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

BRIEF FOR THE APPELLANT

Daniel Solin (Bar No. 67649)
66 West Street
Pittsfield, Massachusetts 01201
(413) 443-7800

Roy T. Englert, Jr. (Bar No. 79535)
Arnon D. Siegel (Bar No. 79536)
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

Counsel for Plaintiff - Appellant

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to First Circuit Rule 34(a), appellant Jacqueline Benham respectfully requests that the Court schedule this appeal for oral argument. Ms. Benham contends in this appeal that the district court's basic findings of fact are fully supported by the record, but that the district court's ultimate conclusion – which it announced *sua sponte*, and which was never advanced, indeed was disavowed, by appellee – completely lacks support in the record. The appeal, in sum, turns on a searching examination of the record. Because the record is so extensive, oral argument will give the Court an opportunity to question counsel in detail.

INTRODUCTION

This is an unusual appeal. After Jackie Benham was fired, she sued for unlawful discrimination; the district court held a bench trial and entered judgment against her. In this appeal, we ask that the judgment be reversed, but we *agree* that the vast majority of the district court's findings of fact are absolutely *correct* – not least the court's finding that the reason advanced for Ms. Benham's firing was pretextual. What we take issue with is the district court's ultimate conclusion, that the Lenox Savings Bank did not violate ERISA because it fired Ms. Benham for a nondiscriminatory reason other than the pretextual one it gave. It is *that* conclusion, we contend – resting on a theory introduced by the district court itself, never the subject of proof by the parties, and emphatically disavowed by the Bank – that is unsupported and insupportable. The district court's *correct* findings point to but one conclusion: that Ms. Benham was fired in violation of ERISA. The judgment should therefore be reversed.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e), (f) & 1140 over this action by Jacqueline Benham, a participant in employee benefit plans, against the Lenox Savings Bank, for unlawfully discharging her for exercising rights to which she was entitled under those plans and with the purpose of interfering with her attainment of her pension rights. On June 22, 2001, the

district court entered final judgment disposing of Ms. Benham's claims. Ms. Benham timely filed a notice of appeal on June 28, 2001. This Court has jurisdiction over the appeal from the final judgment of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The district court in this case correctly found that Jackie Benham easily made out a *prima facie* case of unlawful discrimination by the Lenox Savings Bank in violation of Section 510 of ERISA, 29 U.S.C. § 1140. It correctly found ample facts pointing to unlawful discrimination. And it correctly found that the Bank's proffered explanation for firing Ms. Benham was a pretext. The issue presented is whether the district court's ultimate conclusion – that the Bank nonetheless did not discriminate against Ms. Benham because it fired her for a different nondiscriminatory reason, one never advanced by the Bank itself, unsupported by any subsidiary findings, and insupportable on the record – was clearly erroneous.

STATEMENT OF THE CASE

Section 510 of the Employee Retirement Income Security Act of 1974 makes it "unlawful for any person to discharge * * * a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan * * * or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.

On January 15, 1998, Jacqueline Benham sued the Lenox Savings Bank for violating ERISA § 510 and other, related provisions of the statute. Judge Michael Ponsor denied Ms. Benham's motion for partial summary judgment on three claims, 26 F. Supp. 2d 231 (D. Mass. 1998), and denied the Bank's motion for summary judgment on Ms. Benham's Section 510 claim for unlawful discharge (while granting the Bank's motion with respect to the other claims), 118 F. Supp. 2d 132 (D. Mass. 2000) (JA 33-77). Chief Judge William Young held a bench trial on May 30 and 31, and June 1, 11, 12, and 21, 2001. He issued findings of fact and conclusions of law from the bench on June 21, and on June 22 entered final judgment for the Bank. On June 28, Ms. Benham timely filed a notice of appeal.

STATEMENT OF FACTS

A. Jackie Benham and the Lenox Savings Bank

Until the Lenox Savings Bank fired her summarily on October 15, 1997, Jackie Benham had worked there for her entire career. The Lenox Savings Bank is a small town community bank located in the Berkshires, in western Massachusetts. In 1997, the Bank had two branch offices, roughly $75 million in assets, and 28 employees, most of whom had worked there for many years and were long-time Lenox residents. (JA 150.) Ms. Benham, now 58, has lived in Lenox all her life. She started working at the Bank in 1961, in various capacities both part and full time, and from 1976

worked continuously until she was fired. (JA 97.) From May 1991, Ms. Benham was the Senior Vice President of the Bank, responsible for overseeing collections, managing the Bank's properties, and managing the Bank's loan department. At the time the Bank fired her, Ms. Benham was the third-senior-ranking officer and the Bank's second-longest-serving employee. (JA 140.)

B. Ms. Benham's Substantial Retirement Benefits

Full-time employees of the Bank, including Ms. Benham, were entitled to participate in various retirement plans, and Ms. Benham availed herself of the opportunities. Given her substantial length of service and seniority, Ms. Benham's overall benefits far exceeded those of any other Bank employee.

Among Ms. Benham's ERISA benefits was a tax-deferred retirement account, which she established in 1994. Under the Bank's 401(k) plan, the Bank matched contributions into Ms. Benham's 401(k) account up to 3% of her salary. (JA 81; 962-84.)

Earlier, in 1978, Ms. Benham enrolled in the Bank's Defined Benefit Pension Plan, administered by the Savings Bank Employees Retirement Association (the "SBERA Plan"). (JA 80.) At the time – before the plan was amended as part of the Bank's benefit-reduction measures, see *infra* at 9-10 – the SBERA plan provided for a life annuity that vested at 65 and would give Ms. Benham 1.75% of her average

compensation per year for service up to twenty-five years and 0.6% of her average annual compensation in excess of $48,756. (JA 81.) In 1995, Ms. Benham's SBERA benefits had a present value (under the original formula) of $200,114. The highest present value of any other employee's benefits was $130,819.

In 1988, Ms. Benham enrolled in a deferred-compensation program administered by Brick and Company (the "Brick Plan"). (JA 80.) Under the Brick Plan, participants were required to stay on as Bank employees for up to five years. (JA 832.) During those five years, a portion of the participant's salary was deferred. The Bank would then pay the participant income for ten years beginning at age 65. If the participant died before reaching 75, payments would go to a named beneficiary. Specifically, Ms. Benham's agreement provided that: (i) the Bank would pay her a total of $273,870, in monthly installments of $2,282.25, for ten years starting at age 65; (ii) Ms. Benham would stay in the Bank's employ for five years; (iii) Ms. Benham's benefits would vest monthly over those five years; and (iv) once she had served five consecutive years as a Bank officer, her benefits would vest fully. (JA 822.) Ms. Benham thereafter deferred $3000 of income for each of the five years required by the Brick Plan and continued in the Bank's employ long after her benefits vested. (JA 143.)

C. Michael Christopher and the Plans to Cut ERISA Benefits

In February 1993, Michael Christopher, who was recruited from a bank outside Lenox, became the Bank's President. (JA 81.) In addition to a fixed salary, Mr. Christopher was paid a variable bonus, determined by a formula that Mr. Christopher himself devised shortly after arriving at the Bank. Mr. Christopher's bonus depended directly on the Bank's profits: as the net income of the Bank increased, so did Mr. Christopher's bonus. (JA 525-30.) As Mr. Christopher conceded at trial, that the size of his bonus depended on profits gave him an obvious incentive to increase net income. (JA 538.)

In order to grow net income, the Bank, like any institution, could increase gross income, lower expenses, or do both. Mr. Christopher focused on lowering expenses (JA 530-33) – or, as he put it at trial, "[c]ontrolling costs motivated me" (JA 537).

Foremost among the costs that Mr. Christopher thought needed controlling were the costs of the Bank's employee benefits. (JA 155-61; 536-37; 916.) Mr. Christopher regularly reviewed "Call Reports," which compared various expenses of the Bank to those of other banks in Berkshire County and throughout Massachusetts. (JA 153-56.) As Ms. Benham testified, Mr. Christopher "said that he was very disturbed with the fact that our personnel costs and employee benefits seemed to be much higher than many of the other Banks in Berkshire County." (JA 156-58.) Expressing those views

"many times," Mr. Christopher said that "he was concerned at the high rate of the personnel expense costs for Lenox Savings Bank" and that he thought the personnel expenses of the Bank were "much too high" in comparison with other banks. Mr. Christopher said that "we had to do something in order to get these costs down, get these costs reduced. They were * * * affecting the Bank's profitability." (JA 160.) Mr. Christopher stressed as much in a letter he sent to the Bank's employees, writing that the SBERA plan "was becoming prohibitive and was having considerable consequences to the earnings of the Bank." (JA 557.)

Mr. Christopher carefully tracked the costs of employee benefits. He instituted the practice of sending employees "Anniversary Statements," which detailed exactly how much an employee's benefits were costing the Bank. He did so, he said, because "he wanted the employees to be aware of exactly how much compensation the Bank was paying them, and of all the benefits that they were receiving." (JA 168-69.) Mr. Christopher paid particular attention to comparative costs. He had a chart prepared that listed the costs of each individual employee's benefits. (JA 863-65.) The chart showed that, with respect to the cost of benefits, Ms. Benham was by far the most expensive employee on the payroll. The Bank even prepared a chart dealing solely with Ms. Benham. The chart showed that her Brick Plan benefits alone, if left untouched, would total $135,223.32. (JA 997-98.)

D. Mr. Christopher's Implementation of His Plans to Cut ERISA Benefits

Having expressed concerns over the costs of employee benefits, Mr. Christopher proceeded to cut them.

1. The Unlawful Reduction of Brick Plan Benefits

About a year after becoming President in 1993, Mr. Christopher decided that the Brick Plan, though in place since 1986, had not been properly adopted at the outset. (JA 545.) Mr. Christopher's motivation was simple. He was asked at trial, "What was it that triggered * * * your effort to reduce Brick Plan exposure to the Bank?" Mr. Christopher answered: "I was informed by our auditors that the Brick Plan was underfunded to a level of approximately $200,000 that would have to be taken out of the Bank's 1993 income." That, he readily acknowledged, "caused [him] to take a harder look at the Brick Plan." (JA 537.)

Mr. Christopher told the Brick Plan participants, as well as the Bank's Board of Trustees, that the Brick Plan was "void." He proposed a replacement. (JA 1565-69.) Former Executive Vice President Wayne Lemanski (a Brick Plan participant who had left the Bank's employ in 1991) rejected the proposal. In May 1994, Mr. Lemanski sued the Bank to enforce his benefits under the plan. Mr. Christopher then warned participants that the federal court considering Mr. Lemanski's lawsuit might hold all

the Brick Plan agreements unenforceable. As an alternative to the loss of all benefits, Mr. Christopher offered the other participants 70% of their benefits in return for acknowledging in writing that the Brick Plan was "void and without effect." (JA 541.) In July 1995, Ms. Benham – who reported directly to Mr. Christopher, and was the only still-serving Bank employee who was a member of the Brick Plan – agreed to the reduction in her benefits. (JA 993; 167-68.)

As it turned out, the federal court considering Mr. Lemanski's lawsuit did not rule the Brick Plan unenforceable, as Mr. Christopher had predicted. Just the opposite: the court held – contrary to Mr. Christopher's position that it was "void" – that the Brick Plan had, in fact, been properly adopted by the Bank's Board of Trustees. *Lemanski* v. *Lenox Savings Bank*, 1996 WL 253315, 1996 U.S. Dist. Lexis 6465 (D. Mass. 1996). The court further held that the Bank's repudiation of the Plan violated ERISA. In the meantime, because of her waiver of rights, Ms. Benham's Brick Plan benefits were nonetheless reduced by 30%.

2. The Reduction in SBERA Plan Benefits and the Increase in Mr. Christopher's Benefits

Mr. Christopher's efforts to cut employee benefits did not stop with his attempt to repudiate the Brick Plan. In 1996, Mr. Christopher commissioned an analysis of the SBERA Plan. According to the analysis, (i) the Bank had the most generous plan of

the roughly 100 banks in the SBERA system (JA 555); (ii) Ms. Benham had the highest present value benefit owed, exceeding the next-closest employees (in dollar terms) by a significant amount (JA 558-59; 865; 932-33); and (iii) the SBERA Plan did not provide Mr. Christopher and John Rys, the Bank's Treasurer and second-ranking officer, with retirement benefits comparable to those of presidents and treasurers at similarly sized banks (JA 866-71; 1572-75).

After receiving the study, Mr. Christopher caused amendments to be made to the SBERA Plan. The Bank reduced its contribution to employee SBERA plans, including Ms. Benham's, from 1.75% to 1.25% of an employee's average annual compensation on the date of his or her retirement. (JA 561; 866-71; 1572-75.) The lump-sum value of Ms. Benham's SBERA benefits at age sixty-five under the pre-amendment (1.75%) formula was about $545,520; under the post-amendment (1.25%) formula, it was $493,134. (JA 1050-51.) On October 15, 1997, when Ms. Benham was fired, the lump-sum value of her SBERA benefits was considerably less, $265,426. (JA 1040.)

At the same time that it reduced contributions to the SBERA Plan, the Bank adopted a new Supplemental Employee Retirement Plan ("SERPs"). (JA 871-915.) As originally analyzed by the Bank's consultant, SERPs would have covered Mr. Christopher, Mr. Rys, and Ms. Benham. (JA 845-61.) Ultimately, however, Ms. Benham was excluded from SERPs and only Mr. Christopher and Mr. Rys

participated. (JA 872-915.) SERPs increased Mr. Christopher's retirement benefits to 65%, and Mr. Rys's to 60%, of their final average compensation. In reducing contributions to the SBERA plan, the Bank claimed to have saved approximately $1,500,000. With the sweetened pension packages given to Mr. Christopher and Mr. Rys through SERPs, however, the Bank's savings were about $767,000. (JA 564-69; 866-71; 1572-75.)

3. The Elimination of Post-Retirement Benefits

Another of Mr. Christopher's ERISA targets was the Bank's provision of post-retirement benefits to certain eligible employees. If an employee reached age 60 and had 15 years of continuous service, the Bank paid for post-retirement health, dental, and life insurance. (JA 935-39.) Mr. Christopher consulted with the Bank's accountants and decided that these benefits "would escalate to a tremendous cost." (JA 578.) In 1996, the benefits were eliminated. At the time she was fired, Ms. Benham was 57, had worked for the Bank without interruption for 21 years, and had worked for the Bank 36 years altogether.

E. Ms. Benham's Positive Performance Evaluations

In 1993, when Mr. Christopher became president of the Bank, Ms. Benham's evaluations showed a high level of job performance. In her first evaluation by Mr. Christopher, that June, Mr. Christopher ranked Ms. Benham "outstanding" or

"above acceptable standards" in twenty-three of twenty-five categories. The positive evaluations continued through 1996, with Ms. Benham receiving "above acceptable standards" in eighteen categories in 1994, fifteen categories in 1995, and eighteen categories in 1996. In 1997, Ms. Benham received "above acceptable standards" in only two of thirteen categories. Still, during her entire tenure with the Bank, even including the time when she was evaluated by Mr. Christopher, Ms. Benham never received an evaluation of less than "meets acceptable standards." (JA 942-61.)

F. The Proffered Reasons for Ms. Benham's Firing

1. The Bank's Recanted Justifications

Until the trial in this case, the Bank maintained that it had fired Ms. Benham for four reasons: (i) she had participated in allegedly preferential loans to members of her family, which according to the Bank violated its Code of Conduct; (ii) she had supposedly failed to cooperate and comply with an outside audit; (iii) she had allegedly failed to implement recommendations by a credit consultant retained by the Bank; and (iv) she was supposedly no longer performing her job up to par. See *Benham*, 118 F. Supp. 2d at 144-49 (JA 63-74). At trial, however, the Bank expressly disavowed the three latter justifications for firing her, indeed offering no evidence on those issues at all. Mr. Christopher was unequivocal: Ms. Benham's participation in the loans was not simply "one of the reasons" but "*the* reason" for firing her (emphasis

added). "[A]bsent that reason * * * [he] would not have discharged her." (JA 539.) The Bank's trial counsel made the same point. (JA 135-36.)

2. The Supposed Violations of the Code of Conduct

In 1996, the Bank adopted a Code of Conduct. The Code of Conduct required employees to avoid conflicts of interest, or the appearance of conflicts, in processing loans that would benefit an employee or his or her family. The Code of Conduct also stated that the Bank would not give employees preferential treatment.*

The Code of Conduct did not, however, prohibit loans to employees or their family members or friends so long as they qualified. In fact, such loans were by no means uncommon: Mr. Christopher, Janine Maschino (Vice President of Technology Operations), and Marjorie Pero (Assistant Vice President and Consumer Loan Officer)

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* The Code of Conduct provided (JA 1168, 1171):

> Each Lenox Saving Bank employee must avoid any conflict of interest that might result in personal benefit to the employee or members of the employee's family. Similarly, any appearance of such conflict of interest should be avoided.* * * Lenox Savings Bank will not grant special credit terms or other preferred treatment to its employees or trustees or to any companies they control. Any loans or other extension of credit will be made in full compliance with applicable federal and state rules and regulations and on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with persons not associated directly or indirectly with Lenox Savings Bank.

all had either taken out loans themselves or had family members who had taken out loans. (JA 185-87.)

In firing her, the Bank insisted that Ms. Benham had acted inappropriately in connection with three applications for loans to her daughter, Paula Czop, and her son-in-law, Joseph Czop: a mortgage, which was approved; a home equity loan, which was approved; and a personal loan, which had not been acted on when Ms. Benham was fired.

(a) <u>The Czop Mortgage</u>

In December 1996, the Bank instituted a First Time Home Buyer's Program. (JA 208.) To qualify for the program, a borrower had to meet the Bank's existing loan guidelines and be a first-time buyer with at least two years' verifiable income. (JA 1017.) Ms. Benham's daughter and son-in-law decided to apply for a mortgage under the plan.

Under the Code of Conflict, an employee seeking a loan personally or for a family member was required to present the application to another employee for approval. (JA 185-95.) In May 1997, Ms. Benham asked Jackie McNinch, the Bank's loan originator, to process a mortgage application for the Czops. Ms. Benham told Ms. McNinch to have another loan supervisor review the file for approval. (JA 322;

334-45.) Ms. Benham herself had "no involvement" in the processing of the loan. (JA 211-12; 331-47.)

Ms. McNinch brought the completed application to Ms. Maschino for approval. Ms. Maschino, an 18-year veteran of the Bank, knew that Ms. Czop was Ms. Benham's daughter. (JA 385; 1018.) Ms. McNinch had told Ms. Maschino that she could not verify Ms. Czop's income, as required, but was forwarding the application nonetheless; notes in the loan file stated that Ms. Czop's income might not meet the program's guidelines, that Mr. Czop's income did not account for alimony payments, and that he had owned a home with his former wife. (JA 343; 1180.) Ms. Maschino approved the loan. (JA 387.) She later testified that she did not believe that in approving the loan she had violated the Code of Conduct, and did not think Ms. Benham's actions improper either. (JA 390; 402; 409.) Mr. Christopher later testified that he had told Ms. Benham that "I didn't think that applications to family members ought to be filled out in the handwriting of a lender" (JA 673) (as the mortgage application was, by Ms. Benham). The district court, however, found that Mr. Christopher was lying. (JA 19-20 ("I do not credit that testimony. I don't believe that. That's another example of after-the-fact fabrication.").)

(b) The Czop Home Equity Loan

In September 1997, Ms. Benham filled out some basic information for the Czops on an application for a home equity loan. (JA 220.) Ms. Benham gave the application to Marge Pero, who had worked at the Bank for twenty-two years. (JA 429.) Ms. Benham told Ms. Pero that the rest of the information necessary to complete the application was in the file and that Ms. Pero should follow all of the standard procedures. (JA 222.) In considering whether to approve such loans, the Bank, among other things, compared the amount of the loan with the value of the house (the "loan-to-value ratio"). Ms. Benham told Ms. Pero that the loan-to-value ratio for the Czops' loan might not meet Bank guidelines yet, but that Mr. and Mrs. Czop were using the loan money to make improvements on their house, with which the loan-to-value ratio would have met the Bank's guidelines. (JA 220-22; 445-46.) Ms. Benham also suggested that the loan be disbursed in installments as home improvements were completed, a practice that had been followed before. Ms. Pero completed the application and approved it. (JA 222; 443.)

Both the mortgage and the home equity loan to the Czops were ratified by the Bank's Board of Investment (which was responsible for approving loans and ultimately answered to the Board of Trustees), at meetings attended by Mr. Christopher. (JA 215-19.) Members of the Board of Investment knew Ms. Czop and knew that she was

Ms. Benham's daughter; they expressed pleasure that Ms. Czop was buying a home with her husband in Lenox. Several days before the meeting that approved the mortgage, Ms. Benham testified, she discussed it with Mr. Christopher. Mr. Christopher expressed no concerns. (JA 218; 232-33.) Before the meeting that approved the home equity loan, Ms. Benham had shown Mr. Christopher the relevant reports. Mr. Christopher expressed no concerns. In fact, Mr. Christopher said nothing negative to Ms. Benham about either the mortgage or the home equity loan until he fired her. (JA 218; 232-33.)

(c) The Czop Personal Loan Application

On October 14, 1997, the day before she was fired, Ms. Benham met with Mr. Czop to discuss a third loan, which he intended to use to pay creditors. (JA 225-26.) Ms. Benham put Mr. Czop's name and address on the application. (JA 226.) Normally, a loan application could not be approved unless it was signed or indicated that the applicant had authorized his signature. (JA 227.) Neither was true for Mr. Czop's third application. (JA 227; 1552.) It was also normal practice for a loan application to contain credit information. (JA 231.) This one did not. (JA 1552.) In any event, Ms. Benham initialed the upper left-hand corner of the application and put it on the desk of the staff person who prepared loan documentation, so that the documentation would be in place the next day if the loan was approved. (JA 228-29; 1552.)

G. The Firing of Ms. Benham

In early October 1997, Mr. Rys, the Treasurer, told Mr. Christopher that he should take a look at the mortgage and home equity loans to the Czops. (JA 670-71.) Mr. Christopher reviewed the loans and spoke to Ms. McNinch, Ms. Maschino, and Ms. Pero concerning their participation. (JA 675-76.) Mr. Christopher did not communicate at all with Ms. Benham. On October 14, Ms. Pero told Mr. Christopher that Ms. Benham was "putting on another loan to Joseph Czop." (JA 681.)

On the morning of October 15, Mr. Christopher called Ms. Benham into his office. He read to her from a prepared script. When Ms. Benham tried to speak, Mr. Christopher put up his hand and refused to let her talk. After he finished reading from his script, he fired her. (JA 999-1000.)

On October 20, Mr. Christopher submitted a letter to the Bank's Board of Trustees. In his letter, Mr. Christopher offered four reasons for the firing: because of Ms. Benham's participation in the loans to the Czops; because she had failed to cooperate and comply with an outside audit; because she had failed to implement recommendations from a credit consultant; and because her performance had been declining. (JA 999-1000.) Mr. Christopher later confessed that the latter three "reasons" were false. (JA 690-91.)

H. Mr. Christopher's Post-Firing Coercive Behavior and Disparate Treatment

Although three other Bank employees (Ms. McNinch, Ms. Maschino, and Ms. Pero) were involved in processing the Czops' loan applications, none suffered adverse consequences. Ms. McNinch was promoted, to Vice President of Consumer Lending, after admitting that she had included unverifiable income on the Czops' mortgage application. (JA 355-58; 1003-09.) Ms. Maschino received a bonus and a raise, after approving the mortgage without having reviewed the file, and after ignoring Ms. McNinch's concerns. (JA 413; 1020-23.) Ms. Pero received a bonus and a raise after approving the home equity loan without having reviewed the file and despite her own concerns about the loan-to-value ratio. (JA 1027-37.) None of the three was reprimanded, put on probation, or – as Ms. Benham was – fired.

On October 29, Mr. Christopher received a demand letter from Ms. Benham's attorney. He then prepared what the district court called "CYA" memoranda (JA 1016), dated November 10, 1997, in which he reconstructed the events relating to Ms. Benham's firing. Mr. Christopher presented the memoranda to Ms. McNinch, Ms. Maschino, and Ms. Pero. He demanded that Ms. Maschino and Ms. Pero sign the memoranda, which they did with only minor changes. (JA 691-98; 1001; 1017-18;

1024-25.) Mr. Christopher initially placed the memoranda in their personnel files; he removed the letters from the files later, after they balked. (JA 695-96.)

I. Ms. Benham's Lawsuit and the District Court's Decision

On January 15, 1998, Ms. Benham filed a complaint alleging violations of ERISA § 510 (as well as other claims, later dismissed). On June 21, 2001, the district court issued its findings of fact and conclusions of law. (JA 95-111.)

The Bank had earlier conceded, and the district court held, that Ms. Benham had easily made out a *prima facie* case that her firing violated ERISA. See *Benham*, 118 F. Supp. 2d at 143-44 (JA 58-59). That left the question whether the Bank's facially nondiscriminatory explanation for why it fired her – that she had violated the Code of Conduct in connection with the loans to the Czops – was pretextual. See *id.* at 144 (JA 59).

The district court found that "in terms of her actual discharge of her job, apart from the * * * three instances involving family members, [Ms. Benham] performed in a commendable fashion, her performance being more than adequate. * * * She was and but for this instance remained a valued employee." (JA 100.) Turning to the loans, the court determined that Ms. Benham "seems not to have appreciated" that her subordinates might have been influenced ultimately to approve the third loan when they saw Ms. Benham's initials in the corner of the application; nonetheless, the court

found, with respect to the application – with respect to all three loan applications – "she acted in good faith." (JA 103.) Loans to family members were "to be expected." (JA 99.) In fact, for qualified applicants "it would be encouraged that the bank would do business with people that it knew and their relatives and the friends of those relatives." (JA 99.) The court found that "Ms. Benham's conduct was, at that time, consonant with the way she understood it was appropriate to behave," that "she thought she was acting as a bank officer ought act consonant with the Code of Conduct." (JA 102.) As for Mr. Christopher's testimony that he had told Ms. Benham not to fill out loan applications for family members, the court said, "I don't believe that. That's another example of after-the-fact fabrication." (JA 102.)

Once Mr. Christopher was told about the two completed loans, he "checked [them] out" and "believed that they were preferential." (JA 105.) On learning of the third application, according to the district court, "Mr. Christopher resolved to take action." (JA 105.) Specifically, "[h]e made this resolution without consulting Ms. Benham," who had "no idea it was coming." Without investigating, and without asking Ms. Benham any questions, "[h]e determined to dismiss her." (JA 105-06.) After having summarily fired her, the district court found, Mr. Christopher wrote a memorandum to the Board of Trustees that included makeweight, "CYA" justifications for the firing, such as Ms. Benham's allegedly declining job performance and supposed

failure to cooperate with outside consultants. (JA 106.) And once Mr. Christopher heard from Ms. Benham's lawyer, he "paper[ed] the file," forcing his subordinates to sign memoranda, to be placed in their personnel files, that offered only his version of the facts and reflected "no independent investigation" or "third-party review of what actually happened." (JA 107.) The court continued: "having gotten where he wanted to go, which was the dismissal of Ms. Benham," the memoranda were removed from the files; Ms. McNinch, Ms. Maschino, and Ms. Pero were given raises; and "life went on as before." (JA 107.)

That, according to the district court, left the "key issue." "Why at the time he fired her did he do so?" (JA 109.) With respect to Mr. Christopher's motives, the court found that "he continually sought to bring the [Bank's] benefits plans more in line with what he believed was the average benefits to be paid by a bank of this size and with the Lenox Savings Bank's profitability structure." (JA 98.) Indeed, the court found that it was a "particular theme" of Mr. Christopher's management "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 100-01.) And Mr. Christopher was "well aware that Ms. Benham, given her years of service and 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.) As for

Mr. Christopher's credibility, the district court found, he had little: "when in a jam," the Court said drily, Mr. Christopher was "somewhat creative with the facts." (JA 100.)

Despite these findings – and despite the fact that the district court had earlier said that the evidence supported judgment for Ms. Benham (JA 775-76) – the court concluded by holding that the Bank had not violated ERISA § 510. According to the court, Mr. Christopher "to a certain degree, given his own insecurities in management, had been set up" (by Ms. Pero, "for reasons that I infer were personally invidious," and Mr. Rys, for reasons of "office politics"). And while Mr. Christopher had been "unfair" and "acted in a way that [was] less than professional," the court held, he "did not so act not trying to deprive [Ms. Benham] 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.) As a result, the district court held, the Bank had not violated ERISA.

SUMMARY OF ARGUMENT

The district court's subsidiary findings of fact in this case are correct – but its ultimate conclusion is clearly wrong. The critical issue at trial was whether the reason the Bank gave for having fired Ms. Benham was pretextual. Having disclaimed the other three reasons it had once proferred, the Bank introduced evidence in support only

of its argument that it had fired Ms. Benham because she had supposedly violated the Bank's Code of Conduct in connection with the three loan applications on behalf of the Czops. The district court, however, found otherwise. The court found that that reason was a pretext. The court found that Ms. Benham had acted in good faith. The court found that Mr. Christopher was obsessed with cutting ERISA benefits and had done so before. The court found that after he fired Ms. Benham, then heard from her lawyer, Mr. Christopher had concocted false explanations for the firing. The court found that the three other employees involved in what the Bank insisted were violations of the Code of Conduct were not fired, as Ms. Benham was, but instead given raises and promoted. The court found that Mr. Christopher's testimony at trial was mainly unworthy of belief. Yet despite those findings, and despite Mr. Christopher's demonstrated obsession with benefits in general and Ms. Benham's benefits in particular, the court ultimately concluded that Mr. Christopher had fired Ms. Benham not to rid the Bank of its most expensive employee but, the court determined, to throw around his professional weight. That conclusion is a *non sequitur* and unsupported by the record. The judgment should therefore be reversed.

ARGUMENT

I. This Court Must Reverse the District Court's Ultimate Conclusion as Clearly Erroneous if the Conclusion Does Not Rationally Follow From the Court's Subsidiary Findings

The legal standards governing this case are straightforward. Federal Rule of Civil Procedure 52(a) requires that a judge presiding over a bench trial "find the facts specifically and state separately [his or her] conclusions of law thereon." Conclusions of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *E.g.*, *Saint-Gobain Indus. Ceramics Inc. v. Wellons, Inc.*, 246 F.3d 64, 73 (1st Cir. 2001); see also, *e.g.*, *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) ("Ordinarily, we review the district court's factual findings only for clear error. But when it seems plain that the court arrived at those findings on the basis of faulty logic, such deference is inappropriate.") (reviewing application of sentencing guidelines). A court's findings, moreover, must "permit a clear understanding of the grounds for the decision below." *United States* v. *Davis*, 261 F.3d 1, 31 (1st Cir. 2001); accord, *e.g.*, *Chicago Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314 (11th Cir. 2001); see also 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

§ 2571, at 479-80 (2d ed. 1995) ("Finally, and possibly most important, the requirement that findings of fact be made is intended to evoke care on the part of the trial judge in ascertaining the facts."). That means that "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion * * * can rationally be predicated." *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, 420 (1943) (per curiam); see, *e.g.*, *In re Fordu*, 201 F.3d 693, 710 (6th Cir. 1999). And "[a]n ultimate conclusion not only unsupported by, but contradictory to, the subsidiary facts cannot stand." *Naumkeag Theatres Co.* v. *New England Theatres, Inc.*, 345 F.2d 910, 913 (1st Cir. 1965).

The district court here found numerous specific facts that support only one ultimate conclusion. Yet, instead of deciding that Mr. Christopher fired Ms. Benham to save the Bank money and thus violated ERISA, the district court ultimately held that the Bank had not violated ERISA because Mr. Christopher fired her to show people he was boss. As we explain, we agree that the district court's relevant findings of fact are correct. As we also explain, however, the court's ultimate conclusion was not "rationally * * * predicated" on those correct findings. *Kelley*, 319 U.S. at 420. The only conclusion that could have followed from the correct findings was the conclusion that the Bank violated ERISA.

II. The District Court's Conclusion That the Bank Did Not Violate ERISA Does Not Rationally Follow From Its Correct Findings of Fact

In ultimately concluding that the Bank did not violate ERISA § 510 when it fired Ms. Benham, the district court committed clear error.

In committing clear error, we emphasize, the district court made certain mistakes of fact, not of law. As the district court correctly held, Section 510 prohibits (among other things) firing someone with the intent to avoid having to pay her pension benefits. 29 U.S.C. § 1140; *Barbour* v. *Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1996); *Benham* v. *Lenox Savings Bank*, 118 F. Supp. 2d at 141. See generally *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543, 545 (11th Cir. 1993) ("Congress did not intend to leave employees unprotected once their rights were vested"; ERISA "prohibits the employer from discharging an employee for the purpose of preventing the employee from receiving additional vested benefits") (citing numerous cases); *Conkwright* v. *Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991). All of this is uncontroversial, but of great practical importance because ERISA § 510 is the exclusive remedy for someone in Ms. Benham's situation. State-law causes of action for wrongful discharge are preempted. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138-40 (1990); *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586 (1st Cir. 1989).

The district court rightly understood, moreover, that employees typically lack any direct, "smoking gun" evidence of unlawful intent; they are thus entitled to prove their Section 510 cases circumstantially, under the burden-shifting approach used in cases under other antidiscrimination laws. See *Barbour*, 63 F.3d at 37-38 (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)); *Salus* v. *GTE Directories Serv. Corp.*, 104 F.3d 131, 135 (7th Cir. 1997); *Benham*, 118 F. Supp. 2d at 141. Under that approach, a Section 510 plaintiff makes out a *prima facie* case by showing that she was entitled to protection under ERISA; that she was qualified for the job she held; and that she was fired "under circumstances that give rise to an inference of discrimination." *Barbour*, 63 F.3d at 38 (noting that a plaintiff's burden of proof in making a *prima facie* case is *de minimis*); see *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000). Once a plaintiff meets her burden, the employer must produce a valid, nondiscriminatory reason for the adverse employment action. *Id.* at 142; *Barbour*, 63 F.3d at 38; *Benham*, 118 F. Supp. 2d at 141. If the employer does so, a plaintiff bears the burden of proving that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves*, 530 U.S. at 143 (internal quotation marks omitted); see *Benham*, 118 F. Supp. 2d at 142.

Finally, the district court correctly held that the burden-shifting framework is designed to illuminate the "ultimate inquiry" under ERISA § 510: whether an employer took adverse action "with the specific intent of interfering with [an] employee's ERISA benefits." *Benham*, 118 F. Supp. 2d at 141; see *Barbour*, 63 F.3d at 37. Critically, however, a Section 510 plaintiff need prove that the necessary specific intent was only "*a*" – not "the" – "motivating factor" behind the adverse employment action. *Barbour*, 63 F.3d at 38; *Benham*, 118 F. Supp. 2d at 141. This means, as one court of appeals put it, that "the plaintiff need *not* show that the employer's *sole* purpose was to interfere with the plaintiff's entitlement to benefits." *Walsh* v. *United Parcel Serv.*, 201 F.3d 718, 729 (6th Cir. 2000) (internal quotation marks omitted; emphases added); accord *Garratt* v. *Walker*, 164 F.3d 1249, 1256 (10th Cir. 1998) (en banc) (citing numerous cases); *Seaman*, 985 F.2d at 546; *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (holding that a Section 510 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).

This also means, of course, 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. Cf. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 247 (1989) (plurality opinion) ("[w]here a decision was the product of

a mixture of legitimate and illegitimate motives, * * * it simply makes no sense to ask whether the legitimate reason was '*the* "true reason'"); *id*. at 284 (Kennedy, J., dissenting) ("No one contends * * * that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation * * * sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision."). To sustain Chief Judge Young's ultimate conclusion in this case, therefore, it is necessary – but *not* sufficient – for this Court to find support in the record for the proposition that office politics and/or a desire to show who was boss motivated Mr. Christopher to fire Ms. Benham; and it is *also* necessary to find support in the record for the proposition that such "legitimate" (or at least not statutorily forbidden) motivations operated *to the complete exclusion of* any nontrivial consideration of reducing her pension benefits. The record developed below does not support even the first of those conclusions, and it most certainly does not support the second.

* * * *

The district court held here, and the parties do not dispute, that Ms. Benham easily made out a *prima facie* case: the court found that she had vested in several pension plans protected by ERISA; she was superbly qualified for her job; and she was

fired at a time when the Bank was trying to reduce benefits across-the-board, and when Ms. Benham was the most expensive employee on the benefits balance sheet. *Benham*, 118 F. Supp. 2d at 143-44 (JA 58-59). We take no issue with the district court on that score: All those findings are correct.

With Ms. Benham having made out her *prima facie* case and thus having raised a presumption of discrimination, the burden shifted to the Bank to produce evidence of a nondiscriminatory reason for the firing. *Reeves*, 530 U.S. at 142. Although the Bank originally claimed that she was fired for any one of four nondiscriminatory reasons, it recanted with respect to three. It then attempted to prove its sole remaining justification and produced enough evidence to carry its burden. At that point, "the sole remaining issue was discrimination *vel non*," *id.* at 143, and Ms. Benham sought to prove discrimination both through the proof adduced through her *prima facie* case and by showing that the Bank's proffered explanation for firing her was "unworthy of credence," *id.* at 147.

And that is exactly what the district court found – that the Bank's reason for firing Ms. Benham was *false.* The district court found that the Bank fired her for another reason entirely. That finding – that the Bank gave a false reason for firing Ms. Benham – was manifestly correct. What is clearly wrong, however, is the district court's alternative explanation. Instead of firing her because she had supposedly

violated the Code of Conduct, the court found, Mr. Christopher had fired Ms. Benham "to make an example of her, to demonstrate his power as President of the Lenox Savings Bank." (JA 110.)

In contrast to the finding that the Bank did not fire Ms. Benham, as it insisted, for supposed violations of the Code of Conduct – a finding that is correct – the finding of an alternative explanation cannot be sustained.

To begin with, the Bank itself *disavowed* any reason for the firing other than the supposed Code violations. That Mr. Christopher fired Ms. Benham to "make an example of her" and "demonstrate his power" was a reason *never* advanced by the Bank. Indeed, neither party, at any point in the course of the proceedings, ever made such a suggestion. This alternative explanation was, instead, introduced for the first time *by the district court*, just before it announced its judgment. Yet the Supreme Court has said that a factfinder's role in discrimination cases is to "decide which party's explanation of the employer's motivation it believes," which is a role inconsistent with a free-ranging search through the record for creative, undisclosed justifications. *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983); cf. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 541-42 (1993) (Souter, J., dissenting); *Dea*, 2001 WL 672046, at *9 & n.7 (holding that it was clear error to find

that the employer was motivated by a nondiscriminatory justification that the employer "did not argue before the district court" and that the court came up with "on its own").

The district court's alternative explanation was, moreover, unsupported. The district court cited no evidence in support of this finding. As this Court has held, however, an "[a]ppellant is entitled to know the version of facts found by the district court in order to formulate a meaningful appellate position. This court is similarly entitled to know the fact basis on which the district court proceeded." *Thermo Electron Corp.* v. *Schiavone Constr. Co.*, 915 F.2d 770, 773 (1st Cir. 1990); see *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. at 420. The district court's ultimate conclusion here – "unsupported by subsidiary findings or by explication of the court's reasoning with respect to the relevant facts" (*Thermo Electron*, 915 F.2d at 773 (internal quotation omitted)) – was woefully inadequate, not even the sort of modestly detailed finding required by Rule 52(a). See *id.*; *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1228-29 (1st Cir. 1994) ("'conclusory findings' are not enough"); *Atlantic Thermoplastics Co.* v. *Faytex Corp.*, 5 F.3d 1477, 1479 (Fed. Cir. 1993) (findings of fact and ultimate conclusions cannot be "conclusory and sparse"); see also *Commissioner* v. *Duberstein*, 363 U.S. 278, 292 (1959) ("[an] unelaborated finding of ultimate fact here cannot stand as a fulfillment of [Rule 52(a)]").

More important, the finding is also insupportable (which likely explains why it was unsupported). The district court cited no record evidence in support of his finding – and none exists. The district court did suggest that Mr. Christopher was "mak[ing] an example of" Ms. Benham because, "given his own insecurities in management," he had, "to a certain degree," been "set up" by Ms. Pero and Mr. Rys. (JA 110.) Counsel for the Bank, however, emphatically and unequivocally rejected the possibility that there was any kind of "setup." (JA 779-80.) And the district court made no findings of fact concerning Mr. Christopher's psychological makeup and how he reacted to a setup – no doubt because the Bank never introduced any such evidence. Nor is there any evidence in the record concerning any setup by Ms. Pero and Mr. Rys; indeed, the district court conceded that it did not, and could not, know why they told Mr. Christopher that Ms. Benham had supposedly done something improper. (JA 102 ("I'm not in a position to have sufficient evidence to know what motivated Ms. Pero").)

In defense of its finding, the district court offered only the passing comment that "one can infer, as in so many places, there's office politics." (JA 104.) Yet an "inference" that all explanations proffered by both sides were false, and that instead "office politics" explained the abrupt firing of a 36-year employee, simply cannot do. Precisely *because* "so many places" have office politics, allowing such a finding to

stand is equivalent to saying that none of the evidence offered in, or appellate review of, a bench trial matters at all: by seizing on a characteristic of *every* workplace instead of relying on any specific *evidence*, the district court shifted the focus from the trial record to preconceptions about what may cause workplace relationships to sour. And the preconceptions on which the district court relied are not even particularly accurate readings of human nature: rare is the executive so insensitive that he fires a 36-year employee for no more specific reason than "office politics," and rarer still the executive who obsesses about one person's pension benefits and then fires her despite – not because of – that obsession based on "office politics."

And even if there were some support in the record for the district court's theory (which there was not), the court's ultimate conclusion would still be clearly erroneous. An ultimate conclusion is clearly erroneous if, among other things, it is "implausible" or "illogical." *Noble* v. *United States*, 231 F.3d 352, 356 (7th Cir. 2000); see, *e.g.*, *Wileman* v. *Frank*, 979 F.2d 30, 35 (4th Cir. 1992) (same). Here, the district court's conclusion simply makes no sense.

To reach the conclusion that it did, the district court necessarily found not only that Mr. Christopher fired Ms. Benham because he was showing her and the Bank who was boss, but that firing her to save the Bank money played *no part whatsoever* in Mr. Christopher's calculus. See *Barbour*, 63 F.3d at 38 (a plaintiff succeeds under

ERISA § 510 by showing that discriminatory intent was *a* motivating factor behind adverse employment action); *Benham*, 118 F. Supp. 2d at 141; *Walsh* v. *United Parcel Serv.*, 201 F.3d at 729; *Price Waterhouse*, 490 U.S. at 241 (plurality opinion). Yet Mr. Christopher came up with four reasons for firing Ms. Benham, three of which he later admitted were false, only *after* he heard from Ms. Benham's lawyer. Cf. *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (noting that "after-the-fact justifications, provided subsequent to the beginning of legal action," are evidence of pretext). Mr. Christopher's own take-home pay depended directly on lowering costs. And Mr. Christopher knew quite well that Ms. Benham was the most expensive employee on the payroll. Whether or not Mr. Christopher was driven to fire Jackie Benham by several different motives, it beggars belief – and flies in the face of overwhelming evidence – to think that he was *in no way* motivated to avoid paying Ms. Benham her pension benefits.

And the implausibility of the district court's ultimate conclusion is heightened by its finding that the Bank's proffered reason for firing Ms. Benham was false. We recognize that the district court was, under governing law, entitled to find that the real reason for the Bank's conduct was other than the one that the Bank itself advanced. *Thomas* v. *Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999). We also recognize that the district court was not *required*, as a matter of law, to find discriminatory intent

based on its finding that the articulated reason was pretextual. See *Hicks*, 509 U.S. at 506-08. When, however, a finder of fact does determine that an employer's articulated reason for adverse action is a pretext, it takes virtually overwhelming evidence to support a finding that *the* real reason – exclusive of any illegitimate considerations – is a nondiscriminatory one that the employer never articulated. As the Supreme Court said in *Reeves*, "[o]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation." 530 U.S. at 148. That makes sense: An employer that gives a false explanation for conduct that has been challenged as discriminatory is probably dissembling to cover up its discrimination. See *Hicks*, 509 U.S. at 511, 517; 5 LEONARD B. SAND, MODERN FEDERAL JURY INSTRUCTIONS ¶ 87.01, at 87-86 (1999) (Instruction 87-27); cf. *Wright* v. *West*, 505 U.S. 277, 296 (1992) (a jury may infer guilt when a criminal defendant makes a false exculpatory statement).

Here, the record contains overwhelming evidence of a discriminatory reason for Ms. Benham's firing. The record contains little or no evidence to support the district court's conclusion that *the* real reason, which was unstated, was nondiscriminatory. Aside from lacking support in the record, in short, the district court's newly minted explanation was farfetched. It is thus clearly erroneous.

III. The District Court's Correct Findings of Fact Lead to One Logical Conclusion: That the Bank Fired Ms. Benham in Violation of ERISA

The *only* ultimate conclusion that could have followed from the district court's findings was that Mr. Christopher fired Ms. Benham to cut costs. As we have explained, we *agree* that, aside from the district court's own, unsupported explanation for Ms. Benham's firing, its other findings are correct. Those findings are as follows:

- Ms. Benham acted in good faith in connection with the loans to her daughter and son-in-law.
- Ms. Benham was the most expensive employee on the payroll from the standpoint of benefits – something Mr. Christopher knew all too well.
- Mr. Christopher was obsessed with controlling costs at the Bank – and as costs went down, Mr. Christopher's bonus went up.
- When faced with personnel issues, Mr. Christopher typically reacted by cutting benefits.
- Mr. Christopher had previously tried to reduce ERISA benefits, and he made such reductions a centerpiece of his time in office.
- After he fired Ms. Benham – and after he then heard from her lawyer – Mr. Christopher fabricated explanations for the firing.

- Mr. Christopher lied under oath at trial about at least one matter and was, in general, not a credible witness.
- The three other employees involved in what the Bank insisted were violations of the Code of Conduct were not fired, as Ms. Benham was, and instead they were given raises.
- The Bank's one explanation for having fired Ms. Benham – the only explanation that the Bank held on to, after abandoning three others it had once advanced – was false.

Given those findings, it necessarily follows that the Bank fired Ms. Benham – at least in part, which is all that is necessary under undisputed governing law – to avoid paying her benefits. All of the district court's findings – which we maintain, again, are correct – point to that conclusion. Nothing in the record supports the conclusion that the district court ultimately reached. As the Supreme Court has repeatedly stressed, "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing 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); see *Hunt* v. *Cromartie*, 121 S. Ct. 1452, 1458-59 (2001) (rejecting numerous findings of fact under clear error standard); *Dea*, 2001 WL 672046, at *3-*12 (holding virtually every finding of fact clearly erroneous); *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)). Here, ample evidence supports the district court's findings discussed above, all of which support the conclusion that the Bank fired Ms. Benham in violation of ERISA § 510. Conversely, there is *no* evidence supporting the district court's finding that the Bank fired Ms. Benham *solely* for another reason. The former findings are correct; the latter is clearly erroneous.

IV. This Court Should Order the District Court to Enter Judgment in Favor of Ms. Benham

Given that the correct findings could have led to only one conclusion, judgment should have been entered in favor of Ms. Benham on her claim that the Bank violated ERISA § 510. This Court should order the district court to do so, as the Fourth Circuit did on comparable facts in *Dea.* 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: November 5, 2001

Respectfully submitted,

Daniel Solin (Bar No. 67649)
66 West Street
Pittsfield, Massachusetts 01201
(413) 443-7800

Roy T. Englert, Jr. (Bar No. 79535)
Arnon D. Siegel (Bar No. 79536)
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

Counsel for Plaintiff - Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2001, I caused copies of the foregoing Brief for the Appellant to be served by first class mail, postage prepaid, and by fax, on the following counsel at the addresses and numbers stated:

James E. Wallace, Jr.
Renée E. Gargulinski
BOWDITCH & DEWEY
311 Main Street
Worcester, Massachusetts 01608-1551
(508) 926-3439 - phone
(508) 929-3055 - fax

_____
Arnon D. Siegel

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for the Appellant complies with the type-volume limitations of FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)(i) and contains 8993 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 statement concerning oral argument; the certificate of service; and this certificate of compliance.

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Arnon D. Siegel