEXT

On May 11th, 2008, Appellant filed a timely Motion for Leave to Appeal to this Court. On August 28th, this Court denied Leave to Appeal. Appellant has sharpened the issues raised by this case, Kathryn Jordan v. Bates Advertising et al, a perceived disability case involving the legal standard for proving "pretext", where the verdict was rendered for the Plaintiff after an 11 day jury trial, and overturned based upon the First Department's interpretation of the facts as applied under "*Stephenson v. Hotel Employees*", and as such, illuminates the fact that New York case law in this area continues to be inconsistent with other states and with the intent of the original Supreme Court cases upon which the standard was founded. Given the implications for all future disability and Title VII cases, we continue to believe it is meritous of this Court's review especially given the relaxed standards for employer compliance that this case law poses.

HISTORY OF THE LEGAL ISSUE

For literally 40 years since Congress enacted Title VII, the Courts have grappled with the issue of the burden of proof in discrimination cases, and how to instruct juries with determing whether employers have

violated the law. The issue of how to interpret our nation's anti-discrimination laws is not only one of the nation's highest priority, but it is an extremely complex area of the law and one fraught with sensitive issues on both sides of the law. Efforts by the Supreme Court, including Reeves (a "sham excuse" permits inference that the employer is attempting to cover up a discriminatory motive and explore the employer's "real reason") and Burdine (if the "proffered reason was not the true reason"....then the victim of discrimination "either (proves) that a discriminatory motive more likely motivated the employer, or was unworthy of credence", to resolve this conundrum have not succeeded. Because of the overweight that judges often place upon not "second guessing" employer business decisions, this has led to many lower courts dismissing bona fide discrimination cases before trial, or reversing them after jury verdict, even where extensive evidence of discrimination was proven, if the plaintiff did not "direct proof" that an employer's motive was discrimination. .

The Kathryn Jordan v. Bates Advertising case is an excellent example of the two sides of this legal controversy, and similar to Reeeves in that the Fifth Circuit also overturned a jury verdict after disregarding evidence of discrimination and while also ignoring the defects in the "legitimate reason". Jordan was the prevailing party after an 11 day jury trial (and after 13 years

of litigation) only to have her case overturned by the First Department, which cited *Stephenson*, a New York discrimination case, which required that a plaintiff must *disprove* the employer's "legitimate reason" to prove discrimination. In *Reeves*, like *Jordan*, the "insufficient evidence" holding was also the result of disregarding evidence favorable to Reeves's prima facie case. Stephenson poses an even greater risk, as if it is upheld, employers could avoid liability simply by proving that their "legitimate reason" was "true". We believe that unless this Court addresses this critical issue of "proving pretext" and adopts the "real reason" model, not only will we continue to see more jury verdicts disturbed we could face decades more of wheel spinning, and worse, employers undermining the nation's anti-discrimination laws.

QUESTION FOR REVIEW

SHOULD THE NEW YORK COURT OF APPEALS REVIEW THE STEPHENSON "TRIPARTITE" STANDARD FOR PROVING DISCRIMINATION, IN PARTICULAR THE LEGAL BURDEN FOR PROVING "PRETEXT", WHICH RELIES UPON THE EMPLOYER'S ABILITY TO REBUT AN ALLEGATION OF DISCRIMINATION *SOLELY* BY PROVING THAT THE "LEGITIMATE REASON" FOR THE ADVERSE EMPLOYMENT ACTION WAS "TRUE", GIVEN RECENT OUT OF STATE DECISIONS THAT APPEAR

TO BETTER CLARIFY THIS CHALLENGING AND EVOLVING AREA OF THE LAW THROUGH THE "REAL REASON" MODEL ?

ARGUMENT

I. The Court of Appeals should have granted leave to appeal because the issue of the burden of proof for "pretext" in discrimination cases continues to *be inconsistently adjudicated by the courts of New York*, despite the United States Supreme Court's rulings aimed at resolution of this critical issue (Burdine, McDonnell Douglas, Reeves), while Courts outside of New York (CT, NJ, MI) have consistently aligned with the "two ways" of proving pretext standard, as the jury was charged here but which standard the First Department rejected.

A. The New York Court of Appeals should consider adopting the "two ways" standard for proving discrimination as it is more consistent with the intent of the federal anti-discrimination laws than the flawed Stephenson model which erroneously relies upon disproving the "legitimate reason".

The First Department cited a "tripartite" burden of proof scheme as applicable to the instant matter:

A plaintiff in a discrimination termination action has the initial burden of establishing a prima facie case of discrimination, the burden then shifts to the defendant to rebut the prima facie case with a legitimate reason, and then shifts again to the plaintiff to show that the defendant's reasons

were pretextual. The burden of persuasion always remains with the plaintiff. (Stephenson v. Hotel Employees, 6 NY3d 265, 270 (2006).

However, the problem with this standard is that it does not precisely define how "pretext" is established, which is the reason why so many New York courts have labored over this issue. The Decision by the First Department concluded that Plaintiff not only had to prove her prima facie case of discrimination but she had to *disprove* the "legitimate reason" in order to prove "pretext". As argued in our Motion for Leave to Appeal, we continue to maintain that there are actually two ways to prove pretext, 1) which provides for the opportunity to prove that the employer's "legitimate reason" was either false, or "unworthy of credence" and hence an attempt to mask a discriminatory motive, and 2) that requires proving that the proferred "legitimate reason" was not the "real reason" and that the employer was really motivated by discrimination.[1] Under this latter approach, an employer's proferred reason could very well be factually "true", but it could also not be the "real reason" the adverse employment action was taken, or it was not the "determining factor". The latter is exactly how the jury was charged by the trial court in the underlying Jordan v. Bates matter.

Again, there can be more than one determining factor in any decision. Therefore, Ms. Jordan need not prove that her perceived disability was the only reason for defendant's decision. Ms. Jordan's perceived disability is a

determining factor if Ms. Jordan's employment would not have been terminated but for defendant's perception of being disabled.

In other words, a perceived disability is a determining factor if it made a difference in whether or not she would have been terminated

Ms . Jordan has the burden of establishing by a preponderance of the evidence that the recent offer (sic, reason offered) by defendants was not really the reason she was terminated and that defendants perceived her to have a disability and that that perception was a determining factor in the decision.

Appellee/Defendant Bates did not object to the jury charge (R 1056-7). The case was tried as a "real reason" or determining factor-pretext case.

Like many of the New York Courts, the First Department concluded that Jordan failed to prove discrimination because she allegedly failed to "cast in doubt" ACR's "legitimate reason" that "her position was being eliminated as a cost cutting measure". In fact, it is clear that New York courts have indeed adopted this "disprove the legitimate reason" standard widely:

Pretext is established "when it is shown both that the reason was false and that discrimination was the real reason". Ferrante v. American Lung 90 NY 2d 623,630 (1997).

Pretext is established when "both the stated reasons were false and that discrimination was the real reason". Forrest v. Jewish Guild for Blind (3 NY 3d 295, 305 2002)

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1. We would also argue that there is really only one truly valid approach as any approach that allows a litigant to prove discrimination simply by proving that the "legitimate reason" is false is equally flawed.

It is not surprising to see this inconsistency when the United States Supreme Court itself has struggled with this issue:

A plaintiff must have the opportunity to demonstrate that the proffered reason was not the true reason (Texas Dept Community v. Burdine 450 US 248, 256 (1981).

The factfinder's disbelief of the reasons...together with a prima facie case, suffice to show intentional discrimination. Thus rejection of the proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimation (St. Mary's v. Hicks 509 US 502, at 511 1993)

We assert here that this standard is erroneous. We argue that the "real reason" standard is more consistent with federal anti-discrimination law, and that the *Stephenson* standard deployed by the First Department actually departs from the intent of the *McDonnell Douglas* standard.

No better laboratory for examining the defects of the *Stephenson* approach exists than the instant case and the very analysis performed by the First Department jurists. The Decision pontificates extensively on the facts

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2. The Panel cited the testimony of top executives who attested to the fact that "half of the staff at AC&R was terminated". It further cited the fact that Jordan was terminated as as "cost cutting measure since account planning activities at Bates and AC&R were duplicative". Further it relied upon the fact that "around the time that plaintiff was terminated one of AC&R's biggest accounts, Estee Lauder was "looking at other agencies" an action that threatened AC&R's viability". Finally the panel adopted Fidoten's, Jordan's supervisor, testimony that he had terminated her because "she was one of the most expensive employees and Bates already had many others performing her planning function". This focus on disproving the legitimate reason, without regard for proving what the motives of the employer were, is the problem with this analysis. The panel also erred in concluding that the "layoffs" that were effected between Spring and August 1994 to address the financial problems of the agency was related to Jordan's termination in March 1995. Further, there was not "already..many others performing her function" when the decision was made to terminate her. It was proven at trial that Bates had just started to embark on a major hiring campaign at the time Jordan was fired as EVP, Planning at AC&R. So there was no Planning Department to be duplicative with.

around the reduction in force required by the merger of Bates and AC&R (Decision p. 4-6) that occurred nine months prior to Jordan's termination. Putting aside the numerous errors in fact and timing[2] that, if corrected, would have proven that Jordan did disprove the legitimate reason, the Decision of the First Department clearly and erroneously concluded that the alleged failure by Jordan to rebut the employer's "legitimate reason" was fatal to the burden of proving pretext.

For the reasons cited previously this is simply flawed, as was the conclusion of the First Department based on this flawed model:

> *Therefore, the verdict was against the weight of the evidence (see White v. New York City Tr. Auth. 40 AD3d 297 (2007). Since it was plaintiff's burden to prove that the proffered legitimate reason for her termination was pretextual, we find that the motion to set aside the verdict should be granted.*

Here the First Department clearly concluded that to prove "pretext" one not only needed to prove the prima facie case of discrimination and but that the litigant also had to disprove the "legitimate reason". This was not necessary under the "*real reason*" model. (In the Bates case, Jordan actually did disprove the "legitimate reason" but the First Department failed to recognize this due to its flawed circuitous analysis)[3].

3. The First Department concluded that the "overwhelming and consistent evidence of financial reasons...was undiputed" and that the "failure to come forth with any evidence that hiring Kosoff, Jordan's non disabled replacement) was just as expensive" and the alleged failure to prove that " using Bates personnel was just as expensive as keeping Plaintiff employed">

Examination of how other courts in other states have addressed this issue is revealing. Under Michigan law, the employee must not merely raise a triable issue that the employer's articulated reason was pretextual, but that it was a *pretext for unlawful discrimination*. [. *Hopson v Daimler Chrysler Corp*, 306 F3d 427, 438–439 (CA 6, 2002); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 166 (2002). *Hazle*, 464 Mich at 465–466; and *Town v Michigan Bell Telephone Co*, 455 Mich 688, 698

Ironically, the language deployed here underscores the problem with the clarity of the standard, "pretextual" is used to connote "false" in the first part of the standard, but "excuse" or "false motive" in the latter part. Further, in proving "pretext" Michigan courts look to evidence that may help establish pretext including situations where the employer deviates from its normal procedure, makes discriminatory remarks, offers inconsistent reasons, or destroys or conceals evidence. (*Wells v New Cherokee Corp*, 58 F3d 233 (CA 6, 1995), . *Ercegovich*, 154 F3d 344; *Cooley v Carmike Cinemas*, 25 F3d 1325 (CA 6, 1994); *Debrow*, 463 Mich at 538; and *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289 (2001); . *Cicero v Borg-Warner, Inc*, 280 F3d 579 (CA 6, 2002); *Tinker v Sears, Roebuck & Co*, 127 F3d 519 (CA 6, 1997); *Byrnie v County of Cromwell, Bd of Ed*, 243 F3d 93 (CA 2, 2001).

In Connecticut, the discrimination statute establishes that the plaintiff's burden is:

"to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden

3. (cont) .. amounted to a failure to meet her "burden of proof as a matter of law". This meant that they pinned the entire burden of proving pretext on one document, that proved the compensation of Jordan's replacement. This document was not necessary as Fidoten himself admitted he "did not know" if it was or was not more cost effective to fire Jordan at the time he made the decision. This proof was elicited by Plaintiff under cross examination of Fidoten at trial.

of persuading the court that the (plaintiff) has been the victim of intentional discrimination. The plaintiff may succeed by either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence (Jacobs v. General Electric Corp, 275 Conn.395, 401, 880 A 2d, 151, 156 (2006).

And in California a similarly advanced perspective is deployed:

" Pretext may be demonstrated by showing 'that the proffered reason had no basis in fact, the proffered reason did not motivate the discharge, or the proffered reason was insufficient to motivate the discharge" "Pretext may also be inferred from the timing of the decision, by the identity of the person making the decision ...."(California Fair Employment & Housing v. Gemini Aluminum Corp 122 Cal. App. 4th 1004, 1023, 18 Cal Rptr 3d 906, 919 (2004).

The Seventh Circuit recently clarified the proper testing process for proving pretext under Title VII in Forrester v. Rauland-Borg Corp (05-4650 7th Cir 6/29/06), explaining specifically that the "pretext" prong of the McDonnell Douglas burden shifting test can also "be thought of as the "*true reason*" portion of the test. o

The Jordan v. Bates case was abundant with this kind of evidence, aimed at proving the motivations of the employer or its "real reason", which the First Department chose to disregard and focused instead solely on the

truth or falsity of the "financial reasons" or legitimate reason. Under the "real reason" standard, an employer may have a "true" legitimate reason for terminating an employee, however if the discrimination plaintiff proves that the employer "*deviated from its normal procedures, made discriminatory remarks, offered inconsistent reasons, or destroyed or concealed evidence*", the finder of fact must consider these circumstances as evidence of the motives of the employer. It was the failure to examine the *motives* of ACR that was fatal to the analysis of the First Department, *even if* you accept the fact that the agency had financial difficulties, and *even if* it was "more cost effective" to fire Jordan. These factors did not preclude the presence of discrimination. The analysis needed to go to the next level. The panel should have considered the other motives for *why* the disabled Jordan was being replaced by the non-disabled executives other than the "financial" ones. (This was especially true given the complete absence of any documentary evidence that the agency was having financial difficulties, or that replacing Jordan solved those difficulties). Jordan proved the following at trial that should have led to the conclusion that the motives of the *decision maker* were indeed discriminatory:

1. That Doug Fidoten, Jordan's supervisor, himself admitted to deviating from his customary procedures for performance reviews and disclosing "client complaints" in the case of Jordan, and that he had provided this consideration to other subordinates.

2. That Fidoten had admitted to excluding Jordan from key client meetings to "keep them small".
3. That President Steven Bennett admitted that he heard Jordan referred to on two occasions as "a cripple" but that he took no action to report or remedy the discrimination even though he was EEO officer at the time.
4. That Fidoten offered at least two different reasons for terminating Jordan, both which were proven not to be true. One, that the Foot Locker client allegedly complained about her, the second, that the agency had financial problems and that it was more cost effective to fire Jordan and then hire two non disabled managers (DeJoseph and Kosoff) and re-deploy "several other" managers already on the payroll. There was no evidence whatsoever of a "client complaint". And the "cost effectiveness" argument was denied by Fidoten himself under cross.
5. The two pretexts of a client complaint and "cost effectiveness" were also inconsistent with each other and with the merger/layoffs" excuse.[1] Not only was the timing inconsistent with Jordan's termination, but Fidoten himself admitted that the "client complaint" was "moot" after he made a decision based on financial reasons. If it was "moot" why was it proffered, if not to cover up a discriminatory motive?
6. That Jordan attested to hazing about her need to ambulate with a cane and that she was repeatedly interrogated about this, and told to fire the only other disabled manager in the company. Further Jordan attested to the fact that Fidoten openly ridiculed her as "a cripple" during a new business presentation.
7. It was proven that Jordan was paid half as much as other EVP's.

The First Department arrived at two fatally flawed conclusions, which were founded in a misapplication and misinterpretation of the McDonnell Douglas standard for proving discrimination and the burden of proof for "pretext";

1: The defendant's overwhelming and consistent evidence of financial reasons for layoffs in the light of the merger and the loss of major client accounts was undisputed. Thus, the finding that defendant failed to

demonstrate a legitimate reason for terminating plaintiff was against the weight of the evidence.

2. Moreover, plaintiff presented no evidence of pretext, and so failed to controvert defendant's evidence of a legitimate nondiscriminatory reason for her termination.

First, the finding that there was no "overwhelming and consistent evidence of financial reasons" was not only not true, it was not the "true reason" for Jordan's termination, as a more advanced analysis would have yielded. Several Bates/AC&R executives cited different reasons as to why Jordan was fired. Jordan's supervisor Fidoten, who made the termination decision, and who was proven, by his own admission, to have departed from customary procedures for evaluating Jordan's performance and excluding her from critical client meetings, actually gave *two* inconsistent reasons for Jordan's termination. One, that a "client complained about her" in the fall of 1994 (after it was proven that there was no evidence of a "client complainat", Fidoten said it was "moot"), and a second, that "it was more cost effective" to fire the disabled Jordan and hire new non-disabled managers to take her place, the latter denied by Fidoten's own admission that he "could not say" whether it was more cost effective or not.

Second, Plaintiff certainly did present highly credible evidence of pretext and proved wha the motivation of employer Bates was in waiting to take the termination action against the disabled Jordan long after the merger

layoffs were concluded (the latter timing negating the credibility of the "part of the merger layoffs" pretext). The First Department did not reach this conclusion because of two serious errors a) they improperly substituted their own *opinion* of Jordan's credibility for that of the Jury; b) they misquoted and actually paraphrased Jordan's testimony from a completely unrelated proceeding and from a "separation memo" that Jordan had secured "for the purposes of outside communication".[4]

The First Department combined these erroneous statements and manipulated "facts" and mischaracterized them as "admissions" by Jordan that financial reasons were the reasons for her termination. In fact, it was apparent that what the First Department did to arrive at the conclusion that there was no evidence of pretext was to completely disregard all of the evidence of discrimination, including Jordan's extensive testimony about hazing about her cane and harassment about being "a cripple", and the corroborative evidence from other executives that proved she was telling the

[4] Citing the First Department verbatim: "*plaintiff acknowledged that the merger in 1994 caused layoffs for economic reasons. She admitted that when she was terminated, Estee Lauder, a major account she worked on, was considering taking its business elsewhere, and that AC&R was facing financial pressures*". This was a false paraphrasing of Jordan's testimony. Jordan was asked in an unrelated matter to provide the reason she left Bates, and testified in the Bates matter that she answered this way because she believed she should provide the "official reason for leaving". Jordan never admitted that "financial pressures" had anything to do with her termination, nor would she as she knew at the time she would be filing the discrimination case. Jordan's actual testimony on the reason for leaving was "I think the elimination of my position as part of the Bates USA-AC&R integration would be sufficient" (for the negotiated reason for leaving).

truth; and its blind acceptance of the unproven "fact" that AC&R was having "financial problems" (without any documentary evidence) as "overwhelming and consistent evidence" that there was a "legitimate reason" for her termination. This error not only reflected a bias by the First Department that once the employer proved it had a "legitimate reason" that this fact alone negated all other burdens of discrimination. This is flawed reasoning for many reasons. For one matter, advertising agencies have financial problems all of the time, and it is most often during these periods of layoffs and RIFF's that persons in protected classes are terminated to mask the motivations of the employer. If employers could simply assert an excuse that is as prevalent in the workplace as "financial problems" and be exculpated of discrimination, we would undoubtedly see an onslaught of abuses. This underscores again the importance of this Court's role in reviewing the standard for "proving pretext" in New York. Citing the "financial problems" example, this "analysis" failed to meet the true definition of "pretext", which always must take into account the employers' motivation.[5] *Even if* Bates/AC&R had proven that it had financial problems that justified eliminating Jordan's position, and replacing her with "several"

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5. Even in the mixed motive case Fields (an excellent model for discrimination), the predominant reason must be proven to be based in a discriminatory motive. It is true across single and multiple motives cases.

non disabled managers, this in itself would not meet the pretext test. And herein lies the flaw in the New York case law, as most glaringly revealed by the Stephenson case.

In relying upon the premise that proving that the employer's "legitimate reason" was true, and therefore not "pretextual", the New York Courts have created a large loophole through which errant employers can readily step through. To avoid this predictable stampede, this Court must embrace a standard where the next step must be taken. That is the victim of discrimination must be able to prove that *even if* the "legitimate reason" were factually true (accurate), that it must be "worthy of credence" and, that if the "legitimate reason" is proven not to be the "real reason", that the employer is deemed to have proffered a "pretext for discrimination". This obviously can only be done by considering the evidence of discrimination, which in this case was "overwhelming and consistent" if interpreted properly under the modern standards for disability discrimination. The First Department, by admitting that it did not understand why Jordan did not report the discriminatory conduct to "anyone" admitted that it did not understand the challenges of the disabled in the workplace. Jordan's harassers were her supervisors. She certainly was not able to tell <u>them</u> they were violating the ADA. There was no EEO department, only the President

and EEO officer who knew it was going on, but took no remedial action. As far as her alleged "admissions", Jordan clearly explained that in order to secure a job outside the agency after her termination, she needed a "reason for leaving" and could not tell future employers about the discrimination. The same goes for why Jordan did not tell her new employers that she had Multiple Sclerosis. The market for $250,000 a year EVP's who have *any* disability is not particularly large.

Further, the conclusion that there was "no evidence to rebut the defendant's showing of legitimate reason" and "no jury could have reached the verdict in this case on any fair interpretation of the evidence" is simply wrong. The First Department admitted Jordan put forth a bona fide prima facie case of discrimination. It was its improper substitution of its *opinion* of the evidence of discrimination that was the problem, along with the flawed premise that failing to disprove the "legitimate reason" was fatal to proving discrimination. First, Jordan did disprove the legitimate reason. But even if she had not, even if the agency really had "financial problems", even if it were "more cost effective" to substitute several others for her job, this did not dispose of either the "pretext" question, nor the discrimination question. Jordan proved that both "legitimate reasons" were highly suspect, and that she was treated <u>differently</u> than her non-disabled peers.

She also proved that the employer knew she was being discriminated against and took so remedial action. Here New York courts might look to Michigan and other states for guidance:

> Further, in proving "pretext" courts look to evidence that may help establish pretext including situations where the employer deviates from its normal procedure, makes discriminatory remarks, offers inconsistent reasons, or destroys or conceals evidence.

Proving discrimination is always challenging for disabled litigants. Employers are becoming better at concealment of their motives. Here though, Jordan actually proved that she survived the "layoffs" that were effected for the financial reasons.[6] She proved that her supervisor concealed the alleged client complaint from her and failed to provide her with any performance reviews during her 15 month employment, although it was "his practice" to do both. Jordan proved that once Bates/AC&R realized that her "skiing injury" was in fact a disability, they began to phase her out. First making her fire the other disabled manager, then excluding her from the merger meetings that all of the other EVP's were invited to, then refused to consider her for the new planning department, and finally by excluding her from key client and new business meetings that were necessary for her to be *able* to do her job. Once her non-

6. Appellant proved that the timing of her termination in March 1995 was not consistent with the summer 1994 RIFF and that most of the terminated employees were "back office" not "client face" executives in growing departments like Planning.

disabled replacements were hired and trained, Jordan was notified she was no longer needed. That was 8 months after the merger riffs.

Despite all of this evidence, the First Department focused on a single document related to the compensation of Jordan's replacement. This document, the Decision concluded, was fatal to Jordan's being able to prove the "pretext" claim because Jordan had not allegedly not disproven the "legitimate reason".[7] This argument is also misguided. As established, even if it were more cost effective to fire Jordan, it would not preclude discrimination on the part of the employer. As it happened, this document was not necessary to the pretext argument as Fidoten himself admitted he did not know if it were more cost effective or not. If he did not know, at the time he allegedly decided that this was the reason for terminating Jordan, than it could not have been the "legitimate reason" must less the "real reason".

7.. In virtually all discrimination cases where the issue of "finances" are part of the employer's pretext, it is customary for the employer to produce hard evidence that this was indeed the case, not rely upon the testimony of executives after a discrimination litigation has been filed. No such evidence was produced here, which should have cast into question the credibility of the "financial problems" excuse. Further, decision maker Fidoten never produced any study or analysis which proved that it was "more cost effective "to fire Jordan. This is apparently why he "could not say" whether it was more cost effective or not. While the burden of proof is on plaintiff, employers routinely provide this kind of evidence to exculpate themselves from the taint of discriminatory animus. The absence of any documentary evidence of any kind is very suspect.

CONCLUSION

Given that the Courts of New York continue to inconsistently adjudicate the standard for proving pretext and that standard is also inconsistent with courts outside of New York state that have addressed the inherent flaws in the model, we urge that the Court of Appeals take this matter under review.

We also argue that while production of a "legitimate reason" by the employer is a right that they have to in order to rebut the allegation of discrimination, it does not dispose of the issue of the employer's motives, the latter essential to the issue of "pretext". The victim of discrimination must always have the right to prove that the "legitimate reason", whether it is true or not, does not preclude the fact that the "real reason" is that the employer was motivated by discrimination. Further, contrary to Stephenson, even if the "legitimate reason" is proved to be false, this does not presume that the employer was motivated by discrimination. A "sham" reason may under certain circumstances not be a discriminatory one. The only true test is the "real reason" test.

The application of the "disprove the legitimate reason" flawed standard has also precluded the proper enforcement of the state's anti-discrimination laws, and requires this Court's immediate attention.

Respectfully Submitted:

Kathryn Grace Jordan

APPELLANT/PLAINTIFF

Dated: September 10, 2008

COPY

KATHRYN GRACE JORDAN
340 ROYAL POINCIANA WAY, #317-360
PALM BEACH FL 33480
954 LEXINGTON AVENUE, #502
NEW YORK NY 10021
917 596 4617 * 561 659 1080* 561 659 1766 (F)

September 22, 2008

HONORABLE CHIEF JUDGE JUDITH S. KAYE
CLERK OF THE COURT
COURT OF APPEALS
STATE OF NEW YORK
20 EAGLE STREET
ALBANY, NY 12207-1095

Re: Appellee Reply to Motion to Re-Argue
Kathryn Jordan v. Bates Advertising et al 115785-99

DEAR JUDGE KAYE:

I am in receipt of my adversary's reply to Appellant's Motion to Re-Argue. I seek only to clarify that we have not raised a new issue. Our original brief raised the issue of the "real reason" for proving pretext as the appropriate legal standard, and specifically cited the importance of resolving "*a conflict between the First Department's decision and this Court's prior decisions and decisions of the Second and Fourth Departments (and comparable cases under federal and other states' laws).* The purpose of a Motion to Re-argue under CPLR 2221 is to address "matters of law or fact that... were overlooked or misapprehended". As the Court did not express the specific grounds upon which Leave to Appeal was denied, Appellant has sought to "sharpen" the arguments already made. This is entirely appropriate. Appellant has not raised any new legal issues, rather emphasized aspects of the issue raised more, specifically that there appears to be divergence not only within New York state, which have predominately relied upon Stephenson in recent years, but that Courts outside the state seemed to have adopted a legal standard for proving pretext ("real reason" standard) that is *more* consistent with the intentions of McDonnell Douglas.

We have argued that it is Stephenson that undermines McDonnell Douglas, as it requires that a discrimination plaintiff disprove the legitimate reason in order to prove pretext. The Stephenson standard relies upon a completely "circular" argument that in order to prove discrimination, a plaintiff must always prove that the legitimate reason is false. The example cited by Appellee, quoting directly from the First Department decision. "*Plaintiff presented no evidence of pretext and so failed to controvert defendant's evidence of a legitimate reason*" says it all. Pretext is *not* synonymous with falsity of a legitimate reason. The falsity of the reason *can* permit the fact finder to "infer

discrimination from the falsity of the employer's legitimate reason" but it does not have to, as it can deploy a variety of other well established methods for identifying discriminatory conduct, nor would the falsity of the reason necessitate discrimination. (Appellant's Brief, p. 13: if an employer "deviates from its normal procedure, makes discriminatory remarks, offers inconsistent reasons, or destroys or conceals evidence" discrimination can be inferred). The premise that the "legitimate reason" must always be rebutted as false is the key to this dispute and the key to the "real reason" standard we are advocating.

As far as the recommended "real reason" standard, we do not presume to resolve this here but to place this issue before this court for review. The fact that there is a certain circuity in the interpretations about how one goes about proving "pretext" only reinforces the need to review this standard.

Although we vigorously argue that no new legal arguments have been made here, we do believe that there are "extraordinary or compelling reasons" for reviewing the laws on proving pretext at this time that supersde the issue of geography. That reason is obvious: If the wrong standard is being deployed, the laws protecting the disabled and other members of protected classes are being systematically undermined, and disabled employees (and Title VII and other classes) like Jordan are being denied their right to recourse against discrimination.

Given the vast and long reaching implications for employees and employers alike that failure to address this issue would have, we respectfully pray that the Court will put the administration of justice over the politics that have pervaded this matter.

Respectfully submitted:

Kathryn Grace Jordan
APPELLANT

End Discrimination Now (E.N.D.)

954 Lexington Avenue
Suite 502
New York NY 10021
917 596 2319

February 10, 2009

HONORABLE GOVERNOR DAVID A. PATTERSON
State Capitol
Albany, NY 12224

Re: **URGENT** : **Proposed Nomination of Judge Jonathan Lippman as Chief Justice of New York Court of Appeals**

Dear Governor Patterson:

I am contacting you on behalf of E.N.D. on a matter of supreme urgency: your proposed appointment of Judge Jonathon Lipmman, and your recognition that the judicial nomination process needs to be reformed. **We strongly oppose the appointment of Judge Jonathon Lippman as Chief Judge for the New York Court of Appeals**. We believe appointing Judge Lippman would be catastrophic to the interests of people in protected classes in the workplace and those leading the fight against discrimination. Judge Lippman has proven himself to be a ruthless manipulator of judicial power with the goal of undermining the nation's anti-discrimination laws. Discrimination, especially against the disabled, will be rampant and we need tough anti-discrimination jurists who can work with employers collaboratively but still enforce our laws. Judge Lippman has proven himself to be unqualified for such a role.

We do support judicial reform however and hope that a "judicial czar" is appointed in the near future who is not part of the insular corrupt judicial and legal system. There has been a steady deterioration in the quality and integrity of judges in New York and the failure of these jurists to *enforce* our nation's and states laws. Judges now feel entitled to fix cases for employers, with the expectation that benefits like "recommendations" will be rendered in the future. Judge Lippman is one of these jurists. Because of Judge Lippman, employers are publishing EEO policies that are "toothless tigers" and that they have no intention of honoring nor attempting to enforce. This is why there has been no improvement in the status of the Disabled or other protected classes. Our judicial system has been hijacked by ambitious opportunists. There has never been a more critical time in our country for the need to protect people in protected classes and enforce our laws.

My Experience with Judge Lippman:

I personally am a disabled woman who has Multiple Sclerorsis. For the last 13 years I have been involved in a litigation against an employer (WPP's Bates Advertising/AC&R which is no longer operating in the US) who discriminated against me when I was an Executive Vice President on the basis of my perceived disability. I was routinely referred to as "a cripple", excluded and isolated, subjected to intimidation and threats about my need to deploy a cane to ambulate, and eventually terminated. I filed a lawsuit in 1996. WPP did not want to settle despite knowing that members of management had admitted to knowing about the discrimination and failed to take any remedial action. We tried the case in April 2005 and I predictably won after an 11 day jury trial. My adversaries, represented by Drinker Biddle, who cheated and obstructed my discovery, hand picked the jury and agreed to the jury instructions or the "law of the case". Their deceptions resulted in a 60% reduction of the damages that would have made me whole. The jury wanted to award me the full amount but the discovery deceptions and other frauds precluded this. Despite the fact that WPP secured this reduction, they decided to appeal the case. Given the fact that the jury instructions were agreed to, their application should have been rejected as frivolous by the First Department Appellate Division. Instead, the panel of five white males, including Judge Lippman, decided to reverse the jury verdict, allegedly because the case "failed as a matter of law", and instead re-wrote the laws on discrimination in their Decision. In their decision, the panel was more concerned that I had made "baseless allegations" against a Jurist that was up for appointment to the First Department (Honorable Rolando Acosta, the trial judge on my case, was nominated by Elliot Spitzer to the First Department during the period I made my complaint), then they were about the fact that there was hard evidence of discrimination by the employer. The details of that decision can be found at the following link:

Why the Jordan v. Bates case was important:

This decision effectively changed the law on proving pretext in discrimination cases. By deploying the diversion of the dispute with the trial judge, and several inaccurate and outmoded beliefs about the disabled, Judge Lippman and his panel cloaked their scheme to re-legislate the laws on proving discrimination under ostensible outrage about a fellow jurist being criticized. According to the afore-cited Lippman decision, all an employer has to do now to dispose of an allegation of discrimination (and this would affect ALL classes under Title VII, ADA et al) is to proffer, but not prove, that they had a "legitimate reason" for the termination of the person in the protected class. In my case, *Kathryn Jordan v. Bates Advertising* , the "legitimate reason" my employer proffered was that "financial problems" that were attendant with a merger and led to layoffs in mid 1994 of "non client face" employees, and that it was more "cost effective" to fire a disabled manager and replace them with "several" non disabled managers. There were several problems with this "theory" that Drinker Biddle concocted and Lippman adopted:

Further, they adopted verbatim the flawed and fictional facts that my adversary deployed, including paraphrased testimony and "blame the victim" interpretations of the facts, to justify their decision. (There was also incredible gender bias in the intimations about my veracity and integrity). *Most egregiously they substituted their own opinions about the evidence for the jury's with the clear objective of enabling the employer's blatant violations of the ADA.*. Their entire legal argument hung on the omission of a single piece of evidence, the documentation of my replacement's compensation, from the record, while disregarding not only all of my sworn testimony but the corroborating testimony that members of management attested to which indisputably proved the employer was motivated by discrimination and that this was the "real reason" for the termination.

We took this argument to the New York Court of Appeals after Judge Lippman issued his Opinion, but the NYCOA was busy with the Bianca Jagger eviction case that week. They declined to hear the most important discrimination case in the history of this state in decades. The legal standard for proving pretext in discrimination cases is not a minor issue. We proved that courts outside New York were aligning around the "real reason" standard, not the "legitimate reason" standard. There can be only one reason why NYCOA would decline to hear a case that would affect the lives of millions of New Yorkers, and change the laws on discrimination forever. They knew the case was fixed and they knew it was a power play by Judge Lippman of the First Department. But NYCOA did not rise to the challenge. They looked the other way, knowing the case was fixed.

Governor, please do not appoint Judge Lippman as Chief Jurist for the New York Court of Appeals. Judge Lippman will destroy the human rights agenda in this state. He will signal to every employer with a "wink" that EEO policies are wallpaper, nothing else. While we appreciate that the appointment must be a balanced one, we do not believe that Judge Lippman is a balanced jurist. We admire his intellectual prowess but it is unfortunately deployed under an insidious and subversive agenda.

Finally, we provide some important links below, as well as my personal email address for expeditious communication. We will publicly oppose this appointment if it is effected.

Sincerely,

Kathryn Grace Jordan
PRESIDENT AND FOUNDER

COPIES OF SOME OF THE DOZENS OF COMPLAINTS FILED WITH THE COMMISSION ON JUDICIAL MISCONDUCT

Please note: The format of the "letter" is the format that Tembeckjian wanted the Complaints articulated in. As you can see from my petition to NYCOA, I was more than capable of drafting a formal "Complaint". But RT wanted the complaints to have as little credibility as possible, from the "get-go".

Complete file is in storage.

KATHRYN GRACE JORDAN
222 Lakeview Avenue
Suite 160-707
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917 596 4617 * 561 659 1080 * 561 659 1766 (F)

August 3, 2006

Robert Tenbeckjian
Commission on Judicial Conduct
61 Broadway
New York, NY 10006

Dear Mr. Tenbeckjian:

I am contacting you to file a formal complaint about the following judge who is overseeing the cited matter:

Judge Rolando T. Acosta
71 Thomas Street
New York Supreme Court
Kathryn Jordan v. Bates Advertising 118785/99

My complaint about this judge falls into two categories:

1. The Judge's inability to bring the case to Judgment after 17 months and a jury verdict where Plaintiff was the prevailing party.

2. The Judge's allowing himself to be improperly influenced on the issue of the award of Legal Fees and his abuse of discretion and retaliation against me, the Plaintiff, for reporting the same and his generally hostile and exclusionary behavior toward me.

Relevant Facts:

1. I am the Plaintiff in this action of disability and gender discrimination. I am visibly disabled. My disability is based in the fact that I have Multiple Sclerosis.

2. This case, against Bates Advertising, has been in litigation for over 10 years. The case came before Judge Acosta in New York Supreme Court in April 2005.

3. After an 11 day trial before a Jury, Plaintiff won the case of wrongful termination on the basis of disability discrimination on April 21, 2006. Plaintiff, a former EVP ($250,000 per year level) was awarded $2.5M in economic and punitive damages. However, Plaintiff's economic damages award was 60% of the amount that Plaintiff's unrebutted expert testified to would make her "whole". [1] The last post trial motion was filed June 27, 2006.

4. In January 2006, I fired the attorney who represented me at the trial. For reasons that Judge Acosta could not possibly know, my attorney had failed to honor the promises he made be in preparing the case for trial. These failures directly led to the substantially reduced damages from what I was eligible for under the law.

5. Judge Acosta filed his Opinion, upholding the jury verdict, on February 2, 2006. This was eight months after the jury verdict and over 7 months after the last post trial motion. The Judge had the option of putting this case on an expedited basis, given Plaintiff's serious medical condition. Instead, Plaintiff had to wait 8 months for the judge's decision. I believed that when the Judge finally issued his decision that the Judgment would be entered. That did not occur. Instead the Judge announced that he would be holding a hearing on the Legal Fee issue. A preliminary hearing was held in March 2006.

6. On April 3rd, a hearing on Legal Fees was adjourned because the Judge claimed he was not able to conduct this hearing due to scheduling problems. However, on this very day he allowed my former attorney, Lawrence Lebowitz, to enter his chambers to discuss our dispute about the contingent legal fee. At the time I was sitting outside in the hall on the phone with the defendants advising them of the adjournment. Upon information and belief, Judge Acosta allowed Mr. Lebowitz to present him with evidence that influenced his opinion on this matter and to argue his case without me being present. After this happened, the Judge called me in and began to warn me on this issue. I was advised that Judge Acosta would "act as a fact witness" in my case against Mr. Lebowitz advocating on his behalf and that he "might be the judge assigned to rule on the case". I was stunned. I defended my position but was extremely concerned about what had been obviously going on behind the scenes. The part-clerk and one of Judge Acosta's clerks (Mr. Vazquez) was present during this conference. My attorney had no authorized role at this conference as he no longer represented me, a matter that the Judge was aware of.

7. On April 5th, I sent a proposed Judgment to the Court. I also sent the Judge a short note about the ultimatum he had issued me regarding my dispute with Mr. Lebowitz. I advised Judge Acosta that I would need to take his deposition if he planned to act as a "fact witness".

8. On April 10th, Judge Acosta held the formal Legal Fee hearing. At this conference, I was not allowed to examine my former attorney Mr. Lebowitz on his hourly submissions. Judge Acosta also took over the questioning of the other attorney who appeared. At the end of this hearing, the Judge promised to hold a separate hearing on the wording of the Judgment as time had run out.

9. On April 19th. I formally notified my former attorney that he would need to escrow the disputed funds until the matter was adjudicated. I also contacted the Judge's clerk, Mr. Vazquez, and expressed my deep concern about what had occurred on April 3rd.

10. On that same day, April 19th, Judge Acosta sent me a scathing note on Supreme Court stationary:

"Ms. Jordan, once again, it is inappropriate for you to drag the Court into your dispute with Mr. Lebowitz. I informed you of this by prior correspondence, at the conference the Court had with you and Mr. Lebowitz where you informed me that he no longer represents you, and on the record during the April 11, 2006 attorney fees hearing".

This note is evidence of just how far Judge Acosta was willing to go to protect Mr. Lebowitz' interests and to transfer blame onto me. First, the Judge pretends that the first time he was made aware that I fired my attorney was the April 11th attorney fee hearing. This is simply not true and I can prove it is not true. The reason he attempted to re-cast the date was because he knew that what he had done on April 3rd, when he allowed Mr. Lebowitz, a non party, into his chambers was wrong. If he had not been notified until the April 10th conference, then there would only be an error in judgment, not a willful attempt to abuse his authority by engaging in an "ex parte" discussion. Just as importantly, the Judge attempts to mis characterize my reporting this matter and my concern about it to him as "inappropriate" and to make it seem that I was trying to drag him into the dispute, when in fact it was Judge Acosta who was using and abusing his position to manipulate and threaten me on this issue.

This note, along with other documents , will provide the evidence that will prove that Judge Acosta willfully and knowingly allowed my former attorney to influence him and that he threatened to use his position to intimidate me into agreeing to accept Mr. Lebowitz threat. (Please note: If you truly intend to conduct a bona fide investigation of this

matter, you would be wise to ask the Judge for copies of all communications from me, and any of the parties he corresponded with on this case before these documents are destroyed.

11. On April 29th, I sent a Supplemental Affidavit to the Court with additional information on the Legal Fee issue, per the Court's directive.

12. Over the next several months, it became apparent to me that my former attorney, Mr. Lebowitz, was having an "ex parte" dialogue with the Court and with my adversary's attorney. I also became aware that information was being shared between these men and that I was being excludec from the information loop. By way of one example, I requested the hearing transcript and was advised by the clerk that this was "not the court's role" and directed me to my former attorney (who was not speaking to me) and my adversary. When I contacted my adversary they refused to provide this transcript. More critically, there were discussions about "settlement" and the "judgment" that occurred which I was not a part of. This was proven to be the case when proposed judgments were sent to the Court in June.

13. On May 19th, Judge Acosta sent me a note indicating that "a decision on Legal Fees will be issued soon". Because of the vagueness of the language and because I simply no longer trusted Judge Acosta to keep his word, sent an Order to Show Cause to the Court on June 8th asking for a hearing as to why "judgment should not be entered and a ruling on Legal Fees "without prejudice".

14. On June 26th, my adversary sent a proposed Judgment to the Court. This was totally expected. What was not expected was the fact that my adversary had copied my former attorney, and more astonishingly, my former attorney had submitted a "proposed judgment". I had written the Court about my concerns about Mr. Lebowitz continued involvement including the conflict of interest and the confusion that would occur by having two different positions from the Plaintiff. There was also an interest of trust as it was apparent that Judge Acosta was encouraging this misconduct. Of new and very disturbing import, my adversary had apparently entered into a secret agreement with Mr. Lebowitz to have his payment made separate from mine. I had learned that they planned to appeal my payment but not Mr. Lebowitz', another symbol of the old boy network tactics that pervaded this litigation. This was tantamount to perpetuating a fraud.

14. On June 28th, Judge Acosta heard my motion for the OTSC. I expressed my deep concern about the 16 months that had transpired

without the entering of Judgment. I also talked about the impropriety of Mr. Lebowitz submission of a "proposed judgment". Judge Acosta, incredibly, defended Mr. Lebowitz submission, asserting that it was "more encompassing" than mine. He clearly missed the point. I had fired Mr. Lebowitz and he had no authorized reason to even be in the courtroom much less sending in proposed judgments.

15. I had requested transcripts of the two formal hearings, April 10 and June 28, to make a record of what was occurring. Judge Acosta had his clerk send me a note saying that it was not the Court's "role" to provide this to me but refusing to provide me with the reporter contact info and directing me to my adversary. I only received April 10 transcript about two weeks ago and still do not have the June 28 transcript.

16. On July 11th, Judge Acosta, after being repeatedly advised of my objections to Mr. Lebowitz' ex parte role in the case (and I believe it was greater than I have been able to prove here), Judge Acosta directed his clerk to send a note to Mr. Lebowitz about an allegedly missing document. I firmly believe this was part of the signaling that the Judge was doing with my former attorney. As I advised him, he could simply have asked me, the Plaintiff, for the document as I had all of the exhibits and pleadings.

17. On August 10th, Judge Acosta sent me a "Decision/Judgment". This document re-iterated, but did not deny, many of the allegations that I made to his Honor over the course of the last six months. The Judge then wielded his final assault on me, labeling me as "contemptuous" and "contumacious", and affixing $5000 in sanctions to me. At first, I thought this "Decision" was a joke. I waited a day and learned that it was not. Judge Acosta, in what can only be described as a masterfully Machiavellian abuse of power, re-cast my complaints about the Court's and my former attorney's misconduct as "disruptive behavior" and "baseless allegations challenging the Court's integrity". In responsive affidavits I reminded His Honor that my allegations were not baseless and that he had not denied any of them. The Judge went on to say "A hearing is not required in this case inasmuch as Plaintiff has already explained to the Court why she has engaged in her conduct, namely her baseless belief that the Court is having ex parte communications in an effort to deprive her of her fair share of the verdict". Although the latter part of this statement is not accurate, I repeatedly asserted this "belief". Importantly, because I was there on April 3rd when the Court conducted the first ex parte conversation with Mr. Lebowitz, and am an eye witness to those events, I do not view them as "beliefs" but facts. If the Court sees these facts as "challenging the Courts' integrity", I would probably agree

with that. I felt that the conduct of the Court and my former attorney has been shameful and disgraceful and completely lacking in integrity.

18. I could have simply gone along with this scheme and taken the $2M without objection. However, I feel so strongly about this obvious abuse of power that I could not do this. The Judge's final manipulation was the deployment of the Judgment itself as a mechanism to immunize himself from criticism and to transfer blame to me. This was so insidious and his slandering of me so viscous that I could not possibly accept any decision his honor would render.

19. I filed a Motion for Recusal on August 24th, 2006. I also began communicating with ALJ Silberman on these matters on July 9th, seeking her assistance. I have reason to believe that she may have sent my complaints about Judge Acosta to him as he references dates that are not part of my communication with him but rather Judge Silberman. I append these documents as well.

20. This entire situation, the delay of 17 months and the ex parte situation with my former attorney, have created enormous stress for me and pose a very serious risk to my health.

21. I believe the defense attorney, Mr. Don Beshada, was instrumental in facilitating the "ex parte" efforts by my former attorney and that de minimus he sought to create interference with my ability to prosecute the case. He had acted in this matter during the pre-trial phase of the litigation when he routinely communicated with my attorneys and former attorneys without my approval and knowledge. This was done to divert attention from the case and to obstruct Plaintiff's discovery. I will be filing complaints about Mr. Lebowitz and Beshada with the Attorney's Disciplinary Committee.

It is imperative that Judge Acosta remove himself immediately from the case and that an investigation be conducted. However, I would only want an investigation performed if it is done properly and thoroughly. A poorly conducted investigation would create more problems than it would solve. I am considering filing a lawsuit against the Judge for his retaliation against me and for the exclusionary and hostile environment that he encouraged against me during the trial.

Potential Witnesses:

Part Clerk, Judge Acosta's Clerks (Mr. Vazquez et al) , Greg Homer (defense attorney), myself

Hostile Witnesses:

Mr. Lebowitz, Judge Acosta, Don Beshada

Please contact me at your earliest convenience. I have been 17 months without relief in this matter and the stress of this is posing a very serious risk to my health.

Sincerely,

Kathryn Jordan
Plaintiff

1. Plaintiff was not made "whole" because Plaintiff's attorney at the time, Laurence Lebowitz, failed to prepare any of Plaintiff's medical witnesses, failed to properly instruct the economic expert and present the economic evidence that was in the record, failed to properly direct the jury about how the damages should be allocated, failed to present any medical evidence, failed to secure the evidence that was available regarding executive compensation and benefits, and failed to direct the jury about punitive damages. Despite these failures, and because of the compelling nature of the evidence against the defendants and because the jury believed me, the Plaintiff, the Jury awarded $2M in economic damages and $500K in punitive damages. It could have awarded between $5M and $15M, based on the "make whole" principle. These failures were completely avoidable. Mr. Lebowitz simply did not want to put in the time in the case to prepare the witnesses or develop the evidence.

KATHRYN JORDAN
222 Lakeview Avenue
West Palm Beach FL 33401
561 658 1080 * 561 659 1766 (f) * 917 596 4617

FAX MEMORANDUM

August 13, 2007

Mr. Robert Tembeckjian
COMMISSION ON JUDICIAL CONDUCT
NEW YORK STATE SUPREME COURT
61 Broadway
New York NY 10006

Re: Judge Acosta Investigation

Dear Mr. Tembeckjian:

It is now 1 year since I filed my request for an investigation into the misconduct of Judge Acosta during his handling of my case against Bates Advertising in New York Supeme Court. Unfortunately, despite a plethora of evidence and leads for witnesses, your team has not been able to reach closure on my case. In my last submission to you I advised you that the Judge had stated on the record that "we know that that (April 3rd, 2006 "ex parte" meeting) never occurred". This was a willful prevarication aimed at obstructing your investigation. The April 3rd meeting did occur and Mr. Lebowitz my former attorney was invited into the Court's chambers and allowed to influence the Court about a matter of interest to him and to present evidence "ex parte". Neither I nor opposing counsel was present during this overture. I only learned of it after I was summoned into the Judge's chambers. However, there were two clerks present throughout all of these events.

Subsequent to this event, I was threatened by the judge, ordered to remain silent, and sanctioned--all to suppress complaints like this one to your group. If your investigative team had even asked the Judge's clerks, who were present during the improper meeting, whether it had occurred and what they recalled, we might have closed this matter by now.

I watched you on Law channel recently. You were impressive in your knowledge of the judiciary. However, you made it clear that judicial complaints are "soft balled". Perhaps that is why Judges continue to believe that they can get away with virutally anything.
I thought you would like to know that your failure to properly investigate this matter has only served to embolden Judge Acosta. He now feels justified by his improper conduct. His attack on me in the final Judgment has created indisputable severe and permanent damage to me and my reputation. Here are some of the things that have occurred since:

1. Two judges have recused themselves from hearing my malpractice cases. As you may

be aware. I filed malpractice and fraud cases against several of the attorneys who took large retainers from me but either failed to do the work they contractually agreed to do or did so under fraudulent or coercive circumstances or did such an incompetent job that they damaged my chances of success. These cases are listed below:

Kathryn Jordan v. Laurence Lebowitz 600246/2007

Kathryn Jordan v Salvatore Gangemi 600245/2007

Kathryn Jordan v. Gary Phelan et al 105183/2007

Kathryn Jordan v. David Fish 601806/2007

Kathryn Jordan v. Robert Ottinger 601805/2007

Judge Madden was originally scheduled to hear most of these cases. She immediately recused herself. (Most are now before Judge Marci Friedman, who could also possibly recuse herself if allowed). Then I learned that Judge Ling-Cohen dismissed my case against Mr. Gangemi after I filed for an extension of time when I was not well enough to respond by the timetable dictated by my adversary. She concocted a number of ridiculous allegations, none of which dispose of the fact that there are triable issues of fact that merit adjudication. I strongly feel that both of these Judges sought to get off these cases because of the completely false and totally slanderous statements that Judge Acosta made about me.

2. Judge Acosta went as far as publishing his Judgment in the Law Review last September which now will make my defamation claim against him libel. I learned about a month ago from an attorney that was suing me (there are several who think that because I won a big award that they should now share in that) that Judge Acosta had his "contemptuous" decision *published last September* in the Law Review. This shocking revelation clarified for me why so many attorneys were aware of the decision from locations ranging from NY to the Courts here in Florida, and why they felt entitled to treat me with complete disrespect. Some specifically recited the false allegations that the Judge concocted to rationalize his decision to sanction me. All of them concluded that I must have been lying because a judge would not lie.

Now I will be appealing the sanction decision before the First Department. However that will not even begin to address the damage that the Judge's conduct has caused. Publishing his Judgment leaves me only one option to protect my good name and the integrity with which I have undertaken a grueling 12 years of litigation (and won despite the failures of any number of greedy incompetent attorneys): and that is going public. Judge Acosta likes publicity so let's see how he likes it when I publish my polygraph and confront his slanderous allegations on the Internet and in the local newspapers in NY.

If it were you, what would you do? Sit by and allow your reputation to be damaged? Look the other way when you knew the Code of Conduct had been violated? Maybe we can cover these issues on a future Lawline program. It is absolutely disgraceful that the

Commission has effectively enabled this conduct by failing to properly and timely investigate this situation. There are two law clerks that I will be investigating this fall. Won't it be embarrassing for your team if I am able to secure these admissions?

Finally, if you really are interested in a fair hearing of the facts, why don't you allow me to respond to Judge Acosta's attack on me on one of your shows? I promise that I will stick to the facts and will reserve any personal remarks for private discussions. But as Freud used to say: "The truth will out, one way or another."

Kathryn Grace Jordan