# Ballance v. Energy Transp. Corp.

United States District Court for the Southern District of New York

October 17, 2001, Decided ; October 18, 2001, Filed

00 Civ. 9180 (LMM)

**Reporter**
2001 U.S. Dist. LEXIS 16763 *; 87 Fair Empl. Prac. Cas. (BNA) 1199; 2002 AMC 198

PATRICIA BALLANCE, Plaintiff, - against - ENERGY TRANSPORTATION CORPORATION, ENERGY TRANSPORTATION GROUP, INC., PRONAV SHIP MANAGEMENT, INC., PATRIOT I SHIPPING, INC., WILMINGTON TRUST CO., and JOHN DOE CORPORATIONS A-Z, Defendants.

**Disposition:** Jones Act claim against all defendants except ETC and ProNav was dismissed. Claim of unseaworthiness was dismissed in its entirety. Summary judgment and 12(b)(6) dismissal for maintenance and cure were denied. Title VII claim was dismissed in its entirety. NYHRL claim was dismissed in its entirety. Claims for punitive damages were dismissed.

## Core Terms

aboard, sexual harassment, vessel, harassment, allegations, discriminatory, maintenance and cure, continuing violation, plaintiff's claim, emotional, summary judgment, sexual, punitive damages, physical impact, physical injury, physical harm, unseaworthiness, Defendants', incidents, distress, unnamed, ship, hostile work environment, alleged incident, claim for relief, material fact, crew member, shipowner, entirety, courts

## Case Summary

**Procedural Posture**
Plaintiff former seaman sued defendants, employers, vessel owners, and a parent company, alleging that her co-workers sexually harassed her on two vessels. The seaman alleged violations of (1) the Jones Act, (2) maritime law, (3) Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, and *(4)* the New York Human Rights Law (NYHRL). Defendants moved to dismiss or, alternatively, for summary judgment.

**Overview**
The court dismissed the Jones Act claims against the vessel owners and the parent company because they were never the seaman's employer. The Jones Act claims against the employers were not dismissed, because the seaman alleged a cognizable emotional injury and there was a question of fact as to whether the seaman feared an immediate risk of physical harm by the alleged sexual harassment. The unseaworthiness claim was dismissed against all defendants because the alleged assaults were not savage and vicious. The maintenance and cure claim against the employers was not dismissed, because there was a question of fact as to whether the seaman actually suffered injuries. The seaman's Title VII claim was dismissed because (1) she failed to name one employer in the Equal Employment Opportunity Commission charge, (2) her claim regarding the first vessel was time-barred and the continuing violation exception did not apply, and (3) the incident aboard the second vessel was one isolated incident. The NYHRL claim was dismissed because the acts occurred on vessels located outside New York and the seaman was not a New York resident.

**Outcome**
Defendants' motion to dismiss or for summary judgment was granted as to the Jones Act claim against the non-employers, the unseaworthiness claim, the Title VII claim, the NYHRL claim, and the punitive damages claims. Defendants' motion was denied as to the Jones Act claim against the employers and the maintenance and cure claim.

## LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

**HN1** **Motions to Dismiss, Failure to State Claim**

Under Fed. R. Civ. P. 12(b)(6), a complaint will be dismissed if there is a failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The court must read the complaint generously accepting the truth of and drawing all reasonable inferences from well-pleaded factual allegations. A court should only dismiss a suit under Rule 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

**HN2** **Summary Judgment, Supporting Materials**

Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Admiralty & Maritime Law > ... > Jones Act > Procedural Matters > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

**HN3** **Jones Act, Procedural Matters**

Once the moving party establishes a prima facie case demonstrating the absence of a genuine issue of material fact, the nonmoving party has the burden of presenting specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation. If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > Course of Employment

Business & Corporate Compliance > ... > Jones Act > Workers' Compensation & SSDI > Jones Act

Admiralty & Maritime Law > ... > Maritime Tort Actions > Negligence > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > General Overview

**HN4** **Jones Act, Course of Employment**

See 42 U.S.C.S. § 688.

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

**HN5** **Maritime Workers' Claims, Jones Act**

An employer-employee relationship is essential to recovery under the Jones Act. Only one person, firm, or corporation can be sued as employer under the Jones Act.

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > Mariner & Seaman Status

Labor & Employment Law > Employment Relationships > At Will Employment > Definition of Employers

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > General Overview

*HN6*[] **Jones Act, Mariner & Seaman Status**

In determining who employed the plaintiff in order to analyze a Jones Act claim, courts may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer. According to the Second Circuit, one of the most important factors to consider is the asserted employer's right of control over the employee. Once the employer is identified, the plaintiff is justified to go the jury if the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Governments > Federal Government > Employees & Officials

Torts > ... > Rail Transportation > Theories of Liability > Federal Employers' Liability Act

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > General Overview

Governments > Federal Government > Claims By & Against

*HN7*[] **Admiralty & Maritime Law, Maritime Workers' Claims**

Because the Jones Act incorporates the Federal Employee Liability Act (FELA) by reference, courts may rely on FELA jurisprudence in analyzing claims under the Jones Act.

Governments > Federal Government > Employees & Officials

Torts > ... > Rail Transportation > Theories of Liability > Federal Employers' Liability Act

Governments > Federal Government > Claims By & Against

Torts > ... > Types of Negligence Actions > Negligent Infliction of Emotional Distress > General Overview

Torts > Transportation Torts > Watercraft > General Overview

*HN8*[] **Federal Government, Employees & Officials**

Claims for negligent infliction of emotional distress are cognizable under the Federal Employee Liability Act. However, the class of plaintiffs who can recover for emotional distress is limited to those falling within a "zone of danger" of the harm. According to the United States Supreme Court, the "zone of danger" test limits recovery to those plaintiffs (1) who sustain a physical impact as a result of a defendant's negligent conduct, or (2) who are placed in immediate risk of physical harm by that conduct. Thus, where there is no physical injury, a plaintiff can still recover for emotional harm if she meets the second prong of that test. Whether a plaintiff sustained a "physical impact," the first prong of the test, turns not on whether she was physically touched, but rather, whether she was physically injured by the defendant.

Governments > Federal Government > Employees & Officials

Labor & Employment Law > ... > Harassment > Sexual Harassment > General Overview

Torts > ... > Rail Transportation > Theories of Liability > Federal Employers' Liability Act

Torts > Transportation Torts > Watercraft > General Overview

*HN9*[] **Federal Government, Employees & Officials**

Under the Federal Employee Liability Act, even physical manifestations of sexual harassment are not enough to satisfy the physical impact test. Thus, if there was no physical injury, the plaintiff may only recover if she was placed in immediate risk of physical harm. The risk of physical harm to plaintiff must be, at the very least, more than minimal.

Governments > Federal Government > Employees & Officials

Torts > ... > Rail Transportation > Theories of Liability > Federal Employers' Liability Act

Torts > Transportation Torts > Watercraft > General Overview

**HN10** **Federal Government, Employees & Officials**

Under the Federal Employee Liability Act, a plaintiff is permitted to recover for emotional injury alone if she is within the "zone of danger."

Admiralty & Maritime Law > Maritime Workers' Claims > Unseaworthiness > Duty to Provide Seaworthy Vessel

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Admiralty & Maritime Law > ... > Maritime Tort Actions > Negligence > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > Unseaworthiness > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Maintenance & Safety

**HN11** **Unseaworthiness, Duty to Provide Seaworthy Vessel**

It is well-established that a shipowner has an absolute nondelegable duty to ensure that its vessel is seaworthy, which includes the obligation to provide a ship with seamen of equal in disposition and seamanship to the ordinary men in the calling. A seaman who is injured aboard a ship may only recover from its owner for breach of this seaworthy warranty if his injuries were sustained as a result of a "savage and vicious" attack by a fellow seaman. The issue will not reach a jury unless the assault involved a weapon or the plaintiff can demonstrate the assailant's exceptionally quarrelsome nature, his habitual drunkenness, his severe personality disorder or other similar factors. A claim involving an attack that does not satisfy the "savage and vicious" standard will be dismissed before reaching a jury.

Admiralty & Maritime Law > ... > Maintenance & Cure > Damages > Availability of Benefits

Admiralty & Maritime Law > General Overview

Admiralty & Maritime Law > Maritime Personal Injuries > Maritime Tort Actions > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure > General Overview

Admiralty & Maritime Law > Maritime Workers' Claims > Maintenance & Cure > Covered Employees

**HN12** **Damages, Availability of Benefits**

Maintenance and cure are implied provisions in contracts between seamen and shipowners. The doctrine of maintenance requires a shipowner to provide an injured or ill seaman with food and lodging during the seaman's service on the ship while the doctrine of cure obligates the shipowner to provide necessary medical care and attention. A seaman is entitled to "maximum medical cure" for her injury aboard a vessel which is reached when the seaman recovers from the injury, the condition permanently stabilizes or cannot be improved further.

Labor & Employment Law > Discrimination > Actionable Discrimination

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

**HN13** **Discrimination, Actionable Discrimination**

Under *42 U.S.C.S. § 2000e-5(f)(1)*, a plaintiff must file a charge against a party with the Equal Employment Opportunity Commission (EEOC) or an authorized state agency before she can sue that party in federal court under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* Thus, as a general matter, a plaintiff cannot sustain a Title VII claim if she failed to bring a charge against that same party with the EEOC. However, the United States Court of Appeals for the Second Circuit recognizes a notable exception to that general rule; that is, a Title VII claim may proceed against a party not charged, if the plaintiff brought an EEOC charge against some party and there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge.

Labor & Employment
Law > Discrimination > Actionable Discrimination

**HN14** **Discrimination, Actionable Discrimination**

In an action under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, the United States Court of Appeals for the Second Circuit considers the following four factors in considering whether there was an "identity of interest" present: (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the Equal Employment Opportunity Commission (EEOC) complaint; (2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

**HN15** **Discrimination, Title VII Discrimination**

Under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, it is an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. *42 U.S.C.S. § 2000e-2(a)(1)*.

Labor & Employment
Law > ... > Harassment > Sexual Harassment > Hostile Work Environment

**HN16** **Sexual Harassment, Hostile Work Environment**

There are two theories that may be developed under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, quid pro quo and hostile work environment. Under a hostile work environment, an employer may be liable for violating Title VII if the workplace is a hostile or abusive environment such that the discrimination is so severe or pervasive to alter the conditions of the victim's employment. The United States Supreme Court's totality of the circumstances test focuses on certain factors to assess whether a hostile or abusive environment exists including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employer's work performance.

Labor & Employment Law > ... > Sexual Harassment > Defenses > General Overview

**HN17** **Sexual Harassment, Defenses**

An employer will generally not be liable for an employee's harassment by a co-employee unless the employer did not provide a reasonable avenue for plaintiff to complain or the employer knew of the harassment but did not remedy the situation.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

Civil Rights Law > Protection of Rights > Procedural Matters > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > ... > Harassment > Sexual Harassment > Statute of Limitations

**HN18** **Statute of Limitations, Time Limitations**

Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, explicitly requires that an Equal Employment Opportunity Commission (EEOC) charge be filed within 180 days of the alleged unlawful activity or 300 days after the alleged unlawful activity if the claimant has already filed the discrimination charge with a state or local equal employment agency. *42 U.S.C.S. § 2000e-5(e)(1)*. According to the United States Court of Appeals for the Second Circuit, this requirement functions as a statute of limitations in that the discriminatory incidents not timely charged before the EEOC will be time-barred upon the plaintiffs' suit in district court.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Labor & Employment Law > ... > Statute of Limitations > Begins to Run > Continuing Violations

Governments > Legislation > Statute of Limitations > General Overview

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

**HN19** **Statute of Limitations, Extensions & Revivals**

The United States Court of Appeals for the Second Circuit recognizes a limited exception to *42 U.S.C.S. § 2000e-5(e)(1)* for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statute of limitations. The continuing violation exception, however, only applies if the discrimination is a result of an ongoing discriminatory policy or mechanism or when specific and related instances of discrimination are permitted by the employer to continue unremedied for so long that they amount to a discriminatory practice. The exception does not apply merely when multiple incidents of similar discriminatory acts occur. Further, completed acts of discrimination cannot be regarded as a continuing violation" nor can alleged incidents that are unrelated. Examples where courts have found continuing violations are the existence of discriminatory seniority lists or discriminatory examination tests.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Labor & Employment Law > ... > Statute of Limitations > Begins to Run > Continuing Violations

Labor & Employment Law > ... > Civil Actions > Time Limitations > General Overview

**HN20** **Statute of Limitations, Extensions & Revivals**

Regarding the time limitation under *42 U.S.C.S. § 2000e-5(e)(1)*, the United States Court of Appeals for the Second Circuit does not look upon the continuing violation theory favorably and, thus, it should only be applied in "compelling circumstances."

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

**HN21** **Discrimination, Title VII Discrimination**

*Section 296* of the New York Human Rights Law, codified at *N.Y. Exec. Law § 296(1)(a)* (McKinney 2001), makes it unlawful for an employer to be engaged in discriminatory practice in the state of New York due to the age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual. *N.Y. Exec. Law § 296(1)(a)* (McKinney 2001).

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

**HN22** **Discrimination, Title VII Discrimination**

There is a requirement under *§ 296* of the New York Human Rights Law (NYHRL), codified at *N.Y. Exec. Law § 296(1)(a)* (McKinney 2001), that the "discriminatory practice" occurs in New York. Corporate decisions made in headquarters inside New York relating to the employment of those working outside of

New York, however, do not constitute discriminatory practice for the purposes of the NYHRL *§ 296* if the employees affected by the decisions work outside New York.

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

*HN23*[] **Discrimination, Title VII Discrimination**

Section *§ 298-a* of the New York Human Rights Law (NYHRL), codified at *N.Y. Exec. Law § 298-a* (McKinney 2001), extends NYHRL *§ 296*, codified at *N.Y. Exec. Law § 296(1)(a)* (McKinney 2001), to certain acts committed outside New York but adds a requirement that the act must be committed against a resident of New York. *N.Y. Exec. Law § 298-a(1)* (McKinney 2001).

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

*HN24*[] **Discrimination, Title VII Discrimination**

See *N.Y. Exec. Law § 298-a(1)* (McKinney 2001).

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > ... > Remedies > Damages > Punitive Damages

*HN25*[] **Damages, Punitive Damages**

A plaintiff cannot recover punitive damages under the New York Human Rights Law.

**Counsel:** For PATRICIA BALLANCE, plaintiff: Henry Gluckstern, Kreindler & Kreindler, New York, NY.

**Judges:** **[*1]** Lawrence M. McKenna, U.S.D.J.

**Opinion by:** Lawrence M. McKenna

## Opinion

MEMORANDUM AND ORDER

McKENNA, D.J.

Patricia Ballance ("plaintiff"), a former seaman, brought this action against Energy Transportation Corporation ("ETC"), Energy Transportation Group, Inc. ("ETG"), ProNav Ship Management, Inc. ("ProNav"), Wilmington Trust Company ("WTC"), and John Doe Corporations A-Z ("John Doe"), [1] (collectively "defendants") alleging sexual harassment by two co-workers during her employment as a crew member aboard two vessels carrying liquified natural gas. Plaintiff's seventeen claims for relief consist of allegations that at least some of the defendants violated: (1) the Jones Act, *46 U.S.C. § 688*; (2) common law principles of maritime law including seaworthiness and maintenance and cure; (3) Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*; and *(4)* New York Human Rights Law ("NYHRL") 296 and 298-a§§ (McKinney 2001). Plaintiff requests not only compensatory damages for these alleged violations, but also punitive damages under the Title VII and NYHRL claims. Defendants move to dismiss the complaint for failure to state **[*2]** a claim upon which relief can be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, or, in the alternative, for summary judgment pursuant to *Federal Rule of Civil Procedure 56*. For the reasons set forth below, the motion is granted in part and denied in part.

**Background**

Plaintiff, a merchant marine, was employed as a cook by defendant ETC from 1992 through November 17, 1998 and defendant ProNav thereafter until her resignation in March, 1999. During the time that she was employed by ETC and ProNav, plaintiff worked aboard numerous liquified natural gas tankers which ran between ports in Indonesia and Japan. The first of these tankers upon which plaintiff alleges she was sexually harassed was the LNG Gemini ("Gemini"). Her work on the Gemini began in February, 1994.

Plaintiff alleges that beginning on or about February 1994, crew member Robert **[*3]** Vint "regularly and repeatedly greeted Plaintiff with provocative, oral expressions formulated to contain sexual content and

[1] Plaintiff has failed to identify who the John Doe Corporations are thus making it impossible for the Court to analyze her claims against them.

innuendo" despite plaintiff's stated desires that Vint not make such comments. (Arralde Aff. Ex. A P 24.) Further, plaintiff claims that Vint continuously "made it his custom and practice to non-consensually place his hands on Plaintiff's buttocks and to utter phrases indicating his desire to engage in sexual intercourse and/or other sexual activity with Plaintiff." (Arralde Aff. Ex. A P 27.) Plaintiff alleges that Vint's repeated unwanted sexual advances occurred until sometime in November 1998 and that she first reported such behavior to the chief steward of the Gemini, George Kenney, on or about November 21, 1998, who, in turn, reported it to Captain Charles Anderson. It is plaintiff's belief that supervisors and other crew members observed the harassment and failed to take meaningful actions to prevent its occurrence and improve the condition on the vessel before November 21, 1998.

In response to plaintiff's report, Anderson ordered Vint and plaintiff to "stay out of each other's way." (Arralde Aff. Ex. A P 37.) Plaintiff claims such response adversely **[*4]** affected her job as she was not permitted to be present where Vint dined thus preventing her from completing her post-dinner cleanup work within the time allotted. Essentially, plaintiff believes that Anderson's response adversely affected her work environment aboard the Gemini and, thus, was punitive in nature. It is not disputed that no further harassment by Vint took place after that date.

Plaintiff claims that the repeated sexual harassment left her unable to adequately perform her duties as the chief cook. Consequently, on November 28, 1998, plaintiff left the Gemini in Indonesia to undergo extensive treatment from doctors provided by the defendants for her allegedly shaken emotional state. She was first given an "unfit for duty slip" by the doctor in Indonesia where she first sought treatment. Thereafter, plaintiff took sick leave which lasted from November 28, 1998 to March 13, 1999. According to plaintiff, at some point during that period, a ProNav vice-president assured her that she would never have such problems again. During her sick leave, plaintiff also learned that ProNav had taken over for ETC and that now she would be employed by and receive her paychecks from **[*5]** ProNav.

On March 13, 1999, plaintiff returned to work for ProNav and was assigned to the LNG Aries ("Aries") vessel with duties again as the chief cook. Plaintiff boarded the Aries on March 17, 1999 and claims that on March 18, 1999 she was sexually harassed by a crew member named Christopher Kruger. In particular, plaintiff states in her complaint that "without solicitation or consent by Plaintiff, [Kruger] placed his hands upon Plaintiff's buttocks while she was on duty and attempting to perform her assigned job. He also untied the apron she was wearing." (Arralde Aff. Ex. A P 57.) Plaintiff immediately reported these acts to chief engineer, Timothy Welty, and the master of the vessel, Captain Hoffman. Plaintiff disembarked from the vessel at the next port on March 26, 1999 and returned to the United States by airplane. She never returned to work as a seaman again and is currently employed as a customer service representative for Office Depot in Georgia earning an hourly wage.

In her complaint, plaintiff states that "in or about July or August 1999" she filed a complaint with the United States Equal Employment Opportunity Commission (EEOC) office in New Orleans, Louisiana **[*6]** which resulted in a formal charge of the EEOC against defendant ProNav on September 17, 1999. (Arralde Aff. Ex. A PP 63-64.) [2] According to plaintiff, the file including plaintiff's EEOC charge was lost at the New Orleans EEOC office and not located again until the second week of July 2000 when it was then forwarded to the New York City EEOC regional office. Ultimately, an EEOC investigation was performed and the EEOC, in a letter to plaintiff, dismissed plaintiff's charge on two grounds: (1) that the sexual harassment allegations aboard the Gemini were time-barred and (2) that the allegations aboard the Aries did not rise to the level of a violation. (Arralde Aff. Ex. B.) The EEOC's letter noted that Kruger was reprimanded after the incident was reported and that plaintiff had the right to sue ProNav in a federal court within ninety days of the date of the letter. (Arralde Aff. Ex. B.) Plaintiff's current suit was timely filed on February 2, 2001.

**[*7]** Plaintiff brings this action with seventeen claims for relief against ETC and ProNav as her employers on the Gemini and Aries, respectively. The other defendants include: (1) ETG, the parent company of ETC; (2) Patriot, the owner of Gemini; and (3) WTC, the owner of Aries. Against all six defendants, plaintiff claims violations of the Jones Act and maritime law. Plaintiff adds a claim under the NYHRL *§§ 296* and *298-a* and Title VII of the Civil Right Act of 1964 against

[2] In her Rule 56.1(b) statement, plaintiff appears to clarify the date and states that she filed the EEOC complaint on August 19, 1999. (Pl. Rule 56.1(b) Statement P 18.). Either way, defendants dispute that such a complaint was filed in July or August and maintain that the earliest such a charge could have been brought is September 17, 1999. (Def. Rule 56.1(b) Statement P 12.)

ETC, ETG, and ProNav.

**Discussion**

**I. Legal Standards**

Defendants' bring a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56. Because there are multiple claims and multiple parties, each claim will be analyzed separately below under the Rule 12(b)(6) or Rule 56 standard.

**A. 12(b)(6)**

HN1[] Under Rule 12(b)(6), a complaint will be dismissed if there is a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Court must read the complaint generously accepting the truth of and drawing all reasonable inferences from well-pleaded factual allegations. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). **[*8]** "A court should only dismiss a suit under Rule 12(b)(6) if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

**B. Summary Judgment**

HN2[] Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

HN3[] Once the moving party establishes a prima facie case demonstrating the absence of a genuine issue of material fact, the nonmoving party **[*9]** has the burden of presenting "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and "may not rely on conclusory allegations or unsubstantiated speculation." Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994).

**II. Jones Act Claim**

**A. Employer-Employee Relationship**

Plaintiff, as a former seaman, has brought negligence claims under the Jones Act against all of the named defendants. HN4[] The Jones Act states, in pertinent part, that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . ." **[*10]** 46 U.S.C. § 688. HN5[] An employer-employee relationship is essential to recovery under the Jones Act. Mahramas v. American Exp. Isbrandtsen Lines, 475 F.2d 165, 170 (2d Cir. 1973). The Supreme Court has concluded that "only one person, firm, or corporation can be sued as employer" under the Jones Act. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 791, 93 L. Ed. 1692, 69 S. Ct. 1317 (1949). Thus, it is essential to determine who employed the plaintiff in order to analyze her Jones Act claim. HN6[] In doing so, the Supreme Court in Cosmopolitan warned that courts "may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer." Id. According to the Second Circuit, one of the most important factors to consider is the asserted employer's right of control over the employee. Mahramas, 475 F.2d at 171. Once the employer is identified, "plaintiff is justified to go the jury if the proofs justify with reason the conclusion that employer negligence played any part, *even the* **[*11]** *slightest*, in producing the injury." Oxley v. City of New York, 923 F.2d 22, 24 (2d Cir. 1991) (quoting Diebold v. Moore McCormack Bulk Transp. Lines, Inc., 805 F.2d 55, 57-58 (2d Cir. 1986))(emphasis in original).

Defendants' contend that ETC, Patriot, and WTC, unlike ETG and ProNav, were never plaintiff's employer and, therefore, cannot be held accountable under the Jones Act. Applying the Supreme Court's rule in Cosmopolitan, the Court agrees that all of the six named defendants cannot be the plaintiff's employer for the purposes of maintaining a Jones Act claim.

The Court also finds that there is very little issue as to who plaintiff's employers were when she worked aboard the Gemini and the Aries. Plaintiff, in her complaint and sworn statement, makes it clear that she believes ETC and ProNav were her employers. First, plaintiff repeatedly refers to ETC and ProNav in her complaint as her employers. (Arralde Aff. Ex. A PP 6-7, 14-15, 17, 20, 50.) For example, plaintiff states that "most of her time at sea was spent as an employee of ETC and, thereafter, of PSM [ProNav] . . . ." (Arralde Aff. Ex. A P 14.) Her sworn statement is **[*12]** equally convincing as to ETC's and ProNav's identities as her employers. (Gluckstein Aff. Ex. 1 PP 2-3.) Plaintiff herself explains how she "had written a complete history of [her] employment with Energy Transportation Corporation . . . [and] the change in management from ETC to ProNav" when she went to the New Orleans EEOC. ( *Gluckstein Aff. Ex. 1 P 61*.) Plaintiff also states that she received her paychecks from ProNav after ProNav assumed ETC's business. (Arralde Aff. Ex. A P 50.) Finally, representatives from defendants ETG, Patriot, and WTC submit sworn affidavits that they were not plaintiff's employer as they had no control over the daily operations of the vessels. (Mason Aff. P 4; Redd Aff. P 4; Oller Aff. P 4.) Plaintiff does not rebut these statements. Thus, the Court finds that for the purposes of the Jones Act, no reasonable jury could find that someone other than ETC and ProNav was plaintiff's employer. Therefore, plaintiff cannot maintain a Jones Act claim against the other defendants and the Court grants their summary judgment motion.

**B. Injury**

Beyond the dispute over the employee-employer relationship, defendants argue that the plaintiff has not **[*13]** suffered an injury recognized under the Jones Act. The Court disagrees and finds that plaintiff has alleged a cognizable injury and that an issue of fact exists such that summary judgment must be denied at this time.

Unlike a plaintiff who suffers an obvious physical injury, there has been some confusion over whether a person who has suffered only emotional injury can maintain a claim under the Jones Act. The law with regard to emotional distress has been more clearly addressed under the Federal Employee Liability Act ("FELA"), the Jones Act's sister statute for injured railroad workers. ***HN7***[⬆] Because the Jones Act incorporates FELA by reference, *Miles v. Apex Marine Corp., 498 U.S. 19, 32, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990)*, courts may, and have, relied on FELA jurisprudence in analyzing claims under the Jones Act.

In the leading case, the Supreme Court explicitly held that ***HN8***[⬆] claims for negligent infliction of emotional distress are cognizable under FELA. *Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 550, 129 L. Ed. 2d 427, 114 S. Ct. 2396*, (1994); see also *Higgins v. Metro-North R.R. Co., 143 F. Supp. 2d 353, 357 (S.D.N.Y. 2001)* ("many courts have recognized a **[*14]** claim under FELA for the negligent infliction of emotional distress based upon sexual harassment."). However, in Gottshall, the Supreme Court limited the class of plaintiffs who can recover for emotional distress to those falling within a "zone of danger" of the harm. *512 U.S. at 554*. According to the Supreme Court, the "zone of danger" test limits recovery to those plaintiffs "(1) who sustain a physical impact as a result of a defendant's negligent conduct, or (2) who are placed in immediate risk of physical harm by that conduct." *Id. at 547-48*. Thus, where there is no physical injury, a plaintiff can still recover for emotional harm if she meets the second prong of that test. *Nelson v. Metro-North Commuter R.R., 235 F.3d 101, 110 (2d Cir. 2000)*.

Whether a plaintiff sustained a "physical impact," the first prong of the test, turns not on whether she was physically touched, but rather, whether she was physically injured by the defendant. *Higgins, 143 F. Supp. 2d at 359* (applying the rule set in Gottshall and further refined in *Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 430, 138 L. Ed. 2d 560, 117 S. Ct. 2113 (1997))* **[*15]** (emphasis added); see also *Wahlstrom v. Metro-North Commuter R.R., 89 F. Supp. 2d 506, 517 (S.D.N.Y. 2000)* ("mere uninvited touching does not automatically raise a jury question on the issue of whether plaintiff suffered a 'physical impact.'"); *Tongret v. Norfolk & Western Ry., Co., 980 F. Supp. 903, 907 (N.D. Ohio 1997)*(dismissing claim for harassment where court found that plaintiff who was put in a headlock by co-employees did not sustain physical impact because he was not injured). In Higgins, for example, while the plaintiff was allegedly sexually harassed both verbally and physically, she testified that she was never physically injured by the contacts. Id.

The Higgins court concluded that ***HN9***[] even physical manifestations of sexual harassment were not enough to satisfy the physical impact test. *143 F. Supp. 2d at 360* ("it does not appear the physical manifestation of emotional harm was the 'harmful effect' contemplated by the Supreme Court in Buckley.").

Thus, if there was no physical injury, the plaintiff may only recover if she was placed in immediate risk of physical harm. Although the Gottshall court failed to supply guidance on how **[*16]** to analyze whether a plaintiff is in immediate risk of physical harm, the Second Circuit has said that "the risk of physical harm to plaintiff must be, at the very least, more than minimal." *235 F.3d at 113*.

Here, plaintiff does not allege that she suffered traditional physical injury under the Jones Act in her complaint. Only in a sworn statement submitted with her opposition to defendants' motions does plaintiff state that she also suffered physical manifestations of such distress such as nausea, vomiting, insomnia, and weight loss. (Gluckstein Aff. Ex. 1 PP 22, 39, 49.). Plaintiff claims repeatedly that she suffered emotional and psychological distress from the alleged sexual harassment. (Arralde Aff. Ex. A PP 41, 42, 44, 46, 47, 61, 69).

This discrepancy, however, is irrelevant because applying the Gottshall standard and the rules set forth by courts following Gottshall, ***HN10***[] a plaintiff is permitted to recover for emotional injury alone if she is within the "zone of danger." While plaintiff does not allege that she suffered the kind of "physical impact" necessary to satisfy the first prong of the zone of danger test, there still is a question of fact as to whether plaintiff **[*17]** feared an immediate risk of physical harm by the alleged sexual harassment aboard the Gemini and the Aries.

Thus, because plaintiff has adequately set forth a claim under the Jones Act and there is an issue of material fact, the Court denies ETC's and ProNav's motions.

**III. Maritime Law Claims**

**1. Unseaworthiness**

In her complaint, plaintiff brings a claim under maritime law against all six defendants for breach of the shipowner's duty to provide seaworthy vessels. However, under Second Circuit precedent, plaintiff's claim cannot survive defendant's summary judgment motion.

***HN11***[] "It is well-established that a shipowner has an absolute nondelegable duty to ensure that its vessel is seaworthy," *Wiradihardja v. Bermuda Star Line, Inc., 802 F. Supp. 989, 994 (S.D.N.Y. 1992)* which includes the obligation to provide a ship with seamen of "'equal in disposition and seamanship to the ordinary men in the calling.'" *Jones v. Lykes Bros. Steamship Co., 204 F.2d 815, 817 (2d Cir. 1953)*. A seaman who is injured aboard a ship may only recover from its owner for breach of this seaworthy warranty if his injuries were sustained as a result of **[*18]** a "savage and vicious" attack by a fellow seaman. *Wiradihardja, 802 F. Supp. at 994*. The issue will not reach a jury unless the assault involved a weapon or the plaintiff can demonstrate "the assailant's exceptionally quarrelsome nature, his habitual drunkiness, his severe personality disorder or other similar factors." *Walters v. Moore-McCormack Lines, Inc., 309 F.2d 191, 193 (2d Cir. 1962)*. A claim involving an attack that does not satisfy the "savage and vicious" standard will be dismissed before reaching a jury.

In applying these rules to an alleged incident of sexual harassment aboard a ship, one federal district court relying on these Second Circuit principles, held that "although plaintiffs' allegations are serious, and the harassing behavior they describe cannot be condoned . . . the alleged conduct would not support an unseaworthiness claim under applicable legal principles." *Williams v. Treasure Chest Casino L.C.C., 1998 U.S. Dist. LEXIS 1135*, Nos. Civ.A. 95-3968, Civ.A. 97-0947, 1998 WL 42586, at *8 (S.D.N.Y. Feb. 3. 1998) (alleged sexual harassment included "unwelcome sexual advances, requested sexual favors and . . . other verbal and physical sexual **[*19]** conduct"). The Court in Williams concluded that such harassment did not rise to the level of the "savage and vicious" behavior that is present in unseaworthiness claims which are generally submitted to a jury. Id.

The Court is aware of no case, nor does plaintiff present one, in which alleged sexual harassment aboard a vessel, even that which involves possible physical contact, survived a summary judgment motion. Unlike the assault claims where the attacks were savage and vicious, the alleged assault here does not fall into the same category. Plaintiff's argument that the law should be flexibly applied in modern times, (Pl.'s Mem. Opp. at 32), is not persuasive because there is, as cited above, recent caselaw interpreting the Second Circuit rules on

unseaworthiness dismissing claims similar to plaintiff's. Thus, plaintiff's claim for unseaworthiness against all defendants must be dismissed.

**2. Maintenance and Cure**

Plaintiff also brings a claim against ETC, ETG, and ProNav for the sums owed to her in unpaid maintenance and cure.

***HN12***[⬆] Maintenance and cure are implied provisions in contracts between seamen and shipowners. *Moran Towing & Transp. Co. v. Lombas, 843 F. Supp. 885, 886 (S.D.N.Y. 1994)*. **[*20]** The doctrine of maintenance requires a shipowner to provide an injured or ill seaman with food and lodging during the seaman's service on the ship while the doctrine of cure obligates the shipowner to provide necessary medical care and attention. Id. A seaman is entitled to "maximum medical cure" for her injury aboard a vessel which "is reached when the seaman recovers from the injury, the condition permanently stabilizes or cannot be improved further." *McMillan v. Tug Jane A. Bouchard, 885 F. Supp. 452, 459 (E.D.N.Y. 1995)*; see also *Alvarez v. Bahama Cruise Line, Inc., 898 F.2d 312, 315 (2d Cir. 1990)*.

Defendants' first argument is that this claim for maintenance and cure cannot be maintained against ETG, Patriot or WTC because none of them ever employed plaintiff. The Court agrees. Because the Court dismisses the Jones Act claim against ETG, Patriot, and WTC, the claim for maintenance and cure against those defendants are dismissed as well.

As to the maintenance and cure claim against ETC and ProNav, defendants' main argument is that plaintiff fails to allege that either defendant failed to pay her maintenance and cure during the period that **[*21]** she was unfit for duty between November 28, 1999 and March 13, 1999. (Def.'s Mem. of Law at 36.)

However, the claim for maintenance and cure accompanies the Jones Act claim. As stated above, there is an issue of fact regarding plaintiff's alleged injuries aboard the two vessels. Thus, until it is determined whether plaintiff actually suffered injuries and to what extent she suffered injuries, the Court will not dismiss the claim for maintenance and cure. Although plaintiff fails to specify how ProNav did not provide for her after she disembarked from the vessel, she contends in her brief that "she literally does not know where she stands with respect to unpaid maintenance and cure." (Pl.'s Mem. Opp. at 35.) Thus, because there is an issue of fact as to what plaintiff might be owed, defendants' motions as to maintenance and cure are denied.

**IV. Title VII Claim**

**1. EEOC Charge**

plaintiff brings a Title VII claim against ETC, ETG, and PSM. [3]

**[*22]** the first issue the Court addresses is whether plaintiff can maintain the Title VII action against parties which she never named in her charge filed with the EEOC. ***HN13***[⬆] Under *42 U.S.C. § 2000e-5(f)(1)*, a plaintiff must file a charge against a party with the Equal Employment Opportunity Commission ("EEOC") or an authorized state agency before she can sue that party in federal court under Title VII. *Vital v. Interfaith Med. Ctr., 168 F.3d 615, 619 (2d Cir. 1999)*. Thus, as a general matter, a plaintiff cannot sustain a Title VII claim if she failed to bring a charge against that same party with the EEOC.

However, the Second Circuit has recognized a notable exception to that general rule; that is, a Title VII claim may proceed against a party not charged, if the plaintiff brought an EEOC charge against some party and there is a clear "identity of interest between the unnamed defendant and the party named in the administrative charge." Id. (citing *Johnson v. Palma, 931 F.2d 203, 209-210 (2d Cir. 1991))*. Adopting the Third Circuit's test, ***HN14***[⬆] the Second Circuit considers the following four factors in considering whether there was **[*23]** an "identity of interest" present:

> (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; (2) whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed

[3] Although defendants argue that the Title VII claim should also be dismissed against Patriot and WTC, (Def.'s Mem. of Law at 12), it does not appear that plaintiff has brought a Title VII claim against Patriot and WTC. (Arralde Aff. Ex. A at 45-47.) Regardless, plaintiff has no Title VII claim against Patriot and WTC because they were not plaintiff's employer as stated above in the Jones Act discussion.

party in the EEOC proceedings; (3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id.

As defendants point out, plaintiff fails to allege in her complaint or argue in her brief that her case falls within the identity of interest exception. Regardless, the Court believes such analysis is necessary to determine if plaintiff can maintain her Title VII claim against ETC and ETG. First, the Court agrees with the defendants that plaintiff could have easily identified ETC's role at the time she allegedly brought the EEOC charge against ProNav **[*24]** on September 17, 1999. Plaintiff claims she was employed by ETC from 1992 until approximately November 17, 1998. (Arralde Aff. Ex. A P 6.). Moreover, when plaintiff went to the EEOC office to file the charge, she gave her complete employment history with ETC. In particular, she stated that she clearly wrote "that the incidents involving Bob Vint had been under the employment of ETC." ( *Gluckstein Aff. Ex. 1 P 61*.) In addition, ETC and ProNav do not share similar interests because they are entirely separate companies and the alleged incidents occurred on two separate vessels. Although ETG's role at the time ProNav was named in the EEOC charge may not have been clear, the Court finds that there was also no identity of interest between ETG and ProNav. And, ETG was not plaintiff's employer. Thus, the Title VII claim should be dismissed against ETC and ETG.

**2. Title VII claim against ProNav**

Plaintiff's remaining Title VII claim is against ProNav. On January 19, 2001, plaintiff received a letter from the EEOC explaining that they failed to find a sexual harassment violation aboard the Aries but that plaintiff had the right to sue ProNav for the alleged violation within **[*25]** 90 days of the letter. (Arralde Aff. Ex. B.) Plaintiff met the deadline to sue. However, defendant contends that plaintiff's claim against ProNav must be dismissed under *Rule 12(b)(6)* or *Rule 56*.

***HN15***[] Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." *42 U.S.C. § 2000e-2(a)(1)*. ***HN16***[] There are two theories that may be developed under Title VII -- quid pro quo and hostile work environment. *Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir. 1994)*. [4] Under a hostile work environment, an employer may be liable for violating Title VII if the workplace is a hostile or abusive environment such that the discrimination is so "severe or pervasive to alter the conditions of the victim's employment . . . ." *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)*. The Supreme Court's totality of the circumstances test focuses on certain factors to assess **[*26]** whether a hostile or abusive environment exists including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employer's work performance." *Id. at 23*.

Further, the Second Circuit has held that ***HN17***[] an employer will generally not be liable for an employee's harassment by a co-employee unless the employer did not provide a reasonable avenue for plaintiff to complain or the employer knew of the harassment but did not remedy the situation. *Quinn v. Green Tree Credit Corp., 159 F.3d 759, 767 (2d Cir. 1998)*.

**a. Events on the LNG Gemini**

the Court must first decide which of the alleged incidents the Court may consider in ruling on plaintiff's Title VII **[*27]** claim. Defendants argue that the Court cannot consider the events which allegedly occurred between Robert Vint and plaintiff on the Gemini because they are time-barred and do not fall within the limited exception of a continuing violation.

***HN18***[] Title VII explicitly requires that an EEOC charge be filed within 180 days of the alleged unlawful activity or 300 days after the alleged unlawful activity if the claimant has already filed the discrimination charge with a state or local equal employment agency. *42 U.S.C. § 2000e-5(e)(1)*. According to the Second Circuit, "this requirement functions as a statute of limitations . . . in that the discriminatory incidents not timely charged before the EEOC will be time-barred

[4] Under a quid pro quo theory, a plaintiff alleges that her rejection of unwanted sexual contact led to employment discrimination by the employer. Such a theory is not applicable to this case.

upon the plaintiffs' suit in district court." *Quinn v. Green Tree Credit Corp., 159 F.3d 759, 765 (2d Cir. 1998)* (citations omitted).

The last possible date that any violations could have occurred aboard the Gemini was November 28, 1998, because on that day, plaintiff left the vessel. (Arralde Aff. Ex. A P 46.) It appears from plaintiff's complaint that the alleged sexual harassment did not occur after November 21, 1998. (Arralde **[*28]** Aff. Ex. A P 36.) Regardless of the precise date of the last act of harassment in November 1998, plaintiff did not file an EEOC charge at all until at the earliest July 1999 (Arralde Aff. Ex. A P 63), and at the latest, September 17, 1999. Moreover, plaintiff presents no evidence that she filed an employment discrimination charge with a state or local employment agency. Thus, the 180 day limitation period applies for the alleged incidents aboard the Gemini and plaintiff failed to meet that deadline.

However, plaintiff asserts that this limitation is not applicable because she was subjected to a "continuing violation" of Title VII such that the statutory time limit should be extended. (Arralde Aff. Ex. A PP 20, 24-30, 36, 42, 44, 45, 56-58, 65, 82-84.) ***HN19***[↑] The Second Circuit has recognized a limited exception to the Title VII provision "for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statute of limitations." *Quinn, 159 F.3d at 765* (quoting *Annis v. County of Westchester, 136 F.3d 239, 246 (2d Cir. 1998))* (emphasis omitted). The continuing violation **[*29]** exception, however, only applies if the discrimination is a result of an ongoing discriminatory policy or mechanism or when specific and related instances of discrimination are permitted by the employer to continue unremedied for so long that they amount to a discriminatory practice. *159 F.3d at 766*. The exception does not apply merely when multiple incidents of similar discriminatory acts occur. Id. Further, "completed acts of discrimination cannot be regarded as a continuing violation" nor can alleged incidents that are unrelated. *Acosta v. The Yale Club of New York City, 1995 U.S. Dist. LEXIS 14881*, *No. 94 Civ. 0888, 1995 WL 600873*, at *5 (S.D.N.Y. Oct. 12, 1995). Examples where courts have found continuing violations are the existence of discriminatory seniority lists or discriminatory examination tests. *Miller v. Citicorp, 1997 U.S. Dist. LEXIS 2395*, No. 95 Civ. 9728, 1997 WL 96596, at *7 (S.D.N.Y. Mar. 4, 1997). Finally, ***HN20***[↑] the Second Circuit does not look upon the continuing violation theory favorably and, thus, it should only be applied in "compelling circumstances." *Acosta, 1995 U.S. Dist. LEXIS 14881*, *16, *1995 WL 600873*, at *6. The flaw in plaintiff's argument in this case is that while there arguably may have **[*30]** been a continuing violation of Title VII aboard the Gemini for the years in which plaintiff alleges the harassment occurred, it cannot be said that the alleged acts aboard the Aries were a continuation of the acts that terminated months earlier. First, the alleged sexual harassment was perpetrated by two different men on different vessels. In *Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000)*, the Second Circuit affirmed the district court's decision to reject the continuing violation theory where the two alleged harrassers did not act in concert. *Id. at 569 n.4*. Second, once the acts were reported in November 1998, it does not appear that the incidents went unremedied such that a "discriminatory policy" developed. Immediately, Vint was told to stay away from plaintiff. (Arralde Aff. Ex. A P 37.) Thereafter, ProNav investigated the allegations and suspended Vint from duty for one month without pay. (Gluckstein Aff. Ex. 6.). The similar, unrelated acts do not amount to a discriminatory policy or mechanism for the purposes of the continuing violation theory.

Plaintiff cites a number of cases where a continuing violation theory was allowed **[*31]** to go to a jury. (Pl.'s Mem. Opp. at 17-20.) However, those cases are factually distinguishable from the case at hand. There are not "compelling circumstances" in plaintiff's case that would require the court to accept her continuing violation theory. The acts were separate and distinct.

Thus, because plaintiff only had 180 days to bring an EEOC charge relating the incidences aboard the Gemini and failed to do so, the Title VII claim against ProNav cannot include the alleged harassment aboard the Gemini as a matter of law. The remaining Title VII claim only exists with regard to the alleged acts aboard the Aries.

**a. Events on the LNG Aries**

The issue remains whether plaintiff has a viable Title VII claim against ProNav for the alleged harassment which took place aboard the Aries on March 17, 1999. In her claim for relief, plaintiff alleges ProNav, as well as the other defendants, "permitted the creation and continuation of a hostile work environment." (Arralde Ex. A P 172). As to events aboard the Aries, plaintiff asserts that ProNav did not take any action before she returned to work in March 1999 to ensure that she would not be harassed again and that **[*32]** "defendants were either unwilling or unable to take the steps necessary to

protect her from continual unwanted harassment from male crew members . . . and eliminate the hostile and abusive work environment under which Plaintiff had been working on the Gemini, and . . . on the Aries." (Arralde Aff. Ex. A P 59.)

The Court has already concluded that the incidents aboard the Gemini are time-barred. Thus, we are left with the sole incident of alleged sexual harassment aboard the Aries. Applying the test for a hostile work environment set forth in Harris, the Court finds that the situation aboard the Aries does not constitute a hostile work environment as a matter of law. Unlike cases in which the discriminatory policies are severe and pervasive, the incident aboard the Aries was one isolated incident and does not amount to an environment permeated with discrimination. The alleged harassment was not severe in isolation and did not place plaintiff in any threat of physical harm. In addition, it is not alleged that the act of touching plaintiff's buttocks and untying her apron occurred in front of other seamen. Taken together, the Court dismisses plaintiff's Title **[*33]** VII claim in its entirety.

### V. New York Human Rights Law Claim

Plaintiff's last claim for relief against ETC, ETG, and ProNav is a state claim under the NYHRL *§§ 296* and *298-a*. The Court dismisses the claims under both *§§ 296* and *298-a*.

***HN21***[↑] NYHRL *§ 296* makes it unlawful for an employer to be engaged in discriminatory practice in the state of New York due to the "age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status of any individual . . . ." *N.Y. Executive Law § 296(1)(a)* (McKinney 2001). ***HN22***[↑] There is a requirement under *§ 296* that the "discriminatory practice" occurs in New York. *Iwankow v. Mobil Corp., 150 A.D.2d 272, 541 N.Y.S.2d 428, 429 (N.Y. App. Div. 1989)*. Corporate decisions made in headquarters inside New York relating to the employment of those working outside of New York, however, do not constitute discriminatory practice for the purposes of the NYHRL *§ 296* if the employees affected by the decisions work outside New York. *Duffy v. Drake Beam Morin, 1998 U.S. Dist. LEXIS 7215*, No. 96 Civ. 5606, 1998 WL 252063, at *12 (S.D.N.Y. May 19, 1998) (dismissing NYHRL claim where decision to fire employee **[*34]** was made in New York but employee worked in New Jersey).

Like in Duffy, plaintiff's claim for relief under *§ 296* is that the policies that permitted the harassment against plaintiff were formulated at the offices of ETC,a New York based corporation. (Pl.'s Mem. Opp. at 33.) However, the acts that plaintiff alleges constituted sexual harassment occurred on vessels located outside New York, by ETC and ProNav employees who did not work in New York. Thus, plaintiff's case is similar to the one in Duffy. Plaintiff has no claim under NYHRL *§ 296*.

***HN23***[↑] NYHRL *§ 298-a* extends *§ 296* to certain acts committed outside New York but adds a requirement that the act must be committed against a resident of New York. *N.Y. Executive Law § 298-a(1)* (McKinney 2001) (***HN24***[↑] "the provisions of this article shall apply as hereinafter provided to an act committed outside this states against a resident of this state or a against a corporation organized under the laws of this state . . . .); *Iwankow, 541 N.Y.S.2d at 429*.

Plaintiff does not dispute that she is a resident of Georgia. (Arralde Aff. Ex. A P 9.) Nor does she dispute that the alleged acts of harassment occurred aboard vessels **[*35]** which sailed only between Indonesia and Japan. (Arralde Aff. Ex. A P 12.) Thus, plaintiff cannot, based on the allegations in her complaint, maintain a claim under NYHRL *§ 298-a* against defendants.

For these reasons, plaintiff's claim under the NYHRL are dismissed in their entirety.

### VI. Punitive Damages

Plaintiff has asserted claims for punitive damages under her claim for relief under Title VII and the NYHRL. However, ***HN25***[↑] a plaintiff cannot recover punitive damages under the NYHRL. *Walia v. Vivek Purmasir & Assocs., 160 F. Supp. 2d 380, 2000 WL 33283288 (S.D.N.Y. 2000)*. Further, the Court has dismissed the Title VII claim. Thus, any claim for punitive damages must be dismissed.

### Conclusion

In sum, the Court: (1) dismisses the Jones Act claim against all defendants except ETC and ProNav; (2) dismisses the claim of unseaworthiness in its entirety; (3) denies summary judgment and 12(b)(6) dismissal for maintenance and cure; (4) dismisses the Title VII claim in its entirety; (5) dismisses the NYHRL claim in its entirety; and (6) dismisses claims for punitive damages.

So ordered.

Dated: October 17, 2001

New York, New York

Lawrence M. **[*36]** McKenna

U.S.D.J.

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