

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

GILDA YAZZIE,	)	
Plaintiff,	)	
	)	
	)	
vs.	)	
	)	
NATIONAL ORGANIZATION FOR	)	CASE NO. 19-cv-03845-RDM
WOMEN, Et al	)	
Defendants.	)	
	)	
_____	)	_____

PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT

## TABLE OF CONTENTS

	<u>Page</u>
<u>Index of Authorities</u> .....	iv
 1. <u>Introduction</u> .....	 1
2. <u>Summary of Argument</u> .....	1
3. <u>Statement of Facts</u> .....	1
A. <u>Yazzie and Van Pelt Elected to NOW                 Organizational Office</u> .....	 1
B. <u>During the Campaign, Van Pelt Proclaims                 Yazzie, her running mate, as "100" Navajo</u> .....	 2
C. <u>Van Pelt Refuses to Work with Yazzie</u> .....	3
D. <u>Van Pelt Goes Bezerk in the NOW Office</u> .....	4
E. <u>Yazzie Complains that Van Pelt's                 Actions Created a Hostile Environment</u> .....	 5
F. <u>Van Pelt Strips Yazzie of More Job Duties</u> .....	6
G. <u>Van Pelt Issues Offensive Redskins                 Press Release without consulting Plaintiff</u> .....	 6
H. <u>Van Pelt Attempts to Compel                 Yazzie's Resignation</u> .....	 7
I. <u>Yazzie Locked out of The Office</u> .....	7
J. <u>The NOW Board Rebuffs Van Pelt's                 Request to Fire Plaintiff but Van Pelt                 refuses to Pay Plaintiff</u> .....	 8
K. <u>A Vice President Oversight Board is Imposed</u> .....	9
 L. <u>Plaintiff Learns of Discriminatory</u>	

	<u>Treatment of NOW staffer Brittany Oliver</u> .....	9
M.	<u>Yazzie Complains of Race Discrimination against Brittany Oliver and Sparkle Barrett</u> .....	10
N.	<u>Van Pelt Punishes Yazzie for Complaining About Discrimination to NOW staffers</u> .....	10
O.	<u>Yazzie is Fired</u> .....	11
P.	<u>Yazzie’s Successor as Vice President is Treated by Van Pelt in a Similar Fashion as Yazzie</u> .....	11
	<u>Argument</u> .....	12
4.	<u>Standard for Summary Judgment</u> .....	12
5.	<u>Number of Employees</u> .....	13
6.	<u>Yazzie Establishes Triable Issues of Fact as to a Hostile Work Environment</u> .....	13
A.	<u>Ms. Van Pelt’s Physical Confrontation Creates a Triable Issue of Fact as a Hostile Work Environment</u> .....	13
B.	<u>Other Acts That Must Be Considered in Assessing the “Totality of the Circumstances</u> .....	16
7.	<u>There Are Triable Issues of Discriminatory Intent</u> .....	17
8.	<b><u>The “Me Too” Evidence of Christian Nunes Is Relevant to Show Discriminatory Intent</u></b> .....	20
9.	<u>There Is a Discriminatory Adverse Employment Action</u> .....	21
10.	<u>Yazzie Engaged in Protected Activity</u> .....,	23
11.	<u>Plaintiff Presents Triable Issues as</u>	

	<b><u>to Retaliatory Adverse Actions</u></b> .....	24
12.	<b><u>Triable Issues Exist as to Retaliatory Causation</u></b> .....	25
13.	<b><u>Conclusion</u></b> .....	25

**INDEX OF AUTHORITIES****1. CASES**

	<b><u>Page</u></b>
<b><u>Anderson v. Liberty Lobby, Inc.</u></b> , (1986) 477 U.S. 242 .....	13
<b><u>Ansell v. Green Acres Contr. Co.</u></b> , (3 <sup>rd</sup> Cir, 2003) 347 F.3d 515 .....	21
<b><u>Arrington v. United States</u></b> , (D.C. Cir. 2006) 473 F.3d 329 .....	12
<b><u>Ayissi-Etoh v. Fannie Mae</u></b> , (DC Cir , 2013) 712 F.3d 572 .....	14, 15, 16, 19
<b><u>Baloch v. Kempthorne</u></b> , (D.C.Cir. 2008) 550 F.3d 1191 .....	14, 24
<b><u>Bowman v. Baltimore City Bd. of Sch. Commissioners</u></b> , D. Md. 2016) 173 F. Supp. 3d 242 .....	23
<b><u>Bryant v. Pepco</u></b> (D.C.D., 2010) 730 F. Supp. 2d 25 .....	25
<b><u>Burlington . &amp; Santa Fe Ry. Co. v. White</u></b> , (2006) , 548 U.S. 53 .....	24
<b><u>Craig v. D.C.</u></b> , (D.C.D., 2014) 74 F. Supp. 3d 349 .....	16
<b><u>Crowley v. Vilsack</u></b> , (D.D.C. 2017) 236 F. Supp. 3d 326 .....	24
<b><u>Czekalski v. Peter</u></b> (D.C.Cir, 2007) 475 F.3d 360 .....	13, 22
<b><u>Elion v. Jackson</u></b> , (D.D.C 2008) 544 F. Supp. 2d 1.....	20
<b><u>Fitzgerald v. Henderson</u></b> , (2d Cor. 2001) 251 F.3d 345 .....	21
<b><u>Faragher v. City of Boca Raton</u></b> , (1998) 524 U.S. 775 .....	14, 17
<b><u>Forkkio v. Powell</u></b> , (D.C. Cir, 2002) 306 F.3d 1127 .....	23
<b><u>Harris v. Forklift Sys., Inc.</u></b> , (1993) 510 U.S. 17.....	14
<b><u>Hawkins v. Anheuser-Busch, Inc.</u></b> , (6th Cir. 2008) 517 F.3d 321 .....	17
<b><u>Hurley v. Atlantic City Police Dep't</u></b> , (3rd Cir. 1999) 174 F.3d 95 .....	17

<b><u>Jackson v. Quanex Corporation</u></b> (6th Cir. 1999) 191 F.3d 647 .....	18
<b><u>Knight v. Mabus</u></b> , (D.C.D., 2015) 134 F. Supp. 3d 348 .....	16
<b><u>Richardson v. Petasis</u></b> , (D.C. D, 2015)160 F. Supp. 3d 88 .....	23
<b><u>Schwapp v. Town of Avon</u></b> , (2d Cir. 1997) 118 F.3d 106 .....	18
<b><u>Skidmore v. Precision Printing &amp; Packaging, Inc.</u></b> , (5th Cir. 1999) 188 F.3d 606 .....	17
<b><u>Sprint/United Mgmt. Co. v. Mendelsohn</u></b> (200*) 552 U.S. 379 .....	20
<b><u>Steiner v. Showboat Operating Co.</u></b> (9 <sup>th</sup> Cir, 1994) 25 F.3d 1459 .....	15
<b><u>Taylor v. Small</u></b> , (D.C. Cir. 2003) 350 F.3d 1286 .....	22
<b><u>Turnbull v. Topeka State Hospital</u></b> (10th Cir. 2001) 255 F.3d 1238 .....	15
<b><u>Vickers v. Powell</u></b> , (D.C.C., 2007) 493 F.3d 186.....	17
<b><u>Velez v. QVC, Inc</u></b> (E.D. Pa, 2002) 227 F. Supp. 2d 384 .....	20
 <b>2. <u>STATUTES</u></b>	
<b>42 U.S.C. § 1981</b> .....	1
<b>Fed. R. Civ. P. 56</b> .....	12

**1. INTRODUCTION**

This is an employment discrimination lawsuit arising from the employment of Plaintiff Gilda Yazzie with the National Organization for Women (NOW). This controversy is based upon acts of intimidation, including assault and battery upon Yazzie, various adverse employment actions, including suspension, and ultimately discharge. Yazzie seeks redress under theories of disparate treatment, hostile work environment and reprisal pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

**2. SUMMARY OF ARGUMENT**

The sheer brutality of Toni Van Pelt's assault, battery and unhinged confrontation with Gilda Yazzie - whom she called "P.O.C." (Person of color) along with the numerous other instances of harassment, tokenism, and hostility create triable issues of fact as to Plaintiff's hostile environment claims /

The sheer persistence of the attempts to discharge Plaintiff from employment coupled with the obvious tokenism creates triable issues as to discrimination. The same goes for retaliation, where Yazzie was relentlessly punished for opposing the rampant discrimination and harassment for employee in the NOW organization.

**3. STATEMENT OF FACTS**

**A. Yazzie and Van Pelt Elected to NOW Organizational Office**

Plaintiff Gilda Yazzie is of Dine (Navajo) ethnicity. She identifies as Native American. Complaint for Damages, Paragraphs 6 [P. 2] & 14 [P. 3-4]. She also identifies

as Navajo and Native American. Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, Fact No. 5 ("Defendants' Fact")

Plaintiff Gilda Yazzie was a member of the NOW Board of Directors for six terms. Declaration of Gilda Yazzie, ¶ 1, Page 1 Plaintiff's Appendix of Declarations In Opposition to Defendant's Motion for Summary Judgment, Exhibit 1. serving on the budget committee of the Board for more than ten years. Id.

Yazzie was elected Vice President of Defendant National Organization for Women (NOW) in the Organization's 2017 Annual Conference. Defendants Fact No. 12. In the same Conference, Defendant Toni Van Pelt was elected President of the Organization. Id. . Van Pelt and Yazzie were running mates. Defendant Fact No. 11. They were each elected to four year terms.

Pursuant to NOW's bylaws, as Vice President, Yazzie also served as Treasurer. Defendant Fact No. 14. Yazzie was also responsible for on boarding new employees, managing employee benefits, training the new "chapter specialists," and the oversight of chapter and member relations, Yazzie Declaration, ¶ 21, P. 7.

Under the same bylaws, the President, Van Pelt, served as Chief Executive Officer and Chief Financial Officer. Defendant Fact No. 13. The President was also required to produce monthly financial reports. Yazzie Declaration, ¶ 6, P. 3.

Both Van Pelt and Yazzie had two weeks of training by the outgoing President and Vice President of the organization.

**B. During the Campaign, Van Pelt Proclaims**



**Yazzie, her running mate, as "100" Navajo**

Yazzie and Van Pelt campaigned for the NOW election together in Florida. Whenever Van Pelt introduced Yazzie she always referred to Plaintiff as "100 % Navajo" or "Native American." Plaintiff Gilda Yazzie's Separate Statement of Fact, Fact No. 4 ("Plaintiff's Fact").

Van Pelt or her campaign prepared campaign materials referring to Plaintiff as "100% Navajo." Plaintiff's Fact No. 2. Plaintiff contends she had no input or say in the content of those election materials. Plaintiff's Fact No. 2. The parties differ on this point. See Defendants Fact No. 7 and the Plaintiff's Response in Plaintiff Gilda Yazzie's Response to Defendants' Separate Statement of Undisputed Fact.

The Plaintiff was offended at being referred to as "100 Navajo." "[It] felt hurtful because blood quantum counting is racist and I find it offensive. I prefer to be referred to as Dine." Yazzie Declaration, ¶ 3, P. 2.

**C. Van Pelt Refuses to Work with Yazzie**

When Van Pelt campaigned with Yazzie, she seemed friendly. Yazzie Declaration, ¶ 3, P. 2.

However, this changed immediately after the election. In the words of Plaintiff:

"Directly after the election, Toni Van Pelt no longer treated me with a friendly demeanor. Her interactions were unsmiling and minimal. There was no argument or even conversation between myself and Toni Van Pelt, she simply refused to communicate or communicated in minimal ways." Yazzie Declaration, ¶ 3, P. 2.

During the two-week training and for the weeks thereafter, Ms. Van Pelt refused

to meet or speak with Plaintiff privately. Yazzie Declaration, ¶ 5, P. 2. The NOW President refused to copy Plaintiff on emails, invite her to in person or other meetings related to operating the organization or any other purpose. Id. See also Plaintiffs' Fact No. 13.

Yazzie persuaded Van Pelt to convene a staff meeting during the first weeks of work but the NOW President immediately decamped back to her home in Florida for about a month, leaving Plaintiff to preside over the meeting by herself. Id.

Pursuant to the NOW Bylaws and the training Ms. Yazzie received, Ms. Van Pelt was supposed to provide Plaintiff with monthly financial reports so she could perform her job as Vice President. Yazzie Declaration, ¶ 6, P. 3. This was never done. Id.

Ms. Yazzie was never given access to NOW's accounting software nor was she ever permitted to log into it at any time so she was unable to view the organization's financial data. Id.

Van Pelt as President had full access to the NOW local area network (LAN) to all passwords and all other programs on the NOW local area network. Yazzie Declaration, ¶ 12, P. 5. Yazzie, however, had only "staff level" access despite the fact that she was Vice President. Yazzie was never given all the organization's passwords. Id.

As will be shown below, less than five months later Yazzie was stripped of much of the remaining responsibilities as Vice President.

#### **D. Van Pelt Goes Bezerk in the NOW Office**

At the NOW headquarters on Monday, January 29, 2018, at 11:20 a.m., Yazzie

was meeting with a coworker Van Pelt confronted Yazzie. The Plaintiff retreated into her office, Van Pelt followed her there, screaming and throwing papers at Yazzie. Van Pelt body slammed Yazzie and grabbed her arm and cornered her yelling at her: "You won't be here for three years!" "You don't understand!" "I am the president, so you have to do what I say!" and "You P.O.C.!"<sup>1</sup> Stunned, Yazzie attempted to retreat to her office, but Van Pelt pursued her, screaming and yelling. See Plaintiff's Facts 28-30.

The Plaintiff was intimidated by this confrontation. Plaintiff's Fact 29.

According to Plaintiff, "Ms. Van Pelt said "P.O.C".... in a hostile manner as if it were a slur and a way to indicate that people of color were somehow a different set of individuals." Yazzie Declaration, ¶ 27, P. 7.

Yazzie somehow managed to move around her desk and escape her office to the office of staff member, Linda Berg. Van Pelt closely followed, still screaming. At Yazzie's request, Linda Berg accompanied Yazzie back to her office and Van Pelt backed off. See Plaintiff's Facts 28-30.

**E. Yazzie Complains that Van Pelt's Actions Created a Hostile Environment**

On January 29, 2018, Yazzie sent a text message to NOW staff in which she advised staff she had been "physically threaten[ed] in a demeaning situation by Toni Van Pelt." Yazzie stated that "Toni Van Pelt has created a hostile work place for me." Yazzie advised staff should be working remotely. Yazzie Declaration, Exh. A.

---

<sup>1</sup>"P.O.C." means "Person of Collor." Van Pelt pronounce "POC" phonetically. Yazzie Declaration, ¶ 13, P. 5.

Also on January 29, 2018, Ms. Yazzie sent correspondence to the NOW Board and staff that Toni Van Pelt “threatened me with aggressive behavior and verbal abuse.” Yazzie Declaration, Exh B.

**F. Van Pelt Strips Yazzie of More Job Duties**

Defendant Van Pelt unilaterally removed Plaintiff from the Paychex electronic payroll system. On March 28, 2018, Van Pelt interrupted Plaintiff and NOW staff member Rachel Motley while there were in a conversation related to the Paychex electronic payroll system. Van Pelt instructed Motley to have no further conversations with Yazzie on Paychex related matters. Days later, Van Pelt removed Yazzie’s access to the Paychex system. See Plaintiffs response to Defendant Fact No. 24. Payroll and Paychex matters were part of Yazzie’s job duties as Vice President, Yazzie Declaration, ¶ 20, P. 7.

In May 2018, Lisa Siegel a non Native American, who had been employed as a part time archivist was given the job “Chief of Staff” and assigned many of the Plaintiff’s job responsibilities, among other things, she was given the assignment of: on boarding new employees, managing employee benefits and training the new "Chapters Specialist." All of these duties, including the oversight of chapter and member relations, were, as provided by the bylaws and prior practice, the responsibility of the Vice President. Plaintiff’s Fact 16.

**G. Van Pelt Issues Offensive Redskins Press Release without consulting Plaintiff**

On May 13, 2018, Van Pelt issued a press release utilizing the term “red skins” ignoring the long held practice among progressive organizations of refusing to use that term in print or at least identifying its racism. Plaintiff Yazzie was never consulted on this or any other press release. As Vice President, Ms. Yazzie understood that she had that right to review all press releases issued in the name of NOW prior to their release. Yazzie Declaration, ¶¶ 22 & 23, P. 7-8.

This was no accident as, we shall see, Van Pelt would repeat this same behavior of issuing a press release, which was also racially offensive, without consulting the Vice President who succeeded Yazzie upon her removal.

#### **H. Van Pelt Attempts to Compel Yazzie’s Resignation**

On May 21, 2018, Defendants by Toni Van Pelt, Cindy Drabek and Beth Corbin along with lawyer Tom Hart met with Plaintiff. Van Pelt and the others demanded that Ms. Yazzie resign in return for a cash settlement. The grounds for the resignation were financial irregularities. The supposed financial irregularities had to do with the fact that the organization was months behind in providing a budget for the Board. Putting a budget together was not Yazzie’s job responsibility. Moreover, Yazzie did not even have access to the organization’s financial software. The meeting lasted for three hours. Yazzie refused to sign the resignation paperwork at that time and asked for more time to consider it. She was escorted out of the office. Plaintiff’s Facts 35 & 36.

#### **I. Yazzie Locked out of The Office**

Immediately after the May 21, 2018, meeting the locks to the office were changed and Plaintiff was not given a key. Also, immediately after the May 21, 2018, meeting, Yazzie was locked out her NOW e-mail account. Toni Van Pelt then used Yazzie's NOW email account vp@now.org to send out email to staff and board members as if Plaintiff was sending the email. In that email, it was falsely represented that Plaintiff was voluntarily taking a personal leave. Yazzie Declaration ¶ 25, P. 9.

Although Yazzie told Cindy Drabek, a crony of Ms. Van Pelt who worked for NOW in various capacities during Van Pelt's Presidency, on June 1, 2018, that she would not resign, the Plaintiff remained locked out of the office until the NOW Board met on June 10. Yazzie Declaration, ¶ 26.

**J. The NOW Board Rebuffs Van Pelt's Request to Fire Plaintiff but Van Pelt refuses to Pay Plaintiff**

The NOW Board of Directors met on June 10, 2018.

"Several staff members complained to the Board of Directors in writing, including therein an extensive folder of files, texts and emails substantiating their claims to have witnessed Van Pelt's disrespectful and intimidating treatment of staff members of color as well as non gender-normative staff." Complaint, ¶ 45 [P. 13]. As part of these complaints, NOW Staff referenced Van Pelt's intimidation of Plaintiff. Id. See Imhoff Declaration, ¶ 2, P. 1, Exh 1 and Yazzie Declaration, ¶ 27, P. 9.

The NOW Board voted to reject Van Pelt's motion to fire Yazzie. Defendants' Fact No. 39.

Ms. Yazzie was then issued a key and allowed to return to work. Yazzie Declaration, ¶ 28, p. 9. However, Van Pelt then refused to sign the Plaintiff's pay checks. Plaintiff's Fact 42.

**K. A Vice President Oversight Board is Imposed**

The parties disagree over the reason Ms. Yazzie was required to work in the field and subjected to the supervision of an "Oversight Committee."

The Defendants contend the Plaintiff was ordered to work in the field and subjected to the supervision of an Oversight Committee at the request of a Board Member. Defendant Fact No. 40.

The Plaintiff alleges that since the Board refused to fire Plaintiff and Van Pelt refused to pay her, the Board was required to establish the oversight committee to assure that Plaintiff got paid. Plaintiff Fact No. 43.

The Plaintiff contends the substance of what the Board adapted was not to approve the motion made by the Board member, which provided for a budget and administrative support. What the Board actually did was to require Yazzie to work from the field, with no budget, no administrative support, she was banned from speaking with NOW employees, she was banned from entering the NOW office, she had to submit to close oversight by an Oversight Committee, had to get permission for everything she did and to provide reports. See Plaintiff's Response to Defendant Fact No. 40.

**L. Plaintiff Learns of Discriminatory**

**Treatment of NOW staffer Brittany Oliver**

On November 11, 2018, Plaintiff received an e-mail from a Board member John Erikson regarding allegations by a recently discharged African American employee (Brittany Oliver) and the response of Van Pelt to Erikson's complaint. Plaintiff's Fact 49. See Yazzie Declaration, ¶ 34 Exh. D.

**M. Yazzie Complains of Race Discrimination against Brittany Oliver and Sparkle Barrett**

On November 13, 2018, Ms. Yazzie sent an email to Oversight Committee Member Nancy Campbell Mead complaining of mistreatment received by two former African American employees, Brittany Oliver and Sparkle Barrett, Yazzie Declaration, ¶ 35, P. 13, Exhibit E. Ms. Mead represented that she would immediately forward the email to members of the Board. Plaintiffs Fact No. 54.

**N. Van Pelt Punishes Yazzie for Complaining About Discrimination Against NOW staffers**

Immediately, after the November 13, 2018, email of Plaintiff to Oversight Committee Member Nancy Campbell Mead, Ms. Yazzie was locked out of her NOW E-mail account. Plaintiffs Fact No. 53.

On January 2, 2019, Ms. Van Pelt announced in a staff meeting that Plaintiff was to immediately cease publicly representing NOW on the issue of the Equal Rights Amendment and would have to cancel an upcoming United Nation's panel talk invitation. Without explanation, Ms. Van Pelt told Plaintiff she could no longer speak on behalf of NOW without her direct prior approval. Before that staff meeting, she had



been submitting weekly reports for months which included various radio and panel discussions on the subject of the Equal Rights Amendment. Plaintiffs Fact No. 55.

**O. Yazzie is Fired**

Due to the stress of being required to work under the punitive oversight committee, Yazzie took medical leave from January 16, 2019, through February 27, 2019. Yazzie Declaration, ¶ 40, P, 15.

Van Pelt removed Yazzie from office and employment on May 6, 2019, by vote of the Board of Directors on May 5, 2019. Yazzie Declaration, ¶ 42. Complaint, ¶ 62, P. 21.

**P. Yazzie's Successor as Vice President is Treated by Van Pelt in the Same Fashion as Yazzie**

Upon Yazzie's removal, her immediate successor as Vice President was Christian Nunes. Plaintiff Fact 19. Ms. Nunes is African American. Plaintiff Fact 18.

Ms. Nunes was treated by Van Pelt in much the same way as Yazzie. Van Pelt stripped her of all financial responsibilities, which were given to Cindy Drabek - a board member who became an employee. Plaintiff Fact 25. These were virtually the entirety of the responsibilities that Ms. Nunes had, given to a White Woman. Plaintiff Fact 26.

In 2020, following the death of George Floyd at the hands of the police in Minnesota, NOW issued a press release containing the "I can't breathe, we all can't breathe." Ms. Nunes did not review or have any input into the statement before it was released. Like Yazzie, in connection with the statement regarding the Red Skins release,

Nunes believed she was, as an elected officer of NOW, entitled to review of statements by the organization before they were released. She was highly offended.<sup>2</sup> Plaintiff's Facts 23 & 24.

In addition, while serving under Van Pelt, Nunes was accused of financial irregularities. Plaintiffs Fact 27.

Nunes testified that whenever Toni Van Pelt introduced her, she referred to Nunes as "my Black Vice President." Plaintiffs Fact 22. This bothered Ms. Nunez.

Ms. Nunes testified that she was "tokenized" when she became Vice President. Plaintiffs Fact 21.

Nunes is currently the President of NOW. Plaintiff's Fact 20.

### **ARGUMENT**

#### **4. STANDARD ON SUMMARY JUDGMENT**

Summary judgment may be granted only if the pleadings, the discovery and <sup>2</sup> disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); **Arrington v. United States**, (D.C. Cir. 2006) 473 F.3d 329, 333,. "A dispute over a material fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" **Arrington**, 473 F.3d at 333 (quoting

---

<sup>2</sup>"And the statement was put out, and I wasn't even --wasn't even sent it to review or help edit at all. And the line in the statement was, like, "I can't breathe; we all can't breathe," which I thought was extremely insensitive and offensive to the Black community; and some other things in it was just totally insensitive. And it was really -- at the time it was so insensitive, and the fact that they didn't even think to consult me as being a Black vice president who's personally affected by this was -- I just felt was really insensitive and disrespectful." Nunes Deposition P. 59:22-60:7, Plaintiff's Deposition Appendix, Exh. C.

Anderson v. Liberty Lobby, Inc., (1986) 477 U.S. 242, 248,). A fact is "material" if it might affect the outcome of the case under the substantive governing law. Liberty Lobby, 477 U.S. at 248.

On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." Czekalski v. Peters, (D.C. Cir. 2007). 475 F.3d 360, 363.

## 5. NUMBER OF EMPLOYEES

Plaintiff produced in her declaration a list of 22 individuals who were employed during her tenure, starting in July 2017. She had personal knowledge given her role in payroll and with the paychex program at least from the end of July 2017 until the Spring of 2018, when her payroll duties were taken away by Van Pelt. The list describes the duties of each individual and, in some cases, whether taxes were withheld. Yazzie Declaration, ¶43, P. 16-19. Emily Imhoff has a similar list of 19 individuals, albeit with less detail, than that of the Plaintiff in her declaration. Imhoff Declaration, ¶ 5, P. 1-2.

## 6. YAZZIE ESTABLISHES TRIABLE ISSUES OF FACT AS TO A HOSTILE WORK ENVIRONMENT

### A. Ms. Van Pelt's Physical Confrontation Creates a Triable Issue of Fact as a Hostile Work Environment

Ms. Yazzie's hostile work environment claims start with, but do not exclusively rely on, the physical confrontation she suffered at the hands of Defendant Van Pelt on January 29, 2018. Also part of her claim is the locking out from the workplace on two

occasions, the refusal to allow Plaintiff to communicate with staff, the tokenism and Plaintiff's awareness of race discrimination against staffers, such as Brittany Oliver and Sparkle Barrett.

To prevail on a hostile-work-environment claim, "a plaintiff must show that his employer subjected him to 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" **Baloch v. Kempthorne**, (D.C. Cir. 2008) 550 F.3d 1191, 1201 (quoting **Harris v. Forklift Sys., Inc.**, (1993) 510 U.S. 17, 21). The work environment must be both objectively and subjectively hostile, meaning that a "reasonable person would find [it] hostile or abusive," and that the victim must "subjectively perceive the environment to be abusive." **Harris**, 510 U.S. at 21-22. The "conduct must be extreme to amount to a change in the terms and conditions of employment." **Faragher v. City of Boca Raton**, (1998) 524 U.S. 775, 788. In evaluating a hostile work environment claim, the court "looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." **Ayissi-Etoh v. Fannie Mae**, (D.C. Cir, 2013) 712 F.3d 572, 577 [citing and Quoting **Farragher**, *supra*, 524 U.S. at 787-788.

The **Ayissi-Etoh** Court observed that a single incident, a single confrontation in a supervisors office could form the basis for a hostile work environment claim.

**Ayissi-Etoh**, *supra*, 712 F.3d at 577 ("This single incident might well have been

sufficient to establish a hostile work environment.”) However, the majority opinion in Ayissi-Eloh observed in that case there were additional aggravating factors such as the plaintiff being required to work for the same supervisor for three months after the incident. *Id.* The Concurring opinion by then Circuit Judge Brett Kavanaugh explicitly stated that the single statement by the plaintiffs supervisor “would establish a hostile work environment.” *Id.* at 581.

The Ayissi-Etoh case is in many ways similar to our own. The hostile work environment claim included a confrontation between a subordinate and a direct supervisor in an office setting. There, the supervisor allegedly said "Get out of my office nigger." *Id.* at 575. The epithet used here, “POC”, while not as commonly used was, per Ms. Yazzie’s testimony, used in a hostile manner, giving it offensive connotations. The confrontation between Plaintiff and Van Pelt, unlike that in Ayissi-Etoh, had a physical component, consisting of assault, battery and general intimidation. There is ample authority for the proposition that a single incident involving assault or battery can, by itself, be sufficient to form the basis for a hostile environment claim, *Id.* at 580 (Kavanaugh Conc). In addition, in that confrontation Van Pelt explicitly threatened Ms. Yazzie’s job. And, to make matters worse, this confrontation occurred in the presence of coworkers, making it all the more humiliating. Steiner v. Showboat Operating Co. (9<sup>th</sup> Cir, 1994) 25 F.3d 1459, 1466.

Among the cases cited in the Ayissi concurrence is Turnbull v. Topeka State Hospital, (10<sup>th</sup> Cir. 2001) 255 F.3d 1238, 1243, that case consisted of a single sexual

assault. The Court held that "[b]ecause frequency is merely one factor in the analysis, an isolated incident may suffice if the conduct is severe and threatening." See Craig v. D.C., (D.C.D., 2014) 74 F. Supp. 3d 349, 371 (Close, hostile physical confrontation - finger pointing in plaintiffs face - "suggest the kind of serious and objectively "physically threatening or humiliating" conduct that supports a hostile work environment claim.")

It has been held that a single incident of "yelling" may not form the basis for a hostile work environment claim. Knight v. Mabus, (D.C.D., 2015) 134 F. Supp. 3d 348, 356. However, that case is distinguishable. There, the "yelling" consisted of a complaint regarding the plaintiff bar coding some equipment. *Id.* at 352. There is no indication there of any assault or battery accompanying that "yelling." Nor did the yelling consist of an ethnic or racial epithet and there was no threat to the employee's job.

**B. Other Acts That Must Be Considered in Assessing the "Totality of the Circumstances"**

However, here, as in Ayissi-Etoh, there is substantially more than a single incident which must be considered to support a finding of a hostile environment. Of course, in this case - as in Ayissi-Etoh, Ms. Yazzie was required to continue working with her harasser, Ms. Van Pelt.

There was also the high pressure meeting on May 21, 2018, in which Ms. Yazzie was pressured to resign, the fact that she was completely banned from coming into the

work place for several weeks until the June 2018 Board meeting..

In addition, the acts of Defendant resulted in the ostracism of Ms. Yazzie from her co-workers, both when she was still at the NOW headquarters and when she was ordered to work "in the field." Skidmore v. Precision Printing & Packaging, Inc., (5th Cir. 1999) 188 F.3d 606, 615 ( Supervisor's behavior causing others to ostracize and make fun of [her]" part of a prima facie case of hostile work environment ). This is point is not concerned with plaintiff being able to socialize with her coworkers, rather does the ostracism interfere with her ability to function in the work place (i.e., "whether it unreasonably interferes with an employee's work performance.")Vickers v. Powell, (D.C.C., 2007) 493 F.3d 186, 197 [Citing Faragher, supra 524 U.S. at 787-88, (quoting Harris, 510 U.S. at 23)].

Additionally, in assessing the totality of the circumstances, th trier of fact can consider instances of discrimination or harassment against other minorities, even if Ms. Yazzie did not personally witness them. Thus, evidence of Plaintiff's awareness discrimination against Brittany Oliver and Sparkle Barrett is relevant. Hawkins v. Anheuser-Busch, Inc., (6th Cir. 2008) 517 F.3d 321, 336 (fact finder may consider similar acts of harassment of which plaintiff becomes aware during the course of his employment even if they were directed at others or occurred outside plaintiff's presence); Hurley v. Atlantic City Police Dep't, (3rd Cir. 1999) 174 F.3d 95, 110-112(evidence of harassment directed at coworkers is relevant to an employee's own claim of a hostile work environment). Schwapp v. Town of Avon, (2d Cir. 1997) 118

F.3d 106, 111-112. (plaintiff's second-hand knowledge of racially derogatory comments or jokes can impact the work environment). The fact that Barrett and Oliver are African American and not Dine does not render the facts pertaining to them irrelevant, Schwapp, supra, 118. F.3d at 112.

There is also the matter of "tokenism," in which Van Pelt purposely sought Yazzie out as a Vice Presidential candidate because she is Native American (Dine) and then following the election, largely excluded her from any of her official responsibilities. The experience of Ms. Yazzie in that position was humiliating, as it surely was for her successor Christian Nunez, who testified to experiencing similar treatment.

In addition, there was the organization's issuing a press release which used the epithet "red skins," a term which Yazzie finds offensive. Had Van Pelt consulted her, s she was required to do, before issuing it the vile term would not have been released to the public matter.<sup>3</sup>

These incidents, along with the confrontation on January 29, 2018, must be considered together in assessing whether Ms. Yazzie has established triable issues of fact as her hostile work environment claim. Jackson v. Quanex Corporation, (6th Cir. 1999) 191 F.3d 647, 660 ("Under the 'totality of the circumstances' approach, a 'district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode.'")

---

<sup>3</sup>There is also the accusation of Yazzie stealing, which is an offensive anti-Native American slur of longstanding. Declaration of Cheryl Wapes'a-Mayes ¶ 3, P. 1.



7. **THERE ARE TRIABLE ISSUES OF DISCRIMINATORY INTENT**

To prevail in the racial discrimination claims under Section 1981 and Title VII, Ms. Yazzie must show that "the employer intentionally discriminated against the employee on the basis of race." **Ayissi-Etoh v. Fannie Mae**, supra, 712 F.3d at 576.

Here we have evidence of racial bias. During Van Pelt's January 29, 2018. Tirade against Yazzie she not only referred to the Plaintiff as "P.O.C." but she also threatened to oust her from the Vice Presidency ("You won't be here for three years!") Plaintiff's Fact 30. The first statement, "P.O.C." is, as used by Van Pelt, a racial epithet term used in a negative or hostile fashion. The second is a threat to remove Yazzie from her office, a threat which Van Pelt persisted in attempting to effectuate from May 21, 2018, until she succeeded May 5, 2019.

Arguably, Van Pelt's threat accompanied by the POC remark qualifies as a direct evidence of discriminatory intent. Id at 576, If it is not direct evidence, it is still highly probative given Van Pelt's unceasing campaign to oust Yazzie.

There is also circumstantial evidence of discriminatory intent in that Plaintiff was stripped of some of her job duties which were assigned to a non member of the protected class (Lisa Siegel) in May 2018. Plaintiff Fact 16.

There is also evidence that Ms. Yazzie was "tokenized," given the title of "Vice President" but accorded none of the responsibilities or authorities. This point is strengthened when one considers the "me too" evidence of Christian

Nunes (more below). “tokenism” - sham hiring of a member of a protected class - may not itself be an adverse action, **Velez v. QVC, Inc** (E.D. Pa, 2002) 227 F. Supp. 2d 384, 408, it may be circumstantial evidence that another, particular adverse employment action may be discriminatory (i.e., such as an employee’s eventual dismissal or discipline).

**8. THE “ME TOO” EVIDENCE OF CHRISTIAN NUNES IS RELEVANT TO SHOW DISCRIMINATORY INTENT**

This case features a novel factual circumstance in which the testimony of the current President of NOW is offered to show “other acts” as evidence of discrimination. In other words, she is a “me too” witness.

**Sprint/United Mgmt. Co. v. Mendelsohn**, (2008) 552 U.S. 379, 387-388.

(observing that district courts may not apply a per se rule excluding "me too" evidence); **Elion v. Jackson**, (D.D.C. 2008) 544 F. Supp. 2d 1, 8 (concluding that "me too" evidence was admissible because "[i]t is established that evidence of an employer's past discriminatory or retaliatory behavior toward other employees may be relevant to whether an employer discriminated or retaliated against a plaintiff").

Subsequent actions may carry less weight than prior actions - primary because of the passage of time. That does not mean that the subsequent actions are without probative value. **Ansell v. Green Acres Contr. Co.**, (3rd Cir, 2003) 347 F.3d 515, 524.

Under our facts, a reasonable finder of fact could well view the testimony provided by Nunes is highly probative given that she held the same job as Yazzie -

indeed she was her immediate successor- and she had the same supervisor. The similarity of the employment experience of Yazzie and Nunes could well lead a reasonable jury to find discriminatory intent on the part of NOW or at least contribute to such a finding. Of course, Any question of weight of such evidence is, of course, for the finder of fact. Fitzgerald v. Henderson, (2d Cir. 2001)251 F.3d 345, 365.

#### 9. THERE ARE DISCRIMINATORY ADVERSE EMPLOYMENT ACTION

In challenging Ms. Yazzie's claims of discrimination and retaliation, NOW focuses its attention on the adverse employment action of discharge from employment. However, Ms. Yazzie grounds her claims on multiple adverse employment actions. As to racially disparate treatment, See Complaint, P. 22 ¶ 69( "Plaintiff suffered a series of adverse employment actions including, but not limited to, demotion, suspension and discharge from employment.") As to retaliation, See Complaint P., 25. ¶ 85 (" As a result of the unlawful retaliation alleged herein, Plaintiff has been subjected to a series of adverse employment actions including, but not limited to, demotion, suspension and discharge from employment.")

While the standard for determining the existence of an adverse employment action occurred differ for claims of disparate treatment and retaliation, Ms. Yazzie establishes triable issues of fact as to adverse actions for both categories of claims.

For purposes of discrimination "An "adverse employment action" is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in

benefits." " **Taylor v. Small**, (D.C. Cir. 2003) 350 F.3d 1286, 1292. Being put on a "Performance Improvement Plan" and have a late performance evaluation were not adverse employment actions in the facts encountered in **Taylor**, Id at 1293.

"[A]n adverse employment action need not entail a loss of salary, grade level, or benefits if the plaintiff has "raised a genuine issue as to whether the reassignment left [the employee] with 'significantly different' -- and diminished -- supervisory and programmatic responsibilities." **Czekalski v. Peter** (D.C.Cir, 2007) 475 F.3d 360, 364.

The Board's assignment of Ms. Yazzie to a "field" position, to be supervised by the Vice President Oversight Committee qualifies as an adverse employment action. It is analogous to a "reassignment and with significantly different responsibilities." The working conditions were different and inferior - with no office, n budget, no administrative staff, no interaction with NOW Office staff and close, more stringent supervision. Given these changes in working conditions, the question of whether being required to work in the field was an adverse employment action is a question of fact. Id at 365.

The removal of Ms. Yazzie from the workplace from May 21, 2018, through June 10, 2018, presents an adverse employment action. It is not mere "workplace slight" nor is such treatment a "mere idiosyncrac[y] of personal preference" 1130 Being removed and barred from a workplace is something "from which a reasonable trier of fact could find objectively tangible harm." **Forkkio v. Powell**, (D.C. Cir, 2002) 306 F.3d 1127, 1130-1131. Here. Ms. Yazzie's being banned for 20 days from the workplace is analogous to

a “suspension.” Courts in the D.C. Circuit have held that lengthy suspensions qualify as adverse employment actions. Richardson v. Petasis, (D.C. D, 2015)160 F. Supp. 3d 88, 117-118. This is especially the case given that Ms. Yazzie’s employer was attempting to discharge her and she had no way of knowing until the June 10, 2018, Board Meeting whether or not she would still have a job.

The requirement of being forced to work under the field under the supervision of the “Vice President Oversight Committee” is an even more clear case of an adverse employment action. - it is reassignment with markedly more onerous working conditions in the form of reporting and documentation requirements, the lack of administrative support, the refusal to provide reimbursement for expenses and the isolation from her coworkers.

#### 10. YAZZIE ENGAGED IN PROTECTED ACTIVITY

“To decide whether a plaintiff has engaged in a protected activity, courts must first consider “whether the employee ‘communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination.’” Bowman v. Baltimore City Bd. of Sch. Commissioners, D. Md. 2016) 173 F. Supp. 3d 242, 248 (. If this question is answered in the affirmative, “then a court considers whether this communicated belief concerns a practice that is ‘actually unlawful under Title VII’ or that the employee ‘reasonably believes to be unlawful.’” Id.

Here we have multiple protected activities. We have complaints by her to the Board of Directors and staff regarding the assault, battery and hostility on the part of

Van Pelt on January 29, 2022. Yazzie Declaration, Exhibits A & b. We have the complaints of discrimination on her behalf by past and present staff members. Imhoff Declaration, Finally, we have her complaint to the Oversight Committee that was forwarded to the Board of Directors regarding the treatment of Brittany Oliver and Sparkle Barrett. Yazzie Declaration, Exh. F.

**11. PLAINTIFF PRESENTS TRIABLE ISSUES OF RETALIATORY ADVERSE ACTIONS**

- Adverse actions within the context of a retaliation claim encompass a "broader sweep of actions" than in the context of a discrimination claim. **Baloch v. Kempthorne**, (D.C. Cir. 2010) 550 F.3d 1191, 1198 n.4. For a claim of retaliation, "an action is adverse if it would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" **Crowley v. Vilsack**, (D.D.C. 2017) 236 F. Supp. 3d 326, 330(quoting **Burlington . & Santa Fe Ry. Co. v. White**, (2006) , 548 U.S. 53, 64, 68}, An action must also be materially adverse so as "to separate significant from trivial harms . . . such as the sporadic use of abusive language." Id.

Here we have several retaliatory adverse employment actions, such as being locked out from the office following the May 21, 2022, demand that Plaintiff resign; Being reassigned to the field position under the Vice President Oversight Committee and the removal of Plaintiff from any kind of public role for NOW following her complaint to the Board regarding the discriminatory treatment of Brittany Oliver and Sparkle Barrett, Plaintiffs' Fact s 51, 53, 54 and 55.

**12. TRIABLE ISSUES EXIST AS TO RETALIATORY CAUSATION**

There is temporal proximity of adverse employment action to several of the protected actions. Yazzie's assignment to the field position after 16 staff members submitted a petition on her behalf of the June 10, 2018, Board Meeting occurred very shortly after the submission of the petition.

In response to the November 13, 2018, complaint regarding the treatment of Brittany Oliver and Sparkle Barrett, Yazzie's email account was blocked immediately thereafter which - if not an adverse action itself - is evidence of retaliatory animus. The action of stripping Yazzie of her public responsibilities came on January 2, 2019, less than two months after the protected activity.

However, temporal proximity is not always required to establish retaliation. **Bryant v. Pepco** (D.C.D., 2010) 730 F. Supp. 2d 25, 32 The sheer persistence of Van Pelt in her drive to oust Ms. Yazzie is itself sufficient to establish a triable issue of fact as to causation for each of the adverse actions, up to and including the final termination on May 5, 2019.

**13. CONCLUSION**

Defendants' motion for summary judgment should be denied in its entirety.

Date: June 6, 2022

Respectfully Submitted,

/s/Steven L. Robinson  
Steven L. Robinson, Cal Bar No. 116146  
In Pro Hac Vice  
**LAW OFFICES OF JOSEPH L.**

**ALIOTO & ANGELA ALIOTO**

700 Montgomery Street

San Francisco, CA 94111

Telephone: (415) 434-8700

Facsimile: (415) 438-4638

srobinson@aliotolawoffice.com