13-561

United States Court of Appeals
for the Second Circuit

ELIJAH TURLEY,
Plaintiff-Appellee,

v.

ISG LACKAWANNA, INC., ISG LACKWANNA, LLC, MITTAL STEEL USA LACKAWANNA INC., LARRY D. SAMPSELL, GERALD C. MARCHAND, THOMAS JAWORSKI, MITTAL STEEL USA, INC., DBA ARCELOR-MITTAL USA, INC., MITTAL STEEL USA INC., AKA ARCELORMITTAL STEEL, ARCELOR MITTAL LACKAWANNA, LLC, FKA ISG LACKAWANNA, LLC,
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK (SKRETNY, J.)

FINAL FORM REPLY BRIEF OF DEFENDANTS-APPELLANTS ISG LACKAWANNA, INC., ISG LACKWANNA, LLC, MITTAL STEEL USA LACKAWANNA INC., LARRY D. SAMPSELL, GERALD C. MARCHAND, THOMAS JAWORSKI, MITTAL STEEL USA, INC., DBA ARCELOR-MITTAL USA, INC., MITTAL STEEL USA INC., AKA ARCELORMITTAL STEEL, ARCELOR MITTAL LACKAWANNA, LLC, FKA ISG LACKAWANNA, LLC

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INTRODUCTION

Turley devotes much of his brief to recounting the harassment he allegedly suffered while working at Lackawanna. We acknowledged in our opening brief that Turley adduced evidence of deplorable conduct by his coworkers, but Turley's account distorts and exaggerates that evidence. We address the inaccuracies that are most relevant to the legal issues presented in this appeal in the relevant sections of this reply brief. Even if this Court were to accept Turley's factual representations at face value, however, the judgment is unsustainable.

ARGUMENT

I. LACKAWANNA AND SAMPSELL ARE ENTITLED TO JUDGMENT ON TURLEY'S IIED CLAIMS.

Turley asserts that the district court "recognized" that it is necessary to "look to all employees' actions when considering an employer's liability" for IIED, lest the employer be able to "avoid liability for extreme and outrageous conduct by having different employees commit each act." Turley Br. 40-41. If the employer—meaning someone in a managerial role—did orchestrate such a scheme, it might well be appropriate to aggregate the actions of each participant, but there is no evidence of such a scheme here. Therefore, the question remains: Was there any conduct that was ***both*** committed by someone acting within the scope of his employment ***and*** extreme and outrageous? The answer to that question is no.

To begin with, the alleged racial harassment committed by Turley's coworkers is not imputable to Lackawanna because that conduct was not within the scope of the coworkers' employment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 757 (1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1318 (2d Cir. 1995); *Wait v. Beck N. Am., Inc.*, 241 F. Supp. 2d 172, 181-82 (N.D.N.Y. 2003); *Somers v. Titan Indem. Co.*, 735 N.Y.S.2d 614 (App. Div. 2001).

Nor can liability rest on any actions or inactions of Jaworski and Marchand, because the jury specifically found that they did ***not*** engage "in extreme and outrageous conduct towards [Turley]." A1687.

Finally, although Turley cites testimony that a coworker overheard plant manager Chris Richards use a racial slur after Turley filed a complaint alleging disparate treatment (Turley Br. 41), there is no evidence that ***Turley*** heard or was aware of the remark during his employment, or that it was made in furtherance of Richards' employment. Accordingly, the IIED verdict cannot rest on that one alleged act by Richards.

That leaves Sampsell, the only manager against whom the jury found IIED liability. Turley contends that Sampsell acted outrageously by failing to do enough to respond to the harassment and by taking certain affirmative actions. *See* Turley Br. 42-44. As to the former, Turley contends that Sampsell "stood by" during a confrontation, failed to impose "meaningful" punishment or address grievances,

bungled investigative efforts, did not assist the police, took too long to provide Turley with an escort, and failed to form a committee to address discrimination.[1] Turley Br. 42-44. As to the latter, Turley suggests that Sampsell acted outrageously by installing a surveillance camera in the workspace he shared with other employees, ordering a background check of Turley, allowing evidence to "disappear," and actively encouraging harassment. *Id*. Neither category of evidence is sufficient to support liability for IIED.

First, as discussed in our opening brief (at 23-24), there is overwhelming authority holding that an inadequate response to harassment does not constitute extreme and outrageous conduct. Turley's cases are not to the contrary. For example, he cites *LaBozzo v. Brooks Brothers, Inc.*, 2002 WL 1275155 (N.Y. Sup. Ct. Apr. 25, 2002), for the proposition that "promising but failing to address harassment, or being present during harassment but not intervening" can satisfy the

[1] In several instances, Turley attempts to recharacterize alleged inaction as affirmative misconduct. For example, he contends that Sampsell "thwarted police investigations." Turley Br. 43-44. As we explained in our opening brief (at 51 n.12), however, Sampsell did nothing more than fail to provide certain information that Detective Cardi hoped to receive—and there was no evidence that the information that Cardi wanted even existed. Turley similarly contends that Sampsell "refused to provide protection to Turley for three years despite multiple death threats." Turley Br. 42 (citing A1103). The cited document itself shows, however, that Sampsell provided Turley with an escort after Turley reported hearing threats over the sound system in the Pickler. Turley implies that Sampsell's offer of an escort was outrageous because it came too late, but there is no evidence that Turley ever previously asked for an escort.

"extreme and outrageous" element of an IIED claim. Turley Br. 39. But *LaBozzo* says no such thing. To the contrary, the plaintiff there alleged that a vice president ***himself*** engaged in a "malicious" sexual harassment "campaign" and then retaliated against the plaintiff, including by subjecting her to a "campaign of public deprecation and derision." 2002 WL 1275155, at *1. Similarly, Turley cites *Wulach v. Bear Stearns & Co.*, 1988 WL 123632, at *5 (S.D.N.Y. Nov. 8, 1988), for the proposition that "[h]arassment investigated by a supervisor who has prejudged a complaint is also outrageous" (Turley Br. 39), but the plaintiff there adduced evidence that her supervisor conducted a "campaign to harass and injure" her, including depicting her as a "Nazi," ordering her files ransacked, and berating her until she wept. Neither these cases nor any other case Turley cites holds that an inadequate response to harassment ***itself*** constitutes extreme and outrageous conduct sufficient to give rise to liability for IIED. Accordingly, the bulk of Turley's evidence—which concerns Sampsell's ***in***action—is insufficient as a matter of law to support his IIED claim.

Second, Turley's cases confirm that only truly outrageous ***affirmative*** conduct can be sufficiently atrocious to support liability for IIED. For example, in *Vasarhelyi v. New School for Social Research*, 646 N.Y.S.2d 795, 797 (App. Div. 1996), the plaintiff's supervisor hired criminal attorneys to subject her to a ten-hour "abusive[] and threatening" interrogation that pried into her personal life and

impugned her honesty and chastity. In *Elson v. Consolidated Edison Co.*, 641 N.Y.S.2d 294 (App. Div. 1996), the individual defendants subjected the plaintiff to eight hours of threatening interrogation, during which he was repeatedly shown a gun, not allowed to call a lawyer, denied food, and intimidated into permitting a home search and a lie detector test. In *Sullivan v. Board of Education*, 517 N.Y.S.2d 197, 199 (App. Div. 1987)—which according to Turley holds that merely "[a]uthorizing wrongdoing" gives rise to an IIED claim (Turley Br. 39)—the defendant ***itself*** falsified charges that the plaintiff had misappropriated funds and spread false rumors that he had been involved in an affair in order to force his resignation. And in *Sawicka v. Catena*, 912 N.Y.S.2d 666, 667 (App. Div. 2010), the employer's owner covertly videotaped and viewed the plaintiffs' ***use of the restroom***.

The various affirmative acts by Sampsell that Turley alleges—several of which are fanciful—do not rise to the level of outrageousness involved in these cases. As we explained in our opening brief (at 24-25), background checks and camera surveillance of work areas are common features of the modern workplace and are not outrageous as a matter of law. And although Turley maintains that Sampsell "allowed" evidence to disappear and that the jury could have inferred that coworker Pyanowski "acted at Sampsell's direction" in a verbal confrontation with Turley (Turley Br. 43), there is no evidence—just sheer speculation—that

Sampsell intentionally destroyed evidence or directed workers to harass Turley.

In sum, Turley's defense of the IIED verdict rests on exaggerations of both the record and the severity of Sampsell's conduct. When Turley's exaggerated rhetoric is stripped away, he cannot plausibly maintain that Sampsell's conduct was sufficiently outrageous to justify IIED liability under New York law.

II. TURLEY DID NOT PROVE THAT AMUSA WAS HIS EMPLOYER.

In arguing that AMUSA should be held liable as Turley's employer, Turley first invokes the liberal construction of the term "employer" under Title VII. Turley Br. 45. But he can cite no case holding that this rule of construction trumps the general rule against holding a parent company liable for its subsidiary's acts. The one case he does cite—*Regan v. In the Heat of the Nite, Inc.*, 1995 WL 413249, at *3 (S.D.N.Y. July 12, 1995)—mentions the liberal-construction canon in *dicta* but in no way rejects the general rule. Nor is Turley able to show that the well-established test for disregarding the distinction between parent and subsidiary in the employment context is satisfied here.

A. There Was No Centralized Control Of Labor Relations.

Turley concedes that "courts focus on the centralized control of labor" relations in determining whether a parent corporation may be held liable under federal employment law for the acts of its subsidiary. Turley Br. 45. But contrary to Turley's assumption, this factor does not create a broad exception to the rule

against parent liability; courts instead must apply this factor with "the critical question" firmly in mind, namely: "What entity made the final decisions regarding employment matters related to the person claiming discrimination?" *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995).

Turley's string-cite of cases finding sufficient evidence of single-employer status at the summary-judgment stage (Turley Br. 45) confirms that AMUSA can be held liable only if it made employment decisions affecting Turley. For example, in *Almeida v. Athena Health Care Associates*, 2009 WL 490066, at *5-6 (D. Conn. Feb. 26, 2009), the parent company characterized itself as having "hired" and "terminated" plaintiff. In *Cooper v. Braun Horticulture, Inc.*, 2002 WL 1063922, at *2 (W.D.N.Y. Mar. 11, 2002), the plaintiff was supervised by personnel in the parent company's office and was fired for refusing to transfer to the parent's location. And in *Peltier v. Apple Health Care, Inc.*, 130 F. Supp. 2d 285, 289 (D. Conn. 2000), the parent entity approved the plaintiff's termination and hired and trained employees at the facility where she worked.

Turley proved no such involvement by AMUSA here. On the contrary, he does not challenge the undisputed evidence that Lackawanna's managers alone made the hiring, firing, supervising, and disciplinary decisions about him and his coworkers. *See* Opening Br. 27 (citing testimony). Tellingly, Turley's 30-page Statement of Facts catalogues numerous employment decisions of ***Lackawanna's***

managers, but fails to mention a single employment decision made by anyone at AMUSA. Turley argues that AMUSA "made the decision to terminate all employees, including Turley" (Turley Br. 52) because an AMUSA financial statement reported that the "Lackawanna, New York facility was closed" (A1047). Unsurprisingly, he cites no case that has imposed liability on a parent company for its subsidiary's employment decisions merely because it reported on the subsidiary's status in its financial statements. Such an outcome would be particularly insupportable when, as here, there is no allegation that the plant closure reported by the parent was itself wrongful.

Unable to show that AMUSA made day-to-day employment decisions affecting him, Turley relies on facts that have been held ***not*** to amount to centralized control of labor relations. Much of his evidence concerns the sporadic appearance of AMUSA's logo on documents. Turley Br. 46-51. He also cites the facts that AMUSA was a party to the CBA; maintained EEO policies, a centralized legal department and benefit system, and an Alertline[2]; and was involved with one particular harassment training. *Id*. Turley also cites slides from that training that state that Lackawanna's HR department would "determine appropriate remedial

[2] While Turley cites an Alertline report (not in evidence) that was "not prepared by Lackawanna" (Turley Br. 50), the undisputed evidence is that third-party vendor Global Compliance operated the Alertline and generated reports and that AMUSA's role was limited to forwarding complaints to Lackawanna for Lackawanna's ***own*** response. A592, A868.

and/or disciplinary action" for harassment, but suggest that it would also "[r]eview such action with the Corporate Human Resources Department." A1226 (cited in Turley Br. at 48). The critical point, however, is that there was no evidence at trial that AMUSA's HR department was ***in fact*** involved in any such determination.

We have cited extensive authority holding that facts like those invoked by Turley do ***not*** establish centralized control over labor relations. Opening Br. 27-30. By contrast, Turley has cherry-picked a few cases that, while mentioning such facts, ultimately turn on the more critical question whether the entity in question exercised control over employment decisions regarding the plaintiff—the very showing that he cannot make. *See, e.g.*, Turley Br. 47-49. For example, in *Levine v. Reader's Digest Association, Inc.*, 2007 WL 4241925, at *8-9 (S.D.N.Y. Nov. 30, 2007), the court denied summary judgment to the parent company because the plaintiff relied on "more than just broad corporate policies," including evidence that the parent directed and implemented the restructuring plan that led to the termination at issue. In *Saleh v. Pretty Girl, Inc.*, 2012 WL 4511372, at *11-12 (E.D.N.Y. Sept. 28, 2012), the parent entity admitted that ***it*** employed the alleged harasser, that workers in the plaintiff's facility were its "employees and/or agents," and that it exercised "centralized control" over policies and complaints arising from that facility. In *Magill v. Precision Systems Manufacturing, Inc.*, 2006 WL 468212, at *6-7 (N.D.N.Y. Feb. 27, 2006), the court denied summary judgment

because of the parent entity's "close[]" participation in human-resources functions, including the investigation of plaintiff's complaint. There are no comparable facts here.

B. Turley Has Not Proven The Other Factors.

With regard to the interrelation-of-operations factor, Turley makes no showing of parent involvement in production decisions, shared bank accounts, credit lines, phone lines, or office space.[3] Instead, he lists business dealings between AMUSA and Lackawanna that show merely that they have a parent-subsidiary relationship, not that AMUSA had the degree of ***control*** over Lackawanna's regular business decisions that would support a finding of single-employer status.[4] Opening Br. 30-31. On the contrary, the trial evidence shows that even if they did not hold the title of CEO, CFO, or COO (Turley Br. 52), Lackawanna's managers made the plant's business and employment decisions.

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[3] Contrary to Turley's suggestion that AMUSA and Lackawanna used the "same payroll system" (Turley Br. 51), Lackawanna used a third-party payroll processor (A447-49). Moreover, even if AMUSA did use the same vendor, that would not be evidence of interrelated operations. *See Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 253 (S.D.N.Y. 2007) (parent's and subsidiary's use of common external auditor was not evidence of interrelated operations).

[4] This case is unlike *Niland v. Buffalo Laborers Welfare Fund*, 2007 WL 3047099 (W.D.N.Y. Oct. 18, 2007) (cited at Turley Br. 46), which held that the operations of a union and a pension fund were so heavily interrelated as to raise an issue of fact regarding whether they could be considered an integrated "employer" meeting Title VII's 15-employee minimum. Among other things, the court found it "significant[]" that the fund was "'established' by the [union] for the 'sole and exclusive benefit' of the [union's] membership." *Id.* at *8.

Similarly, Turley's reliance on evidence of common management or ownership (*id.* at 52-55) is not sufficient to justify treating AMUSA and Lackawanna as a single employer absent evidence that AMUSA's corporate officers participated in employment decisions affecting Turley. Opening Br. 31.

In short, Turley has not proven that this is the ***exceptional*** case in which his employer's parent corporation should be liable for its subsidiary's employment decisions under federal or state law.[5] For this reason, AMUSA is entitled to judgment on Turley's claims.

III. PREJUDICIAL ERROR IN THE VERDICT FORM AND CHARGE REQUIRE A NEW TRIAL.

A. Defense Counsel Objected To The Error At Trial.

Turley begins his defense of the challenged jury instruction and verdict form by asserting that defendants did not preserve their objection to them at trial. Because Turley did not argue waiver before the district court, which addressed this issue on the merits (SPA28-29), this Court should deem the argument forfeited. *See Gibeau v. Nellis*, 18 F.3d 107, 109 (2d Cir. 1994) ("[B]ecause appellees failed to raise this procedural defense in the district court, they are the ones who have waived the issue.").

In any event, defendants clearly preserved the objections raised here. They

[5] As Turley concedes, liability of a parent under the NYHRL requires proof that the parent had power to hire, fire, and pay plaintiff, and to control his conduct. Turley Br. 55-56. Turley has not made this showing.

objected to the verdict form at least three times, including by explaining:

> [Question 2] is problematic because it implies that if the jury finds that there was one supervisor that did not take reasonable action to address it, then they can find the defendants liable. And this is corporate liability, so the issue is not the conduct of any one supervisor, it's the issue of the employer as a whole. So even though any one supervisor may not have taken reasonable action, if the employer through other means or other supervisors did, ... there would not be a basis for liability.

A948-49; *see also* A930-31; A944-46.[6] Defendants also objected that the charge on corporate liability for coworker harassment was an "inaccurate description of the law," that the charge should require proof that "***the defendants*** failed to take reasonable steps to attempt to stop the conduct," and that the court should instead use Defendants' Proposed Jury Charge No. 4, requiring proof "that the ***defendant employers*** acted unreasonably in responding to the harassment." A927-28 (emphasis added); A138 (emphasis added).

B. The Verdict Form And Charge Articulated An Erroneous Standard.

Turley does not dispute that a corporation can be liable for creating a hostile environment only if the employer as a whole (not any one supervisor) failed to respond adequately to the harassment. *See* Turley Br. 58. Although he insists that the district court's instruction "accurately states the law," the single case he cites for that proposition—*Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 148 (2d Cir.

[6] The quoted passage thoroughly refutes Turley's suggestion that defense counsel "endorsed the language now criticized" (Turley Br. 57).

1997)—demonstrates the opposite. In *Perry*, this Court held that liability attaches if the "employer" failed to take appropriate corrective action, and approved an instruction explaining that the company would be liable if the employer's "management level employees"—plural—failed to respond. Similarly, the EEOC sexual-harassment regulation that Turley cites, 29 C.F.R. § 1604.11(d), confirms that corporate liability attaches when "the employer," or its supervisory employees (plural), fail to take corrective action. In contrast, the instruction here erroneously stated that corporate liability would result if a single "supervisor … fail[ed] to take remedial action." Turley Br. 58 (quoting A937-38).[7]

Turley argues that the jurors were not misled because another portion of the charge stated that "[w]hether an employer's response was reasonable has to be assessed from the totality of the circumstances." *Id.* (citing A938). That ancillary instruction about what is "reasonable" plainly could not cure the critical errors in the principal instruction on the standard for corporate liability and in the ultimate question on the verdict form. That question made no reference to the "employer's response," but instead asked merely whether Turley had proven "that a supervisor with immediate or successively higher authority over the plaintiff created or

[7] The out-of-circuit sexual-harassment case that Turley cites, *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001), did not consider the instructional challenge at issue here and is not governed by this Circuit's clear precedent that corporate liability for coworker harassment turns on whether the employer as a whole adequately responded.

permitted the hostile or abusive work environment by not taking reasonable action to address it." A1679.

C. The Error Caused Defendants Severe Prejudice.

Turley's argument that there was no prejudice is unpersuasive. The fact that the district court found sufficient evidence to support the jury's verdict regarding corporate liability (Turley Br. 59) is beside the point: A holding that the jury ***could*** have found liability under the proper standard does not negate the prejudice resulting from the jury having been given an erroneous one.

Turley also observes that the jury found three supervisors individually liable (*id.*), but ignores that managers ***other than*** the individual defendants assisted in responding to Turley's complaints.[8] As our opening brief explained (at 35-36), the instruction and charge foreclosed the jury from considering the evidence of remedial measures taken, for example, by Lackawanna HR personnel and shift managers.

Turley also is mistaken in invoking the jury's finding under the NYHRL. *See* Turley Br. 60. The erroneous charge on the federal standard, which immediately preceded the charge on the state standard, profoundly confused the issue of corporate liability generally. Moreover, the fact that the jurors found

[8] Contrary to Turley's suggestion (Turley Br. 59), the jury's rejection of defendants' affirmative defense does not negate the prejudice. As the district court recognized, that defense was governed by a different standard of proof. SPA29.

corporate liability under the NYHRL (which required a finding that "upper-level supervisors" ignored the conduct) does not mean that they would have found that ***all*** supervisors did so. *See* Opening Br. 34-36.

In sum, Turley's assertion that the jury "clearly intended to impose" corporate liability for the "collective inaction of all supervisors" (Turley Br. 60) is rank speculation. Because the jury was not asked the proper question, a new trial is required.

IV. THE COMPENSATORY DAMAGES ARE EXCESSIVE.

Turley does not deny that the compensatory-damages award is an unprecedented outlier in this Circuit. In fact, he concedes that there are "no comparable cases" awarding "damages of the same magnitude." Turley Br. 67. Instead, he posits that his distress is categorically more severe than that of any other plaintiff in "significant" or "egregious" distress cases in this Circuit, thus justifying the massive award. This contention does not survive scrutiny.

A. There Is No Evidence Of Long-Term Debilitating Distress Or Effect On Future Employability.

Turley undoubtedly suffered distress from his coworkers' conduct, but the record will not support a finding that his distress was permanently debilitating or that it would impact his future employment. Thus, it does not justify the enormous compensatory award.

While Turley states that he received treatment from three doctors for

"several years" (Turley Br. 62), the record shows that he was seen a few times by a primary-care physician, who suggested that he see a psychologist, and that he then was treated by two mental-health professionals for a few months each. A217, A384, A686-89. Undisputed evidence also shows that, at the time of trial, Turley felt that he did not need ***any*** treatment because he had developed coping mechanisms. A217, A686-89. In testimony that Turley elides (*see* Turley Br. 65), Dr. Jaffri admitted that if Turley felt that he could "comfortably handle" his situation with those coping mechanisms, "that's even better." A690.

Despite his admissions at trial that he had improved significantly since the plant closed in 2009, Turley now insists that he will "suffer ... debilitating emotional distress" "for the rest of his life." Turley Br. 65. He relies on the testimony of Dr. Jaffri who, at of the time of trial, had not treated Turley in 3½ years. A687. But Dr. Jaffri offered no long-term prognosis of Turley and opined only that "[i]n some cases" PTSD patients re-experience symptoms in response to triggers. A685-86. In fact, while Dr. Jaffri speculated that Turley might "be more vulnerable" in the event that he experienced a racially intimidating environment in the future (A686), Dr. Jaffri conceded that after the plant closed "the triggers are not there." A689.

Turley further asserts that his allegedly "debilitating symptoms substantially affect [his] employability." Turley Br. 71. He cites no evidence in support of this

assertion, because there is none. Turley did not claim any lost wages or front pay at trial and put forth ***no evidence*** that his long-term employment prospects were in any way hindered.[9]

B. The Award Falls Far Outside The Range For "Significant" Distress Cases.

Contrary to Turley's representation (Turley Br. 67), the district court did not find that the degree of his emotional distress reached the "egregious" level. Although the district court stated that the underlying coworker ***conduct*** was "egregious" (SPA36), when it came to characterizing the degree of Turley's harm, the court indicated that he experienced "***significant*** emotional and physical repercussions" (*id.* (emphasis added)). Turley does not show that his distress was materially more severe than that experienced by the plaintiffs in the cases we cited involving "significant" distress. *See* Opening Br. 41-43. Nor does he offer any persuasive rationale as to why his award should be ***7.5 to 13 times*** the amount of the awards in those cases.

[9] Although Turley testified that an unidentified doctor diagnosed him as "totally disabled" (Turley Br. 62 (citing A394)), no evidence corroborated this hearsay statement, which is at odds with his doctors' testimony and his own admission that he worked continuously during this period.

C. The Award Is An Outlier Even Among "Egregious" Cases.

Moreover, Turley's compensatory award is an extreme outlier even when compared to the awards in cases involving "egregious" distress. Indeed, in four of the five "egregious" emotional-distress cases from this Circuit cited by Turley—undoubtedly the highest ones he could find—the awards are between $400,000 and $500,000, while the fifth was for $650,000. Turley Br. 68-69. Turley also cites a sixth case, *Osorio v. Source Enterprises, Inc.*, 2007 WL 683985, at *5-6 (S.D.N.Y. Mar. 2, 2007), but the award there covered not just emotional distress, but also the unique reputational harm suffered by the plaintiff, who had been rendered unable to work in her field indefinitely.

Tacitly conceding that his award is an outlier, Turley insists that the degree of his distress is an outlier as well. Turley Br. 68. A review of the "egregious" distress cases easily disposes of this implausible notion. For example, cases cited by Turley himself (*id.* at 68-69) involve plaintiffs who were awarded $500,000 after suffering permanent debilitation (such as one plaintiff deemed "unemployable for life"[10]) and appalling exacerbation of pre-existing conditions (such as a former child-molestation victim who suffered "pervasive and relentless" "extremely lewd" sexual harassment[11]). Cases we cited awarding well under $500,000 involved

[10] *Ramirez v. NYC Off-Track Betting Corp.*, 112 F.3d 38, 41 n.1 (2d Cir. 1997).

[11] *In re Town of Hempstead v. State Div. of Human Rights*, 649 N.Y.S.2d 942 (App. Div. 1996).

plaintiffs who became suicidal, experienced constant fear of death from an exacerbated heart condition, and suffered anguish that was expected "to continue for the rest of [the plaintiff's] life." *See* Opening Br. 44-45. Even viewed in the light most favorable to Turley, his distress does not equal, much less exceed, the long-term psychological devastation and/or effects on employability of plaintiffs who received a mere fraction of the massive compensatory award here. *See id*. at 43-45.

D. The Fact That Turley Was Not Fired Is An Additional Factor Demonstrating The Excessiveness Of The Award.

Turley dismisses this Court's guidance in *Lore v. City of Syracuse*, 670 F.3d 127 (2d Cir. 2012), that emotional-distress awards should be more modest when the plaintiff has not been subjected to a discriminatory termination. Turley Br. 66. Contrary to Turley's straw-man argument, we do not contend that *Lore* sets a "cap" of $250,000 on every emotional-distress award. Rather, *Lore*'s common-sense holding was that $250,000—$150,000 of which was for emotional distress—was "generous" for a plaintiff who suffered real distress, including physician-diagnosed depression requiring a leave of absence, but was not discriminatorily fired.[12] The fact that Turley was not fired, but was awarded more than ***nine times*** the emotional-distress award deemed "generous" in *Lore*, highlights the award's

[12] Contrary to Turley's assertion that we "omit[ted] to tell this Court [that] defense counsel suggested the jury's award should not exceed $250,000" (Turley Br. 61 n.13), we expressly so advised the Court. Opening Br. 47.

excessiveness.

E. This Court's Ruling In *Zeno* Confirms The Excessiveness Of Turley's Award.

Contrary to Turley's assertion (Turley Br. 70), this Court's decision in *Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2d Cir. 2012), does not support the $1.32 million award here.

First, Turley ignores this Court's explanation in *Zeno* that the distress suffered by a vulnerable child in a racially hostile school environment is ***not*** comparable to distress suffered by an adult in a workplace setting. *See* Opening Br. 45-47. Second, contrary to his suggestion (Turley Br. 71), Turley's circumstances are nothing like those of the teenaged plaintiff in *Zeno* who was foreclosed from earning a high school diploma and thus suffered, just as he was poised to begin his working years, a permanent diminution of his career opportunities and earning capacity. As discussed above, there was no evidence of ***any*** effect on Turley's future earning capacity. Finally, this Court held in *Zeno* that a $1.25 million award was excessive and that $1 million was the uppermost limit to compensate a child for the profound, long-term effects from his school's failure to protect him from harassment. Turley cannot begin to show why he is entitled to an award larger than an amount deemed excessive for a ***more*** vulnerable plaintiff who suffered ***greater*** consequences from alleged harassment.

V. THE PUNITIVE DAMAGES ARE EXCESSIVE.

Turley does not deny that the $5,000,000 punitive award is nearly seven times the largest punishment ever approved by this Court in an employment-discrimination case. He insists that the award would not set a new benchmark because this case involves "truly extraordinary … facts and circumstances" (Turley Br. 82), but he identifies no reason why a materially lower award would be insufficient to satisfy the governmental interests in retribution and deterrence. On the contrary, the standards for ensuring that punitive damages are "fair, reasonable, predictable, and proportionate" (*Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013)) require a significant reduction of the outsize award.

A. The Punitive Damages Are Unconstitutionally Excessive.

As our opening brief explained, the Supreme Court's guideposts indicate that the $5,000,000 punitive award is grossly excessive. Turley's analysis of the guideposts only confirms that conclusion.

1. *Reprehensibility*. Turley contends that "all five factors in the reprehensibility analysis are present." Turley Br. 74. In so arguing, he stretches the factors beyond recognition and distorts the record.[13]

[13] Contrary to Turley's evident assumption, in assessing the degree of reprehensibility, this Court may not presume that the jury resolved all factual disputes and construed all inferences in favor of finding defendants' conduct extremely reprehensible. "Unlike the measure of actual damages suffered, … the level of punitive damages is not really a 'fact' 'tried by the jury." *Cooper Indus.*,

The first reprehensibility factor recognizes that nonviolent conduct is "less serious" than conduct "marked by violence or the threat of violence." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996). Noting the absence of any "physical assault," the district court concluded that this factor is inapplicable. SPA40 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)). Turley contends that he was subjected to "repeated death threats" (Turley Br. 74), but there is no evidence that defendants themselves either threatened Turley or ignored "repeated death threats" by others. On the contrary, the portions of the transcript that Turley cites in his brief reveal that defendants responded reasonably to these alleged threats.

The first "death threat" was allegedly made during a "heated argument" between Pelc and Turley. A575-78. The undisputed evidence shows that Lackawanna managers promptly investigated the incident by interviewing every witness (A578); one worker confirmed that Pelc had made unspecified "threats"

Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001). Thus, "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *In re Exxon Valdez*, 270 F.3d 1215, 1238-39 (9th Cir. 2001). Indeed, when the Supreme Court itself has applied the three guideposts, it has independently assessed the facts relevant to its analysis. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576, 579 (1996) (discussing the lack of evidence that BMW acted in bad faith); *see also, e.g.*, *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 72 (Cal. 2005) ("While we defer to express jury findings supported by the evidence, in the absence of an express finding on the question we must independently decide" factual issues bearing on the constitutionally permissible amount of punitive damages.").

(A189-90)—not "death threats" as Turley asserts (Turley Br. 10); and Pelc was disciplined for threatening Turley (A579). Turley notes that an employee "told the union representative [that] Pelc 'was going nuts on Elijah Turley'" and complains that management "never talked to the union representative" about the incident. Turley Br. 10 (citing A193). But the union representative, James Hickey, admittedly knew that at least one worker had "sugarcoated" his account of the incident when speaking with management (A194), yet failed to report the worker's obfuscation to the investigators because he "didn't want to get anybody in trouble" (A195). Far from showing that Lackawanna management conducted an intentionally perfunctory investigation or condoned threats, this episode highlights the obstacles Lackawanna faced when endeavoring to address the alleged harassment.

On the other occasion when management became aware of an alleged threat, Turley reported that he had been told by coworkers that "Pelc wanted to kill him and Pelc and Reiter were plotting to physically harm him." Turley Br. 18 (citing A1303). But Turley was unwilling to identify his informants, and he did not authorize managers to talk to Pelc or Reiter. A1303. He instead suggested that they speak to Frank Daley about an alleged threat from Pelc the previous year; they did so, and Daley denied knowledge of any threat. *Id.* Turley now asserts that the investigation was too brief, but it is unclear what more the investigators could have

done when Turley would not disclose who told him of the recent threat and directed them to inquire instead about a stale threat. *See* A875 (testimony by Nevin Hope that, given the limitations imposed by Turley, "there really wasn't much that we could do other than speak to Mr. Daley"). And even if defendants' handling of these two matters fell short of the ideal, that passive failure to do more does not justify treating defendants as though ***they*** subjected Turley to violence or the threat of violence.

The second reprehensibility factor addresses whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419. Turley argues that defendants "watched Turley break down" yet "refused to take prompt, meaningful, and progressive action to stop the harassment." Turley Br. 74. However, substantial undisputed evidence showed that Lackawanna ***did*** promptly respond to each incident of race-based harassment that Turley reported and that its efforts increased over time to include stepped-up monitoring of the Pickler, hiring of an outside investigator, and the installation of lights and a recording device. *See* Opening Br. 7-12. Defendants also assisted Turley in obtaining medical care (A409), referred him to the Employee Assistance Program (A409-10, A765), and arranged for him to have an escort (A782-84, A786, A787-90). Although these efforts may not have ended the harassment, that does not mean that defendants recklessly disregarded Turley's health or safety.

Turley next asserts that he "was in a financially vulnerable position" because he "was making more than $76,000 a year at the Lackawanna plant" and "knew he could not obtain another job that paid as well." Turley Br. 74. To the contrary, mistreatment of a ***well-paid*** employee is the polar opposite of what the Supreme Court appears to have had in mind when it explained that "infliction of economic injury" on a "financially vulnerable" "target" "can warrant a substantial penalty." *BMW*, 517 U.S. at 576; *see also In re Exxon Valdez*, 472 F.3d 600, 616-17 (9th Cir. 2006) (per curiam) (explaining that "there must be some kind of intentional aiming or targeting of the vulnerable" to satisfy this factor), *vacated & remanded on other grounds by Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

Turley attempts to satisfy the fourth factor—recidivism—by pointing to an employment-discrimination suit initially filed against Bethlehem Steel in ***the late 1960s*** (*e.g.*, *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971)) and two interim rulings in unrelated suits against AMUSA (*Haraburda v. Arcelor Mittal USA Inc.*, 2011 WL 2600756 (N.D. Ind. June 28, 2011); *Zajac v. Mittal Steel USA*, 2008 WL 4936975 (N.D. Ind. Nov. 17, 2008)). Turley Br. 75. Because no evidence about these cases was introduced at trial, Turley may not seek to salvage his award by invoking them. In any event, these cases are irrelevant. Both *Haraburda* and *Zajac*—which involved claims of gender discrimination—were dismissed by stipulation without any finding of liability. *See* Stipulation of

Dismissal (Mar. 13, 2013) (Dkt 41) in *Haraburda v. Arcelor Mittal USA Inc.*, No. 2:11-cv-00093 (N.D. Ind.); Stipulation to Dismiss (Mar. 16, 2009) (Dkt. 58) in *Zajac v. Mittal Steel USA*, No. 3:07-cv-00035 (N.D. Ind.). The *Bethlehem Steel* case involved claims of race discrimination in hiring and promotion at the Lackawanna plant ***forty-five years ago***, when the plant was owned by a company unrelated to defendants. 446 F.2d at 654. None of the cases remotely suggests that AMUSA and Lackawanna are repeat offenders against whom a large sanction is needed.

Finally, the tepidness of Turley's effort to show "intentional malice, trickery, or deceit" (*State Farm*, 538 U.S. at 419) shows that the conduct here was not exceptionally reprehensible. For example, Turley's allegations that "Defendants deceived" him (Turley Br. 76) rest on no more than his disappointment with management's response to his complaints (*id.* (citing, *e.g.*, A288)). His allegation that defendants took "actions to create a pretext for firing [him]" (*id.*) rests on Sampsell's installation of a camera to observe Turley's shared work station and his decision to perform a background check on Turley (A181-82, A336-40, A422). As we have already discussed (Opening Br. 24-25), those actions were not outrageous, and Sampsell never accused Turley of any infraction. All that stands behind Turley's assertion that defendants "forced him to work side by side with his tormenters" (Turley Br. 76) is his contention that he objected to working with Pelc

and that Pelc backed a coil out of the production line while they were working together (A332-34, A849-50). And Turley's assertion that defendants "repeatedly laughed at racist incidents" (Turley Br. 76) rests on testimony that certain managers initially dismissed as "horseplay" the King Kong graffiti and the appearance of grease on controls at Turley's work station. A301, A304-05, A321-22. To call such incidents "horseplay" may reflect insensitivity to the ways in which racism may be expressed in the workplace, but it is not evidence of malice toward Turley. Indeed, after the King Kong graffiti was found, Lackawanna management shut down the production line and held meetings with the two Pickler shifts to explain that such graffiti would not be tolerated. A400-05, A440, A491, A755-56, A834-35.

In short, Turley fails to show that this case involves anything other than ineffectiveness in ending workplace harassment under difficult circumstances. The imposition of any punitive damages is a severe rebuke for a failure of this nature. A $5,000,000 exaction would be entirely disproportionate to the reprehensibility of the alleged misconduct.

2. *Ratio.* As our opening brief explained, given the size of the compensatory award and the nature of the alleged wrongdoing, the 3.8:1 ratio between the punitive and compensatory damages is grossly excessive; indeed, even a 1:1 ratio "would … be very high." *Payne*, 711 F.3d at 103. Turley does not even

acknowledge this Court's thorough discussion of the ratio guidepost in *Payne*, and he all but ignores the raft of cases we cited which hold that a 1:1 ratio represents the constitutional maximum when the compensatory damages are substantial.

Instead, Turley first argues that the "[w]ealth of the wrongdoer should be considered when assessing a punitive award." Turley Br. 77. He adds that a smaller award "would not accomplish" the goals of retribution and deterrence because AMUSA is a large company with a correspondingly high net worth. *Id.* at 80. The Supreme Court has made clear, however, that the defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. Tellingly, the three guideposts make no mention of the defendant's resources. *Id.* at 418. As the Court stated in *BMW*, "[t]he fact that [the defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585. To impose punishment based on AMUSA's high net worth or large number of employees (Turley Br. 81) "would be discriminatory and would violate the rule of law … by making punishment depend on status rather than conduct." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

Turley next cites four district-court cases within this Circuit that ostensibly approved comparable ratios. Turley Br. 78. None of the decisions was reviewed

by this Court, all pre-date *Payne*, and all but one involve compensatory awards that are a small fraction of the amount awarded here. *See Kauffman v. Maxim Healthcare Servs., Inc.*, 509 F. Supp. 2d 210 (E.D.N.Y. 2007) (reducing punitive damages from $1,500,000 to $551,470 where compensatory damages were $137,935); *Hill v. Airborne Freight Corp.*, 212 F. Supp. 2d 59 (E.D.N.Y. 2002) (reducing combined punitive awards of five plaintiffs from $1,500,000 to $1,000,000 where the total compensatory damages were $185,000), *aff'd*, 93 F. App'x 260 (2d Cir. 2004); *Greenbaum v. Handelsbanken, NY*, 67 F. Supp. 2d 228 (S.D.N.Y. 1999) (approving $1,250,000 punitive award where actual harm was $320,000). In the fourth case, *Chopra v. General Electric Co.*, 527 F. Supp. 2d 230, 246 (D. Conn. 2007), the district court approved a $5,000,000 punitive award that was approximately double the actual harm, but the case is a clear outlier that pre-dates this Court's decision in *Payne* and thus offers no useful guidance here.

Turley's cherry-picked cases from other Circuits (Turley Br. 79) similarly fail to support the 3.8:1 ratio here. To begin with, it is *Payne*, and not the decisions of other courts of appeals, that governs the analysis here. Moreover, only *Estate of Moreland v. Dieter*, 395 F.3d 747 (7th Cir. 2005), was decided within the last decade, and it is inapposite because the ratio was 1:1 and the conduct was "truly reprehensible" (*id.* at 757): The defendants brutalized and caused the death of a thirty-year-old man in their custody, and their "vicious and unconscionable"

conduct demonstrated "a clear intent to cause … great pain and suffering" (*id.*). *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), predated *State Farm* and affirmed an award only one-fifth as large as the punishment here. *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), came down shortly after *State Farm*, when the Ninth Circuit was not yet ready to "extend the law" by "disapproving of a single-digit ratio between punitive and compensatory damages" (*id.* at 1044); it has since recognized that ratios well below 9:1 can represent the constitutional maximum when compensatory damages are substantial.[14] Finally, *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), approved a 4:1 ratio where the compensatory damages were $500,000 per plaintiff, but it was decided just two months after *State Farm.* Subsequent to *Bogle*, many more decisions have followed the Supreme Court's teaching that a ratio of 1:1 or lower may be the constitutional maximum when the compensatory damages are substantial. *See* Opening Br. 54-55 & n.13.

3. *Fines for comparable conduct.* Turley does not deny that claims under the New York Human Rights Law and Title VII—which cap penalties at

[14] *See, e.g., Southern Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (holding that "the Constitution permits a three to one ratio of punitive to compensatory damages in this case, but not more" where compensatory damages were $395,072); *Leavey v. Unum Provident Corp.*, 295 F. App'x 255 (9th Cir. 2008) (holding that the district court correctly reduced the $15 million punitive award to $3 million where the compensatory damages were $1.2 million).

$100,000 and $300,000, respectively—are "comparable" to his claim under Section 1981; indeed, he sued under all three statutes. Nor does he deny that courts within this Circuit frequently look to the Title VII cap for guidance as to "a suitable amount to support the objectives of deterrence and punishment of discriminatory conduct." *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 317-18 (S.D.N.Y. 2008).

Turley nevertheless insists that, because Congress did not include a cap in Section 1981, it must have "intended large punitive awards under § 1981." Turley Br. 81. To the contrary, the absence of a statutory cap just means that it falls to the courts to impose appropriate limitations on punitive damages as a matter of federal common law. That is why the Supreme Court declared that a 1:1 ratio is the presumptive maximum in federal maritime cases. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (explaining that responsibility for "regulating [punitive damages] as a common law remedy … lies with this Court as a source of judge-made law in the absence of statute"). Comparing the punitive damages in a Section 1981 case to the Title VII cap serves similar purposes.[15] Hence, despite

[15] Some courts have held that the 1:1 ratio adopted in *Baker* is limited to the maritime context. There is no basis for cabining the Supreme Court's decision in that way. The concerns expressed by the Supreme Court in *Baker* apply to all federal causes of action that are not subject to hard caps. *See, e.g.*, 554 U.S. at 499 (opining that "[t]he real problem" with punitive damages" is "the stark unpredictability of punitive awards"); *id.* at 502 (discussing "the implication of unfairness" associated with "an eccentrically high punitive verdict"). Indeed, the

Turley's insistence that it is "the least important factor" (Turley Br. 81), the third guidepost strongly indicates that the $5,000,000 award is unconstitutionally excessive.

B. The Punitive Damages Are Excessive Under Federal Common Law.

We explained in our opening brief (at 57-59) that the punitive award in this case far exceeds the norm for punitive damages in employment-discrimination suits in New York and would shatter the existing record for such suits in this Circuit. Turley does not respond directly to this argument and thus implicitly concedes it.

Turley does address *Greenbaum* and *Watson v. E.S. Sutton, Inc.*, 225 F. App'x 3, 5 (2d Cir. 2006), which hold the previous records ($1,250,000 and $717,000, respectively) for punitive awards in employment cases in New York district courts and in this Court. His argument (Turley Br. 79-80) that the conduct here was more reprehensible than the conduct in those cases is unpersuasive. In *Greenbaum* (which preceded *State Farm* and *Payne* and was settled rather than appealed), the defendant repeatedly denied the plaintiff promotions because of her gender and then fired her in retaliation for her complaint, causing her substantial economic harm. 67 F. Supp. 2d at 262-63. In *Watson* (where the ratio of punitive

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Court's many references to arbitrariness (*id*. at 499, 500, 502, 504, 513)—a core due process concern—suggest that its adoption of a 1:1 ratio should be employed in cases involving federal statutory claims as well.

to compensatory damages was less than 1:1), the evidence "showed a systemic failure to take seriously women's complaints of sexual misconduct, and malicious termination of Watson because she complained." 225 F. App'x at 17. In addition, Watson was a "single mother" who was "left with no income" after she was fired; the defendants also "fil[ed] indisputably dishonest affidavits, and finally accus[ed] Watson (falsely) of having committed a federal crime." *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *17 (S.D.N.Y. Sept. 6, 2005), *aff'd*, 225 F. App'x 3 (2d Cir. 2006). Even if the conduct at issue here—the failure to respond robustly enough to coworker harassment—is deemed more reprehensible, Turley does not explain why a punishment ***four times*** the award in *Greenbaum* and ***nearly seven times*** the award in *Watson* is necessary to punish and deter.

C. The Punishment Is Excessive Given Lackawanna's Financial Condition.

We explained in our opening brief (at 59-60) that the $998,750 punitive award against Lackawanna "constitute[s] a disproportionately large percentage" of its $1,132,000 net worth. That the company is already "defunct" (Turley Br. 83) does not justify an award that would wipe out nearly all of its remaining value. Turley's observation that the company's assets were sold for $3,500,000—long before the trial in this case—does not change that calculus; nor does it raise "issues of fraudulent conveyance" (*id.*). Indeed, Lackawanna incurred losses every year from 2005 until it closed in 2009. A976-77. When the plant closed, Lackawanna

recognized a $23 million loss, and it continued to lose money after the closure due to expenses such as "property taxes, utilities, and other things that didn't go away when the plant stopped operating." A979. This evidence of Lackawanna's difficult financial circumstances confirms that the punitive award against it is excessive.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on October 24, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by the Court's order of September 27, 2013, because it contains 8,162 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point type for text and footnotes.

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