No. 06-___

IN THE

Supreme Court of the United States

Clifford B. Meacham *et al.*,
Petitioners,

v.

Knolls Atomic Power Laboratory *et al.*

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

PETITION FOR A WRIT OF CERTIORARI

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May 9, 2007

QUESTIONS PRESENTED

The Age Discrimination in Employment Act (ADEA) prohibits employment practices that have an unjustified disparate impact on older workers, *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), but also provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The questions presented are:

1. Whether an employee alleging disparate impact under the ADEA bears the burden of persuasion on the "reasonable factors other than age" defense, as held by the Second Circuit in this case in conflict with the decisions of other circuits and a regulation of the Equal Employment Opportunity Commission.

2. Whether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a "reasonable factor other than age" as a matter of law.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case include Raymond Adams, Wallace Arnold, Deborah Bush, William Cabot, Allen Cromer, Thedrick Eighmie, Belinda Gundersen (as appointed representative of her late husband, Paul Gundersen), Clifford Levendusky, Clifford Meacham, Bruce Palmatier, Neil Pareen, James Quinn, Margaret Reynheer (as appointed representative of her late husband, William Reynheer), John Stannard, Allen Sweet, David Townsend, and Carl Woodman.

The defendants include Knolls Atomic Power Laboratory, Lockheed Martin Corp., and John J. Freeh.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clifford B. Meacham *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-32a) is published at 461 F.3d 134. A prior decision of the court of appeals (Pet. App. 33a-69a) is published at 381 F.3d 61. The magistrate judge's order denying respondents' motion for judgment as a matter of law (Pet. App. 70a-154a) is published at 185 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on January 8, 2007. Pet. App. 155a-56a. On April 3, 2007, Justice Ginsberg extended the time in which to file this petition to and including May 9, 2007. App. No. 06A946. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The relevant provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 623, are reproduced in the appendix to this petition. Pet. App. 157a-58a.

STATEMENT

Petitioners, all workers above the age of forty, were terminated off during a reduction in force in which the employer delegated broad discretionary authority to supervisors to determine which employees should be fired. A jury found that respondents' failure to adequately monitor and direct that discretionary process had an unlawful disparate

impact on older workers, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. The Second Circuit affirmed the jury verdict in an initial appeal, but that judgment was vacated and remanded by this Court for reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005). On remand, the court of appeals held, in conflict with the decisions of other circuits and with a regulation issued by the Equal Employment Opportunity Commission (EEOC), that petitioners bore the burden of demonstrating that respondents' employment practices were unreasonable. The court further held, in conflict with the position of the EEOC and this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that the delegation of broad termination discretion to company supervisors usually would be, and in this case was, reasonable and therefore immune from disparate impact challenge. Both holdings require review and correction by this Court.

1. The ADEA provides that it "shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).[1] The statute further provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsectio[n] (a) . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). The EEOC, which has rulemaking and enforcement authority under the statute,[2] has provided by

[1] The Act is limited to discrimination against "individuals who are at least 40 years of age." *Id.* § 631(a).

[2] *See* 29 U.S.C. § 628 (providing that "the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this

regulation that "[w]hen the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. § 1625.7(e).

The prohibitory language of Section 623 of the ADEA parallels the prohibition in Title VII of the Civil Rights Act against employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a). This Court has accordingly looked to its cases interpreting Title VII in construing the ADEA's prohibition against age discrimination. *See, e.g.*, *Smith*, 544 U.S. at 233-34. One of the Title VII precedents of "compelling importance" to the interpretation of the ADEA is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Smith*, 544 U.S. at 234. In *Griggs*, this Court interpreted the common language of Title VII and the ADEA to prohibit intentionally discriminatory employment practices as well as practices that have an unjustified disparate impact on protected employees. 401 U.S. at 429-30. The Court later held that *Griggs*'s disparate impact analysis applies not only to employment tests and criteria, like those at issue in *Griggs* itself, but also to an employer's "system of subjective decisionmaking," *Watson*, 487 U.S. at 990, like the one challenged in this case.

In subsequent decisions, including *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), this Court provided a framework for considering disparate impact claims under Title VII. First, the "plaintiff must begin by identifying the specific employment practice that is challenged" and show that the "challenged practice has a significantly disparate impact on employment opportunities" for protected workers. *Id*. at 656. If that burden is satisfied, "the case will shift to any business justification [the employer] offers for [its] use of

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chapter"); *id*. § 626(a)-(b) (providing EEOC enforcement authority with respect to private employment); *id*. § 633a(b) (same for federal employment).

these practices." *Id.* at 658. This so-called "business necessity test" contains two components: "first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact." *Id.* With respect to the business justification, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. On this question, "employer carries the burden of producing evidence of a business justification for his employment practice" but the "burden of persuasion . . . remains with the disparate-impact plaintiff." *Id.* If the employer produces evidence of a business justification, and the employee fails to rebut it, the employee may yet prevail by identifying "alternatives to [the employer's] hiring practices that reduce the racially disparate impact of practices currently being used" and would be "equally effective . . . in achieving [the employer's] legitimate employment goals." *Id.* at 660-61.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that the ADEA, like Title VII, prohibits employment practices that have an unjustified disparate impact on protected workers. *Id.* at 240. The Court further concluded that "*Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." *Id.*[3] However, the Court also held that "the scope of disparate-impact liability under ADEA is narrower than under Title VII," because the ADEA (but not Title VII) contains an exception for disparities resulting from "reasonable factors other than age." *Id.* This "RFOA" provision, the Court held, precludes liability for employment practices that would otherwise be unlawful under *Wards Cove*, if the practice is

[3] In 1991, Congress amended Title VII, but not the ADEA, to alter the burden-shifting regime established in *Wards Cove*. *See Smith*, 544 U.S. at 240 (discussing Civil Rights Act of 1991, § 2, 105 Stat. 1071).

"reasonable." 544 U.S. at 241. Without addressing which party bears the burden of proving or disproving the "reasonableness" of the employer's practice, the Court concluded that the practice before it – giving larger percentage pay raises to less senior employees in order to bring "starting salaries . . . up to the regional average," *id*. at 231 – was "unquestionably reasonable," *id*. at 242.

2. Petitioners are former employees of respondent Knolls Atomic Power Laboratories who lost their jobs during an involuntary reduction in force. Pet. App. 4a. Petitioners claimed, among other things, that respondents violated the ADEA by designing and implementing the workforce reduction process in a manner that had an unlawful disparate impact against older workers protected by the ADEA. *Id*. at 7a. In particular, the Lab decided which employees to terminate by instructing certain unit managers to rank their employees "between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service." Pet. App. 5a. This system gave substantial discretion to individual supervisors to determine whom to terminate,[4] and led to "startlingly skewed results." Pet. App. 7a. Of the thirty-one individuals selected for layoff, all but one were over forty. At trial, petitioners' statistical expert testified that "the probability of this differential occurring by chance was approximately one in 348,000." *Id*.

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[4] The guidance given supervisors on how to judge an employee's "flexibility" and "criticality" did little to constrain that discretion. Supervisors were told that the "tests for making a flexibility determination were whether the employee's 'documented skills [could] be used in other assignments that [would] add value to current or future Lab work." Pet. App. 5a-6a. "Critical skills were those skills that were critical to continuing work in the Lab as a whole," taking into account whether the skill was "a *key* technical resource" and whether it was available elsewhere within the Lab or in the external labor market. *Id*. at 6a (emphasis in original).

at 42a.[5] Petitioners' expert further found that the disparate effect on age arose principally from the ill-defined criteria of "criticality and flexibility" that relied on the subjective impressions of individual managers and, hence, were potential vehicles through which supervisors could give effect to overt or subconscious bias against older workers. *Id.*

The expert also testified that "the procedures set up for review of the individual managers' decisions 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome.'" *Id.* For example, although the written policy required the Lab's management to conduct a disparate impact analysis to guard against age discrimination, the actual analysis conducted simply compared the average age of the Lab's more than 2000 employees before and after the reduction in force; unsurprisingly, the average changed little as the result of terminating less than two percent of its workforce. *Id.* at 43a.

3. Petitioners sued respondents claiming, among other things, that their "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility" had an unlawful disparate impact based on age in violation of the ADEA. Pet. App. 7a. The parties consented to have the jury trial conducted before a magistrate. After hearing extensive testimony and evidence, the jury found that petitioners had established all the elements of an ADEA disparate impact claim under the law of the Second Circuit at the time. *Id.* at 45a. In particular, the jury found that plaintiffs had "proven that a specific employment practice of the defendants . . . although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages"; that defendants failed to "articulate[] a business justification for

[5] The odds varied depending on the comparison drawn, the highest reflecting the chance of drawing thirty workers older than forty off the lists of workers chosen for consideration for layoff, which was "approximately one in seventy-three," a still-statistically significant correlation. *Id.*

selecting the plaintiffs for termination"; that plaintiffs had proven "that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants" and that defendants acted willfully. *Id*. The magistrate judge denied respondents' motions for judgment as a matter of law, *id*. at 72a., and the Second Circuit affirmed, *id*. at 36a.

4. Shortly thereafter, this Court issued its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), agreeing with the Second Circuit that a disparate impact cause of action exists under the ADEA but making clear that an employer is not liable for a disparate impact that is the result of a reasonable factor other than age. Subsequently, this Court granted respondents' petition for certiorari, vacated the Second Circuit's judgment, and remanded for reconsideration in light of *Smith*. 544 U.S. 957 (2005).

On remand, the EEOC filed an amicus brief in support of petitioners, arguing that under *Smith*, the employer bears the burden of proof on the RFOA defense. *See* EEOC C.A. Br. 14. More specifically, the Commission argued that the employer must "prove that the challenged employment practice was reasonably designed to further or achieve an important and legitimate business purpose and was administered in a way that reasonably advances that purpose." *Id*. at 18. A divided panel rejected that view and reversed the denial of respondents' motion for judgment as a matter of law. The majority concluded that *Smith* cast no doubt on petitioners' showing that respondents' layoff practices caused "startlingly skewed results" having a marked disparate impact on the basis of age. Pet. App. 7a. The majority concluded, however, that under *Smith*, it was no longer sufficient for petitioners to show that an alternative practice could have avoided the disparate impact, as had been the rule in the Second Circuit prior to *Smith*. *Id*. at 9a. Instead, the court held, "the appropriate test is 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment practice, in relying on specific non-

age factors, constitutes a reasonable means to the employer's legitimate goals." *Id.*

The question then became whether the jury verdict could be sustained under that standard. To resolve that question, the court was required to determine "who bears the burden of persuasion with respect to the 'reasonableness' of the employer's proffered business justification under the ADEA disparate-impact framework." *Id.* at 11a. Agreeing with the Tenth Circuit, and disagreeing with the EEOC, the court held that burden belongs to the plaintiff. *See id.* (citing *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006)). The majority acknowledged that there "is some force" to the arguments to the contrary, including that the RFOA provision "(i) permits conduct that is 'otherwise prohibited' – language that suggests an affirmative defense; and (ii) is listed in the statute after the bona fide occupational qualification ('BFOQ') exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion." *Id.* at 13a (citations omitted). The majority nonetheless concluded that the employee should bear the burden of disproving reasonableness, because is it "hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable." *Id.* at 14a.

The court then proceeded to decide whether the evidence produced at trial was sufficient to satisfy petitioners' burden. *Id.* at 16a-19a. The court acknowledged that the system of discretionary decisionmaking chosen by respondents risked, and indeed produced, a massive reduction in employment opportunities for older workers. *Id.* at 17a. It held, however, that this fact had no bearing on the reasonableness of the system. *Id.* at 18a-19a. The Court likewise recognized that "the process could have been better scrutinized to guard against a skewed layoff distribution." *Id.* at 19a. But the court nonetheless held as a matter of law that employment

practices based on discretionary decisionmaking are generally immune from challenge under the ADEA:

> Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

Id.

Judge Pooler dissented. Disagreeing with the majority's analysis, she would have held that the RFOA creates a traditional affirmative defense upon which the defendant bears the burden of persuasion. *Id*. at 25a-31a. She explained that Section 623(f) carved out an exception to liability – providing a safe haven for conduct "otherwise prohibited" by the Act – as is common with other affirmative defenses upon which the defendant bears the burden of proof. Pet. App. 26a-27a. She also noted that Congress had expressly included the "otherwise prohibited" language in a parallel provision (Section 623(f)(2)) to overturn this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), which had construed that provision not to create an affirmative defense. Pet. App. 27a-28a. Judge Pooler further observed that "several circuits have characterized the RFOA provision and other Section 623(f) exemptions as affirmative defenses." *Id*. at 29a (collecting cases).

The Second Circuit denied petitioners' subsequent petition for rehearing and rehearing en banc. *Id*. at 155a-56a. This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case deepened a division of authority over an important question that frequently arises under the ADEA, and which this Court previously granted certiorari to decide but did not resolve. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985). In holding that employees bear the burden of disproving the asserted reasonableness of an employer's discriminatory practices in an ADEA disparate impact case, the Second Circuit's decision is in accord with the law of the Tenth Circuit, but in conflict with decisions from the Sixth and Ninth Circuits. At the same time, the court of appeals' decision rejected the interpretation given the Act by the agency Congress tasked with administering the statute, as expressed through notice-and-comment rulemaking. The Second Circuit's declaration that reliance upon subjective decisionmaking by direct supervisors will ordinarily be reasonable – and therefore beyond disparate impact challenge under the ADEA – also conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), which held that such a "system of subjective decisionmaking" *is* subject to challenge under a disparate impact regime. Certiorari should be granted to resolve these conflicts.

I. This Court Should Resolve The Growing Division Among The Courts Of Appeals Over Who Bears The Burden Of Persuasion On The "Reasonable Factors Other Than Age" Defense.

Whether employers or employees bear the burden of proof under the ADEA's "reasonable factors other than age" defense is the subject of a substantial, mature circuit split awaiting resolution by this Court. The question is all the more urgent because two circuits now apply a standard contrary to that applied by the EEOC in the course of its administrative responsibilities under the Act. Granting certiorari in this case would remove that untenable conflict

while also providing this Court an opportunity to bring much needed clarity to the level of deference owed the EEOC's ADEA regulations.

A. The Decision Below Deepened A Circuit Split On The Burden Of Proof Under The RFOA Provision.

The decision in this case exacerbated a long-standing division of authority this Court attempted, but failed, to resolve in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). *See id*. at 408 n.10. This petition provides the Court an opportunity to finish the work it began in that case.

In *Western Airlines*, commercial pilots brought a disparate impact challenge to their employer's policy of forbidding pilots from "downbidding" for the position of second officer, alleging that it had a disparate impact on the basis of age. *See Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 391 (C.D. Cal. 1981).[6] The pilots prevailed at trial and the airline appealed, arguing that "that the district court erred in instructing the jury that the defendant had the burden of proving 'by a preponderance of the evidence' that its decision . . . was motivated by 'reasonable factors other than age.'" *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983). The Ninth Circuit rejected that assertion, explaining that the employer

> confuses the elements of and burdens borne in the case-in-chief and those of an affirmative defense. The "reasonable factors" defense appears alongside the BFOQ exception in the ADEA, 29 U.S.C. § 623(f), and is an affirmative defense for which the employer bears the burden of proof.

Id. For this conclusion, the Ninth Circuit cited the EEOC's regulation at 29 C.F.R. § 1625.7(e), which provides that "the

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[6] The plaintiffs also challenged the airline's mandatory retirement age for pilots. 514 F. Supp. at 391.

employer bears the burden of showing that the 'reasonable factor other than age' exists factually.'" 709 F.2d at 553. The court further relied on a prior regulation of the Department of Labor that likewise provided that the RFOA provision "must be construed narrowly, and the burden of proof . . . will rest on the employer." *Id*. (citing 29 C.F.R. § 860.103(e) (1982)).[7] This Court granted certiorari to decide the burden of proof question, but ultimately failed to reach it. *See* 472 U.S. at 408 n.10.

In *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), the Sixth Circuit expressed the same understanding of the Department of Labor regulation as the Ninth Circuit, explaining that the provision was directed at shifting the burden of persuasion to the employer in a disparate impact case. *Id*. at 315.[8] *See also Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 959-60 (8th Cir. 1978) (stating that the employer bears the burden of the proof on the RFOA defense in a disparate treatment case).[9]

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[7] As originally enacted, the ADEA authorized the Secretary of Labor to issue implementing regulations. *See* Pub. L. No. 90-202 § 9, 81 Stat. 605 (1967). Pursuant to Reorganization Plan No. 1 of 1978, Congress transferred enforcement authority over the ADEA from the Department of Labor to the EEOC effective July 1, 1979. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. Section 321, *reprinted in* 92 Stat. 3781 (1978).

[8] While the statement was dicta, there is no basis to believe that the courts of the Sixth Circuit would not follow this understanding when confronted by the question presented in this case.

[9] As Judge Pooler noted below, a number of courts have characterized the RFOA provision as embodying an "affirmative defense." *See* Pet. App. 29a (citing, *e.g.*, *Erie Country Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 199 (3d Cir. 2000); *Baker v. Delta Airlines, Inc.*, 6 F.3d 632, 639 (9th Cir. 1993); *Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 959-60 (8th Cir. 1978)). *See also Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 808 (9th Cir. 2004).

Other courts, however, have held that the plaintiff bears the burden of disproving the reasonableness of the employer's practice under the RFOA provision. In this case, while acknowledging that there was "some force" to the contrary view, the Second Circuit concluded that "the best reading" of the ADEA is that "the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable." Pet. App. 11a. The court specifically embraced the Tenth Circuit's decision in *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186 (10th Cir. 2006). *See* Pet. App. 11a. In *Pippin*, the Tenth Circuit held that

> after an employee establishes a prima facie case of disparate impact age discrimination under the ADEA, the burden of production shifts to the employer to assert that its neutral policy is based on a *reasonable* factor other than age. …. [T]o prevail on an ADEA disparate impact claim, an employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is *unreasonable.*

440 F.3d at 1200 (emphasis in original).

Two other circuits have said that the employee bears the burden of proof on the RFOA defense in cases involving disparate treatment, but have not considered whether that holding applies to disparate impact cases. *See Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1416 (11th Cir 1986) ("We have repeatedly held that the plaintiff bears the burden of persuasion on the RFOA defense."); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978) (holding that RFOA provision is not an affirmative defense).

B. Allocation Of The Burden of Proof On The RFOA Defense Is A Question Of Recurring Importance In ADEA Litigation.

This division of authority should be resolved by this Court in light of the recurring importance of the issue.

Congress enacted the ADEA because it found that older workers were routinely subject to an array of overt and subtle discrimination, including the "discriminatory effects result[ing] from '[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Smith*, 544 U.S. at 232 (citation omitted). As a result, ADEA disputes, including disparate impact claims, are common,[10] particularly in cases such as this, involving involuntary reductions in force.[11] *See, e.g.*, Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 ALBANY L. REV. 143 (2006).

Very often the burden of proof on the RFOA defense is outcome-determinative. By its nature, the "reasonableness" standard cannot be applied with mathematical precision. And in many cases, like this one, an employer may be able to articulate a weak justification for employing a practice with a marked discriminatory effect. Whether that explanation is sufficient to avoid liability will often depend, as in this case,

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[10] The EEOC does not publish statistics that distinguish between disparate treatment and disparate impact claims under the ADEA, but its data does show that the agency has received more than 90,000 charges of age discrimination over the past five years for which data is available. *See* Age Discrimination in Employment Act (ADEA) Charges, FY 1997-FY2006 (available at *http://www.eeoc.gov/stats/adea.html*).

[11] *See, e.g., Reminder v. Roadway Express, Inc.*, No. 06-3224, 2007 WL 414273 (6th Cir. 2007) (disparate impact claim to reduction in force); *Pippin*, 440 F.3d at 1189 (same); *Smith v. Allstate Ins. Co.*, 195 Fed. Appx. 389 (6th Cir. 2006) (same); *Seasonwein v. First Montauk Sec. Corp.*, 189 Fed. Appx. 106 (3d Cir. 2006) (same); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005) (same); *Keating v. Harsco Corp.*, 109 Fed. Appx. 835 (8th Cir. 2004) (same); *Pottenger v. Potlatch Corp.*, 329 F.3d 740 (9th Cir. 2003) (same); *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948 (8th Cir. 2001).

on who bears the burden of persuasion on the question of reasonableness. *See* Pet. App. 16a-19a.

Accordingly, the current circuit split risks treating similarly situated workers and employers differently depending on accidents of geography, a disparity inconsistent with Congress's intent to create a uniform national law regarding age discrimination in employment. Only this Court can restore that intended uniformity to the law.

C. The Conflict Between Two Courts Of Appeals And The EEOC Provides Additional Reason For Review By This Court.

The Second and Tenth Circuits' failure to defer to the EEOC's interpretation of the RFOA provision – expressed in a notice-and-comment regulation as well as an amicus brief to the Second Circuit in this case, see EEOC C.A. Br. 14 – is not only erroneous, *see infra*, but also creates an untenable conflict between the administrative and judicial enforcement of the statute in these circuits.

That conflict gives rise to two distinct problems. First, the conflict will predictably lead to different treatment of private and federal employees subject to the same employment practices. In 29 U.S.C. § 633a, Congress gave the EEOC responsibility for enforcing the proscriptions of the ADEA against federal employers, along with the authority to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." *Id.* § 633a(b). Pursuant to that authorization, the EEOC established an administrative process for adjudicating federal-sector ADEA complaints, generally culminating with review by the Commission. *See generally* 29 C.F.R. Part 1614; 29 C.F.R. § 1614.401-410. The resulting decision is binding upon the federal agency. *Id.* § 1614.502.

As a result, within the Second and Tenth Circuits, private and federal workers are subject to the opposite standards of proof in challenging the discriminatory impact of identical

employment practices. In EEOC administrative proceedings challenging federal practices, the burden of proving the RFOA defense falls upon the employer; in parallel private litigation in federal court, the burden falls on the employee. In many cases, that difference may result in the same practice being deemed illegal or not depending on whether the employer is a private corporation or a federal entity. Whether a particular reduction-in-force practice is held illegal under the ADEA should not depend on whether the lab is run directly by a federal agency or, instead, operated by a private entity on a government contract.

The disagreement between the EEOC and the circuits also gives rise to a second difficulty with practical consequences for the private sector. While the EEOC does not have direct adjudicative authority over private employers as it does over federal agencies, the Commission nonetheless has a substantial role in enforcing the ADEA against private employers. By statute, the EEOC is required to receive and evaluate private-sector ADEA complaints. *See* 29 U.S.C. § 626(d). If the Commission determines that the charge of discrimination is well-founded, it is authorized to commence conciliation and, if conciliation fails, litigation. *See* 29 U.S.C. § 626(b). In deciding whether a disparate impact claim is meritorious, and whether to commence litigation in response to that charge, the EEOC will apply its regulation placing the burden of proving the RFOA defense on the employer. If that regulation is invalid, employers may be unnecessarily subject to litigation based on an erroneous view of the law. On the other hand, if the Second and Tenth Circuits have erred in placing the burden on plaintiffs, workers in those circuits will be unduly hampered in vindicating their rights under this important statute.

Review is warranted not only to resolve the conflict over the meaning of the RFOA provision, but also to address a longstanding confusion regarding the degree of deference owed to the EEOC's ADEA regulations. That issue arose, but was not resolved, in *Smith*. In that case, the Fifth Circuit

declined to give *Chevron* deference to the EEOC's ADEA regulations on the ground that they were labeled as "interpretive" by the agency. *Smith v. City of Jackson*, 351 F.3d 183, 189 n.5 (5th Cir. 2003). Other circuits, however, have applied *Chevron* to the same "interpretative" regulations, regardless of their label. *See, e.g.*, *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1328 & n.4 (11th Cir.), cert. granted, 534 U.S. 1054 (2001), cert. dismissed, 535 U.S. 228 (2002); *Kralman v. Illinois Dep't of Vet. Affairs*, 23 F.3d 150, 155 (7th Cir. 1994); *see also General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (noting that the "parties contest the degree of weight owed to the EEOC's reading" of 29 C.F.R. § 1625.2(a), but not resolving the question). This Court did not resolve the conflict in *Smith*, *see* 544 U.S. at 239, although members of the Court expressed different views on the question. *Compare id*. at 243 (Scalia, J., concurring in part and concurring in the judgment) (giving *Chevron* deference to regulation) with *id*. at 263-65 (O'Connor, J., dissenting) (declining to give *Chevron* deference). This case provides the Court an opportunity to resolve that outstanding division and confusion.

D. Review Is Also Warranted Because The Decision Below Is Wrong.

The Second Circuit's decision is also wrong, ignoring an agency interpretation that is due deference and is consistent with the text, structure, history, and purposes of the Act.

1. The Text, Structure, History, And Purposes Of The ADEA Demonstrate That The RFOA Provision Creates An Affirmative Defense.

The RFOA provision is one of several affirmative defenses enumerated in subsection (f) of 29 U.S.C. § 623. That provision begins, "It shall not be unlawful for an employer" and is followed by three subsections. Two of the subsections continue with the phrase "take any action

otherwise prohibited" by the ADEA, making clear that the rest of the two subsections provide a defense to otherwise unlawful conduct. *See* 29 U.S.C. § 623(f)(1)-(2). As the Second Circuit acknowledged, this construction ordinarily is used to establish an affirmative defense. Pet. App. 13a. And, in fact, this Court has already recognized that at least one of the defenses established in subsection (f)(1) – the claim that "age is a bona fide occupational qualification" – constitutes an affirmative defense. *See Smith*, 544 U.S. at 233 n.3; *see also, e.g.*, *Everson v. Michigan Dep't of Corr.*, 391 F.3d 737, 749 (6th Cir. 2004) (recognizing same of BFOQ defense under Title VII); *Healey v. Southwood Psych. Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996) (same); *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 838 F.2d 944, 949 (7th Cir. 1988) (same); *Air Line Pilots Ass'n v. TWA*, 713 F.2d 940, 954 (2d Cir. 1983), aff'd in part, rev'd in part, 469 U.S. 111 (1985) (same).

Nor can there be any serious question that the other defenses established in subsections (f)(1) and (2) constitute affirmative defenses. Subsection (f)(1) exempts employers from liability where compliance with the ADEA "would cause such employer . . . to violate the laws of the country in which such workplace is located." The employer is obviously better situated than an employee (often proceeding without counsel) to determine and prove whether its practices are required by foreign law. Subsection (f)(2) exempts from liability action taken "to observe the terms of a bona fide seniority system" or "bona fide employee benefit plan." When this Court held that the employee bore the burden of proof with respect to an employee benefit plan under a predecessor version of subsection (f)(2), *see Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989), Congress promptly amended the statute to make clear that the opposite is true. *See* Older Workers Benefit Protection Act (OWPA), Pub. L. No. 101-433, § 103, 104 Stat. 978 (October 16, 1990) (as amended by Pub. L. No. 101-

521, 104 Stat. 2287 (November 5, 1990)); 29 U.S.C. § 632(f)(2).

In overruling *Betts*, Congress acted to "restore the original congressional intent in passing and amending" the ADEA. Pub. L. No. 101-133, § 101. The Senate Report explained that the revised subsection (f)(2)

> should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defense, section 4(f)(1) [29 U.S.C. § 623(f)(1)]. Accordingly, the language of section 4(f)(1) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . to take any action otherwise prohibited" by the ADEA (emphasis added)) has been incorporated as part of section 4(f)(2) and also section 4(l).

S. Rep. No. 101-263, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1535. The report goes on to

> endorse[] the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (See 29 CFR 1625.7), and express[] approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception. See *Criswell v. Western Airlines*, 709 F.2d 544, 552-553 (9th Cir.1982), affirmed on other grounds, 472 U.S. 400 (1985). See also *Laugeson v. Anaconda Co.*, 510 F2d 307, 315 (6th Cir.1975); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir.1978).

Id.

The purposes of the ADEA are best served by this long-established understanding of the RFOA provision. As the Court made clear in *Smith*, the "reasonableness" requirement places a modest burden on employers, and is more easily met

than the "business necessity" test. 544 U.S. at 243. It is not unfair to place that light burden on the employer, especially when the employer is best situated to marshal the evidence relating to the reasonableness of its business choices. Conversely, it is always difficult to prove a negative. Plaintiffs are poorly positioned to disprove the reasonableness of an employment practice when they do not have direct access to the reasons why the employer chose one method over another or the evidence relating to administrative cost or convenience that could support or undermine the reasonableness of that choice. Although Congress intended to afford employers substantial leeway to engage in reasonable practices that have an incidental disparate impact on older workers, it nonetheless intended to afford employees a meaningful chance to challenge practices that unreasonably injure protected employees. Requiring workers to prove the unreasonableness of the practice would, in a great many cases, eliminate the possibility of a remedy for conduct Congress plainly intended to prohibit.

2. The EEOC's Interpretation Of The RFOA Provision Is Entitled To Chevron *Deference.*

To the extent there is any ambiguity regarding the ADEA's allocation of the burden of proof under the RFOA provision, that ambiguity must be resolved by deferring to the EEOC's reasonable construction of the statute.

"This is an absolutely classic case for deference to agency interpretation." *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment). The ADEA expressly gives the EEOC authority to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the statute. 29 U.S.C. § 628. Pursuant to that authority, the EEOC promulgated a regulation, after notice and comment, providing that "the employer bears the burden of showing that the 'reasonable factor other than age' exists factually.'" 29 C.F.R. § 1625.7(e). That interpretation is consistent with a regulation

previously issued by the Department of Labor, which stated that the RFOA provision "must be construed narrowly, and the burden of proof . . . will rest on the employer." In its amicus brief filed in this case, the Commission interpreted its regulation to place the burden of persuasion under the RFOA defense squarely on the employer in disparate impact cases. *See* EEOC C.A. Br. 14; *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation, expressed in an amicus brief, is "controlling unless "'plainly erroneous or inconsistent with the regulation.'") (citation omitted). Under these circumstances, the agency's construction controls unless inconsistent with the text of the statute or otherwise unreasonable. *See Smith*, 544 U.S. at 243-44 (Scalia, J., concurring in part and concurring in the judgment); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n.17 (1981); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-31 & n.12 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The label applied to the regulation is immaterial. "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227 (quoting *Chevron*, 467 U.S. at 843-44). While interpretations "such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), the regulations at issue here were generated through notice-and-comment rulemaking. *See* 46 Fed. Reg. 47724, 47727 (1981). And, "[o]f course, the framework of deference set forth in *Chevron does* apply to an agency interpretation contained in a regulation." *Id*. (emphasis added).

3. Nothing In Wards Cove *or* Smith *Supports Converting The RFOA Affirmative Defense Into An Element Of The Plaintiff's Case In Chief.*

In light of the foregoing, the question is whether there is some significant reason to believe that Congress intended to treat the RFOA differently than all the other affirmative defenses established in Section 623(f)(1)-(2) and to impose the opposite allocation of burdens to that established by the long-standing EEOC and Department of Labor regulations. The court of appeals believed it had found such a reason in this Court's decisions in *Wards Cove* and *Smith*. Pet. App. 11a. That conclusion is wrong.

The court of appeals assumed that Congress intended the RFOA inquiry as a substitute for the "business necessity" test. *See* Pet. App. 11a-12a. Given that the plaintiff bore the burden of persuasion under the now-displaced "business necessity" test, the court reasoned, it only makes sense that the plaintiff would also bear the burden of proof on its replacement. *See id*. at 12a. That view cannot be squared with the text of the ADEA or the Court's decision in *Smith*.

"As the text makes clear, the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA." *Smith*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original). *See* 29 U.S.C. § 623(f)(1). Whether an employment practice with a disparate impact is "otherwise prohibited" by the ADEA is governed by the traditional *Wards Cove* standards, *see Smith*, 544 U.S. at 240, which requires application of the "business necessity" test. Only if the employment practice fails that test – if, for example, an employee proves that other equally effective means with less disparate impact were available – does the RFOA defense come into play, providing a defense if the employer can demonstrate that the practice, while not a business necessity, was nonetheless reasonable.

There is nothing incongruous about placing the burden of disproving business necessity on the plaintiff, while placing the burden of proving reasonableness on the employer. The two issues are quite different: "[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Smith*, 544 U.S. at 243. The RFOA provision thus provides a broader defense, but one that must be proven by the defendant. Because the defense only comes into play when the employer's practice has been shown by the plaintiff to have an *unnecessary* disparate impact – a showing that would be sufficient to establish liability under Title VII – it is entirely appropriate for Congress to place the burden to avoid liability on the defendant.[12] An employment practice that unnecessarily harms protected workers, and which the employer cannot show to be even "reasonable," is one that Congress surely intended to prohibit under the ADEA.[13]

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[12] The court of appeals objected that this construction of the statute added unnecessary complexity to ADEA adjudications. Pet. App. 10a-11a n.5. But nothing prevents an employer from pretermitting the full analysis by establishing at the outset that it has a reasonable basis for the challenged employment practice. *See, e.g., Smith*, 544 U.S. at 241-43 (resolving case on RFOA defense without first fully analyzing whether practice was "otherwise prohibited").

[13] The Second Circuit also found support in a supposed textual similarity between the RFOA provision and Section 703(h) of Title VII, which provides, in relevant part: "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test." 42 U.S.C. § 2000e-2(h). The court assumed that this provision would not be treated as an affirmative defense because, the court believed, it is the textual source of the "business necessity" test first announced in *Griggs*, upon which the plaintiff bears the burden of persuasion. *See* Pet. App. 14a. This argument fails at its premise. While this

II. This Court Also Should Decide Whether The "Reasonable Factors Other Than Age" Defense Precludes, As A Matter Of Law, Challenges To Reduction-In-Force Regimes That Confer Substantial Discretionary Decisionmaking Authority Upon Direct Supervisors.

Certiorari is also warranted to reverse the Second Circuit's determination that respondents' practice of allowing direct supervisors substantial discretionary authority to choose which workers to terminate in a reduction in force constitutes, as a matter of law, a "reasonable factor other than age." That holding conflicts with this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and will have a broad impact on ADEA litigation generally unless corrected by this Court.

Court has said in passing dicta that *Griggs* was generally "construing 42 U.S.C. § 2000e-2(h)," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 n.21 (1975), it clearly did not mean that the business necessity test derives solely or even principally from that provision. *Griggs* itself noted that Section 2000e-2(h) addresses only discrimination arising from the administration of a "professionally developed ability test" and therefore did not even apply to all the employment practices challenged in *Griggs* itself. *See* 401 U.S. at 433 n.8 ("It has no applicability to the high school diploma requirement."). And it obviously does not apply to the full panoply of other employment practices subject to the business necessity test. Accordingly, in *Smith* this Court explained that "*Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view." 544 U.S. at 235. Later cases identified a textual basis in a different provision than cited in *Albemarle*: the statutory prohibition against actions that "'deprive individuals of employment opportunities or *otherwise adversely affect* his status as an employee because of such individual's' race or age." *Smith*, 544 U.S. at 235 (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis in original).

A. The Second Circuit's Decision Conflicts With *Watson v. Fort Worth Bank & Trust.*

In *Watson*, this Court unanimously held that disparate impact challenges under Title VII were not limited to employment tests and criteria, but could also be applied to a company's practice of making employment decisions in reliance upon the subjective judgments of its direct supervisors. *See id*. at 990 (opinion for the Court); *id*. at 1011 (Stevens, J., concurring in the judgment). The plaintiff in *Watson* was repeatedly passed over for promotions as a bank supervisor. "The Bank . . . had not developed precise and formal criteria for evaluating candidates" but "relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." *Id*. at 982. The court of appeals held that workers were required to challenge the denial of a promotion under such a system through a disparate treatment claim; they could not bring a disparate impact challenge to the system of discretionary decisionmaking. *Id*. at 984. This Court reversed. "If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Id*. at 990-91. The Court recognized that relying on the unchecked discretionary judgment of individual supervisors gives rise to a very real "problem of subconscious stereotypes and prejudices" controlling the distribution of employment opportunities, precisely the problem Congress intended Title VII to address. *Id*. at 990.

The same problem arises, and is met with the same solution, under the ADEA. The risk that discretionary decisionmaking systems may effectuate hidden stereotypes is aptly illustrated by the facts of this case. Respondents selected workers to terminate through a process that required supervisors to rank their workers based on vague and

subjective criteria such as the workers' "flexibility" and the "criticality of their skills." Pet. App. 5a-6a. Using such criteria risked giving effect to stereotypes of older workers as inflexible and outdated. And, in this case, use of those factors without implementation of meaningful checks led to "startlingly skewed results." Pet. App. 61a n.8. While about sixty percent of the workers considered for termination were over forty, "workers over forty constituted approximately *ninety-eight* percent of the laid-off workers." *Id*. at 42a (emphasis added). Statistical analysis revealed that the scores for "flexibility" and "criticality" had the greatest influence on who was selected for termination. *Id*.

The court of appeals nonetheless held that by enacting the RFOA defense, Congress intended to pervasively (perhaps completely) preclude disparate impact challenges to such practices. The Second Circuit acknowledged that "probative record evidence suggests that the factors used . . . could have been better drawn and that the process could have been better scrutinized to guard against a skewed layoff distribution." Pet. App. 17a. The court nonetheless held that the jury could not have rationally held in petitioners' favor, because of a legal principle that required entering judgment for respondents as a matter of law: "at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable." *Id*. at 19a.

This pronouncement of law effectively forecloses disparate impact challenges to subjective decisionmaking under the ADEA. And it unavoidably conflicts with this Court's decision in *Watson*, which read the common prohibitory language of Title VII and the ADEA to preclude discretionary decisionmaking processes that had an unjustified disparate impact. 487 U.S. at 990-91. There is nothing in the RFOA defense that authorizes a different rule for ADEA cases. As the Court recognized in *Watson*, "disparate impact analysis might effectively be abolished" if

construed not to extend to subjective decisionmaking processes. 487 U.S. at 990. While the "scope of disparate-impact liability under the ADEA is narrower than under Title VII," Smith, 544 U.S. at 240, it is not so narrow as to be non-existent. Instead, the statute provides a defense for practices that are "reasonable," a term that must be understood in light of the statutory purposes and the legal backdrop against which the statute was enacted and amended. A principal purpose of the statute is to eliminate unwarranted business practices that unreasonably deprive older workers of employment opportunities. *See* 29 U.S.C. § 621(a)(2). Giving supervisors free rein to engage in egregious discrimination on the basis of age, then failing to employ simple, inexpensive means to ensure that this discretion is not abused, is not reasonable in light of that purpose.

The Second Circuit also erred in focusing on the reasonableness of the employer's "objectives" – *i.e.*, retaining flexible workers with critical skills – rather than the means used to pursue that plainly reasonable goal. Petitioners' complaint is not that respondents attempted to lay off inflexible workers with less critical skills; their complaint is that the means chosen to fulfill that goal were so haphazard and unconstrained that age could be used by supervisors as an illegitimate proxy for flexibility and criticality, thereby exposing older workers to the central harm the ADEA was enacted to prevent. To prevent that from happening, the RFOA defense examines not only the purpose of the employment practice, but also whether that practice "was reasonably designed and administered so as to attain that stated purpose." EEOC C.A. Br. 17. While the employer plainly is not required to adopt the means with the least disparate impact, the extent to which "there are other equally effective ways, at comparable cost, of achieving the employer's stated goals with less disparate impact on older

employees . . . would bear on the reasonableness of the employer's choice." *Id*. at 20.[14]

The Second Circuit thus erred in holding that it is usually reasonable for an employer to rely on unchecked managerial discretion simply because the supervisors exercising that discretion had day-to-day experience with their employees.

B. This Court Should Use This Opportunity To Provide The Lower Courts And The EEOC Guidance On The Application Of The RFOA Defense.

Addressing the application of the RFOA defense in the context of this case would provide the lower courts much-needed guidance on the scope of disparate impact liability under the ADEA. Although this Court made clear in *Smith* that disparate impact liability is available, but narrower than under Title VII, it gave little guidance on how the generalized requirement of "reasonableness" is to be applied in the context of age discrimination in employment. It gave little direction, for example, as to whether the reasonableness analysis takes into account the degree of disparate impact caused by the defendant's chosen practice and the availability of alternatives, as urged by the EEOC, or whether, as held by the Second Circuit here, those factors are irrelevant. *Compare* EEOC C.A. Br. 19-20 *with* Pet. App. 18a-19a. On these questions, the courts cannot turn to Title VII precedents for guidance, as only the ADEA contains a RFOA defense.

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[14] *Smith* is not to the contrary. There, this Court held that in choosing *among* reasonable alternatives, an employer need not seek to minimize any disparate impact on older workers. 544 U.S. at 243. But this Court did not suggest that the availability of alternatives plays no role in determining whether a particular practice is, itself, reasonable. Indeed, it is difficult to imagine what factors a court could consider in the reasonableness analysis if not the degree to which the chosen practice injures older workers and the ease with which that injury may be avoided by the employer.

Given the amount of litigation under the ADEA, particularly in the context of reductions in force, more concrete guidance by this Court would be of substantial assistance to the lower courts and the EEOC, as well as to employers and workers alike.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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May 9, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Submitted After Remand: June 28, 2005
Decided: August 14, 2006)

Docket Nos. 02-7378-cv(L), 02-7474-cv(XAP)

CLIFFORD B. MEACHAM, Thedrick L. Eighmie, and Allen G. Sweet, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

James R. Quinn, Ph.D., Deborah L. Bush, Raymond E. Adams, Wallace Arnold, William F. Chabot, Allen E. Cromer, Paul M. Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Pareene, William C. Reynheer, John K. Stannard, David W. Townsend, and Carl T. Woodman,

Consolidated-Plaintiffs-Appellees,

Hildreth E. Simmons, Jr., Henry Bielawski, Ronald G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Teofils F. Turlais, and Bruce E. Vedder,

Consolidated Plaintiffs-Appellees,

v.

KNOWLES ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., Lockheed Martin Corporation, and John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross Appellees.

Before: McLAUGHLIN, JACOBS, and POOLER, *Circuit Judges*. Judge Pooler dissents in a separate opinion.

Remand from the United States Supreme Court for reconsideration of our judgment in *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004), in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005). Meacham affirmed the judgment of the United States District Court for the Northern District of New York (Homer, M.J.), inter alia, denying a post-verdict motion by defendants-appellants ("defendants") seeking judgment as a matter of law as to disparate-impact claims brought by plaintiffs-appellees ("plaintiffs") under the Age Discrimination in Employment Act, 29 U.S.C. § 631(a), and the New York Human Rights Law, N.Y. Exec. Law § 296(3-a)(a). We conclude that plaintiffs have failed to carry their burden of demonstrating that the challenged employment practice was unreasonable, and therefore vacate the judgment of the district court and remand with instructions to enter judgment as a matter of law in favor of defendants and to dismiss the case.

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Lawyers Association in support of Plaintiffs.

DENNIS JACOBS, Circuit Judge:

This case returns to us on remand from the United States Supreme Court. See *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 62 (2d Cir. 2004) ("Meacham"), vacated and remanded by *KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005). Originally, we had reviewed this case on appeal from a judgment of the United States District Court for the Northern District of New York (Homer, M.J.), inter alia, denying the motion of defendants-appellants ("defendants") seeking judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) after a jury verdict awarding damages to plaintiffs-appellees ("plaintiffs").[1] *See Meacham v. Knolls Atomic Power Lab.*, 185 F.Supp.2d 193 (N.D.N.Y. 2002). Plaintiffs are former employees of defendant Knolls Atomic Power Laboratories ("KAPL"), which designs advanced nuclear propulsion systems; trains sailors in their use; and oversees their maintenance, repair, refueling and decommissioning. Plaintiffs lost their jobs at the Knolls Atomic Power Laboratory (the "Lab") in an involuntary reduction in force ("IRIF"), and sued under the Age Discrimination in Employment Act, 29 U.S.C. § 631(a), ("ADEA") and the New York Human Rights Law, N.Y. Exec. Law § 296 (3-a)(a), ("HRL"). The jury verdict rested on a disparate-impact theory of liability. Previously, we held that (i) plaintiffs had established a *prima facie* case under the ADEA by demonstrating the disparate impact on older workers of the subjective decision-making involved in the IRIF; and (ii) notwithstanding defendants' facially legitimate business justification for the IRIF and its constituent parts, there was sufficient evidence of an equally effective alternative to the

[1] The complete procedural history of this case in the district court can be found at *Meacham*, 381 F.3d at 65-68.

subjective components of the IRIF to support liability. *See Meacham*, 381 F.3d at 71-76. The Supreme Court vacated our judgment affirming the judgment of the district court and remanded for reconsideration in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005), which issued while defendants' petition for a writ of certiorari was pending. *See KAPL*, 544 U.S. 957. We have considered *City of Jackson* and the parties' supplemental briefing, and we now vacate the judgment of the district court and remand with instructions to enter judgment as a matter of law in favor of defendants on all claims and to dismiss the case.

I.

The Lab is funded by the United States Navy's Nuclear Propulsion Program ("NR") (jointly with the Department of Energy), which sets annual staffing limits for the facility in consultation with KAPL.[2] In fiscal year 1996, the NR imposed a more stringent limit on annual staffing levels and (at the same time) assigned additional work to the Lab that required new hires. Among the compliance measures adopted by KAPL was an IRIF in which plaintiffs, all of whom are over forty years of age, lost their jobs. *Meacham*, 381 F.3d at 62-63.

KAPL provided a guide for implementing the IRIF to participating (i.e., over-budget) managers. The guide instructed managers

> to select employees for the IRIF by listing "all employees in [their] group[s] on [a] matrix"; ranking them between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service. Managers were to rate performance based on an average of the two most recent performance appraisals. The tests for making a flexibility determination were whether

[2] A complete factual description of this case can be found in *Meacham*, 381 F.3d at 62-65.

> the employee's "documented skills [could] be used in other assignments that [would] add value to current or future Lab work" and whether the employee was "retrainable for other Lab assignments." Critical skills were those skills that were critical to continuing work in the Lab as a whole. In addition, KAPL directed managers to consider whether the "individual's skill [was] a key technical resource for the NR program" and whether "the skill [was] readily accessible within the Lab or generally available from the external market."

Id. at 63-64 (brackets and emphasis in original). Once employees were thus ranked, managers were instructed to identify for layoff employees at the bottom-as necessary to achieve the required staff reduction-and then to perform an adverse impact analysis to determine whether the layoffs "might have a disparate impact on a protected class of employees." *Id.* at 64. To ensure compliance with the ADEA, managers were instructed to perform an analysis "similar" to the EEOC's "four-fifths" rule, by which (according to the guide) a "serious discrepancy" would exist "if the selection rate for a protected group is greater than 120% of the rate for the total population." *Id.* Once this process was completed,

> a review board was to assess the manager's selections "to assure adherence to downsizing principles as well as minimal impact on the business and employees." Finally, KAPL's general manager, John Freeh, and its [general] counsel, Richard Correa, were to review the final IRIF selections and the impact analyses.

Id.

In the end, 245 out of an estimated 2,063 eligible employees were placed on the matrices; thirty-one employees on the matrices were selected for layoff, thirty of whom were over forty years of age.

II.

In *Meacham*, we held that plaintiffs adduced evidence sufficient to establish a *prima facie* case for disparate-impact liability under the ADEA. *Id.* at 71-74. Plaintiffs identified a specific employment practice – KAPL's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility'" in implementing the IRIF – and presented evidence supporting a reasonable inference that the practice caused the "startlingly skewed results." *Meacham*, 381 F.3d at 75 n. 8. We see nothing in *City of Jackson* that casts doubt on this holding. *City of Jackson* reiterated the requirement that disparate-impact plaintiffs under the ADEA are "'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities,'" 544 U.S. at 241 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989)) (emphasis in *City of Jackson*); in *Meacham*, we held that plaintiffs had satisfied that specificity requirement, *see Meacham*, 381 F.3d at 74.

A.

The matrix for adjudicating disparate-impact claims, once a plaintiff has made out a *prima facie* case, was first authoritatively established in *Wards Cove Packing Co. v. Atonio*, in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). 490 U.S. 642 (1989). The employer assumes the burden of producing evidence that the challenged employment practice has a legitimate business justification, *see id.* at 658-59; *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988); however, "'the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times,'" *Wards Cove*, 490 U.S. at 659 (quoting *Watson*, 487 U.S. at 997). Thus, after the employer has proffered a legitimate business justification, the plaintiff bears the burden of persuading the jury that the employer's justification does

not pass the test of "business necessity" – *i.e.*, either that the challenged practice does not serve, in a significant way, the legitimate employment goals of the employer or that "'other tests or selection devices, without a similarly undesirable ... effect, would also serve the employer's legitimate [hiring] interest[s].'" *Id.* at 659-60 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)); *see also Watson*, 487 U.S. at 998-99; *City of Jackson*, 544 U.S. at 243 (referencing "business necessity test"). In *Smith v. Xerox Corp.*, we extended this burden-shifting approach to disparate-impact claims under the ADEA. 196 F.3d 358, 365 (2d Cir.1999).

We held in Meacham that KAPL had advanced "a facially legitimate business justification for the IRIF and its constituent parts [–] 'to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions.'" *Meacham*, 381 F.3d at 74 (quoting *Meacham v. Knolls Atomic Power Lab.*, 185 F.Supp.2d 193, 213 (N.D.N.Y. 2002)). While such a justification, unchallenged, "would preclude a finding of disparate impact [liability]," *id.*, we ruled-following the precedent established in *Xerox* – that plaintiffs could prevail nevertheless by demonstrating that KAPL's justification failed the test of "business necessity," *i.e.*, by challenging the justification head-on or by showing "'that another practice would achieve the same result at a comparable cost without having a disparate impact on the protected group,'" *id.* at 74 (quoting *Xerox*, 196 F.3d at 365). We concluded that plaintiffs had discharged their burden because "[a]t least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less subject to managerial bias."[3] *Id.* at 75.

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[3] According to the district court, plaintiffs overcame KAPL's showing of "business necessity" by presenting evidence of suitable alternative measures, i.e., a hiring freeze or expansion of KAPL's voluntary separation plan. However, these were alternatives to the

That analysis is untenable on this remand because, in *City of Jackson*, the Supreme Court held that the "business necessity" test is not applicable in the ADEA context; rather, the appropriate test is for "reasonableness," such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals. *See City of Jackson*, 544 U.S. at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."); *see also id.* at 239 (stating that there is no liability under the ADEA if the adverse impact of the challenged employment action is "attributable to a nonage factor that [i]s 'reasonable'"). The "reasonableness" test in *City of Jackson* is derived primarily from wording in the ADEA "that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *City of Jackson*, 544 U.S. at 233 (quoting ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1)).[4] The Court emphasized that (i) Congress had

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IRIF itself (which we concluded was justified), not alternatives to the specific components of the IRIF that plaintiffs had identified as discriminatory. See *Meacham*, 381 F.3d at 75.

[4] ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), reads in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization ... to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than

refrained from addressing the ADEA in the Civil Rights Act of 1991, even though the Act had amended Title VII to expand the narrow construction of an "employer's exposure to liability on a disparate-impact theory" established in *Wards Cove*, *see City of Jackson*, 544 U.S. at 240; *see also* Civil Rights Act of 1991, 105 Stat. 1071; and (ii) "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," *City of Jackson*, 544 U.S. at 240.

While "as a general rule, one panel of this Court cannot overrule a prior decision of another panel[,] ... an exception to this general rule arises where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent." *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003). In light of *City of Jackson*, it is clear that *Xerox* is no longer good law insofar as it holds that the "business necessity" test governs ADEA disparate-impact claims.[5]

> age, or where such practices involve an employee in a workplace in a foreign country ...

(emphasis added).

[5] Judge Pooler argues in dissent that *City of Jackson* "did not state or imply ... that the 'business necessity' part of the *Wards Cove* analysis ... no longer exists as part of the [ADEA] disparate impact analysis." Dissenting Op. at 148. That is an unnatural reading of *City of Jackson*, which (i) directly contrasts the "business necessity test" with the "reasonableness inquiry," City of Jackson, 544 U.S. at 243, and (ii) makes no suggestion in the course of establishing and applying the reasonableness inquiry that the business necessity test is available in the alternative. The dissent's approach would introduce a redundant (and counterintuitive) step in the analysis, with disparate-impact plaintiffs required to demonstrate that an employer's proffered business justification fails the business necessity test, at which point the employer would still prevail upon demonstrating that the

B.

It remains to apply the "reasonableness" test to plaintiffs' disparate-impact claims, which survived application of the "business necessity" test in *Meacham.*

First, we consider who bears the burden of persuasion with respect to the "reasonableness" of the employer's proffered business justification under the ADEA disparate-impact framework. The best reading of the text of the ADEA-in light of *City of Jackson* and *Wards Cove* – is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) (holding that under *City of Jackson*, once employer has satisfied burden of producing evidence of legitimate business justification, to prevail "employee must ultimately persuade the factfinder that the employer's asserted basis for the neutral policy is unreasonable"). The following considerations lead us to that conclusion:

1. In substituting the "reasonableness" test for the "business necessity" test, *City of Jackson* nowhere suggested

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justification was nonetheless "reasonable." (No one has previously complained that the burden-shifting framework requires more steps.) The dissent also rests in part on the mistaken assumption that "the *Wards Cove* analysis is a judicially created doctrine," see Dissenting Op. at 148, and hence that the "business necessity" test established therein survives *City of Jackson* to the extent that the reasoning in *City of Jackson* was based on an interpretation of the "reasonable factors other than age" ("RFOA") provision of the ADEA, see ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). But, as we demonstrate below, see supra at 142 - 143, the source of the "business necessity" test established in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), was later traced to Title VII § 703(h), 42 U.S.C. § 2000e-2 (h), see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), which (like the RFOA provision) is subject to interpretation as an affirmative defense, even though it is not.

that the burden of persuasion with respect to the legitimacy of the business justification was being shifted to the employer. That is not dispositive, however: the facts raised no close question as to the reasonableness of the employer's proffered business justification. *See City of Jackson*, 544 U.S. at 241-43.

2. *City of Jackson* says that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." *Id.* at 240. *Wards Cove* explained that the plaintiff bears the burden of persuasion to defeat the employer's "business necessity" justification because the plaintiff bears the ultimate burden under Title VII to "prove that it was 'because of [his] race, color,' etc., that he was denied a desired employment opportunity." *Wards Cove*, 490 U.S. at 660 (quoting 42 U.S.C. § 2000e-2(a)). The analogous § 4(a) of the ADEA, 29 U.S.C. § 623(a), is identical to that of Title VII "[e]xcept for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin.'" *City of Jackson*, 544 U.S. at 233. *City of Jackson* thus applies the reasoning and analysis of *Wards Cove* to disparate-impact claims under the ADEA, with the effect that an employer defeats a plaintiff's *prima facie* case by producing a legitimate business justification, unless the plaintiff is able to discharge the ultimate burden of persuading the factfinder that the employer's justification is unreasonable. Any other interpretation would compromise the holding in *Wards Cove* that the employer is not to bear the ultimate burden of persuasion with respect to the "legitimacy" of its business justification. *Wards Cove*, 490 U.S. at 659-60.

3. *City of Jackson* reasoned that the "narrower" scope of disparate-impact liability under the ADEA (as compared with Title VII) is justified because "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," and that as a result, "certain employment criteria that are routinely used may be reasonable

despite their adverse impact on older workers as a group." *City of Jackson*, 544 U.S. at 240-41. It would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable.

In dissent, Judge Pooler argues that the "reasonable factors other than age" ("RFOA") provision, ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), is in the nature of an affirmative defense for which the employer should bear the burden of persuasion. *See* Dissenting Op. at 148-152. In support of this argument, Judge Pooler observes that the provision (i) permits conduct that is "otherwise prohibited"-language that suggests an affirmative defense, *see id.* at 139; and (ii) is listed in the statute after the *bona fide* occupational qualification ("BFOQ") exception – an affirmative defense for which the Supreme Court has strongly suggested the employer bears the burden of persuasion, *see id.* at 139-140 (citing *City of Jackson*, 544 U.S. 228, 233 n.3 (2005)); *see also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Air Line Pilots Ass'n v. TWA*, 713 F.2d 940, 954 (2d Cir. 1983) (establishing that BFOQ provision "may be invoked only if an employer proves 'plainly and unmistakably' that its employment practice meets the 'terms and spirit' of the remedial legislation"), *aff'd in part & rev'd in part on other grounds sub nom TWA v. Thurston*, 479 U.S. 111 (1985).[6] There is some force to this argument, but it does

[6] A provision of the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"), the agency statutorily charged with implementing the ADEA, see 29 U.S.C. § 628, interprets ADEA § 4(f)(1) as placing the burden of persuasion with respect to a RFOA on the employer in the context of disparate treatment. See 29 C.F.R. 1625.7(e) ("When the exception of a [RFOA] is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the [RFOA] exists factually.") (internal quotation marks omitted). We are disinclined to accord this interpretation any weight given that (i)

not withstand *City of Jackson*, which emphasized that there are reasonable and permissible employment criteria that correlate with age. (This case is a fine example of the phenomenon.) It is therefore hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable.[7]

Our conclusion is reinforced by the history of the development of the "business necessity" test. The Supreme Court established the "business necessity" test in *Griggs v. Duke Power Co.*, explaining that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. 424, 432 (1971). Although *Griggs* failed to locate the source of the test in any particular statutory provision of Title VII, *Wards Cove* later clarified that the "burden" referred to in *Griggs* was the burden of production, not persuasion, *see supra*; and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), located the source of the "business necessity" test in Title VII § 703(h), 42 U.S.C. § 2000e-2 (h), which provides that it shall *not*

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we are interpreting the RFOA provision in the context of disparate impact; and (ii) *City of Jackson* directly contradicts 29 C.F.R. 1625.7(d), which interprets the RFOA provision as mandating a "business necessity" test when a plaintiff has established a prima facie case of disparate impact, and thereby casts substantial doubt on the soundness of the relevant EEOC regulations.

[7] The dissent points out that *City of Jackson* characterized the BFOQ exception as an "affirmative defense," see Dissenting Op. at 149 (citing City of Jackson, 544 U.S. at 233 n. 3); this makes it all the more telling that the opinion did not so characterize the RFOA provision. Moreover, the cases cited in the dissent as characterizing the RFOA provision as an affirmative defense, see Dissenting Op. at 151, are inapt because they all (i) concern suits alleging disparate treatment, not disparate impact, and (ii) pre-date *City of Jackson*.

> be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

This section, like the RFOA provision in the ADEA, lends itself to interpretation as an affirmative defense, with the burden of persuasion on the employer; but the Supreme Court has determined that it is not, and we are convinced that there is insufficient reason to depart from that analysis in interpreting the ADEA.

Applying the *Wards Cove* burden shifting framework – as modified in the ADEA context by *City of Jackson* – to the facts before us, we reaffirm our conclusion in *Meacham* that KAPL satisfied its burden of producing evidence suggesting that a legitimate business justification motivated the challenged components of the IRIF. *See supra.* But we must revisit that question because we followed the district court in characterizing KAPL's legitimate justification as the reduction of KAPL's "'workforce while still retaining employees with skills critical to the performance of KAPL's functions.'" *Meacham*, 381 F.3d at 74 (quoting *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 213 (N.D.N.Y. 2002)). Evidence supports that business objective, but our characterization did not conform to the specific employment practice identified by the plaintiffs: the IRIF's "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility,'" *supra.* Defendants' burden was to advance a justification for these features of the IRIF, and it was plaintiffs' burden to demonstrate that *that* justification is unreasonable. The record demonstrates that defendants discharged their burden, and plaintiffs did not.

At trial, defendants' expert witness – a specialist in industrial psychology with substantial corporate downsizing experience – testified that the criteria of "criticality" and "flexibility" were ubiquitous components of "systems for making personnel decisions," and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation. KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that KAPL could carry on operations with a shrinking workforce. This evidence unquestionably discharged defendants' burden of production – it suggested that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decisionmaking systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF.

The next question is whether plaintiffs discharged their burden of demonstrating that the justification was unreasonable. "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *City of Jackson*, 544 U.S. at 243; *see also id*. at 240 ("[T]he scope of disparate-impact liability under ADEA is narrower than under Title VII."). In determining whether plaintiffs have demonstrated that KAPL's relatively subjective and unaudited procedures for measuring "criticality" and "flexibility" were unreasonable, we keep in mind that "we are not a super-personnel department." *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001); *see also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices."). "It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a

court to review." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir.1984); *but see Albemarle Paper*, 422 U.S. at 433 (expressing concern over "a 'standard' that was extremely vague and fatally open to divergent interpretations"). The range of reasonable personnel systems is wide in a fluid and adaptive economy.

As we observed in *Meacham*, plaintiffs presented probative evidence tending to show that: (i) KAPL's criteria were subjective (and "imprecise at best"); (ii) "the subjectivity disproportionately impacted older employees"; (iii) KAPL "observed that the disproportion was gross and obvious"; and (iv) KAPL "did nothing to audit or validate the results." *Meacham*, 381 F.3d at 75 & n. 7.

Moreover, even though KAPL implemented some of its established guidelines for the IRIF, *see supra*, compliance was uneven. Managers were trained to ensure that they understood the matrix criteria definitions and the process for analyzing the completed matrices. But the company's only disparate-impact analysis of the employees selected for layoff was done by a human resources manager who lacked training or serious preparation, and whose technique was to compare the average age of the workforce before and after the IRIF, *see Meacham*, 381 F.3d at 64; given the size of KAPL's workforce, this technique was inadequate to identify age-related discrepancies resulting from a personnel action that affected only thirty-one employees. *See id.*

Per the guide instructions, KAPL's review board assessed the design and execution of the IRIF-including the process for constructing matrices and the final layoff decisions-to ensure that they conformed to KAPL's business needs; but the review board did not assess age discrimination issues. *See id.* KAPL's general counsel conducted a legal review of the IRIF after its completion, consulting with the company's human resources representatives and some managers about employee scoring and placement on the matrices, as well as about individual layoff decisions. *See id.* The general

counsel was familiar with the ADEA and apparently aware of the viability of the disparate-impact theory in the Second Circuit at the time; however, he did not analyze the *results* of the IRIF, explaining that he was only concerned with whether "[I]RIF decisions were properly made" and "legitimate." *Id.*

Plaintiffs, who bear the burden of demonstrating that KAPL's action was unreasonable, did not directly challenge the testimony of KAPL principals regarding the planning and execution of the IRIF. However, Dr. Janice Madden, an employment discrimination expert and experienced statistician, testified for plaintiffs that (i) the probability of the age disparities at various stages of the IRIF happening by chance was so low as to suggest to a high degree of statistical significance that the disparities were not the result of chance;[8] (ii) "criticality" and "flexibility" were the criteria most responsible statistically for the selection of individuals to be laid off; and (iii) the procedures established for review of the decisions made by individual managers "did not offer adequate protections to keep the prejudices of managers from influencing the outcome." *Id.* at 65.

Have plaintiffs discharged their burden? It is important to distinguish between evidence that KAPL's IRIF resulted in an unlikely, "startlingly skewed" age distribution of laid-off employees-which is relevant to plaintiffs' *prima facie* case – and evidence that KAPL's business justification for the specific design and execution of the IRIF was "unreasonable." The fact that the IRIF resulted in a skewed age distribution of laid-off employees is not itself necessarily probative of whether KAPL's business justification for particular features of its IRIF was "reasonable." As the Supreme Court observed in *City of Jackson*, age is often highly correlated with legitimate employment needs. *See*

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[8] Dr. Madden explained that a disparity is statistically significant if "the probability that [it] could happen by chance is less than 5 percent." *Meacham*, 381 F.3d at 65.

City of Jackson, 544 U.S. at 240 ("[A]ge, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."). To draw a negative inference from the ex post age distribution of laid-off employees would inhibit reliance on reasonable and useful employment criteria that are highly correlated with age.

The probative record evidence suggests that the factors used in KAPL's IRIF could have been better drawn and that the process could have been better scrutinized to guard against a skewed layoff distribution. However, KAPL set standards for managers constructing matrices and selecting employees for layoff, and it did monitor the implementation of the IRIF. The IRIF restricted arbitrary decision-making by individual managers, and the measures that KAPL put in place to prevent such arbitrary decision-making and ensure that the layoffs satisfied KAPL's business needs – while not foolproof – were substantial. Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

"[T]here may have been other reasonable ways for [KAPL] to achieve its goals" (as we held in *Meacham*, 381 F.3d at 75), but "the one selected was not unreasonable." *City of Jackson*, 544 U.S. at 243.

III.

"[S]ince claims under the HRL are analyzed identically to claims under the ADEA[,] ... the outcome of an employment discrimination claim made pursuant to the HRL is the same as it is under the ADEA...." *Xerox*, 196 F.3d at 363; *see also Leopold v. Baccarat, Inc.*, 174 F.3d 261, 264 n.1 (2d Cir.1999). Moreover, the HRL contains a RFOA

exception identical to that contained in the ADEA. See N.Y. Exec. L. § 296(3-a)(d). Therefore, we have no reason to think that, in analyzing the HRL, New York will reject our interpretation of the impact of *City of Jackson* on analysis of the ADEA. Plaintiffs' HRL claims therefore fail for the same reason as their ADEA claims: plaintiffs have not satisfied their burden of demonstrating that defendants' business justification was unreasonable.[9]

IV.

Because we conclude that plaintiffs' ADEA and HRL claims fail, we reach plaintiffs' cross-appeal challenging the decisions of the district court (i) to strike the report of plaintiffs' expert, Madden, at the end of the liability phase of the trial, and (ii) to exclude from evidence the document entitled "Eligibility Requirement Options for [Voluntary Separation Plan]." We review a district court's evidentiary rulings "only for manifest error because the decision of which evidence is admissible is one that is committed to the district judge's discretion." *Barrett v. Orange County Human Rights*

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[9] We held in *Meacham* that defendants had waived their argument that "a disparate impact claim is conceptually impossible" under the HRL because they did not raise the argument until their post-verdict motion. See *Meacham*, 381 F.3d at 71. We enforce the waiver and do not consider the argument. However, defendants have not waived the argument that their business justification was "reasonable," because defendants have consistently maintained that plaintiffs' HRL claims should be dismissed because their ADEA claims fail. Defendants repeatedly sought judgment as a matter of law with respect to both the ADEA and HRL claims, and the district court analyzed the HRL and ADEA claims together. See *Meacham*, 381 F.3d at 66 ("[D]efendants moved for summary judgment dismissing all of plaintiffs' claims.") (emphasis added); *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 206 (N.D.N.Y. 2002) ("A plaintiff may establish violations of the ADEA and the HRL under theories of disparate treatment and disparate impact.").

Comm'n, 194 F.3d 341, 346 (2d Cir. 1999). The district court committed no manifest error, because (i) Madden testified at length as to the contents of her report and (ii) the document relating to the voluntary separation plan was immaterial because-as we held in *Meacham* – the plan was not a suitable alternative to the challenged employment practice. *See Meacham*, 381 F.3d at 75.

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For the reasons set forth above, we vacate the judgment of the district court, and remand with instructions to enter judgment as a matter of law in favor of defendants on all claims and to dismiss the case.

POOLER, Circuit Judge, dissenting:

I respectfully dissent because I do not agree that *Smith v. City of Jackson*, 544 U.S. 228 (2005) requires vacatur of the district court judgment. The concerns animating my disagreement with the majority are (1) the majority improperly conflates the analysis of proof of a reasonable factor other than age ("RFOA") with the legitimate business justification analysis as it is used in a disparate impact analysis; (2) the majority errs by assigning to plaintiffs the burden of proving that a RFOA does not exist; and (3) the majority improperly reaches the asserted RFOA error because, although defendants pleaded an affirmative RFOA defense, they did not seek a charge or a verdict sheet question on that defense, thus requiring that we find fundamental error, which does not exist, to reach the claimed error.

I. Impact of *City of Jackson* on ADEA Disparate Impact Analysis.

City of Jackson has a three-fold impact on ADEA disparate impact analysis. First, the Supreme Court held 23 that disparate impact claims can be proven under the ADEA.

544 U.S. at 240. Second, it held that the disparate impact analysis contained in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), continued to apply in ADEA cases, albeit not in Title VII cases. See *City of Jackson*, 544 U.S. at 240 ("*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). Third, the Court held that an employee could not defend against proof of a RFOA by showing that another reasonable method to reach the employer's goals existed. *See id.* at 243 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.").

As indicated in the majority opinion, *City of Jackson*'s first holding is consonant with our precedent and needs no further analysis. The second holding – that a *Wards Cove* disparate impact analysis remains applicable – does require further examination. The *Wards Cove* Court analyzed the judicially created burdens of proof for disparate impact analysis under Title VII. *See* 490 U.S. at 656-661. The Court held that after the plaintiffs establish a *prima facie* case, the analysis shifts to the legitimacy of the business justification proffered by the employer, and that "the dispositive issue [at that stage] is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The Court then held that plaintiff retained the ultimate burden of proving discrimination and added that if the "[employees] cannot persuade the trier of fact on the question of petitioners' business necessity defense, [the employees] may still be able to prevail." *Id.* at 660. To succeed at this stage, the employees must persuade the factfinder that "'other tests or selection devices, without a similarly undesirable racial effect would also serve the employer's legitimate [hiring] interest[s].'" Id. (quoting

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). The *City of Jackson* Court's adherence to *Wards Cove* in the ADEA disparate-impact analysis does not change the law of this circuit because we have long used the *Wards Cove* analysis in ADEA disparate impact cases. *See, e.g., Meacham v. KAPL*, 381 F.3d 56, 71-76 (2d Cir. 2004).

At trial, the district court correctly stated the *Wards Cove* burdens in its charge, and defendants did not object. The jury then found that plaintiffs satisfied their burden of proving disparate-impact discrimination. Although the district court set aside the jury's finding that defendants did not proffer a legitimate business justification, *see Meacham*, 381 F.3d at 74, it refused to set aside the verdict-and we affirmed-because plaintiffs had identified an alternative that would equally well serve KAPL's business purpose, *id.* at 75. Therefore, both the district court and this court performed exactly the analysis required by *Wards Cove*. As a result, the second holding of *City of Jackson* does not require vacatur of the district court judgment.

I turn, then, to the third holding in *City of Jackson* – that the RFOA exemption of 29 U.S.C. § 623(f)(1) cannot be defeated by a showing that other equally effective alternatives that do not have an adverse impact on older workers are available. In vacating the district court's judgment and directing the dismissal of the complaint, the majority holds that "[i]n light of *City of Jackson*, it is clear that *[Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)] is no longer good law insofar as it holds that the 'business necessity' test governs ADEA disparate impact test claims." It is here that the majority, in my view, impermissibly conflates the Supreme Court's holding on an age discrimination disparate impact analysis with its holding on the RFOA defense. The Supreme Court held that the *Wards Cove* analysis continues to govern ADEA disparate impact claims. *See City of Jackson*, 544 U.S. at 240. It did not state or imply that the "business necessity" part of the *Wards Cove* analysis–on

which plaintiffs bear the burden of proof–no longer exists as part of the disparate impact analysis.

We should not make the leap between a disparate-impact analysis and a RFOA analysis–which the Supreme Court did not make explicitly or implicitly in *City of Jackson*–because the *Wards Cove* disparate impact analysis and RFOA are very different doctrines. Throughout the entire *Wards Cove* analysis, the plaintiffs continue to bear the burden of persuasion with respect to disparate impact. *See* 490 U.S. at 659. However, in a RFOA analysis, as I argue below, the employer bears the burden of proof. Further, the *Wards Cove* analysis is a judicially created[1] doctrine setting forth what employees must demonstrate to prevail on a disparate impact claim under the ADEA, *see Wards Cove*, 490 U.S. at 650-661, while the RFOA is a statutory exemption to liability otherwise established by plaintiffs under a disparate impact analysis, *see* 29 U.S.C. § 623(f)(1); *City of Jackson*, 544 U.S. at 239 (reasoning that "[i]t is … in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable

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[1] The majority quarrels with the phrase, "judicially created," because "*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) located the source of the 'business necessity' test in Title VII § 703(h), 42 U.S.C. § 2000e-2(h), which provides that" the administration of professionally developed ability tests not designed, intended, or used to discriminate on a prohibited ground is not an unlawful employment practice. Majority op. at 141 n. 5. However, the Supreme Court has applied its disparate impact analysis in situations far removed from the tests and practices listed in Section 2000e-2(h). See, *e.g.*, *Wards Cove*, 490 U.S. at 657 (nepotism, separate hiring halls, rehire preferences, and subjective decision making). The use of disparate impact analysis in areas not covered by Section 2000e-2(h) is certainly judicially created. Further-and more important-Section 2000e-2(h) does not contain the words, "otherwise prohibited," which, as I explain below at [7-15] are important in establishing that the RFOA provision is an affirmative defense.

to a nonage factor that was 'reasonable.'"). The majority implicitly suggests that because the RFOA provision does not require that an employer use the most reasonable alternative or even an equally reasonable alternative, the plaintiffs' demonstration of equally effective practices that would serve the employer's legitimate goal no longer serves any purpose. This logic is sound only if one accepts two premises: (1) that "legitimate business justification" means the same thing as "reasonable factor other than age," and (2) that the employee bears the burden of proof under the RFOA provision. As outlined in the next section, existing cases, legislative history, and statutory structure overwhelmingly support the view that employers bear the burden of establishing a RFOA. In addition, I am not at all certain that "legitimate business justification" and "reasonable factor other than age" should be construed to mean the same thing. Therefore, I believe the district court and this court applied *Wards Cove* correctly to plaintiffs' disparate-impact claim.

II. Burden of Proof

To determine whether a claim that an employment determination rests on a "reasonable factor other than age," within the meaning of 29 U.S.C. § 623(f)(1), (1) is properly characterized as an affirmative defense, placing the burden of proof on the employer, or (2) must be negated as part of plaintiff's overall burden of proving age discrimination within a *Wards Cove* disparate impact analysis, I look first to the language of the statute that creates both liability and exemptions from liability for age discrimination, 29 U.S.C. § 623. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir.2006) ("Statutory analysis begins with the text and its plain meaning, if it has one.") Only if the statute is ambiguous, is resort to canons of construction permitted. *See id.* If the canons of construction fail to clarify the ambiguity, legislative history may be examined to determine congressional intent. *See id.* at 338.

The ADEA provides that "It shall be unlawful for an employer ... to limit, segregate, or classify his employees in any manner 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 age." 29 U.S.C. § 623(a)(2). Section 623(f) creates five exceptions to liability that would otherwise exist under Section 623(a). In Section 623(f)(1), Congress exempted from unlawfulness "any action otherwise prohibited" if age was a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; the "otherwise prohibited" action was based on reasonable factors other than age; or the action was required by a law in the country in which the workplace was located. With limitations, Section 623(f)(2), exempts an action "otherwise prohibited under [this section]" if it is taken "to observe the terms of a bona fide seniority system ... not intended to evade the purposes of this chapter" or "to observe the terms of a bona fide benefit plan." The consistent use of the words, "otherwise prohibited," suggests that Section 623(f) creates affirmative defenses because the various fact patterns listed are exceptions to liability that would otherwise exist.

However, even assuming that Section 623(f)(1) is ambiguous, at least two key canons of construction support placing the burden of proof on the employer. First, we must construe the meaning of Section 623(f)(2) in light of Section 623 as a whole. *See Gottlieb*, 436 F.3d at 338. The architecture of Section 623 is simple. Section 623(a), (b), (c), (d), and (e) define unlawful practices. Then, Section 623(f) creates exemptions to liability for certain actions prohibited by Section 623(a), (b), (c), and (e).[2] If plaintiffs were required to show that no RFOA existed, Congress logically

[2] Section 623(d) is the ADEA's retaliation provision. Thus the Section 623(f) exemptions would not be relevant.

would have included this provision within the liability sections, rather than within the exemption sections.

The second rule of construction favoring the interpretation of Section 623(f) as creating affirmative defenses is the doctrine of in pari materia. Where two sections are in the same statute and "share the same purpose," they "can, as a matter of general statutory construction, be interpreted to be in pari materia," that is, as having the same meaning. *United States v. Carr*, 880 F.2d 1550, 1553 (2d Cir. 1989). All five of Section 623(f)'s exemptions are expressed in parallel fashion: conduct that would be "otherwise prohibited" is rendered lawful if certain facts exist. Further, the first of the Section 623(f)(1) exemptions-the bona fide occupational qualification ("BFOQ") defense-is an affirmative defense. *See City of Jackson*, 544 U.S. at 233 n. 3. The principle of in pari materia leads me to believe that, because the RFOA provision is in the same section as the BFOQ defense and uses the same words–"otherwise prohibited"–Congress likewise intended the RFOA provision as an affirmative defense.

Interpreting the RFOA provision and other Section 623(f) exemptions as affirmative defenses is also supported by Congress's enactment of the Older Workers Benefit Protection Act ("OWBPA"), Pub.L. No. 101-433, 104 Stat. 978 (1990) (codified in relevant part at 29 U.S.C. § 623(f)(2)), after the Supreme Court held that the benefit plan exemption of Section 623(f)(2) did not create an affirmative defense, *see Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989). Prior to 1990, the Section 623(f)(2) exceptions-bona fide seniority systems and benefit plans-did not include language specifying that these exemptions apply to conduct "otherwise prohibited." *See* 29 U.S.C. § 623(f)(2) (1990). In 1989, the Supreme Court held that the bona-fide-benefit plan exception "is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the

employee benefit plan context" and that plaintiffs were required to show that a benefit plan was a subterfuge in order to prevail. *Betts*, 492 U.S. at 181. Congress responded by enacting OWBPA, which modifies the ADEA in significant respects. In its findings, Congress indicated that *Betts* required "legislative action ... to restore the original congressional intent in passing and amending the [ADEA]." Pub.L. 101-133 § 101. For our purposes, the relevant change was the insertion of "any action otherwise prohibited" into Section 623(f)(2). *See id.* § 103.

A detailed report of the Senate Labor and Human Resources Committee concerning OWBPA states that Congress inserted "otherwise prohibited," "language ... that is commonly understood to signify an affirmative defense" into Section 623(f)(2) to make it clear "that the employer bears the burden to plead and prove the defenses and exceptions established in that section." S. Rep. No. 101-263, as reprinted in 1990 U.S.C.C.A.N. 1509, 1535. The Committee added that it endorsed "the uniform body of federal court decisions" holding that the BFOQ exception was an affirmative defense as well as circuit court decisions imposing the burden of proving the reasonable-factors defense on the employer. *Id.* (citing *Criswell v. Western Airlines*, 709 F.2d 544, 552-553 (9th Cir.1982), *affirmed on other grounds*, 472 U.S. 400 (1985); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975), *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978)).

Of course, the OWBPA's legislative history is not relevant to determining the intent of the legislators who enacted Section 623(f)(1), which was not changed by OWBPA. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 118-19 (1988). However, the legislative history discussed is probative of the meaning Congress normally assumes will be ascribed to the words "otherwise prohibited" when they preface exemptions to liability.

Finally, several circuits have characterized the RFOA provision and other Section 623(f) exemptions as affirmative defenses. *See Jankovitz v. Des Moines Indep. Cmty. Dist.*, 421 F.3d 649, 651 (8th Cir. 2005) (characterizing as an affirmative defense employer's claim of a bona fide voluntary early retirement incentive plan pursuant to 29 U.S.C. § 623(f)(2)(B)(ii)); *Erie County Retirees Assoc. v. County of Erie, Pa.*, 220 F.3d 193, 199 (3d Cir.2000) (characterizing the RFOA exemption as an "affirmative defense"); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 639 (9th Cir.1993) (stating that "[o]nce the plaintiff establishes a prima facie case that age was a determining factor in the employment decision, the defendant-employer can rebut the prima facie case and/or assert any number of affirmative defenses [including] the RFOA defense."); *Heiar v. Crawford Co., Wis.*, 746 F.2d 1190, 1197-99 (7th Cir. 1984) (requiring employer to prove that age was a BFOQ); *Cova*, 574 F.2d at 959-60 (holding that if the plaintiff makes out a prima facie case of age discrimination, the employer must "show[ ] that the discharge was 'based on reasonable factors other than age,'" and, if the employer meets that burden, the plaintiff must show that "age was a determining factor in the discharge") (quoting 29 U.S.C. § 623(f)(1)); *Laugesen*, 510 F.2d at 313 (stating in dicta that the BFOQ exemption is an affirmative defense).[3] The majority cites only one case, *Pippin v. Burlington Resources*, 440 F.3d 1186, 1200 (10th Cir. 2006), holding that an employee bears the burden of disproving an asserted

[3] The majority characterizes these decisions as "inapt," Majority op. at 143 n. 7 because they are disparate treatment cases and were decided prior to *City of Jackson*. The majority's position provokes two questions: (1) Is there any evidence that Congress intended different burdens of proof for the RFOA provision depending on whether it is employed in a disparate treatment or a disparate impact case? and (2) Is it logical to assume that the Supreme Court rejected existing interpretations of the RFOA provision sub silentio and without analysis?

RFOA. Because *Pippin* contains no analysis, it does not disturb my conclusion that the weight of authority indicates that Congress intended that the employer bear the burden of proving a RFOA.

Based on the language and structure of the statute, the weight of authority, and the legislative history of the OWBPA, I conclude that the RFOA exemption is an affirmative defense. The majority, however, holds that the employees must disprove the employer's claim of a RFOA because (1) the *City of Jackson* court "nowhere suggested that the burden of persuasion with respect to the legitimacy of the business justification was being shifted to the employer"; (2) *City of Jackson* holds that "'*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA,'" and "*Wards Cove* explained that the plaintiff bears the burden of persuasion to defeat the employer's 'business necessity' justification because the plaintiff bears the ultimate burden under Title VII to 'prove that it was "because of [his] race, color," etc., that he was denied a desired employment opportunity,'" [id.] (quoting *City of Jackson*, 544 U.S. at 240, and *Wards Cove*, 490 U.S. at 660); and (3) *City of Jackson* acknowledged that age-as opposed to race and sex-does sometimes correlate with reasonable performance factors and thus the ADEA has a narrower scope that Title VII, [id.].

My first problem with the majority's reasoning is that the *Wards Cove* Court did not analyze the "identical language" at issue in this case. At issue in this case is 29 U.S.C. § 623(f)(1), a statute that was not construed in *Wards Cove*. The burden of proving a disparate impact claim remains exactly as it is described in *Wards Cove*, but that does not mean that the burden of proving the statutory RFOA exemption has been changed by *Wards Cove* or by *City of Jackson*. After *City of Jackson*, it remains necessary for a court interpreting Section 623(f)(1) to adhere to the ordinary principles of statutory interpretation applied above. Further, *City of Jackson*'s

acknowledgment that age does sometimes correlate with ability or inability to do a job explains why Congress did not amend the ADEA–as it did Title VII–to change certain aspects of *Wards Cove* and why Congress enacted the RFOA provision but not why the RFOA provision should be read to impose the burden of proof on a particular party. *See City of Jackson*, 544 U.S. at 240-41. Therefore, the possible correlation between age and certain work-related factors has no bearing on where the RFOA burden should rest. Rather, an appropriate statutory analysis mandates construing the RFOA provision as imposing the burden on the employer to prove that a RFOA exists.

III. Waiver and Fundamental Error

Where a claim of error has its genesis in the charge or the verdict sheet and the party relying on the error for reversal or a new trial did not object at trial, the error is waived and can be reached only if fundamental error occurred. *See Patrolmen's Benevolent Assoc. of the City of New York v. City of New York*, 310 F.3d 43, 54 (2d Cir. 2002). "Fundamental error is more egregious than the 'plain' error that can excuse a procedural default in a criminal trial, and is so serious and flagrant that it goes to the very integrity of the trial." *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002) (internal citation and quotation marks omitted).

Defendants, who, in my view, bear the burden of proving a RFOA, included RFOA as an affirmative defense to liability in their answer. However, the charge did not include an instruction on the RFOA exemption. Defense counsel did not object to the court's charge in any respect. Nevertheless, defendants argue that they did not waive any aspect of a disparate impact analysis because *City of Jackson* "represents a change in the prevailing law under the ADEA, and where there has been an intervening change ... no waiver may be found." Appellants' Reply Br. at 9. This argument is not valid. Since the RFOA was enacted, it has been clear that employers can defend against disparate impact liability by

showing that employees were selected for termination based on a reasonable factor other than age. Further, courts construing Sections 623(f)(1) and (2) have generally found that they create affirmative defenses to liability. *See Jankovitz*, 421 F.3d at 651; *Erie County Retirees Assoc.*, 220 F.3d at 199; *Baker*, 6 F.3d at 639; *Cova*, 574 F.2d at 959-60; *Laugesen*, 510 F.2d at 313. Finally, defendants themselves pleaded RFOA as an affirmative defense. Under these circumstances, there can be no claim that changes in the law excused defendants' waiver, and defendants must demonstrate that the court's failure to include a RFOA instruction in the charge and a RFOA question in the verdict sheet constituted fundamental error.

I see no fundamental error. Parties, as the masters of their cases, should and usually will request the charges that they believe their evidence supports and should object when those charges are omitted. From all that appears in the record before us, defendants may have made a strategic decision not to press the RFOA defense, believing that it would be easier to require plaintiffs to establish disparate impact under the *Wards Cove* analysis than for defendants themselves to prove a reasonable factor other than age. In addition, I do not consider that a jury that had been properly charged that defendants bear the burden of proving a RFOA would necessarily find for defendants. Such a jury could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented.

CONCLUSION

For the reasons discussed above, we should adhere to our prior decision and reinstate the vacated judgment. I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 10, 2003 Decided: August 23, 2004)

Docket Nos. 02-7378 (L); 02-7474 (XAP)

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

James R. Quinn, Ph.D., Deborah L. Bush, Raymond E. Adams, Wallace Arnold, William F. Chabot, Allen E. Cromer, Paul M. Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Pareene, William C. Reynheer, John K. Stannard, David W. Townsend, and Carl T. Woodman,

Consolidated-Plaintiffs-Appellees,

Hildreth E. Simmons, Jr., Henry Bielawski, Ronlad G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Teofils F. Turlais, and Bruce E. Vedder,

Consolidated-Plaintiffs-Appellees,

v.

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., Lockheed Martin Corp., and John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross-Appellees.

Before: McLAUGHLIN, JACOBS, and POOLER, *Circuit Judges*.

Appeal from a judgment, entered after a jury trial, finding defendants liable for disparate impact age discrimination under federal and state law, finding that defendants' violation was willful, and awarding plaintiffs liquidated damages, front and back pay, damages for mental anguish, interest, and attorney's fees.

Affirmed.

MARGARET A. CLEMENS, Nixon Peabody LLP, Rochester, NY (John E. Higgins, Nixon Peabody, LLP, Albany, NY, on the brief), for *Defendants-Appellants-Cross-Appellees*.

JOHN B. DuCHARME, Berger & DuCharme, LLP, Clifton Park, NY, for *Plaintiffs-Appellees-Cross-Appellants*.

Laurie A. McCann, Daniel B. Kohrman, AARP Foundation Litigation; Melvin Radowitz, AARP, Washington, DC, *for Amicus Curiae AARP in support of Plaintiffs*.

Stephen A. Bokat, Robin S. Conrad, Ellen Dunham Bryant, National Chamber Litigation Center, Washington, DC; Mark S. Dichter, Morgan, Lewis & Bockius LLP, Philadelphia, PA; Grace E. Speights, Anne M. Brafford, Jonathan C. Fritts, Morgan, Lewis & Bockius, LLP, Washington, DC, *for Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendants.*

Nicholas M. Inzeo, Acting Deputy General Counsel, Philip B. Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Barbara L. Sloan, Attorney, Equal Employment Opportunity Commission, Washington, DC, *for Amicus Curiae Equal Employment Opportunity Commission in support of Plaintiffs*.

Jennifer Bosco, National Employment Lawyers Association, San Francisco, CA; Cathy Ventrell-Monsees, Chevy Chase, MD, *for Amicus Curiae National Employment Lawyers Association in support of Plaintiffs*.

POOLER, *Circuit Judge*:

Plaintiffs are all former employees of defendant Knolls Atomic Power Laboratories ("KAPL") who lost their jobs in

the course of an involuntary reduction in force ("IRIF"). As all of the plaintiffs are over forty, they are protected under the Age Discrimination in Employment Act ("ADEA"). *See* 29 U.S.C. § 631(a). They sued KAPL, its president, John Freeh, and its parent company, Lockheed Martin Corporation, alleging age discrimination under both federal and state law. In particular, they claimed that KAPL designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees. The jury rejected plaintiff's intentional discrimination claim but found that a facially neutral policy had a discriminatory impact on older employees and that KAPL could have accomplished its legitimate business goals by a method that was not discriminatory in its impact. The jury also found that defendants KAPL and Lockheed Martin acted willfully.

On appeal, KAPL attacks the verdict on several grounds. First, it urges that we reexamine and reject prior holdings of this court allowing an age discrimination claimant to proceed on a disparate impact theory. KAPL also contends that New York courts do not allow a disparate impact claim. Assuming the availability of a disparate impact claim to age discrimination plaintiffs, KAPL attacks the sufficiency of the evidence to support the disparate impact verdict because (a) the same practice—the IRIF—cannot be the basis for both a disparate treatment and a disparate impact claim; (b) plaintiffs did not sufficiently specify the contested employment practice; (c) plaintiffs' statistical evidence was inadequate and a portion of it was improperly admitted; (d) plaintiffs offered no evidence of an equally effective and no more costly alternative to the IRIF procedures; and (e) there was no competent evidence of willfulness. Finally, KAPL urges that portions of the damages award must be reduced or entirely set aside.

We affirm the verdict, holding that the arguments not waived by KAPL lack merit.

BACKGROUND

Relevant Facts

Our description of the background for this appeal is drawn from the trial testimony and exhibits as well as stipulated facts—viewed in light of the applicable standards of review, the limited number of issues on appeal, and questions concerning KAPL's preservation of certain issues. Because the jury ruled in KAPL's favor on the disparate treatment claim and plaintiffs question this verdict only in the alternative, we do not discuss facts relevant to it. Because the standard of review for denial of judgment as a matter of law ("JMOL") requires us to credit the testimony that favors plaintiffs and does not allow us to reverse the jury's verdict based on evidence the jury could have rejected, we do not set out, except in general terms, defendants' refutation of plaintiffs' witnesses' testimony. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir. 2001). And, because of the waiver issues, we address at some length the arguments defendants made in their motions for summary judgment and JMOL.

KAPL manages and operates the Knolls Atomic Power Laboratory, a research and development facility owned by the United States, under a contract with the Department of Energy ("DOE"). Its work is jointly funded by DOE and the United States Navy's Nuclear Propulsion Program (collectively, "NR"), and consists of designing advanced nuclear propulsion systems, providing training to sailors to operate them, and overseeing maintenance, repair, refueling and decommissioning.

NR pays KAPL on a cost-plus basis for the work it performs. To control costs, NR, in consultation with KAPL, sets an annual staffing limit for the lab.[1] This limit is

[1] "Staffing level" is not an exact term. The agreement between NR and KAPL instead provided for a fixed number of "manyears." If the same workers remained at the same jobs for the entire year,

designed to adequately staff the work KAPL contracts to perform for NR. KAPL must stay within this ceiling.

For fiscal year 1996, NR set KAPL's staffing level at 108 jobs below the previous year's level. In addition, NR assigned KAPL new work that KAPL alleges required it to make thirty-five new hires. In combination, the staffing level reduction and the need for new hires required KAPL to eliminate 143 existing jobs. Thus, KAPL designed and implemented a Workforce Reduction Plan ("WRP") providing the following methods to both pare the existing work force and acquire employees with unmet critical skills: (1) a voluntary separation plan ("VSP") offering a $20,000 separation incentive for employees with at least twenty years of service; (2) transfers where possible to accommodate hiring needs; (3) retraining to allow existing employees to perform new skills; (4) an involuntary reduction in force; and (5) new hiring only when necessary for critical skills. KAPL consistently estimated that the average voluntary separation would cost it less than the average involuntary termination.

Prior to issuing the final workforce reduction plan, KAPL considered allowing all employees to participate in the VSP. KAPL's human resources manager, Donald Burek, estimated that between 200 and 250 people would have elected to participate in such a plan. According to Freeh, KAPL rejected the idea of a VSP open to all employees except those with critical skills because, after speaking with other employers who had implemented such plans, he was

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the staffing level would be identical to the number of manyears. However, because workers do not remain at the same jobs throughout the year and because the IRIF took some time to implement, KAPL had to eliminate more employees than it would have eliminated if it had simply been required to reduce its workforce to a certain level by a certain date. We nevertheless use the more easily comprehensible terms, "staffing levels" and "number of employees" because the distinctions between those terms and "manyears" do not affect our analysis.

concerned that denying the severance payment to persons with critical skills would cause a morale problem.

KAPL warned its employees that it could disapprove a VSP application on the basis of business needs. The company, in fact, denied at least one application because the employee had skills critical to the company.

By November 16, 1995, KAPL had completed the VSP process and allowed 107 employees to participate. The company then began to implement the IRIF component of its overall plan to reduce the workforce. Before the IRIF started, Burek made several different projections concerning its impact on the workforce by age group. The estimates of the participation by workers over forty in the IRIF ranged from 70% on the high end to 30% on the low end.

Initially, managers throughout KAPL determined which sections were facing an increased workload and which skills were excess. The particular sections, subsections, and units that would be impacted by the IRIF were determined by their staffing budgets. That is, if a section was over budget, it undertook an IRIF. If it was under budget, there was no IRIF even if workers in the section had skills that had been determined to be "excess."

Over-budget managers were instructed to select employees for the IRIF by listing "all employees in [their] group[s] on [a] matrix"; ranking them between zero and ten for performance, flexibility, and criticality of their skills; and giving up to ten points for company service. Managers were to rate performance based on an average of the two most recent performance appraisals. The tests for making a flexibility determination were whether the employee's "documented skills [could] be used in other assignments that [would] add value to current or future Lab work" and whether the employee was "retrainable for other Lab assignments." Critical skills were those skills that were critical to continuing work in the Lab as a whole. In addition, KAPL directed managers to consider whether the "individual's skill [was] a

key technical resource for the NR program" and whether "the skill [was] readily accessible within the Lab or generally available from the external market." An employee would receive two points for service if she had between two and five years of service, four points for six to ten years of service, six points for eleven to fifteen years, eight points for sixteen to twenty years of service, and ten points for service above twenty years.

The guidelines further instructed the managers to identify for layoff the lowest ranked employees until its staffing was reduced to the required level. The managers were then to perform an adverse impact analysis to "determine whether [their] planned actions might have a disparate impact on a protected class of employees." For minorities and females, the guidelines suggested using the EEOC's four-fifths rule to determine whether an adverse impact existed. In explaining the rule, KAPL noted that "if the selection rate for a protected group is greater than 120% of the rate for the total population a serious discrepancy exists." The instructions further provided: "A similar analysis should be performed to assure that we are not violating the Age Discrimination in Employment Act ('ADEA')."

A review board was to assess the manager's selections "to assure adher[e]nce to downsizing principles as well as minimal impact on the business and employees." Finally, KAPL's general manager, John Freeh, and its chief counsel, Richard Correa, were to review the final IRIF selections and the impact analyses.

The managers placed 245 of a total of approximately 2,063 exempt employees on the matrices and selected thirty-one for layoff. Thirty of the terminated employees were over forty.

After managers submitted the names of employees identified for layoff, KAPL performed an adverse impact analysis, but not the four-fifths analysis described in the Guidelines. Instead, Linda Geiszler, a human resources

representative, compared the average age of the workforce before the IRIF with the average age of the workforce after the IRIF. Geiszler neither received instruction on how to conduct such an analysis from senior human resources personnel nor read any books or articles on how to do it. Although the review board considered the accuracy of managers' ratings, it did not look at age discrimination issues.

Correa testified that although Freeh did not ask him to investigate why older workers were disproportionately represented in the layoffs, he did complete a legal review of the IRIF process. His paralegal checked the math on the matrices, and he spoke with human resource representatives and some, but not all, managers "to see if there was a legitimate, nondiscriminatory reason for the selections." When he did speak with managers, he questioned them only about the lowest four or five individuals on each matrix.

Although Correa was familiar with the ADEA, he explained that he did not look at who was placed on the matrices because "[w]hat was important was [that] the RIF decisions were properly made, they were legitimate decisions." At one point, Correa testified that "an impact analysis is only required for race and sex." However, he later grudgingly acknowledged that "[r]ight now" disparate impact analysis was a viable age-discrimination theory in the Second Circuit. He further claimed that there was "no way to determine whether [Geiszler's analysis was] appropriate or not, since there's no guidance on it." Correa concluded as a result of his review that the IRIF did not violate the ADEA.

Dr. Janice Madden, a qualified expert in the area of employment discrimination and an experienced statistician who testified for the plaintiffs, analyzed the impact of several aspects of the IRIF on older employees. First, she compared the age composition of the pre-IRIF exempt work-force to the persons actually laid off. The pre-layoff exempt population consisted of approximately 40% workers under the age of forty and approximately 60% over forty. However, workers

over forty constituted approximately ninety-eight percent of the laid-off workers. Madden estimated that the probability of this differential occurring by chance was approximately one in 348,000. Looking at the IRIF section by section, Madden estimated the probability that thirty employees over forty would be laid off by chance as one in 6,639. Madden also testified that younger workers were less likely to get on the matrices in the first place. Of the 245 workers on the matrices, 179 were over forty. The odds of selecting thirty workers over forty from the 245 workers on the matrices were approximately one in 1,260.

Madden also testified that the matrices with the highest percentages of workers over forty resulted in the highest percentage of layoffs. However, even assuming that the matrices were drawn up properly, the odds of thirty older workers being laid off from these matrices were approximately one in seventy-three. Each of the disparities Madden found was statistically significant. She explained that a disparity is statistically significant if "the probability that something could happen by chance is less than 5 percent" and that each of the disparate outcomes she studied had a much lower than five percent chance of occurring randomly with the closest one being less than one percent.

Madden also considered each of the four criteria on the matrix and "found ... that the years of service score had no [e]ffect. The performance score actually had very little [e]ffect. ... [T]he two scores that were most responsible statistically for selecting who was RIFed among those individuals on the matrices [were] criticality and flexibility." She also concluded that excess skills could not explain the age differential. Madden concluded that the procedures set up for review of the individual managers' decisions "did not offer adequate protections to keep the prejudices of managers from influencing the outcome."

Finally, Madden criticized Geiszler's analysis of adverse impact, stating that to do a proper adverse impact analysis, a statistician must compare the age composition of the pool from which the laid off employees were selected with the age composition of the group selected for layoff. Because KAPL's exempt workforce exceeded 2,000 persons, Madden testified that "you literally could go from top to bottom of 31 people picking the oldest, you know, just blatantly and you wouldn't affect the average age composition in any meaningful way."

District Court Proceedings

In January 1997, appellants filed two separate age discrimination lawsuits in the United States District Court for the Northern District of New York. These two lawsuits, which made claims under the ADEA and New York's Human Rights Law, were consolidated. Plaintiffs alleged both disparate treatment in the planning and implementation of the IRIF and disparate impact from the IRIF. Claiming that defendants' violations of the ADEA were willful, plaintiffs demanded liquidated damages pursuant to 29 U.S.C. § 626(b). They also sought damages for emotional suffering under the Human Rights Law, front pay, back pay, and attorney's fees.

On July 7, 1999, after discovery, defendants moved for summary judgment dismissing all of plaintiffs' claims. As relevant to this appeal, they argued that the disparate impact claim should be dismissed because (1) a disparate impact claim is not cognizable under the ADEA, (2) plaintiffs failed to identify a facially neutral policy or practice; (3) plaintiffs did not establish that the design of the IRIF caused the disparate impact on older workers because plaintiffs' expert failed to perform a regression analysis to rule out other causes; and (4) plaintiffs' disparate impact claim was nothing "more than an ill-disguised disparate treatment claim" for which plaintiffs must prove discriminatory intent. To support their argument on the last point, KAPL cited *Maresco v.*

Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992) for the proposition that a disparate impact claim must be dismissed where the alleged "facially neutral employment practice coalesces with the discharge which [the plaintiff] claims to have constituted disparate treatment." The district court (Lawrence E. Kahn, *Judge*) denied defendants' motion without opinion.

The parties consented to a jury trial before Magistrate Judge David Homer, the liability portion of which began June 20, 2000. At the close of plaintiffs' proof, defendants moved for judgment as a matter of law. With respect to the disparate impact claim, defense counsel argued that Dr. Madden's testimony was defective because she failed to conduct a regression analysis to rule out factors other than age, including criticality, flexibility and performance. Because Madden purportedly did not perform a regression analysis, counsel argued that plaintiffs had not shown the policy caused the disproportionate number of layoffs of older employees.[2]

Plaintiffs' counsel identified the challenged practice as both "the overall selection process of the people to be placed on the matrices and what's on the matrices, the scoring of those people" and "each element within the overall practice." Counsel also argued that the statistical disparity itself was sufficient to demonstrate causation. As alternative practices to the IRIF, plaintiffs' counsel suggested (1) opening the VSP to the entire workforce except those with critical skills and (2) a hiring freeze.

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[2] This argument is the only claim defendants made concerning the disparate impact theory. However, they also argued with respect to pattern and practice intentional discrimination that plaintiffs failed to submit acceptable proof of an alternative practice that would have met defendants' business goals and thus shown pretext.

In rebuttal, defense counsel criticized plaintiffs' reliance on individual elements of the IRIF, arguing that this reliance was "in fact, a treatment case sort of masquerading as an impact case." Defense counsel also argued that plaintiffs could not rely on the IRIF as a whole because they had not proven it was incapable of separation for analysis.

Judge Homer denied defendants' motion. Before the case was submitted to the jury, defendants renewed their Rule 50(b) motion. Again, defense counsel argued that plaintiffs' case failed to the extent that they relied on the overall IRIF because plaintiffs did not show that the IRIF was incapable of separation for analysis. Counsel also argued once more that Dr. Madden did not establish causation. Finally, counsel contended that plaintiffs had not met their burden of showing an equally effective alternative to the IRIF. Judge Homer denied the motion.

On July 26, 2000, the jury returned a verdict in defendants' favor on the disparate treatment counts. However, the jury also found that plaintiffs had "proven that a specific employment practice of the defendants . . . although non-discriminatory on its face, had an adverse impact on the plaintiffs because of their ages"; that defendants failed to "articulate[] a business justification for selecting the plaintiffs for termination"; that plaintiffs had proven "that an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals as the method actually followed by the defendants" and that defendants acted willfully.

Prior to the beginning of the damages phase of the trial, eight of the plaintiffs settled with the defendants. The jury awarded the remaining plaintiffs damages ranging from approximately $69,000 to over $1.1 million.

After the damages phase, defendants renewed their motion for JMOL. On liability, they contested the sufficiency of the evidence on the grounds that (1) plaintiffs impermissibly relied on the overall selection process and

(2) plaintiffs' expert testimony was inadequate because she did not identify the correct population or rule out factors other than age as the cause of the disproportionate number of protected employees selected for layoff. Defendants also argued that there was a legally insufficient basis for the jury's findings that (1) defendants failed to articulate a business justification; (2) plaintiffs proved an alternative practice would have been equally effective in achieving the defendants' legitimate employment goals; and (3) defendants acted willfully.

On damages, KAPL contended that there was no evidence to support the front pay award for seven plaintiffs or the back pay awards to ten plaintiffs. Defendants also attacked all the prospective mental anguish awards and sought reduction of awards for past suffering to between $5,000 and $30,000.

KAPL alternatively moved for a new trial pursuant to Federal Rule of Civil Procedure 59, contending that the verdict was against the weight of the evidence and that the court's admission of Madden's testimony—particularly her testimony on the regression analyses—was prejudicial error. KAPL also sought a new trial or remittitur on some of the damages issues.

In a published opinion, Judge Homer denied KAPL's motion, with the sole exception of its request for remittitur on mental anguish damages. *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 245 (N.D.N.Y. 2002). The judge noted preliminarily that "[a]lthough courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit." *Id.* at 206. He then addressed KAPL's various claims concerning the disparate impact verdict. He held that the plaintiffs' prima facie case was sufficient, finding that (1) in this case, the entire IRIF could serve as a facially neutral employment policy because Madden's testimony established that "no particular factor and no

particular criterion caused the disparate impact on older employees"; *id.* at 208; (2) either the entire exempt work force or the exempt employees actually placed on the matrices properly could have been considered by the jury as the correct population for purposes of comparison to the plaintiffs; (3) Madden's results demonstrated statistical significance, *id.* at 210-11; and (4) Madden's testimony concerning her regression analyses was properly admitted because KAPL opened the door and, in any event, it was not prejudicial, *id.* at 211-12.

Judge Homer agreed with defendants that the jury erroneously found that KAPL had not offered a legitimate business justification. *Id.* at 213. However, the "erroneous finding [did] not merit judgment as a matter of law or a new trial" because the jury also found that plaintiffs offered proof of alternative practices that would be equally effective and no more costly than the IRIF. *Id.* at 213-14. The judge also held that the jury permissibly could have found that either a hiring freeze or an extension of the VSP would have permitted KAPL to stay within its staffing budget and retain critical skills at less cost than the IRIF. *Id.* at 215.

KAPL had argued that the willfulness verdict must be set aside both because it was inconsistent with the disparate treatment verdict and because it was unsupported by the evidence. Judge Homer rejected the inconsistency challenge based on the different mens rea standards applicable to disparate treatment and willfulness. He sustained the willfulness verdict based on (1) KAPL's awareness that the ADEA prohibited employment practices that disparately impacted older employees; (2) defendants' knowledge that implementation of the IRIF would result in a disproportionate impact on older employees and their failure to take "meaningful steps to avoid or mitigate that impact"; (3) KAPL's use of a statistical measure for disparate impact that it knew "was incapable of identifying any disparate

impact on older employees"; and (4) KAPL's post-IRIF hiring of younger employees. *Id.* at 215-16.

Primarily on waiver grounds, Judge Homer rejected plaintiffs' contention that disparate impact claims are not actionable under New York's Human Rights Law. *Id.* at 216-17. Alternatively, he held that age discrimination disparate impact claims are actionable under the Human Rights Law. *Id.* at 217.

With respect to damages, the district court rejected all of KAPL's front and back pay challenges but granted relief with respect to some plaintiffs' mental anguish damages. Specifically, if the jury had awarded a plaintiff who had not offered evidence of treatment or of physical sequelae more than $125,000 for mental anguish, the court ordered a new trial unless the plaintiff agreed to accept a damages amount of $125,000. If a plaintiff who had offered proof of treatment or physical impact received more than $175,000 in emotional suffering damages, the court set a remittitur equal to that amount. *Id.* at 221-37.

KAPL filed a timely notice of appeal and plaintiffs a timely notice of cross-appeal. KAPL's principal arguments on appeal are: (1) the ADEA does not support a cause of action based on disparate impact; (2) disparate impact is not cognizable under the Human Rights Law; (3) there is no evidence of disparate impact because (a) plaintiffs failed to isolate and identify a facially neutral employment process; (b) Madden did not demonstrate causation; (c) Madden's post-discovery regression analysis was erroneously admitted and not probative of causation; and (d) plaintiffs did not establish an equally effective and no more costly alternative to the IRIF; (4) there is no evidence of willfulness; (5) the willfulness verdict is inconsistent with the disparate treatment verdict; (6) the emotional damages awards are excessive; and (7) there was no evidence to support the front pay awards to four plaintiffs. Plaintiffs seek to maintain their cross-appeal,

which rests on two asserted evidentiary errors, only if defendants prevail on the principal appeal.

DISCUSSION

I. Principles implicated in our review.

This appeal requires us to apply general principles concerning waiver, stare decisis, and sufficiency of the evidence to support a jury verdict which we will briefly describe.

Plaintiffs argue that KAPL waived several issues by failing to raise them in its motion for JMOL. "[A] party is not entitled to challenge on appeal the sufficiency of the evidence to support the jury's verdict unless it has timely moved in the district court for judgment as a matter of law on that issue." *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998). To be timely, the motion must be made before the jury retires so that the non-moving party has an opportunity to remedy any defects in its proof. Id. The motion "must at least identify the specific element that the defendant contends is insufficiently supported." *Id.* (quoting *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir. 1998)). We will reach the waived issue if to ignore it would result in manifest injustice. *Id.* We also may correct an error below despite the lack of a timely request in the district court if the issue is purely legal and no fact finding is required. *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). However, we are much less likely to consider a waived claim "involv[ing] a complex and novel issue of state law." *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 96 (2d Cir. 2000).

Stare decisis, and in particular, our obligation to follow the rulings of prior panels, also plays a role in this case. We are compelled to follow a decision of an earlier panel "unless it has been called into question by an intervening Supreme Court decision or by one of this Court sitting in banc," *United States v. Santiago*, 268 F.3d 151, 154 (2d Cir. 2001), or "unless and until its rationale is overruled, implicitly or

expressly, by the Supreme Court, or this court in banc." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (per curiam).

Where we reach the merits, we review the district court's denial of JMOL de novo. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108 (2d Cir. 2001). The district court, and thus this court, can grant the motion only if after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, it finds that there was insufficient evidence to support the verdict. *Tolbert v. Queens Coll*., 242 F.3d 58, 70 (2d Cir. 2001). Neither the district court nor this court can set aside the jury's credibility findings or find for the movant based on evidence the jury was entitled to discredit. *Id.*

II. Disparate impact under the ADEA.

KAPL contends, based on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) and decisions from other circuits[3] that we should disavow our own precedent holding that policies having a disparate impact on older workers are actionable under the ADEA. According to plaintiffs, this argument was waived by KAPL's failure to raise it before submission to the jury, and is barred by stare decisis. Alternatively they claim that the argument lacks merit.

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[3] See *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 187 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 697 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1001 (10th Cir. 1996); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1994). *But see Arnett v. California Pub. Emp. Ret. Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1989), *vacated on other grounds*, 528 U.S. 1111 (2000); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996).

At summary judgment, KAPL acknowledged that this circuit recognizes ADEA disparate impact claims, but, in light of the authority to the contrary, did not concede that an ADEA plaintiff could make a disparate impact claim. Defs.' Mem. Supp. Summ. J. at 10-11. However, in moving for judgment as a matter of law on plaintiffs' disparate impact claim, KAPL did not preserve this argument. Nor was the argument made in KAPL's trial memorandum.

KAPL's failure to move for JMOL based on the unavailabilty of an ADEA disparate impact claim constitutes a waiver. *See, e.g.*, *Kirsch*, 148 F.3d at 169-70. We do not believe the attempted preservation of the issue at the summary judgment stage avoids the procedural default. *Cf. Becker v. Poling Transp. Corp.*, 356 F.3d 381, 391 (2d Cir. 2004) (stating that "the denial of a motion for summary judgment is moot in light of the fact the case has since been tried before a jury"). Nevertheless, the waiver rule is not an absolute one. Here, the district court considered whether a disparate impact claim was tenable under the ADEA notwithstanding KAPL's failure to raise the issue. The district court's decision allows us to proceed with review. *See Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (considering the merits of an issue where—despite party's failure to present it to the courts below—those courts decided it). Moreover, the waived issue is easily resolved under existing circuit precedent. Therefore, we will address it.

Stare decisis requires us to hold that the ADEA allows disparate impact claims. As defendants concede, we have repeatedly so held. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 364 (2d Cir. 1999); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (per curiam); *Maresco*, 964 F.2d at 115. We can reject this precedent only if a Supreme Court decision or a decision from this circuit sitting en banc implicitly or explicitly overrules it. *See Santiago*, 268 F.3d at 154; *Sokolowski*, 205 F.3d at 534-35.

In *Hazen Paper*, a disparate treatment case, the Supreme Court held that an employer may lawfully discriminate based on factors closely correlated with age. 507 U.S. at 611-13. KAPL argues that this holding and dicta in *Hazen Paper* suggest that the Supreme Court ultimately will reject ADEA disparate impact claims. While this may be so, the Hazen Paper Court directly stated that it had not resolved the viability of ADEA disparate impact claims.[4] 507 U.S. at 610. The Supreme Court's express statement contradicts any claim that Hazen Paper expressly or implicitly overruled our prior precedent. And, the Supreme Court's dicta do not outweigh prior circuit authority. *See Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996) (following prior case law allowing an ADEA claim for disparate impact despite its conclusion that dicta in Hazen Paper cast doubt on its viability); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1225-26 (4th Cir. 1995) ("Although subsequent Supreme Court opinions might be read to cast some doubt upon the constitutionality of the election scheme [we] upheld in [a previous case] . . . we feel bound to treat [that] result . . . as controlling unless and until the Supreme Court provides a much clearer signal to the contrary."); *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 218 (1997) (Cabranes, J., *concurring in part and dissenting in part*) ("we are not free to follow the Supreme Court's strong suggestion in what is concededly dicta"). Of course, the decisions of other circuits do not expressly or implicitly overrule our prior cases. Therefore, we reject KAPL's contention that disparate impact claims are not permissible under the ADEA.

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[4] The Court is likely to resolve this issue next term. On March 29, 2004, it granted certiorari in *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), which held that the disparate impact theory of recovery is not available in age discrimination cases. 124 S. Ct. 1724 (2004).

III. Disparate impact under New York's Human Rights law.

KAPL next argues that we should set aside the jury's Human Rights Law verdict, which is the sole source of plaintiffs' emotional suffering damages. In light of the state age discrimination law's coverage of anyone over the age of eighteen, N.Y. Exec. L. § 296(3-a)(a), and the law in this circuit indicating that ADEA disparate impact plaintiffs must show that a challenged policy has an impact on the entire class, *see Criley*, 119 F.3d at 105, KAPL contends that a disparate impact claim is conceptually impossible. That is, no one employment policy can discriminate against everyone over the age of eighteen. At least one of New York's four intermediate appellate courts has accepted this premise. *See Bohlke v. General Elec. Co.*, 742 N.Y.S.2d 131, 132 (App. Div. 3d Dep't 2002). However, the question has not been addressed by New York's highest court. *See Becker v. City of New York*, 671 N.Y.S.2d 88, 90 (App. Div. 1st Dep't 1998) (noting that "[n]either the United States Supreme Court nor the Court of Appeals has ruled conclusively that disparate impact, as opposed to disparate treatment, constitutes age discrimination").

KAPL concedes that it did not raise this issue until its post-verdict motion but argues that it would constitute manifest injustice to allow the state law verdict to stand. Unlike KAPL's claim that the ADEA does not extend to disparate impact claims, this argument cannot be answered by reference to our decisions. It is also not easily resolvable by construing state law or cases. We cannot easily predict whether New York's Court of Appeals would apply *Criley* to its own statute as the federal and state statutes differ. The federal statute creates a class of older employees who are protected while the state statute prohibits discrimination on account of age against both older and younger workers. *Compare* 29 U.S.C. § 631(a) *with* N.Y. Exec. L. § 296(3-a)(a). The general principle that we construe the

Human Rights law just as we do the ADEA, *see Smith*, 196 F.3d at 363 n.1, has little application to these two quite different statutory provisions. Although *Bohlke* may foreshadow the New York Court of Appeals' resolution of this issue, New York's highest court also could find that a policy having a disparate impact on all persons between, for example, fifty and sixty was actionable even though it had no impact on employees between eighteen and twenty-eight. Because the New York courts should resolve this issue, we decline to address it in the face of KAPL's acknowledged waiver. *See Pulvers*, 210 F.3d at 96.

IV. Adequacy of the proof of disparate impact.

To prove disparate impact, plaintiffs must first identify the specific policy or policies responsible for the disparate impact. *Smith*, 196 F.3d at 367-68. They cannot rely on the company's overall decision making process for a reduction in force unless they "can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Id.* An employer's subjective decision-making process is a proper subject for a disparate impact analysis. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988).

After identifying the relevant policy, the plaintiffs must choose the correct population for statistical analysis. *Smith*, 196 F.3d at 368. In a reduction in force, this population will generally be the population subject to termination, here either KAPL's entire exempt workforce or those exempt employees actually placed on the matrices. *Id.* Plaintiffs' expert then must compare the retention rate of protected employees to that of the non-protected employees. *Id.*

If the comparison of retention rates demonstrates "a statistical disparity . . . sufficiently substantial to raise an inference of causation," defendant must "explain the business necessity of the challenged employment practice." *Id.* at 365. After the defendants meet their burden, plaintiffs may prevail

only "if [they] can show that the employer's proffered explanation was merely a pretext for discrimination." *Id.* They can do this by "show[ing] that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.*

KAPL contends that plaintiffs' proof was deficient in several respects, the first of which is identification of the policy or practice causing the IRIF. They claim that plaintiffs (1) incorrectly focused on the entire IRIF rather than particular aspects of it and (2) impermissibly named the same practice—the design of the IRIF—as the focus of both their disparate impact and disparate treatment claims.

Plaintiffs asserts that KAPL's second argument, which focuses on *Maresco*, has been waived. In *Maresco*, we said:

> Both the disparate treatment and disparate impact theories can be invoked in a given case to establish ADEA liability, since they are simply alternative doctrinal premises for a statutory violation. We do not believe, however, that the disparate impact theory provides any significant analytical contribution in this case.
>
> The facially neutral employment policy that Maresco invokes as the premise for disparate impact liability coalesces with the discharge which he claims to have constituted disparate treatment. Because evidence of the employer's subjective intent to discriminate must be provided to support a claim of disparate treatment, allowing the disparate impact doctrine to be invoked as Maresco proposes would simply provide a means to circumvent the subjective intent requirement in any disparate treatment case. Furthermore, the eight discharges that occurred in connection with the divisional consolidation at issue in this case are unlikely to provide an adequate basis for the sort of statistical

> analysis frequently employed in disparate impact cases.

964 F.2d at 115 (internal citations and quotation marks omitted). In KAPL's view, *Maresco* means that the same policy or practice can never be the focus of both a disparate impact and a disparate treatment claim. That is, an age discrimination plaintiff cannot argue alternatively that the defendants designed their policy with discriminatory intent and that, regardless of intent, the policy had a discriminatory impact. The preliminary question before us is whether KAPL sufficiently alerted the district court to its argument.

KAPL's motion for summary judgment relied on *Maresco* for the proposition that plaintiffs had made only a disparate treatment claim. KAPL did not explicitly argue that plaintiffs can never maintain a disparate treatment and a disparate impact claim based on the same policy. *See* Defs.' Mem. Supp. Summ. J. at 18-19. However, KAPL did describe *Maresco* as "dismissing a disparate impact claim where the plaintiffs 'facially neutral practice ... coalesces with the discharge which he claims to have constituted disparate treatment.'" Id. at 19. (quoting *Maresco*, 964 F.2d at 115). KAPL's references to *Maresco* at trial and before the jury retired were even more oblique. In its trial memorandum of law, KAPL did not cite *Maresco* and did not claim that disparate impact and disparate treatment claims could never focus on the same policy or practice. Instead, it argued that plaintiffs' disparate impact claim was really a disparate treatment claim in disguise. In its initial Rule 50 motion, KAPL argued:

> Number two, [plaintiffs' counsel] pointed out something also that relates to the [Smith] case. He spoke of the individual elements that also they are complaining about, sort of the individual flexibility, criticality, as applied. This impact case, I think is, in fact, a treatment case sort of masquerading as an impact case. They are complaining about managers

> subjectively applying their judgments to these decisions, which certainly can allow one to, if you've got animus, to inject it into the process. But that's treatment, sir. That's motivation. That's not adverse impact. That's not statistics. And that's all I want to say.

Tr. at 2486.

We believe that the district court would have understood KAPL to have argued that because plaintiffs focused on individual judgments by individual managers, they did not make out a disparate impact claim. KAPL never argued clearly that one policy could not be the focus of both a disparate impact claim and a disparate treatment claim. Thus, we hold that KAPL waived its *Maresco* claim. Had KAPL made its argument clearly, even without citation to *Maresco*, we would consider the *Maresco* argument on the merits. However, whatever the outside boundaries of a party's obligation to specify its objections, at a minimum, the party must have articulated the objection so that a reasonable judge would understand it. KAPL did not meet this standard.

We decline to exercise our discretionary jurisdiction to reach the *Maresco* claim.[5]

We turn now to plaintiffs' purported failure to identify a policy other than the overall IRIF as having a disparate impact. As discussed previously, we held in *Smith* that a plaintiff cannot rely on his employer's overall decision-making process for a reduction in force unless he "can show that the elements of the employer's decision-making process are not capable of separation for analysis." 196 F.3d at 368.

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[5] To reach *Maresco*, we would need to search a large and complex record to determine whether plaintiffs' disparate impact and disparate treatment claims actually do "coalesce." Defendants' failure to preserve means that we would have to do that without the benefit of the district court's insights.

Plaintiff's obligation to identify a specific employment practice causing a disparate impact stems from Watson. In that case, four justices of the Supreme Court said:

> The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more standardized rules or tests, the plaintiff is in our vie responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

487 U.S. at 994 (O'Connor, Justice, writing for herself, the Chief Justice, and Justices White and Scalia).

One year later, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court considered plaintiffs' claim that several hiring practices including nepotism, separate hiring channels, rehire preferences, and subjective decision making resulted in a racially imbalanced workforce. *Id.* The Wards Cove court rejected plaintiffs' global approach, requiring instead that they demonstrate that "specific elements of the [employer's] hiring process have a significantly disparate impact on nonwhites." Id. at 658. Thus, although subjective decision making is subject to a disparate impact analysis, it must be shown that it is the subjective elements of the decision-making process that caused the disparate impact.

With these principles in mind, we examine in the light most favorable to plaintiffs, their statistical proof. At the outset, we note that KAPL's IRIF was broken down and analyzed by Dr. Madden as a four-step process, and that the structure of the IRIF lent itself to that analysis; plaintiffs were thus required to "isolate [] and identify [] . . . specific employment practices" allegedly responsible for the IRIF's

lopsided outcome. *Watson*, 487 U.S. at 994. Plaintiffs met this burden. A reasonable juror could have viewed Dr. Madden's testimony as establishing that (1) the procedures used to select employees to be placed on the matrices selected older employees at a disproportionate rate; (2) older employees were selected from the matrices at a rate disproportionate to their numbers on the matrices; (3) of the criteria listed on the matrices, managers' judgments on flexibility and criticality had the greatest impact on the persons selected for layoff; (4) one basic flaw in the IRIF process was the degree of subjective decision making it allowed to individual managers to set flexibility and criticality scores; and (5) another was the failure to audit for that tendency. Thus, the jury could have found that the degree of subjective decision making allowed in the IRIF created the disparity.

But sustaining the jury's causation finding is insufficient to preserve the verdict against KAPL because, as the district court ruled, the lab offered a facially legitimate business justification for the IRIF and its constituent parts: "to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions." *Meacham*, 185 F. Supp. 2d at 213.[6] Unchallenged, KAPL's justification would preclude a finding of disparate impact. However, plaintiffs prevail nonetheless if they demonstrate that KAPL's justifications are a pretext for discrimination by challenging their veracity or by showing "that another practice would achieve the same result at a comparable cost without having a disparate impact on the protected group." *Smith*, 196 F.3d at 365.

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[6] Although it denied KAPL's post-verdict motions, the district court noted that the jury erroneously found that KAPL failed to offer a legitimate business justification for terminating plaintiffs' employment through the IRIF. The error was deemed harmless due to the jury's finding with respect to equally effective alternatives. *Meacham*, 185 F. Supp. 2d at 213-14.

The district court ruled that the jury could have found that the availability of two suitable alternatives—a hiring freeze and a selective expansion of the VSP—exposed KAPL's justification as pretextual. *Meacham*, 185 F. Supp. 2d at 214-15. We affirm this result on different grounds, notwithstanding that Judge Homer's ruling was erroneous. A hiring freeze or an extended VSP might have been cost effective, but they are not alternatives to the specific employment practices plaintiffs identified as discriminatory: unaudited and heavy reliance on subjective assessments of "criticality" and "flexibility." Rather, they are replacements for the IRIF itself, which was (and is) a personnel decision justified by KAPL's business objectives. *See, e.g., Atonio v. Wards Cove Packing Co., Inc.*, 10 F.3d 1485, 1502-03 (9th Cir. 1993).

Faced with the need to cut its workforce and simultaneously to retain employees with critical skills, KAPL undertook a multi-step workforce reduction plan that included a VSP, transfers, retraining, a limitation on new hiring to candidates with critical skills, and—finally—the IRIF. Employers are free to decide that layoffs are necessary; and "criticality" and "flexibility" may be appropriate criteria to use in making a termination decision. But if a particular criterion is subjective (as "flexibility" and "criticality" are, and if (as here) evidence shows that (i) the subjectivity disproportionately impacted older employees; (ii) the employer observed that the disproportion was gross and obvious; and (iii) the employer did nothing to audit or validate the results, then an employer may be liable for discrimination if equally effective alternatives to the challenged features of the employment practice are available.

At least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias. For

instance, KAPL's in-house counsel, Richard Correa, spoke to certain managers about certain scores, but his review was far from systematic and appears to have consisted primarily of having a paralegal check the managers' math. A sample of the factors considered in scoring flexibility shows that the criterion was imprecise at best.[7] This evidence, combined with Dr. Madden's testimony and KAPL's inadequate response when the criticality and flexibility criteria led to extremely skewed results (see the discussion of willfulness below) could easily have led the jury to conclude that KAPL could have made simple adjustments to the criticality and flexibility criteria that would have led to a nondiscriminatory distribution of layoffs.[8]

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[7] According to one set of instructions:

> Flexibility: The individual's flexibility to do other work within KAPL was considered. We considered principally ability to do other work within MDO, but kept in mind ability to do other work around KAPL. Highest ratings went to those with demonstrated previous experience in other assignments. For those without as much broad experience as those getting top values, higher ratings were provided to those who had demonstrated flexibility in different types of work within their assignments. For the population below this, points were provided for demonstrated operative behavior in taking on or being asked to take on work. Lowest ratings went to those who had demonstrated resistance to being flexible to new tasks, or who, despite a flexible attitude were limited in their skills.

[8] The alternative of reworking the challenged criteria is all but self-evident from the record, particularly since company counsel could have asked for a second (perhaps outside) opinion when he received the IRIF's startlingly skewed results. We are satisfied that the alternative was adequately presented to support the result here.

We turn now to KAPL's claim that because Dr. Madden did not rule out other causes, plaintiffs failed to establish that KAPL's facially neutral IRIF policy caused the disparate impact on older workers. This argument misconstrues the role statistics play in a disparate impact analysis. Statistical disparity alone—assuming it is substantial as it was here—raises an inference of causation. *Smith*, 196 F.3d at 365. The Second Circuit cases that KAPL cites for its argument to the contrary are all disparate treatment cases, not disparate impact cases, and (in part because defendants failed to preserve the Maresco issue) are not relevant to this disparate impact case. *See* Appellants' Br. at 47 (citing *Bickerstaff v. Vassar College*, 196 F.3d 435, 445-50 (2d Cir. 1999); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60, 68 (2d Cir. 1997)).

KAPL also argues that Madden's testimony concerning regression analyses was erroneously admitted and that it prejudiced KAPL. Madden admitted at her deposition that she had not performed any regression analyses. Armed with this admission, defense counsel sought to undermine her direct testimony by asking whether she had performed any regression analyses. She answered that she had.[9] On redirect, plaintiffs' counsel asked Madden to describe the analyses she had performed. Over KAPL's objections, the court allowed the testimony but provided that KAPL could recall Madden at a later time and at plaintiffs' expense. Madden then testified that she had found that older workers' performance skills declined disproportionately to those of younger workers between evaluations conducted in 1991 and evaluations conducted in 1995. She also testified that flexibility and criticality scores were much better predictors of who would be laid off than were performance and years of service scores.

[9] She performed these analyses between the deposition and her trial testimony.

We review the district court's evidentiary rulings for abuse of discretion, *see Wolak v. Spucci*, 217 F.3d 157, 161 (2d Cir. 2000), and we reverse only if refusal to do so is "inconsistent with substantial justice," Fed. R. Civ. P. 61. Thus, although Federal Rule of Civil Procedure 26(a)(2) requires disclosure and supplementation as needed of expert reports, any nonprejudicial error the district court may have made does not require reversal. The district court gave KAPL a chance to remediate any prejudice by recalling Madden at plaintiffs' expense. Although KAPL chose not to recall Madden, it did offer extensive testimony from its own expert to rebut Madden's conclusions. Therefore, plaintiffs gained no unfair advantage from their partial failure to disclose.

Having addressed KAPL's objections to the jury's disparate impact verdict, we affirm it.

V. The willfulness verdict.

An employee is entitled to liquidated damages equal to his back pay for willful violations of the ADEA. 29 U.S.C. §§ 216(b), 626(b). KAPL challenges the jury's willfulness verdict arguing that (1) it is inconsistent with the jury's finding that KAPL did not intentionally discriminate and (2) in light of KAPL's careful IRIF plan, there was no evidence to support the verdict.

There is no inconsistency in the verdicts. Disparate treatment liability requires that the plaintiff employer intend to discriminate on the basis of age, *Cronin v. Aetna Life Ins. Co.* 46 F.3d 196, 204 (2d Cir. 1995), while an ADEA violation is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," *Hazen Paper*, 507 U.S. at 614. Given these different standards, a jury could reasonably find both that KAPL did not intentionally discriminate on the basis of age and that it showed reckless disregard for the impact of its IRIF policy on older employees.

We also hold that the jury had sufficient proof of reckless disregard to find willfulness. KAPL's counsel knew that this circuit recognizes a claim for disparate impact under the ADEA. In addition, the IRIF guidelines instructed managers to test for age discrimination by use of the 4/5 test. Geiszler, however, did not use the 4/5 test. Instead, she compared the average age of KAPL's 2000-plus employees before and after the IRIF and found no significant difference. Not only did Madden testify to this method's gross inadequacy, but it is also inconsistent with the methodology we have approved. *See Smith*, 196 F.3d at 365-66 (approving as methods for judging disparate impact, the four-fifths test and the statistical approach used by Madden).

KAPL knew that its IRIF had affected a disproportionate number of older employees. A reasonable jury could have found that KAPL management's failure to challenge Geiszler's patently inadequate approach evinced a desire not to know that the overwhelming—and overwhelmingly disparate—impact of the IRIF was on older workers, and that KAPL's failure to modify its procedures in the face of this disparity reflected a reckless disregard for whether it had violated the ADEA by implementing a policy with such an impact.

Seen in the light most favorable to plaintiffs, the proof demonstrated that KAPL's procedures for guarding against disparate impact age discrimination were inadequate. Some managers who selected employees for termination testified that they received no training on avoiding age discrimination in the IRIF. The review board also received no training on age discrimination and did not monitor for age discrimination. And, as we have outlined, Correa's review was quite limited. The jury reasonably could have found that this proof, too, supported a conclusion that KAPL managers acted in reckless disregard of their obligations under the ADEA.

Because there was sufficient proof of reckless disregard to enable a jury to find that KAPL acted willfully and there is

no inconsistency between the disparate treatment and willfulness verdicts, we affirm the jury's verdict on willfulness.

VI. Damages.

A. Mental anguish.

Where plaintiffs offered no proof other than testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress, Judge Homer limited their mental anguish damages to $125,000. The judge limited damages where either physical sequelae or professional treatment was established to $175,000. In some instances, these caps significantly reduced the amounts the jury had awarded. KAPL contends, however, that all awards should have been reduced to between $5,000 and $30,000. In KAPL's view, the damages must be reduced to this level because (1) the district court failed to address the damages in light of KAPL's good faith and (2) plaintiffs' claims do not rise above garden variety emotional distress claims for which New York courts traditionally uphold awards of no more than $30,000.

In determining whether the mental anguish damages, which stem exclusively from plaintiffs' state law claim, should have been further reduced, we must use New York standards. *Gasperini v. Center for Humanities*, 518 U.S. 415, 431 (1996). New York law provides that jury verdicts may be set aside and new trials ordered where the jury's award "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. § 5501(c). Mental anguish damages must also be "reasonably related to the discriminatory conduct" of the defendant. *In re New York City Transit Auth.*, 573 N.Y.S.2d 49, 54 (NY 1991). The reviewing court looks to "the duration of a complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment." *Id.* at 55. Finally, the reviewing court must determine how the award

compares with others awarded for similar injuries and whether it is supported by evidence before the jury. *Id.*

New York cases vary widely in the amount of damages awarded for mental anguish. Many do reduce awards to $30,000 or below. *See, e.g., In re Buffalo Athletic Club*, 672 N.Y.S.2d 210, 211 (App. Div. 4th Dep't 1998); *In re Manhattan and Bronx Surface Transit Operating Auth.*, 632 N.Y.S.2d 642, 644 (App. Div. 2d Dep't 1995); *In re New York State Office of Mental Retardation and Developmental Disabilities*, 583 N.Y.S.2d 580, 582 (App. Div. 3d Dep't 1992); *In re City of Fulton*, 633 N.Y.S.2d 914, 915 (App. Div. 4th Dep't 1995). However, other cases uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment. *See, e.g., Rio Mar Rest. v NYSDHR*, 704 N.Y.S.2d 230, 231 (App. Div. 1st Dep't 2000); *In re Allender*, 649 N.Y.S.2d 144, 145 (App. Div. 1st Dep't 1996); *Boutique Indus., Inc. v. NYSDHR*, 643 N.Y.S.2d 986, 986 (App. Div. 1st Dep't 1996). For truly egregious conduct with severe and verified results on a complainant's mental and physical health, courts have upheld awards far in excess of the amounts upheld here. *See, e.g., In re New York City Transit Auth.*, 581 N.Y.S.2d 426, 428-29 (App. Div. 2d Dep't 1992). In addition, the passage of time since the cited cases were decided could reasonably support higher verdicts. When confronted with the range of mental anguish verdicts approved under New York law, we do not find the verdicts in this case to deviate substantially from verdicts awarded under similar circumstances.

B. Front Pay.

Finally, KAPL claims that there was no evidence to support the jury's front pay awards for plaintiffs Deborah Bush, who received $70,625.15 for ten years; Bruce Palmatier, who received $13,211.05 for nine years; David Townsend, who received $25,121.50 for twelve years; and Carl Woodman, who received $42,344.21 for twelve and a half years. KAPL contends that the awards are not justified

because plaintiffs have not demonstrated that they continued to make efforts to obtain comparable employment. KAPL also contends that the awards project too far out in the future.

Front pay is available under the ADEA "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable employment." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984). The employer ordinarily has the burden of demonstrating that suitable employment was available. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998). However, if the employee failed to take reasonable steps to mitigate his damages, the employer need not prove that suitable employment existed and the plaintiff is not entitled to front pay. *Id.* at 54-55. The first issue presented is whether plaintiffs failed to make reasonable efforts to mitigate their damages, thus relieving defendants of the burden to demonstrate the existence of suitable employment.

Each of the plaintiffs obtained employment. Six months after Bush's termination, she found a job as an administrative assistant at a salary lower than she had received at KAPL. She left that job for another job that paid less but gave her better prospects of promotion. By the time of trial, her new job paid her approximately $3,000 less per year than she had been paid at KAPL.

Woodman, who had worked as a specialist in non-destructive testing, was rehired at KAPL as a janitor. Woodman continued to look for jobs in his field. He found a job as a nondestructive tester with another company but continued to look for other opportunities. In early summer 1998, the new company fired him. In November 1998, KAPL rehired him as a nondestructive test inspector, a non-exempt job. He continued to look for a specialist job at KAPL.

Palmatier, who worked as an exempt electrical specialist at the time of the layoffs, returned to KAPL in May 1996 as a non-exempt hourly electrician. With overtime, his wages slightly exceeded the salary he received at the time of layoff.

He did not look for non-union work because layoffs are by seniority in the non-exempt ranks and he believed he would have better protection as a member of the union.

In April or May 1996, Townsend, a former specialist, obtained a job as a health physics technician at a KAPL subcontractor. From that position, he became employed as a janitor at KAPL. Later, he was promoted to the position of radioactive waste processor. Townsend also applied for specialist jobs but was turned down. In February 1998, he took a job at KAPL as a radiation technician and has continued to seek promotion within his unit. However, because of his prior experience, Townsend is now wary of applying for exempt positions.

The district court did not clearly err in finding that plaintiffs made reasonable efforts to mitigate damages and that defendants failed to prove that other, more comparable employment existed. Each plaintiff diligently sought employment and reasonably explained why he or she was unable to or chose not to find more remunerative employment.

The amount of time for which front pay will be awarded is committed to the district court's discretion. *See, e.g., Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1182 (2d Cir. 1996). KAPL wholly fails to demonstrate why the district court abused its discretion in choosing time periods between nine and twelve and a half years as the front pay period for plaintiffs who already had taken substantial steps to mitigate their damages. Therefore, we affirm the front pay awards.

VII. Cross-appeal.

As noted previously, plaintiffs request affirmative relief on their cross-appeal only if the defendants prevail on their appeal. Because we have affirmed the judgment of the district court, we have no need to address the issues raised on the cross-appeal.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
N.D. NEW YORK.

Feb. 13, 2002

Nos. 97-CV-12 (DRH), 97-CV-45 (DRH)

Clifford B. MEACHAM; Thedrick L. Eighmie; and Allen G. Sweet, all individually and on behalf of all other persons similarly situated; and

James R. Quinn, PhD; Deborah L. Bush; Raymond E. Adams; Wallace Arnold; William F. Chabot; Allen E. Cromer; Paul M. Gundersen; Clifford J. Levendusky; Bruce E. Palmatier; Neil R. Pareene; William C. Reynheer; John K. Stannard; David W. Townsend; and Carl T. Woodman,

Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, aka KAPL, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

James R. Quinn, PhD,

Plaintiff,

v.

Knolls Atomic Power Laboratory, Inc., aka Kapl, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin,

Defendants.

Berger & DuCharme, LLP (John B. DuCharme, Joseph C. Berger, of counsel), Clifton Park, NY, *for Plaintiffs*.

Epstein Becker & Green, P.C. (Michael R. Zeller, Alesia J. Kantor, of counsel), New York City, Nixon Peabody LLP (John E. Higgins, of counsel), Albany, NY, *for Defendants*.

MEMORANDUM-DECISION AND ORDER

HOMER, United States Magistrate Judge.

[TABLE OF CONTENTS OMMITTED]

I. Introduction

The twenty-six plaintiffs, all over age forty, were employed by defendant Knolls Atomic Power Laboratory, Inc. ("KAPL") until 1996 when their employment was terminated in an involuntary reduction-in-force (IRIF). Plaintiffs then commenced this class action[10] against KAPL, Lockheed Martin, Inc., KAPL's parent company, and John J. Freeh ("Freeh"), KAPL's President and General Manager, alleging that their terminations violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the New York Human Rights Law (HRL), N.Y. Exec. Law § 290 *et seq.* (McKinney 2001).[11] Plaintiffs allege

[10] Two additional employees, Ronald G. Butler, Sr. and Janice M. Polsinelle, were members of the class which brought this action. However, the jury found in favor of the defendants on their claims.

[11] An "opt in" class action may be maintained under the ADEA in accordance with section 16(b) of the Fair Labor Standards Act, see 29 U.S.C. § 626(b) (incorporating 29 U.S.C. §

that the violations resulted from both disparate treatment and disparate impact. Following trial, a jury returned verdicts in favor of the plaintiffs on their disparate impact theory, in favor of defendants on the disparate treatment theory, and awarded damages totaling $5,077,285.33. Judgment was entered on the verdicts. Am. J. (Docket No. 133).

Presently pending are (1) defendants' motion for judgment as a matter of law, a new trial and remittitur (Docket No. 137); (2) plaintiffs' motion for prejudgment interest, postjudgment interest and an upward adjustment of damages for increased taxes (Docket No. 138); and (3) plaintiffs' motion for attorneys' fees and costs (Docket No. 197). For the reasons which follow, defendants' motion for judgment as a matter of law is denied and their motion for a new trial and remittitur is granted in part and denied in part. Plaintiffs' motion for prejudgment interest is granted in part and denied in part, their motion for postjudgment interest is granted and their motion for an upward adjustment of damages for increased taxes is denied. Finally, plaintiffs' motion for attorneys' fees and costs is granted.

II. Background

A. The IRIF

KAPL operates a laboratory to design, build and test prototype naval nuclear reactors and to train United States Navy personnel in their operation and maintenance. KAPL employs approximately 2,700 individuals principally at sites in Niskayuna and West Milton, New York, both within forty miles of Albany. KAPL operates the laboratory under a "cost-plus" contract between the United States Department of Energy (DOE) and Lockheed Martin by which KAPL receives reimbursement for expenses it incurs plus a percentage of those expenses. The contract is overseen by DOE's Schenectady Naval Reactors Office (SNR).

216(b)); *Pandis v. Sikorsky Aircraft Div.*, 431 F.Supp. 793, 796 (D.Conn.1977).

The twenty-six prevailing plaintiffs were employed in exempt, or salaried, positions in various of KAPL's sixteen sections.[12] The sixteen sections were headed by managers who reported directly to Freeh. Each section was also subdivided into sections headed by subsection managers. Certain subsections were further subdivided into units headed by unit managers.

In March 1994, KAPL began formulating a plan to reduce its workforce by approximately 140 positions in accordance with budget projections coordinated between KAPL and SNR. KAPL conceived and adopted a "Workforce Adjustment Plan" (WAP) to achieve the desired reduction in two stages. The first was the "Voluntary Separation Plan" (VSP) by which KAPL offered early retirement to employees with at least twenty years of service in return for the payment of $20,000. The second was the IRIF. In the Fall of 1995, KAPL offered the VSP to its employees. Ultimately, 107 employees applied and were approved for the VSP.

In November 1995, KAPL proceeded with the IRIF.[13] First, KAPL identified the positions within the sixteen sections which were to be eliminated. This "excess skills analysis" sought to determine those positions which KAPL could terminate with the least adverse effect on KAPL's operations. These included, for example, specialized positions in reduced demand. After the employees in those excess positions were identified, the section, subsection and unit managers were directed to evaluate the individuals in those positions by a prescribed process which resulted in the assignment of a numerical score for each employee subject to the IRIF.

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[12] Butler and Polsinelle, the two nonprevailing plaintiffs, were employed in non-exempt, or hourly, positions.

[13] At the same time, KAPL was recruiting and hiring thirty-five new exempt employees, virtually all of whom were under forty years old.

First, the managers assigned scores of from zero to ten points to each such employee in four categories: length of service, work performance, criticality to KAPL's operations, and the flexibility of their talents. For length of service, each employee subject to the IRIF was given one point for every two years of service to a maximum of ten points.[14] For work performance the subject employees were assigned scores based on their previous two performance evaluations.[15] For criticality and flexibility, subject employees were assigned ratings points in each category by their managers.

Second, subject employees were then placed on matrices grouped by category of excess skill and were ranked according to their numerical scores. The employees with the lowest scores on the matrices were selected for the IRIF.[16] KAPL made efforts to place these employees in other vacant positions within KAPL before final decisions were made. On December 6, 1995, KAPL served notices on thirty-one exempt employees and five non-exempt employees that their employment was terminated in the IRIF effective January 12, 1996.[17] Because of KAPL's security concerns, terminated employees were given three hours after receiving their notice to pack their personal belongings and were then escorted off the premises.

At the time of the IRIF, KAPL employed 2,063 individuals in exempt positions after the VSP. Of those,

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[14] Employees were credited with service to General Electric Company, the parent company of KAPL prior to Lockheed Martin.

[15] Performance evaluations were required to be done by an employee's manager every twelve to fourteen months.

[16] Where employees on the same matrix were tied, the managers performed "paired comparisons" of those employees in the various categories to break the ties.

[17] Plaintiff Allen E. Cromer was on disability leave on December 6, 1995. The termination of his employment was extended to May 17, 1996 when he was cleared to return to work.

1,203, or fifty-eight percent, were forty years of age or older [hereinafter "older employees"]. Of those, 245 were considered for the IRIF. Of the 245, 179, or seventy-three percent, were older employees. Of the thirty-one exempt employees selected for the IRIF, thirty, or ninety-seven percent, were older employees.[18] The terminated employees received certain benefits, including severance totaling one week of pay for every year of service to a maximum of twenty-six weeks; continuation of benefits for one year; and the free use and services of an employment counseling service outside KAPL.

B. The Trial

Plaintiffs commenced this action on January 6, 1997.[19] Defendants KAPL and Lockheed Martin were named in the ADEA cause of action and all three defendants were named in the HRL cause of action. Plaintiffs alleged two theories of liability under both the ADEA and the HRL-disparate treatment and disparate impact. Compl. (Docket No. 1). Defendants' motion to bifurcate the trial between liability and damages was granted, Docket No. 59, and the trial on liability commenced before a jury on June 20, 2000. On July 26, 2000, the jury returned a verdict finding under plaintiffs' disparate impact theory that the defendants had discriminated against the twenty-six exempt employees and that such discrimination had been willful. The jury found in favor of

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[18] Five non-exempt employees were also selected for the RIF. Three were over forty years of age.

[19] Plaintiff James R. Quinn commenced a separate action on January 10, 1997 alleging the same claims as well as a claim for breach of an employment contract. In the Memorandum-Decision and Order of United States District Judge Lawrence E. Kahn filed March 20, 1998, the defendants' motion to dismiss the contract claim was granted. *Quinn* Docket No. 15. The two actions were consolidated for all other purposes. *Id.; see also Meacham* Docket No. 15.

defendants on plaintiffs' disparate treatment theory of discrimination. Docket No. 86.

Prior to the commencement of the damages phase of the trial, eight plaintiffs[20] settled their claims with defendants. *See* Docket Nos. 111-17 & 121. The trial on damages commenced before the same jury on September 19, 2000. Evidence was presented in four groups of plaintiffs with four or five plaintiffs in each group and with the jury returning a separate verdict for each group. The verdict for the final group was returned on November 22, 2000. The jury's verdicts on damages awarded the remaining eighteen prevailing plaintiffs total damages as follows:

	Total
Plaintiff	**Amount Awarded**
Raymond E. Adams	$ 411,823.13
Wallace Arnold	$ 526,825.81
Deborah L. Bush	$ 246,509.50
William R. Chabot	$ 119,734.85
Allen E. Cromer	$ 109,386.97
Thedrick L. Eighmie	$ 91,445.00
Paul M. Gundersen	$ 160,218.71
Clifford J. Levendusky	$ 190,605.55
Clifford B. Meacham	$ 125,000.00
Bruce E. Palmatier	$ 332,126.09

[20] Frank A. Paxton, Bruce E. Vedder, David J. Kopmeyer, Arthur J. Kaszubski, James S. Chambers, Teofils F. Turlais, Hildreth E. Simmons and Henry Bielawski.

Christine A. Palmer[21]	$ 78,812.50
Neil R. Pareene	$ 283,783.95
James R. Quinn	$ 68,921.04
William C. Reynheer	$1,115,357.58
John K. Stannard	$ 258,189.40
Allen G. Sweet	$ 128,953.46
David W. Townsend	$ 397,482.91
Carl T. Woodman	$ 432,108.88

Docket Nos. 119, 124, 126 & 128. Judgment was entered on the verdicts. Docket No. 133. These motions followed.

III. Defendants' Motion

Defendants move for an order (1) granting judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b), or in the alternative (2) granting a new trial pursuant to Fed.R.Civ.P. 59, or (3) granting remittitur on certain of plaintiffs' damage awards.

A motion for judgment as a matter of law under Rule 50 should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the moving] party on that issue." Fed.R.Civ.P. 50(a)(1). The standard under Rule 50 "mirrors" that for a motion for summary judgment under Fed.R.Civ.P. 56. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On a motion under Rule 50, a court must consider all evidence in the record and not simply the evidence favorable to the nonmovant. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 149, 120 S.Ct. 2097,

[21] During the pendency of these motions, plaintiff Christine A. Palmer settled her claims with defendants and her claims have been dismissed. Docket Nos. 208, 209. There thus remain seventeen plaintiffs on these motions.

147 L.Ed.2d 105 (2000); *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir.2001). "In doing so, however, the court must draw all reasonable inference in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 149, 120 S.Ct. 2097 (citations omitted). Thus, in reviewing the entire record, a court should consider only that evidence favorable to the nonmoving party and any evidence supporting the moving party which is uncontradicted and unimpeached. *Id.*

The standard for granting a new trial under Rule 59 is less demanding. "[U]nlike a motion for judgment as a matter of law, a trial judge considering a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *United States v. Landau*, 155 F.3d 93, 104 (2d Cir.1998) (internal quotations and citation omitted); *see also Funk v. F & K Supply, Inc.*, 43 F.Supp.2d 205, 224 (N.D.N.Y.1999) (McAvoy, J.). Thus, " 'a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict.' " *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir.2000) (quoting *Landau*, 155 F.3d at 104). A court should grant a new trial if "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Caruolo*, 226 F.3d at 54 (internal quotations and citation omitted).[22]

A. Timeliness

A motion for judgment as a matter of law and for a new trial following a jury verdict must both be filed within ten days of the entry of judgment. Fed.R.Civ.P. 50(b), 59(b). The original judgment in this case was filed on December 5, 2000. Docket No. 131.[23] Thus, excluding Saturdays, Sundays and legal holidays as required by Fed.R.Civ.P. 6(a),

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[22] As to the legal standard applicable to defendants' motion for remittitur, see section II(C) *infra*.

[23] An amended judgment was filed on December 11, 2000. Docket No. 133.

defendants' motion was required to be filed on or before December 19, 2000. On December 19, 2000, defendants filed the instant notice of motion and a supporting affidavit. Docket No. 137. In an order filed the same day, defendants were granted until February 1, 2001 to file and serve supplemental pleadings in support of their motion. Docket No. 136. Defendants timely filed a memorandum of law in support of their motion on February 1, 2001. Docket No. 196. As a threshold matter, plaintiffs now contend that defendants' motion is untimely because their memorandum of law was not filed within the ten days required by the rules. Pls. Mem. of Law (Docket No. 203) at 2-6.

The ten day time limit for this motion is jurisdictional and could not be extended. *See Lichtenberg v. Besicorp Group, Inc.,* 204 F.3d 397, 401 (2d Cir.2000) (describing time limit as "uncompromisable"); *Weissman v. Dawn Joy Fashions, Inc.,* 214 F.3d 224, 230 (2d Cir.2000); Fed.R.Civ.P. 6(a). If a motion is not filed within the ten day period, the district court is divested of jurisdiction to consider the motion. *See Weissman,* 214 F.3d at 230. There is no dispute that defendants completed the filing and service of their notice of motion and supporting affidavit within the ten day period. Plaintiffs' contention here thus requires a determination of when a motion is deemed filed for purposes of Rules 50 and 59.

Generally, a motion is deemed filed when it is delivered to the Clerk's Office. *See Wight v. Bankamerica Corp.,* 219 F.3d 79, 85 (2d Cir.2000). Defendants' notice of motion and affidavit were delivered to the Clerk's Office and served within the ten day period. Plaintiffs argue that such filing was not effective for purposes of Rules 50 and 59, however, because the papers filed failed to include a memorandum of law as required by N.D.N.Y.L.R. 7.1(a)(1) and 7.1(g). Plaintiffs also argue that allowing defendants to file their memorandum of law six weeks after their notice of motion

was filed circumvents the purpose of the ten day limits in Rules 50 and 59.

Plaintiffs arguments fail for at least two reasons. First, defendants' motion was accepted for filing by the Clerk and the Court on December 19, 2000 and for that reason alone should be deemed filed as of that date. *See Wight,* 219 F.3d at 85 (holding that the district court's treatment of a motion filed under Rule 59 as timely supported the conclusion that the motion timely filed even though supplemental pleadings were filed after the ten day period to cure technical defects in the original pleadings). Second, the requirement in the local rules that a memorandum of law accompany any motion may be excused or delayed if "good cause is shown." N.D.N.Y.L.R. 7.1(b)(3). Here, given the length and complexity of the trial and the fact that a transcript of the trial was not completed until January 9, 2001 (Docket Nos. 143-95), good cause existed for permitting defendants additional time to file and serve their memorandum of law. Thus, the delayed filing of the memorandum of law did not vitiate the timeliness of defendants' motion under the local rules. Moreover, a district court possesses the inherent power to authorize departures from the requirements of its local rules. *See Somlyo v. J. Lu-Rob Enters.*, 932 F.2d 1043, 1048-49 (2d Cir.1991) ("it is the business of the district court to determine whether fairness demands that noncompliance [with local rules] be excused"); *see also Wight,* 219 F.3d at 85-86 (approving the district court's " 'tailor[ing] the Local Rules to best achieve a just outcome.' ") (quoting *Somlyo,* 932 F.2d at 1049).

Accordingly, defendants' motion here was timely filed and plaintiffs' contention to the contrary must be rejected.

B. Liability

A plaintiff may establish violations of the ADEA and the HRL under theories of disparate treatment and disparate impact. *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir.1992); *see also Smith v.*

Xerox Corp., 196 F.3d 358, 363 n. 1 (2d Cir.1999) (holding that claims under the ADEA and the HRL "are analyzed identically"); *Gonzalez v. City of New York,* 135 F.Supp.2d 385, 399, n. 9, 400, n. 11 (E.D.N.Y.2001) (holding that disparate impact age discrimination claim may be asserted under the HRL and analyzed identically to those brought under the ADEA). Disparate treatment requires evidence that an employer intentionally discriminated against a person forty years of age or older while "[d]isparate impact ... results from the use of employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on a protected group and cannot be justified by business necessity." *Maresco,* 964 F.2d at 115 (internal quotation and alteration omitted); *see also District Council 37, AFSCME v. New York City Dep't of Parks & Recreation,* 113 F.3d 347, 351 (2d Cir.1997). Disparate impact age discrimination does not require proof of discriminatory intent. *Smith,* 196 F.3d at 364 (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). Rather, the disparate impact theory addresses employment practices "that are fair in form but discriminatory in impact." *Griggs,* 401 U.S. at 431, 91 S.Ct. 849. Although courts of appeals are divided over the viability of the disparate impact theory under the ADEA, this theory of proof remains available in the Second Circuit. *See Smith,* 196 F.3d at 367 n. 6.

To recover under a disparate impact claim, a plaintiff must first establish a prima facie case "by identifying a specific employment practice which, although facially neutral, has had an adverse impact on her as a member of a protected class." *Smith,* 196 F.3d at 364 (citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)); *Knighton v. City of Syracuse Fire Dep't,* 145 F.Supp.2d 217, 224 (N.D.N.Y.2001) (Scullin, C.J.); *Gonzalez,* 135 F.Supp.2d at 399; *Hogan v. General Elec. Co.,* 109 F.Supp.2d 99, 104 (N.D.N.Y.2000) (Hurd, J.). The burden then shifts to the employer to offer a business necessity for the challenged employment practice. *Smith,* 196

F.3d at 365; *Hogan v. Metromail,* 167 F.Supp.2d 593, 595 (S.D.N.Y.2001). If an employer offers such a business necessity, the burden then returns to the plaintiff to "show that the employer's proffered reason was merely a pretext for discrimination." *Id.; Knighton,* 145 F. supp.2d at 224. Defendants contend on this motion that plaintiffs failed at each of these steps of their claim and as well failed to establish that the defendants' conduct was willful or that defendants were liable under the HRL.

1. Plaintiffs' Prima Facie Case

Defendants contend that plaintiffs' evidence failed to establish a prima facie case as a matter of law because (a) plaintiffs failed to identify a facially neutral employment practice, (b) the statistical evidence was insufficient, and (c) the testimony of plaintiffs' statistical expert witness was improperly admitted and insufficient. Defs. Mem. of Law at 8-16.

First, however, the issue presented here follows a trial on the merits. "It is well-established that once a [discrimination] case has been fully tried on the merits, the question whether the plaintiff has established a prima facie case is no longer relevant." *Ottaviani v. State Univ. of New York,* 875 F.2d 365, 373 (2d Cir.1989) (citing *Mitchell v. Baldrige,* 759 F.2d 80, 83 (D.C.Cir.1985)) (internal quotations omitted).[24] Thus, "the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore v. Friday,* 478 U.S. 385, 398, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). Because this case has been fully tried, defendants' motion on this ground is denied since the only cognizable issue at this stage is whether plaintiffs proved discrimination.

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[24] *Ottaviani* was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. However, discrimination cases under Title VII, the ADEA and the HRL are analyzed identically. *See Smith,* 196 F.3d at 362 n. 1.

In the alternative, however, defendants' arguments concerning plaintiffs' prima facie case are considered on their merits.

a. Facially Neutral Employment Practice

Plaintiffs' initial burden under the disparate impact theory required, *inter alia,* that they identify "a specific employment practice which, although facially neutral, has had an adverse impact on" older employees. *Smith,* 196 F.3d at 364; *Gonzalez,* 135 F.Supp.2d at 399. Plaintiffs identified "the implementation of the exempt employee [IRIF] portion of the WAP." Pls. Mem. of Law (Docket No. 203) at 11-13. Defendants contend that this employment practice was insufficiently specific to satisfy plaintiffs' burden.

The requirement that a plaintiff specify the employment practice which he or she alleges caused the discrimination serves to insure that an employer not be held liable for discrimination simply because a result appeared discriminatory numerically. *See Smith,* 196 F.3d at 367-68; *see also Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656-58, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Thus, "a plaintiff generally cannot rely on the overall decision-making process ... [as] a specific employment practice." *Smith,* 196 F.3d at 367.

Plaintiffs contend that because the implementation of the guidelines for the IRIF was a component of defendants' WAP, which included other components such as the VSP, employee retraining and transfers, their specification of the "implementation" of the IRIF satisfied its burden of identifying a specific employment practice. Such identification, however, actually specifies the decision-making process by which exempt employees were selected for the termination of their employment. The implementation identified here by plaintiffs retains all the elements of overall decision-making regarding the IRIF, which itself was comprised of various elements. The fact that defendants' implementation of the IRIF was a subpart of the larger WAP does not of itself render it a "specific"

employment practice sufficient to satisfy plaintiffs' initial burden.

Nevertheless, a general decision-making process such as that identified by plaintiffs here may serve as the specified employment practice "if the plaintiff can show that the elements of the employer's decision-making process are not capable of separation for analysis." *Smith*, 196 F.3d at 368 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i)). The trial testimony established that exempt employees were selected for the IRIF pursuant to "Salaried Employee Reduction-in-Force Guidelines." Those guidelines established four criteria by which managers were to select exempt employees for the IRIF. Employees considered for the IRIF were given up to ten points in each for: company service, performance, flexibility and criticality. Points were totaled for each exempt employee considered for the IRIF and the exempt employees with the lowest point totals were selected for the IRIF. These guidelines were facially neutral, were followed by all managers in selecting exempt employees for the IRIF, and led directly to the selection of plaintiffs for the IRIF.

The criterion for service was objective on its face, but because it denied credit to employees for any period of employment beyond twenty years, it arguably had a disproportionate impact on employees with lengthy periods of employment with defendants, all of whom were over forty years of age.[25] The remaining three criteria required the application of objective standards in various categories.[26] The

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[25] The most extreme example was presented by plaintiff Clifford B. Meacham. Meacham had been employed by KAPL and General Electric for over forty-three years but received credit under the guidelines for only twenty years of employment.

[26] For example, advanced degrees, training and prior experience were considered for flexibility and criticality.

points assigned for the four criteria were then totaled to determine which employees would be selected for the IRIF.

Thus, various factors were considered for each criterion and the four criteria were considered as a group to determine selection for the IRIF. The evidence adduced by plaintiffs at trial, principally that of KAPL personnel regarding the guidelines and plaintiffs' statistical expert witness, sufficed to establish that no particular factor and no particular criterion caused the disparate impact on older employees. Rather, the evidence established that, as asserted by plaintiffs, such impact resulted from the implementation of the guidelines and that the various factors and criteria, the elements of defendants' decision-making, reasonably were "not capable of separation for analysis." *Smith,* 196 F.3d at 368. Thus, in the circumstances of this case, plaintiffs' identification of the implementation of the guidelines for selecting exempt employees for the IRIF satisfied plaintiffs' initial burden of proof.

b. Sufficiency of Plaintiffs' Statistical Evidence

Defendants next contend that plaintiffs failed to satisfy their initial burden of demonstrating that any statistical disparity against plaintiffs was caused by age discrimination. Defs. Mem. of Law at 11-14. Plaintiffs respond that the statistical evidence offered through their expert witness sufficed to meet this burden. Pls. Mem. of Law at 13-19.

After a plaintiff specifies the employment practice responsible for the adverse impact on older employees, a plaintiff must then demonstrate, generally through statistical data, that the employment practice caused a significant disparity in outcome between older employees and younger employees. *See Smith*, 196 F.3d at 364-65 (citing *Watson*, 487 U.S. at 994-95, 108 S.Ct. 2777). Where a plaintiff relies on a statistical disparity to meet this burden, that disparity "must be sufficiently substantial to raise an inference of causation." *Id.; see also Watson,* 487 U.S. at 994, 108 S.Ct. 2777 (holding that statistical evidence at this stage must be

"of a kind and degree sufficient to" infer discrimination); *Gonzalez,* 135 F.Supp.2d at 399.

No bright line rules have been established to determine the sufficiency of statistical evidence at this stage. *See Ottaviani,* 875 F.2d at 373 ("in accordance with Supreme Court pronouncements, we must reject appellants' suggestion that this court announce a rule of law with respect to what level of statistical significance automatically gives rise to a rebuttable presumption of discrimination."); *see also Smith,* 196 F.3d at 365 ("no bright line rules exist"). However, courts generally require a plaintiff to meet two requirements. First, a "plaintiff must identify the correct population for analysis." *Smith,* 196 F.3d at 368. Generally, this population will be those employees who were subject to the employment practice in question. *See id.; Lander v. Montgomery County Bd. of Commissioners,* 159 F.Supp.2d 1044, 1060 (S.D.Ohio 2001); *Shah v. New York State Dep't of Civil Serv.,* No. 94 CIV 9193 RPP, 2001 WL 839986, at *7 n. 7 (S.D.N.Y. July 25, 2001).

Here, plaintiffs identified four possible populations through the testimony of their expert witness, Dr. Janice Fanning Madden. Included in the four groups were all exempt employees at KAPL and those 245 exempt employees who were actually considered for the IRIF. Madden Tr. (Docket No. 154) at 17-18. There was sufficient evidence from which the jury could reasonably find that either group was the correct population for purposes of comparison. As to the population of exempt employees, the implementation of the IRIF commenced with that population within which those employees with excess skills were identified. Moreover, in its own internal analysis of the statistical impact of the IRIF on older employees, KAPL itself chose the population of 2.063 exempt employees for purposes of analysis. *See, e.g.,* Madden Tr. at 34; *see also* Fed.R.Evid. 801(d)(2) (admission by party-opponent). Thus, the record contained sufficient evidence from which the jury could conclude that the correct

population for purposes of comparison was KAPL's entire population of exempt employees.

There was also evidence from which the jury could find that the correct population was comprised of the 245 exempt employees whose positions were identified during the excess skills analysis as subject to the IRIF. It was this more limited group who were placed on the matrices and whose numerical scores were compared according to the procedures prescribed in the WAP. Thus, it was this group of exempt employees who were actually and universally subject to all aspects of defendants' implementation of the guidelines for selecting exempt employees for the IRIF-the employment practice identified by plaintiffs in their prima facie case. Accordingly, the record also contained sufficient evidence from which the jury could conclude that the correct population for purposes of comparison was the exempt employees who were placed on the matrices, *i.e.,* those actually considered for the IRIF. *See Smith,* 196 F.3d at 368 ("The [correct] population in a reduction-in-force situation consists of workers subject to termination.").

The second requirement is that a plaintiff demonstrate a statistically sufficient comparison between the predicted result for older employees in the population selected and the actual result. *Ottaviani,* 875 F.2d at 371; *see also Smith,* 196 F.3d at 366 (referring to "expected result" and "obtained result" rather than "predicted result" and "actual result"); *Hogan,* 109 F.Supp.2d at 104. This comparison serves to determine whether there is a statistically significant disparity between the predicted and actual results. For this case a predicted result is determined by the percentage of older employees in the population of employees subject to the IRIF. The actual result constitutes the percentage of older employees actually selected for the IRIF in the population subject to the IRIF. A comparison of the predicted and actual results must be made to determine if a statistically significant

disparity exists. *Smith,* 196 F.3d at 365-66; *Ottaviani,* 875 F.2d at 371.

"Statistical significance" measures "the probability that a disparity is simply due to chance rather than any other identifiable factor." *Ottaviani,* 875 F.2d at 371. One measure of statistical significance is standard deviation. *See Smith,* 196 F.3d at 365-66; *Ottaviani,* 875 F.2d at 371. Standard deviation is a "unit of measurement used to express the probability that an [actual] result is merely a random deviation from a predicted result." *Ottaviani,* 875 F.2d at 371. Generally, "'[t]he greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the [predicted] and [actual] results.'" *Id.* (quoting *Coates v. Johnson & Johnson,* 756 F.2d 524, 536 (7th Cir.1985)). If the actual result varies from the predicted result by two standard deviations,[27] "[courts] generally consider this level of significance sufficient to warrant an inference of discrimination." *Smith,* 196 F.3d at 366; *see also Ottaviani,* 875 F.2d at 371-72.

Here, as to the population of 2.063 exempt employees, there were 1,203, or fifty-eight percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus fifty-eight percent of thirty-one, or eighteen older employees. The actual result was that thirty of the thirty-one employees, or ninety-seven percent,

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[27] Two standard deviations equates approximately "to a 1 in 20 chance that the outcome is a random fluctuation. Three standard deviations corresponds to approximately a 1 in 384 chance of randomness. Finally, a range of four to five standard deviations corresponds to a probability range of 1 chance in 15, 786 to 1 chance in 1,742,160." *Ottaviani,* 875 F.2d at 372 n. 7 (citing M. Abramowitz & I. Steigan, *Handbook of Mathematical Functions,* National Bureau of Standards, U.S. Government Printing Office, Applied Mathematics Series No. 55 (1966) (Tables 26.1, 26.2)).

whose employment was terminated in the IRIF were older employees. According to Dr. Madden, there was one chance in 348,000 that this actual result would occur. Madden Tr. at 20. This constitutes between four and five standard deviations.

As to the population of 245 exempt employees placed on the matrices and actually considered for the IRIF, there were 179, or seventy-three percent, who were older employees. The predicted result from this population for the thirty-one exempt employees whose employment was terminated in the IRIF was thus seventy-three percent of thirty-one, or twenty-three older employees. The actual result was thirty, or ninety-seven percent. According to Dr. Madden, there was one chance in 1,260 that this actual result would occur. Madden Tr. at 25-27. This constitutes between three and four standard deviations.[28]

Thus, whether the jury found that the correct population for comparison was the 2,063 exempt employees subject to the IRIF or the 245 exempt employees who were placed on matrices and actually considered for the IRIF, the statistical disparity substantially exceeded two standard deviations, permitting the jury to draw the inference that the disparity was caused by age discrimination. There was, therefore, sufficient evidence from which the jury could find that plaintiffs had satisfied their initial burden as to either group. Based on this evidence alone, defendants' contention that

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[28] Dr. Madden testified that she also analyzed the population of 245 employees who were placed on the matrices controlling for the particular matrix on which an employee was placed (*i.e.*, controlling for the particular group of employees against whom an employee was compared). From this analysis, Dr. Madden concluded that there was one chance in seventy-three, or between two and three standard deviations, that an actual result of thirty older employees out of thirty-one selected for the IRIF would occur. Madden Tr. at 23-27.

plaintiffs failed to meet their initial burden of demonstrating that the statistical disparity was caused by age discrimination must be rejected.

However, this conclusion is further supported by testimony offered by Dr. Madden during her redirect examination. The statistical evidence described above assessed the evidence to determine the probability that the statistical disparity between the predicted and actual results deviated from the norm by chance or for some other reasons, such as age discrimination. According to Dr. Madden, she also performed multiple regression analyses-"a statistical test which identifies factors, called independent variables, that might influence the outcome of an observed phenomenon, called a dependent variable." *Smith,* 196 F.3d at 363 n. 3. By this method, a statistician seeks to identify legitimate factors, other than age discrimination here, which may have influenced or caused the statistical deviation from the norm. *Id.*

Dr. Madden testified that she performed multiple regression analyses to determine if the statistical disparity could be explained by the individual components of the employees' numerical ratings on the matrices-years of service, performance appraisals, flexibility and criticality. Dr. Madden concluded that there was no significant correlation between an employees' years of service and the likelihood that he or she would be selected for the IRIF. Madden Tr. at 88. As to the other three components, Dr. Madden found that there existed statistically significant age effects in that older employees were more likely than younger employees to have experienced a decline in their performance appraisals after KAPL began planning for the IRIF and generally in the ratings for flexibility and criticality. *Id.* at 88-89. This evidence further supported the jury's finding that plaintiffs' satisfied their burden of proof to establish a prima facie case.

Accordingly, defendants' contention that there was insufficient evidence to establish a prima facie case must be rejected.

c. Evidence of Multiple Regression Analyses

Defendants contend that Dr. Madden's testimony regarding multiple regression analyses was erroneously admitted in evidence. Defs. Mem. of Law at 14-16.

Dr. Madden made no mention of multiple regression analyses in her expert witness reports, her deposition before trial or during her direct examination at trial. On cross-examination at trial, however, Dr. Madden was asked by defendants' counsel at least three times about additional analyses she had conducted. Madden Tr. at 38-39, 56-58, 76-77. In none of his questions did defendants' counsel limit Dr. Madden to analyses conducted prior to her reports or her deposition, and Dr. Madden testified each time that she had in fact conducted such analyses following her deposition and prior to trial. *Id.* In the most detailed colloquy, Dr. Madden was questioned as follows:

> Q. You did not do a regression analysis for criticality, did you?
> A. Yes.
> Q. And did you do one for flexibility?
> A. Yes.
>
> . . . . .
>
> Q. And for performance?
> A. Yes.
> Q. And for company service?
> A. Yes.

Madden Tr. at 58. On redirect examination, plaintiffs' counsel asked Dr. Madden the results of her multiple regression analyses. *Id.* at 83. Defendants' counsel objected that such analyses had not previously been disclosed to defendants. *Id.* The objection was overruled on the ground that the questions of defendants' counsel had "opened the door" and unless plaintiffs' counsel was permitted to ask Dr.

Madden about these analyses, the jury could infer that her analyses were unfavorable to plaintiffs. *Id.* at 83-87. Dr. Madden then testified to the results of her multiple regression analyses. *Id.* at 87-89.

A trial court is accorded "substantial deference" in making evidentiary rulings and those rulings are reviewed only for clear abuse of discretion. *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 266 (2d Cir.1999); *see also Healey v. Chelsea Res., Ltd.*, 947 F.2d 611, 619-20 (2d Cir.1991). "Further, even an erroneous evidentiary ruling will not lead to reversal unless affirmance would be 'inconsistent with substantial justice.' " *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir.1997) (quoting Fed.R.Civ.P. 61).

Here, the ruling on defendants' objection was proper. Defendants' questions to Dr. Madden did not limit her answers to analyses she performed prior to her reports or her deposition. Defendants elicited testimony from Dr. Madden that she had performed multiple regression analyses but left unanswered the results of those analyses. If plaintiffs had not been permitted to elicit those results, the jury could reasonably have inferred that Dr. Madden's analyses were adverse to plaintiffs. Thus, the testimony of Dr. Madden on redirect examination was properly admitted and was not an abuse of discretion. *Cf. Caruolo v. A C & S, Inc.*, No. 93 CIV. 3752(RWS), 1999 WL 147740, at *14 (S.D.N.Y. Mar. 18, 1999) (holding that cross-examination by defendants of plaintiffs' expert witness opened the door to the admission of additional testimony on redirect examination of tests conducted by another expert and reported in a treatise), *aff'd in part and rev'd in part on other grounds*, 226 F.3d 46 (2d Cir.2000).

Moreover, while the testimony of Dr. Madden in this regard supported plaintiffs' claims, that testimony was limited, taking no more than two to three minutes (less than two pages of transcript) in a trial that lasted five weeks during

the liability phase alone. Its secondary importance is also underscored by the limited time devoted to it by counsel during their summations. Accordingly, even if the admission of this evidence was erroneous, any such error was harmless. *See* Fed.R.Evid. 61. Defendants' contention here must, therefore, be rejected.

2. Defendants' Burden of Production

Plaintiffs having satisfied their burden of establishing a prima facie case, the burden then shifted to defendants to offer a business justification for the challenged employment practice. *See Griggs,* 401 U.S. at 432, 91 S.Ct. 849; *Smith,* 196 F.3d at 365. The jury here found that defendants failed to meet this burden. Special Verdict (Docket No. 86) at 11. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 17-21. Plaintiffs disagree. Pls. Mem. of Law at 19-20.

An employer's burden at this stage is to demonstrate "a legitimate business justification" for the challenged employment practice. *Wards Cove,* 490 U.S. at 643, 109 S.Ct. 2115. The employer's burden is one of production, not persuasion, as the burden of persuasion remains with the plaintiff throughout the case. *See id.; Watson,* 487 U.S. at 1008, 108 S.Ct. 2777; *EEOC v. Joint Apprenticeship Comm.,* 186 F.3d 110, 120 (2d Cir.1999). An employer meets this minimal burden by articulating a business necessity or reason for the employment practice. *See Watson,* 487 U.S. at 1008, 108 S.Ct. 2777.

The jury found that defendants had not met this burden. Defendants first argue that the jury was asked the "wrong question." Defs. Mem. of Law at 17. The verdict form asked the jury whether any defendant "has articulated a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force?" Special Verdict at 11. Defendants failed to object to this question prior to its submission to the jury. Charge Conference Tr. (Docket No. 163) at 44-48. Thus, the

question must rise to the level of plain error to be cognizable. *See Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 96 (2d Cir.1998) (applying plain error review where party failed to object to proposed special verdict form). Defendants do not claim plain error here and none appears from the record. Second, defendants fail to specify in what respect the question was incorrect and the question appears to reflect accurately defendants' burden at this stage.[29]

The business justification offered by defendants was the budgetary need to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions. Defs. Mem. of Law at 18. The presentation of this justification sufficed to satisfy defendants' burden of production. *See Wards Cove*, 490 U.S. at 643, 109 S.Ct. 2115. The consideration of defendants' justification at this stage permitted no qualitative assessment of its sufficiency by, for example, weighing defendants' business justification against other evidence in the case. *See Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir.1982) (holding that the wisdom of a business justification may not be questioned). Only if the business justification offered here was weighed against other evidence could the jury have found that defendants failed to meet their burden of production. Thus, as a matter of law, defendants met their burden of production at this stage.

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[29] Defendants also argue that the jury's finding on this question was somehow inconsistent with its finding on the disparate treatment theory. The two theories required proof of different elements and, therefore, the jury's findings were not internally inconsistent. *See Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592, 598 (2d Cir.2001) (holding that first question is whether asserted inconsistency can be resolved). Defendants' argument must, therefore, be rejected.

As noted above, the jury found to the contrary.[30] Nevertheless, this erroneous finding does not merit judgment as a matter of law or a new trial. First, although not required to do so in light of its finding that defendants failed to meet their burden of production, the jury proceeded to make findings at the third and final stage. The jury's findings at the third and final stage obviated the error made on defendants' burden of production and rendered that error harmless. *See Kotteakos v. United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *Bruneau ex rel. Schofield v.*

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[30] The jury was instructed as follows on defendants' burden of production:

> The second step requires you to determine whether the defendants have rebutted the presumption of discrimination arising under the first step of this theory. Under this step, the defendants must articulate, but not prove, a business justification for selecting the plaintiffs for termination of their employment in the reduction-in-force. This is *not* a burden of proof on the defendants and does not require the defendants to prove by any standard that the reason offered was the only reason for their decision to terminate the employment of the plaintiffs. Rather, the defendants have satisfied their burden in this step if you find that the defendants have presented a business justification for the selection of the plaintiffs for termination of their employment in the reduction-in-force. You need not find, nor need the defendants prove, that such justification was essential or indispensable to the defendants' business. If you find that the defendants have met this minimal burden, the presumption of discrimination arising under the first step is rebutted and plays no further part in your deliberations.

Jury Charge (Docket No. 85) at 28. The jury was also instructed not to answer the ultimate question regarding discrimination if it found that defendants' had not satisfied their burden of production. Jury Verdict at 11.

South Kortright Cent. Sch. Dist., 163 F.3d 749, 759 (2d Cir.1998) (holding that "when we are able to conclude that the verdict was not substantially influenced by the alleged error, then we may be quite confident the objecting party's rights were not prejudiced and may uphold the general verdict"). Second, as noted above, the issue presented here follows a trial on the merits. Thus, issues related to defendants' burden of production are not relevant at this stage and the only question is whether there was sufficient evidence to support the jury's ultimate finding of discrimination. *Ottaviani,* 875 F.2d at 373; *Mitchell,* 759 F.2d at 83.

Therefore, defendants satisfied their burden of production at the second stage as a matter of law. However, the jury's contrary finding in the circumstances of this case does not warrant granting defendants' motion for judgment as a matter of law or for a new trial. Defendants' motion on this ground is denied.

3. Discrimination

Defendants also contend that insufficient evidence was offered to support the jury's finding at the final stage that defendants' business justification for implementation of the guidelines for the IRIF was a pretext for age discrimination. Defs. Mem. of Law at 21-22.

"Even if the employer successfully defends the business necessity of the practice, the plaintiff may still prevail if she can show that the employer's proffered explanation was merely a pretext for discrimination." *Smith,* 196 F.3d at 365. One method by which a plaintiff may demonstrate pretext in a disparate impact case is by evidence "that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group." *Id.* (citing *Wards Cove,* 490 U.S. at 660-61, 109 S.Ct. 2115).

Here, plaintiffs offered evidence from which the jury could find that either of two alternative practices were available to defendants to achieve the same result without causing a disparate impact on older employees. First,

defendants could have instituted a temporary hiring freeze to achieve manpower limits. The evidence at trial established that following the VSP, KAPL was only one employee over its manpower ceiling. However, KAPL desired to hire an additional thirty-five new exempt employees. Freeh Tr. (Docket No. 143) at 25-26, 43-44. Second, KAPL could have offered the VSP to a greater number of employees to achieve the desired manpower reduction. The evidence established that a broadened VSP would have attracted sufficient employees to reduce KAPL's manpower to the desired level, its cost would have been no greater than that of the IRIF, KAPL could have rejected the VSP applications of any employees with critical skills, and any adverse impact on older employees would have been avoided. *Id.* at 44-49.

There is little dispute that either alternative offered by plaintiffs would have permitted defendants to achieve desired manpower levels at costs comparable to the cost of IRIF. Defendants argue, however, that plaintiffs failed to adduce evidence that either alternative would have been equally effective as the IRIF in maintaining the mix of essential skills among employees which KAPL required to perform its functions. There was evidence[31] from which the jury could have found that a limited hiring freeze would not have impaired KAPL's ability to perform its functions given the availability of employees with critical skills within the over 2,000 exempt employees. Moreover, the jury could also find

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[31] Defendants argue that the testimony of KAPL officials that the alternatives offered by plaintiffs would not be equally effective was unrebutted by plaintiffs and, therefore, should be accepted. The testimony of all such witnesses, however, was challenged and impeached by plaintiffs, and the jury was entitled to reject such testimony. After these issues were fully developed at trial and in light of the jury's findings, a court may not substitute its judgment on the credibility of witnesses for that of the jury. *See Reeves*, 120 S.Ct. at 2110 (citations omitted).

with respect to the broadened VSP alternative that KAPL could have retained employees with skills deemed critical by rejecting the applications of those employees. Thus, there was sufficient evidence before the jury from which it could conclude that the alternatives offered by plaintiffs would have been equally effective as the IRIF. Defendants' motion for judgment as a matter of law and a new trial on this ground is denied.

4. Willfulness

The ADEA mandates liquidated damages for a plaintiff, in an amount equivalent to a plaintiff's award for back pay and benefits, if a jury finds that the employer's violation of the ADEA was willful. 29 U.S.C. § 626(b); *see also McGinty v. State of N.Y.*, 193 F.3d 64, 68 (2d Cir.1999). The jury here found that defendants KAPL and Lockheed Martin acted willfully in discriminating against plaintiffs, entitling each prevailing plaintiff to liquidated damages. Special Verdict at 12. Defendants contend that this finding was erroneous as a matter of law. Defs. Mem. of Law at 23-24.

An employer acts "willfully" under the ADEA "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (citations and quotations omitted). Thus, either knowledge or reckless disregard is required to establish willfulness. *See McGinty*, 193 F.3d at 68.

Defendants contend first that the jury's finding of willfulness was inconsistent with its finding that defendants did not intentionally discriminate against plaintiffs under plaintiffs' disparate treatment theories. However, the questions of "intentional" and "willful" conduct presented different issues for the jury. "Intentional" conduct required evidence that defendants were motivated by plaintiffs' ages to select them for the IRIF. *See Cronin v. Aetna Life Insurance Co.*, 46 F.3d 196, 203 (2d Cir.1995) "Willful" conduct required evidence that defendants showed reckless disregard

for whether their conduct violated the ADEA. Thus, an employer could act willfully by recklessly ignoring the impact an employment practice had on older employees but could act intentionally only if his employment decision was based at least in part on an employee's age. *See Kolstad v. American Dental Ass'n,* 527 U.S. 526, 549, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 126-27, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Because the requirements for willful and intentional conduct differ, the jury's different findings on those two questions are not inconsistent and its finding of willfulness on the disparate impact theory was not error as a matter of law for that reason.

Defendants also argue that the evidence of defendants' willfulness was insufficient as a matter of law. First, defendants ask the Court to accept the testimony offered by KAPL officials denying willfulness. The credibility of that testimony presented a question of fact for the jury, not the Court. As noted above, the jury was entitled to reject the testimony by KAPL officials and to accept the evidence supporting a finding of willfulness. *See* note 22 *supra.* The evidence adduced at trial which supported a finding of willfulness included the following:

- KAPL officials and employees were aware that the ADEA prohibited employment practices which caused disparate impacts on older employees;
- Defendants were aware that the implementation of the guidelines for the IRIF would result in a disparate impact on older employees, in that thirty of the thirty-one employees selected for the IRIF were older employees, but took no meaningful steps to avoid or mitigate that impact;
- The guidelines for the IRIF dictated that KAPL perform a statistical assessment of the group of employees selected for termination of their employment to identify any disparate impact on older employees. Such an assessment was performed by a

KAPL employee which compared the average age of the KAPL workforce of over 2,000 before the IRIF with its average age after the IRIF. In fact, as acknowledged by KAPL at trial and as was self-evident, this statistical assessment was incapable of identifying any disparate impact on older employees. Burek Tr. (Docket No. 146) at 260; Correa Tr. (Docket No. 150) at 26-32. The jury was entitled to conclude from this lone statistical assessment by KAPL prior to the IRIF that KAPL recklessly disregarded what should have been apparent from the fact that thirty of the thirty-one employees selected for the IRIF were older employees.

- At the same time that KAPL was proceeding to select thirty older employees out of a total of thirty-one for the IRIF, KAPL was proceeding to hire thirty-five new employees, virtually all of whom were younger employees. The jury was entitled to infer from this evidence that KAPL was motivated to disregard the disparate impact of the IRIF on older employees by its desire to hire new and younger employees.

There was, therefore, sufficient evidence for a reasonable jury to find that defendants KAPL and Lockheed Martin acted willfully in disregarding the disparate impact on older employees caused by the IRIF. Defendants' argument to the contrary must be rejected.

5. Liability Under the HRL

Defendants contend that they are entitled to judgment as a matter of law on plaintiffs' claim under the HRL. Defs. Mem. of Law at 25-26. The ADEA defines the protected class of older employees as those forty years of age or older. 29 U.S.C. § 631(a). The HRL defines the protected class as those over the age of eighteen. N.Y. Exec. Law § 296(3-a)(a). *See Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461 (2d Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001). Defendants argue that plaintiffs

offered no evidence of any disparate impact from the IRIF on employees over age eighteen.

This contention fails for two reasons. First, defendants raise this argument for the first time on this motion. Defendants did not seek summary judgment on this ground, did not include this ground in their motions in limine and failed to seek judgment as a matter of law on this ground at the close of the plaintiffs' case or at the close of all the evidence. Moreover, defendants failed to request a jury instruction to this effect, failed to object to the jury instruction linking plaintiffs' claims under the ADEA with those under the HRL,[32] and failed to object to a special verdict form which also linked the claims under the two statutes. Defendants' failure to object at any prior stage waived the objection they now assert. *See Tuttle v. Equifax Check,* 190 F.3d 9, 15-16 (2d Cir.1999); *Scala v. Moore McCormack Lines, Inc.,* 985 F.2d 680, 684 (2d cir.1993) (holding that vessel owner waived objection to sufficiency of the evidence to support verdict for injured longshoreman by failing to renew its motion for directed verdict at close of all the evidence); *Lavoie v. Pacific Press & Shear Co.,* 975 F.2d 48, 55 (2d Cir.1992) ("Failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection.").

Second, defendants' statement of the law appears incorrect. Several courts have noted the differences in the definitions of the protected classes under the ADEA and the HRL. *See, e.g., Gonzalez,* 135 F.Supp.2d at 400 n. 11; *Hogan v. Metromail,* 107 F.Supp.2d 459, 470-71 (S.D.N.Y.2000);

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[32] The jury was instructed to "consider the plaintiffs' claim under the state Human Rights Law ... *identically* to your consideration of the plaintiffs' claims ... under the Age Discrimination in Employment Act...." Jury Charge at 14 (emphasis added).

Abdu-Brisson v. Delta Air Lines, Inc., No. 94 Civ. 8494(HB), 1999 WL 944505, at *4 n. 4 (S.D.N.Y. Oct. 19, 1999), *aff'd,* 239 F.3d 456 (2d Cir.), *cert. denied,* 534 U.S. 993, 122 S.Ct. 460, 151 L.Ed.2d 378 (2001). As defendants acknowledge, however, research has revealed no cases addressing this issue. In the absence of any controlling decision to the contrary, guidance must be taken from the Second Circuit's statement in *Smith* that since, as here, "claims under the [HRL] are analyzed *identically* to claims under the ADEA and Title VII, the outcome of an employment discrimination claim made pursuant to the [HRL] is the same as it is under the ADEA and Title VII." *Smith,* 196 F.3d at 363 n. 1 (emphasis added).

Accordingly, defendants' motion on this ground is denied.

C. Damages

The jury awarded damages to the seventeen remaining prevailing plaintiffs in varying amounts for back pay, front pay and emotional distress, both past and future. Defendants move for a new trial or remittitur of the damages awarded to all remaining plaintiffs except James R. Quinn. Defs. Mem. of Law at 26-72.

If a district court finds that damages awarded by a jury are excessive, it may grant a defendant's motion for a new trial in whole or limited to damages, or it may grant remittitur by conditioning denial of a defendant's motion for a new trial on a plaintiff's accepting damages in a reduced amount. *See Tingley Sys., Inc. v. Norse Sys., Inc.,* 49 F.3d 93, 96 (2d Cir.1995); *Tanzini v. Marine Midland Bank,* 978 F.Supp. 70, 77 (N.D.N.Y.1997) (McAvoy, J.). Remittitur is "the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Earl v. Bouchard Transp. Co.,* 917 F.2d 1320, 1328 (2d Cir.1990) (quoting *Shu-Tao Lin v. McDonnell Douglas Corp.,* 742 F.2d 45, 49 (2d Cir.1984)). "It is not among the powers of the ... court ... simply to reduce the damages without offering the prevailing party the option of a new trial." *Lightfoot v. Union*

Carbide Corp., 110 F.3d 898, 914-15 (2d Cir.1997) (quoting *Tingley Sys., Inc.,* 49 F.3d at 96). A reduced award should represent "the maximum award that would not be excessive." *Ragona v. Wal-Mart Stores, Inc.,* 62 F.Supp.2d 665, 668 (N.D.N.Y.1999) (McAvoy, J.), *aff'd,* 210 F.3d 355 (2d Cir.2000).

Awards of damages for back pay and front pay are authorized under both the ADEA and the HRL, but awards of damages for emotional distress are authorized only by the HRL. *See Haskell v. Kaman Corp.,* 743 F.2d 113, 120-21 (2d Cir.1984)(holding that "plaintiffs are not entitled to recovery for emotional distress in ADEA actions") (citing *Johnson v. Al Tech Specialties Steel Corp.,* 731 F.2d 143, 147-48 (2d Cir.1984)); *Young v. Bank of Boston Conn.,* No. 93 CV 1642(AVC), 1996 WL 756504, at *3 n. 2 (D. Conn. June 18, 1996). The standard for review of damages awarded by a jury under a federal law such as the ADEA is the traditional common law standard whether the award "shocks the conscience." *See Consorti v. Armstrong World Indus., Inc.,* 103 F.3d 2, 4 (2d Cir.1995); *Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1176, 1189 (2d Cir.1992).

The standard for review of damages awarded by a jury under a state law such as the HRL is defined by the applicable state law. *See Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 419-20, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *Fowler v. Industrial Tire Products, Inc.,* 2001 WL 51007, at *1, 2 Fed.Appx. 125 (2d Cir.2001). The standard under New York law is set forth in N.Y. C.P.L.R. § 5501(c) (McKinney Supp.2001), which directs a court to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." The "deviates materially" standard under New York law is less deferential to the jury's verdict than is the "shocks the conscience" standard. *See Gasperini,* 518 U.S. at 424, 116 S.Ct. 2211; *Gasperini v. Center for Humanities, Inc.,* 149 F.3d 137, 139 (2d Cir.1998) (noting on appeal after remand that the New

York standard is "more favorable to the party challenging the award than is the federal 'shocks the conscience' review"). Thus, the jury's awards of damages for back pay and front pay under both the ADEA and the HRL and its awards of damages for emotional distress implicate different standards of review on defendants' motion here. In addition, defendants present different arguments under each element of damages.

1. Back Pay

"A plaintiff who has proven a discharge in violation of the ADEA is, as a general matter, entitled to back pay from the date of discharge until the date of judgment." *Kirsch v. Fleet St., Ltd.,* 148 F.3d 149, 167 (2d Cir.1998); *accord, Banks v. Travelers Cos.,* 180 F.3d 358, 364 (2d Cir.1999). With respect to the damages for back pay awarded by the jury, defendants contend that certain plaintiffs failed to mitigate such damages and, therefore, the awards of back pay to those plaintiffs was erroneous as a matter of law.

An employee discharged as the result of discrimination "has an obligation to attempt to mitigate her damages by using 'reasonable diligence in finding other suitable employment.'" *Hawkins v. 1115 Legal Serv. Care,* 163 F.3d 684, 695 (2d Cir.1998) (quoting *Ford Motor Co. v. EEOC,* 458 U.S. 219, 231, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982)). An employee's duty to mitigate is "not onerous" and does not require that an employee actually find other employment. *Id.; Dailey v. Societe Generale,* 108 F.3d 451, 456 (2d Cir.1997). On this issue, a defendant bears the burden of proving "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." *Hawkins,* 163 F.3d at 695; *Dailey,* 108 F.3d at 456. In considering other employment, a discharged employee "need not go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co.,* 458 U.S. at 231, 102 S.Ct. 3057. However, an employer "is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such

employment." *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 54 (2d Cir.1998). The "ultimate question" is whether a discharged employee "acted reasonably in attempting to gain other employment or in rejecting proffered employment." *Hawkins*, 163 F.3d at 695 (quoting *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir.1992)).

2. Front Pay

The ADEA authorizes the district court to fashion equitable remedies "to ensure that victims of age discrimination are made whole." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir.1984). The ADEA explicitly authorizes a court to require the reinstatement of a discharged employee. *See* 29 U.S.C. § 626(b). However, where reinstatement is not feasible, a district court may award an employee front pay. *Banks*, 180 F.3d at 364. Defendants here concede that reinstatement of all prevailing plaintiffs is impossible and impracticable. Defs. Mem. of Law at 63. Front pay may be awarded for future lost earnings to make "victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment." *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir.1996) (quoting *Whittlesey*, 742 F.2d at 729). "While a jury determines back pay, the determination of any front pay award is committed exclusively to the district court's equitable jurisdiction." *Banks*, 180 F.3d at 364; *Tanzini*, 978 F.Supp. at 80. However, a court may receive an advisory verdict from a jury on front pay. *See Hogan v. General Elec. Co.*, 144 F.Supp.2d 138, 144 (N.D.N.Y.2001) (Hurd, J.); *Tanzini*, 978 F.Supp. at 80. Here, the jury returned advisory verdicts on front pay for plaintiffs which the Court adopted when it entered judgment on the jury's verdicts.

Defendants challenge the jury's awards of front pay on the grounds that there was insufficient evidence from which to find that the plaintiffs to whom front pay was awarded lacked reasonable prospects of obtaining comparable

employment in the future and it required undue speculation to determine the amount of income such plaintiffs would have earned in the future if their employment had not been terminated. Defs. Mem. of Law at 63. Awards of front pay are necessarily peculiar to the facts of each case and, because such an award requires a degree of prediction, "always involve some degree of speculation...." *Tanzini,* 978 F.Supp. at 81 (quoting *Tyler,* 958 F.2d at 1189). Nevertheless, there must exist sufficient evidence from which the factfinder may reasonably determine the likelihood that a discharged employee will find suitable employment in the future, the amount of income the employee may reasonably be expected to earn in the future, the amount of income the employee reasonably would have earned if his employment with the defendant had not been terminated, and the duration of such employment with the defendant. *See Padilla,* 92 F.3d at 124-26; *Whittlesey,* 742 F.2d at 728; *Tanzini,* 978 F.Supp. at 81.

3. Emotional Distress

Defendants contend that the jury's awards of damages for emotional distress under the HRL deviate materially from what would constitute reasonable compensation under New York law. In determining whether a jury's award of such damages was excessive under the New York standard, the reasonableness of a particular award must be determined by reference to verdicts in similar cases. *See Gasperini,* 518 U.S. at 424, 116 S.Ct. 2211. Damages for emotional distress may not be presumed and are not established simply by evidence of a defendant's discriminatory conduct. *See Tanzini,* 978 F.Supp. at 78. However, such damages may be established by the plaintiff's testimony alone. *See id.*

Where a plaintiff's emotional distress consisted of shock, sleepless nights, nightmares, moodiness, humiliation, upset and the like but the plaintiff did not require treatment,[33] the

[33] Such evidence of emotional distress has frequently been referred to in cases as "garden variety" emotional distress. *See,*

range of awards sustained by courts in similar cases appears to be from $5,000 to $125,000. *See, e.g., Shannon v. Fireman's Fund Ins. Co.,* 156 F.Supp.2d 279, 296-98 (S.D.N.Y.2001) (reducing award of $80,000 for emotional distress in age discrimination case to $40,000); *Epstein v. Kalvin-Miller Int'l, Inc.,* 139 F.Supp.2d 469, 479-81 (S.D.N.Y.2001) (upholding jury award of $54,000 for emotional distress for age discrimination and concluding that "some courts have remitted emotional distress awards to between $30,000 and $125,000 where the only evidence of emotional distress has been the plaintiff's testimony that he was distressed, even when no physical manifestations have been claimed"); *Fowler v. New York Transit Auth'y,* No. 96 Civ. 6796(JGK), 2001 WL 83228, at *10-15 (S.D.N.Y. Jan. 31, 2001) (reducing award of $50,000 for emotional distress for racial discrimination to $25,000); *Distefano v. Long Island R.R. Co.,* No. 96 CV 5487, 1999 WL 1704784, at *5-7 (E.D.N.Y. Dec. 21, 1999) (reducing damages for emotional distress in age and gender discrimination case from $7,000,000 to $125,000); *Funk v. F & K Supply, Inc.,* 43 F.Supp.2d 205, 226-29 (N.D.N.Y.1999) (McAvoy, J.) (reducing awards of $850,000 and $450,000 for emotional distress under the HRL in gender discrimination case to $30,000 each); *Courtney v. City of New York,* 20 F.Supp.2d 655, 660-62 (S.D.N.Y.1998) (finding that maximum award of

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e.g., Jessamy v. Ehren, 153 F.Supp.2d 398, 401 (S.D.N.Y.2001); *Shannon v. Fireman's Fund Ins. Co.,* 156 F. Supp.2d 279, 297 (S.D.N.Y.2001); *Epstein v. Kalvin-Miller Int'l, Inc.,* 139 F.Supp.2d 469, 479 (S.D.N.Y.2001) ("[a] 'garden variety' emotional distress claim is one that did not require medical treatment"); *Ruhlmann v. Ulster County Dep't of Social Servs.,* 194 F.R.D. 445, 449 & n. 6 (N.D.N.Y.2000) (Hurd, J.); *Funk v. F & K Supply, Inc.,* 43 F.Supp.2d 205, 227 (N.D.N.Y.1999) (McAvoy, J.); *Luciano v. Olsten Corp.,* 912 F.Supp. 663, 672 (E.D.N.Y.1996), *aff'd,* 110 F.3d 210 (2d Cir.1997).

damages for emotional distress in similar cases is $100,000); *Sanderson v. City of New York,* No. 96-Civ. 3368(LLS), 1998 WL 187834, at *7-10 (S.D.N.Y. Apr. 21, 1998) (finding that awards upheld in similar cases did not exceed $100,000 and reducing jury's award to four plaintiffs in an age discrimination case from $450,000 for each plaintiff to between $10,000 and $100,000); *Tanzini,* 978 F.Supp. at 78-80 (collecting cases and finding applicable range in such cases to be from $5,000 to $30,000); *Allender v. Mercado,* 233 A.D.2d 153, 649 N.Y.S.2d 144 (1st Dep't 1996) (upholding award of $100,000 for mental anguish in an employment discrimination suit); *Boutique Indus., Inc. v. New York State Div. of Human Rights,* 228 A.D.2d 171, 643 N.Y.S.2d 986 (1st Dep't 1996) (reducing award of $150,000 to $100,000 in an age discrimination suit); *see also Shea v. Icelandair,* 925 F.Supp. 1014, 1019-30 (S.D.N.Y.1996) (reducing jury's award for emotional distress in an age discrimination case from $250,000 to $175,000 and finding that "[t]he most important factor that sets this case apart from others involving emotional pain and suffering is the fact that [defendant's] discriminatory conduct had physical consequences").

What appears from a review of these cases is that courts have exhibited substantial disagreement over what constitutes reasonable compensation for emotional distress under the HRL where the evidence supporting a plaintiff's claim rests exclusively on testimony establishing shock, nightmares, sleeplessness, humiliation, moodiness and similar consequences but without significant physical manifestations or the need for treatment. However, those cases identify factors which affect the determination of the reasonableness of a jury's award, including the nature, severity and duration of such consequences. It further appears that where those consequences do not include physical manifestations or treatment by a medical care provider, the maximum award which does not deviate materially from awards in comparable cases is $125,000.

4. Individual Plaintiffs

Defendants' challenges to the damages awarded to the individual plaintiffs require separate consideration of the evidence presented as to each plaintiff.

a. Raymond E. Adams

Defendants contend that the jury's award of a total of $294,795.60 to plaintiff Raymond E. Adams ("Adams") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 50-52.

Adams was forty-eight at the time of the IRIF. He held the position of Team Coordinator at that time with an annual salary of approximately $49,600. He had been employed by KAPL or its parent company for approximately thirty years. Adams has held two positions with other employers since the IRIF at comparable salaries and is presently employed as a project manager at a manufacturing company. The evidence of Adams' emotional distress consisted of Adams' testimony that he was shocked and devastated by the IRIF, he suffered stress at the loss of his job as he was the sole support for his family, he suffered sleeplessness for months, he was lethargic, he felt small and inadequate, and he has worried constantly since the IRIF about having his employment terminated again. Adams Tr. (Docket No. 180) at 237-89.

The evidence supporting Adams' claim for emotional distress consisted exclusively of shock, sleeplessness, upset and similar consequences but involved no physical manifestations and required no treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Adams' damages for emotional distress is granted unless Adams files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

b. Wallace Arnold

The jury awarded plaintiff Wallace Arnold ("Arnold") back pay in the amount of $172, 899.95 and damages for emotional distress totaling $118,778.41. Defendants contend that Arnold's back pay award should be reduced for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 42-43, 72. Defendants do not challenge the front pay awarded to Arnold.

Arnold was forty-one at the time of the IRIF. Arnold held a doctorate in Environmental Engineering and was employed as a Chemical Waste Engineer at the time of the IRIF earning approximately $44,000 annually. Arnold had been employed by KAPL since 1984, he was married and had two teenage children. Following the IRIF, Arnold accepted a contract research position at Pennsylvania State University in State College, Pennsylvania which paid approximately $27,000 annually. The contract for that position ended in June 1997 and was not renewed. Arnold and his family then returned to the Albany area where he held positions as a truck driver, bank teller, laundromat worker and gas station attendant and pursued courses to obtain a certificate to teach high school chemistry. Arnold Tr. (Docket Nos. 168, 169).

Defendants argue that while employed at Penn State, Arnold failed to mitigate his damages by seeking comparable employment even though he was aware that the contract for his employment there would end in or about June 1997. However, Arnold testified that he accepted this position in the hope that it would serve as an entry to a teaching position. The jury was entitled to credit this testimony, to find that Arnold's efforts in this period pursuing a teaching position constituted reasonable efforts to obtain comparable employment and to conclude that defendants had failed to meet their burden of proof on this issue. *See Padilla*, 92 F.3d at 125-26. Accordingly, the record sufficiently supported the jury's award of back pay to Arnold, and that award was not

substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on this issue is denied.

The evidence supporting Arnold's claim of emotional distress derived solely from Arnold's testimony. Arnold testified that in the aftermath of the IRIF, he was shocked, devastated and humiliated. He lost twenty to thirty pounds and was unable to sleep for months. Arnold testified that he felt severe shame and humiliation at the loss of his position at KAPL and at the series of jobs he held following the IRIF to support his family, feelings which persisted to the time of trial. Finally, Arnold testified that the IRIF and its aftermath was a significant contributing factor in his wife's decision to separate from him. Arnold Tr. (Docket No. 168) at 1098-1155. Although there was no evidence that Arnold ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Arnold's damages for emotional distress is denied.

c. Deborah L. Bush

The jury awarded plaintiff Deborah Bush ("Bush") back pay in the amount of $32,152.97, front pay in the amount of $70,625.15, and damages for emotional distress totaling $111,578.41. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 47-49, 65-66.

Bush was forty-one at the time of the IRIF and was the single mother of an eight year old son. She had received a degree in secretarial science and was employed as an administrative specialist at the time of the IRIF earning an annual salary of approximately $35,000. She had been employed by KAPL for twenty-two years. Six months after the IRIF, Bush found a position as a secretary at another company paying approximately $25,000 annually. She accepted a position as a secretary at another company in

February 1998 where she remained at the time of trial earning approximately $32,000 annually. Bush Tr. (Docket No. 179).

Defendants challenge the jury's back pay award to Bush on the ground that she failed to satisfy her duty to mitigate damages when she moved to a new position at a lower salary and by failing to continue to seek employment comparable to her position at KAPL. In February 1998, Bush was earning approximately $27,500 annually when she accepted a position at another company which paid approximately $26,000 annually. Bush testified that she accepted the lower paying position because her opportunities for promotion were greater at the second company. In fact, her annual salary there had risen to almost $32,000 by the time of trial. Bush also testified that she had continued to seek employment comparable to her administrative position at KAPL: by checking advertisements but had found nothing to pursue.[34] Whether Bush's testimony was credible and her efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Bush failed to mitigate her damages in either respect. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Bush is denied.

Defendants challenge the front pay award to Bush on the grounds that Bush failed to establish the absence of any prospect of obtaining comparable employment and that the duration of the front pay award was unduly speculative. The evidence at trial established that Bush's only post-high school

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[34] Bush testified that in the summer of 1996, KAPL itself considered her application for re-employment there but only for a secretarial position paying approximately $27,000 annually. Bush Tr. at 18-19.

education was for a position as a secretary, the only position she was offered after the IRIF, including from defendants, was as a secretary, and that Bush had continued to check newspaper advertisements for employment comparable to her position at KAPL but had found none. From this record, there was sufficient evidence to conclude that Bush had no reasonable prospect of obtaining a position comparable to her administrative position at KAPL in the foreseeable future.

Bush was awarded front pay as compensation for a period of ten years. Special Verdict (Docket No. 126) at 1. Given Bush's age and the absence of prospects for comparable employment, it was reasonable to conclude that front pay for a period of ten years was "necessary to provide whole relief for [a] victim[ ] of employment discrimination." *Padilla,* 92 F.3d at 126 (upholding front pay intended to provide compensation over a period of twenty years).[35] This conclusion was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of front pay for Bush is denied.

Finally, defendants contend that the jury's award of damages to Bush for emotional distress was excessive and remittitur to $10,000 should be granted. Bush herself presented the only evidence supporting her claim of emotional distress. She testified that following the IRIF, she

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[35] Front pay was awarded to only seven of the eighteen plaintiffs here and the duration of each varied as follows: 1.25 years (Arnold), two years (Reynheer), nine years (Palmatier), 9.75 years (Adams), ten years (Bush), twelve years (Townsend) and 12.5 years (Woodman). Special Verdicts (Docket Nos. 119, 124, 126, 128). Thus, it appears that in rendering its advisory verdicts on front pay, the jury followed its instruction that "[t]he claim for damages of each plaintiff, and the evidence related to that claim, must be considered and weighed by you on its own merits. Whether you award damages to one plaintiff, or the amount of any such damages, has no bearing on any other plaintiff's claim for damages." *See, e.g.*, Jury Charge (Docket No. 127) at 11-12.

was upset, ashamed and humiliated. She also experienced headaches, sleeplessness, stomach upset and weight gain. Bush further testified that while these symptoms abated after several months, the headaches and stomach distress continued at reduced frequencies to the time of trial. Bush Tr. at 8-24. Although there was no evidence that Bush ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Bush's damages for emotional distress is also denied.

d. William R. Chabot

Defendants contend that the jury's award of a total of $119,734.85 to plaintiff William R. Chabot ("Chabot") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 40-42.

Chabot was fifty-seven at the time of the IRIF. He was a computer specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL for thirty-six years. Chabot was unable to find other suitable employment and began collecting his pension from KAPL in February 1996. The evidence of Chabot's emotional distress consisted of the testimony of Chabot and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he was ashamed and withdrew from interaction with his sons and others, and he became indecisive and was argumentative with his family. Chabot Tr. (Docket No. 173) at 139-53, 180-81. Although there was no evidence that Chabot ever required treatment for any consequences of the IRIF, the jury's award was within the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial or remittitur on the issue of Chabot's damages for emotional distress is denied.

e. Allen E. Cromer

Defendants contend that the jury's award of a total of $74,734.85 to plaintiff Allen E. Cromer ("Cromer") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 52-53. Defendants do not challenge the award to Cromer of $17,326.06 for back pay.

Cromer was forty-two at the time of the IRIF. He was a specialist performing inspections at that time earning an annual salary of approximately $43,000. He had been employed by KAPL for fifteen years. Cromer was re-employed by KAPL in September 1996 in a janitorial position and was promoted up to an inspector position in July 1997 at an annual salary of approximately $38,000. Cromer Tr. (Docket No. 173) at 218-24. Cromer subsequently was promoted to another position in the same field, comparable but inferior to his position at the time of the IRIF, at an annual salary of approximately $42,000 which he held at the time of trial. *Id.* at 225-26.

The evidence of Cromer's emotional distress consisted solely of the testimony of Cromer that he was scared and frightened when he receive notice of the IRIF, he has suffered sleeplessness since receiving that notice, he suffered chest pains due to the stress of the IRIF and received medical care for both the sleeplessness and the chest pains, he withdrew socially, and he was humiliated and embarrassed. Moreover, Cromer testified that during his ten months as a janitor, he was deeply humiliated to be seen by his former co-workers performing what he believed were menial tasks and was occasionally called derisive names by former co-workers. Cromer Tr. at 195-99, 215-31, 249-50. Based on this and other testimony, the jury's award does not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Cromer's damages for emotional distress is denied.

f. Thedrick L. Eighmie

The jury awarded plaintiff Thedrick L. Eighmie ("Eighmie") back pay in the amount of $25,585.00 and damages for emotional distress totaling $40, 275.00. Defendants contend that Eighmie's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 55-56, 71-72.

Eighmie was fifty-three at the time of the IRIF. Eighmie held a master's degree in Ceramic Engineering and was employed as an engineer at the time of the IRIF earning approximately $54,000 annually. Eighmie had been employed by KAPL since 1979, he was married and had three children, two were in college and one in high school. Following the IRIF, Eighmie found no other employment. He started a financial consulting business, but that business had few clients and Eighmie earned less than $11,000 total in the four years following the IRIF. Eighmie Tr. (Docket No. 187) at 343-73.

Defendants argue that as a matter of law, Eighmie took insufficient steps to satisfy his duty to mitigate damages by finding comparable employment and, therefore, defendants are entitled to judgment at a matter of law or to a new trial on the issue of the jury's award of back pay to Eighmie. However, Eighmie testified that following the IRIF, he prepared a new resume, checked for job listings in local newspapers and at KAPL, and the Department of Labor, attended seminars on interview techniques, provided a copy of his resume to a job placement agency, went on one job interview, contacted a KAPL representative concerning the availability of a position in addition to making efforts to start his financial consulting business. Eighmie Tr. at 355-73. While defendants elicited other evidence of steps Eighmie could have taken to obtain other employment, the questions of the credibility of Eighmie's testimony and the reasonableness of Eighmie's efforts were issues of fact for determination by

the jury. Crediting Eighmie's testimony, there was sufficient evidence to support the jury's finding that defendants failed to sustain their burden of proving that Eighmie failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

The evidence of Eighmie's emotional distress consisted solely of Eighmie's testimony that he was angry and felt betrayed when the IRIF was announced, feelings which had continued to the time of trial. As the sole support for his family and with three college-age children, Eighmie felt like a failure and worried about how he would support his family in the future. Eighmie and his wife were forced by financial constraints to cancel a twenty-fifth wedding anniversary cruise that they had planned with friends. Eighmie suffered sleeplessness following the IRIF which continued to the time of trial. Eighmie Tr. at 343-52, 363. Eighmie never sought treatment for any consequences he experienced from the IRIF. From this testimony, the jury's award does not deviate materially from the maximum compensation of $125, 000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Eighmie's damages for emotional distress or for remittitur is denied.

g. Paul M. Gundersen

Defendants contend that the jury's award of a total of $130,578.41 to plaintiff Paul M. Gundersen (“Gundersen”) for emotional distress under the HRL was excessive. Defs. Mem. of Law at 60-62. Defendants do not challenge the award to Gundersen of $14,820.15 for back pay.

Gundersen was forty-six at the time of the IRIF. He was a mechanical specialist at that time with an annual salary of approximately $44,000. He had been employed by KAPL or its parent company for twenty-eight years. Gundersen is married and the father of two adult children. Following the IRIF, Gundersen found and maintained other employment at a

salary slightly reduced from that at KAPL. Gundersen Tr. (Docket No. 182) at 328-40.

The evidence of Gundersen's emotional distress consisted of the testimony of Gundersen and his wife that he was initially humiliated when he broke down crying at the staff meeting announcing those selected for the IRIF. He has experienced sleeplessness and nightmares continuously since the IRIF, and he has lost interest in many things. Gundersen further testified that he had been diagnosed with depression eight months prior to the IRIF for which he was prescribed an antidepressant. Gundersen testified that his depression was exacerbated by the IRIF, an effect which continued to the time of trial, and that the dosage of his medication was doubled as a result of the IRIF and remained so to the time of trial. Moreover, Gundersen and his wife testified that following the IRIF and as a consequence thereof, Gundersen had gained approximately one hundred pounds by the time of trial. Gundersen Tr. at 328-40, 456-57.

The testimony of Gundersen and his wife established not only the emotional consequences similar in kind to that suffered by other plaintiffs-humiliation, shock, sleeplessness, nightmares, reduced self-esteem and the like-but also physical and mental manifestations of emotional distress. In particular, that testimony established that Gundersen experienced a substantial weight gain and that his pre-existing depression was made worse by the IRIF, both of which had persisted in the five years since the IRIF. Thus, the jury's award to Gundersen for emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. *See, e.g. Shea,* 925 F.Supp. at 1019-30. Accordingly, defendants' motion for a new trial or remittitur on the issue of the jury's award of damages to Gundersen for emotional distress is denied.

h. Clifford J. Levendusky

The jury awarded plaintiff Clifford J. Levendusky ("Levendusky") back pay in the amount of $21,461.17 and

damages for emotional distress totaling $147,683.21. Defendants contend that Levendusky's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 46-47, 68-69.

Levendusky was fifty-four at the time of the IRIF. He was employed as an engineering specialist earning approximately $52,000 annually. Levendusky had been employed by KAPL or its parent company for over thirty years, he was married and had two sons, one in college and the other recently graduated from college. On March 4, 1996, Levendusky was rehired by KAPL as a plumber/steamfitter at an hourly rate at which he earned an average of $42,500 annually over the next four years. Levendusky Tr. (Docket No. 173) at 274-98.

Defendants argue that because Levendusky failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Levendusky testified that immediately following the IRIF, he had contacted the KAPL Human Resources Manager about the possibility of being rehired by KAPL in his former position but was told by the manager that "It's out of the question." Levendusky Tr. at 286-87. Levendusky further testified that after his return to KAPL, he checked the listings of job openings within KAPL but saw no listing for a position comparable to his former position for which he might be qualified. *Id.* at 294-95. The jury was entitled to find from Levendusky's re-employment, the KAPL manager's discouragement of Levendusky's efforts within KAPL and the results of Levendusky's checks of the KAPL internal job listings that defendants had failed to meet their burden of proving that Levendusky failed to mitigate his damages and that Levendusky's efforts in these circumstances were reasonable. This finding was neither substantially

erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Levendusky's emotional distress consisted solely of Levendusky's testimony that he was shocked when told that he had been selected for the IRIF. His shock was exacerbated because at an awards banquet two months before the IRIF at which Levendusky received an award for his years of service, defendant Freeh had shaken his hand and told him not to worry about the IRIF. Levendusky Tr. at 282-83. Levendusky also testified that he was upset and embarrassed to tell his family that he had lost his job, he was forced to accept a demotion to the plumber/steamfitter position to support himself and his family, and his new job was made more difficult because his new co-workers refused to speak to him for the first three years of his return because he was returning to a union position after twenty-three years as a salaried employee. Levendusky Tr. at 274-93. Levendusky never sought treatment for any consequences he experienced from the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Levendusky's damages for emotional distress is granted unless Levendusky files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

i. Clifford B. Meacham

Defendants contend that the jury's award of a total of $125,000.00 to plaintiff Clifford B. Meacham (“Meacham”) for emotional distress under the HRL was excessive. Defs. Mem. of Law at 37-40.

Meacham was sixty at the time of the IRIF. He received a master's degree in Computer Science and was earning approximately $63,000 annually at the time of the IRIF. He had been employed by KAPL or its parent company for over

forty-three years and planned to work until age sixty-five. Following the IRIF, Meacham found employment at another company for approximately one year at an annual salary of approximately $53,000. That employment ended in November 1997 and Meacham then moved to Florida where he has remained, supporting himself at several temporary positions and receiving his pension. Meacham Tr. (Docket No. 164) at 63-112.

The evidence of Meacham's emotional distress consisted of the testimony of Meacham and his treating psychologist that Meacham was initially dazed and bewildered after the IRIF was announced. Meacham lost self-confidence and endured the stress of uncertainty following the loss of his job. He suffered a recurrence of chronic pain in his back, neck and shoulders which he attributed to the stress from the IRIF. Meacham also suffered symptoms of depression. Meacham sought treatment from a psychologist for problems resulting from the IRIF as well as for other unrelated and preexisting issues. These consequences of the IRIF and Meacham's treatment with the psychologist were generally resolved within one to two years. Meacham Tr. at 65-66, 110-12; Nydegger Tr. (Docket No. 165).

The jury was entitled to credit the testimony of Meacham and his treating psychologist. That testimony established the emotional consequences, physical manifestations of emotional distress and medical care for that distress. On this evidence, the jury's award of $125,000.00 to Meacham for his emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of the jury's award of damages to Meacham for emotional distress or for remittitur is denied.

j. Bruce E. Palmatier

The jury awarded plaintiff Bruce E. Palmatier ("Palmatier") back pay in the amount of $2,841.28, front pay in the amount of $13,211.05.15, and damages for emotional

distress totaling $313,232.48. Defendants contend that they are entitled to a new trial or remittitur on all such awards. Defs. Mem. of Law at 43-45, 69-70.

Palmatier was forty-nine at the time of the IRIF and was married with four children ranging in age from seven to twelve. He was employed as an electrical specialist at the time of the IRIF earning an annual salary of approximately $43,000. Palmatier had been employed by KAPL or its parent company for thirty years. Six months after the IRIF, Palmatier was rehired by KAPL as an electrician at an hourly rate of pay, a position in which he continued through the time of trial. By working substantial overtime, Palmatier earned an approximate annual income of $44,700 in the four years following the IRIF. Palmatier Tr. (Docket No. 186) at 190-228.

Defendants challenge the jury's back pay award to Palmatier on the ground that he failed to satisfy his duty to mitigate damages by failing to seek comparable employment after returning to KAPL as an electrician. Defendants argue that Palmatier's duty to mitigate damages required him to seek an exempt position rather that choosing to remain in the hourly position as Palmatier chose to reduce the likelihood that he would be selected for another IRIF. Palmatier Tr. at 230-32. First, the jury was entitled to find that the income Palmatier earned as an electrician following the IRIF was comparable, if not identical, to that which he had received as an exempt electrical specialist. Second, the reasonableness of Palmatier's decision not to pursue another exempt position for fear of another IRIF was a question for the jury. For either reason, the jury's finding that defendants failed to meet their burden of proving that Palmatier did not sufficiently mitigate his damages was supported by the evidence in the record. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion on this ground is denied.

Defendants challenge the front pay award to Palmatier on the ground that Palmatier failed to establish the absence of any prospect of obtaining comparable employment. The evidence at trial established that Palmatier, a high school graduate with college credits but no college degree, obtained a position as an electrician which was a demotion from his previous position as a specialist but comparable and, with overtime, allowed Palmatier to earn comparable pay. Whether other comparable positions existed and, if so, whether such prospects were reasonable presented questions of fact. The determination on this record either that Palmatier had already obtained comparable employment or that he had no reasonable prospect of obtaining a position more comparable to his electrical specialist position at KAPL in the foreseeable future was adequately supported by the evidence. That determination was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial or remittitur on the issue of the award of front pay to Palmatier is denied.

Finally, defendants contend that the jury's award of damages to Palmatier for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Palmatier and his wife presented the only evidence supporting his claim of emotional distress. They testified that following the IRIF, Palmatier began experiencing sleeplessness and anxiety. His personality changed significantly, including increased irritability, lack of "drive," an inability to finish projects and a diminished ability to communicate with his children leading to a deterioration of their family life. Palmatier also experienced a weight gain. Palmatier Tr. (Docket No. 186) at 194-95; Palmatier Tr. (Docket No. 187) at 295-96. These consequences had persisted through the time of trial and showed no signs of abating. *Id.* at 296.

Palmatier further testified that in order to earn income comparable to his income prior to the IRIF, he worked

substantial overtime and planned to continue doing so for the foreseeable future. Palmatier Tr. at 222-25. This causes additional stress for Palmatier. As a result, Palmatier consulted his treating physician who in August 2000 prescribed Prozac, an antidepressant. Palmatier was continuing to take Prozac at the time of trial to assist in dealing with the stress. *Id.* at 226-27.

The testimony of Palmatier and his wife adduced evidence from which the jury could conclude that the consequences of the IRIF for Palmatier had included severe stress, personality changes and the treatment which had continued for the five years since the IRIF and would continue into the foreseeable future. Given this testimony establishing the nature, severity and duration of the consequences of the IRIF, the jury could reasonably award Palmatier substantial damages for emotional distress. However, its award of $313,242.38 deviates materially from the maximum compensation of $175,000 found reasonable in other similar cases involving consequences such as the jury could find were present here. *See, e.g., Shea,* 925 F.Supp. at 1019-30. Accordingly, defendants' motion for a new trial on the issue of Palmatier's damages for emotional distress is granted unless Palmatier files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

k. Neil R. Pareene

The jury awarded plaintiff Neil R. Pareene ("Pareene") back pay in the amount of $63,050.37 and damages for emotional distress totaling $157,683.21. Defendants contend that they are entitled to a new trial or remittitur on both awards. Defs. Mem. of Law at 49-50, 67-68.

Pareene was forty-five at the time of the IRIF and was married with children. He was employed as a specialist in the position of Craft Production Supervisor at the time of the IRIF earning an annual salary of approximately $48,000. Pareene had been employed by KAPL or its parent company

for over twenty-six years. Following the IRIF, Pareene, a high school graduate, enrolled as a student at Schenectady County Community College pursuing an associate's degree in electrical technology and attended college full-time for the Spring and Fall semesters of 1996. Pareene also obtained a truck driver's license and worked as a truck driver for two different companies from May 1996 to August 1998 at hourly rates ranging from $10.00 to $12.39. Pareene was rehired by KAPL as a janitor in August 1998 at an hourly rate of approximately $17.00. In September 1999, Pareene was promoted to an hourly position as a systems operator at an hourly rate of $20.30. In the four years following the IRIF, Pareene earned an average annual salary of approximately $34,000. Pareene Tr. (Docket No. 174) at 360-408, 487-503.

Defendants challenge the jury's back pay award to Pareene on the ground that he failed to satisfy his duty to mitigate damages in two ways. First, defendants argue that Pareene's full-time attendance at college in the year following the IRIF breached his duty to mitigate damages. However, as the Second Circuit has stated:

> [T]here is no per se rule that finds inherently incompatible the duty of a ... plaintiff to use reasonable diligence in securing comparable employment and such a plaintiff's decision to attend school on a full-time basis. Rather, the central question a court must consider when deciding whether a student-claimant has mitigated her damages is "whether an individual's furtherance of his education is inconsistent with his responsibility 'to use reasonable diligence in finding other suitable employment.' " We believe that a fact-finder may, under certain circumstances, conclude that "one who chooses to attend school only when diligent efforts to find work prove fruitless" satisfies his or her duty to mitigate.

Dailey, 108 F.3d at 456-57 (citations omitted); *see also Smith v. American Serv. Co.*, 796 F.2d 1430, 1432 (11th Cir.1986) (holding that the decision to attend school full-time was "entirely reasonable" where a job search was futile and the claimant held a part-time job while in school). Thus, Pareene's decision to attend school presented a question of reasonableness for determination by the jury in light of the circumstances which he then faced. Those circumstances included efforts by Pareene to seek other employment before enrolling as a full-time student and his obtaining employment while he attended school. Thus, it cannot be said that defendants satisfied their burden of proving Pareene's failure to mitigate in this regard.

Second, defendants argue that in the Spring of 1999, Pareene declined to accept an offer of a promotion to a position more comparable to his position prior to the IRIF. However, Pareene declined the offer because it would require him to work a day shift rather than the preferred night shift to which he was then assigned. The jury was entitled to consider whether the change in shifts made the offered potion unsuitable or not comparable to Pareene's position before the IRIF. Moreover, since this offer was not made until over three years after the IRIF, the jury could at most reduce rather than deny back pay to Pareene on this ground. Thus, the offer to and declination by Pareene of this position presented a question of fact for resolution by the jury. The jury's resolution of this question was not substantially erroneous or a miscarriage of justice. Defendants' motion for a new trial on the issue of the award of back pay to Pareene is denied.

Defendants also contend that the jury's award of damages to Pareene for emotional distress was excessive and remittitur to $10,000 should be granted. Pareene presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, angry, confused, frustrated, pained and more prone to crying. Pareene Tr. at 370-72, 502. Being told by defendants that his

skills were neither critical nor flexible led him to enroll as a full-time student to improve his skills in those areas. *Id.* at 388-90. He aspired to return to a position at KAPL as satisfying as his position at the time of the IRIF but was told upon his re-employment there that he "could never hope to go back" to his former position. *Id.* at 402. Pareene testified that he has felt a constant strain since the IRIF and that the experience was traumatic. *Id.* at 500. He has felt a constant pressure to avoid mistakes that could lead to another IRIF. *Id.* at 501. The increased overtime he is required to work in his present position also place an additional strain on him. *Id.* at 496.

Pareene's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. Thus, the jury's award of $157,683.21 deviates materially from the maximum compensation of $125,000 found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Pareene's damages for emotional distress is granted unless Pareene files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

l. William C. Reynheer

The jury awarded plaintiff William C. Reynheer ("Reynheer") damages for back pay, front pay and emotional distress totaling $935,617.41. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 34-37, 63-65.

Reynheer was fifty-six at the time of the IRIF and was married with two adult children. He had received a bachelor's degree in engineering and was employed as an engineer at the time of the IRIF earning an annual salary of approximately $65,400. Reynheer had been employed by KAPL or its parent company for over twenty-six years.

Following the IRIF, Reynheer sought unsuccessfully to obtain an engineering position. He then received training to become a truck driver and unsuccessfully sought a position as a truck driver after obtaining a license. In response to a newspaper advertisement, Reynheer then obtained a position as an automobile salesman in September 1996, earning approximately $1,000 monthly. Reynheer was rehired by KAPL as a janitor on November 8, 1996 at an approximate annual income of $30,000. In November 1997, Reynheer was promoted to a position as a technician at an approximate annual income of $35,000. In the four years following the IRIF, Reynheer earned an average annual income of approximately $40,000. Reynheer Tr. (Docket No. 167) at 758-879.

Defendants challenge the jury's back pay award of $179,740.17 to Reynheer on the ground that he failed to satisfy his duty to mitigate damages when he failed to seek other engineering positions after his re-employment by KAPL in November 1996. Reynheer testified at length about his unsuccessful efforts to seek comparable employment prior to his re-employment at KAPL and about his efforts to obtain better positions within KAPL after his return. Whether Reynheer's testimony was credible and his efforts to find comparable employment reasonable were questions for the jury. On this record the jury was entitled to find that defendants had not satisfied their burden of proving that Reynheer failed to mitigate his damages. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants' motion for a new trial on the issue of the jury's award of back pay to Reynheer is denied.

Defendants challenge the front pay award to Reynheer of $102,380.00 on the grounds that Reynheer failed to establish the absence of any prospect of obtaining comparable employment. The evidence at trial established that Reynheer made diligent efforts for the first year after the IRIF to find employment as an engineer without success and that he made

efforts to find employment as an engineer within KAPL after his re-employment there. From Reynheer's diligent but unsuccessful efforts prior to trial, the jury was entitled to find that there were no reasonable prospects for Reynheer to obtain a position as an engineer in the future. Defendants' motion on this ground is denied.

Finally, defendants contend that the jury's award of damages of $653,497.24 to Reynheer for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Reynheer presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt as he had on the occasions when he learned his parents had died. Reynheer Tr. at 758. Reynheer became depressed and "vegetative." *Id.* at 761. A pre-existing condition of high blood pressure was exacerbated and required an adjustment in his medication. *Id.* at 762. He experienced sleeplessness and his drinking increased. He became irritable and withdrew from family and friends. He ceased exercising as he had before the IRIF. *Id.* at 761-62, 774-75. Reynheer further testified, however, that these consequences largely disappeared by the end of 1996 when he returned to work at KAPL although he has continued to suffer episodes of depression less than once a month related to the IRIF. *Id.* at 763-75. Reynheer never sought treatment for any of these consequences. Reynheer also testified that he felt acute humiliation after returning to KAPL as a janitor and for the year he remained in that position. He would regularly see his former co-workers as he performed his duties, but they avoided contact with him. *Id.* at 841-42.

Reynheer's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF. However, that distress did not include significant physical manifestations or require treatment. In these circumstances, the jury's award of $653,497.24 deviates materially from the maximum compensation of $125,000 found reasonable in other similar

cases. Accordingly, defendants' motion for a new trial on the issue of Reynheer's damages for emotional distress is granted unless Reynheer files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

m. John K. Stannard

The jury awarded plaintiff John K. Stannard ("Stannard") back pay in the amount of $58,242.97 and damages for emotional distress totaling $140,803.46. Defendants contend that Stannard's back pay award should be vacated for his failure to mitigate damages and that the award for emotional distress is excessive. Defs. Mem. of Law at 57-60, 66-67.

Stannard was forty-seven at the time of the IRIF and was married with one son then in his second year of college. Stannard was employed as a maintenance engineering specialist at the time of the IRIF earning approximately $49,000 annually. Stannard had been employed by KAPL for over twenty-seven years. On February 2, 1996, Stannard was rehired by KAPL as a janitor at an hourly rate at which he earned an average of $35,300 annually over the next four years. Stannard Tr. (Docket No. 186) at 25-66.

Defendants argue that because Stannard failed to seek other employment either inside or outside KAPL after his return to KAPL, he failed to satisfy his obligation to mitigate damages and, therefore, was not entitled to an award for back pay. However, Stannard, who has an associate's degree, testified that he searched for other comparable employment immediately following the IRIF before applying for and accepting the position at KAPL. Stannard Tr. at 42-43. Stannard further testified that since his return to KAPL, he has continued to check the listings of job openings within KAPL as well as in local newspaper and on the Internet but has seen no listings for a position comparable to his former position for which he might be qualified. *Id.* at 55-57. The jury was entitled to find from Stannard's re-employment and the results of Stannard's search for other positions that

defendants had failed to meet their burden of proving that Stannard failed to mitigate his damages and that Stannard's efforts in these circumstances were reasonable. That finding was neither substantially erroneous nor a miscarriage of justice. Defendants motion on this ground is denied.

The evidence of Stannard's emotional distress consisted solely of Stannard's testimony that he felt betrayed, devastated and angry when told that he had been selected for the IRIF. Stannard experienced sleeplessness and weight loss following the IRIF and felt run down. Stannard Tr. at 25-29. The stress of the IRIF also caused high blood pressure, an aggravation of a pre-existing back problem, a sinus infection and dental problems. *Id.* at 29-30. Stannard also experienced trigeminal neuralgia.[36] These problems persisted in diminished degree to the time of trial. *Id.* at 35. The uncertainty caused by the IRIF caused Stannard's son to withdraw from college. *Id.* at 62-66. In these circumstances and given the physical manifestations experienced by Stannard, the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See Shea*, 925 F.Supp. at 1019-30. Therefore, because the award to Stannard does not exceed that figure, defendants' motion for a new trial or remittitur on the issue of Stannard's damages for emotional distress is denied.

n. Allen G. Sweet

Defendants contend that the jury's award of a total of $128,953.46 to plaintiff Allen G. Sweet ("Sweet") for emotional distress under the HRL was excessive. Defs. Mem. of Law at 53-55.

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[36] A disorder of the nervous system causing "excruciating episodic [facial] pain in the area supplied by the trigeminal nerve." Dorland's Illustrated Medical Dictionary 1127 (28th ed.1994).

Sweet was sixty-three at the time of the IRIF. He was a specialist at that time with an annual salary of approximately $50,000. He had been employed by KAPL or its parent company for over thirty years. Sweet was married and had received a high school equivalency degree. Following the IRIF, Sweet was unable to find other suitable employment and began collecting his pension from KAPL. Sweet Tr. (Docket Nos. 172, 173) at 21-44.

The evidence of Sweet's emotional distress consisted of the testimony of Sweet and his wife that he was shocked, embarrassed and humiliated by the IRIF, he has suffered sleeplessness since the IRIF, he lost approximately forty pounds, and he was ashamed and withdrew from friends, *Id.* at 27-30, 44, 114-18. The sleeplessness and weight loss continued to the time of trial. *Id.* at 117-18. Sweet never required treatment for any consequences of the IRIF. On this record, the jury's award of $128,953.46 exceeded the maximum award of $125,000 which does not deviate materially from the compensation found reasonable in other similar cases. Accordingly, defendants' motion for a new trial on the issue of Sweet's damages for emotional distress is granted unless Sweet files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.[37]

[37] The jury's award deviates from what has been found herein to be the maximum reasonable compensation in other cases by less than $4,000, or approximately three percent. Little guidance is found as to whether such a deviation is "material" under the HRL. However, since the figure of $125,000 has been determined to be the *maximum* reasonable compensation in such circumstances, the deviation here is deemed material.

o. David W. Townsend

Plaintiff David W. Townsend ("Townsend") was awarded damages for back pay, front pay and emotional distress totaling $379,356.09. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 56-57, 70-71.

Townsend was forty-six at the time of the IRIF and was married with two school-age children. He had received an associate's degree and was employed as a specialist at the time of the IRIF earning an annual salary of approximately $40,500. Townsend had been employed by KAPL for over twenty-five years. In May 1996, Townsend obtained employment at another company as a laborer at an hourly rate of $14.50 and was later promoted to a position paying an hourly rate of $16.00. In October 1996, Townsend was rehired by KAPL as a janitor and was promoted in February 1998 to a position as irradiation technician where he has since remained at a current current annual income of $43,300. Townsend Tr. (Docket Nos. 1188, 189) at 583-646.

Defendants challenge the jury's back pay award of $18,126.82 on the ground that Townsend failed to satisfy his duty to mitigate damages when he failed to seek other comparable specialist positions after his promotion to the technician position at KAPL in February 1998. Defendants' argument fails for two reasons. First, while not identical in duties or pay to the specialist position, the technician position was sufficiently comparable in duties and pay to satisfy Townsend's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $40,500 while his annual income in the technician position at the time of trial was approximately $43,300. Townsend Tr. at 580, 642. Second, defendants contend that Townsend's failure to mitigate commenced with his promotion to the technician position in February 1998 but do not appear to contend that his efforts for the two prior years were deficient. In these circumstances

a question of fact was presented for resolution by the jury as to what extent, if any, the back pay award to Townsend should be reduced for any such limited failure to mitigate. The jury's award here was supported by the evidence in the case. The award was not substantially erroneous or a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Townsend is denied.

Defendants challenge the front pay award to Townsend of $25,121.50 on the ground that Townsend failed to establish the absence of any reasonable prospect of obtaining comparable employment. The evidence at trial established that Townsend made diligent efforts for two years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the technician position he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Townsend's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Townsend's education, age and unsuccessful efforts to obtain more comparable employment for over two years prior to February 1998 could also be considered. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Townsend must be denied.

Finally, defendants contend that the jury's award of damages of $336,107.77 to Townsend for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Townsend presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he was shocked, depressed, irritable and "not able to function properly." Townsend Tr. at 584-89. Townsend stated that he suffered sleeplessness which has continued since the IRIF. *Id.* at 590. Townsend further testified that he began suffering acidic stomach pains following the IRIF which have continued to date and for

which his doctor prescribed medication. *Id.* at 591-92. Townsend also testified that he experienced episodes of chest pains from the stress of the IRIF which caused him to seek treatment. *Id.* at 592-93. The manual labor position Townsend found immediately after the IRIF caused a hernia which required surgery. *Id.* at 618.

Townsend's testimony established that he suffered emotional distress in the five years following the IRIF as a consequence of the IRIF which will continue in the future. It also established that this included significant physical consequences requiring treatment. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $175,000. *See, e.g. Shea,* 925 F.Supp. at 1019-30. Therefore, defendants' motion for a new trial on the issue of Townsend's damages for emotional distress is granted unless Townsend files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $175,000 on or before March 8, 2002.

p. Carl T. Woodman

Plaintiff Carl T. Woodman ("Woodman") was awarded damages for back pay, front pay and emotional distress totaling $398,188.70. Defendants contend that they are entitled to a new trial on all such awards. Defs. Mem. of Law at 45-46, 69.

Woodman was forty-five at the time of the IRIF and was married. He had received an associate's degree in business administration and was employed as a specialist in nondestructive testing at the time of the IRIF earning an annual salary of approximately $47,000. Woodman had been employed by KAPL or its parent company for over twenty-five years. In September 1996, Woodman was rehired by KAPL as a janitor at an hourly rate of $16.00. Woodman left that position for one as a field inspector at another company at an hourly rate of $17.00. Woodman's employment there was terminated in the Summer of 1998. He was then rehired

by KAPL in November 1998 as a nondestructive tester, where he remains, at an hourly rate from which he received an approximate annual income of $49,000. Woodman Tr. (Docket Nos. 179, 180) at 60-141.

Defendants challenge the jury's back pay award of $33,920.18 to Woodman on the ground that he failed to satisfy his duty to mitigate damages by failing to seek other comparable specialist positions after his re-employment at KAPL in 1998. Defendants' argument fails for three reasons. First, while not identical in duties or pay to the specialist position Woodman held at the time of the IRIF, the jury could reasonably have found that the position as a tester was sufficiently comparable in duties and pay to satisfy Woodman's duty to mitigate damages. For example, Townsend's annual salary at the time of the IRIF as a specialist was approximately $47,000 while his annual income in the position as a tester at the time of trial was approximately $49,000. Woodman Tr. at 55, 140. Second, Woodman testified that he in fact made efforts to find other employment after November 1998. *Id.* at 136-39. The jury could conclude from such testimony that Woodman in fact satisfied his duty to mitigate damages. Third, defendants contend that Woodman's failure to mitigate commenced with his re-employment at KAPL in November 1998 but do not appear to contend that his efforts for the nearly three prior years were deficient. In these circumstances a question of fact was presented for resolution by the jury as to what extent, if any, the back pay award to Woodman should be reduced for any such limited failure to mitigate. The jury's award here is supported by the evidence in the case. That award was neither substantially erroneous nor a miscarriage of justice. Accordingly, defendants' motion for a new trial on the issue of the jury's award of back pay to Woodman is denied.

Defendants challenge the front pay award to Woodman of $42,344.21 on the ground that Woodman failed to establish the absence of any reasonable prospect of obtaining

comparable employment. The evidence at trial established that Woodman made diligent efforts for the five years after the IRIF to find employment comparable to the specialist position he held at the time of the IRIF without success and that the position of tester he ultimately obtained at KAPL was sufficiently comparable, if not identical, to the specialist position to satisfy Woodman's burden of demonstrating the absence of reasonable prospects of obtaining more comparable employment. Woodman's education and age could also be considered in determining whether there existed any reasonable prospect that he would obtain more comparable employment in the future. On this record, therefore, defendants' motion for a new trial on the issue of the award of front pay to Woodman must be denied.

Finally, defendants contend that the jury's award of damages of $321,924.31 to Woodman for emotional distress was excessive and remittitur to between $5,000 and $30,000 should be granted. Woodman presented the only evidence supporting his claim of emotional distress. He testified that following the IRIF, he felt scared, ashamed and betrayed. Woodman Tr. at 60-64. Woodman stated that he suffered sleeplessness and that he has remained scared, irritable, anxious about the future and paranoid since the IRIF. *Id.* at 140-41. Woodman sought no treatment for any of these consequences of the IRIF. In these circumstances the maximum award which does not deviate materially from the compensation found reasonable in other similar cases is $125,000. Therefore, defendants' motion for a new trial on the issue of Woodman's damages for emotional distress is granted unless Woodman files and serves a written acceptance of remittitur of the emotional distress component of his damages award to $125,000 on or before March 8, 2002.

IV. Plaintiffs' Motions

Plaintiffs seek awards of prejudgment interest, postjudgment interest, an upward adjustment of the judgment

in light of plaintiffs' increased tax liabilities, and attorneys' fees and costs.

A. Prejudgment Interest

Plaintiffs seek an award of prejudgment interest for the damages awarded for back pay and for past emotional distress for the period from the effective date of the IRIF, January 12, 1996, through the date of the judgment on the jury's verdicts, December 5, 2000. Pls. Mem. of Law (Docket No. 141) at 4-6. Defendants do not oppose an award of prejudgment interest for back pay or the methodology proposed by plaintiffs for calculating prejudgment interest, but defendants oppose any award of prejudgment interest for the awards for past emotional distress. Defs. Mem. of Law (Docket No. 201) at 2-4. Therefore, without objection, plaintiffs' motion for an award of prejudgment interest on the back pay awards is granted for the period from January 12, 1996 through December 5, 2000, and such interest shall be calculated by (1) dividing the back pay awards evenly over the period from January 12, 1996 through December 5, 2000; (2) the average annual United States Treasury bill rate of interest referenced in 28 U.S.C. § 1961 shall then be applied to each component period; and (3) the interest shall be compounded annually. *See Hogan*, 144 F.Supp.2d at 141; *Stratton v. Department for the Aging for the City of N.Y.*, No. 91 Civ. 6623(SAS), 1996 WL 352909, at *4 (S.D.N.Y. June 25, 1996).

Defendants oppose plaintiffs' motion for an award of prejudgment interest for the awards of damages for past emotional distress. Plaintiffs contend that such an award should be made to insure that plaintiffs are made whole. *See Robinson v. Instructional Sys., Inc.*, 80 F.Supp.2d 203, 207 (S.D.N.Y.2000) ("courts also exercise their discretion to award prejudgment interest on compensatory damage awards when interests of fairness and full compensation to the plaintiff so require"). However, for two reasons, plaintiffs' motion for prejudgment interest on the awards for past emotional distress is denied.

First, prejudgment interest is generally awarded "to compensate the plaintiff for loss of the use of money wrongfully withheld through an unlawful discharge." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.,* 818 F.2d 278, 281 (2d Cir.1987). Unlike the awards for back pay, the awards here for past emotional distress did not compensate plaintiffs for any money withheld as the result of the IRIF but for emotional injuries suffered as a result thereof. Thus, prejudgment interest on those awards is not required to insure that plaintiffs are made whole in that regard.

Second, the awards for past emotional distress were made under the HRL. New York courts generally hold that prejudgment interest is unavailable for awards for past emotional distress. *See Campbell v. Metropolitan Property & Cas. Ins. Co.,* 239 F.3d 179, 186-87 (2d Cir.2001); *Miller v. Santoro,* 227 A.D.2d 534, 535, 643 N.Y.S.2d 168 (2d Dep't 1996) (correcting judgment which erroneously awarded preverdict interest for conscious pain and suffering); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.,* 176 Misc.2d 325, 333, 672 N.Y.S.2d 230 (1997) ("courts of New York State have consistently held that pre-verdict interest is *not* available on an award of compensatory damages") (emphasis in original); *see also* N.Y. C.P.L.R. § 5001(a) (McKinney Supp.2001).

Therefore, both because considerations of fairness do not support an award of prejudgment interest for past emotional distress here and because plaintiffs' awards for past emotional distress were made under the New York HRL and New York law does not authorize prejudgment interest for such awards, plaintiffs' motion for prejudgment interest on their awards for past emotional distress is denied.

B. Postjudgment Interest

Plaintiffs seek an award of postjudgment interest pursuant to 28 U.S.C. § 1961 on all amounts awarded from December 5, 2000, the date the amended judgment was filed, until the judgment is satisfied. Pls. Mem. of Law at 6-7.

Defendants do not oppose this motion. Accordingly, plaintiffs' motion is granted and plaintiffs are granted postjudgment interest on all amounts awarded from December 5, 2000 to the date the judgment is satisfied.

C. Upward Adjustment for Increased Taxes

Plaintiffs also seek an upward adjustment of their awards to offset what they contend are adverse tax consequences from the lump sum awards. Pls. Mem. of Law at 7-8. Plaintiffs rely on the only case which research reveals has awarded such an adjustment. *See O'Neill v. Sears, Roebuck & Co.*, 108 F.Supp.2d 443, 446-48 (E.D.Pa.2000). However, plaintiffs offered no evidence on any claimed adverse tax consequences at trial. Moreover, the evidence offered in support of this motion fails to demonstrate any such adverse consequence. Plaintiffs offer only a proposed methodology for calculating such tax consequences[38] and a conclusory "demonstration" of that methodology as to plaintiff Reynheer which would result in an upward adjustment of Reynheer's award by approximately sixty-five to eighty-five percent.[39] No basis for this conclusion is provided and, therefore, plaintiffs' "demonstration" is unduly speculative. Finally, the *O'Neill* case provides the only authority for such an upward adjustment, but that case acknowledged that it stood alone, it has yet to be followed by any other court and it limited its upward adjustment to an award for back pay and front pay but not damages for emotional distress, a limitation plaintiffs

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[38] *See* Barry Ben-Zion, *Neutralizing the Adverse Tax Consequences of a Lump-Sum Award in Employment Cases*, 13 J. of Forensic Econ. 233 (2000).

[39] According to plaintiffs' counsel, Reynheer's award of $1,115,357.58 should be adjusted upward by $948,054. Pls. Mem. of Law at 8. According to plaintiffs' economist, that award should be adjusted upward by $718,341. Riccardi Aff. (Docket No. 140) at ¶ 10.

ignore here. In these circumstances plaintiffs' motion for an upward adjustment must be denied.

D. Attorneys' Fees and Costs

Plaintiffs seek attorneys' fees and costs totaling $1,037,818.08 for those fees and costs incurred through November 22, 2000[40] when the jury returned its last verdict. Docket No. 197. Such fees and costs are sought under the ADEA against defendants KAPL and Lockheed Martin. The ADEA mandates an award of reasonable attorneys' fees and costs to a prevailing plaintiff to the extent authorized by the Fair Labor Standards Act, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b); *Lightfoot,* 110 F.3d at 913. "The operative term is 'reasonable.'" *Tanzini,* 978 F.Supp. at 82.

1. Attorneys' Fees

Plaintiffs seek a total of $979,348.71 in attorneys' fees. To determine the reasonable amount of attorneys' fees, a court must first multiply the number of hours expended by a plaintiff's attorney in prosecuting a case by the reasonable hourly rate charged by the attorney to establish a "lodestar" figure. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Certain adjustments may then be made to this lodestar figure to arrive at a final award. *Tanzini,* 978 F.Supp. at 83-84. Here, plaintiffs seek an award for fees charged by three attorneys, a law clerk who was admitted to practice as an attorney during the pendency of this case, and three paralegals.

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[40] Plaintiffs' motion concerns fees and costs incurred to the date of the last verdict. Plaintiffs' counsel have incurred additional fees and costs since that date, *inter alia,* in responding to defendants' posttrial motions. Accordingly, plaintiffs are granted leave to file a supplemental motion for attorneys' fees and costs incurred subsequent to November 22, 2000.

a. Hours Expended

Plaintiffs contend that their attorneys and staff expended a total of 6,935 hours in prosecuting this case. DuCharme Aff. (Docket No. 197) at Exs. A-E. Defendants challenge the hours claimed in several respects.

Plaintiffs assert that the hours claimed do not include any hours expended in prosecuting the claims of (a) the two plaintiffs for whom the jury returned a verdict in favor of defendants, or (b) the eight plaintiffs who settled their claims following the liability phase of the trial.[41] *Id.* at ¶ ¶ 6-8. Defendants generally accept the method by which plaintiffs excluded hours expended on the claims of these ten plaintiffs. Defs. Mem. of Law (Docket No. 201) at 15-16. However, defendants contend that there should be further exclusions where plaintiffs' records indicate that the attorneys' time was devoted exclusively to one or more of the ten defendants and where plaintiffs' exclusion of time did not sufficiently reflect the portion of that time devoted to on or more of the ten plaintiffs. *Id.* at 16-17 & nn. 7, 8. The total fees claimed for such entries in plaintiffs' records is $4,175.52. A review of plaintiffs' records confirms defendants' contention in whole regarding those instances where the entire billing entry was devoted to one or more of the ten plaintiffs. *See* Defs. Mem. of Law at 16 n. 7. However, where a billing entry was devoted in one-half to one of the ten plaintiffs, a review of the records indicates that defendants are incorrect as to one such entry and that the reduction sought was miscalculated as to the others. *See id.* at 17 n. 8. Therefore, the lodestar figure will be reduced on this account by a total of $3,412.52.

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[41] A ninth plaintiff, Christine A. Palmer, settled her claims after plaintiffs filed this motion. *See* note 12 *supra.* The extent to which, if at all, the hours expended by plaintiffs' counsel should be adjusted because of that settlement is unclear. Accordingly, this motion is considered without adjustment for the Palmer settlement.

Defendants challenge several categories of the hours claimed on the ground that such hours were redundant and unnecessary. Defs. Mem. of Law at 17-19; *see Hensley*, 461 U.S. at 432, 103 S.Ct. 1933; *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 97 (2d Cir.1997). First, defendants contend that three meetings with plaintiffs attended by all three of plaintiffs' attorneys and for which all three attorneys billed their full hourly rate was unnecessary. Defs. Mem of Law at 17-18. However, while it may generally hold that one attorney will suffice to provide services in most instances, there may arise certain situations at critical junctures of cases which require the attendance and participation of two or more attorneys. In these three instances, the three attorneys attended meetings at the outset of the case with various plaintiffs to obtain information and assess the potential of the case. Given the number of plaintiffs, the complexity of the case and the impact of a commitment to accept this case to a law firm like that of plaintiffs' counsel with only three attorneys, these early meetings were sufficiently important that the attendance of all three attorneys was not unreasonable. Accordingly, the hours claimed by all three attorneys for these meetings will be allowed.

Defendants also contend that in twelve instances, two or more of plaintiffs' attorneys billed for attendance at certain depositions. Defs. Mem. of Law at 18 (specifying the instances). A review of those twelve instances indicates that six of those instances actually involved meetings among plaintiffs' attorneys and the other six involved the depositions of key KAPL officers and employees. Meetings among counsel to review and discuss developments in the case were essential and, therefore, reasonable. Defendants have not suggested, nor does it appear from the billing records of plaintiffs' counsel, that such meetings were held with excessive frequency. As to the depositions, the attendance of two attorneys at a single deposition is not unreasonable as a matter of law. *See Hogan*, 144 F.Supp.2d at 141 (holding in age discrimination case where two attorneys attended

depositions on behalf of four plaintiffs that "[i]n light of the complexity of this case and the fact that [the prevailing plaintiff] was suing ... a large company with significant resources at its disposal, the use of two attorneys was not unnecessary or unreasonable"); *Coffey v. Dobbs Int'l Servs., Inc.*, 5 F.Supp.2d 79, 86 (N.D.N.Y.1998), *rev'd on other grounds*, 170 F.3d 323 (2d Cir.1999). The attendance of two attorneys for plaintiffs at depositions appears to have been limited to such important witnesses as only one attorney generally attended depositions for plaintiffs. In the circumstances of this case, it was not unreasonable for two attorneys to attend those particular depositions. Accordingly, the hours claimed by plaintiffs' counsel will not be reduced in these instances.

Defendants also contend that the hours claimed should be reduced by the hours claimed for consultation with an expert witness who was never retained or called to testify by plaintiffs. Defs. Mem. of Law at 19 & n. 9. However, it was not unreasonable for plaintiffs to explore the possibility of calling other expert witnesses as case preparations proceeded and the time expended in this regard was not excessive. Defendants further contend that time expended in drafting a letter to the DOE after the liability phase and before the damages phase and time expended in that period for legal research on liability after liability had been found by the jury were unnecessary. *Id.* at 19. However, settlement discussions between the parties were ongoing in this period, the records of the DOE being sought in the letter were potentially relevant to both settlement and the damages phase of the trial, and the legal research on liability was likewise useful to plaintiffs in their settlement discussions both as to damages awarded in disparate impact cases and to refute defendants' continuing assertions that the evidence did not support the verdict on liability. Thus, the hours claimed in these instances were not unreasonable and will not be reduced.

Finally defendants point out what appears to be a billing error in the duplicate entries for March 26 and 27, 1998. Defs. Mem. of Law at 19. The entries are identical in all respects and only one such charge is reasonable. Accordingly, the lodestar will be reduced by a total of $218.59 for the duplication of charges in this instance.

b. Hourly Rates

With one exception, the hourly rates claimed by plaintiffs' counsel are within the range of those previously found reasonable in this district, defendants take no issue with those rates and the rates claimed are allowed. The exception concerns Kimberly Ann Harp. Harp began work on this case for plaintiffs' counsel in 1997 when she was a second-year law student. DuCharme Aff. at ¶ 36. She continued to provide legal services throughout this case, including after her graduation from law school and admission to the bar in 1999. Plaintiffs claim hourly rates of $90-$100 throughout the case for work performed by Harp. Defendants do not challenge that rate for work performed after Harp was admitted to the bar but contend that the rate is excessive for work performed prior to that time. Defs. Mem. of Law at 14-15. Defendants contend that Harp's hourly rate should be no more that $65 prior to her admission to the bar. *See John S. v. Cuomo,* No. 90-CV-294 (NPM), 1999 WL 592693, at *2 (N.D.N.Y. July 29, 1999) (McCurn, J.) (awarding hourly rate of $65 for law student work). Defendants' contention finds support in the cases decided in this district. *See, e.g., id.; Hannigan v. Board of. Educ. of Brunswick Sch. Dist.*, No. 95-CV-1435 (FJS), 1997 WL 10971, at *3 (N.D.N.Y. Jan. 9, 1997) (Scullin, J.) (awarding hourly rate of $50 for law student work). Recalculating the amounts claimed by plaintiffs at the lower hourly rate for Harp requires that the lodestar fugure claimed by plaintiffs be reduced by a total of $4,753.05.

Reducing the lodestar figure of $979,348.71 claimed by plaintiffs by the three amounts described above yields a total lodestar figure of $970,964.55.

c. Adjustments

There exists "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington v. Dague,* 505 U.S. 557, 561, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). Adjustments may be made to the lodestar figure for various reasons, but the party seeking such an adjustment bears the burden of establishing its reasonableness. *See id.* (citing *Blum v. Stenson,* 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)).

Plaintiffs contend that the lodestar figure should be adjusted upward in an unspecified amount given various factors present in this case, including the novelty and difficulty of the issues, the skill required to represent the plaintiffs successfully and the result obtained. Pls. Mem. of Law at 5 (citing *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933). There is no question that plaintiffs' counsel demonstrated uncommon skill in prosecuting this case on behalf of twenty-eight plaintiffs against defendants with substantial resources and themselves represented by skilled counsel. The result obtained for the plaintiffs was also unqualifiedly successful. However, the lodestar figure reasonably reflects not only the time, effort, resources and skill required of plaintiffs' counsel in this case but bears a reasonably proportionate relationship to the result obtained. Accordingly, plaintiffs have failed to meet their burden of demonstrating that the lodestar figure should be adjusted upward.

Defendants contend that the lodestar figure should be adjusted downward by fifty percent in light of plaintiffs' limited success in prevailing on the disparate impact theory but not on the disparate treatment theory. Defs. Mem. of Law at 19-24. As noted above, the lodestar figure includes

downward adjustments for the jury's verdict in favor of defendants as to two plaintiffs and the settlement of the claims of eight other plaintiffs. Defendants, therefore, seek the downward adjustment here solely on the ground of the jury's rejection of the disparate treatment theory.

The lodestar figure may be adjusted downward where a plaintiff prevailed on certain claims but not on others. However, no reduction on this ground should be made "if the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories.' " *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir.1996) (quoting *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1259 (2d Cir.1987)); *Hogan*, 144 F.Supp.2d at 141; *Tanzini*, 978 F.Supp. at 83. Thus, "[s]o long as the plaintiff's unsuccessful claims are not 'wholly unrelated' to the plaintiff's successful claims, hours spent on the unsuccessful claims need not be excluded from the lodestar amount." *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir.1994) (quoting *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir.1992)).

The determination whether successful and unsuccessful claims bear a sufficiently close relationship that no downward adjustment for limited success should be made is necessarily informed by the facts of each case. However, courts have held in other cases that, for example, claims of age discrimination and retaliatory discharge were inextricably intertwined, *see Dominic*, 822 F.2d at 1259; claims of sexual harassment, sex discrimination, retaliation and age discrimination were inextricably intertwined, *Greenbaum v. Svenska Handelsbanken, N.Y.*, 998 F.Supp. 301, 306 (S.D.N.Y.1998); and claims of a failure to promote and wrongful termination, both based on age and disability discrimination, were inextricably intertwined. *Tanzini*, 978 F.Supp. at 84.

Here, plaintiffs' claims of age discrimination were asserted on the alternative theories of disparate treatment and

disparate impact. The two theories are closely related. Moreover, the preparation and trial on the two theories involved the discovery and testimony of virtually all the same witnesses regarding how the individual plaintiffs were treated in the IRIF and whether there existed reasonable alternatives to the IRIF. Moreover, plaintiffs' claim that defendants acted willfully involved virtually identical evidence under either theory. Given the inherently close relation of the two theories, the fact that the evidence concerning the two theories substantially overlapped in this case and the "common core of facts" underlying the two theories, it cannot be said that the two theories were wholly unrelated.

Nevertheless, to a minimal degree the preparation and trial of the two theories required plaintiffs' counsel to devote time to the unsuccessful disparate treatment theory. A reduction of ten percent to account for such time appears appropriate. *See Greenbaum*, 998 F.Supp. at 307 (reducing fee by ten percent where successful and unsuccessful claims inextricably intertwined); *Dailey*, 915 F.Supp. at 1331 (reducing lodestar figure by ten percent). Thus, the lodestar figure will be reduced on this ground by $97,096.46.

For the reasons set forth above, plaintiffs are awarded attorneys' fees in the total amount of $873,868.09.

2. Costs

Plaintiffs also move for an order awarding them costs totaling $58,469.37 incurred in the litigation of this case. Pls. Mem. of Law at 6. As prevailing parties, plaintiffs are entitled to recover taxable costs pursuant to 28 U.S.C. § 1920 and "all reasonable out-of-pocket expenses that are normally charged to clients." *O'Grady v. Mohawk Finishing Prods., Inc.*, No. 96-CV-1945, 1999 WL 30988, at *7 (N.D.N.Y. Jan. 15, 1999) (Scullin, J.); *see also LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir.1998); *Hogan*, 144 F.Supp.2d at 143. Ordinary overhead expenses are not recoverable. *LeBlanc-Sternberg*, 143 F.3d at 763. Whether a particular item constitutes ordinary overhead or an awardable

cost depends on whether the item is one normally absorbed within the attorney's fee or separately charged to a client. *See id.* Defendants challenge various costs claimed by plaintiffs.

a. Fees for the Depositions of Defendants' Experts

Plaintiffs seek a total of $7,350.00 for fees paid to defendants' two expert witnesses as fees for their depositions. DuCharme Aff., Ex. F at 4. Such costs are those incurred in obtaining discovery, such as the costs of a stenographer or a witness' travel, and are normally charged to a client. Accordingly, plaintiffs are awarded such costs.

b. Computerized Research

Plaintiffs seek an award of $350.18 for computer research. DuCharme Aff., Ex. F at 2-7. Such costs are not compensable on this record. *See United States ex rel. Evergreen Pipeline Constr. v. Merritt-Meridian Constr. Corp.*, 95 F.3d 153, 173 (2d Cir.1996); *Tanzini,* 978 F.Supp. at 85 (holding that costs of computer research not compensable "in the absence of an hour/rate showing by plaintiff"). Accordingly, the costs claimed by plaintiffs will be reduced by $350.18.

c. Supplies

Plaintiffs seek $458.23[42] for exhibit tabs and binders. Defs. Mem. of Law at 9 & n. 4. Such costs constitute routine office overhead and are not compensable here. The amount of $458.23 will be deducted from the costs claimed by plaintiffs.

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[42] Plaintiffs claim $297.05 for "copying and exhibit binders" on 9/9/00. DuCharme Aff., Ex. F at 6. In the absence of itemization, this charge is divided evenly between copying and binders.

d. Photocopies

Plaintiffs seek a total of $24,438.00 for photocopying 97,752 pages of documents in this case, a rate of $.25 per page. DuCharme Aff., Ex. F at 7. Defendants challenge both the sufficiency of the documentation for this claim and the page rate of $.25 claimed by plaintiffs. Defs. Mem. of Law at 9-10.

Plaintiffs' description of this item states in total as follows: "12/15/00-Copy charge at $.25 per sheet x 97,752 sheets-$24,438.00." No supporting documentation or affidavit describing this claim is included. While the documents and, therefore, the photocopying in this case was substantial, it cannot be determined from plaintiffs' submissions whether a portion of the photocopying claimed was for the convenience of counsel or the plaintiffs or was otherwise unnecessary to the litigation.[43] Accordingly, the number of photocopies for which plaintiffs claim reimbursement will be reduced to 75,000. *See Baker v. Power Securities Corp.*, 174 F.R.D. 292, 295 (W.D.N.Y.1997) (reducing amount claimed for photocopying costs for insufficient documentation).

Plaintiffs claim photocopying costs at the rate of $.25 per page. Plaintiffs have submitted no supporting documentation for this rate in the form of rates normally charged in this region for outside or in-office copying or the rate plaintiffs' counsel normally charged its clients for photocopying. Other courts have found photocopying rates of $.10 per page appropriate. *See, e.g., Hogan*, 144 F.Supp.2d at 144; *Rodriguez ex rel. Kelly v. McLoughlin*, 84 F.Supp.2d 417, 426 (S.D.N.Y.1999); *In re Towers Fin. Corp. Noteholders Litigation*, No. 93CIV.0810 (WK)(AJP), 1997 WL 5904, at *1 (S.D.N.Y. Jan. 8, 1997). Multiplying 75,000 pages by

[43] A reduction for that portion of the costs attributable to the ten plaintiffs who did not prevail or have settled their claims is discussed *infra* at subsection h.

$.10 yields a compensable total of $7,500.00. Accordingly, the costs claimed by plaintiffs will be reduced by $16,938.00.

e. Parking

Plaintiffs seek $515.00 for parking fees incurred by their counsel in attending depositions and court proceedings. *See, e.g.,* DuCharme Aff., Ex. F at 4-7. Defendants contend that such fees are not recoverable. Parking fees are recoverable as litigation costs. *See Kuzma v. I.R.S.,* 821 F.2d 930, 933 (2d Cir.1987) (holding that parking fees "clearly represent the reasonable costs of litigation and are recoverable"). Accordingly, plaintiffs' claim for parking fees will be allowed.

f. Court-Ordered Payment to Defendants' Expert Witness

Before trial, a schedule was established for the parties to file motions in limine, including any motions regarding expert witnesses. *See, e.g.,* Docket No. 53 (defendants' motion in limine to preclude plaintiffs' expert witness). Plaintiffs made no such motion. During the liability phase, defendants called Dr. Frank Landy, an industrial psychologist, who had previously been disclosed to plaintiffs, to testify as an expert witness. Plaintiffs' counsel for the first time moved to preclude Dr. Landy's testimony. Dr. Landy's testimony was then postponed to permit plaintiffs and defendants to submit briefs on the issue. Docket Nos. 82, 83. As a consequence of their untimely motion, plaintiffs were ordered to reimburse defendants for the costs incurred in Dr. Landy's postponed appearance. Plaintiffs thereafter reimbursed defendants in the amount of $4,196.26. DuCharme Aff., Ex. F at 5. Plaintiffs now claim this payment as a cost of litigation and seek recovery. However, this cost was incurred by plaintiffs' counsel as a result of their failure to file their motion on time. This cost was not an ordinary litigation expense and, because it resulted from counsel's error, could not ordinarily be charged to a client. Accordingly, the costs claimed by plaintiffs will be reduced by $4,196.26.

g. Lodging

Plaintiffs claim a total of $972.96 for lodging and meals for their counsel in traveling to New York City to defend the depositions of plaintiffs' expert witnesses. DuCharme Aff., Ex. F at 4. Defendants contend that this item lacks sufficient documentation. Defs. Mem. of Law at 11. As defendants note, plaintiffs' claim simply states the total amounts for lodging ($740.96) and meals ($232.00) for the period from May 24-29, 1999. The time records of plaintiffs' counsel indicate that these expenses were incurred by one attorney. *Id.*, Ex. D at 22-23. Thus, plaintiffs' counsel paid $185.24 per night for lodging for four nights in New York City and spent an average of $46.40 per day for five days for meals. Neither amount is unreasonable, their documentation is sufficient here, and plaintiffs will be allowed these costs.

h. Adjustment of Costs

As noted above, plaintiffs' claims for attorneys' fees was adjusted downward by plaintiffs to exclude that portion of the fees incurred on behalf of the ten plaintiffs who previously settled their claims or who did not prevail at trial. DuCharme Aff. at ¶ ¶ 6-8. It does not appear from plaintiffs' motion that any similar exclusion was performed for the costs claimed and that the costs claimed constitute all costs incurred in the litigation. Defendants contend that the costs claimed should be reduced by the portion of those costs attributable to the ten plaintiffs. Defs. Mem. of Law at 7 n. 2. Any costs incurred on behalf of the two nonprevailing plaintiffs are not recoverable here. It is unclear whether the costs incurred on behalf of the eight settling plaintiffs were included in any of their settlement agreements. In the absence of proof that the parties agreed in those settlement agreements that plaintiffs could seek an award for costs incurred on behalf of those eight plaintiffs as part of this motion, plaintiffs have failed to satisfy their burden of demonstrating entitlement to costs on behalf of those plaintiffs.

Accordingly, after the costs claimed by plaintiffs have been reduced in the amounts indicated above, that adjusted claim for costs must be further reduced in accordance with the methodology utilized by plaintiffs to exclude the attorneys' fees incurred on behalf of the ten plaintiffs. Plaintiffs' claim for costs of $58,469.37 must be reduced as indicated above by a total of $21,942.67, yielding an adjusted claim for costs of $36,526.70. The methodology utilized by plaintiffs and accepted by defendants for deducting the portion attributable to the ten plaintiffs requires that this adjusted claim for costs be reduced by 35.71%, or $13,043.68. DuCharme Aff. at ¶ 8. Therefore, plaintiffs are awarded costs in a total amount of $23,483.02.

V. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. Defendants' motion (Docket No. 137) for:

A. Judgment as a matter of law is **DENIED**; and

B. A new trial or remittitur is **DENIED** in all respects except as to the following:

i. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Raymond E. Adams, Clifford J. Levendusky, Neil R. Pareene, William C. Reynheer, Allen G. Sweet and Carl T. Woodman is **GRANTED** *unless* such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $125,000 each on or before **March 8, 2002**; and

ii. Defendants' motion for a new trial on the issue of damages for emotional distress awarded to plaintiffs Bruce E. Palmatier and David W. Townsend is **GRANTED** *unless* such plaintiffs file and serve written acceptances of remittitur of the emotional distress components of their damages awards to $175,000 each on or before **March 8, 2002**;

2. Plaintiffs' motion (Docket No. 138) for:

A. Prejudgment interest is **GRANTED** as to plaintiffs' back pay awards and is **DENIED** in all other respects;

B. Postjudgment interest is **GRANTED**; and

C. An upward adjustment of damages for increased taxes is **DENIED**; and

3. Plaintiffs' motion (Docket No. 197) for an award of attorneys' fees and costs incurred through November 22, 2000 is **GRANTED**, and plaintiffs are awarded attorneys' fees in the amount of $873,868.09 and costs in the amount of $23,483.02.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:	January 8, 2007
Docket Number:	02-7378-cv
Short Title:	Meacham v. Knolls Atomic Power
DC Docket Number:	97-cv-12
DC:	NDNY (ALBANY)
DC Judge:	Honorable David Homer

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of January two thousand six.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, and ALLEN G. SWEET, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

JAMES R. QUINN, Phd., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, PAUL M. GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, WILLIAM C. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND and CARL T. WOODMAN, HILDRETH E. SIMMONS, JR., HENRY BIELAWSKI, RONLAD G. BUTLER, SR., JAMES S. CHAMBERS, ARTHUR J. KASZUBSKI, DAVID J. KOPMEYER, CHRISTINE A.

PALMER, FRANK A. PAXTON, JANICE M. POLSINELLE, TEOFILS F. TURLAIS and BRUCE E. VEDDER

Consolidated-Plaintiffs-Appellees,

v.

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., LOCKHEED MARTIN CORPORATION and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants-Cross-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Clifford B. Meacham, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.** It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken theron.

For the Court,
Thomas Asreen, Acting Clerk

By: /S/_____

Motion Staff Attorney

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides in relevant part:

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

> (A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual

specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.