



1 STANNARD, DAVID W. TOWNSEND and  
2 CARL T. WOODMAN,

3  
4 Consolidated-Plaintiffs-Appellees,

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6 HILDRETH E. SIMMONS, JR., HENRY  
7 BEILAWSKI, RONLAD G. BUTLER, SR.,  
8 JAMES S. CHAMBERS, ARTHUR J.  
9 KASZUBSKI, DAVID J. KOPMEYER,  
10 CHRISTINE A. PALMER, FRANK A.  
11 PAXTON, JANICE M. POLSINELLE,  
12 TEOFILS F. TURLAIS and BRUCE E.  
13 VEDDER,

14  
15 Consolidated-Plaintiffs-Appellees,

16  
17 -v.-

02-7378-cv  
02-7474-cv

18  
19 KNOLLS ATOMIC POWER LABORATORY, a/k/a  
20 KAPL, Inc., LOCKHEED MARTIN  
21 CORPORATION and JOHN J. FREEH, both  
22 individually and as an employee of  
23 KAPL and Lockheed Martin,

24  
25 Defendants-Appellants-Cross-  
26 Appellees.

27 - - - - -X

28  
29 **APPEARING FOR APPELLANTS:** MARGARET A. CLEMENS, Nixon  
30 Peabody LLP, Rochester, NY, John  
31 E. Higgins, Blank Rome LLP,  
32 Albany, NY.

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34 **APPEARING FOR APPELLEES:** JOHN B. DuCHARME, Berger &  
35 DuCharme & Harp, LLP, Clifton  
36 Park, NY.

37  
38 On remand from the United States Supreme Court.

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40 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
41 **AND DECREED** that the case be **REMANDED** to the district court.

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43 Plaintiffs are former employees of Defendant Knolls  
44 Atomic Power Laboratory ("the employer") who lost their jobs  
45 and sued pursuant to the Age Discrimination in Employment

1 Act, 29 U.S.C. § 631(a), and the New York Human Rights Law,  
2 N.Y. Exec. Law § 296(3-a)(a). Following our August 14, 2006  
3 decision in Meacham v. Knolls Atomic Power Laboratory, 461  
4 F.3d 134 (2d Cir. 2006), Plaintiffs appealed to the United  
5 States Supreme Court citing conflicting decisions regarding  
6 the assignment of the burden of persuasion on the  
7 reasonable-factors-other-than-age ("RFOA") defense. The  
8 Supreme Court granted certiorari, vacated, and remanded to  
9 us. Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct.  
10 2395 (2008). We assume the parties' familiarity with the  
11 underlying facts and the extensive procedural history of  
12 this case.

13  
14 For the reasons stated in its June 19, 2008 opinion,  
15 the Supreme Court held that "the RFOA exemption is an  
16 affirmative defense" for which the employer bears the burden  
17 of persuasion. Meacham, 128 S.Ct. at 2404, 2406. After  
18 clarifying this allocation of the burden, the Supreme Court  
19 instructed us to determine "whether the outcome [of this  
20 case] should be any different when the burden is properly  
21 placed on the employer." Id. at 2406-07. Because this  
22 determination requires a factual inquiry that this Court  
23 lacks the institutional capacity to perform, we now remand  
24 to the United States District Court for the Northern  
25 District of New York for consideration of the following  
26 issues:

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28 (1) Did the employer waive the RFOA affirmative  
29 defense by its conduct at the district court?

30  
31 (2) If so, was any such waiver excused as the  
32 "the result of conflicting statements in our case  
33 law, for which [the employer] should not be  
34 penalized"?<sup>1</sup>

35  
36 (3) If the employer did not waive the defense, or  
37 if any such waiver is excused:

38  
39 (a) Should the employer prevail as a matter  
40 of law on the RFOA defense in light of the  
41 Supreme Court's decision?  
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<sup>1</sup>In re Salomon Analyst Metromedia Litig., 544 F.3d 474,  
485 (2d Cir. 2008).

1 (b) Should this case be resolved on the  
2 record created, or is a new trial warranted in  
3 light of the change in the relevant law?  
4

5 Depending on the findings and rulings made in  
6 considering these questions, the district court may enter  
7 such orders and conduct such further proceedings (including  
8 discovery and trial) as the district court deems  
9 appropriate. Any further appeal in this case will be  
10 assigned to a new panel in the ordinary course.  
11

12 We hereby **REMAND** to the district court for further  
13 proceedings in accordance with this order.  
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16  
17 FOR THE COURT:  
18 CATHERINE O'HAGAN WOLFE, CLERK  
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20  
21 By: \_\_\_\_\_  
22