17-P-1238 Appeals Court

CHANTAL F. CHARLES vs. VIVIAN LEO & another.[1]

No. 17-P-1238.

Suffolk. November 15, 2018. - October 31, 2019.

Present: Rubin, Maldonado, & Lemire, JJ.

Anti-Discrimination Law, Employment, Race, Damages. Employment, Discrimination, Retaliation. Damages, Under anti-discrimination law, Emotional distress, Punitive, Remittitur. Constitutional Law, Limitation on recovery of damages. Practice, Civil, Judgment notwithstanding verdict, New trial, Instructions to jury, Bias of judge, Damages.

Civil action commenced in the Superior Court Department on March 5, 2012.

The case was tried before Elizabeth M. Fahey, J., a motion for judgment notwithstanding the verdict was heard by her, and a motion for a new trial or remittitur was heard by her.

Emma Quinn-Judge (Monica R. Shah also present) for the plaintiff.

Kay H. Hodge (John M. Simon also present) for the defendants.

[1] City of Boston.

RUBIN, J. Chantal Charles sued Vivian Leo and the city of Boston (city) for racial discrimination and retaliation in violation of G. L. c. 151B. A jury found the defendants liable on both claims, and awarded Charles $888,159.83 in compensatory damages ($32,350 for back pay, $105,394.56 for front pay, $250,415.27 for retirement benefits, and $500,000 for emotional distress) and $10 million in punitive damages. Following trial, the defendants moved for judgment notwithstanding the verdict (n.o.v.),[2] a new trial, and remittitur. The trial judge denied in full the motions for judgment n.o.v. and a new trial. She also declined to remit the compensatory damages award, but remitted the punitive damages award to $2 million, and an amended final judgment then entered. The defendants have appealed from the amended final judgment, arguing error in the denial of their motion for judgment n.o.v., the denial of their new trial motion, the denial of the remittitur motion as to compensatory damages, and the partial denial of the remittitur motion as to punitive damages. Charles has appealed, arguing error in the judge's reduction of the punitive damages award. We vacate the portion of the final amended judgment related to the punitive damages award and remand for reconsideration of the

[2] The defendants also moved for a directed verdict at trial, which the judge denied.

motion to remit those damages. In all other respects, we affirm the final amended judgment.

Facts. Given the applicable standards of review, we summarize the facts adduced at trial in the light most favorable to Charles, with additional facts reserved for discussion.

Charles is a black woman who, since 1986, has worked as a senior administrative assistant, paid at a grade of MM-5, in the trust office of the city's treasury department. Leo, a white woman, has worked in the treasury department since 1974, and has served as the first assistant collector-treasurer since 1996. From 1986 until 2011, Charles was supervised by Robert Fleming, who became the executive secretary of the trust office in 1990. Fleming initially reported directly to the collector-treasurer, but the trust office eventually became part of the treasury department, and Fleming began reporting to Leo in 2000.

The trust office manages trust funds left to the city for various purposes. Some, under the "small grants program," are left for purposes such as community activities, events, and cultural programs. Another fund, the Edward Ingersoll Browne Fund (Browne Fund), is used for beautification projects related to parks, squares, streets, and public art. Although Charles had originally been hired to do secretarial and operational work within the trust office, she quickly acquired management responsibilities over the small grants program and the Browne

Fund. For instance, Fleming assigned her to "staff the Browne Fund committee and work with the various other [c]ity agencies in preparing applications for review, interacting with the community organizations that were making applications to the Browne Fund, making sure that when they came into the Browne Fund committee for their presentations, they delivered the material that they were required to, and the like." This often required Charles to meet with community groups after business hours because many members of those groups were volunteers with standard work schedules and therefore unavailable during the day. Fleming assigned Charles these responsibilities because of her "knowledge and her ability to . . . accept the training that [the trust office was] providing." In connection with these responsibilities, she was given "functional" job titles of "fund manager" and "community service director." While these titles were not reflected in the city's civil service system, the title of community service director did appear on Charles's business card.

Charles's job conditions changed when the trust office was reorganized within the treasury department. Leo prohibited Charles from using her functional titles in memoranda and letters to the community. Leo also prohibited Charles from attending community meetings after 5:00 P.M. because Leo would not approve overtime, although Charles attended some such

meetings anyway, without remuneration. Leo also prohibited Charles from accepting awards on the trust office's behalf. This included one instance in which the mayor gave an award to the trust office based on its management of a grant that was given to the parks department; the head of the parks department, a white man, accepted the award on Charles's behalf.

In November of 2010, Fleming had an unscheduled meeting with Leo and her deputy, Richard DePiano, a white man. Leo accused Fleming of being a bad manager because he inadequately supervised Charles, whose behavior Leo described as "aloof, non-deferential, uppity." (Leo denied using the word "uppity," but a rational juror could have credited Fleming's version of events.) Leo then threatened to give Fleming a poor performance evaluation, and to take action to remove him as executive secretary of the trust office, if he did not give Charles an evaluation that Leo "believed was justified." According to Fleming, because Leo did not manage Charles on a daily basis, her order was inconsistent with the city's policy on performance reviews. Fleming refused to capitulate, and gave Charles a review he thought she deserved, which was "[a] good performance evaluation." Leo then gave Fleming a "very poor performance evaluation as executive secretary." This caused Fleming to retire early. The city's personnel files, which were maintained by Leo's assistant, ordinarily contained past performance

reviews, but these two reviews were missing from the city's personnel files at the time of trial.

When Fleming retired, he was working on six or seven Browne Fund projects and performing account reconciliation work on the small grants program and the Browne Fund. He was also attending community meetings. Charles took over this work in addition to the six or seven Browne Fund projects that she had already been managing. She was neither compensated for the additional work nor instructed not to perform it, and she was not aware of anyone else who had taken over Fleming's other responsibilities.

Nonetheless, shortly after Fleming's retirement, Charles was marginalized from working on the Browne Fund. On September 15, 2011, she was contacted by Karin Goodfellow, the director of the Boston Art Commission, asking for input on revisions to the Browne Fund application procedure and guidelines -- Charles had originally drafted the application. Goodfellow's e-mail indicates that she had been discussing the revisions with Gail Hackett, the assistant to the collector-treasurer. This surprised Charles because both Goodfellow and Hackett did not "really deal with the Browne Fund."

The next day, Charles filed a complaint with the Massachusetts Commission Against Discrimination (MCAD). Shortly thereafter, Leo circulated a final version of the new Browne Fund application that had removed Charles as the contact person.

The city's website had also removed Charles as the contact person and replaced her with Goodfellow. Furthermore, DePiano instructed Charles that she could no longer lead Browne Fund committee meetings, prepare Browne Fund summary reports, or work on the small grants program, all of which she had done prior to filing her MCAD complaint. She was also no longer given information on what occurred at the Browne Fund meetings. This impeded her ability to work with community organizations.

Although Charles was hoping to be promoted to Fleming's position after he retired, nobody suggested she apply to replace him, nor did she see a job posting for that position. She did, however, see a posting for a position called "supervisor of accounts," a title that existed in other parts of the treasury department but had never been used in the trust office. The job description differed substantially from the work Fleming had been performing: it "listed a lot of public awareness procedural awareness, [etc.]," whereas Fleming's responsibilities were focused on community engagement and project management. It also would be paid at a grade of MM-8; Fleming had been paid at MM-9. In addition, while Fleming's executive secretary position had not required a formal application, this position did. Charles did not apply because the job description and pay grade did not correspond to Fleming's executive secretary position, and because "Leo was

never going to give [her] this job if [she] applied for it." At trial, DePiano referred to it as Fleming's position.

Ultimately, Andrew Niles, a white man, received the position, and began work in November of 2011. By his own admission, Niles "obviously wasn't qualified" to handle certain investment-related aspects of the job, and had been terminated for performance-related reasons from his previous job as a mutual fund accountant. (According to Fleming, Charles did not have experience handling investments either, but did have the ability to learn the required skills. Fleming also noted that DePiano had been trained in the relevant investment-related work on the job.)

When Niles began as supervisor of accounts, he was told his position was actually called "trust fund manager," which bears an obvious resemblance to the quasi-official title of "fund manager" that Leo had prohibited Charles from using. Indeed, when Leo introduced Niles to Charles as a "trust fund manager," Charles did not understand that Niles was her supervisor. She learned this only after Leo's assistant instructed her to get Niles's approval for a vacation request. After Charles clarified the matter with Leo, Leo wrote Charles a warning letter alleging that she had acted disrespectfully and had accused Leo of being a liar, an accusation that Charles had not leveled. This was the first warning Charles had ever received.

Niles did not last long on the job. On April 11, 2012, Charles asked Niles for permission to attend an evening meeting at Edward Everett Square related to the Browne Fund. Pursuant to procedure, Niles asked Leo if he and Charles could go to the meeting and receive overtime pay. Leo denied the overtime request. Niles told Charles she could go to the meeting but would not get paid. Leo fired Niles the next day. According to the termination letter Leo gave to Niles, one of the "major factor[s]" in her decision was his "not exhibiting a capacity to monitor workflow and accountability of those employees you manage." Charles was one of two employees Niles managed, and there was no suggestion in the record that Leo believed Niles had problems managing the other employee.

Leo and DePiano subsequently prepared another job posting for supervisor of accounts. The description differed from the one related to Niles's application and the work Fleming performed; it focused less on the various trust funds themselves and more on financial reporting. Charles did not apply because she did not recognize it as Fleming's position and because the rewriting of the job description "was a clear message to [her] that [she] need not apply." Leo hired Angela Chandler, a white woman and a former collector-treasurer for the town Norwell, for the position.

Charles continued to be subjected to hostile behavior. When a group came to the office asking for Charles's advice on Browne Fund applications, Leo prohibited them from talking to her and instead diverted them to Chandler. In addition, a small nonprofit organization that for many years had received a small grant, and which had given Charles several awards for her work with them, was the only one out of twenty-one applicants to be denied a small grant in the relevant funding cycle. Finally, Charles continued not to receive overtime for attending after-hours meetings during Chandler's tenure as her supervisor. In fact, shortly before trial, after Chandler had approved Charles's attendance at two after-hours meetings, Leo met with Chandler regarding her failure to follow procedures in approving Charles's overtime, which caused Chandler to become upset and miss a day and one-half of work.

Discussion. 1. Judgment n.o.v. "In reviewing the judgment, we consider the facts and inferences therefrom in the light most favorable to the plaintiff to determine if 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" Phelan v. May Dep't Stores Co., 60 Mass. App. Ct. 843, 844 (2004), quoting Stapleton v. Macchi, 401 Mass. 725, 728 (1988). Our review is de novo. See Phelan, supra at 845.

Charles claimed in the Superior Court that (1) the defendants discriminated against her on the basis of race by failing to promote her to the positions that ultimately went to Niles and Chandler, (2) the defendants discriminated against her on the basis of race by not awarding her out-of-grade pay when she assumed Fleming's responsibilities following his departure, (3) the defendants discriminated against her on the basis of race by refusing her overtime pay for the after-hours meetings she attended, and (4) the defendants retaliated against her for filing her September, 2011 MCAD complaint. The defendants waived any challenge to the out-of-grade pay and overtime arguments by not raising those issues in their motion for a directed verdict.[3] See Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 34 (1991). As such, we need only address the sufficiency of the evidence for the failure-to-promote and retaliation claims.[4]

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[3] The defendants did argue that "a directed verdict must issue with respect to each of the [p]laintiff's [c]hapter 151B claims against Ms. Leo personally," but their only argument in support of this proposition was that there was insufficient evidence that Leo "aided or abetted a violation by the [c]ity of [c]hapter 151B," an argument they do not make on appeal.

[4] Furthermore, the jury were only asked whether the defendants "discriminated against Ms. Charles with at least one adverse employment action after November 23, 2010 because of her race," but not specifically how they discriminated against Charles. It is therefore unclear whether they found for Charles on either her out-of-grade pay or overtime claims.

a. Failure to promote. To succeed on an employment discrimination claim under G. L. c. 151B, a plaintiff must prove four elements: "membership in a protected class, harm, discriminatory animus, and causation." Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001). Charles, as a black person alleging racial discrimination, is a member of a protected class. The defendants here dispute the sufficiency of the evidence with respect to the other three elements. Specifically, they argue that Charles cannot establish those elements because she did not apply for the positions, and because Niles and Chandler were more qualified than she.

i. Futility. The defendants argue first that Charles's claim must fail because she did not apply for the promotions she did not receive. Ordinarily, to succeed on a failure-to-promote claim, the plaintiff must show that he or she applied for and was denied a promotion. However, a plaintiff need not meet this requirement if she can show that applying would have been futile because a "consistently enforced pattern or practice of discrimination" existed which would have resulted in the plaintiff's "explicit and certain rejection." Nguyen v. William Joiner Center for the Study of War & Social Consequences, 450 Mass. 291, 297, 298 (2007),quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977). A plaintiff can prove futility by the employer's "consistent

discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups." Id., quoting International Bhd. of Teamsters, supra. The judge instructed the jury consistently with these legal principles:

> "Generally, a person who does not apply for a posted position is not allowed to sue for not getting the posted position. . . . [One] exception is that applying for the job would have been a futile gesture due to a consistently enforced pattern or practice of discrimination. . . . If an employer should announce his policy of discrimination by a sign reading, men only, or whites only on the hiring office door, the victims would not be limited to the few who ignored the sign and have subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly, but just as clearly by an employer's actual practices, by an employer's consistent discriminatory treatment of actual applicants, by the manner in which the employer publicizes vacancies, by the employer's recruitment techniques, by the employer's responses to casual or attentative [sic] inquiries, and even by the racial or ethnic composition of that part of the employer's workforce, from which the employer has discriminatorily excluded members of minority groups."

A rational jury, armed with the facts as we have described them, clearly could have inferred that it would have been futile for Charles to apply for the positions. Furthermore, while many of Leo's acts, devoid of context, would not compel an inference that this futility was caused by Leo's race-based discrimination, context is crucial in determining the

discriminatory quality of those acts. Here, to begin with, Leo instructed Fleming to give Charles an unjustified performance review because of her "uppity" behavior. The "racially-charged term 'uppity,'" Bridges v. Scranton Sch. Dist., 644 F. App'x 172, 180 n.6 (3d Cir. 2016), is a derogatory term applied by definition only to those whom the speaker considers inferior, and it has a long, sorry history of use in the United States to describe African Americans who the speaker believes don't know or keep to what the speaker believes is their proper, subjugated place. See, e.g., Bell, Racial Equality: Progressives' Passion for the Unattainable, The Lost Promise of Civil Rights, 94 Va. L. Rev. 495, 517 n.68 (2008) (book review) ("Racial tensions were high in the years following World War I. Some whites, often aided by the KKK, responded with violence to any indication that blacks were acting 'uppity' or had strayed 'from their place'"); Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow xiv-xv (Vintage ed. 1999) (during Jim Crow era, "[e]vidence of success, no matter how it was achieved or displayed, made every black man and woman vulnerable. To convey an air of independence . . . . was to invite trouble. The simple fact was that many whites equated black success with 'uppityness,' 'impudence,' 'getting out of place,' and pretensions toward racial equality"); Craig-Taylor, To be Free: Liberty, Citizenship, Property and Race, 14 Harv.

BlackLetter J. 45, 57 (1998) (prior to Emancipation, free blacks "who did purchase property were subject to mob action for being too 'uppity'"). See also, e.g., Beckwith v. State, 707 So. 2d 547, 564 (Miss. 1997) (quoting murderer of Mississippi civil rights activist Medgar Evers calling Evers an "uppity nigger"). It is in the context of this case strong evidence of racially discriminatory animus. A rational juror therefore could have concluded that Leo, out of discriminatory animus, instructed Fleming to give Charles an unjustified performance review, and disciplined him for not doing so.

Furthermore, the jury heard evidence of the racial composition of upper management. Of ten people holding management positions above Charles's grade of MM-5, only one, Priscilla Flint, was black, and a rational juror could have concluded that Leo promoted Flint to conceal Leo's discriminatory behavior with respect to another black employee, Patrick Bosah: Leo gave Flint the job without Flint's having applied, Flint assumed supervisory responsibilities over Bosah shortly after Bosah had filed a racial discrimination claim with the MCAD, and Leo ordered Flint to attend one of Bosah's MCAD hearings because "I have you, you're black." (Flint testified that she did not attend the MCAD hearing voluntarily.) Again, this supports an inference of racial animus.

Given this context, Leo's decisions to distance Charles from the Browne Fund and small grants program, and to rewrite the job descriptions to minimize the value of Charles's work experience, take on new possible meanings. A rational juror could have concluded that Leo did not want black people in upper management, and, when it looked like Charles would emerge as a successor to Fleming, Leo took these steps to prevent that from happening.[5] On all the facts and circumstances, a rational juror could have concluded that it would have been futile for Charles to apply for the positions because of the defendants' discriminatory practices.

The defendants claim that Charles's real reason for not applying for the positions was simply that she did not want them, and that there is therefore an insufficient causal link between their alleged pattern or practice and Charles's failure to apply. Their only argument for this proposition consists of out-of-context citations to Charles's testimony, given on cross-examination, that she "didn't . . . specifically want" Niles's position, and that she "didn't want [Chandler's] job because of the title and also the job description. It's strictly financials." But Charles also testified that she did not

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[5] While Fleming testified that Leo's poor performance review of him pushed him into early retirement, he also testified that he probably would have retired about eighteen months later.

understand these positions to be the ones that would replace Fleming's position, which she said she wanted. Indeed, a rational juror could have concluded that Charles lacked this understanding precisely because of the defendants' discriminatory acts in changing the jobs' title, descriptions, and pay grade.

ii. Qualifications. The defendants also argue that Charles's failure-to-promote claim cannot succeed because Niles and Chandler were more qualified than she was for the positions. See International Bhd. of Teamsters, 431 U.S. at 369 n.53 ("Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that his status is similar to that of the applicant, he must bear the burden of coming forward with the basic information about his qualifications that he would have presented in an application. . . . [T]he burden then will be on the employer to show that the nonapplicant was nevertheless not a victim of discrimination. For example, the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient"). See also Somers v. Converged Access, Inc., 454 Mass. 582, 595-596 (2009). The defendants did not raise this argument in their motion for a directed verdict and have therefore waived it on appeal. If we were to reach the merits, we would disagree. A

rational juror could have found that Charles was at least as qualified as Niles and Chandler.

Charles had worked in the trust office for a quarter century and had a detailed knowledge of many of the trust funds the office managed. Indeed, she had taken over Fleming's responsibilities when he retired early, and had designed the application form for the Browne Fund, one of the major funds the trust office administered. She had also received positive performance reviews throughout the course of her employment.

Niles, by his own admission, was not qualified for certain aspects of the job. He was fired after only a few months. While he had previous accounting-related experience that Charles lacked, this is undercut by the fact that he was terminated for performance reasons from his prior position in which he performed that work. In any event, a rational juror could have found that Charles's superior qualifications in other areas more than outweighed this experience.

Chandler certainly was more qualified for the financial aspects of the position, which the amended posted job description emphasized. But a rational juror could have concluded that she was more qualified for the job as it was posted only because Leo had changed its description to emphasize misleadingly those aspects of the job in order to exclude Charles, on account of her race, from appearing qualified. In

these circumstances, the appropriate comparison is between Charles's and Chandler's qualifications for the job as it existed before the discriminatory rewrites, i.e., the job Fleming was performing when he retired. According to Fleming, he spent the majority of his time on community work, for which Charles was highly qualified. Indeed, Leo admitted at trial that Chandler's trust experience did not extend to the "large capacity" of trusts handled by the trust office. Plus, Fleming, who had supervised Charles for two decades, believed that Charles had the capacity learn to the financial aspects of the position, an opportunity DePiano, a white man, had been given earlier in his career. A rational juror could have thus concluded that Charles was at least as qualified as Chandler.

b. Retaliation. A retaliation claim under G. L. c. 151B has four elements:

> "First, there must be evidence that the employee reasonably and in good faith believed that the employer was engaged in wrongful discrimination. Second, there must be evidence that the employee acted reasonably in response to that belief, through reasonable acts meant to protest or oppose . . . discrimination (protected activity). Third, there must be evidence that the employer took adverse action against the employee. Finally, there must be evidence that the adverse action was a response to the employee's protected activity (forbidden motive)." (Quotations and citations omitted.)

Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 405-406 (2016).

On appeal, the defendants argue only that there was insufficient evidence that they performed any acts in retaliation for Charles's filing of her MCAD complaint. We disagree. Charles testified that after she filed her MCAD complaint, she was immediately further marginalized from her Browne Fund and small grants program responsibilities, which is sufficient on its own to make out a claim of retaliation, especially since her exclusion from after-hours meetings resulted in lost opportunities for overtime pay. See Yee v. Massachusetts State Police, 481 Mass. 290, 297-299 (2019) (denial of opportunity for overtime pay constitutes adverse employment action); Rideout v. Crum & Forster Commercial Ins., 417 Mass. 757, 763 (1994) (reassignment to "ignoble and isolated tasks" can constitute retaliation). Indeed, a rational juror could have concluded that Niles was fired at least in part because he allowed Charles to attend after-hours meetings without being paid, which they could have interpreted as further efforts to keep Charles away from the trust fund applicants she had been capably advising. Our description of the facts above also contains additional behaviors by the defendants that a rational juror could have interpreted as retaliatory. We therefore have no difficulty in concluding that with respect to the retaliation claim, the motion for judgment n.o.v. was properly denied.

2. Motion for a new trial. The defendants raise several grounds on which, they claim, the Superior Court judge should have granted a new trial. We address only those that have been preserved.[6]

a. The collective bargaining agreement. The defendants attempted to argue at trial that they did not hire Charles for either position because a collective bargaining agreement (CBA) between the city and Charles's union prohibited the defendants from hiring individuals who did not submit applications. The trial judge read the CBA, concluded that it did not prohibit the defendants from hiring someone who did not apply, and barred the defendants from making this claim to the jury in their opening statement. The defendants argue that this was error and also claim that the trial judge erroneously prohibited them from introducing evidence on the subject. We review the judge's limitations on opening statements and her evidentiary rulings for abuse of discretion. See Commonwealth v. Mahoney, 400 Mass.

[6] The defendants waived the following arguments by not objecting at trial, see Freyermuth v. Lutfy, 376 Mass. 612, 616 (1978): the judge erred by permitting Charles to introduce evidence of acts that occurred outside the statute of limitations, the judge erred by permitting Charles to introduce evidence of nonactionable incidents that occurred within the statute of limitations, and the judge erred by permitting Charles to introduce evidence concerning the racial composition of the workforce. Were we to reach these arguments, we would conclude that they all fail.

524, 530 (1987); Crown v. Kobrick Offshore Fund, Ltd., 85 Mass. App. Ct. 214, 219 (2014).

First, the defendants in fact introduced evidence that the CBA prohibited them from hiring someone who had not applied for the position. DePiano testified that he had never interviewed or hired someone who did not apply because "[i]t would be in violation of the [CBA]." The CBA was also in evidence.

In any event, whatever the CBA permitted, the issue is largely immaterial. Charles's theory was not that the defendants had the opportunity to promote her but failed to do so. Rather, it was that, by rendering her application futile, they denied her the opportunity to be promoted. Furthermore, the judge instructed the jury that, generally, "a person who does not apply for a posted position is not allowed to sue for not getting the posted position," but that futility is an exception to this general rule. Therefore, whatever limitations the CBA might have placed on the defendants related to promoting Charles were not directly relevant to her discrimination claim, and the judge did not abuse her discretion in precluding certain references to it.

b. Stray remarks instruction. The defendants requested, and the judge declined to give, the following jury instruction:

> "In this case, Ms. Charles alleges that Ms. Leo in November 2010 made a comment to Mr. Fleming about Ms. Charles that is some evidence of improper animus. Ms. Leo denies making

> such a comment. You alone must determine whether Ms. Charles has proven that such a comment was in fact made.
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> "Even if you do determine that Ms. Charles has proven that this comment was made, you are not to consider any comment on Ms. Charles made by Ms. Leo that is unrelated to the adverse employment actions complained of. Such stray remarks in the work place are not sufficient to conclude that Ms. Charles has shown by direct evidence that she was discriminated against on the basis of her race or national origin."

We review for abuse of discretion and find none. See Pardo v. General Hosp. Corp., 446 Mass. 1, 20 (2006). "Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy the plaintiff's threshold burden in [employment discrimination] cases." Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 667 (2000). Although we are not aware of a decision that has explicitly defined "stray remark," the court in Wynn & Wynn concluded that the relevant statements in that case "were not stray remarks" because "[t]hey were made by a person with the power to make employment decisions." Id. The relevant remark here -- Leo's statement that Charles's behavior was "uppity" -- was made by a person with just that power, and hence was not a stray remark. The proposed instruction was therefore inapplicable to the case.

c. Judicial bias. The defendants argue that alleged judicial bias requires a new trial. The defendants argue first

that the judge "hostilely cross-examined" the director of the city's human resources office regarding the city's efforts to increase workforce diversity and the city's minority population. Shortly after the alleged hostile cross-examination, the defendants moved for a mistrial. Although contemporaneous motions for a mistrial are relevant in determining judicial bias, see Poly v. Moylan, 423 Mass. 141, 150 (1996), we are confident the judge's questioning exhibited none. Before asking the witness what steps she had taken to ensure that "the [c]ity's hiring decisions are in accord with the goal of having the employment population of the [c]ity reflect the percentage of the population represented," the judge asked counsel whether they had any objections to her asking this question, and nobody objected. The witness responded that certain laws limited the steps they could take with respect to the police and fire departments, and the judge asked, for clarification, whether the witness's answer applied only to those departments. After the witness responded that it did and continued with her explanation, the judge asked a few more follow-up questions that fell within the scope of the initial question. We detect no bias.

The defendants next argue that the judge demonstrated bias by interrupting defense counsel's closing argument when he deviated from the evidence, but did not interrupt plaintiff's

counsel when she made two allegedly improper statements of her own. After noting that Leo denied making the "uppity" comment, defense counsel argued that "in [forty] years of service to the [c]ity of Boston Vivian Leo has never been accused of one other racially charged statement in any way," the judge said, "Please confine yourself to the evidence. There's no such evidence." The defendants do not argue on appeal that counsel's statement had an evidentiary basis, and our review of the record discloses none. The judge therefore appropriately interrupted an improper statement. Moreover, we find no impropriety in plaintiff's counsel's closing, and hence no suggestion that the judge's interruption of defense counsel was one-sided. Contrary to the defendants' suggestion, plaintiff's counsel did not say that the defendants could have hired Charles without her having applied for the job.[7] And there was no impropriety in plaintiff's counsel's request that the jury "send a message" to the city.

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[7] Plaintiff's counsel stated: "For three decades the [e]xecutive [s]ecretary position was an appointed position. You heard that from Vivian Leo. You heard that from Ms. Leonard. It required no posting, no application, and for three decades three white males held that position. As soon as Mr. Fleming departs and one of the more senior people in the [t]rust [o]ffice is a black woman, that entire process changes. And you've heard a lot about the union, union policies, all of that. Those union policies didn't apply to this position beforehand." The natural interpretation of this statement is that the defendants changed the requirements for the position to require an application.

Charles was requesting punitive damages,[8] and "[a] proper punitive damage award . . . would be a sufficient amount to send a clear message to [the defendants] of condemnation for [their] reprehensible behavior. " Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 624 (2005). Plaintiff's counsel was therefore making an accurate statement of law. The judge did not exhibit bias by interrupting the only improper statement in closing.

Finally, the defendants argue that the judge was biased because, purportedly, her first "substantive instruction" to the jury was that they could draw a negative inference from the defendants' alleged spoliation of Charles's and Fleming's 2010 performance reviews. A review of the jury charge shows, however, that this instruction was simply in the middle of a set of instructions on the types of inferences the jury might draw from the evidence. Again, the defendants have shown no bias.[9]

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[8] The defendants argue that plaintiff's counsel made this statement in connection with an argument on compensatory damages, but there is no support in the record for this assertion.

[9] The defendants also allege that the judge made several comments at sidebar that were further evidence of her bias. We can find no such comments in the record. Although, as the defendants observe, the recording equipment appears to have rendered many of the sidebar conversations inaudible, no party appears to have made an effort to stipulate to the contents of those conversations. See Mass. R. A. P. 8 (e) (3), 481 Mass. 1614 (2019). As it is the appellant's burden to produce the

3. Compensatory damages. We next address the defendants' argument that the judge erred by not ordering a new trial on compensatory damages or remitting the compensatory damages award. "In this court as an appellate tribunal an award of damages must stand unless to make it or to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law." Bartley v. Phillips, 317 Mass. 35, 43 (1944). The defendants argue that all parts of the compensatory damages award should be reduced to zero, or a new trial granted with respect to those damages, because there was insufficient evidence of liability. Having found sufficient evidence of liability, we reject this argument. We now consider the defendants' arguments with respect to specific parts of the compensatory damages award.

a. Front pay and retirement benefits. As the judge instructed the jury, awards for lost future earnings in G. L. c. 151B cases must be reduced to present value. See Conway v. Electro Switch Corp., 402 Mass. 385, 388 n.3 (1988). In the instant case, this applies to the front pay and retirement benefits awards. The defendants argue that the jury's

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record on appeal, see Mass. R. A. P. 9 (d), 481 Mass. 1616 (2019), we do not consider these additional arguments. See Wooldridge v. Hickey, 45 Mass. App. Ct. 637, 641 (1998).

calculations on the special verdict form show that, rather than reducing the damages award to present value, they increased it.

The jury's calculations in the margins of the special verdict form on front pay and retirement benefits each show a "Int. 3%" amount that was added to some other number to reach the total amount they awarded. As the trial judge noted, "[i]t is evident that, far from improperly adding interest, the jury [were], in fact, taking into account the annual three percent wage increase reflected in each of the last three years of the [c]ity of Boston [c]ompensation [p]lan for 2012-2016 when calculating the front pay and retirement benefit awards." We agree with this conclusion. Moreover, there is no basis for the assertion that, had the jury disobeyed the judge's instruction to reduce the award to present value, they would have increased its value by this very amount. See Commonwealth v. Foster, 411 Mass. 762, 766 (1992) ("members of a jury are presumed to obey the instructions of the judge").[10]

[10] The defendants also argue that the retirement benefits award is duplicative, and must be remitted in full, because retirement contributions would be deducted from her back and front pay awards as if she had earned this award as salary, and she would receive benefits upon retirement. This, essentially, is an objection to the judge's instruction to the jury that they could award lost retirement benefits. Because the defendants first raised this point during jury deliberations, it has been waived. See Dubuque v. Cumberland Farms, Inc., 93 Mass. App. Ct. 332, 348 n.27 (2018).

b. Emotional distress. The defendants argue that the award of $500,000 in emotional distress damages is excessive and must be remitted. Like all damages awards, a compensatory damages award for emotional distress must be remitted "if 'the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice.'" Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997), quoting doCanto v. Ametek, Inc., 367 Mass. 776, 787 (1975). Emotional distress damages should not be awarded punitively. Further, as the judge instructed the jury, physical manifestation of the emotional distress is "beneficial [but] not necessary to awarding damages," and "factors that should be considered include (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counselling or by taking medication)." Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 576 (2004).

Here, there was evidence that, as a result of the defendants' conduct, Charles lost confidence, hair, appetite, sleep, interests, and her active social life. She also gained weight, became depressed, and experienced daily cramps and headaches at work, the latter of which a doctor diagnosed as a

result of high blood pressure, for which she was prescribed medication. She sought help from her church and family in coping with her emotional difficulties.

The judge did not err in concluding that the jury's award was supported by the evidence. The harm from the defendants' conduct was significant and prolonged, and Charles's distress manifested itself in many different ways. And although she did not seek help from a professional therapist or psychiatrist, no case has held this to be a prerequisite for an emotional distress damages award.

The defendants' only argument to the contrary involves citing cases that vacated emotional distress awards. The defendants first cite Labonte, but that case indicated that comparison of emotional distress verdicts is disfavored as a means of showing excessiveness. See Labonte, 424 Mass. at 826 n.17 ("we do not rely on comparisons in arriving at our conclusion"). Putting that aside, the case is distinguishable. In Labonte, the court vacated an emotional distress damages award of $550,000 primarily because the wrongfully-terminated plaintiff's symptoms "abated as he found a new job and began taking classes at Boston University." Id. at 825. He also was "'very motivated' to move on to new projects" after his termination and was "relieved to be free of the emotional stress of his position." Id. Here, the defendants point to no

evidence that Charles's symptoms have abated, and certainly to no respect in which the emotional distress caused by the defendants' discriminatory and retaliatory acts was accompanied by any countervailing emotional benefit that might not be reflected in the damages award.

The defendants also cite DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 8 (2006), in which the court vacated a $50,000 award for emotional distress. But there the only purported evidence of emotional distress causally connected to the actionable claim was the plaintiff's statement that he "couldn't understand" his employer's reason for giving him a certain assignment, which he held for one day before leaving his job. Id. at 9. The court also noted the absence of "testimony that the plaintiff experienced physical manifestations of distress, such as loss of appetite or difficulty in sleeping, or that the plaintiff was compelled to curtail his life activities in any way due to stress from the department's retaliatory action." Id. All, and more, are present here.

4. Punitive damages. We next address the defendants' challenge to the sufficiency of the evidence to support a punitive damages award, and all parties' challenge to the judge's partial remittitur of that award.

a. Sufficiency of the evidence. In this Commonwealth, punitive damages may be awarded only where specifically authorized by the Legislature. With respect to cases of racial discrimination, the third paragraph of G. L. c. 151B, § 9, provides that "[i]f the court finds for the petitioner, it may award the petitioner actual and punitive damages." In c. 151B cases, "[p]unitive damages may be awarded only where the defendant's conduct is outrageous or egregious. Punitive damages are warranted where the conduct is so offensive that it justifies punishment and not merely compensation." Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91, 110 (2009). Relevant factors include:

> "1. whether there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class);
>
> "2. whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregarded the likelihood that serious harm would arise;
>
> "3. the actual harm to the plaintiff;
>
> "4. the defendant's conduct after learning that the initial conduct would likely cause harm;
>
> "5. the duration of the wrongful conduct and any concealment of that conduct by the defendant."

Id. at 111.

The experienced trial judge considered these factors, and we cannot improve upon her analysis. She stated in her decision:

> "The plaintiff's long time supervisor, Robert Fleming, testified that in a November 2010 meeting, defendant Viv[i]an Leo instructed him to write the plaintiff a bad review because she was 'aloof, non-deferential and uppity' and threatened him with negative job consequences if he failed to do so. He further testified that when he refused to comply with Leo's directive and instead wrote a much-deserved good review of the plaintiff, Leo acted on her threat and gave him a poor, written review. Leo's actions, according to Fleming, prompted him to take early retirement at some personal financial cost. Neither the plaintiff's nor Fleming's review was subsequently preserved in the [c]ity's personnel records in violation of G. L. c. 149, § 52C, which requires that such personnel records be maintained. During the trial, the defendants did not provide an explanation for this failure.
>
> "Other evidence presented at trial showed that fo11owing Fleming's resignation and the plaintiff's filing of her MCAD complaint in September 2011, the defendants restricted her responsibilities, excluded her from meetings, began shadowing her work, subjected her to an unwarranted written warning and poor performance review, and passed her over for a promotion on two occasions despite her qualifications. The evidence demonstrated that on each of these occasions, all finalists considered for the opening were white and that during this time period (and indeed at least as far back as 1995), the [c]ity consistently failed to promote black employees in Treasury beyond middle management.
>
> "The above evidence permits the inference that over several years, the defendants consciously diminished and demeaned the plaintiff because of her race and in retaliation for her MCAD complaint, at times sought to conceal their unlawful conduct, and recklessly disregarded the harm inflicted to the plaintiff and on third parties. The jury, therefore, appropriately concluded that the defendants' actions were extreme and outrageous, warranting an award of punitive damages." (Footnotes omitted.)

b. Amount of punitive damages. Finally, we address the parties' cross appeals on the remittitur of punitive damages. The jury instructions on punitive damages, to which the defendants made no specific objections, were as follows:

> "Unlike compensatory damages which compensate the victim for the harm she has suffered, the purpose of punitive damages is to punish the defendant, the defendant who committed the wrongful acts, one or both of them, for conduct that is outrageous because of the defendant's evil motive or reckless indifference to the rights of others.
>
> "To find that punitive damages should be awarded you must find that more than intentional discrimination occurred. Punitive damages may be awarded only where the defendant's conduct, one or both of them, is outrageous or egregious.
>
> "In determining the amount of a punitive damage award if any you should consider the character and nature of the defendant's conduct. Deliberate violations of general laws 151B, the [a]nti-discrimination [s]tatute, by those charged with the public duty to enforce the law equally, present a heightened degree of reprehensibility.
>
> "Two, the defendant's wealth, in order to determine what amount of money is needed to punish the defendant's conduct and to deter any future acts of discrimination.
>
> "Three, the actual harm suffered by the plaintiff.
>
> "Four, the magnitude of any potential harm to other victims if similar future [sic] is not deterred.
>
> "Five, whether there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part.
>
> "Six, whether the defendant was aware that the discriminatory conduct would likely cause serious harm or recklessly disregard the likelihood that serious harm would arise.
>
> "Seven, the defendant's conduct after learning that the initial conduct would likely cause harm.

> "And eight, the duration of the defendant's wrongful conduct and any concealment of the conduct by the defendant, one or both of them.
>
> "If you do award punitive damages you should fix the amount of punitive damages by using calm discretion and sound reason."

The jury awarded $10 million in punitive damages. Applying Mass. R. Civ. P. 59 (a), 365 Mass. 827 (1974) (rule 59 [a]), the trial judge remitted the jury's $10 million award of punitive damages, reducing it by eighty percent, to $2 million. The defendants argue on appeal that the remittitur was not large enough. Charles accepted the remittitur order, but properly filed a cross appeal challenging the remittitur after the defendants appealed the judgment. See Pelletier v. Somerset, 458 Mass. 504, 525 (2010).

In BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562-563 (1996), the United States Supreme Court articulated three factors to be considered in determining whether a punitive damages award is "grossly excessive" and thus "exceeds the constitutional limit" under the due process clause of the Fourteenth Amendment to the United States Constitution: "'the degree of reprehensibility of the defendant's conduct'; the ratio of the punitive damage award to the 'actual harm inflicted on the plaintiff'; and a comparison of 'the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.'" Labonte, 424 Mass. at 826-827,

quoting BMW of N. Am, Inc., supra at 575, 580, 583. Of course, as the trial judge here recognized, the city, as a public entity, has no Fourteenth Amendment rights, Bain v. Springfield, 424 Mass. 758, 768 (1997), and the judge did not purport to find that the award violated due process.[11] As stated above, her order of remittitur was issued, rather, under rule 59 (a), under which punitive damages judgments against public entities have been reviewed for "excessiveness." See Clifton, 445 Mass. at 623-624. We review her ruling under rule 59 (a) for abuse of discretion or other error of law. See id. at 623.

"Rule 59 (a) requires that a judge remit only so much of the damages 'as the court adjudges is excessive,' in order to bring the award within the range of verdicts supported by the evidence. See D'Annolfo v. Stoneham Hous. Auth., 375 Mass. 650, 662 (1978). A remittitur of punitive damages (which do not purport to relate directly to a plaintiff's loss) raises slightly different issues. General factors to be considered in determining whether a punitive damage award is excessive . . . are [the three BMW of N. Am., Inc. factors.]" Clifton, 445 Mass. at 623. Of course, the judge does "'not substitute [his or her] judgment for that of the jury.' Dartt v. Browning-

[11] Of course Leo, as a person, does have due process rights under the Fourteenth Amendment. See note 14, infra.

Ferris Indus., Inc. (Mass.), [427 Mass. 1, 17a (1998)]. '[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system.' McCleskey v. Kemp, 481 U.S. 279, 311 (1987), quoting H. Kalven & H. Zeisel, The American Jury 498 (1966). See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., [532 U.S. 424, 432 (2001)] ('A jury's assessment . . . of punitive damages is an expression of its moral condemnation'). [The judge's] role, therefore, is not to review the wisdom of the jury's award of punitive damages." Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 413-414 (2013), but only to determine whether it is excessive, id. at 414.

"In addition," in a discrimination case, "we point out the following considerations that bear on the status of . . . a public entity: first, the Commonwealth and its subdivisions are liable for punitive damages [under G. L. c. 151B] on the same basis as other persons and employers. Second, deliberate violations of G. L. c. 151B, by those charged with the public duty to enforce the law equally, present a heightened degree of reprehensibility. And, third, G. L. c. 151B, § 9, provides no statutory cap on the amount of punitive damages that are allowable for racial discrimination. In our view, given that no limiting language appears in the statute, and that the statute contains specific provisions allowing for three (but not less

than two) times actual damages for discrimination on the basis of age, it is fair to infer that the Legislature intends to punish employers who discriminate, with no restrictions as to the type of discrimination that occurred here. A proper punitive damage award in this case would be a sufficient amount to send a clear message to the [public entity's] management of condemnation for its reprehensible behavior and of warning that it must put an end to any legacy of discrimination that still pervades that [public entity]." (Quotations and citations omitted.) Clifton, 445 Mass. at 623. See Labonte, 424 Mass. at 826.

The judge's analysis reads in full:

> "Each of the three [BMW of N. Am., Inc.] factors favors remittitur. First, although the defendants' actions were clearly deplorable, the conduct was less reprehensible than in other situations where lesser punitive damages have been awarded. See, e.g., Clifton, 445 Mass. at 613-614; Dalrymple v. Winthrop, 50 Mass. App. Ct. 611, 612-616 (2000). The plaintiff fails to cite any comparable cases involving such a large punitive damages award. Second, the ratio of the punitive damages award to the compensatory damages award is more than 10 to 1. The Supreme Court has held that a punitive damages award that exceeds a 'single digit ratio' (more than 9 to 1) may possibly violate the [d]ue [p]rocess [c]lause. See State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003). Although the [c]ity does not have [F]ederal due process rights, the single digit ratio described in Campbell remains an important guidepost when evaluating the reasonableness of the jury's punitive damages award. See Bain v. Springfield, 424 Mass. 758, 769 (1997) ('The same considerations that require scrutiny and control by the trial judge or a reviewing court to meet the requirements of due process apply here even though no

> constitutional due process rights are implicated'). The double digit ratio here suggests that the award is too high. Third, there are no civil or criminal penalties that could be imposed against the defendants for their conduct.
>
> "In light of these considerations, this court concludes that the $10 [m]illion punitive damages award was unreasonable and will remit the award to $2 [m]illion plus interest. This amount, while not as large, still sends a necessary message of condemnation and deterrence."

The experienced trial judge permissibly limited her analysis to the three factors from BMW of N. Am., Inc.[12] However, we conclude that her brief analysis contained some errors, and that lower courts and parties would benefit from some additional guidance with respect to claims that punitive damages are excessive.

The first factor the judge analyzed is reprehensibility. A judge is entitled, viewing the evidence in the light most favorable to the prevailing party, to make a reasonable judgment

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[12] We note that in addition, "[i]n reviewing punitive damages, the judge may consider the following criteria: a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred; a reasonable relationship to the degree of reprehensibility of the defendant's conduct; removal of the profit of an illegal activity and be in excess of it so that the defendant recognizes a loss; factoring in of the financial position of the defendant; factoring in of the costs of litigation and encourage plaintiffs to bring wrongdoers to trial; an examination whether criminal sanctions have been imposed; an examination whether other civil actions have been filed against the same defendant." Labonte, 424 Mass. at 827.

with respect to the degree of reprehensibility of the unlawful conduct found by the jury. In this case, the judge went beyond that and, in assessing excessiveness, took the additional step of comparing the punitive damages awards in what she determined were more reprehensible cases with the award in this case.

This is permissible as part of an excessiveness analysis. However, if a judge takes this approach he or she must do more than compare the dollar amounts awarded as punitive damages in the other cases with the damages awarded in the case before her, which is in essence what the judge did here saying that the defendants' conduct was "less reprehensible than in other situations where lesser punitive damages have been awarded," and that Charles failed "to cite any comparable cases involving such a large punitive damages award." Punitive damages awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award[] must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993) (plurality opinion). Given that, a proper comparison of punitive damages awards in different cases requires an analysis not only of reprehensibility and of the amounts of the awards, but of the relationship of the punitive

award in each case to the compensatory award, and of the financial circumstance of the defendants in each case, something the jury here were properly instructed that they should consider "in order to determine what amount of money is needed to punish the defendant's conduct and to deter any future acts of discrimination." The burden is on the movant to demonstrate excessiveness, and to the extent it relies on a comparison, it must address not only the absolute amounts of other awards in light of the reprehensibility of the conduct being punished, but the relative ratios of those awards (or why they do not matter), and the relative financial circumstances of the defendants. Thus, in Clifton, 445 Mass. at 615, for example, the public entity was the MBTA, the jury awarded punitive damages of $5 million, and it was an amount ten times the size of its compensatory award. In Dalrymple, 50 Mass. App. Ct. at 621, the public entity was the (presumably much less wealthy) town of Winthrop, and the jury award of $300,000 was only slightly more than the compensatory award. To the extent the defendants sought to have the judge compare these awards to the award in this case, they were required to address the relevant dimensions along which the awards might be compared, and in making such a

comparison, the judge's analysis, too, should have addressed them.[13]

Second, with respect to examination of the ratio between punitive and compensatory damages in the instant case, the judge concluded that, although there were no constitutional issues involved with respect to the city, and her decision was based on rule 59 (a), the ratio between punitive and compensatory damages, too, favored remittitur because "[t]he double digit ratio here suggests that the award is too high." But what the Supreme Court said in Campbell was that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (emphasis added). Campbell, 538 U.S. at 425. The ratio in this case of approximately 11 to 1 does not exceed a single-digit ratio "to a significant degree," and out-of-jurisdiction employment cases have upheld against constitutional challenge ratios that far exceed this one. See, e.g., Jeffries v. Wal-Mart Stores, Inc., 15 F. App'x 252, 266 (6th Cir. 2001) (50 to 1); Hamlin v.

[13] We recognize that the trial judge in Clifton, 445 Mass. at 615, remitted the punitive damages award by ninety percent to $500,000, however that remittitur was vacated by the Supreme Judicial Court because a new trial on compensatory damages was necessary. The court expressed no opinion on the remittitur, but remanded with guidance like that we provide today, noting, as we do, that there is "no statutory cap on the amount of punitive damages that are allowable for racial discrimination."

Hampton Lumber Mills, Inc., 349 Or. 526, 537 (2011) (22 to 1). See also Aleo, 466 Mass. at 417 (noting that other jurisdictions have "upheld punitive awards representing . . . low double-digit ratios of punitive to compensatory damages"); Bain, 424 Mass. at 769 ("We do not think . . . that an award of $100,000, even in the absence of any compensatory harm, would necessarily exceed the norms of rationality"). The ratio itself, therefore, does not necessarily indicate that the award is excessive.[14]

Third, in this context, the absence of any identified civil or criminal penalties does not favor remittitur. The Supreme Court introduced this factor in the excessiveness analysis to express deference to "legislative judgments concerning appropriate sanctions for the conduct at issue," which are reflected in civil and criminal penalties. BMW of N. Am., Inc., 517 U.S. at 583. But the absence of such legislatively imposed penalties in this case does not provide guidance with respect to the appropriate size of a punitive damages award because what we do know of the Legislature's judgment is that it expressly chose

[14] Contrary to the defendants' suggestion, since the damages here are not "purely economic," the Supreme Court's suggestion that in such cases "a ratio of punitive to compensatory damages of more than four to one 'may be close to the line'" of what due process will allow is of no relevance to the constitutional analysis in this case. Aleo, 466 Mass. at 416, quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 6 (1991).

not to limit punitive damages in race discrimination cases to three times the compensatory damages.[15]

Finally, the judge reduced the punitive damages award by eighty percent, cutting it from an award with a ratio to compensatory damages of approximately 11 to 1, to one with a ratio of just over 2 to 1, without any explanation for her choice of the amount of $2 million. Her conclusion that "[t]he double digit ratio here suggests that the award is too high" does not explain why she chose a ratio of slightly more than 2 to 1. The judge is empowered to remit "so much" of the damages award "as the court adjudges is excessive." Rule 59 (a). But the judge must provide a "reasoned basis" for the amount of the remittitur. Hastings Assocs., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162, 178 n.18 (1997). Despite her otherwise thorough analysis, she did not do so, nor do the defendants make any argument in support of the $2 million amount. That basis is absent from her decision.

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[15] To the extent the defendants argue that the remittitur with respect to Leo must be affirmed because the $10 million punitive award violated the due process rights of Leo, we are required to review the propriety of the remittitur de novo, rather than under an abuse of discretion standard. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001). For the reasons given in the text, we conclude that, assessing the three BMW of N. Am., Inc. factors, the jury's punitive damages award did not violate due process.

Consequently, the order on the motion to remit the punitive damages must be vacated, and the case remanded for reconsideration consistent with this opinion, and for the articulation of a reasoned basis for any remittitur the judge may permissibly order. To be clear, we are not holding that as a matter of law this award was not excessive, or that an eighty percent reduction in the punitive damages award to $2 million would be an abuse of discretion. Our remand is for the judge to reconsider the motion for remittitur under the principles we have articulated; we express no opinion on the proper resolution of that motion, which is for the trial judge in the first instance.

Conclusion. The portion of the final amended judgment related to the punitive damages award is vacated. In all other respects, the final amended judgment is affirmed. The matter is remanded for further proceedings in accordance with this opinion.[16]

So ordered.

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[16] Charles has requested an award of attorney's fees on appeal. She is entitled to such an award pursuant to G. L. c. 151B, § 9. Charles may file her application for appellate attorney's fees and costs within fourteen days of the date of rescript, in accordance with Fabre v. Walton, 441 Mass. 9 (2004). The defendants shall then have fourteen days within which to respond. See Ciccarelli v. School Dep't of Lowell, 70 Mass. App. Ct. 787, 799 (2007).