APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1302

Yury Rinsky,

Plaintiff - Appellee,

v.

Cushman & Wakefield, Inc.,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Massachusetts

[Hon. Allison D. Burroughs, U.S. District Judge]

Filed: March 8, 2019

Before

Barron and Selya, Circuit Judges, and Katzmann,[*]
Judge.

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[*] Of the United States Court of International Trade, sitting by designation.

Sawnie A. McEntire, with whom Benjamin M. McGovern, Holland & Knight LLP, Ralph T. Lepore, III, Paula D. Taylor, and Parsons McEntire McCleary PLLC were on brief, for appellant.

Mark D. Szal, with whom Szal Law Group LLC, John W. Dennehy, and Dennehy Law were on brief, for appellee.

KATZMANN, Judge. In this diversity action, Appellee Yury Rinsky ("Rinksy"), a citizen of Massachusetts, brought suit against his former employer, the New York-based real estate firm Cushman & Wakefield, Inc. ("C&W"), claiming that C&W impermissibly fired him because of his age and disability. C&W removed Rinsky's suit from the Massachusetts Superior Court to the United States District Court for the District of Massachusetts ("district court") in Boston, which applied the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101–107. The jury then found that C&W discriminated against Rinsky on the basis of age and awarded him $1,275,000, comprised of $425,000 in compensatory damages and $850,000 in punitive damages. C&W appeals from this verdict, arguing that the NYCHRL was inapplicable, that the district court judge incorrectly instructed the jury, and that there was insufficient evidence to support the jury's verdict. After navigating through the issues, including a question requiring us to make an informed prophecy about how the highest court in New York would define the burden of proof for punitive damages in a NYCHRL claim, we affirm.

I.

A. Evidence at Trial.

Rinsky began working as a senior systems analyst for C&W's New York City office in 1988. Between 2009 and 2015, Rinsky worked as a software engineer for the company's AS/400 computer system. Beginning in 2012, he worked three to four days a week remotely from his home in New Jersey and spent the remainder of the work week in the New York City office. Rinsky also occasionally worked remotely while visiting his daughter in Boston. Rinsky received performance reviews of "exceeds expectations" and "excellent" throughout his 27-year tenure with C&W.

In December 2014, Rinsky and his wife purchased a home in Winchester, Massachusetts. Rinsky testified at trial that he did not initially intend to move there right away, but rather that he and his wife planned to retire there in a few years to be closer to their daughter and grandchild. In March 2015, Rinsky's broker listed his home in New Jersey for sale. Rinsky learned that same month that his boss, Colin Reid, was transferring to the Miami office. Rinsky testified that he then decided to ask Reid about the possibility of transferring to the Boston office, and that when he raised the question, Reid replied that they would "have plenty of time to talk about it later."

Rinsky then received an offer on his New Jersey home. The offer included the following lease-back provision: "Sellers will have the option to lease the house back at the lease market value until buying another property." Rinsky called Reid to inform him of the offer and again inquired about the possibility of transferring to the Boston office. During the phone call, Reid approved of Rinsky's transfer to Boston but said he needed to check with his boss, Andrew Hamilton. Reid also noted that Rinsky primarily worked remotely anyway. A few days

later, Rinsky asked Reid about Hamilton's response, but Reid informed Rinsky that he had not yet talked to Hamilton about his transfer request. Rinsky testified that a few days later, however, Reid told him that he had spoken with Hamilton, that Hamilton said that he knew that Rinsky "handle[s] most of the work on the AS/400, and he ha[d] no problem for [Rinsky] to work out of the Boston office," and that the Chief Information Officer would be in touch about arranging a cubicle for Rinsky in Boston.

Reid disputed Rinsky's timeline at trial and testified that the first he had heard of Rinsky's relocation was April 30, 2015. He testified that he told Rinsky that the transfer request would need to go through a process, requiring approvals from three other company managers, and warned Rinsky that his own transfer had taken months.

On May 14, Hamilton sent Reid a meeting request to "discuss the situation Yury has put us in with his home purchase in Boston." On Sunday, May 17, Rinsky emailed Reid:

> As discussed I will be moving to Boston on 5/27/2015 for family reasons and need to take 4 personal days after Memorial Day (5/26 – 5/29). I am confident that I can continue to work to the best of my ability remotely. I look forward to sitting down with you and coming up with an arrangement that benefits all involved. Thanks.

Reid replied, "Ok, we will talk on Tuesday."

Hamilton emailed his boss and senior managing director, Leif Maiorini, on May 27 with six steps to replace Rinsky, including hiring a new employee, retaining Rinsky for about nine weeks for knowledge

transfer, and working with the Human Resources manager on Rinsky's exit. Later that same week, Rinsky began working remotely from his Winchester, Massachusetts home. On June 2, a C&W employee emailed Rinsky to ask if he would need his desktop in Boston, to which Rinsky replied, "I will need my desktop in a couple of weeks when I get a cubicle in [the] Boston office." Reid replied, "Pls [sic] wait until I am back in NY tomorrow. Yury might be getting new equipment for Boston, since I have an AS400 consultant sitting there next week." Rinsky continued to work remotely from his Massachusetts home.

Over the next three weeks, senior management exchanged several emails regarding Rinsky's position, his move to Boston, and the need to terminate him. On June 15, Maiorini emailed Hamilton and Reid to say, "we need to move forward with Yuri's [sic] termination as quickly as possible. The position that Yuri [sic] fills is located in NYC. Given that he left without notifying his manager or HR is unacceptable and we need to take action as [sic] quickly." The next day, the Human Resources manager emailed Hamilton and Reid sample resignation language to share with Rinsky. On Monday, June 22, Hamilton and Reid called Rinsky and asked him to report to New York City for work five days a week, beginning the next day, or, in the alternative, to resign from his position. Rinsky protested, sending emails to senior management in which he explained that he believed his job transfer to Boston had been approved. After Rinsky opted not to resign, C&W terminated him on July 10.

Rinsky was 63 years old when he was terminated, and C&W replaced him with an approximately 48-year-old employee. Hamilton and Maiorini were in their forties, while Reid was 61 years old. C&W also treated the request

for a transfer of another employee differently from the way it treated Rinsky's request. In May 2015, another C&W employee, Jay Leiser,[1] moved to Florida. C&W allowed him to work remotely from Florida part of the week and in person in the New York City office the rest of the week. After six months, C&W approved a full-time transfer to Florida.

B. Background and Procedural History.

On January 15, 2016, Rinsky, then living in Winchester, Massachusetts, filed a complaint in Massachusetts Superior Court, asserting claims against his former employer, C&W, for age discrimination and disability discrimination, both in violation of Mass. Gen. Laws ch. 151B[2], promissory estoppel/detrimental reliance, fraudulent representation, and negligent representation. Mass. Gen. Laws ch. 151B, § 9 allows for recovery of "actual and punitive damages" and "award[s] the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust." "[P]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Dartt v. Browning-Ferris Indus., Inc. (Mass.), 691 N.E.2d 526, 537 (Mass. 1998) (quoting Restatement (Second) of Torts

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[1] Neither party cites Leiser's exact age. In closing argument, C&W acknowledged that Leiser was younger than Rinsky, and in his brief before this Court, Rinsky also indicated that Leiser was younger than he.

[2] As required by the Massachusetts exhaustion scheme, see Goldstein v. Brigham & Women's Faulkner Hosp., Inc., 80 F. Supp. 3d 317, 323 (D. Mass. 2015), prior to filing suit under Mass. Gen. Laws ch. 151B in Superior Court, Rinsky first filed an administrative complaint with the Commonwealth of Massachusetts Commission Against Discrimination ("MCAD") and waited the requisite 90 days before suing upon his claim.

§ 908(2) (1979)). Such damages "are appropriate 'where a defendant's conduct warrants condemnation and deterrence.'" Id. at 536 (quoting Bain v. Springfield, 678 N.E.2d 155, 162 (Mass, 1997)). In age discrimination cases, Mass. Gen. Laws ch. 151B, § 9 provides that the court must double and may treble actual damages "if the court finds that the act or practice complained of was committed with knowledge or reason to know" that there was a violation.

Noting that Rinsky was a citizen of Massachusetts, C&W was a corporation organized under the law of the state of New York, with a principal place of business in New York, and the amount in controversy exceeded $75,000, C&W removed the case on diversity grounds to the federal district court. As required by 28 U.S.C. § 1446(a), the complaint served on C&W in the state court action was attached to the Notice of Removal. The complaint was not repleaded in federal court. The case proceeded to discovery under Massachusetts law. C&W moved for and was denied summary judgment under Massachusetts law. The district court then ordered briefing on whether Massachusetts or New York law should apply.

Citing the Massachusetts "functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole," C&W argued that New York law should apply because New York "has the most significant relationship" to the case. See Bushkin Assocs. v. Raytheon Co., 473 N.E.2d 662, 668 (Mass. 1985); City of Haverhill v. George Brox, Inc., 716 N.E.2d 138, 144 (Mass. App. Ct. 1999). According to C&W, Massachusetts was only connected to the case because the plaintiff moved there on his own accord. Moreover, the termination took place in New York and was the key event that engendered this suit. C&W

represented that the New York counterpart to the Massachusetts discrimination statute (Mass. Gen. Laws ch. 151B) pleaded by Rinsky in the underlying complaint was the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290–296. In relevant part, that statute prohibits discrimination in employment on the basis of "age . . . [or] disability." Id. at § 296(a). To prevail in an action, a plaintiff must show that "age was the 'but-for' cause of the challenged adverse employment action." See Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010) (stating that claims under the NYSHRL are "identical" to claims brought under the more stringent stands of the federal Age Discrimination in Employment Act, id. at 105 n.6); Douglas v. Banta Homes Corp., No. 11 Civ. 7217, 2012 WL 4378109, at *3 (S.D.N.Y. Sept. 21, 2012) (stating that, for claims under the NYSHRL, a plaintiff must meet a heightened standard of proving that "age was the 'but-for' cause of the challenged adverse action [and] [i]t is insufficient for the plaintiff to prove simply that age was 'one motivating factor' in the decision" (quoting Colon v. Trump Int'l Hotel & Tower, No. 10 Civ. 4794, 2011 WL 6092299, at *5 (S.D.N.Y. Dec. 10, 2011))). C&W noted that, unlike the Massachusetts statute, the NYSHRL does not provide for punitive damages or for an award of fees.

Rinsky responded that the statute most analogous to the Massachusetts statute was the NYCHRL, N.Y.C. Admin. Code § 8-101 et seq., which expressly provides for recovery of uncapped compensatory damages, including punitive damages and attorneys' fees for claims of age and disability discrimination. Specifically, the NYCHRL provides that persons aggrieved by unlawful discriminatory practices "shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages." N.Y.C. Admin. Code § 8-502(a). To

succeed, a plaintiff must meet a lesser standard than that required by the NYSHRL; age need only be "one motivating factor" or a "substantial factor" for the adverse employment action. See Russo v. N.Y. Presbyterian Hosp., 972 F. Supp. 2d 429, 455–56 (E.D.N.Y. 2013) (citing Brightman v. Prison Health Serv., Inc., 970 N.Y.S.2d 789, 792 (App. Div. 2013)). The NYCHRL further provides that "the court, in its discretion, may award the prevailing party reasonable attorney's fees, expert fees and other costs." N.Y.C. Admin. Code § 8-502(g). Rinsky noted that "the viability of the punitive damages and attorney's fees provisions of the City Human Rights Law [is] not affected in any way by the State Human Rights Law." Grullon v. S. Bronx Overall Econ. Dev. Corp., 712 N.Y.S.2d 911, 917 (N.Y. Civ. Ct. 2000).

The district court ruled that:

> [a]fter reviewing the parties' supplemental briefing [ECF Nos. 45, 46], the Court concludes that New York law applies to this case, and that New York law does not permit Plaintiff to bring common-law claims for fraudulent or negligent misrepresentation or promissory estoppel. The Court further concludes that Plaintiff may bring his discrimination claims pursuant to the New York City Human Rights Law, Admin. Code of City of New York § 8-101 et seq., which provides for the recovery of punitive damages and attorneys' fees. Therefore, the Court will allow Plaintiff to introduce evidence of damages in accordance with this statute. The parties are granted leave to

> supplement their proposed jury instructions. [3]

The district court also determined that the NYCHRL, which provides for punitive damages, was analogous to the initially pleaded claims under Massachusetts law. In short, with the dismissal of Rinsky's common law claims, what remained for the jury was consideration of the age and disability discrimination claims pursuant to the NYCHRL.

The morning of the commencement of the trial and delivery of opening statements by counsel, just as the evidence was about to be introduced, C&W's counsel stated to the court:

> I don't think this particular point has been made clear. C&W objects to the New York City Human Rights Law being applied. I know it's in Your Honor's order from last Friday. Our position on this is what was pled was state law claims. [Rinsky] availed himself of the MCAD. He availed himself of M.G.L. 151B. These are state law claims. There is a New York counterpart to M.G.L. 151B, and that is the New York State Human Rights Law. And our position is although Your Honor has already ruled on this, it would be the state law claims that would be the analog to the Massachusetts claims that have been pled.

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[3] "A federal court sitting in diversity applies state substantive law. To determine the applicable substantive law, the federal court applies the choice-of-law principles of the forum state, here Massachusetts." Levin v. Dalva Bros., Inc., 459 F.3d 68, 73 (1st Cir. 2006) (citations omitted).

The court replied: "Okay. That wasn't clear. So thank you."

Following a five-day trial, the jury returned its verdict. Although Rinsky did not prevail on his claim of disability discrimination, the jury found in his favor on his age discrimination claim, awarding $425,000 in compensatory damages and $850,000 in punitive damages. After the verdict was rendered, C&W filed, pursuant to Federal Rule of Civil Procedure 50(b), a renewed motion for judgment as a matter of law ("JMOL"), in which it argues that the evidence was legally insufficient to find that age or disability discrimination was a motivating factor in Rinsky's termination. C&W also moved for a new trial, pursuant to Federal Rule of Civil Procedure 59(a), on the age discrimination claim. The district court denied C&W's post-trial motions. C&W timely filed an appeal with this court.

C. Jurisdiction.

The district court had subject matter jurisdiction under 28 U.S.C. § 1332(a) because the controversy is between citizens of different states and the amount in controversy exceeds $75,000. We have jurisdiction over the appeal of the district court's final order under 28 U.S.C. § 1291.

II.

C&W argues that the district court impermissibly applied the NYCHRL because the impact of Rinsky's termination was felt in Massachusetts, not New York City, as would be required for the protections of the NYCHRL to apply; that the district court improperly instructed the jury; and that there was insufficient evidence to support the jury's verdict. We discuss each issue in turn.

A. Applicability of the NYCHRL.

On appeal, C&W launches two separate challenges to the applicability of the NYCHRL. Neither is meritorious.

1. Pleading.

C&W argues on appeal that Rinsky waived his NYCHRL claim "by failing to plead a city-based cause of action (or amend his pleadings in order to do so) at any point during the proceedings below." We conclude that this claim has not been preserved for appellate review and that in any event it fails on the merits.

At the outset, we note that the NYCHRL claim is in the case only because after C&W removed the action from Massachusetts state court to federal court, C&W requested that the district court apply New York rather than Massachusetts law. Rinsky's complaint under Massachusetts law raised the issue of age discrimination and punitive damages, the pleadings and proceedings made C&W aware of the issues in dispute, and the parties discussed the NYCHRL prior to trial. As we have detailed, supra pp. 10-11, the district court acceded to C&W's request to apply New York law and then concluded that -- as a choice of law matter -- the analogous New York law claim was one based on NYCHRL, which like Massachusetts law, offered the potential for punitive damages. We have also noted that after trial was under way, C&W merely objected to the district court's decision to apply the city-based cause of action, without providing any explanation or case law for why that decision was wrong. We have "repeatedly warned litigants that 'arguments not made initially to the district court cannot be raised on appeal.'" DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 34 (1st Cir. 2001) (quoting St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1205 (1st Cir. 1994)). "Simply noting an argument in passing

without explanation is insufficient to avoid waiver." Id. (citing McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991)). "A party must 'provide . . . analysis. . .' or 'present . . . legal authority directly supporting their thesis.'" Id. (quoting McCoy, 950 F.2d at 22). Thus, because C&W failed in the district court to "meet [its] 'duty to spell out . . . arguments squarely and distinctly[,]'" any challenge to the decision to apply the NYCHRL as a result of its choice of law analysis is waived. Id. (quoting McCoy, 950 F.3d at 22 (finding that two sentences plus one case citation were insufficient to avoid waiver)). For the same reasons, C&W's post-trial contention, made in a footnote without argument or authority, that Rinsky forfeited his ability to pursue a NYCHRL claim because his original complaint did not include a cause of action under an unidentified Massachusetts city ordinance, must also be deemed waived.[4] See DiMarco-Zappa, 238 F.3d at 34. As the district court observed: C&W "has never raised this point before, and does not explain what principle would allow it to do so for the first time in a post-trial motion. Simply appending an otherwise-waived argument to a jurisdiction argument is not enough." We agree.

C&W's pleading claim also fails on the merits. The Federal Rules of Civil Procedure govern an action once it is removed from the state court. Fed. R. Civ. P. 81(c)(1). See generally 14 James Wm. Moore et al., Moore's Federal Practice – Civil § 81.04 ¶ 3 (2018). "A fundamental purpose of pleadings under the Federal Rules of Civil Procedure is to afford the opposing party fair notice of the claims asserted against him and the grounds on which those claims rest." Rodriguez v. Doral Mortg. Corp., 57 F.3d 1168, 1171 (1st Cir. 1995). Under the circumstances

[4] The district court noted that "no such statute exists in Winchester, where [Rinsky] resides[]."

of this action removed by C&W, with fair notice of the claim and issues provided to C&W as mandated by Federal Rule of Civil Procedure 8(a)(2),[5] Rinsky was not required to newly plead the NYCHRL claim.

We also note that Federal Rule of Civil Procedure 81(c)(2) provides that "[a]fter removal, repleading is unnecessary unless the court orders it." See Moore, § 81.04 ¶ 4(a); Freeman v. Bee Machine Co., 319 U.S. 448, 452 (1943) ("District courts . . . [have] the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules."). "[F]ederal courts will accept, as operative, papers served in state court which satisfy the notice-giving function of pleadings under the Federal Rules of Civil Procedure." Frank B. Hall & Co., Inc. v. Rushmore Ins. Co., 92 F.R.D. 743, 745 (S.D.N.Y. 1981); see also Istituto Per Lo Sviluppo Economico Dell'Italia Meridionale v. Sperti Prods., Inc., 47 F.R.D. 310, 313 (S.D.N.Y. 1969) (rejecting defendant's objection to lack of a formal complaint since plaintiff "supplied the defendant with more details than it could possibly hope to obtain from a formal complaint" and defendant was "fully able to raise any objections and defenses" to plaintiff's claims). That said, "[i]t would not serve the interests of justice . . . to redeem a totally unpleaded, unlitigated claim in circumstances that threaten significant prejudice to a defendant." Rodriguez, 57 F.3d at 1171.

Here, contrary to C&W's assertions, the NYCHRL claim was not an unlitigated claim "tease[d] [] out of adduced facts." Id. On these facts, C&W has shown no prejudice arising out of the failure to replead, nor can it assert successfully that it was denied notice of what claim

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[5] Federal Rule of Civil Procedure 8(a)(2) requires that a complaint "must contain a short and plain statement of the claim showing that the pleader is entitled to relief."

was being litigated. Although it would have been advisable as a matter of "clean" litigation practice for the district court to have ordered repleading, repleading was not required here.[6]

2. Justiciability.

C&W alleges that the district court improperly concluded that the NYCHRL applied to Rinsky's claims because he lived and worked in Massachusetts at the time C&W terminated him, and thus the impact of the adverse employment decision was not felt in New York City. Therefore, according to C&W, the district court lacked subject matter jurisdiction. We are unpersuaded by C&W's contentions.

a. Basic Concepts.

At the outset, we note that C&W confuses the very different concepts of subject matter jurisdiction and justiciability. "[T]he question whether a district court has subject matter jurisdiction over a dispute, as a general matter, is substantively different from the question whether a district court has, or has acquired, the power to adjudicate a particular dispute." AEP Energy Servs. Gas Holding Co. v. Bank of America, 626 F.3d 699, 720 (2d Cir. 2010). "It is well-settled that subject matter jurisdiction 'concerns a court's competence to adjudicate a particular category of cases.'" Id. (quoting Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006)); see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 643 (2002) (noting that subject matter jurisdiction refers to "the

[6] The court, in its "Memorandum and Order Denying Defendant's Post-Trial Motions," stated that had C&W raised the issue in a timely fashion, "the Court would have entertained a motion to amend the complaint . . . Allowing Plaintiff to amend the complaint would have been appropriate once the Court determined, at Defendant's behest, that New York law applied, and such an amendment would not have prejudiced Defendant."

courts' statutory or constitutional power to adjudicate the case" (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89 (1998) (emphasis omitted)). Subject matter jurisdiction "poses a 'whether[]' . . . question: Has the Legislature empowered the court to hear cases of a certain genre?" Schmidt, 546 U.S. at 316. Cf. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (condemning the use of "'drive-by jurisdictional rulings'" that conflate a federal court's subject matter jurisdiction with "the question whether the federal court had authority to adjudicate the claim in suit" (quoting Steel Co., 523 U.S. at 91)).

Here, there can be no doubt the federal district court has original subject matter jurisdiction under 28 U.S.C. § 1332(a)(1), commonly known as the "diversity jurisdiction" provision. The parties are citizens of different states, and the amount in controversy exceeds $75,000, which satisfies 28 U.S.C. § 1332(a)(1). Cf. Grinnell Corp. v. Hackett, 475 F.2d 449, 453 (1st Cir. 1973) ("Justiciability is . . . distinguishable from subject matter jurisdiction, which was here properly not disputed.").

We have recognized a formulation of justiciability that relates to whether there is "a lack of judicially discoverable and manageable standards for resolving [the case]." Id. (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Thus, whether the elements of the legal claims in dispute have been satisfied -- that is, whether the claims are cognizable and thus justiciable -- is another matter to which we now turn.

Throughout trial, C&W contended that it terminated Rinsky because he moved to Massachusetts without first receiving proper approval to transfer his employment to the C&W of Massachusetts ("C&W of MA") office in Boston. C&W argues that the NYCHRL did not apply to Rinsky's claims because he lived and worked in Massachusetts at the time C&W terminated

him, and thus the impact of the decision was felt only outside New York City and not within the reach of the statute. We disagree.

The highest court in New York, the Court of Appeals, has held that when determining whether plaintiffs can bring a claim pursuant to the NYCHRL, the question is whether the impact of an alleged discriminatory decision was felt within New York City. Hoffman v. Parade Publ'n, 933 N.E.2d 744, 746 (N.Y. 2010); see also Vangas v. Montefiore Med. Ctr., 823 F.3d 174, 182–83 (2d Cir. 2016); Robles v. Cox & Co., 841 F. Supp. 2d 615, 624 (E.D.N.Y. 2012). "[T]he impact requirement does not exclude all nonresidents from its protection; rather, it expands those protections to nonresidents who work in the city, while concomitantly narrowing the class of nonresident plaintiffs who may invoke its protection." Hoffman, 933 N.E.2d at 747. In other words, the impact requirement "confines the protections of the NYCHRL to those who are meant to be protected -- those who work in the city." Id. In contrast, the fact that the alleged discriminatory action occurs in New York City is not enough to support a claim under the NYCHRL; "although the locus of the decision to terminate may be a factor to consider, the success or failure of an NYCHRL claim should not be solely dependent on something as arbitrary as where the termination decision was made." Id.

b. Impact Under the NYCHRL.

In light of these tenets, the present claim appears fully justiciable. It is clear that Rinsky's residence in Massachusetts does not either preclude him from bringing a claim under the NYCHRL or support the conclusion that the impact of his termination was not felt in New York City. See id. Nor does the fact that he teleworked from Massachusetts. C&W asserts, unpersuasively, that "the

only rational interpretation of the jury's verdict is that it rejected C&W's theory of job abandonment and instead credited Rinsky's argument that C&W granted his request (either explicitly or implicitly) to be transferred to C&W of MA." Rather, the evidence showed that Rinsky performed work at C&W's New York City office for twenty-seven years. Believing he had permission to work from Massachusetts, Rinsky began to perform his work for the New York City office remotely from his Massachusetts home. Several weeks later, C&W terminated him, purportedly for refusing to conduct his work while physically present in the New York City office. We agree with the post-trial observation of the presiding judge that a "plausible reading of the verdict and the evidence is that [C&W] allowed [Rinsky] to believe that he would be able to transfer to Massachusetts, but never officially authorized or intended to authorize the transfer, thus creating a pretext to fire him after he moved." Therefore, Rinsky was "continuously employed in New York City, despite the fact that he worked remotely from Massachusetts in the days preceding his termination."

The NYCHRL must be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2nd Cir. 2013) (quoting Restoration Act § 7 (amending N.Y.C. Admin. Code § 8–130)). It would create a significant loophole in the statutory protection that the New York Court of Appeals deemed was provided to non-resident employees, Hoffman, 933 N.E.2d at 746, if by the chicanery of misleading or lulling employees into working remotely from outside New York City before terminating them, an employer could immunize itself from liability. Surely, in enacting the NYCHRL, the New York City Council did not countenance that such stratagems in service of

prohibited discrimination would be beyond the reach of the statute. In short, the district court did not err in determining that the NYCHRL applies.[7]

We find instructive the analysis presented in Wexelberg v. Project Brokers LLC, No. 13 Civ. 7904, 2014 WL 2624761 (S.D.N.Y. 2014). In that case, the plaintiff had worked in the defendant's New York City office for six weeks, followed by five weeks of working remotely for the New York City office from his New Jersey home. Id. at *10. The court determined that the plaintiff could bring claims under the NYCHRL and noted that "this arrangement may present quite a different scenario from the caselaw that addresses a claim by an employee stationed at an out-of-state office." Id. at *11; contra Hoffman, 933 N.E.2d at 745-47 (denying NYCHRL protection to a resident of Georgia working for defendant's Atlanta office when his contacts with New York City were limited to communications and occasional personal visits to the New York City office). The Wexelberg court was particularly concerned about the "form of victimization" that would result from "the simple stratagem of directing a targeted employee to do his work at home rather than at the New York [City] office where he normally works, and then terminating him a few days or weeks later" in order to circumvent the NYCHRL. Wexelberg, 2014 WL 2624761, at *11. C&W argues that Wexelberg is distinguishable because C&W did not direct Rinsky to move to Boston and instead Rinsky initiated his own relocation. Be that as it may, the same concerns present in Wexelberg are still at play here.

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[7] In view of our holding, we need not reach Rinsky's alternative argument that C&W should be judicially estopped from contending that the NYCHRL does not apply.

B. Jury Instructions.

C&W contends that the district court committed reversible error in its causation and punitive damages instructions. We do not discern merit in these claims.

1. Causation.

C&W argues that the district court failed to instruct the jury properly regarding the substantive differences between the NYCHRL and the NYSHRL and that this failure prejudiced C&W. Specifically, C&W contends that the instruction incorrectly captured the applicable law because it included the lower standard of causation pursuant to the NYCHRL -- that age must be a substantial or motivating factor in a plaintiff's termination -- which C&W contends is inapplicable to this action. Instead, according to C&W, the district court should have exclusively denoted the stricter "but-for" standard under the NYSHRL. Moreover, C&W contends that, regardless of whether it was proper for the district court to address the NYCHRL and NYSHRL claims in tandem, the phraseology of the instruction still prejudiced C&W by collapsing the distinction between the NYCHRL and NYSHRL.

The relevant portion of the jury instruction is as follows:

> It is unlawful for an employer or its agents to terminate an employee based on his age or because of a disability. In this case, in order for the plaintiff to recover, he must prove by a preponderance of the evidence that his age, a disability, or both was a determining or substantial factor in Defendant Cushman & Wakefield's decision to terminate him. . . .
>
> Age and/or disability are determining factors if Plaintiff would not have been

> terminated but for his age and/or disability. . . .
>
> Evidence of pretext standing alone may but not need support an inference of unlawful bias. Therefore, if the plaintiff has persuaded you that the defendant's explanation for terminating the plaintiff is false, you may but are not required to infer that defendant is covering up a discriminatory intent, motive, or state of mind, although plaintiff must still show that age or disability was a substantial factor.

Additionally, C&W complains of the question posed in the special verdict form asking whether Rinsky "prove[d] by a preponderance of the evidence that his age was a substantial factor in [C&W's] decision to terminate him?"

Claims of preserved instructional error are reviewed under a split standard. Franchina v. City of Providence, 881 F.3d 32, 55 (1st Cir. 2018). "Questions as to whether jury instructions capture the essence of the applicable law are reviewed de novo, while questions as to whether the court's choice of phraseology in crafting its jury instructions is unfairly prejudicial are reviewed for abuse of discretion." Id. (citing DeCaro v. Hasbro, Inc., 580 F.3d 55, 61 (1st Cir. 2009)). The abuse of discretion analysis "focuses on whether the instruction 'adequately illuminate[d] the law applicable to the controverted issues in the case without unduly complicating matters or misleading the jury.'" Shervin v. Partners Healthcare Sys., Inc., 804 F.3d 23, 47 (1st Cir. 2015) (quoting Testa v. Wal–Mart Stores, Inc., 144 F.3d 173, 175 (1st Cir. 1998)).

As we have discussed, the NYCHRL -- not the NYSHRL -- is applicable in this action. The jury instruction language quoted above includes the essence of

applicable law -- that is, that a plaintiff must "establish that there was a causal connection between [the] protected activity and the employer's subsequent action, and must show that a defendant's legitimate reason for [his] termination was pretextual or 'motivated at least in part by an impermissible motive.'" Russo, 972 F. Supp. 2d at 456 (citing Brightman, 970 N.Y.S.2d at 792). Courts interpreting claims under the NYCHRL have rejected the imposition of the heightened "but-for" causation standard governing NYSHRL actions. See, e.g., Calhoun v. Cnty. of Herkimer, 980 N.Y.S.2d 664, 667–68 (2014) (stating that plaintiff's burden of establishing causation is showing that "the defendant was motivated at least in part by an impermissible motive" (quoting Brightman, 970 N.Y.S.2d at 789)); Taylor v. Seamen's Soc. For Children, No. 12 Civ. 3713, 2013 WL 6633166, at *23 (S.D.N.Y. Dec. 17, 2013) (finding that the "but-for" causation standard did not apply to claim under the NYCHRL); Douglas, 2012 WL 4378109, at *3 ("[T]he Court's analysis of the claims brought pursuant to the . . . NYSHRL diverges from its analysis of the claim brought pursuant to the NYCHRL . . . [C]ourts . . . have found that NYCHRL claims remain subject to the standard that requires age to be only a 'motivating factor' for the adverse employment action, rather than the 'but-for' cause.") (quoting Colon, 2011 WL 6092299, at *5) (internal quotation marks omitted). This is because NYCHRL claims are viewed under a more liberal standard than New York state and federal claims. See Douglas, 2012 WL 4378109, at *3; Holleman v. Art Crating Inc., No. 12 Civ. 2719, 2014 WL 4907732 at *22 (E.D.N.Y. Sept. 30, 2014) (citing Mihalik, 715 F.3d at 109–10); see also Sass v. MTA Bus Co., 6 F. Supp. 3d 238, 243 (E.D.N.Y. 2014) (finding no error in instructing jury on the NYCHRL claim that plaintiff had to prove that "one or more of his protected activities played an important role in defendant's decision to

terminate plaintiff," and that "plaintiff's participation in protected activities were more likely than not a motivating factor in defendant's termination of plaintiff"). C&W does not dispute that a "motivating factor" instruction was correct under the NYCHRL. We conclude that the jury instructions did not fail to "capture the essence of the applicable law." Franchina, 881 F.3d at 55.

If anything, the district court's instructions provided a higher burden of proof than was necessary in stating that "[a]ge and or disability are determining factors if [Rinsky] would not have been terminated but for his age and/or disability." Such error was not prejudicial. Because the more lenient "substantial factor" standard is appropriate under the NYCHRL, the inclusion of the stricter "but-for" standard language as well did not prejudice C&W. Where Rinsky's NYCHRL claim prevailed, even with an instruction that included the language of the stricter standard, any error in the instruction was harmless to C&W. See 28 U.S.C. § 2111.

"Jury instructions are intended to furnish a set of directions composing, in the aggregate, the proper legal standards to be applied by lay jurors in determining the issues that they must resolve in a particular case." Teixeira v. Town of Coventry, 882 F.3d 13, 16 (1st Cir. 2018) (quoting United States v. DeStefano, 59 F.3d 1, 2 (1st Cir. 1995)). Here, the instructions, in aggregate, describe the appropriate substantial factor standard. Thus, "[g]iven the satisfactory nature of the district court's jury instructions as a whole, we discern no merit in the appellant's claims of error." Id. at 15.

Finally, we address C&W's contention that the court should have delivered C&W's requested jury instruction:

> Plaintiff must prove, by a preponderance of the evidence, that his age . . . was the "but-

> for" cause of defendant's decision to terminate his employment. The issue in an action for age . . . discrimination is not whether defendant acted with good cause, but whether its business decision would have been made but for a discriminatory motive.

"When . . . a party assigns error to the failure to give a requested instruction, the threshold inquiry is whether the requested instruction was correct as a matter of law." Shervin, 804 F.3d at 47 (citing Elliott v. S.D. Warren Co., 134 F.3d 1, 6 (1st Cir. 1998)). "If that threshold is met, the challenger must make two subsequent showings: first that the proposed instruction is 'not substantially incorporated into the charge as rendered' and second that it is 'integral to an important point in the case.'" Franchina, 881 F.3d at 55–56 (quoting White v. N.H. Dept. of Corr., 221 F.3d 254, 263 (1st Cir. 2000)). Here, as discussed above, the applicable standard for the NYCHRL claims is whether age was a substantial or motivating factor, not whether Rinsky's termination would have occurred but for a discriminatory motive.[8] C&W's proposed instruction thus fails the threshold test, and we discern no error in the district court's decision not to use C&W's suggested instruction.

2. Punitive Damages.

C&W contends that the district court's punitive damages instructions to the jury constituted error for two reasons. First, according to C&W, the NYCHRL does not apply, and thus the jury should not have considered

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[8] There is thus no merit to C&W's complaint that the question posed in the special verdict form -- asking whether Rinsky "prove[d] by a preponderance of the evidence that his age was a substantial factor in [C&W's] decision to terminate him?" - - was in error.

punitive damages that are explicitly authorized under that statute in appropriate cases. However, as we have discussed, the NYCHRL does apply to this action, and so the district court properly permitted the jury to consider whether to award punitive damages.

Second, C&W argues that, even assuming arguendo that consideration of punitive damages under the NYCHRL was proper, the district court erred in not instructing the jury that Rinsky had to prove his entitlement to punitive damages by "clear and convincing evidence." The district court instructed the jury on punitive damages as follows:

> Although uncertainty in the amount of damages does not bar recovery and mathematical precision is not required, you must not speculate, conjecture, or guess in awarding damages. A damages award must be based on just and reasonable inferences from the evidence.
>
> . . .
>
> In addition to awarding damages to compensate the plaintiff, you may but are not required to award plaintiff punitive damages if you find the acts of the defendant were wanton and reckless or malicious. The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant and thereby discourage the defendant and others from acting in a similar way in the future. An act is malicious when it is done deliberately with knowledge of the plaintiff's rights and with intent to interfere fear [sic] with those rights. An act is wanton and reckless when it demonstrates conscious indifference and

> utter disregard of its effect upon the health, safety, and rights of others. If you find that the defendant's acts were not wanton or reckless or malicious, you may not award punitive damages. On the other hand, if you find the defendant's acts were wanton or reckless or malicious, you may award punitive damages.

After the trial concluded and briefing on the post-trial motions was completed, "consistent with the New York City Council's directive to construe the New York City Human Rights Law liberally," Chauca v. Abraham, 89 N.E.3d 475, 477 (N.Y. 2017), the New York Court of Appeals rejected the heightened level of culpability set forth under Title VII of the Civil Rights Act, that had been imposed by Second Circuit precedent. Id.[9] Rather, it ruled that the appropriate, common-law-derived standard, as articulated in Home Ins. Co. v. Am. Home Prod. Corp., 550 N.E.2d 930, 934–35 (N.Y. 1990), was "whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a 'conscious disregard of the rights of others or conduct so reckless so as to amount to such disregard.'" Chauca, 89 N.E.3d at 481 (quoting Home Ins. Co., 550 N.E.2d at 932). Thus, as it turned out, the jury instruction challenged in the instant appeal largely tracked the language set forth by the New

[9] In Farias v. Instructional Sys., Inc., the Second Circuit ruled the federal Title VII standard applies to claims for punitive damages under the NYCHRL. 259 F.3d 91, 101 (2d Cir. 2001). Therefore, according to the Farias court, "the standard in the Second Circuit for liability for punitive damages under the NYCHRL required a showing that the defendant had engaged in intentional discrimination and had done so with malice or with reckless indifference to the protected rights of the aggrieved individual." Chauca v. Abraham, 841 F.3d 86, 91 (2d Cir. 2016) (summarizing the holding in Farias).

York Court of Appeals, and on appeal C&W does not contend that the standard to be used for determining liability for punitive damages as charged by the judge here was in error. Rather, C&W argues that the punitive damages instruction was in error because it did not reflect the plaintiff's burden of offering "clear and convincing evidence" in order to obtain punitive damages, which, according to C&W, was required under New York law.

We are unpersuaded by this argument. First, to provide context, we note that the appropriate burden of proof for punitive damages generally is a matter of debate within New York's courts. See N.Y. Prac., Com. Litig. In New York State Courts § 49:7 (4th ed. 2018). Indeed, the New York Pattern Jury Instructions "does not include a statement of the standard of proof that must be satisfied for an award of punitive damages because the Appellate Divisions are split on the issue" of whether "clear and convincing evidence" or "preponderance of the evidence" is the appropriate standard. N.Y. Pattern Jury Inst. –Civil 2:278 (Comment, Dec. 2018 Update).[10] New York's highest court has not addressed the split. Writing in 1997, then Judge Sotomayor observed that "[t]he federal and state court cases on the question are mired in a morass of ambiguity." Greenbaum v. Svenska Handelsbanken, N.Y., 979 F. Supp. 973, 981–82 (S.D.N.Y. 1997). Surveying the landscape, including New York Court of Appeals and Second Circuit jurisprudence, the court in Greenbaum determined that the appropriate standard is

[10] For entitlement to punitive damages, the Second Department requires that the "clear and convincing evidence" standard be charged, the First Department requires "clear, unequivocal and convincing evidence", and the Fourth Department holds that proof by "a preponderance of the evidence" is sufficient. See N.Y. Pattern Jury Inst. –Civil 2:278 (Comment, Dec. 2018 Update) (citing cases).

"preponderance of the evidence." Id. at 982–83.[11] The relevant terrain has not changed since that decision. Were the issue before us the question of the appropriate burden of proof for punitive damages generally, we might seriously consider certifying the question to New York's highest court. Cf. Chauca, 841 F.3d at 93 (certification by Second Circuit to the New York Court of Appeals on issue of standard of liability for awarding punitive damages under the NYCHRL); see also In re Engage, Inc., 544 F.3d 50, 53–58 (1st Cir. 2008) (certification by First Circuit of question to the Massachusetts Supreme Judicial Court). Though the parties have not requested certification, we would not be precluded from so doing on our own. See Chauca, 841 F.3d at 93.

The issue before us, however, is a narrower one: is clear and convincing evidence required to award punitive damages under the NYCHRL, which does not statutorily specify the quantum of proof? As a Boston-based federal court, we are in essence asked to make an informed prophecy as to the standard that would be articulated by the New York Court of Appeals if confronted with that question. "[A] federal court sitting in diversity should not simply throw up its hands, but, rather, should endeavor to predict how that court would likely decide the question." Butler v. Balolia, 736 F.3d 609, 613 (1st Cir. 2013); see also Travelers Ins. Co. v. 633 Third Assoc., 14 F.3d 114, 119 (2d Cir. 1994). In making such a determination, "the federal

[11] The Greenbaum court noted that in an 1874 negligence case, the New York Court of Appeals held that liability for punitive damages needed to be "clearly established." Cleghorn v. N.Y. Cent. & H.R.R.R., 56 N.Y. 44, 47–48 (1874). However, "a significantly more recent Court of Appeals decision recommends the precise opposite result: that the preponderance standard applies to punitive damages determinations." Greenbaum, 979 F. Supp. at 978 (citing Corrigan v. Bobbs-Merrill Co., 126 N.E. 260, 263 (N.Y. 1920)).

court should consult the types of sources that the state's highest court would be apt to consult, including analogous opinions of that court, decisions of lower courts in the state, precedents and trends in other jurisdictions, learned treatises, and considerations of sound public policy." Butler, 736 F.3d at 613. In our view, the road to the decision is well-lit, with sign posts that guide us to our determination that under the NYCHRL, clear and convincing evidence is not the quantum of proof for punitive damages. Even if we were to assume arguendo that the New York Court of Appeals would apply the "clear and convincing" evidence standard to punitive damages generally, for the reasons discussed below, our conclusion regarding the NYCHRL would not change. The district court thus was correct in declining to so charge.

We turn for resolution of the burden of proof question before us to the New York Court of Appeals decision that is now the touchstone of our understanding for punitive damages under the NYCHRL -- Chauca, 89 N.E.3d 475. There, as we have noted, the Court of Appeals rejected as "contrary to the intent of the [New York City] Council" the application of the stringent standards imposed by Title VII for punitive damages. The court explained:

> [I]n 2005, subsequent to Farias, the City Council passed the Restoration Act, amending the Administrative Code of the City of New York to ensure that "[t]he provisions of [the NYCHRL] shall be construed liberally . . . regardless of whether federal or New York state civil and human rights laws . . . have been so construed" (Administrative Code § 8-130 [a]). Expressing concern that the NYCHRL was

> being too strictly construed, the amendment established that similarly worded state or federal statutes may be used as interpretive aids only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise," and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial purposes" of the local law (Local Law No. 85 [2005] of City of NY §§ 1, 7). In a report on the amendments (see Rep of Comm on Gen Welfare, Aug. 17, 2005, 2005 NY City Legis Ann at 537), the Committee on General Welfare rejected prior reasoning by this Court that the City Council "would need to amend the City HRL to specifically depart from a federal doctrine if it wanted to do so" (Bennett v. Health Mgt. Sys., Inc., 936 N.Y.S.2d 112 [2011]; McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519 [2004]). As a result, this Court has acknowledged that all provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (Albunio v. City of New York, 947 N.E.2d 135 [2011]).

Chauca, 89 N.E.3d at 90. Because the New York Court of Appeals has determined that the standard for recovering punitive damages under the NYCHRL should be less demanding than the federal Title VII standard, C&W's contention that the NYCHRL mandates a burden of clear and convincing evidence -- a burden that is higher than

even the rejected Title VII standard -- fails under the weight of precedent and logic. It contradicts the reasoning and holding of the Chauca court. In short, the suggested instruction was wrong as a matter of law, and the district court did not err in rejecting it. See Shervin, 804 F.3d at 46–48.

C. Sufficiency of the Evidence.

C&W contends that the district court erred "by rejecting C&W's post-verdict challenges to awards of compensatory and punitive damages that were unsupported and against the weight of the evidence." C&W argues that Rinsky fell far short of meeting his burden to show that age discrimination was the "but-for" cause of termination. As discussed supra pp. 18–23, however, the NYCHRL does apply, and Rinsky needed only to show that age discrimination was a "substantial factor" in his termination. We thus review the district court's denial of the post-verdict motions using the "substantial factor" standard. We affirm the district court's denial of the motion for JMOL under de novo review and its denial of the motion for a new trial under abuse-of-discretion review.

We review de novo the district court's post-verdict denial of the Federal Rule of Civil Procedure 50 motion for JMOL, "tak[ing] the facts in the light most favorable to the verdict." Jennings v. Jones, 587 F.3d 430, 438 (1st Cir. 2009); see also Kennedy v. Town of Billerica, 617 F.3d 520, 527 (1st Cir. 2010). "We reverse the district court's denial of such motions if the jury would not have a legally sufficient evidentiary basis for its verdict." Kennedy, 617 F.3d at 527 (quoting Jennings, 587 F.3d at 436). "This review is weighted toward preservation of the jury verdict, which stands unless the evidence was so strongly and overwhelmingly inconsistent with the verdict that no reasonable jury could have returned it." Crowe v. Bolduc,

334 F.3d 124, 134 (1st Cir. 2003) (citing Primus v. Galgano, 329 F.3d 236, 241–42 (1st Cir. 2003)); see also Granfield v. CSX Transp., Inc., 597 F.3d 474, 482 (1st Cir. 2010); Sanchez v. P.R. Oil Co., 37 F.3d 712, 716 (1st Cir. 1994).

We review for abuse of discretion the district court's post-verdict denial of the Federal Rule of Civil Procedure 59 motion for a new trial. Jennings, 587 F.3d at 438 (citing Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) and Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925 (1st Cir. 1997)).

> Appellate review of a district court's disposition of a Rule 59(a) motion is even more circumscribed [than appellate review of a denial of a motion for JMOL]; a district court may set aside a jury's verdict and order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice. And, moreover, a trial judge's refusal to disturb a jury verdict is further insulated because it can be reversed solely for abuse of discretion.

Sanchez, 37 F.3d at 717 (internal citations omitted) (citing Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 6 (1st Cir. 1982); Freeman v. Package Mach. Co., 865 F.2d 1331, 1334 (1st Cir. 1988); Milone v. Moceri Family, Inc., 847 F.2d 35, 37 (1st Cir 1988). Abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988). "[W]e will reverse a judge's decision not to grant a motion for a new trial 'only if the verdict is so seriously mistaken, so clearly against the law

or the evidence, as to constitute a miscarriage of justice.'" Gutierrez-Rodriguez, 882 F.2d at 558 (quoting Levesque v. Anchor Motor Freight, Inc., 832 F.2d 702, 703 (1st Cir. 1987)).

C&W has failed to meet its burden of showing either that there was no legally sufficient basis for the verdict or that the district court abused its discretion. We thus affirm the district court's denial of JMOL and the motion for a new trial.

As we have noted, C&W contends that Rinsky was fired because he moved to Boston without its approval, and then refused to return to New York when C&W asked him to do so. C&W argues that "although Rinsky premised his entire case on the notion that C&W created a 'pretext' to terminate him, there is not one iota of evidence in the record to explain why C&W would have been motivated to do so." C&W further contends that "[t]here also was no direct evidence in the record" to show age discrimination and provides a litany of reasons as to why it would not have made sense for Rinsky's age to motivate his termination, from his "excellent performance reviews" to his experience with the AS/400 system and the age of his replacement. C&W, in sum, asserts that the lack of direct evidence on the record plainly showing age discrimination creates an evidentiary insufficiency, entitling C&W either to JMOL or a new trial.

C&W, however, uses the wrong standard. As the district court noted in its order and memorandum denying C&W's motion, the NYCHRL is "uniquely broad and protective," allowing for the "use of circumstantial evidence, by disproving Defendant's proffered non-discriminatory explanation, and then relying on appropriate inferences." The district court followed the standard as summarized by the Second Circuit in Mihalik, 715 F.3d at 108–09:

> In amending the NYCHRL, the City Council expressed the view that the NYCHRL had been "construed too narrowly" and therefore "underscore[d] that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes." Restoration Act § 1. To bring about this change in the law, the Act established two new rules of construction. First, it created a "one-way ratchet," by which interpretations of state and federal civil rights statutes can serve only "'as a floor below which the City's Human Rights law cannot fall.'" Loeffler, 582 F.3d [268,][] 278 [(2d 2009)] (quoting Restoration Act § 1). Second, it amended the NYCHRL to require that its provisions "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title[,] have been so construed." Restoration Act § 7 (amending N.Y.C. Admin. Code § 8-130).

While noting that the Restoration Act, amending the NYCHRL, set forth a "one-way ratchet," such that the federal standard is the floor, the Mihalik court also observed that "[i]t is unclear whether, and to what extent, the McDonnell Douglas burden-shifting analysis [used for federal age discrimination claims] has been modified for NYCHRL claims." Id. at 110 n.8; see also McDonnell

Douglas Corp. v. Green, 411 U.S. 792 (1973). The answer to this question was given in 2016 by New York City's Local Law No. 35, amending Administrative Code § 8-130 "to provide additional guidance to the development of an independent body of jurisprudence for the [NYCHRL] that is maximally protective of civil rights in all circumstances." N.Y.C. Local L. 35 of 2016 § 1 (Mar. 28, 2016) (codified at N.Y.C. Admin. Code § 8-130). The amendment ratified three decisions under the NYCHRL, including Bennett v. Health Mgmt. Sys., Inc., 936 N.Y.S.2d 112, 116 (App. Div. 2011). It explained that each of the cases "correctly understood and analyzed the liberal construction requirement" of the NYCHRL and "developed legal doctrines accordingly that reflect the broad and remedial purposes of [the NYCHRL]." N.Y.C. Admin. Code § 8-130. See also Morse v. Fidessa Corp., 84 N.Y.S.3d 50, 52–53 (App. Div. 2018) (quoting Restoration Act and March 8, 2016 Committee on Civil Rights report accompanying Local Law 35). Noting that different evidentiary frameworks may be appropriate for different kinds of cases, Bennett explained that to establish a claim for discrimination under the NYCHRL, a plaintiff must satisfy either the McDonnell Douglas standard, or a lesser burden in cases analyzing liability under a mixed motives theory. See Bennett, 936 N.Y.S.2d at 117–21 (comparing various burdens of proof in discrimination claims). Rinsky's age discrimination claim satisfies both.

Discriminatory intent can be difficult to prove. In Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000), the Supreme Court held that the McDonnell Douglas framework is applicable to federal age discrimination claims ("Reeves/McDonnell Douglas"), setting forth when it is appropriate for a jury to infer discrimination if it declines to credit the employer's explanation for an adverse employment action. See

Reeves, 530 U.S. at 143–44. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive." Id. at 147. A jury may infer unlawful discrimination where there is (1) a prima facie case of discrimination and (2) "sufficient evidence to find that the employer's asserted justification is false." Id. at 148. This does not mean "that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability." Id. Where, for example, "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue . . . ", "an employer would be entitled to judgment as a matter of law." Id.

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors . . . includ[ing] the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . .

Id. at 148–49. In such cases, a court should not order JMOL for the defendant absent sufficient evidence "to conclusively demonstrate that [the employer's] actions were not discriminatorily motivated." Id. at 153 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978)).

As discussed above, one way for a plaintiff to establish discrimination under the NYCHRL is to fulfill the requirements of the Reeves/McDonnell Douglas criteria. Here, the first element of the Reeves/McDonnell Douglas inquiry is satisfied, as there is sufficient evidence on the record for the jury to find that Rinsky met his

burden of showing a prima facie case of discrimination. A prima facie case of discrimination under federal law requires that:

> (i) at the relevant time the plaintiff was a member of the protected class; (ii) the plaintiff was qualified for the job; (iii) the plaintiff suffered an adverse employment action; and (iv) the adverse employment action occurred under circumstances giving rise to an inference of discrimination, such as the fact that the plaintiff was replaced by someone 'substantially younger.'

Roge v. NYP Holdings, Inc., 257 F.3d 164, 168 (2d Cir. 2001) (quoting O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996)) (applying the standard for a prima facie case of racial discrimination by an employer, set forth in McDonnell Douglas, 411 U.S. at 793, to an age discrimination case); see also Woodman v. WWOR-TV, Inc., 411 F.3d 69 (2d Cir. 2005). At 63 years old, Rinsky was indisputably a member of the protected class. Both parties, moreover, agree that Rinsky was qualified for his job, receiving "excellent" performance reviews, and that C&W terminated him. The fourth requirement of a prima facie showing is met by substantially the same record evidence as that of the finding that C&W's non-discriminatory justification was false, including C&W's replacement of Rinsky with a "substantially younger" employee, fifteen years his junior, see O'Connor, 517 U.S. at 313, and buttressed by substantially the same record evidence discussed below supporting the finding that C&W's non-discriminatory justification was false. We conclude that Rinsky established a prima facie case of age discrimination.

The second element of the Reeves/McDonnell Douglas inquiry is also satisfied, as there is sufficient

evidence on the record for the jury to find that C&W's justification was false. Making inferences most favorable to the plaintiff, a reasonable jury could find from the evidence of record that Rinsky had long worked remotely for C&W, C&W knew of Rinky's intent to move to Boston, C&W treated other employees requesting transfers differently, and C&W never warned Rinsky that his move to Boston could result in termination. Rinsky was the oldest member of his department, and C&W replaced Rinsky with a significantly younger employee. Lastly, the record evidence shows that C&W began formulating a plan to replace Rinsky prior to his move to Boston. The district court thus concluded that "the evidence presented at trial strongly suggested that Defendant's asserted reason for firing Plaintiff was false." The district court found that the evidence suggested "Defendant allowed Plaintiff to think that he had permission to transfer, waited until he moved to Boston and his replacement was trained, and then used the move as a pretense to fire him." We conclude that the district court's finding was not "so clearly against the law or the evidence" and therefore not an abuse of discretion. Gutierrez-Rodriguez, 882 F.2d at 558 (quoting Levesque, 832 F.2d at 703).

With the first two elements met, we then must examine, as the district court rightly stated, "whether the record 'conclusively revealed' an alternative, non-discriminatory reason for the employer's decision." Reeves, 530 U.S. at 148–49. On C&W's side of the ledger, the record does indicate that Reid was close to Rinsky in age, Rinsky was skilled at his position, and senior management had concerns about the number of employees working remotely. However, nothing on the record conclusively shows that C&W's motivation for firing Rinsky was non- discriminatory. The district court noted "the lack of any indication in the record of an

obvious, alternative, non-discriminatory explanation for Plaintiff's firing" and found "the jury permissibly inferred that Defendant's continued insistence that it fired Plaintiff for moving without permission was covering up an impermissible motive, even where there was little direct evidence of age discrimination." Considering both C&W's burden to show conclusively the non-discriminatory reason for Rinsky's termination and our obligation to weight our review of the record "toward preservation of the jury verdict," we conclude that the record provides an insufficient basis for us to overturn the district court's denial of JMOL. Crowe, 334 F.3d at 134. The district court, therefore, did not abuse its discretion, as the evidence substantially supports its finding that Rinsky satisfied the age discrimination analysis under Reeves/McDonnell Douglas.

As we have noted, apart from the more stringent federal McDonnell Douglas framework, a plaintiff may also establish a claim of age discrimination in violation of the NYCHRL under the less onerous mixed motive framework, as the district court recognized.[12] The

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[12] The judge stated:

> Alternatively, a plaintiff may also prevail in a NYCHRL action "if he or she proves that unlawful discrimination was one of the motivating factors, even it was not the sole motivating factor for an adverse employment decision." Melman v. Montefiore Med Ctr., 989 A.D.3d 107, 127 (N.Y. App. Div. 2012). "If a plaintiff can prevail on a 'mixed motive' theory, it follows that he or she need not prove that the reasons proffered by the employer for the challenged action was actually false or entirely irrelevant." Id. Rather, the plaintiff must demonstrate that the challenged action was "more likely than not based in whole or in part on

difference in analysis has been well articulated in a recent age discrimination case arising under the NYCHRL:

> The McDonnell Douglas framework and the mixed motive framework diverge only after the plaintiff has established a prima facie case of discrimination . . . and the defense has responded to that prima facie case by presenting admissible evidence of "legitimate, independent, and nondiscriminatory reasons to support its employment decision" (Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 819 N.E.2d 998 [2004] [internal quotation marks omitted]).
>
> At that point, under McDonnell Douglas, the burden shifts to the plaintiff to produce evidence tending to "prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination." (id.). By contrast, under the mixed motive analysis, the plaintiff may defeat the defendant's evidence of legitimate reasons for the challenged action by coming forward with evidence from which it could be found that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision" (Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 127, 946 N.Y.S.2d 27 [1st Dept.2012]).

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discrimination." Id. (quoting Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80 (2d Cir. 2009)).

Hamburg v. NYU Sch. of Med., 62 N.Y.S.3d 26, 32 (App. Div. 2017).

We have already concluded that the district court did not err in concluding that Rinsky established at trial a prima facie case of discrimination. We have further concluded that the district court did not abuse its discretion in finding that the trial evidence "strongly suggested that [C&W]'s asserted reason for firing [Rinsky] was false." Thus, under a mixed motive theory of liability, the jury's verdict could also be sustained. In short, whether analyzed under the McDonnell Douglas framework or the mixed motive framework, we affirm the district court's denials of C&W's motions for JMOL and a new trial.

Finally, we are mindful of the "maximally protective" reach of the NYCHRL in addressing claims of discrimination. N.Y.C. Admin. Code § 8-130. "The independent analysis of NYCHRL claims must be targeted to understanding and fulfilling the NYCHRL's uniquely broad and remedial purposes, which go beyond those of counterpart state and federal civil rights laws." Id. at Case Notes ¶3. The New York City government was clear as to the legislative intent of the NYCHRL: "it is the intention of the Council that judges interpreting the City's Human Rights Law are not bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed." David N. Dinkins, Mayor, New York City, Remarks at Public Hearing on Local Laws (June 18, 1991) (on file with Committee on General Welfare) available at http://antibiaslaw.com/sites/default/files/all/LL39LegHist-Mayor.pdf. As we have noted, that commitment has only been strengthened by the two rules of construction set forth in the Restoration Act in 2005 and by the most recent amendment in 2016. Here, the district court first reviewed

C&W's motions for JMOL and a new trial under the more restrictive federal employment law. Finding first that the record sufficiently supported the jury's finding of age discrimination under this more restrictive standard, the district court then found the jury's verdict to be supported under the more "liberally . . . construed" NYCHRL. We agree.

III.

We uphold the district court's ruling denying C&W's motion for JMOL or a new trial, and we reject C&W's other assignments of error. Therefore, we **affirm** the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1302

Yury Rinsky,

Plaintiff - Appellee,

v.

Cushman & Wakefield, Inc.,

Defendant - Appellant.

Appeal from U.S. District Court for the District of Massachusetts
(16-cv-10403-ADB)

JUDGMENT

Entered: March 8, 2019

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Benjamin M. McGovern
Edward F. Whitesell Jr.
Ralph T. Lepore
Robert R. Berluti
Sawnie A. McEntire
Paula Danielle Taylor
John William Dennehy
Mark D. Szal

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 16-cv-10403-ADB

Yury Rinsky,
Plaintiff,

v.

Cushman & Wakefield, Inc.,
Defendant.

MEMORANDUM AND ORDER
DENYING DEFENDANT'S POST-TRIAL MOTIONS

Filed: March 07, 2018

BURROUGHS, D.J.

Plaintiff Yury Rinsky filed this case in Massachusetts state court in January 15, 2016, alleging that Defendant Cushman & Wakefield, Inc., his former employer, discriminated against him based on his age and disability. [ECF No. 1-1 at 5–13]. Defendant removed the case to this Court on February 25, 2016, invoking the Court's diversity jurisdiction. [ECF No. 1]. After a five-day jury

trial, on April 14, 2017, the jury returned a verdict finding that Plaintiff's age was a substantial factor in Defendant's decision to terminate him, but that Plaintiff's disability, if any, was not a substantial factor in the decision to terminate. [ECF No. 60]. The jury awarded Plaintiff $290,000 in back pay, $135,000 in front pay, $850,000 in punitive damages, and nothing for emotional distress, resulting in a total award of $1,275,000. Id. Now before the Court are Defendant's renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) [ECF No. 74] and its motion for a new trial under Fed. R. Civ. P. 59(a) [ECF No. 75]. For the reasons set forth below, both motions are denied.

I. STANDARD OF REVIEW

Defendant's Rule 50 motion for judgment as a matter of law is based on the contention that the evidence was not sufficient to support the jury's verdict. "A party seeking to overturn a jury verdict faces an uphill battle." Marcano Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 167 (1st Cir. 2005). "Courts may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Id. (quoting Rivera Castillo v. Autokirey, Inc., 379 F.3d 4, 9 (1st Cir. 2004)). In evaluating a motion for judgment as a matter of law, the Court must consider "the evidence presented to the jury, and all reasonable inferences that may be drawn from such evidence, in the light most favorable to the jury verdict." Osorio v. One World Techs. Inc., 659 F.3d 81, 84 (1st Cir. 2011) (quoting Granfield v. CSX Transp., Inc., 597 F.3d 474, 482 (1st Cir. 2010)).

In contrast, the Court's power to grant a Rule 59 motion for a new trial "is much broader than its power to grant a [motion for judgment as a matter of law]."

Jennings v. Jones, 587 F.3d 430, 436 (1st Cir. 2009). The Court may grant a motion for a new trial "if the verdict is against the demonstrable weight of the credible evidence," or if it "results in a blatant miscarriage of justice." Foisy v. Royal Maccabees Life Ins. Co., 356 F.3d 141, 146 (1st Cir. 2004) (quoting Sanchez v. P.R. Oil Co., 37 F.3d 712, 717 (1st Cir. 1994)). "The district court may 'independently weigh the evidence' in deciding whether to grant a new trial." Cham v. Station Operators, Inc., 685 F.3d 87, 97 (1st Cir. 2012) (quoting Jennings, 587 F.3d at 435). "[A] district court wields 'broad legal authority' when considering a motion for a new trial. . . ." Jennings, 587 F.3d at 436 (quoting de Perez v. Hosp. del Maestro, 910 F.2d 1004, 1006 (1st Cir.1990)). At the same time, a "district judge cannot displace a jury's verdict merely because [she] disagrees with it' or because 'a contrary verdict may have been equally . . . supportable.'" Id. (quoting Ahern v. Scholz, 85 F.3d 774, 780 (1st Cir. 1996)). "[W]hen an argument that the evidence was insufficient forms the basis of a motion for new trial, the district court is generally well within the bounds of its discretion in denying the motion using the same reasoning as in its denial of a motion for judgment as a matter of law." Lama v. Borras, 16 F.3d 473, 477 (1st Cir. 1994).

II. EVIDENCE AT TRIAL

In reaching its verdict, the jury could have found the following facts, based on the evidence presented at trial.[1]

Plaintiff began working for Defendant in New York City in 1988. From 2009 to 2015, he was employed as a

[1] While the Court is not required to weigh evidence or draw inferences in favor of the jury's verdict for purposes of a Rule 59 motion, in this case, the Court does not believe that the verdict is against the weight of the evidence or that the jury erred in making the credibility determinations or drawing the inferences that it did.

software engineer specializing in the AS/400 computer system. In 2012, Defendant instructed Plaintiff to work remotely part time due to a lack of space in the New York City office, so from 2012 to 2015, Plaintiff worked remotely three to four days a week, spending only one or two days per week in the office. Defendant did not impose any restrictions as to where Plaintiff performed remote work, and sometimes Plaintiff would work remotely from Boston while visiting his daughter. During this time, Plaintiff continued to receive excellent annual performance reviews.

Plaintiff learned in March 2015 that his supervisor, Colin Reid, was transferring from New York to Miami. Later the same month, Plaintiff asked Reid if he could transfer to Boston. Reid responded that he was too busy to discuss it at the time, but that they could talk about it later. In April 2015, Plaintiff informed Reid that he had sold his house, but with the option to continue living in it after the sale went through. Plaintiff again requested permission to transfer to Boston. Reid said he was willing to allow Plaintiff to transfer, especially given the fact that Plaintiff was already working remotely half of the time, although he would have to check with his manager, Andrew Hamilton. A few days later, Plaintiff asked Reid if he had spoken to Hamilton yet; Reid responded that he had not. Approximately four days later, in mid-April 2015, Plaintiff asked again, and Reid responded that Hamilton had said it was "no problem" for Plaintiff to work out of the Boston office. Plaintiff asked Reid what the next steps were, and Reid responded that the chief information officer would need to arrange for a cubicle for Plaintiff in the Boston office. At this point, Plaintiff understandably believed that his transfer to Boston had been approved.

On Sunday, May 17, 2015, Plaintiff sent an email to Reid in which he stated that he planned to move to Boston

on Wednesday, May 27, and asked to take four personal days off near that time. Reid responded, "Okay. We will talk on Tuesday [May 19]." When Plaintiff spoke with Reid on May 19, they discussed logistical matters such as his equipment and who would be Plaintiff's contact in the Boston office. When Plaintiff offered to come to the New York office one day per week, Reid stated that might not be necessary, and that Plaintiff would likely only have to come to New York occasionally, as needed, or possibly at the end of each month, when the workload was the heaviest. Plaintiff's last day in the New York office was May 22. On that day, he met with Reid to discuss his current projects and what he would work on in June. Plaintiff also said goodbye to his coworkers in the New York office, and told them he was transferring to Boston.

Throughout the time period at issue, neither Reid nor any other individual mentioned to Plaintiff that Defendant had a specific process for handling transfer requests, nor did anyone tell Plaintiff that any other authorization or additional steps were required beyond obtaining permission from Reid and Hamilton. As far as Plaintiff knew, Defendant did not have any official or unofficial policies concerning transferring offices. Prior to his departure, nobody told Plaintiff that his transfer request was still pending, that there was any problem with it, that it was not approved, or that he might lose his job if he moved.

Plaintiff began working from Boston on May 28. Shortly thereafter, an employee of Defendant who managed computer inventory emailed Plaintiff to ask if he still needed his desktop computer, which was in New York. Plaintiff replied, copying Reid, that he would need it in a couple weeks once he was assigned a cubicle in the Boston office. Reid sent an email in response, copying Hamilton, stating that Plaintiff might be getting new equipment in

Boston, because a consultant would be sitting at Plaintiff's previous space in New York. Plaintiff performed his work remotely during the first few weeks of June. He communicated regularly with Reid, who never mentioned any issues concerning the transfer.

Plaintiff was invited to participate in a conference call on June 22, 2015 with Reid, Hamilton, and a representative from HR, Katrina Hicks. During the call, Hamilton informed Plaintiff that he would be required to be physically present in the New York office five days per week, beginning the following day. Hamilton also stated that it would be in Plaintiff's best interest to resign, which Plaintiff declined to do. After the call ended, Reid sent an email, with a draft resignation letter attached, to Plaintiff, copying Hamilton and Hicks, that stated, "this is the response that HR is expecting from you based on our conversation this morning."[2] The proposed text included this statement: "After informing you of my decision to relocate and understanding the need for my role is located in [Defendant's] New York office, I have decided not to continue my employment." Plaintiff refused to submit the proposed resignation letter. The next day, Plaintiff lost access to the AS/400 system, and after a period of review, on July 14, 2015, Reid sent an email to Plaintiff stating that he had been terminated.

Unbeknownst to Plaintiff, Defendant had formulated a plan to hire a replacement and then terminate Plaintiff even before Plaintiff moved to Boston. On May 14, 2015,

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[2] The email misspelled Plaintiff's first name as "Yuri," even though Reid had worked with Plaintiff for 27 years. In addition, Hicks stated that she worked with Reid and a "partnership" of others to prepare the letter terminating Plaintiff's employment, although the letter did not indicate that anyone other than Reid was involved in its preparation.

Reid sent an email to Hamilton asking him to "think through the options and risks of replacing [Plaintiff] (via contractor or permanent role) so we can evaluate all the pros and cons of keeping and replacing."[3] Reid and Hamilton had a meeting to discuss the matter on May 19. On May 20, Reid contacted Edgardo Felix, Plaintiff's eventual replacement, to ask if he was interested in working for Defendant, and to inquire as to whether he had experience with the AS/400 system. On May 27, Hamilton sent an email to Leif Maiorini, his supervisor, who was a senior managing director for Defendant. The email explained that Hamilton, Reid, and Hicks had agreed on a plan to onboard Plaintiff's replacement, transfer knowledge from Plaintiff to his replacement, retain Plaintiff for about nine weeks, and then work with Hicks on the "official exit (mitigating litigation risks)." Felix was hired as a contractor to work on the AS/400 system in early June. For several weeks leading up to the June 22 phone call with Plaintiff, Reid, Hamilton, Maiorini, Hicks, and Craig Cuyar, the head of the department, corresponded via email about when to conduct what they referred to as Plaintiff's "termination" or "separation," depending on the progress of the knowledge transfer and Plaintiff's work on key tasks.

During the time at issue, Defendant did not maintain a formal process for evaluating employee transfer requests, and there was no written policy concerning transfers. Instead, transfer requests were discussed verbally by the managers involved, as well as HR. Maiorini testified that,

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[3] The header of the email indicates that it was sent by Reid to Hamilton, and Reid testified that he sent the email, but the body of the email is addressed to Reid from Hamilton, and based on the content, it appears more likely that Hamilton was the sender. The email's relevance to the case is essentially the same either way, however.

in general, the process was that an employee would make a verbal transfer request to his or her manager, and then the manager would be responsible for discussing the request with the other, more senior individuals whose approval was necessary. No further action from the employee was required. Maiorini characterized the process as "informal," and stated that managers can skip steps or ignore steps in the process.

In May 2015, another employee of Defendant, Jay Leiser, who worked in the same department as Plaintiff, asked to transfer to Florida. Leiser informed his manager, Bill Wolf, that his wife had an opportunity to start a dental practice in Florida, and that he had already made plans to sell his home in New York and move to Florida. In an email sent the next month, on June 4, Cuyar informed Maiorini that he wanted to address Leiser's compensation since he was moving to an area with a lower cost of living, but that he wanted to handle Plaintiff's move differently, following the precedent established when a previous employee moved without informing Defendant first, despite the fact that Plaintiff's situation was more analogous to Leiser's. Not long after, Leiser moved to Florida. For the first six months, Leiser worked remotely one or two days per week, and came back to New York to work in person the rest of the time. Defendant then granted him permission to transfer to Florida. In addition, another employee in the department, Steve Lipka, transferred to Boston in or around 2011.

Plaintiff was 63 years old at the time he was terminated. He was the oldest person in his department. Plaintiff's replacement, Felix, was approximately 48 years old. Hamilton, Cuyar, and Maiorini were all in their 40s, while Reid was approximately 61.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendant first contends that it is entitled to judgment as a matter of law, or alternatively, that it should receive a new trial, because the jury's verdict was unsupported and against the weight of the evidence given that there was no direct evidence to prove that Plaintiff was terminated because of his age. Instead, Defendant claims that Plaintiff was fired because he moved to Boston without Defendant's approval, and then refused to return to New York when Defendant asked him to do so.[4]

Plaintiff brought his claim pursuant to the New York City Human Rights Law ("NYCHRL"), which prohibits many forms of discrimination, including, as relevant here, forbidding employers from discriminating based on age. N.Y.C. Admin. Code § 8-107. For many years, courts construed the NYCHRL "to be coextensive with its federal and state counterparts." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 108 (2d Cir. 2013). In 2005, however, the New York City Council passed the Local Civil Rights Restoration Act of 2005, which requires courts to perform an "independent analysis" of NYCHRL claims, because the council believed that courts were construing the NYCHRL too

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[4] Plaintiff argues that the district court cannot grant Defendant's motion for judgment as a matter of law where the evidence presented at trial was not substantially different from that considered at the summary judgment stage. Plaintiff's argument is based on a case in which the Second Circuit determined that, after the trial court's grant of summary judgment had been reversed by the appellate court, the trial court could not then grant judgment as a matter of law based on essentially the same evidence. See Piesco v. Koch, 12 F.3d 332, 341–42 (2d Cir. 1993). In this case, however, where there has been no appeal and no appellate decision, the rule set forth in Piesco is inapposite.

narrowly. Id. at 109. The Restoration Act "established two new rules of construction." Id. "First, it created a 'one-way ratchet,' by which interpretations of state and federal civil rights statutes can serve only 'as a *floor* below which the City's Human Rights law cannot fall.'" Id. (quoting Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009)). "Second, it amended the NYCHRL to require that its provisions 'be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with [comparably-worded provisions], have been so construed.'" Id. (quoting Restoration Act § 7). "Thus, even if the challenged conduct is not actionable under federal and state law, federal courts must consider separately whether it is actionable under the broader New York City standards." Id. The Second Circuit has regularly noted error in district court decisions where the district courts applied federal standards to NYCHRL claims. Id. (citing cases).

For claims based on federal law, courts regularly acknowledge that "'employers are rarely so cooperative as to include a notation in the personnel file' that their actions are motivated by factors expressly forbidden by law." Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994) (quoting Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 464 (2d Cir. 1989)). "[D]irect evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it." Id. (quoting Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1112 (2d Cir. 1988)). "[A]n employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent," which means that "a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence." Id.

Due to the fact that discriminatory intent can be difficult to prove, the Supreme Court developed an analytic framework in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147–49 (2000) to determine where it is appropriate for a jury to infer discrimination if it declines to credit the employer's explanation for an adverse employment action. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Reeves, 530 U.S. at 147. "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." Id. "Evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation." Holcomb v. Iona Coll., 521 F.3d 130, 141 (2d Cir. 2008) (quoting Reeves, 530 U.S. at 154 (Ginsburg, J., concurring)). "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves, 530 U.S. at 148. Of course, this does not mean "that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability." Id. For instance, where "the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue," the employer could be entitled to judgment as a matter of law. Id. Therefore, "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors," including "the strength of the

plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case." Id. at 148–49.

Alternatively, a plaintiff may also prevail in a NYCHRL action "if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision." Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 127 (N.Y. App. Div. 2012). "If a plaintiff can prevail on a 'mixed motive' theory, it follows that he or she need not prove that the reason proffered by the employer for the challenged action was actually false or entirely irrelevant." Id. Rather, under this analysis, the plaintiff must demonstrate that the challenged action was "more likely than not based in whole or in part on discrimination." Id. (quoting Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80 (2d Cir. 2009)).

Here, the evidence presented at trial strongly suggested that Defendant's asserted reason for firing Plaintiff was false. Defendant's employee, Reid, told Plaintiff that in order to transfer to Boston, he only had to obtain permission from Reid and Hamilton, and further conveyed that he had received that permission. Plaintiff was not aware of any policy to the contrary, or any remaining issue that needed to be resolved. During the period of time when Plaintiff made arrangements to move to Boston, told his colleagues that he was transferring, began working in Boston, and asked for equipment and space in Boston, none of Defendant's employees told Plaintiff that he did not have permission to transfer or that there was any problem with the transfer. Meanwhile, however, Defendant's employees were formulating a plan to fire Plaintiff.

Based on this evidence, it appears that Defendant allowed Plaintiff to think that he had permission to transfer, waited until he moved to Boston and his replacement was trained, and then used the move as a pretense to fire him. Had Defendant wished to continue to employ Plaintiff, it simply could have told him, at any point prior to his move to Boston, that he did not have permission to transfer, or that he was still required to work in the New York office on the same schedule as before. The circumstances surrounding the June 22 conversation also undermine Defendant's asserted reason for firing Plaintiff. Although Defendant told Plaintiff that he could keep his position if he returned to New York, Defendant had already hired Plaintiff's replacement, made plans to "terminate" Plaintiff, and then put strong pressure on Plaintiff to resign. Furthermore, Defendant insisted that Plaintiff would have to be physically present in the New York office five days per week, beginning the very next day, despite the unreasonable time frame and the same space constraints which had originally prompted Defendant to require Plaintiff to work remotely at least 60% of the time in the years leading up to his termination. In contrast, when Leiser, the similarly-situated employee who wished to transfer to Florida, approached Defendant with his transfer request, Defendant did not fire him for planning to move or even moving to Florida; instead, Defendant accommodated the move, first allowing him to work remotely for part of the time and then eventually allowing him to transfer. Thus, the evidence demonstrates that Defendant's purported justification for terminating Plaintiff was false.

Next, continuing to apply the analytic framework set forth in Reeves, the Court also concludes that Plaintiff presented a prima facie case of age discrimination. To make out a prima facie case of age discrimination, a

plaintiff must show that "(1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." Melman, 98 A.D.3d 107, 113 (N.Y. App. Div. 2012). The first three factors appear to be undisputed here: Plaintiff was a member of a protected class due to his age; he was qualified to hold the position; and he was terminated. As to the fourth factor, courts have determined that, in general, "a plaintiff's replacement by a significantly younger person is evidence of age discrimination" at the prima facie stage. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000) (citing cases); see also Mendillo v. Prudential Ins. Co. of Am., 156 F. Supp. 3d 317, 339 (D. Conn. 2016) (same). In this case, Plaintiff's replacement, Felix, was approximately 15 years younger, which is enough to satisfy the fourth factor. Thus, Plaintiff presented a prima facie case of age discrimination.

Even though Plaintiff established a prima facie case of age discrimination and provided compelling evidence that Defendant's purported justification was false, the Court must still determine whether the jury permissibly inferred that Defendant unlawfully discriminated against him. As discussed supra, factors to consider include the relative strength or weakness of the evidence presented by each side, including the strength of the plaintiff's prima facie case, and whether the record "conclusively revealed" an alternative, non-discriminatory reason for the employer's decision. Reeves, 530 U.S. at 148–49. Here, much of Plaintiff's case hinges on the fact that Defendant's purported reason for firing Plaintiff did not make sense, given the way events unfolded, and also that the behavior of Defendant's employees was at odds with Defendant's

justification. Indeed, the evidence indicates that Defendant was actively attempting to create a pretext to fire Plaintiff. Furthermore, Defendant treated Plaintiff differently than another employee who made essentially the same request within the same time period, which gives rise to an inference that Defendant was singling out Plaintiff for different treatment even if the reason for the disparate treatment remained unclear. In light of this evidence, Plaintiff's solid prima facie case, and the lack of any indication in the record of an obvious, alternative, non-discriminatory explanation for Plaintiff's firing, the jury permissibly inferred that Defendant's continued insistence that it fired Plaintiff for moving without permission was covering up an impermissible motive, even where there was little direct evidence of age discrimination. Moreover, Plaintiff was entitled to prove his case through circumstantial evidence.

Although there is limited case law concerning post-verdict motions challenging the sufficiency of the evidence under the NYCHRL, the New York City Council has repeatedly reiterated that the NYCHRL is meant to be uniquely broad and protective, and that state and federal civil rights statutes serve only as a floor below which the NYCHRL cannot fall. Therefore, the Court determines that, although this case might be a close call under federal law given the lack of any direct evidence of age discrimination, the scope of the NYCHRL permits Plaintiff to prove his case through the use of circumstantial evidence, by disproving Defendant's proffered non-discriminatory explanation, and then relying on appropriate inferences.[5] Accordingly, the

[5] Defendant's argument relies heavily on two cases, Malone v. Lockheed Martin Corp., 610 F.3d 16, 20–22 (1st Cir. 2010) and Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245, 248–53 (1st Cir.

evidence is sufficient to support the jury's verdict that Defendant violated the NYCHRL.

B. Existence of Subject Matter Jurisdiction

Next, Defendant argues that the jury's verdict deprived the Court of subject matter jurisdiction because the NYCHRL protects only individuals who "inhabit or are 'persons in' the City of New York." Hoffman v. Parade Publ'ns, 15 N.Y.3d 285, 289 (2010). In order to establish that a plaintiff is protected by the law, the plaintiff must establish that the "alleged discriminatory conduct had an impact within the city." Id. at 290 (quotation marks omitted). Defendant contends that the jury verdict reflects a finding that the jury believed Plaintiff had permission to transfer to Massachusetts, and so the impact of the discriminatory conduct was felt in Massachusetts, not New York. As such, Defendant contends that the Court was deprived of subject matter jurisdiction at the time the jury rendered its verdict.

Defendant's argument is flawed for a number of reasons. First, as Plaintiff correctly points out, Defendant invoked the Court's diversity jurisdiction at the time it removed the case from state to federal court. [ECF No. 1]. The only requirements for diversity jurisdiction are: (1) diversity of citizenship; and (2) that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a); see also id. at § 1441 (same requirements for removal). Defendant has never claimed that either of these two prerequisites are not present here. See [ECF No. 1 at 2] (notice of removal filed by Defendant, which asserts that "[t]here is complete diversity between the parties," because Plaintiff is a citizen of Massachusetts and Defendant is a New York

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2000). Those cases did not apply the framework set forth in Reeves, and they concern federal law as interpreted by the First Circuit; therefore, they have limited persuasive value here.

corporation, and claims that "[t]he amount in controversy exceeds $75,000"). Nothing about the jury's verdict changes the fact that the parties are diverse and that the amount in controversy is more than $75,000. Therefore, the Court continues to have subject matter jurisdiction over the dispute.

While Defendant provides quotes from several cases asserting that the court lacks subject matter jurisdiction over a NYCHRL claim where the discriminatory impact of the challenged action is felt outside New York City, Defendant fails to note that those cases concern the jurisdiction of New York state courts. See Hoffman, 15 N.Y.3d at 289 (describing Appellate Division decision as addressing whether "New York has subject matter jurisdiction over the claims"); see also id. at 292 (Jones, J., dissenting) ("At issue is whether New York courts have subject matter jurisdiction over a nonresident plaintiff's claims against a New York employer. . . ."); Benham v. eCommission Solutions, LLC, 989 N.Y.S.2d 20 (App. Div. 2014) (discussing "[w]hether New York courts have subject matter jurisdiction over a nonresident plaintiff's claims" under city and state human rights laws). In addition, Defendant cites to a federal district court case which notes that New York courts view the issue as one of subject matter jurisdiction and then proceeds to analyze an argument under that framework, but the case does not discuss whether the lack of state court jurisdiction would deprive a federal court of diversity jurisdiction. See Wexelberg v. Project Brokers LLC, No. 13 CIV. 7904 LAK MHD, 2014 WL 2624761, at *1, *10, *12 (S.D.N.Y. Apr. 28, 2014).

Furthermore, even if the Court accepted the contention that a jury verdict on the merits of the case could bear on the issue of whether the Court has diversity jurisdiction, Defendant is not correct that the verdict in

this case proves that Plaintiff is not entitled to the protection of the NYCHRL. The jury was not asked specifically whether Plaintiff was given permission to transfer to Massachusetts, and Defendant never requested the inclusion of such a question on the verdict form. An alternate, equally (if not more) plausible reading of the verdict and the evidence is that Defendant allowed Plaintiff to believe that he would be able to transfer to Massachusetts, but never officially authorized or intended to authorize the transfer, thus creating a pretext to fire him after he moved.[6] If the jury concluded that Plaintiff was always employed in New York City, even if he sometimes worked remotely for the New York City office, he would be able to bring a claim pursuant to the NYCHRL. See Hoffman, 15 N.Y.3d at 291 (describing the NYCHRL as protecting "those who work in the city"); Robles v. Cox & Co., 841 F. Supp. 2d 615, 624 (E.D.N.Y. 2012) (same, quoting Hoffman); see also Wexelberg, 2014 WL 2624761 at *11 (recognizing that working remotely for a New York City office "may present quite a different scenario" from one where an employee is stationed at an out-of-state office). Ultimately, Defendant's argument demonstrates the folly in attempting to discern a factual finding from a verdict where the jury was not asked to make a specific determination as to that issue.

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[6] Were the Court required to make factual findings concerning its diversity jurisdiction, the Court would conclude that Defendant never transferred Plaintiff to Massachusetts and he was therefore continuously employed in New York City, despite the fact that he worked remotely from Massachusetts in the days preceding his termination. Importantly, Defendant issued an ultimatum to Plaintiff—that he would have to be physically present in the New York City office five days per week to keep his job—which demonstrated that Defendant viewed the job as being located in New York City at the time Plaintiff was terminated.

Accordingly, the verdict does not demonstrate that Plaintiff is not protected by the NYCHRL.

Finally, Defendant claims in a footnote that Plaintiff waived his ability to pursue a NYCHRL claim because his original complaint, which brought claims based on Massachusetts state law, did not include a cause of action under a Massachusetts city statute (despite the fact that no such statute exists in Winchester, where he resides). While the Court is skeptical of the merits of this argument, Defendant has never raised this point before, and does not explain what principle would allow it to do so for the first time in a post-trial motion. Simply appending an otherwise-waived argument to a jurisdictional argument is not enough. In any case, had Defendant raised this issue earlier, the Court would have entertained a motion to amend the complaint. See Fed. R. Civ. P. 15 (court should "freely give leave" to amend complaint "when justice so requires," and allowing amendments even during and after trial); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1488 (3d ed.) ("Quite appropriately the courts have not imposed any arbitrary timing restrictions on requests for leave to amend and permission has been granted under Rule 15(a) at various stages of the litigation."). Allowing Plaintiff to amend the complaint would have been appropriate once the Court determined, at Defendant's behest, that New York law applied, and such an amendment would not have prejudiced Defendant.[7]

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[7] Defendant separately argues that the inclusion of the "substantial factor" causation standard in the jury instructions and the special verdict form was error. This argument is based on the premise that Plaintiff should only have been allowed to bring a claim under the New York State Human Rights Law ("NYSHRL"), not the New York City Human Rights Law. Since there is no basis to conclude that Plaintiff should not have been allowed to bring his NYCHRL claim, however,

C. Standard of Proof for Punitive Damages Under the NYCHRL

Defendant asserts that the jury should have been instructed that Plaintiff had to prove his entitlement to punitive damages by "clear and convincing" evidence. Instead, the jury was instructed that it was permitted, but not required, to award punitive damages "if you find that the acts of the Defendant were wanton and reckless or malicious." [Tr. Day 4 at 585:16–18]. The Court went on to explain that "[a]n act is malicious when it is done deliberately with knowledge of the Plaintiff's rights, and with the intent to interfere with those rights," and that "[a]n act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others." Id. at 585:22–586:2. The jury was further instructed that it could not award punitive damages "[i]f you find that Defendant's acts were not wanton and reckless or malicious." Id. at 586:3–5.

The NYCHRL explicitly authorizes an award of punitive damages, but does not specify the standard to be used for determining liability for punitive damages. See N.Y.C. Admin. Code § 8-502; see also Chauca v. Abraham, 841 F.3d 86, 90 (2d Cir. 2016) (holding that appropriate standard for awarding punitive damages under NYCHRL was unclear, thus warranting certification of question to New York Court of Appeals). After the trial in this case concluded and briefing on the post-trial motions was completed, however, on November 1, 2017, the New York Court of Appeals issued a definitive opinion on this question. The court announced that "the standard for determining punitive damages under the NYCHRL is

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for the reasons discussed in this section, the argument based on the NYSHRL also fails.

whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'" Chauca v. Abraham, 30 N.Y.3d 325, 334 (2017) (quoting Home Ins. Co. v. Am. Home Prod. Corp., 75 N.Y.2d 196, 203–204 (1990)).[8] The instructions given to the jury in this case track the Chauca standard closely; if anything, they impose a higher burden of proof than that endorsed in Chauca. Although Chauca was not the law at the time of trial, it simply clarified an area of law that previously lacked a definitive explanation from the state's highest court, rather than reversing a prior decision or announcing a new standard. See Chauca, 841 F.3d at 93 ("New York state court decisions do not provide definitive guidance on this question."). Therefore, Chauca confirms that the punitive damages instructions in this case were not erroneous.

Further, even based on the cases available at the time of trial, there is no indication that the instructions were incorrect. Throughout trial, and again in its post-verdict motions, Defendant cited only negligence cases[9] in support of applying the "clear and convincing" standard and never offered any explanation as to why the standard for assessing punitive damages for negligence claims must also apply in the context of a NYCHRL claim. When faced with this issue, then-District Judge Sotomayor explained

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[8] In its brief in support of its post-trial motions, Defendant noted that the issue of the standard of proof for punitive damages for NYCHRL claims was pending before the New York Court of Appeals in Chauca. [ECF No. 76 at 18 n.4].

[9] Defendant cites Randi A.J. v. Long Island Surgi-Ctr., 842 N.Y.S.2d 558 (App. Div. 2007) (breach of confidentiality, privacy, and fiduciary duty), and Munoz v. Puretz, 753 N.Y.S.2d 463 (App. Div. 2003) (personal injury).

that "under New York law, punitive damages are not a separate cause of action;" rather, "[t]hey are inextricably linked to the underlying cause of action." Greenbaum v. Svenska Handelsbanken, N.Y., 979 F. Supp. 973, 982 (S.D.N.Y. 1997). Therefore, "it is difficult to justify subjecting only one form of damages to a different evidentiary standard than all of the other elements of the claim at issue—at least without clear direction from either a statute or controlling judicial authority." Id. She determined that, "[g]iven that there is no such clear direction [concerning city and state human rights laws], it is more reasonable to apply the same burden of proof with respect to one aspect of a claim as is applied to other aspects of the claim," and then accordingly concluded that a punitive damages award made under the preponderance standard applicable to federal claims should also apply to a NYCHRL claim. Id. at 982–83.

Defendant was unable to cite a single case that employed the "clear and convincing" standard for punitive damages on a NYCHRL claim. In contrast, a multitude of cases have applied the "willful or wanton negligence, or recklessness" standard. See, e.g., Johnson v. Strive E. Harlem Emp't Grp., 990 F. Supp. 2d 435, 449–50 (S.D.N.Y. 2014) (applying federal standard to NYCHRL claim, and explaining that the "punitive damages award thus turns on whether the evidence supports an inference of 'intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" (quoting MacMillan v. Millennium Broadway Hotel, 873 F. Supp. 2d 546, 563 (S.D.N.Y. 2012))); Farias v. Instructional Sys., Inc., 259 F.3d 91, 101 (2d Cir. 2001) (holding that the federal standard applies to claims for punitive damages under NYCHRL); Roberts v. United Parcel Serv., Inc., 115 F. Supp. 3d 344, 373 (E.D.N.Y. 2015) (same); MacMillan, 873 F. Supp. 2d at 563 (same).

Defendant responds to this line of cases by asserting that they describe "only *what* a plaintiff must prove to obtain punitive damages, not *the level* to which the claim must be proven." [ECF No. 76 at 18 n.5]. Though Defendant does not elaborate on this point, apparently the argument is that a plaintiff is required to prove, by clear and convincing evidence, that the defendant acted with willful or wanton negligence or recklessness. Again, Defendant does not cite any cases that directly support this proposition. Furthermore, the cases that analyze the NYCHRL punitive damages standard in depth do not include even a single mention of either the "preponderance" or "clear and convincing" standards. See, e.g., Chauca, 30 N.Y.3d at 330–34; Chauca, 841 F.3d at 89–93; Farias, 259 F.3d at 101–102.

In New York, "the general standard of proof in civil litigation is a preponderance of the evidence," with some exceptions. 8 Carmody-Wait New York Practice § 56:16 (2d ed. 2017); accord 5 N.Y. Practice Series §§ 3:9–10. Absent a recognized exception, courts should be hesitant to apply a higher burden of proof. Greenbaum, 979 F. Supp. at 982. Here, in particular, the reasoning behind Chauca indicates that the clear and convincing standard should not apply to NYCHRL punitive damages claims. In Chauca, the court began with the Title VII standard for punitive damages, as endorsed in Farias, but explained that, in light of the Restoration Act and subsequent guidance issued by the City Council, a lower standard of proof should apply. Chauca, 30 N.Y.3d at 332–34. Multiple appellate courts have determined that, in Title VII cases, a plaintiff must only prove entitlement to punitive damages by a preponderance of the evidence. See, e.g., White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 805–806 (6th Cir. 2004), aff'd sub nom. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Karnes v.

SCI Colo. Funeral Servs., Inc., 162 F.3d 1077, 1080–82 (10th Cir. 1998); Notter v. N. Hand Prot., No. 95-1087, 1996 WL 342008, at *10 (4th Cir. Jun. 21, 1996). Since the Chauca court concluded that the standard for recovering punitive damages under the NYCHRL should be *less* demanding than the federal standard, requiring punitive damages to be proven by clear and convincing evidence would directly contradict Chauca's reasoning. Consistent with this approach, a New York federal district court determined that a plaintiff bringing federal and NYCHRL claims was required to "prove *by a preponderance of the evidence* that the employer acted with malice or reckless indifference, or engaged in egregious and outrageous conduct." Caravantes v. 53rd St. Partners, LLC, No. 09 CIV. 7821 RPP, 2012 WL 3631276, at *25 (S.D.N.Y. Aug. 23, 2012) (emphasis added). Therefore, given the lack of support for Defendant's position, the authority indicating that the clear and convincing standard should *not* apply, and the reluctance of New York courts to impose a higher standard of proof absent clear direction to do so, the Court concludes that Defendant was not entitled to an instruction that Plaintiff was required to prove his claim for punitive damages by clear and convincing evidence.[10]

IV. CONCLUSION

For the reasons discussed supra, Defendant is not entitled to judgment as a matter of law because the evidence was sufficient to support the jury's verdict. Likewise, Defendant is not entitled to a new trial on the basis that the verdict is against the "demonstrable weight of the credible evidence," Foisy, 356 F.3d at 146, because the jury's verdict is sufficiently supported by the credible

[10] For the same reasons, Defendant is not correct that it was entitled to a question on the special verdict form reflecting the clear and convincing evidence standard.

evidence presented at trial. Furthermore, the additional grounds that Defendant raised in arguing for a new trial—the existence of subject matter jurisdiction, the standard of proof for punitive damages, choice of law issues, and arguments based on the New York state human rights law—are also unavailing.

Accordingly, Defendant's motion for judgment as a matter of law [ECF No. 74] and motion for a new trial [ECF No. 75] are DENIED.

SO ORDERED.

March 7, 2018

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1302

(Filed 04/08/19)

Yury Rinsky

Plaintiff - Appellee,

v.

Cushman & Wakefield, Inc.

Defendant - Appellant.

Appeal from U.S. District Court for the District of Massachusetts
(16-cv-10403-ADB)

Before

Howard, Chief Judge,
Torruella, Selya, Lynch, Thompson,

Kayatta, and Barron, Circuit Judges,
Katzmann, U.S. District Judge.[*]

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Benjamin M. McGovern, Edward F. Whitesell Jr., Ralph T. Lepore, Robert R. Berluti, Sawnie A. McEntire, Paula Danielle Taylor, John William Dennehy, Mark D. Szal

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[*] Of the United States Court of International Trade, sitting by designation.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

> 1. Employment. It shall be an unlawful discriminatory practice:
>
> (a) For an employer * * *, because of the actual or perceived age, race, creed, color, national origin, gender, disability * * * of any person:
>
> (1) To represent that any employment or position is not available when in fact it is available;
>
> (2) To refuse to hire or employ or to bar or to discharge from employment such person; or
>
> (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

New York City Human Rights Law, N.Y.C. Admin. Code § 8-107(1)(a).

> Except as otherwise provided by law, any person claiming to be a person aggrieved by an unlawful discriminatory practice * * * or by an act of discriminatory harassment or violence * * * shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages * * * .

New York City Human Rights Law, N.Y.C. Admin. Code § 8-502(a).