No. _____

In The

Supreme Court of the United States

THOMAS COLE,

Petitioner,

v.

FOXMAR, INC., d/b/a EDUCATION AND TRAINING RESOURCES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The punitive damages standard set forth by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) included consideration of the potential harm to others. However, in *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007), this Court noted it had not yet "decide[d] the question of harm to others" and "the [*Gore*] opinion appears to have left the question open."

In the present case, the district court applied an incorrect punitive damages standard failing to consider the potential harm to others and overturned an award that was fully supported under the law. The district court ordered a new trial on damages without issuing a remittitur, and it excluded evidence at retrial relevant to punitive damages.

The questions presented are:

1. Should the potential harm to others be considered when reviewing the reasonableness of a punitive damages award under the Due Process Clause?

2. In the alternative, does the common law or Seventh Amendment require a trial court to issue a remittitur prior to ordering a new trial on damages where no evidence of passion or prejudice by the jury exists?

QUESTIONS PRESENTED—Continued

3. In the alternative, is evidence that a retaliation is part of a larger scheme to suppress safety complaints relevant to the issue of punitive damages?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Thomas Cole was the plaintiff before the district court and the appellant before the Second Circuit.

Respondent Foxmar, Inc., d/b/a Education and Training Resources was the defendant before the district court and the appellee before the Second Circuit.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

Cole v. Foxmar, Inc., No. 2:18-CV-00220, 2022 WL 842881 (D. Vt. Mar. 22, 2022) (judgment entered August 2, 2021) (judgment on retrial entered December 20, 2022).

Cole v. Foxmar, Inc., No. 23-87, 2024 WL 74902 (2d Cir. Jan. 8, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit is located at 2024 WL 74902 and App. 1a-11a. The opinion of the district court is located at 2022 WL 842881 and App. 12a-61a.

JURISDICTION

The Second Circuit issued its decision on January 8, 2024. App 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The constitutional and statutory provisions involved in the case are reproduced in the petition appendix. App. 81a-93a.

INTRODUCTION

Petitioner Thomas Cole ("Cole") obtained a $3,215,943 judgment at trial against Respondent

Foxmar, Inc., d/b/a Education and Training Resources ("Foxmar"). The jury awarded $140,943 in lost wages, $75,000 in emotional damages, and $3,000,000 in punitive damages against Foxmar for terminating Cole's employment in retaliation for raising protected safety complaints. The retaliation was part of a larger scheme by Foxmar to suppress safety complaints at the Northlands Job Corps Center ("NJCC") where it was responsible for overseeing minor and young adult students. The scheme was financially motivated, included top corporate officials, and involved the suppression of safety complaints to the U.S. Department of Labor. Students and employees were harmed as a result and were at risk of continued harm if the conduct were not deterred.

Foxmar moved for a new trial, which the district court granted. The district court held emotional damages were reasonable and lost wages would not have warranted a new trial, except for the punitive damages award which it held was grossly excessive, violated due process, and precluded remittitur. Prior to retrial, the district court granted Foxmar's motion to exclude evidence of its suppression of substandard food and weapon safety complaints that had been admitted at the first trial. A verdict was issued at retrial in the amount of $55,000. In affirming the district court's decision, the Second Circuit decided important federal questions that have not been, but should be, settled by this Court, and has decided those questions in a way that conflicts with the relevant decisions of this Court.

First, this petition seeks to uphold the judgment of the first trial. The district court erred by holding the punitive damages award was excessive and violated Foxmar's due process. The district court failed to consider the potential harm to others as required under *TXO* and *Gore* and in so doing improperly applied the *Gore* guideposts. The Second Circuit made the same errors when it affirmed the district court's decision.

These errors are part of a systemic failure by circuit courts to apply the correct legal standard for punitive damages set forth in *TXO* and *Gore*. This Court's ensuing decisions in *State Farm* and *Cooper Industries* appear to have confused lower courts because those cases only involved, and therefore discussed, potential harm to the plaintiff. In addition, this Court later held in *Philip Morris* that the issue of potential harm to others is still an open question. As a result, nearly every circuit court mistakenly cites *State Farm*'s potential harm to the plaintiff standard instead of *TXO*'s potential harm to others standard. The failure of lower courts to consider the potential harm to others when reviewing punitive damages undermines the ability of the legal system to deter unlawful conduct and poses a significant risk to public safety.

Second, in the alternative, this petition seeks remittitur in the amount the district court should have issued prior to ordering a new trial on damages. The district court erred by holding the size of the punitive damages award indicated passion and prejudice by the

jury such that remittitur was unavailable. This error was a result of its failure to apply the correct punitive damages standard and consider the potential harm to others. Accordingly, this Court should grant certiorari to address Question 1 and affirm the judgment of the first trial or order remittitur, whichever it deems should have occurred.

In addition, even if the potential harm to others were not considered, the district court's failure to issue remittitur violated the common law and Seventh Amendment. The punitive award was not so large as to indicate passion or prejudice by the jury precluding remittitur. Further, this Court in *Hetzel* held the Seventh Amendment is violated when remittitur is ordered without the option of a new trial. The right to a jury trial is similarly infringed when a new trial is ordered without the option of remittitur. This infringement is even greater than in *Hetzel* because the result of the trial is eliminated.

Third, in the alternative, this petition seeks a new trial as a result of the district court excluding evidence at retrial of Foxmar's suppression of weapon and food safety complaints that had previously been admitted in the first trial. This was an abuse of discretion because the evidence was relevant to the level of reprehensibility for punitive damages.

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STATEMENT OF THE CASE

I. Factual Background

A. Job Corps Program

The Job Corps program is run by the U.S. Department of Labor. CA2JA 505-07, 512-13. Students attend Job Corps in order to obtain high school equivalency and vocational training, including urban forestry, welding, clinical and medical assistance, culinary arts, and auto repair. CA2JA 505-06. Employees include nurses, cafeteria staff, counselors, teachers, and vocational instructors. CA2JA 506. Students live on campus and are sixteen to twenty-four years old. CA2JA 243-44, 504-05. Foxmar had been in business for over twenty-seven years, and, at the time of trial, oversaw nine Job Corps campuses under contracts with the Department of Labor. CA2JA 379-80, 525-26.

B. Department of Labor

Foxmar contracted with the Department of Labor to run the Northlands Job Corps Center ("NJCC"), the only Job Corps in Vermont, beginning June 1, 2018. App. 13a. The Department of Labor required that Foxmar rehire existing non-managerial employees, including Cole. CA2JA 588-89.

Under its contract with the Department of Labor, Foxmar was required to maintain a clean, well maintained, and safe environment for the students. CA2JA 527-28, 872. The Department of Labor had the

right to rescind the contract if Foxmar breached these provisions. CA2JA 509, 529.

C. Retaliatory Termination

Cole worked at NJCC full and part-time from 2013 until 2018. CA2JA 66-68, 704-07. At the time of termination, he was a full-time Residential Counselor tasked with overseeing the health and safety of students in the dorms. CA2JA 73-75. He was fifty-seven at the time of trial and planned to work until he was seventy. CA2JA 64, 168.

Foxmar terminated Cole's employment on July 27, 2018 for allegedly missing three consecutive days of work without notice. CA2JA 774. This reason was pretext for Foxmar's retaliation against Cole for complaining about its failure to provide cleaning supplies to sanitize the dorms and its unlawful sick leave policy. App. 12a-13a, 30a-31a, 34a-35a; *and* CA2JA 76, 103-04, 115-16, 138-39. Cole was terminated the same week he made these complaints and the same day he submitted them in writing. CA2JA 98-100, 123, 770, 772.

D. Pattern of Suppression of Safety Complaints

Foxmar's retaliation against Cole was part of a larger pattern of suppressing safety complaints that risked the health and safety of employees and students. App. 15a-16a, 30a-31a, 38a-40a, 52a-53a. Foxmar had a corporate culture of suppressing

legitimate complaints. App. 15a-16a, 52a-53a. Foxmar told employees not to make any complaints to the Department of Labor. App. 15a-16a, 30a-31a; *and* CA2JA 509, 512-13, 527-29, 872.

Employees were threatened with retaliation on an almost daily basis if they complained to anyone but their immediate supervisor. CA2JA 321, 324. Foxmar's VP/COO, who had been with Foxmar since 2004, admitted a purpose of this policy was to prevent employees from complaining to the Department of Labor. CA2JA 523-24. Cole violated this suppression policy by reporting his safety complaints directly to both the Center Director and the HR Director, not his immediate supervisor, and he was terminated the same week he did so. App. 15a-20a. Other employees were reprimanded for reporting safety issues, and the Center Director was terminated without cause after making safety complaints. CA2JA 273-76, 280-83, 297, 324, 328-29.

By suppressing all complaints to the Department of Labor, Foxmar was emboldened to ignore safety complaints without consequence, many of which related to safety issues it caused by cutting costs. Foxmar made drastic cuts to the food budget on campus and ignored complaints that students were regularly falling ill from the poor food quality. CA2JA 275-77, 280-81. The food was inedible and made students so sick they needed to go to the Wellness Department for treatment. *Id.* The top cafeteria staff made these complaints, as did the Center Director to corporate. *Id.* Foxmar ignored these complaints, and

the substandard food and student illnesses were never addressed. CA2JA 281.

Foxmar neglected to provide the cleaning supplies necessary to sanitize the dorms, despite complaints from Cole and other employees. CA2JA 227, 245-46, 325-27, 772. Employees were forced to buy cleaning supplies for the students with their own money because Foxmar failed to do so. CA2JA 327. The dorms were dirty and in deplorable condition. CA2JA 327-28. Foxmar directed employees not to complain about mold in the dorms because it could be flagged as an issue by the Department of Labor. CA2JA 328-30. At least one student complained of respiratory issues from the mold. CA2JA 331. The mold was never addressed. *Id.*

Foxmar ordered the Center Director not to report a student with a weapon to the Department of Labor. CA2JA 273-75. The weapon was a large knife that required expulsion under Department of Labor rules. CA2JA 274-75. Foxmar was paid in relation to the number of students it had on campus. CA2JA 275.

Foxmar cut the full-time Safety Officer position when it took over at NJCC. CA2JA 281-83. It did so over the objection of the Center Director, who had never seen the Safety Officer position cut in any of the Job Corps she had worked. CA2JA 282-83.

II. Procedural Background

Cole filed a complaint against Foxmar for retaliation in Vermont Superior Court in November

2018. App. 12a, 21a. Foxmar removed the case to federal court, which had subject matter jurisdiction based on diversity of citizenship and the controversy exceeding $75,000 exclusive of costs and interest. 28 U.S.C. § 1332. A jury returned a verdict against Foxmar for unlawful retaliation in violation of the Vermont Occupational Safety and Health Act ("VOSHA") and the Vermont Earned Sick Time Act ("VESTA") and awarded back pay of $55,305, front pay of $85,638, emotional distress damages of $75,000, and punitive damages of $3,000,000. App. 77a.

The district court, the Honorable Christina Reiss presiding, granted Foxmar's motion for a new trial on damages, holding that the punitive damages were excessive, violated due process, and required a new trial, and that the lost wages and emotional damages would not have required a new trial except for its overturning of the punitive damages award. App. 47a-48a, 50a-51a, 58a-61a. Prior to retrial, Foxmar filed a motion in limine to exclude evidence relating to its suppression of substandard food and weapon safety complaints, which the district court granted. CA2JA 666-68, 677. A verdict was issued at retrial in the amount of $55,000. App. 79a.

Cole timely appealed, arguing the district court erred by ordering a new trial on damages, or, in the alternative, erred by failing to issue remittitur prior to ordering a new trial, or, in the alternative, erred by excluding evidence at retrial relevant to punitive

damages. App. 3a-4a. The Second Circuit affirmed the district court's decision. App. 2a.

REASONS FOR GRANTING THE PETITION

I. This case presents an important, frequently recurring issue which this Court has yet to resolve with respect to punitive damages.

This Court has previously applied a punitive damages standard in which potential harm to others is relevant to the reasonableness of the award for due process review. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion)[1] ("It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred*.") (emphasis added); *and BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) ("*TXO*, following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually

[1] While a plurality opinion, a majority of the justices agreed potential harm to others should be considered when reviewing the reasonableness of a punitive damages award. *TXO*, 509 U.S. at 460-62, 472 (SCALIA, J., joined by THOMAS, J., concurring in judgment).

has occurred.") (internal quotations omitted) (emphasis in original).

The standard applied in *TXO* and *Gore* is sound and worthy of formal adoption. Punitive damages have always protected against the potential harm to others because they are, by their nature, designed for deterrence. The more harm that is likely to result from unlawful conduct, the more deterrence is needed. This is an elementary foundation of the legal system. The protection of society from harm is one of the most legitimate "state interests that a punitive award is designed to serve." *Gore*, 517 U.S. at 568.

The most important factor in analyzing the appropriateness of a punitive award is the level of reprehensibility, *id.*, at 575, and reprehensibility includes "an indifference to or a reckless disregard of the health or safety of others." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Thus, reprehensibility includes consideration of the potential harm to others. *See also Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) ("actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible."). Accordingly, it would be an inherent contradiction if the potential harm to others were relevant to reprehensibility but not the reasonableness of the award.

However, subsequent cases in this Court have yet to formally adopt the potential harm to others

standard applied in *TXO* and *Gore*. In *Philip Morris*, this Court noted it had not "decide[d] the question of harm to others" and "the [*Gore*] opinion appears to have left the question open." *Id*. Elsewhere in *Philip Morris*, this Court stated, "we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id.*, at 353. The distinction between punishment and deterrence is understandable, but in making this point this Court engaged in discussion appearing to support the plaintiff-only potential harm standard. *Id.* This created an apparent split in rationale within *Philip Morris*, and between *Philip Morris* and *TXO* and *Gore*, meriting further clarification.

In addition, this Court's decisions in *State Farm* and *Cooper Industries* have added to the uncertainty by stating a standard in which only the potential harm to the plaintiff is considered, perhaps because harm to others was not at issue in either case. *See State Farm*, 538 U.S. at 409 ("the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. . . ."); *and Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 (2001) ("the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award. . . .").

The widespread confusion of the circuit courts is evident from each circuit's regular application of *State Farm*'s potential harm to the plaintiff standard instead of *TXO*'s potential harm to others standard. *See Cabral v. U.S. Dep't of Just.*, 587 F.3d 13, 25 (1st

Cir. 2009); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 F. App'x 628, 631 (2d Cir. 2009);[2] *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 25 (3d Cir. 2008); *Daugherty v. Ocwen Loan Servicing*, LLC, 701 F. App'x 246, 259 (4th Cir. 2017); *Vanderbilt Mortg. & Fin., Inc. v. Flores*, 692 F.3d 358, 374 (5th Cir. 2012); *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 (6th Cir. 2006); *Sommerfield v. Knasiak*, 967 F.3d 617, 623 (7th Cir. 2020); *Masters v. City of Indep., Missouri*, 998 F.3d 827, 840 (8th Cir. 2021); *Hardeman v. Monsanto Co.*, 997 F.3d 941, 977 (9th Cir. 2021); *Burke v. Regalado*, 935 F.3d 960, 1037 (10th Cir. 2019); *Rubinstein v. Yehuda*, 38 F.4th 982, 998 (11th Cir. 2022); *Pennington v. Islamic Republic of Iran*, No. CV 19-796 (JEB), 2022 WL 168261, at *5 (D.D.C. Jan. 19, 2022), *vacated in part*, No. CV 19-796 (JEB), 2022 WL 18814284 (D.D.C. May 3, 2022); *and Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1350 (Fed. Cir. 2001), *cert. granted, judgment vacated sub nom. DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 538 U.S. 974, 123 S. Ct. 1828, 155 L. Ed. 2d 662 (2003), and *opinion modified and reinstated*, 345 F.3d 1366 (Fed. Cir. 2003).

Only the Eighth, Tenth, and Eleventh Circuits appear to have ever correctly applied *TXO*'s standard. *See Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 462 (8th Cir. 2020) (determining potential harm to others too speculative based on facts of case); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 660 (8th Cir. 1995) (potential harm to

[2] The Second Circuit also applied the plaintiff-only standard in the present case. *Cole v. Foxmar, Inc.*, No. 23-87, 2024 WL 74902, at *2 (2d Cir. Jan. 8, 2024).

others may be considered where evidence of "a company policy or practice as was the case in *TXO*" or "any evidence rebutting assertion that this was an isolated and rare incident"); *Klein v. Grynberg*, 44 F.3d 1497, 1505 (10th Cir. 1995) (potential harm to plaintiff and others considered); *and U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 617, n. 7 (11th Cir. 2000) ("Testimony showed that W&O had applied the policy to other women and would likely have continued to apply it in the future without this lawsuit.").

The impact of this unresolved issue is also evident in the disparity of citations to the competing standards. Circuit courts have only cited *TXO*'s "possible harm to other victims" standard 10 times, and district courts 31 times, whereas those same courts have cited *State Farm*'s "potential harm suffered by the plaintiff" standard 95 and 464 times respectively.[3] For state courts, *TXO*'s standard has been cited 37 times, whereas *State Farm*'s standard has been cited 489 times. These statistics further demonstrate the confusion of the lower courts as to the correct legal standard. This issue will be remedied only when this Court formally adopts a standard that considers the potential harm to others, which it acknowledged in *Philip Morris* has not yet occurred. Until then, the language in *State Farm* will continue to overwhelm the punitive damages law, causing

[3] These results were obtained through a Westlaw search using the terms "*TXO*" and "possible harm to other victims." The second search was conducted using the terms "*State Farm*" and "potential harm suffered by the plaintiff."

misapplication by courts and misunderstanding by parties to litigation.

This unresolved legal issue is important and recurring because punitive damages are one of the most widely used and essential tools of the common law for the protection of society. This Court issued its decision in *TXO* over thirty years ago, yet this issue is still unresolved and lower courts continue to apply an incorrect punitive damages standard. Certiorari is necessary to remedy this longstanding issue.

II. This case provides an ideal vehicle for reviewing the question presented.

A. The district court and Second Circuit failed to apply the correct standard for punitive damages.

The district court failed to consider the potential harm to others when it held the punitive damages award violated Foxmar's due process and ordered a new trial. App. 52a-54a. In affirming the district court, the Second Circuit also failed to consider the potential harm to others. App. 6a-8a. Both the district court and Second Circuit solely referenced the *State Farm* standard considering potential harm to the plaintiff and neither cited nor applied the potential harm to others standard in *TXO* that Cole had argued. App. 6a-8a, 52a-54a; *and* Br. of Appellant at 41, 44-45.

As a result, the issue is ripe for consideration by this Court. For the following reasons, the punitive damages awarded by the jury were fully supported

under the three *Gore* guideposts, especially when considering the potential harm to others as applied in *TXO* and *Gore*.

B. The punitive award was reasonable under the three *Gore* guideposts and was not grossly excessive.

The district court held a retrial on punitive damages was necessary because the jury's award was "grossly excessive" under Vermont law and violated Foxmar's due process. App. 59a-60a. The following argument addresses why the award did not violate Foxmar's due process, which, in turn, similarly demonstrates the award was not grossly excessive under Vermont law.[4]

1. Guidepost 1

The first guidepost under *Gore* is "the degree of reprehensibility of defendant's misconduct," which is "the most important indicium of the reasonableness of a punitive damage award. . . ." *State Farm*, 538 U.S. at 418-19 (quoting *Gore*, 517 U.S. at 575). At least four

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[4] The Vermont standard of punitive damages is more lenient than due process review. *See*, *e.g.*, *Sweet v. Roy*, 801 A.2d 694, 715 (Vt. 2002) ("For the same reasons that the punitive damage award is not unconstitutional, it is also not manifestly and grossly excessive. The amount lies within the discretion of the jury."); *and Crump v. P & C Food Markets, Inc.*, 576 A.2d 441, 449 (Vt. 1990) ("the amount of the punitive damages need bear no particular relationship to the amount of compensatory damages.").

out of the five reprehensibility factors were present to a significant degree.

i. Harm caused was physical as opposed to economic

Cole was terminated for complaining about Foxmar's unlawful sick leave policy, which forced employees to work sick and while in close proximity with minor and young adult students. App. 30a-31a. In addition, this retaliation was part of a larger scheme to suppress all safety complaints on campus, which caused physical harm, as discussed in the following subsection.

ii. Indifference and reckless disregard for the health or safety of others

Foxmar retaliated against Cole for complaining about its unlawful sick leave policy that risked the health of employees and students. *See supra* Statement of the Case, § (I)(C).

In addition, this retaliation was part of a larger retaliatory scheme to suppress safety complaints on campus and to the Department of Labor. *Id.*, at § (I)(D). Foxmar threatened its employees with retaliation if they complained to anyone but their immediate supervisor, and it terminated Cole when he did so. *Id.* The purpose of this retaliatory scheme was to suppress complaints on campus and to the Department of Labor. *Id.*

This scheme endangered the health and safety of both employees and students. Students were minors and young adults who lived on campus and engaged in vocational training including forestry, welding, culinary arts, and auto repair. CA2JA 505. It was important that students were provided with a safe environment to train and live on campus, which was required by the Department of Labor. *Id.*, at § (1)(B).

Employees included nurses, cafeteria staff, counselors, teachers, and vocational instructors, and it was critical these employees felt free to report any dangers to the health and safety of the students. CA2JA 506. Foxmar endangered the safety of students by prohibiting these employees from complaining about safety issues to the Department of Labor or anyone other than their immediate supervisor. *Id.*, at § (I)(D). This was a dangerous policy for many reasons, including the fact the Department of Labor was the authority in charge of overseeing Foxmar's safety compliance, Foxmar itself did not address safety complaints that were made, an immediate supervisor might not be available or address a safety issue, and the policy made it less likely employees would make complaints.

Foxmar's retaliatory scheme caused actual harm to the health and safety of others, including students regularly suffering illnesses from substandard food, mold in the dorms and resulting student illness, lack of cleaning supplies for sanitation, the unlawful retention of a student with a prohibited weapon, and the unlawful sick leave policy. *Id.* Foxmar

suppressed complaints about these issues and they were never addressed. *Id.*

All of this evidence demonstrated Foxmar's retaliation against Cole was part of a larger scheme to suppress safety complaints to the Department of Labor that "evinced a disregard for the health and safety of its employees and students." App. 52a-53a.

iii. The targets of the conduct had financial vulnerability

Cole suffered severe financial hardship as a result of the retaliation. He needed to apply for unemployment multiple times in the three years following his termination. CA2JA 166. He suffered a loss in his credit rating. CA2JA 164. He was unable to pay rent and was behind two months at the time of trial. CA2JA 163-64. He had to perform work for his landlords to pay rent and had to sell personal and family items to pay his bills. CA2JA 164-165.

Cole's coworkers were also financially vulnerable. Foxmar's threats of retaliation threatened their employment and ability to provide for themselves and their families.

The students at NJCC were also financially vulnerable. They were minors and young adults living on campus away from their families, and they were attending the Job Corps program to gain their GED and vocational skills. CA2JA 243-44, 504-05. As a

result, they were less able to leave the Job Corps program or to complain to address Foxmar's conduct.

iv. The conduct involved repeated actions and was not an isolated incident

Foxmar's retaliatory termination of Cole involved repeated actions, including the deceptive acts leading up to the termination and the attempts to cover up the retaliation at trial. *See supra* Statement of the Case, § (I)(C). The decisionmakers, including Foxmar's VP/COO, fabricated a reason for termination, then lied in testimony claiming they did not know it was false at the time of termination. App. 34a-35a; *and* CA2JA 418-20, 534-35, 831. The VP/COO also testified at trial he was unaware of Cole's safety complaints at the time of termination in another attempt to avoid liability for retaliation. CA2JA 397, 400, 521, 539. This testimony was likewise proven false at trial. App. 34a-35a.

Furthermore, the retaliation was part of a larger scheme to suppress safety complaints which involved repeated actions for the reasons set forth in subsection (ii) *supra* and subsection (v) *infra*.

v. The harm was the result of intentional malice, trickery, and deceit

Foxmar intentionally disregarded Cole's rights when it terminated him for raising safety complaints. *See supra* Statement of the Case, § (I)(C). The

retaliation was also part of a scheme to suppress safety complaints on campus and to the Department of Labor. *See supra* Statement of the Case, § (I)(D). This scheme was intentional, financially motivated, and part of "a corporate culture of suppressing legitimate complaints." *Id.*, at § (A)(B); *and* App. 53a. For these reasons, intentional malice was involved. *See DeYoung v. Ruggiero*, 971 A.2d 627, 636 (Vt. 2009); *and Shortle v. Central Vermont Public Service Corp.*, 399 A.2d 517, 518 (Vt. 1979).

There was also substantial trickery and deceit. Foxmar "'fabricated grounds for termination' in retaliation for Cole's VESTA complaints," and its VP/COO directly participated in the retaliatory termination. App. 35a. Foxmar's entire scheme to suppress complaints also involved trickery and deceit as its purpose was to conceal safety violations from the Department of Labor, which was the governmental agency in charge of overseeing the Job Corps program and enforcing Foxmar's contractual obligation to maintain a safe environment for students. *See supra* Statement of the Case, § (I)(B) and (D).

vi. The district court's reasons for overturning the punitive damages award were erroneous

The district court gave the following factual reasons it believed the punitive damages award violated Foxmar's due process. App. 15a-16a, 52a-54a. Each of these reasons were erroneous, and, even if

somehow valid, in no way contradicted the strong evidence of reprehensibility.

First, the district court erred in finding the conduct was limited in scope. App. 52a-53a. Foxmar's retaliatory scheme involved its VP/COO and corporate officials, and it affected all students and employees at NJCC. § (II)(B)(1)(ii) and (v) *supra*. Foxmar was an experienced company in the business of overseeing Job Corps and immediately implemented the scheme upon taking over NJCC. Statement of the Case, § (I)(A), (D) *supra*. Foxmar risked the health and safety of employees and students with the scheme. *Id.*; *and* § (II)(B)(1)(ii) *supra*. Further, students were actually harmed as a result of the scheme, and defendant ignored those complaints and continued with its scheme, further demonstrating the likelihood it would continue if not deterred. *Id.*

Second, the district court erred in reasoning Cole's probationary status or at-will status as an employee was somehow relevant. App. 52a-53a. An employee is protected against unlawful retaliation immediately upon hire. There are no exceptions under VESTA's retaliation provision if an employee is at-will or in a probationary period of employment. 21 V.S.A. § 483(l). Moreover, Cole had been employed at NJCC for five years, and the only reason he was in probationary status of employment was because Foxmar technically rehired him when it took over, which it was required to do for all existing non-managerial employees at NJCC pursuant to its contract with the Department of Labor. CA2JA 588-89.

Third, the district court erred in crediting Foxmar's claim that it was trying to reestablish higher standards at NJCC. Foxmar had an intentional scheme of suppressing legitimate complaints concerning health and safety issues at NJCC, which the district court itself acknowledged. App. 15a-16a, 30a-31a, 38a-40a, 52a-53a.

Fourth, the district court erred in finding Foxmar's alleged "good faith mistakes" and "non-retaliatory reasons for plaintiff's termination" were reasons to overturn the punitive award. App. 53a-54a. This finding was in direct contradiction to the verdict in the case holding Foxmar liable for *intentional* retaliation and the substantial evidence proving its proffered reasons were false and pretextual. App. 34a-35a.

Fifth, the district court erred in finding no other employees had been disciplined or terminated for making safety complaints. App. 53a-54a. Other employees had indeed been disciplined and were relentlessly threatened with retaliation. CA2JA 321, 324, 328-29. The Center Director had also been terminated without cause after making safety complaints. CA2JA 273-76, 280-83, 297.

Lastly, the district court erred by reasoning the Center Director "may have been motivated to testify falsely because defendant terminated her employment." App. 53a-54a. The mere fact a witness has been terminated by the defendant is an insufficient reason to discredit her sworn testimony when the jury credited it, and it is a completely

speculative basis to overturn a punitive damages award. It was the Center Director's duty to oversee everything on campus, including all safety issues, and to report those issues to Foxmar's entire corporate team, making her testimony particularly compelling. CA2JA 240-42.

2. Guidepost 2

The second *Gore* guidepost is "the disparity between the actual or potential harm suffered by the plaintiff [and others] and the punitive damages award."[5] 517 U.S. at 574. "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.*, at 583.

The actual harm suffered by Cole from the unlawful retaliation was $140,943 in lost wages and $75,000 in emotional damages, totaling $215,943 in compensatory damages. Cole suffered significant financial and emotional distress as a result of the termination. § (II)(B)(1)(iii) *supra*.

When considering the potential harm to others, the reasonableness of the punitive award becomes even more apparent. The potential harm of Foxmar's conduct was significant if not deterred, including continued retaliations, suppression of safety complaints, and ongoing safety violations risking harm to a large

[5] The potential harm to others should be considered for the reasons set forth in § (I) *supra*.

number of employees and students. These violations included substandard food causing persistent student illnesses, mold in the dorms and resulting student illness, lack of required cleaning supplies, unlawful retention of a student with a prohibited weapon, and an unlawful sick leave policy. § (II)(B)(1)(ii) *supra*.

Preventing just one other retaliatory termination would bring the ratio to 7:1 between actual and potential harm to punitive damages. *TXO*, 509 U.S. at 460. This is a modest estimate of future retaliations given the retaliatory scheme. Foxmar had a corporate run scheme of suppressing complaints to the Department of Labor, threatened employees on an almost daily basis with retaliation as part of that scheme, and retaliated against Cole as part of the scheme. § (II)(B)(1) *supra*. Other employees had been reprimanded for reporting safety issues, and the Center Director had been terminated without cause after making safety complaints, all within the first year of Foxmar taking control of NJCC. A-273-76, 280-83, 297, 324, 328-29. All of this evidence provided more than sufficient basis for the jury to determine retaliations against employees would continue if not deterred. In addition, when considering the aforementioned potential harm to students, the ratio would appear to be 1:1 or lower. *Cf. TXO*, 509 U.S. at 472 (SCALIA, J., joined by THOMAS, J., concurring in judgment).

Naturally, consideration of potential harm to others must not be overly speculative. Such consideration is appropriate, however, in cases where there is substantial

evidence the unlawful conduct would continue and cause future harm if not deterred. *See*, *e.g.*, *Gore*, 517 U.S. at 579 (emphasizing "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*."); *and Pulla*, 72 F.3d at 660 (likelihood of potential harm to others includes "a company policy or practice as was the case in *TXO*" or "any evidence rebutting assertion that this was an isolated and rare incident").

Potential harm to others was likely in this case because the unlawful conduct was part of a larger scheme, was financially motivated, and harmed the health and safety of others. § (II)(B)(1) *supra*. When viewed under *TXO* and *Gore*, it is clear this evidence was sufficient to show the conduct was likely to continue and cause potential harm to others if not deterred. *See TXO*, 509 U.S. at 462; *and Gore*, 517 U.S. at 582. Similar to *TXO*, the unlawful conduct was part of a larger scheme, was financially motivated, and involved trickery and deceit. *Id.* Even more reprehensibility and likelihood of potential harm existed here due to the indifference and reckless disregard to the health and safety of others. In contrast, this case is dissimilar to *Gore*, where this Court considered potential harm to others and determined none existed. 517 U.S. at 582.

For these reasons, the size and ratio of the award was fully supported by the reprehensibility, actual harm, and potential harm of the unlawful conduct if not deterred.

3. Guidepost 3

The third *Gore* guidepost is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 574.

Federal and state case law support the size and ratio of the verdict.[6] *See*, *e.g.*, *TXO*, 509 U.S. at 460 ($10 million at 526:1 ratio for slander of title); *Haslip*, 499 U.S. at 1 ($1 million at more than 4:1 ratio for fraud); *Am. Fin. Servs. Group v. Treasure Bay Gaming & Resorts*, No. 99CIV.1068NT, 2000 WL 815894, at *16 (S.D.N.Y. June 23, 2000) ($5 million at 10:1 ratio for intentional misrepresentation); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ($2.6 million at 7:1 ratio for employment discrimination); *Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 663 (N.D. Ill. 2019) ($3 million at 6:1 ratio for consumer fraud); *Lynn v. TNT Logistics N. Am. Inc.*, 275 S.W.3d 304, 310 (Mo. App. W.D. 2008) ($3,750,000 at 75:1 ratio for sexual harassment); *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 441-42 (Mo. App. W.D. 2015) ($2,000,000 at 10:1 ratio for discrimination); *and Holland v. Schwan's Home Serv., Inc.*, 992 N.E.2d 43, 95 (Ill. App. Ct. 2013)

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[6] Vermont's punitive damages standards are less stringent than federal due process standards. *Supra*, n. 5. Therefore, all case law applying those or more stringent standards put Foxmar on notice of the severity of the penalty that could be imposed for its conduct in Vermont. *Gore*, 517 U.S. at 574.

($3,600,000 at 5:1 ratio for workers' compensation retaliation).[7]

In comparison to the aforementioned cases, the conduct in this case was of equal or greater reprehensibility, in particular due to Foxmar's indifference to the health and safety of others that was likely to continue if not deterred. Foxmar abused the federal Job Corp program designed to assist underprivileged youth by enforcing a retaliatory scheme to suppress complaints about safety violations that caused actual harm and risked continued harm if not deterred.

Nonetheless, despite the aforementioned case law, the district court and Second Circuit erred in holding the individual safety fines under VOSHA and VESTA were comparable and did not support the punitive award. App. 7a-8a, 57a-58a. These statutory fines were in no way comparable because they did not apply to retaliatory termination, only to individual safety violations. *See State Farm*, 538 U.S. at 418; *and Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 85-86 (2d Cir. 2007). In fact, the retaliation penalties elsewhere in those statutes specifically provided for punitive damages *without any limitation*. 21 V.S.A. § 483(l); 21 V.S.A. § 397(b); 21 V.S.A. § 232; *and Kwon v. Edson*, 217 A.3d 935, 945 (Vt. 2019) (damages include punitive damages). Accordingly, the district court improperly applied individual safety fines instead of the punitive damages established by the legislature as

[7] These awards are of course greater in today's dollars.

the appropriate remedy. *Gore*, 517 U.S. at 583 ("a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.") (internal quotations and citations omitted).

Furthermore, even if the individual statutory fines were somehow comparable, the district court only compared the punitive damages to a single safety violation. In contrast, Foxmar engaged in continuous safety violations, including its unlawful sick leave policy, substandard food causing student illnesses, mold in the dorms, lack of cleaning supplies, unlawful retention of a student with a prohibited weapon, constant threats of retaliation against employees, and the intentional suppression of safety complaints on campus and to the Department of Labor. Thus, even if proper as a metric, the individual statutory fines supported the jury's award of punitive damages.[8]

No evidence existed indicating Foxmar paid any other civil awards or penalties for the same conduct that would warrant a limitation of the award. *Haslip*, 499 U.S. at 21-22.

Lastly, Foxmar failed to present any evidence of its finances. App. 57a. This was its burden, and its failure to do so further conflicts with the notion the award violated its due process. *See*, *e.g.*, *Mathie v. Fries*, 121

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[8] VOSHA allows for fines of $127,749 *per violation*. 21 V.S.A. § 210(a). VESTA allows for fines of $5,000 *per violation*. 21 V.S.A. § 483(m); 21 V.S.A. § 345; *and* Vt. Admin. Code 13-5-13(a).

F.3d 808, 815 (2d Cir. 1997); *Fishman v. Clancy*, 763 F.2d 485, 490 (1st Cir. 1985); *and Tri-Tron Int'l v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975).

C. No other issues in the case preclude this Court from addressing this issue.

The district court ordered a new trial on punitive damages, emotional damages, and lost wages. App. 60a. However, only the punitive damages award was the cause of the new trial. The district court held the emotional damages award of $75,000 was reasonable. App. 47a-48a, 50a-51a. The district court held the lost wages award of $140,943 was excessive but would have been appropriate for remittitur except the punitive damages award was so high it precluded any remittitur. App. 50a-51a, 58a-61a.

Accordingly, the emotional damages and lost wages awards in no way hinder this Court's ability to reverse the district court's decision on punitive damages. If this Court were to grant certiorari and affirm or remit the punitive damages award, then the emotional damages award would be affirmed and the lost wages award would be affirmed or be remitted per this Court's decision, as the district court acknowledged neither warranted a new trial.

Cole argues on appeal that the lost wages award need not be remitted. Br. of Appellant at 15-28. However, even if this Court were to determine it should be remitted, such remittitur would not be significant. For instance, in affirming the district court, the Second

Circuit focused on the fact the lost wages award was $4,227 more than Cole's expert estimated, which included only $18,958 more in front pay. App. 4a-5a. These minor computational differences were an insufficient basis to overturn the lost wages award. *See*, *e.g.*, *Anderson v. Metro-N. Commuter R.R.*, 493 F. App'x 149, 153 (2d Cir. 2012); *and In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 575 (S.D.N.Y. 2011), *aff'd sub nom. In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016).

III. The issue is fundamental to public safety.

First, the longstanding failure of lower courts to apply the correct punitive damages standard considering potential harm to others endangers society by undermining the ability of the legal system to deter *all* reprehensible conduct. Punitive damages are one of the most essential tools to protect society and "may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568. "In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* As in this case, the failure of lower courts to consider the potential harm to others when considering a defendant's challenge to a punitive damages award unduly limits the ability of the legal system and the right of states to sufficiently deter unlawful conduct.

Second, retaliatory terminations endanger public safety to a degree warranting direction from this Court that such conduct may justify higher awards and ratios to effectuate deterrence, especially where the retaliation is part of an intentional scheme to suppress safety complaints. Such conduct harms the health and safety of others, risks future harm if not deterred, has strong financial incentives, and is difficult to catch and prove.

Employees are particularly vulnerable to threats of retaliation because their employment is crucial to their livelihood and that of their family. Even the threat of retaliation suppresses safety complaints, and any retaliatory termination in a company has a chilling effect on all other employees. Such retaliations threaten public safety as employees are the individuals most likely to notice safety issues, and they must feel free to report those issues for the safety of all. Safety complaints not only protect employees but all citizens who patron or are affected by a business. This is true whether the business is in energy, scientific research, transportation, education, or any other industry.

As society advances, the potential harm from safety violations is magnified as a result of the growth of science and technology and the interconnectedness of society. Some of the greatest risks to modern day society stem from unsafe actions for economic gain. If retaliations are not sufficiently deterred through punitive damages, companies may evade compliance with safety laws through retaliation and suppression without fear of much more than a simple calculation

on a balance sheet—the amount of compensatory damages times a single-digit multiplier, at most, to pay in punitive damages. This will oftentimes be nowhere near enough to deter a company from a retaliation given the strong financial incentives to shirk safety regulations and the unlikelihood they will be caught as a result of the difficulty in catching and proving the conduct.

For each of these reasons, the issues in this case are important to public safety. The potential harm to others standard must be formally adopted to sufficiently deter all forms of reprehensible conduct, and retaliatory terminations against safety complaints are a particularly reprehensible form of conduct, especially when part of a larger scheme to suppress safety complaints.

IV. This case presents important common law and constitutional issues which this Court has yet to resolve with respect to remittitur.

In the alternative, the district court erred by ordering a new trial without issuing a remittitur. The district court held remittitur was unavailable because the size of the punitive damages award alone indicated passion and prejudice by the jury. App. 58a-61a. The Second Circuit affirmed the decision on that same basis. App. 9a-10a. This decision violated the common law on remittitur and the Seventh Amendment.

A. The district court erred in holding the size of the award indicated passion and prejudice by the jury such that remittitur was not available.

"[F]or more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages. . . ." *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). The Second Circuit follows this approved practice. *See*, *e.g.*, *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 375 (2d Cir. 1988). However, "[a] remittitur should be granted only where the trial has been free of prejudicial error." *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997). "The cases in which the jury's award is seen to reflect prejudice . . . are generally limited to those in which the remittitur granted is totally out of proportion to the damages allowed by the district court." *Id.*, at 41.

In affirming the district court, the Second Circuit reasoned "the punitive damages award here was so excessive that it would require a similarly out-of proportion remittitur [such as remittiturs of $4.35 million on a $5 million award and $1.65 million on a $1.9 million award]. . . ." App. 9a-10a. This was erroneous. The remittiturs cited by the Second Circuit were each an 87% decrease from the initial jury award. In the present case, no such drastic remittitur was at issue. Even if the district court had remitted the punitive damages from 14:1 to as low as a 6:1 ratio, the total award would have been $1,511,601. This would

have only been a remittitur of approximately 50%, which is commonplace and *much less* than other remittiturs regularly issued. *See*, *e.g.*, *Int'l Mins. & Res., S.A. v. Bomar Res., Inc.*, 5 F. App'x 5, 7 (2d Cir. 2001) ($37.5 million to $1.5 million); *Purgess v. Sharrock*, 33 F.3d 134, 143 (2d Cir. 1994) ($4.6 million to $500,000); *and Brink's Inc. v. City of New York*, 717 F.2d 700, 702 (2d Cir. 1983) ($5 million to $1.5 million).

For the reasons set forth in § (II) *supra*, the size of the punitive damages award was nowhere near so high as to indicate passion or prejudice given the reprehensibility of the conduct. The district court cited no factual support for its holding that the jury was in any way infected with passion or prejudice. App. 58a-61a. This holding was against the aforementioned law of the Second Circuit and remittitur should have been issued.

B. The district court's failure to issue remittitur prior to ordering a new trial violated the Seventh Amendment.

In addition, the Seventh Amendment was violated. The Seventh Amendment prohibits a trial court from issuing remittitur without providing the option of a new trial. *Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 210-11 (1998). The same logic applies equally the other way around. Since the Seventh Amendment protects the right to a new trial in lieu of remittitur, it must also protect the right to remittitur in lieu of a

new trial.[9] If remittitur is not issued, the right to the first jury trial is infringed upon. Such infringement is even greater than in *Hetzel* because a new trial without remittitur completely eliminates the damages awarded at trial, whereas remittitur without a new trial merely decreases those damages. Since the latter is unconstitutional, the former must be as well, unless the trial was infected by passion or prejudice.

Relatedly, the Second Circuit has held "district courts should use the least intrusive standard for calculating a remittitur" and "should remit the jury's award only to the maximum amount that would be upheld by the district court as not excessive." *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1330 (2d Cir. 1990). This remittitur requirement has the same underlying rationale as the Seventh Amendment requiring that a jury trial should be infringed upon to the least degree possible. It further demonstrates that the right to a jury trial is infringed upon where a trial court overturns a damages award without providing the opportunity for remittitur. Such action is akin to offering the plaintiff a remittitur of $0 because it forces a new trial, which violates the principle of least intrusive remittitur.

The historic preference of remittitur over retrial is supported by important policy considerations. Retrials risk undermining public confidence in the judicial

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[9] In both circumstances the trial must not have been infected by passion or prejudice. Otherwise, remittitur would be improper. *Ramirez*, 112 F.3d at 40.

system by the overturning of jury verdicts and by large disparities in verdicts. Retrials are costly to the litigants and court system and have inherent flaws. The defendant has a second chance to prepare evidence and arguments knowing how the first trial proceeded. Key witnesses may also become unavailable years later, as occurred in this case where the HR Director was unavailable for the retrial. In addition, retrials on punitive damages are particularly flawed because they relate so closely to the evidence of the liability of the defendant. The jury that determined liability is the jury most capable of determining punitive damages.

Remittitur also serves the important function of ensuring litigants do not limit the relief they seek out of fear of a large award causing a retrial. Punitive damages are intended to protect society by deterring dangerous conduct. However, if trial courts were authorized to order new trials without issuing remittitur, it would create a perverse incentive for plaintiffs to limit the amount of punitive damages they seek at trial in order to avoid the risk of a retrial. This would impede the purpose of punitive damages and the ability of the judicial system to deter unlawful conduct.

V. This case presents an important, frequently recurring issue with respect to the evidence relevant to punitive damages.

In the alternative, the district court erred by excluding evidence relevant to punitive damages. At

retrial, the district court granted Foxmar's motion in limine to exclude evidence of its suppression of safety complaints regarding substandard food quality causing students to regularly become sick and the retention of a student with a prohibited weapon against Department of Labor rules. CA2JA 666-68, 677. In excluding this evidence, the district court went against its prior ruling that these food safety and weapon complaints were relevant and admissible. App. 15a-16a, 40a-42a. The disparity between the first and second trial verdicts indicates the exclusion of the evidence impacted the verdict.

This evidence was critical to the jury's analysis of punitive damages because it was relevant to the level of reprehensibility, pattern, indifference to health and safety, actual harm, and potential harm from Foxmar's retaliatory scheme. *See*, *e.g.*, *Gore*, 517 U.S. at 575; *and TXO*, 509 U.S. at 462, n. 28. However, in affirming the district court, the Second Circuit reasoned the weapon and food safety complaints were properly excluded because they "were not similar to Cole's protests about employee sick leave." App. 10a. This reasoning was erroneous. To draw an analogy, if a nuclear technician were terminated for complaining about an unlawful sick leave policy, and the retaliation was part of a larger scheme by the employer to suppress safety complaints to the Nuclear Regulatory Commission, evidence of other safety violations and suppressed complaints would be relevant to the reprehensibility of the conduct, including pattern, deceit, and indifference to the health and safety of others.

The district court also erred by excluding the food safety complaints based on Foxmar's hearsay objection. The prior Center Director testified students were regularly sick from substandard food and that she heard these complaints from the cafeteria and wellness staff. CA2JA 274-77, 280-81. This was non-hearsay because the statements were made on matters within the scope of those employees' duties. F.R.E. 801(d)(2)(D). The students' underlying complaints of illness qualified as exceptions for statements of a "then-existing . . . physical condition (such as mental feeling, pain, or bodily health)" to the cafeteria staff, and as statements made for medical treatment to the wellness department, and under the residual exception. F.R.E. 803(3), (4), and 807.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of January, two thousand twenty-four.

PRESENT:

JOSÉ A CABRANES,
RICHARD J. SULLIVAN,
MYRNA PÉREZ,
Circuit Judges.

THOMAS COLE,

Plaintiff-Appellant,

v. No. 23-87

FOXMAR, INC., d.b.a.
EDUCATION AND
TRAINING RESOURCES,

Defendant-Appellee.*

For Plaintiff-Appellant: WILLIAM PETTERSEN, Pettersen Law PLLC, Colchester, VT.

For Defendant-Appellee: MICHAEL D. BILLOK (Paul J. Buehler, *on the brief*), Bond, Schoeneck & King, PLLC, Saratoga Springs, NY.

Appeal from a judgment of the United States District Court for the District of Vermont (Christina Reiss, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Thomas Cole appeals from the August 2, 2021 judgment of the district court following a retrial on damages relating to Cole's claims of retaliation under Vermont law against his former employer, Foxmar, Inc.

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

("Foxmar"). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to resolve this appeal.

Foxmar is a federal contractor that operates several Job Corps centers, which provide education and vocational training to teens and young adults. Cole worked at the Northlands Job Corps Center ("NJCC") in Vergennes, Vermont on and off for about five years. Cole's tenure at NJCC ended in 2018 when Foxmar fired him days after Cole lodged several complaints about Foxmar's refusal to allow NJCC employees to take sick leave. Cole ultimately sued Foxmar for retaliatory discharge under several Vermont statutes. After a one-week trial, the jury returned a verdict in favor of Cole, awarding him $140,943 for back and front pay, $75,000 for emotional distress, and $3 million in punitive damages. Foxmar promptly moved for a new trial on damages under Federal Rule of Civil Procedure 59, arguing that the jury awards were excessive and unsupported by the evidence. The district court ordered a new trial as to damages only, without giving Cole the option to accept a lower award via remittitur. At the retrial, the district court ruled that it would exclude evidence that Foxmar had suppressed food safety and weapons complaints. The jury thereafter returned a verdict awarding Cole only $35,000 in back pay and $20,000 in damages for emotional distress.

Cole now appeals, arguing that the district court erred when it (1) ordered a retrial on the grounds that

the jury's initial awards for lost wages and punitive damages were excessive, (2) ordered that retrial without first giving Cole the option to accept a lower damages award through remittitur, and (3) precluded Cole from introducing evidence at the retrial that Foxmar suppressed complaints made by others about food safety and weapons at the camp. We address each argument in turn.

First, we reject Cole's argument that the district court erred when it set aside the jury's award for lost wages as excessive under Vermont law. We review the district court's decision for abuse of discretion, scrutinizing whether the district court wrongly applied state damages law, made a clear error in fact, or otherwise committed an arbitrary or unreasonable error of judgment. *See Gasperini v. Ctr. for Humans., Inc.*, 149 F.3d 137, 142 (2d Cir. 1998). We see no reversible errors here. The district court stated the correct legal standard for excessive damages under Vermont law – whether the award was "grossly excessive," *Lent v. Huntoon*, 143 Vt. 539, 553 (1983) – and proceeded to detail why the evidence at trial could not support the jury's speculative front-pay award, *see Haynes v. Golub Corp.*, 166 Vt. 228, 239 (1997) ("When front pay is allowed, the damages must be limited to a reasonable period of time, and the amount must not be speculative." (citations omitted)).

The court first noted that the jury had awarded Cole $4,000 more in lost wages than he had asked for – a sum that apparently included $18,958 more in

front pay than even Cole's own expert had calculated.[1] To reach that figure, the jury would have had to find either that Cole would have worked at NJCC for more than fifteen years (until he was over seventy) or that he would have received larger raises than expected. But, as the district court explained, neither of those conclusions was supported by the record, indicating that the jury had inflated its front-pay award beyond what the evidence allowed. *See id.* at 238 (vacating lost-wages award when the damages figure required the jury to assume that the plaintiff would have worked longer than the evidence established). Cole's arguments to the contrary are little more than challenges to the district court's assessment of the evidence regarding the award for front pay damages, which fall well short of showing an abuse of discretion here. *See Crawford v. Tribeca Lending Corp.*, 815 F.3d 121, 128 (2d Cir. 2016) ("A district court may grant a Rule 59 motion – even if some evidence supports the verdict – if the court determines, in its independent judgment, that the jury has reached a seriously erroneous result." (alterations and internal quotation marks omitted)).[2]

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[1] The jury awarded Cole $85,638 in front pay damages. Cole's expert calculated the award for front pay damages to be $66,680.

[2] Cole has never argued – here or below – that the district court erred by granting a retrial on both back and front pay as opposed to a partial retrial on only the excessive front-pay award. We therefore do not consider whether the district court should have ordered a partial retrial. *See Doe v. Trump Corp.*, 6 F.4th 400, 410 (2d Cir. 2021) (explaining that we generally do not consider forfeited arguments).

Second, Cole argues that the district court erred when it found that his punitive damages award was so excessive that it violated the Due Process Clause.[3] Because this issue involves punitive rather than compensatory damages, we review the district court's ruling *de novo*. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437, 443 (2001). Under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), we assess the constitutionality of punitive damages awards based on three guideposts: (1) "the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *Gore*, 517 U.S. at 575).

The first guidepost examines whether the harm was physical or economic, whether the defendant behaved in a manner reckless to the health or safety of others, whether the plaintiff was financially vulnerable, whether the defendant's conduct was a repeated pattern, and whether the harm was intentional. *See id.* at 419. Under that rubric, Foxmar's

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[3] Cole also challenges the district court's finding that the jury's punitive damages award was excessive under Vermont law. We need not reach that question, because we separately find that his punitive damages award was invalid under the Due Process Clause.

conduct was insufficiently reprehensible to justify the jury's $3 million punitive award. Foxmar did not "physical[ly]" harm Cole and was shown to have suppressed complaints only in "isolated" incidents. *Id.* And even if it could be argued that suppressing sick-leave complaints disregarded the health of Foxmar's employees, there is no suggestion that such conduct risked more than "minor injuries" as opposed to "serious physical" ones. *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 209 (2d Cir. 2014).

As to the second guidepost, Cole's multimillion-dollar punitive award created an outsized "disparity" between Cole's compensatory and punitive damages. *State Farm*, 538 U.S. at 418. Indeed, "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id.* at 425. Moreover, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages," will comport with due process. *Id.* Here, Cole received a substantial compensatory damages award of $215,943 capped off by a whopping $3 million punitive award, reflecting a double-digit ratio of nearly 14 to 1.[4]

The final guidepost – the difference between the punitive damages and civil penalties in comparable cases – likewise confirms the district court's conclusion that Cole's award was excessive. As the district court

[4] The $215,943 compensatory damages total includes Cole's award of $75,000 for emotional distress, which the district court left undisturbed as reasonable under Vermont law.

explained, the two Vermont statutes under which Cole sued generally authorize fines of several thousand dollars. The maximum fine under either is $126,749, and even then only for cases of "willful[]" or "repeated[]" offenders. Sp. App'x at 31. Remarkably, the jury's punitive damages award was nearly twenty-four times greater than the maximum civil penalties to which Foxmar was subject. *See Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 126 (2d Cir. 2004).

In short, there is no real dispute that Cole's award was excessive to the point of violating due process. Rarely will a defendant's misconduct, even if egregious, call for a double-digit punitive damages award. *See State Farm*, 538 U.S. at 425. Though the jury presumably concluded that Foxmar's conduct was reckless and intentional, it was far from the sort of repeated and dangerous pattern that could justify so large a penalty, especially when Cole also secured a sizable compensatory award.

Third, Cole argues that the district court erred when it granted Foxmar a new trial without first giving Cole the opportunity to accept a lower damages award through remittitur. As a threshold matter, Cole argues in his reply brief that the district court was *required* to offer remittitur because, under Vermont law, trial courts must give plaintiffs the option of accepting a lower damages award before ordering a retrial. But Cole has forfeited that argument since he failed to raise it in his opening brief. *See* Cole Br. at 57-58 (challenging remittitur without mentioning Vermont law); *see also JP Morgan Chase Bank v. Altos*

Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005). We therefore assume that the federal standard for granting remittitur applies. *See Stampf*, 761 F.3d at 204 (explaining that "[w]hether a new trial or remittitur should be ordered" shall be determined "by reference to federal standards developed under Rule 59" (quoting *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 435 (1996)).

In our Circuit, when a district court concludes that a damages award is excessive, it has discretion to either grant a new trial outright or to first give the plaintiff the option to accept a lower damages award through remittitur. *See Bracey v. Bd. of Educ. of Bridgeport*, 368 F.3d 108, 119 (2d Cir. 2004) (directing district court to order a new trial but nevertheless giving the district court "discretion" to offer the plaintiff remittitur); *see also Lore v. City of Syracuse*, 670 F.3d 127, 176-77 (2d Cir. 2012). The district court acted well within that discretion in declining to offer a remittitur here. Indeed, the case law is clear that remittitur should *not* be offered when the "size of a jury's verdict [is] so excessive as to be inherently indicative of passion or prejudice," such that the "remittitur granted is totally out of proportion to the damages allowed by the district court." *Ramirez v. N.Y.C. Off-Track Betting Corp.*, 112 F.3d 38, 40-41 (2d Cir. 1997) (internal quotation marks omitted) (citing examples where courts improperly offered remittiturs of $4.35 million on a $5 million jury award and $1.65 million on a $1.9 million award). Because the punitive damages award here was so excessive that it would

require a similarly out-of-proportion remittitur, the district court had good reason to order a new trial outright.

Finally, we reject Cole's argument that the district court abused its discretion when it precluded Cole from introducing evidence about Foxmar's alleged suppression of complaints concerning food safety and weapons possession. "We review the district court's evidentiary rulings under an abuse of discretion standard, requiring manifest error to disturb them." *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 292 (2d Cir. 1999) (internal quotation marks omitted). We see no such error in the district court's finding that this evidence was unduly prejudicial under Federal Rule of Evidence 403. Cole maintains that testimony about these topics was relevant to punitive damages, as suppression of complaints beyond Cole's could establish a pattern of misconduct warranting punitive damages. But those complaints – which were about students getting sick or possessing weapons – were not similar to Cole's protests about employee sick leave. And as the district court explained, evidence about these complaints risked inflaming the jury, as "pure propensity evidence to establish that the defendant in general is a bad employer." J. App'x at 675. Given the marginal relevance and high risk of prejudice, the district court was well within its authority to exclude testimony about these incidents.

* * *

We have considered Cole's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagain Wolfe

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

THOMAS COLE, Plaintiff, v. FOXMAR, INC., d/b/a EDUCATION AND TRAINING RESOURCES, Defendant.	Case No. 2:18-cv-00220 (Filed Mar. 22, 2022)

OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL (Doc. 131)

Pending before the court is a renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial filed by Defendant Foxmar, Inc., d/b/a Education and Training Resources. (Doc. 131.) Plaintiff Thomas Cole brought this suit against Defendant seeking damages as a result of Defendant's termination of Plaintiff's employment on July 27, 2018. The jury considered two claims: retaliation in violation of the Vermont Occupational Safety and Health Act ("VOSHA"), 21 V.S.A. §§ 201-32, and retaliation in violation of the Vermont Earned Sick Time Act ("VESTA"), 21 V.S.A. §§ 481-87, and returned a verdict for Plaintiff on both claims. It awarded Plaintiff $215,943 in compensatory damages,

comprised of $55,305 in back pay, $85,638 in front pay, and $75,000 in emotional distress damages. The jury also awarded Plaintiff $3 million in punitive damages, for total damages of $3,215,943. The court entered judgment on the verdict on August 2, 2021.

Defendant filed the pending motion on August 27, 2021. Pursuant to a stipulated briefing schedule, Plaintiff opposed the motion on October 29, 2021, and Defendant replied on November 29, 2021. The court held oral argument on January 18, 2022, at which time it took the pending motion under advisement.

Plaintiff is represented by William Pettersen, IV, Esq. Defendant is represented by Kevin L. Kite, Esq., Mara D. Afzali, Esq., Michael D. Billok, Esq., and Paul J. Buehler, III, Esq.

I. Factual and Procedural Background.

Defendant is a company that partners with the U.S. Department of Labor, Office of Job Corps, and local Workforce Investment Boards for the management and operation of Job Corps Centers and customized workforce development programs that serve both youth and adults. On June 1, 2018, Defendant assumed management of the Northland Job Corps Center ("NJCC") located at 100A MacDonough Drive, Vergennes, Vermont. Prior to Defendant's management of NJCC, it was managed by Chugach Education Services, Inc. ("Chugach").

Plaintiff was hired as a Residential Counselor ("RC") in 2018 under Chugach's management and was rehired in that position when Defendant assumed management of NJCC. As an RC, Plaintiff's duties included interacting with students and overseeing dormitory maintenance.

Defendant's employee handbook (the "Handbook") identifies job abandonment as a "[d]ischargeable [o]ffense" and contains an Attendance and Punctuality policy which notes that "[a]bsence from work for three (3) consecutive days without notifying your manager or the Human Resources Department will be considered a voluntary resignation and job abandonment." (Doc. 58-13 at 28, 40.) Although the Handbook includes an "accountability schedule" that distinguishes between minor, major, and dischargeable offenses, it also states that gait management's discretion, any violation of policies or any conduct considered inappropriate or unsatisfactory may subject the offender to accountability action, up to and including losing your job." *Id.* at 38, 40 (italics omitted). The Handbook further states:

> Employees who do not have an individualized written employment contract or a collective bargaining agreement are employed at the will of the company. This means that you are free to quit at any time, for any reason, just as we are free to release you from employment at any time, for any reason with or without notice or cause.

Id. at 20. Plaintiff did not have an express individualized employment contract and was not covered by a collaborative bargaining agreement.

In dismissing Plaintiff's claims for breach of contract and breach of implied covenant of good faith and fair dealing claim based on an alleged contract, the court held that he was an at-will employee as a matter of law and that the Handbook did not guarantee progressive discipline. *Cole v. Foxmar, Inc.*, 387 F. Supp. 3d 370, 386 (D. Vt. 2019).

On July 23, 2018, Plaintiff's supervisor, Angela Mobley, assigned him to Dorm 24, which was not his typical dormitory assignment. The students in Dorm 24 informed Plaintiff and Ms. Mobley that the dormitory was out of sanitizer and had been for an unknown period of time. When asked to clean the dormitory, some of the students told Plaintiff that they could not perform this task because they were sick. Plaintiff testified that cleaning supplies were often missing and RCs were forced to purchase them with their own money.

At trial, there was evidence that Defendant required employees to bring safety complaints only to their direct supervisor, which Howard Harmon, Defendant's Executive Vice President and Chief Operating Officer, testified was motivated in part by a desire to limit complaints to the United States Department of Labor (the "DOL"). Correspondingly, employees were discouraged from making complaints to the DOL, including with regard to an incident of a

student with a weapon, substandard food quality, and mold in the dorms. There was also evidence that NJCC experienced problems in each of these sectors, and Mr. Harmon himself acknowledged that at the time Defendant took over NJCC, it was a "mess." (Tr. 645.)

On the morning of Tuesday, July 24, 2018, Plaintiff met with Alicia Grangent, NJCC's Center Director responsible for overseeing the NJCC campus and the highest-ranking on-site member of Defendant's staff. Plaintiff expressed his concerns about the failure to properly supply a dormitory with cleaning supplies. He also complained that RCs were not allowed to leave work when they were sick, placing students and other employees at risk. At trial, he testified inconsistently regarding whether he discussed with Ms. Grangent the need for sick employees to find their own replacements. He stated that he overheard Ms. Mobley tell a sick RC that "[w]e will find somebody so that you can go home." (Tr. 152.) (internal quotation marks omitted). Plaintiff admitted that he had worked while he was sick in the past and did not believe it was a violation of the law.

Ms. Grangent notified Ms. Mobley and Bernadette Brookes, the Human Resources Director for NJCC, about her meeting with Plaintiff and the substance of his concerns. Ms. Grangent also claimed to have alerted Defendant's corporate officers. When Plaintiff returned to NJCC for his afternoon shift, he saw RC Paige Howell and another RC, both of whom were sick and one of whom was lying on a couch in a fetal position. Plaintiff also felt sick and decided to leave work. On his way to Ms. Grangent's office, Plaintiff

encountered Ms. Grangent on campus. They spoke briefly, and Plaintiff informed her that he was leaving. When Ms. Grangent asked him to wait to discuss the matter further, he stated he needed to leave. Plaintiff then stopped by Ms. Grangent's office and spoke to her assistant, Brian Lacharite, to let Mr. Lacharite know he was leaving and would not be returning to work that day. Mr. Lacharite testified that on more than one occasion, Ms. Mobley informed staff to find their own replacements if they called out sick.

Plaintiff was not scheduled to work on Wednesday, July 25, 2018, or Thursday, July 26, 2018. On Wednesday, July 25, 2018, Plaintiff called Defendant's Human Resources Department, located at its corporate headquarters in Kentucky, and left a voicemail indicating that he was experiencing difficulties at NJCC and looking for assistance. He received no response to his voicemail. He also went to the NJCC campus to speak with Ms. Brookes. He was unable to speak to her but spoke to her assistant, Mari Trybendis, and explained he had safety concerns he wanted to share, including a lack of cleaning supplies and sick employees working.

On Thursday, Plaintiff called Defendant's corporate headquarters a second time and left a voicemail stating he was having difficulties at NJCC and was looking for assistance and direction. On the morning of Friday, July 27, 2018, Plaintiff drafted a letter to Ms. Brookes and at approximately 9:34 a.m. emailed it to Ms. Trybendis and to Ms. Grangent. Plaintiff's letter stated:

I met with Northlands Center Director on Tuesday morning, 7/24/2018 to express my concerns of oversight on health and wellness related practices within the Department of Independent Living.

In particular, I cited a willingness on the part of the department lead to retain staff members for shift coverage after acknowledging that the staff member had symptoms of diarrhea, vomiting and dizziness.

I also spoke of reassignment the previous evening to a dorm that could be determined unsanitary. An address of the students by the Independent Living Coordinator during accountability resulted in the disclosure that there were no cleaning chemicals on site, to include sanitizer, and it was undetermined as to the length of time that had passed in the absence of proper sanitizing.

Not feeling well, I departed prior to my shift and again alerted the Center Director to my earlier concerns and to the presence of a staff member laying in the fetal position on a lounge couch at the time of their arrival for in briefing.

I believe these conditions present an unnecessary risk to my personal health and wellness and negatively impact the over all confidence in my role and presence within the Department of Independent Living.

> I am asking for the consideration of a job reassignment out of the Department of Independent Living.

(Doc. 65-3 at 1.)

On Thursday, July 26, 2018, Ms. Brookes spoke with Ms. Mobley and told her that Plaintiff had not contacted her regarding leaving his shift on Tuesday, July 24, 2018. Ms. Brookes asked Ms. Mobley when Plaintiff was scheduled to work that week, and Ms. Mobley responded that Plaintiff missed his scheduled shifts on Wednesday and Thursday, July 25-26, 2018, and that he abandoned his shift on Tuesday, July 24, 2018. Because of these absences, Ms. Mobley stated she believed Plaintiff should be terminated. Ms. Grangent refused to approve Plaintiff's termination and advised Ms. Brookes and Ms. Mobley that Plaintiff could not be terminated for job abandonment because he had not yet missed three days of work.

On Friday, July 27, 2018, at approximately 10:07 a.m., Ms. Brookes emailed Mr. Harmon; Ms. Mobley; Ms. Grangent; and Scott Dunham, Defendant's Vice President, Center Operations & Support, recommending Plaintiff be disciplined and reassigned. She included a description of Plaintiff's conduct over the course of the preceding week from Ms. Mobley in her email. Ms. Brookes referred to the fact that when Chugach operated the NJCC campus, Plaintiff had been reprimanded for leaving a shift early and for using inappropriate language with students. Ms. Brookes wrote that Plaintiff's "prior behavior under

Chugach counts for [NJCC] as it relates to interfacing with the students as they are still here. The recommended write up has been discarded due to the contract change but the behavior is still a running commentary for [NJCC]." *Cole v. Foxmar, Inc.*, 2021 WL 5178822, at *4 (D. Vt. Mar. 8, 2021). Ms. Grangent replied suggesting discipline but not reassignment and stated that Plaintiff's job abandonment under Chugach "doesn't count." *Id.*

At 11:21 a.m., Mr. Harmon responded recommending Plaintiff's termination but deferring to Ms. Brookes and Ms. Grangent for the final decision. Ms. Brookes responded at 12:12 p.m. that it had been decided that Plaintiff should be terminated for both job abandonment and failing to report to work for three days.

In the afternoon of July 27, 2018, Ms. Brookes met with Plaintiff to inform him of his termination. During that meeting, Plaintiff asked Ms. Brookes if she had read his letter, and she responded that she was unaware of his letter. Defendant thereafter issued Plaintiff a termination notice dated July 27, 2018, which stated that Plaintiff was terminated because he did not report for his scheduled shifts on Monday, July 23; Tuesday, July 24; and Wednesday July 25, 2018. The termination notice was signed by Mr. Harmon, Ms. Mobley, and Ms. Brookes.

On August 20, 2018, Plaintiff contacted Mr. Harmon to notify him that there were errors in his termination letter regarding his schedule. Mr. Harmon

told Plaintiff that he was an at-will employee and was terminated during his probationary period and that, for this reason, Defendant was not required to provide him with any reason for his termination.

Ms. Grangent and Ms. Trybendis both testified that NJCC employees who missed work for one day without notice were not terminated. In addition, Ms. Trybendis testified that in at least two other cases, NJCC employees who had missed more than three consecutive days without notice were not terminated.

Plaintiff filed a complaint in Vermont Superior Court in November 2018, and Defendant removed the case to this court on December 10, 2018. Plaintiff alleged that the claimed reason for his termination was false and pretextual and that he was actually terminated because he complained to his supervisors regarding health and safety violations he witnessed. On May 16, 2019, upon Defendant's motion, the court dismissed Plaintiff's claims for wrongful termination in violation of public policy, breach of contract, and breach of implied covenant of good faith and fair dealing. On March 8, 2021, the court granted in part and denied in part Defendant's motion for summary judgment, dismissing Plaintiff's promissory estoppel claim but allowing his claims for retaliation under VOSHA and VESTA to proceed.

From July 26, 2021 to July 30, 2021, the court held a jury trial, at which Plaintiff, Mr. Lacharite, Ms. Grangent, Ms. Brookes, and Mr. Harmon testified. Ms. Howell and Ms. Trybendis were unavailable to testify,

and portions of their deposition testimony were read into the record. Economist Richard Heaps, who testified for Plaintiff, and economist Charles Amodio, who testified for Defendant, opined as expert witnesses on the issues of front pay and back pay. After the close of evidence, Defendant moved for judgment as a matter of law, which the court denied. The jury returned a verdict for Plaintiff on both counts.

II. Conclusions of Law and Analysis.

A. Whether Defendant is Entitled to Judgment as a Matter of Law.

Defendant argues that it is entitled to judgment as a matter of law in its favor on each of Plaintiff's claims and on the issue of punitive damages. The court may grant a motion for judgment as a matter of law "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50. Under this standard, a verdict may be set aside

> only where there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against him.

Bucalo v. Shelter Island Union Free Sch. Dist., 691 F.3d 119, 127-28 (2d Cir. 2012) (internal quotation marks omitted) (quoting *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 456 (2d Cir. 2009)). The court "must give deference to all credibility determinations and reasonable inferences of the jury, and may not weigh the credibility of witnesses or otherwise consider the weight of the evidence." *Brady v. WalMart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir. 2008) (internal quotation marks omitted) (quoting *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 51 (2d Cir. 2000)).

1. Whether Defendant is Entitled to Judgment as a Matter of Law as to Liability.

Defendant argues that Plaintiff's retaliation claims under VOSHA and VESTA fail as a matter of law. To establish a prima facie case of retaliation, a plaintiff must establish: (1) the plaintiff was engaged in a protected activity; (2) the defendant knew of that activity; (3) plaintiff suffered an adverse employment action; and (4) a causal connection exists between plaintiff's protected activity and the adverse employment action. *See Cole*, 2021 WL 5178822, at *10-11 (citing *Mellin v. Flood Brook Union Sch. Dist.*, 790 A.2d 408, 417-18 (Vt. 2001)). "If a plaintiff establishes a prima facie case, the defendant must proffer a legitimate, nondiscriminatory reason for its actions." *Id.* at 10 (citing *Mellin*, 790 A.2d at 418). "If the defendant sustains this burden, the plaintiff must prove by a preponderance of the evidence either that

the purported reason was a pretext for retaliation or that the defendant had mixed motives one of which was retaliatory and was a but-for cause its decision." *Id.*

A plaintiff may prove pretext "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by defendant." *Raniola v. Bratton*, 243 F.3d 610, 625 (2d Cir. 2001) (quoting *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000)). "Under some circumstances, retaliatory intent may also be shown, in conjunction with the plaintiff's prima facie case, by sufficient proof to rebut the employer's proffered reason for the termination." *Id.* (citation omitted); *see also Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013) ("A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, non-retaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason."). Temporal proximity alone is insufficient to establish pretext. *See El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) ("[W]ithout more, . . . temporal proximity is insufficient to satisfy appellant's burden to bring forward some evidence of pretext."). As

Plaintiff points out, he presented evidence of temporal proximity; disparate treatment of similarly situated employees; and weaknesses, implausibilities, and contradictions in Defendant's proffered nondiscriminatory reasons for his termination coupled with evidence of a corporate culture of suppressing legitimate safety complaints.

While the Vermont Supreme Court has not addressed whether, under VOSHA or VESTA, it is sufficient if a complainant has a good faith, reasonable belief that the employer is committing a violation of the law, courts have repeatedly found this satisfies similar anti-retaliation laws. *See*, *e.g.*, *Treglia v. Town of Manlius*, 313 F.3d 713, 719 (2d Cir. 2002) (holding that, under the Americans with Disabilities Act, a plaintiff may prevail on a claim for retaliation even when the underlying conduct complained of was not in fact unlawful "so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law") (alteration in original); *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (holding that a plaintiff states a prima facie claim for retaliation under Title VII "so long as the employee has a good faith, reasonable belief that the underlying challenged actions of the employer violated the law") (citation omitted); *cf. Gonzalez v. Metro-North Commuter R.R.*, 2020 WL 230115, at *5, *9-10 (S.D.N.Y. Jan. 15, 2020) (granting defendant summary judgment on plaintiff's retaliation claim where he lacked a good faith belief that the concerns

he reported related to any unlawful activity by his former employer).

Defendant argues that no reasonable juror could conclude that Plaintiff engaged in a protected activity under VOSHA or VESTA because Plaintiff failed to establish a good faith, reasonable belief that a violation of VOSHA or VESTA had occurred. With regard to Plaintiff's VOSHA violation claims,[1] Defendant argues that a temporary lack of cleaning supplies is not a violation of the law and that Plaintiff's testimony that "any workplace has a legal violation, is breaking the law, if they are temporarily out of cleaning supplies[,]" (Tr. 265-66), is "patently absurd[.]" (Doc. 135 at 27.) Defendant asserts that the reasonableness of Plaintiff's belief that a violation occurred was undermined by his acknowledgment that cleaning supplies were available in other dorms and were provided to him when requested.

As for Plaintiff's VESTA claim, Defendant contends that Plaintiff testified that he only complained about working with sick co-workers, which

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[1] VOSHA includes numerous requirements relating to workplace health and safety, including requirements that an employer must not provide working conditions that are unsanitary, hazardous, or dangerous to the health or safety of its employees. 29 C.F.R. §§ 1925.1; 4.6. An employer must provide employees with safe and healthful working conditions at their workplace. 21 V.S.A. § 201. An employer must provide employees with working conditions that insofar as practicable do not result in the diminished health of an employee. *Id.* Finally, an employer must ensure all places of employment be kept clean to the extent that the nature of the work allows. 29 C.F.R. § 1910.141(a)(3)(i).

is not a violation of VESTA,[2] and made no complaint about sick employees having to find their own replacements.[3] Although Ms. Grangent testified that Plaintiff mentioned to her "a piece about having to find a replacement," (Tr. 319), and Plaintiff overheard Ms. Mobley telling another RC she needed to find a replacement before she could go home on the day he left his shift early, Defendant asserts that Ms. Grangent's testimony was impeached to an extent that "no reasonable juror could credit her testimony." (Doc. 135 at 31.)

Defendant further argues that no reasonable juror could find that retaliation was a but-for cause of Plaintiff's dismissal because the only evidence that any supervisor was aware of his protected activity was Ms. Grangent's testimony, "and she was impeached at trial on this very point." *Id.* at 32 (emphasis omitted). Defendant claims that the decision-makers who terminated Plaintiff were unaware of the letter he sent prior to his termination and were also unaware of his call to corporate headquarters. Defendant further challenges the sufficiency of evidence of pretext, arguing that the irregularities and inconsistencies surrounding Plaintiff's termination were "understandable" and "reasonable[.]" *Id.* at 36.

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[2] An employee "may use earned sick time" if "ill or injured[,]" but this is not required. 21 V.S.A § 483(a).

[3] VESTA provides: "An employer shall not require an employee to find a replacement for absences, including absences for professional diagnostic, preventive, routine, or therapeutic health care." 21 V.S.A. § 483(g).

Defendant contends "Ms. Grangent's testimony is essentially worthless" and "Plaintiff's testimony is worthy of no weight at all[,]" while the "overwhelming majority of the evidence presented at trial warranted a verdict in [Defendant's] favor." (Doc. 140 at 34-35.) Defendant's arguments all depend on a re-evaluation of the credibility of witnesses and require the court to conclude that certain witnesses must be discredited in whole or in part. It also asks the court to reweigh the evidence in the light most favorable to Defendant.

On a motion for judgment as a matter of law, the court "may not weigh the credibility of witnesses or otherwise consider the weight of the evidence." *Brady*, 531 F.3d at 133 (quoting *Caruolo*, 226 F.3d at 51). To do so would intrude on the jury's role and function. This is not a case in which there was a "complete absence of evidence supporting the verdict" or evidence so unworthy of credibility that "reasonable and fair minded" jurors could not have reached the same liability verdict. *Bucalo*, 691 F.3d at 127-28 (internal quotation marks omitted) (quoting *AMW Materials Testing*, 584 F.3d 456).

For the foregoing reasons, Defendant's motion for judgment as a matter of law as to liability is DENIED.

2. Whether Defendant is Entitled to Judgment as a Matter of Law as to Punitive Damages.

Defendant argues that punitive damages are unavailable as a matter of law and the court erred in

sending the issue of punitive damages to the jury. The jury was instructed that "[i]n this case, punitive damages pertain only to [P]laintiff's claim that [D]efendant had a policy of requiring sick employees to find their own replacements before they were allowed to leave work." (Tr. 903.) Defendant does not challenge the substance of the court's punitive damage instructions, only the fact that they were given.

"In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). Under Vermont law, Plaintiff must prove two elements to be awarded punitive damages "(1) wrongful conduct that is outrageously reprehensible; and (2) malice." *Carpentier v. Tuthill*, 2013 VT 91, ¶ 12, 195 Vt. 52, 57, 86 A.3d 1006, 1011 (citing *Fly Fish Vt., Inc. v. Chapin Hill Ests., Inc.*, 2010 VT 33, ¶ 18, 187 Vt. 541, 996 A.2d 1167).

Defendant asserts that "the trial court must decide whether punitive damages are warranted as a matter of law before submitting the question to the jury[.]" (Doc. 135 at 38.) The Vermont Supreme Court has held that there must be "a showing that defendants acted with actual malice" before the issue of punitive damages may be submitted to a jury; however, the required showing is not that punitive damages are warranted as a matter of law. *Folio v.*

Florindo, 2009 VT 11, ¶ 44, 185 Vt. 390, 411, 970 A.2d 1230, 1245. Instead, "if there is evidence which reasonably supports punitive damages, the trial court must submit the issue to the jury." *Lent v. Huntoon*, 470 A.2d 1162, 1171 (Vt. 1983).

Defendant contends its conduct was not outrageously reprehensible because forcing employees to find their own replacements is legal in thirty-four states without paid sick leave laws[4] and pales in comparison to conduct the Vermont Supreme Court has found outrageously reprehensible.

This determination of whether wrongful conduct warrants punitive damages is fact-specific and must be:

> determined by reference to whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Shahi v. Madden, 2008 VT 25, ¶ 26, 183 Vt. 320, 334, 949 A.2d 1022, 1034 (internal quotations and citations omitted).

Evidence was presented at trial that Defendant required sick employees to work until they found

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[4] This evidence was not introduced at trial.

replacements, even though they worked closely with minor and young adult students entrusted into Defendant's care. In addition, there was evidence that Defendant discouraged employees from making complaints to the DOL about unsafe conditions or concerning incidents at NJCC.

A reasonable juror could infer from this evidence that Defendant had a pattern and practice of discouraging employees from reporting health and safety concerns and requiring employees to work while sick and find their own replacements, which put employees and students at risk. The question of whether this was "wrongful conduct that is outrageously reprehensible[,]" *Carpentier*, 2013 VT 91, ¶ 12, 195 Vt. at 57, 86 A.3d at 1011, was properly submitted to the jury, which found that it was.

Defendant argues that none of the individuals involved in Plaintiff's termination acted with malice, which is "defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like." *Fly Fish Vt., Inc.*, 2010 VT 33, ¶ 18, 187 Vt. at 549, 996 A.2d at 1173. "[Ma]lice may arise from deliberate and outrageous conduct aimed at securing financial gain or some other advantage at another's expense, even if the motivation underlying the outrageous conduct is to benefit oneself rather than harm another." *DeYoung v. Ruggiero*, 2009 VT 9, ¶ 27, 185 Vt. 267, 279, 971 A.2d 627, 636. A corporation may be held liable for punitive damages if the malicious act is "that of the governing officers of the corporation or one lawfully exercising their authority, or, if . . . that of a

servant or agent of the corporation, it must be clearly shown that the governing officers either directed the act, participated in it, or subsequently ratified it." *Shortle v. Cent. Vt. Pub. Serv. Corp.*, 399 A.2d 517, 518 (Vt. 1979).

The Vermont Supreme Court has "incorporate[d] recklessness as a component of malice" so that "punitive damages are not limited to intentional egregious torts only, but can extend to egregious harm resulting from reckless conduct amounting to malice." *Fly Fish Vt., Inc.*, 2010 VT 33, ¶ 25, 187 Vt. at 553-54, 996 A.2d at 1176-77. However, "[t]hat defendants were in wi[l]lful violation of [the law] or indifferent to plaintiff's' rights, or both, is not determinative of malice." *Id.* at ¶ 28, 187 Vt. at 555, 996 A.2d at 1177. "[T]he reckless malfeasance or nonfeasance and its attendant risk of harm must all be more reprehensible than simply wrongful or illegal behavior." *Id.* at ¶ 25, 187 Vt. at 553, 996 A.2d at 1176. "Misconduct motivated by fraud, associated with traditional notions of *crimen falsi* or moral turpitude or deliberately oppressive trespass are often sustained as grounds for punitive damages" while "strict liability offenses, such as regulatory violations without malice or consumer fraud without actual intent to deceive, have not been deemed sufficient to warrant an exemplary award." *Id.* at ¶ 25 n.3, 187 Vt. at 553 n.3, 996 A.2d at 1176 n.3 (collecting cases).

Ainsworth v. Franklin Cnty. Cheese Corp., 592 A.2d 871 (Vt. 1991), is instructive. There, the plaintiff argued that his employer had "fabricated grounds for

termination solely to deny plaintiff his severance allowance" and "did so only after plaintiff had worked in good faith to finish up his work and turn over his position to a new manager." *Id.* at 875. The employer argued this was insufficient to show malice, but the Vermont Supreme Court disagreed, finding "[t]his is the type of conduct that has given rise to an award of punitive damages in our prior cases" because it "'has the character of a willful and wanton or fraudulent tort.'" *Id.* at 874 (emphasis omitted) (quoting *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983)) (citing *Appropriate Tech. Corp. v. Palma*, 508 A.2d 724, 727 (Vt. 1986)).[5] The *Ainsworth* court noted that "[m]alice may be inferred from the nature of defendant's conduct and the surrounding circumstances" and held that "the jury could find in this case that [the employer's] conduct showed a wanton disregard for plaintiff's rights and was done to oppress." *Id.* at 875. It concluded "[t]here was no error in submitting the punitive damage issue to the jury." *Id.*

Plaintiff's theory at trial was similar to that at issue in *Ainsworth.* He argued Defendant "fabricated

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[5] In *Appropriate Tech. Corp. v. Palma*, a "company president knowingly misrepresented [the company's] finances [to an employee], and . . . such misrepresentation induced [the employee] to leave the corporation's employ[,]" which, in turn, allowed the company to avoid a payout to the employee under a stock agreement. 508 A.2d 724, 727 (Vt. 1986). The Vermont Supreme Court affirmed the lower court's finding that the misrepresentation was made "in bad faith and with evil intent" and demonstrated sufficient malice to support a punitive damages award. *Id.*

grounds for [his] termination" in reckless disregard of his rights. *Id.* The grounds Defendant gave for terminating Plaintiff were demonstrably false, and although Defendant contended this was a mere mistake, Plaintiff claimed it was a deliberate and malicious falsehood intended to punish him for his safety complaints. He pointed out that although Ms. Brookes claimed to have called him several times, Defendant lacked phone records that supported this claim. In addition, the parties cross-designated portions of the deposition of Ms. Trybendis, wherein she testified that other employees who had missed three or more days of work were not terminated.

The master schedule and time records in Defendant's possession contradicted its stated reasons for termination. In addition, Defendant's former supervisory employee, Ms. Grangent, testified that she raised concerns that the stated grounds for Plaintiff's termination were false and alerted management to Plaintiff's safety complaints in a conference call with corporate officers, including Mr. Harmon, prior to Plaintiff's termination. While Mr. Harmon testified that he did not realize the termination notice had errors in it until a week after Plaintiff's termination, he also testified to having a telephone conversation prior to Plaintiff's termination about the need to pay Plaintiff for his work on Tuesday, although the termination notice stated he had missed work that day. The evidence at trial included an email received by Mr. Harmon prior to Plaintiff's termination which showed that Plaintiff had worked on Monday and Tuesday. Ms.

Grangent testified that she refused to sign the termination notice because it was false and claimed Defendant nonetheless knowingly authorized the termination to proceed.

A reasonable juror could "infer[] from the nature of [D]efendant's conduct and the surrounding circumstances" that Defendant "fabricated grounds for [Plaintiff's] termination" in retaliation for Plaintiff's VESTA complaints. *Ainsworth*, 592 A.2d at 875; *see also Williams v. Regus Mgmt. Grp. LLC*, 836 F. Supp. 2d 159, 174 (S.D.N.Y. 2011) ("The factfinder may disbelieve the defendant's explanation either because the facts underlying the explanation are false or because the explanation is weakened by inconsistencies or logical flaws."). The evidence further reasonably supported a conclusion that Mr. Harmon, a corporate officer, "either directed the act, participated in it, or subsequently ratified it." *Shortle*, 399 A.2d at 518. In turn, a reasonable juror could conclude that Defendant committed "a wi[l]lful violation of law in reckless disregard of [P]laintiff's rights" under VESTA, *Fly Fish Vt., Inc.*, at ¶ 29, 187 Vt. at 555, 996 A.2d at 1178, with misrepresentations that had "the character of fraud[.]" *Follo*, 2009 VT 11, ¶ 48, 185 Vt. at 413, 970 A.2d at 1246. This evidence was sufficient to support the jury's conclusion that Defendant acted with "bad motive [and] ill will" in terminating Plaintiff. *Fly Fish Vt., Inc.*, 2010 VT 33, ¶ 18, 187 Vt. at 549, 996 A.2d at 1173. The jurors were properly instructed regarding the legal standard for punitive damages and "are presumed to [have] follow[ed] [the court's]

instructions." *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (internal quotation marks omitted) (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

Because there was "evidence which reasonably supports punitive damages," there was no error in submitting the issue to the jury. *Lent*, 470 A.2d at 1171. For this reason, Defendant's renewed motion for judgment as a matter of law as to punitive damages is DENIED.

B. Whether Defendant is Entitled to a New Trial.

Defendant contends that even if it is not entitled to judgment as a matter of law in its favor, it is entitled to a new trial. "It is well established that the trial judge enjoys 'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence[.]'" *Lore v. City of Syracuse*, 670 F.3d 127, 176-77 (2d Cir. 2012) (first alteration in original) (quoting *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 433 (1996)). "A district court may grant a Rule 59 motion—even if some evidence supports the verdict—if the court determines, 'in its independent judgment, [that] the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice.'" *Crawford v. Tribeca Lending Corp.*, 815 F.3d 121, 128 (2d Cir. 2016) (quoting *Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir. 2005) (alterations in original)).

1. Whether the Verdict as to Liability Was Against the Weight of the Evidence.

Defendant contends the jury's verdict as to the VOSHA and VESTA retaliation claims was against the weight of the evidence because Plaintiff's witnesses were not credible. In considering a motion for a new trial, "a trial judge should not be quick to revisit a jury's credibility determinations, and must proceed 'with caution and great restraint' when asked to do so." *Id.* at 128 (quoting *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012)). In this case, the credibility determinations by the jury were not so "seriously erroneous" that they resulted in a "miscarriage of justice." *Id.* (quoting *Nimely*, 414 F.3d at 392). The court therefore declines to exercise its discretion to order a new trial on this basis.

2. Whether the Presentation of Allegedly Inadmissible Evidence Warrants a New Trial.

Defendant argues that the jury was presented with inadmissible evidence from witnesses Ms. Howell and Ms. Grangent. Plaintiff introduced this evidence as admissions by a party opponent, pointing out that Fed. R. Evid. 801(d)(2)(D) does not require an employee to have speaking authority as a prerequisite to a party admission. *See* Advisory Committee's Notes on Fed. R. Evid. 801(d)(2)(D) ("Since few principals employ agents for the purpose of making damaging statements . . . [the rule] favors admitting statements related to a matter within the scope of the agency or

employment."). Defendant nonetheless contends the evidence was irrelevant and unduly prejudicial.

To support a motion for a new trial, the introduction of evidence must have been "a clear abuse of discretion" and "so clearly prejudicial to the outcome of the trial" that the court is "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Nimely*, 414 F.3d at 399 (quoting *Luciano v. Olsten Corp.*, 110 F.3d 210, 217 (2d Cir. 1997)). The court must be "especially loath to regard any error as harmless in a close case, since in such a case even the smallest error may have been enough to tilt the balance." *Id.* at 400 (internal quotation marks omitted) (quoting *Hester v. BIC Corp.*, 225 F.3d 178, 185 (2d Cir. 2000)).

Under Fed. R. Evid. 404(b), evidence of other crimes, wrongs, or acts are "not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character[,]" but "may be admissible for another purpose, such as proving motive, . . . intent, . . . plan, . . . [or] absence of mistake[.]" Fed. R. Evid. 404(b)(1)-(2). "The Second Circuit evaluates Rule 404(b) evidence under an 'inclusionary approach' and allows evidence 'for any purpose other than to show a defendant's . . . propensity.'" *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (citations omitted).

Ms. Howell testified that on one occasion she was asked to find her own replacement when she was absent due to illness for her autoimmune disease. She

stated that she and other RCs raised complaints to Defendant regarding a lack of cleaning supplies and mold in the dorms. She claimed felt threatened by Ms. Mobley's statements that employees would be disciplined and reprimanded for missing work and that these types of statements continued even after Defendant terminated Ms. Mobley. Ms. Howell conceded that neither she nor her fellow RCs were disciplined for their complaints although they were told that they needed to be "more responsible" and respect their supervisors. (Tr. 397-98.) They were also told that it was their fault Ms. Mobley was terminated and they "needed to stop making petulant complaints and acting like children[.]" *Id.*

Because Ms. Howell was unavailable to testify, a portion of her deposition testimony was admitted over Defendant's objection based on the court's ruling that Ms. Howell's testimony was relevant to Defendant's retaliatory intent. Defendant argues this testimony was not probative, lacked foundation, and was especially prejudicial as Ms. Howell was not subject to cross-examination at trial, although Defendant's counsel questioned her at deposition and cross-designated portions of her deposition to be read to the jury.

> Prior acts of an employer are admissible for the purpose of establishing or negating discriminatory intent because "discrimination analysis must concentrate not on individual incidents, but on the overall scenario. . . . What may appear to be a legitimate

> justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."

Solomon v. Uniondale Union Free Sch. Dist., 2007 WL 608137, at *4 (E.D.N.Y. Feb. 16, 2007) (alteration in original) (quoting *Raniola*, 243 F.3d at 622). Ms. Howell corroborated Plaintiff's claim that Defendant's employees were expected to work when they were sick and faced disciplinary action if they failed to do so. The prejudicial impact of this testimony was minimal as Defendant's own employee, Mr. Lacharite, testified that this was also his understanding. The probative value of this evidence substantially outweighed any unfair prejudice as it went to the heart of Plaintiff's VOSHA and VESTA claims.

Defendant seeks a new trial with regard to Ms. Grangent's testimony about food quality, mold, student behavioral issues, and the discouragement of reports to the DOL, which Defendant argues are "far afield of the issues at trial" and were inadmissible propensity evidence under Federal Rule of Evidence 404(b). (Doc. 135 at 46.) Ms. Grangent's testimony, however, was probative of the context in which Plaintiff's alleged protected activity took place and admissible on the issue of retaliatory intent. It was limited in scope, and the court prohibited Plaintiff from expanding this evidence further. (Tr. 360-65.)

In any event, Ms. Grangent's testimony did not solely favor Plaintiff as she admitted that, although

she received a variety of employee complaints, none of those individuals were terminated for making them. Defendant argued to the jury that the lack of cleaning supplies on a single occasion or working while sick were *de minimis* events that did not warrant a finding of liability or damages. Plaintiff was entitled to demonstrate that these issues were part of a broader pattern and culture of disregard for employee and student well-being and unsanitary conditions. *See United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (holding other acts are admissible if they "arose out of the same transaction or series of transactions as the [claims] . . . or if it is necessary to complete the story of the [claims] on trial") (quoting *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000)).

The challenged testimony was also admissible with regard to Plaintiff's punitive damages claim, for which a jury may consider whether "the conduct involved repeated actions or was an isolated incident." *Shahi*, 2008 VT 25, ¶ 26, 183 Vt. at 334, 949 A.2d at 1034. Evidence that Defendant "had committed similar acts in the past against others" was therefore relevant. *Carpentier*, 2013 VT 91, ¶¶ 17, 23, 195 Vt. at 59-60, 62, 86 A.3d at 1012, 1014; *see also Sweet v. Roy*, 801 A.2d 694, 710 (Vt. 2002) (holding other bad act evidence "was admissible on whether to award punitive damages and on the amount of any punitive damages") (citing *Devine v. Rand*, 38 Vt. 621, 626-27 (1866)); *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996) (holding "evidence that a defendant has repeatedly engaged in prohibited conduct while

knowing or suspecting that it was unlawful would provide relevant support" to finding of reprehensibility); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (noting that "the existence and frequency of similar past conduct" is relevant to punitive damages).

In closing arguments, Plaintiff's counsel referred to Ms. Howell's and Ms. Grangent's testimony only in the context of retaliatory animus and punitive damages. Because the challenged evidence was properly admitted, relevant, and not unfairly prejudicial, its presentation to the jury does not merit a new trial.

3. Whether An Improper Closing Argument Warrants a New Trial.

Defendant contends that a new trial is warranted because Plaintiff's counsel was allowed to propose a punitive damages amount for the first time in rebuttal. At trial, Defendant objected because it would not have an opportunity to respond to this amount. The court allowed Plaintiff's counsel to request a specific punitive damages amount and instructed the jury that "the [D]efendant had no opportunity to address it." (Tr. 876.) Defendant declined the opportunity to offer a sur-rebuttal argument. (Tr. 882.) In its own closing argument, Defendant told the jury Plaintiff spent "a lot of time talking about punitive damages. Big dollar signs[,]" and that Plaintiff was asking for Defendant to be "punished by paying [Plaintiff] a massive windfall

. . . [which] doesn't even merit any consideration." (Tr. 864-65.)

"[W]hen the conduct of counsel in argument causes prejudice to the opposing party and unfairly influences a jury's verdict, a new trial should be granted." *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992) (citations omitted). "Obviously not all misconduct of counsel taints a verdict to such a degree as to warrant a new trial." *Id.* (citing *Matthews v. CTI Container Transp. Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989)). In the context of the entire trial, some issues can be "dealt with by the trial court's rulings and curative instructions." *Id.* But "the bounds of counsel's advocacy are circumscribed by considerations of the prejudice it might engender." *Id.* at 539 (collecting cases).

In general, rebuttal is "an opportunity to respond to the defense's arguments in summation[.]" *United States v. Faisal*, 282 F. App'x 849, 850 (2d Cir. 2008) (citing *United States v. Rubinson*, 543 F.2d 951, 966 (2d Cir. 1976)). Plaintiff's claim for punitive damages was asserted throughout the trial and in his initial summation, although no dollar amount was requested until his rebuttal. The Second Circuit "has not adopted a ban on suggestions of damage amounts[,]" although it has "expressed concern that lawyers may influence juries unduly when they mention particular damage awards." *Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) (citing *Mileski v. Long Island Rail Road Co.*, 499 F.2d 1169, 1172-74 (2d Cir.1974)). The concern is that "[a] jury with little or no

experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel, particularly if he conveys the impression (as frequently happens) that he speaks on the basis of extensive trial experience." *Mileski*, 499 F.2d at 1172. Plaintiff's counsel stated:

> 3-1/2 million. That's what Mr. Cole requests in this case for punitive damages. Is that enough to deter a company like [Defendant]? I don't know. You use your own judgment. Maybe it's too much. I don't know. Mr. Cole requests 3-1/2 million in order to deter this conduct. Please feel free to make your own determination on that and the other damages.

(Tr. 877.)

While the court perhaps should have "specifically caution[ed] the jury that the dollar figures advanced by counsel do not constitute evidence but merely represent argument which the jury is free to disregard in its deliberations[,]" *Mileski*, 499 F.2d at 1174, Defendant did not request this type of curative instruction, and the court's contemporaneous instruction that Defendant had no opportunity to respond to this amount alerted the jury that Plaintiff's figure was merely a suggestion. Defendant proposed no further curative instructions and was offered an opportunity for sur-rebuttal but declined it. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1282 (11th Cir. 2008) (holding defendant was not prejudiced where plaintiff "did not argue punitive damages in his

first closing argument but raised the issue in rebuttal" because defendant "could have requested a sur[-]rebuttal, but . . . failed to request an opportunity to respond on this issue"). The court's jury instructions made clear that counsel's arguments and statements were not evidence. Against this backdrop, Plaintiff's counsel's "summation was not so outrageous, [n]or [was] the [court's] failure to [further] caution the jury with respect to it so fundamental an error, as to mandate [a new trial]." *Mileski*, 499 F.2d at 1174.

4. Whether the Jury's Award of Emotional Damages Was Excessive.

Pursuant to Fed. R. Civ. P. 59, the court has discretion to "overturn[] verdicts for excessiveness and order[] a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Lore*, 670 F.3d at 177 (alterations in original) (internal quotation marks omitted) (quoting *Gasperini*, 518 U.S. at 433).

> In considering motions for a new trial and/or remittitur, "[t]he role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered."

Stampf v. Long Island R.R. Co., 761 F.3d 192, 204 (2d Cir. 2014) (alteration in original) (quoting *Gasperini*, 518 U.S. at 435).

The jury awarded $75,000 in emotional distress damages, which Defendant argues were "garden variety," meaning "the evidence of emotional harm is limited to the plaintiff's testimony, which describes his or her injuries in vague or conclusory terms, and fails to relate the severity or consequences of the injury. These claims typically lack extraordinary circumstances and are not supported by medical testimony." *Sooroojballie v. Port Auth. of New York & New Jersey*, 816 F. App'x 536, 546 (2d Cir. 2020) (citation omitted). Citing non-controlling decisions, Defendant asserts "garden variety" emotional distress claims merit awards of $35,000 or less absent exceptional circumstances. *See*, *e.g.*, *Najnin v. Dollar Mountain, Inc.*, 2015 WL 6125436, at *3 (S.D.N.Y. Sept. 25, 2015) ("'Garden variety' emotional distress claims lacking extraordinary circumstances and without medical corroboration generally merit $5,000 to $35,000 awards. Cases with evidence of debilitating and permanent alterations in lifestyle may merit larger awards.") (citation omitted).

While Plaintiff's emotional distress claims are indisputably of the "garden variety," the cited cases are not dispositive. The Second Circuit has affirmed awards of $125,000 for emotional damages "where the evidence of emotional distress consisted only of testimony establishing shock, nightmares, sleeplessness, humiliation, and other subjective distress[.]" *Lore*, 670 F.3d at 177 (internal quotation marks and citations omitted) (collecting cases).

Moreover, Vermont law is relevant to the excessiveness determination. *See Stampf*, 761 F.3d at 204 (quoting *Gasperini*, 518 U.S. at 435) (holding district courts must "determine whether the jury's verdict is within the confines set by state law"). Under Vermont law, "an award of damages where exact computation is impossible" must be upheld "[u]nless grossly excessive[.]" *Lent*, 470 A.2d at 1172. The Vermont Supreme Court has held that it is not possible to place an exact "monetary value on a person's sense of dignity[.]" *In re Est. of Peters*, 765 A.2d 468, 477 (Vt. 2000). "Calculating damages is the jury's duty," and considering the evidence, "the size of the verdict alone does not show that the award was entirely excessive." *Id.* at 478 (internal quotation marks and citations omitted). Although the jury's award of emotional damages was substantial, it was not so excessive that it warrants a new trial.

5. Whether The Jury's Awards of Back Pay and Front Pay Were Excessive and Unsupported By the Evidence at Trial.

Defendant gains greater traction with its argument that the jury's awards of back pay and front pay were excessive and unsupported by the evidence at trial. The jury awarded Plaintiff back pay of $55,305 and front pay of $85,638, for a total of $140,943. Plaintiff had requested a total of $136,716.

In evaluating whether compensatory damages are excessive under Vermont law, the court "must consider the evidence in the light most favorable to the damages found by the jury and uphold the verdict if there was evidence reasonably supporting it." *Sweet*, 801 A.2d at 713. "The general rule for determining damages is that the jury should estimate the amount within reasonable limits based upon the evidence before it. Thus, if there is evidence from which an estimation may be made with reasonable certainty, a jury has the authority to make an assessment." *In re Grievance of Brown*, 2004 VT 109, ¶ 26, 177 Vt. 365, 375, 865 A.2d 402, 410 (internal quotation marks and citations omitted) (quoting *Benoir v. Ethan Allen, Inc.*, 514 A.2d 716, 719 (Vt. 1986)). "When front pay is allowed, the damages must be limited to a reasonable period of time, and the amount must not be speculative." *Haynes v. Golub Corp.*, 692 A.2d 377, 383 (Vt. 1997) (citations omitted).

An award of back pay and front pay may be "too speculative because it exceed[s] the amount claimed by plaintiff[.]" *Id.* In this case, the award of back pay and front pay exceeded the amount claimed by Plaintiff and cannot be explained by an adverse tax offset or Plaintiff's *post hoc* justifications. For example, Plaintiff suggests that the jury could have concluded that his salary would have risen higher than the 2.5% estimated by his expert witness because his expert witness testified his estimate was conservative. Plaintiff further argues the jury could have decided that he would have worked his way up to a higher wage because a document in evidence listed a maximum

salary for his position higher than his actual salary. Alternatively, the jury could have decided Plaintiff would have been promoted to a position with higher pay based on testimony from Defendant's expert that another employee in his position had been promoted. The mere speculative possibility of a higher salary or promotion, however, does not provide "reasonable certainty" of the dollar amount awarded. *In re Grievance of Brown*, 2004 VT 109, ¶ 26, 177 Vt. at 375, 865 A.2d at 410 (internal quotation marks and citations omitted) (quoting *Benoir*, 514 A.2d at 719).

Defendant contends it was not reasonable for the jury to award front pay until Plaintiff reached the age of seventy in 2033 because turnover of RCs at NJCC was rampant, Plaintiff worked for Defendant for only a short while and was still in probationary status, Plaintiff asked for reassignment to a lower-paying position, and Plaintiff has never held long-term employment. *See Havill v. Woodstock Soapstone Co.*, 2004 VT 73, ¶ 29, 177 Vt. 297, 309, 865 A.2d 335, 344 ("[T]he length of employment prior to termination is a factor bearing on the determination that a front pay damage award is reasonable and not too speculative."). Defendant proffered evidence that prior to his employment at NJCC, Plaintiff changed jobs on average once every three years. After his termination, he changed jobs on average every three months.[6]

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[6] As Defendant points out, there was also evidence that Plaintiff failed to mitigate his damages, including leaving two managerial positions with allegedly comparable pay and benefits. *See Bergerson v. New York State Off of Mental Health, Cent. New*

In addition, Defendant elicited evidence that Plaintiff's expert witness had not reviewed Defendant's contract to operate NJCC and therefore made assumptions about raises and the duration of Plaintiff's employment that were inconsistent with that contract.[7] Plaintiff counters it was reasonable for the jury to conclude he would stay at NJCC until age seventy because his RC position was the best-paying job he had ever had, was within his chosen profession and consistent with his educational background, and he had no incentive to leave.

The court agrees with Defendant that no rational view of the evidence supports a conclusion that Plaintiff would have worked at NJCC until he was seventy. He was sufficiently dissatisfied with his role as RC to ask for reassignment prior to his termination. Moreover, nothing in his work history either before or after his employment with Defendant supported a conclusion that he would have remained in the same position throughout his career. There was also evidence that Plaintiff failed to mitigate his damages

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York Psychiatric Ctr., 526 F. App'x 109, 111 (2d Cir. 2013) ("A plaintiff who, for personal reasons, resigns from or declines a job substantially equivalent to the one [he or] she was denied has not adequately mitigated damages. But an employee need not go into another line of work, accept a demotion, or take a demeaning position, and a voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment[.]") (internal quotation marks and citations omitted).

[7] Defendant's contract to run NJCC was guaranteed for only three years with a three-year renewal period. After five years, DOL was required to put the contract out to bid.

by resigning from two positions that would have reduced his damages. More importantly, the awards of back pay and front pay awarded were not supported by the evidence and were more than Plaintiff requested, which, alone, reflects a "seriously erroneous result[.]" *Crawford*, 815 F.3d at 128 (quoting *Nimely*, 414 F.3d at 392). Although the court could order remittitur rather than a new trial on the issues of back pay and front pay, the jury's grossly excessive punitive damages award renders remittitur inappropriate.

6. Whether the Jury's Award of Punitive Damages Was Excessive.

A punitive damages verdict may be set aside "only if it is 'manifestly and grossly excessive.' " *Sweet*, 801 A.2d at 715 (quoting *Crump v. P & C Food Mkts., Inc.*, 576 A.2d 441, 450 (Vt. 1990)). "Grossly excessive" is the same language used by the Supreme Court to evaluate whether punitive damages are so excessive that they violate the Due Process Clause. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *Gore*, 517 U.S. at 568 ("Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."). The Vermont Supreme Court has applied the Supreme Court's framework in reviewing punitive damages awards. *See Carpentier*, 2013 VT 91,

¶¶ 19-25, 195 Vt. at 60-63, 86 A.3d at 1013-14; *but see Sweet*, 801 A.2d at 446-47 (maintaining the Vermont standard is more deferential to the jury).

Three guideposts assist in the determination of whether a punitive damages award is grossly excessive: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418. "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. As to reprehensibility, the court must consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419; accord *Shahi*, 2008 VT 25, ¶ 26, 183 Vt. at 334-35, 949 A.2d at 1034.

In this case, Defendant harmed Plaintiff economically, not physically, although its conduct

evinced a disregard for the health and safety of its employees and students. There was also evidence of a corporate culture of suppressing legitimate complaints, and thus sufficient reprehensibility to support a punitive damages award.

On the other hand, Defendant's conduct was limited in scope and duration, Plaintiff was a probationary employee, and Defendant was in the process of trying to reestablish higher standards at a facility which it recently took over and conceded was a "mess." (Tr. 645.) Defendant pointed out that it was Plaintiff's responsibility as an RC to ensure there were sufficient cleaning supplies and further argued Plaintiff's conduct in leaving his shift and a dormitory of students unattended at a time when NJCC was understaffed posed its own safety risks. In addition, although Plaintiff proffered sufficient evidence of malice to submit the question to the jury, Defendant countered with evidence of good faith mistakes in Plaintiff's termination notice coupled with evidence that Plaintiff's employment status was at will.

Defendant presented evidence of non-retaliatory reasons for Plaintiff's termination, including abandonment of his shift and prior discipline while NJCC was operated by Chugach. It proffered evidence that notwithstanding claims about a culture of suppressing complaints, there was no evidence that other employees had been disciplined or terminated on that basis. Finally, Defendant presented evidence that Ms. Grangent, Plaintiff's primary witness against

Defendant, may have been motivated to testify falsely because Defendant terminated her employment.

On balance, Defendant's conduct does not support the amount of punitive damages awarded, which reflects a high degree of reprehensibility and virtually no mitigating circumstances. As media outlets reported, this was one of the largest employment verdicts in Vermont history, *see* Doc. 135 at 60 (collecting news articles), even though the facts and circumstances of this case did not shock the conscience or fall so far outside accepted norms that they mandated severe punishment and substantial deterrence.

The ratio of punitive to compensatory damages in this case, 13.9 to 1, also supports a conclusion that the jury's punitive damages award was excessive. While there is no "bright-line ratio which a punitive damages award cannot exceed . . . in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. Vermont law does not "impos[e] a ratio requirement[,]" in part because to do so "would improperly hamper the punitive function of the award[,]" *Pezzano v. Bonneau*, 329 A.2d 659, 661 (Vt. 1974); however, the Vermont Supreme Court has considered the ratio to be a relevant metric in determining whether punitive damages are excessive. *See Carpentier*, 2013 VT 91, ¶ 24, 195 Vt. at 62, 86 A.3d at 1014 (considering ratio between compensatory and punitive damages "to the extent . . . relevant"); *Appropriate Tech. Corp.*, 508 A.2d

at 727 (holding that "[p]unitive damages need not bear any relationship to the underlying compensatory damage award" but the ratio of compensatory damages to punitive damages is "[n]evertheless" relevant in determining whether punitive damages award should be vacated on appeal). "Single-digit multipliers are more likely to comport with due process," although:

> ratios greater than [single digits] may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. . . . The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Campbell, 538 U.S. at 425 (internal quotation marks and citations omitted).

In cases in which the Vermont Supreme Court has upheld ratios greater than a single digit, the compensatory damages have been relatively small and the conduct "particularly egregious[.]" *Id.* (internal quotation marks omitted). For example, in *Sweet v. Roy*, the Vermont Supreme Court upheld a 10-to-1 ratio where compensatory damages were $10,000. 173 A.2d at 715. In *Sweet*, the jury found defendants had attempted "to evict plaintiff by force or

other self-help means" and there was evidence that defendants were engaged in a longstanding and ongoing campaign of self-help evictions in the trailer park they owned, which included throwing rocks through trailer doors, pouring water in fuel lines, breaking windows, and cutting electrical lines. *Id.* at 699-700. The Vermont Supreme Court found the jury "faced a strong need to fashion a punitive damage award that would deter defendants' ongoing illegal conduct and scheme and prevent further harm to park residents. In addressing this need, it had compelling evidence that a smaller punitive damage award, levied in 1986, had not deterred the misconduct." *Id.* at 715.

The only case Plaintiff cited in which the Vermont Supreme Court upheld a ratio greater than 13.9-to-1 is *Pezzano v. Bonneau*, in which the ratio was 25 to 1. 329 A.2d at 660. However, there, the compensatory damages were only $300 and, in addition to maliciously converting the plaintiff's car, the defendant falsely told police that the plaintiff stole the car and was dealing drugs. *Id.*

In this case, the amount of compensatory damages was "substantial," but unsupported by the evidence and in excess of the amount Plaintiff requested. This alone suggests the jury made decisions based on factors external to the evidence presented. In turn, Defendant's reprehensible conduct was limited in time and scope and was not apparently part of a broader context of disciplining or terminating employees with retaliatory intent. *Campbell*, 538 U.S. at 425. The jury was not presented with any evidence that prior

adverse verdicts had failed to deter Defendant's conduct.

The third factor is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418. The parties both cite what they consider comparable cases, primarily in federal courts, but "on the issue of excessiveness, comparing punitive damage awards in other cases where employers were found liable for discrimination and/or retaliation, is of limited utility because a wide range of awards have been upheld." *Mugavero v. Arms Acres, Inc.*, 680 F. Supp. 2d 544, 589-90 (S.D.N.Y. 2010) (citing *Hill v. Airborne Freight Corp.*, 212 F. Supp. 2d 59, 77 (E.D.N.Y. 2002) (collecting cases upholding punitive awards between $10,000 and $1.25 million) (alteration omitted)).

As Plaintiff observes, Defendant could have proffered evidence of its financial status and chose not to do so. This lack of evidence, however, only goes so far. It does not mean the jury's punitive damages award is not cabined by any restraints. A relevant metric in this case is the civil penalties authorized by VOSHA and VESTA. *See Campbell*, 538 U.S. at 418. An employer who violates VESTA "shall be fined not more than $5,000.00." 21 V.S.A. § 345; *see also* 21 V.S.A. § 483(m) ("An employer who violates [VESTA] shall be subject to the penalty provisions of [21 V.S.A. § 345]."); Vt. Admin. Code 13-5-13(a) ("An employer who violates [VESTA] shall be fined not more than $5,000.00 per violation."). An employer who "willfully or repeatedly

violates" VOSHA "may be assessed a civil penalty of not more than $126,749.00[.]" 21 V.S.A. § 210. The jury's punitive damages award dwarfs these civil penalties which reflect the Vermont Legislature's determination of an appropriate punishment.

"Punitive-damage awards are subject to constitutional scrutiny because due process demands 'that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" *Shahi*, 2008 VT 25, ¶ 25, 183 Vt. at 334, 949 A.2d at 1033 (quoting *Gore*, 517 U.S. at 574). Here, the jury's award of $3 million in punitive damages was so "manifestly and grossly excessive[,]" *Sweet*, 801 A.2d at 715 (internal quotation marks omitted) (quoting *Crump*, 576 A.2d at 450), under both Vermont law and the Due Process Clause, that it must be set aside. Although the court is reluctant to intrude upon the province of the jury, it must do so when necessary to prevent "a miscarriage of justice" that would undermine confidence in the courts. *Crawford*, 815 F.3d at 128 (quoting *Nimely*, 414 F.3d at 392). The jury's award of punitive damages was beyond "the outermost limit of the due process guarantee[,]" *Campbell*, 538 U.S. at 425, and Defendant is therefore entitled to a new trial on the issue of punitive damages.

7. Whether the Court Should Order Remittitur.

"If a district court finds that a verdict is excessive, it may order a new trial, a new trial limited to damages, or, under the practice of remittitur, may condition a denial of a motion for a new trial on the plaintiff's accepting damages in a reduced amount." *Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir. 1995) (citing *Phelan v. Loc. 305 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 973 F.2d 1050, 1064 (2d Cir. 1992)). "[W]hether a new trial or remittitur should be ordered" is to be determined "by reference to federal standards developed under Rule 59[.]" *Stampf*, 761 F.3d at 204 (quoting *Gasperini*, 518 U.S. at 435).

"A remittitur should be granted only where the trial has been free of prejudicial error." *Ramirez*, 112 F.3d at 40 (citing *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027-28 (2d Cir. 1991)). "If, instead, the record establishes that the jury's verdict on damages was not only excessive but was also infected by fundamental error, remittitur is improper" and the court should order "a new trial on damages." *Id.* In some cases, "the size of a jury's verdict may be so excessive as to be 'inherently indicative of passion or prejudice' and to require a new trial." *Id.* at 4041 (citing *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 603 (5th Cir. 1988)).

"The cases in which the jury's award is seen to reflect prejudice, however, are generally limited to

those in which the remittitur granted is totally out of proportion to the damages allowed by the district court"; for example, where the "district court ordered $4.35 million remittitur after jury awarded $5 million" or where the "district court ordered $1.65 million remittitur after jury awarded $1.9 million[.]" *Id.* at 41 (citing *Auster Oil & Gas, Inc.*, 835 F.2d at 603; *Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683-84 (5th Cir. 1986)).

Because of the grossly excessive award of punitive damages in this case, coupled with awards of back pay and front pay unsupported by the evidence, any remittitur ordered by the court may be "totally out of proportion to the damages allowed[.]" *Id.* Remittitur is thus inappropriate, and the court must hold a new trial.

While Rule 59 "permits partial retrial of distinct issues, . . . the trial court must examine whether a jury's award of damages and its finding of liability are sufficiently separate to allow a partial new trial[.]" *Akermanis v. Sea-Land Serv., Inc.*, 688 F.2d 898, 906 (2d Cir. 1982) (citing *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 500 (1931) ("Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.")). Liability in this case is sufficiently distinct from damages that a new trial limited to the issue of

appropriate damages would not prejudice either party.[8]

For the foregoing reason, the court DENIES IN PART and GRANTS IN PART Defendant's motion for a new trial and ORDERS a new trial on damages.

CONCLUSION

For the foregoing reasons, Defendant's renewed motion for judgment as a matter of law is DENIED and Defendant's motion for a new trial is DENIED IN PART and GRANTED IN PART. (Doc. 131.) The court hereby ORDERS a new trial on damages. SO ORDERED.

Dated at Burlington, in the District of Vermont, this 22nd day of March, 2022.

/s/ Christina Reiss
Christina Reiss, District Judge
United States District Court

[8] While the jury's award of emotional distress damages is not itself excessive, the issue of emotional damages is not "sufficiently separate" from other damages "to allow a partial new trial" as to front pay, back pay, and punitive damages but not emotional distress damages. *Akermanis v. Sea-Land Serv., Inc.*, 688 F.2d 898, 906 (2d Cir. 1982) (citing *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 500 (1931)).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

THOMAS COLE, Plaintiff, v. FOXMAR, INC., d/b/a EDUCATION AND TRAINING RESOURCES, Defendant.	Case No. 2:18-cv-00220 (Filed Jun. 13, 2022)

ENTRY ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (Doc. 149)

Pending before the court is Plaintiff Thomas Cole's April 5, 2022 motion for reconsideration of the court's March 22, 2022 Opinion and Order granting in part and denying in part the renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial filed by Defendant Foxmar, Inc., d/b/a Education and Training Resources. (Doc. 149.) Plaintiff seeks reconsideration of the court's decision to set aside the jury's compensatory and punitive damages awards as well as its order granting a new trial on damages. On May 3, 2022, Defendant opposed the motion and Plaintiff filed a reply on May 17, 2022, at which time it took the pending motion under advisement.

Plaintiff is represented by William Pettersen, IV, Esq. Defendant is represented by Kevin L. Kite, Esq., Mara D. Afzali, Esq., Michael D. Billok, Esq., and Paul J. Buehler, III, Esq.

"It is well-settled that a party may move for reconsideration and obtain relief only when the [movant] identifies 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 108 (2d Cir. 2013) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). This standard must be "narrowly construed and strictly applied so as to 'avoid duplicative rulings on previously considered issues' and prevent [motions for reconsideration] from being used to advance theories not previously argued or 'as a substitute for appealing a final judgment.'" *Merced Irrigation Dist. v. Barclays Bank PLC*, 178 F. Supp. 3d 181, 183 (S.D.N.Y. 2016) (quoting *Montanile v. Nat'l Broad. Co.*, 216 F. Supp. 2d 341, 342 (S.D.N.Y. 2002)); *accord Analytical Survs., Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("[T]he standard for granting a [ ]motion for reconsideration is strict[.]") (alteration adopted) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)). A motion for reconsideration is not "a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple[.]'" *See Tonga Partners, L.P.*,

684 F.3d at 52 (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)).

Plaintiff challenges the court's decision to set aside the jury's awards of front pay and back pay. The jury awarded $55,305 in back pay and $85,638 in front pay, for a total award of $140,943 in lost wages. The parties dispute by how much $140,943 exceeds Plaintiff's expert's calculation of lost wages but agree that it is by at least $4,227. Plaintiff admits that the jury awarded "$19,185 more *in front pay* than Plaintiff's expert's estimate[.]" (Doc. 153 at 6) (emphasis supplied). Plaintiff asserts the discrepancy between the amount claimed and the amount awarded is a "slight difference," or even a 'minor computational error,'" that reflects the inherently speculative nature of front pay awards. (Doc. 153 at 6) (quoting *Anderson v. Metro-N Commuter R.R.*, 493 F. App'x 149, 153 (2d Cir. 2012)). He cites *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992), for the proposition that "a slight difference between the jury's award and a plaintiff's expert's estimate does not justify a retrial." (Doc. 153 at 3-4.)

Tyler involved a motion for judgment as a matter of law, not a motion for a new trial, and the Second Circuit explicitly stated that it was not reviewing whether "the jury's verdict was against the 'clear weight' of the evidence," under Fed. R. Civ. P. 59. *Tyler*, 958 F.2d at 1187. For this reason, it found "no basis for [the court] to disturb" an award of back pay and emotional distress damages which was "slightly higher than the plaintiff's expert's calculation." *Id.* at 1190.

Plaintiff points to evidence that supports his argument that he would have worked for Defendant until age seventy and challenges the court's finding that "no rational view of the evidence supports a conclusion that Plaintiff would have worked at NJCC until he was seventy." (Doc. 145 at 26.) "A district court may grant a Rule 59 motion—even if some evidence supports the verdict[,]'" *Crawford v. Tribeca Lending Corp.*, 815 F.3d 121, 128 (2d Cir. 2016), however, and the court's observation regarding Plaintiffs likelihood of remaining employed with Defendant was only one part of the court's analysis. It was by no means the most important factor. Moreover, *Tyler* provides no support for a different outcome.

In *Tyler*, the Second Circuit noted that "front pay awards always involve some degree of speculation," and upheld an award of front pay only because it "'did not require undue speculation' and was "well-cabined by the expert testimony of expected income, possible future earnings from other employment, and expected worklife." *Id.* at 1189 (quoting *Whittlesey v. Union Carbide Corp.*, 742 F.2d 729 (2d Cir. 1984)). The same cannot be said for the jury's award of front pay in this case. As the court explained in its March 22, 2022 Opinion and Order, the jury's back pay and front pay awards were contrary to the evidence, were more than Plaintiff requested or his expert testified were supported, and could not be justified without speculation by the jury. Nor can the significant discrepancy be explained away as the jury's mathematical error. The court noted that if lost wages

were the only issue challenged in Plaintiffs post-trial motion, they could be rectified by remittitur. Defendant's challenge to punitive damages, however, makes a new trial on damages the appropriate course.

Plaintiff seeks reconsideration of the court's determination that the jury's punitive damages award must be set aside. "[E]vidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 429 (1994). Procedural due process requires "judicial review of the size of punitive damages awards" to ensure they have a rational basis. *Id.* at 432; *see also TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring) ("'[P]rocedural due process' requires judicial review of punitive damages awards for reasonableness[.]").[1]

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[1] While Justice Scalia suggested "reasonableness," a majority of the Supreme Court has not decided "what standard of review is constitutionally required." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 n.10 (1994). The *Honda* majority noted, however, that there is not "much practical difference between review that focuses on 'passion and prejudice,' gross excessiveness,' [ ] whether the verdict was 'against the great weight of the evidence[,]' [or] whether 'no rational trier of fact could have' reached the same verdict." *Id.* (citation omitted). Under Vermont law, an award of punitive damages is "manifestly and grossly excessive," when it is "so great . . . as to indicate that it is the result of perverted judgment, accident, or gross mistake." *Coty v. Ramsey Assocs., Inc.*, 546 A.2d 196, 206 (Vt. 1988) (quoting *Woodhouse v. Woodhouse*, 130 A. 758, 789 (Vt. 1925)). That standard is satisfied in this case.

"Federal judges may, and should, insist that the [punitive damages] award be sensible and justified by a sound theory of deterrence. Random and freakish punitive awards have no place in federal court, and intellectual discipline should be maintained." *Payne v. Jones*, 711 F.3d 85, 97 (2d Cir. 2013) (quoting *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000)). The jury's punitive damages award was "outside the universe of possible awards which are supported by the evidence," *Mathieu Enterprises, Inc. v. Patsy's Companies*, 2009 VT 69, ¶ 10, 186 Vt. at 559, 978 A.2d at 484 (internal quotation marks and citations omitted), and not justified by any "sound theory of deterrence." *Payne*, 711 F.3d at 97 (quoting *Perez*, 223 F.3d at 625). Plaintiff's disagreement with the court's decision, without pointing to "overlooked" facts or law, is not grounds for reconsideration. *Shrader*, 70 F.3d at 257.

The "new" non-controlling precedent Plaintiff cites as instructive in his reply brief, *Diaz v. Tesla, Inc.*, 2022 WL 1105075 (N.D. Cal. Apr. 13, 2022), *motion to certify appeal denied*, 2022 WL 2046827 (N.D. Cal. June 7, 2022), exemplifies the difficulty of drawing meaningful conclusions by comparing awards in disparate cases. *Diaz* was a discrimination case brought under 42 U.S.C. § 1981, "a Reconstruction-era civil rights statute that prohibits discrimination in the making and enforcement of contracts[,]" and California state law. *Id.* at *1. The court granted remittitur of compensatory damages from $6.9 million to $1.5 million and punitive

damages from $130 million to $13.5 million. The court noted that

> The evidence was disturbing. The jury heard that the Tesla factory was saturated with racism. Diaz faced frequent racial abuse, including the N-word and other slurs. Other employees harassed him. His supervisors, and Tesla's broader management structure, did little or nothing to respond. And supervisors even joined in on the abuse, one going so far as to threaten Diaz and draw a racist caricature near his workstation.

Id. at *1. "Diaz sought only non-economic—that is, emotional—damages." *Id.* at *6.

Plaintiff contends that Defendant's conduct in this case was even more reprehensible than Tesla's in *Diaz* because it was intentional, involved deception, and put health and safety at risk. But a "disturbing" campaign of "racial abuse" by coworkers and supervisors cannot be compared to the retaliatory firing of a probationary employee for reporting violations of a paid sick leave law. *Id.* at *1.

Plaintiff next claims it was error for the court to look to statutory civil penalties as a relevant metric in reviewing the size of the punitive damages award. Contrary to Plaintiff's assertions, the statutory penalties for the Vermont Earned Sick Time Act

("VESTA") apply to Defendant's retaliatory conduct,[2] and the statutory penalties for Vermont Occupational Safety and Health Act ("VOSHA") sanction similar conduct.[3] The Supreme Court has consistently cited statutory penalties in analyzing the excessiveness of punitive damage awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003) ("[W]e need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the [Defendants] appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award.") (citation omitted); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) ("[A] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue. . . . The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000[.]") (internal quotation marks, citations, and footnote omitted).

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[2] *See* 21 V.S.A. § 483(1) (prohibiting retaliation under VESTA); § 483(m) (authorizing $5,000 penalty for violation of provisions of § 483).

[3] *See* 21 V.S.A. § 201 (noting purpose of VOSHA is to ensure "safe and healthful working conditions at the[ ] work place"); § 231 (prohibiting retaliation for making complaints or exercising rights under VOSHA); § 210 (providing for penalties between $5,000 and $126,749 for "[a]ny employer that willfully or repeatedly violates the requirements of [VOSHA] or any standard or rule adopted, or order issued pursuant to [VOSHA]").

Finally, Plaintiff argues the court should have instead relied on case law which he claims supports the jury's punitive damages award. While it may be "helpful in deciding whether a particular punitive award is excessive to compare it to court rulings on the same question in other cases," *Payne*, 711 F.3d at 104, by Plaintiffs own admission there are "absolutely no prior Vermont cases in which a school, university, or other employer responsible for young students intentionally flouted safety laws, suppressed complaints, and ignored safety issues, in reckless disregard for the health and safety of employees and students." (Doc. 149 at 18.) Punitive damage awards for violations of different laws, in different jurisdictions, upheld under different excessiveness standards, are not controlling. *See Payne*, 711 F.3d at 104-05 (noting that comparing cases is "precarious" and it can be "difficult to draw useful comparisons"); *Coty v. Ramsey Assocs., Inc.*, 546 A.2d 196, 207 (Vt. 1988) ("[S]uch comparisons are of dubious value[.]").

The court exercised "caution and great restraint" and did not set aside the verdict merely because it "disagree[d] with the jury[.]" *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012). A searching review of the record compelled the conclusion that allowing the jury's back pay and front pay and punitive damages awards to stand would be "a miscarriage of justice." *Id.* Because Plaintiff does not "present any new facts or controlling law that the court overlooked that might reasonably be expected to alter the court's decision and order," *Kolel Beth Yechiel Mechil of*

Tartikov, Inc., 729 F.3d at 108, his motion for reconsideration (Doc. 149) is DENIED.

CONCLUSION

For the foregoing reasons, Defendant's motion for reconsideration (Doc. 149) is DENIED.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 13th day of June, 2022.

/s/ Christina Reiss
Christina Reiss, District Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

THOMAS COLE, Plaintiff, vs. FOXMAR, INC., d/b/a EDUCATION AND TRAINING RESOURCES, Defendant.	)	CIVIL ACTION NO. 2:18-cv-220

HEARING ON MOTIONS *IN LIMINE*
Monday, December 12, 2022
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA C. REISS,
District Judge

APPEARANCES:

WILLIAM PETTERSEN IV, ESQ., Pettersen Law PLLC, 1084 East Lakeshore Drive, Colchester, VT 05446, Counsel for the Plaintiff

MICHAEL D. BILLOK, ESQ., and PAUL J. BUEHLER III, ESQ., Bond, Schoeneck & King, PLLC, 268 Broadway, Suite 104, Saratoga Springs, NY 12866-4281, Counsel for the Defendant

* * *

[8] strike. But I thought about it afterwards and thought this is not the way it should have come up, I'm not so sure why we're hearing about all this, *et cetera*.

So I think these different issues should be treated differently.

Food quality to me is far afield from retaliation for reporting a violation of Vermont statute. It's entirely based on hearsay, from what I can understand. I understand Mr. Pettersen's argument that, hey, she's the director and people are reporting to her in the course of their employment, but we don't know who's reporting to her. She says a fair amount of inflammatory things about "every time the kids go to the cafeteria, they eat, then they get sick all over the dormitories." I don't have any confidence she has personal knowledge of any of that. But it strikes the Court that the food issue is pure propensity and far afield. I might have a little bit different attitude if we get into punitive damages, but I think it's going to be cumulative.

With regard to the knife incident, I don't think we have any offer of proof that if a student brought a three-inch knife to the Job Corps, that would have to be reported to the Department of Labor. So I don't know that we have that predicate information. I do agree with defendant, and I remember quite clearly the testimony of his primary witness that these are often troubled youth, this is the kind of program it is. I remember the horrific story about them luring [9] somebody off campus, killing them, and burning their body. Horrible. So I don't think this is a smoking gun of anything – any kind. It has nothing to do with plaintiff's claim.

And I was thinking if you came to me and this was a case of a student-on-a-student assault with a weapon, I'd be like, yeah, the fact that they have a no-tolerance policy and somebody comes with a knife and they don't enforce it, I think the jury should hear about that. This just seems to be other bad evidence, way off course, and I don't see that it goes to any kind of contested issue other than you're not really picking the kinds of students you should have at this particular campus.

The mold issue, however, is actually tied more closely to this case. The plaintiff's testimony is dorms were filthy; the kids couldn't clean it; people were complaining about it; he was complaining about it. There's a back-and-forth about whether the plaintiff did his own best job to remediate that. We had Ms. Howell's testimony, which I'm going to talk to you about in a minute, about the mold. And the fact that this was an issue that persisted even after plaintiff was terminated and the same kind of policy of, like, "Don't complain about it. It shouldn't be flagged," I think is appropriate. It's more cumulative than anything else. It is wrapped up in the allegation that there's this kind of pattern of retaliation and that [10] – you know, plaintiff has already established his case, but causation is a big issue. Is this – are these damages that he is suffering because of the retaliation and the termination, or would he have suffered these same damages even in its absence? So I'm a little bit more on the fence about the mold.

And I'm going to start this time with the plaintiff as the proponent of the evidence.

MR. PETTERSEN: Thank you, your Honor.

Well, these three pieces of evidence from plaintiff's perspective are crucial to the case of punitive damages. I'll just go through quickly and address the primary points why.

Your Honor touched on it in your dialogue, which is the purpose of this evidence is not necessarily the safety violations that were or were not happening: the food making students sick, the mold, the knife. What the extreme relevance is is that these were complained about and ignored and suppressed.

With the food, the center director herself received complaints from staff. That's not hearsay because that's an employee exception to hearsay. She received complaints from staff that the students were getting sick.

THE COURT: So let me ask you about it. I get where you are going with this, but at some point it becomes too attenuated. So I would hope you would agree with me that if

* * *

[19] to be about VESTA.

THE COURT: Right. The Court's ruling remains unchanged. The probative value of the knife and food quality evidence is substantially outweighed by the potential for unfair prejudice, confusion of the

jury. It appears to be pure propensity evidence. It's cumulative in light of the Court's ruling that the mold evidence will be admissible, and so the Court's ruling stands.

Now I'm going to talk to you about Ms. Howell's testimony and your cross-designations, and I will tell you my initial thoughts. You did a very nice job of setting this up. When I saw it come in this morning, I thought I would never be able to get through it in time, but I could because you did such a nice job.

I think Ms. Howell's testimony is relevant. It is an employee's personal observations in the course of her employment about the subject matter of her employment. It is directly relevant to the plaintiff's claims that there was a culture of suppression and retaliation when employees were ill and they were advised to, A, work through it and, B, get their own substitutes. Ms. Howell talks about the mold that is in the log. I agree with defendant that what Ms. Howell told Mr. Pettersen, that first conversation that takes place in the transcript that you provided me, which starts on page 17 at line 20 and goes to page 19, line 4, I can't imagine why the

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UNITED STATES DISTRICT COURT
for the
District of Vermont

THOMAS COLE *Plaintiff(s)* v. FOXMAR INC., d/b/a EDUCATION AND TRAINING RESOURCES *Defendant(s)*	)	Civil Action No. 2:18-CV-220 (Filed Aug. 2, 2021)

JUDGMENT IN A CIVIL ACTION

☑ **Jury Verdict.**

☐ **Decision by Court.**

IT IS ORDERED AND ADJUDGED pursuant to the Verdict of the Jury (Document No. 111) filed on July 30, 2021, plaintiff established by a preponderance of the evidence the elements of a retaliation claim under VOSHA and VESTA. Plaintiff is awarded back pay of Fifty-Five Thousand Three Hundred Five Dollars ($55,305), front pay of Eighty-Five Thousand Six Hundred Thirty-Eight Dollars ($85,638), emotional distress damages of Seventy-Five Thousand Dollars ($75,000), and punitive damages of Three Million Dollars ($3,000,000). JUDGMENT is hereby entered in the amount of Three Million Two Hundred Fifteen Thousand Nine Hundred Forty-Three Dollars ($3,215,943) for plaintiff Thomas Cole, against defendant Foxmar, Inc.

Previously, pursuant to the court's Opinion and Order (Document No. 74) filed March 8, 2021, defendant's Motion for Summary Judgment (Document No. 58) was GRANTED IN PART and DENIED IN PART. Defendant's motion with regard to plaintiff's claims for wrongful termination in violation of VOSHA and VESTA (Counts I and II) were DENIED, plaintiff's claim for promissory estoppel (Count III) is GRANTED.

The effective post-judgment interest rate is:
.07 percent.

JEFFREY S. EATON
CLERK OF COURT

Date: August 2, 2021

JUDGMENT ENTERED
ON DOCKET
DATE ENTERED: 8/2/2021

/s/ Jennifer B. Ruddy
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
for the
District of Vermont

Thomas Cole *Plaintiff(s)* v. Foxmar, Inc., d/b/a Education and Training Resources *Defendant(s)*	)	Civil Action No. 2:18-cv-220 (Filed Dec. 20, 2022)

JUDGMENT IN A CIVIL ACTION

☑ **Jury Verdict.**

☐ **Decision by Court.**

IT IS ORDERED AND ADJUDGED pursuant to the Verdict of the Jury (Document 206) filed on December 19, 2022, plaintiff is awarded back pay of Thirty-Five Thousand Dollars ($35,000) and Emotional Distress damages of Twenty Thousand Dollars ($20,000). JUDGMENT is hereby entered in the amount of Fifty-Five Thousand Dollars ($55,000) for plaintiff Thomas Cole, against defendant Foxmar, Inc.

Previous, pursuant to the Verdict of the Jury (Document No. 111) filed on July 30, 2021, plaintiff established by a preponderance of the evidence the elements of a retaliation claim under VOSHA and VESTA. Pursuant to the court's Opinion and Order (Document No. 145) filed on March 22, 2022, the court

GRANTED IN PART and DENIED IN PART Defendant's Renewed Motion For Judgment as a Matter of Law or in the Altenative a New Trial or Amended Verdict (Document No. 131) and ORDERED a new trial on damages.

Also, previously pursuant to the court's Opinion and Order (Document No. 74) filed March 8, 2021, defendant's Motion for Summary Judgment (Document No. 58) was GRANTED IN PART and DENIED IN PART. Defendant's motion with regard to plaintiff's claims for wrongful termination in violation of VOSHA and VESTA (Counts I and II) were DENIED, plaintiff's claim for promissory estoppel (Count III) was GRANTED.

The effective post-judgment interest rate is: 4.66%

JEFFREY S. EATON
CLERK OF COURT

Date: December 20, 2022

JUDGMENT ENTERED
ON DOCKET
DATE ENTERED: 12/20/2022

/s/ Jennifer B. Ruddy
Signature of Clerk or Deputy Clerk

RELEVANT CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS

Const. Amend. VII

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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21 V.S.A. § 210

Penalties

(a) Upon issuance of a citation under this chapter, the Review Board is authorized to assess civil penalties for grounds provided in this subsection. In assessing civil penalties, the Review Board shall follow to the degree practicable the federal procedures prescribed in rules adopted under the Act.[1] The Review Board shall give due consideration to the appropriateness of the penalty with respect to the size of the business or operation of the employer being assessed, the gravity of the violation, the good faith of the employer, and the history of previous violations. Civil penalties shall be paid to the Commissioner for deposit with the State Treasurer, and may be recovered in a civil action in the name of the State of Vermont brought in any court of

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[1] Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651 et seq.

competent jurisdiction. The Commissioner shall not reduce the assessed penalties in any fiscal year by more than 50 percent.

(1) Any employer that willfully or repeatedly violates the requirements of this Code or any standard or rule adopted, or order issued pursuant to this Code may be assessed a civil penalty of not more than $126,749.00 for each violation, but not less than $5,000.00 for each willful violation.

(2) Any employer that has received a citation for a serious violation of the requirements of this Code, or any standard or rule adopted, or order issued pursuant to this Code, shall be assessed a civil penalty of up to $12,675.00 for each violation.

(3) Any employer that has received a citation for a violation of the requirements of this Code, or any standard or rule adopted, or order issued pursuant to this Code, if the violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $12,675.00 for each such violation.

(4) Any employer that fails to correct a violation for which a citation has been issued within the period permitted for its correction, which period shall not begin to run until the date of the final order of the Review Board, in the case of any review proceeding under section 226 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty of not more than $12,675.00 for each day during which the failure or violation continues.

(5) Any employer that willfully violates any standard or rule adopted, or order issued pursuant to this Code, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $126,749.00 or by imprisonment for not more than one year, or by both.

(6) Any person who gives advance notice of any inspection to be conducted under this Code, without authority from the Commissioner or Director or designees, shall, upon conviction, be punished by a fine of not more than $1,000.00 or by imprisonment for not more than six months, or by both.

(7) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Code shall, upon conviction, be punished by a fme of not more than $10,000.00 or by imprisonment for not more than six months, or by both.

(8) Any employer that violates any of the posting requirements, as prescribed under the provisions of this Code, shall be assessed a civil penalty of up to $12,675.00 for each violation.

(9)(A) As provided under the federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and the Act, the penalties provided in subdivisions (1), (2), (3), (4), (5), and (8) of this subsection (a) shall annually, on January 1, be adjusted to reflect the increase in the Consumer Price Index, CPI-U, U.S. City Average, not

seasonally adjusted, as calculated by the U.S. Department of Labor or successor agency for the 12 months preceding the previous December 1.

(B) The Commissioner shall calculate and publish the adjustment to the penalties on or before January 1 of each year, and the penalties shall apply to fines imposed on or after that date.

(b) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in such place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.

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21 V.S.A. § 231

Employee rights

(a) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself, herself, or others of any right afforded by this chapter.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, file a complaint with the Commissioner alleging such discrimination. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the Commissioner determines that the provisions of this section have been violated, he or she shall bring an action in any appropriate State court against such person. In any such action, the State courts shall have jurisdiction, for cause shown to restrain violations of subsection (a) of this section and order all appropriate relief, including rehiring or reinstatement of the employee to his or her former position with back pay.

(c) Within 90 days of the receipt of a complaint filed under this section, the Commissioner shall notify the complainant of his or her determination under subsection (b) of this section.

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21 V.S.A. § 232

Private right of action

An employee aggrieved by a violation of section 231 of this title may bring an action in Superior Court for appropriate relief, including reinstatement, triple wages, damages, costs, and reasonable attorney's fees.

Such an action may be brought in addition to or in lieu of an action under section 231 of this title.

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21 V.S.A. § 345

Nonpayment of wages and benefits

(a) Each employer who violates section 342, 343, 482, or 483 of this title shall be fined not more than $5,000.00. Where the employer is a corporation, the president or other officers who have control of the payment operations of the corporation shall be considered employers and liable to the employee for actual wages due when the officer has willfully and without good cause participated in knowing violations of this chapter.

(b) In addition to any other penalty or punishment otherwise prescribed by law, any employer who, pursuant to an oral or written employment agreement, is required to provide benefits to an employee shall be liable to the employee for actual damages caused by the failure to pay for the benefits, and where the failure to pay is knowing and willful and continues for 30 days after the payments are due shall be assessed a civil penalty by the Commissioner of not more than $5,000.00.

(c) The Commissioner may enforce collection of the fines assessed under this section in the Civil Division of the Superior Court.

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21 V.S.A. § 397

Retaliation prohibited

(a) An employer shall not discharge or in any other manner retaliate against an employee because:

(1) the employee lodged a complaint of a violation of this subchapter;

(2) the employee has cooperated with the Commissioner in an investigation of a violation of this subchapter; or

(3) the employer believes that the employee may lodge a complaint or cooperate in an investigation of a violation of this subchapter.

(b) Any person aggrieved by a violation of this section may bring an action in the Civil Division of the Superior Court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or benefits, reinstatement, costs, reasonable attorney's fees, and other appropriate relief.

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21 V.S.A. § 483

Use of earned sick time

(a) An employee may use earned sick time accrued pursuant to section 482 of this subchapter for any of the following reasons:

(1) The employee is ill or injured.

(2) The employee obtains professional diagnostic, preventive, routine, or therapeutic health care.

(3) The employee cares for a sick or injured parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment, or accompanying the employee's parent, grandparent, spouse, or parent-in-law to an appointment related to his or her longterm care.

(4) The employee is arranging for social or legal services or obtaining medical care or counseling for the employee or for the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking. As used in this section, "domestic violence," "sexual assault," and "stalking" shall have the same meanings as in 15 V.S.A. § 1151.

(5) The employee cares for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where that individual is normally located during the employee's workday is closed for public health or safety reasons.

(b) If an employee's absence is shorter than a normal workday, the employee shall use earned sick time

accrued pursuant to section 482 of this subchapter in the smallest time increments that the employer's payroll system uses to account for other absences or that the employer's paid time off policy permits. Nothing in this subsection shall be construed to require an employer to permit an employee to use earned sick time in increments that are shorter than one hour.

(c) An employer may limit the amount of earned sick time accrued pursuant to section 482 of this subchapter that an employee may use to:

(1) from January 1, 2017 until December 31, 2018, no more than 24 hours in a 12-month period; and

(2) after December 31, 2018, no more than 40 hours in a 12-month period.

(d)(1) Except as otherwise provided in subsection 484(a) of this subchapter, earned sick time that remains unused at the end of an annual period shall be carried over to the next annual period and the employee shall continue to accrue earned sick time as provided pursuant to section 482 of this subchapter. However, nothing in this subdivision shall be construed to permit an employee to use more earned sick time during an annual period than any limit on the use of earned sick time that is established by his or her employer pursuant to subsection (c) of this section.

(2) If, at an employer's discretion, an employer pays an employee for unused earned sick time

accrued pursuant to section 482 of this subchapter at the end of an annual period, then the amount for which the employee was compensated does not carry over to the next annual period.

(e) Upon separation from employment, an employee shall not be entitled to payment for unused earned sick time accrued pursuant to section 482 of this subchapter unless agreed upon by the employer.

(f)(1) An employee who is discharged by his or her employer after he or she has completed a waiting period required pursuant to subsection 482(b) of this subchapter and is subsequently rehired by the same employer within 12 months after the discharge from employment shall begin to accrue and may use earned sick time without a waiting period. However, the employee shall not be entitled to retain any earned sick time that accrued before the time of his or her discharge unless agreed to by the employer.

(2) An employee that voluntarily separates from employment after he or she has completed a waiting period required pursuant to subsection 482(b) of this subchapter and is subsequently rehired by the same employer within 12 months after the separation from employment shall not be entitled to accrue and use earned sick time without a waiting period unless agreed to by the employer.

(g) An employer shall not require an employee to find a replacement for absences, including absences for professional diagnostic, preventive, routine, or therapeutic health care.

(h) An employer may require an employee planning to take earned sick time accrued pursuant to section 482 of this subchapter to:

(1) make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours; or

(2) notify the employer as soon as practicable of the intent to take earned sick time accrued pursuant to section 482 of this subchapter and the expected duration of the employee's absence.

(i)(1) If an employee is absent from work for one of the reasons listed in subsection (a) of this section, the employee shall not be required to use earned sick time accrued pursuant to section 482 of this subchapter and the employer will not be required to pay for the time that the employee was absent if the employer and the employee mutually agree that either:

(A) the employee will work an equivalent number of hours as the number of hours for which the employee is absent during the same pay period; or

(B) the employee will trade hours with a second employee so that the second employee works during the hours for which the employee is absent and the employee works an equivalent number of hours in place of the second employee during the same pay period.

(2) Nothing in this subsection shall be construed to prevent an employer from adopting a policy that requires an employee to use earned sick time accrued pursuant to section 482 of this subchapter

for an absence from work for one of the reasons set forth in subsection (a) of this section.

(j) An employer shall post notice of the provisions of this section in a form provided by the Commissioner in a place conspicuous to employees at the employer's place of business. An employer shall also notify an employee of the provisions of this section at the time of the employee's hiring.

(k) An employee who uses earned sick time accrued pursuant to section 482 of this subchapter shall not diminish his or her rights under sections 472 and 472a of this title.

(l) The provisions against retaliation set forth in section 397 of this title shall apply to this subchapter.

(m) An employer who violates this subchapter shall be subject to the penalty provisions of section 345 of this title.

(n) The Commissioner shall enforce this subchapter in accordance with the procedures established in section 342a of this title. However, the appeal provision of subsection 342a(f) shall not apply to any enforcement action brought pursuant to this subsection.

Vt. Admin. Code 13-5-13

Violations of the Earned Sick Time Law.

(a) An employer who violates 21 V.S.A. § 482 or § 483 shall be fined not more than $5,000.00 per violation.

(b) An employee may file a complaint with the Commissioner in the manner prescribed by the Commissioner. The Commissioner shall investigate and enforce any violations in accordance with 21 V.S.A. § 342a.

(c) In addition to recovery of earned sick time pay, the Commissioner may assess a civil penalty of not more than $5,000.00 per violation.