

FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPEL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

AGENDA COMMISSIONERS MEETING TUESDAY, APRIL 14, 2009 AT 1:30 P.M.

1. Minutes
 - a) 3/24/09
 - b) 3/31/09
 - c) 4/07/09
2. Marcus Cederqvist
 - a) HAVA Update
 - Letter from SBOE re: 2009 Voting Systems Pilot Program
 - Conference Call with SBOE April 9, 2009
 - b) Vacancies of the Standing Committees
3. John Ward
 - a) Vacancy Report
4. Executive Session
 - a) Litigation

For Your Information

- DMV Registrations/Change of Address
- NYS Board of Elections Weekly Status Report for the Week of April 2, 2009 through April 9, 2009
- Marshall V. Board of Elections (06LE000078)
- Transcript - United States v. NYS Board of Elections (06-CV-263)

News Items of Interest

- Daily News: Don't discard most-effective voting machines for disabled
- Cheap politics: Board of Elections pays ridiculous rent in party patronage ploy

Marcus Cederqvist

From: Marcus Cederqvist
Sent: Wednesday, April 08, 2009 4:17 PM
To: *Commissioners
Cc: *ExecutiveManagement; *ManagersMeetingGroup; *Chief & Deputy Chief Clerks (all)
Subject: FW: 2009 Voting Systems Pilot Program



All Counties Letter
4-8-09.pdf...

Commissioners:

Please see the attached letter from the State Board and the message below concerning a schedule for conference calls (note - in a follow-up email, they specified that the conference calls are scheduled for tomorrow).

m

-----Original Message-----

From: CoExecutiveDirectors [mailto:CoExecutiveDirectors@elections.state.ny.us]
Sent: Wednesday, April 08, 2009 3:38 PM
Subject: 2009 Voting Systems Pilot Program

Dear Commissioners,

Attached please find a letter seeking your input regarding a pilot program for voting systems for 2009. We know that you will have questions. To that end we'd like to invite each county to participate in a conference call to ask questions. We will also be polling each of you to see what your initial reaction to a pilot in your county will be so that we can provide that information to the Department of Justice on Friday. In order to proceed in orderly fashion we'd like to have all of the counties in an ECA region call in on the following schedule:

Region 1: 10 AM (Except for NYC)
Region 2: 11 AM
Region 3: 12 PM
Region 4: 2 PM
Region 5: 3 PM
Region 6: 4 PM
NYC: 5 PM

The call-in number is : 1-866-699-3239

Attendee's access code: 56931451

For those counties involved in the canvass of the 20th CD, please feel free to e-mail your questions or call when you have completed the canvass.

Sincerely,

Stanley Zalen and
Todd Valentine



State of New York
STATE BOARD OF ELECTIONS
40 STEUBEN STREET
ALBANY, N.Y. 12207-2108
Phone: 518-474-8100 Fax: 518-486-4068
www.elections.state.ny.us

James A. Walsh
Co-Chair
Gregory P. Peterson
Commissioner
Todd D. Valentine
Co-Executive Director

Douglas A. Kellner
Co-Chair
Evelyn J. Aquila
Commissioner
Stanley L. Zalen
Co-Executive Director

April 8, 2009

Dear Commissioners:

As you are all well aware, on March 27, 2009, the Federal Court held a Conference on the feasibility of a Lot 1 machine roll out this fall. A transcript of this conference has been posted to our website since early last week.

The bottom line is that our certification testing will not be completed in time for a full Lot 1 roll out this fall. We remain committed to the goal of implementing HAVA while at the same time ensuring that all voters have the benefit of a fully tested and certified voting system. To that end, we are now negotiating with the Department of Justice for an extension of the Lot 1 time line. We must avoid any set of circumstances whereby the Lot 1 roll out is of uncertified voting systems, given our mutual commitment to the integrity of the voting process. Any roll out will be with machines that have been subjected to aggressive, albeit not complete testing. In addition, various compensating conditions and procedural safeguards will need to be developed to ensure accuracy. Under some circumstances, these safeguards may possibly escalate what will be required to include a full hand count. The extent of compensating conditions to ensure the integrity of any Pilot Program election will of course depend on the amount of testing which we can accomplish prior to the fall and also the extent of an enhanced accepting testing protocol

As you further know, it is the position of the Federal Court that all counties within the state are under its January, 2008 Order to implement a full Lot 1 roll out this fall. We have explained our position to the Department of Justice and they have indicated some willingness to consider a partial roll out this fall by means of pilot programs throughout the state.

It is clear that a significant pilot program will be required this fall. The scope and breadth of which will be determined by an agreement with the State Board and the Department of Justice. Experience has shown that a partial roll out of new voting systems is often extremely beneficial in terms of gaining experience with a new system. It is our belief that all counties would benefit by participating in our 2009 Pilot Program.

Accordingly we are asking that you inform us by April 17th as to whether or not you are willing to engage in our 2009 Pilot Program. Your response is necessary so that we can build the details of the plan around your participation and can subsequently inform DOJ as to the breath of our initiative and attempt to reach consensus with them. It is our belief that if sufficient numbers of counties willingly participate, we will avoid the risk of a Court ordered roll out of uncertified systems. Your participation need not be countywide, but certainly it would not be appropriate to have two systems at any one polling place. The goal is to show both the Court and DOJ good

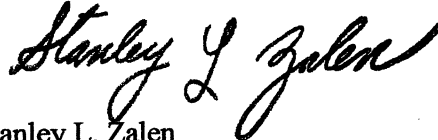
faith in moving toward HAVA implementation and also to allow you to obtain invaluable hands on experience.

As we must complete our negotiations with DOJ by April 24th or face the inevitability of Court action, we must insist that you respond as quickly as possible, but no later than April 17th.

Sincerely,



Todd D. Valentine
Executive Director

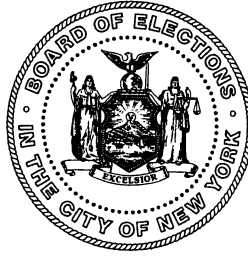


Stanley L. Zalen
Executive Director

TDV/SLZ/mer

Board of Elections in the City of New York Standing Committees for 2009

| | |
|--|---|
| Human Resources | Commissioner Silie Commissioner Schacher |
| Budget & Finance | Commissioner Silie Commissioner Soumas Commissioner Polanco Commissioner Umane |
| Communications, Voter Registration and Outreach | Commissioner Polanco Commissioner Stupp Commissioner Araujo Commissioner Soumas |
| Management Information Systems and Services | Commissioner Dent Commissioner Umane |
| Legislative Affairs | Commissioner Yennella Commissioner Sampel Commissioner Stupp Commissioner Soumas |
| Investigations | Commissioner Sampel Commissioner Polanco Commissioner Soumas Commissioner Schacher |



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPEL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

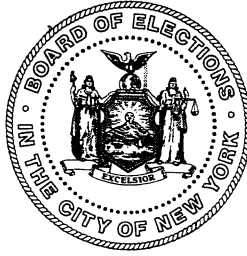
JOHN J. WARD
FINANCE OFFICER

DATE: April 14, 2009
TO: Commissioners

FROM: John Ward
Finance Officer.

RE: Vacancies

| | | | | | Inc. | New. |
|---|---------------------------|------------|-------|------|----------|----------|
| 1 | Assistant General Counsel | | | | | \$75,000 |
| 2 | Valerie Marshall | Adm. Asst. | N.Y. | Dem. | \$39,440 | \$37,562 |
| 3 | Robert Helenius | VMT | Bklyn | Rep. | \$27,818 | \$26,493 |
| 4 | Lisa Sattie | Adm. Asst. | S.I. | Dem. | \$39,440 | \$37,562 |
| 5 | Rosemarie Daraio | Adm. Asst. | Qns. | Rep. | \$39,440 | \$37,562 |



FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
JUAN CARLOS "J.C." POLANCO
JAMES J. SAMPAL
NANCY MOTTOLA-SCHACHER
NAOMI C. SILIE
J.P. SIPP
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

April 7, 2009

Todd Valentine, Co-Executive Director
Stanley Zalen, Co- Executive Director
New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108

Re: DMV Registrations/Change of Address

Dear Messrs. Valentine & Zalen:

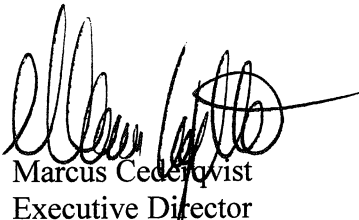
The Board of Elections in the City of New York is required by law to process all voter registration application received on a timely basis, including any applications from the Department of Motor Vehicles.

It has been brought to our attention by our Borough Office Managers that the forms sent by DMV have not been processed in accordance with the statutory requirements imposed on DMV. This is a major problem for this Board. We cannot process those applications because information is missing. I have asked our Borough Managers to submit samples of those forms having missing information. Enclosed, are those samples for your review. Kindly note that our Borough Office staff made notations on the forms to indicate what information is missing.

The Board of Elections in the City of New York requests that the State Board of Elections take the necessary action to ensure that New York State Department of Motor Vehicles processes all voter registration requests in accordance with the provisions of the Election Law.

We thank you in advance for your immediate attention, assistance and cooperation in this matter. If you have any questions or require additional information, please do not hesitate to call us at 212.487.5412.

Sincerely,


Marcus Cederqvist
Executive Director


George Gonzalez
Deputy Executive Director

Enclosures

BOARD OF ELECTIONS

Copies without Enclosures to:

Commissioners of Elections in the City of New York
Pamela Perkins, Administrative Manager
Steven H. Richman, General Counsel
Beth Fossella, Coordinator – Voter Registration Activities

State of New York

Hon. David A. Paterson, Governor
Hon. David Schwartz, Commissioner of Motor Vehicles
Commissioners, New York State Board of Elections



State of New York
STATE BOARD OF ELECTIONS

James A. Walsh
Chair
Douglas A. Kellner
Chair
Gregory P. Peterson
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Todd D. Valentine
Executive Director
Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

April 10, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending April 9, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

NEW YORK STATE BOARD OF ELECTIONS

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week 4/2/09-4/9/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Contracting with Voting System Vendors

Status of tasks in this category: on schedule.

- Contract amendment updates were sent to OGS this week; finance is reviewing.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: in jeopardy and behind schedule.

- Overall progress of testing:
 - SBOE advised voting system vendors that all updates related to documentation, software and hardware that is to be considered for certification must be delivered and installed to SysTest by April 30, 2009. Any delay will result in testing resources being removed from testing of the system and assigned to other systems ready for testing.
 - NYSTEC continued working sessions on the pre-election testing, test deck and maintenance procedures for lot 1.
 - SBOE responded to a formal request for interpretation from SysTest on the subject of closed networks.
 - Weekly conference calls continue between between SBOE, NYSTEC, SysTest and vendors.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: in jeopardy and behind schedule.

- SBOE, is preparing a plan for a Fall 2009 Pilot Program for Lot 1 machines.
- SBOE held 6 calls involving 41 counties to gauge initial support for a fall Pilot Program.

HAVA COMPLAINT PROCESS

SBOE is still awaiting a response from NYC.

Comm Mtg
F.Y.L.

Steven H. Richman

From: Steven H. Richman
Sent: Tuesday, April 07, 2009 11:19 AM
To: *Commissioners; *ExecutiveManagement; *Legal Department; Dorothy Delayo; Troy Johnson; Timothy Gay; Beth Fossella
Subject: FW: Marshall v. Bd. of Elections (06LE000078)---affirmed by Second Circuit

Attached for your information, review and files is a copy of the decision of the 2nd US Circuit Court of Appeals affirming the District Court's decision to grant the Board summary judgment on Valerie Marshall's complaint that the Board discriminated against her on the basis of race, gender and religion by subjecting her to unequal terms and conditions of employment and a hostile work environment. She also alleged retaliation for filing a charge of discrimination with the EEOC and CHR.

STEVEN H. RICHMAN
 General Counsel
 Board of Elections in the City of New York
 32 Broadway, 7th Floor
 New York, NY 10004-1609
 Tel: (212) 487-5338
 Fax: (212) 487-5342
 E-Mail: srichman@boe.nyc.ny.us

-----Original Message-----

From: Rootenberg, Sharyn [<mailto:srootenb@law.nyc.gov>]
Sent: Tuesday, April 07, 2009 10:41 AM
To: Carberry, Andrez; Rosenbaum, Bruce; Steven H. Richman
Cc: Sonnenshein, Larry
Subject: Marshall v. Bd. of Elections (06LE000078)---affirmed by Second Circuit

In this Title VII action, plaintiff alleged that the Bd. of Elections discriminated against her on the basis of race, gender and religion by subjecting her to unequal terms and conditions of employment and a hostile work environment. She also alleged retaliation for filing a charge of discrimination with the EEOC and CHR.

The district court granted our motion for summary judgment in Sept. 2007 dismissing the complaint, and plaintiff appealed. The 2nd Cir. affirmed today. The decision is attached for your review.

SHARYN ROOTENBERG
 New York City Law Department
 Appeals Division
 100 Church Street, Room 6-210
 N.Y., N.Y. 10007
 (212) 788-1049

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of April, two thousand and nine.

Present: CHESTER J. STRAUB,
ROSEMARY S. POOLER,
REENA RAGGI,
Circuit Judges.

VALORIE MARSHALL,

Plaintiff-Appellant,

-v-

(07-4561-cv)

NYC BOARD OF ELECTIONS,

Defendant-Appellee.

Appearing for Appellant: Valorie Marshall, Pro Se, New York, N.Y.

Appearing for Appellee: Sharyn Michele Rootenberg, New York City Law Department,
New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Kaplan, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellant Valorie Marshall, pro se, appeals the district court's grant of summary judgment dismissing her claims against the New York City Board of Elections ("BOE") of race, sex, and religious discrimination and retaliation under Title VII of the Civil Rights Act of 1964. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review a district court's order granting summary judgment de novo, and ask whether the court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. See Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 300 (2d Cir. 2003).

The district court properly found that Marshall failed to exhaust her religious discrimination claim. In neither Marshall's initial letter to the New York City Commission on Human Rights ("CCHR"), nor her administrative charge, did she make any allegation that she was discriminated against on the basis of her religion, nor did she include any incidents that would have allowed the CCHR to investigate such allegations. Accordingly, her religious discrimination claim was not reasonably related to her charge of race and gender discrimination. See Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 83 (2d Cir. 2001) (holding religious discrimination claim not reasonably related to EEOC charge alleging discrimination on basis of age and sex).

With respect to Marshall's hostile work environment claim, a review of the evidence shows that, even if all the incidents that Marshall alleged had occurred, the conduct was not sufficiently pervasive to alter the conditions of her employment, nor was there any evidence that it was on account of Marshall's race or sex. See Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002). Her supervisor's alleged references to lunch dates and weekend outings with his same-sex partner do not amount to harassment. Such discussions are equally unprofessional to, but no more harassing to Marshall than would be references to heterosexual relationships. Although Marshall may have been legitimately offended when her supervisor allegedly showed her a sexual device he had purchased for his partner, that one event does not rise to the severity necessary to constitute a hostile work environment, see id., nor does it demonstrate that her workplace was permeated with sex or gender intolerance. Marshall's allegations that her supervisor displayed a violent temper, stood over her with clenched fists on several occasions, disparaged her educational background, and engaged in crass behavior are troubling. But Title VII is not a "general civility code for the American workplace;" it prohibits only harassment that is discriminatory. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

Marshall also alleges that she suffered adverse job reassignments and disciplinary measures in retaliation for filing an employment discrimination charge. To establish a prima facie case of retaliation under Title VII, a plaintiff is required to show: "[1] that she engaged in protected participation or opposition under Title VII, [2] that the employer was aware of this activity, [3] that the employer took adverse action against [her], and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a

part in the adverse employment action.” Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001) (quotation marks omitted). In the absence of direct evidence of retaliatory motive, courts apply the McDonnell Douglas test. See Taitt v. Chem. Bank, 849 F.2d 775, 777 (2d Cir. 1988) (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to a retaliation claim). Under McDonnell Douglas, the defendant has the burden to demonstrate a “legitimate, nondiscriminatory reason” for the adverse action against the plaintiff. 411 U.S. at 802. If the defendant articulates such a reason, the burden shifts back to the plaintiff “to show that the reasons proffered by the defendant were not the defendant’s true reasons, but rather a pretext for [retaliation].” Taitt, 849 F.2d at 777.

Marshall’s job transfer in July 2004 to the Scribe and Payroll units was not retaliatory because it occurred before Marshall first filed a charge of discrimination in August 2004. In October 2005, Marshall was transferred from her job in the Manhattan office to a job in the executive office, where her title remained the same, but she alleges she had been reassigned to mailroom duties that she believes were “beneath [her] qualifications.” We assume, without deciding, that such a transfer could constitute a materially adverse action. See, e.g., Kessler v. Westchester County Dep’t of Soc. Servs., 461 F.3d 199, 207-08 (2d Cir. 2006) (retaliation may be actionable even when the alleged adverse action “had not effected any change in [the employee’s] salary, benefits, job title, grade, or hours of work”). Marshall also argues that she earned less overtime pay after her transfer.

BOE Administrative Manager Pamela Perkins stated that the reasons for Marshall’s October 2005 transfer included: (1) Marshall was a Democrat, and the BOE needed to place another Democrat in the administrative assistant title in the executive office to ensure equity between the political parties, and (2) to avoid the difficulties Marshall had working with the management in the Manhattan office, as evinced by Marshall’s employee evaluations. Although Marshall claims that Perkins told her the “real reason” for her transfer was her former supervisor’s request, she presents no evidence that he harbored retaliatory motives. Cf. Roge v. NYP Holdings, Inc., 257 F.3d 164, 170 (2d Cir. 2001) (“[Plaintiff] has not offered any evidence that the [defendant’s] justifications, even if pretextual, served as a pretext for [] discrimination.” (quotation marks omitted)). Marshall does not offer evidence from which a reasonable factfinder could conclude that the BOE’s reasons were pretexts for retaliation.

Marshall also received two employee advisories on March 29, 2005, shortly after her employment discrimination complaint was dismissed by the CCHR. However, the BOE offered evidence that one of those advisories was motivated by a legitimate business reason, that Marshall violated office procedures by excusing her own latenesses prior to submitting documentation of transit delays. Marshall has not pointed to any evidence that this explanation was a pretext for retaliation. The other employee advisory was rescinded. Marshall points to no circumstances suggesting that the issuance of the later-rescinded advisory was sufficiently “adverse” such that it “could well have dissuaded a reasonable employee in [her] position from complaining of unlawful discrimination.” Kessler, 461 F.3d at 209.

We have carefully reviewed the Appellant’s remaining arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk

By: _____

Comm Mtg
FYI.

Steven H. Richman

From: Steven H. Richman
Sent: Tuesday, April 07, 2009 6:43 PM
To: *Commissioners; *ExecutiveManagement; *Legal Department; *ManagersMeetingGroup; *Chief & Deputy Chief Clerks (all)
Subject: Transcript03272009Conference.pdf - Adobe Reader

Attached is a copy of the transcript of the conference held by Judge Sharpe on March 27, 2009.

STEVEN H. RICHMAN
General Counsel
Board of Elections in the City of New York
32 Broadway, 7th Floor
New York, NY 10004-1609
Tel: (212) 487-5338
Fax: (212) 487-5342
E-Mail: srichman@boe.nyc.ny.us

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA

5 Plaintiff,
6 -versus- 06-CV-263

7 NEW YORK STATE BOARD OF ELECTIONS, et al.,
8 Defendants.
9 -----

10 TRANSCRIPT OF **IN CHAMBERS CONFERENCE** held in and for
11 the United States District Court, Northern District of
12 New York, at the James T. Foley United States Courthouse,
13 445 Broadway, Albany, New York 12207, on **FRIDAY,**
14 **MARCH 27, 2009,** before the **HON. GARY L. SHARPE,**
15 United States District Court Judge.

16 **APPEARANCES:**

17 **FOR THE PLAINTIFF:**

18 U.S. DEPT OF JUSTICE
19 BY: BRIAN F. HEFFERNAN, DOJ ATTY.

20 **FOR THE DEFENDANT BOARD OF ELECTIONS:**

21 NYS BOARD OF ELECTIONS
22 BY: KIMBERLY A. GALVIN, ESQ. and PAUL M. COLLINS, ESQ.

23 **FOR THE DEFENDANT STATE OF NEW YORK:**

24 OFFICE OF THE NYS ATTORNEY GENERAL
25 BY: JEFFREY M. DVORIN, AAG and BRUCE J. BOIVIN, AAG

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 (Court commenced in chambers at 9:00 AM.)

2 THE COURT: Good morning. Why don't we do
3 this -- Brian, I've got Bonnie here and we're on the record --
4 so let me have everybody state their appearances so she can
5 control the record. Go ahead, start with you, Brian.

6 MR. HEFFERNAN: Okay. Brian Heffernan with the
7 Civil Rights Division of the U.S. Department of Justice in
8 Washington, for the plaintiff.

9 MR. DVORIN: Jeffrey Dvorin, New York State
10 Attorney General's Office, on behalf of the State of New York.

11 MS. GALVIN: Kimberly Galvin, New York State
12 Board of Elections.

13 MR. COLLINS: Paul Collins, State Board of
14 Elections.

15 THE COURT: All right. Let me ask you a
16 question first, Brian, before I turn to listening to the
17 State's sad tale of woes. I see the change in the HAVA
18 legislation, and I'm not certain that I understand the change.
19 I can't tell you that I've gone back and looked at the
20 congressional intent or anything else, but why the lever
21 change in the HAVA legislation? Are you familiar with that?

22 MR. HEFFERNAN: Yes, I am. I am -- it was
23 probably the one issue I was going to deal with today, so I, I
24 think our basic position is that there's nothing pending
25 before the Court. I do want to comment on that. I find

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 putting this in a letter to the Court to be disingenuous, at
2 best. This change, which is six lines contained in a 500 page
3 appropriations bill in between something that amends the
4 Christopher Columbus Fellowship Act and something that deals
5 with the FTC and the mortgage loan deals with one thing and
6 one thing only; it deals with Title One of HAVA, which
7 provides for the funds to the State to replace lever or punch
8 cord machines.

9 All this does -- a little background. When
10 HAVA was first enacted, it provided for this funding for
11 states that wanted it and said that the lever machines had to
12 be in order to keep the funding that the states got; the lever
13 machines had to be in place by a certain period of time.
14 Initially, that was by January 1st of 2006. It was changed
15 about two years ago, about a year and a half ago, actually
16 around the time of when we had our December 2007 hearing,
17 quite frankly, at the behest of New York State legislators to
18 make sure that they did not lose the \$50 million they have
19 sitting in their state treasury to replace lever machines.

20 Most recently, apparently, at the same behest,
21 this was hidden in the congressional appropriations bill, and
22 all it says is that New York does not lose the \$50 million in
23 the Treasury that it has to replace leverage machines as long
24 as they're replaced, I think, by the time of the first
25 election after November 1, 2010. It in no way, shape or form

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 does anything to Title Three of HAVA which contains the
2 substantive voting system requirements on which we based our
3 lawsuit, which contains both the requirements and the
4 deadlines for replacement of machines, and in no way affects
5 the Court's orders in this case. And I assume the State is
6 not making any statement that they're no longer bound by the
7 Court orders here.

8 THE COURT: All right. So I wondered when I
9 saw that, it is true then that legislation is really specific
10 to New York so they don't lose money? It's got nothing to do
11 with whether or not other states have lever machines in place?

12 MR. HEFFERNAN: No, your Honor. I mean at this
13 point, as we've been through before, you know, New York is
14 really the only state that's in this situation.

15 THE COURT: That's the question I had, in light
16 of the statement in the papers; there's nothing that alters
17 the fact that still out of 50 states, New York's the only one
18 that hasn't complied?

19 MR. HEFFERNAN: Correct, your Honor. And
20 there's absolutely nothing in this that alters the
21 requirements of Title Three of HAVA, which is the basis of
22 this lawsuit and the basis for the outstanding Court orders we
23 have at this point.

24 THE COURT: Let me ask you one more question,
25 and then I'll let you fill in as you hear one thing or another

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 from the State, but it appears to me that the federal -- the
2 Department of Justice is reluctant to recommend to me any
3 penalty I ought to impose as a result of the violation of the
4 consent decrees. Have you altered your position in that
5 regard?

6 (Bruce Boivin, AAG, enters...)

7 MR. HEFFERNAN: Well, your Honor, I guess our
8 position at this point is that we don't have a position,
9 majorly because there's nothing at this point that is before
10 the Court. I mean we -- to put this in perspective, we have
11 had our weekly meetings, conference calls, and the State has
12 been very up front about what has been happening here. We are
13 well aware of the issues that arose with regard to the test
14 lab, but we really only found out about this recent change, a
15 specific change to the timeline last week basically. It
16 was -- I think it was on the 18th or something when we were
17 provided by the State with a copy of the recent timeline that
18 the testing lab gave to the State Board following its -- the
19 reinstatement of its accreditation by the Election Assistance
20 Commission. It was only at that point that we knew that the
21 lab was projecting that the testing and the certification
22 would not be complete until after the elections. And to --
23 elections in this year. And one thing actually that the
24 letter does not mention, and I assume it's inadvertent, is the
25 date. They project some dates put in there by the State, but

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 they -- at this point the timeline that we've seen, the lab
2 has projected completion by November 30th of this year. And
3 the State has -- the State Board did not put that in a letter
4 because, I assume, they forgot or perhaps there's a different
5 date they have in mind. We don't know what they have in mind
6 at this point.

7 But, in any event, we discussed this timeline
8 last Friday in our conference call. The State indicated later
9 on that day that it was going to be asking the Court for a
10 conference. But until Wednesday, we did not know that the
11 State was going to formally move to extend. So we were now
12 having internal discussions with regard to what, apparently,
13 is going to be the State's request and, you know, are prepared
14 to make our position known once that request is made either of
15 the Court or -- quite frankly, your Honor, you know, we have
16 never been adverse to the State discussing anything with us
17 and, you know, we've had a very cooperative relationship with
18 at least the people who are sitting before you.

19 THE COURT: You're all on a first name basis
20 then. (Laughter.) Go ahead.

21 MR. HEFFERNAN: So, you know, certainly, to the
22 extent the State Board wanted to present something to us,
23 prior to presenting it to the Court, then we're not going to
24 reject anything out of hand. But to answer your question, in
25 as long-winded a fashion as I possibly can, which I've done

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 already, it's -- you know, we have not yet had a chance to
2 formulate a position on something we only found out a couple
3 of days ago, and we -- which technically is not even pending
4 before the Court at this point.

5 THE COURT: All right. Thank you. What I
6 really was interested in were those two issues; number one,
7 the lever machine issue, and I cocked an eye when I saw that,
8 and whatever position the Government intended to take really,
9 lest whether I ought to grant it or whether I not, we're going
10 to get down to the issues of penalties here sooner or later.
11 I don't know where else to go.

12 Let me summarize what I hear from the State and
13 then let me hear from the State so at least you can correct my
14 viewpoint on it. And, again, I'm trying to stay above the
15 trees, as I have all along in this case, but it's not easy.

16 It appears to me is that the fundamental
17 problem here is, is that the testing protocol broke down. So
18 there were delays due to decertification of those who were
19 testing. And as a result of those delays, you're now being
20 told by the testers that they can't have the testing protocol
21 done in time to put the lever machines in place by this fall's
22 elections. That's the gist of it.

23 Staying above the trees for a moment, am I
24 correct that the State is the one who selected the testing
25 protocol? And the State is going to tell me, we're required

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 by our rules and regulations to make sure these machines
2 comply with A, B, C, D, under our rules and regulations and,
3 therefore, those are the standards we insisted on the testers
4 that they comply with? They weren't doing it through their
5 certification process, therefore, we had to de-certify them,
6 and that's what caused the delay? Is that what I'm going to
7 hear, in general?

8 MR. COLLINS: Respectfully, your Honor, the
9 State did not de-certify the SysTest. The EAC is the federal
10 agency in charge of promulgating the testing standards.

11 MR. HEFFERNAN: Excuse me, Paul. If you can
12 please speak louder, I'm having a hard time hearing you.

13 MR. COLLINS: Sure.

14 THE COURT: Wait a minute. We can turn that
15 up.

16 (Pause.)

17 MR. COLLINS: The State -- I apologize for
18 raising my -- can you hear me, Brian?

19 MR. HEFFERNAN: Yeah, as well as the rustling
20 of paper.

21 MR. COLLINS: The State did not de-certify
22 SysTest. The EAC did. And they restored their certification.

23 Your Honor, the State further -- the protocol
24 that the State is insisting upon is the conformance with the
25 EAC's voluntary voting system standard guidelines. We're not

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 speaking at this juncture about anomalies of New York State
2 ballot configurations or any of that. And I think that's an
3 important distinction.

4 THE COURT: Let me put what you just said in my
5 words, and then you tell me if I'm right. This is an effort
6 to make sure I understand what you're saying.

7 Unlike what I relayed a moment ago, what you're
8 indicating to me is the decertification of the testers was
9 done by the federal government, not by the State?

10 MR. COLLINS: That is correct, your Honor.

11 THE COURT: Therefore, you had a process in
12 place where they were testing the machines, and those who were
13 testing were no longer permitted to do that by the federal
14 government; is that what you're indicating to me?

15 MR. COLLINS: I'm indicating, your Honor, that
16 they lost their accreditation for a period of time, and during
17 that down time, when we would not allow them as an uncertified
18 lab to test, they were working on -- and we agreed, they were
19 working on the creation of the so-called test cases, which, as
20 I understand it, is essentially the testing protocols. And as
21 we speak today, and Miss Galvin can help me out with this, I'm
22 not sure that they have all of those protocols completed.

23 MS. GALVIN: Judge, if I may just add, under
24 our contractual arrangements, we said that the testing lab
25 must be certified by the Government lab. SysTest labs was.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 As we progressed down, they lost their accreditation by the
2 federal government, so contractually we were unable to
3 continue to pay them for testing services under the contract.
4 We did continue a parallel track with them to try to do
5 non-testing development of these test cases, as Mr. Collins
6 speaks of. And most recently when they had their
7 accreditation restored by the federal government, we
8 reinstated our testing protocols and they produced this
9 timeline based upon our urging to see where we were in the
10 whole schedule of events.

11 Now, that being said, I think it's -- with all
12 due respect to the Court, it's not as simple as just blaming
13 the lab. Clearly, the State is at fault for some of our
14 management things. We have individual consultants that have
15 taken longer. It's turned out to be a much greater task than
16 originally envisioned. And the testing, you know, clearly was
17 a much greater undertaking than any of us had first seen in
18 trying to reach these federal standards or our own standards
19 which come next.

20 So, that being said, the testing lab did push
21 us back. I wouldn't say that all of the blame of this
22 blown-out timeline should rest with them, but, but much of it
23 does. They clearly weren't in a position to -- I mean we were
24 talking about whether or not they should have been accredited
25 in the first place when we found out how difficult it was when

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 we were involved in the day-to-day workings of the testing.
2 They didn't seem to be producing at the level that they were
3 suggesting they could. The machines weren't at the level that
4 the vendors said they were. It became a -- you know, and I'm
5 relatively new to this process, only a few months. It became
6 a very mushrooming type situation, and then when they lost
7 their accreditation, everybody took a hard look and sharpened
8 up the pencils to see where they stood. It isn't a pretty
9 picture at this point, but Brian is well aware of that.

10 THE COURT: Mm-hmm. Here's the difficulty I've
11 had all along. I mean, fundamentally, the problem is -- and,
12 you know, it is what it is, so I mean we aren't going to
13 re-invent the wheel in the context of this litigation. It's
14 obvious that New York is arcane in its system of Government
15 from top to bottom. (laughter) I mean -- and I'm a lifelong
16 New York resident so I mean I'm exercising my First Amendment
17 right to say that. I'm not -- I don't know that I'm speaking
18 as a Judge. But the problem, from an overall perspective, has
19 been that New York is obligated to comply with federal law.
20 Nobody has ever disagreed with that fundamental precept. New
21 York is obligated to comply with federal law. And what's
22 happened is one component or another of that arcane system is
23 getting stuck with retrenchment from all other components of
24 that system, as they're saying, well, under our law or under
25 our rules or under our regulations, we can't do X, Y, Z, so

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 that we can comply with federal law. Well, all those reasons
2 may be true from one component to another, but it's not true
3 from the overall perspective of the lawsuit. The lawsuit is
4 you're obligated to comply with federal law. And it's crystal
5 clear you haven't. And, again, from a common sense
6 perspective, there are 50 states in this nation that have had
7 to comply with this law; 49 have long since done it, and the
8 only one that hasn't is New York. And I don't throw stones at
9 the people around this table. I know you leave here and have
10 to go back and deal with other components and agencies and
11 people and all of that, but the bottom line is, sooner or
12 later I'm going to do something about it. And I'm done
13 threatening. It's either going to get done or it's not.

14 What's New York want me to do? They want me to
15 extend the consent decree and extend the deadlines in the
16 consent decree? Isn't that the way I read your letter? We
17 can't have it done by this fall, but we'll have it done in the
18 next federal election in 2010.

19 MR. COLLINS: Respectfully, your Honor, I wrote
20 the letter, okay, and I'll take the hit for having written the
21 letter. (laughter)

22 THE COURT: You're compadres around the table
23 appreciate that.

24 MR. COLLINS: Notice how they're moving away.

25 MS. GALVIN: I was in court in Poughkeepsie.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 (laughter)

2 MR. COLLINS: I wrote the letter because it
3 became apparent that we were not going to be able to comply
4 with your deadline. And while we have been telling Brian
5 Heffernan on a weekly basis and sharing with him, I felt it
6 important that we tell your Honor flat out and also to come
7 down and seek some guidance as to, you know, we probably are
8 going to make -- as I look at life under the federal rules, I
9 think I've got to make an application to be relieved of
10 non-compliance with your order. And I also know that most of
11 the Northern District judges just don't want to see a motion
12 come out of the blue; they want to talk about how we're going
13 to schedule it, etcetera. And we're not here today to argue
14 the merits of our position.

15 THE COURT: Mm-hmm.

16 MR. COLLINS: And the letter -- as your Honor
17 knows, ultimately, you have equitable authority, and we're
18 pointing out some of the equities, because you asked -- John
19 Law said what are we going to have a conference about? And
20 that's -- these are the items that, you know, we're going to
21 talk about.

22 THE COURT: I've sicked him on everybody like a
23 pit bull.

24 MR. COLLINS: He's a very effective pit bull.
25 I mean, obviously, to come in here cold with you not knowing

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 what we wanted to talk about would have been inane, and it
2 makes sense for you to ask what is it you guys want to talk
3 about.

4 THE COURT: Right.

5 MR. COLLINS: That's it. And we are going to
6 seek permission and a schedule to make an application to
7 enlarge the time within which to comply with your order. This
8 is not that application, obviously.

9 THE COURT: Right.

10 MR. COLLINS: There's no papers.

11 THE COURT: Right.

12 MR. COLLINS: And we just wanted to point out,
13 we're not in the business of sandbagging either the Court or
14 the Department of Justice.

15 THE COURT: I don't believe that -- I don't
16 believe anything to the contrary.

17 MR. COLLINS: Okay.

18 THE COURT: I've tried to communicate as often
19 as I can that never have I believed I've had true issues with
20 the people who are appearing before me. I've had issues with
21 the people I'm not seeing. That's the problem I've had all
22 along.

23 MR. COLLINS: Respectfully, your Honor, in
24 fairness to those people whom we represent, they are part and
25 parcel of this application and they're not looking to sandbag

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 you either.

2 THE COURT: I understand that.

3 MR. COLLINS: You know...

4 THE COURT: I understand that. But it is one
5 aspect or another, given my initial observation about the
6 arcane system that's in place in New York, where some of the
7 clients find themselves paralyzed by what they believe New
8 York law rules and regulations require of them as they try to
9 work their way through this system. And I respect that point
10 of view by them. The problem I have is they don't understand
11 the federal society. They don't understand that the federal
12 government is pre-eminent in this realm. Not the State of New
13 York. So when push comes to shove, and the two are at odds
14 with one another, the federal government is going to win this
15 argument. It's that simple. So it's not a question of
16 whether New York wants to, can, or not. They will. Or, I
17 suppose, one of the things I could do is order the Governor to
18 write a \$50 million check and return the money. I mean I
19 suppose that could be one penalty to impose. I mean, I tried
20 to be comical about that one day, and the State Board of
21 Elections didn't see the comedy. I mean I was talking about
22 calling out the National Guard to install the machines on one
23 hand, and locking them up on the other, and all they heard was
24 locking them up.

25 MS. GALVIN: They still heard locking them up.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 They're clear.

2 MR. COLLINS: Well, respectfully, your Honor,
3 your tone of voice on that day was significantly different
4 than this morning.

5 THE COURT: Well, you got to know me. You just
6 got to know me. I'm a pussy cat.

7 MS. GALVIN: I still use the toothbrush
8 jokingly.

9 THE COURT: Brian, I think what they're
10 indicating is precisely what you're indicating. What you
11 would prefer is to see an application so that you've got some
12 time to digest the position with your superiors and respond
13 accordingly.

14 MR. HEFFERNAN: Either that, your Honor, or, as
15 I said, you know, if they want to send something to us to look
16 at prior to approaching the Court, then we certainly have no
17 problem with that. But, you know, again, all we have is an
18 indication that they want an extension. We do not know the
19 specifics in terms of the time, in terms of what else there
20 might be there. And so, you know, if we have something
21 concrete to react to, we can do that, but at this point we do
22 not.

23 THE COURT: Doesn't he make sense? Why don't
24 you send him whatever proposal it is you're making, because
25 it's what you're going to present to me in a motion.

**BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY**

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 MR. COLLINS: Yes.

2 THE COURT: You know, we're big people around
3 the table. Like I said, it gets disseminated differently as
4 it goes out, but it's no surprise to the State that Brian
5 doesn't want to be here... And I don't want to be here.

6 MR. COLLINS: If it's any consolation, we
7 don't --

8 MS. GALVIN: We don't want to be here either.

9 MR. DVORIN: I definitely don't want to be
10 here. (laughter)

11 THE COURT: None of us, none of us want to take
12 action in connection with this, but we're all obligated to
13 make sure HAVA is complied with and implemented. But what
14 Brian is saying makes sense to me.

15 Why don't you put a proposal -- let me put some
16 in anticipation. I think your point is well taken. Let's set
17 some timelines when we can get that done. I'll be frank with
18 you, you're not going to see me after today for the next 30
19 days. So I'm unavailable until May anyway.

20 What makes sense, Brian? They ought to send
21 you something by when? Or do you want, you want them to make
22 the initial salvo and you get to holler about it?

23 MR. HEFFERNAN: Yeah, you know, I mean at this
24 point there's nothing, obviously, preventing us from walking
25 in on any day and saying this is it.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 THE COURT: No, I know that.

2 MR. HEFFERNAN: If the State has taken it upon
3 themselves to advise the Court that it is going to move to do
4 something, then, you know, there's no reason why the State
5 can't move quickly to make a proposal to us, if that's what it
6 wants to do. At some point, if we don't hear from the State,
7 then, you know --

8 THE COURT: How much time --

9 MR. HEFFERNAN: -- we'll have to decide what we
10 need to do.

11 THE COURT: How much time does the State want?

12 MR. COLLINS: Your Honor, I would like to be
13 clear on that.

14 THE COURT: Yes.

15 MR. COLLINS: What we're talking about is a
16 time frame to send to the Department of Justice a specific
17 proposal.

18 THE COURT: Right.

19 MR. COLLINS: If the Department of Justice
20 either accepts that proposal, and we tweak it, nobody makes a
21 motion, or we don't make our application.

22 THE COURT: Or you simply then send a consent,
23 a proposed consent order to amend the consent decree. I think
24 that's what you would do.

25 MR. COLLINS: Right.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 MR. HEFFERNAN: That, you know, without,
2 without prejudging how any of this is going to go, I would
3 expect that, you know, if we got something from the State, and
4 after consultation here, we decided something that we could
5 live with, and that ideally would be what would happen,
6 obviously, if that was -- if we were unable to do that, then I
7 would expect that motion practice would go on after that.

8 THE COURT: Yeah, I think we're all on the same
9 sheet of music, Brian. That's what I anticipated. I would
10 prefer to see the two of you talk and to see whether the Civil
11 Rights Division thinks it's time to pull the trigger.
12 Metaphorically.

13 MR. COLLINS: Thank you for that caveat.

14 MS. GALVIN: I wrote it down. I got it. He
15 was nice, but he was firm. Pulling the trigger and
16 toothbrushes were brought up. I have it. (laughter)

17 THE COURT: What's the State -- they're looking
18 for a concrete proposal.

19 MS. GALVIN: I know. And it's really -- I know
20 nothing in life is simple. We're going to have to have a lot
21 of internal discussions because many people at the board, to
22 be honest, well, we're going to live with this timeline.
23 There's another faction of people perhaps that think we ought
24 to move it up. I mean we -- everything -- you know, Noah's
25 Ark didn't work either. Because every time we get into a

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 situation -- so, so when I say we should be able to have it in
2 a week, we probably wouldn't -- Brian knows, we probably
3 wouldn't be able to have it in a week. We have a board
4 meeting April 7th.

5 MR. COLLINS: I believe so. Yes.

6 MS. GALVIN: Would that Friday work after that
7 board meeting, Brian, you think?

8 MR. HEFFERNAN: Is that two weeks from today?
9 Is that next week?

10 MR. COLLINS: No. It's two weeks from today,
11 by my watch.

12 MR. HEFFERNAN: Well, I --

13 MS. GALVIN: As we continue with the testing
14 and do everything that we possibly -- I mean we haven't
15 stopped anything so ...

16 MR. HEFFERNAN: Yeah, I suppose so, especially
17 since his Honor has indicated that he is basically unavailable
18 for the next 30 days, in any event.

19 THE COURT: Doesn't mean you can't reach me.

20 MR. HEFFERNAN: Oh, I understand that, your
21 Honor.

22 MR. COLLINS: We would just as soon leave you
23 alone.

24 THE COURT: If it was up to me, I wouldn't be
25 going anywhere, but after 42 years of marriage, I have little

**BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNV**

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 say in the process. (laughter)

2 MS. GALVIN: Internally, that will give us time
3 to put something before the board, hopefully, on the 7th, and
4 then make any changes that we need to, so that it's a unified
5 proposal as we move forward, that we don't have any division
6 there...

7 MR. COLLINS: That would be April 10th, your
8 Honor, by my math. Right?

9 THE COURT: April 10th you're going to supply
10 Brian with a proposal?

11 MS. GALVIN: Right.

12 THE COURT: How much time do you want to digest
13 that proposal and respond to the State, Brian?

14 MR. HEFFERNAN: Two weeks.

15 MR. COLLINS: The 24th?

16 THE COURT: Right. And, therefore, couldn't we
17 set -- you all tell me, couldn't we set an anticipatory date
18 that if those exchanges don't bear fruition, then the State is
19 going to move to do something with the consent decree; and
20 they ought to file that motion by when? A week later? Two
21 weeks later?

22 MR. COLLINS: How about 5/15, your Honor?

23 THE COURT: How about 5/15, Brian?

24 MR. HEFFERNAN: An additional three weeks?

25 MR. COLLINS: Yup.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 MR. HEFFERNAN: I mean I hate to start these
2 discussions with reasons to accommodate continuing a delay on
3 behalf of the board. I mean if -- I assume by filing this
4 letter with the Court, the board was basically prepared to
5 move forward pretty quickly with a motion to extend, and so
6 I'm -- I guess I don't know if, if we will get something back
7 to -- you know, if we will hopefully have something back, and
8 I think it would be long before April 24th, what we're going
9 to do if they're going to take an additional three weeks to
10 extend --

11 THE COURT: I agree. Two weeks is enough.

12 MR. COLLINS: That would be 5/8?

13 THE COURT: Yes. To which you'll respond by
14 what, 5/15, so you accelerate it? Or do you want two weeks?

15 MR. HEFFERNAN: No, we can certainly do it in a
16 week.

17 THE COURT: We all know where this is going. I
18 made it eminently clear. So I mean sooner or later,
19 metaphorically, I'm going to pull the trigger.

20 MR. COLLINS: May we then have a week to
21 respond to DOJ?

22 THE COURT: If permission is granted. I'm not
23 going to give it to you now.

24 MS. GALVIN: Just to be clear, I don't know,
25 maybe I talk too much, but when we get into May, and Brian is

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 well aware of this, as Paul is and Jeff is, we're now running
2 into issues with the counties, and whatever is ordered,
3 whether or not they can actually physically comply with a roll
4 out depending upon the --

5 THE COURT: They're already under an order to
6 comply with a roll out.

7 MS. GALVIN: But the --

8 THE COURT: To the extent that they don't
9 comply with the order --

10 MS. GALVIN: The machines are not made, sir.
11 That's just what I'm saying.

12 THE COURT: I understand all the underlying
13 problems.

14 MS. GALVIN: I understand.

15 THE COURT: It doesn't change the fact that
16 they're under an order to comply, and if they don't meet that
17 date, nothing changes; they're in violation of that order, and
18 I'm at the point where I'm ready to take action.

19 MS. GALVIN: I understand.

20 THE COURT: I want the federal government's
21 recommendation, if that's the case, as to what action they
22 feel I ought to take. I want the State's view in terms of
23 what action they think I ought to take. And then I'm going to
24 take action. Enough is enough. Non-compliance is not an
25 option. I say that at every proceeding, so I've now got it on

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 the record at this one too.

2 MR. COLLINS: That message has been heard loud
3 and clear.

4 THE COURT: I know it has. I know it has. I
5 know the people here believe me.

6 MR. HEFFERNAN: In light of that, your Honor, I
7 mean, if the Court is granting and the Court is granting -- I
8 mean we're going to go by way of motion and then by way of
9 response and then by way of reply...

10 THE COURT: No, no, no. Here's what I said.
11 They're going to file their motion, and you're going to file
12 your response. If they wish to reply, they can seek
13 permission to reply.

14 MR. HEFFERNAN: Okay. Okay.

15 THE COURT: That's what I said.

16 MR. HEFFERNAN: Okay.

17 MR. BOIVIN: That's only if we can't work
18 things out.

19 THE COURT: Precisely. I'm of the hope that
20 spring is eternal, that the motion schedule will never be
21 employed.

22 MR. COLLINS: Okay.

23 THE COURT: That's what I'm hopeful of.

24 What else can I do for you?

25 MR. COLLINS: I think that's what we sought to

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

UNITED STATES v NYS BOARD OF ELECTIONS 06-CV-263

1 accomplish this morning, and we're appreciative of the Court's
2 time.

3 THE COURT: Thank you. Brian, do you need
4 anything further?

5 MR. HEFFERNAN: No, your Honor. This is fine
6 with me. And I just want -- you know, one thing, you know, I
7 can put on the record is, again, you know, they know how to
8 get in touch with me, and we're here and open to discussion to
9 the extent that problems can be obviated and, you know, then
10 they know how to get me.

11 THE COURT: Yes.

12 MR. COLLINS: Brian, I assume that this
13 constitutes our weekly status conference. (laughter)

14 MR. HEFFERNAN: Yes. With special guest,
15 that's correct. (laughter)

16 THE COURT: Thank you, Brian.

17 MR. HEFFERNAN: Thank you very much.

18 MR. COLLINS: Thank you, your Honor.

19 THE COURT: Thank you, folks.

20 (Court adjourned at 9:30 AM.)

21 * * * * *

22

23

24

25

**BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, Official Court Reporter
in and for the United States District Court, Northern District
of New York, do hereby certify that I attended at the time and
place set forth in the heading hereof; that I did make a
stenographic record of the proceedings held in this matter and
caused the same to be transcribed; that the foregoing is a
true and correct transcript of the same and whole thereof.

BONNIE J. BUCKLEY, RPR
USDC Court Reporter - NDNY

DATED: MARCH 30, 2009

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY



BE OUR GUEST: KAREN LUXTON GOURGEY, advocate for the Blind

Don't discard most-effective voting machines for disabled

I have been voting for 40 years, but last November was the first time I marked my ballot by myself, in private. After casting my vote, I found myself in tears.

For people with severe vision loss and others with disabilities, voting has long been a frustrating and sometimes humiliating ordeal.

At the mercy of the old lever machines, we had to sacrifice privacy for assistance.

The Help America Vote Act was passed to achieve the same equality inside the voting booth that our country strives to provide outside it.

For the disabled, this marked a new era, with the possibility of fair and equal civic participation.

New York has lagged sorely behind the times, being one of the last states to comply with HAVA. While other states were holding elections with updated, disability-friendly voting machines, New York delayed reform for years.

Finally, forced by legal action, the state implemented change in the last elections.

In response, the city's Board of Elections purchased 1,800 new AutoMARK ballot-marking devices, set them up in the polling

sites throughout the five boroughs.

And, the disabled population got its first taste of real democracy.

The AutoMARK device is specifically designed to allow people with disabilities to complete our ballots with ease.

It has convenient touch screens, keypads and an audio component that reads the election choices to the voter.

The stand-alone machine also grants a great deal of privacy, which is an important demand of the disabled community.

I was thrilled to be able to mark my ballot and submit it without assistance, knowing that, for the first time, my selections were completely private. It was a freeing experience.

Apparently, though, last year's AutoMARK purchase was only half the battle, and now there is a second vote to determine the voting system that the city will use for the future.

The Board of Elections is currently deliberating between the system that uses the AutoMARK and one other competitor. The board is slated to make a decision this month.

The city has already spent \$25 million on the AutoMARK machines. November elections showed promise of genuine access.

Friends in the disability community have expressed overwhelming satisfaction with the AutoMARK.

I have gotten no such impression regarding the competing system. In the current economic climate, it seems strange to me that the Board of Elections would even consider discarding the AutoMARK, wasting millions and buying a new system that many believe is significantly inferior.

We have waited too long for change at the voting booth.

Scrapping the AutoMARK and starting from scratch could only risk additional problems.

I urge the Board of Elections to take quick action, select the existing system and begin to take steps toward full implementation. Any other choice does not make sense.

The ballot box is the heart of our freedom, where we pump the blood into our democratic process. I hope for the day when all blind and visually impaired people can feel we are treated fairly and equally at the polls. I personally stepped into a new world of equal and full participation last November. Let's not turn back!

Karen Luxton Gourgey is president of the Greater New York chapter of the American Council of the Blind.

'We have waited too long for change.'

Cheap politics: Board of Elections pays ridiculous rent in party patronage ploy

Sunday, April 12th 2009, 4:00 AM

The city's Board of Elections has taken patronage politics to a new extreme. It is writing checks not just to party hacks, but to their clubhouses as well.

Dominated by Democratic and Republican bosses, the board has long hired the faithful to staff polling places at election times, barring good-government groups from providing dedicated nonpartisan citizens for the task.

Now, the board has reversed what was perhaps its only reform, however minor, in decades. It has voted to start paying "rent" again to clubhouses that, supposedly, conduct training classes for those same poll workers.

The fee schedule is hilarious: \$75 per session, plus \$25 if the joint is air-conditioned. Clubs that report holding a dozen sessions pull in about \$1,000 - not much in the grand scheme, but enough to keep them in potato chips and palm cards.

Among the beneficiaries last year were the Bushwick Democratic Club, home base of Brooklyn boss Assemblyman Vito Lopez, the 55th A.D. Democratic Club, the 56th A.D. Democratic Club, the New Era Democratic Club, the Stars and Stripes Democratic Club, the Thomas Jefferson Democratic Club and the United Progressive Democratic Club. All are in Brooklyn. In Queens, the Fred Wilson Regular Democratic Club and the Taminent Regular Democratic Club shared in the booty.

Those payments were supposed to be the last issued by the board. President Frederic Umane of the Manhattan GOP secured a resolution last year barring the practice, arguing it "was not appropriate to have taxpayer money paid to political parties for rent."

But then the clubs complained to legislators. And the legislators pressured the board. And last month the board lifted Umane's ban against having the public subsidize the operation of political organizations. It's shameless and cheap and wrong.

As Susan Lerner of Common Cause/New York put it, giving tax dollars to the clubs "is indicative of the entire problem with this patronage-driven system. Nobody is looking out for the voter or the taxpayer."