Nos. 08-1110 and 08-1364

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDITH HERZOG,

Plaintiff-Appellee,

vs.

CITY OF WATERTOWN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN,
CASE NO. 07-C-0213-S,
THE HONORABLE JOHN C. SHABAZ

BRIEF AND APPENDIX OF PLAINTIFF-APPELLEE, JUDITH HERZOG

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 08-1110 and 08-1364
Short Caption: Judith Herzog v. City of Watertown

(1) The full name of every party that the attorney represents in the case:

Judith Herzog

(2) The names of all law firms whose partners or associates have appeared for the party in the case:

Townsend Law Office
Kasieta Legal Group, LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

Attorney's Signature: _____

Date: April 17, 2008

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d):

Yes _x_ No ____

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The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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2. Did the District Court correctly determine that the jury had sufficient evidence to find that the City discriminated against Ms. Herzog on the basis of her age when it did not recall her, or hire her, for a vacant Account Clerk position?

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4. Did the District Court abuse its discretion by denying the City's motion for a new trial on issues of liability?

5. Did the District Court abuse its discretion by denying the City's motion for a new trial on damages?

6. Did the District Court abuse its discretion when it reduced the jury's award of compensatory damages from $228,000 to $100,000?

STATEMENT OF THE CASE

The Appellee Judith Herzog ("Ms. Herzog") supplements the Statement of the case presented by the Appellant City of Watertown ("the City"). On April 13, 2007, Ms. Herzog filed a Complaint and alleged that the City engaged in two counts of age discrimination and one count of sex discrimination. (R. 2).[1] She alleged that the City engaged in age discrimination when, on September 26, 2003, the City selected Ms. Herzog for layoff (age 48), rather than one of the two younger employees, Lori Bachler, (age 34) or Donna Christian, (age 35). (R. 2, ¶ 167). In its Answer, the City admitted that the ages of these three employees were 48, 34 and 35, respectively. (R. 5, ¶¶ 25-27). Ms. Herzog does not challenge the City's decision to downsize the office by one employee.

Ms. Herzog also claimed that the City engaged in age discrimination when, several months after her layoff, she was not recalled to the vacant position of Account Clerk in violation of the City's Layoff and Recall Policy, and that the City engaged in age discrimination when the City selected a younger, less qualified candidate for that position. (R. 2, ¶¶ 342, 362). Finally, Ms. Herzog claimed the City engaged in gender discrimination when it failed to promote her to the position of Assistant Manager - Water on September 29, 2003, and instead promoted a less qualified man. (R. 2, ¶ 327).

On August 1, 2007, the City moved for summary judgement on all three claims and Ms. Herzog moved for summary judgment on her claim of sex discrimination. (R. 15; R.

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[1] References to the record are as follows: Record (R. __:__) [docket entry no._:pg. or ¶ no. _]; Appellee's Appendix (Herzog App. ___); Appellant's Appendix (City App. __); Trial Exhibits (Trial Ex. ___); Appellant's Brief (City Br. __); and, Appellee Brief (Herzog Br. __).

22). Judge Shabaz denied the motions and determined that there were material facts in dispute. (R. 50).

At the trial commencing on October 9, 2007, the court read stipulated facts to the jury. (R. 122: 49-52; R. 51). The parties agreed that 102 Exhibits would be submitted to the jury, including 63 Exhibits submitted by Ms. Herzog. (Nos. 1-4, 6, 7, 9, 11-15, 17-19, 23, 25-34, 37, 40-43, 46-53, 64-69, 74-76, 78, 79, 81, 83-87, 89, 91, 112, 113, 121, 124, and 125). The City submitted 39 Exhibits to the jury. (Nos. 205-213, 215-216, 219-32, 234-39, 257-62, 275-76). During the trial Judge Shabaz denied the City's Motion for a Directed Verdict. (R. 123:11). He found, "the jury could reasonably conclude either way . . . ." (*Id.*).

The City's Statement of the Case accurately reflects the verdict of the Jury on liability and damages, the Court's entry of Judgment, as well as the Court's Decision with respect to the City's post-trial motions. (City Br. 4).

STATEMENT OF FACTS

A. The career and performance of Plaintiff Judy Herzog: 1990-2003.

Ms. Herzog was hired by the City on January 15, 1990, as a Bookkeeper in the Water Department. (R. 122:49). During the first twelve years of her employment, Ms. Herzog advanced to positions of increasing responsibility under the supervision of the Water Department Manager, Mike Olesen. (Herzog App. 35; Trial Ex. 124 at Def. Adm. No.95). From September of 2000 through September 26, 2003, she was responsible for supervising four Water Department employees. (R. 122:49). Her performance evaluations reflect that she consistently met or exceeded performance expectations. (R. 122:49-52; 83-84; Trial Ex. 11).

In her most recent performance evaluation, dated December 17, 2001, Mr. Olesen rated her performance as "exceeding expectations." (R. 122:50). Mr. Olesen stated, among other things, that she is "very good at dealing with customers," "has completed all assigned duties plus special projects," arrives "early," and "puts in necessary overtime to complete duties/task[s] when short handed." (R. 122: 50-52).

Ms. Herzog was first given supervisory duties in November of 1993, when Lori Bachler was hired to perform receptionist and secretarial tasks, which had primarily been performed by Ms. Herzog. (R. 122:85-86; Trial Ex. 15). Ms. Herzog had previously been an Accounting Supervisor with a previous employer. (R. 122:71: Trial Ex. 234, p. 4)

After Ms. Bachler was hired, Ms. Herzog trained her in the performance of her duties, and together with Mr. Olesen, scheduled and directed her work. (*Id.*; R. 122:102).

After Ms. Bachler was hired, Ms. Herzog's job title was changed to Financial Administrator. (Trial Ex. 11).

In July of 2000, Ms. Herzog was promoted to the position of Financial Supervisor. (R. 122:49; Trial Ex. 17). In this position, she was responsible for the supervision of: (1) Ms. Bachler, who had been promoted to the newly created position of Billing Clerk and assigned billing duties previously performed by Ms. Herzog; (2) Michael Craig, the water meter technician who repaired, installed, and tested water meters; and (3) Sixto Villegas, who read water meters. (R. 122:49; Trial Exs. 12-15).

In September of 2000, Ms. Herzog was given additional supervisory responsibility when Linda Kratz was hired to perform receptionist and secretarial tasks that had previously been performed by Ms. Bachler. (R. 122:49). Ms. Herzog continued to perform that supervisory role when Donna Christian was hired in 2001 to replace Ms. Kratz. (R. 122:49).

As Financial Supervisor, Ms. Herzog was responsible for directing and evaluating the work of her subordinates. (R. 122:49, 93; Trial Ex. 27). But consistent with the needs of a small Department, Ms. Herzog also helped her staff perform their duties, including answering the phone, reading meters and performing other duties as needed. (Herzog App. 37-39; R. 122:92 and 110; Trial Ex. 27, p. 2).

Customer service was always a part of Ms. Herzog's responsibilities with the City. (Trial Ex. 65, Def. Adm. No. 94; R. 122:93). While it was the responsibility of the

secretary to answer the calls to the Water Department, customers and others seeking information, (including the City Clerk-Treasurer Mike Hoppenrath), still directed their questions to Ms. Herzog. (R. 122:93, 197, 198). Mr. Hoppenrath stated that he "never doubted" the accuracy of the information that Ms. Herzog provided. (R. 122:198)

During her three years as Financial Supervisor, Ms. Herzog participated in the daily meetings that Mr. Olesen and his successor Paul Lange conducted with her and the two other supervisors in the Water Department, Richard Kuerschner and Mike Rowoldt. (R. 122:49-50, 93, 150-152). At these daily meetings, the three supervisors and the manager engaged in the planning and scheduling of work that needed to be done each day, and addressed problems in the department. (R. 122:93, 138, 150, 152). These meetings would address the work orders, which were given out to staff. (R. 122:90, 150).

Most of the duties performed by the meter technician and the distribution crew required a work order. (Trial Ex. 64, Def. Adm. Nos. 62-68; R. 122:90-91). These tasks included any meter repairs and work related to valves, hydrants, and water mains performed by the distribution crew. (R. 122:90; Trial Ex. 64, Def. Adm. Nos. 62-68). The City admitted that in order to process the work orders, Ms. Herzog had to know the details of each job, including the kind of job, how long the job took to perform, and the cost, kind and quantity of all materials that were used. (Trial Ex. 64, Def. Adm. Nos. 55-61). (Trial Ex. 64, Def. Adm. Nos. 54-70; R. 122:90-91).

Ms. Herzog relied on the data she obtained from work orders to assist her in other tasks for which she was responsible, including dealing with insurance companies and

regulatory compliance. For example, she used information gleaned from work orders to prepare the Department's annual report to the Public Service Commission (PSC), which was required by state law. (R. 122:88-91, 116).

The PSC report covered all aspects of the "business and affairs" of the Water Department. (Trial Ex. 37). The report describes all new construction as well as details concerning the number of fire hydrants and water meters that were put in service and replaced. (*Id.*). All of the work performed by utility employees came across Ms. Herzog's desk.

Following the resignation of Mr. Olesen, on June 28, 2002, Ms. Herzog assumed some of Mr. Olesen's management duties. She reported directly to the Water Commission, and made recommendations on several matters, including personnel matters and the investment of funds. (Herzog App. 34, Trial Ex. 124, Def. Adm. No. Ex. 90; R. 122:94-97; Trial Ex. 23 at pp. 2-3; Trial Exs. 26-27). She continued to perform these additional duties until January 1, 2003, when the City merged the Water Department with the Wastewater Utility, and Paul Lange was promoted from his prior position as Wastewater Manager to the newly created position of Water Systems Manager for the combined operations. (R. 122:52).

B. The layoff of Ms. Herzog and the retention of two younger, less-experienced women.

Late in the afternoon of Friday, September 26, 2003, after nearly nine months as Water Systems Manager, Mr. Lange entered Ms. Herzog's office and asked her for the

password to her computer and the keys to the building. (R. 122:72). After Ms. Herzog gave him the password and the keys as requested, Mr. Lange told her that her position had been eliminated, directed her to pack her personal belongings and watched over her as she packed. (*Id.*). He then escorted her to her car. (R. 122:73).

Ms. Herzog was 48 years old at the time that she was laid off. (R. 2, ¶25; R. 5, ¶25). The City retained the services of Lori Bachler, who was 34, and Donna Christian, who was 35. (R. 2¶¶26-27; R. 5, ¶¶26-27).

At the time of the layoff, the City had a layoff policy of which Paul Lange had personal knowledge, which provides in part:

> Should, in the opinion of the City, a reduction in personnel become necessary in any job classification, employees will be laid off based on a consideration of the employee's (1) skills, (2) abilities, (3) qualifications, (4) past performances, (5) attitude, (6) length of continuous service as well as on a (7) consideration of the efficient operation of the City.

(Herzog App. 8; Trial Ex. 68, Def. Adm. Nos. 10, 11). Prior to laying off Ms. Herzog, Mr. Lange did not document any comparison of her performance with that of Ms. Bachler or Ms. Christian. (Herzog App. 5; Trial Ex. 66, Def. Adm. No. 44). There is no documentary evidence in the record that Mr. Lange considered any of the seven factors contained in the layoff policy when he chose Ms. Herzog for layoff instead of one of the two younger staff.

The City layoff policy also provides that "employees affected by a reduction in personnel in their job classification may be transferred to, or allowed to replace

employees in, other equal or lower paying job classifications." (Herzog App. 8; Trial Ex. 68, Def. Adm. No. 10). The City did not permit Ms. Herzog "to replace" either the younger Ms. Bachler or the younger Ms. Christian in their "lower paying job classifications."

C. Ms. Herzog's appeal to the Mayor.

Following the termination of her employment, Ms. Herzog appealed her layoff to Mayor John David. (Herzog App. 40; R. 122:75-76). She asked that she be permitted to replace Donna Christian, the newest and least experienced employee, in her "lower paying job classification," in accord with the City's layoff policy. (R. 122:76-78). The Mayor said he would discuss her appeal with Mr. Hoppenrath and Mr. Lange. (Herzog App. 40; Trial Ex. 43).

The Mayor subsequently rejected Ms. Herzog's appeal. (R. 122:78; Trial Ex. 46). Ms. Herzog questioned the Mayor's decision and asked him to consider her for vacant positions with the City. (R. 122:79; Trial Ex. 47) He reaffirmed the denial. (R. 122:79; Trial Ex. 48).

The record contains inconsistent and contradictory evidence as to who made the layoff decision, and why it was made. For example, when Mr. Lange told Ms. Herzog that her position had been eliminated, he stated that the decision was made by Mayor David and Mike Hoppenrath. (R. 122:72; Trial Ex. 47). When Mayor David denied the appeal, he stated that it was Mr. Lange's decision. (Trial Ex. 46). The Mayor subsequently stated that City Clerk-Treasurer "Mike Hoppenrath, Paul Lange and

myself" participated in the decision to terminate her employment. (Trial Ex. 48). Mr. Hoppenrath subsequently testified that it was Mr. Lange's decision, and that Mr. Lange had simply informed the Mayor that "Lori and Donna were going to remain and Judy was going to be terminated." (Herzog App. 11; Trial Ex. 69, Def. Adm. No. 34).

At the time of the layoff, Mr. Lange told Ms. Herzog that he did not have "any problem" with her during their "working relationship." (Herzog App. 2; Trial Ex. 66, Def. Adm. No. 2). The City admitted that Ms. Herzog was meeting the expectations of the job at the time her employment was terminated. (Herzog App. 5; Trial Ex. 66, Def. Adm. No. 45).

D. The failure to recall or hire Ms. Herzog for a vacant Account Clerk position.

The City layoff policy contains a recall provision which provides that "[t]hose employees who are laid off will have recall rights for a period of one year and will be recalled based on the considerations listed above." (Herzog App. 8, 25; Trial Ex. 68, Def. Adm. No. 10; Trial Ex. 84, Def. Adm. Nos. 302, 303, 307). However, less than six months later, when a vacancy occurred for an Account Clerk position in the office of Mike Hoppenrath (who had participated in the layoff decision), Ms. Herzog was not recalled despite the fact that Mr. Hoppenrath had personal knowledge of this policy. (Herzog App. 9; Trial Ex. 68, Def. Adm. No. 16).

Instead, in March of 2004, the City posted the vacancy and began a hiring process. Ms. Herzog applied for the position and was interviewed. (Herzog App. 27; Def. Adm. No. 315; R. 121:81-83). The City admitted that Ms. Herzog met the qualifications for the

position. (Herzog App. 28, Trial Ex. 86, Def. Adm. No. 318). However, the City ultimately selected a younger woman to fill the position, who had no municipal experience, no education beyond high school, and no background in accounting. (Herzog App. 29; Trial Ex. 86, Def. Adm. Nos. 324-328).

E. The failure to promote Ms. Herzog to the newly created position of Assistant Manager-Water.

As part of the decision to combine the Water and Wastewater operations under the supervision of Paul Lange, the City Council created the position of Assistant Manager-Water in December of 2002. (R. 122:52; Trial Ex. 34). The Finance/Personnel committee determined that Mr. Lange would hire the new Assistant Manager from within the Water Department. (Trial Ex. 74, Def. Adm. No. 181). It was also determined that the person selected for that job would be given a raise of approximately $5,000 as compensation for the increased responsibilities. (Trial Ex. 74, Def. Adm. No. 176).

The City has a promotion policy, which provides that the "City intends to promote present employees whenever possible provided they are fully qualified and meet competitive standards *within the job description*." (Trial Ex. 3, p. 5, emphasis added.) However, despite the existence of this policy that "competitive standards" ought to be defined and documented "within the job description" before employees are promoted to a higher position, Mr. Lange did not prepare any job description for the position prior to the promotion decision nearly ten months later. (Herzog App. 16; Trial Ex. 74, Def. Adm. Nos. 210-211). In addition, Mr. Lange did not solicit or accept any applications for the position. (R. 122:234).

Although Ms. Herzog had served as one of the three supervisors in the Water Department since July of 2000, and Mr. Lange had been directed to promote one of the existing employees to the new Assistant Manager-Water position, the City admitted that Mr. Lange "at no time considered" Ms. Herzog "as a candidate for promotion to the new position of Assistant Manager - Water." (Trial Ex. 125, Answer ¶236). Instead, he considered three men as candidates for the promotion, including: (1) Mr. Rowoldt, who supervised four employees comprising the distribution crew; (2) Mr. Kuerschner, who supervised the plant janitor and the plant operator; and (3) Michael Craig, the Water Meter Technician who repaired, installed and tested water meters under the supervision of Ms. Herzog. (Herzog App. 17; R.121:102, 104, 154).

On September 29, 2003, the Monday following the Friday layoff, Mr. Lange placed Mr. Kuerschner in the position of Assistant Manager-Water. (Herzog App. 24, 37-39; Trial Ex. 83, Def. Adm. No. 300; R. 122:128). According to Mr. Kuerschner's trial testimony, Mr. Lange told Mr. Kuerschner that the job duties:

> would be more managerial than working in the field. We'd be doing more supervision instead of doing the actual work myself and we'd do more work in the planning stages . . . .

(R. 122:131).

Mr. Kuerschner had no supervisory experience prior to his July 2000 promotion to the position of Plant Foreman. (R. 122:154; Herzog App. 33). As Plant Foreman, he was responsible for the supervision of just two employees: the plant janitor and the plant operator. (*Id.*). He had no experience in the preparation of financial reports, or the

accounting and billing functions of the Water Department or the regulatory tasks performed in the Water Department office, such as the preparation of filings with the Public Service Commission. (R. 121:132-33; Herzog App. 32-33; Trial Ex. 89, Def. Adm. Nos. 243-249). However, with his promotion to Assistant Manager-Water in September of 2003, Mr. Kuerschner was immediately given supervisory responsibility for all 11 of the Water Department staff employees, including the four employees previously supervised by Ms. Herzog. (Herzog App. 39, Trial Ex. 124, Def. Adm. No. 263.).

F. The failure of the City to train decision makers to prevent or avoid discrimination.

The City did not provide any training with respect to the laws concerning employment discrimination to the managers who made the employment decisions that are the subject of this lawsuit. Neither Paul Lange, Mike Hoppenrath nor Mayor David ever received any formal training as to what a manager should do to prevent or avoid discrimination in terminations and hirings. (Herzog App. 30; Trial Ex. 87, Def. Adm. Nos. 275 - 279; R. 122:228). In this context, Mr. Hoppenrath testified that he did not ask a single question of Mr. Lange at the time Mr. Lange told him in the presence of the Mayor that "Lori and Donna were going to remain and Judy was going to be terminated." (Herzog App. 11; R. 124:42).

SUMMARY OF ARGUMENT

The City's principal claims on appeal are assertions that the jury should have accepted the self-serving trial testimony of City witnesses as if it was dispositive. However, that argument overlooks the many admissions of the City that are part of the record, as well as the fact that the trial testimony of the City witnesses is riddled with inconsistencies and contradictions. Ms. Herzog contends, in accord with the decision of the court below, that there was sufficient evidence, when combined with permissible and reasonable inferences, to support the verdicts rendered by the jury.

In addition, as the United States Supreme Court determined in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 134, 147 (2000), "the trier of fact can reasonably infer from the falsity of the explanation [for an employment decision] that the employer is dissembling to cover up a discriminatory purpose." In this context, Ms. Herzog contends that the record contains substantial evidence of pretextual claims with respect to each of the challenged employment decisions at issue, which the jury was entitled to consider as affirmative evidence of guilt.

ARGUMENT

I. There Was a Rational Basis for the Jury to Find, Based on the Evidence Presented That the City Engaged in Age and Gender Discrimination.

The standard of review for a jury verdict is whether a rational jury could have found for Ms. Herzog in her three claims of age and gender discrimination. *Davis v. Dept. of Corrections*, 445 F.3d 971, 975 (7th Cir. 2006).

Here, the City's principal claims on appeal are assertions that the jury was required to accept the self-serving trial testimony of its managers as if it was dispositive. However, that argument overlooks the many admissions of the City that are part of the record, as well as the fact that the trial testimony of the City witnesses was riddled with inconsistencies and contradictions.

In addition, as the United States Supreme Court determined in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 134, 137 (2000), "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." The court declared that "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'":

> [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. . . . [W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his decision on an impermissible consideration.

Id. at 147-148.

Ms. Herzog submits that this is such a case. The record reflects that the City asserted reasons for each of the challenged employment decisions that were either demonstrably false, unworthy of belief, or at best, entitled to little or no weight, because of the inconsistencies and contradictions in the record.

A. There was sufficient evidence for the jury to find that the city discriminated when it laid off Ms. Herzog and retained the services of two younger, less-experienced employees.

1. The District Court correctly found that the evidence was sufficient to support the jury's verdict that the city engaged in age discrimination, when it laid off Ms. Herzog.

The District Court determined that "the evidence presented, combined with all reasonable inferences . . . is sufficient to support the verdict" that the City engaged in age discrimination when it laid off Ms. Herzog and retained the services of two younger, less experienced employees. (City App. 9). In this context, the District Court cited evidence "that plaintiff who was 48 years old was laid off after 13 years of outstanding performance in positions of increasing responsibility," and an admission by the City "that plaintiff was meeting its job expectations" at the time of the layoff. (City App. 3). It noted additional evidence "that her layoff was not consistent with the City's layoff policy," and that "two younger, less experienced employees . . . were retained. (City App. 3, 10).

In its opinion, the District Court also summarized "conflicting evidence as to who made the decision to layoff plaintiff," stating that Paul Lange told her it was the Mayor

and Mike Hoppenrath [who made the decision] and that the Mayor told her Paul Lange made the decision. (City App. 10). There was also testimony, as noted above, that all three of those men concurred in making the layoff decision during a meeting that took place prior to the layoff. (Herzog App. 11-12; Trial Ex. 48).

Under these circumstances, we submit the District Court correctly held that "the evidence presented was legally sufficient to support the jury's verdict." (City App. 13). It determined that the jury "could have drawn the reasonable inference that plaintiff was laid off because of her age" on the basis of evidence "that plaintiff's layoff was not according to the City's policy and that two younger employees were not laid off."

2. The jury had sufficient evidence to determine that the stated reason's for the layoff of Ms. Herzog were either pretextual, or entitled to little or no weight.

The District Court did not find it necessary to determine whether any of the evidence presented by the City was either unworthy of belief or pretextual. However, Ms. Herzog submits that the evidence submitted to the jury permitted the jury to reasonably conclude that the City's "stated reason[s]" for the layoff are simply "unworthy of belief, a mere pretext for discrimination." *Walker v. Board of Regents of the University of Wisconsin System, 410 F. 3d 387 (7th Cir. 2005); Troupe v. May Dept. Stores, 20 F. 3d 734, 736 (7th Cir. 1994).*

a. The jury had sufficient evidence to determine that Ms. Herzog was more qualified than the younger, less experienced employees.

The record contains undisputed evidence that Ms. Herzog was consistently given outstanding performance evaluations as she advanced to positions of increasing

responsibility during her career with the Water Department. (R. 122:49-52; 83-84; Herzog App. 35; Trial Ex. 11). It contains undisputed evidence that Mr. Lange failed to tell Ms. Herzog, in the eight months that he oversaw her work, that he had "any concerns about her performance," despite his testimony that it was his practice to advise his subordinates of any concerns he might have. (Herzog App. 1-6). And it contains undisputed evidence "that Herzog was meeting the requisite 'job expectations'" at the time she was laid off. (Herzog App. 5-6).

In the face of this evidence, the city contended that Ms. Herzog was laid off because Mr. Lange concluded that "Lori [Bachler] and Donna [Christian] were more qualified." (R. 124:42; Herzog App.11; Trial Ex. 69, Def. Adm. 35). This claim was emphasized in the City's closing argument when the City told the jury that the relative youth and inexperience of Ms. Bachler and Ms. Christian "doesn't necessarily mean that they don't do better work." (R. 123:73). The jury was entitled to find that this claim was incredible.

The record reflects that from 1993 to 2000, Ms. Herzog was responsible for performing the billing tasks that in 2000 were assigned to Ms. Bachler. (R. 122:86-87; Trial Ex. 17). Ms. Christian, the Department secretary, had been with the Department less than two years and was still in the process of learning her job. (R. 122:77). Ms. Herzog had an Associate Degree in Accounting, while Ms. Bachler and Ms. Christian had no education beyond high school. (Herzog App. 13-14). In addition, Ms. Herzog had been involved in training and supervising these employees since they were hired. (Herzog Br. 8). The jury was entitled to conclude that there was no merit to the City's

pretextual claim that Ms. Herzog was less qualified than either Ms. Bachler or Ms. Christian.

b. The jury had sufficient evidence to determine that the testimony concerning Mr. Lange's alleged "evaluation" was either pretextual, or entitled to little or no weight.

The City attempts to buttress its pretextual claim that Ms. Herzog was less qualified than the two younger, less experienced employees who were retained, by claiming that Mr. Lange engaged in "an eight month evaluation"of Ms. Herzog's performance before deciding that she "would be the one to be let go." (See, e.g., City Br. 14; R. 122:96). However, the evidence concerning the alleged "evaluation" is so random, insubstantial, and inconclusive that the jury could reasonably decide, either that the claims of the City were pretextual, or that the evidence concerning the "evaluation" was entitled to little or no weight in the light of the other evidence in the record.

As noted above, the City had a layoff policy which describes certain factors that the City should consider in the making of any layoff decision. These factors are "the employee's (1) skills, (2) abilities, (3) qualifications, (4) past performances, (5) attitude, (6) length of continuous service as well as on a (7) consideration of the efficient operation of the City." (Herzog App. 8). Yet, the record is devoid of any documentary evidence that Mr. Lange gave any consideration to any of the factors specified in the layoff policy, before he decided to lay off Ms. Herzog.

In addition, although Mr. Lange supposedly engaged in an "eight month evaluation," he did not review her personnel file. (R. 122:224) Nor did he review the

performance evaluations that she received in the course of her 13 years of service to the City. (R. 122:224-225; Trial Ex. 125, Answer ¶47) The failure of Mr. Lange to look at these records during the course of the alleged "evaluation" is additional evidence from which the jury could reasonably conclude that the alleged "evaluation" was a sham.

Moreover, contrary to the innuendos in the City's Brief (Br. 16-17), Mr. Lange's trial testimony did not "articulate" any "observations of problems or concerns that he had with Herzog" that could possibly substantiate his claim that Ms. Herzog was the least qualified of the three office workers. This point is best demonstrated by a review of what Mr. Lange actually said at trial.

First, Mr. Lange testified that his "evaluation process" consisted of giving members of the office staff "different assignments and ask[ing] them to type letters." (R. 122:216). His testimony did not find fault with any of the work that Ms. Herzog performed in response to such assignments, but he did find it "interesting" that "more often than not she would come back with Lori Bachler and make a presentation as to what her recommendations would be, but it was always with Lori present." (R. 122:216-217).

As noted above, Ms. Herzog was a second-level supervisor of four employees, who was accustomed to delegating tasks to one of her subordinates, but it appears that Mr. Lange did not direct Ms. Herzog to perform the "assignments" herself, because he wanted to keep his "evaluation process" secret. (R. 122:216-217). Accordingly, even if the jury may have understood the word "interesting" as an implicit criticism of the way Ms. Herzog dealt with his assignments, it was entitled to give that cryptic comment

little or no weight as evidence of the relative qualifications of Ms. Herzog and her subordinates.

Second, when Mr. Lange was asked "what led to your decision to let Ms. Herzog go," he was unable to present a succinct and substantive answer. Instead, he gave a rambling response which questioned the merits of a recommendation Ms. Herzog made on a personnel matter. (R. 122:219). The jury was entitled to view these comments as additional evidence of pretext.

The third "observation" in Mr. Lange's testimony about his alleged "evaluation" was an unexplained assertion that Ms. Bachler and Ms. Christian "seemed to be more energetic." (R. 122:219). A reasonable jury could believe that such a reference effectively uses code words which reflect an age bias.

The fourth "observation" flowing from the alleged "eight month evaluation" was the result of surreptitious nocturnal visits that Mr. Lange made to Ms. Herzog's office. R. 122:220-221):

> I decided I'd go in and sit in her office after she had gone and I'd mark items that were on her desk . . . where everything was . . . [and] on return visits those items . . . still remained.

Since Mr. Lange did not tell Ms. Herzog that he had any concerns about items on her desk (because he kept his "evaluation" secret), the jury could reasonably find that this inconclusive "observation" was entitled to little or no weight, or in the alternative, that it was pretextual.

The final observation that Mr. Lange made, when he was questioned about his so-

called "evaluation," was a cryptic comment that conflicts with the City's claim that Ms. Herzog had a "distrust of computers." (City Br. 16). In this context, Mr. Lange testified that, when he offered staff members an opportunity to take additional classes, he found it "to be kind of curious" that Ms. Herzog chose "to take Excel spreadsheet," instead of conversational Spanish. The jury was entitled to find that this inconclusive observation was also entitled to little or no weight in determining the relative qualifications of Ms. Herzog and her subordinates.

In the final analysis, the jury's verdict demonstrates that the jury did not believe the City's claim that Ms. Herzog was laid off because she was less qualified than the younger women that she had trained and supervised. (R. 123:111).

c. The jury had sufficient evidence to determine that City claims concerning an alleged "distrust of computers" and other "problems" were pretextual.

Despite the lack of any substance in Mr. Lange's testimony about the alleged results of his alleged "evaluation," the City contends (City Br. 16-17) that "Lange's observations of problems or concerns that he had with Herzog were independently verified by the testimony" of other witnesses. Apart from the fact that the testimony of Mr. Lange was so random, insubstantial, and inconclusive that it cannot fairly be said to have identified any real "problems or concerns," it is evident that the testimony of the other witnesses does not provide any verification "of the reasons [for the layoff] articulated by Lange,"as the City claims. (City Br. 16-17).

First, as the United States Supreme Court made clear in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) the relevant inquiry is the motivation of the City "at the time the

[layoff] decision was made," and that question must be determined in the circumstances of this case by the evidence that Mr. Lange himself gave with respect to his alleged "evaluation." Accordingly, in the absence of relevant testimony by Mr. Lange with respect to the alleged "distrust of computers," the jury could reasonably determine that the testimony of other witnesses about this claim was either pretextual, or entitled to little or no weight.

In this context, the jury heard evidence that Ms. Herzog introduced computers to the Water Department when she was first hired. (R. 122:91). While all Department records were kept "manually" at the time she was hired in 1990, it was Ms. Herzog who "started doing payroll and accounts payable and the general ledger all on the computer" within a month or two of the time that she began working for the City. (R. 122:91-92). Several years later, she participated in the decision-making that led to an upgrade of the software that was used in the Water Department. (R. 122:92). In addition, she took several software courses, including Excel, Intermediate Excel, Word and Access. (*Id.;* R. 123:18, 20*).* More recently she recommended that the City invest in software to bar code bills, which she believed would save the City money. (R. 122:96; Trial Ex. 28).

This evidence is inconsistent with the City's claim that Ms. Herzog had a "distrust of computers." However, in the face of this evidence, and Mr. Lange's failure to establish any predicate for the claim, the City attempted to impugn Ms. Herzog's computer skills at the trial through the testimony of Therese Oie, who had served as Mr. Lange's Secretary for more than 16 years. (R. 123:15). She said that she was surprised to learn

that Ms. Herzog had signed up for an Intermediate Excel class, because she assumed that anyone with accounting experience would already "be able to do spreadsheets." (R.123:18, 20). During the examination, she volunteered that she was "self-taught," and on cross examination, she admitted that she had never taken a course in Excel, and did not know what is taught in an Intermediate Excel course. (R. 123:20).

Under these circumstances, the jury was entitled to give Ms. Oie's testimony little or no weight. It could reasonably infer that she did not know what she was talking about, and that, as Mr. Lange's secretary, she had an interest in shading her testimony to please her employer.

The City also cites the testimony of Vicki Hellenbrand, a partner in the City's outside auditor. (City Br. 17). Her testimony notes that Water Department work orders were "still done manually" a number of years after she "suggested to both Mike Olesen and Judy" that they should be prepared "with an Excel spreadsheet." (R. 122:167-168). However, the jury also heard evidence that Mr. Olesen "wasn't very computer literate," and as noted above, that it was Ms. Herzog who started to set the departmental work "up on the computer." (R. 122:91-92). The jury also heard testimony that, despite Ms. Hellenbrand's recommendation, it was Mr. Olesen who decided that Ms. Herzog should continue to prepare the work orders manually. (R. 122:116). "Mr. Olesen wanted them done that way," Ms. Herzog testified, and that fact had been communicated to Ms. Hellenbrand. (R. 122:116).

In the face of the evidence already recounted, the jury could reasonably find that there was no merit in the City's attempt to justify the layoff on the basis of a post-layoff

attack on the grounds of an alleged "distrust of computers" and hints of other potential performance problems. In fact, far from justifying the City's layoff decision, the jury may well have determined that the City's post-layoff attack on Ms. Herzog during the trial was evidence of pretext.

Ms. Hellenbrand also gave vague and inconclusive testimony that hinted at issues Mr. Lange had not mentioned in his testimony. But this testimony conflicted with other evidence that Ms. Herzog had worked with members of the accounting firm over the years, and that members of Ms. Hellenbrand's firm "always brought their new recruits" to her office, "because they wanted to show them a set of good books." (R. 121:115).

Finally, the City elicited testimony from Cynthia Rupprecht, the Deputy Clerk-Treasurer, who has worked for Mr. Hoppenrath for 24 years. She hinted at another performance issue that Mr. Lange did not mention. However, the jury also heard testimony from Mr. Hoppenrath, which reflects that he always asked for Ms. Herzog whenever he had a question at the Water Department, because he found the information Ms. Herzog provided to be accurate and reliable. (R. 122:198). And, there is no evidence that Mr. Hoppenrath was ever critical of Ms. Herzog until she filed the instant lawsuit.

In the face of the evidence already recounted, the jury could reasonably find that there was no merit in the City's attempt to justify the layoff on the basis of a post-litigation claim of an alleged "distrust of computers" and other deficient performance. In fact, far from justifying the City's layoff decision, the jury may well have determined that the City's post-litigation attack on Ms. Herzog was nothing less than "affirmative

evidence of guilt."

B. There was sufficient evidence for the jury to find that the city discriminated against Ms. Herzog on the basis of age when it did not recall her or hire her for the vacant position of Account Clerk.

1. The District Court found that the evidence was sufficient to support the jury's verdict that the city engaged in age discrimination, when it failed to recall Ms. Herzog or to hire her for the vacant position of Account Clerk.

The District Court also determined that "the evidence presented was legally sufficient to support the jury's verdict" that the City engaged in age discrimination, when it failed to recall or hire her for a vacant Account Clerk position in Mr. Hoppenrath's office."(City App. 13; *See* pp. 3-4, 10-11). In this context, the Court's opinion cites "evidence that the Account Clerk position became available within a year of the plaintiff's layoff," that "the City had the recall policy, that "[t]here was conflicting testimony as to whether the City's layoff policy required plaintiff to be recalled to this position," and that "plaintiff was not recalled for this position." (City App. pp. 3, 10). The District Court determined, in view of this evidence, that "[t]he jury could have reasonably found that plaintiff should have been recalled to the position based on the policy." (City App. 10).

The District Court proceeded to note that, instead of recalling Ms. Herzog "[i]n March 2004 the City of Watertown advertised for [the vacant] Account Clerk Position" in Mr. Hoppenrath's office. (City App. 3). The Court states that "plaintiff was qualified for the position." (*Id.*) It also declares that Ms. Herzog was "interviewed" for the position, that "Mike Hoppenrath had participated in the previous layoff decision," as well as "the decision not to hire her for the Account Clerk position," and that "the

woman hired for the position was younger than plaintiff." (City App. pp. 3-4).

The Court determined that "the jury could have reasonably inferred," on the basis of the foregoing evidence, "that plaintiff was not hired for the position because of her age." (City App. 11). The Court concluded that "the evidence presented at trial," combined with reasonable inferences drawn by the jury, "is sufficient to support the jury's liability verdict." (*Id.*).

2. There was sufficient evidence from which the jury could infer that the City engaged in age discrimination when it failed to recall Ms. Herzog.

Despite the provisions of its recall policy, the City did not recall Ms. Herzog to fill the position of Account Clerk. When Mr. Hoppenrath was asked why, he stated that he "didn't know if she was qualified." (R. 122:197). He also stated he had "no knowledge of her experience." (*Id.*)

However, this testimony was contradicted by Mr. Hoppenrath himself at trial. He testified that he would ask for Ms. Herzog when he called the Water Department to obtain information. (R. 122:197-198). He stated that he did not doubt the accuracy of the information she provided. (R. 122:198). And he admitted that he did "know some of what . . .[Ms. Herzog] did" in her job with the Water Department. Most important, he admitted a belief that Ms. Herzog "was a qualified person to do" the duties of the Account Clerk position. (R. 122:198).

When asked why he did not recall Ms. Herzog in accord with the recall policy, Mr. Hoppenrath stated his "understanding" that he was not required to do so. (R. 122:183). He said that he viewed the recall policy as applying "to your department only," and not

to positions with the City government. However, he could not point to any documentation or prior interpretation that might have supported his interpretation of the recall policy. (R. 122:183). When he was subsequently asked to concede "that there is nothing in the [text of the] layoff or recall policy that limits a recall simply to the department from which you were laid off," Mr. Hoppenrath answered "correct." (R. 122:198-199).

Under these circumstances, and in view of the evidence that Mr. Hoppenrath had participated in the layoff decision, the jury could reasonably find that the City's explanation for failing to follow its recall policy was not credible. In addition, Ms. Herzog submits that the jury could reasonably infer that the City engaged in age discrimination when it failed to recall Ms. Herzog.

3. There was sufficient evidence from which the jury could infer that the City engaged in age discrimination when it failed to hire Ms. Herzog.

Instead of recalling Ms. Herzog to the vacant position of account clerk, the City advertised the position and accepted applications. Ms. Herzog applied, but the City ultimately selected a younger woman to fill the position, who had no municipal experience, no education beyond high school, and no background in accounting. (Herzog App. 29).

The City argues that Ms. Herzog was not selected on the basis of a ten minute interview, in which the interviewers allegedly "determined that she was not the best person for the job given the need for strong customer service skills." (City Br. 21; R. 82, 186). This claim is incredible.

First, as noted above, the record reflects that customer service was an important part of Ms. Herzog's job with the Water Department, and that Mr. Hoppenrath knew that to be the case. In fact, as the trial began, the Judge read a "Statement of Undisputed Facts" to the jury, including a portion of Ms. Herzog's last performance evaluation, which rated her customer skills as outstanding – "Very customer driven." (R. 122:51).

In the face of the evidence that Ms. Herzog had "customer service skills," Mr. Hoppenrath testified at trial that he thought Ms. Herzog was "cold" and "unfriendly" during the brief interview. (R. 122:193). However, he did not write "cold" or "unfriendly" on her interview sheet. Instead, he wrote the "[s]ame Judy we know." (Trial Ex. 49).

Mr. Hoppenrath's interview notes contain comments that one of the applicants had "gray hair," and was "older but seems dedicated to service to customers." (R. 122:194; Herzog App. 28). When he was asked why he wrote that comment, Mr. Hoppenrath gave the following rambling answer:

> in this particular job you would have to get up from your chair hundreds of times a day. People would come in and you would have to get up and service them and sit back down . . . . [T]his was not just a sitting job and you would have to get up and down quite often . . . .

(R. 122:194).

Finally, the jury may well have found it significant that Mr. Hoppenrath noted that the successful candidate had "dark hair." (R. 122:195; Herzog App. 29). Although the City argues that the "dark hair" candidate was 45, and was only four years younger than Ms. Herzog, that does not preclude a finding of age discrimination. The jury could

have inferred that Mr. Hoppenrath preferred a more youthful looking candidate with "dark hair." Moreover, this Court has held that a small age difference does not preclude the jury from finding discrimination "where a jury could conclude that the evidence "reveals the employer's decision to be motivated" by age. *EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d 296, 302 (7th Cir. 2002).

Ms. Rupprecht, Mr. Hoppenrath's Deputy, testified that Ms. Herzog seemed nervous during the interview, which was understandable in view of the evidence that Mr. Hoppenrath had participated in the layoff decision, and had already failed to recall her in accord with the City's recall policy. (R. 122:39, 82). Ms. Rupprecht added that she did not recall any discussion about the work that Ms. Herzog had done in her thirteen years of employment with the City. (R. 122:45).

Under these circumstances, the jury had sufficient evidence to determine that Mr. Hoppenrath's shifting and inconsistent explanations for his failure, either to recall Ms. Herzog or to hire her for the Account Clerk vacancy, were simply not worthy of belief. In fact, in accord with the Supreme Court's decision in *Reeves v. Sanderson, supra,* Ms. Herzog submits that the jury could reasonably have determined that the stated reasons were pretextual assertions that constituted "affirmative evidence of guilt."

C. The evidence was sufficient for the jury to find that the city discriminated against Ms. Herzog on the basis of her sex when it did not select her for the position of Assistant Manager-Water.

    1. The District Court correctly found that the evidence was sufficient to support the jury's verdict that the City engaged in sex discrimination, when it did not select Ms. Herzog for the Assistant Manager-Water position.

The District Court determined that "the evidence presented [at trial], combined with all reasonable inferences . . . is sufficient to support the verdict" that the City engaged in gender discrimination by failing to promote Ms. Herzog to the position of Assistant Manager-Water. (City App. 9). In making this decision, the Court noted evidence in the record that Mr. Lange decided to hire Mr. Kuerschner for the Assistant Manager position "without advertising the position and without a written job description for the position." (City App. 11). The Court's opinion adds that, "[b]ecause there was no job description there was conflicting testimony about the [intended] duties of the position." (*Id*.). It also notes that, according to the testimony of Mr. Kuerschner, Mr. Lange told him "that his duties would be more managerial than field work." (*Id*.).

On the question of relative qualifications, the Court cited evidence that "Plaintiff had [more] supervisory experience," while Mr. Kuerschner, in contrast, "had practical experience" in "field work." (*Id*.). He also notes that "[p]laintiff was not considered for the job," but that Mr. Lange "had considered other male employees" as potential candidates for the promotion. (City App. 9, 11).

Under these circumstances, the District Court determined that the evidence "is sufficient to support the jury's liability verdict." It correctly decided that "[t]he jury could have drawn a reasonable inference that Paul Lange did not hire plaintiff for the position because she was a woman." (City App. 11).

2. The jury had sufficient evidence to determine that the Assistant Manager-Water was intended to perform duties of a managerial nature.

The relevant inquiry with respect to the claim of gender discrimination, as the

United States Supreme Court made clear in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989), is what motivated the employer "*at the time of the [promotion] decision*." In this context, there is undisputed evidence in the record, from which the jury could infer that the Assistant Manager was intended to perform duties of a managerial nature at the time the promotion decision was made.

First, the position was assigned the title of "Assistant Manager-Water." (Trial Ex. 74, Def. Adm. No. 180). In this context, *Webster's Third New International Dictionary* (2002 ed., p. 1372), defines a "manager" as "a person that conducts, directs, or supervises something." Under these circumstances, the plain and ordinary meaning of the position title is evidence that the new Assistant Manager was primarily intended to assist Mr. Lange in conducting, directing and supervising the operations of the Water Department, as distinguished from "hands on" work with the equipment and machinery.

Second, as the District Court noted in its opinion, the jury heard Mr. Kuerschner testify that Mr. Lange told him, *at the time of his promotion to the Assistant Manager position,* that "his duties would be more managerial than field work." (City App. 4; R. 122:131). This testimony of Mr. Kuerschner flatly contradicts the claim of the City at trial and in this Court that the Assistant Manager position was primarily intended to perform duties of a "hands on" or "technical" nature.

Third, there is evidence that, immediately following the promotion, Mr. Kuerschner was given responsibility for supervising all of the eleven staff employees of the Water

Department. (Herzog App. 39; Trial Ex. 124, Def. Adm. No. 263 with Adm. Ex. D). This early decision is consistent with the jury's determination that the Assistant Manager position was primarily intended to perform duties of a "managerial" nature, as Mr. Kuerschner testified at trial.

Finally, the jury was entitled to make that decision in the light of the additional evidence set forth below that the stated reasons for the promotion decision were pretextual. This evidence provided the jury with a rational basis to infer that the City's stated reasons for the promotion decision were either unworthy of belief, and therefore entitled to little or no weight, or that they were pretextual in nature, and ought to be considered as "affirmative evidence of guilt."

3. The jury had sufficient evidence to determine that Ms. Herzog was qualified to perform managerial duties in the position of Assistant Manager-Water.

The jury's verdict reflects a determination that the Assistant Manager position was created to perform managerial duties, that Ms. Herzog was qualified to perform such duties, and that she did not receive the promotion because she was a woman. The jury determined, based on the evidence presented, that had Ms. Herzog been a man, with all the credentials she possessed, it was she, and not Mr. Kuerschner, who would have been chosen to perform in a managerial capacity.

The record contains evidence that Ms. Herzog worked for almost 13 years with the City Water Department, had performance evaluations that consistently rated her work as outstanding, and had advanced to positions of increasing responsibility. That evidence provides a rational basis for the jury to infer that Ms. Herzog was qualified to

assist Mr. Lange in the managerial tasks of conducting, directing and supervising the work of the Water Department, and to make management-level decisions with respect to such tasks.

During her three years as Financial Supervisor, Ms. Herzog participated in daily meetings that Mr. Olesen and Mr. Lange had with the three second level supervisors in the Department. These meetings concerned the planning and scheduling of work that needed to be done, and addressed problems as they arose.

Ms. Herzog testified that she knew each of the staff persons that were assigned to the Assistant Manager for supervision. She had worked with most of them for over a period of ten years, and supervised four of them. (R. 122:102-106) At the time of the promotion decision, Mr. Rowoldt was responsible for the supervision of four employees, and Mr. Kuerschner was responsible for the supervision of just two. (*Id*; Herzog App. 33).

With respect to the distribution crew, Ms. Herzog knew precisely what tasks were performed each day, how long it took each employee to perform each task, as well as the kind, cost and quantity of the materials that were used. (R. 122:90-91; Trial Ex. 64, Def. Adm. Nos. 54, 55, 56, 57, 58, 59, 60, 61). All of this information was contained in the thousands of work orders that Ms. Herzog was responsible for processing.

During the period from June to December 2002, when the Water Department was between managers, Ms. Herzog was responsible for many of the day-to-day tasks of the Water Department that had previously been performed by Mr. Olesen. Her memos to

the Water Commission during this period provide further evidence of her experience with personnel issues that a manager of eleven employees would be expected to address on a daily basis. (R. 122:94-97; Trial Exs. 23, 26, 27, 28 and 29).

In addition, Ms. Herzog's regulatory compliance responsibilities provided additional evidence that she was qualified to perform in a management capacity. In this context, Ms. Herzog's preparation of the annual report to the Public Service Commission demonstrates that she had a comprehensive understanding of the operations of the Water Department. This detailed report that she prepared on an annual basis, and in 2002 was 64 pages, required that Ms. Herzog be knowledgeable about all aspects of the "business and affairs" of the Water Department. (Trial Ex. 37, p. 2). The report includes not only financial details of the Department, but also detailed information concerning the City's water supplies, including the location, depth and yield per day of the wells. The report also contains detailed descriptions of the water utility plant and its operating equipment, as well as a description of the number of fire hydrants and water meters that were put in and out of service during the year. (Trial Ex. 37; R. 122:88-91).

In addition, Ms. Herzog understood the finances of the Utility, which knowledge is critical to the effective operation of the Water Department. She worked on rate increases, billing and other financial matters that were essential to the operation of the Department.

The City did not attempt to explain how Mr. Kuerschner could be qualified to serve

as "Assistant Manager," when he had no experience with respect to the preparation of financial reports, or filings for the Public Service Commission. (R. 122:132-133; Trial Ex. 89; Def. Adm. Nos. 247, 248, 249). Nor did it explain how Mr. Kuerschner could be expected to supervise the billing clerk, when he had no experience with respect to the utility billing duties, or to oversee the accounting tasks that the Water Department was still required to perform. (*Id.*; Def. Adm. No. 244; R. 122:132).

It is evident that Ms. Herzog had the skills and knowledge, from which the jury could determine that she was qualified for the position. The City inaccurately claims that Ms. Herzog must demonstrate that her qualifications were "significantly superior" to those of Mr. Kuerschner. (City Br. 27). While the jury may have believed her qualifications for the manager position were superior, such a showing is not mandatory to find gender discrimination. *Fischer v. Cevanade*, No. 07-1800, 2008 WL 681173 at 12 (7th Cir. March 14, 2008). In this respect, it is sufficient that Ms. Herzog provided sufficient evidence from which the jury could determine that the City's reasons for denying her the position are pretextual.

4. The jury had sufficient evidence to determine that the stated reasons for the City's promotion decision were pretextual.

Judge Shabaz did not find it necessary to evaluate the credibility of the evidence presented by the City. However, Ms. Herzog submits that the City has made pretextual assertions to justify its conduct, and that the jury was entitled to determine, either that the City's claims were entitled to little or no weight, or that those claims constituted evidence of pretext that the jury could properly regard as affirmative evidence of guilt

in accord with the Supreme Court's decision in *Reeves v. Sanderson, supra.*

The City claims, contrary to the evidence as to what was intended "*at the time of the [promotion] decision*,"that the Assistant Manager position is "technical" and "hands-on," as distinguished from managerial in nature (City Br. 24-28). In contrast, Ms. Herzog submits that there is ample evidence from which the jury could reasonably conclude, in the words of the City's Brief that "the employer's justification for the decision . . . was a lie." (City Br. 28). The record is replete with evidence from which the jury could reasonably infer that the stated reasons for the promotion decision were pretextual.

In this context, the City's claim is contradicted by the trial testimony of Mr. Kuerschner that the Assistant Manager "would be more managerial than field work," as well as by the plain and ordinary meaning of the "Assistant Manager" title. In addition, in evaluating the credibility of the stated reasons for the promotion decision, the jury had the ample evidence set forth above, that the City had made pretextual assertions in connection with the age discrimination claims, which the jury could consider in assessing credibility with respect to the City's defense to the gender claim.

a. The jury had sufficient evidence to determine that the alleged "necessity" of "hands-on" experience was pretextual.

The City's principal claim with respect to the promotion decision (City Br. 28) is a contention that "Herzog was not considered for the position because she lacked" the [allegedly] "necessary experience in the hands-on operation of the Water Department." In this context, the City appears to contend that, since Mr. Lange testified that he was "looking for people that had hands-on day-to-day experience in running the treatment

facilities and operation distribution" (R. 122:208), the jury was required to accept his testimony as dispositive as to the necessity of such experience.

However, the record contains evidence that the City had made at least two other claims that Ms. Herzog lacked "necessary" qualifications for the Assistant Manager position. And in each case, the jury was presented with evidence that the claims of "necessity" were false.

In this context, the jury had evidence of the City's previous claim "that a job qualification for the Assistant Manager-Water position were certifications in ground water and iron removal." (Herzog App. 22). The City contended that these DNR licenses were "necessary" qualifications for the position, and claimed on that basis, that Ms. Herzog was not qualified. (Herzog App. 21-22). Mr. Lange testified at trial that it was "necessary . . . in my absence . . . that the Assistant [Manager] would be able to sign the reports. (R. 122:213-214).

Yet, contrary to these claims, Mr. Lange admitted that "a lot of those DNR forms" are signed, not by Mr. Lange or Mr. Kuerschner as his Assistant Manager, but by Mike English, the plant operator. (R. 122:104, 154, 213-214). In other words, the jury could reasonably determine that the DNR forms could be signed by lower-level employees who had the licenses that were alleged to be necessary for an Assistant Manager.

The jury was also given Trial Exhibit 81, in which the City admits that "[t]here is no documentation that the Defendant has ever considered DNR certifications to be an essential job qualification for the position . . . ." (Herzog App. 22; Trial Ex. 81, Def. Adm.

288). The jury also heard testimony from Mr. Kuerschner that the iron removal license could be obtained by taking a one-day course and an exam, and that the groundwater distribution license required six days of course work followed by an exam. (R. 122:139-140). Accordingly, the jury could have reasonably concluded that, if Mr. Lange had told Ms. Herzog of the alleged requirement early in 2003, or posted the opening for an Assistant Manager with a job description, she might have been able to obtain the allegedly necessary licenses before the promotion decision was made. Moreover, Mr. Lange conceded during his trial testimony that neither Mr. Rowoldt or Mr. Craig, two of the three men he considered, actually had the licenses that he had claimed to be "necessary" at the time he gave them consideration. (R. 122:213-214).

In addition, the jury had evidence of another false representation on the part of the City. It claimed that Ms. Herzog was not qualified because "a qualification for the position of Assistant Manager Water is the ability to climb the water tower and change light bulbs." (Herzog App. 23-24; Trial Ex. 83 at No. 299). The City subsequently admitted that, at the time Richard Kuerschner was promoted, neither task was a direct duty of the Assistant Manager. (Herzog App. 24; Trial Ex. 83, Def. Adm. No. 300).

The foregoing testimony and admissions constitute evidence from which the jury could reasonably infer that the City was not telling the truth when it attempted to justify its promotion decision on the ground that a lack of "necessary" DNR licenses and tower-climbing abilities accounted for the failure to consider Ms. Herzog as a candidate for the promotion. Ms. Herzog submits that, since two of the City's claims of

"necessary" qualifications had already been admitted or demonstrated to be false, the jury could reasonably infer that the claim of a third "necessary" qualification also was false.

b. The evasive testimony of Mr. Kuerschner is additional evidence from which the jury could infer that the stated reasons for the promotion are pretextual.

As noted above, Mr. Kuerschner's trial testimony flatly contradicts the City's claim that the Assistant Manager position was intended to be a "technical" and "hands on" position, as distinguished from a managerial or executive position. However, the jury may have found additional significance in the fact that he initially attempted to evade the point. When asked to tell the jury what Mr. Lange had told him about the job at the time he was promoted, he first gave an unresponsive answer that Judge Shabaz struck from the record, then denied what he had said in his deposition, before finally admitting that Mr. Lange had told him that the duties of the Assistant Manager "would be more managerial than working in the field," and would require "doing more supervision instead of doing the actual work myself," as well as "more work in the planning stages." (R. 122:131).

Mr. Kuerschner's outright denial of what Mr. Lange told him in September of 2003, in direct contradiction of his deposition testimony, and his additional attempt to evade the issue, was critical. It constitutes evidence that the stated reasons for the City's promotion decision at the trial were pretextual, and that Mr. Lange's uncorroborated testimony about the reasons for his decision was not credible.

c. The jury had sufficient evidence to determine that the claim of minimal supervisory responsibility was pretextual.

In this Court, the Defendant contends (Br. 26) that supervisory experience was a minor qualification in determining who should be promoted, but this suggestion is contradicted by evidence. First, in its response to Requests for Admissions, the City admitted that supervisory experience is a qualification for the position of Assistant Manager - Water. (Herzog App. 26; Trial Ex. 85, Def. Adm. No. 233). More important, the candidacy of Mr. Rowoldt was ultimately rejected on the basis of deficient supervisory skills. (R. 122:102, 210). In this context, the admissions in Trial Exhibit 78 reflect that Mr. Lange "initially thought . . . [Mr. Rowoldt] might be capable of supervising, but the more he evaluated him, the more he realized that might not be the case." (Herzog App. 19; Trial Ex. 78, Def. Adm. 188).

Although the City admitted during discovery and at trial that a qualification for the Assistant Manager position was "supervisory experience," it did not present evidence concerning Mr. Kuerschner 's supervisory experience. Instead it asked the jury to accept the proposition that the position was intended to be "hands-on" and "technical" on the basis of Mr. Kuerschner's testimony, during the trial in October of 2007, more than four years after the promotion decision, that his "day-to-day work" at that time consisted of "no more than 25 percent supervision." (R. 122:150; See City Br. 26).

Contrary to the City's claim that this testimony of Mr. Kuerschner is dispositive with respect to the intended duties of the Assistant Manager position in 2003 (City Br. 26), it raises the question of whether the current duties are different from what was originally

intended. The jury could reasonably infer, on the basis of Mr. Kuerschner's testimony that the job duties were supposed to be more "managerial" rather than "technical" but due to Mr. Kuerschner's lack of qualifications for the position, Mr. Lange changed the job duties subsequent to Mr. Kuerschner's appointment.

d. The City's failure to prepare a position description for the assistant manager position is additional evidence from which the jury could reasonably infer that the stated reasons for the promotion decision are pretextual.

As noted above, the City's promotion policy is based on the premise that each position will have a job description that documents the "competitive standards" that must be met by candidates for a promotion. (Trial Ex. 3, p. 5). In addition, the record contains an admission that Mr. Lange did not prepare any job description for the position of Assistant Manager prior to the time he promoted Mr. Kuerschner to that position. (Herzog App. 16; Trial Ex. 75, Def. Adm. Nos. 210 and 211). In fact, there had still been no position description created as of October 6, 2006. *(Id.)*

The failure to prepare a job description was unusual, and the City failed to provide any credible explanation for that failure. At trial, Mr. Kuerschner testified as follows:

Q Sir, this is the first position [assistant manager water] you have had at the City of Watertown where you have not had a job description, is that correct?

A Yes.

Q After you received the position, you asked Paul Lange for a job description, Correct?

A Yes.

Q And Mr. Lange said to you that it would be taken under advisement, is that correct?

A Yes

Q And several years went by and you still didn't have a job description, correct?

A Yes.

(R. 122:132; Herzog App. 16; Trial Ex. 75, Def. Adm. No. 211).

Under these circumstance, the failure to follow the promotion policy by preparing a job description to define and document the criteria to be used in evaluating candidates for the promotion, was both unusual and unexplained. It is additional evidence from which the jury could reasonably infer that the stated reasons for the promotion decision were pretextual.

e. The City's admission that it did not consider Ms. Herzog as a candidate for the promotion is evidence from which the jury could reasonably determine that the stated reasons for the promotion are pretextual.

The record contains two admissions that Mr. Lange did not give any consideration to Ms. Herzog as a potential Assistant Manager-Water, despite the fact that she was one of the three supervisors in the Department and supervised the same number of employees as Mr. Rowoldt. (Trial Ex. 128, Ans. Nos. 87 and 236). In one, the City admits that "Mr. Lange, <u>at no time</u>, considered the Plaintiff as a candidate for promotion to the new position of Assistant Manager -Water." (*Id.* at Ans. No. 236, emphasis added). In the other, it admits that "Mr. Lange did not consider the Plaintiff as a candidate for promotion to the new position of Assistant Manager - Water." (*Id*. at Ans. No. 87).

In contrast, Mr. Lange considered each of the two male second-level supervisors in the Water Department as candidates for the promotion. In addition, he considered Mr. Craig, despite a limited role that consisted of the installation, repair and testing of water meters under Ms. Herzog's supervision. (Herzog App. 17).

In addition to the fact that Mr. Lange considered a subordinate of Ms. Herzog who had limited credentials and experience without considering her, the record contains an admission that Mr. Lange "had never hired or promoted a woman to a supervisory or managerial position" at the time he made the promotion decision at issue here (Herzog App. 20). It also contains Mr. Lange's trial testimony that, during work for a previous employer, he observed that the hiring of woman managers might lead to "difficulty," because "men were challenging" them at his previous employment and "creating challenges for them." (R. 122:227).

The verdict reflects a conclusion on the part of the jury that Ms. Herzog was excluded from consideration for the Assistant Manager position because she was a woman. In this context, it had evidence that Mr. Rowoldt was considered and rejected on the basis of a lack of supervisory ability. It had evidence that Mr. Craig, was considered and rejected because Mr. Lange "didn't see the potential there." (R. 122:209; Herzog App. 17; Trial Ex. 78). In view of these facts, the jury could reasonably infer that Mr. Kuerschner was actually selected for the position of Assistant Manager, not because he was qualified to perform the duties that were originally intended for the Assistant Manager, or because he had "hands-on" experience that the others lacked, but instead,

because he was the only in-house candidate who remained after all of the others had been eliminated.

This reasoning suggests that the duties of the Assistant Manager position in October of 2007 are not necessarily the duties that were contemplated in 2003, and that the 2007 testimony as to those duties may reflect what Mr. Kuerschner is capable of doing, instead of the "competitive standards" that ought to have been documented in a job description prior to the time the promotion was awarded. Under these circumstances, Ms. Herzog submits that the jury could reasonably infer, based on the evidence, that the City made pretextual claims when it asserted that the position was intended to be "hands-on" and "technical," as distinguished from supervisory and managerial.

II. The District Court Did Not Abuse its Discretion When it Denied the City's Motion for a New Trial on Liability.

A. The District Court correctly denied the City's motion for a new trial.

The standard of review for determining whether to reverse a district court's decision respect to a new trial on liability is stringent. This Court has made clear that the "'authority to grant a new trial. . . is confided almost entirely to the exercise of discretion on the part of the trial court . . . [and thus] the grant or denial of a motion for a new trial is not subject to review by this court except upon exceptional circumstances showing a clear abuse of discretion.'" *Cygnar v. City of Chicago*, 865 F.2d 827, 845 (7th Cir. 1989).

The District Judge determined that the verdicts of the jury on liability were not "against the great weight of the evidence." (City App. at 12). He also stated that "the

evidence together with the reasonable inferences drawn therefrom support the liability of on plaintiff's three claims."

B. There was sufficient evidence to support the verdicts of liability.

The City has two principal arguments. The first, a claim of insufficient evidence to support the verdicts, is without merit for the reasons set forth above.

The other argument contends that "the jury was either confused and did not understand the evidence and [the] instructions [of the District Judge] or simply chose to ignore them." (City Br. 30). The City provides no credible basis for these attempts to discredit the jury decision. Its criticism is constructed upon rank speculation and assumes, contrary to the evidence and the findings of both the jury and the District Court, that there is an "absence of evidence of discrimination." (City Br. 31).

III. The District Court Did Not Abuse its Discretion by Denying the City's Motion for a New Trial on the Issue of Damages.

A. The District Court did not abuse its discretion when it determined that a new trial on damages was not appropriate and a remittitur of $100,000 is appropriate.

The standard of review with respect to a request for a new trial is whether the District Court Judge abused his or her discretion. *Cygnar v. City of Chicago*, supra, 865 F.2d at 845. The standard of review for a "district court's remittitur" is also whether there was an "abuse of discretion." *Deloughery v. City of Chicago*, 422 F. 3d 611, 617 (7th Cir. 2005)

The District Court determined that there was sufficient evidence from which the jury could reasonably conclude that Ms. Herzog suffered "pain and suffering as a result

of the . . . [City's] failure to hire her" for the Assistant Manager-Water position. (City App. 15). In considering the City's motion for remittitur, the Court determined that "an award of $100,000 is reasonable in this case."(*Id.* 16).

In rendering that decision, the District Court relied on two of this Court's decisions, which are comparable to the instant case in that neither included "medical testimony of emotional stress" as part of the evidence in the record. (*Id.* 16). It noted that this Court affirmed the District Court's remittitur of a $250,000.00 jury award for emotional distress to $175,000.00 in *Deloughery v. City of Chicago*, 422 F.3d 611 (7th Cir. 2005), and that the Court reduced a compensatory damage award from $75,000 to $35,000 in *Ramsey v. American Air Filter Co., Inc.*, 772 F.3d 1303, 1313 (7th Cir. 1985). (City App. 16).

In *Deloughery*, where the court determined $175,000 was a reasonable amount of compensatory damages, the plaintiff was a police officer, who testified that she was "devastated" by City denials of a promotion to the rank of Captain. However, in contrast to the evidence submitted by Ms. Herzog in the instant case, the plaintiff in *Deloughery* did not suffer the loss of her job, did not suffer the pain of conducting multiple job searches, did not have worries about paying her bills, did not suffer sleep disruptions and weight gain, and did not feel the severe embarrassment that Ms. Herzog suffered.

Although Ms. Herzog submits that the facts of her case are more compelling in these respects than those in *Deloughery*, Ms. Herzog accepted the Court's remittitur of $100,000. She submits, on the authority of the *Deloughery* case, that the remittitur was

well within the Court's discretion to reduce the amount of compensatory damages, and that accordingly, there is no merit to the City's request for a new trial.

B. The record contains substantial evidence of emotional distress.

The City contends that the "evidence submitted at trial to support Herzog's claim of emotional distress related to the gender discrimination claim was nonexistent." (City Br. 41). This claim ignores substantial evidence in the record.

As noted above, the jury heard evidence that Ms. Herzog had worked for the City of Watertown for thirteen years in positions of increasing responsibility, had served for three years as one of three second-level supervisors in the Water Department, and had been laid off without warning from her position as Financial Supervisor. The impact of the layoff, and the concurrent failure to promote, was significantly enhanced by the fact that her husband had lost his job of thirty-one years, a few months before the layoff took place. (R.122:69).

When asked about the connection between her emotional distress and the fact that she was not promoted to the Assistant Manager position, Ms. Herzog testified (R. 124:25-26):

> If I would have gotten the position of Assistant Manager. . . [I] wouldn't have had to go through these last four years of . . . very, very stressful [emotional pain] . . . .[W]e would have been able to live on the money that I made. I would have been able to continue to have my insurance. . . . We had no money to . . . [celebrate our 25th wedding anniversary]. If you don't have a job, you can't pay for these things . . . .

Ms. Herzog testified that it took "a long time to find another job."(R. 124:26). In the meantime, she had sent "out application after application" and received multiple

"letters of rejection." (R. 124:26).

The impact of Ms. Herzog's layoff, and the concurrent promotion decision, was significantly enhanced by the fact that Watertown is a relatively small community, in which she had lived for her entire life. Ms. Herzog testified that, when she would go out into the community, "people would constantly ask me what had happened." (R. 124:26). "I was humiliated by losing my position with the water utility after working there for 13 and a half years." (R. 124:31).

The severity of Ms. Herzog's distress was demonstrated when one of her City friends died of cancer in June of 2004. (R. 124:27-28). Pat "had been my friend since we were in grade school," she testified, but she did not attend the funeral. (R. 124:28). "I didn't feel comfortable going to the funeral because everybody from the City was going to be there." (R. 124:28). "That's one of the things that really bothered me." (R. 124:28).

Ms. Herzog also testified that, during the intervals when she was unemployed, "I was having trouble sleeping at night" due to "the stress of not knowing when I was going to get a job and worrying about finances . . . ." (R. 124:28). She added that she also gained weight after the denial of the promotion to Assistant Manager. "It just was very, very stressful," she said, "having to deal with the financial burden of not having that job."

Under these circumstances, there is no merit to the City's claim in this Court that evidence of "emotional distress related to the gender discrimination claim was nonexistent." (City Br. 41). "But for" the failure to promote because Ms. Herzog is a

woman, there would have been no emotional distress.

C. The District Court correctly determined that the issue of wilfulness was not relevant, because the court did not award any damages on the age discrimination verdicts.

The judgment of the District Court does not include any award of damages on Ms. Herzog's two successful claims that the City engaged in age discrimination. Accordingly, at this point, the issue of wilfulness is moot.

In any event, this Court has determined that "an employer's violation of the [ADEA] statute is willful if the 'employer knew or showed reckless disregard for the matter of whether its conduct was prohibited," and that "'leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake from which a jury can infer reckless indifference." *E.E.O.C. v. Board of Regents of the University of Wisconsin*, 288 F. 3d 296, 304 (7th Cir. 2002). In this context, the jury's finding of willfulness is supported, not only by the evidence in the liability phase of the trial that supports findings of age discrimination, but also by the fact that the City did not provide its managers with any training with respect to the requirements of the federal employment discrimination laws. (R. 122:228). It is also supported by the fact that Mayor David and Mr. Hoppenrath permitted Mr. Lange to engage in acts of age discrimination without any meaningful oversight.

CONCLUSION

For the reasons set forth above, Ms. Herzog respectfully asks this Court to affirm the judgment of the court below in all respects, that the City be directed to pay the Judgment in the amount of $322,330.03 together with post-judgment interest, and that the City be directed to pay Ms. Herzog's reasonable attorneys' fees and the costs incurred in connection with this appeal.

Dated this 17th day of April, 2008.

Respectfully submitted,

_____

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RULE 32(a)(7) CERTIFICATION

I certify that this Corrected Brief complies with the rules contained in F.R.A.P. 32(a)(7) for a brief produced with a proportionally spaced serif typeface. As determined by Counsel's word process program, the length of this brief is 13,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated this 17th day of April, 2008.

_____

Marilyn Townsend
Attorney for Appellee-Plaintiff

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have furnished to the Court a digital version of the Corrected Brief as well as a digital version of the Appendix, pursuant to Circuit Rule 31(e). The digital version has been furnished on a CD which is labeled with the case name, docket number and the fact that it is presented on behalf of the Appellee Judith Herzog. The format has been generated by printing to pdf from the original word processing file.

_____

Marilyn Townsend
Attorney for Appellee-Plaintiff

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiff-Appellee, Judith Herzog, certifies that on April 17, 2008, two copies of the Corrected Brief and one copy of a digital version of the Corrected Brief, were delivered by first-class U.S. Mail to Appellant's counsel:

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Nos. 08-1110 and 08-1364

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDITH HERZOG,

Plaintiff-Appellee,

vs.

CITY OF WATERTOWN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN,
CASE NO. 07-C-0213-S,
THE HONORABLE JOHN C. SHABAZ

APPENDIX OF PLAINTIFF-APPELLEE, JUDITH HERZOG

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