IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2802

JOHN M. COLLINS,

Plaintiff-Appellant,

v.

ALCO PARKING CORPORATION,

Defendant-Appellee.

APPEAL FROM THE ORDER OF THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA ENTERING JUDGMENT ON THE JURY VERDICT AT CIVIL ACTION NO. 03-1762

BRIEF OF PLAINTIFF-APPELLANT JOHN M. COLLINS

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STATEMENT OF SUBJECT MATTER and APPELLATE JURISDICTION

This case arose under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"). Subject matter jurisdiction vested under 29 U.S.C. § 626(b)-(c) and 28 U.S.C. § 1337. This appeal is from a final order disposing of all parties' claims entered on May 4, 2005. Appellate jurisdiction vests under 28 U.S.C. § 1291. Plaintiff-Appellant timely filed a Notice of Appeal on May 27, 2005.

STATEMENT OF THE CASE

Plaintiff-Appellant John M. "Jack" Collins brought this age discrimination suit against Alco Parking Corporation ("Alco") following his termination at the age of sixty-one after nine years of employment. After the parties took discovery, the District Court denied Alco's motion for summary judgment. The parties held a three day trial in which the jury heard Mr. Collins' evidence that Alco's decisionmaker was biased because of Mr. Collins' age, Defendant's evidence that it discharged Mr. Collins because he overcharged a customer, and Mr. Collins' responses that Alco's story was false, insincere and otherwise a pretext for age discrimination. At the close of the evidence, the District Court denied Alco's motion for judgment as a matter of law.

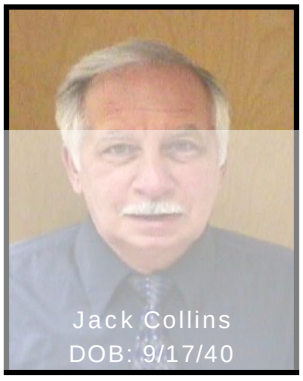
The jury returned a general verdict in Alco's favor. Mr. Collins timely appealed, assigning several of the jury instructions as error.

STATEMENT OF THE ISSUES

I. Whether the District Court abused its discretion by telling the jury that Mr. Collins could recover attorney fees on top of the jury's damages award if he was allowed to win. *Preserved at*: R. 236:5-21.

II. Whether the District Court misstated the law of pretext by telling the jury to ignore evidence that Alco's reason was false and insincere, failing to instruct on the inference of discrimination from shifting, false and insincere reasons, instructing on circumstantial evidence that was not part of the record, and narrowly limiting the jury's ability to draw an inference of discrimination. *Preserved at*: R. 215:24 – 219:12; 143:23 144:11; 445; 460; 461. *See also*, R. 141:5-12.

STATEMENT OF THE FACTS

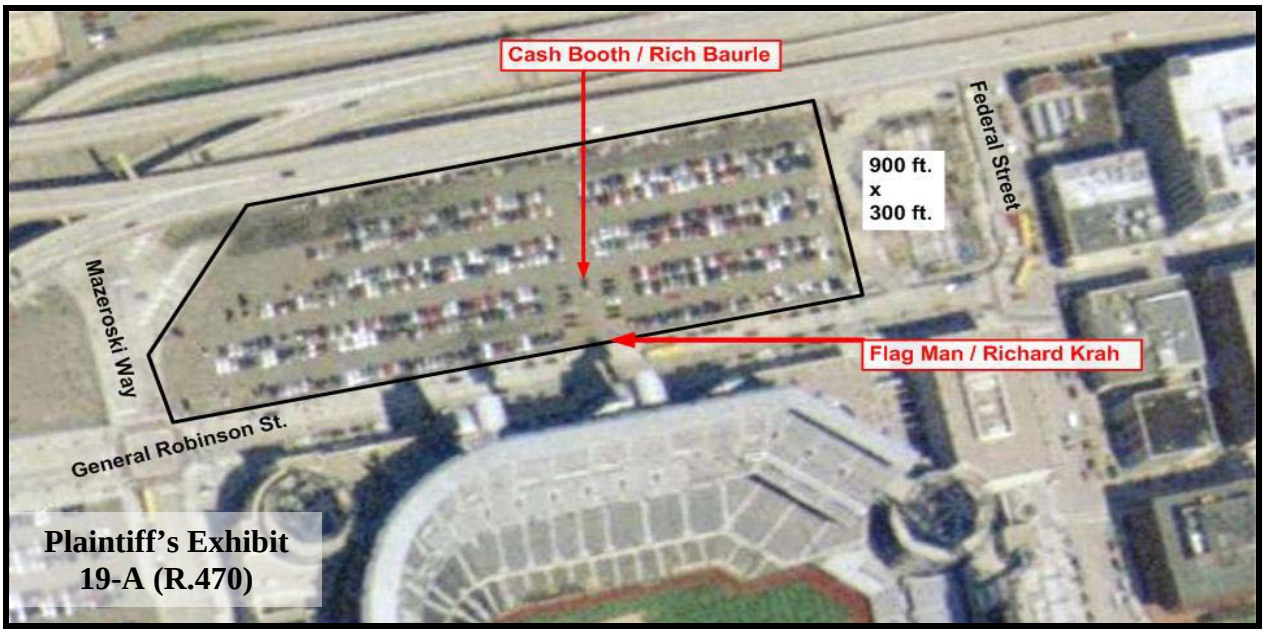


January 27, 2002. The Steelers are warming up to play the Patriots for the AFC Championship and a trip to the Super Bowl. As fans arrive for the game, John "Jack" Collins is managing a large parking lot Alco owns on Pittsburgh's North Side. Working with him are four union lot attendants: Rich Baurle, Rich Krah, Clayton Giles and Don Sesky. (R. 101:23 – 108:9).

Mr. Krah is stationed at the entrance of the lot as the "Flag man." *Id.* His job is to flag customers in from General Robinson Street to park. Mr. Krah is the first Alco employee a customer encounters when entering the lot. (R. 30:2 – 33:8; 101:23 – 108:9).

Mr. Baurle is stationed in a booth 50 feet inside the lot as the "Cash man." (R. 30:2 – 33:8; 101:23 – 108:9). As Cash man, Mr. Baurle collects parking fees, provides receipts, and lets customers through the gate. Mr. Baurle is the second Alco employee a customer encounters when entering the lot. *Id.*

The precise locations of Krah and Baurle are shown in the photograph on the next page.



Both "Flag man" and "Cash man" are union jobs, and managers such as Mr. Collins are not allowed to work them. (R. 93:7-21). After assigning Messrs. Krah and Baurle their stations, Mr. Collins stays inside the lot directing traffic and keeping count of spaces. (R. 101:23 – 108:9). Being inside the lot, Mr. Collins does not encounter customers, if at all, until after they have paid their parking fee and driven by Mr. Krah at the entrance and Mr. Baurle in the cash booth. *Id.*

A fan named John Miller arrives at the lot seeking to park two vehicles. He gives two accounts of what happens when he tries to get in. In his first account (given the morning of January 28, 2002), Mr. Miller speaks to the employee *at the entrance* of the lot. (R. 311-312). In his second (given in a letter dated February 5, 2002), he speaks to the employee *in the parking lot booth.* (R. 313). Mr. Miller

describes the employee as a "white/gray haired man wearing a parking jacket."[1] The employee tells Mr. Miller the lot is full, but ultimately accepts $100.00 to let Mr. Miller and his two cars into the lot.

Mr. Krah at the entrance has a documented history of charging customers more than Alco's standard $20.00 parking fee. (R. 43:15 – 47:17; 305 – 310). On three other occasions, Mr. Krah solicited extra money from other patrons and was disciplined each time. *Id.* He would frequently tell customers he could not ask for extra money, but could accept it if offered. *Id.* Mr. Krah was ultimately terminated for surcharging customers, stealing from Alco and falsifying its accounting records. *Id.*

Mr. Baurle in the cash booth controls the "turn-in sheet" and the gate.[2] (R. 80:5-25). The turn-in sheet Mr. Baurle prepares for January 27, 2002 falsely reports a $20.00 per vehicle charge for all patrons, even though Mr. Miller paid $50.00 per vehicle for admission. (R. 439). At end of the shift, Mr. Baurle gives

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[1] Both Krah and Baurle have gray/white hair and are wearing Alco parking jackets. (R. 105-107)

[2] Cash men such as Mr. Baurle prepare a daily "turn-in" sheet showing the number of patrons who parked in the lot, the price charged to each, and the total receipts collected for the day. These sheets are locked in the cash bag and then delivered to Alco's offices.

Mr. Collins $15.00 to deliver to Clayton Giles, saying the money represented Mr. Giles' share of the day's tips.[3] (R. 108:10 – 109:23).

The Mindset of the Decisionmaker and Alco's Stated Reason for the Termination

Hired in 1993, Mr. Collins had earned two promotions, quickly rising from a part-time attendant to a full-time Lot Manager. (R. 83:12 – 85:3). In nine years, he never required discipline or corrective action. *Id.* In nine years, not a single co-worker or customer ever complained about him. *Id.* Mr. Collins averaged 580 *overtime* hours each year from 1996 through 2001. (R. 96:6-21; 467-68). In the words of one Alco executive, Mr. Collins was "doing a good job [and] was a trusted employee." (R. 195:3)

But when 43-year old decisionmaker Merile Stabile looked at Mr. Collins, he did not see a trusted employee doing a good job. He saw "old Jack," an "unmotivated" man who should "retire and go on Social Security" because, contrary to his record, he "didn't have the will to work hard." (R. 21:14-25; 22:3-24:2; 24:13-25:1; 25:2-10; 70:18-71:16).[4]

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[3] [(($50.00/car x Mr. Miller's 2 cars) – ($20 standard fee/car x 2 cars)) / 4 attendants] = $15.00.

[4] Mr. Stabile explained his use of the term "old Jack" was a sign of affection, and stated he had been referring to his close friends as "old Joe," "old Jane," etc. since the 5th grade. He explained that his beliefs regarding Mr. Collins' "motivation" and "will" were not based on Mr. Collins' actual work record, but merely his own anecdotal perceptions. He also said he suggested retirement and Social Security for Mr. Collins because he was trying to help him think of ways to pay his bills. (R. 200:22 – 203:24; 205-206)

Mr. Stabile knew that every customer who parked in the lot first encountered Flag man Richard Krah at the entrance, and then encountered Cash man Richard Baurle in the cash booth. (R. 30:2 – 33:8; 48:18 – 51:16). But he also knew those men were protected by Teamsters Local 926. (R. 33:6-24). The Teamsters filed a grievance whenever Alco attempted to discipline members like Krah and Baurle. *Id.* Low-level managers like Mr. Collins did not have a union protecting them. *Id.*

When Mr. Collins stopped by Alco's office the next morning, his manager asked him whether he knew anything about the customer's complaint. According to four long-term, front-office employees who testified for Alco at trial, Mr. Collins surprised his manager by "confessing" that he *personally* encountered Mr. Miller, and *personally* overcharged him $30.00 per vehicle for admission into the lot. (R. 159, 191-92, 226, 231, 403).

This "confession" story was the lynchpin of Alco's case. The Corporation cited it as the sole reason why it fired Mr. Collins,[5] and the sole reason why it did not investigate Mr. Krah or Mr. Baurle. (R. 42:12-15; 44:1-5). If the jury did not believe that Mr. Collins confessed, Alco's case collapsed. As defense counsel himself observed in his closing argument: "If [Mr. Collins] didn't admit he did it, nothing makes sense ... ." (R. 275:16 - 276:5) (emphasis added).

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[5] Mr. Collins was the fourth oldest of twenty-nine managers on Alco's payroll. (R. 469) The men who replaced him were 10 years his junior. (R. 339).

Mr. Collins' Proof that Alco's Story was False and Insincere

A. Lack of Opportunity to Commit the Infraction

Mr. Collins denied Alco's accusations regarding the overcharge. (R. 113:7 – 114:5). But more importantly, he affirmatively demonstrated he was not the employee who overcharged the customer. Because of their stations, only Flag man Richard Krah and Cash man Richard Baurle had the opportunity to collect parking fees from customers. Mr. Collins, on the other hand, had none because he was always inside the lot, and never saw a customer until after they paid their fee and passed by Krah and Baurle. This proof that Mr. Collins was not and could not have been the employee who overcharged the customer was *critical* because it cast substantial doubt on Alco's story that Mr. Collins had confessed.

B. Employer Behavior Contradicting Story about a Confession

At least two admissions in the record contradicted Alco's confession story. First, Mr. Collins expressly averred in his Complaint that he was not the employee who overcharged the customer, and specifically identified two union employees as the culprits. (R. 34:12 – 39:6; 320). In its Answer, Alco responded that after reasonable investigation, it did not know who overcharged the customer. (R. 328). Similarly, in its 30(b)(6) deposition, Alco testified that it did not have its "facts straight" until approximately February 5, 2002, a week after it terminated Mr.

Collins' employment. (R. 51:17 – 55:10). Both of these admissions contradicted Alco's story that Mr. Collins confessed.

C. Shifting Reasons and False Testimony Under Oath

Alco also gave shifting reasons for terminating Mr. Collins' employment. Sometimes it said Mr. Collins confessed to soliciting a surcharge and negotiating back and forth with the customer (R. 68:19-23; 316, 336), while other times it said Mr. Collins confessed simply to accepting money offered to him. (R. 68:24 – 69:4; 199:1-3; 207:11-13; 316, 403). This was important proof because Alco knew there was a substantive difference between "soliciting a surcharge" (which the Company prohibited), and accepting a tip (which the Company did not prohibit). (R. 68:24 – 69:4; 338). Similarly, prior to trial, Alco claimed that Mr. Collins "was terminated as a result of willful misconduct." (R. 399). At trial, however, Mr. Stabile testified that he did not believe Mr. Collins acted maliciously. Instead, he attributed Mr. Collins' conduct to "stupidity" and a "lack of thought." (R. 63:11 – 64:1).

In addition to articulating inconsistent reasons, Alco gave false answers under oath about key facts in the case. For example, Alco misidentified Ralph Reetz and Michael Webb as the decisionmakers, when the actual decisionmaker was 43 year-old Merile Stabile, who believed "old Jack" should "retire and go on Social Security." (R. 67:21 – 68:6). Alco also said it had a written policy against

accepting gratuities which it relied on in terminating Mr. Collins' employment. It later admitted both statements were false. (R. 65:8-21; 68:7-18). Finally, when asked whether Alco had *any* policy against employees accepting extra cash from customers, Alco said it did not, even though that was supposedly why Mr. Collins had been fired. (R. 65:22 – 66:23).

Mr. Collins Explains His Theory of Discrimination to the Court

During oral argument on Alco's motion for judgment as a matter of law, the Court and Plaintiff's counsel had a colloquy about Mr. Collins' evidence and whether it could support a reasonable inference of discrimination. (R. 215:22 – 218:22). Because of its relevance to the pretext issue presented by this appeal, Mr. Collins reproduces the colloquy in full:

> THE COURT: If you establish that, well, they got the wrong guy, is that enough to show pretext?
>
> MR. LAMBERTON: It is evidence of pretext if they knew they had the wrong guy and proceeded against the wrong guy anyway . . . . They knew it wasn't [Mr. Collins]. They fired him anyway. It's a link in the chain of inference that the jury is entitled to consider, along with all the other links that we've presented in the case. ***
>
> THE COURT: [] If all you established is they got the wrong guy, is that enough to show their proffered reasons [are] pretext and you get an inference of discrimination?
>
> MR. LAMBERTON: In conjunction – discrimination cases, as the Court knows, are always viewed from the forest view. You don't look at bits and pieces of evidence in isolation.

The Third Circuit has been very clear about that. The leading case is *Aman v. Cort Furniture Rental,* viewing all the evidence in its totality . . . . Proof that they knew it was Krah at the entrance, the flag man, or they knew it was Baurle in the cash booth, neither of whom was Jack Collins, and then proceeded against Mr. Collins anyway is strong inferential evidence of pretext, particularly in light of the statements that Mr. Stabile made about [Mr. Collins].

[H]is first reaction, his first response to "What am I going to do now?' [was] "Retire. Go on Social Security." [And] [d]espite the objective record with all the overtime hours and special events, [Mr. Stabile says Mr. Collins] is "unmotivated," [and] "doesn't take initiative or responsibility."

In conjunction with those types of code words, that type of comment in the termination meeting by the decisionmaker, the slip about "old Jack" at the deposition, certainly they knew that they had the wrong guy. They knew it was Krah. They knew it was Baurle. They couldn't fire them though because the union grieves about everything, so let's get the other old guy who's not unionized. That is very strong evidence of pretext.

Plus, this employer has changed its stories about 10,000 times about why it fired Mr. Collins. "Oh, Mr. Collins accepted more money than we were charging. No. He solicited, he extorted, he stole from us." The story has been changing, your Honor.

THE COURT: Well, the word has changed, but the story hasn't changed.

MR. LAMBERTON: The story has changed. There is a difference, and they pointed out there's a difference, between accepting money from a customer and soliciting a surcharge. [T]here's a difference, and they switched back and forth several times in the case. They [also] hid the decisionmaker.

Their interrogatories are just full of wrong and misleading answers that are discrepant as to what has been testified to at deposition and testified to in this trial.

> Obviously, we know from *Fuentes v. Perskie*, a case in the Third Circuit, [to look for] "inconsistencies, contradictions, weaknesses, implausibilities." Those are the exact words used by the Third Circuit. If I can prove those type of things, and I have proved a plethora of them, then the question of pretext goes to the jury.

Following argument, the District Court denied Alco's motion.

The Jury Instructions

Over Mr. Collins' objection, the District Court instructed the jury to disregard Mr. Collins' proof that he was not the employee who overcharged the customer. (R. 263:12-14). The court instructed that Mr. Collins' innocence *per se* merely proved Alco was "wrong" or "mistaken," not that its explanation was unworthy of belief. (R. 261:24 – 262:2). For Alco's explanation to be unworthy of belief, the Court instructed, it had to be roughly as incredible as a story about Grant Street being hit by a "flash flood" on a rainless day. (R. 261:21-263:6).

The district court rejected Mr. Collins' requests for specific instructions that the jury could infer discrimination if it believed Alco had offered an insincere reason, or shifting reasons, for terminating Mr. Collins' employment. (R. 460-61). In place of these instructions, the court quoted some generic language from *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3rd Cir. 1998). That language failed to cover the subject matter of Mr. Collins' requests, and instead discussed circumstantial evidence that Mr. Collins did not possess and never presented to the jury. (R. 261:8-13).

Without explaining itself, the Court then instructed that if the jury allowed Mr. Collins to win, he had a right to request attorney fees from the court on top of what the jury awarded in damages. (R. 236, 265)

> You are instructed that if [the] plaintiff wins on his claim[s], he may be entitled to an award of attorney fees and costs over and above what you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how much. Therefore, attorney fees and costs should play no part in your calculation of any damages.

Alco had requested a substantially identical instruction in its Proposed Points for Charge.

> You are instructed that, if Mr. Collins prevails on his claims, he may be entitled to an award of attorneys' fees and costs over and above what you award as damages. It is the Court's duty to decide any award of attorneys' fees and costs, and this should play no part in your calculation of any damages.

(R. 536).

The jury deliberated for half a day and returned a general verdict in Alco's favor.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are none.

STATEMENT OF THE STANDARDS OF REVIEW

The Fee Shifting Instruction

Jury instructions are usually reviewed for an abuse of discretion. However, this Court should apply a *de novo* standard because the District Court did not explain its reasons for instructing on fee shifting, and they are not otherwise apparent from the record. *See, e.g., Becker v. Arco Chemical Co.*, 207 F.3d 176, 180-81 (3rd Cir. 2000); *U.S. v. Himelwright*, 42 F.3d 777, 781 (3rd Cir. 1994).

If the Court chooses to review for a misuse of discretion, it must begin by identifying the narrow zone of discretion to charge on fee shifting in a discrimination case. That zone is measured by the degree of relationship between the instruction and the rationale for granting trial courts discretion in charging juries. *See generally, United States v. Criden*, 648 F.2d 814, 817 (3rd Cir. 1981); Ruggero J. Aldisert, Winning On Appeal: Better Briefs and Oral Arguments, § 5.7 at 67-68 (2nd ed. 2003). In a civil rights case, unless the plaintiff has made a prejudicial argument that requires a curative instruction on attorney fees, instructing on fee shifting is not related to the rationale for granting trial courts discretion.[6] Where a fee shifting instruction is not curative, and fosters the impression that the plaintiff will recover a windfall if allowed to win, a district

[6] *See generally, Wolfe v. Gilmore Manufacturing Co.*, 143 F.3d 1122, 1125 (8th Cir. 1998) (district court has discretion to customize charge to case the parties tried); *Brooks v. Cook*, 938 F.2d 1048, 1050 (9th Cir. 1991) (plaintiff's request for nominal damages arguably opened door to fee shifting instruction, but district court still abused its discretion in giving one).

court's discretion to deliver it approaches zero. Because the scope of appellate review is inversely related to the level of discretion conferred on the trial court, this Court's review of the District Court's decision to instruct on fee shifting is effectively plenary.

The Pretext Instruction

The legal accuracy of the District Court's pretext charge is reviewed *de novo*. The question is "whether the [pretext] charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the [pretext issue] . . . to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3rd Cir. 1977). If the instruction "fail[s] to advise, or misadvise[s], a jury of concepts it needs to know to properly discharge its duties," the case must be remanded for a new trial. *Fornicoia v. Haemonetics Corp.*, 2005 U.S. App. LEXIS 9279 at 5 (3rd Cir. 2005) (citations omitted).

SUMMARY OF THE ARGUMENT

The District Court's jury instructions denied Mr. Collins a fair trial. The District Court instructed on fee shifting, an irrelevant and highly inflammatory point of law, and misinstructed on pretext, the most important law in the case. Because the District Court's errors strike at the heart of Mr. Collins' right to an impartial and properly instructed jury, this Court should vacate the jury's verdict and remand for a new trial.

The Fee Shifting Instruction

Psychological research demonstrates that jurors cannot deliberately forget prejudicial information once exposed to it, particularly if they are instructed to do so without an explanation. When instructed to disregard prejudicial information, the information "locks in" to the jury's consciousness, and is all but impossible to ignore.

Largely for these reasons, courts of appeal agree that juries should not be told of irrelevant laws that add to or subtract from the damages award. If such laws are disclosed to the jury, they become "locked in" and can taint the jury's decision on liability and damages. Recognizing this danger, the Ninth Circuit has expressly held that instructing on fee shifting in a civil rights case is reversible error. The Sixth Circuit holds a similar view. No other courts of appeal have considered the issue.

The rationale for not disclosing such laws is easy to understand. Juries determine liability and damages, not the total amount of the judgment. The final judgment often differs from the damages award because of laws that add attorney fees, treble damages, cap damages or reduce damages in proportion to comparative fault. The legislature's policy decision to augment or reduce the damages award is irrelevant to the jury's determination of liability and damages.

If juries are told about these extraneous rules, they will not understand the policy rationales behind them. Instead, they will view them as unfair to one party or the other, and will attempt to offset them by changing their decisions on liability and damages. In the area of civil rights, this creates a serious risk that victims of discrimination will not be compensated for their injuries and discriminators will not be held accountable for their actions. Both risks undermine the public policy against discrimination in the workplace. For all these reasons, this Court should hold that instructing the jury on fee shifting in an ADEA case is reversible error.

The Pretext Instruction

The absence of direct evidence in most discrimination cases means that employees must rely on pretext to prove their claims. Pretext proves discrimination cumulatively, through a series of interconnected inferences from the evidence. To enable juries to intelligently choose whether to infer discrimination, it is imperative that the district court deliver complete and accurate instructions about pretext, and not limit the jury's ability to draw reasonable conclusions from the evidence.

The District Court's pretext instruction was incomplete and inaccurate in critical respects. It failed to explain that in deciding the issue of discrimination, the jury could consider the falsity of Alco's explanation, as well as the Company's sincerity and whether it had offered shifting reasons for terminating Mr. Collins'

employment. The Court did not otherwise cover these points, and instead instructed on circumstantial evidence that Mr. Collins did not possess.

Worse, the Court affirmatively instructed the jury to ignore Mr. Collins' evidence he was not the employee who overcharged the customer. That evidence not only proved Alco's explanation was objectively false, but also it rendered Alco's story about a confession weak and implausible because people rarely confess to crimes they do not commit. By instructing the jury to ignore this key pretext evidence, the District Court misled the jury on the substantive law.

In addition to delivering an incomplete and inaccurate pretext charge, the District Court pretermited the jury's ability to draw an inference of discrimination. Settled law invests the factfinder with exclusive jurisdiction over credibility, weight and the inferences to draw from the evidence. Nevertheless, the Court prohibited the jury from giving any weight to Mr. Collin's evidence that he was innocent of the overcharge. It also steered the jury away from an inference of discrimination by suggesting Mr. Collins' innocence merely proved Alco made a mistake, not that it was being insincere. Finally, the District Court suggested that Alco's story was not unworthy of belief unless it was patently absurd, like a story about Grant Street being hit by a "flash flood" on a rainless day.

The District Court's errors were not harmless. Because the jury delivered a general verdict, it is impossible to determine whether the erroneous instructions

affected the outcome of the case. As a matter of law, errors of this kind are not harmless.

In the alternative, Mr. Collins would probably have prevailed but for the erroneous instructions. Mr. Collins' proof he had no opportunity to overcharge the customer, and his affirmative identification of the only two employees who did, exposed Alco's confession story as weak, implausible and insincere. Together with Mr. Collins' other pretext evidence and the evidence of Mr. Stabile's ageist mindset, a properly instructed jury would readily have inferred that age was one of the determinative factors behind Mr. Collins' termination from employment.

For all these reasons, this Court should vacate the jury's verdict and remand for a new trial.

ARGUMENT

I. The District Court abused its discretion by telling the jury that Mr. Collins could recover attorney fees on top of the jury's damages award if he was allowed to win.

A. Trial courts have a duty to shield juries from irrelevant laws that add to or subtract from the damages award.

When a dispute brings parties to court, the law aims to help the factfinder ascertain the truth and justly decide the case. *See,* Fed. R. Evid. 102; *U.S. v. Adedoyin*, 369 F.3d 337, 342 (3rd Cir. 2004) (Jury trials are a search for the truth). The entire field of evidence law, for example, is devoted primarily to this purpose.

The objective is the same when it comes to jury instructions. In charging on the law, the district court must provide complete, accurate and relevant instructions to enable the jury to ascertain the truth and justly decide the case. *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278, 279 (3rd Cir. 1998). The court must also protect the jury from incomplete or inaccurate instructions, or instructions about laws that are not relevant to the facts, because such instructions can mislead the jury or compromise its integrity.[7]

When a jury is exposed to prejudicial information and then told to ignore it, the information "locks in" to the jury's consciousness. Efforts to deliberately forget or ignore the prejudicial information produce the opposite result, and cause the jury to spend even more time thinking about the subject.[8] Judge Learned Hand recognized this in 1932 when he compared a limiting instruction to an effort to "unring a bell." Telling jurors to ignore information they have already acquired, he

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[7] *See, e.g., Watson v. SEPTA*, 207 F.3d 207, 222 (3rd Cir. 2000) (error to instruct on defendant's burden of production under *McDonnell-Douglas* because that is a legal issue for the court); *Smith*, 147 F.3d at 278 (instructions not germane to the employee's pretext evidence should not be given); *Curnow v. West View Park Co.*, 337 F.2d 241, 242 (3rd Cir. 1964) (reversible abuse of discretion to instruct a jury on matters it could not legally consider in determining liability and damages).

[8] Andrew A. Wistrich, Chris Guthrie and Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. No. 4, 1251, 1260-77 (March, 2005) (collecting cases and discussing studies), available at http://www.pennlawreview.com/Issues/153/issue4/Rachlinski.pdf. Respectively, the authors are a Magistrate Judge for the U.S. District Court for the Central District of California, a professor of law at Vanderbilt University Law School, and a professor of law/Ph.D. psychologist at Cornell Law School.

wrote, is "recommend[ing] a mental gymnastic which is beyond not only their powers, but anybody [] else['s] as well." *Nash v. United States,* 54 F.2d 1006, 1007 (2nd Cir. 1932).

The Seventh Circuit expressed a similar view in *United States v. DeCastris.* In that case, the district court gave a limiting instruction on prior bad act evidence. Commenting on the instruction, the Seventh Circuit wrote:

> We do not pretend that a jury can keep one inference in mind without thinking about the other. An instruction told the jury to do this, but this is like telling someone not to think about a hippopotamus. To tell someone not to think about the beast is to assure at least a fleeting metal image. So it is here. Each juror must have had both the legitimate and the forbidden considerations somewhere in mind, if only in the subconscious.

United States v. DeCastris, 798 F. 2d 261, 264-265 (7th Cir. 1986).[9]

Because instructing the jury to deliberately forget a subject will cause it to focus on the subject, juries should not be told about irrelevant laws that add to or subtract from the damages award. Such laws are not relevant to liability or damages, and instructing on them invites a decision on improper grounds.

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[9] *See also, Lang v. Kohl's Food Stores, Inc.*, 217 F. 3d 919, 927 (7th Cir. 2000) (telling jury to disregard a given piece of information is "futile," "like telling the jurors that for the remainder of the trial, none of them [are] allowed to say the word 'rhinoceros' to himself."); *United States v. Delli Paoli*, 229 F.2d 319, 321 (2nd Cir. 1956) (noting that the attempt to deliberately forget information "does violence to our habitual ways of thinking"); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be an unmitigated fiction").

> The purpose of [fee shifting, treble damages, etc.] is to deter violations and encourage private enforcement of the [law]. The justifiable fear of … plaintiffs is that juries will adjust the damage award downward or find no liability, therefore thwarting Congress's purpose, because of some notions of a windfall to the plaintiff. [A] jury might [even] take the revelation of the [award-enhancing] provision as an intimation from the court [on how to decide the case] ….
>
> Second, it is not for the jury to determine the amount of a *judgment*. Its function is to compute the amount of *damages*. Congress's authorization … to [award attorney fees, treble damages, or otherwise add to the jury's award] is a matter of law to be applied by the district court …. The fact that the awarded amount will [include a statutory enhancement] has no relevance in determining the amount a plaintiff was injured by the [defendant's conduct].

Pollock & Riley, Inc., 498 F.2d 1240, 1242-43 (5th Cir. 1974) (emphasis in original).

Courts have applied the rationale of *Pollock* to laws that cap damages,[10] treble damages,[11] divert punitive damages to the state treasury,[12] and to laws that

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[10] *See, e.g., Sasaki v. Class*, 92 F.3d 232, 237 (4th Cir. 1996) (remanding for new trial where jury told that damages on federal discrimination claim were capped, but damages on state claim were not); *Weiss v. Goldfarb*, 154 N.J. 468, 480, 713 A.2d 427 (N.J. 1998) (reversing and remanding where jury told that damages against charitable defendant were capped, but damages against other defendants were not).

[11] *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 45-46 (2d Cir. 1994) (collecting cases) (trial court should not tell jury of treble damage and attorney fees provisions of RICO because they are irrelevant to jury's role and jury might react by lowering damages award); *but see Marcella v. Shaffer*, 324 Ill. App. 3rd 134, 140, 754 N.E.2d 411 (trial court did not err in instructing on damage trebling under Illinois' Wrongful Tree Cutting Act).

[12] *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 476 S.E.2d 565, 570-71 (Ga. 1996) (reversible error to tell jury that portion of punitive damages award will be diverted to state treasury); *Honeywell v. Sterling Furniture Co.*, 310 Ore. 206, 797 P.2d 1019 (Ore. 1990) (same) *Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993) cert. denied 510 U.S. 1115 (1994)

reduce recoverable damages in proportion to the plaintiff's comparative fault.[13] The rule has also been invoked to prohibit disclosure of private agreements that have the effect of lowering a jury's punitive damages award.[14]

B. Because fee shifting in a civil rights case is irrelevant to liability and damages and adds money to the damages award, it will rarely be appropriate to disclose that law to the jury.

In a much closer case than this one, the Ninth Circuit held it is reversible error to instruct on fee shifting in a civil rights case. *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991) reaffirmed in *In Re The Exxon Valdez Icicle Seafoods, Inc.*, 229 F.3d 790, 798 (9th Cir. 2000). The Sixth Circuit reached a similar conclusion in *Fisher v. City of Memphis*, 234 F.3d 312, 318 (6th Cir. 2000) (affirming trial court's refusal to instruct on fee shifting in civil rights case, and suggesting such an instruction would be clearly erroneous).

Brooks was a § 1983 case arising out of a traffic stop. In his complaint, the plaintiff requested $2 Million in general and punitive damages. *Brooks*, 938 F.2d at 1050. However, at the close of the second jury trial, plaintiff's counsel argued

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(improper under Iowa law to inform jury that portion of punitive damages award would go into civil trust fund).

[13] *Rosenthal v. Kolars*, 231 N.W.2d 285, 288 (Minn. 1975) (en banc) (reversible error to instruct jury that finding of comparative fault will reduce damages recoverable by plaintiff).

[14] *In Re The Exxon Valdez Icicle Seafoods, Inc.*, 229 F.3d 790, 799 (9th Cir. 2000) (affirming decision not to disclose "cede back" agreement in trial of mandatory punitive damages class action, and holding that "juries are to be kept free of any outside influence that might lead them to inflate or reduce their damages award to 'secure justice' for the parties.").

that his client merely wanted to vindicate his constitutional rights, and would accept an award of nominal damages. *Id.* The defendant suspected that the plaintiff was attempting to induce a compromise verdict so he could recover attorney fees. The defendant thus requested an instruction on fee shifting. Agreeing that the plaintiff might be attempting to "trick" the jury, the district court granted the defendant's request, and instructed the jury that if it found in the plaintiff's favor, the plaintiff would be entitled to attorney fees in addition to the damages award. *Brooks*, 938 F.2d at 1051. The jury returned a defense verdict. Brooks appealed.

On appeal, Brooks argued that the trial court abused its discretion in disclosing his right to recover attorney fees on top of the damages award. A unanimous panel of the Ninth Circuit agreed.

> The award of attorneys' fees is a matter of law for the judge, not the jury. *** The jury's role is to determine liability and the amount of damages. These determinations are distinct from the awarding of fees. By informing the jury of the plaintiff's right to seek attorneys' fees …, the court invited the jury to factor in a subsequent step - the court's calculation of the ultimate judgment - that had no relevance to the jury's determination of liability and damages.

Brooks, 938 F.2d at 1051.

The *Brooks* court also believed that informing the jury about the possibility of fees would undermine the public policies behind fee shifting in civil rights cases. *Brooks*, 938 F.2d at 1051. Those public policies are well known.

> When the [civil rights laws were] passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A [discrimination] suit is thus private in form only. When a plaintiff brings an action … he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. *** Congress therefore enacted the provision[s] for counsel fees … to encourage individuals injured by … discrimination to seek judicial relief ….

Newman v. Piggy Park Enterprises, Inc. 390 U.S. 400, 401 (1968). In addition, fee shifting lessens the financial disincentives to combating discrimination in court, and provides employers with an incentive to voluntarily comply with the law. *Brooks,* 938 F.2d at 1051.

The average juror has no understanding of the legislative policies behind fee shifting in civil rights cases. To him or her, fee shifting looks like an unfair law that gives the employee more than what s/he is justly owed, and requires payment in excess of what the employer ought to pay. It is easy to predict how a juror will react under these circumstances.

> [I]nforming the jury of the plaintiff's potential right to receive attorneys' fees might lead the jury to offset the fees by reducing the damage award. Even more troubling, however, is the case where actual damages are small or nonexistent. When damages are nominal, there is a risk that the jury may believe that the harm does not justify the payment of a large fee award. The jury may thus decide to find for the defendant rather than allow the plaintiff's attorney to recover fees.

Brooks, 938 F.2d at 1051 (emphasis added). For these reasons among others, the *Brooks* court sensibly concluded that "the right of a prevailing plaintiff to

attorneys' fees … should play no part in the jury's deliberation." *Brooks*, 938 F.3d at 1053 (emphasis added).

Adopting the rationale of *Brooks* would be a reasonable and incremental extension of existing Third Circuit law. The law here already requires district courts to protect juries from irrelevant and prejudicial instructions. *See, e.g., cases collected at Footnote 7.* A decision to follow *Brooks* would thus represent a natural development in the law of this Circuit.

C. The District Court's unexplained decision to instruct on fee shifting exceeded the narrow scope of its discretion.

Mr. Collins did not open the door to a curative instruction on fee shifting. *Cf. Brooks*, 938 F.3d at 1050. He did not attempt to induce a compromise verdict with a sly request for nominal damages. He did not attempt to inflate the damages award with a misleading argument about litigation expenses. The instruction was not curative; rather, it was a pre-planned part of Alco's trial strategy. (R. 536).

Alco cited no authority to support its request, and the District Court did not articulate a basis in law or logic for granting it. Nor did the Court attempt to educate the jury on the policy rationales behind fee shifting under the civil rights laws. Instead, the District Court created and then did nothing to dispel the strong impression that Mr. Collins would recover (and Alco would pay) more than the "fair amount" if he was allowed to win. Because the fee shifting instruction caused great harm to Mr. Collins' case without serving a discernible legitimate purpose,

the decision to deliver it can only be regarded as arbitrary, unfair and inconsistent with the sound exercise of discretion.

For all of the foregoing reasons, this Court should find the District Court abused its discretion in instructing on fee shifting, vacate the jury's verdict and remand for a new trial.

II. The District Court misstated the law of pretext by telling the jury to ignore evidence that Alco's reason was false and insincere, failing to instruct on the inference of discrimination from Alco's shifting, false and insincere reasons, instructing on circumstantial evidence that was not part of the record, and narrowly limiting the jury's ability to draw an inference of discrimination.

Because discrimination is "uniquely difficult to prove," most employees rely on pretext to prove their claims. *Sheridan v. E.I. DuPont De Nemours*, 72 FEP Cases 518, 526 (3rd Cir. 1996) (*en banc*). Pretext permits an inference of discrimination because the employer knows the true reason for its actions, and if it offers a false or insincere reason, it is logical to infer it is hiding an unlawful motive. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143-44 (2000); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 279 (3rd Cir. 1998). Therefore, the plaintiff's goal in a pretext case is to expose "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's explanation, such that a jury could reasonably find it "unworthy of credence" and infer an unlawful motive was at play. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3rd Cir. 1994).

Because pretext plays a "pivotal role … in the ultimate decision of discrimination *vel non*," the trial court's pretext instructions must be tailored to the plaintiff's specific proof and arguments. *Smith*, 147 F.3d at 278-79. In *Smith*, the trial court told the jury it "could consider direct or circumstantial evidence … including a departure from the employer's standard practices, suspect decision making methods, a history of discrimination, a hostile work environment [and] statistical proof of discrimination," but did not otherwise tailor its instruction to the plaintiff's proof and arguments. *Id.* at 280. The jury returned a verdict for the employer, and the plaintiff appealed.

This Court vacated the jury's verdict and remanded for a new trial. Although the district court listed some generic classes of circumstantial evidence probative of discrimination, that could not replace a complete set of pretext instructions tailored to the plaintiff's arguments and proof. Indeed, the trial court's instruction was more likely to confuse the jury than help it.

> This instruction is inadequate for those employees who have little or no circumstantial evidence of the type alluded to by the district court, the very plaintiffs for whom the *McDonnell Douglas* framework was developed. Under this instruction, the jurors who found no evidence fitting the examples of circumstantial evidence referred to in the charge, but who disbelieved the employer's explanation, could reasonably conclude that there was no evidence on which they would be permitted to base a plaintiff's verdict. This conclusion would, of course, be incorrect as a matter of law but would be understandable in light of the instruction.

Smith, 147 F.3d at 280.

In this case, the trial court's pretext instruction was virtually identical to the instruction this Court criticized in *Smith*. (R. 261:4-13).[15] Just as in *Smith*, the District Court failed to relate the law of pretext to key components of Mr. Collins' pretext case. Mr. Collins had repeatedly argued that Alco's story was false and insincere because Mr. Collins could not have encountered the customer. He also argued that Alco's story had shifted and changed over time. Although settled Third Circuit law permitted the jury to draw an inference of discrimination from this evidence,[16] and equally settled law entitled Mr. Collins to an instruction on it,[17] the District Court omitted these instructions from its charge.

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[15] The only difference between the two was that the Court below reluctantly inserted a clause on age-based stereotypes to account for Mr. Stabile's statements that "Old Jack" should "retire and go on Social Security." (R. 246-249).

[16] Regarding the falsity or insincerity of Alco's explanation: *see, Reeves*, 530 U.S. at 144 (reversing judgment for employer where clerical employee proved he properly maintained attendance records despite employer's claim he did not); *Fasold v. Edmund*, 409 F.3d 178, 185-86 (3rd Cir. 2005) (reversing judgment for employer where police employee proved he generated a sufficient number of arrests despite employer's claim he did not); *Sheridan*, 72 FEP Cases at 529 (reversing judgment for employer where employee proved she was on jury duty at time employer claimed she had dispensed free drinks); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 331 (3rd Cir. 1995) (reversing judgment for employer where employee cited specific examples where employer's criticisms were erroneous or misplaced). *See also, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517 ("Proving the employer's reason false … considerably assists the greater enterprise of proving … intentional discrimination.").

Regarding the shifts and changes in Alco's explanation: *see, Reeves*, 530 U.S. at 144 (reversing judgment for employer where employer first claimed it fired plaintiff for deliberately falsifying payroll records but then claimed mere inaccuracy of records resulted in plaintiff's termination); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000); *Smith*, 147 F.3d at 281 (noting shifts in employer's explanation as given to EEOC and at trial, and observing reasonable jury could infer discrimination from the "variation in [the employer's] articulated reasons.").

[17] *Smith*, 147 F.3d at 281.

Compounding its error, the District Court charged on circumstantial evidence that Mr. Collins never presented to the jury. Mr. Collins neither possessed nor presented "statistical proof" of discrimination, or "proof of a history of discrimination." By instructing on these conspicuously absent forms of circumstantial evidence, the District Court created the same risk that concerned this Court in *Smith* – the jury, finding no "statistical proof" or "proof of a history of discrimination," concludes it cannot return a verdict for Mr. Collins even though it does not believe Alco's explanation. *See also, In Re Diet Drugs Products Liability Litigation,* 369 F.3d 293, 315 (3rd Cir. 2004) ("The absence of proof that would normally be expected can cause the jury to draw unwarranted inferences").

Instead of discussing evidence not in the record, the District Court should have instructed on Mr. Collins' proof that Alco's explanation was false and insincere. Mr. Collins relied on that evidence both in successfully opposing Alco's motion for summary judgment (R. 428-430) and its motion for judgment as a matter of law (R. 215-219). He discussed it in the factual narrative of his pretrial statement (R. 509), and with it in mind, twice requested instructions that the jury could infer discrimination from a disingenuous explanation for Mr. Collins' termination (R.448, 460).

When the District Court expressed its view that Mr. Collins' innocence merely proved Alco "got the wrong guy" (R. 138), Plaintiff's counsel specifically explained how the evidence supported a reasonable inference of discrimination:

> [T]he case is about who did it in a very real part because if this employer did not sincerely believe that it was Mr. Collins, … if they knew better because of the location of the flag man and the customer first complaining about the guy at the entrance of the lot[,] and then the location of the cash man, and the customer then complaining about the guy in the cash booth, the law is clear this isn't a question of business judgment or making a mistake. The plaintiff is challenging the sincerity of the employer's professed belief that it was the plaintiff that did what they're accusing him of having done wrong. That is a very legitimate way of demonstrating pretext. The law is settled on that.

(R.143:23-144:10). *See also,* Colloquy between District Court and Plaintiff's Counsel at R. 215:22 – 219:12.

Despite these arguments, the District Court not only refused to tell the jury it could infer discrimination from a false or insincere reason, it expressly instructed the jury to *disregard* Mr. Collins' proof that he was not the employee who overcharged the customer. By instructing the jury to disregard this proof, the District Court prevented the jury from considering both the objective falsity of Alco's explanation and the Company's sincerity in deciding the issue of discrimination. This was a misstatement of the law because the falsity of an

employer's explanation *always* supports an inference of discrimination, particularly when combined with proof of mendacity.[18]

In addition to misstating the law of pretext, the District Court improperly steered the jury away from an inference of discrimination. The law is well-settled that

> [once the district court is satisfied] the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible, … it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.

Sheridan, 100 F.3d at 1071-72 (internal citations omitted). Despite this clear mandate, the District Court prohibited the jury from giving any weight to Mr. Collin's evidence he was innocent of the overcharge, intimated that Mr. Collins' innocence merely proved Alco made a mistake, and put Alco's credibility beyond Mr. Collins' reach with a wild hypothetical about "flash floods."

Contrary to court's charge, the jury was free to find Alco's story incredible "merely" on the basis of its belief that Mr. Collins was not the employee who

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[18] *Hicks,* 509 U.S. at 511 (1993). *See also, Reeves,* 530 U.S. at 144 (reversing judgment for employer where clerical employee proved he properly maintained attendance records despite employer's claim he did not); *Fasold,* 409 F.3d at 185-86 (reversing judgment for employer where police employee proved he generated a sufficient number of arrests despite employer's claim he did not); *Sheridan,* 72 FEP Cases at 529 (reversing judgment for employer where employee proved she was on jury duty at time employer claimed she had dispensed free drinks); *Brewer,* 72 F.3d at 331 (reversing judgment for employer where employee cited specific examples where employer's criticisms were erroneous or misplaced).

overcharged the customer. Also contrary to the court's charge, the record did not support an inference that Alco was simply "wrong or mistaken." Indeed, given Alco's insistence that Mr. Collins' *confessed* to overcharging the customer, it was error to even suggest that Alco might have been "wrong or mistaken."[19]

The District Court's fantastic hypothetical about a "flash flood hitting Grant Street" on a rainless day created the impression that only a patently absurd and manifestly false explanation could be found unworthy of belief. Of course, that is contrary to the settled law that pretext need only be proven by a preponderance of the evidence. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 352 n.4 (3rd Cir. 1999). Moreover, the law has never required plaintiffs to prove pretext with any particular kind of evidence. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); *Farrell v. Planters LifeSavers Company*, 206 F.3d 271, 286 (3rd Cir. 2000).

If district courts are allowed to steer juries away from an inference of discrimination, the inferential method of proving discrimination breaks down. The whole point of *McDonnell Douglas* is to compensate for the absence of direct evidence. *Sheridan*, 100 F.3d at 1071 (collecting cases). To do that in a meaningful way, the law must afford juries the freedom to fully evaluate the

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[19] *Hobson v. Wilson*, 737 F.2d 1, 41 (D.C. Cir. 1984) ("Regardless whether a proposed instruction correctly states a legal abstraction, when the instruction is not applicable to the facts, it is properly denied"); 9A Charles Alan Wright and Arthur Miller, Federal Practice and Procedure, § 2552 at 393-94 ("The district court should refuse a request for an instruction that correctly states a legal abstraction not applicable to the facts ….").

credibility of the employer's explanation, and then draw the inferences *the jury* believes are appropriate. That freedom cannot be exercised unless the court delivers complete, correct and non-suggestive instructions on the law of pretext. If district courts are not held at least to that standard, employees will not be able to prove their claims. *See, Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497, 508 (3rd Cir. 1996) (civil rights laws would be "toothless tiger" if employees could not rely on pretext).

III. The District Court's errors were not harmless.

A. As a matter of law, error in jury instructions is not harmless where the jury delivers a general verdict.

The District Court's errors were not harmless because the jury delivered a general verdict. Because it is thus impossible to determine whether the erroneous instructions affected the outcome of the case, as a matter of law the errors are not harmless. *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 534 (3rd Cir. 1998) (where jury returns general verdict that could have been based on legally erroneous instruction, error is not harmless and verdict must be set aside); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 999-1000 (3rd Cir. 1988) (same).

B. The District Court's erroneous instructions affected the outcome of the case.

No error may be held harmless unless "it is highly probable that [it] did not affect the outcome of the case." *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d

43, 53 (3d Cir. 1989); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924, 927-28 (3d Cir. 1985). On the record, the District Court's erroneous instructions were far from harmless.

The sole explanation Alco offered to support its decision was that Mr. Collins overcharged a customer and then confessed to it. Mr. Collins' proof he had no opportunity to overcharge the customer, and his identification of the only two employees who did, exposed Alco's story as objectively false, weak, implausible and insincere. Together with Alco's admissions it did not know who overcharged the customer, its provision of false testimony under oath, its changing stories about why Mr. Collins was fired, and Mr. Stabile's ageist belief that it was time for "Old Jack" to "retire and go on Social Security," a properly instructed jury would readily have inferred that age was one of the determinative factors behind Mr. Collins' termination from employment.

CONCLUSION

The District Court's jury instructions denied Mr. Collins a fair trial. The District Court instructed on fee shifting, an irrelevant and highly inflammatory point of law, and misinstructed on pretext, the most important law in the case. Because the District Court's errors strike at the heart of Mr. Collins' right to an impartial and properly instructed jury, this Court should vacate the jury's verdict and remand for a new trial.

CERTIFICATIONS OF COUNSEL

1. Pursuant to 3rd Cir. LAR 28.3(d), I certify I am a member of the bar of this Court.

2. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) in that the total word count, including headnotes, footnotes and quotations, consists of 8,886 words and 928 lines.

3. Pursuant to 3rd Cir. LAR 31.1(c) and (d), I certify that:

   a. The text of the electronic version of this brief is the same as the paper version,

   b. The electronic version was scanned for viruses using McAfee VirusScan, Engine Version 4.4.00, DAT Version 4.0.4539, and no viruses were detected,

   c. Opposing counsel has consented to electronic service, and,

   d. This Brief and the Appendix have been served electronically upon Joseph Mack, III, Esq. at jmack@spilmanlaw.com and upon Kenneth J. Yarsky, II, Esq. at kyarsky@yarskybrown.com.

Respectfully submitted,

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