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Roniger v. McCall
S.D.N.Y.,2000.

United States District Court,S.D. New
York.

George P. RONIGER, Plaintiff,

v.

H. Carl McCALL, Individually and as
Comptroller of the State of New York, and
Rosemary Scanlon, Individually and as
State Deputy Comptroller for the City of
New York, Defendants.

No. 97 Civ. 8009(RWS).

Oct. 23, 2000.

Former assistant deputy comptroller for city brought action against state comptroller and deputy comptroller for city, alleging retaliatory discharge in violation of his First Amendment and civil rights conspiracy. Defendants moved for order excluding admission of certain newspaper article exhibits. The District Court, Sweet, J., held that: (1) articles were inadmissible as cumulative; (2) articles were admissible to prove damages and to prove state comptroller's state of mind; (3) probative value of newspaper articles were outweighed by unfair prejudice; and (4) newspaper articles were inadmissible hearsay to extent that assistant sought to admit them on issue of whether state comptroller politicized office.

Motion granted in part and denied in part.

West Headnotes

[1] Evidence 157 ⇨361

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and
Publications

157k360 Books and Other
Printed Publications

157k361 k. In General. Most
Cited Cases

Federal Civil Procedure 170A ⇨2011

170A Federal Civil Procedure

170AXV Trial

170AXV(C) Reception of Evidence

170Ak2011 k. In General. Most
Cited Cases

Newspaper article which questioned whether politics caused state comptroller to fire certain employees was not admissible in former assistant deputy comptroller's suit against state comptroller alleging retaliatory discharge in violation of First Amendment based on newspaper coverage of his testimony in employee's prior suit against state comptroller, where article merely mentioned that assistant was on list of witnesses and was cumulative of other evidence about relationship between state comptroller's adverse publicity and

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his motivations for firing assistant.
U.S.C.A. Const.Amend. 1.

[2] Evidence 157 ⇌361

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k360 Books and Other Printed Publications

157k361 k. In General. Most

Cited Cases

Newspaper articles which included assistant deputy comptroller's testimony in prior suit against state comptroller, characterized that testimony as critical of state comptroller, and reported on assistant's firing was admissible to establish damages in assistant's suit against state comptroller, alleging retaliatory discharge in violation of First Amendment arising from newspaper coverage of his testimony in prior suit. U.S.C.A. Const.Amend. 1.

[3] Evidence 157 ⇌361

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k360 Books and Other Printed Publications

157k361 k. In General. Most

Cited Cases

Newspaper articles which were published before assistant deputy comptroller was discharged and described how state

comptroller's office had issued report that was critical of mayor administration's budget and how mayor and editor of newspaper reacted adversely to state comptroller's report were admissible to establish state comptroller's state of mind in assistant's suit against state comptroller alleging retaliatory discharge in violation of First Amendment based on newspaper coverage of assistant's testimony in suit against state comptroller. U.S.C.A. Const.Amend. 1.

[4] Evidence 157 ⇌146

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Probative value of newspaper articles which were published before assistant deputy comptroller was discharged and concerned discharge of certain employees was outweighed by substantial potential for prejudice in assistant's suit against state comptroller alleging retaliatory discharge in violation of First Amendment based on newspaper coverage of his testimony in employees' suit; although articles were relevant to state comptroller's state of mind when he fired assistant, they were replete with negative comments about state comptroller and prior lawsuit. U.S.C.A. Const.Amend. 1.

[5] Evidence 157 ⇌318(1)

157 Evidence

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157IX Hearsay

157k315 Statements by Persons
Other Than Parties or Witnesses

157k318 Writings

157k318(1) k. In General.

Most Cited Cases

Newspaper articles concerning lawmaker who sought to impeach state comptroller for politicizing Office of State Deputy Comptroller (OSDC) and state comptroller's criticisms of mayor's budget plan constituted inadmissible hearsay in assistant's suit against state comptroller alleging retaliatory discharge in violation of First Amendment, to extent that assistant sought to admit articles on issue of whether state comptroller politicized OSDC. U.S.C.A. Const.Amend. 1.

***408 Beranbaum Menken Ben-Asher,** New York City by John A. **Beranbaum** , of counsel, for Plaintiff.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City by Debo P. Adegbile, Robert S. Smith, of counsel, for Defendants.

OPINION

SWEET, District Judge.

Defendants H. Carl McCall ("McCall") and Rosemary Scanlon ("Scanlon") (collectively, "the Defendants") move for an order excluding the admission of certain of plaintiff George P. Roniger's ("Roniger") newspaper article exhibits, pursuant to Federal Rules of Evidence 401, 402 and 403. Roniger opposes the motion.

For the reasons set forth below, the motion will be granted in part and denied in part.

Parties, Facts and Prior Proceedings

The parties, facts, and prior proceedings in this action are set forth in greater detail in the prior opinions of this Court, familiarity with which is presumed. *See Roniger v. McCall*, 72 F.Supp.2d 433 (S.D.N.Y.1999) ("Roniger I"); *Roniger v. McCall*, 22 F.Supp.2d 156 (S.D.N.Y.1998) ("Roniger II"); *Roniger v. McCall*, 97 Civ. 8009, 2000 WL 1191078 (S.D.N.Y. Aug.22, 2000) ("Roniger III").

The claims remaining in this action are: (1) a First Amendment retaliation claim against McCall in his official capacity, pursuant to 42 U.S.C. § 1983, seeking equitable relief, and (2) a civil conspiracy claim against McCall and Scanlon individually, pursuant to 42 U.S.C. § 1985, seeking monetary damages.

From May of 1993 until approximately December 1, 1994, Roniger was employed in the Office of the State Deputy Comptroller for the City of New York ("OSDC"), a division of the Office of the State Comptroller. McCall at all relevant times was the Comptroller for the State of New York. As set forth in *Roniger I* and **409 II*, Roniger has alleged that he was terminated from his position at the OSDC as a result of his politically embarrassing

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statements in deposition testimony concerning a June 29, 1993 letter that McCall sent to Standard & Poors (the "S & P Letter"), an agency that was known to be reviewing New York City's bond rating. Roniger gave this deposition testimony on August 12, 1994, in a suit filed by certain employees in the OSDC who had been fired by McCall, entitled *Westmeyer v. McCall*, No. 93 Civ. 8226(JSM) (the "Westmeyer Lawsuit"). Roniger testified *inter alia* that the S & P Letter "took too soft a position vis-a-vis the City."

Shortly thereafter, on September 14, 1994, the Bond Buyer, a newspaper serving the New York financial community, published an article headlined "State Comptroller Downplayed Plight of N.Y.C. Budget Woes, Top Aide Says." The Bond Buyer story described Roniger's testimony in the Westmeyer Lawsuit. This story was subsequently picked up by other newspapers. According to Roniger, in the wake of the negative publicity surrounding his testimony in the Westmeyer Lawsuit, McCall and Scanlon conspired to humiliate him and to remove him from the OSDC.

The instant motion was filed on May 12, 2000 and submissions were received through August 2, 2000, at which time the matter was deemed fully submitted.

Discussion

There are six categories of articles which the Defendants seek to exclude.^{FN1}

FN1. The Defendants have omitted certain of Roniger's proposed newspaper article exhibits from this motion, but reserve their rights to challenge their admissibility in light of the proof at trial.

1. Category 1-Pl. Exh. 54

[1] Exhibit 54 is an article appearing in the Bond Buyer, headlined "McCall Denies Politics Caused Him To Dismiss N.Y. Analysts," on September 8, 1994. McCall objects to this article on the grounds that it is not relevant to Roniger's testimony in the Westmeyer Lawsuit and prejudicial because it characterizes McCall's testimony in that litigation, quotes counsel for the Westmeyer plaintiffs, and rehashes the allegations from the Westmeyer pleadings.

Roniger contends that this article is relevant as "one of the flurry of articles that appeared in the aftermath of the Westmeyer suit that raised again the question of McCall's political independence." Whether or not McCall was motivated by his own personal interests in reelection and reputation, and to obtain retribution against Roniger as a result of personal embarrassment over the publicity surrounding Roniger's testimony, is relevant to Roniger's claims. *See*

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Roniger II, 72 F.Supp.2d at 441. However, Exhibit 54, which appeared before the September 14, 1994 Bond Buyer article that allegedly set off the controversy over Roniger's testimony, does not provide a sufficient link between Roniger's testimony and McCall's motivations. With respect to Roniger's testimony, the article simply mentions that Roniger was on the list of witnesses in the Westmeyer Lawsuit. It is also cumulative of other evidence expected at trial concerning the relationship between adverse publicity concerning McCall's political independence and his motivations for firing Roniger. Therefore, it is excluded.

2. Category 2-Pl. Exhs. 36, 47 and 59

[2] Exhibits 36, 47 and 59 are newspaper articles published after Roniger was fired. The articles mention Roniger's testimony in the Westmeyer Lawsuit, characterize that testimony as critical of McCall, and report on Roniger's firing. The Defendants contend that these articles are irrelevant and, in addition, prejudicial because they characterize Roniger's testimony in the Westmeyer lawsuit and imply that he was terminated as a result of that testimony, which is an ultimate issue of fact for the jury in this case. Roniger contends that Exhibit 47 is relevant to *410 impeach McCall as to the issue of whether he made a good faith effort to reassign Roniger, and that all three articles are relevant on the issue of damages. With

respect to pain and suffering damages, he contends that he first learned of his termination through the newspaper, and that this was humiliating to him. With respect to economic damages, he contends that a reasonable jury could infer that the publicity surrounding his discharge, given that they reveal that he was the only McCall appointee discharged as of that time, harmed his chances of finding re-employment.

Insofar as the theory for the admissibility of Exhibit 47 is its impeachment value at trial, a ruling at this juncture would be premature. However, these articles are relevant to the issues of both economic and pain and suffering damages and their admission does not contravene Rule 403. Therefore, they will be admitted.

3. Category 3-Pl. Exhs. 16, 17, 19, 20 and 33

[3] These articles were published in June 1993. They describe how McCall's office had issued a report that was highly critical of then-Mayor David Dinkins' ("Dinkins") administration's budget, the nature of the relationship between McCall and Dinkins, and how Dinkins and the editor of the Amsterdam News reacted adversely to McCall's report. The Defendants contend that these exhibits are irrelevant because they were published more than a year before Roniger's

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deposition testimony and his dismissal and contain nothing more than reporters' speculations about the nature of McCall's relationship with Dinkins. The Defendants also contend that jury members may be improperly influenced by their views on Dinkins. Roniger, citing *Yarborough v. City of Warren*, 383 F.Supp. 676, 682 (E.D.Mich.1974) asserts that these articles are admissible to provide necessary historical background to the circumstances behind the signing of the S & P letter, the firing of the four senior analysts' discharge in July 1993, and the ensuing Westmeyer Lawsuit in which Roniger gave his deposition testimony.

The difficulty with these articles is less relevance than it is hearsay. Roniger's case is premised on the theory that McCall's personal stake in his reelection and in restoring his reputation motivated Roniger's firing. See *Roniger I*, 72 F.Supp.2d at 441. Roniger's criticism of the S & P Letter pertained to McCall's allegedly compromised political independence due to McCall's personal political connection with Dinkins. See *Roniger II*, 22 F.Supp.2d at 168. These articles would be inadmissible hearsay if offered for the truth of the matters reported therein, even though those matters may be relevant to Roniger's case, such as whether the report issued by McCall was critical of the Dinkins administration, the nature of McCall's political relationship with Dinkins, and how Dinkins reacted to the report. See *Yarborough*, 383 F.Supp. at 681 (admitting newspaper articles as

background because not offered to prove truth of matters reported). However, these articles are admissible as evidence relating to McCall's state of mind. As for prejudice, the possibility that jury members will be prejudiced against McCall based on their feelings about Dinkins is speculative at best and, in any event, it is expected that there will be other evidence that will reveal that McCall and Dinkins were close political allies. Therefore, these articles will be admitted.

4. *Category 4-PLExh. 22*

This exhibit is an interview with McCall published in the Bond Buyer on July 23, 1993. The Defendants contend that this article, which was published more than a year before Roniger was fired, is irrelevant. Roniger contends that it is admissible for impeachment purposes because it contradicts testimony McCall gave during his deposition in this case concerning his reasons for signing the S & P Letter. A ruling at this juncture would be premature *411 given Roniger's impeachment theory of admissibility. Both parties may renew their contentions at such time as McCall testifies at trial and Roniger seeks to admit this item into evidence.

5. *Category 5-PLExhs. 22, 23, 24, 31, 32, 34-41, 43-45, 48-52, 55-58*^{FN2}

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FN2. In addition to the exhibits listed, both parties discuss Exhibit 26, which is the September 14, 1994 Bond Buyer article which allegedly set off the public controversy over Roniger's testimony. The high probative value of that evidence seems apparent. However, that article was not submitted in connection with the instant motion nor identified in the Defendants' moving papers as a subject of its motion. Therefore, the references to this article are disregarded and no conclusion as to its admissibility is reached herein.

[4] These articles, all published in August 1993, concern the firings of the Westmeyer plaintiffs and the political aftermath of those events. The Defendants contend that these articles are irrelevant and, in addition, unduly prejudicial because they expose the jury to extensive newspaper coverage of another lawsuit against McCall. Roniger responds that they are relevant as context for the events leading to his discharge and that without these articles the jury will not be able to fully appreciate the scope of the controversy engendered by Roniger's deposition testimony.

On the one hand, there is a substantial potential for prejudice because these articles are replete with negative commentary regarding McCall in relation to the Westmeyer Lawsuit, including his

political independence or lack thereof. On the other hand, the scope of the controversy surrounding Roniger's testimony is relevant to McCall's state of mind. Based on the instant submissions, however, it cannot be said that these August 1993 articles are necessary for the jury to fully appreciate the scope of the controversy stirred up by Roniger's testimony in August 1994. The submissions do not address other evidence that would be relevant to the scope of the controversy, including evidence pertaining to the post-September 14, 1994 period. See *Roniger I*, 72 F.Supp.2d at 434 (describing evidence that September 14, 1994 Bond Buyer article set off public controversy over Roniger's testimony including subsequent newspaper stories). Moreover, the case cited by Roniger, *United States v. Romer*, 148 F.3d 359, 368 (4th Cir.1998), is not persuasive here because the court's admission into evidence of a newspaper article to provide context occurred in very different circumstances. See *id.* at 368 (article admitted to illuminate conversation in which defendants referred to and discussed article). There is also the problem of cumulative evidence presented by admitting all of these articles. Therefore, these articles are deemed inadmissible. However, Roniger has leave to renew his request for the admission of some or all of these articles and to address the aforementioned concerns at an appropriate point at trial.

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6.-*Category 6-PLExhs. 21, 25 53*^{FN3}

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FN3. Exhibit 53 is referred to erroneously by both parties as Exhibit 54.

END OF DOCUMENT

[5] These articles were published prior to Roniger's testimony in the Westmeyer Lawsuit and concern, first a Republican lawmaker who sought McCall's impeachment for politicizing the OSDC, second, McCall's criticisms of the budget plan of Dinkins' successor, Mayor Rudolph Giuliani, and third, a financial security analysis expressing surprise that S & P did not downgrade the City's credit rating in July 1993. The Defendants contend that these articles are irrelevant and unduly prejudicial. Roniger responds that they are relevant because they bear on the issue on the issue of McCall's politicized of the OSDC. States as such, this evidence runs afoul of the hearsay rule. In addition, the danger of unfair prejudice substantially outweighs their probative value. Therefore, these articles will be excluded.

***412 Conclusion**

Therefore, for the reasons set forth above, the Defendants' motion is granted in part and denied in part.

It is so ordered.

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Roniger v. McCall
S.D.N.Y., 2000.

“McCall”) and Rosemary Scanlon (“Scanlon”) (collectively, “the Defendants”) oppose the motion.

United States District Court, S.D. New
York.

George P. RONIGER, Plaintiff,

v.

H. Carl MCCALL, individually and as
Comptroller of the State of New York, and
Rosemary Scanlon, individually and as
State Deputy Comptroller for the City of
New York, Defendants.

No. 97 Civ. 8009(RWS).

Aug. 22, 2000.

Berenbaum Menken Ben-Asher & Fishel,
New York, NY, By: John A. Beranbaum ,
for Plaintiff, of counsel.
Paul, Weiss, Rifkind, Wharton & Garrison,
New York, NY, By: Debo P. Adegbile,
Robert S. Smith, Maria H. Keane, for
Defendants, of counsel.

OPINION

SWEET, J.

*1 Plaintiff George P. Roniger (“Roniger”) moves for an order excluding expert testimony and to try the causation issue of his Section 1983 claim to an advisory jury. Defendants H. Carl McCall (

For the reasons set forth below, the motion will be granted in part and denied in part.

Parties, Facts and Prior Proceedings

The parties, facts, and prior proceedings in this action are set forth in the prior opinions of this Court, familiarity with which is presumed. *See Roniger v. McCall*, 72 F.Supp.2d 433 (S.D.N.Y.1999) (“Roniger I”); *Roniger v. McCall*, 22 F.Supp.2d 156 (S.D. N.Y.1998) (“Roniger II”). Pursuant to those decisions, which granted in part and denied in part the Defendants' motions to dismiss and for partial summary judgment, the claims remaining in this action are: (1) a First Amendment retaliation claim against McCall in his official capacity, pursuant to 28 U.S.C. § 1983, seeking equitable relief, and (2) a civil conspiracy claim against McCall and Scanlon individually, pursuant to 28 U.S.C. § 1985, seeking monetary damages.

From May of 1993 until approximately December 1, 1994, Roniger was employed in the Office of the State Deputy

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Comptroller for the City of New York (“OSDC”), a division of the Office of the State Comptroller. As set forth in *Roniger I* and *II*, Roniger has alleged in this action that he was terminated from his position at the OSDC as a result of his politically embarrassing statements in deposition testimony concerning a June 29, 1993 letter that McCall, who is the Comptroller for the State of New York, sent to then-Mayor David Dinkins in connection with New York City's efforts to prevent a downgrading of its bond rating. Although the record is less than clear concerning the specifics of Roniger's discharge, it is not disputed that he was notified of his dismissal from his position on December 1, 1994 and that the “effective date” of his termination was February 10, 1995. His annual salary as of that date was \$103,477.

The Defendants retained Charles L. Sodikoff, Ph. D. (“Sodikoff”), to render an expert opinion in this case. Sodikoff has a Ph. D. in industrial/organizational psychology and has worked for more than 25 years in the field of hiring and career development consulting. Sodikoff subsequently prepared an “Assessment of Job Search Activity in the Matter of *Roniger v. H. Carl McCall*” (the “Expert Report”). The Expert Report sets forth matters concerning which the Defendants intend to call Sodikoff to testify at trial. Specifically, it contains opinions by Sodikoff concerning the length of time it should have taken Roniger to find a comparably paying job or to build a profitable consulting practice, and the

reasonableness of Roniger's job search. The Expert Report concludes that Roniger should have obtained comparable work within six to ten months of his termination from the OSDC and that he should have built a consulting practice sufficient to replace his compensation in 1994 within two years of his termination. The report also reviews the steps taken by Roniger to obtain employment subsequent to his termination and concludes that Roniger did not conduct a “fully active and proper job search.”

*2 The instant motion *in limine* was filed on April 11, 2000, and oral argument was heard on May 3, 2000, at which time the matter was deemed fully submitted.

Discussion

I. *The Motion To Exclude Expert Testimony*

Roniger does not dispute that Sodikoff is a qualified expert in the field of hiring and career development. The dispute herein turns on whether the testimony offered by Sodikoff is (a) reliable and (b) a proper subject for expert opinion evidence. Roniger seeks to exclude Sodikoff's testimony regarding when Roniger should have obtained comparable employment or build a consulting practice as unreliable under *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and *Daubert v.*

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Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Roniger seeks to exclude Sodikoff's testimony as to the reasonableness of Roniger's job search on the ground that it would not assist the jury and would invade their province of decision-making. See *Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir.1989)

A. Reliability Under *Kumho* and *Daubert*

The standard for the admissibility of expert testimony at trial is set forth in Federal Rule of Evidence 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702.

The trial judge is to act as a "gatekeeper" with respect to expert testimony to ensure that such testimony is both relevant and reliable. See *Daubert*, 509 U.S. at 589-91. This rule applies not only to scientific knowledge, but also to technical or other specialized knowledge. See *Kumho*, 526 U.S. at 141. The determination as to the relevance and reliability of such evidence is committed to the sound discretion of the trial court. See *id.* at 158.

Daubert sets forth specific factors, such as "testing, peer review, error rates, and 'acceptability' in the relevant scientific community," which the trial court may consider in determining reliability. 509 U.S. at 595. The *Daubert* test is flexible, however, and this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho*, 526 U.S. at 141. Expert testimony is reliable where it has "a traceable, analytical basis in objective fact." *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997)). "[O]pinion evidence that is connected to existing data only by the *ipse dixit* of the expert" should not be admitted. *Kumho*, 526 U.S. at 157 (citing *Joiner*, 522 U.S. at 146). It is within the trial court's discretion to determine what are reasonable criteria to be used to determine reliability in a particular case and whether the proposed testimony meets those criteria. See *Kumho*, 526 U.S. at 158 (decision to exclude expert evidence within trial court's discretion where based on "failure to satisfy either *Daubert*'s factors or any other set of reasonable reliability criteria").

B. The Expert Testimony As To When Roniger Should Have Found Comparable Work Or Established A Profitable Consulting Practice Will Be Excluded

1. Expert Testimony As To Mitigation By

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Roniger Is Relevant

*3 An employee who has been subject to discriminatory discharge is required to mitigate his damages. See *Dailey v. Societe Generale*, 108 F.3d 451, 455 (2d Cir.1997). In *Greenway v. Buffalo Hilton Hotel*, the Second Circuit explained that this duty means that the discharged employee “ ‘ must use reasonable diligence in finding other suitable employment,’ which need not be comparable to [his] previous positions.” 143 F.3d 47, 53 (2d Cir.1998) (internal citation omitted). The employer bears the evidentiary burden to show failure to mitigate by the employee. See *id.* Generally speaking, this requires the employer to show that suitable work exists in the marketplace and the discharged employee “has not made reasonable efforts to find it.” *Id.* However, under *Greenway*, which involved a case in which the discharged employee “failed to pursue employment at all,” there is an exception to the requirement that the employer establish the availability of comparable employment “if it can prove that the employee made no reasonable efforts to seek such employment.” *Id.* at 54. Under the applicable legal standard, then, the expert evidence offered by McCall is relevant with respect to the issue of whether Roniger satisfied his obligation to mitigate his damages.

2. *The Expert Evidence As To When*

Roniger Should Have Found Comparable Employment Is Not Reliable

Sodikoff states in the Expert Report that, in his opinion, Roniger should have found comparable employment “within a year, with the most likely range between 6 to 10 months” after his termination. Sodikoff further states that this opinion is based on his own experience and on statistical data. Sodikoff discusses two sources of statistical data. The first is a study conducted by Drake Beam Morin, Inc. (the “DBM Study”), a management consulting firm, of the job search experience of over 1000 senior management and executive level job seekers across the United States. According to this study, the average length of job searches by these executives before finding employment was 7.7 months in 1995. The average salary of these executives' new jobs was \$100,207 as compared with the average salary of their old jobs of \$101,014. The second source of statistical data is a survey by the National Association of Business Economists (the “NABE Survey”), which reported the median salary in 1996 of economists with over 25 years of experience as \$95,000. The NABE Survey does not report data by geographic region but states that New York is one of the four top cities in the nation with respect to salary structure.

There are several problems with the reliability of Sodikoff's opinion as to how long it should have taken Roniger to find comparable work. First, he does not

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explain what theory or method he used to arrive at this opinion. It is not necessary that Sodikoff's methodology be subject to the specific criteria set forth in *Daubert*, such as peer review or error rates. See 509 U.S. at 595. Nonetheless, however simple Sodikoff's method or theory, he must provide some explanation thereof so that it can be evaluated as to its reliability. See *Kumho*, 526 U.S. at 157 (citation omitted). Sodikoff has failed to do so. Second, the statistical data he cites is too general to render his opinion reliable. The DBM Study results as to the average length of job search concerns "senior management and executive" job seekers as a whole without distinguishing as to their field. Roniger is an economist. In order to be reliable, Sodikoff's opinion as to when Roniger should have found comparable work should be based on information that is pertinent to Roniger's field.^{FN1} See *Berk v. Bates Advertising USA, Inc.*, No. 94 Civ. 9140, 1998 WL 726030, at *3 (S.D.N.Y. Oct. 14, 1998) (admitting expert's opinion as to available employment opportunities based on information concerning executive positions in the advertising industry); *Barbour v. Medlantic Management Corp.*, 952 F.Supp. 857, 862-63 (D.D.C.1997) (admitting expert's opinion as to when plaintiff should have obtained comparable work based in part on survey of opportunities for materials management directors in hospitals).

FN1. The Defendants urge that Sodikoff is not required to provide

data regarding opportunities for "municipal finance economists." This argument is misplaced. Roniger does not contend, and this Court does not conclude, that the data must be so narrow.

*4 In addition, the DBM Study concerns the nation as a whole and does not provide data with respect to the relevant geographic region within which Roniger would be expected to find comparable work. Cf. *Birch v. FMC Corp.*, 98 Civ. 269 J (D.Wyo. Aug. 18, 1999) (unpublished opinion) (admitting expert's opinion as to employment opportunities available to plaintiff based on comparing plaintiff's credentials with database of classified ads for jobs in areas relatively near plaintiff's residence); *Barbour*, 952 F.Supp. at 862-63 (admitting expert's opinion as to when plaintiff should have found comparable work based in part on survey of available jobs in the geographic area). As for the NABE Survey, this study provides only salary data and does not provide a basis for a reliable opinion as to when Roniger should have found comparable work.

Finally, although it is permissible for Sodikoff to base his opinion on his own experience as a job counselor, see *Kumho*, 526 U.S. at 150, he must do more than aver conclusorily that his experience led to his opinion. Cf. *Berk*, 1998 WL 726030, at *3 (expert, who offered opinion as to available job opportunities based on expert's experience and plaintiff's

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credentials, supported her opinion with 151 'assignments' worked on during the relevant period concerning positions in advertising agencies compatible with plaintiff's skills and experience).

In sum, there is simply too great an "analytical gap" between the data and the opinion proffered for the opinion to be reliable. *Joiner*, 522 U.S. at 146; see also *Kumho*, 526 U.S. at 153 (evidence not reliable where "outside the range where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is 'shaky'").

3. *When Roniger Should Have Established A Consulting Practice To Replace His Compensation At OSD*

The Expert Report also includes an opinion by Sodikoff that Roniger could have built an active consulting practice to replace the compensation he was earning at OSD in 1994 "within two years of his termination, if not sooner." The report contains numerous observations by Sodikoff as to the nature of the efforts Roniger has made to build his consulting practice, and opinions by Sodikoff as to the adequacy or vigorousness of those efforts. However, Sodikoff does not identify and the Court cannot discern a basis for his opinion as to a specific time period within which Roniger should have established a consulting practice providing

compensation comparable to what he received in 1994. Therefore, Sodikoff will not be permitted to testify to that opinion.

C. *The Expert Testimony As To Roniger's Job Search Will Be Admitted In Part And Excluded In Part*

Under Rule 702, expert testimony is admissible if it is helpful to the trier of fact. See Fed.R.Evid. 702. Under Rule 704(a), opinion testimony that is otherwise admissible "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704(a). However, the Advisory Committee Notes to Rule 704(a) caution that the provisions of Rule 704(a) "do[] not lower the bar so as to admit all opinions." Fed.R.Evid. 704(a) advisory committee's note. More specifically, the Notes observe that, pursuant to Rules 701, 702, and 403, "opinions which would merely tell the jury what result to reach" are not admissible. *Id.* Consistent with these rules, an expert will not be permitted to testify where she "undertakes to tell the jury what result to reach, [since] this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury." *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir.1994) (citations and internal quotation marks omitted).

*5 It would not be proper for Sodikoff to testify as to whether Roniger's efforts to find comparable employment were "

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reasonable” because this is an ultimate question in this case which is for the jury to decide based on all the evidence and this Court’s instructions. *See Berk*, 1998 WL 726030, at *4 (expert in unlawful discharge case would not be permitted to testify as to whether plaintiff’s efforts to find employment were “reasonable”); *see also Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir.1992) (expert in excessive force case may not testify as to whether arresting officer’s conduct was “not justified under the circumstances,” not “warranted under the circumstances,” and “totally improper”); *Andrews*, 882 F.2d at 709 (expert may not testify as to whether plaintiff was “reasonable” or defendant “negligent” in tort case); *Strong v. E.I. DuPont de Nemours Co., Inc.*, 667 F.2d 682, 685-86 (8th Cir.1981) (expert may not testify as to whether product warnings rendered product unreasonably dangerous). Such testimony is not helpful to the jury and invades their province of decision-making. Therefore, Sodikoff will not be permitted to testify to conclusions contained in the Expert Report as to whether Roniger’s job search was “reasonable,” “active and proper,” “vigorous,” “serious,” and the like.

However, this does not mean that Sodikoff may not testify regarding Roniger’s job search efforts. It is proper for Sodikoff to do so to the extent that his testimony offers information that is relevant to the issue of Roniger’s mitigation and that lies outside the knowledge of a layperson. *See Duncan*, 42

F.3d at 102 n. 3. Thus, based on his own experience as a job consultant or other proper basis, Sodikoff may testify regarding matters such as: the nature and degree of efforts which typify an average or successful job search, the effect one would expect Roniger’s age to have on his search, the resources available to a person in Roniger’s position, the number of interviews one might expect to see generated based on certain search efforts, what makes for effective networking, and how Roniger’s efforts compare to what are typical-or successful-efforts. *Cf. Marx & Co., Inc. v. The Diner’s Club, Inc.*, 550 F.2d 505, 509 (2d Cir.1977) (expert testimony concerning ordinary practice in industry proper to assist jury in evaluating parties’ conduct against that standard).

II. Roniger’s Request That The Section 1983 Causation Issue Be Tried To An Advisory Jury Will Be Granted

Roniger and the Defendants agree that Roniger’s Section 1983 claim for reinstatement is an equitable claim that must be tried to the Court rather than a jury. Roniger, however, has requested that the Court try the causation issue involved in his Section 1983 claim to an advisory jury.

Federal Rule of Civil Procedure 39(c) provides in relevant part that “[i]n all actions not triable of right by a jury the court upon motion or of its own initiative

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may try any issue with an advisory jury.” The decision whether to use an advisory jury is committed to the discretion of the trial court. *See Peele v. New York City Dep't of Social Servs. Human Resources Admin.*, No. 92 Civ. 3765, 1995 WL 110085, at *5 (S.D.N.Y. March 14, 1995). Such juries have been utilized in discrimination cases. *See Peele*, 1995 WL 110085, at *5 (Title VII); *Ragin v. Harry Macklowe Real Estate Co., Inc.*, 801 F.Supp. 1213 (S.D.N.Y.1992) (Fair Housing Act), *aff'd. in part, rev'd in part on other grounds*, 6 F.3d 898 (2d Cir.1993). Responsibility for reaching a decision, including making findings of fact, remains with the court, *see Ragin v. Harry Macklowe Real Estate Co., Inc.*, 6 F.3d 898, 907 (2d Cir.1993), except that findings by the jury as to facts common to both claims are binding on the Court, *see Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 954 (2d Cir.1988) (jury findings as to common facts in case involving both legal and equitable claims preclude contrary findings by the court with respect to equitable claim) (citations omitted).

*6 An advisory jury is appropriate here for similar reasons as those cited by the Honorable Leonard Berkinow, United States Magistrate Judge, in *Peele*, 1995 WL 110085, at *5. A jury must be empaneled to hear Roniger's Section 1985 claims. Therefore, trying the Section 1983 causation issue to the jury in an advisory capacity would not undermine the efficiency of the trial or waste the jurors'

time. *See id.* Indeed, efficiency will be facilitated to the extent the parties and the Court will not be required to address issues concerning which evidence may be heard by the jury and which may not. *See id.* Finally, the facts concerning the two claims are overlapping, so that it can be expected that the jury would hear much of the evidence in any case. *See id.* Thus, Roniger's request will be granted.

Conclusion

Therefore, for the reasons set forth above, Roniger's motion to exclude expert testimony is granted in part and denied in part, and his request for an advisory jury is granted.

It is so ordered.

S.D.N.Y., 2000.

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Roniger v. McCall
S.D.N.Y.,1999.

United States District Court, S.D. New
York.

George P. RONIGER, Plaintiff,
v.

H. Carl McCALL, individually and as
Comptroller of the State of New York, and
Rosemary Scanlon, individually and as
State Deputy Comptroller for the City of
New York, Defendants.

No. 97 Civ. 8009(RWS).

Dec. 1, 1999.

Comptroller of the State of New York and
another employee of Office of the State
Comptroller moved for partial summary
judgment dismissing a deputy
comptroller's § 1985(2) conspiracy claim.
The District Court, Sweet, J., held that
disputed issues of material fact existed
concerning the extent to which
Comptroller was motivated by exclusively
personal interests when he authorized
dismissal of deputy comptroller,
precluding summary judgment in favor of
defendants on basis of intraenterprise
conspiracy doctrine.

Motion denied.

West Headnotes

OPINION

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Federal Civil Procedure 170A ⇌2497.1

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2497 Employees and
Employment Discrimination, Actions
Involving

170Ak2497.1 k. In

General. Most Cited Cases

Disputed issues of material fact existed
concerning the extent to which
Comptroller of the State of New York was
motivated by exclusively personal interests
when he authorized dismissal of deputy
comptroller, precluding summary
judgment in favor of Comptroller and
another employee of Office of the State
Comptroller on basis of intraenterprise
conspiracy doctrine on deputy's § 1985(2)
conspiracy claim. Fed.Rules
Civ.Proc.Rule 56(b), 28 U.S.C.A.; 42
U.S.C.A. § 1985(2).

*434 **Beranbaum** Menken Ben-Asher &
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defendants.

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SWEET, District Judge.

Defendants H. Carl McCall ("McCall"), Comptroller of the State of New York, and Rosemary Scanlon ("Scanlon") (collectively the "Defendants") have moved, pursuant to Rule 56(b), Fed.R.Civ.P., for partial summary judgment dismissing the conspiracy claim brought by plaintiff George P. Roniger ("Roniger") under 42 U.S.C. § 1985(2). For the reasons set forth below, the motion is denied.

Facts and Prior Proceedings

The facts, parties, and prior proceedings in this case have been set forth more fully in a prior opinion of the Court, familiarity with which is assumed. See *Roniger v. McCall*, 22 F.Supp.2d 156 (S.D.N.Y.1998)(*Roniger I*).

On October 29, 1997, Roniger filed his original complaint in this action, asserting causes of action under 42 U.S.C. § 1983 and § 1985(2). Roniger's First Amended Complaint (the "Complaint") was filed on May 8, 1998.

From May of 1993 until approximately December 1, 1994, Roniger was employed in the Office of the State Deputy Comptroller for the City of New York ("OSDC")—a division of the Office of the State Comptroller ("OSC"). As was set forth in more detail in *Roniger I*, Roniger has alleged in this action that he was

terminated from his position at the OSDC as a result of his politically embarrassing statements in deposition testimony concerning a June 29, 1993 letter (the "June 1993 letter") that Comptroller McCall sent to then-Mayor Dinkins in connection with the City's efforts to prevent a downgrading of its bond rating. In that letter, McCall made a variety of representations to Dinkins concerning the state of the City's budget. The City ultimately utilized the Comptroller's positive statements in that letter in remonstrating for the maintenance of its "A-" bond rating by Standard & Poors.

The lawsuit in which Roniger had been called to testify involved accusations by former OSDC personnel that they had been improperly fired because of McCall's alleged politicization of the OSC, and because of their pointed criticism of the City's budget in a draft OSC report. Several fired employees filed suit against McCall in federal court for wrongful termination and retaliation, claiming that they had been discharged for truthfully assessing the fiscal position of New York City at a time when McCall had political reasons to downplay the City's financial difficulties.*435 See *Westmeyer v. McCall*, No. 93 Civ. 8226(JSM) (hereinafter the "Westmeyer Lawsuit"); see also *Fry v. McCall*, No. 95 Civ.1915(JFK). The plaintiffs in the Westmeyer Lawsuit claimed that they had been discharged for political reasons, and that McCall had sought to influence their reports in order to help Dinkins' reelection

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chances.

On August 12, 1994, approximately three months before McCall faced reelection for Comptroller, the plaintiffs in the Westmeyer Lawsuit deposed Roniger. Roniger was questioned at length about the June 1993 Letter, and it was during this questioning that his only criticism of McCall was voiced. As the deposition transcript reveals, Roniger expressed the view that the Comptroller's June 1993 letter was too soft on the City:

Q: Do you know whether the portions of the letter that you saw conformed to the statements contained in the various reports sent out by the Comptroller's office concerning the City financial plan?

A: As I recall from a distance, it was my view that the letter took too soft a position vis-a-vis the City.

Q: In what respect?

A: I can't answer that question because I don't remember the language. It's been too long.

Q: I don't want to put words in your mouth. You are here to testify, not me. But do you mean it was not critical enough of the City's financial plan?

A: In my view, the City's position was somewhat more difficult than what I recall the letter suggested.

Shortly thereafter, on September 14, 1994, the *Bond Buyer*, a newspaper serving the New York financial community, published an article headlined, "State Comptroller Downplayed Plight of N.Y.C.

Budget Woes, Top Aide Says."The *Bond Buyer* story stated, in relevant part:

[G]eorge Roniger ... recently said he had misgivings about the letter's content, and specifically, its description of the city's fiscal situation....

[S]everal fiscal analysts interviewed for this article said the letter is unusual because it soft-pedals many of the city's fiscal woes, and because it was written with the assistance of city officials. Parts of the letter even run counter to the tone and substance of reports produced by McCall's New York City Budget Office....

In his testimony, McCall said Roniger was responsible for "validity of any document that we produced that he was involved in."

The *Bond Buyer* story was picked up by other newspapers, and the New York Post severely criticized both the substance of the June 1993 letter and the process by which the letter was allegedly produced-the submission of a draft letter by the City. The June 1993 Letter became the source of criticism of McCall in his successful 1994 campaign for Comptroller.

According to Roniger, in the wake of the negative publicity surrounding his testimony in the Westmeyer Lawsuit, McCall and Scanlon-who was then head of the OSDC-conspired to humiliate Roniger and to remove him from the Comptroller's Office. Though the record appears somewhat unclear concerning the specifics of Roniger's discharge, it is not disputed

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that he was notified of his dismissal from his position on December 1, 1994. The “effective date” of his termination was February 10, 1995. Both Scanlon and McCall were employees of the OSC at the time Roniger was terminated, though Scanlon has since left her position at that office.

In *Roniger I*, it was held that Roniger's § 1983 claims against both McCall and Scanlon in their individual capacities would be dismissed under the doctrine of “qualified immunity,” given that, as a policymaker, Roniger's asserted First Amendment right was not clearly established in 1994. 22 F.Supp.2d at 166. *Roniger I* also held, *436 however, that Roniger had stated a claim against McCall under § 1983 in his official capacity, though the official-capacity claim against Scanlon was dismissed since she had ceased to be employed by the OSC in 1997. *See id.* at 161.

More importantly for the purposes of the instant motion, *Roniger I* left open the question of whether Roniger could maintain his § 1985(2) claim against McCall and Scanlon, given that both were employed by OSC at the time Roniger suffered an adverse employment action. *See id.* at 169.

The Defendants filed their motion for partial summary judgment on June 21, 1999. Oral argument was heard on September 15, at which time the motion was deemed fully submitted.

Discussion

I. Rule 56(b)

Under Rule 56(b), Fed.R.Civ.P., a “party against whom a claim, counterclaim, or cross-claim is asserted ... may, at any time, move ... for a summary judgment in the party's favor as to all or any part thereof.” Summary judgment is appropriate, however, only where the evidence is such that a reasonable jury could not return a verdict in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under Rule 56(c), Fed.R.Civ.P., it shall be rendered “forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

As the Second Circuit has explained:

“As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party.” However, where the nonmoving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim.

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Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir.1991) (quoting *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir.1988)) (internal citations omitted).

II. Summary Judgment Shall Not Be Granted In Favor of Defendants Concerning Roniger's § 1985(2) Claim

At the outset, it is important to emphasize the discrete nature of the matter under consideration in connection with Defendants' present motion. Roniger's remaining § 1983 claim against McCall in his official capacity is not at issue. The only matter presently before the Court is Roniger's § 1985 claim. Thus, while the parties have submitted a significant amount of material that would appear to refer to the vitality of Roniger's underlying § 1983 claims, it is the question of conspiracy that is addressed herein.

42 U.S.C. § 1985(2) provides in pertinent part:

[I]f two or more persons in any State or territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified ... the party so injured or deprived may have an action for the recovery of

damages, occasioned by such injury or deprivation against any one or more of the conspirators.

As was discussed in detail in *Roniger I*, the Defendants contend that Roniger's claim under this section must be dismissed pursuant to the "intraenterprise" or "intracorporate" conspiracy doctrine, as the conduct complained of was really that of a single entity—the OSC.

*437 As was stated by the court in *Johnson v. Nyack Hospital*, 954 F.Supp. 717 (S.D.N.Y.1997):

[t]he intraenterprise conspiracy doctrine is drawn from Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations and conspiracies in restraint of trade. The evil to which that statute is directed is concerted decisions of two or more business entities to take action "that, in a competitive world, each would take separately." In consequence, the statutory requirement of a plurality of actors is not satisfied by joint action of wholly owned subsidiaries of a single entity, unincorporated divisions of a company, or employees of a single entity acting within the scope of their employment.

Id. at 722 (quoting *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir.1984)). Though this doctrine had its genesis in antitrust law, and in lawsuits concerning anticompetitive conspiracies between and among corporate actors, it has since been

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imported into § 1985 jurisprudence. See *Herrmann v. Moore*, 576 F.2d 453, 458 (2d Cir.1978) (holding that plaintiff could not maintain § 1985(2) claim, despite the fact that one of the reasons for his discharge was that he had attended and testified in court, because “[e]very one of the defendants who was involved in the so-called conspiracy was either a trustee or faculty member of the Brooklyn Law School which is admittedly an educational corporation and was acting in that capacity in connection with the discharge.”); *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 71 (2d Cir.1976) (finding that plaintiff’s § 1985(3) claim must be dismissed, given that “conspiracy” alleged involved actions by individual defendants in corporate capacities); *Gatling v. The Fashion Ass’n*, No. 98 Civ. 2251(LMM), 1999 WL 637232, at *2-3 (S.D.N.Y. Aug.20, 1999) (finding plaintiff’s proposed § 1985 claim to be futile based on intracorporate conspiracy doctrine). The doctrine has been extended to apply to public entities, and to alleged conspiracies involving public employees. See *Rini v. Zwirn*, 886 F.Supp. 270, 292 (E.D.N.Y.1995) (collecting cases); see also *Allen v. City of Chicago*, 828 F.Supp. 543, 564 (N.D.Ill.1993) (holding, in context of § 1985(3) suit against City of Chicago and various officials, that “[w]hile we believe that plaintiffs have alleged facts indicating that these individuals came to a meeting of the minds concerning unconstitutional conduct, we agree with defendants that the ‘intra-corporate conspiracy’ theory bars this claim”).

The Defendants claim, as they did in connection with *Roniger I*, that Roniger’s § 1985 claim cannot lie because, for the purposes of § 1985, both McCall and Scanlon were employees of OSC and therefore one-in-the-same. Just as it takes two to tango, they press, it takes at least two distinct individuals or entities to conspire, and given the context in which Roniger was discharged the intraenterprise conspiracy doctrine does not allow one to consider McCall and Scanlon separately.

As in *Roniger I*, Roniger seizes on the so-called “personal interest” exception to the intraenterprise conspiracy doctrine to ward off dismissal. See *Bond v. Board of Education*, No. 97 CV 1337, 1999 WL 151702, at *2 (E.D.N.Y. Mar.17, 1999); *Quinn v. Nassau Cty. Police Dep’t*, 53 F.Supp.2d 347, 360 (E.D.N.Y.1999); *Geiger v. E.I. DuPont Nemours & Co.*, No. 96 Civ. 2757, 1997 WL 83291, at *10 (S.D.N.Y. Feb.14, 1997); *Rini*, 886 F.Supp. at 293; see also *See Perkins v. Gregg County*, No. 6:94 CV 328, 1995 WL 836051, at *6 (E.D.Tex. Dec.6, 1995) (finding that intracorporate conspiracy doctrine does not apply, given plaintiff’s pleadings in action against County, its commissioners and other defendants, where Gregg County Commissioner was alleged to have been motivated to retaliate against plaintiff because of plaintiff’s cooperation with federal investigators and implication of Commissioner in criminal activity); *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1127 (10th Cir.1994) (noting, in case where former Rocky *438

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Flats worker sued employer and former coworkers for engaging in conspiracy to deter her from testifying and to retaliate for her testimony, that personal interest exception would apply where whistleblower plaintiff implicated defendants in criminal activity and statements allegedly made by defendants indicated that "they feared plaintiffs' testimony would lead to the plant's closing and the loss of defendants' jobs"). According to Roniger, his discharge was motivated by personal reasons, not reasons connected to OSC official business. McCall's interest in being reelected Comptroller, in downplaying his allegedly compromised political independence, in vindicating his reputation, and in punishing Roniger for his testimony are asserted to be personal interests distinct from the interests of either Scanlon or the "corporate" objectives of the Comptroller's Office. According to Roniger, the OSC was intended to be non-partisan, and therefore any politically-motivated termination would reflect distinctly personal interests belonging to McCall alone.

By contrast, according to Defendants, even if Roniger's discharge was attributable to the fallout surrounding Roniger's testimony,^{FN1} McCall simply had a personal stake in keeping his job, and in appearing in a favorable light-the same "interest" every employee of every entity has. Moreover, to the extent that any of the evidence submitted by Roniger could allow one to conclude that McCall approved of his discharge because of

McCall's personal interest in reelection, Defendants suggest that the intraenterprise conspiracy doctrine could never apply to elected officials if Roniger's position were correct-as all officials facing reelection make decisions, in some way or another, to satisfy the voting public and to increase their chances of reelection.

FN1. It is worth noting that the Defendants do not concede this point, and have submitted a significant amount of evidence from which it could be concluded that Roniger's situation at OSDC had become precarious well before he was ever deposed-as the result of deterioration of the working relationship between him and Scanlon. Indeed, "vent" notes dutifully recorded by Roniger detail his growing dissatisfaction with Scanlon's managerial tactics and travails, and with the marginalization of his own role at OSDC, many months before he testified in the Westmeyer Lawsuit.

In *Roniger I*, resolution of this issue was put off to another day, as it was "not clear that Roniger could prove no set of facts supporting the notion that McCall acted upon some personal motive or in furtherance of a personal-maybe even economic-interest outside of the objectives of the Comptroller's Office in terminating Roniger." 22 F.Supp.2d at 169.

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Based on the record presently before the Court, disputed issues of material fact exist concerning the extent to which McCall was motivated by exclusively personal interests when he authorized Roniger's dismissal. While Roniger has not supplied evidence concerning any independent economic interest that McCall might have had in terminating Roniger, the record contains evidence from which a reasonable jury might conclude that Roniger was terminated based on personal interests unconnected with the official interests of the OSC.

A review of the decisions applying the intracorporate conspiracy doctrine reveals a degree of uncertainty in the law. Some courts have appeared to apply the doctrine in strict fashion, whenever the defendants' activities were undertaken within the scope of their official duties. Other courts have either sought to parse the true scope of a defendant's official duties, or determined that a defendant's acts were undertaken for essentially personal reasons—such that the acts about which a plaintiff complains should not be considered merely the acts of a corporate entity acting through its agents or officers. A few other courts have, like this Court, forestalled a decision about the applicability of the doctrine. See *439 *Northen v. City of Chicago*, No. 93 C 7013, 1999 WL 342441, at *3 (N.D.Ill. May 17, 1999) (denying defendants' motion to dismiss premised upon intracorporate conspiracy doctrine, as plaintiff had alleged that he was falsely arrested in retaliation for criticizing

Chicago Police Department; noting that “based on [plaintiff's] allegations, this court cannot determine whether the officers were pursuing lawful police business”); *Yeadon v. New York City Transit Auth.*, 719 F.Supp. 204, 211-12 (S.D.N.Y.1989) (holding that plaintiffs' § 1985 and § 1986 claims could not be dismissed upon 12(b)(6) motion, as they had adequately alleged “independent, personal conspiratorial purposes.”). Whether the applicability of the intracorporate conspiracy doctrine is a question of fact or of law is an issue that continues to divide the circuits, and one that also does not appear to have been conclusively resolved within this Circuit. See *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 126 (2d Cir.1981); *Geiger*, 1997 WL 83291, at *10 n. 3; *Martin Process Co. v. Lee Co.*, No. 81 Civ. 3775(HEW), 1983 WL 1907, at *5 (S.D.N.Y. Sept.14, 1983); see also *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F.Supp. 1217, 1231 (D.N.J.1986) (discussing trial court's instructions to jury concerning intracorporate conspiracy doctrine, including instruction that a conspiracy may properly be found where alleged conspirator had “private economic motives”).

In *Herrmann v. Moore*, the Second Circuit applied the “familiar doctrine” that “there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within

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the scope of his employment.” 576 F.2d at 459. In pressing his claims, Roniger asserts that, to apply the intraenterprise conspiracy doctrine whenever a particular set of defendants acted within the scope of their official duties would be to graft an “ill-advised” exception upon the “personal stake” exception that already exists to the doctrine. While this assertion mischaracterizes the specifics of Defendants' position, there is some truth to Roniger's general position that whether or not a particular individual was operating in the scope of his employment is not the only determinative question to be raised when considering the application of the intraenterprise conspiracy doctrine. After all, a wide range of conspiracies may result in adverse employment actions—demotions, terminations, pay reductions, and the like—that are properly within the power of a set of defendants to take. Moreover, if the scope of a Defendant's employment were the only relevant criterion, it is doubtful that the courts would have ever fashioned the so-called “personal interest” exception to the doctrine.^{FN2}

FN2. Of course, it might be observed that application of such an “exception” is merely another way of finding that the employee or officer of a corporate entity was not truly operating in the “scope” of his or her employment, but rather went beyond the scope of his or her employment by making decisions based on exclusively personal

interests.

By the same token, however, it should be observed that a promiscuous use of the “personal interest” exception to the doctrine would eviscerate the doctrine as a whole. In *Johnson v. Nyack*, the court responded as follows to a plaintiff's claim that personal racial bias constitutes a personal interest sufficient to block application of the doctrine:

If personal racial bias were sufficient to defeat the intraenterprise conspiracy doctrine, the exception would swallow the rule, and Girard and Herrmann would be meaningless. Accordingly, this Court holds that personal bias is not the sort of individual interest that takes a defendant out of the intraenterprise conspiracy doctrine where, as here, the action complained of arguably served a legitimate interest of Nyack Hospital.

954 F.Supp. at 723; see *Bond*, 1999 WL 151702, at *2 (“Although the complaint includes an allegation that Rodriguez-Torres wanted to ‘get rid of’ plaintiff, personal bias does not constitute personal interest *440 and is not sufficient to defeat the intracorporate conspiracy doctrine.”). In the context of § 1985(3) claims based on racial or other discrimination, other courts have observed that the necessity of demonstrating discriminatory animus would render the doctrine meaningless unless the personal stake exception is applied carefully. See *Hartman v. Board of Trustees*, 4 F.3d 465, 470 (7th Cir.1993); *Markham v. White*, No

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95 C 2065, 1995 WL 669643, at *5 (N.D.Ill. Nov.8, 1995). By definition, for example, racial discrimination or other types of unconstitutional activity are seldom within a conspiracy defendant's job description.^{FN3} Similarly, an officer or agent's personal financial interests in a matter, distinct from the financial interests of the corporate entity, may constitute a sufficient personal stake in a matter to merit suspension of the doctrine. To some degree or another, however, all individuals have a financial stake in the positions they occupy or the sinecures they hope to obtain. It is for this reason, perhaps, that courts have at times held that an employee must have been motivated "solely" by personal bias or exclusively personal interests in order for the personal interest exception to apply. *See Hartman*, 4 F.3d at 470.

FN3. Indeed, many of the cases in which the intraenterprise conspiracy doctrine has been found *not* to apply are cases involving claims of racial or other invidious discrimination. *See Quinn*, 53 F.Supp.2d at 360 (finding that police officer who abused plaintiff officer based on his sexual orientation pursued "personal interests wholly separate and apart from the entity," and that "personal interest" exception to doctrine therefore applied); *McCraven v. City of Chicago*, 18 F.Supp.2d 877, 884 (N.D.Ill.1998) (holding that

police department's race-based treatment of plaintiff was "sufficient to take this case outside the intracorporate immunity doctrine"); *Salto v. Mercado*, No. 96 C 7168, 1997 WL 222874, at *2 (N.D.Ill. Apr.24, 1997) ("Here, Salto alleges that defendants conspired to physically abuse and falsely arrest him in retaliation for complaining of police misconduct and for filing a civil lawsuit. These allegations, if true ... would demonstrate that the defendants were motivated solely by personal bias.").

In his submissions, Roniger asserts that, because a New York State agency such as the OSC is proscribed from engaging in partisan politics, and because the State Comptroller is "obliged by the State Constitution to function as [an] independent auditing official for the affairs of the State," any interests McCall might have had in "protecting his political image and settling a political score" were not only distinct from, but inimical to, the business of the Comptroller's office. However, this begs the very question presented, and Roniger's efforts to resolve a complex matter by way of mere definition are unhelpful-given that the Comptroller, however independent and "nonpartisan," occupies an elected position, and given that even non-elected officials and non-partisan governmental entities can reasonably be expected to react to public criticism based on "corporate" interests.

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One might just as easily say that the interests of a law school's trustees or faculty members are in running the law school and teaching, not in punishing a fellow faculty member for attending and testifying in court, *but see Herrmann*, 576 F.2d at 458, that the interests of employees of the Department of Children and Family Services (DCFS) are properly in protecting the welfare of children, but not in retaliating against a DCFS caseworker for retaining a lawyer and filing a federal lawsuit, *but see Wright v. Illinois Dep't of Children & Family Services*, 40 F.3d 1492, 1508-09 (7th Cir.1994) (holding that conspiracy alleged "had a rather limited object-stifling [plaintiff's] efforts to air her personal and professional grievances," and finding that doctrine therefore applied), or that the interests of municipal employees do not lie in conspiring to eliminate other employees' positions based on their political affiliation, but rather in doing their assigned tasks with singleminded determination. *But see Rini*, 886 F.Supp. at 291 ("Here it is alleged that the Municipal defendants conspired to develop and approve a budget reduction plan which eliminated plaintiffs' positions [because they were registered Republicans]. Regardless *441 of the motive or intent supporting the legislation, these are acts within the scope of their official duties. Therefore, the § 1985 claims against the Municipal defendants in their individual capacities must be dismissed, as a matter of law, as the allegation that their acts in furtherance of the conspiracy were solely within the scope of their duties as officials

or employees of the Town."). Thorny questions about the application of the intraenterprise conspiracy doctrine are not so easily dispatched.

Nevertheless, there is truth to Roniger's observation that McCall may, on certain occasions, act as Comptroller McCall, and on other occasions act as either private citizen McCall or candidate McCall. The Comptroller's personal interests in his reelection and in his reputation, for example, may be distinct from his official interests in managing OSDC's personnel, defending the institutional integrity of the OSC, or even in retaliating for public criticism of that Office. In practice, it may be rather difficult to determine whether an elected official was acting as an official or as a candidate, pursuant to personal or public interests. However, this does not mean that the inquiry should be abandoned, and the intracorporate conspiracy doctrine applied automatically.

Given the record before the Court, it cannot be said that no material issues of fact exist as to whether the Comptroller's decision to fire Roniger was motivated solely by personal interests distinct from those of the OSC. To the extent that Roniger has contended that McCall had a distinctly personal interest in firing Roniger because of the "damage done to his reputation as a trustworthy person," the lion's share of evidence Roniger has offered in support of this proposition concerns alleged discrepancies in deposition testimony that would only have

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become apparent well after the decision to terminate Roniger had been made. Furthermore, much of the evidence submitted would be consistent with a determination that McCall was not motivated by personal interests, but rather by the interests of the OSC itself. Nevertheless, the record contains enough evidence concerning the political fallout following Roniger's deposition testimony, the timing of Roniger's firing, and McCall's handling of Roniger's discharge from which it could be inferred that Roniger was ultimately fired because of McCall's own personal interests in his reelection and reputation, and to obtain retribution against Roniger as a result of personal embarrassment over the publicity surrounding Roniger's testimony. Such disputed factual issues do not lend themselves to easy resolution by a court upon a motion for summary judgment, but rather are best left to a jury.

Conclusion

For the reasons stated above, the Defendants' motion for partial summary judgment shall be denied.

It is so ordered.

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