No. __-____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES RAY,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Fourth Circuit applied the incorrect standard to determine who could be a relevant "decisionmaker" and agent for the defendant employer in a suit under Title VII of the Civil Rights Act of 1964 for wrongful termination in the context of discriminatory enforcement of disciplinary procedures, where the Circuit Courts have articulated different tests and the Fourth Circuit test essentially precludes corporate liability where the corporation presents a discriminatory, disciplinary record against the employee but there is not substantial evidence of discriminatory intent by the person making the ultimate, termination decision?

2) Whether the Fourth Circuit erred by refusing to review the record in the light most favorable to the plaintiff, who received the jury's verdict, by ruling that the plaintiff had not presented sufficient evidence to dispute the employer's pretextual reasons for disparate charging decisions, and further by finding that the plaintiff's misconduct was not comparable in seriousness to employees outside the protected class?

LIST OF PARTIES

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James Ray, petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case, after Petition for Rehearing, on June 20, 2006.

OPINION BELOW

The May 23, 2006 opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A.

The June 20, 2006 order denying Mr. Ray's petition for rehearing and rehearing en banc also appears at Appendix A, as well as the May 24, 2005 memorandum opinion and order of the United States District Court for the Western District of Virginia.

STATEMENT OF JURISDICTION

The original judgment of the Court of Appeals was entered on May 23, 2006, the decision denying the petition for rehearing and rehearing en banc was entered June 20, 2006. The jurisdiction of this Court applies pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES, AND REGULATIONS INVOLVED

42 U.S.C. Sec. 2000e-2 - Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

On March 22, 2004, James Ray filed a Complaint in the United States District Court for the Western District of Virginia, claiming that his employer, CSX Transportation, Inc. violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., related to his disciplinary discharge from employment. Mr. Ray sought reinstatement, back pay, compensatory damages, punitive damages, attorney fees and costs. Joint Appendix I filed in the United States Court of Appeals for the Fourth Circuit ("JA I") pp. 6,13-14. Jurisdiction in the district court was appropriate pursuant to 28 U.S.C. § 1331.

The Honorable Judge James C. Turk presided over a two-day trial on March 15-16, 2005. After the plaintiff's evidence, the defendant moved for judgment as a matter of law pursuant to Rule 50. JA I -363. The court took the motion under advisement. JA I - 373.

The jury found for the plaintiff in the amount of $128,000 for back pay and $72,000 for compensatory damages. JA I - 466. The defendant renewed its motion for judgment as a matter of law for the defendant under Rule 50(b). JA I - 472. Ultimately, the court granted the defendant's Motion for Judgment as a Matter of Law, setting aside the jury's verdict. JA I - 594.

Mr. Ray filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the trial court's actions, and denied relief to Mr. Ray. In particular, the Fourth Circuit ruled that Steve

Persinger, the CSX employee committing the most egregious acts of discrimination towards Ray, was not a "decisionmaker" and agent of CSX for purposes of Title VII. The Fourth Circuit further refused to consider all of the evidence leading to the termination, including the discriminatory disciplinary process, and considered only the termination itself in finding that CSX had not violated Title VII in its dealings with Ray.

The facts material to the consideration of the questions presented are as follows:

I. CSX' discriminatory disciplinary process and resulting termination of Ray's employment

James "Jay" Ray is an African American who began working for CSX Transportation in 1980. JA I 85. Over more than two decades of employment, Ray had not had a single disciplinary infraction until the events in question. Indeed, CSX's division superintendent admitted at trial that Ray was "a very capable employee." JA I 198.

On March 31, 2003, Ray began working at a new location with a new set of engineers in Balcony Falls, Virginia. JA I 88. Ray received a copy of a computer program, the "Blue Zone", from Larry Woodward, a Caucasian employee who had been an engineer at Balcony Falls for six years. JA I 88-9. Ray was not familiar with the program.

Each two-man train crew recorded its daily work hours by logging in and out at a CSX computer terminal, called "putting off" time. By using the Blue Zone program, however, a crew member was able instead to log into the CSX computer system from a remote location such as a home computer, and then log off the crew. Ray was told that

he should use the Blue Zone for his crew. JA I 88-9. Beginning on April 8, 2003, James Ray began using the Blue Zone program to put off time for his crew at home. This resulted in the crew getting credit for time not worked, since the employee had to travel home to use the program and the computer would register the crew on duty until the time the crew was logged off.

On or about April 16, CSX managers became suspicious that Balcony Falls employees had been wrongfully claiming overtime. JA I 324-5, 583. Steve Persinger, a CSX trainmaster, coordinated the disciplinary investigation into potential violations. Other CSX personnel involved in the disciplinary investigation included his brother Mike, another trainmaster, Don Hensley, the superintendent, and Wes Knick, the terminal manager. All of these individuals were Caucasian.

CSX and Persinger discriminated against Ray from the beginning of this investigation. First, they excluded Lenford Hatcher, an African American trainmaster with oversight over James Ray, from all phases of James Ray's disciplinary investigation.

Next, as revealed in an email, Steve Persinger specifically targeted James Ray, and did not investigate white employees for violations. Between March 31 and April 16, 2003, the only dates listed in the Persinger email, the first time anyone logged off the crew using the Blue Zone was on April 3, 2003. The individual responsible was Larry Woodward. JA II 614-16. The next time someone put off the crew with the Blue Zone was April 5, and this was done by engineer Bill Hardbarger. JA II 614-16. James Ray did not use the Blue Zone to put off the crew until April 8, 2003, after the other, white employees had done so and he

had been on the crew for nine days. JA II 616. However, Persinger limited his entire disciplinary investigation and records gathered to the seventeen days during which the plaintiff was working at Balcony Falls. JA II 616.

This discrimination in the disciplinary process continued when Persinger recommended charges against James Ray and three other employees. On April 22 and 23, CSX sent Ray four separate charge letters, charging him with logging off the crew for unearned overtime on April 11, 13 14 and 16, and for failing to correctly report the time logged in by Bill Hardbarger on April 5. JA II 608-13. Persinger recommended these charges after discussing his findings with John Thompson, CSX director of labor relations. JA I 346, JA II 608-13.

Larry Woodward's April 6 time entry, using the Blue Zone to claim hours of unearned overtime, was a violation identical to the plaintiff's. JA I 89. Nonetheless, Persinger and CSX never charged Larry Woodward for putting off remotely for the crew for two hours of unearned overtime on April 6, even though Persinger and CSX were aware of the violation. JA I 287, 312; JA II 616.

In addition to the patent, identical violations by white employees Woodward and Hardbarger apparent from Persinger's email, Ray established that had CSX reviewed the time records from the prior month of March, or other records for previous (white) employees at Balcony Falls, it would have discovered rampant use of the Blue Zone to claim overtime, each of which would constitute the same violations for which Ray was disciplined. JA I 296.

The CSX "Boards of Inquiry" for the four charges against James Ray were held May 14, 2003. Ray voluntarily admitted to the Board that he had put off the time using the

Blue Zone, from his home computer, on the date charged. JA II 742-3. He apologized, noted that he did not deserve any overtime pay and wished to return any that CSX may have credited him. Persinger made recommendations as to the appropriate discipline of Ray to Gery Williams, the General Manager. JA I 237. Upon Persinger's recommendation and Williams' decision, CSX terminated Ray. JA II 615, 832, 833, 834. Even though Bill Hardbarger committed the same violation by logging off the crew for overtime at home on April 5, he received only sixty days suspension. JA II 741.

II. CSX's Pretexts for Discrimination

During trial, CSX attempted to prove that the reason for Persinger's suspect decision to only include records beginning March 31, 2003 was that Persinger's computer records only went back this far, somehow innocently coinciding with the day the plaintiff began working at Balcony Falls. JA I 73. However, Persinger admitted under cross-examination that even using only his own office computer to gather the same type of records copied into his email, he could have gone back for the full Balcony Falls location "pretty far" before March 31. JA I 291.

Persinger attempted another non-discriminatory explanation by saying that he started the records at the first "discrepancy" he noticed in his computer's entries. JA I 291, 333. However, even on his chosen record, the first "discrepancy" would have been on April 3, 2003, Woodward's first Blue Zone time entry. JA II 616. There were no "discrepancies" for March 31, April 1, or April 2, which were normal, CSX computer log offs.

The next "non-discriminatory" reason given by

Persinger and CSX for not charging Woodward for April 6, and for not researching prior violations of white employees, was that Persinger could not retrieve "black box" data recorder information from the crew's locomotive engine dating back prior to April 11. CSX claimed that this information was necessary to verify when the crew shut the train down, and thereby to infer when its crew actually quit working for a given day and ceased earning time. JA I 285, 288, 299-300. However, Persinger, Hensley and Williams each acknowledged that the time records themselves were conclusive of the violations and the black box was not only unnecessary, but largely irrelevant, to prove an employee's violation of unearned overtime. JA I 297-311.

III. Reinstatement

CSX was subsequently ordered to reinstate James Ray by a neutral arbitrator in a Public Law Board pursuant to his union's collective bargaining agreement, returning to work at CSX after nineteen unemployed months, in November, 2004. JA I 108. The arbitrator specifically reinstated Ray because the documentary evidence from Ray's Boards of Inquiry demonstrated that CSX administered less discipline to other employees who had committed "similarly culpable" actions that were "essentially the same offense." JA I 599. Ray has never received any of his lost wages. JA I 107-8.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's ruling in *Hill v. Lockheed Martin Logistics,* upon which the panel based the ruling that Steve Persinger was not a

"decisionmaker" under Title VII, and the decision that evidence of discriminatory intent by CSX was therefore insufficient as a matter of law, conflict with the various rulings of every other Circuit Court of Appeals, demanding clarification of the correct rules by the Supreme Court of the United States.

In affirming the trial court's order setting aside the verdict, the panel relied upon the Fourth Circuit decision in *Hill v. Lockheed Martin Logistics Management*, 354 F.3d 277, 291 (4th Cir. 2004) to rule that CSX Division Manager Gary Williams was the only relevant decisionmaker in the disciplinary process culminating in the plaintiff's termination. *See* Panel Opinion, APP. 13 ("Given the facts of this case, we find that at this stage in the disciplinary proceedings Williams made the relevant decision himself.") However, the evidence demonstrated that the plaintiff's immediate supervisor, Steve Persinger, made numerous material, discriminatory decisions in the disciplinary process that were the proximate and principal cause of the plaintiff's formal termination. Panel Opinion, APP. 5-8. In applying the law in this manner, the panel has effectively ruled that a corporate employer is completely insulated from its own supervisors' racial discrimination throughout a disciplinary process – even when these discriminatory actions are the proximate cause of a termination – so long as the ultimate termination decision is formally made by someone for whom the plaintiff can not prove a discriminatory motive. This ruling, and the *Hill* case upon which it is founded, arise from a fundamental misinterpretation of the seminal law and depart from every other Circuit Court of Appeals, which themselves diverge in form and substance on this issue. The

plaintiff respectfully submits that the panel's ruling and the Fourth Circuit's rules on this issue merit review by the Supreme Court in order to ensure that the federal courts apply consistent rules to ensure the protections of the Constitution and Title VII of the Civil Rights Act.

In *Hill v. Lockheed Martin Logistics Management*, the Fourth Circuit examined the circumstances under which a corporate employer could be held liable for the actions of a supervising employee who was not the "formal" decisionmaker responsible for the "tangible employment action" giving rise to the suit. As the court recognized, the discrimination statutes apply to the actions of any "agent" of the employer, such as a supervisor. *Id.*, 354 F.3d at 287 (citing 42 U.S.C. § 2000e(b)).

Because the Supreme Court has not spoken explicitly on the issue, the Fourth Circuit looked for specific rulings from its sister Seventh Circuit case of *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990) and for foundational guidance from *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The Fourth Circuit then acknowledged that according to these sources, a "person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." *Hill*, 354 F.3d at 288-9. After reviewing the decisions of numerous sister circuits, the Court addressed "agency principles," and specifically looked to the Seventh Circuit decision in *Shager v. Upjohn*, which the Court noted the Supreme Court had cited with "seeming approval" for consistent rationale. *Hill* at 290. Analyzing

Shager, this Court concluded:

> When a formal decisionmaker acts merely as a cat's paw for or rubber-stamps a decision, report, or recommendation actually made by a subordinate, it is not inconsistent to say that the subordinate is the actual decisionmaker or the one principally responsible for the contested employment decision, so long as he otherwise falls within the parameters of the discrimination statute's definition of an employer or agent of the employer.

Hill, 354 F.3d at 290. The Court then qualified its ruling, and this was the language the Panel found persuasive:

> However, we decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

Id., 354 F.3d at 291; *see also* Panel Opinion , APP. 13.

The Panel's application of this rule to this case is erroneous for two reasons. First, *Hill* does not apply to Steve Persinger, because he was not a "subordinate who has no supervisory or disciplinary authority". Rather, as the panel recognized earlier in its opinion, Persinger was in fact a supervising trainmaster of the plaintiff with the authority to conduct the most material aspects of the disciplinary process: investigating the plaintiff, charging the plaintiff, suspending the plaintiff from work, organizing the evidence against the

plaintiff, and presenting it before the Board of Inquiry in a prosecutorial role. Panel Opinion, APP. 5 fn.2; JA I 274-5 . From any reasonable perspective, Persinger had both supervisory and disciplinary authority over the plaintiff, and *Hill* simply should not have been applied to this case. The panel erred when it overlooked these points of law and fact and applied the *Hill* rule to disregard Persinger's actions, influence, and animus.

Second, and more material to the Supreme Court's review, the Seventh Circuit reviewed *Hill* and declared that it did not comport with the rule from *Shager*, despite the Fourth Circuit's apparent claim of solidarity with *Shager*. In *Lust v. Sealy*, 383 F.3d 580 (7th Cir. 2004), the Seventh Circuit held that where there was evidence that the plaintiff's supervisor had gender-discriminatory motives, and that his recommendation of a male employee for a promotion had influenced the formal decisionmaker's choice not to promote the plaintiff, a verdict for plaintiff should be upheld. The Court rejected *Hill* as support for the defense:

> We are mindful that *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 286-91 (4th Cir.2004), holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision in *Shager v. Upjohn Co.*, 913 F.2d 398, 404-05 (7th Cir.1990), and has been

> repeated in a number of our cases. ....The formula was (obviously) not intended to be taken literally ...., and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation. If Boulden would not have turned down Lust for the promotion had it not been for Penters' recommendation, a recommendation that the jury could reasonably find was motivated by sexist attitudes, then Penters' sexism was a cause of Lust's injury, whether or not Boulden could reasonably be thought a mere cat's paw. Indeed it would make this case just like *Shager*.

Lust, supra, 383 F.3d at 584.

The decisions of every other Circuit (and the Supreme Court) reflect the ruling described by *Lust*: the relevant inquiry is a straightforward, proximate causational analysis. Every court outside the Fourth Circuit has held that where a supervisory employee – by definition an "agent" of the corporation – acts with discriminatory motives and is a proximate cause (or "influence") of a disparate employment action, the employer can be held liable for discrimination. *See Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77, 84-88 (1st Cir. 2004) (employer liable when neutral decisionmakers rely upon information that is manipulated by another employee who harbors illegitimate animus; supervisor's withholding of information material to grounds for plaintiff's termination was sufficient); *Griffin v. Washington Convention Center*, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998) (employer liable where biased supervisor

was the neutral decisionmaker's chief source of information and his "discriminatory motive "would have infected any deliberations over whether to terminate Plaintiff's employment"); *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 286 (3rd Cir. 2001) ("it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."); *Laxton v. Gap Inc*., 333 F.3d 572, 584 (5th Cir.2003) ("the discriminatory animus of a manager can be imputed to the ultimate decisionmaker if the [manager] ... had influence or leverage over" the decisionmaking, such as being the primary source of information for the decisionmaker); *Wallace v. SMC Pneumatics, Inc*., 103 F.3d 1394, 1400 (7th Cir. 1997) (where biased subordinate conceals relevant information from the decisionmaking employee ..., influencing the decision, the discriminatory motive of the other employee is the real cause of the adverse employment action); *Stacks v. Southwestern Bell Yellow Pages, Inc,*. 27 F.3d 1316, 1325 (8th Cir. 1994) (where disciplinary proceedings and investigation leading up to plaintiff's termination were tainted by gender bias and were conducted differently for the plaintiff, ultimate termination decision was influenced and employer liable); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (discrimination where evidence showed supervisor influenced selection process); *cf. Wilson v. Stroh Companies, Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (if plaintiff were to offer evidence suggesting that his supervisor had not reported comparable misconduct by white employees to decisionmaker, then he would establish a prima facie case based upon influence of decisionmaker); *English v. Colorado Dept. of Corrections*, 248 F.3d 1002, 1011 (10th

Cir. 2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999).

From the perspective of these courts, this case would be clearly analogous to *Lust* and *Shager*, in that it demonstrates a causal link between Persinger's discriminatory investigation, charging, and evidence, and the termination that necessarily resulted. However, as applied by the Panel, *Hill*'s rule means that all corporate employers can shield themselves from any liability for a supervisor's animus or even institutional discrimination, as long as the company makes sure the ultimate, formal decision is made by an oblivious individual with no apparent discriminatory motivation. Certainly this abandons the policy of Title VII – if a corporation can not be held liable even where a supervisor's racial discrimination exerts a "substantial influence" over the ultimate termination decision by another, then the only way to prove discrimination is to prove such animus by the formal decisionmaker.

In *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000), this Court ruled that the United States Court of Appeals for the Fifth Circuit had erred in discrediting the plaintiff's evidence that his supervisor was the actual decisionmaker in the termination decision. In *Reeves*, the Fifth Circuit gave weight to the fact that there was no evidence that the other decisionmakers (such as the one who actually terminated Mr. Reeves) were motivated by age. However, this Court reversed the Fifth Circuit's finding that there was no unlawful age discrimination, and noted that the Fifth Circuit should have credited the plaintiff's evidence that his supervisor, who did make discriminatory comments regarding his age, was the actual decisionmaker. The United States Court of Appeals for the Fourth Circuit ignored this

Court's ruling in *Reeves* when it discredited Mr. Ray's evidence that Persinger was the actual decisionmaker in this case, and failed to consider the evidence of Persinger's discriminatory animus towards Mr. Ray.

II. The Fourth Circuit panel erred by substituting its own impressions of the evidence in disregard of the jury's verdict, specifically by ruling that the plaintiff had not presented sufficient evidence to dispute the employer's pretextual reasons for disparate charging decisions, and further by finding that the plaintiff's misconduct was not comparable in seriousness to employees outside the protected class.

This petition raises clear splits in the Circuits about fundamental standards to be applied in the context of Title VII suits involving the discriminatory enforcement of disciplinary measures. It is likewise essential to highlight that this case stands in the sensitive posture of a jury's unanimous verdict for the plaintiff in a racial discrimination case that has been voided by reviewing courts in favor of their own review of the factual record, or certain parts of it. Like the other Circuits, the standards evinced by the Fourth Circuit for reviewing such cases reflect a deferential, *de novo* review of the facts in the light most favorable to the party prevailing with that jury. The Court must "construe the evidence in the light most favorable to the party against whom the motion was made and ask whether 'there is substantial evidence in the record to support the jury's findings.'" *Anderson v. Russell*, 247 F.3d 125, 129 (4th Cir. 2001).

The Court was not permitted to "retry factual

findings or credibility determinations reached by the jury." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998) (citing *Duke v. Uniroyal, Inc*., 928 F.2d 1413, 1419 (4th Cir.1991)). Rather, the Court must "assume that testimony in favor of the non-moving party is credible, 'unless totally incredible on its face,' and ignore the substantive weight of any evidence supporting the moving party." *Id.* Thus, the defendant "bears a hefty burden in establishing that the evidence is not sufficient to support the awards." *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1249 (4th Cir. 1996). "[I]f there is evidence on which a reasonable jury may return verdicts in favor of [plaintiffs], we must affirm." *Id.* In this case, the Fourth Circuit did not follow these basic standards of review. More specifically, the Fourth Circuit's analysis of the facts demonstrated fundamental error in the application of the rules specific to the discriminatory enforcement of disciplinary measures against a minority employee protected under Title VII.

The panel ultimately concluded that Gary Williams was the only relevant decisionmaker in the plaintiff's case for the discriminatory enforcement of disciplinary procedures, because he was the individual who made a formal termination decision upon the charges and record compiled by his subordinate manager. Panel Opinion, APP. 13. This premise necessarily overlooked important issues of law and fact. First, this case was not simply a wrongful termination case, and thus it does not simply involve discriminatory employment action focused upon a single termination event. This case involved the discriminatory enforcement of disciplinary procedures – a Title VII claim that brings a distinct set of elements, as recognized by the

Fourth Circuit in *Cook v. CSX Transportation Corporation*, 988 F.2d 507 (4th Cir. 1993). As the Court recognized in *Cook* but failed to credit in this case, the jury is entitled to review the entire disciplinary process, from initial investigation to charging to prosecution to final termination. By focusing principally upon only the termination event, with secondary references to the charges brought and no attention to the evidence of discrimination prior to formal charging, the panel abandoned the foundation of *Cook* and essentially declared irrelevant all discrimination prior to a final termination decision.

Steve Persinger had the disciplinary authority and made the most material decisions in the process that led to inevitable termination of the plaintiff upon a biased record that withheld information about the actions of comparable white employees. At minimum, *Cook* and Title VII require attention to the discriminatory disciplinary decisions causally linked to the termination event, and Persinger's decisions had more than a substantial influence upon the undisputable, disparate results in this case.

It was Persinger who decided not to charge Bill Hardbarger for violations prior to April 5, despite Hardbarger's supposed confession to Persinger (the pretext of "corroborating evidence") that he had used the Blue Zone many times in the past.[1] Persinger charged him only with April 5 because Hardbarger had specifically forced

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[1]This was another fact overlooked by the Panel opinion, which stated that Hardbarger confessed "that he had also used Blue Zone on one occasion to log out." Panel Opinion, APP. 7. This was not accurate, as Hardbarger testified that he confessed to Persinger that he had used the Blue Zone many times in the past, and not mistakenly. See JA I - 242. Persinger never inquired further.

Persinger's attention to April 5 and suggested any overtime claimed was mistaken (such that Hardbarger would not be severely disciplined for that date). However, Persinger never looked into or charged the previous violations Hardbarger confessed were not mistaken, despite the confession.

It was Persinger who chose not to charge Larry Woodward for April 6, and *never offered a legitimate explanation*, despite the fact that Woodward's violation was identical to those for which the plaintiff was fired and that this evidence was actually established by the records Persinger chose to present. It was Persinger who accessed records back as far as 45 days, which exposed further violations by Woodward and Vail, but who excluded those records from the ones he presented at the Board of Inquiry designed to make the plaintiff look solely responsible.

It was Persinger who selected the evidence to support his Blue Zone overtime charges – the only evidence Williams would ever review. Persinger chose to select *only* the dates from which the *plaintiff* had begun working with the Balcony Falls crew, March 31. Persinger initially explained that March 31 was the first date his computer pulled up, but was caught in a lie when confronted with the fact that this was only 17 days prior to his check and he had admitted the computer would have pulled up as much as 45 days of entries. He then said March 31 was the first date of a "discrepancy," but then admitted under cross-examination that there was no discrepancy on March 31 at all, and that the first "discrepancies" on his screen would actually have been prior dates in March on which Woodward and Vail logged off for unearned overtime but were never charged. He never offered a third explanation why he targeted only the plaintiff's work dates, or why he also withheld

information from March that would have shown Blue Zone violations by Woodward and Vail. Persinger, however, was responsible for the decisions that singled out the plaintiff and presented a tilted record against him that implied that he alone was the source of the problem.[2]

These decisions – made from the initiation of the disciplinary process – were the *proximate cause of the ultimate discriminatory outcome*: the plaintiff was ostensibly terminated because he admitted full responsibility for his own actions – the only actions Persinger put before the Board of Inquiry and Gary Williams – and was painted as a "ringleader", despite the fact that he was only the latest of a long history of Blue Zone overtime offenders that Persinger concealed. The others were never terminated, even though CSX admitted to knowledge of dozens of identical violations by other, white employees during the case. CSX never investigated or disciplined the others, *and admitted at trial that it never would do so*, despite admitting also the right and ability to do so.

Despite these facts, the panel was apparently

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[2]In addition, the evidence showed Steve Persinger 1) excluded the plaintiff's immediate supervisor, the only black trainmaster, from the investigation of the plaintiff; 2) presented the plaintiff as a "ringleader" of the Blue Zone overtime use, despite patent evidence of the violations prior to the plaintiff's arrival on the crew; 3) never sought any information from anyone about Woodward's April 6 violation (i.e. corroborating evidence such as a confession), and never charged Woodward for it; and 4) made the decisions to suspend the plaintiff, keep him off the property, cut off all contact with him, and deny his requests for information on the issue, while contemporaneously contacting Bill Hardbarger, allowing him access to the property and information against him, accepting his explanations for his own violations, and asking him questions – about the plaintiff's violations only.

convinced that no reasonable jury could have disbelieved the "black box" excuse.[3] Despite this, the panel correctly recognized that the plaintiff's evidence demonstrated that 1) there was in fact no need for corroborating evidence of when a crew stopped working to claim unearned overtime in order to demonstrate a conclusive violation of CSX overtime policy, a terminable offense, and 2) that in any event, the black box data recorder did not actually provide any corroboration of when a crew actually stopped working. *See* Opinion at 10. However, the panel made the pro-defendant ruling that there was "no evidence" to establish "that Persinger's belief that the black box data offered corroboration was anything but honest," even though proven to be inaccurate. *Id.* The panel has overlooked the actual facts. At the time Persinger brought the charges, he *did* know that the black box corroboration was in fact unnecessary to prove the violations he charged, and the jury was entitled to conclude that the black box was never a real reason for Persinger's decision not to charge the other, white employees with comparable violations at any time.

Contrary to the Panel's assumption, CSX did *not* present evidence that the black box corroborated the charged violation of using the Blue Zone to claim unearned time, nor that Persinger mistakenly believed it did. Indeed, no one

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[3]The "black box" excuse did not appear pre-trial, and only arose on the second day of trial, when other excuses had disintegrated. CSX' actual excuse for the reason that CSX did not "go after" other, white employees for comparable violations was the incredible theory that the plaintiff had somehow "covered up" the violations of others by claiming responsibility at his Board of Inquiry for every Blue Zone overtime entry by every other employee, at all times, even prior to his arrival on the crew. See JA I - 67-8, 77-79.

from CSX ever testified that they had a belief, at any time, that the engine download information was necessary to prove that the violation indeed occurred – i.e. that some amount of unearned overtime had been claimed with the Blue Zone. CSX' testimony established at most that Persinger thought the black box may have provided corroborating information about the *amount of overtime* being wrongfully claimed, as it gave some ballpark indication as to when the crew left work. However, Persinger testified that he *did* know at the time he brought the charges that, even looking at his own email document, Larry Woodward had put off with the Blue Zone on April 6 from a remote location for overtime, violating the policy. JA I – 302-3, 309. He admitted that he knew this because Larry Woodward's entry showed that he had logged off during overtime hours from a remote location, likely his home which Persinger knew was an hour away. JA I-301. Thus, Persinger never believed the black box was actually necessary to prove the violation; it is therefore not an excuse for his disparate disciplinary decisions.

This distinction is crucial. CSX's witness repeatedly stated it was a "zero tolerance" policy to terminate anyone who claimed *any* amount of unearned overtime; the amount was irrelevant. *See* JA I - 201-2, 203, 206, 208; 309-10, 349. Persinger admitted that he always knew that his own computer records alone were sufficient proof that Woodward violated this policy on April 6:

> Q: Well, you might not be able to prove the exact amount, but you certainly know that there's overtime in there that they haven't earned that the company's going to have to pay them for.
>
> A: I knew that after I got this

information that they had put off from a remote terminal.

Q: Right.

A: Yes, sir.

Q: And you knew when you had this information that Mr. Woodward, by looking at the email you prepared, that Mr. Woodward had put in for time that was overtime that he had not earned.

A: The whole entire crew was put in for overtime they didn't earn.

Q: Exactly. But Mr. Woodward was the one who entered the time.

A: Yes, sir.

JA I – 302-3; see also id. at 309. The evidence was that under CSX' "zero tolerance" for any overtime theft, CSX knew at the time it disciplined the plaintiff that the black box was *not necessary* to prove such theft. "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one...., may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas.*" *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). In this case, the jury considered clear evidence permitting it to conclude that the purported need for the black box data was in fact a false pretext. The Panel relied principally upon a misstatement of these facts and failed to draw proper inferences for the plaintiff. At minimum, the jury was entitled to infer that Persinger's need for "corroboration" from the black box was false.

The other flawed, factual foundation of the Fourth Circuit's ruling involved the conclusion "that based on Ray's

confessions – which completely exonerated his fellow crew members on those instances in which he improperly logged-out – he was no longer engaged in conduct that 'was comparable in seriousness to misconduct of employees outside the protected class.'" Panel Opinion, APP. 13. (citing *Cook*, 988 F.2d at 511). This ruling – taken from CSX's own distorted rendition of the facts, merits exacting attention. The panel and the trial court ruled in essence that because the plaintiff took the blame at his Boards of Inquiry prosecutions for the four dates for which he was formally charged for personally logging off the crew, his actual misconduct somehow became *worse* than the charged *and uncharged* misconduct of the white employees. In other words, although numerous white employees had been using the Blue Zone to steal overtime prior the plaintiff's arrival, and even though CSX admittedly viewed any such theft as a zero tolerance cause for automatic termination, James Ray's subsequent *mea culpa* for his own, charged misconduct made his violations *worse* than the identical violations of the white employees, whether charged or uncharged. Understandably, this did not resonate with the jury, and the numerous legal and logical flaws inherent in this ruling demand reversal.

It is clear that the plaintiff's "conduct" referenced by the panel as not "comparable" was not the conduct for which Ray was actually being disciplined – making the Blue Zone log-offs for unearned overtime – but rather his irrelevant "conduct" in accepting blame for his own actions at the Boards of Inquiry. JA I - 548, 587. Likewise, the trial court specifically cited Ray's ostensible "conduct" in supposedly stating to CSX that "Hardbarger, Woodward and Mahaffey had nothing to do with the Blue Zone or with the claiming of

unearned overtime."[4] *Id.*

Clearly, neither of the court's cited "actions" have anything to do with the "conduct" element of the *Cook* test, which clearly focuses upon the underlying *misconduct* for which Ray was actually *disciplined*, i.e. the rules violations of unearned overtime. *See Cook, supra*, at 511 (affirming the district court's ruling that the plaintiff had proven the second element because "several white employees had violated Rule 500, 'the primary offense which led to plaintiff's dismissal,' and therefore had engaged in conduct of 'comparable seriousness' to that of Cook."). There can be no doubt that Ray offered substantial, unrebutted proof that Woodward and Hardbarger, not to mention other white employees Vail (the conductor who Ray replaced), Surgoine, and Smith, had all committed the same (and indeed, more) violations of the exact same rules that Ray was charged with violating, in the same manner and to the same end, all prior to James Ray's first violation. Indeed, Persinger explicitly stated that even in the limited records of his email, Woodward and Hardbarger had done "the same thing wrong" in claiming overtime they did not earn. JA I 289.

CSX' General Manager Steve Persinger was

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[4]The evidentiary record does not support the court's statements about Ray taking unlimited responsibility for all actions by the other three. Both the plaintiff's and CSX' witnesses stated clearly that when Ray explicitly said that Hardbarger, Mahaffey, and Woodward had nothing to do with nor any knowledge of Ray's actions, he was taking responsibility, but only of his *own* actions in claiming overtime on the dates charged. JA I - 245-6, 427-8. Ray never took responsibility for Blue Zone overtime violations traceable to another employee's actions, and it would be ridiculous for CSX to assert otherwise when their own records clearly delineate the Reporting ID of the employee responsible for each date. JA II - 616.

unequivocal about this admission:

> Q. Isn't it true that Woodward, Hardbarger, and James Ray all did the same thing? They all did the same thing wrong, even under the email that you wrote.
>
> A. They all used the Blue Zone. They all claimed overtime that they did not earn. Yes sir.

JA I - 289; *see also* JA I - 201-2, 203, 206, 208, 349 (CSX's policy of "zero tolerance" for any false claim of overtime). Thus, it is indisputable that the plaintiff met Cook's second element and established a *prima facie* case. His charged "misconduct" was comparable to that of the white employees. Indeed, if his subsequent *mea culpa* for his own charges has any effect, it should be to make his own conduct *less culpable*, since he was in fact willing to accept responsibility for his individual actions. The Fourth Circuit did not see it that way, and this contradicts not only established law on Title VII but the remedial and protective policies underlying that law.

Although the panel did not address the issue explicitly, it clearly disregarded the comparable, uncharged overtime violations of the white employees, ostensibly accepting Persinger's contradictory and rotating positions that he did not see, did not know about, or could not corroborate the other employees' misconduct sufficient to charge them. As the record makes clear, however, CSX lost credibility by feigning stupidity about the other Blue Zone overtime time entries, particularly where even on Persinger's email (and all CSX records) each Blue Zone overtime violation was traceable to the distinct employee's Reporting ID for a given date. JA I - 614. The court's adoption of

CSX' pretext of ignorance at Ray's May 14 Board of Inquiry also ignored the undisputed fact that Bill Hardbarger confessed to CSX on April 17 to personally logging the crew out with the Blue Zone for overtime on April 5, and also informed CSX he had been using it in the past (before the plaintiff's arrival at Balcony Falls). See JA I - 240-2, 286-7. Finally, as discussed *supra*, the jury certainly had sufficient evidence to disbelieve the proffered excuse of the necessity for black box evidence or Persinger's subjective belief in that necessity. Although the trial court and Fourth Circuit panel may have reached a different result, they were not the fact finder and should not have substituted their own interpretations of the facts to that end.

CONCLUSION

For the above reasons, the petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted this 18th day of September, 2006.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 20, 2006

No. 05-1623
CA-04-134-7

JAMES RAY
Plaintiff - Appellant

v.

CSX TRANSPORTATION, INCORPORATED
Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no matter of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Shedd, and Judge Currie.

For the Court,
/s/ Patricia S. Connor
Clerk

JUDGMENT

Filed: May 23, 2006

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 05-1623
CA-04-134-7

JAMES RAY
Plaintiff - Appellant

v.

CSX TRANSPORTATION, INCORPORATED
Defendant - Appellee

Appeal from the United States District Court for the
Western District of Virginia at Roanoke

In accordance with the written opinion of the Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1623

JAMES RAY,

Plaintiff - Appellant,

versus

CSX TRANSPORTATION, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Senior District Judge. (CA-04-134-7)

Argued: March 16, 2006 Decided: May 23, 2006

Before WILKINSON and SHEDD, Circuit Judges, and Cameron McGown CURRIE, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Devon James Munro, LICHTENSTEIN, FISHWICK & JOHNSON, P.L.C., Roanoke, Virginia, for Appellant. Robert Craig Wood, MCGUIREWOODS, L.L.P., Charlottesville, Virginia, for Appellee. **ON BRIEF**: John P. Fishwick, Jr., LICHTENSTEIN, FISHWICK & JOHNSON, P.L.C., Roanoke, Virginia for Appellant. Aaron J. Longo, MCGUIREWOODS, L.L.P., Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

James Ray, an African-American employee of CSX Transportation, Inc., brought this Title VII action against CSX for race discrimination. See 42 U.S.C. §§ 2000 (e) et seq. Ray alleged that CSX discriminated by enforcing disciplinary measures against him differently than against white employees. The jury found in Ray's favor and awarded him $72,000 in compensatory damages and $128,000 in back pay. On CSX's post-trial motion, the district court granted judgment as a matter of law to CSX; alternatively, the district court sua sponte granted a conditional new trial. See Fed. R. Civ. P. 50, 59. Ray now appeals these rulings. For the following reasons, we affirm the district court's grant of judgment as a matter of law in favor of CSX.

I.

On March 31, 2003, CSX transferred Ray - - a longtime CSX employee - - to its Balcony Falls work site in Glasgow, Virginia.[1] At Balcony Falls, Ray worked as a conductor on CSX's two-man train crews, which consisted of a conductor and an engineer. Upon the completion of the work day, the conductor was responsible for logging the train crew out at a designated CSX computer terminal at Balcony Falls.

After Ray had been at Balcony Falls for 17 days, CSX became suspicious that several Balcony Falls employees (including Ray) had been wrongfully claiming ("stealing") overtime. Specifically, CSX suspected that some of its train crews were stealing overtime by logging-out at home instead of logging-out at the designated computer terminal. CSX's suspicion first arose because of information learned by Steve Persinger, a white CSX trainmaster, about the payment of overtime to William Hardbarger, a white CSX engineer. Persinger relayed this information to Wes Knick, CSX's terminal manager, and Don Hensley, CSX's district superintendent. Hensley asked Persinger to investigate.[2]

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[1]In this appeal from a ruling on CSX's Rule 50 motion, we view the acts in the light most favorable to Ray, the nonmovant. Babcock v. BellSouth Adver. and Publ'g Corp., 348 F.3d 73, 75 n.1 (4th Cir. 2003).

[2]Lenford Hatcher, an African-American CSX trainmaster, was the same rank as Persinger and was the direct supervisor of Ray's territorial jurisdiction. Hatcher was not at work on the day the investigation began. When

As part of this investigation, Knick visited Balcony Falls. On the day of his visit, Knick observed the train crew finish its work for the day, but contrary to CSX's policy, the crew did not log-out from the designated terminal. Thus, Knick made visual confirmation of a CSX overtime policy violation. The offending crew that day composed of Ray and T.S. Mahaffy, a white CSX engineer.

Meanwhile, Persinger was continuing the investigation from his office. Using his computer, Persinger accessed the log-in/log-out times for all Balcony Falls employees for the preceding several weeks. Because some employees had logged-out from terminals that Persinger did not recognize, he sent an e-mail cataloguing log-out information from March 31 through April 17, 2003, to CSX's Information Security Office ("Infosec"), in Jacksonville, Florida, asking how to identify the location of those unrecognized terminals. Infosec explained in response that certain Union Officials employed by CSX had access to a computer program called the "Blue Zone."[3] Although CSX had a zero tolerance policy for employees logging-out from remote locations, Blue Zone had the unintended effect of allowing employees with the software and an internet

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Hatcher later asked for information on the investigation, he was told that CSX had it under control. Testimony established that CSX's ordinary practice was that a manager who began an investigation maintained control of it until its conclusion.

[3]Ray wan not a Union Official and did not have authorization to possess the Blue Zone software.

connection to log-out from a remote location, usually the employee's home. Logging out from such remote locations allowed employees to steal overtime by receiving credit for time thy were actually not working. The terminals that Persinger did not recognize were remote locations where employees had used Blue Zone to log-off. Because each entry for log-out times displayed an employee identification number, Persinger could identify which employees had improperly logged-out using Blue Zone.

Given this explanation, Persinger suspected that several employees had stolen overtime. In an effort to confirm his suspicion, Persinger obtained the "engine download" information from the train's "black box," which records the time when the train engine was operating. Because Persinger believed that it usually took a crew no more than one hour after a train's engine shut down to complete necessary paperwork and log-out, he was able to estimate from the black box data the approximate time that the train crews should have logged-out on each day. Persinger discovered, however, that the engine download information was available only from April 11 through April 17, 2003.[4]

At some point during the investigation, Persinger called Hardbarger to inquire about what time he and Ray had

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[4]The black box had a limited amount of recording tape and continuously recorded over previously recorded data. If the train was used daily, the tape stored approximately six days of information before it recorded over previous recordings.

finished work on a day that Ray had logged-out using Blue Zone. The next day, Hardbarger confessed to Persinger that he had also used Blue Zone on one occasion to log-out. Hardbarger's use of Blue Zone was on April 5, 2003. Hardbarger maintained throughout the investigation and subsequent disciplinary proceedings that in using Blue Zone he had not intended to steal overtime.[5]

After conducting this investigation, Persinger spoke with Hensley and John Thompson, CSX's director of labor relations, and informed them of the information he had compiled. Thompson then instructed Persinger to bring charges against Ray and three white employees (Hardbarger, Mahaffey, and Larry Woodward) for overtime violations. Ray was charged for four violations in which he had improperly logged-out. These violations involved Hardbarger, one involved Mahaffey, and one involved Woodward. These men were charged as crew members. There is no dispute that Ray committed these violations. Additionally, Ray and Hardbarger were charged for the separate April 5 incident to which Hardbarger had confessed. Hardbarger had logged-out on that day, and Ray was a crew member.

Although it was evident from Persinger's e-mail to Infosec that both Ray and Woodward had improperly logged-out using Blue Zone on several occasions prior to April 11, CSX did not charge either for those violations.

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[5]As a union official, Hardbarger was entitled to have Blue Zone.

Persinger explained that he did not charge for those earlier violations because he had no corroborating evidence. Although the black box data only revealed when the train stopped, not when the employee actually left work, Persinger believed that the data provided a sufficient form of corroboration to charge an employee with a violation of company policy.

Pursuant to a Collective Bargaining Agreement ("CBA") between CSX and the Union which represented CSX's employees, CSX conducted a Board of Inquiry for each charged violation. At each Board of Inquiry involving a charge that Ray had improperly used Blue Zone to log-out, Ray took full responsibility for the violation and exonerated the other employees with whom he was charged. Specifically, Ray admitted that he was the one improperly using Blue Zone and that the other members of his train crew were ignorant of, and had nothing to do with, his use of Blue Zone. Additionally, Ray refused to divulge how he obtained the Blue Zone software.

Following these Boards of Inquiry, Garhart Williams, the head of the CSX Huntington Division, reviewed the Boards' proceedings and discussed them with Thompson. Williams then recommended to Doug Greer, CSX's regional vice-resident, that Ray be terminated based on his admitted multiple Blue Zone violations. Williams also recommended a 15-day suspension for Woodward and no punishment for Mahaffey based on their relatively minor role in the offenses, and he recommended a 60-day suspension for Hardbarger, who had confessed and attributed his use of Blue Zone to a mistake. CSX accepted Williams' recommendation and

disciplined the employees accordingly.[6]

Pursuant to the CBA, Ray appealed his termination to an arbitrator. As a result of an arbitration award, Ray was reinstated without back pay. Although the arbitrator reinstated Ray, he found that there was "not a scintilla of credible proof of racial discrimination." J.A. 599.

II.

At trial, Ray bore the burden of proving "that he has been the victim of intentional discrimination." Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995) (internal punctuation omitted). After the verdict for Ray, the district court granted judgment as a matter of law in favor of CSX under Rule 50(b), which provides that a district court may grant such a motion if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Specifically, the district court held that the facts of this case support only one conclusion: CSX was not motivated by discrimination in charging or terminating Ray for his overtime violations.

Ray contends that the district court erred in granting this Rule 50 motion. We review this ruling de novo. Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 543 (4th Cir. 2003). Under Rule 50(b), our inquiry is whether a jury,

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[6]According to Williams, he told Greer that he intended to implement his recommendations unless he was instructed otherwise.

viewing the evidence in the list most favorable to Ray, "could have properly reached the conclusion reached by this jury." Id. (internal punctuation omitted). If reasonable minds could differ about the result in this case, we must reverse the grant of judgment as a matter of law. Id. In reviewing the district court's judgment, "we examine the full trial record to determine whether sufficient evidence supported the jury's verdict." Id. (Internal punctuation omitted).

A.

Ray first contends that he was treated differently than white CSX employees who were not charged with overtime violations. The district court recognized that CSX presented evidence that it would not charge employees without black box data or other corroboration, and stated that Ray's "subjective beliefs that the charges were limited based on the engine download information in order to target him does not render [CSX's] explanations unworthy of belief." J.A. 591. Like the district court, we conclude that Ray has presented insufficient evidence that he was discriminated against when CSX brought charges against him.

Initially, we point out that the other three employees charged along with Ray were white. This fact militates against a conclusion that CSX discriminated against Ray. See Hicks v. Southern Md. Health Sys. Agency, 737 F.2d 399, 403 (4th Cir. 1984). Further, CSX maintained that it would only charge an employee with a violation for stealing overtime if there was corroborating evidence, such as black box data or the employee's own confession, and the facts established that CSX did not charge any overtime violations

against either white of African-American employees where there was no corroborating evidence. Instead, CSX did not charge Ray for two prior instances when he stole overtime because there was no corroborating evidence.

Ray contends that the black box data does not corroborate an overtime violation and was therefore unnecessary to bring charges. Although Ray points to evidence that in hindsight suggests that the black box data did not provide any corroboration for these offenses, he presented no evidence to establish that Persinger's belief that the black box data offered corroboration was anything but honest. Thus, whether the black box data was actually necessary or not is immaterial because "it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for" Persinger's decision. DeJarnette v. Corning, Inc., 133 F.3d 293, 299 (4th Cir. 1998).[7]

Because CSX only charged those employees for violations where it believed corroborating evidence existed, and it charged white and African-American employees equally under this standard, "there was no disparity of treatment from which one could conclude that [CSX's decision to charge Ray] was a product of racial discrimination." Cook v. CSX Transp. Co., 988 F.2d 507,

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[7]Although Ray points to additional evidence to support his claim that CSX unfairly charged him we find that evidence to be insufficient to establish that CSX discriminated against him.

512 (4th Cir. 1993). Accordingly, we find that Ray presented insufficient evidence that he was discriminated against when CSX brought charges against him.

B.

Ray also claims that he was treated differently than white CSX employees who were charged for overtime violations because he received a more severe punishment. The district court rejected this theory, hold that Williams, the decisionmaker, was not motivated by Ray's race but, instead, based his decision on Ray's admitted multiple overtime violations. Like the district court, we conclude that Ray filed to establish that CSX discriminated against him in this regard.

Although Ray argues that Persinger was the relevant decisionmaker and that Williams had a limited role in handing down a foregone sentence, even if we assume Persinger was biased, we decline to deem "a biased subordinate who has no supervisory or disciplinary authority and who does not make the fine or formal employment decision . . . a decisionmaker simply because he had a substantial influence on the ultimate decision" or because he played a significant role in the adverse employment decision. Hill v Lockhead Martin Logistics Mgmt., 354 F.3d 277, 291 (rth Cir. 2004) (en banc). Given the facts of this case, we find that at this stage in the disciplinary proceedings Williams made the relevant decision himself. Further, we find that based on Ray's confessions - - which completely exonerated his fellow crew members on those instances in which he improperly logged-out - - he was no longer

engaged in conduct that "was comparable in seriousness to misconduct of employees outside the protected class." Cook, 988 F.2d at 511. Thus, because the coworkers charged along with Ray were not engaged in conduct of comparable seriousness, Ray cannot establish that the discipline enforced against him was a product of racial discrimination. See id. For these reasons, CSX did not discriminate against Ray by punishing him more severely than others also charged for overtime violations.[8]

III.

In conclusion, we hold that the district court did not err in granting judgment as a matter of law in favor of CSX. The evidence, even viewed in the light most favorable to Ray, established that CSX charged Ray and other employees for overtime violations only when it had what it considered to be corroborating evidence of a violation. In those instances when CSX had such evidence, it charged all white and African-American employees. Likewise, when CSX was aware of an overtime violation but did not have corroborating evidence, it did not charge white or African-American employees (including Ray). Moreover, CSX terminated Ray only because of his own admissions that

[8]Although Hardbarger admitted using Blue Zone to log-out improperly on one occasion, his situation differs from Ray's. Hardbarger had previously confessed to his own violation, and unlike Ray he attributed the violation to a mistake. Ray has not pointed to any evidence in the record to suggest that CSX had reason to doubt Hardbarger's explanation.

evinced more culpable conduct than other employees who were charged. Accordingly, we affirm the district court's grant of CSX's motion for judgment as a matter of law.[9]

AFFIRMED

[9]Because we affirm the district court's grant of judgment as a matter of law, we need not address Ray's contention that the district court erred in granting a conditional new trial.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

JAMES RAY,	**)**	**Civil Action No.**
Plaintiff	**)**	**7:04cv00134**
v.	**)**	
	)	**FINAL ORDER**
CSX TRANSPORTATION, INC.,	**)**	**By: James C. Turk**
Defendant	**)**	**Senior United States**
	)	**District Judge**

In accordance with the accompanying Memorandum Opinion, it hereby is

ORDERED

that the jury verdict finding for the plaintiff is set aside and the Defendant's Motion for Judgment as a Matter of Law (Dkt. No. 29) hereby is **GRANTED** and Plaintiff's Motion for Entry of Verdict (Dkt. No. 31) hereby is **DENIED**. Should the Appellant Court decide that judgment as a matter of law is inappropriate in this case, the Court hereby **GRANTS** the defendant a new trial in this case.

The Clerk is directed to strike this case from the active docket of the Court and to send certified copies of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTER: This 23rd day of May, 2005.

/s/ James C. Turk
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

JAMES RAY,	**)**	**Civil Action No.**
Plaintiff	**)**	**7:04cv00134**
v.	**)**	**MEMORANDUM**
	)	**OPINION**
CSX TRANSPORTATION,	**)**	
INC.,	**)**	**By: James C. Turk**
Defendant	**)**	**Senior United States**
	)	**District Judge**

The Plaintiff, James Ray ("Ray" or "plaintiff"), brought this Title VII action against the defendant, CSX Transportation, Inc. ("CSX" or "defendant"), alleging that plaintiff was discriminated against because of his race. The parties tried the case before a seven-member jury, which returned a verdict in plaintiff's favor and awarded both compensatory damages and back pay. The Court gave both sides fifteen days to file any post trial motions. Pending before the Court is the defendant's Motion for Judgment as a Matter of Law (Dkt. No. 33) and Plaintiff's Motion to Enter Judgment on the Jury Verdict (Dkt. No. 34.). After hearing oral arguments and reviewing the record in the case, the Court concludes that the defendant's motion must be granted and plaintiff's motion denied.

I.

The evidence at trial, taken in a light most favorable to the plaintiff, established the following. After 21 years of

service with CSX in other locations, plaintiff was transferred to CSX's Glasgow, Virginia work site[1] on March 31, 2003. After being at the Balcony Falls site for seventeen days, CSX became suspicious that several Balcony Falls employees had been wrongfully claiming overtime that they did not work. On April 17, 2003, defendant pulled plaintiff from the job and suspended him pending an investigation. As a result of the investigation, plaintiff and three white employees were charged with CSX policy violations alleging that they had wrongfully claimed unearned overtime from CSX. Plaintiff was eventually terminated for the violations while the other white employees who were charged with overtime violation, were not.

The possibility that certain Balcony Falls employees might be engaging in payroll fraud first came to the defendant's attention when William Hardbarger ("Hardbarger"), a CSX engineer assigned to Balcony Falls, was observed at a CSX office several miles from Balcony Falls while still logged on a the site. Steve Persinger ("Persinger"), a CSX Trainmaster, assumed responsibility for investigating whether other overtime policy violations existed at the Balcony Falls site. As part of this investigation, Wes Knick ("Knick") visited the Balcony Falls site. Knick observed the train crew finish its work for the day, but contrary to CSX's policy, the crew did not log off from the train's destination terminal. Thus, Knick made

[1]At trial, the work site at Glasgow, Virginia was referred to as "Balcony Falls;" the Court will do the same.

visual confirmation of CSX overtime policy violations.[2]

Meanwhile, Persinger continued his investigation at his office. There, he accessed the log-in/log-out times for all Balcony Falls employees from mid-March through April 17, 2003.[3] Because some employees had logged-off from terminals that Persinger did not recognize, he sent an e-mail to CSX's Information Security Office In Jacksonville, Florida ("Infosec"). Infosec explained that certain Union officials, employed by CSX,[4] had access to a computer program called the "Blue Zone." The Blue Zone program was intended to allow the Union officials to access the CSX computer system in order to obtain information regarding Union employees. The software had the unintended effect, however, of allowing employees with the software and an internet connection to log-off from a remote location, usually

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[2]The offending crew that day was composed of T.S. Mahaffey ("Mahaffey"), a CSX engineer, and the plaintiff.

[3]Persinger had access to another CSX computer program that would have given him the log-in/log-out times for any employee further in the past. To get this information, however, Persinger would have had to enter each employee's identification number into the program. Given the number of employees at CSX and Persinger's suspicion being limited to the Balcony Falls work site, the amount of effort required to discover the violations would have been much grater than the scope of the violations demanded.

[4]Ray was not a Union Official, and did not have authorization to possess the Blue Zone software under circumstance.

the employee's home. The terminals that Persinger would not identify were actually the remote locations where the employee had used the Blue Zone to log-off.

Given this explanation, Persinger suspected that several employees had claimed overtime that they had not earned. In order to confirm his suspicion, Persinger obtained the "engine download" information from the "black box" of the relevant train. This information allowed Persinger to see when the engine of the train was shut down for the day. Once Persinger had this information he was able to determine the approximate time that the crew should have logged-off.[5] Persinger discovered, however, that the engine download information for the relevant train was available from April 11, 2003 through April 17, 2003.[6]

Since the engine download information was necessary to bring a successful charge for overtime policy violation, John Thompson ("Thompson"), Director of Labor Relations for the Huntington Division of CSX, instructed Persinger to charge each employee who used the Blue Zone to claim unearned overtime on dates the engine download information was available. Additionally, Persinger was

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[5]The evidence was that a crew usually took about twenty minutes after a train's engine shut down to complete the necessary paper work and log-off, but that it never took more than an hour.

[6]The black box had a limited amount of recording tape, and continuously re-wrote itself. If a train was used daily, the tape stored approximately six days of information before it wrote over previous recordings.

instructed to charge Hardbarger and plaintiff for a violation on April 5, despite the missing engine download information, only because Hardbarger had confessed to claiming unearned overtime on that date. As a result of this instruction, plaintiff was charged with four overtime policy violations.[7]

Pursuant to a Collective Bargaining Agreement ("CBA") between CSX and the Union, the company conducted a Board of Inquiry for each charged violation. At each Board of Inquiry, the plaintiff took full responsibility for the violation and exonerated the other employees with whom he was charged. Additionally, plaintiff refused to divulge where he received the Blue Zone software. Following the Boards of Inquiry, Gery Williams, the head of the Huntington Division, decided to terminate plaintiff while imposing less sever discipline on the three white employees. Pursuant to the CBA, Ray appealed the decision. As a result of an arbitration award, nearly 20 months after he had been terminated, plaintiff was reinstated, without back pay.[8] Although he reinstated plaintiff, the arbitrator found that

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[7]Plaintiff was charged with a violation on: 1) April 5 and 14, 2003, along with Hardbarger (two separate violations); 2) April 16, 2003, along with Mahaffey; and 3) April 11, 2003, along with Larry Woodward ("Woodward"), another CSX employee assigned to Balcony Falls.

[8]After CSX had reinstated plaintiff and promised him that no further charges would be brought, plaintiff revealed that it was Woodward who had supplied him with the Blue Zone software.

there was "not a scintilla of credible proof [of] any form of racial discrimination[.]"[9]

II.

In reviewing a motion for judgment as a matter of law, a court "must review all the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence." *Reeves*, 530 U.S. at 135. A court should leave intact a jury's verdict if reasonable minds could differ about the result the case. *See Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536, 534 (4th Cir. 2003). A court, however, should not act as a "rubber stamp convened merely to endorse the conclusions of the jury[.]" *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996). Rather, judgment as a matter of law "is mandated where the facts and the law will reasonably support only one conclusion." *See Id, Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (internal quotation and citations omitted). After hearing oral argument and reviewing the evidence in a light most favorable to the plaintiff, the Court finds that the evidence leads to one conclusion: that plaintiff was not actually discriminated against because of his race.

To establish a *prima facie* case of racial discrimination in a disparate discipline case, plaintiff must show: 1) that he is a member of the class protected by Title VII; 2) that the prohibited conduct in which he engaged was

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[9]Defendant's Trial Exhibit #1.

comparable in seriousness to misconduct of employees outside the protected class; and 3) that the disciplinary measures enforced against him were more sever that those enforced against those other employees. *Cook v. CSX Transportation Corp.*, 988 F.2d 507, 511 (4th Cir. 1993). Under the scheme set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff's *prima facie* case establishes a presumption that the employer unlawfully discriminated against the employee. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). This presumption, in turn, places on the defendant the burden of producing evidence "that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" *Id.* at 507 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). If the defendant presents such evidence, "the *McDonnell Douglas* framework - with its presumptions and burdens - is no longer relevant." *Id*. at 510.

The burden is on the plaintiff, then, to show that the adverse employment decisions were actually motivated by racial discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (citing *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). The plaintiff may meet this burden by showing the falsity of the employer's proffered explanation. *Id*. If the plaintiff does so, the trier of fact is permitted to infer the ultimate fact of discrimination from the falsity of the explanation. *Id*. at 147. The plaintiff bears the ultimate burden, in all circumstances, to prove that an individual's protected status was the actual motivating factor for the adverse employment action at issue. *Id.*; *St. Mary's Honor Ctr.*, 509 U.S. at 507-08.

III.

As stated above, the evidence at trial was that plaintiff used the Blue Zone to claim unearned overtime on several occasions in April, 2003. In each Board in Inquiry, plaintiff admitted that claiming the unearned overtime was wrong and took full responsibility for each employee with whom he was charged. *See* Plaintiff's Trial Exhibits 14, 18 and 19. He expressly stated at the respective Boards of Inquiry that Hardbarger, Woodward and Mahaffey had nothing to do with the Blue Zone or with the claiming of unearned overtime. *Id*. Moveover, plaintiff outright lied at the Boards by telling CSX that he did not remember who had given him the Blue Zone.[10] At that point, plaintiff set himself apart, admitting that his behavior was more serious than the others.

The only reasonable inference to be drawn from the evidence, even after taking the facts in a light most favorable to the plaintiff, is that plaintiff intended to exonerate those employees charged with him. There can be no doubt that, as between the four charged employees, plaintiff's statements made his conduct more serious than the others. Accordingly, the Court concludes that plaintiff did not present sufficient evidence to make out a *prima facie* case of discrimination

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[10]Despite plaintiff's reference regarding his "honesty about his own transgressions," Plaintiff's Memo at 18, at trial, plaintiff admitted he lied at the Boards both about the involvement of the other employees with the Blue Zone and about not remembering where he obtained the Blue Zone software.

because he did not show that his conduct was comparable in seriousness to the misconduct of the other charged employees. *See Cook*, 988 F.2d at 511.

Assuming, however, that plaintiff had made out a *prima facie* case, the verdict cannot stand because the plaintiff has not shown that a reasonable probability exists that plaintiff's termination was actually motivated by discrimination. Since defendant has proffered a legitimate, nondiscriminatory rational for the adverse employment actions, plaintiff's case hinges on whether he presented sufficient evidence of the falsity of defendant's explanations such that the jury was permitted to infer discrimination. *See Reeves*, 530 U.S. at 143. The Court finds that he did not.

In his brief, plaintiff argues that the jury had sufficient evidence upon which to conclude discriminatory intent. In support of his argument plaintiff offers evidence that shows the falsity of defendants contention that "[n]one of the white employees engaged in conduct as serious as that of plaintiff . . . " Plaintiff's Memo at 15, quoting CSX's Memo at 10. Plaintiff essentially argues that CSX orchestrated the investigation, charges and Boards of Inquiry in a manner that made it appear that plaintiff was more culpable than the other employees. CSX did this by: 1) only investigating the use of the Blue Zone after March 31, 2003, the date that plaintiff started at the Balcony Falls site; 2) ignoring the white employees use of the Blue Zone and charging only on dates that the plaintiff had claimed overtime using the Blue Zone; 3) relying of plaintiff's "honesty" to obscure the multiple overtime violations by other white employees and diminish their culpability for

their own use of the Blue Zone to claim overtime. The Court will address each contention separately.

A.

At trial, Persinger testified that the function he used on his computer to obtain log-in/log-out times for Balcony Falls employees allowed him to go back to mid-March for this information. He further testified that he went back as fare as his computer permitted him and found the first discrepancy on April 3, 2003. This evidence is undisputed. When challenged by plaintiff's counsel, however, Persinger testified that there was a way for him to determine whether an individual employee used a remote terminal to log-off as far back as he wished to go. While Persinger could not have done this search on his own, he could have requested the information from CSX. Plaintiff maintains that this is where CSX's explanation disintegrates into pretext. Ostensibly, this is so because Persinger should have known to investigate further back to see if other employees besides those Persinger already suspected had used the Blue Zone to claim unearned overtime.

Evidence that Persinger could have investigated further back than he did does not mean that his reason for not doing so was pretext. The only inference that can reasonable be drawn from Persinger's testimony about the manner in which he proceeded with his investigation is that he was

chiefly concerned with the present Balcony Falls crew.[11] He did not isolate his investigation to violations committed by the plaintiff only, but investigated all of the discrepancies that he found. In his e-mail, he asked Infosec for the identification of each terminal that he did not recognize, not just the ones where had plaintiff logged-off on a remote terminal. Plaintiff's subjective belief that Persinger should have known that the overtime policy violations were broader than his first anticipated does not make his motivations suspect.

B.

As stated above, the evidence at trial revealed that two things were needed in order to charge an employee for an unearned overtime violation: 1) the engine download information from the black box to determine when the engine had shut down; and 2) the log-out time of the employee. Persinger obtained the engine download information that was available for the relevant train. The information was available only for April 11 through April 16. Persinger charged only those employees who used the Blue Zone to log-off and worked overtime during those dates, with only one exception.[12]

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[11]Persinger had information already that Hardbarger, Mahaffey and plaintiff, all Balcony Falls employees, had claimed overtime which they did not work.

[12]As stated earlier, Hardbarger and plaintiff were charged for April 5 because he had previously confessed to Persinger that he had wrongfully claimed overtime for that

Plaintiff charges that defendant ignored white employees' use of the Blue Zone, namely Woodward's violations occurring on April 3 and April 6, without explanation. The evidence was, however, that defendant did not charge Woodward for these days because CSX did not have the black box information for those days. Far from ignoring these violations, they are present in the e-mail that Persinger sent to Infosec in the first instance. Importantly, CSX did not "ignore" any violations committed by white employees between April 11 and April 16. In fact, Woodward was charged for an overtime policy violation for a day which CSX had the engine download information. Moreover, to further support CSX's proffered explanation, the evidence shows that plaintiff himself was not charged for two days in which he logged-off using the Blue Zone and apparently claimed overtime because there was no engine download information for those days.[13] Plaintiff's subjective beliefs that the charges were limited based on the engine download information in order to target him does not render defendant's explanations unworthy of belief.

C.

As the Court stated when discussing plaintiff's *prima facie* case, the evidence at trial was that plaintiff took full responsibility for each violation for which he was charged and exonerated each employee with whom he was charged.

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day.

[13]*See* Plaintiff's Trial Exhibit #4.

See Plaintiff's Trial Exhibits 14, 18 and 19. Accordingly, defendant explained that it terminated plaintiff from his employment with CSX, and not the other charged employees, because plaintiff was admittedly more culpable then the others. In response to this explanation, plaintiff argues that his "honesty" could not possibly have exonerated every white employee who had ever used the Blue Zone. To maintain such a ludicrous position, plaintiff argues, shows the pretextual nature of CSX's explanation an allowed the jury to infer actual discrimination on the part of CSX.

Plaintiff overstates the evidence. At no time did CSX claim that plaintiff took responsibility for every claim of unearned overtime. Rather, as between plaintiff and the other three charged employees, plaintiff voluntarily took the blame for the overtime violations. The decision maker, Gery Williams, was presented with a record of four employees charged with violations and one of them having accepted full responsibility for all of the violations. Williams relied on plaintiff's own statements and took action accordingly.

A reasonable fact-finder could not conclude, on the evidence presented, that in order to rid itself of one particular black employee, CSX charged three white employees, along with plaintiff, knowing somehow that plaintiff would accept full responsibility for the other charged employees. Plaintiff's subjective belief that he should not have been terminated after being "honest" and taking full responsibility for his violations does not create a reasonable inference that defendant fabricated its explanation for the adverse employment decision.

IV.

As stated above, plaintiff did not make out a *prima facie* case. Assuming, however, that he had, the defendant proffered at trial a legitimate, nondiscriminatory reason for the adverse employment actions taken against plaintiff. Thus, the burden was on plaintiff to show that those adverse employment actions were actually motivated by race discrimination. While plaintiff was permitted to meet this burden through circumstantial evidence by showing that the defendant's legitimate, nondiscriminatory reasons were pretext, plaintiff failed to present such evidence. The facts of this case support only one conclusion: that the defendant's decision to charge and terminate plaintiff for his overtime violations was not actually motivated by race discrimination. Accordingly, the Court has no choice but to grant defendant's motion for judgment as a matter of law. *See DeJarnette*, 133 F.3d at 298. An appropriate order shall this day issue.

V.

In the alternative, should higher authority not sustain this Court's grant of a judgment as a matter of law, this Court finds that a new trial pursuant to FED. R. CIV. P. 59 would be appropriate. It is within the Court's discretion to grant a new trial if it finds that the verdict was against the clear weight of the evidence. *See, e.g. Byrd v. Blue Ridge Rural Electric. Co-op, Inc.*, 356 U.S. 525 (1958). When considering whether a new trial should be granted, the facts are considered in a light less favorable to a non-movant than on a motion for judgment as a matter of law. *See, e.g.*

Williams v. Nichols, 266 F.2D 389, 391-93 (4th Cir. 1959). Even if plaintiff's evidence could reasonably support an inference that defendant's proffered legitimate reason for terminating plaintiff was pretextual, the weight of the evidence does not support the conclusion that the reasons for terminating plaintiff were pretext for discrimination. *See Reeves*, 530 U.S. at 147 (recognizing that it is not enough to disbelieve the employer, but the fact finder must believe the plaintiff's explanation of intentional discrimination). Accordingly, not requiring a new trial would constitute an injustice.

The Clerk is directed to send certified copies of this Memorandum Opinion and accompanying Order to all counsel of record.

ENTER: This 23rd day of May, 2005.

/s/ James C. Turk
Senior United States District Judge

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

VERDICT

JAMES RAY,	)	
Plaintiff	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**7:04CV14**
CSX TRANSPORTATION,	)	
INC.,	)	
Defendant(s)	)	

We, the Jury, having tried the issues joined in the above-entitled action find: in favor of the plaintiff, and fix damages as follows:

Back Pay:	$ 128,000
Compensatory Damages:	$ 72,000

/s/ Wendy M. Hubbard — 3-16-05
FOREPERSON'S SIGNATURE — DATE

Wendy M. Hubbard
FOREPERSON'S PRINTED NAME