

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York (Hon. John Ansonia, presiding) had federal question jurisdiction over this case under 28 U.S.C. section 1331. Plaintiff-Appellee James Kennedy's ("Kennedy") claims were premised upon the Employee Polygraph Protection Act ("the EPPA"), 29 U.S.C. section 2001 *et seq.* After a jury trial and a jury verdict in Kennedy's favor, the district court denied the post-trial motion for directed verdict and new trial filed by Defendant-Appellant Cosmetics Plus. This Memorandum and Order was not published but can be located at 2001 WL 124441 and at page 391 of the appendix. (JA391-393).¹ The Memorandum and Order was dated January 19, 2001, and entered on January 25, 2001. (JA6a). Classy Makeup timely appealed that judgment to this Court under 28 U.S.C. section 1291.

¹All references are to the contemporaneously-filed Joint Appendix.

ISSUES FOR REVIEW

1. Prior to trial, the district court denied Classy Makeup’ motion to dismiss for failure to state a claim under the EPPA, which only applies to employers who engage in interstate commerce. At trial, Kennedy did not present any evidence that Classy Makeup was engaged in interstate commerce necessary to subject it to the EPPA. In denying Classy Makeup’ post-trial motion for directed verdict, did the district court incorrectly apply a motion to dismiss standard in refusing to examine the evidence, thereby relieving Kennedy of the burden of proof on the interstate commerce element under the EPPA?
2. Kennedy claims that Classy Makeup violated the EPPA by requesting that he submit to a polygraph test and then terminating him as a result of his refusal to do so. Although Kennedy presented evidence that William Jose requested that he submit to a polygraph test, no evidence exists that Classy Makeup’ owners, executives, and principals authorized, directed, or even were aware that Jose, a low-level employee, discussed a polygraph test with Kennedy. Is the evidence legally insufficient to prove that Classy Makeup indirectly or directly requested, suggested, or demanded that Kennedy submit to a polygraph?
3. The jury was asked whether “any person or persons acting on behalf of the defendant Classy Makeup, either directly or indirectly, suggested, requested, required, or otherwise asked that the plaintiff submit to a polygraph...” Classy Makeup’ counsel requested that the word “authorized” be added to the question. Did the court err in refusing counsel’s request and submitting a jury question that would enable a finding of liability against Classy Makeup despite the absence of any evidence of its culpability?

4. Kennedy testified that he suffered damages as a result of taking lesser-paying jobs. Is the jury award of \$75,000 in lost earnings excessive in light of the jury finding that Kennedy failed to mitigate his damages by diligently seeking comparable employment?

5. The jury awarded Kennedy \$5,000 in punitive damages. The EPPA makes no provision for punitive damages, and, assuming arguendo that punitive damages are available under the Act, such damages require a finding that the employer acted with malice or reckless disregard of an employee's rights. Does the EPPA exclude punitive damages, and, if not, is the evidence insufficient to support a jury award of punitive damages in this case?

The answers to all of these questions is yes.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings, and Disposition Below.

Appellant Classy Makeup respectfully appeals from the January 19, 2001, Memorandum and Order denying its Motion for a Directed Verdict or for a New Trial. (JA391-393). The Memorandum and Order was entered on January 23, 2001. (JA6a). Appellee James Kennedy, an employee of Classy Makeup, filed suit under the Employee Polygraph Protection Act (“the EPPA”) claiming that Classy Makeup terminated him after he refused its request to take a polygraph test.

1. Classy Makeup files a pre-trial motion to dismiss asserting that Kennedy failed to allege that it was engaged in interstate commerce and was, therefore, subject to the EPPA.

Prior to trial, Classy Makeup filed a motion to dismiss alleging that Kennedy failed to state a claim under the EPPA, which only applies to employers involved in interstate commerce. The EPPA prohibits any employer, either engaged in interstate commerce or producing goods for interstate commerce, from suggesting, requesting, or demanding that an employee take a polygraph test and then basing an adverse employment decision upon either the results of or the refusal to take a polygraph test. 29 U.S.C. § 2001 *et seq.* The court denied this branch of the motion to dismiss,

concluding that there was no indication that Classy Makeup was not involved in interstate commerce. *Kennedy v. Classy Makeup*, 1997 WL 12222 at *2 (S.D.N.Y. 1997). Kennedy also raised claims under state law for breach of contract and for intentional infliction of emotional distress, which were both dismissed pre-trial. *Id.* at *4-5.

2. During trial, Classy Makeup moves for directed verdict, arguing that Kennedy failed to prove his EPPA claim.

During the jury trial, Classy Makeup moved for directed verdict after the close of Kennedy's case, again attacking the sufficiency of his case under the EPPA. (JA143). Counsel for Classy Makeup argued that Kennedy had not proven that Classy Makeup directly or indirectly through its low-level, unauthorized employee, William Jose, ever requested, suggested, or demanded that Kennedy submit to a polygraph test. (JA143-145). The district judge denied the motion for directed verdict, although the judge stated that he also could not recollect any testimony that Classy Makeup had requested that Kennedy submit to a polygraph test:

According to my recollection of the testimony, he was never asked to take a test and he never refused to take a test according to my recollection of the testimony. Now perhaps you can even – if you had made this motion and I am denying it, you may for all I know have an appealable case even if the jury should convict and I doubt it, but I am just not going to proceed on my recollection of the testimony... Maybe

an analysis of the testimony would find some way of saying he had been asked to take it. I don't think so. However, I am going to deny the motion.

(JA152-153). Contrary to the court's prediction, the jury found in Kennedy's favor and awarded him \$75,000 in lost earnings and \$5,000 in punitive damages. (JA386-

388). 3. After trial, Classy Makeup files a motion for directed verdict or new trial on the basis that Kennedy failed to prove it was engaged in interstate commerce and subject to the EPPA, that no evidence existed that it requested that Kennedy take a polygraph, and because the damages were excessive.

After trial, Classy Makeup filed a timely motion for a directed verdict or a new trial, which the district court denied in a Memorandum and Order dated January 19, 2001. (JA391-393). Classy Makeup raised several points in its motion requesting judgment as a matter of law including: (1) Kennedy's failure to prove that it was engaged in interstate commerce and that it was, therefore, subject to the EPPA; (2) that Kennedy failed to prove that Classy Makeup had requested that he take a polygraph test; and (3) that the damage award was excessive and not supported by the evidence. (JA391-393).

On the first ground, the district court refused to examine the evidence, instead, relying upon its pre-trial denial of Classy Makeup's motion to dismiss, which was directed only at the pleadings:

The question of jurisdiction under the EPPA was raised and decided before trial in our Memorandum and Order dated October 23, 1997. We then rejected defendants' contention that Classy Makeup was not engaged in interstate commerce at the time plaintiff was discharged. We found that "even if at that time defendants had no stores outside the State of New York, there is no indication that their inventory did not move through the states either before or after sale."

(JA391). The standard for determining whether to grant a pre-trial motion to dismiss applies presumptions and inferences in favor of the plaintiff, and the court assumes all elements of the cause of action to be true. In contrast, at trial, the plaintiff bears the burden of proving each and every element of his or her case through substantive evidence.

On the second ground, the district court concluded that it would not disturb the jury's finding that a person or entity acting on behalf of the defendant Classy Makeup requested that Kennedy submit to a polygraph test. (JA392). The district court did not discuss the propriety of the jury question, to which Classy Makeup' counsel objected, premising its liability upon the unauthorized actions of a low-level employee, William Jose. Despite the absence of any evidence that Classy Makeup

authorized, directed, or even had knowledge of Jose' discussion with Kennedy regarding a polygraph test, the court utilized the broad definition of "employer" to impose vicarious liability on Classy Makeup rather than applying the definition to impose independent liability of Jose.

On the third ground, the district court concluded that the jury award of \$75,000 in lost earnings and \$5,000 in punitive damages were not excessive. (JA392). In reaching its decision, the court did not discuss the jury finding that Kennedy failed to mitigate his damages by diligently seeking comparable employment. Yet the jury award of \$75,000 was based, in part, on the income disparity caused by Kennedy's conscious election not to seek comparable employment. The court also did not discuss whether punitive damages were available under the EPPA, nor discuss what, if any, evidence existed of malice or reckless disregard of Kennedy's rights, necessary to justify an award of punitive damages.

B. Statement of Facts.

As Classy Makeup is challenging the legal sufficiency of the evidence, the propriety of a question to the jury regarding Classy Makeup' liability for Jose' unauthorized actions, and the excessiveness of the damages award, a summary of all relevant evidence presented by both Kennedy and Classy Makeup follows.

1. Classy Makeup Employs James Kennedy as a Fragrance Buyer and Store Manager.

Classy Makeup, a New York corporation, is a wholesaler and retailer of fragrances with several stores in the Manhattan area. (JA269). Classy Makeup hired James Kennedy in January 1997 as a manager at their 56th Street store, dealing with the wholesale aspect of the business. (JA46). Kennedy was an employee-at-will who could be fired for any non-discriminatory reason. (JA112, 270). The 56th Street store was a close-out center for overstock, damaged merchandise, and salvageable returns. (JA54). Kennedy received management training and was subsequently shuttled back and forth to various stores in Manhattan where he would oversee training, buying, and inventory. (JA47-53, 58). In 1999, Kennedy received a favorable review and a raise. (JA59).

2. Kennedy participates in inventories at both the warehouse and the 56th Street store location in August 1999.

Kennedy participated in inventories at both the 56th Street store and the warehouse in early August 1999. The inventory at the 56th Street store was conducted on a dollar basis rather than a unit number basis. (JA63-64). Kennedy was responsible for making up dollar values for everything in the store. (JA65). The warehouse inventory followed the 56th Street store inventory and was slated for

August 6, 1999. (JA65). An outside auditing agency conducted the warehouse inventory for two purposes: to have an accurate valuation for bank collateral purposes and to have an accurate count for stocking purposes. (JA117, 235-236).

During inventories, Kennedy's main function was "laying tickets." Kennedy would map the warehouse and number each section so everything could be counted. (JA63-64, 66). He would also organize the shelves so that the merchandise bar codes were facing outwards. (JA63-64). Bulk merchandise in sealed boxes had pre-counts that were submitted to the outside auditing agency. (JA66).

Each inventory had a "freeze-out" date, after which merchandise, even damaged "garbage" items, could not be moved or transferred to another location. If a UPS order came in, it would be set aside and not counted. (JA63-64). Inventory control and monitoring was discussed at length at management meetings, at which Kennedy was present. (JA115). Kennedy also received handbooks and procedure statements detailing the freeze-out periods. (JA115-116; DX-F; DX-G). Kennedy testified that he was aware of company policy that no merchandise was to be transferred or moved during the freeze-out period. (JA116). As a manager, Kennedy had been involved in five to six inventories a year at each store and an additional two inventories a year at the warehouse. (JA118).

According to Kennedy's testimony, he went to the warehouse on August 4, 1999, after the freeze-out date, and removed damaged goods from the shelves and placed them in boxes for transfer to the 56th Street store. (JA66, 68). Kennedy claimed that he did not remove the boxes from the warehouse during the freeze-out period. (JA69). But Kennedy admitted that he did transfer "garbage" merchandise to the 56th Street store during the freeze-out period via van. (JA70-71). Kennedy was unsure if the owners, Robin and Tammy Bitworth and John Darwin, were aware of his activities at the time. Kennedy did know that his co-manager, Nilsa Davidoff ("Davidoff") was aware of his actions. (JA71).

3. Classy Makeup employee William Jose receives information about employee thefts in the warehouse and conducts an investigation focusing on Kennedy and Davidoff.

William Jose was employed as head of security at Classy Makeup from December 1995 until November 2000. (JA161). In late July or early August 1996, warehouse worker Carlos Torres contacted Jose about employee theft. (JA162). According to Torres, and another warehouse worker Eddie Vanilla, they saw Kennedy and Davidoff remove merchandise from the warehouse in shopping bags, which they then placed in their cars. Often Kennedy and Davidoff would ask other

employees to help them carry out merchandise. (JA197, 225). Kennedy and Davidoff never completed any transfer paperwork, however. (JA163-164). Both Torres and Vanilla asked Jose if they could take lie detector tests to corroborate their reports. (JA197-199, 227, 232). The results of their tests supported their theft accusations against Davidoff and Kennedy, as did written statements from other warehouse employees. (JA220-221; DX-E).

Based on this evidence, Jose began conducting video surveillance of the warehouse. (JA165). Jose believed that any merchandise would be moved prior to the scheduled inventory. (JA165). During the surveillance, Jose observed three non-employees enter the warehouse and then exit, along with Nilsa, carrying shopping bags. (JA166). Store policy prohibited non-employees from being in the warehouse. (JA175). Kennedy and Davidoff were also observed removing “armloads” of merchandise from the “live” fragrance aisle. (JA173). Jose’ investigation revealed that any mis-shelved merchandise was moved prior to the freeze-out and before Kennedy’s activities on August 4, 1999. (JA188). Jose recorded these activities on surveillance tape from one of several cameras located throughout the warehouse. (JA167, 172; DX 2). All of this occurred during the inventory freeze when no merchandise was to be removed. (JA174).

The boxes full of merchandise that Kennedy admitted moving to the front of the warehouse were not there the next day. (JA191). It was store policy that all garbage would go into a compactor to be crushed into bales. (JA83-A84). Jose intercepted the garbage bales from the warehouse and discovered numerous empty boxes that had contained large quantities of eight to twelve different fragrances. (JA181-182). Although one of the discarded boxes had “tester” written on it, Jose testified that only the merchandise stamped “testers” were recognized as such. (JA193-194). Jose also stated that the stains on some of the discarded boxes were attributable to the boxes being “baled” with the rest of the garbage in the compactor. (JA194-195).

4. The chief operating officer confronts Kennedy with a warehouse surveillance tape showing him removing items from a shelf and putting them into a box during the freeze-out period.

After the inventory was concluded, John Darwin called Kennedy into his office on August 13, 1999, and showed him a warehouse surveillance tape on which he is seen removing items from the shelves and placing them in a box. (JA72). The surveillance tape also shows non-employees entering the store and exiting with Davidoff carrying shopping bags, which they then loaded into various vehicles,

including Davidoff's car. Kennedy admitted that he never told Farbman or the Bitworths that he was moving merchandise from the warehouse to the 56th Street store during the freeze-out period. (JA139-140). Kennedy also testified that the merchandise that other employees removed from the warehouse were testers and gifts-with-purchase they received as rewards for their hard work. (JA80-82).

According to Kennedy, Mr. Farbman began "screaming" at him. (JA73). Farbman testified that he was not satisfied with Kennedy's explanation that he was merely "transferring" damaged merchandise to the 56th Street store because he had completed the inventory at the 56th Street store only hours before he was seen removing the merchandise from the warehouse. (JA243). There was no way to add the merchandise to the count at the 56th Street store after the inventory had been completed. (JA243). The merchandise would effectively be "lost" as it was also excluded from the warehouse inventory as well. (JA243). Farbman suspended Kennedy and asked for his keys. (JA75). Davidoff was also suspended that day. (JA78).

5. Without the Bitworths or Farbman's knowledge or authorization, employee William Jose approaches Kennedy and discusses a polygraph test with him.

William Jose, another Classy Makeup employee, approached Kennedy and asked to speak with him. (JA76). According to Kennedy, Jose told him that there was an ongoing investigation into Davidoff's activities. When Kennedy denied that Davidoff had taken any merchandise, Jose asked him if he would be willing to take a polygraph test, to which Kennedy consented. (JA77). Jose denied raising the subject of a polygraph test and, instead, testified that Kennedy offered to take the test. (JA170-171).

Kennedy testified that Farbman and the Bitworths never requested that he take a polygraph test and that he had already been suspended when Jose discussed the taking of a polygraph with him. (JA124-126). Farbman and Tammy Bitworth also denied ever asking that Kennedy take a lie detector test. (JA243, 275).

6. Kennedy meets with Robin and Tammy Bitworth, corporate shareholders along with John Darwin, but they also do not believe Kennedy's explanation for his conduct on the surveillance tape.

Kennedy called Robin Bitworth the evening that he was suspended and arranged a meeting with him and his wife the next day. (JA78). They watched the

surveillance tape together. Robin commented that according to company policy any garbage was to be crushed in a compactor, rather than carried out of the store. (JA83-84).

Tammy Bitworth testified that she did not believe either Kennedy or Davidoff's explanation for their actions on the surveillance tape. According to Toby, Davidoff was unable to explain what happened other than they were straightening up and had given gifts to the employees. (JA273). Toby testified that Kennedy kept saying they were moving the merchandise to the 56th Street store. (JA273). But this did not make sense to Toby as everything at the 56th Street store had been counted earlier that morning and the items in the warehouse had not yet been counted. (JA274). Toby testified that the only thing that would have made sense was taking items out of boxes and putting them on shelves – not the other way around. (JA275).

7. After returning from vacation and consulting with an attorney, Kennedy changes his mind about taking the polygraph.

Kennedy was scheduled for his annual vacation on August 16, 1999. The day he left, a Classy Makeup secretary called and informed him that she had an envelope for him containing a polygraph request. (JA85-86). Although Kennedy requested that she send it over by messenger, he did not receive it. Kennedy returned on August

24th or 25th. Jose called him on August 26, 1999, and told Kennedy that he wanted to schedule the polygraph test. (JA86). Kennedy never received any paperwork until after discovery in this case. The request forms that Jose executed do not contain any signature or name of Classy Makeup employees, officers, or principals, other than that of Jose. (JA135).

8. Classy Makeup terminates Kennedy on August 29, 1999, and offers him a severance package, which Kennedy rejects in lieu of a \$2,000,000 demand letter.

John Darwin met with Kennedy on August 29th. (JA87, 133). During the meeting, Kennedy testified that Farbman said “you haven’t taken the polygraph.” During his testimony, Jose denied ever telling Farbman that Kennedy had decided not to take the polygraph test. (JA214). Farbman denied having any interest in Kennedy taking a polygraph test because the violation of company policy was “crystal clear” from the surveillance tapes. (JA262). Farbman testified that “[f]rom my standpoint, what I saw was either gross negligence and dishonesty or gross incompetence, either of which was fatal to the company.” (JA262). Tammy Bitworth also testified that whether or not Kennedy took the lie detector test had no impact upon their decision to terminate him. According to Toby, whatever his explanation, Kennedy’s actions violated company policy and resulted from poor judgment. (JA275).

Farbman also told Kennedy that he could not live with the situation at the warehouse and that Classy Makeup was terminating him, effective the following day. (JA88, A288). Classy Makeup was willing to provide Kennedy eight weeks of severance pay, a reference, and six months of insurance coverage. (JA88). Kennedy rejected the offer. Instead, Kennedy's attorney sent Classy Makeup a letter demanding \$2,000,000. (JA89, A134). Kennedy testified that he felt like his whole world was crashing down as a result of his termination. (JA89).

9. Kennedy waits weeks before looking for a job and later bounces from job to job.

Kennedy testified that he began looking for work in the middle of September 1996. (JA102). He registered with a number of employment agencies and headhunters but was out of work for seven months until he obtained employment as a store manager for Macy's in April 2000. (JA102). After losing that job in the spring of 2000, Kennedy was then employed as a sales associate at Goldman's Treasures in October 2001. (JA103). Kennedy submitted a list of his claimed lost earning and other related expenses. (JA107; PX 1). Kennedy claimed over \$30,000 in damages due to income disparity between his compensation while at Classy Makeup and his income at subsequent jobs. Kennedy also claimed emotional distress. (JA108).

During cross-examination, Kennedy admitted that at the time of his discharge, he was 44 years old, college-educated, and single. (JA136). Kennedy also admitted that there was an economic boom at the time of his discharge and that he failed to ever follow through on an interview with the Board of Education for tutoring work. (JA136-137).

SUMMARY OF ARGUMENT

The district court erred in denying Classy Makeup' Motion for a Directed Verdict or a New Trial for several reasons. First, the district court failed to apply the correct standard for examining the legal sufficiency of the evidence supporting the interstate commerce element of Kennedy's EPPA claim. The EPPA only applies to employers who are engaged in interstate commerce. Kennedy offered no evidence that Classy Makeup was engaged in interstate commerce or that it had any out-of-state contacts. Despite the complete absence of evidence, the district court denied the motion for judgment as a matter of law. In doing so, the court relied exclusively upon its denial of Classy Makeup' pretrial motion to dismiss, which was directed to the pleadings. Rather than weighing the evidence, the district court incorrectly gave Kennedy the benefit of inferences and presumptions that are only appropriate on a pre-trial motion to dismiss. By misapplying the law, the district court relieved Kennedy of the burden of proof on an element of the EPPA, i.e. that Classy Makeup engaged in interstate commerce. (Point I, pages 24-27).

Second, the district court erred in denying Classy Makeup' motion for a directed verdict or a new trial because Kennedy failed to offer any evidence that Classy Makeup directly or indirectly requested that Kennedy submit to a polygraph

test. All the evidence, even Kennedy's own testimony, established that Classy Makeup' decision-making principals never authorized, directed, or even had knowledge that low-level employee William Jose discussed taking a polygraph test with Kennedy. Whether or not Jose fits the definition of "employer" under the EPPA and is personally liable under the Act does not establish Classy Makeup' vicarious liability in the absence of its culpability. Such a result is inconsistent with the purpose of the EPPA – to prohibit employers from requesting polygraphs of their employees. (Point II, pages 28-31).

Third, the jury found Classy Makeup liable in the absence of culpability as a result of the incorrect jury question, which the court submitted over Classy Makeup' objection. The district court denied the request of Classy Makeup' counsel that the word "authorized" be added to the question inquiring into whether any person had requested on Classy Makeup' behalf that Kennedy submit to a polygraph test. By omitting the phrase "authorized person," the district court erroneously premised Classy Makeup' liability on that of a low-level employee, whose actions were unauthorized. (Point III, pages 31-32).

Fourth, the jury award for lost earnings is excessive and shocks the judicial conscience. Kennedy submitted a list of claimed lost earnings, which were based, in

part, on the disparity of income between his earning at Classy Makeup and his income at subsequent jobs. The jury found that Kennedy did not mitigate his damages by diligently seeking comparable employment. But the jury did not reduce its award of \$75,000 in lost earnings despite Kennedy's failure to seek comparable employment. This award was excessive as Kennedy should not receive a windfall at Classy Makeup' expense for his failure to diligently seek comparable employment. (Point IV, pages 32-34).

Finally, the jury award of \$5,000 in punitive damages must also be set aside. The EPPA does not provide for punitive damages. Moreover, assuming arguendo, that punitive damages are available under the EPPA, punitive damages should not have been awarded in this case due to the absence of malice or reckless disregard. No evidence exists that Classy Makeup principals or executives ever authorized, directed, or were even aware that low-level employee William Jose had discussed a polygraph test with Kennedy. Moreover, Classy Makeup executives gave Kennedy repeated opportunities to explain the surveillance tape which showed him removing merchandise from the shelves, as well as other violations of company policy. Classy Makeup even offered Kennedy a severance package. Thus, even if punitive damages

are available under the EPPA, the evidence is insufficient to support such an award in this case. (Point V, pages 34-36).

ARGUMENT

Standard of Review

This Court “review[s] a district court's decision granting a motion for judgment as a matter of law *de novo*, applying the same standards as the district court to determine whether judgment as a matter of law was appropriate.” *Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999). Judgment as matter of law is appropriate where “there is no legally sufficient evidentiary basis for a reasonable jury to find for a party.” *De Falco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001), *citing* Fed.R.Civ.P. 50(a)(1). Under the Federal Rules of Civil Procedure, a party may file a motion for judgment as a matter of law during trial, before the jury renders a verdict. Fed.R.Civ.P. 50. After a verdict is rendered, the moving party then has ten days to renew its request for judgment as a matter of law. *Id.* Here, Classy Makeup filed a pretrial motion to dismiss, a motion for directed verdict at the close of Kennedy’s case at trial, and a post-verdict motion for judgment notwithstanding the verdict, objecting to the lack of any evidence proving that it engaged in interstate commerce and that it ever requested or authorized its employee Jose to discuss a

polygraph test with Kennedy. The district court erred in denying Classy Makeup' motions for judgment as a matter of law because Kennedy failed to present even a scintilla of evidence that Classy Makeup engaged in interstate commerce or that it authorized a polygraph test. Moreover, the evidence is undisputed that the Classy Makeup principals and executives were unaware that Jose had even discussed the polygraph with Kennedy until some time after Kennedy had decided not to take the test.

Classy Makeup also raised the excessiveness of the jury verdict based upon the jury's finding that Kennedy failed to mitigate his damages. This Court reviews a district judge's excessiveness determination for abuse of discretion. *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 18 (2d Cir. 1996). "[I]n the federal courts, a judgment cannot stand where the damages awarded are so excessive 'as to shock the judicial conscience.'" *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993). Here, the damages are excessive as the jury found that Kennedy failed to mitigate his damages yet refused to reduce the damages by any amount. (JA349).

I. THE DISTRICT COURT ERRED IN DENYING COSMETIC PLUS' MOTION FOR DIRECTED VERDICT BECAUSE KENNEDY FAILED TO PROVE THAT CLASSY MAKEUP WAS ENGAGED IN INTERSTATE COMMERCE, A NECESSARY ELEMENT UNDER THE EPPA.

The district court erred in denying Classy Makeup' motion for judgment as a matter of law because Kennedy failed to offer any evidence that Classy Makeup was engaged in interstate commerce at the time of the alleged violation. The EPPA applies to any employer "engaged in or affecting commerce or in the production of goods for commerce..." 29 U.S.C. § 2002. Although the EPPA does not define "commerce," it incorporates by reference the definition of commerce provided by the Fair Labor Standards Act ("FLSA") at 29 U.S.C. section 203(c). *See* 29 U.S.C. § 2001(1). Thus, EPPA, like the FLSA, only applies to those employers who are engaged in interstate commerce.

The United States Supreme Court has held that, under the FLSA, it is the plaintiff's burden to prove that the employer engages in interstate commerce and is subject to the Act. *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 90 (1942); *accord, Gilreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504, 511(8th Cir. 1970). Both the EPPA and the FLSA only apply to employers involved in interstate commerce, the definition of which is the same under both Acts. Thus, a plaintiff

carries the same burden of proof under either the EPPA or the FLSA. Plaintiffs must prove that the employer is engaged in interstate commerce and is, therefore, subject to the respective act. Here, as the plaintiff-employee seeking to recover under the EPPA, Kennedy failed to meet his burden of proving that Classy Makeup was involved in interstate commerce. Kennedy failed to present any evidence that Classy Makeup' merchandise originated out of state, that it had any stores outside of Manhattan, that it had any contacts outside the state of New York, or that it sold or shipped any of its merchandise out of state. The only evidence presented regarding the extent of Classy Makeup' operations was that it had seventeen stores in Manhattan. (JA269). Absolutely no evidence was presented that Classy Makeup engaged in any out-of-state activities. Thus, Kennedy failed to prove its case, having failed to show that the EPPA even applied to Classy Makeup.

In determining whether to grant or deny Classy Makeup' motion for directed verdict, the district court was required to examine the evidence. Judgment as matter of law is appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find for a party." *De Falco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001), *citing* Fed.R.Civ.P. 50(a)(1). The district court misapplied the law in refusing

to review the evidence and, instead, relying upon its previous denial of Cosmetic Plus' pretrial motion to dismiss:

The question of jurisdiction under the EPPA was raised and decided before trial in our Memorandum and Order dated October 3, 1997. We then rejected defendants' contention that Classy Makeup was not engaged in interstate commerce at the time plaintiff was discharged. We found that "[e]ven if at that time defendants had no stores outside the State of New York, there is no indication that their inventory did not move through the states either before or after sale." Although defendants in no way during the trial suggested that they wanted to relitigate the question we had disposed of in our pretrial Memorandum and Order, they now invite us to examine the evidence produced at trial to see whether a preponderance of it justified the result we reached when the question was at issue before us. We decline that invitation.

(JA391). In refusing to examine the evidence, the district court misapplied the law and improperly denied Classy Makeup' motion for directed verdict.

By relying upon its pre-trial determination, the district court relieved Kennedy of his burden of proof on the interstate commerce element by utilizing presumptions and inferences applicable only to a pre-trial motion to dismiss. In determining a motion to dismiss, a district court grants all inferences and presumptions in favor of the plaintiff. A complaint may not be dismissed under Rule 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Vasile v. Dean Witter Reynolds Inc.* 20 F.Supp.2d

465, 476 (E.D.N.Y. 1998), *affirmed*, 205 F.3d 1327 (2d Cir.2000), *quoting H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). Thus, in determining a motion to dismiss, it “is not whether ... [the] plaintiff will ultimately prevail but whether the claimant [is] entitled to offer evidence to support the claims.” *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995), *cert. denied* 519 U.S. 808 (1996). The fact that the district court denied Classy Makeup pretrial motion to dismiss has no bearing upon whether or not Kennedy actually proved every element of his case – including the interstate commerce element. Kennedy failed to prove that Classy Makeup was engaged in interstate commerce as required under the plain language of the Act and that the EPPA was even applicable to Classy Makeup. Kennedy did not offer any evidence even addressing the extent of Classy Makeup’ business or its out-of-state contacts. Accordingly, the district court erred in denying Classy Makeup’ motion for judgment as a matter of law.

II. THE DISTRICT COURT ALSO ERRED IN DENYING CLASSY MAKEUP'S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE NO EVIDENCE WAS PRESENTED THAT CLASSY MAKEUP DIRECTLY, OR INDIRECTLY THROUGH JOSE, REQUESTED THAT KENNEDY SUBMIT TO A POLYGRAPH TEST.

The district court erred in denying Classy Makeup's motions for judgment as a matter of law because no evidence was presented that Classy Makeup directed, authorized, or was aware that low-level employee William Jose was discussing a polygraph test with Kennedy. An employer violates the EPPA by directly or indirectly requesting, suggesting, or requiring that an employee take a polygraph test. 29 U.S.C. § 2002 (1). Classy Makeup has three principals, who are also the decision-making officers for the company: Tammy Bitworth, Robin Bitworth, and John Darwin. All the witnesses' testimony, including Kennedy's, established that Cosmetic Plus' principals/executives never asked, requested, or even suggested either to Jose or to Kennedy that Kennedy submit to a polygraph test. (JA124-125, 274). Jose, who no longer worked for Classy Makeup at the time of trial, denied ever speaking to the Bitworths or Farbman about having Kennedy submit to a polygraph test. (JA221-222). Even Kennedy admitted that Jose was the only individual who approached him about the polygraph. (JA124-126). Thus, under the plain language

of the statute, Classy Makeup never directly or indirectly requested, suggested, or required that Kennedy take a polygraph test and should not be held liable under the EPPA in the absence of any culpable conduct which the Act seeks to remedy.

Further, not only did Classy Makeup not request, suggest, or demand that Kennedy submit to a polygraph, but no evidence exists that Jose violated the EPPA either. The EPPA only provides for employer liability. 29 U.S.C. § 2001 (1). The Act defines the term “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.” 29 U.S.C. § 2001(2). There is no evidence that Jose was acting in the interest or on behalf of Classy Makeup, which did not authorize, direct, or even have knowledge that Jose discussed a polygraph test with Kennedy.

In the alternative, even if Jose could be characterized as an “employer” under the Act, this does not establish Classy Makeup’ liability as an employer. The few cases that address the definition of “employer” do so only to broaden liability to persons and entities other than the traditional employer, not to establish vicarious liability on the corporate employer for a low-level employee’s unauthorized and unilateral acts. In *Rubin v. Tourneau, Inc*, the United States District Court for the Southern District of New York concluded that a third-party polygraph operator could

be held liable as an employer under the EPPA. *See Rubin v. Tourneau*, 797 F.Supp. 247 (S.D.N.Y. 1992). The court concluded that a person or entity, who is not an employer in the traditional sense of the word, can also be held liable under the EPPA if that person or entity exerts some degree of control over the true employer's compliance with the EPPA. *Id.* at 252. The broad definition of an "employer" in the EPPA only expands liability to persons and entities that are not considered traditional employers. It does not create a daisy chain of "employers," which then triggers a non-culpable corporate employer's vicarious liability for unauthorized actions by low-level employees.

Classy Makeup is unaware of any cases which apply the "employer" definition to create vicarious liability. In *Rubin*, unlike in this case, the corporate employer authorized the polygraph examiner to examine the employee. In contrast, no evidence exists in this case that Classy Makeup authorized its low-level employee, William Jose, to discuss a polygraph examination with its employee Kennedy. Classy Makeup is unaware of any case law stating that a corporate employer can be held liable under the EPPA merely because a low-level employee approached another employee and discussed the taking of a polygraph test, without authorization from or acquiescence by the corporate employer. Such a result would not further the purpose of the Act.

Instead, it would expose corporate employers, who have shown no culpability, to liability based upon the whims of low-level employees, who are neither decision nor policy-makers.

III. THE DISTRICT COURT ERRED IN REFUSING DEFENSE COUNSEL’S REQUESTED JURY QUESTION LANGUAGE THAT ANY PERSON ACTING ON BEHALF OF THE DEFENDANT CLASSY MAKEUP BE AUTHORIZED TO REQUEST, SUGGEST, OR DEMAND THAT THE EMPLOYEE SUBMIT TO A POLYGRAPH TEST.

The jury found that Classy Makeup violated the EPPA after being incorrectly charged on the law. In order to preserve an objection to a jury instruction, a party must lodge a specific objection “before the jury retires to consider its verdict.” Fed. R. Civ. P. 51. Here, prior to the jury being instructed, Classy Makeup’ counsel objected to the phrasing of question number one, which read:

Has the plaintiff, James Kennedy, established by a preponderance of the evidence that any person or persons acting on behalf of the defendant Classy Makeup, either directly or indirectly, suggested, requested, required or otherwise asked that the plaintiff submit to a polygraph or lie detector test?

(JA386). Counsel stated “...I want to put in here that any authorized person –.” The judge refused his requested instruction, stating that “if you had said that earlier, I might have done it, but I am not going to change it now.” (JA331). As a result, the

court incorrectly instructed the jury that Classy Makeup could be held liable for the unauthorized actions of its low-level employee, William Jose, even though no evidence was offered that Classy Makeup authorized, directed, or had any knowledge that Jose had discussed a polygraph test with Kennedy. Based upon the incorrect statement of the law incorporated into the question, the jury impermissibly found Classy Makeup liable in the absence of any culpable conduct on its behalf.

IV. THE JURY AWARD IS EXCESSIVE IN LIGHT OF THE FACT THAT THE JURY FOUND THAT THE PLAINTIFF FAILED TO MITIGATE HIS DAMAGES .

The jury award of \$75,000 in lost wages should be set aside as excessive. In the federal courts, a judgment cannot stand “where the damages awarded are so excessive as to shock the judicial conscience.” *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993) (internal quotations omitted). Here, the jury awarded Kennedy \$75,000 in lost wages, which was attributable to several periods of unemployment as well as the income disparity between his income while at Classy Makeup and that at subsequent jobs. (JA360). The jury also concluded that Kennedy failed to “take reasonable and diligent steps to find comparable employment after his termination.” (JA387). Yet the jury did not reduce its award of \$75,000 to reflect Kennedy’s failure to seek comparable employment. (JA388).

Allowing Kennedy to recover \$75,000 as a result of his own failure to obtain comparable employment constitutes a windfall at Classy Makeup's expense. Such a windfall shocks the judicial conscience and should not be allowed to stand. *See Calcagni v. Hudson Waterways Corp.*, 603 F.2d 1049 (2d Cir. 1979). In *Calcagni*, a negligence action under the Jones Act, the plaintiff recovered \$25,000 in lost wages as a result of his injuries. The plaintiff made \$7,622 a month and only 2 1/2 months passed between the date of his injury and the day that his doctor pronounced him fit to return to work. The plaintiff alleged that he immediately began searching for employment on a shift, once his accrued vacation time had lapsed – well after he was pronounced fit for work. The Second Circuit reduced the jury award of \$25,000 in lost wages to \$17,292, concluding that because the plaintiff did not diligently look for subsequent employment, he could only receive lost wages for the time he was recovering from his injuries. “We do not think that appellant should be held responsible for what under the damages awarded amount to compensation for a month's ‘looking’ time when to suit appellee's own convenience he did not start looking for two and a half or three months after he was capable of working.” *Id* at 1052. Likewise, Classy Makeup should not be required to pay damages attributable to income disparity merely because Kennedy refused to diligently search for

comparable employment. Kennedy is not entitled to a windfall. Accordingly, the award for lost wages are excessive and should be substantially reduced.

V. THE JURY AWARD OF \$5,000 IN PUNITIVE DAMAGES SHOULD BE SET ASIDE AS THE EPPA DOES NOT PROVIDE FOR PUNITIVE DAMAGES AND BECAUSE THERE WAS NO SHOWING THAT CLASSY MAKEUP ACTED WITH MALICE OR INTENTIONAL DISREGARD OF KENNEDY'S RIGHTS.

The jury award of \$5,000 in punitive damages should be set aside for two reasons. First, the EPPA does not provide for punitive damages, and the section providing for a damages under a private action states:

An employer who violates this chapter shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

29 USCA § 2005(c)(1). Punitive damages are not included in this list.

Second, assuming *arguendo* that punitive damages are available under the EPPA, the facts in this case do not warrant such damages. Classy Makeup located one case discussing punitive damages under the EPPA. *See Mennen v. Easter Stores*, 951 F.Supp. 838 (N.D.Iowa 1997). The *Mennon* court assumed, without deciding, that punitive damages were available under the EPPA. The court then analogized a punitive damages award under the EPPA to that available under the Civil Rights Act

of 1991. The Civil Rights Act of 1991 provides for punitive damages where an employer is found to have "engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Based upon the body of law governing punitive damages under the Civil Rights Act of 1991, the court concluded that although the employer "clearly violated" the EPPA in *Mennen*, that punitive damages were not justified as there was no evidence that the employer's actions were either "willful or in reckless disregard of Mennen's rights." Specifically, there was no evidence of animosity toward Mennen. *Id.* at 866. Likewise, in this case, there is also no evidence of malice or reckless disregard for Kennedy's rights. Classy Makeup principals and executives did not direct, authorize, or were even aware that Jose approached Kennedy and spoke with him about a polygraph test. Moreover, before terminating Kennedy, Classy Makeup executives offered him the opportunity to explain the surveillance tape showing him removing merchandise from warehouse shelves and non-employees removing bags from the warehouse and placing them in various vehicles. (JA72, 83-84). Classy Makeup even offered Kennedy a severance package, a good reference, and six months of continuing insurance coverage. (JA88). Thus, even assuming that the EPPA provides for punitive damages, no evidence

exists of malice or intentional disregard of Kennedy's rights, justifying an award of punitive damages.

CONCLUSION

Defendant-Appellant Classy Makeup respectfully requests that the district court's Memorandum and Order denying their motion for directed verdict or new trial be reversed with costs, and that this Court grant it such other and further relief to which it may be justly entitled.

Respectfully submitted,

William H. Jones

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Classy Makeup*

CORPORATE DISCLOSURE STATEMENT (FRAP 26.1 & 28(a)(1)).

Pursuant to Federal Rule of Appellate Procedure 26.1, Classy Makeup states that there are no parent corporations, nor any publicly held company that owns 10% or more of its stock.

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| A. Nature of Case, Course of Proceedings, and Disposition Below. ... | 4 |
| 1. Classy Makeup files a pre-trial motion to dismiss asserting that Kennedy failed to allege that it was engaged in interstate commerce and was, therefore, subject to the EPPA. | 4 |
| 2. During trial, Classy Makeup moves for directed verdict, arguing that Kennedy failed to prove his EPPA claim. | 5 |
| 3. After trial, Classy Makeup files a motion for directed verdict or new trial on the basis that Kennedy failed to prove it was engaged in interstate commerce and subject to the EPPA, that no evidence existed that it requested that Kennedy take a polygraph, and because the damages were excessive. | 6 |
| B. Statement of Facts. | 8 |
| 1. Classy Makeup Employs James Kennedy as a Fragrance Buyer and Store Manager. | 9 |

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| 2. | Kennedy participates in inventories at both the warehouse and the 56th Street store location in August 1996. | 9 |
| 3. | Classy Makeup employee William Jose receives information about employee thefts in the warehouse and conducts an investigation focusing on Kennedy and Davidoff. | 11 |
| 4. | The Chief owners of Classy Makeup confront Kennedy with a warehouse surveillance tape showing him removing items from a shelf and putting them into a box during the freeze-out period. | 13 |
| 5. | Without the Bitworths or Farbman’s knowledge or authorization, employee William Jose approaches Kennedy and discusses a polygraph test with him | 14 |
| 6. | Kennedy meets with Robin and Tammy Bitworth, corporate shareholders along with John Darwin, but they also do not believe Kennedy’s explanation for his conduct on the surveillance tape. | 15 |
| 7. | After returning from vacation and consulting with an attorney, Kennedy changes his mind about taking the polygraph. | 16 |
| 8. | Classy Makeup terminates Kennedy on August 29, 1996, and offers him a severance package, which Kennedy rejects in lieu of a \$2,000,000 demand letter. | 17 |
| 9. | Kennedy waits weeks before looking for a job and later bounces from job to job. | 18 |
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Certification Pursuant to FRAP 32(a)(7)

Pursuant to FRAP 32(a)(7), I certify that the attached brief

 X Uses proportionately spaced, has a type face of 14 points or more, and contains 8,446 words,

June 22, 2001

Date

William H. Jones