

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 ADAM WIERCINSKI,

5 Plaintiff,

6 versus

09 CV 4413 (ILG)

7 MANGIA 57, INC.,

8 Defendant.

U.S. Courthouse
Brooklyn, New York

9 -----x
October 23, 2013
10:00 a.m.

11 Transcript of Civil Cause for Trial

12 Before: HONORABLE I. LEO GLASSER,
13 District Court Senior Judge

14 APPEARANCES

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Also Present:
GREGG CYMBROWITZ
ADAM WIERCINSKI

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1 (In open court.)

2 THE CLERK: Please be seated. Civil cause on trial,
3 Wiercinski versus Mangia 57.

4 MR. BLIT: Your Honor, I have just one preliminary
5 matter.

6 THE COURT: Yes?

7 MR. BLIT: I would like to renew our objection to the
8 questions pertaining to the employment and W-2s.

9 The fact was that there was no evidence ever
10 introduced regarding the W-2s. There was an indication that
11 there were documents that would prove these alleged illegal
12 activities, but there was none. Nothing was introduced that
13 the company ever issued a W-2.

14 There was plenty of opportunity to produce these
15 documents. They never were produced. So it's just basically
16 just vague questions that have no foundation anywhere.

17 THE COURT: I don't think there was any question about
18 W-2s. The question was whether he ever filed income tax
19 returns.

20 MR. DANIEL KAISER: Your Honor, there was, under
21 608(b), as your Honor already ruled -- yeah.

22 THE COURT: The objection is noted. The objection was
23 already made at the time, and I dealt with it. What's the
24 point of your objection now?

25 MR. BLIT: Well, the point that I put the objection on

1 the record now is because there was no documents ever
2 introduced into evidence that would give any support to it or
3 any foundation to, and it's just conjecture and surmise; and
4 you shouldn't be -- you can't draw an inference from something
5 out of thin air, of made-up questions, without any foundation.

6 MR. DANIEL KAISER: Your Honor, it goes to
7 truthfulness. Those documents could not be introduced because
8 they are extrinsic to the issue of truthfulness, but you can
9 cross-examine under 608(b). We cross examined, and in fact he
10 conceded those issues in his prior testimony, which I read to
11 the jury.

12 THE COURT: Your objection has been noted twice,
13 Mr. Blit.

14 Are you ready to proceed?

15 MR. BLIT: Yes, your Honor.

16 THE COURT: With respect to two questions that were
17 left open when we adjourned, first, with respect to whether the
18 burden of proof on punitive damages is preponderance of the
19 evidence, the answer is yes. The Second Circuit has dealt with
20 that. You were going to do some research on whether a prior
21 handbook is a prerequisite for the defense. The answer is it
22 is not.

23 I take it you found authority one way or the other?

24 MR. BLIT: No, your Honor.

25 THE COURT: We had quite a bit.

1 How long did you say you were going to be?

2 MR. BLIT: Twenty minutes, half hour.

3 THE COURT: Okay.

4 MR. BLIT: Nothing more than that, your Honor.

5 THE CLERK: They are all here, judge.

6 THE COURT: Bring them in.

7 (Pause.)

8 (Jury enters.)

9 THE COURT: Good morning. Thank you very much for
10 being so prompt.

11 What is left of this trial, as I have explained to
12 you, the lawyers will now sum up. Plaintiff will sum up first,
13 and defendant will sum up thereafter.

14 Whatever the lawyers say is not evidence in this case.
15 I think I explained that to you early on.

16 Mr. Blit, if you are ready, go ahead.

17 MR. BLIT: Thank you, your Honor.

18 Good morning. We are finally in the home stretch, and
19 you heard a lot of testimony, a lot of people yesterday. You
20 heard Adam testify the day before. And a lot of names. I
21 can't imagine anybody remembering all of the names, but I'm
22 going to try and help you bring everything together today.

23 First, I want to discuss discrimination, and think
24 about it. It wasn't that long ago we didn't have these laws.
25 Just think about what it was like in the '40s and '50s and '60s

Summation - Blit

1 with the civil rights movement. Did you ever see any of those
2 movies on TV or clips? I can't even imagine or fathom a
3 society like that. Firehoses, and that was legal.

4 We have laws. We created laws to prevent
5 discrimination. It took us a long time to get there. Brown
6 versus Board of Ed, all created in courts, just like where we
7 are here today.

8 We have come a long way but not far enough. It's
9 still going on today. You have the power, the power that very
10 few people get to have in their life. You have an opportunity
11 to be on the side of justice and help prevent it, because this
12 is where we do it.

13 The police arrest criminals. They put them -- and it
14 goes through court and juries decide. You guys have that power
15 to be on the side of the right, to help our society, to help
16 our children, our future generations.

17 Who are we? Think about that for a second. Who am I?
18 I'm a lawyer. Who are you? You teach special ed, computers,
19 engineer. Hardest job of them all, mother. Raising a child.
20 I can't imagine anything harder than that. I watch my wife do
21 it. That's why I'm here. But we are an administrative
22 assistant to a boss. Going home, we are at work for the best
23 part of our lives, the most part of our days.

24 Think about it. The most productive parts of our life
25 are spent at work. The 9:00 to 5:00, if that really exists,

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Summation - Blit

1 are spent at work, working with our coworkers, being controlled
2 by our supervisors. They become sort of like an extended
3 family. Some we like, some we don't like.

4 And when we get home from work, or school, or
5 anything, what do we do? We talk to our loved ones, our
6 spouses, our friends, about work. Then we go out on the
7 weekends. If we go to a family wedding, if we go to the bar, a
8 restaurant. What do we do? We talk about work again. Hi, my
9 name is Joe. What do you do? Oh, I'm an engineer. I'm a
10 bartender, I'm a waitress, I'm a lawyer, I'm this, I'm that.

11 It's who we are, and it's a sacred place, that
12 workplace, because it's our lives, it's our identity, it's
13 everything to us. Our supervisor and our bosses and the owners
14 of these companies are who we look up to, whether we know it or
15 not; but our bodies, we look up to these people. They control
16 us, they control the food we put on our table. They control
17 our identities. They have everything. They have the power to
18 control us.

19 It's one thing you walk on the street, somebody bumps
20 into you, they might turn around and get upset and make a
21 derogatory remark to you. But that person has no power over
22 you. But when it's at work, it's a coworker or a supervisor
23 that controls, that's a big difference. It's a very big
24 difference, and that's why these laws are created and that's
25 why we are here to enforce them.

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Summation - Blit

1 Think about it. Adam had to answer to a supervisor
2 who said he smelled. Can you imagine the humility on that?
3 Your boss comes over and says you stink. He says, I bathe
4 every day. You stink of Jew. Pennies tossed at him. It might
5 seem like a funny joke to him. The supervisor, Artur Zbozien,
6 might have thought it was a joke; but not to Adam. That was --
7 it took all his dignity in front of everybody down in the
8 basement.

9 Think about it. They worked in a basement, not on the
10 upper two levels. They worked in the basement, all the
11 deliverymen and Artur Zbozien. The big boss down there, he
12 decides their routes and gives them their pay. Fucking Jew?
13 He kicked him in the groin for complaining?

14 Then when it's time for Adam to come get paid, he gets
15 up and leaves later on. How humiliating is that? Imagine your
16 supervisor comes over to you one day, and however you get your
17 check, and just throws it on your desk. That's insulting in
18 and of itself.

19 He was degraded, humiliated, in front of other
20 workers. What workers was he humiliated in front of? His
21 coworkers, who were also offended and came and testified about
22 that.

23 I told you, the defense can come in and throw smoke
24 screens, smoke and mirrors, and try and distract you from the
25 discrimination and try and discredit Adam. What did they do?

1 They try and tell you that he used a fake name for tax
2 purposes. But we all, you know, there is a saying: Those who
3 live in glass houses should not throw stones. Let's think
4 about that for a second.

5 They know Adam for over 20 years. They know his name
6 isn't Adam Jamroz. Right? So if they knew that and they put
7 it on a form, they are just as guilty as he is. So if his
8 credibility is no good and you can't believe anything he said,
9 you can't believe anything they said.

10 Adam pled the Fifth. He has a right to plead the
11 Fifth. It doesn't mean he did it or he didn't do it, but here
12 is an interesting thing. It's very easy to prove something
13 like that. If he used a fictitious name and they are the
14 employer, all they have to do is show the paperwork they
15 submitted with his name on it and/or the other name on it; but
16 they didn't do that because that would incriminate them also.

17 Think about it, a W-2 submitted by the employer or any
18 forms. If someone is trying to use a fictitious name with the
19 employer, the employer has to be a party to that; and they are
20 just as guilty as anybody else would be. But there is no
21 evidence of it.

22 When you go back into that jury room you are not going
23 to see any documents that say Adam was arrested, Adam was
24 convicted. Nothing. It never even came up. It's just smoke
25 screens, smoke and mirrors, trying to distract you from the

1 truth.

2 You know, and then they use their witnesses, all
3 interested parties, managers, who didn't work down in the
4 basement. It was friends and family day yesterday. Friends
5 and family day of Mangia, coming to testify against Adam.
6 That's all they were. Hamptons, anybody? Come join me in the
7 Hamptons. It sounds like somebody is interested.

8 He is not going to testify against his friend who had
9 his bar mitzvah and grew up with him since he was four or five
10 years old, but that's not a witness to events of
11 discrimination. The man wasn't even down there. He is a
12 manager.

13 They didn't produce -- then they produced the sister,
14 the 18-year-old widow, to cry on the stand and try and get your
15 sympathy. We have all lost somebody. We all lost somebody
16 close to us. Everybody has, or you are going to. It's sad,
17 and I agree and I felt bad I sat there and I felt bad for her;
18 but it doesn't mean she is truthful.

19 Think about what's at stake for her. Her brother
20 created an empire of catering, and she is going to -- and her
21 brother put her in this top position. She is not going to let
22 this empire crumble. She is going to do everything and
23 anything she can to protect it.

24 She even got up on the stand and told you she doesn't
25 even know what jopek means. Look, I didn't know what jopek

1 means, but I wasn't Polish. It's not my language. It's one
2 thing if she got up there and said I know what jopek means but
3 I didn't say it. It's just incredulous. There is just no way
4 you can possibly believe that.

5 Then she fired Adam because he went to visit a sick
6 relative, and she hired him back because she was so nice? No,
7 because what she did was illegal. You can't fire someone for
8 visiting a sick relative.

9 In fact, she lied to you on several occasions. She
10 said there was a policy that they would follow in the event of
11 discrimination, but she also told you that she didn't follow
12 that policy because she didn't have to follow that policy
13 because she didn't know there was any claim of discrimination
14 from Adam. That's interesting.

15 Because we know regardless of what Adam said or any of
16 his witnesses said, Artur Zbozien got up on the stand and
17 testified that he learned that a complaint was made to
18 management about discrimination. The only thing you are going
19 to find in evidence is what I put in, an affidavit of Artur
20 Zbozien.

21 Now, what I want you to do is -- you can read the
22 entire document, but for those of you who are taking notes, I
23 want you to look at paragraph five and paragraph six, okay. In
24 paragraph five it says, I later learned that in response to
25 this incident he went to Mangia's supervisor and complained

1 that I cursed at him and made various inappropriate
2 anti-Semitic remarks. I was reprimanded and transferred by
3 Margaret Cymanow, the owner's sister, who was testifying on the
4 stand that she never heard of any incident of anti-Semitism.
5 But Artur said he was reprimanded and transferred.

6 Now, that seems okay. Good. That's what they should
7 have done, but then she transferred him back. The next
8 paragraph, paragraph six, sometime after the above incident, I
9 asked Ms. Cymanow, transfer me back to the 57th Street branch.
10 That's where I make all the money. And she did. Put him right
11 back there, to discriminate against Adam again. Right back
12 there.

13 But she told you she transferred him for other
14 reasons. Oh, because they needed more help at the other
15 location. Now they didn't need more help a couple weeks later
16 and transferred him back? Come on. It's just common sense,
17 common sense.

18 This has nothing to do with Adam's credibility. This
19 is their own witnesses. This is who they put on, not I put on.
20 They put on.

21 So there was a policy. Let's say there was a policy.
22 Where is it? Ask yourself this question. Where is their
23 employment policy? There is none. Ask for it. When you are
24 in -- when you are deliberating, you can ask for any exhibits.
25 I didn't see any. I didn't see any handbooks with anyplace for

1 a person to sign a handbook.

2 This is not a small company. This is a large catering
3 company. You heard about their Wall Street location, their
4 57th Street, their 48th Street, their midtown, this town, that
5 town. With so many employees, an empire with no
6 antidiscrimination policy that's handed out to the employees
7 for them to sign and read or nowhere to go with complaints?
8 It's not acceptable. It's not in evidence. It's never been
9 presented to you to look at because there is none.

10 Bottom line is nothing was done to protect Adam.
11 Adam's witnesses testified.

12 I think there is one other witness I want to discuss
13 with you. Very important. Let me get a drink of water before
14 I do that. My mouth is dry.

15 There was a witness that testified that Adam called
16 him to testify on his behalf and offered him money. Adam made
17 \$250 a week. He was going to pay him 1,000 to \$2,000 to
18 testify for him?

19 But here's the best part. That's nothing. Think
20 about what he testified to. He testified -- and this might be
21 true -- that's why Adam called him, to testify on his behalf.
22 Russ got up and he asked him, Did he ask you to lie for him?
23 No. He just asked me to testify on his behalf.

24 Think about this. If you are creating this massive
25 lie, would you call someone and say testify on my behalf or,

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1 listen, I'm creating this story about this discrimination
2 against Artur Zbozien, I need you to lie for me and say Artur
3 discriminated against me. He didn't say that. The witness
4 just said he asked him to testify on his behalf. Because Adam
5 knew he saw it. He didn't have to ask him to lie.

6 He was the only person that was a delivery guy, now
7 management, and several years after this comes forward when
8 Adam called him and asked him to testify in his behalf. He
9 didn't go running to management then. When did he go running
10 to management? When he was a supervisor, a big-time guy, a
11 corporate office guy. Convenient, but at least he testified
12 truthfully. Adam never asked him to lie.

13 Adam never asked anybody to lie. There is no evidence
14 Adam asked anybody to lie because they saw it. They saw it
15 with their own eyes. They saw what was going on, and even
16 though they weren't Jewish they were offended by it. They saw
17 him kick him in the groin after he made the complaint, and
18 still nothing is done.

19 Can you imagine that? Can you imagine going to HR, if
20 your supervisor has you in a meeting one on one and starts
21 discriminating against you? Can you imagine when you go to
22 turn they just turn the other cheek?

23 Adam's witness testified exactly who Artur Zbozien
24 was, a racist anti-Semite. Does it matter if he used black or
25 the N word? He said he hated blacks or blacks and Jews.

1 Excuse me, blacks and Jews. And that's a supervisor. That's
2 the one that's controlling him. Unacceptable. He wasn't even
3 asked if he even said it. His own attorney wouldn't ask that
4 question because who knows what his facial expression would
5 have been.

6 Easy part was the testimony. You seen what happened
7 on the stand and listening to the witness. The hard part is
8 what you are going to go back in a little while and do. You
9 are going to listen to the judge's instructions, and then you
10 are going to fill out this jury verdict form.

11 I have trouble with this thing also. So when you get
12 back there you are going to see this maze of papers and these
13 words that are very difficult. So I want to go through this
14 with you, okay, because it's created by lawyers and anything
15 created by lawyers is always complicated.

16 So the first thing this jury verdict form is going to
17 ask you, question one, it's going to say did the plaintiff
18 prove by a preponderance of the evidence that he was subjected
19 to an unlawful hostile work environment based on his Jewish
20 ancestry and ethnicity, perpetrated by his supervisor and
21 coworkers during his employment at Mangia 57. That's the easy
22 question. Okay. So it gives you yes or no, and you check yes
23 for yes. I can't imagine checking no.

24 But then you move on to the next question. Okay. The
25 instructions after that, it says if you answered yes --

Summation - Blit

1 THE COURT: Mr. Blit, the jury will be instructed with
2 respect to the elements of the offense, and they will have that
3 jury form when they deliberate. If they have some questions
4 about it they will inquire.

5 MR. BLIT: Okay.

6 THE COURT: Move on.

7 MR. BLIT: Okay. Question two asks did the defendant
8 prove by a preponderance of the evidence that both he exercised
9 reasonable care --

10 MR. DANIEL KAISER: Your Honor.

11 THE COURT: Mr. Blit, I directed you to move on.

12 MR. BLIT: Okay.

13 THE COURT: That form was approved by you and by
14 counsel.

15 MR. BLIT: I agree, your Honor.

16 The forms ask you about whether the defendants used
17 proper corrective measures, but how could you ever make a
18 determination that they used the proper corrective measures if
19 the person that was supposed to take the proper corrective
20 measure said she never even received a complaint of
21 discrimination? This baffles me, how that can translate into
22 anything other than there was no corrective action. And even
23 if Artur was transferred for a couple of weeks, he was
24 transferred back. It's just impossible. There is just no way.

25 Should they have known about the harassment? It was

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1 his supervisor. The supervisor was the main culprit, Artur
2 Zbozien. I might be pronouncing that name incorrectly, I
3 apologize, but that was the supervisor. Adam and Artur are the
4 two players here, Artur and Adam, my client, and the witnesses.

5 There is no evidence that any of these witnesses were
6 paid off. There is no documents in evidence. There was barely
7 any question about it. We are the ones, the lawyers are the
8 ones that asked the witnesses to be here. We subpoenaed them
9 to be here. They were court ordered to be here.

10 All the Mangia 57 witnesses just pranced in here
11 because their manager, because the owner asked them to. Of
12 course.

13 Think about the hot topics in society today.
14 Bullying. I can't even imagine my kids growing up, going to
15 school today. Even when I was in school, I was picked on. I
16 wasn't the high school quarterback or anything. I was the
17 little geek, and I remember going to school and being picked
18 on; and I remember right over here, this knot, I couldn't get
19 it out. Imagine how Adam felt.

20 Thank you.

21 THE COURT: Mr. Kaiser.

22 MR. DANIEL KAISER: Thank you, your Honor.

23 Good morning to you all. How are you?

24 I asked you to consider, when I first addressed you in
25 my opening remarks, this question. I asked you to consider

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1 whether Mr. Wiercinski was an honest, truthful man, a man of
2 integrity.

3 Mr. Blit has told you that all of the questions that I
4 asked him that go to that issue, is he truthful, is he honest,
5 that's a distraction. I would submit to you not only is it not
6 a distraction, it is the only question or certainly the most
7 critical and core question you need to ask yourself when you
8 evaluate this evidence.

9 He has come into this courtroom and told you a story,
10 his story, a story he claims to be his. And you can't ask
11 yourself the question, is he a man of honesty? Is he truthful?
12 Has he been entirely truthful with me, if he is going to come
13 here into this courtroom and ask me for money?

14 What have you learned about the answer to that
15 question? Mr. Blit talked about, referred to very obliquely
16 and very quickly, his taking of the Fifth Amendment. And
17 nothing was really proven. But the court will instruct you as
18 to what inferences you can take from someone asserting over and
19 over and over again the Fifth Amendment to questions posed to
20 him by counsel at his trial, on his claim.

21 I asked him whether he used an alternative name at
22 work. I take the Fifth Amendment. It might incriminate me.
23 The answer.

24 I asked him whether he hid income while working at
25 Mangia -- mind you, from the United States Government. I take

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1 the Fifth Amendment. I don't want to tell you the answer to
2 that question.

3 I asked him whether he committed social security
4 fraud, whether he took benefits, government money that he
5 wasn't entitled to, premised upon a scheme he came up with; and
6 what did he tell you? I take the Fifth Amendment. I don't
7 want to tell you the answer to that question.

8 Now, Mr. Blit referred to the fact there were no
9 documents. All I will tell you on that score are there are
10 rules of evidence when asking questions about truthfulness that
11 I obeyed. But what I can also tell you is that not only did he
12 take the Fifth Amendment to those questions, but he actually,
13 before he really understood the criminal implications of his
14 conduct, in a proceeding that occurred way back when, he
15 admitted to it.

16 I read you that testimony. I asked him -- another
17 lawyer asked him at that proceeding -- actually, it was the
18 court that asked him that question, did you use a different
19 name? Yes. He answered then. Did you do it to conceal your
20 income from the government? Yes, in fact I did. Did you do it
21 so you could commit social security fraud, take benefits you
22 weren't entitled to? Yes, I did. So he conceded to you,
23 through his prior testimony, despite his taking the Fifth now,
24 that in fact he had committed those -- he had committed those
25 crimes.

1 These are crimes of honesty. The reason why they are
2 relevant is not just any misdoing, any wrongdoing. These
3 are -- these are transgressions that go to honesty, character,
4 truthfulness. If you can't trust him to tell you the truth in
5 this courtroom in its entirety, how can he win? How can he
6 prove his case? You must trust what he is telling you.

7 He talked about submitting forged documents to the
8 INS. I take the Fifth.

9 He talked about taking a name on another occasion. I
10 take the Fifth.

11 He talked about getting public assistance. I take the
12 Fifth.

13 And finally, talked about weaving a tale, a lie about
14 his relationship with Adam Jamroz, and submitting it to social
15 security, a whole lie in order to get money. I take the Fifth.

16 I submit this is absolutely at the core of what you
17 need to consider when you evaluate Mr. Wiercinski's claims.
18 You know, the thing about the Fifth is Mr. Blit is right, you
19 have the right to take the Fifth, he has the right to take the
20 Fifth; but remember, this isn't a criminal proceeding. He
21 wasn't being criminally prosecuted in this courtroom.

22 He, through his decision, came to this courtroom to
23 tell you his story because he thinks he is entitled to money.
24 So while he has the right to take the Fifth, he certainly
25 didn't have to take the Fifth. He certainly decided not to

1 tell you the entire truth.

2 It's sort of like taking sand and throwing it into
3 your collective faces. You know, in his arrogance and
4 entitlement, I will tell you what I think you need to know.
5 What I think you don't need to know, jury, I won't tell you.
6 Although it is my claim and I am asking you for money, I will
7 decide what you need to know and what you don't need to know.
8 That's not right.

9 You, jury, are entitled to the whole truth, all of it,
10 if he expects you to evaluate his claim in its entirety.

11 This is just, this litigation, Mr. Wiercinski's latest
12 effort to play the system. That's who he is, and this is but
13 the latest chapter. He came into this federal courthouse
14 before this federal judge, before this federally impaneled
15 jury, and he is asking you for money on a claim, and now he
16 seeks your cooperation in his latest scheme.

17 Now, the question, in terms of what happened. Well,
18 what did he tell you happened? Mr. Wiercinski told you that he
19 suffered over years, year after year after year, terrible
20 abuse, terrible abuse, constant. That's Mr. Wiercinski's
21 words.

22 And what did we learn about that from Mr. Wiercinski?
23 Well, I told you in my opening remarks that one of the things
24 you have to consider is that question, is this someone -- now,
25 sphere, pervasive, the court will instruct you that the

1 harassment has to be -- that will be the phrase, severe and
2 pervasive. It can't be a remark made here and a remark made
3 there. It has to be --

4 MR. BLIT: Objection, your Honor. Objection to remark
5 made here and there.

6 THE COURT: Overruled.

7 MR. DANIEL KAISER: It has to be severe and pervasive.
8 So the question then is: Was this conduct sphere and
9 pervasive? And the only witness, the only witness we have,
10 that you have to assess that claim is Mr. Wiercinski. Because
11 even his witnesses, which I will get to in a moment and review
12 with you their testimony, even his witnesses didn't talk about
13 severe and pervasive conduct.

14 They talked about episodic conduct, what they claim to
15 have heard on different occasions; but the severe and
16 pervasive, there is one guy you need to trust to answer that
17 question, and that's sitting at the table over there.

18 So he stayed there. He wants you to believe that he
19 stayed there as a food deliverer, year after year, 1999, 2000,
20 2001, 2002, 2003, 2004, 2005, 2006, 2007, and never left. He
21 never left. He stayed. Not only didn't he leave, but he also
22 testified that during 2003, after suffering at that point years
23 of abuse, he asked, he asked, to go back on a shift that
24 Mr. Zbozien was on. Come on.

25 This level of abuse, the kind of abuse that was just

1 described to you by counsel in his closing remarks, and he
2 asked that, his admission, to go back on to the shift that
3 Mr. Zbozien was running, and we are to believe that this was
4 severe and pervasive conduct?

5 Now, I asked him --

6 THE COURT: Excuse me, Mr. Blit?

7 MR. BLIT: It's "or pervasive," not "and pervasive."

8 THE COURT: Mr. Blit, you will have your opportunity,
9 and I will instruct the jury.

10 MR. DANIEL KAISER: I also asked him this question,
11 because this goes squarely to the issue as to whether this
12 conduct was severe and pervasive. I asked him whether he
13 looked for another job.

14 Now, I mean you would think, any of us, in those
15 circumstances, would at least look for another job, in all of
16 these years, look for another job, one where we weren't being
17 subjected to the severe and pervasive conduct, this constant
18 barrage of conduct. What did he say? What was his answer?
19 What was Mr. Wiercinski's answer? It was a nonanswer. He took
20 the Fifth Amendment. He wouldn't answer the question as to
21 whether he looked for another job during that time. Come on.

22 That goes to what I was suggesting to you before.
23 Come into this courtroom and ask for money, and he is not going
24 to answer that question, whether he looked for another job,
25 based on that it might implicate him in some crime? Don't you

1 think you are entitled to know that much information? Don't
2 you think that goes directly to the question of whether this
3 conduct was severe and pervasive?

4 By the way, he found another job as a food deliverer.
5 He talked about being in his mid-50s, I believe, how hard it
6 was. When he left Mangia he got another job at Cucina, another
7 food deliverer position. When I asked him that question at
8 this trial, he pled the Fifth Amendment; but he answered that
9 question at the prior proceeding.

10 "Question: Where did you go?

11 "I went to Cucina.

12 "How long were you there?

13 Some period of time after I left Mangia."

14 Right away after he left. He got a job right away.
15 So we are to believe he suffered severe and pervasive conduct,
16 never looked for a job while he was there, and got a job right
17 away when he left. It is not credible, from a very unbelievable
18 witness, to say the least.

19 Now, what do we know about, a little bit more about
20 his testimony on some of the substantive stuff? Beyond all the
21 other credibility issues, which -- of which there are many, he
22 had all the time in the world to tell you what happened to him.
23 Prepare for this moment, when he would come into this courtroom
24 and tell you about his experiences, right?

25 What did he leave out? The first, the very first

1 instance of discrimination that he suffered at Mangia, which
2 was at the hands of a gentleman by the name of Mr. Lipski.
3 Remember Mangia, according to Mr. Lipski, was populated with
4 anti-Semites. There were at least five or six vicious
5 anti-Semites that worked there that victimized him. The first
6 being Mr. Lipski, a manager, who fired him because he is
7 Jewish, according to Mr. Wiercinski, called him a dirty Jew or
8 a little stupid Jew, according to Mr. Wiercinski.

9 He gave, I don't know, 45 minutes of direct, was asked
10 two or three times by his counsel whether he had now covered
11 the territory of discrimination; and he forgot the first
12 instance, Mr. Lipski? It's because when you are, you know, if
13 at first you practice to deceive, that famous quote, oh, what a
14 tangled web I weave. That's what you are seeing. Look, it's
15 hard. When you are not being truthful, it's hard to keep a
16 narrative straight. It just is for anybody, for the smartest
17 of people. It is hard to tell a consistent story.

18 You saw a glaring example of that with the leaving out
19 of Mr. Lipski, the first instance of discrimination. Oh, yeah,
20 that's right, Mr. Lipski. I forgot to tell you about that one.
21 Can't get his story straight because his story isn't true.

22 Called Margaret Cymanow a vicious anti-Semite, not
23 just someone who made anti-Semitic remarks. A vicious
24 anti-Semite, those were his words.

25 Now, you met Margaret Cymanow. She testified to you.

1 A vicious anti-Semite? A vicious anti-Semite. Someone who
2 Ross Furman told you, Jewish, worked at Mangia for years,
3 celebrates the holidays. At the very least you know was
4 friends with Margaret Cymanow and the family for years and
5 years. She would be friends with Ross Furman, and she is a
6 vicious anti-Semite? It is not believable.

7 Another lie by Mr. Wiercinski. It is simply beyond
8 the pale of credibility to believe that Margaret Cymanow is a
9 vicious anti-Semite.

10 Now, about the witnesses, his witnesses, what did we
11 learn about his witnesses? Well, first, before I get to each
12 one individually, and before you consider what their possible
13 motivations are based on testimony you heard on defendant's
14 case, every one of them also, when you are telling a story,
15 wasn't consistent. Every one of them, each one of them was
16 impeached on a core issue based on their prior testimony, their
17 prior words, telling something different when they were on the
18 stand. That's the testimony of someone who is not being
19 truthful with you.

20 Now, the first witness, Mr. Krajewski. First, we
21 know -- what's the first thing we know about Mr. Krajewski? We
22 know that he was fired for stealing from the company.
23 Ms. Cymanow told us that. He conceded that he was fired but
24 told you he was given no explanation nor did he seek an
25 explanation. He just assumed he was fired for being friends

1 with Adam. Is that credible, that he would be summarily
2 terminated for being friends with Adam?

3 Adam himself wasn't terminated apparently for years
4 and years and years; and, in fact, when he was fired he was
5 rehired. But this gentleman was fired for just being friends
6 with him, and he never sought an explanation, never sought an
7 explanation as to why he was terminated. But Ms. Cymanow gave
8 it to him. He was fired for stealing, and that was
9 unimpeached. There was no alternative explanation, no
10 alternative explanation for that. So right away you know who
11 Mr. Krajewski is.

12 And Mr. Krajewski testified that there were multiple
13 people, multiple people, who discriminated against
14 Mr. Wiercinski. There were a number of different people who
15 were discriminating against him. But what did he say in his
16 prior testimony? What did he tell you? He said he didn't
17 remember anyone discriminating other than Mr. Zbozien.

18 Now, how can that be? If you were just simply telling
19 a story that's true and you are deposed and you are under oath
20 at a deposition, there is no one else but Mr. Zbozien.
21 Suddenly there is a whole population of people that
22 discriminated.

23 It is a window. When there is that kind of
24 impeachment on a core issue, not on some collateral thing where
25 someone's memory could be different, but on the core thing you

1 are testifying about, that is a window into credibility. It's
2 a window into whether this person is telling you the truth.
3 His story is evolving over time. He also told you that he
4 himself sued Mangia.

5 Mr. Swiderski couldn't tell a consistent story.

6 Mr. Swiderski, when I asked him did the plaintiff ever complain
7 about anti-Semitism, on the stand, because now he is looking to
8 convince you of something. So he wants you to believe that,
9 sure, I mean I was his friend, I knew him. Of course he would,
10 if this were a severe, pervasive working environment, severe
11 and pervasive harassment, well, one would expect that
12 Mr. Wiercinski would tell him about it, would complain to him
13 about it. So he said yes, of course he complained to me about
14 it.

15 But when he was deposed, under oath, as much as he was
16 under oath at trial two days ago, what did he say? He said
17 that he did not complain. He never complained to me about
18 anti-Semitism. That was his testimony under oath, and he said
19 something entirely different on the stand. Again, not on some
20 collateral issue, on the very thing we are here about. How can
21 you believe his testimony, if you can't get that right?

22 He also testified that he never complained to him.
23 Mr. Wiercinski never complained to him about compensation. But
24 at his deposition he testified he was complaining to me all the
25 time about his compensation. So he got it completely turned

1 around in a very convenient way for you at trial, but when he
2 was testifying at his deposition it was completely the
3 opposite, 360, again, on an issue that goes to the core of his
4 credibility. It is a window into whether he is telling you the
5 truth or not.

6 And finally, Mr. Ubowski. I respectfully disagree
7 with counsel. I think that to testify to you here in court and
8 tell you that the N word was used, most horrific, disgusting
9 slur imaginable, there is no comparison. There is simply no
10 comparison to that word. I don't think anyone can think of a
11 comparison, in terms of a slur, to the N word.

12 And he said, well, what's the difference, black, the N
13 word? Seriously? He came into this court and said he said he
14 doesn't like Jews and the N word. I don't even want to say it
15 because it really is so loathsome and disgusting.

16 But what did he say at the deposition? He doesn't
17 like Jews and blacks. It's not a good thing to say, but those
18 are the same thing? Of course they are not the same thing.

19 In fact, he knows so much that it's not the same thing
20 that he didn't try to tell you it was the same thing. He said
21 they must have made a mistake at my prior sworn testimony. It
22 must have been a mistake because I said it. He didn't say it.
23 It was nowhere in his sworn testimony, but now he is telling
24 you that that word was said. Is he telling you the truth?

25 That is a glaring window, a huge window into his

1 credibility. He is starting to try to tell you things that
2 happened, trying to make a story that's going to move you; but
3 we've got his prior words. It didn't happen.

4 Then he said all the cursing -- all three witnesses
5 were in Polish -- all the bad stuff was in Polish. Well, they
6 only speak Polish. Mr. Wiercinski didn't say a word to you
7 about that. He said something about Ms. Cymanow saying things
8 in Polish, but not Mr. Zbozien. He just -- and he testified in
9 English. He speaks English, Mr. Wiercinski. He testified to
10 you. Kind of strange that he wouldn't have told you that,
11 wouldn't have told you how this was being done. It was his
12 testimony. But his witnesses, who were Polish speaking, say it
13 was in Polish.

14 Now, compare, contrast, that testimony from
15 Mr. Wiercinski and from all of his witnesses with all of their
16 collective credibility issues, with Mangia's witnesses. Well,
17 you heard from Robert Ranfranz, hard-working guy, diligent,
18 came here from Poland, kept his head down, was promoted.

19 Learned about this litigation, and what does he do? A
20 year ago, heard there is going to be a trial, might be a trial.
21 So he goes to his boss and said, hey, you know, I had a
22 conversation with Mr. Wiercinski sometime ago, and he related
23 it to you. That's all. Just came here and told you.

24 They say, well, he didn't say that he was going to
25 lie. Right. He didn't say it, so he didn't tell you. Just

1 told you what he said. If he was going to lie, if he was going
2 to make something up, he would have said this, yeah, he gave me
3 the details, he told me to lie. That's not what Mr. Wiercinski
4 told him. It was a short conversation, and he told you as it
5 happened. He called me, said he was going to bring a
6 litigation, wanted me to testify, and offered me compensation
7 for it. He wasn't interested.

8 There was no follow-up. He wasn't impeached. And if
9 that's true, would he be entitled to anything? Seriously,
10 anything, if he attempted to bribe a witness to be his witness?

11 Now, his witnesses didn't say anything about being
12 offered compensation, but we know there is all sorts of
13 credibility issues with those witnesses. So we are left to
14 speculate as to perhaps what was done with those witnesses.

15 But what we do know is Mr. Ranfranz was there for the
16 conversation, and he told you that. He just told you like it
17 is, didn't try to embellish it, didn't try to say he said to
18 say this and Mr. Zbozien is an anti-Semite. A short
19 conversation.

20 Mr. Ranfranz clearly wasn't interested in talking to
21 him, and so there wasn't any detail in the conversation. He
22 didn't put any elaboration on what he wanted. It was one
23 conversation, only one. If that's true, can you believe
24 Mr. Ranfranz?

25 How about Mr. Zbozien himself? Came here from Poland,

1 hard-working guy, came, told you truthfully what happened.
2 Look, hard boss, we heard from a lot of people about that.
3 Believable that he could be a hard boss. It's a hard job,
4 being evening dispatcher; but he wasn't impeached, other than
5 the fact he works there. So he wants you to believe that
6 therefore you should not believe anything he is saying. He is
7 believable, credible, wasn't impeached in any way, no prior
8 statements, nothing inconsistent about his testimony. Told you
9 a clear narrative of what happened and that he didn't do
10 anything to this gentleman. Was there anything unbelievable
11 about his testimony?

12 How about Margaret Cymanow? Yes, she is the sister of
13 the owner. So she is going to come in and perjure herself for
14 him? Hard working, told you about her history, told you about
15 her great grandmother, her own connection to the Holocaust and
16 the loss of part of her family through her great grandmother,
17 was incredulous at any idea that she would be -- that she would
18 be okay with anti-Semitism in the workplace, much less herself
19 being what Mr. Wiercinski claims, an anti-Semite herself,
20 vicious anti-Semite.

21 Ross Furman, her friend for so many years, and she is
22 a vicious anti-Semite? Is there anything about Ms. Cymanow's
23 presentation to you that would make you believe that, that she
24 would harbor that and much less harbor but be a vicious
25 anti-Semite? Is there anything believable about that?

1 She told you how she would react to complaints, and
2 there was nothing not to believe about that. There were
3 procedures, that she would investigate it, that she would take
4 action. And, look, she did it. When there wasn't a
5 discrimination complaint but even when there was interpersonal
6 issues, she took action, and there was a transfer. She
7 concedes that.

8 There is nothing about -- and remember about
9 Margaret's testimony. In counsel's opening remarks, in
10 counsel's opening remarks he said I would be yelling and
11 screaming about -- at his witness, you know, and waving the
12 issues concerning his honesty. I didn't scream at him; I
13 didn't yell. I let Mr. Wiercinski's testimony speak for
14 itself.

15 Counsel, on the other hand, was getting all animated
16 and agitated at Ms. Cymanow, telling her that she is a liar.
17 Don't lie to this jury, he screamed at one point. You know
18 what, it sound pretty defensive to you, that he was frustrated
19 at her testimony, frustrated at the credibility of it?

20 I'm not the one who was screaming and yelling during
21 this trial. I just let the testimony come out and have you all
22 evaluate that testimony. Ms. Cymanow, the central witness in
23 our case, she got a lot of yelling at by counsel.

24 Zindel Zelmanovitch, Jewish guy, religious guy
25 clearly, was his friend, was Mr. Wiercinski's friend for a

1 long -- 25 years I think is what he said, since he came here
2 from Poland. Since he came here from Poland. Helped him
3 settle here, provided all sorts of assistance. It's conceded
4 got him to be rehired. Got him to be rehired after he was
5 fired. Intervened and got him -- got his job back. Came to
6 him with all sorts of work issues, personal issues.

7 This is a guy that was a confidante of Mr. Wiercinski,
8 and not once did he complain to him about anti-Semitism, not
9 one time? It is -- it is just irreconcilable that he was the
10 victim of severe and pervasive barrage of anti-Semitism and
11 never once did he go with a complaint to Mr. Zelmanovitch?
12 Given their relationship, it is not believable that that would
13 have occurred, but that was the testimony. It was unrebutted.
14 It was unrebutted by anyone, including Mr. Wiercinski. How can
15 that be?

16 And Ross Furman, yes, a family friend, not working
17 there anymore. Jewish guy, saw nothing there, and most
18 important, was friendly with Mr. Wiercinski, talked about the
19 holidays with him. Not once did Mr. Wiercinski say I'm being
20 discriminated against; and, given Mr. Furman's relationship,
21 don't you think Mr. Furman would have said something if he had
22 said something about anti-Semitism to the Mangia people? Is it
23 believable he wouldn't have said anything about that? It's not
24 believable. But he didn't because he never said anything to
25 Mr. Furman about that discrimination.

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1 He never complained, and what do we know about the
2 fact that he never complained? Never in writing, not one
3 written complaint of discrimination, not one written complaint
4 of discrimination. All oral, over years, years and years.
5 That he complained every six months, I think he said, to
6 Ms. Cymanow, and not one written complaint?

7 Now, this is a guy who knows about putting things in
8 writing. He put all of his lies in order to, in order to
9 criminally get social security benefits he wasn't entitled to.
10 Put all his lies, created this story, put it in writing to
11 social security, but didn't think to create that written record
12 in his latest endeavor, a written complaint, given what we know
13 of him and what he is willing to do to accomplish his ends?
14 Not one single written complaint of discrimination in all those
15 years?

16 Again, it's just not believable that he complained
17 about this conduct. And there is not any writing of any kind
18 that would substantiate that.

19 Now, he talked about his emotional injuries in this
20 case, and I don't think based on the record and the evidence
21 that you have seen that you get to that question, but I think
22 that his testimony on the emotional injuries is also relevant
23 to his credibility. He claims to have all of these emotional
24 injuries from all of this harassment, but did we hear from one
25 doctor, one therapist, any corroboration of any kind about his

1 injuries? Any medical corroboration? A single piece of paper?
2 No, nothing. You have Mr. Wiercinski's word as to what his
3 emotional injuries are.

4 And what was the question, very important, about the
5 therapist he saw at the Jewish board, do you remember that
6 testimony? I asked him -- and this is classic Adam
7 Wiercinski -- I asked him, did you go to that therapist and ask
8 that therapist to tie your emotional injuries to this
9 litigation? Do you recall that question? He said no, I did
10 not. That was his answer, because he knew that's not good to
11 say yes to that, right. He wants you to believe him.

12 Then, when I showed him those records, just to refresh
13 his recollection, he said, oh, yeah, I guess it says that,
14 yeah, I guess I did. Think about that just for a moment, just
15 that one fact for a moment in the larger context of what we
16 know about Adam Wiercinski. You go to a therapist, can you tie
17 my emotional injuries to this litigation? I'm not worried
18 about getting better, but can you tie it to this litigation,
19 can you? It's Mr. Wiercinski manipulating the record, trying
20 to make his claim and trying to get others to cooperate in that
21 endeavor, like he is trying to get you to do.

22 You know, Mr. Wiercinski has spent his life believing,
23 you know, it is a sad story in a lot of ways, truly a sad
24 story. Spent his life, you know, believing he wasn't getting
25 his due. You know, you know that from, you know,

1 Mr. Zelmanovitch told you that, constantly complaining I'm not
2 making enough money. You know that from Ms. Cymanow, always
3 felt entitled, special, wasn't getting enough money. You know
4 that from his witness, who said he was constantly complaining
5 to me about compensation.

6 Here is a guy who just believes he is not getting his
7 due. So what did he do? He stole public assistance money, and
8 then he stole social security to get --

9 MR. BLIT: Objection.

10 MR. DANIEL KAISER: And then what did he do? This is
11 his next endeavor, okay. He wants you to be involved to help
12 him because he was shortchanged. Life has shortchanged him.
13 He wants you to make that right.

14 You know, the discrimination laws are very important.
15 They really are. They are very, very important; and it's a
16 great thing that we have those laws. But it is equally
17 important that we all remain vigilant and not let anyone take
18 advantage of them, not let anyone exploit them. They are there
19 to serve the interests of those who are truly victimized; and I
20 thank God that we have those laws, but we must not let those
21 laws become the tool of those who would exploit them.

22 And I will leave you with -- and I know you are
23 grateful that I am done, and I am done -- with a quote from a
24 British author, Jonathan Gash, "Fraud is the daughter of
25 greed," and I think that that sums up what you have heard here

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1 at this trial, during the course of the last two days.

2 Thank you for your attention. I appreciate your time
3 that you have taken to carefully consider the evidence, and I
4 know my client is grateful. Thank you.

5 MR. BLIT: Very briefly, your Honor.

6 Counsel started off by questioning Adam's credibility
7 and, like I said, there was nothing proven. And what counsel
8 doesn't really explain to you is that he is ignoring one person
9 in this room, a very powerful person, which is the judge. If
10 Adam testifies and gets tripped up by him, by counsel, to
11 answer questions about items that have criminal ramifications
12 to it, that judge has an obligation to do something about it.

13 MR. DANIEL KAISER: Objection, your Honor.

14 THE COURT: Excuse me. Mr. Blit, I really have no
15 idea what it is that you are inferring, but please --

16 MR. BLIT: I will move on.

17 THE COURT: -- please, it's objectionable.

18 MR. BLIT: Okay.

19 THE COURT: Are you inferring that I have in some way
20 been deficient?

21 MR. BLIT: No, absolutely not, your Honor. I'm sorry.
22 I will move on.

23 THE COURT: Please move on.

24 MR. BLIT: Going on to the witnesses, they all
25 testified about what happened. They all testified that they

1 heard these comments and that they were made routinely. It's a
2 hostile work environment. It was offensive, insulting,
3 humiliating, and intimidating.

4 When the judge instructs you on the law, those are the
5 words you will hear: Offensive, insulting, humiliating,
6 intimidating. Going back to whether it was mentioned, whether
7 he said he didn't like black people or the N word, in no way am
8 I saying that one word is less than the other word, but it's
9 the idea, it's the concept that a person does not like another
10 person based upon the color of their skin, their religion,
11 their gender, their race. It's just -- that's what it's about.
12 That's my point.

13 There is no evidence that he didn't say it. He never
14 said he didn't, and he never said whether he said -- whether he
15 used black or the N word, never said it.

16 And as far as credibility of the defense witnesses,
17 it's just -- it's just common sense. It's just common sense.
18 They produced no witness that was down in the basement; and
19 there was many, many deliverymen. Not one other deliveryman
20 came in and said I was down there all the time, I worked with
21 Adam, I worked with Artur, I never saw anything. All he did is
22 bring in people that weren't down there, to bring in people
23 that were uninvolved.

24 THE COURT: Mr. Blit, this is a reply, not another
25 summation.

Rebuttal - Blit

1 MR. BLIT: Okay. As far as the damages go, Adam
2 testified that a judge told him to go to see a doctor, to see
3 if this was related, that his illnesses and his feelings were
4 related directly to his work at Mangia. That's what he did.
5 That's what the form said. That's what he testified to. So
6 why wouldn't he do that? He was told to.

7 Adam had that pit in his stomach. Think about it.
8 Everybody had to have that one time in their life at least
9 where they were humiliated --

10 MR. DANIEL KAISER: Objection.

11 MR. BLIT: -- insulted, intimidated --

12 MR. DANIEL KAISER: Your Honor, this is summation now.

13 MR. BLIT: It's in reply.

14 And the Jewish man that they had testify, it's a nice
15 ploy, but he wasn't down in the basement to see if there was
16 discrimination there either. That's where the discrimination
17 occurred, and when it was brought up to management nothing was
18 done about it, because they didn't care. That's the bottom
19 line.

20 Thank you very much for being here. You have the
21 opportunity to serve justice. Serve justice. Thank you.

22 THE COURT: We will take a brief recess, and then I
23 will instruct you on the law.

24 We will take about five minutes.

25 (Jury exits.)

1 (Recess.)

2 (In open court.)

3 THE COURT: Are we ready? Let's get the jury.

4 (Pause.)

5 (Jury enters.)

6 THE COURT: I'm last person that stands between you
7 and light. Hopefully you will be through by 1:00.

8 My responsibility at this point is to instruct you
9 with respect to the law, essentially. I left a copy of my
10 instructions. You can either follow along with me, if you
11 wish, or just leave it on your lap and look at it later, as you
12 wish. I'm more or less congenitally incapable of reading
13 things word for word. So I may be digressing a bit from time
14 to time.

15 These instructions are essentially in three parts.
16 The first portion of it will deal with much of what I told you
17 the very first day. You recall that when you were initially
18 sworn as jurors I took some time to explain to you what your
19 obligation is as jurors, what evidence is, that you should
20 decide the case based solely on the facts, the facts are the
21 facts which will be produced in evidence. So let me go through
22 those with you quickly.

23 So the first portion of these instructions, you will
24 recall, was my telling you that your primary responsibility as
25 jurors is to determine what the facts are. You may remember I

1 told you that in every true sense of the word you are judges
2 without robes. I told you that you will be aware of your
3 position and responsibility as judges when you enter and leave
4 this courtroom. I will be standing, as will everybody else, as
5 a mark of our respect for your position as judges of the facts
6 in this case.

7 In determining what the facts are, don't be swayed or
8 influenced by sympathy or by anything that is not fact based
9 and evidence based. I told you that when you determined what
10 the facts are, apply the law to those facts as I will give them
11 to you. The lawyers have made very little comment about the
12 law, but to the extent that they made any comment about it at
13 all, base your determination as to what the law is on what I
14 tell you, not what you have heard from anybody else.

15 You may remember I told you that in determining what
16 the facts are -- and I have told this to you ad nauseam --
17 determine what those facts are based only on the evidence; and
18 I told you that evidence comes in three forms. It comes in the
19 form of the sworn testimony of witnesses, which is essentially
20 what the evidence in this case was, the evidence presented to
21 you from questions that were put to the witnesses who took the
22 stand and the answers that they gave you.

23 I told you that evidence sometimes also comes in the
24 form of an exhibit. There was one exhibit, which was
25 introduced by the plaintiff in this case. Mr. Blit made some

Jury Charge

1 reference to it in the course of his summation. There were no
2 other exhibits received in evidence. And there were no
3 stipulations at all. So the primary evidence in this case
4 consisted of the testimony of witnesses.

5 What is not evidence is anything that I may have said
6 during the course of the trial, statements and arguments which
7 have been made by lawyers during the course of the trial.
8 Questions which have been put to the witness are not evidence.
9 It's the answer which the witness gave which is evidence.

10 From time to time you have heard one or the other of
11 the attorneys in this case make an objection, objection to a
12 question which was asked or the answer which was sought to be
13 elicited. When lawyers object to evidence which is sought to
14 be elicited, it is not because they are seeking to hide
15 anything from you. It is because they believe that the rules
16 of evidence, which are quite complicated, would not allow that
17 evidence to be received.

18 Objections which are made to evidence, for the most
19 part, in any case, are based on what are known as hearsay, a
20 word which I'm sure you have used, may have used from time to
21 time during the course of your social intercourse and
22 discussion. When objections have been made and I have
23 sustained the objection, did not permit the witness to answer,
24 you shouldn't have speculated or wondered what the witness
25 might have said, had he answered. And if I overruled an

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Jury Charge

1 objection, there was nothing -- nothing special about the
2 evidence which was received in response to an overruled
3 objection.

4 The most difficult thing jurors have in discharging
5 their responsibility is determining what to believe, who to
6 believe, how much to believe. Before I get to that, let me
7 just quickly tell you that not only does evidence come, as I
8 told you before, in those three forms, but evidence we speak of
9 also as being direct and circumstantial. You may remember very
10 quickly that what we referred to as direct evidence is a
11 statement, a fact which is communicated by a witness, which the
12 witness says I know it because I heard it or I saw it, the fact
13 that the person says he learned through one of his five senses.
14 That's direct evidence.

15 The important obligation that jurors have with respect
16 to that is to determine whether or not the witness is
17 accurately remembering what he says he saw or heard and whether
18 the witness is testifying to it truthfully.

19 Circumstantial evidence, you may remember, is evidence
20 which seeks to prove one fact by proving another, evidence
21 which seeks to prove fact A by proving fact B and the jury is
22 asked to infer the existence of fact A from fact B. You may
23 remember the illustration I gave you. It was my inability to
24 prove to you that it's raining as we are sitting here because
25 we can't see it, hear it, feel it. But if somebody walked into

Jury Charge

1 this courtroom and we turned to look, he is wearing a soaking
2 wet raincoat and a dripping umbrella, we might infer that it's
3 raining.

4 To infer something simply means to find, to conclude
5 one thing from proof of another. And inferences ought to be
6 drawn only if they are reasonable and logical to draw them.
7 Inferences should not be drawn on the basis of guesswork or
8 speculation.

9 During the course of the trial you have heard
10 Mr. Wiercinski assert the Fifth Amendment to a series of
11 questions which were put to him. You may, I suppose, during
12 the course of your common experience and life, have heard
13 references to a person taking the Fifth. It is refusing to
14 answer a question because the claim is that if I answered it I
15 might be incriminating myself. That's the basis of the Fifth
16 Amendment.

17 In a civil case when a person takes the Fifth
18 Amendment, the jury has a right to infer -- they may, but they
19 are not required to infer -- an adverse inference by virtue of
20 the fact that the witness asserted the Fifth Amendment. The
21 jury may infer but they are not required to infer that the
22 answer which the witness would have given, had he answered it,
23 would have been unfavorable to him.

24 With respect to the proof, the burden of proof, which
25 the plaintiff must bear in a civil case, the burden of proof in

1 a civil case is what we speak of as by a preponderance of the
2 evidence. A preponderance of the evidence simply means proof
3 that one side of the case is more likely so than the other. If
4 it were possible to put evidence presented by both sides on a
5 scale, a preponderance of the evidence would have been the
6 slightly more heavier, however slightly heavier, on one side
7 than it would have been on the other. Preponderance of the
8 evidence means that the fact or the issue that has been
9 presented or claimed is more likely so than not so.

10 If you find or believe that the evidence is equally
11 balanced on both sides, it's evenly divided between the
12 parties, it's equally probable that one side is right as it is
13 that the other side is right, then you must find against the
14 party who has the burden of proof. It means that the burden of
15 proof has not been carried.

16 In connection with this case, to put it in context, if
17 the evidence presented by the plaintiff and by the defendant
18 are evenly balanced, you must decide this case against the
19 plaintiff, who bears the burden of proof with respect to his
20 claims.

21 Getting back to what I started to tell you concerning
22 what I have experienced over many years as being the most
23 difficult part that juries tell me that they have, most
24 difficult part of their jury service, is deciding what to
25 believe, who to believe, how much to believe. Now, let me

1 briefly suggest to you some things which, just a matter of
2 common sense, might guide you in making that determination.
3 It's pretty much the same things that you would consider during
4 the course of communicating with anybody, in the course of your
5 lives or in the course of your everyday affairs.

6 Did the witness have an opportunity to observe the
7 events which he describes? Did the witness have the
8 opportunity to see or hear or touch or feel whatever it is he
9 said he heard or saw? Did the witness -- when I say, did the
10 witness, that was the person that you would be confronting or
11 dealing with in everyday life -- did that person strike you as
12 being intelligent, as having a good memory, to think that he
13 was remembering accurately what it was that he was testifying
14 about? What was the witness' manner when he testified? How
15 did the witness strike you, observing him during the course of
16 his testimony? Did he strike you as being a person who was
17 willing to respond to the question quickly, or was he
18 apparently or seemingly hesitant, seeming to be evasive, not
19 terribly anxious to answer it responsively and quickly? How
20 reasonable was the witness' testimony considered in light of
21 all the circumstances in the case?

22 In evaluating the credibility of a witness, you may
23 want to take into account his interest in the outcome of the
24 case. Evaluate that witness' testimony in that respect
25 together with all other factors that you would normally be

Jury Charge

1 considering and determining for credibility of a witness.
2 Determining were the witness was influenced by any bias or
3 prejudice or hostility that would cause the witness, whether
4 consciously or not, to testify to something that was less than
5 a completely accurate account of the facts.

6 If you believe that a witness testified falsely in one
7 respect, you may disbelieve all or any part of the testimony of
8 that witness in all respects. If you find that the testimony
9 of a witness is contradictory by something the witness has said
10 or something the witness did on another occasion, you can
11 disbelieve all or any part of that witness' testimony. But
12 making that decision, you may want to keep in mind that people
13 sometimes forget things. Contradiction may be just an innocent
14 lapse of memory, or it may be an intentional lie. So consider
15 whether this contradiction had to do with a fact which had some
16 significance in the case or did it have to do with some
17 insignificant detail.

18 Now, let me turn to the second part of these
19 instructions, which is really the heart of it: The elements,
20 the legal elements of the plaintiff's claim, each of which the
21 plaintiff has the burden of proving by a preponderance of the
22 evidence, a concept I have already explained to you a minute
23 ago as to what preponderance of the evidence means. Plaintiff
24 claims that Mangia 57, the defendant in this case, violated a
25 statute which prohibits discrimination in the workplace. More

Jury Charge

1 specifically, plaintiff claims that he was subject to a hostile
2 work environment, which the statute makes unlawful for an
3 employer to subject an employee to.

4 And the hostile work environment which he claims he
5 was subjected to was discrimination on account of his race. In
6 this case, race being his Jewish ancestry and ethnicity, which
7 is regarded, as far as the law is concerned, as race. To
8 succeed in that claim, the plaintiff has the burden of proving
9 by a preponderance of the evidence, first, that he was an
10 employee of Mangia 57; that he was subjected to harassment.
11 Harassment would include ridicule, abusive conduct by
12 supervisors or coworkers of his employer, by the defendant
13 Mangia.

14 He has to prove that the harassment was based on his
15 Jewish ancestry, ethnicity. He had the burden of proving that
16 the harassment was so severe and pervasive that he would
17 reasonably have perceived this work environment to be hostile
18 and abusive, and he would have to prove by a preponderance of
19 the evidence that Mangia's management, employees, knew or
20 should have known of the abusive conduct. Each of those
21 elements has to be established by the plaintiff beyond a
22 reasonable doubt. Just let me elaborate on one or two of them,
23 as is required.

24 The first element is self-explanatory, namely, he has
25 to establish that he was subjected to harassment; and unwelcome

Jury Charge

1 harassment means unwanted conduct that's offensive or insulting
2 or humiliating or intimidating. The second element needs no
3 explanation. It's self-explanatory. This is to satisfy you by
4 a preponderance of the evidence that the harassment was based
5 on his Jewish ancestry and ethnicity.

6 The third element, namely, that the harassment was so
7 severe and pervasive that he reasonably perceived his work
8 environment to be hostile and abusive. It doesn't require much
9 in the way of elaboration. Plaintiff would have to prove by a
10 preponderance of the evidence that he felt or understood that
11 the alleged conduct was hostile or abusive and that it was
12 objectively abusive and hostile, and would be regarded as being
13 harassing, hostile, abusive, by reasonable people who may have
14 heard and had observed that conduct.

15 Finally, he would have to establish by a fair
16 preponderance of the evidence that the conduct was frequent,
17 that it was ongoing, it wasn't merely an isolated occurrence or
18 petty annoyance or just bad manners. In other words,
19 considering all the evidence which was presented in this case,
20 you have the burden of proving that the harassment was of such
21 a nature that, an ongoing nature, that a reasonable person
22 would have found this work environment abusive.

23 If you find that the plaintiff proved by a
24 preponderance of the evidence that his working environment was
25 hostile or abusive, as described in the first element of this

Jury Charge

1 case, you must then prove by a preponderance of the evidence
2 that Mangia was responsible for it, was liable for it. And the
3 test as to whether Mangia was liable for it depends upon
4 whether the offensive conduct, the harassment, was created or
5 caused by a supervisor or by a coworker. If he established by
6 a preponderance of the evidence that a supervisor created or
7 was responsible for the hostile environment, then Mangia would
8 be automatically liable for the harassment unless Mangia proved
9 by a preponderance of the evidence that it wasn't liable
10 because it exercised reasonable care to prevent and promptly
11 correct the offensive, harassing conduct and that the plaintiff
12 was unreasonable in failing to take advantage of an opportunity
13 provided by Mangia to correct or prevent that abusive conduct.

14 The defendant would be liable if the offensive conduct
15 was attributable to a coworker only if the plaintiff has proved
16 by a preponderance of the evidence that the employer knew or
17 should have known about that conduct and failed to do anything
18 about it, failed to take any action to correct it. If the
19 plaintiff carried his burden of proof with regard to that, the
20 defendant would be liable; if it didn't, Mangia would not be
21 responsible at all.

22 And if he failed to carry the burden of proof with
23 respect to conduct which he claimed supervisors were guilty of,
24 if you find that the defendant satisfied its burden that they
25 took steps to correct it, plaintiff didn't take opportunity --

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1 advantage of an opportunity to complain about it, then the
2 defendant would not be liable either.

3 Let me then turn to the final portion of the second
4 part of these instructions. The purpose of bringing this
5 lawsuit by the plaintiff essentially is to obtain damages to be
6 compensated for the hostile work environment which he claims he
7 was subjected to. So I'm obliged to instruct you with respect
8 to the law with regard to the damages. The fact that I am
9 instructing you with respect to it does not indicate in any way
10 whether you should or should not award any damages at all.
11 That's entirely for you to decide.

12 But in considering the question of damages, damages
13 take or are defined, characterized in the law, as being of two
14 kinds. We speak of damages being compensatory, and we speak of
15 damages as being punitive.

16 Compensatory damages, as the term implies, is to be
17 awarded to compensate, reimburse the plaintiff for the harm
18 which he claims he endured. In this case, the harm he claims
19 he endured was mental anguish, emotional distress. If he
20 satisfies you by a preponderance of the evidence that he
21 sustained that harm, and if you find that he has sustained that
22 harm, then the award you may be considering must be fair
23 compensation only for the harm which he has satisfied you he
24 served and he also would have to satisfy you by a preponderance
25 of the evidence that the harm was proximately caused by the

Jury Charge

1 harassment.

2 Harm would be proximately caused if he proves that the
3 harassment was a substantial factor in bringing it about, in
4 bringing about this mental anguish or emotional distress, and
5 was reasonably foreseeable by the defendant, Mangia.

6 In considering damages, compensatory damages, be
7 guided by your common sense, by your experience. Don't be
8 guided by sympathy or speculation. Any awards you may make
9 must be based entirely on the evidence presented to you and
10 must be fair and reasonable.

11 Punitive damages are designed to punish, as the word
12 implies, designed to punish an offending party, the defendant
13 in any case, from similar conduct in the future. Now, punitive
14 damages may be awarded if you find that the plaintiff proved by
15 a preponderance of the evidence that a person who had
16 significant supervisory responsibility, decision making
17 authority, acted maliciously, recklessly, indifferent to the
18 plaintiff's rights.

19 If you find that the plaintiff established that by a
20 preponderance of the evidence, you may award punitive damages
21 in addition to the compensatory damages. Punitive damages are
22 entirely discretionary as to whether they will or will not be
23 awarded, and they need not be made if the requirements for
24 rewarding them have not been established.

25 In deciding whether to make any award for punitive

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1 damages, although there has been virtually no evidence with
2 respect to it, a jury may, in an appropriate case, consider the
3 financial resources of the defendant. There has been no
4 evidence at all in this case with respect to that.

5 That brings us to the third and closing part of these
6 instructions. Again, for the nth time, base your determination
7 solely upon the evidence in this case. I can't emphasize that
8 strongly enough. Make your determination based on --
9 essentially this case was one which deals with credibility.
10 The determination in this case is essentially a determination
11 which must be based because the evidence you had in this case
12 was from sworn testimony of witnesses. So your determination
13 is essentially one based on credibility.

14 In making your determination, during the course of
15 your deliberations, discuss the case fully amongst yourselves,
16 discuss the evidence. Each of you is entitled to his or her
17 opinion. Exchange your views, exchange your opinions. Don't
18 hesitate to change an opinion, if after discussing it -- don't
19 hesitate to change your opinion which you started your
20 deliberations with if you are convinced or satisfied after
21 discussion that you may have been wrong in view of somebody
22 else, some other members of the jury may be worthy of
23 significant consideration.

24 Never surrender an honest conviction of what your view
25 of the evidence is just to be agreeable and just for the

Jury Charge

1 purpose of the jury getting a verdict.

2 If the plaintiff carried his burden of proof with
3 respect to his claim of hostile working environment, and
4 establishing every element that I have discussed with you,
5 established by a preponderance of the evidence, your sworn duty
6 is to find for him. If he failed to establish any essential
7 element of his claim, your sworn duty is to find for the
8 defendant.

9 When you return to the jury room for the purpose of
10 deliberating, it sometimes happens that jurors would like to
11 have a portion of the evidence reviewed for them, reread to
12 them. You may properly do that, but, if you do, if you are
13 going to send a note to me asking that a portion of the
14 testimony be read back, try and be as specific as you can in
15 identifying what it is you want to have read back.

16 If there is a specific portion of the testimony of one
17 or the other of the witnesses you want to be read back, try and
18 identify, I would like to hear the testimony of Mr. X or Mrs. X
19 with respect to this issue, rather than say, I would like to
20 hear the testimony of Mr. X when you don't want to hear all of
21 it. It may take a good deal of reading.

22 If you should send me a note, if you have any question
23 at all about these instructions or anything else affecting your
24 deliberations, you send a note to me. The only way I will
25 communicate with you once you retire to deliberate is here in

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1 open court, or if you send me a note I can respond to it by a
2 note in return. I will do that.

3 But if you are sending me a note, don't ever tell me
4 how it is you stand in your deliberations, whether you are six
5 to two or seven to one or whatever. When you have all decided
6 on your verdict, your verdict must be unanimous; and have the
7 jury person send a note saying we have reached a verdict.

8 It's customary in this and in most courts for the
9 person seated in jury seat number one to be the foreperson of
10 the jury. That would be you. It needn't be a custom that's
11 followed. If you decide to nominate a designated foreperson of
12 the jury and have an election, you are free to do that as well.

13 But if you have arrived at a verdict, then your
14 verdict must be unanimous. Send a note telling me that you
15 have reached a verdict.

16 I think I told you sometime yesterday that not only
17 must you not communicate with anybody, but don't -- should it
18 be necessary for you to proceed, go beyond today and continue
19 into another day, but don't use the Internet for the purpose of
20 doing any investigation of your own. Base your determination
21 based solely on the evidence in this case and nothing else.

22 You took an oath when you were initially seated as
23 jurors. Your oath was that you will fairly, truthfully,
24 conscientiously determine what the facts in this case are based
25 upon the evidence.

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1 You have been a very attentive jury. I have been
2 watching you during the course of the trial and listening
3 carefully. I want to thank you very much for being prompt
4 these two days.

5 Is a marshal here?

6 THE CLERK: Yes, there is.

7 THE COURT: Swear the marshal. We are going to have
8 the marshal sworn, to make sure that you are not interfered
9 with, nobody will attempt to talk to you, converse with you
10 during the course of your deliberations. So you will be in the
11 custody of the United States Marshal, and I think your lunch
12 will be here, should be here -- it won't be here for another
13 hour. Okay. Okay.

14 THE CLERK: Will the marshal please raise his right
15 hand.

16 (The marshal was sworn.)

17 THE MARSHAL: I do.

18 THE COURT: Before we dismiss the jury, counsel, would
19 you come up.

20 (Continued on the next page.)

1 (Sidebar conference.)

2 THE COURT: There were no objections to or exceptions
3 to the charge?

4 MR. BLIT: No.

5 THE COURT: Yes. I asked there were no exceptions or
6 objections to the charge. Okay.

7 (End of sidebar conference.)

8 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: Marshal.

3 (Jury exits.)

4 (The jury retired to commence deliberations at
5 12:00 p.m.)

6 THE CLERK: The verdict sheet is marked Court Exhibit
7 number 1.

8 (Court Exhibit 1 so marked.)

9 MR. BLIT: Your Honor, one other thing, the affidavit,
10 the exhibit?

11 THE COURT: Yes. That will go in.

12 MR. BLIT: Okay. Thank you.

13 (Court in recess awaiting the verdict of the jury.)

14 (In open court.)

15 (Jury not present.)

16 THE CLERK: Civil cause on trial.

17 THE COURT: I have a note from the jury, which we
18 marked Court's Exhibit 2. It reads, "Can you clarify if the
19 term 'coworker' refers to other delivery persons."

20 Mr. Kaiser, do you want to be heard?

21 (Court Exhibit 2 so marked.)

22 MR. DANIEL KAISER: Yes. I think coworker would refer
23 to other delivery persons.

24 MR. BLIT: We would say delivery persons and other --
25 actually, it would mean anyone he works with, not just a

1 delivery person.

2 THE COURT: They ask specifically does it refer to
3 other delivery persons, and the answer is yes.

4 MR. DANIEL KAISER: Yes.

5 MR. BLIT: But it should be a qualified yes.

6 THE COURT: It refers to other delivery persons, the
7 answer is yes. What other persons was there any evidence
8 about? I'm sending the note back marked yes.

9 MR. BLIT: Okay. Yes, your Honor.

10 (Court in recess awaiting the verdict of the jury.)

11 THE COURT: Okay. I have two other matters now.

12 (Recess.)

13 (In open court.)

14 (Jury not present.)

15 THE COURT: We marked a jury note as Court Exhibit 3,
16 "We have reached a verdict."

17 (Court Exhibit 3 so marked.)

18 (Jury enters at 4:06 p.m.)

19 THE COURT: I have your note. It's been marked as
20 Court Exhibit 3, and it reads you have reached a verdict.

21 Madam foreperson, would you stand.

22 THE CLERK: Madam foreperson, question number one:
23 Did the plaintiff prove by a preponderance of the evidence that
24 he was subjected to an unlawful, hostile work environment based
25 on his Jewish ancestry and ethnicity, perpetrated either by his

1 supervisors and/or coworkers during his employment at Mangia
2 57?

3 Perpetrated by supervisors, yes or no?

4 THE FOREPERSON: Yes.

5 THE CLERK: Perpetrated by coworkers, yes or no?

6 THE FOREPERSON: No.

7 THE CLERK: Question number two: Did the defendant
8 prove by a -- did the defendant prove by a preponderance of the
9 evidence both, one, that it exercised reasonable care to
10 prevent and correct promptly the harassing behavior, and, two,
11 that the plaintiff unreasonably failed to take advantage of any
12 preventive or corrective opportunities provided by the
13 defendant?

14 THE FOREPERSON: No.

15 THE CLERK: Question number four: Did the plaintiff
16 prove by a preponderance of the evidence that he was harmed as
17 a proximate result of being subjected to an unlawful, hostile
18 work environment based on his Jewish ancestry and ethnicity
19 during his employment with Mangia 57?

20 THE FOREPERSON: No.

21 THE CLERK: Does the jury award nominal damages?

22 THE FOREPERSON: \$1.

23 THE CLERK: Did the plaintiff prove by a preponderance
24 of the evidence that a management official of the defendant,
25 someone who exercised significant supervisory responsibility

1 and decision-making authority, acted with malice or reckless
2 indifference to the plaintiff's federally protected rights, yes
3 or no?

4 THE FOREPERSON: Yes.

5 THE CLERK: What amount, if any, of punitive damages
6 does the jury award?

7 THE FOREPERSON: \$900,000.

8 THE COURT: How much?

9 THE FOREPERSON: \$900,000.

10 THE COURT: Thank you. Please be seated.

11 THE CLERK: Ladies and gentlemen of the jury, you have
12 heard the verdict as the court has received it.

13 Is that your verdict, yes or no?

14 Juror number 1, is that your verdict?

15 JUROR: Yes.

16 THE CLERK: Juror number 2, is that your verdict?

17 JUROR: Yes.

18 THE CLERK: Juror number 3, is that your verdict?

19 JUROR: Yes.

20 THE CLERK: Juror number 4, is that your verdict?

21 JUROR: Yes.

22 THE CLERK: Juror number 5, is that your verdict?

23 JUROR: Yes.

24 THE CLERK: Juror number 6, is that your verdict?

25 JUROR: Yes.

1 THE CLERK: Juror number 7, is that your verdict?

2 JUROR: Yes.

3 THE CLERK: Juror number 8, is that your verdict?

4 JUROR: Yes.

5 THE CLERK: So say you all.

6 THE COURT: Thank you very much. You are discharged.

7 Thank you.

8 (Jury exits at 4:09 p.m.)

9 THE COURT: Mr. Kaiser?

10 MR. DANIEL KAISER: Your Honor, I would like an
11 opportunity to make judgment notwithstanding the verdict, an
12 opportunity to submit arguments to your Honor for
13 consideration.

14 THE COURT: By all means. I think you have about 28
15 days to do that.

16 MR. DANIEL KAISER: All right.

17 THE COURT: Or whatever rule 50 says. Okay. Thank
18 you.

19 MR. DANIEL KAISER: Thank you, your Honor.

20 MR. BLIT: Thank you, your Honor.

21 (End of proceedings.)

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