No. 01-2101

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JACQUELINE T. BENHAM,

Plaintiff - Appellant,

v.

LENOX SAVINGS BANK,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE APPELLANT

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INTRODUCTION

The Lenox Savings Bank tried this case on the theory that a perceived violation of the Bank's Code of Conduct was the sole motivation for the firing of Jackie Benham and that a desire to reduce the costs to the Bank of her pension benefits played no role in her firing. The Bank has briefed the case on appeal as if the district court accepted its theory. But that is not so.

The district court did find – in the pivotal finding that we challenge as clearly erroneous – that Mr. Christopher "act[ed] not trying to deprive her of her retirement benefits, though that was clearly a collateral consequence." (JA 110.) Unless this Court is persuaded that *that* finding is clearly erroneous, it will affirm. But in assessing Chief Judge Young's finding that the motivation forbidden by federal law did *not* play *any* role in Ms. Benham's firing, the Court must also assess his findings about what *did* play a role in her firing. The Bank's theory – that the only thing that *did* motivate Mr. Christopher was his perception that Ms. Benham had violated the Code of Conduct – is simply not accepted in Chief Judge Young's findings. Instead, after a long series of subsidiary findings (almost all of which support Ms. Benham's position), Chief Judge Young announced his ultimate findings as follows:

> This leaves us with the key issue. Why at the time he fired her did he do so? Because if he fired her to deprive her of her retirement benefits such conduct violates the federal law and she must be compensated for it.

> I am not so persuaded. What he did do was unfair. He did it without the benefit of an investigation of any sort. He did it after hearing from people, at least in the case of Marge Pero, who apparently had some reason to get Ms. Benham. But he was the officer that the bank entrusted with doing it. He, to a certain degree, given his own insecurities in management, had been set up. He saw things only one way. He acted in a way that I find less than professional. But, he did so act not trying to deprive her of her retirement benefits, though that was clearly a collateral consequence.
>
> *He did so to make an example of her, to demonstrate his power as president of the Lenox Savings Bank*. We may decry that. We may think that that is less than what is to be expected of mature individuals in such responsible positions with power over the lives of others. And this Court would do so. But it is not a violation of the federal law.

(JA 109-10 (emphasis added).)

Given the absence of any findings accepting the Bank's theory of what *did* motivate Mr. Christopher – and given that Chief Judge Young's finding that "he did so to make an example of her, to demonstrate his power as president of the Lenox Savings Bank," is neither defended nor defensible – the parties' normal roles are essentially reversed on this appeal. For Ms. Benham's part, we defend the vast majority of the district court's subsidiary findings and challenge the district court's implausible conclusion. The Bank, in contrast, argues *against* most of the district court's subsidiary findings (apparently regarding them as clearly erroneous) but supports the court's ultimate conclusion using a theory that the court did not accept. And the Bank makes no meaningful effort to bridge the gap between the district court's

explicit finding that cutting benefits was a "particular theme of Mr. Christopher's management of the bank" (JA 100) and the court's ultimate finding that Ms. Benham's firing occurred despite, not even in part because of, its effect on her benefits.

It is unfortunate that the Bank found it necessary in defense of this appeal to say that our opening brief was "so filled with patent misstatement" as to be "unconscionable." Bank's Br. 3; see also *id*. at 16. There is really no dispute at all about the law applicable to this case, although we clear up a few misunderstandings in Point I below. And there is far less dispute about the material facts in this case than meets the eye. The parties' sharpest genuine dispute, oddly enough, seems to be about how to read the district court's findings. But Chief Judge Young's succinct findings from the bench (JA 96-110) are quite easy for this Court to read, and resolving the parties' disputes about how to read them should not be hard.

The district court's subsidiary findings are correct; its ultimate conclusion is clearly wrong in light of its subsidiary findings and in light of the entire record. The judgment should therefore be reversed.

SUMMARY OF ARGUMENT

The governing law, which the Bank does not seriously dispute, requires judgment for Ms. Benham if she showed that interference with her ERISA rights was *a* motivating factor in her termination. Contrary to the Bank's suggestion, we do not

argue that Ms. Benham is entitled to judgment as a matter of law; rather, we argue that the district court's correct findings of fact, and the entire record, lead to the conclusion that discriminatory intent played a role in Ms. Benham's firing and that the Bank thus fired her in violation of ERISA. Further, the parties agree that the district court's findings are reviewed for clear error. The parties also agree that particular deference should be given findings on credibility, and here the district court's findings on credibility favor Ms. Benham, not the Bank. Given the district court's correct subsidiary findings and the entire record, the district court's ultimate conclusion – that discriminatory intent played no role in Ms. Benham's firing – is clearly erroneous. Given that that ultimate finding is clearly erroneous, this Court should remand the case for entry of judgment in Ms. Benham's favor and the calculation of her damages.

ARGUMENT

I. The Undisputed Governing Law Requires Judgment for Ms. Benham If She Showed That Interference with Her ERISA Rights Was *A* Motivating Factor in Her Termination

As we stated in our opening brief, we are not challenging the legal rules that the district court applied, only its ultimate finding of fact. In particular, we agree that the district court correctly understood that an ERISA § 510 plaintiff must prove that the necessary specific intent was only "*a*" – not "the" – "motivating factor" behind adverse

employment action. See, *e.g.*, *Barbour* v. *Dynamics Research Corp.*, 63 F.3d 32, 38 (1st Cir. 1996); *Walsh* v. *United Parcel Serv.*, 201 F.3d 718, 729 (6th Cir. 2000) ("[T]he plaintiff need *not* show that the employer's *sole* purpose was to interfere with the plaintiff's entitlement to benefits." (emphases added; internal quotation marks omitted)); *Nero* v. *Industrial Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999) ("A plaintiff need not show that the sole reason for the termination was to interfere with rights protected by ERISA; he need only prove that a specific intent to violate ERISA *partly* motivated the employer." (emphasis added)); *Garratt* v. *Walker*, 164 F.3d 1249, 1256 (10th Cir. 1998) (en banc) (citing numerous cases); *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993) (Section 510 "does not require the plaintiff to show that interference with ERISA rights was the sole reason for discharge"); *Olitsky* v. *Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992) ("To recover under section 510, a plaintiff need not show that the *sole* reason for his [or her] termination was to interfere with pension rights" (emphasis in original; internal quotation marks omitted)); *Meredith* v. *Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991) (a Section 510 plaintiff must show that "the desire to reduce his pension benefits was *a* 'determinative factor'" motivating the adverse employment action (emphasis added)); *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (a Section 510 plaintiff need show only that an employer was "in part"

motivated to discriminate on the basis of rights to benefits); *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987) ("To recover under § 510, a plaintiff need not prove that 'the sole reason for his [or her] termination was to interfere with pension rights.'" (quoting *Titsch* v. *Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), aff'd mem., 742 F.2d 1441 (2d Cir. 1983)); *Benham* v. *Lenox Savings Bank*, 118 F. Supp. 2d 132, 141 (D. Mass. 2000). As we also noted, it follows logically that judgment for an employer cannot be sustained unless the record supports a finding that the intent to interfere with ERISA benefits played *no* role in the adverse employment action. In assessing whether the district court's ultimate finding was clearly erroneous, it is critical to keep this governing legal standard firmly in mind.

What is not at all important to our position is assessing who bore the burden of persuasion. We readily concede for purposes of this appeal that Ms. Benham had that burden. In trying to refute a perceived contrary suggestion, the Bank (at 23 and 24) misunderstands our position. We have not sought to shift the burden of persuasion away from Ms. Benham, only to make clear what it is that Ms. Benham was required to show: because, to prevail, a plaintiff need prove only that discriminatory intent played *a* role in her firing, a judgment for an employer cannot be entered unless the court determines, without clear error, that discriminatory intent played *no* role.

We do not agree with the Bank that it is "significant" that "nearly every case" we cited "pertain[s] to the plaintiff's burden at summary judgment (or at the motion to dismiss stage), not at trial." Bank's Br. 23 n.13. This is a classic distinction without a difference. Every one of the cases we cited and quoted sets out the legal standard that governs actions under ERISA § 510. The Bank in no way disputes that we have correctly stated the governing law and in no way explains why the governing law as we have stated it should be otherwise. Because this case comes to this Court on appeal after a bench trial, Ms. Benham must show on appeal that the district court's ultimate finding was clearly erroneous under the governing law, not just that a complaint has alleged or a rational factfinder *could* find the forbidden motivation under the governing law. But the governing law itself does not change just because the case comes up on appeal after a bench trial rather than after the grant or denial of a dispositive motion.

Nor do we suggest that the district court should have ruled *as a matter of law* for Ms. Benham once it rejected (or at least failed to accept) the Bank's proffered motivation. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506-06 (1993), makes it clear that it remains a question of fact, not law, what *did* motivate an employer once the employer's proffered motivation is disbelieved. But we can and do argue, fully consistent with *Hicks,* that the *facts* of this case and the district court's subsidiary findings make it impossible to support the required ultimate finding, concerning

discriminatory intent. The district court tried to come up with a nondiscriminatory explanation for the firing, but as a matter of record evidence (not law) its effort is unsupportable – indeed, unsupported – on this appeal.

In entering judgment for the Bank, the district court here necessarily found that Ms. Benham's firing was in no way motivated by Mr. Christopher's desire not to pay her substantial ERISA benefits. (JA 109.) As we explain more fully below in discussing the facts (at 10-24), under the governing law, that ultimate finding was clearly erroneous.

II. The Parties Agree on the Standard of Review, But the Particular Deference Given to a District Court's Credibility Findings Favors Ms. Benham, Not the Bank

The district court's findings of fact, as we stated in our opening brief, are reviewed for clear error. FED. R. CIV. P. 52(a); *Saint-Gobain Indus. Ceramics Inc.* v. *Wellons, Inc.*, 246 F.3d 64, 73 (1st Cir. 2001); *Dea* v. *Washington Suburban Sanitary Comm'n*, 2001 WL 672046, at *3, 2001 U.S. App. Lexis 13355 (4th Cir. 2001). But cf. *United States* v. *Thompson*, 27 F.3d 671, 676 (D.C. Cir. 1994) (when a district court "arrive[s] at [its] findings on the basis of faulty logic," deference under the clear error standard is "inappropriate"). In particular, as we noted, the Supreme Court and this Court have made clear that a district court's ultimate conclusions must be "rationally

* * * predicated" on its subsidiary findings. *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, 420 (1943) (per curiam); see *Naumkeag Theatres Co.* v. *New England Theatres, Inc.*, 345 F.2d 910, 913 (1st Cir. 1965) ("An ultimate conclusion not only unsupported by, but contradictory to, the subsidiary facts cannot stand."). And "of course the clearly erroneous standard does not shield findings that are unsupported or arbitrary." *Kumar* v. *Board of Trustees, Univ. of Mass.*, 774 F.2d 1, 9 (1st Cir. 1985) (internal quotation marks omitted).

The Bank does not take issue with our statement of the standard of review (Bank's Br. 1-2, 14-15) but it does add an important complementary point: that under clear error review "[a] trial court's determinations regarding credibility will be even further respected." Bank's Br. 14 (citing *United States* v. *Nee*, 261 F.3d 79, 84 (1st Cir. 2001)). We fully agree and note that this point applies with particular force to this appeal. For, although the Bank suggests that the district court found Ms. Benham not credible with respect to a matter of minor relevance (the significance of her initials in a corner of her son-in-law's loan application) (Bank's Br. 14 n.6), Ms. Benham's credibility does not bear on the pivotal issue in the case: whether the Bank, acting through Mr. Christopher, fired Ms. Benham with discriminatory intent in violation of ERISA. On that issue, it is *Mr. Christopher's* credibility that matters – and the district court found expressly that Mr. Christopher lied under oath on at least one occasion.

(JA 102 (calling Mr. Christopher's testimony on a point "another example of after-the-fact fabrication"); JA 100 (stating that Mr. Christopher was "somewhat creative with the facts").) Notably, the Bank never defends Mr. Christopher's credibility. And the fact that Mr. Christopher's testimony was unworthy of belief only helps to confirm that the district court's ultimate conclusion – that discriminatory intent played no role in Ms. Benham's firing – was clearly erroneous.

III. Given the District Court's Correct Subsidiary Findings and the Entire Record, the District Court's Ultimate Conclusion Is Clearly Erroneous

The question on this appeal, as on any appeal challenging findings of fact as clearly erroneous, is whether the Court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985). It is not enough to preclude reversal that there might be some evidence to support findings that the district court did *not* make, such as a finding that Ms. Benham's alleged violation of the Code of Conduct was the sole motivation for Mr. Christopher to fire her. Indeed, it is not enough to preclude reversal even if there is some evidence to support findings that the district court *did* make. See *id*.; see also *Irving* v. *United States*, 49 F.3d 830, 835 (1st Cir. 1995) ("[T]he Supreme Court has indicated that if a reviewing court is firmly convinced that a finding is

mistaken, it should reverse the finding *even where* there is evidence to support it." (emphasis in original)); *Dea*, 2001 WL 672046, at *3-*12.

We argued in our opening brief that the district court committed clear error in ultimately concluding that the Bank did not violate ERISA § 510 when it fired Ms. Benham. This was so, we explained, because the district court *correctly* found numerous facts that, *taken together*, lead to the ultimate conclusion *not* that Mr. Christopher fired Ms. Benham solely because was determined to show who was boss (as the district court found), but rather the conclusion that he fired her (at least in part) to save the Bank from having to pay her the substantial benefits she had accrued and would continue to accrue – a course of action forbidden by ERISA.

In response, the Bank argues repeatedly that "The District Court's Finding That [XYZ Occurred] Did Not Require It To Find In Benham's Favor." Bank's Br. 21, 22, 31, 35. We agree. No *one* finding *compelled* a conclusion that the Bank unlawfully discriminated against Ms. Benham. But the Court, on the entire evidence, should be left with the definite and firm conviction that a mistake has been made.

* * * *

As we have explained, we agree with the vast majority (though not all) of the district court's subsidiary findings. We review those findings and the Bank's responses to them.

- *Ms. Benham's high retirement costs to the Bank and Mr. Christopher's knowledge.*

The district court found that "given [Ms. Benham's] years of service and her seniority in the bank, she was at the time of her termination the third most senior official in the bank, it was clear that her benefits package was among the most substantial." (JA 101.) Moreover, the district court expressly found that Mr. Christopher was "well aware" of Ms. Benham's relatively high price. (*Id.*)

The Bank does not dispute the finding that Ms. Benham was an extremely expensive employee from the standpoint of benefits, and it is difficult to imagine how it could. In a footnote (at 34 n.24), the Bank does dispute that Mr. Christopher was well aware that Ms. Benham was costing the Bank substantial sums in benefits. But the district court made a *specific finding* that Mr. Christopher was "well aware that Ms. Benham, given her years of service and her seniority in the bank, she was at the time of her termination the third most senior official in the bank, it was clear that her benefits package was among the most substantial" (JA 101), and that finding is not clearly erroneous. Mr. Christopher was president of a small-town bank with only 28 employees, and for him *not* to be "well aware" implies a level of ignorance or incompetence directly at odds with the ample evidence that Mr. Christopher knew exactly what was going on with respect to benefits. After all, as the district court

expressly found, Mr. Christopher made the reduction of benefits a "particular theme" of his management. (JA 100.) As the Bank concedes, moreover, Mr. Christopher commissioned the preparation of a chart that listed the costs of each individual employee's benefits. Bank's Br. 34 n.24. And the district court itself found that Mr. Christopher knew well what Ms. Benham was costing the Bank.

- *Mr. Christopher's obsession with cutting costs.*

The district court found that "it was a particular theme of Mr. Christopher's management of the bank to reduce, in a reactive fashion, when problems were brought to his attention, to reduce the benefits to be afforded to bank officers and employees." (JA 101.) The district court further noted that Judge Ponsor had held (in *Lemanski* v. *Lenox Savings Bank*, 1996 WL 253315, 1996 U.S. Dist. Lexis 6465 (D. Mass. 1996)), that "his [Mr. Christopher's] efforts to reduce a certain Brick Plan violated the tenets of ERISA." (JA 101.) We said that Mr. Christopher's efforts reflected an obsession with cutting costs, and ample evidence in the record supports our characterization. In addition to having unlawfully tried to shut down the Brick Plan, Mr. Christopher cut the benefits available through the SBERA Plan (JA 561; 866-71; 1572-75) and eliminated certain post-retirement benefits (JA 578; 935-39). Moreover, as benefits went down, Mr. Christopher's annual bonus went up. (JA 525-30, 538.) Mr. Christopher's bonus, determined by a formula of his own devising, gave him an

obvious personal incentive to cut benefits – a point that the Bank does not mention, much less dispute.

The Bank's objections to our characterization of the record are misplaced. For example, the Bank calls it a "flat misrepresentation of the court's findings" (Bank's Br. 17 n.9) to say that "when faced with personnel issues, Mr. Christopher typically reacted by cutting benefits" (Opening Br. 38) and that there is "no basis" (Bank's Br. 17 n.9) for the statement that Mr. Christopher made reducing benefits "a centerpiece of his time in office" (Opening Br. 38). Compare what we wrote with the district court's findings: "when problems were brought to his attention, [Mr. Christopher would] reduce the benefits to be afforded to bank officers and employees" (JA 101) – and that such reductions were "a particular theme of Mr. Christopher's management of the bank" (JA 100).

When it comes to substance, the Bank does not seriously challenge the district court's finding that Mr. Christopher made cost-cutting a "particular theme" (though it does call Mr. Christopher's efforts "supposed" (at 31-32), as if calling them "supposed" makes them any less real). Rather, the Bank asserts that Mr. Christopher's pattern and practice of slashing benefits is somehow not relevant because he cut benefits across-the-board and because in cutting benefits Mr. Christopher did not

specifically target Ms. Benham (at least, of course, until he fired her). Bank's Br. 31-35.

Yet we did not argue in our opening brief that the cuts in the Brick Plan, SBERA plan, and post-retirement benefits *themselves* entitled Ms. Benham to recover for violations of ERISA. Instead, these measures, instigated by Mr. Christopher, show – as the district court correctly found – that cutting benefits was Mr. Christopher's "particular theme." (JA 100.) That finding, along with the other correct findings, supports our contention *not* that Ms. Benham was legally wronged by the across-the-board cuts, but that she was wronged by being fired so that the Bank could lower costs and thus increase profits and, not coincidentally, Mr. Christopher's bonus.

The evidence of Mr. Christopher's benefit-cutting motivation in firing Ms. Benham is circumstantial, to be sure, but it is powerful, and the district court's finding that benefit cutting was a "particular theme" of Mr. Christopher's management puts the exclamation point on the circumstantial evidence. To find – as the governing law requires – that the desire to cut Ms. Benham's benefits played *no* part in her firing, in the face of such evidence, the district court would have had to have a well-supported alternative explanation for the firing. But, as we have explained in our opening brief and in this reply brief, the district court had no such well-supported alternative explanation. That is why this Court should be left with the definite and firm conviction that a mistake has been made.

- *Mr. Christopher's false and recanted explanations for the firing.*

Last year, the Bank moved for summary judgment before Judge Ponsor. In deciding the motion, Judge Ponsor applied the framework of *McDonnell Douglas*. Because the Bank had conceded for the purposes of the motion that Ms. Benham had made out a *prima facie* case of unlawful discrimination – a finding that Chief Judge Young later made, and which the Bank does not dispute on appeal – Judge Ponsor turned to the question whether the Bank had met its burden of articulating a non-discriminatory reason for having fired Ms. Benham. He held that the Bank, in fact, had provided *four* non-discriminatory reasons for the firing:

> defendant has proffered admissible evidence sufficient to demonstrate that Benham was fired because [1] her job performance had declined in recent years, because [2] she had failed to cooperate with [3] or comply with an outside auditor's recommendations, and because [4] she violated the Bank's Code of Conduct.

Benham, 118 F. Supp. 2d at 144. Evaluating each asserted reason independently, Judge Ponsor then held that there were material issues of fact concerning whether reasons 1, 2, and 4 were pretextual, but that "any attempt" by the Bank "to justify its decision" by Ms. Benham's alleged failure to comply with the audit "fails as blatant pretext." *Id.* at 146.

When the case came to trial before Chief Judge Young, the Bank abandoned the first three reasons it had advanced before Judge Ponsor and relied only on the last.

Indeed, the Bank introduced no evidence concerning the three reasons it had abandoned. The district court found that the three recanted reasons were "afterthoughts" and "CYA" and that when Mr. Christopher "received a demand letter from Ms. Benham's attorney then he began to paper the file." (JA 106.) In other words, Mr. Christopher *said* that he fired Ms. Benham for four reasons, but he did not mean it; the Bank represented to Judge Ponsor that it fired Ms. Benham for four reasons but told Chief Judge Young it fired her for only one. We think that we fairly characterized the three abandoned reasons as false ones that were later recanted.

In its brief, the Bank asserts that it did not abandon three reasons of the four it originally gave for firing Ms. Benham. Bank's Br. 29-31. In light of the position the Bank took before Judge Ponsor, and the change in its position when it came before Chief Judge Young, the Bank's assertion in this Court is simply untenable.

All of this evidence, though of course not conclusive by itself, should strongly influence this Court's judgment whether it can have a definite and firm conviction that a mistake has been made. The Bank proffered, and then abandoned, numerous explanations for Ms. Benham's firing in an effort to show that it was not motivated, even in part, by a desire to interfere with her ERISA-protected rights. The one explanation the Bank ultimately advanced at trial was *not* accepted by the district court either, yet the district court came up with yet another explanation – that

Mr. Christopher acted simply "to make an example of her, to demonstrate his power as president of the Lenox Savings Bank." (JA 110.) At some point, the process of making up explanations other than the obvious one – that Mr. Christopher acted in accordance with the "particular theme" of his management when he fired Ms. Benham – should cease.

- *Mr. Christopher's lies and lack of credibility.*

The district court expressly found that Mr. Christopher's trial testimony on one point was "another example of after-the-fact fabrication" (JA 102) and that as Bank president Mr. Christopher, "when in a jam, was somewhat creative with the facts" (*id.*). We fairly characterized Mr. Christopher as having lied and as lacking credibility. In its brief, the Bank fails to address the point – an omission that speaks volumes.

- *The preferential treatment given the other employees who violated the Code of Conduct.*

The district court found that the other three employees involved in Ms. Benham's supposed violation of the Code of Conduct were asked to, and did, sign memoranda concerning Ms. Benham's firing that included "a characterization of the facts which was all Mr. Christopher's way." (JA 107.) The memoranda were placed in their personnel files. But once Mr. Christopher "got[] where he wanted to go, which was the dismissal of Ms. Benham, shortly thereafter these were removed from the file,

life went on as before, and the other loan officers were given raises and the like." (*Id.*) The district court called this behavior "evidence of a manager who is inconsistent, erratic in his management" (*id.*) – in other words, what we fairly characterized as evidence of disparate treatment. Ample evidence in the record supports our characterization. (JA 67-74 (Judge Ponsor's summary of evidence showing disparate treatment).)

The Bank disputes this finding (despite the "clearly erroneous" standard that the Bank itself emphasizes), saying that the different employees' "circumstances" were "materially different." Bank's Br. 36. But the Bank relies for support only on Mr. Christopher's unsurprising (and obviously self-serving) testimony that Mr. Christopher himself "believed" that he treated all employees "consistent with the nature and magnitude of their conduct" (*id.* (citing JA 673-674).) And the Bank never disputes that unlike Ms. Benham, who was fired, the other three – and quantifiably cheaper – employees were retained, later given raises and/or promoted, and, as the district court put it, "life went on as before." (JA 107.) Whether *Mr. Christopher* honestly thought that he treated employees appropriately is irrelevant (even assuming he may have told the truth). What matters is the district court's finding that the less expensive employees who also supposedly violated the Code of Conduct were treated well, and

Ms. Benham, among the most expensive employees at the Bank, was fired. That finding was manifestly correct.

- *The District Court's Finding on Mr. Christopher's Intent.*

In announcing its finding concerning the reason for Ms. Benham's firing, the district court said, "This leaves us with the key issue. Why at the time he fired her did he do so? Because if he fired her to deprive her of her retirement benefits such conduct violates the federal law and she must be compensated for it." The court then continued: "[H]e did so act not trying to deprive her of her retirement benefits, though that was clearly a collateral consequence. He did so to make an example of her, to demonstrate his power as president of the Lenox Savings Bank." (JA 109-10.) In addressing the "key issue," the court did not even mention the Code of Conduct.

For its part, the Bank does not seriously defend the district court's finding that Mr. Christopher wanted to "make an example" of Ms. Benham and to "demonstrate his power." That the Bank does not defend the district court's explanation is no surprise, given that the Bank never advanced that theory itself and never introduced evidence to support it. Instead, the Bank maintains, even though the district court *said* that those were the reasons for the firing, the *real* reason for the firing was Ms. Benham's supposed violation of the Code of Conduct. Bank's Br. at 26-28, 28-29. But the district court *never* said that the alleged violation of the Code of Conduct was the (or

even a) reason that Mr. Christopher fired Ms. Benham. What the court did say is plain: Hardly a "comment on his management style" (Bank's Br. 29), the reason for Ms. Benham's firing was Mr. Christopher's decision, after having been "set up," to "make an example of" Ms. Benham and "to demonstrate his power."

Earlier, as part of its subsidiary findings, the district court did find that Mr. Christopher "believed that [the two loans] were preferential and, therefore, in violation of the bank's Code of Conduct." (JA 105.) Had the district court gone on to find that that belief was Mr. Christopher's *sole* motivation for firing Ms. Benham, we would have to show that that finding was clearly erroneous (which it very well might have been). But the district court did not find that Mr. Christopher's belief was even *a* motivation, let alone the *sole* motivation, for the firing. Rather, *after* finding that Mr. Christopher had a belief that Ms. Benham had violated the Code of Conduct, Chief Judge Young observed that "Mr. Christopher then resolved to take action" and "determined to dismiss her" (*id.*). Rather than say that he did so *because of* (let alone *solely* because of) the violation of the Code of Conduct, however, Chief Judge Young said, in the very next sentence, "it is the reason for that determination that lies at the very heart of this case" (*id.*) – suggesting that the prior findings lead up to, rather than resolve, the question of Mr. Christopher's motivation. And Chief Judge Young did not return to the question of Mr. Christopher's motivation until he made the ultimate

findings that we have quoted, saying *not* that the perceived violation was his motivation, but that Mr. Christopher fired Ms. Benham "to make an example of her, to demonstrate his power as president of the Lenox Savings Bank." (JA 110.)

The Bank obviously means to defend the district court's ultimate findings, but it has failed to reach its goal after "an arduous climb," *Sierra Fria Corp.* v. *Donald J. Evans, P.C.*, 127 F.3d 175, 182 (1st Cir. 1997). Whether or not Mr. Christopher was driven to fire Jackie Benham by more than one motive, it simply defies belief, and ignores overwhelming evidence, to think that he *in no way* was motivated to avoid paying Ms. Benham her benefits. If the Bank is right, and the district court's finding that discriminatory intent played *no* role is not clear error, Ms. Benham loses this appeal. But, in light of all the record evidence and all the things that the Bank may wish the district court had found but it did not, we respectfully submit that the ultimate conclusion is *not* clearly erroneous only if the subsidiary facts *are* clearly erroneous. In light of the substantial evidence supporting them, the latter cannot be. As we explained more fully in our opening brief (at 30-37), the district court's ultimate conclusion was "implausible" and "illogical," *Noble* v. *United States*, 231 F.3d 352, 356 (7th Cir. 2000), and unsupported. It was therefore clearly erroneous.

* * * *

To summarize what we have already said, this Court's task on appeal is to review both the entire record and the district court's findings in light of the governing law. In light of the governing law – which says that Ms. Benham prevails as long as the record compels the conclusion that interfering with her pension benefits was *a* motivation for her firing – and in light of the entire record, it is Ms. Benham's position on this appeal that, unless this Court determines that the subsidiary findings of the district court were clearly erroneous, the judgment of the district court should be reversed.

Succinctly summarized, these subsidiary findings are as follows:

- Ms. Benham's ERISA-protected benefits were among the most substantial of any employee at the Bank;
- Mr. Christopher was well aware of Ms. Benham's high cost to the Bank;
- Mr. Christopher made it a particular theme of his regime to cut benefits when problems were brought to his attention;
- Mr. Christopher's attempts to eviscerate the Brick Plan were previously determined to be illegal;
- Mr. Christopher lied under oath at trial on one issue and as Bank president was "somewhat creative with the facts"; and

- Mr. Christopher's treatment of other employees involved in Benham's alleged violation of the Code of Conduct was evidence of disparate treatment.

There is ample — indeed overwhelming — support in the record for each of those findings. In stark contrast, there is a complete lack of any evidentiary support in the record for the ultimate conclusion reached *sua sponte* by the district court that Mr. Christopher's sole motivation was "to make an example of her, to demonstrate his power as president of the Lenox Savings Bank." (JA 110.)

Based on these findings and undisputed facts of record, a fair review of the underlying evidence leads to only one conclusion: a mistake has been made.

IV. The Proper Disposition Is a Remand for Entry of Judgment for Ms. Benham and Calculation of Damages

We argued in the opening brief that where a factual record leads to only one conclusion on liability, a court of appeals should direct a district court to enter judgment on liability and remand only (if necessary) for factfinding on damages. That was what the Fourth Circuit did recently in *Dea* v. *Washington Suburban Sanitary Comm'n*, 2001 WL 672046, at *11, 2001 U.S. App. Lexis 13355 (4th Cir. 2001), and that is what this Court should do here.

That the Bank would dispute the clarity (or not) of the record is to be expected (Bank's Br. 38 n.28). But the Bank goes further, maintaining that "there is nothing in

the law of the First Circuit to support such a request" (*id.* at 37) and that the course we have urged cannot be proper when a case turns on a finding of discriminatory intent (*id.* at 37-38). The Bank seems to be implying that the course that the Fourth Circuit took in *Dea* was so outlandish this Court should reject it out of hand.

Not so. Findings of discriminatory intent are, the Supreme Court has held, findings of fact subject (like any other) to review for clear error. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-88 (1982). And as *Dea* thus made clear, that a case involves findings of discriminatory intent does not except it from standard practice. The rule we have stated – that a clean record leading to only one conclusion on an issue makes a remand on the issue unwarranted – is standard operating procedure, not just in the Fourth Circuit, but in the United States Supreme Court and every federal court of appeals, including this one.

Thus, in *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967), the Court held that "this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." *Id.* at 170. In this Court's formulation, "where only one resolution of a predominantly factbound question would, on a full record, be sustainable, courts of appeals can, and often should, decline to remand where there has been an error

committed." *Williams* v. *Poulos*, 11 F.3d 271, 281 (1st Cir. 1993); see also, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809, 826-27 (1975) (declining to remand "because the outcome is readily apparent"); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 72 F.3d 190, 203 (1st Cir. 1995) (declining to "resort[] to remand" where "the record is sufficiently developed that we can apply the law to the facts before us" (quoting *Lipsett* v. *Blanco*, 975 F.2d 934, 944 (1st Cir. 1992)); *Société des Produits Nestlé, S.A.* v. *Casa Helvetia, Inc.*, 982 F.2d 633, 642 (1st Cir. 1992); *Media Services Group* v. *Bay Cities Communications, Inc.*, 237 F.3d 1326, 1330 (11th Cir. 2001) ("Everything else in the district court's opinion suggests the contrary, and we cannot reconcile the district court's findings with the conclusion"; "remand is unnecessary"); *United States* v. *Hernandez*, 93 F.3d 1493, 1500 (10th Cir. 1996) ("the record permits only one resolution of the issue"); *LaRoche* v. *United States*, 779 F.2d 1372, 1377 (8th Cir. 1986) ("After a thorough review of the entire record * * * we feel that the record supports but one conclusion").

In this case, as in *Dea*, "'a thorough review of the record permits only one resolution.'" 2001 WL 672046, at *11 (quoting *Patterson* v. *Greenwood School Dist.*, 696 F.2d 293, 295-96 (4th Cir. 1982)). Because the facts in this case "admit of only one plausible legal conclusion," further factfinding on liability would be "wasteful wheel-spinning." *Dantran, Inc.* v. *U.S. Dep't of Labor*, 171 F.3d 58, 75 (1st Cir.

1999). This Court should therefore reverse the judgment and remand with instructions that the district court enter judgment for Ms. Benham on liability and make findings of fact only with respect to Ms. Benham's damages.

CONCLUSION

The judgment of the district court should be reversed, and the district court should be ordered to enter judgment on liability in favor of Ms. Benham and resolve only the still-undecided question of her damages.

Dated: December 26, 2001

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2001, I caused copies of the foregoing Reply Brief for the Appellant to be served by overnight delivery service on the following counsel at the addresses and numbers stated:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for the Appellant complies with the type-volume limitations of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)(ii) and contains 6404 words, calculated by the WordPerfect 10 word processing system used to prepare the brief, exclusive of the cover; the table of contents; the table of authorities; the certificate of service; and this certificate of compliance.

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