For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

LIAT (1974), LTD., Appellant/Defendant, v. **WILLIAM CHERUBIN,** Appellee/Plaintiff.	**S. Ct. Civ. No. 2019-0047** Re: Super. Ct. Civ. No. 62/2017 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: February 9, 2021
Filed: December 5, 2022

Cite as: 2022 VI 21

BEFORE: **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **RENÈE GUMBS-CARTY,**[1] Designated Justice.

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

[1] Associate Justice Maria M. Cabret is recused from this matter. The Honorable Renée Gumbs-Carty has been designated in her place in accordance with title 4, section 24(a) of the Virgin Islands Code.

¶ 1 LIAT (1974), Limited ("LIAT") appeals the Superior Court's denial of its renewed motion for judgment as a matter of law and its motion for a new trial after a jury found LIAT liable to its former employee, William Cherubin, for terminating him on the basis of his age. For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 Cherubin began working for LIAT in 1968 as a ticket agent at the Henry E. Rohlsen Airport on St. Croix. In 2008, LIAT promoted him to the position of area manager, which placed him in charge of all LIAT's affairs in the Virgin Islands, including handling sales and banking deposits.

¶ 3 In a letter dated March 3, 2015, Susan Daly-Richardson, LIAT's regional manager, advised Cherubin that LIAT had become aware that he had cashed a check for his wife for $450 using LIAT funds. Daly-Richardson reminded Cherubin that he had previously received an email on January 16, 2009, informing all managers that no employee may cash a third-party check with company funds, and stated that he was "being formally reminded that absolutely no cashing of cheques including third party cheques is allowed using LIAT's sales proceeds." (J.A. 255.) Daly-Richardson further advised that "[i]n the event of a repetition you shall be suspended without pay for a period of 7 (seven) days and thereafter if you are, within 3 (three) months following receipt of this written warning, guilty of an infraction in or in relation to your work which is the same or substantially the same as th[is] infraction . . . the Company will take further disciplinary action against you, which may include termination of your employment." (J.A. 255.) The letter concluded by directing Cherubin to sign and return the letter to acknowledge its receipt.

¶ 4 On March 5, 2015, Cherubin received a second letter from Daly-Richardson. In this letter, Daly-Richardson stated that there were inconsistencies between his sales reports and banking records, that some sales reports were out of order or late, and that he had not responded to several

emails about the matter. However, the letter stated that it was "a warning letter," and advised him of the need to abide by company practices. (J.A. 258.) Although the March 5, 2015 letter acknowledged that Cherubin had eventually responded and attributed the anomalies to another entity—Worldwide Flight Services ("WFS")—failing to pay funds it owed to LIAT, Daly-Richardson nevertheless ordered that Cherubin "provide full reimbursement of the missing funds in the amount of US $1,190 by March 31, 2015." (J.A. 258.) Like the March 3, 2015 letter, this letter also required Cherubin to sign and return it to acknowledge receipt.

¶ 5 Shortly after sending these letters, LIAT instituted several policies to downsize its operations by reducing the number of employees. On May 5, 2015, its Director of Human Resources, Ilean Ramsey, sent a memo to all staff advising that "LIAT will be a smaller airline in 2015," and that "in order to restore our business to financial stability we must remove the costs that we were carrying as a larger entity." (J.A. 260.) To that end, LIAT invited employees to apply to take a voluntary leave of absence, but emphasized that "if insufficient volunteers are forthcoming, the Company may have to consider the need for compulsory redundancies." (J.A. 261.)

¶ 6 In another memo, also sent on May 5, 2015, Ramsey invited employees to apply for its newly established voluntary separation ("VSAP") and early retirement ("ER") programs. Employees who chose either of these programs would receive the lesser of one month's pay for each year of service, or thirteen months' pay for each year remaining in service before attaining the age of 65. As with the memo permitting voluntary leaves of absence, Ramsey concluded by advising "that if insufficient volunteers are forthcoming, we may have to consider the need for compulsory redundancies." (J.A. 302.)

¶ 7 The window for applying for these programs ran from May 5, 2015, to June 19, 2015. (J.A.

263.) On June 4, 2015—two weeks before that deadline—Cherubin received a letter from Ramsey advising that LIAT was terminating his employment for "gross misconduct." (J.A. 271.) The June 4, 2015 letter identified this misconduct as stemming from the same incidents that were the subjects of the March 3, 2015 and March 5, 2015 letters, with the only new allegation being that he failed to pay $1,190 to LIAT until April 14, 2015, fifteen days after the March 31, 2015 deadline in the March 5, 2015 letter. At the time of his June 4, 2015 termination, Cherubin was 71 years old, and had worked for LIAT for 47 years.

¶ 8 Cherubin filed suit against LIAT in the Superior Court on February 27, 2017, alleging that it unlawfully terminated him from his employment because of his age in violation of the Virgin Islands Civil Rights Act ("VICRA"). *See* 10 V.I.C. § 64(1)(a). In his complaint, Cherubin sought both compensatory and punitive damages. Approximately one month later, in March 2017, LIAT discontinued all its operations in the Virgin Islands.

¶ 9 A jury trial on Cherubin's complaint occurred on February 4-5, 2019. In addition to evidence pertaining to Cherubin's termination, the jury was presented with evidence relating to the corporate culture of LIAT as it pertains to older workers, including a provision of its employee handbook identifying 65 years as LIAT's "normal retirement age." At the close of Cherubin's case-in-chief, LIAT orally moved for judgment as a matter of law. The Superior Court partially granted the motion by dismissing Cherubin's request for punitive damages but permitting the VICRA claim to be submitted to the jury limited only to compensatory damages. Ultimately, the jury found LIAT liable for age discrimination in violation of the VICRA and awarded compensatory damages in the amount of $1,633,320, representing $82,000 in lost wages and $1,551,320 for mental anguish. LIAT subsequently filed a renewed motion for judgment as a matter of law and a motion for a new trial on damages, both of which the Superior Court denied

in a May 13, 2019 opinion and order. LIAT timely filed a notice of appeal with this Court on May 17, 2019. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 10 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). The Superior Court's May 13, 2019, opinion and order was a final order because it "ends the litigation on the merits, leaving nothing else for the court to do except execute the judgment." *Pub. Employees Relation Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 433 (V.I. 2012).

¶ 11 This Court reviews a motion for judgment as a matter of law under a de novo standard, applying the same legal standard the Superior Court should have utilized. *Chestnut v. Goodman*, 59 V.I. 467, 474–75 (2013). This Court reviews a denial of a motion for a new trial under an abuse of discretion standard, unless the denial is based on an application of a legal precept, in which case this Court's review is plenary. *Ventura v. People*, 64 V.I. 589, 600 (2016). This Court exercises plenary review over applications of law and reviews findings of fact for clear error. *See St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

B. Age Discrimination

¶ 12 On appeal, LIAT argues that the Superior Court erred when it denied its renewed motion for judgment as a matter of law. Specifically, LIAT asserts that Cherubin failed to introduce sufficient evidence to establish that it terminated or otherwise discriminated against him due to his age, as opposed to misconduct or other permissible reasons.

¶ 13 A motion for judgment as a matter of law is governed by Rule 50 of the Virgin Islands Rules of Civil Procedure. "[J]udgments as a matter of law should be granted sparingly" and "only when viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Chestnut*, 59 V.I. at 475. "In performing this narrow inquiry, [a court] must refrain from weighing the evidence, determining the credibility of witnesses, or substituting [its] own version of the facts for that of the jury." *Id*. (internal citations and quotations removed).

¶ 14 The Virgin Islands Civil Rights Act provides, in pertinent part, that it is an unlawful discriminatory practice

> [f]or an employer, because of age, race, creed, color, national origin, place of birth, sex, disability and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

10 V.I.C. § 64(1)(a). The Superior Court correctly recognized that the plain text of the Act required Cherubin to prove that LIAT terminated Cherubin from his employment or otherwise discriminated against him due to his age. While the Superior Court acknowledged in its May 13, 2019 opinion that Cherubin did not introduce any direct evidence of age discrimination, and that LIAT had provided a non-discriminatory reason for his termination, the Superior Court determined (1) that "if the jury inferred that LIAT's proffered reasons for termination were false, then the jury could plausibly infer from the falsity that LIAT fired Cherubin because of his age," J.A. 414, and (2) that the jury could make a reasonable inference that LIAT had a corporate atmosphere hostile to older workers due to the existence of an early retirement program limited to employees under 65 years of age.

¶ 15 The Superior Court's determination that a jury could infer that LIAT discriminated Cherubin based on his age if it believed LIAT did not terminate Cherubin for misconduct bears some superficial similarity to the framework the United States Supreme Court adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for adjudicating discrimination claims under the federal Civil Rights Act. Pursuant to the federal *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of discrimination and, once this is done, the burden shifts to the defendant to produce evidence demonstrating that the termination occurred for a non-discriminatory reason. The United States Supreme Court subsequently assumed, without deciding, that the *McDonnell Douglas* standard applied to age discrimination claims arising under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") and held that it is permissible for a jury to infer that age discrimination occurred if it rejects the defendant's purported non-discriminatory explanation. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *see also Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 n.2 (2009) ("[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . is appropriate in the ADEA context.").

¶ 16 However, the Superior Court and Cherubin overlooked the fact that — regardless of whether *McDonnell Douglas* applies to claims under the ADEA — this Court has already held that the *McDonnell Douglas* framework does not apply to claims arising under the VICRA. "Rather than grafting the *McDonnell Douglas* pleading framework onto the Virgin Islands Civil Rights Act," this Court concluded that "the better methodology is to simply look to the statutory language itself." *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 552 (V.I. 2015). The VICRA, while evidencing some similarity to the federal ADEA, is substantially less comprehensive, and omits much of the language found in that statute. Therefore, federal case law interpreting the ADEA, while perhaps

persuasive in certain circumstances, is of limited utility in the present case, and must yield to the plain language of the VICRA and other relevant Virgin Islands statutes.[2] *Id.*

¶ 17 Significantly, the *McDonnell Douglas* framework is inconsistent with Virgin Islands law with respect to the burden of proof in civil cases. The Legislature has specifically provided that "[i]n civil cases the affirmative of the issues shall be proved." 5 V.I.C. § 740(5). The purpose of this provision is to ensure that a litigant is "not required to prove a negative." *Bryan v. Fawkes*, 61 V.I. 416, 473 (V.I. 2014). As the Superior Court correctly recognized, the plain text of the VICRA requires Cherubin "to prove by the preponderance of the evidence that LIAT was his employer; that LIAT terminated him from his employment; that LIAT terminated him because of his age; and that he suffered damages as a result." (J.A. 412.) Yet by adopting a process by which the jury could infer age discrimination solely from rejecting LIAT's proffered non-discriminatory reason, the Superior Court relieved Cherubin of his statutory obligation to prove the affirmative—that LIAT terminated him due to his age—and, instead, shifted the burden to LIAT to prove a negative: that Cherubin was not terminated for misconduct.

[2] The dissent, while acknowledging our prior holdings that the *McDonnell Douglas* framework is inapplicable to claims brought under the VICRA, as well as recognizing that the VICRA and the ADEA contain dissimilar language, nevertheless applies federal cases interpreting the ADEA due to the absence of "local jurisprudence" interpreting and applying the age discrimination provisions of the VICRA. But this approach is wholly inconsistent with the most fundamental rule of statutory interpretation: that courts must interpret statutes to effectuate the intent of the Legislature. *In re L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (collecting cases). More significantly, the approach taken by the dissent would infringe upon the constitutional authority of the Legislature to pass laws with respect "to all rightful subjects of legislation," 48 U.S.C. § 1574(a), as well as constitute an abdication by this Court of its authority to exercise "the supreme judicial power of the Territory," 4 V.I.C. § 21(a). *See In re L.O.F.*, 62 V.I. at 661 n.6 (observing that it was the intent of "Congress and the Virgin Islands Legislature in creating a local judiciary independent of the federal judiciary" to "ensure the creation of indigenous Virgin Islands law free of undue outside influence").

¶ 18 It is true, of course, that this Court has already held that in a case brought under the Virgin Islands Wrongful Discharge Act ("VIWDA"), a plaintiff need only prove that the defendant was his employer and that he was discharged, while the defendant must affirmatively prove that the plaintiff had been discharged for a permissible ground, such as misconduct. *See Rennie*, 62 V.I. at 544. In *Rennie*, however, this Court stated that this pleading regime is based on the plain text of the VIWDA, which is drafted in a way which essentially presumes that all discharges are wrongful unless the defendant proves that the employee was dismissed for one of the nine statutorily enumerated permissible reasons. *See* 24 V.I.C. § 76. But the VICRA is structured very differently from the VIWDA, in that it contains no such presumption. Consequently, to find liability under the VICRA, the jury cannot simply presume that LIAT terminated Cherubin due to his age solely because it concluded that LIAT did not fire Cherubin for misconduct; after all, it may very well be the case that LIAT did not fire Cherubin for misconduct and did not fire him due to his age, but instead fired him for an unstated third reason which might be permissible or appropriate. In effect, the Superior Court grafted the pleading framework for a wrongful discharge claim under the VIWDA onto an age discrimination claim under the VICRA, despite the statutes having virtually no similarity.

¶ 19 Nevertheless, we ultimately agree that Cherubin introduced sufficient evidence to prove age discrimination. It is well-established that a plaintiff may establish an element of a cause of action through circumstantial evidence alone. *See Charles v. Arcos Dorados USVI, Inc.*, 71 V.I. 1146, 1154-55 (V.I. 2019). "While direct proof of a person's actions is not necessary to prove the affirmative, the fact finder may only infer such from circumstantial evidence when reason and experience support such an inference because there is a rational connection between the facts proved and the facts inferred." *Penn v. Mosley*, 67 V.I. 879, 899 (V.I. 2017).

¶ 20 In this case, Cherubin provided the jury with sufficient affirmative circumstantial evidence to permissibly support a finding of age discrimination. The jury could easily infer that LIAT did not terminate Cherubin for misconduct, since the June 4, 2015 letter purported to terminate him for the very same incidents which were the subjects of the March 3 and 5, 2015 letters. Those letters had only imposed a warning and advised that further disciplinary action would only be taken "[i]n the event of repetition following receipt of this written warning" of conduct "which is the same or substantially the same as the infraction in respect of which this written warning is given." (J.A. 255, 259.) Because LIAT terminated Cherubin three months later for the same incidents that had only resulted in a warning and which had not been repeated, the jury could reasonably infer that LIAT's claim that it fired Cherubin for misconduct was a pretext, and that he had in fact been terminated for some other reason.

¶ 21 Likewise, the jury heard evidence that supports an inference that LIAT did in fact terminate Cherubin due to his age. The jury was aware that LIAT's employee manual stated that the age of 65 constituted its "normal requirement age." (J.A. 273.) While LIAT had not forced Cherubin to retire at this age, the jury was aware that LIAT established an ER program one month before it terminated him, which was limited only to employees under the age of 65 and provided workers with progressively diminished benefits based solely on age. For example, an employee taking advantage of the ER program would receive their monthly salary multiplied by the lesser of either their number of years of service, or 13 multiplied by 65 minus the age of the employee. Consequently, if two employees possessed identical years of service and earned the same monthly salary, the older employee would always receive a lower benefit under LIAT's ER program than the younger employee, since the higher the age, the lower the multiplier. *See Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988) (holding that a reduction in early retirement

benefits for employees as they aged was age discrimination under the federal ADEA); *see also Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 852–53, 855 (7th Cir. 1999) (holding that an early retirement plan was discriminatory on its face when 58-year-olds received full retirement benefits but that diminished by 25% each year the employee got closer to age 62); *O'Brien v. Bd. of Educ. of Deer Park Union Free School Dist.*, 92 F. Supp. 2d 110, 115-17 (E.D.N.Y. 2000) (holding that an early retirement plan in which benefits were reduced as the age of the participants increased arbitrarily discriminated based on age). And while the jury heard testimony that Cherubin still remained eligible to apply for the VSAP program, the fact that employees under the age of 65 could choose between either the VSAP or ER programs—while Cherubin was limited solely to the VSAP program due to being older than 65—itself constituted "discriminat[ion] . . . in terms, conditions or privileges of employment" based solely on age.[3] 10 V.I.C. § 64(1)(a).

¶ 22 The jury, having all this evidence before it, could reasonably infer that LIAT systematically discriminated against its employees based on age, and that age discrimination therefore was a motivating factor in its decision to terminate Cherubin. Consequently, the Superior Court committed no error when it denied LIAT's renewed motion for judgment as a matter of law.

C. Damages

¶ 23 LIAT contends that the damages awarded by the jury—$82,000 in lost wages and $1,551,320 for emotional pain and suffering—were unauthorized by law and excessive. We disagree.

[3] At trial, Alison Benjamin, a LIAT human resources manager, testified that Cherubin would have received greater benefits than the VSAP program than under the ER program, due to his substantial years of service. This is only the case, however, due to the formula utilized for the ER program discriminating against older workers such as Cherubin by providing fewer benefits as one's age increases.

1. Sufficiency of the Evidence

¶ 24 LIAT does not dispute that Cherubin introduced sufficient evidence to sustain the $82,000 in economic damages—representing lost wages—awarded by the jury.[4] However, it contends that the evidence presented at trial is insufficient to support any award of non-economic damages. Specifically, LIAT alleges that Cherubin introduced no evidence to corroborate his own testimony, and the testimony of other witnesses, that he suffered from mental pain and anguish. To recover non-economic damages, LIAT argues, Cherubin should have been required to provide proof of psychological counseling, a physical injury, or other compelling extrinsic evidence.

¶ 25 This Court reviews the sufficiency of the evidence to support a damages award pursuant to the same standard under which it reviews a motion for a directed verdict—that is, we "must consider the evidence in the light most favorable to [the plaintiff], including giving [the plaintiff] the benefit of all reasonable inferences to be drawn from that proof." *Atlantic Human Resource Advisors, LLC v. Espersen*, 76 V.I. 583, 630 (V.I. 2022) (citing *Chestnut v. Goodman*, 59 V.I. 467,

[4] The dissent, relying on caselaw interpreting the federal ADEA, asserts that Cherubin is not entitled to recover the $82,000 awarded by the jury to compensate for lost wages because he failed to introduce evidence that he made efforts to mitigate his damages, such as by attempting to procure subsequent employment. However, as noted above, LIAT does not challenge the jury's lost wages award, and thus that award is not properly before this Court on appeal. *See* V.I. R. APP. P. 22(m) ("Issues that were (1) not raised or objected to before the Superior Court, (2) raised or objected to but not briefed, or (3) are only adverted to in a perfunctory manner or unsupported by argument and citation to legal authority, are deemed waived for purposes of appeal.").

In any event, we noted earlier, it is the VICRA—and not the federal ADEA—that controls this case, and the Legislature elected not to require that a plaintiff attempt to mitigate damages as a prerequisite for obtaining redress under the VICRA. Whether requiring mitigation is desirable as a matter of policy is irrelevant, for the authority to create statutory causes of action is a quintessential and express power of the Legislature and not this Court. *See* 48 U.S.C. § 1574(a). As we explained in rejecting a similar mitigation argument in the context of claims brought under the Virgin Islands Wrongful Discharge Act, "policy arguments cannot serve as justification for creating an ambiguity in an otherwise unambiguous statute or for otherwise disregarding the statute as written by the Legislature." *Atlantic Human Resource Advisors*, 76 V.I. at 604-05 (collecting cases).

475 (V.I. 2013)). Under this highly deferential standard, this Court is prohibited from independently weighing the evidence or determining the credibility of witnesses. *See Fontaine v. People*, 56 V.I. 571, 585-86 (V.I. 2012). Importantly, it is the quality of the evidence that controls, and not the number of witnesses or the type of evidence used. *See Francis v. People*, 57 V.I. 201, 211-12 (V.I. 2012).

¶ 26 Unlike the federal ADEA, which does not permit a plaintiff to recover damages for pain and suffering, *see Vaughan v. Anderson Regional Medical Ctr.*, 849 F.3d 588, 592 (5th Cir. 2017), the VICRA expressly allows a plaintiff to "bring an action for compensatory and punitive damages."[5] 10 V.I.C. § 64(15). Compensatory damages include damages for pain, suffering, humiliation, anxiety, embarrassment, and other injuries stemming from the defendant's conduct. *Thomas Hyll Funeral Home, Inc. v. Bradford*, 233 F.Supp.2d 704, 712 (D.V.I. 2002) (quoting *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87 (3d Cir. 1980)). Moreover, the VICRA does not differentiate in any way between compensatory damages awarded for non-economic damages such as mental anguish and those awarded for economic damages such as lost wages.

¶ 27 Here, the record is replete with testimony from both Cherubin himself and other witnesses that, if credited by the jury, supports a finding that he experienced mental anguish. As LIAT acknowledges in its own brief, Cherubin testified that he felt "shame" and "could not go out as he wanted," with other witnesses testifying that he was "visibly broken," "could not leave the house

[5] The dissent asserts that because "Congress capped damages in discrimination cases at $300,000 . . . awards reaching that amount should be reserved for the most egregious cases," and would adopt a nine-factor test adopted by the United States Court of Appeals for the Fourth Circuit to assess the amount of non-economic damages awarded under that cap. However, Cherubin sued LIAT for violations of the VICRA, and not the ADEA or any other federal anti-discrimination law. Because the Legislature did not impose a damages cap for causes of action brought under the VICRA, we decline to adopt this federal case law and create a cap through judicial fiat.

for several days," "totally demoralized," "sluggish," "stressed out," and "just completely—wasn't himself." (Appellant's Br. 31 (quoting J.A. 75, 99-100, 131). While LIAT dismisses Cherubin's own testimony and that of his family and friends as self-serving, such testimony "will almost always be self-serving since few litigants will knowingly volunteer statements that are prejudicial to their case," yet "that has never meant that a litigant's evidence must be categorically rejected by the fact finder." *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 321 (3d Cir. 2014). Moreover, since mental anguish is difficult to quantify and is often best proven through the testimony of witnesses who can speak to significant changes in the plaintiff's emotional makeup after the defendant's conduct, the witnesses providing such testimony will typically be family, friends, and other individuals who were already well acquainted with the plaintiff prior to the acts that gave rise to the lawsuit. *See Buckman-Peirson v. Brannon*, 822 N.E.2d 830, 837 (Ohio. Ct. App. 2004). In the present case, based on the evidence presented, a rational jury, were it to view all this testimony in the light most favorable to Cherubin, could certainly have determined that Cherubin suffered significant mental anguish and emotional distress as a result of LIAT's actions.[6]

2. Excessiveness of Compensatory Damages for Mental Anguish

¶ 28 LIAT also argues that the jury issued an excessive verdict. According to LIAT, no rational jury could possibly have awarded $1,551,320 in compensatory damages for mental anguish while

[6] In its appellate brief, LIAT also maintains that Cherubin "failed to link his emotional distress with any act of age discrimination" and that he "would have been equally distraught had he lost his job for whatever reason." (Appellant's Br. 34.) This ignores, however, the fact that the jury found that LIAT *did* terminate Cherubin's employment due to age discrimination and used as a pretext that he had committed "gross misconduct." To hold that Cherubin cannot recover any compensatory damages for mental anguish under this theory would be equivalent to denying compensatory damages to an individual rendered a quadriplegic after being struck by a drunk driver because the injury would have been the same if the person became a quadriplegic after accidentally falling off a ladder.

only awarding $82,000 in compensatory damages for lost wages. LIAT maintains that "the jury was swayed by passion" because "Cherubin made a passioned plea to the jury as an elderly gentleman reduced to tears on the stand," and "in effect awarded punitive damages" under the guise of compensatory damages in order to impose "a civil penalty." (Appellant's Br. 33-34.)

¶ 29 As we have previously explained, "a claim that a jury had to have been motivated by passion or prejudice without any direct evidence but based solely on the amount of the verdict is effectively a request for a new trial on damages based on the weight of the evidence." *Atlantic Human Resources Advisors, LLC,* 76 V.I. at 638. "When conducting this inquiry, the judge does not sit as a thirteenth or 'super' juror," *id.*, and "should avoid displacing the factfinding of the jury." *R.J. Reynolds Tobacco Co. v. Gerald,* 76 V.I. 656, 695 (V.I. 2022). Rather, "the court must examine a jury's damages award for excessiveness or inadequacy and set aside the verdict and grant a new trial where appropriate" in order "to protect litigants and the judicial process from so-called 'invisible error,' that is, error that arises from improper jury decision-making that hides behind the shroud of deliberative secrecy.") *Id.* at 695-96 (quoting *Atlantic Human Resources Advisors,* 76 V.I. at 622) (internal quotation marks omitted).

¶ 30 Applying this highly deferential standard, we cannot conclude that the jury awarded an excessive verdict in this case. As a threshold matter, that Cherubin cried during his testimony is not—without more—sufficient for a finding that the jury verdict was the result of passion rather than a weighing of the evidence. *See, e.g., Morga v. FedEx Ground Package System, Inc.*, 420 P.3d 586, 599-600 (N.M. Ct. App. 2018); *Hamner v. Edmonds*, 36 S.W.2d 929, 936 (Mo. 1931). LIAT does not allege—and the record certainly does not provide any indication—that Cherubin's tears were not genuine. On the contrary, one would naturally expect a witness, when recounting events that resulted in severe emotional distress, to become visibly emotional. *Morga,* 420 P.3d

at 599. And because mental anguish is necessarily subjective and difficult to quantify, the fact that the jury awarded a high verdict after hearing highly emotional testimony from Cherubin about how the termination affected him is consistent with the jurors taking their oaths seriously, determining that Cherubin is credible and that he suffered significant emotional distress that warranted $1,551,320 in compensatory damages for mental anguish.

¶ 31 Perhaps most importantly, however, we are not persuaded that it is appropriate to presume that a jury acted inappropriately simply by comparing the compensatory damages awarded for lost wages to the compensatory damages awarded for mental anguish. Compensatory damages awarded for mental anguish are not punitive damages. They are not awarded to punish the defendant, but rather to compensate the plaintiff for actual emotional harm suffered due to the defendant's wrongdoing. *See, e.g., New York State Div. of Human Rights v. Young Legends, LLC,* 934 N.Y.S.2d 628, 632-33 (N.Y. App. Div. 2011); *Dept. of Civil Rights ex rel. Johnson v. Silver Dollar Café*, 499 N.W.2d 409, 410 (Mich. Ct. App. 1993).

¶ 32 While it may be difficult to justify a punitive damages award that is 19 times larger than a compensatory damages award, *see R.J. Reynolds Tobacco Co.*, 76 V.I. at 715-16 (collecting cases), there are many legitimate reasons for why a jury may award compensatory damages for mental anguish that are 19 times greater than the compensatory damages awarded for lost wages. Calculating lost wages does not require speculation—in most cases, they "can be calculated based on objective facts and data." *Houle v. Casillas*, 594 S.W.3d 524, 559 (Tex. App. 2019).

¶ 33 But this is not the case for compensatory damages for mental anguish, emotional distress, and other subjective harms. Rather, "[t]he process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss" for which "there is no objective

way to measure the adequacy of the amount awarded as compensation." *Figueroa v. Davis*, 318 S.W.3d 53, 62 (Tex. App. 2010). Because "[t]he amount of damages awarded for pain and suffering . . . [is] necessarily speculative," the finder of fact receives substantial deference, and ultimately "each case must be judged on its own facts." *Id.* at 62 (internal citations omitted).

¶ 34 Here, the substantial disparity between the jury's award of $82,000 in compensatory damages for lost wages and its award of $1,551,320 in compensatory damages for mental anguish can easily be explained by the nature of each injury. In this case, it appears that the jury arrived at its $82,000 award for lost wages by calculating what wages Cherubin would have earned had he not been terminated but rather maintained his employment from June 2015 through March 2017, when LIAT ceased its operations in the Virgin Islands. But had LIAT not voluntarily ceased its operations less than two years after discharging Cherubin, the lost wages awarded would certainly have been higher—just as they would likely have been lower had LIAT abandoned its Virgin Islands operations sooner. In other words, the amount of harm Cherubin suffered with respect to his lost wages was—at least in the view of the jury—highly volatile, and ultimately tied to how long LIAT continued to operate in the Virgin Islands.

¶ 35 The same cannot be said, however, for the mental anguish Cherubin suffered. While the lost wages award was certainly affected by the subsequent length of operations of the LIAT facility, the jury heard evidence that Cherubin continued to suffer mental anguish well after LIAT ceased operations. In addition to Cherubin's own testimony, the jury heard from his nephew, who testified that "[Cherubin]'s never been the same person from that day," J.A. 76, as well as a friend who had testified to seeing him every day since the 1970s and observing how he changed as a person after the incident. Thus, the jury was presented with evidence that, if credited, established that Cherubin still suffered mental anguish up to the day of trial, and likely would continue to do

so for the foreseeable future. Consequently, the significant difference between the damages awarded for lost wages and the mental anguish award can easily be explained by factors other than a jury swayed by passion: while the jury calculated Cherubin's lost wages from June 2015 to March 2017, it likely predicated the award of mental anguish damages based on a period running from June 2015 to a much later date, resulting in a longer time period over which the harm he suffered, and the resulting damages he incurred from it, accrued. Under these circumstances, we cannot conclude that a new trial is appropriate.[7]

III. CONCLUSION

¶ 36 The Superior Court committed no error when it denied LIAT's renewed motions for judgment as a matter of law and for a new trial. Cherubin introduced sufficient evidence that, if credited by the jury, supported a finding that it had terminated him due to his age. Likewise, Cherubin introduced sufficient evidence to demonstrate an entitlement to compensatory damages for mental anguish, and the record contains no indication that passion or prejudice on the part of the jurors contributed to the verdict. Accordingly, we affirm the Superior Court's May 19, 2019 opinion and order.

Dated this 5th day of December, 2022.

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[7] The dissent asserts that this Court should find the $1,555,320 mental anguish award excessive and reduce it on appeal to $150,000. However, consistent with our prior precedents, the appropriate remedy for a seemingly excessive compensatory damages award is not for this Court to displace the jury as the finder of fact and issue a new damages award on appeal, but to order a new trial on the issue of compensatory damages so that a second jury may consider the matter. *See R.J. Reynolds Tobacco Co*., 76 V.I. at 703-04. As we previously explained, "the remedy of a new trial is appropriate in that it provides a mechanism to test whether the original jury acted improperly, for if the judge was right that invisible error infected the process, then a second jury is unlikely to return the same verdict," while "if a second jury in fact returns the same verdict that the judge originally thought weighed strongly against the evidence, that that is a sign that the judge, rather than the jury, was more likely to have been wrong." *Atlantic Human Resources Co.,* 76 V.I. at 623 (internal citations and quotation marks omitted).

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: December 5, 2022

SWAN, Associate Justice, Dissenting

¶37 Unequivocally, I believe the majority's affirmation of Cherubin's emotional damages award of more than one and one half million dollars (specifically $1,555,320) is obscenely exorbitant and unjustified. Moreover, it is error because he failed to provide any modicum, scintilla, or iota of medical, psychological, or supplemental support or expert witness testimony in support of any element of emotional damages he allegedly sustained as a result of his employment termination from Liat. Accordingly, I respectfully dissent.

¶38 First, I acknowledge the majority's contention that the Virgin Islands Civil Rights Act ("VICRA") and the federal Age Discrimination in Employment Act ("ADEA"), are dichotomous. Specifically, the majority contends the dissimilarity between the two statutes extends to their scope, with ADEA being considerably narrower, and their methodology, with ADEA relying on the *McDonnell Douglas* test to establish workplace discrimination. Contrastingly, VICRA employs statutory interpretation to prove work place discrimination. Maj. Op. ¶15-16. Furthermore, as the majority states, I concede that we have previously held that the *McDonnell Douglas* test is inapplicable to discrimination cases in the Virgin Islands. *Id*.

¶39 However, it is indisputable that both VICRA and ADEA address age discrimination in the workplace. Undeniably, multiple cases opine that a court may employ federal case law to help explain a state statute if two statutes possess similar language and objectives. *See Chinnery v. People*, 55 V.I. 508, 533-34 (V.I. 2011) (explaining that "when our statute is derived from and substantially identical to a statute from another [jurisdiction], the judicial decisions interpreting the [other] statute are highly persuasive and that "where the purpose and language of a federal statute are substantially the same as a later state statute, interpretations of the federal statute are ordinarily persuasive.") (citations and alterations omitted); *In re Insulin Pricing Litigation*, No.

2:17-cv-00699 (BRM)(ESK), 2021 WL 5980629, at *7 (D.N.J. Dec. 17, 2021) (slip copy) ("Because the state racketeering statutes of Colorado, Georgia, Utah, and Wisconsin are modeled after federal RICO, courts have looked to federal case law construing federal RICO for guidance in interpreting these state racketeering statutes.") (citations omitted); *Zeltiq Aesthetics, Inc. v. BTL Indus., Inc.*, No. 13-cv-05473-JCS, 2015 WL 1359048, at *4 (N.D. Cal. Mar. 23, 2015) (unpublished) ("[W]here the wording and objectives of a California statute are similar to the wording and objectives of a federal statute, California courts look to interpretations of the federal statute for guidance in interpreting the state statute.") (citations omitted); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1072 (8th Cir. 2006) ("Where a federal rule has been construed by the federal courts and our Court thereafter adopts a similar rule on the same subject using identical language, there is no principled way to ignore the federal cases.") (citations omitted).

¶40 Nonetheless, case law also acknowledges the validity of the minority position in which a court may utilize a federal interpretation of a federal statute to aid its interpretation of a comparable state statute if both statutes address the same subject but lack identical language. *See Gov't of the V.I. v. Takata Corp.*, 67 V.I. 316, 368-69 (V.I. 2017) (explaining that, despite the linguistic distinctions between the two statutes, the similarities between the Virgin Islands CICO Act and the federal RICO Act allowed the court to employ interpretations of the federal statute to guide its interpretation of the territorial statute). Moreover, case law also holds that the same strategy may be employed if the statutes originate from the same jurisdiction. *See Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271 (7th Cir. 1986) (stating that, because of the similarities in the statutes' objectives, prohibitions, and legislative histories, the district court did not err when it considered the definition of employer in the ADEA statute to help interpret the definition of employer in the

Title VII statute despite language differences in the two definitions); *Fancher v. U.S. Railroad Retirement Bd.*, 205 Fed. Appx. 221, 222 n.1 (5th Cir. 2006) (stating that, although Plaintiff believes two sentences in two different statutes are incongruent because they utilized different language, the Court found the meaning of both sentences were the same). Therefore, although cases from other jurisdictions interpreting the ADEA are not binding on the Virgin Islands Supreme Court, I believe they elucidate the points I assert below. Thus, I will incorporate ADEA caselaw into the forthcoming analysis because of its persuasive character. *See Mykland v. Common Spirit Health*, No. 3:21-cv-05061-RAJ, 2021 WL 4209429, at *9 (W.D. Wash. Sept.16, 2021) (slip copy) ("We have frequently recognized that while federal discrimination cases are not binding, they may be persuasive and their analyses adopted where they further the purposes and mandates of state law. . . .").

¶41 As a starting point, I commence the analysis with a brief comparison of VICRA and ADEA.

¶42 In the Virgin Islands, age discrimination cases fall under the auspices of 10 V.I.C. § 64(1)(a).[1] The statute is commonly known as the Virgin Islands Civil Rights Act ("VICRA"). However, although there is Virgin Islands Supreme Court precedent interpreting VICRA as it relates to racial discrimination, "[t]he . . . Court has not yet provided guidance regarding age discrimination claims under VICRA . . . ." *Bass v. Fed. Express Corp.*, Civ. No. 14-0060, 2017 WL 2022977, at *3 (D.V.I. May 11, 2017). Moreover, the Virgin Islands Supreme Court has expressed dissatisfaction with applying the test adopted by the United States Supreme Court in

[1] "It shall be an unlawful discriminatory practice: (a) For an employer, because of age, race, creed, color, national origin, place of birth, sex, disability and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment." 10 V.I.C § 64(1)(a).

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to local racial discrimination cases and has declared a strong preference for interpreting VICRA when a case involves racial discrimination. *Id*. Because the Virgin Islands Supreme Court has concluded that the test announced by the United States Supreme Court in *McDonnell Douglas* is inapposite in cases involving racial discrimination claims that arise under Virgin Islands law, it is presumed that the Court will similarly conclude that a legal analysis of the Age Discrimination in Employment Act of 1967 (ADEA)[2], which utilizes the *McDonnell Douglas* test, is inapposite in cases of age discrimination that arise under Virgin Islands law. However, "[t]here is no substantive case law from the Virgin Islands Supreme Court or lower [territorial] courts that interpret [VICRA] in an age discrimination case." *Id*. Accordingly, despite the Supreme Court's possible disfavor of ADEA, I will analyze Cherubin's contentions using ADEA principles and subsequently examine the scope of recoverable damages in age discrimination cases under ADEA because local jurisprudence fails to address age discrimination under VICRA.

¶43 "Discrimination is the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability." BLACK'S LAW DICTIONARY 405 (10th ed. 2015). By extension, "age discrimination is discrimination based on age." *Id*.

¶44 "ADEA makes it 'unlawful for an employer . . . to [intentionally] discharge [an] individual . . . because of [the] individual's age.'" *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995). Under ADEA, an age discrimination case requires a plaintiff to establish "1) he was discharged, 2) he was qualified for the position, 3) he was within the protected class [aged

[2] ADEA is the federal counterpart to VICRA.

forty or older], and 4) he was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age." *Id*.

¶45 In *McDonnell Douglas Corp.*, 411 U.S. at 802, the United States Supreme Court created a burden shifting framework for racial discrimination cases which has subsequently been applied to age discrimination cases involving alleged violations of ADEA. The framework imposes the burden of proving an impermissible, age-related employment termination on the plaintiff. Under the three-tiered *McDonnell Douglas* scheme, a plaintiff has the initial burden of demonstrating a prima facie case of discrimination using the elements above. *Id*. If the plaintiff succeeds in carrying his initial burden, the burden shifts to the defendant employer to present a nondiscriminatory reason for plaintiff's termination. *Id*. "This burden is one of production, not persuasion." *Montgomery v. C & C Self Enterprises, Inc.*, 62 So.3d 279, 282 (3rd Cir. 2011). More succinctly, the employer does not necessarily have to convince the court that the proffered reasons were the actual basis for plaintiff's termination. *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994). However, an employer must offer sufficient evidence of its nondiscriminatory intent in terminating the plaintiff that would justify a judgment in the employer's favor. *Mitchell v. Sisters of Charity of Incarnate Word*, 924 F.Supp 793, 799 (S.D. Tex. 1996).

¶46 If the plaintiff establishes a prima facie discrimination case, there is a presumption of discrimination unless the employer provides a nondiscriminatory explanation for the plaintiff's termination. *Cash Distrib. Co., Inc. v. Neely*, 947 So.2d 286, 293 (Miss. 2007). If the employer fails to offer any evidence relating to its nondiscriminatory intent in terminating the plaintiff, the court must grant judgment for plaintiff. *Id*.

¶47 Under the last tier of the *McDonnell Douglas* burden-shifting paradigm, if the employer satisfies its evidentiary obligation, the burden returns to the plaintiff to introduce evidence to prove by a preponderance of the evidence that the employer's reasons were illegitimate and merely a pretext for plaintiff's unjustifiable, age-related termination. *Mitchell*, 924 F.Supp. at 799.

¶48 Here, Cherubin asserts that he was impermissibly terminated from Liat because of his age. Undeniably, Cherubin was terminated from Liat as a regional manager after more than 40 years in the airline's employment. At the time of his termination, Cherubin was 71 years old. Thus, Cherubin's claim satisfies the first three elements of ADEA. However, the record fails to provide evidence that Cherubin was replaced by someone younger or by someone outside of the protected class. Hence, Cherubin's claim could prevail only if he establishes that Liat terminated him because of his age.

¶49 As evidence of his unconstitutional, age-related termination, Cherubin only offers Liat's dissemination of material that pertains to the company's retirement program and voluntary separation program, the distribution of which occurred one month prior to Cherubin's June 4, 2015 termination. However, suggestions about retirement, standing alone, are insufficient to constitute age discrimination. *See Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 724 (6th Cir. 2012) (explaining that discussions about an employee's retirement plans do not alone constitute direct evidence of age discrimination); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1395 (6th Cir. 1993) (explaining that suggestions by a law firm that an attorney retire are alone insufficient to support a finding of age discrimination). Importantly, Cherubin fails to provide satisfactory evidence that indicates Liat discriminated against him because of age. He does not proffer discriminatory verbal or written statements by Liat owners about their preference for

younger employees, evidence of a corporate culture that promotes youth over age, or even evidence that his job was given to a younger employee. Therefore, it is unlikely that Cherubin's age discrimination suit would prevail under ADEA because he offers little to no evidence that Liat actually and personally discriminated against him.

¶50 Additionally, Liat could easily assert the reasons itemized in Cherubin's March 3 and March 5, 2015 reprimand letters as nondiscriminatory reasons for his termination. Specifically, the March 3, 2015 letter chastises Cherubin for cashing a third party check while the March 5, 2015 letter rebukes Cherubin for his failure to timely submit sales reports and for a perceived shortfall in sales receipts because Cherubin failed to collect money owed to Liat from one of the company's vendors. Moreover, the March 5 letter instructs Cherubin to pay Liat the amount the vendor owed the company by March 31, 2015, but Cherubin did not settle the debt until April 14, 2015. Although the letters stated that repeating the prohibited conduct could result in additional censures including termination and Cherubin did not repeat either action, the infractions were against company policy and conceivably legitimate grounds to terminate Cherubin. Therefore, it is unlikely that Cherubin's age discrimination suit would prevail under ADEA because Liat had legitimate, nondiscriminatory reasons to terminate him.

¶51 Essentially, under the first level of the *McDonnell Douglas* burden shifting scheme, Cherubin cannot sustain his initial burden to establish a prima facie discrimination case because he cannot satisfy the last element required to do so. Even if he established a prima facie case, Liat could rebut his allegations with its nondiscriminatory reasons for Cherubin's termination which Cherubin could not dispute with evidence that Liat's reasons were mere pretext because he lacks quantifiable evidence to do so. Therefore, although I realize ADEA is not the law in the Virgin

Islands, I believe that the result obtained by applying that statute is the correct resolution in this case.

I. ADEA DAMAGES

¶52 Regardless, if Cherubin prevails on his age discrimination claim, ADEA offers several kinds of damages. "The purpose of ADEA remedies is to make the victim of age discrimination whole." *Mitchell*, 924 F.Supp. at 803. To do that, ADEA allows for actual damages which are primarily lost wages and unpaid benefits, liquidated damages which are punitive damages, emotional or non-economic damages, job reinstatement, or front pay if job reinstatement is impractical.

¶53 Under ADEA, lost wages are generally determined as the difference between what was earned and what would have been earned but for the illegally discriminatory act. *Aledo-Garcia v. Puerto Rico Nat. Guard Fund, Inc.*, 887 F.2d 354, 356 (1st Cir. 1989). "The amount of wages that could have been earned includes the wage rate illegally denied multiplied by the period of time the wage was illegally denied, plus the value of any fringe benefits such as life insurance, pension benefits, medical insurance, and any other benefits generally provided by the employer." *Id*. at 356-57.

¶54 In this case, Cherubin was terminated on June 4, 2015. Although the record fails to indicate whether he received insurance, pension benefits, or other incentives from Liat, it does establish that Cherubin would have earned $82,000 between June 4, 2015 and May 2017 when Liat ceased its St. Croix operation. Thus, under ADEA, Cherubin was entitled to $82,000 in actual damages.

¶55 However, to be awarded back pay under ADEA, a plaintiff must mitigate his damages. *See Behr v. Drake Hotel, Inc.*, No. 82C5551, 1986 WL 11980, at *1 (N.D. Ill Oct. 20, 1986) (unpublished) ("Mitigation of damages under the ADEA is not statutorily required as it is under Title VII of the Civil Rights Act of 1964. Despite this statutory difference, the Seventh Circuit and other circuits have treated the issue of mitigation as a duty of ADEA plaintiffs."); *Jackson v. Shell Oil Co.*, 702 F.2d 197 (9th Cir. 1983) ("An ADEA plaintiff has a duty to mitigate damages by using reasonable care and diligence in seeking suitable alternative employment."); *Cline v. Roadway Express*, 689 F.2d 481, 488 (4th Cir. 1982) ("Plaintiffs in ADEA cases have a duty to mitigate their damages by seeking other available employment with reasonable diligency."); *Chiano v. Dimension Molding Corp.*, No. 91C3140, 1993 WL 326687, at *2 (N.D. Ill Aug. 25, 1993) (unpublished) ("The defendant bears the burden of showing that there were suitable positions available and that the plaintiff failed to use reasonable care in seeking them. Although 'the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.'").

¶56 To mitigate damages, a plaintiff must "use reasonable efforts to obtain other employment after he is terminated." *Hansard v. Pepsi-Cola Metro. Bottling Co., Inc.*, 865 F.2d 1461, 1468 (5th Cir. 1989). Consequently, if the discharged employee ceases to use reasonable diligence to procure substantially similar employment after the challenged termination, he is unentitled to back pay. *Id. See also, Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983) (Back pay awarded under ADEA must be offset by plaintiff's earnings and amounts "which the plaintiff could have earned through reasonable efforts to seek suitable alternative employment.").

¶57 In this case, the record fails to reveal whether Cherubin attempted to procure subsequent employment following his challenged termination from Liat. Accordingly, because he did not offer proof that he employed reasonable diligence to obtain substantially similar employment, Cherubin is not entitled to the jury's back pay damage award under ADEA. *See Smith v. Great Am. Rest., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992) ("A discharged ADEA plaintiff has a duty to exercise reasonable diligence in attempting to mitigate damages by finding comparable work. The defendant, however, has the burden of proving that the plaintiff has failed to discharge its duty. The issue of mitigation is a question of fact for the jury.").

¶58 Under ADEA, liquidated damages are punitive and only awarded if the defendant employer willfully violates ADEA requirements. *Mitchell*, 924 F.Supp. at 801. Furthermore, liquidated damages are reserved for the most egregious ADEA violations. *Id*. "'By the express terms of the statute, liquidated damages are an additional amount equal to the back pay and benefits award' and thus do not include front pay." *Id*. at 802. "The measure of liquidated damages recoverable for a willful violation is the sum of amounts owing to the plaintiff as a result of the violation. Amounts owing include unpaid wages and benefits but do not include damages for pain and suffering. Thus, the provision for liquidated damages effectively doubles the award of back pay and benefits." *Id*.

¶59 Front pay recovery arises when reinstating the plaintiff to his former position is unfeasible. Although many circuit courts believe the best procedure to make a plaintiff whole is to award back pay and then reinstate the plaintiff to his position, reinstatement may be difficult because of the animosity that may have arisen between the plaintiff and his former employer following the plaintiff's illegal termination. *Id*. at 803. Moreover, the position that plaintiff formerly occupied may be filled or may have been permanently eliminated from the organization's structure. *Id*. In

such instances, courts award plaintiff the front pay he would have earned less income derived from other sources. *Id*. Front pay may be reduced or denied if a plaintiff fails to mitigate damages by seeking other employment. *Id*. In some cases, front pay is calculated as the timeframe between the start date of the trial on the alleged illegal termination and plaintiff's prospective retirement date. *Id*. at n. 6. However, front pay is highly speculative. "In determining when front pay ends, the Court generally considers the length of the prior employment, the permanency of the position held, the nature of the work, the age and physical condition of the employee, possible consolidation of jobs, and other nondiscriminatory factors that could validly affect the possible post discharge employment relationship." *Id*.

¶60 In this case, liquidated damages are unobtainable because there is scant and paltry to no evidence that Liat intentionally terminated Cherubin because of his age. Therefore, there can be no finding that Liat willfully violated ADEA. Similarly, front pay is also unavailable because Liat ceased its St. Croix operation in May 2017 and, even if Cherubin had been illegally dismissed, he could not be rehired as a Liat manager following the February 2019 trial on his age discrimination suit because Liat no longer operated in St. Croix. Essentially, Cherubin could have conceivably been terminated when the company ceased functioning in May 2017 because nothing in the record suggests his continued employment with the company (possibly in a different capacity or in a different locale) beyond that date. Therefore, Cherubin's entitlement to front pay ceased when Liat shuttered its St. Croix business. Furthermore, even if Liat had continued its St. Croix initiative, the record fails to indicate that Cherubin mitigated his damages by seeking employment elsewhere. Thus, emotional or non-economic damages are the only other relief available to Cherubin.

¶61 Congress capped damages in discrimination cases at $300,000 and awards reaching that amount should be reserved for the most egregious cases. *City of Hollywood v. Hogan*, 986 So.2d 634, 649 (Fla. Dist. Ct. App. 2008). To assess non-economic damages in discrimination cases, courts should contemplate (1) whether plaintiff lost the esteem of his peers, (2) whether plaintiff suffered physical injury as a consequence of his emotional distress, (3) whether plaintiff received psychological counseling or other medical treatment, (4) whether plaintiff suffered a loss of income, (5) the degree of emotional distress, (6) the context of the events surrounding the distress, (7) the evidence tending to corroborate plaintiff's testimony, (8) the nexus between the challenged conduct and the emotional distress, and (9) mitigating circumstances. *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996).

¶62 Pursuant to the statute, a trial court must determine the amount, if any, by which an award exceeds a reasonable range of damages. *Hogan*, 986 So.2d at 648. It is understood that comparing the awards entered in other discrimination cases can help with the reasonability inquiry. *Id.* "In evaluating the reasonability of jury award in a retaliation or discrimination suit, it is useful to look at the 'duration, extent and consequences of the mental anguish suffered by plaintiff' and see whether the case fits into a class of 'so-called 'garden variety' mental anguish claims, in which the awards hover in the range of $5,000 to $30,000.' In such cases, evidence usually is limited to the testimony of the plaintiff who describes the emotional distress in vague or conclusory terms, presents minimal or no evidence of medical treatment, and offers little detail of the duration, severity, or consequences of the condition." *Reiter v. Metro Transp. Auth.*, No. 01 Civ. 2762(JGK), 2003 WL 22271223, at *9 (S.D.N.Y. Sept. 30, 2003) (unpublished). *See Hill v. Airborne Freight Corp.*, 212 F.Supp.2d 59, 73-74 (E.D.N.Y. 2002) (explaining a case "entailing plaintiff's general

testimony of humiliation and stress, without medical corroboration" is one in which damages "have generally been awarded in the range of $5,000 to $100,000"); *Fierro v. Girozente Vienna Bank*, No. 91 Civ. 8743(CMM), 1994 WL 240360, at *3-4 (S.D.N.Y May 27, 1994) (unpublished) (analyzing a case where testimony about distress was "brief, not particularly strong, and included a single reference to a visit to a psychologist," and finding "no [precedence] based on similar facts . . . an award of over $15,000 was upheld; in the vast majority of cases, courts found awards of $5000 to $10,000 to be appropriate"); *Miller v. Raytheon Co.*, 716 F.3d 138, 147 (5th Cir. 2013) (analyzing a case where the Court of Appeals vacated the District Court's remitter of a non-economic damage award from one million dollars to one hundred thousand dollars because the plaintiff only offered the self-serving testimony of himself and his wife to substantiate his claim of emotional distress following the his termination but plaintiff failed to provide any expert medical or psychological evidence to support his mental anguish claim); *Dossat v. Hoffman-La Roche Inc.*, No. 09-CV-00245, 2012 WL 5287956, at *5 (D. Nev. Oct.24, 2012) (unpublished) (explaining that a non-economic damage award of $1,500,000 was grossly excessive which warranted use of remittitur to $200,000); *Epstein v. Miller Int'l., Inc.*, 139 F.Supp.2d 469, 480 (S.D.N.Y. 2001) ("A 'garden variety' emotional distress claim is one that did not require medical treatment.").

¶63 In *City of Hollywood v. Hogan*, 986 So.2d 634, 649-50 (Fla. Dist. Ct. App. 2008), the court concluded that plaintiffs' award of more than a million dollars each for non-economic damages was unreasonable because of one plaintiff's minimal evidence supporting his emotional injury (high blood pressure that may have resulted from the illegal discrimination) and the other plaintiff's failure to offer any evidence of an emotional injury. The court opined that the plaintiff

with no evidence of an emotional injury had a garden variety claim worth $5000 to $30,000 while the claim of the second plaintiff with high blood pressure could have been worth more, but not more than $150,000, which is the highest permissible non-economic damage award.

¶64 In *Reiter*, 2003 WL 22271223 at *5, the plaintiff simply testified to feeling "stressed, nervous, on edge, and clammy." In that case, the court found an award of $140,000 was unreasonable and reduced it to $10,000.

¶65 In *Epstein*, 139 F.Supp.2d at 481, the court upheld a $54,000 jury award for emotional distress where the emotional distress aggravated the plaintiff's physical symptoms.

¶66 In *Abrams v. Lightolier, Inc.*, 841 F.Supp. 584 (D.N.J. 1994), the court reduced a $100,000 noneconomic jury award to $2500 because there was insufficient evidence demonstrating plaintiff's actual mental distress.

¶67 In *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000), the court upheld plaintiff's $150,000 jury award despite plaintiff's failure to corroborate his claimed injuries with objective medical evidence.

¶68 In this case, the jury awarded Cherubin more than one and one half million dollars ($1,555,320.00) as damages for emotional distress. The only emotional distress evidence Cherubin offered was the testimony of his long-term friends, Alvin Canaii and William Bohlke, Jr. Cherubin also testified. Both Canaii and Bohlke testified that Cherubin was a different person following his Liat termination. Canaii said Cherubin was more than visibly shaken by the termination. During his weekly visits with Cherubin, Canaii said Cherubin appeared dazed and sluggish, mumbled to himself, and acted totally demoralized. Similarly, Bohlke testified that Cherubin's personality had

absolutely changed following the termination. Bohlke said Cherubin was stressed out, mentally devastated, and not himself. On the stand, Cherubin testified about the shame and humiliation caused by the termination. Cherubin said, after his many years of service to Liat, he felt betrayed and felt the termination was a blight on him and his family. Unable to stem his emotion while testifying, Cherubin cried on the witness stand.

¶69 Despite Cherubin's contentions and his friends' assertions, there is no evidence in the record to demonstrate Cherubin suffered some physical aliment as a result of the termination or, more appropriately, the mental anguish caused by the termination. Moreover, Cherubin did not seek medical treatment for his emotional anguish. Cherubin only offers his own self-serving statements as well as those of his friends as evidence of his emotional duress. Cherubin dismally failed to present any expert medical or expert psychological testimony to remotely justify the excruciatingly exorbitant judgment in excess of one and one half million dollars ($1,555,320.00). Undoubtedly, Cherubin's declarations and those of his testifiers may suggest Cherubin lost some of the esteem held by his peers and the community following the termination, but the elevated non-economic jury award seems predicated more on Cherubin's teary testimony than objective evidence of emotional distress. Moreover, under ADEA, damages should not exceed $300,000, which is awarded only in the most egregious cases. Unfortunately, Cherubin's claim seems to fall in the 'garden-variety' emotional distress category and is only worth $5,000 to $30,000 accordingly. At best, although the majority finds Cherubin sustained excessive mental toil as a result of his termination, the Virgin Islands Supreme Court should award him $150,000 in non-economic damages, but even that amount seems outrageous without additional corroboration.

CONCLUSION

¶70 Because of the excessive emotional damage award of more than one and one half million dollars ($1,555,320.00) and the paucity of evidence Cherubin provides to substantiate it, I would remand the matter to the trial court for a rehearing on the issue of damages.

Dated this 5 day of December 2022

BY THE COURT:

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ReishaCorneiro
Deputy Clerk II

Date: December 5, 2022