

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT SMITH

:  
CIVIL ACTION

v.

INTERNATIONAL TOTAL  
SERVICES, INC.

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NO. 95-2038

O'Neill, J.

August , 1997

MEMORANDUM

Herbert Smith, a former employee of defendant International Total Services, sued ITS under three separate provisions of the Pennsylvania Human Relations Act, 43 Pa.C.S.A. §§ 951-63, alleging that defendant denied him a skycap position because of his age in violation of § 955(a), retaliated against him for filing a discrimination complaint in violation of § 955(d), and aided, abetted or incited violations of the PHRA or obstructed or prevented compliance therewith in violation of § 955(e). Jurisdiction is based on diversity of citizenship and the requisite jurisdictional amount.

After a four-day trial the jury returned a verdict for plaintiff on all three claims and awarded \$464,000 in lost wages, \$60 in other damages and \$500,000 in punitive damages. Defendant, through new counsel who did not try the case, contends that the verdict is against the weight of the evidence, warranting a new trial or judgment as a matter of law. Defendant also seeks a new trial based on errors in the conduct of the trial.

**I. Weight of the Evidence**

A new trial may be granted on the grounds that the verdict is against the weight of the evidence "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the] conscience." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991). While the evidence need not be viewed in the light most favorable to the verdict, Smith v. General Elec. Corp., 1996 WL 24762 (E.D. Pa. 1996), the court must "not substitute its judgment of the facts and the

credibility of the witnesses for that of the jury." Sheridan v. E.I. DuPont DeNemours & Co., 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc) (internal quotations omitted), cert. denied, 117 S. Ct. 2532 (1997).

**A. Age Discrimination**

The jury found that defendant discriminated based on age in denying plaintiff a skycap position. The verdict is not against the weight of the evidence. According to plaintiff's testimony, in December, 1988, when he was fifty-four years old, he applied to ITS for a skycap job for which he was qualified based on his prior experience as a skycap. (Tr. 5/12/97 at 39-43; 50-54).<sup>1</sup> Gertrude Williams, a supervisor of security staff, informed him that Clemmon DeV Vaughn, who was in charge of hiring skycaps, was away but offered plaintiff a job as a baggage claim agent "until [DeVaughn] got back or until there was an opening" for a skycap. Upon his return, DeVaughn told plaintiff that he "just took some men on" as skycaps but promised plaintiff "the next position I have." (Tr. 5/12/97 at 53-56). Plaintiff continued to work as a minimum-wage claim agent while awaiting an opening for a lucrative skycap job. (Tr. 5/12/97 at 44-49; 5/13/97 at 157, 164-65; 5/14/97 at 80-82).

Plaintiff testified that, while he regularly reminded DeVaughn that he wanted a skycap job and was told "when I get an opening for you, I'll let you know," many applicants who were much younger and no more qualified than he were hired as skycaps. (Tr. 5/12/97 at 58-59).<sup>2</sup> This evidence established a prima facie case of age discrimination, requiring defendant to articulate a legitimate non-discriminatory reason for rejecting plaintiff's application for a skycap position.

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<sup>1</sup> Plaintiff testified that he showed defendant a commendation for exemplary skycap service he received from a passenger. The commendation was admitted into evidence. (Tr. 5/12/97 at 40-41; Ex. 1).

<sup>2</sup> Documents in evidence corroborated that most skycaps hired during 1989 while plaintiff remained a claim agent were significantly younger than plaintiff. (Ex. 15; Ex. 28; Ex. 47). Meryl Smith-Green, a witness who investigated plaintiff's complaint with the Pennsylvania Human Relations Commission, testified that she reviewed the applications of those hired as skycaps and observed that many were younger than plaintiff, and "almost all . . . had less experience in the airline industry." (Tr. 5/13/97 at 197-98).

See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).<sup>3</sup> Defendant contends that the jury's failure to credit its proffered reasons for denying plaintiff a skycap job is against the weight of the evidence. I disagree. The record supports the conclusion that plaintiff met his burden of proving that defendant's proffered reasons were pretextual and its real reason was age discrimination. See Fuentes, 32 F.3d at 763.

The hiring of many new skycaps between January and September, 1989 while plaintiff remained a claim agent refutes defendant's assertion that there were no openings for skycaps. (Tr. 5/13/97 at 118-19). Plaintiff's testimony regarding the influx of new skycaps was corroborated not only by documents in evidence, but also by the testimony of Sam Jenkins, an independent witness called by defendant, who testified that defendant "recruited" him as a skycap in January, 1989 because it was "looking for someone with experience to work with some new people that they were going to be hiring." Jenkins confirmed that defendant hired "more than two dozen" skycaps in Philadelphia during 1989. (Tr. 5/12/97 at 59; 5/14/97 at 153, 162; 5/13/97 at 124-26, Ex. 15, 28, 47). The evidence supports a finding that the unavailability of skycap positions was not the true reason plaintiff was denied one.<sup>4</sup>

Defendant contended that DeVaughn did not offer plaintiff a skycap job because he was not authorized to hire skycaps. (Tr. 5/13/97 at 119; 5/19/97 at 8; Ex. 14). Plaintiff testified, however, that when he applied as a skycap Williams directed him to DeVaughn as the person who hired skycaps. (Tr. 5/12/97 at 53-55). Jenkins testified that DeVaughn hired him, hired other skycaps, and "more than likely" hired "dozens" of skycaps in 1989. (Tr. 5/14/97 at 160-62). Meryl Smith-Green, who investigated plaintiff's complaint before the Pennsylvania Human

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<sup>3</sup> A prima facie case arises when a plaintiff establishes that he belongs to a protected class, that he applied and was qualified for an available job, that he was rejected, and that after his rejection the defendant continued to seek applications from persons of plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997).

<sup>4</sup> The fact that defendant hired new skycaps throughout 1989 undermines the persuasiveness of its assertion that a mass hiring of skycaps from a competitor "just before [plaintiff] came on board [as a claim agent]" filled all skycap positions. (Tr. 5/14/97 at 119). Patricia Painter, the ITS representative who made this assertion, did not join ITS until 1995. Documents in evidence revealed that defendant did not assert this explanation during the 1990 investigation of plaintiff's PHRC complaint. (Tr. 5/13/97 at 118, Ex. 18).

Relations Commission ("PHRC"), testified that DeVaughn's signature appeared on the skycap applications as the person who apparently interviewed the applicants. (Tr. 5/13/97 at 200-01; 5/14/97 at 19). The evidence supported a conclusion that DeVaughn's lack of authority was not the reason plaintiff was denied a skycap job.<sup>5</sup>

Two of defendant's witnesses, neither of whom worked at ITS in 1989 and both of whom conceded they had no first-hand knowledge of why Smith was not offered a skycap job, asserted that claim agents could not become skycaps without first becoming baggage handlers. (Tr. 5/14/97 at 120-21, 133; 5/19/97 at 8, 13-14). While plaintiff noted that baggage handlers were "more likely" than claim agents to become skycaps, the record confirmed that defendant hired many skycaps "from outside" the company who were not required to serve as baggage handlers. (Ex. 28, 30-43; Tr. 5/12/97 at 7, 60; 5/13/97 at 162; 5/19/97 at 13). Plaintiff testified that to increase his chances of becoming a skycap he sought an interim baggage handler job but was denied that position as well. (Tr. 5/12/97 at 60; 5/13/97 at 7). The record supports a finding that the asserted baggage handler requirement was not the real reason plaintiff was denied a skycap job.<sup>6</sup>

Defendant asserted that plaintiff could not become a skycap because he had not taken a written skycap test. (Tr. 5/13/97 at 68-69). Plaintiff testified that no test was given in 1989. (Tr. 5/13/97 at 3, 68). Jenkins testified that he took a test in August, 1992 and did not recall whether he was given a test before 1992. (Tr. 5/13/97 at 183). No evidence confirmed the existence of such a test in 1989, and plaintiff demonstrated that defendant mentioned no such test when, in 1989, the PHRC asked why Smith was not hired or promoted as a skycap. (Ex. 14; Tr. 5/13/97 at

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<sup>5</sup> Defendant did not call DeVaughn or assert who, other than DeVaughn, hired the skycaps.

<sup>6</sup> Defendant mentioned no such policy in 1990 when the PHRC inquired why Smith was not made a skycap. (Ex. 14; Tr. 5/13/97 at 118-20). Jenkins and Price, witnesses called by defendant, acknowledged that skycaps were hired directly without being required to serve as baggage handlers. (Tr. 5/13/97 at 153; 5/19/97 at 13).

118-20). The evidence supports a finding that a skycap test requirement was not the real reason plaintiff was not hired or promoted to a skycap position.<sup>7</sup>

Defendant also contended that disciplinary problems disqualified plaintiff for promotion as a skycap. However, as discussed more fully in connection with plaintiff's retaliation claim, the evidence that plaintiff had a "good relationship" with his superiors, "often got compliments for [his] work," and was "often called to do overtime duty" until he filed a discrimination complaint supports a finding that disciplinary problems were not the real reason plaintiff was not made a skycap. (Tr. 5/12/97 at 62, 63).<sup>8</sup>

While the jury could permissibly infer from plaintiff's discrediting of defendant's proffered reasons that defendant's real reasons were discriminatory, see Fuentes, 32 F.3d at 763, plaintiff presented further evidence supporting the inference that age discrimination was a motivating factor and had a determinative effect on the decision not to offer plaintiff a skycap job. Plaintiff testified that most of the skycaps hired while he was seeking the job were "young men" who lacked skycapping skills. (Tr. 5/12/97 at 59; 5/13/97 at 7). Smith-Green confirmed, based on her review of the applications of the skycaps hired, that many were younger than plaintiff, had "minimal" experience and "had less experience in the airline industry" than plaintiff. (Tr. 5/13/97 at 197-98).<sup>9</sup>

Smith-Green testified that while defendant asserted to the PHRC in 1989 that 44% of its skycaps were at least 40 years old, a list of skycaps provided at the time revealed that only seven of sixty-five were 40 or older and of those seven, at least three had been terminated by July,

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<sup>7</sup> Defendant's witness Les Price testified that "the only thing we looked for was [that skycap applicants] had a high school diploma or GED." (Tr. 5/19/97 at 7). Jenkins, when asked "you were able when you started at ITS to use your knowledge of the airport codes . . . from previous positions . . . ?" responded, "[y]es, of course," undermining defendant's assertion that, despite his prior skycap experience, plaintiff was not qualified until he was trained and tested in airport codes specific to ITS. (Tr. 5/13/97 at 168).

<sup>8</sup> Even if the jury credited testimony that Smith's unofficial skycapping violated company policy over Smith's testimony that he never skycapped while on duty, at an ITS terminal, or in an ITS uniform, (Tr. 5/13/97 at 157), the jury could still credit plaintiff's testimony that he was never reprimanded for such activity and was viewed as a good employee entitled to overtime until he filed a discrimination complaint. (Tr. 5/12/97 at 62-63).

<sup>9</sup> Jenkins' testimony that defendant "recruited" him because it was "looking for someone with experience to work with some new people that they were going to be hiring," supports plaintiff's and Smith-Green's testimony that defendant hired inexperienced skycaps. (Tr. 5/14/97 at 153).

1989. (Ex. 15; Tr. 5/13/97 at 120, 123-24). Other documents disclosed that, although some skycaps were over forty when hired, out of 152 Philadelphia skycaps only two were plaintiff's age or older and only three others were within ten years of plaintiff's age. (Ex. 47; Tr. 5/14/97 at 44-58). The high proportion of significantly younger skycaps supports the inference, raised by plaintiff's discrediting of defendant's proffered reasons, that age bias in favor of younger skycap applicants was a motivating factor with a determinative effect on defendant's failure to hire or promote plaintiff as a skycap.<sup>10</sup>

In light of this evidence that plaintiff, although qualified to be a skycap, was passed over in favor of younger, less qualified applicants, that defendant's asserted reasons for not offering plaintiff a skycap job were, more likely than not, not the real reasons, and that age bias more likely than not played a determinative role in skycap hiring, I find that the weight of the evidence supports the verdict as to plaintiff's age discrimination claim.

## **B. Retaliation**

The jury found that defendant retaliated against plaintiff for filing a discrimination complaint with the Pennsylvania Human Relations Commission. The evidence supports the verdict. From the time plaintiff was hired as a claim agent in January, 1989 until defendant received notice of plaintiff's discrimination complaint in July 1989, plaintiff received no written

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<sup>10</sup> Because a large proportion of the skycaps were significantly younger than plaintiff, it is immaterial whether they were over 40. Barber v. CVX Distrib. Servs., 68 F.3d 694, 699 (3d Cir. 1995) (holding that bias in favor of significantly younger individuals constitutes age discrimination regardless of whether individuals are over 40). Smith-Green testified that in 1991 ITS provided a list purporting to include all ITS Philadelphia skycaps from December, 1988 to December, 1989. Of the 26 or 27 hired between December, 1988 and September, 1989, only one, Ernest Raeford, was over 40 and he was ten years younger than plaintiff. Other older individuals identified on the list dated 1989 did not appear on the list furnished in 1991. (Ex. 15, 28; Tr. 5/13/97 at 124-25, 186-88). On a list of all ITS employees over 40, which included 47 names, only four were skycaps and only one, Ernest Raeford, was hired between December, 1988 and September, 1989. (Ex. 20; Tr. 5/13/97 at 140-142). While skycap applications did not request a birth date, Smith-Green testified that they contained school graduation dates and that applicants were interviewed in person, providing sufficient evidence that defendant knew each applicant's approximate age. (Tr. 5/14/97 at 18, 22, 33-34, 65).

Defendant contends that its hiring of plaintiff as a claim agent when he was over 40 dispels any inference of discrimination. See Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992). Lowe, in which the plaintiff was hired for then fired from the job at issue, is inapposite because Smith was never hired as a skycap but was hired as a minimum-wage claim agent. The fact that Williams was over 40 when she hired plaintiff as a claim agent is immaterial to the issue of age bias in skycap hiring as Williams did not hire skycaps.

reprimands.<sup>11</sup> He testified that during that time he had a "good relationship" with his superiors and believed he "was thought very well of" because he "often got compliments for [his] work," was never criticized, and was "often called to do overtime duty." (Tr. 5/12/97 at 62, 63; Tr. 5/13/97 at 5).<sup>12</sup> Patricia Painter, defendant's Human Resources Manager, corroborated that overtime was generally given to "a good employee who followed the rules." (Tr. 5/14/97 at 128).

Plaintiff testified that shortly after he filed the complaint his circumstances changed "drastically." In contrast to his previously "good relationship" his superiors, he became the object of "harassment from that time on;" "the atmosphere . . . was made very cold to the point that everything I would do all of a sudden was wrong and there was always a manager or supervisor nagging at me or accusing me of something I didn't do." (Tr. 5/13/97 at 12-13).<sup>13</sup> Williams told plaintiff he was "wrong" to have filed a discrimination complaint, a comment that plaintiff construed "as a threat." (Tr. 5/13/97 at 11). In the months after filing his PHRC complaint, plaintiff "was never given any more overtime even though [he] requested it a million times."<sup>14</sup>

Plaintiff further testified that on August 24, 1989, he went to the ITS office to get his "time sheets to straighten [his] pay out" because his previous paycheck was "very short." (Tr. 5/13/9 at 13). When he arrived, managers Ray Delfing and Tom Lego gave him three

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<sup>11</sup> Defendant contended that plaintiff received an unwritten reprimand from Gertrude Williams in May or June, 1989. (Tr. 5/13/97 at 67-68). Plaintiff, however, explained that Williams approached him because he appeared to be skycapping when he was merely instructing a passenger not to take a skycap cart from the terminal. He stated that Williams "apologized . . . for accusing me of skycapping after the passenger had explained to her what had happened." (Tr. 5/12/97 at 65). The jury was entitled to credit this testimony that the incident was a misunderstanding for which Williams apologized and not an unwritten reprimand predating the PHRC complaint. Williams died prior to trial.

<sup>12</sup> Plaintiff's respectful, forthright demeanor in court may have lent credibility to his testimony that he was viewed as good employee, undermining defendant's attempt to portray him as fractious and insubordinate.

<sup>13</sup> Plaintiff testified that he was accused of leaving his post when he visited the restroom and was reprimanded for eating at his station although "all the employees, managers, supervisors, we all ate at the station." (Tr. 5/13/97 at 12). He explained that if he and others were eating together "I would be addressed as the one . . . eating at the station, the other person, nothing would be said to them." (Tr. 5/13/97 at 12).

<sup>14</sup> A jury may infer from temporal proximity between a discrimination complaint and subsequent adverse actions that the adverse actions were causally linked to the complaint. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). In discovery responses submitted into evidence defendant admitted that Smith received overtime before but not after July, 1989.

disciplinary reports and a memo accusing him of unauthorized skycapping. Plaintiff testified that he had seen none of the reports before August 24 and that the accusations in them were false and were motivated by retaliation. (Tr. 5/13/97 at 17-18, 21, 24, 59). Defendant called none of the supervisors who wrote the reports to testify to their accuracy, and defendant's representative, Patricia Painter, who did not join ITS until 1995, conceded that she spoke to none of those supervisors about the reports. (Tr. 5/14/97 at 133-34).

One report was undated; two were dated shortly after defendant learned of plaintiff's discrimination complaint. (Tr. 5/13/97 at 20-22). None bore plaintiff's signature although each had a space for the employee to sign upon receipt.<sup>15</sup> Spaces to mark the report as a first, second or subsequent warning were left blank. (Ex. 3-6; Tr. 5/13/97 at 99). Plaintiff asserted that Lego was not at work on the day he reportedly observed plaintiff's misconduct; defendant did not respond to the PHRC's requests for Lego's schedule. (Ex. 49 at 3).<sup>16</sup> Even if the jury believed that plaintiff broke the rules,<sup>17</sup> it could infer from his unblemished record before his PHRC complaint, from the fact that none of the reports was dated before plaintiff's discrimination complaint, from evidence that the reports were not presented to plaintiff in sequence at the time of the alleged conduct, and from discrepancies in the form and content of the reports, that his superiors were initially unaware of or unconcerned with his conduct, then feigned concern and decided to reprimand him only after they learned he had complained of discrimination. The record supports a finding that the disciplinary reports were retaliatory.

Defendant asserted that plaintiff was ultimately fired for leaving his post on September 5, 1989. The record, however, supports a conclusion that defendant's decision to terminate plaintiff was unduly harsh under the circumstances and more likely than not motivated by retaliation. Plaintiff testified that he generally worked with two other claim agents and that "even . . . at full

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<sup>15</sup> Painter confirmed that employees were supposed to receive disciplinary reports promptly and could not confirm whether plaintiff received these reports before August 24, 1989. (Tr. 5/14/97 at 84-85, 134).

<sup>16</sup> Plaintiff testified that a sentence stating he was warned of possible termination was added to one report after he saw it. (Tr. 5/13/97 at 17-18).

<sup>17</sup> The jury was, of course, entitled to credit plaintiff's testimony that he did not.

staff" passengers would "become irritated" by "long waits for their luggage." One person outraged by such delays had, in fact, punched plaintiff in the back. (Tr. 5/13/97 at 25-26). Plaintiff testified that when he arrived for work on September 5, "a very heavy travel day" following the labor day holiday, nobody else had signed in; his supervisor stated he would have to work alone and "maybe someone would come in." (Tr. 5/13/97 at 27-28).

After working alone for approximately two hours, he "went back to [his] supervisor requesting help." (Tr. 5/13/97 at 29). When his supervisor stated that none was available, plaintiff replied that he "could not handle the shift alone and . . . would sign out and lose the day[s] pay," then did so. (Tr. 5/13/97 at 30-31).<sup>18</sup> This testimony suggested that plaintiff did not leave his post without provocation but failed to complete an unusually demanding assignment after warning his supervisor he "could not handle" it and receiving no response.<sup>19</sup>

Defendant denied that plaintiff was working alone and stated to the PHRC that plaintiff was assisted . . . by two other employees. Attached . . . is the employee sign-in sheet . . . showing that both Ronald Wright and Chuck Boyer . . . work[ed] as . . . claims agents [from] 2:00 P.M. to 10:00 P.M. . . . these two . . . were left short-handed [by plaintiff's] irresponsible behavior.

Ex. 18 at 3. While plaintiff testified that employees signed in in order of arrival and the other names appeared in order of arrival, the sign-in sheet showed that Wright and Boyer signed in at 2:00, below plaintiff who signed in at 3:00. Plaintiff testified that no employee named Wright or Boyer worked that day and that he knew no employees by those names. The PHRC requested, but never received, other sign-in sheets for comparison and payroll records reflecting whether a Wright or Boyer worked September 5. (Tr. 5/13/97 at 34-35, 135, Ex. 19, 49 at 3). A report stating that "at 4:50 U.S. Air called & said that nobody was in baggage checking stubs" further

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<sup>18</sup> This testimony, corroborated in part by documents confirming that plaintiff signed out, refuted defendant's assertion that Smith left his post "without prior notice to anyone in supervision." (Ex. 18 at 2; 19).

<sup>19</sup> When part of a "pattern of antagonism," a defendant's "setting [a plaintiff] up to fail" by placing him in a challenging position and "refusing to provide him with adequate resources" supports an inference of retaliation. Woodson v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997). The evidence supports an inference that, regardless of whether defendant planned in advance for plaintiff to work alone, it fired him for failing to complete an assignment that was unreasonably difficult without adequate assistance. Plaintiff's quiet, respectful demeanor may have weighed against defendant's attempt to portray plaintiff's leaving his post as an unprovoked act of defiance.

supported plaintiff's testimony and refuted defendant's suggestion that plaintiff was "assisted . . . by two other employees" and thus left his post for no reason. (Ex. 18 at 7; Tr. 5/13/97 at 37). The evidence supports an inference that the sign-in sheet was altered to conceal the fact that plaintiff was working alone.

Defendant's attempt to conceal that plaintiff was working alone supports an inference that the assignment was unusually demanding, making plaintiff's refusal to complete it more understandable and less plausible as a grounds for immediate termination. Under this view of the evidence, which finds support in the record, termination was an unduly harsh response under the circumstances and was more likely explained by retaliatory animus than by the events of September 5.<sup>20</sup> The record contained evidence that plaintiff, in contrast to his clean record before filing a discrimination complaint, received increasingly harsh treatment thereafter, culminating in termination for failing to complete an exceptionally difficult assignment, the most demanding aspects of which defendant attempted to conceal. The jury's conclusion that retaliatory animus was a motivating factor and had a determinative effect in the decision to terminate plaintiff is not against the weight of the evidence.

### **C. Aiding and Abetting Violations or Obstructing Compliance**

The jury found that defendant aided, abetted incited, compelled or coerced others to violate the PHRA or obstructed or prevented compliance with the PHRA in violation of 43 Pa.C.S.A. § 955(e). The evidence supports the verdict. According to plaintiff's testimony and documents in evidence, numerous supervisors and managers including Gertrude Williams, Tom Lego, Ray Delfing, Tracy Miles and Ted Clement were all involved in writing the reprimands that, for reasons recounted above, the jury could conclude were fabricated after the fact for

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<sup>20</sup> The manner in which plaintiff was terminated further supports a conclusion that defendant's response to the September 5 incident was motivated by retaliatory animus. Defendant terminated plaintiff by confronting him in public with a team of three managers and withheld his pay until the Department of Labor intervened. Plaintiff also testified that defendant attempted to coerce him into signing a false statement that he resigned voluntarily. (Tr. 5/13/97 at 41-53; Ex. 8-10).

retaliatory reasons. (Ex. 3-6; Tr. 5/13/97 at 13, 17, 20, 22, 27, 43, 47). The barrage of retaliatory acts by a number of different managers and supervisors, who otherwise had no role in supervising plaintiff and no reason to form retaliatory animus against him, supports an inference that one or more ITS managers or supervisors incited or compelled other managers and supervisors to commit additional retaliatory acts against plaintiff in violation of the PHRA.

Plaintiff also testified that several managers participated in the retaliatory termination proscribed under the PHRA, confronting him loudly in public with a team of three managers, and subjecting him to a harsh and harassing treatment for actions that would not, absent animus toward plaintiff for complaining of discrimination, have been likely to elicit such a hostile response. (Tr. 5/13/97 at 41-53). Evidence that defendant withheld plaintiff's pay after terminating him, requiring intervention by the Department of Labor, supports a conclusion that additional retaliatory acts occurred even after plaintiff's termination. (Tr. 5/13/97 at 41-53; Ex. 8-10). The evidence, viewed as a whole, suggests that plaintiff did not experience isolated violations of the PHRA at the hands of one or two individuals, but rather was the target of a concerted effort involving many superiors who, absent incitement from other agents of defendant, would have had little or no reason to form sufficient retaliatory animus against plaintiff to fabricate reports about him, to berate him publicly for failing to complete an impossible assignment, or to withhold his paycheck after his termination. The evidence supports a conclusion that defendant aided, abetted or incited others to commit additional acts of retaliation proscribed by the PHRA.

The evidence also revealed that the PHRC sought, but never received, many documents and received documents that appeared to be inconsistent, falsified or altered. Several different ITS representatives were involved in this resistance to the PHRC's attempt to resolve plaintiff's complaint and assure compliance with the PHRA. (Tr. 5/13/97 at 147-48). This evidence of resistance to the PHRC's investigation supports a finding that defendant obstructed or prevented compliance with the PHRA. Thus the evidence supported the verdict on plaintiff's § 955(e) claim on either an aiding, abetting, or inciting theory or an obstruction of compliance theory.

#### **D. Lost Earnings**

Plaintiff sought lost skycap earnings from January, 1989 through the present. The jury awarded him \$464,000.<sup>21</sup> While the court has "a responsibility to review a damage award to determine if it is rationally based," Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1038 (3d Cir. 1987), the court may not disturb a jury's award "merely because [the court] would have granted a lesser amount of damages." Motter v. Everest & Jennings, Inc., 883 F.2d 1223, 1230 (3d Cir. 1989); Hurley v. Atlantic City Police Dep't, 933 F. Supp. 396, 423 (D.N.J. 1996).

Where, however, the verdict is so excessive that it finds no rational support in the record and disturbs the judicial conscience, the court may order the plaintiff "to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." Dunn v. Hovic, 1 F.3d 1371, 1383 (3d Cir.) (en banc) modified on other grounds, 13 F.3d 58 (3d Cir. 1993); Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). While remittitur may be warranted when a jury's determination is "clearly unsupported and/or excessive" or "wholly speculative," Spence v. Board of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986), a remittitur "must not cause the damage award to fall below the maximum amount which the jury could reasonably find." Gumbs, 823 F.2d 768, at 771-72, 74 (3d Cir. 1987); Garrison v. Mollers North America, Inc., 820 F. Supp. 814, 822 (D. Del. 1993).

I must decide whether the award of \$464,000 is, as defendant contends, "clearly unsupported" by "any rational . . . estimate of the damages that could be based upon the evidence before the jury." Starceski, 54 F.3d at 1101 (3d Cir. 1995) (citations omitted).

Defendant's representative Les Price, who came from USAir to work for ITS in 1989, testified that employees would "live and die" for skycap jobs because the tips were so high. (Tr. 5/19/97 at 14). Patricia Painter, defendant's Human Resources Manager, testified that skycaps earned \$80,000-\$100,000 per year at J.F.K. airport in 1989. (Tr. 5/14/97 at 80-82). Sam Jenkins, an independent witness called by defendant, estimated skycaps' tips at \$100-\$300 per day, (Tr.

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<sup>21</sup> Defendant does not challenge the jury's award of \$60 in "other damages."

5/13/97 at 157, 164-55), which, at 40 hours per week and 50 weeks per year, amounts to \$25,000 to \$75,000 annually.

Plaintiff testified, based on his earnings in a prior skycap job, on the earnings of skycaps he knew, and on his observation of skycaps at ITS, that skycaps earned from \$200 to \$600 per day. (Tr. 5/12/97 at 44-49; 5/13/97 at 42). He testified that ITS's Philadelphia skycaps were "very, very busy" because USAir had just expanded and . . . accepted business from another airline that was folding" giving USAir "98 to 99 percent of the business in and out of Philadelphia." (Tr. 5/12/97 at 46-47). Due to the volume of travel on USAir, plaintiff explained, "it was a larger crowd, and passengers [were] . . . willing to pay more to be served." (Tr. 5/12/97 at 48).

Plaintiff stated that under these conditions skycaps would have a "goal of five to six hundred dollars per day." (Tr. 5/12/97 at 46). He conceded, however, that these figures were based on his observations of skycaps counting tips near his work area, an event that "happened infrequently" and that he only recalled seeing "approximately four different times" during his nine months at ITS. (Tr. 5/13/97 at 77-79). No other evidence suggested that skycaps could earn \$500 to \$600 per day. This evidence, if credited, suggests only that skycaps could aspire to earn \$500 to \$600 on exceptional occasions; it does not rationally suggest that skycaps earned such amounts on a regular or average basis. An estimate of \$500 to \$600 per day, which at forty hours per week and fifty weeks per year would amount to \$125,000 to \$150,000 annually, would exceed the maximum amount rationally supported by the evidence and would trouble the judicial conscience.

The jury could, however, rationally find that skycaps regularly earned up to \$400 per day, or \$100,000 annually. Plaintiff based this portion of his estimate not on occasional observations of ITS skycaps but on his own prior experience as a skycap and on the earnings of friends who were skycaps. (Tr. 5/12/97 at 44-49; 5/13/97 at 42). Moreover, Painter corroborated that skycaps could earn up to \$100,000 in 1989. While Painter asserted that she believed that this figure, which was based on skycap earnings at J.F.K. airport, would have been lower in Philadelphia

because of differences in "the amount of flights, the amount of airlines, and the type of airlines," she conceded that she never worked for ITS in Philadelphia and had no basis for comparing the volume of flights ITS serviced at Philadelphia versus J.F.K. (Tr. 5/14/97 at 80-82).

Given plaintiff's first-hand knowledge of the circumstances at the Philadelphia airport in 1989, the jury could rationally place greater weight on his testimony that ITS's Philadelphia skycaps serviced an unusually high volume of passengers. The jury could thus rationally conclude that Philadelphia skycap earnings were comparable to J.F.K. skycap earnings and approached \$100,000.<sup>22</sup> However, because no evidence suggested that skycap earnings ever exceeded \$100,000, and because the evidence established that skycap earnings fluctuated for various reasons, the record does not rationally support a finding that plaintiff could have earned an average of \$100,000 over a sustained number of years. (Tr. 5/12/97 at 43, 45, 47-48, 58-59).<sup>23</sup> Bearing in mind that the jury retains "broad discretion to calculate damages" and that its award may not be reduced below "the maximum amount . . . the jury could reasonably find," Gumbs, 823 F.2d 768 at 771-73, 74, I conclude that the jury could rationally find based on the evidence in the record that plaintiff's annual skycap earnings ranged from \$90,000 to \$100,000 and averaged \$95,000 per year.<sup>24</sup>

The jury could not, however, properly award plaintiff \$95,000 per year without subtracting a reasonable estimate of plaintiff's actual earnings. The evidence established that

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<sup>22</sup> The jury was entitled to credit the parts of Painter's testimony it found persuasive and reject the parts it did not based on the other evidence, her lack of first-hand knowledge, her apparent reluctance to make statements against her employer's interests, and her general demeanor. (see, e.g., Tr. 5/14/97 at 140; Painter, when asked basis for her knowledge, retorted to counsel "you weren't there either").

<sup>23</sup> Plaintiff testified that tip earnings varied depending on factors such as the shift, whether the skycap was assigned to arrivals or departures, and the number of flights. (Tr. 5/12/97 at 43, 45, 47-48, 58-59).

<sup>24</sup> Defendant emphasizes that Jenkins' highest estimate of average tip earnings was \$300 per day, an equivalent of \$75,000 per year. The jury was, however, entitled to consider factors such as Jenkins' conceded interest in underreporting tip income for tax purposes, his apparent reluctance to estimate his average tips, and the extent to which his estimate was supported by the other evidence. (Tr. 5/13/97 at 163-66, 175). The jury could rationally arrive at an estimate of lost earnings higher than that offered by Jenkins, particularly since the higher estimate was corroborated by Painter, a defense witness. The process of calculating lost earnings requires the jury to "recreat[e] the past" which "necessarily involve[s] a degree of approximation and imprecision." International Bhd. of Teamsters v. United States, 431 U.S. 324, 372 (1977). The "risk of lack of certainty" in this process must be "borne by the wrongdoer, not the victim." Starceski, 54 F.3d at 1101 (citations omitted).

plaintiff earned minimum wage as a claim agent at ITS from January, 1989 until September, 1989, then worked in construction earning approximately \$16 per hour which, at 40 hours per week and 50 weeks per year, amounts to \$640 per week or \$32,000 annually. Plaintiff testified that he experienced episodes of unemployment "periodically." He also testified that he supplemented his income by serving as a "runner" for friends who were skycaps at other airlines and by performing odd jobs for neighbors. (Tr. 5/12/97 at 60-61; 5/13/97 at 75, 96).

Plaintiff's brief allusion to episodes of unemployment does not support a finding that plaintiff was unemployed for extended periods amounting to more than 25% of the time. Thus while the jury could find that intermittent unemployment reduced plaintiff's earnings below \$32,000 per year, the jury could not, based on the evidence in the record, rationally find that plaintiff's estimated earnings fell below \$24,000, or 75% of his earnings rate of \$32,000. Moreover, the record, viewed as a whole, portrayed plaintiff as uncommonly industrious and resourceful at supplementing his income even when fully employed. (Tr. 5/12/97 at 60-61; 5/13/97 at 75, 96). Plaintiff's supplemental work assisting skycaps and doing odd jobs, even if amounting to only \$50 per week, would have yielded an additional \$2,500 per year. In light of this evidence I conclude that the record does not support a finding that plaintiff's average annual income dropped below \$25,000, even when factoring in the months in 1989 when plaintiff earned minimum wage.<sup>25</sup>

The jury, weighing the evidence as a whole, could rationally award plaintiff \$70,000 per year in lost earnings, based on the highest estimate of annual skycap earnings, or \$95,000, reduced by the lowest estimate of plaintiff's actual annual earnings, or \$25,000. An award

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<sup>25</sup> Plaintiff earned minimum wage, augmented by his supplemental employment, for nine months then earned three times as much during the ensuing years. Defendant presented no evidence that plaintiff could have earned more than he did. Plaintiff's testimony afforded the jury a sufficient basis to derive a reasonable estimate of his actual earnings and defendant did not contend otherwise in its Rule 50 motion. See Fed.R.Civ.P. 50(a)(2) (requiring statement of "law and facts" which entitle movant to judgment as a matter of law); (Tr. 5/14/97 at 148-50; 5/19/97 at 64-65) (Rule 50 motion addressing only sufficiency of evidence of discriminatory and retaliatory motive). Defendant thus waived its right to seek judgment as a matter of law regarding proof of damages but is entitled to challenge whether the verdict is excessive and against the weight of the evidence.

averaging \$70,000 per year would neither exceed the range of reasonable estimates based on the record nor disquiet the judicial conscience.

Having determined that the jury could rationally award plaintiff \$70,000 per year, I must, in order to determine whether the verdict exceeds the amount supported by the record, decide the number of years for which lost earnings could properly be awarded. Plaintiff contends that the record supports a finding that but for defendant's unlawful conduct he would have remained a skycap until the present. He thus contends he is entitled to recover lost earnings from 1989 through the present. Defendant responds that the record does not support an award of damages past 1994 when ITS lost its contract in Philadelphia.

A plaintiff may not recover back pay for periods after he would have been terminated for legitimate reasons. Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 604-05 (E.D. Pa. 1989), aff'd, 922 F.2d 184 (3d Cir. 1990). A plaintiff may, however, recover back pay he would have earned working for another employer if he proves, without undue speculation, that he would have earned those amounts but for the defendant's unlawful conduct. See, e.g., Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989) (allowing award of back pay past date employer sold plant to another company where "remaining . . . employees in [plaintiff's] department continued their employment" with successor company). I must decide whether the jury could rationally conclude based on the record that but for defendant's unlawful conduct plaintiff would have remained a skycap beyond 1994 when ITS ceased employing skycaps in Philadelphia.<sup>26</sup>

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<sup>26</sup> The fact that ITS's Philadelphia operations ended in 1994 was not proven in the record but was conceded by plaintiff's counsel in closing and is a judicial admission. (Tr. 5/19/97 at 47). By failing to raise the issue before the case went to the jury defendant waived the right to contest the absence of a charge instructing that damages could not be awarded past 1994. See Fed.R.Civ.P. 51. While defendant protests that it had no advance notice of language allowing calculation of damages "up to this point in time," defendant did have advance notice that the Court had denied its request for a charge precluding the jury from awarding damages past 1994. See Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 276 (2d Cir. 1996) ("a court [must] give notice only of its proposed action upon requests for jury instructions . . . and need not otherwise give counsel notice of the charge"). Despite this notice defendant did not object when invited to do so both before and after hearing how the jury was actually instructed. (Tr. 5/19/97 at 65, 106).

Nor did defendant seek judgment as a matter of law on the grounds that there was no legally sufficient basis for awarding damages past 1994. Such motions must specify "the law and the facts" that entitle the movant to judgment in a manner that apprises the Court and the non-movant of the alleged deficiency in the evidence. See Fed.R.Civ.P. 50(a)(2); Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1996); Holmes v. United States, 85 F.3d 956, 963 (2d Cir. 1996). Defendant challenged the sufficiency of the evidence only as to discriminatory and retaliatory motive without apprising plaintiff or the Court of the alleged deficiency of evidence regarding damages incurred after 1994. (Tr. 5/14/97 at 148-50; 5/19/97 at 64-65). Defendant thus waived the issue. While these

Plaintiff testified that "when a[n] airline gets new companies, they have some choice people that they ask the new company or demand the new company [to] take, people who have established themselves with the airline personnel." (Tr. 5/13/97 at 96). Jenkins testified that "airlines will change service corporations for a number of reasons, but I've survived through reputation." He stated that he currently skycapped for USAir at the Philadelphia airport through a service company called Huntley. (Tr. 5/13/97 at 152). Price testified that his observations of other companies' skycaps would "come into play in deciding whether or not to hire them." (Tr. 5/19/97 at 8).<sup>27</sup>

While this testimony suggested, in general terms, that skycaps would be well-positioned to obtain other skycap jobs when their employer's contract with an airline ended, it did not provide any specific evidence of the likelihood that plaintiff, or any other ITS skycap, would have secured another skycap job when ITS lost its Philadelphia contract. The record is devoid of any evidence as to which company succeeded ITS, how many skycaps that company hired, where that company hired its skycaps, or how many ITS skycaps obtained skycap jobs with that or any other company. On the present record, which affords no rational basis for assessing plaintiff's prospects for continued skycap employment upon ITS's withdrawal from Philadelphia, an award of damages for lost skycap earnings past 1994 would be impermissibly speculative, unsupported by a rational interpretation of the record and troubling to the judicial conscience. See Blackburn v. Martin, 982 F.2d 125, 130 (4th Cir. 1992) (denying back pay beyond date employer lost contract absent "critical link in proof" that employer's wrongful conduct was the cause of plaintiff's inability to obtain position with successor to contract); Holley v. Northrop Worldwide Aircraft Servs., 835 F.2d 1375, 1376-77 & n.5 (11th Cir. 1988) (denying back pay beyond date employer's contract ended where plaintiff "presented nothing more than circumstantial and

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principles preclude judgment as a matter of law regarding post-1994 damages, I nonetheless consider whether the jury could rationally find for plaintiff on this issue.

<sup>27</sup> Painter also testified that service companies observed each other's employees to see "how they behave on a regular basis" and whether the company "wanted those people if they should apply." (Tr. 5/14/97 at 122).

inconclusive evidence" that he would have obtained position with successor to contract absent defendant's unlawful conduct); Mennen v. Easter Stores, 951 F. Supp. 838, 861 (N.D. Iowa 1997) (denying back pay beyond date employer sold store to new company where employer had "no agreement" with and "no control" over new company "as to whether the employees would retain their jobs" leaving only "speculation that [plaintiff] would have continued in his position"); cf. Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989) (allowing back pay past date employer sold plant where "remaining . . . employees in [plaintiff's] department continued their employment" with successor company).

Accordingly, the jury could rationally award plaintiff five years of lost skycap earnings for the years 1989 to 1994. At \$70,000 per year, the maximum annual amount supported by the record, plaintiff would be entitled to recover \$350,000. Because any award beyond that amount would exceed a rational appraisal of plaintiff's lost earnings based on the evidence, I will grant plaintiff the option of remitting \$114,000, the portion of the award that exceeds a rational estimated based on the record, or submitting to a new trial on the issue of compensatory damages.<sup>28</sup>

#### **E. Punitive Damages**

Defendant contends that the jury's \$500,000 punitive damage award is so excessive as to shock the conscience and justify a new trial or remittitur. Defendant does not dispute that the record contains sufficient evidence to support the conclusion that defendant acted outrageously or with malice or reckless indifference to plaintiff's rights under the PHRA. Defendant contends

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<sup>28</sup> The jury's award was not grossly beyond the range supported by the evidence. Moreover, the jury declined to award damages for "emotional pain and suffering, inconvenience, humiliation, embarrassment, [or] mental anguish," awarding only \$60 as "other damages" despite plaintiff's testimony as to emotional damages. (Tr. 5/13/97 at 49, 107-08; Ex. 12). I find no basis to suspect that the award was the product of sympathy, passion or prejudice. Because the verdict is not the product of "clear judicial error" or "pernicious influence," I will exercise my discretion to deny the motion for a new trial subject to plaintiff's acceptance of the remittitur. See Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). While the issue of compensatory damages is "distinct and separable" from issues of liability and punitive damages and may be tried separately "without injustice" to either party, the issue of lost wages is "interwoven" with issues of other types of compensatory damages intended to make plaintiff whole. See Garrison, 820 F. Supp. at 823. Thus any new trial in this case will involve both lost earnings and other compensatory damages.

only that the award is unjustified because plaintiff introduced insufficient evidence of defendant's financial condition. I disagree.

While the record does not contain extensive evidence of defendant's worth, it establishes that defendant is a large company with over 10,000 employees, does business nationwide, has been in business for over a decade,<sup>29</sup> contracts with major airlines, operates at 53 airports in its Eastern Division alone, has recently seen significant increases in its work force and number of airports,<sup>30</sup> and by its own admission is a "profitable" company in "financially stable condition." (Tr. 5/14/97 at 94, 95, 110, 111). Because the record supports a finding of conduct warranting punitive damages, and because a preponderance of the evidence suggests that defendant had significant financial resources, I do not find the jury's award to be against the weight of the evidence or so excessive as to shock the conscience or raise suspicion that it resulted from passion, prejudice, sympathy or bias.<sup>31</sup>

Apart from the excessive award of lost earnings, which warrants a new trial as to compensatory damages only if plaintiff declines to remit the excess portion of that award, I do not find that any aspect of the verdict is against the weight of the evidence or shocking to the conscience. See Sheridan v. E.I. DuPont DeNemours & Co., 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc); Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 290 (3d Cir. 1993); Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991). I will deny the motion for a new trial based on the weight of the evidence.

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<sup>29</sup> The relevant facts date back to 1989; documents in evidence reveal that ITS hired skycaps as early as 1984.

<sup>30</sup> The staff at one airport expanded from 800 employees to 1200 since 1995. (Tr. 5/14/97 at 95).

<sup>31</sup> Defendant, citing Smith v. General Elec., 1996 WL 24762 (E.D. Pa. 1996), asserts that the punitive damage award is excessive. In Smith the jury awarded \$1,000,000 for retaliation involving one low-level supervisor, where the employer had been exonerated for its role in the retaliation and the testimony was tainted by sympathy, passion and prejudice. No such factors are present in this case where the jury awarded half as much.

## II. Judgment as a Matter of Law

Judgment as a matter of law may be granted only if there is "no legally sufficient evidentiary basis for a reasonable jury" to find for the non-movant. Fed.R.Civ.P. 50(a). A motion for judgment as a matter of law should be granted:

only if, in viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. . . . [T]he court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version.

McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995), cert. denied, 116 S. Ct. 1017 (1996). The inquiry must be based "not on individual incidents, but on the whole scenario." Id. at 1484; Woodson v. Scott Paper Co., 109 F.3d 913, 921 (3d Cir. 1997) ("we must determine whether the evidence is sufficient based on the whole picture"). Viewing the evidence recounted above in light of these standards, I do not find the record "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). I therefore deny defendant's motion for judgment as a matter of law.<sup>32</sup>

## III. Trial Errors

Defendant contends that errors in the conduct of the trial entitle defendant to a new trial. A new trial is warranted based on such errors when they are "so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." Finch v. Hercules, Inc., 941 F. Supp. 1395, 1414 (D. Del. 1996); Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 601 (E.D. Pa. 1989), aff'd, 922 F.2d 184 (3d Cir. 1991). Defendant points to no such errors.

### A. Burden of Proof

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<sup>32</sup> As discussed above, defendant's Rule 50 motion challenged the sufficiency of the evidence only as to discriminatory and retaliatory motive and did not allege any deficiency in the evidence regarding damages. See Fed.R.Civ.P. 50(a)(2); Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1996); Holmes v. United States, 85 F.3d 956, 963 (2d Cir. 1996); (Tr. 5/14/97 at 148-50; 5/19/97 at 64-65). Defendant failed to preserve the sufficiency of the evidence regarding damages as a grounds for judgment as a matter of law.

Defendant contends that the Court erred in describing plaintiff's burden of proof regarding his age discrimination and retaliation claims. Defendant waived this contention by failing to raise it "before the jury retire[d] to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." Fed.R.Civ.P. 51. Moreover, the contention lacks merit. The Court clearly and repeatedly instructed the jury that plaintiff bore the burden of proving that age discrimination and retaliation were motivating factors and had a determinative effect on defendant's decisions. (Tr. 5/19/97 at 71-72, 78, 79, 80, 82, 86) (age discrimination); (Tr. 5/19/97 at 87, 88, 90) (retaliation). The instructions also clearly explained that defendant "does not have the burden of proving that its reasons are more likely than not the real reasons," repeating this instruction as to both plaintiff's discrimination claim and his retaliation claim. (Tr. 5/19/97 at 84, 90-91).

Defendant, while conceding that the Court properly stated that discriminatory or retaliatory motive could be inferred if plaintiff proved his prima facie case and disproved defendant's proffered reasons,<sup>33</sup> contends that the Court erred because it did not "explain in this context" that plaintiff still had to prove that age discrimination or retaliation was a motivating factor.

I disagree. While defendant is entitled to an instruction "that accurately and fairly sets forth the current status of the law, . . . . [n]o litigant has a right to a jury instruction . . . precisely in the manner and words of its own preference." Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995). The instructions clearly assigned plaintiff the burden of proving that discrimination and retaliation were motivating factors that had a determinative effect and committed no error by explaining the inference cited above in the context of describing how a plaintiff may meet this burden. Defendant has cited no error warranting a new trial.<sup>34</sup>

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<sup>33</sup> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Saint Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

<sup>34</sup> Defendant also contends that the Court improperly instructed the jury that defendant treated plaintiff differently from others. Taken in context the instruction merely stated an element of what plaintiff must prove to prevail on his age discrimination claim: that age was a reason he was treated differently from others. (Tr. 5/19/97 at 80). This

**B. Section 955(e)**

Defendant contends that the jury instructions and interrogatory regarding plaintiff's § 955(e) claim warrant a new trial. Defendant waived this issue by failing to raise it before the jury retired. Fed.R.Civ.P. 51. Even if properly preserved, defendant's contentions lack merit. Section 955(e) makes it unlawful for:

any person [or] employer . . . to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder . . . .

Defendant contends that the § 955(e) claim should not have been submitted to the jury because "there were no other defendants named as aiders or abettors." The statute makes an employer, or any other person, liable for inciting or compelling "the doing of any" unlawful act. It does not require that the person incited or compelled to commit the act be a defendant.<sup>35</sup>

Although defendant requested no instructions explaining or defining the terms "aid, abet, incite, coerce and obstruct," defendant contends, without citation, that the Court should have defined each term. Defendant points to no prejudice arising from this asserted error. Defendant also contends that the interrogatory submitted to the jury, to which defendant did not object, improperly suggested that the jury was to choose between two alternatives: aiding, abetting, etc., or obstructing, preventing, etc. This objection, which defendant waived, is meritless. Under §

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statement is not error. Moreover, it was undisputed that plaintiff was not hired as a skycap while others were. Thus even an instruction establishing that plaintiff was treated differently would not prejudice defendant.

<sup>35</sup> Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552-553 (3d Cir. 1996), did not, as defendant asserts, suggest that the party incited must be a defendant. Dici addressed only whether summary judgment was proper as to supervisors who were also defendants under § 955(e). Dici implicitly recognized that the party aided or incited may be another individual within the employer entity as the defendant. See id. at 553 (holding that supervisor's complicity in harassment by other employees gave rise to § 955(e) claim); see also Palace v. Deaver, 1994 WL 705232 (E.D. Pa. 1994) (holding that one supervisor's refusal to interfere with another supervisor's violations gave rise to § 955(e) claim). Where, as here, agents of the corporation induced others to commit and participate in further retaliatory acts, defendant's assertion that every act of retaliation "would also be a violation of § 955(e)" is unfounded. I predict, based on the plain statutory language, that the Pennsylvania Supreme Court would construe § 955(e) to encompass such incitement of further retaliatory acts from within the same corporate entity regardless of whether the party incited was also a defendant.

955(e) each of the enumerated acts constitutes a violation. The jury was to answer "YES" or "NO" as to whether defendant engaged in any of the enumerated acts.<sup>36</sup>

### **C. Testimony of Meryl Smith-Green**

Defendant contends that the admission of Smith-Green's testimony constitutes an error warranting a new trial. Before trial defendant moved in limine to preclude Smith-Green's testimony on the grounds that it was irrelevant and prejudicial and constituted improper lay opinion testimony. The Court denied the motion in part, allowing Smith-Green to testify as to defendant's statements<sup>37</sup> and her factual observations made in the course of the PHRC investigation, but precluding her from stating her findings and conclusions. (Tr. 5/12/97 at 6-8; 5/13/97 at 118). This testimony, reflecting defendant's contemporaneous explanations of the events in dispute, was highly probative as to the credibility of defendant's assertions and the material issue whether they were pretextual. The probative value of the testimony was increased by defendant's failure to call as a witness any representative who worked at ITS during the events in question. Smith-Green was a fact witness with first-hand knowledge of defendants' statements regarding the relevant events, the questions asked to elicit those statements, and the context in which the statements were made.

In accordance with the Court's ruling excluding her findings and conclusions, Smith-Green neither stated nor suggested any conclusion as to the merits of plaintiff's claims.<sup>38</sup> In the course of recounting the questions she posed to defendant about the events at issue and

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<sup>36</sup> None of the errors asserted as to § 955(e) would affect the award of damages. The evidence revealed no theory under which defendant's incitement of further retaliatory acts or obstruction of the PHRC investigation caused any monetary loss beyond that caused by denial of a skycap position and termination. The jury awarded no damages for mental or emotional suffering, awarding as "other damages" only the \$60 out-of-pocket expense attributable to plaintiff's hospital visit the day after his termination. The facts supporting the § 955(e) verdict would demonstrate malice or reckless disregard toward plaintiff's rights under the PHRA, warranting punitive damages regardless of whether the facts established another violation of the PHRA.

<sup>37</sup> Many of these statements were made through documents defendant provided the PHRC.

<sup>38</sup> I therefore reject defendant's assertion that Smith-Green's testimony forced defendant to "disprove to the jury the PHRC's view that [ITS] discriminated against plaintiff." The testimony never implied that the PHRC held such a view, which, in any event would be admissible in the Court's discretion. See *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099-1100 n.12 (3d Cir. 1995). Moreover, the testimony was evidence produced by plaintiff to meet the burden, which the jury was clearly instructed was his, of proving that defendant's asserted reasons were pretextual and that the real reasons were unlawful.

defendant's responses to those questions, Smith-Green testified that she observed inconsistencies and omissions in defendant's responses. This testimony of a first-hand witness to defendant's statements and actions when asked about the events at issue was highly probative and not unfairly prejudicial. (Tr. 5/13/97 at 127, 133-34; 144-46, 193-94, 197, 201, 204-05; 5/14/97 at 6-7, 10-11).<sup>39</sup>

At only one point during two days of testimony did Smith-Green state, in the context of explaining why her investigation lasted so long, that she had "very little cooperation" from defendant. (Tr. 5/14/97 at 13). Like her allusion to certain inconsistencies and omissions in defendant's statements, this observation was apparent from documents properly admitted into evidence and from highly probative testimony describing the sequence of inquiries and defendant's responses or failures to respond thereto. In the exercise of my discretion to appraise the effect of the admitted evidence on the trial as a whole, see Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 290 (3d Cir. 1993), I find no unfair prejudice arising from Smith-Green's incidental comments characterizing defendant's actions and responses during her investigation or from her single statement that defendant was uncooperative. I find no grounds for granting a new trial based on Smith-Green's testimony.<sup>40</sup>

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<sup>39</sup> Some of the questions Smith-Green posed to defendant during the investigation asked defendant to explain omissions and inconsistencies in its prior responses. Smith-Green's testimony summarizing these questions and defendant's responses or lack of response thereto was highly probative of the credibility of defendant's explanations and was not unfairly prejudicial. (Tr. 5/13/97 at 184-85, 194, 203, 205). Defendant's unwillingness to explain its decisions was probative not only of the credibility of its proffered non-discriminatory or non-retaliatory reasons, but also of the willfulness of its conduct for punitive damages purposes and the obstruction of compliance theory under § 955(e). If Smith-Green's observations of discrepancies and omissions in defendant's responses expressed an opinion, the opinion was "rationally based on the perception of the witness" and "helpful to the jury" based on her knowledge, as the investigator, of the sequence of inquiries to which defendant was responding. It would thus constitute a proper opinion of a technically competent lay witness. See Fed.R.Evid. 701; Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1193 (3d Cir. 1995).

<sup>40</sup> Defendant, through present counsel, also seeks a new trial because the Court failed to conduct a balancing analysis on the record pursuant to Federal Rule of Evidence 403. In the memorandum attached to trial counsel's motion in limine, although not in the motion itself, defendant cited Rule 403 but raised only vague, conclusory objections concerning relevance, prejudice and lay opinion testimony as to "any potential evidence to which Ms. Smith-Green may testify." Defendant did not, in writing or on the record, state a "specific ground" for its objections as required by Fed.R.Evid. 103(a)(1). Thus the Court was not required to apply Rule 403. Glass v. Philadelphia Elec. Co., 34 F.3d 188, 192 n.4 (3d Cir. 1994); (Tr. 5/12/97 at 6-8; 5/13/97 at 117-18).

In any event, the probative value of Smith-Green's first-hand observations of defendant's statements about the events in dispute, including defendant's silence in response to certain inquiries about those events, was so readily apparent and the danger of "unfair" prejudice so remote that a balancing on the record, even if required, would have been perfunctory. The Court sustained defendant's objections to testimony stating conclusions about the merits of plaintiff's claim and whether defendant "stonewalled" the investigation. (Tr. 5/12/97 at 6-8; 5/13/97 at 117-18). The

**D. Counsel's Law Student Status**

Before trial defendant moved to preclude plaintiff's counsel from informing the jury that they were law students.<sup>41</sup> The Court granted the motion, holding that plaintiff's counsel could state their affiliation with the University of Pennsylvania Legal Assistance Clinic, as any attorney would state his or her affiliation at voir dire, but could not refer to themselves as students and were required to refer to their supervisor as co-counsel. The transcript of voir dire proceedings reveals no argumentative or improper remarks.<sup>42</sup> Even if such remarks were made, I could not find them sufficiently prejudicial to warrant a new trial, given the volume of evidence presented over the course of four trial days during which plaintiff's attorneys were consistently referred to as "counsel."

**E. Limitation of Damages Under § 962(c)**

The PHRA provides that "[b]ack pay liability shall not accrue from a date more than three years prior to filing a complaint charging violations of this act." 42 Pa.C.S.A. § 962(c). Defendant contends that the three-year period runs from the date of the civil complaint, in this case 1995, precluding recovery of damages for the period before 1992. Plaintiff maintains that the three-year period runs from the date of the administrative complaint, in this case 1990, allowing recovery for the entire relevant period, which began in 1989.<sup>43</sup>

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absence of an explicit Rule 403 determination on the record does not warrant a new trial.

<sup>41</sup> Law students certified pursuant to Local Rule of Civil Procedure 83.5.1 may practice before this Court.

<sup>42</sup> Plaintiff's counsel stated "I'm one of the attorneys representing Herbert Smith . . . Once we finish this initial jury questioning process, there'll actually be two others representing Mr. Smith throughout most of the trial . . . and we're all from the Penn Legal Assistance Office at the University of Pennsylvania." Voir Dire Tr. at 2. This statement, which referred to all members of plaintiff's legal team as attorneys, did not emphasize their affiliation any more than did defense counsel's statement "my name is Paul Kirk. I'm employed with a law firm here in Philadelphia called German, Gallagher and Murtagh." Id. at 42.

<sup>43</sup> Defendant waived this issue by failing to raise it before submission of the case to the jury, see Fed.R.Civ.P. 51. Defendant in fact did not raise it in initial post-trial motions, but only in a supplemental memorandum filed June 11, 1997, 22 days after entry of judgment on May 20, 1997. However, because it would be fundamentally unjust to hold defendant liable for more than the statutorily recoverable amount, I address the merits of the issue. See Bereda v. Pickering Creek Indus. Park, Inc., 865 F.3d 49, 54 (3d Cir. 1989).

Pennsylvania courts have not analyzed the issue. Based on the statutory language and the few cases addressing the issue, I find that the three-year period under § 962(c) runs from the date of the administrative complaint. As the Court of Appeals observed, the relevant portion of § 962(c) "closely follows the wording of the cap on back pay imposed under Title VII . . . except that PHRA caps back pay at three years while Title VII allows only two years of back pay." Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49, 54 (3d Cir. 1989).

While the period under Title VII runs from "the filing of a charge with the [Equal Employment Opportunity] Commission," 42 U.S.C. § 2000e-5(g), the period under PHRA runs from "the filing of a complaint charging violations of this act." 43 Pa.C.S.A. § 962(c). Whereas Title VII refers to an administrative complaint as a "charge," analogous provisions of the PHRA refer to an administrative complaint as a "complaint," Compare 42 U.S.C. § 2000e-5(b)-5(g) with 43 Pa.C.S.A. § 959(a)-(g), suggesting that the "complaint" referred to in § 962(c) is the administrative grievance analogous to the "charge" under Title VII.<sup>44</sup> I construe § 962(c) as referring to the administrative complaint like its Title VII counterpart. Federal courts that have confronted the issue have, at least implicitly, concurred. See Bereda, 865 F.2d at 54 (holding that plaintiff was entitled to damages "only during the three-year period preceding the filing of [her] complaint with the PHRC");<sup>45</sup> Gallo v. John Powell Chevrolet, 779 F. Supp. 804, 817 (M.D. Pa. 1991) (holding that plaintiff was "eligible to recover back pay damages for a three-year period preceding the filing of her complaint with the Pennsylvania Human Relations Commission"); Myers v. Chestnut Hill College, 1996 WL 67612 at \*4, \*9-10 & n.8 (E.D. Pa. 1996) (holding, in action where civil complaint was filed in October, 1995 but administrative complaint was filed with PHRC in November, 1993, that § 962(c)'s three-year damage limitation allowed recovery

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<sup>44</sup> Section 962(c)'s reference to a complaint "charging" rather than "alleging" violations tends to denote an administrative rather than a judicial context. The PHRA's damage limitation clause, like Title VII's, is set forth in a paragraph pertaining to civil actions, for the obvious reason that the clauses define the damages recoverable in such civil actions. See 42 U.S.C. § 2000e-5(g); 43 Pa.C.S.A. § 962(c). The surrounding references to civil actions thus do not, as defendant contends, suggest that the word "complaint" in § 962(c)'s damage limitation clause must be construed as the civil rather than the administrative complaint.

<sup>45</sup> Because Bereda remanded the case for a "new trial consistent with this opinion on the issue of damages," I am unpersuaded by defendant's attempt to characterize the Bereda court's interpretation of § 962(c) as dictum.

for damages dating back to November, 1990).<sup>46</sup> Because plaintiff did not seek damages accruing beyond the three years preceding his PHRC complaint, § 962(c) does not limit his recovery.

#### **F. Punitive Damages**

Defendant, citing Hoy v. Angelone, 691 A.2d 476, 483 (Pa. Super. 1997), contends that punitive damages are not available under the PHRA and that the Court erred by submitting the punitive damages claim to the jury. The Pennsylvania Supreme Court has not decided the issue. The PHRA makes available "any . . . legal or equitable relief as the court deems appropriate." 42 Pa.C.S.A. § 962(c). I predict that the Pennsylvania Supreme Court will construe this broad language to permit recovery of punitive damages.<sup>47</sup> The submission of the punitive damage issue to the jury does not warrant a new trial.

#### **IV. Stay of Proceedings to Enforce the Judgment**

Defendant moves, pursuant to Federal Rule of Civil Procedure 62(b), for a stay of proceedings to enforce the judgment pending resolution of the post-trial motions.<sup>48</sup> Defendant's

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<sup>46</sup> In Taylor v. Central Pennsylvania Drug & Alcohol Servs. Corp., 890 F. Supp. 360, 370 (M.D. Pa. 1995), the court, considering both Title VII's two-year damage limitation provision and the PHRA's three-year provision, held that because "neither plaintiff seeks recovery for a period more than two years prior to the filing of this action . . . neither plaintiff's recovery is restricted by a statutory cap." I ascribe little if any precedential weight to Taylor's reference to "this action" in defining the relevant period. The reference to a two-year period reveals that the court applied Title VII's period, which undisputedly runs from the administrative charge. Finding that all damages were recoverable, even when running Title VII's more restrictive period from the date of the civil action, the court analyzed the issue no further.

<sup>47</sup> Many other courts have construed the PHRA's language in this manner. See, e.g., Kim v. City of Philadelphia, 1997 WL 277357 (E.D. Pa. 1997) (predicting that Pennsylvania Supreme Court would not follow decision of divided panel in Hoy and would construe PHRA to permit recovery of punitive damages); Smith v. General Elec. Co., 1996 WL 24762 (E.D. Pa. 1996); Gould v. Lawyers Title Ins. Corp., 1997 WL 241146 (E.D. Pa. 1997); Rossi v. Sun Refining, 1995 WL 12056 (E.D. Pa. 1995); Jason & Coker, Inc. v. Lynam, 840 F. Supp. 1040, 1050 (E.D. Pa. 1993), aff'd, 31 F.3d 1172 (3d Cir. 1994); Brown Transp. Corp. v. PHRC, 578 A.2d 555, 565 (Pa. Commw. Ct. 1990).

<sup>48</sup> Rule 62(b) provides,  
In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending disposition of a motion for a new trial . . . or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50 . . . .

motion is moot upon filing of this Memorandum and the accompanying Order resolving the post-trial motions.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT SMITH

v.

INTERNATIONAL TOTAL  
SERVICES, INC.

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: CIVIL ACTION  
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NO. 95-2038

ORDER

AND NOW, this        day of August, 1997 upon consideration of defendant's motion for a new trial or in the alternative for judgment as a matter of law, defendant's motion for stay of proceedings to enforce the judgment, and the parties' filings related thereto it is hereby ORDERED that:

- (1) The judgment entered by Order of May 20, 1997 is VACATED;
- (2) Judgment is entered on plaintiff's punitive damages claim in favor of plaintiff Herbert Smith and against defendant International Total Services, Inc. in the amount of \$500,000.00;
- (3) If plaintiff, within twenty (20) days of the date of this Order, files an acceptance of remittitur in the amount of \$114,000.00, defendant's motion for a new trial will be DENIED in all respects and judgment will be entered on plaintiff's compensatory damages claims in favor of plaintiff and against defendant in the amount of \$350,060.00;
- (4) If plaintiff declines to accept the remittitur, a new trial will be GRANTED as to lost earnings and other compensatory damages only;
- (5) Defendant's motion for judgment as a matter of law is DENIED; and
- (6) Defendant's motion for a stay of proceedings to enforce the judgment pending resolution of the post-trial motions is DENIED as moot.

