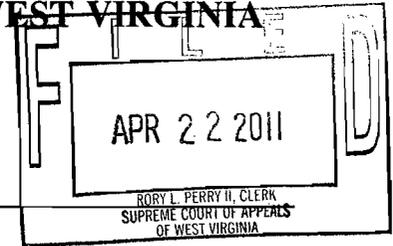


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. _____



ANGELA SMITH

Plaintiff Below/Respondent Herein

v.

CSX TRANSPORTATION, INC.

Defendant Below/Appellant Herein

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APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 08-C-96

JUDGE WILLIAM S. THOMPSON

PETITION FOR APPEAL

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I. INTRODUCTION

This action arises out of Appellee Angela Smith's ("Smith") complaint of a single inappropriate comment in the workplace, Appellant CSX Transportation, Inc.'s ("CSXT") immediate investigation of that comment and imposition of appropriate discipline on the person who uttered the inappropriate comment, and CSXT's subsequent and unrelated termination of Ms. Smith's employment – a decision that was justified by Ms. Smith's repeated violations of CSXT's rules regarding the use of company-provided taxis for personal use. A jury rendered a verdict of \$2,108,611.80, including \$500,000 in punitive damages, against CSXT on Smith's claims that she was subjected to a hostile work environment in violation of the West Virginia Human Rights Act, that CSXT retaliated against her in violation of the West Virginia Human Rights Act, and that CSXT negligently retained another employee - Ernest Wesley Knick.

The jury's verdict was the result of the trial court's error in allowing Smith's hostile work environment claim to be presented to the jury despite evidence of only a single inappropriate comment that CSXT promptly investigated and subsequently imposed disciplinary measures on the employee who made the comment. Additionally, the court failed to properly instruct the jury on the law of pre-text and mixed motive in retaliatory discharge cases in two instances. In each case, these instructions erroneously placed the burden of proof on CSXT with regard to defenses raised against Ms. Smith's claims without regard to the factual predicate required of Ms. Smith as the Plaintiff to make a prima facie case to satisfy the elements of her claim. Furthermore, the trial court should not have allowed punitive damages to go to the jury, and once the punitive damage verdict was returned, the court should have set it aside as not supported by the evidence or, alternatively, that the punitive damage award was excessive.

Given these errors and on the record below, CSXT requests that this Court reverse the judgment of the Circuit Court and enter judgment in its favor or remand this matter for a new trial to be conducted in accordance with the well established law of the State of West Virginia.

II. STATEMENT OF FACTS

A. BACKGROUND

CSXT hired Angela Smith in 1997. (Trial Tr. Day 4 at p. 100). The first position she held was as a yardmaster, a union-represented position covered by a collective bargaining agreement. (*Id.* at 101). Ms. Smith worked in the Danville, West Virginia yard office until she applied for and was accepted into a management (non-union) trainee program in 2006. (*Id.* at 104). She was supported and encouraged to participate in the program by Gery Williams, III, CSXT's Huntington Division Manager. (Excerpted Trial Testimony of A. Smith Day 5 at p. 115). During that program, Ms. Smith met and befriended another management trainee, Clay Newsome. (Trial Tr. Day 4 at p. 105).

After she completed that training program CSXT placed Ms. Smith in a Trainmaster position in Grafton, West Virginia. (*Id.* at 106). CSXT placed Mr. Newsome in a Trainmaster position in Clifton Forge, Virginia. (*Id.* at 114). After beginning their jobs as Trainmasters, Smith and Newsome were accepted into an additional training program, the Associate Development Program. (*Id.* at 113). As part of this enhanced training program, Smith and Newsome worked together on training projects. (*Id.*).

B. THE TELEPHONE INCIDENT INVOLVING WES KNICK

On June 28, 2007, Smith was on her cell phone talking with Newsome, who was in his office, but on his cell phone using its speaker, or hands-free, function. (*Id.* at 114; Excerpted

Trial Testimony of A. Smith Day 5 at p. 98). Smith offered contradictory testimony regarding her physical location when the phone call took place. (Trial Tr. Day 4 at p. 114; Trial Tr. Day 9 at p. 46). During the course of the call, Smith heard a man comment to Newsome, “So how does Angie Smith taste and feel because I heard she's never had a dick in her.”¹ (Trial Tr. Day 4 at p. 114). Newsome immediately hung up the phone and Smith called back to ask the identity of the speaker. (*Id.* at 115). Newsome reported to Smith that the speaker was E. Wesley Knick, another Trainmaster who worked in Clifton Forge, Virginia. (*Id.*). Smith did not know Knick, had never met or spoken with him before June 28, 2007, and had never even seen him prior to that date. (Excerpted Trial Testimony of A. Smith Day 5 at p. 98). Neither Smith nor Newsome reported this incident to CSXT at that time. (Trial Tr. Day 4 at p. 122). Smith continued to work at her position as a Trainmaster in Grafton, West Virginia. (Excerpted Trial Testimony of A. Smith Day 5 at p. 100).

On July 3, 2007, Smith, Knick, Newsome and others attended a staff meeting in Huntington. (Trial Tr. Day 6 at p. 64). Smith and Knick sat at the same table during the meeting. According to Smith, it was the first time that they had met or seen each other. (*Id.* p. 65). During the break, Smith initiated casual conversation with Knick, never mentioning the comment that she overheard. (*Id.*). At that meeting, Division Manager Gery Williams and Assistant Division Manager Jay Fleenor, the supervisor for all three Trainmasters were in attendance. (*Id.*; Excerpted Trial Testimony of A. Smith Day 5 at pp. 102-103). Smith did not mention the comment she overheard to Knick, Williams or Fleenor. (*Id.*).

¹ Ms. Smith is gay, although there was no testimony at trial as to how Wes Knick, who never worked with her, became aware of her sexual orientation.

C. THE INCIDENT IS REPORTED, INVESTIGATED AND KNICK IS TERMINATED

On July 5 and 6, 2007, Smith told Williams, one of her supervisors, that she would like to transfer out of Grafton, West Virginia to another CSXT facility for family-related reasons. (Trial Tr. Day 8 at pp. 228-229). During this exchange, Smith never mentioned Knick's comment to Williams. (*Id.*).

On July 13, 2007, Smith and Newsome asked for a meeting with Jay Fleenor and reported the comment that Knick made to Newsome regarding Smith. (Trial Tr. Day 4 at p. 126). CSXT has a zero-tolerance policy for harassment that requires an immediate response, including a full investigation when a report of harassment has been made. (Trial Tr. Day 8 at p. 232). Within hours of the report, Knick was ordered by his supervisors to come from Clifton Forge, Virginia to Huntington to be questioned by Fleenor and Williams. (*Id.* at 231). Knick arrived at 8:00 p.m. that evening and during that meeting CSXT placed him on administrative leave pending investigation. (*Id.* at 231-236). Following an internal investigation, CSXT terminated Knick from his Trainmaster position on August 16, 2007. (Trial Tr. Day 8 at pp. 237-238). During the investigation of Knick, Smith continued in her position as a Trainmaster in Grafton, West Virginia. (Trial Tr. Day 4 at p. 128).

On the day that CSXT terminated Knick from his management position, Gery Williams and Terry Schray, from CSXT's Human Resources department, called Smith to report the outcome of the investigation. (*Id.* at 129). Smith expressed concern that Knick would exercise his union-held seniority rights and become a locomotive engineer in the area that she supervised. (*Id.* at 130; Trial Tr. Day 8 at p. 244). Williams explained that Smith would be his supervisor only on those occasions when he came to Grafton, but plaintiff was not swayed. (Trial Tr. Day 8

at pp 244, 268). Because of the unusual nature of the situation Williams placed Smith on fully-paid administrative leave to determine how to address her concerns. (*Id.*).

Knick exercised his union seniority rights governed by his collective bargaining agreement and marked up as a locomotive Engineer in Rowlesburg, West Virginia. (Trial Tr. Day 6 at p. 62). This position required that he only occasionally take locomotive engines to Grafton, West Virginia for service. (*Id.*).

D. SMITH'S USE OF COMPANY TAXIS FOR PERSONAL USE

In response to her concerns about supervising Knick, CSXT offered Smith the option to transfer to Trainmaster positions in Russell, Kentucky and Erwin, Tennessee, or to continue her position in Grafton, West Virginia. (Excerpted Trial Testimony of A. Smith Day 5 at p. 134; Trial Tr. Day 8 at p. 245). Smith refused these transfers and instead commenced a six-month paid medical leave to address psychological problems. (Excerpted Trial Testimony of A. Smith Day 5 at p. 134). CSXT left the Grafton Trainmaster position open in case Ms. Smith elected to return to it after he medical leave ended.

Ultimately, Smith decided to resign as a Trainmaster and return to work as a union yardmaster in Danville, West Virginia on May 1, 2008. (Trial Tr. Day 4 at p. 152). Yardmasters are paid a daily wage for their time, which begins when they arrive at the work location and ends when they leave the location. (Excerpted Trial Testimony of A. Smith Day 5 at p. 91-92). Yardmasters are not paid mileage or personal vehicle use or any other allowance for travel to their job location. (*Id.*).

In December, 2008, Ms. Smith's co-workers advised Smith's supervisor, Randy Hall, that Smith was riding in taxi cabs to and from work and that the cost of the rides were being charged to CSXT. (Trial Tr. Day 3 at p. 183). CSXT uses the taxi company, Williams Transport, in the

Danville, West Virginia area to provide transportation to locomotive crews between locations, trains, hotels and outlying destinations. (Trial Tr. Day 8 at p. 145). CSXT pays the taxi company for these business related purposes but not for transporting yardmasters to and from work. (*Id.*). When Hall questioned Smith about her use of the taxi cab services, Smith assured him that CSXT was not paying for her taxi rides. (Trial Tr. Day 3 at p. 184). Later, when questioned by Huntington Division Assistant Division Manager Jack Vierling, Smith first denied using the taxis for personal use and when confronted with multiple taxi vouchers with her signature that had been falsified to appear as if the taxis had been used by CSXT train crews, Smith admitted that she had used taxis on occasions for personal use but that she had permission to do so. (Trial Tr. Day 8 at p. 153). At that time, CSXT removed Smith from service as a yardmaster pending a formal investigation. (*Id.* at 154).

Pursuant to her collective bargaining agreement, CSXT conducted an investigative hearing at which Smith was represented by a union official. (*Id.* at 155). During the course of this investigative hearing, and at the trial of this matter, Smith admitted using the taxis for personal use and charging a portion of those rides to CSXT. (Excerpted Trial Testimony of A. Smith Day 5 at pp. 8 - 9). Following the investigative hearing, a transcript was prepared and the matter was submitted to Huntington Division Manager Bob Frulla for a determination of whether a punishment was warranted under the terms of the collective bargaining agreement. Frulla determined that Smith should be terminated. (Trial Tr. Day 8 at p. 156). Pursuant to her rights under the collective bargaining agreement, Smith appealed the termination and the termination was upheld. (Trial Tr. Day 10 at p. 133). Smith further exercised her collective bargaining agreement rights and presented her termination to a Public Law Board established pursuant to the

provisions of the Railway Labor Act, 45 U.S.C.A §§ 151-159a, and a decision was pending at the same time as the trial of this matter. (Trial Tr. at Day 10, p. 133).

E. PROCEDURAL HISTORY AND TRIAL

Smith filed this action in the Circuit Court of Boone County, West Virginia asserting that CSXT, Gery Williams and Jay Fleenor violated the West Virginia Human Rights Act by subjecting her to a hostile work environment. (*See* Complaint). Later she amended her Complaint and alleged retaliatory discharge by CSXT and added Knick as a Defendant. (*See* Second Amended Compl.) CSXT sought summary judgment on the claims of sexual harassment and retaliatory discharge contending that a hostile work environment was not present and Smith was not fired in retaliation for the sexual harassment complaint, but the Circuit Court denied that motion. (*See* Defendant's Motion or Summary Judgment; Order Denying Motion for Summary Judgment). Ultimately, Plaintiff voluntarily dismissed Defendants Fleenor, Williams and Knick.

After a 10 day trial conducted over the course of a month, the trial court submitted the following questions to the jury: 1) was Smith subjected to a hostile work environment; 2) did CSXT adequately investigate and respond to the allegations; 3) did CSXT retaliate against Smith for claims of sexual harassment and/or filing a lawsuit; and, 4) did CSXT negligently retain Knick and did that negligence harm Smith? (Trial Tr. at Day 10, p. 88 and pp. 92-93).

The jury answered all questions affirmatively and returned a verdict in favor of Ms. Smith. (Trial Tr. at Day 10, pp. 92-93). With respect to damages, the jury awarded her \$277,600.00 in back pay, \$1,000,000.00 in front pay, and \$280,000.00 in aggravation, inconvenience, indignity, embarrassment, humiliation and emotional distress. (*Id.*) The jury then heard testimony, argument and instruction on punitive damages and awarded \$500,000.00 in punitive damages. (*Id.* at 161).

On August 23, 2010, CSXT moved the court for Post-Trial relief of the verdict and that Motion was denied on November 19, 2010, which resulted in this Petition for Appeal. (*See* Defendant's Motion for Post-Trial Relief; Order Denying Motion for Post-Trial Relief).

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

The Court's review of motion for judgment as a matter of law is *de novo*. Syl pt. 1, 2 *Pipemasters, Inc. v. Putnam Co. Comm'n*, 625 S.E.2d 274 (2005). Likewise, the standard of review applied to a motion for a new trial is also *de novo*. *Id.*, 625 S.E.2d at 279. The question of whether a jury was properly instructed is a question of law, and the review is also *de novo*. Syl. pt. 1, *State v. Hinkle*, 489 S.E.2d 257 (1996).

B. A SINGLE COMMENT THAT WAS SUBJECT TO IMMEDIATE INVESTIGATION AND DISCIPLINE CANNOT CONSTITUTE A HOSTILE WORK ENVIRONMENT

CSXT was entitled to entry of judgment in its favor on Plaintiff's hostile work environment claim, because even when construed in a light most favorable to Ms. Smith, the single comment by Wes Knick, which was the subject of an immediate investigation and discipline, could not constitute a hostile work environment under West Virginia law.

To recover on her hostile work environment claim of sexual harassment under the West Virginia Human Rights Act, W. Va. Code §5-11-1 through §5-11-20, Ms. Smith was required to prove that the subject conduct was: (1) unwelcome; (2) based on the sex of the plaintiff; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment (*e.g.* it was hostile); and (4) imputable on some factual basis to the employer. *See Conrad v. ARA Szabo*,

480 S.E.2d 801, 811 (W. Va. 1996) (quoting Syl. pt. 5, *Hanlon v. Chambers*, 464 S.E.2d 741 (W. Va. 1995)).²

1. A Single Offensive Utterance Cannot Establish a Hostile Work Environment Claim.

As to the third element quoted above, one of the “key inquiries [is] whether the mistreatment . . . was of such a nature, because of its seriousness or its pervasiveness, as to ruin the working environment for the plaintiff.” *Id.* (emphasis added). Hostility in these cases, “turns on what effect the conduct would have, cumulatively, on a reasonable person.” *Conrad*, 480 S.E.2d at 810 (emphasis added). Discussing this element of a hostile work environment claim, the U.S. Supreme Court has explained that a claim may exist “[w]hen the work place is permeated with discriminatory intimidation, ridicule, and insult.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); see also *Hanlon v. Chambers*, 464 S.E.2d 741, 749 (W. Va. 1995) (hostile environment harassment may be present “when the workplace is infected, for example, by sexual barbs or innuendos, offensive touching, or dirty tricks.”). Not every instance of verbal or physical harassment in the workplace is actionable however; and while coworkers may be unpleasant and sometimes cruel, “not every such instance renders the workplace objectively hostile.” *McNeal v. Montgomery County*, 307 Fed. Appx. 766, 776 (4th Cir. 2009). When these standards are “[p]roperly applied, they will filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.’” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)(quoting B.

² This Court has “consistently held that cases brought under the West Virginia Human Rights Act, W.Va. Code §§ 5-11-1 through 5-11-20, are governed by the same analytical framework and structures developed under Title VII, at least where our statute’s language does not direct otherwise.” *Barefoot v. Sundale Nursing Homes*, 457 S.E.2d 152, 159 (W. Va. 1995).

Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992) (footnotes omitted)). The U.S. Supreme Court has made clear that “isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” *Faragher*, 524 U.S. at 788. Instead, “[a] hostile work environment claim is comprised of a series of separate acts that collectively constitute an ‘unlawful employment practice.’” *AMTRAK v. Morgan*, 536 U.S. 101, 116 (2002) (quoting 42 U.S.C. § 2000e-5(e)(1)).

To determine whether a work environment is sufficiently hostile or abusive to be actionable, courts must “look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *AMTRAK v. Morgan*, 536 U.S. at 116 (internal quotations omitted); *see also McNeal*, 307 Fed. Appx. at 776; *Faragher*, 524 U.S. at 787-788. This Court has stated that improper conduct that ruins the workplace may consist of “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [that] have the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.” *Akers v. Cabell Huntington Hospital*, 599 S.E.2d 769, 775 (W. Va. 2004) (citing *Hanlon*, 464 S.E.2d at 745, Syl. pt. 7).

A hostile work environment has been established in cases where the totality of the circumstances demonstrated that the plaintiff was subjected to “frequent intimidating and uncooperative behavior,” including a co-worker that “repeatedly . . . grabbed his genital area and unzipped and reziped his pants while he spoke with the plaintiff,” a co-worker that asked plaintiff to meet him to “make love all night,” a co-worker that stated “[l]et’s you and me go do the nasty,” and a co-worker who asked plaintiff, “[w]hat’s to stop me from pulling the van over

and giving you what I know you want?” while driving plaintiff home from work. *Conrad*, 480 S.E.2d at 807, 812 (emphasis added). Likewise a hostile work environment was established where a plaintiff was subjected to a co-worker who “always made sure he had his body pressed up against” plaintiff when they spoke, “constantly” put his arm around plaintiff and massaged her shoulders, would rub his pelvic area against the back of plaintiff’s chair, would stand over plaintiff and look down her blouse, and any time plaintiff was showing him documents, would brush his hand against plaintiff’s breasts “every time” plaintiff turned the page. *Akers*, 599 S.E.2d 769 (W. Va. 2004) (emphasis added).

Justice Cleckley recognized the policy reasons why single incidents of harassment, such as in this case, should not be actionable in his opinion in *Hanlon*:

This case illustrates another example supporting the prevailing federal view, that is, in hostile environment harassment cases (sexual, racial, or whatever), the offensive conduct often does not rise to the level of actionability until after there has been a significant accumulation of incidents. Both employees and employers would benefit from a standard that encourages harassed employees to come forward early, well before the ephemeral line of legal liability has been crossed, in order to root out the problem before it grows into an unmanageable and costly crisis.

Hanlon, 464 S.E.2d at 754.

In stark contrast to the severe and pervasive circumstances in *Hanlon*, *Conrad* and *Akers*, the totality of the circumstances surrounding Ms. Smith’s allegations compel the conclusion that they were not sufficiently severe or pervasive to establish a *prima facie* claim of a hostile work environment. Specifically, the evidence in support of Ms. Smith’s hostile work environment claim consisted of a single comment made over the telephone by a person she had never met who was nearly 200 miles away from Ms. Smith when the comment was made. (Trial Tr. at Day 4, p. 114, Trial Tr. at Day 9, p. 46). Moreover, the comment was not directed to Ms. Smith. (Trial Tr.

at Day 4, pp. 114-115) Instead, it was directed to a third party who was on the telephone with Ms. Smith when the comment was made. (*Id.*) Likewise, Ms. Smith was not subjected to any sexual advances, was not subjected to any unwanted physical contact, and the conduct at issue was not physically threatening or repetitive. Instead, it was a “mere offensive utterance.”³ *AMTRAK v. Morgan*, 536 U.S. at 116. The evidence adduced at trial also failed to establish that this single offensive utterance altered the terms and conditions of Ms. Smith’s employment. Ms. Smith continued working at the same location, performing the same job responsibilities for two weeks after the incident before she reported it to her superiors, and in the interim, attended a meeting where she sat at the same table and exchanged friendly conversation with Wes Knick. (Excerpted Trial Testimony of Angela Smith, Day 5, p. 100, Trial Tr. at Day 6, pp. 64-65). Ms. Smith had repeated conversations with her superiors between the incident and the time she reported the incident without mentioning the offensive comment. (Trial Tr. at Day 8, pp. 228-29). Ms. Smith also continued working in the same position and location after reporting the incident to her superiors for another month. (Trial Tr. at Day 4, pp. 126 and 129).

Importantly, once Ms. Smith reported the Knick comment to her superiors, action was swift and decisive pursuant to the CSXT policy on harassment. It is uncontroverted that CSXT had a zero-tolerance policy for harassment. (Trial Tr. at Day 8, p. 232, Trial Tr. at Day 4, pp. 105-106). The zero-tolerance policy requires that every claim will be taken seriously, fully investigated and disciplinary action taken, when needed. (Trial Tr. at Day 8, pp. 232-233). In accordance with this policy, CSXT took swift action once Ms. Smith's finally reported the Knick comment. (Trial Tr. at Day 8, pp. 230-231). Within hours of Ms. Smith's report, Knick was

³ Ms. Smith acknowledged on cross-examination during defendant's case-in-chief that the single episode phone call did not occur while she was sitting at her desk as she had previously testified (and as she advised CSXT during its investigation and alleged in her complaint), but occurred while she was in her car driving on I-79 on a personal trip to Charleston. (Trial Tr. at Day 4, p. 114, in contrast to Trial Tr. at Day 9, p. 46).

called to the Huntington headquarters from his terminal in Clifton Forge, Virginia. (*Id.*) He met with Williams and Fleenor in Huntington on a Friday evening beginning at 8:00 p.m. to be interviewed and to provide a written statement. (Trial Tr. at Day 6, p. 68). At the end of that meeting Knick was put on administrative leave. (Trial Tr. at Day 8, p. 235). He was not allowed to return to work during the investigation of Ms. Smith's report. (*Id.* Trial Tr. at Day 6, p. 70). Knick never returned to work as a trainmaster for CSXT and, in fact, was terminated from his management position. (Trial Tr. at Day 6, pp. 71-72, Trial Tr. at Day 8, p. 236). Thus, within hours of reporting Knick's comment to CSXT, Knick was removed from his job and never returned to work as a supervisor for CSXT.

Given the lack of repetition, lack of severity, lack of a physical threat accompanying the statement, lack of interference with the terms and conditions of Ms. Smith's work performance, and the swift and decisive action of handling Ms. Smith's complaint, the evidentiary record fails, as a matter of law, to establish a hostile work environment claim.

2. The Trial Court Erred in Relying on Conduct that was Unconnected to CSXT to Support the Finding of Pervasive Harassment

In denying CSXT's motion for Judgment as a Matter of Law on Plaintiff's hostile work environment claim, the trial court relied on improper evidence to support a finding that Ms. Smith was subjected to pervasive harassment.

In its order, the trial court cited to W. Va. C.S.R. § 77-4-2.5 for the proposition that hostile or aggressive behavior, in addition to sexual conduct, may support a finding of harassment and a hostile work environment. (11/19/10 Order at ¶ 26). The trial court then found that Ms. Smith was subjected to a variety of hostile behavior in addition to the offensive

comment made by Mr. Knick to Mr. Newsome that was overheard by Ms. Smith. The trial court specifically noted that this hostile behavior included harassing telephone calls (*Id.* at ¶¶ 27, 31, Trial Tr. at Day 4, pp. 145-146), and an incident where an unidentified individual appeared at Ms. Smith's house and made threats while knocking on her door. (*Id.* at ¶ 29; *see also* Trial Tr. at Day 4, pp. 132-133). These incidents were not corroborated by any evidence other than Ms. Smith's testimony. Further, the testimony regarding the incidents failed to establish that CSXT was responsible for any them. First, all of the incidents occurred while Ms. Smith was somewhere other than at work (*e.g.* at home, in her car, away from work, etc...). Similarly, all of the incidents occurred during the six week period that Ms. Smith was on paid administrative leave and after CSXT had disciplined Knick for the single improper comment. (Trial Tr. at Day 4, pp. 145-146 and 132-133). As a result, there is no evidence that CSXT was in any way connected to these incidents. As such, they cannot be imputed to CSXT, and the only record evidence which arguably supports the jury's verdict on Ms. Smith's hostile work environment claim is the single offensive utterance by Mr. Knick, which is not sufficient as a matter of law. *See Faragher*, 524 U.S. at 788; *AMTRAK*, 536 U.S. at 116.

Ms. Smith also failed to introduce any evidence that established the identity of the person(s) who made these threats, whether in person or via telephone, much less any proof that connected these individuals with CSXT. (Trial Tr. at Day 4, pp. 134 and 145-146). Instead, Ms. Smith relied on speculation and innuendo and hoped that the jury would assume the threats were made by Wes Knick and impute the alleged conduct to CSXT even in the absence of any factual basis for doing so. (Excerpted Trial Testimony of A. Smith Day 5, at pp. 70, 72, 78-79, 85; Trial Tr. Day 10, at p. 9-10).

Even if the jury assumed that these acts were carried out by Wes Knick (which was never established), there is still no factual basis for connecting the acts to CSXT. Under the doctrine of *respondeat superior*, an employer can only be held liable for the acts of its employees that are committed within the scope of employment. See Syl. Pt. 3 *Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981); Syl. Pts. 3 (in part), 4, *O'Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937) (“[t]he master is answerable to a stranger for the negligent act of a person employed by the [master or the] master’s authorized agent, if the act is within the scope of the person’s employment.”). As stated by this Court in *Conrad v. Szabo*, an employer is not liable for harassment and offending conduct “unless the employer had knowledge of the misconduct or reason to know of the misconduct.” *Conrad*, 480 S.E.2d at 812 (citing *Hanlon*, 464 S.E.2d at 750). Here, there was no proof that these alleged acts were committed within the scope of any individual’s employment with CSXT, and the alleged misconduct occurred somewhere other than CSXT’s workplace. Furthermore, even if these unidentified individuals were employed by CSXT, there was no proof that the acts were committed within the scope of the individuals’ employment with CSXT. As a result, the court erred in considering this evidence as support for plaintiff’s claim of a hostile work environment.

C. IN GIVING PLAINTIFF'S INSTRUCTION NO. 7, THE COURT IMPERMISSIBLY ALLOWED THE JURY TO INFER THE EXISTENCE OF AN ELEMENT THAT THE PLAINTIFF HAD TO PROVE

The Court, over CSXT’s objections, accepted Ms. Smith’s Instruction No. 7, which provided:

The Court instructs the jury that proof of pretext can by itself sustain a conclusion that the defendant engaged in retaliation. “Pretext” means a

false or weak reason or motive advanced to hide the actual reason or motive. Therefore if the jury disbelieves the defendant's explanation for its termination of the Plaintiff, the jury may conclude that the logical explanation for the action was the plaintiff's complaints of harassment or her filing of a lawsuit.

(6/24/10 Tr. Transcript, 3:21-4:5.) The above instruction was taken in part from this Court's decision in *Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561 (W. Va. 1996) (see Syl. pt. 5). *Skaggs*, however, was a disability discrimination case based on a disparate treatment theory, in which a plaintiff prevails if she proves by a preponderance of the evidence (direct or circumstantial) that a forbidden intent (*e.g.* discriminating against a qualified individual with a disability) was a motivating factor in an adverse employment action. *See id.* at Syl. pt. 6.

Ms. Smith did not assert a claim for disparate treatment. Instead, she brought a claim for retaliatory discharge under W. Va. Code § 5-11-9(7) of the West Virginia Human Rights Act. To succeed on her claim for retaliatory discharge, Ms. Smith bore the burden of proving by a preponderance of the evidence:

(1) that the [Plaintiff] engaged in protected activity, (2) that [Plaintiff's] employer was aware of the protected activities, (3) that [Plaintiff] was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that [Plaintiff's] discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251, 259 (1986); *see also, Conrad v. ARA Szabo*, 480 S.E.2d 801 (W. Va. 1996). While pretext can play a part in both disparate treatment and retaliatory discharge cases, the context in which the proof of pretext is offered, and the burden for proving pretext, is different in retaliatory discharge cases.⁴

⁴ While Plaintiff's Instruction No. 7 is a verbatim recitation of Syllabus Point 5 in *Skaggs*, it is clear from a reading of the opinion by Justice Cleckley that this syllabus point was never intended to be a statement of law

If a plaintiff produces sufficient evidence to establish a *prima facie* retaliatory discharge claim, the defendant employer then has the burden of production to show “credible evidence of legitimate nondiscriminatory reasons for its actions.” *Mace v. Pizza Hut, Inc.*, 377 S.E.2d 461, 464 (W. Va. 1988). If the defendant employer provides credible evidence of legitimate nondiscriminatory reasons for its actions, plaintiff’s *prima facie* showing “drops out of the picture,” *Hanlon v. Chambers*, 464 S.E.2d 741, 748, fn.3 (W. Va. 1995), and the burden returns to the plaintiff “to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful” retaliation. *West Virginia Dept. of Natural Resources v. Myers*, 443 S.E.2d 229, 233 (1994). In making the showing of a legitimate non-discriminatory reason for its actions, the defendant need not prove that it was actually motivated by the proffered reason; defendant satisfies its burden if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. *Shepherdstown Volunteer Fire Department v State Human Rights Commission*, 309 S.E. 2d 342 (W.Va. 1983).

This issue regarding the plaintiff's burden of proof after the defendant has shown a legitimate, non-discriminatory reason for termination was recently addressed by the Tenth Circuit Court of Appeals in *Hysten v. Burlington Northern Santa Fe Rwy. Co.*, 2011 WL 89732 (C.A.10, March 16, 2011). Hysten sued BNSF alleging retaliatory discharge as a result of his race and because of his filing a claim under the Federal Employers' Liability Act, 45 U.S.C. 51, et seq. In affirming a grant of summary judgment for BNSF, the court noted that once a plaintiff makes a *prima facie* showing of retaliation⁵, the burden shifts:

for the purpose of instructing a jury. Syllabus point 6 in *Skaggs*, however, is a statement of the law setting forth the elements of proof in a disparate treatment discrimination case.

⁵In *Hysten*, the court was applying Kansas law, but the standards for a *prima facie* showing of retaliatory discharge there are the same as in West Virginia.

Once a plaintiff makes this showing, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the termination. (citation omitted). If the employer articulates such a reason, the presumption of discrimination "simply drops out of the picture." (citing *St. Mary's Honor*). **At that point, the plaintiff faces the full burden of showing that the employer acted illegitimately**, which he may satisfy by demonstrating by a preponderance of the evidence that the employer's proffered reason is pretextual. (citations omitted) (emphasis added).

2011 WL 892732 at p. 4.

Applying this standard to the present case, the jury presumably found that Ms. Smith established a *prima facie* retaliatory discharge claim. In response, CSXT introduced evidence that it terminated Ms. Smith because she improperly used taxis for personal benefit at CSXT's expense, which Ms. Smith admitted, and which constituted credible evidence of a legitimate nondiscriminatory reason for its decision to terminate Ms. Smith. *See Mace*, 377 S.E.2d at 464. As such, the burden should have returned to Ms. Smith to prove by a preponderance of the evidence that CSXT's explanation for her termination (*e.g.* wrongful use of taxis for personal benefit) was merely a pretext for retaliation against her for asserting claims of harassment and filing a lawsuit. *See Myers*, 443 S.E.2d at 233.

Ms. Smith failed, however, to introduce any evidence (much less evidence sufficient to make a *prima facie* case) that CSXT's stated reason for her termination was pretextual. Instead, Ms. Smith benefitted from an erroneous jury instruction that allowed the jury to disregard the burden of proof applicable to her retaliatory discharge claim. That instruction - Plaintiff's Instruction No. 7 - allowed the jury to "conclude" or presume that CSXT's explanation for Ms. Smith's termination was pretextual if the jury did not believe it. (Trial Tr. at Day 9, p. 83-85). Thus, Ms. Smith was freed from having to establish by a preponderance of the evidence that CSXT's stated reason for her termination was pretextual and the bar for success on her

retaliatory discharge claim was substantially lowered. As noted in *Hysten*, the burden of proving pretext is always with the plaintiff, and an instruction that relieves the plaintiff of this burden, and allows a jury to infer pretext from the proof relating to defendant's limited showing of a legitimate basis for termination, is erroneous.

In essence, the instruction did not require Ms. Smith to prove anything, and instead required CSXT to prove a negative – that it did not terminate Ms. Smith in retaliation against her. Additionally, it placed the burden on CSXT to prove that its reason for terminating Ms. Smith *was not* pretextual, despite that being exclusively within the plaintiff's burden of proof, and despite the prevailing law being that the defendant's burden is only to show a non-discriminatory basis for her termination. CSXT was undoubtedly prejudiced by the Court's acceptance of Plaintiff's Instruction No. 7 given the jury's verdict in favor of Ms. Smith on the retaliatory discharge claim and the lack of record evidence that CSXT's stated reason for her termination was in fact pretextual. As a result of this error, CSXT is entitled to a new trial.⁶

D. IN GIVING PLAINTIFF'S INSTRUCTION NO. 26, THE COURT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO CSXT TO PROVE A NEGATIVE

The Court, over CSXT's objections, accepted Ms. Smith's Instruction No. 26, which provided:

If the plaintiff proves, by a preponderance of the evidence, that she was terminated in retaliation for her complaints of harassment or for filing a

⁶ Additionally, as noted by the Tenth Circuit in *Hysten*, the proof necessary to show pretext is significant. "The relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs." 2011 WL 892732 at p. 5.

lawsuit against the defendant, you may find in favor of the plaintiff. However, if you find that the plaintiff was terminated for a legitimate, non-discriminatory reason, you may find in favor of the defendant.

Finally, if you find that the defendant was motivated by both a retaliatory reason and a non-retaliatory reason in its decision to terminate the plaintiff, then defendant will be able to avoid liability only if it can prove that the same result would have occurred even without the unlawful motive. Nevertheless, the ultimate burden of persuasion remains at all times with the plaintiff to prove that she was terminated in retaliation for engaging in protected conduct.

(Trial Transcript at Day 9, p. 103) The erroneous portion of this instruction is the first sentence of the second paragraph regarding a defendant's mixed motive. As this Court has previously stated, "a mixed motive case *is* a disparate treatment case" as "mixed motive cases form a subcategory of disparate treatment cases." *Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 584 (W. Va. 1996). As noted above, *Skaggs* is a disparate treatment case, not a retaliatory discharge case. If the defendant employer in a retaliatory discharge case provides credible evidence of legitimate nondiscriminatory reasons for its actions, the burden of proof returns to the plaintiff "to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful" retaliation. *Myers*, 443 S.E.2d at 233. Even if the *Skaggs* mixed motive instruction applies in a retaliatory discharge case such as this one (as opposed to a *Harless* public policy action), Plaintiff still bears the burden of establishing that retaliation was "the substantial motivating factor" in mixed motive cases. *Skaggs*, 479 S.E.2d at 584; *Page v. Columbia Nat. Resources*, 198 W. Va 378, 390 (1996). Plaintiff's Instruction No. 26 omits this crucial language and instead places the burden on the defendant to prove that the same result would have occurred (*e.g.* plaintiff's discharge), even in the absence of the unlawful motive (*e.g.* retaliation).

Ms. Smith failed to carry her burden of establishing that retaliation was the “substantial motivating factor” in CSXT’s decision to terminate her employment. Indeed, she introduced no evidence on that issue and instead relied on inferences and innuendo. Plaintiff’s Instruction No. 26 then misplaced the burden of proof, and allowed the jury to find in Ms. Smith’s favor despite the her failure to carry the burden of proof, causing prejudice to Defendant and requiring a new trial.

E. THE TRIAL COURT ERRED IN ALLOWING PUNITIVE DAMAGES TO GO TO THE JURY

An appellate court is required to exercise meaningful appellate review of jury verdicts that include an award of punitive damages. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *Peters v. Rivers Edge Mining*, 680 S.E.2d 791 (W. Va. 2009). Under West Virginia law, a court’s post trial review of a punitive damages award involves a two-step process requiring “first, a determination of whether the conduct of an actor toward another persons entitles the person to a punitive damage award [and] second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991). Syl. pt. 7 *Alkire v. First Nat. ’l Bank of Parsons*, 475 S.E. 2d 122 (W. Va. 1996). As set forth below, the jury’s \$500,000 punitive damages award fails both of these tests.

1. The Punitive Damages Award Lacks Sufficient Factual Support and Should Therefore Be Reversed.

In general, “to sustain a claim for punitive damages the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act done under a bona fide claim of right and without malice in any form constitutes no

basis for such damages.” *GMAC v. D.C. Wrecker Service*, 647 S.E.2d 861, 867 (W. Va. 2007); *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 887 (W. Va. 1992).

The evidentiary record in this case is void of any evidence that that defendants acted with malice towards Ms. Smith or with willful disregard of her rights and is, therefore, not sufficient to sustain the punitive damages award. When Ms. Smith eventually reported the Knick incident to CSXT, the company began an immediate investigation and terminated Wes Knick from his managerial position within one month. (Trial Tr. at Day 8, pp. 231, 237-238). Thereafter, Mr. Knick was able, pursuant to the collective bargaining agreement that governed his employment with CSXT, to mark up in a non-management position based on seniority and his CBA. (Trial Tr. at Day 6, p. 62). CSXT informed Ms. Smith of Mr. Knick’s termination and the possibility that Mr. Knick could be working near Ms. Smith’s area of supervision in West Virginia. (Trial Tr. at Day 8, p. 245). When Ms. Smith expressed her concern about this situation, CSXT allowed her to take paid administrative leave while it determined whether there was an available position for her at another CSXT location.⁷ (*Id.*). Ms. Smith was offered identical vacant trainmaster positions in at least two other locations, Russell, Kentucky and Erwin, Tennessee, but refused those positions. (Trial Tr. at Day 8, p. 245, Excerpted Trial Testimony of Angela Smith at Day 5, p. 134). After fully paid administrative and medical leave (during which time CSXT kept the Grafton trainmaster position vacant for Ms. Smith), Ms. Smith returned to work at CSXT as a yardmaster in Danville in April 2008. (Excerpted Trial Testimony of Angela Smith at Day 5, p. 134, Trial Tr. at Day 4, p. 152). This position was a non-management

⁷ Ironically, in her position as a Trainmaster at Grafton, Ms. Smith would have been Mr. Knick’s supervisor on those rare occasions when he would have come to Grafton. Not only would she have been able to control the scope and type of work he performed while at Grafton, but she also could have been involved in disciplinary or other actions against him for any rule violation or other misbehavior. If CSXT had elected to fire Knick from his union job (and that termination upheld through arbitration), CSXT would have had no on-going control over Knick’s behavior concerning Ms. Smith.

position which Ms. Smith held prior to becoming a trainmaster, and for which she retained rights pursuant to her CBA. (*Id.*)

Several months after Ms. Smith returned to work as a yardmaster in Danville, West Virginia, CSXT received a report that Ms. Smith was taking a taxi to and from work and charging the cost to CSXT. (Trial Tr. at Day 3, p. 145) Upon receiving the report, CSXT conducted an investigation and ultimately determined that the report was true. (Trial Tr. at Day 8, pp. 153-154) CSXT reached this conclusion based in large part on Ms. Smith's admission that she had in fact charged CSXT for the cost of the taxi rides on multiple occasions, and upon the evidence that Ms. Smith had altered taxi vouchers to cover up her use of the taxis. (*Id.* at pp 154-156, Excerpted Testimony of Angela Smith, at Day 5, p. 8-10). This conduct – which Ms. Smith admitted to – was improper and CSXT, acting under a *bona fide* claim of right, terminated Ms. Smith's employment with CSXT based on this misconduct. (Trial Tr. at Day 8, pp. 188-189).

CSXT terminated Ms. Smith in March 2009, nearly two years after she reported the harassment by Mr. Knick to CSXT, and approximately one year after she filed suit against CSXT asserting claims related to that incident. Despite the lack of temporal proximity, and the lack of direct or circumstantial evidence tying the termination to the prior claim, the jury determined that CSXT's termination of Ms. Smith was related to her complaints of a hostile work environment. There is no evidence in the record, however, that CSXT's decision to charge Ms. Smith under her CBA was connected in any way to her claim of sexual harassment by Wes Knick. Different people were involved in the investigation of the Wes Knick incident and the taxi incident and there was no testimony that the personnel involved in the decision to charge, investigate and terminate Ms. Smith had any knowledge of her claim of sexual harassment. Instead, the evidence showed that CSXT had a right to terminate Ms. Smith for this conduct – which she admitted to –

and chose to exercise this right believing it was the proper action to take under the circumstances. Under these circumstances, CSXT's actions were taken based a *bona fide* claim of right and cannot form the basis for an award of punitive damages. *D.C. Wrecker Service*, 647 S.E.2d, at 867; *see also TXO Prod. Corp.*; 419 S.E.2d at 887. As a result, CSXT is entitled to an entry of judgment in its favor with regard to the question of punitive damages.

Additionally, the jury's award of both emotional distress damages and punitive damages in a retaliatory discharge case such as this case is improper as a matter of West Virginia law. As this Court has previously stated, "there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim." *Harless v. First. Nat'l Bank*, 289 S.E.2d 692, 703 (W. Va. 1982). As a result, the Court has "decline[d] to automatically allow a claim for punitive damages to be added to the damage picture" for a retaliatory discharge claim because "[t]he recovery for emotional distress as well as other compensatory damages such as lost wages should adequately compensate plaintiff." *Id.* In retaliatory discharge cases such as this one, "punitive damages may be appropriate" only if the "employer's conduct is wanton, willful or malicious." *Id.* According to this Court, "[s]uch a situation may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment." *Id.* at n. 19. At trial, no evidence was introduced which suggested that CSXT's conduct rose to the level of malice. Here, as in *Harless*, the facts "do not demonstrate the type of wanton, willful or malicious conduct that traditionally authorizes the right to punitive damages." *Id.* Because Ms. Smith failed to provide evidence of further egregious conduct on the part of CSXT and because "the mere existence of a retaliatory

discharge will not automatically give rise to the right to punitive damages,” CSXT was entitled to entry of judgment on this issue as a matter of law. *Id.*

Additionally, the trial court also erred in relying on conduct that could not be imputed to CSXT in support of its decision to allow the issue of punitive damages to go to the jury. Specifically, the trial court found that “[t]here is evidence to support a conclusion that the defendant’s agent, Mr. Knick, intentionally harassed and threatened plaintiff. The jury could have found that Mr. Knick was responsible for the harassing and threatening phone calls and visits.” (11/19/10 Order at ¶ 56). As outlined above, however, even if the jury did conclude that these acts were carried out by Mr. Knick, there was no evidence connecting the phone calls or the incident at her home to CSXT. Under the doctrine of *respondeat superior*, an employer can only be held liable for the acts of its agents/employees that are committed within the scope of employment. See Syl. Pt. 3 *Musgrove v. Hickory Inn, Inc.*, 168 W.Va. 65, 281 S.E.2d 499 (1981); Syl. Pts. 3 (in part), 4, *O’Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937) (“[t]he master is answerable to a stranger for the negligent act of a person employed by the [master or the] master’s authorized agent, if the act is within the scope of the person’s employment.”). Similarly, an employer/master can only be liable for punitive damages where it “knowingly employs or retains a careless and incompetent servant, [and] thereby impliedly authorizes or ratifies his negligent acts committed in the course of his employment” which are also wanton, willful, or malicious. *Addair v. Huffman*, 195 S.E.2d 739, 745 (W. Va. 1973) (quoting *Marietta & Interurban Ry. Co.*, 84 S.E. 923 (1915)). Here, there is no proof that the alleged acts of intimidation or harassment were committed within the scope of any individual’s employment with CSXT, especially where the alleged misconduct occurred outside of any CSXT workplace and while Ms. Smith was out of work on administrative leave. As a result, there is no

basis to impute these acts to CSXT and the trial court erred in relying on them to support the jury's award of punitive damages, which should not have been submitted to the jury.

2. The Court Should Establish a Meaningful Standard for Punitive Damages In Wrongful Termination Cases.

The trial court found, despite the above quoted language from the *Harless* decision, that the recent decision of *Peters v. Rivers Edge Mining, Inc.* 224 W. Va. 160 (2009) “reaffirmed that the punitive damages standard announced in Mayer v. Frobe is still the law in West Virginia.” (11/19/10 Order at ¶ 55). Thus, according to the trial court, a plaintiff need only show that a defendant engaged in “wanton, willful or malicious” conduct to submit the question of punitive damages to the jury. (*Id.* at ¶ 43 (citing *Mayer v. Frobe* 22 S.E. 58 (W. Va. 1895)). At trial, Plaintiff focused exclusively on whether CSXT’s termination of Ms. Smith was willful or intentional.⁸ Plaintiffs’ counsel argued that because the termination was willful, and because the jury found in favor of Plaintiff on her retaliatory discharge claim, that Ms. Smith’s entitlement to punitive damages was a foregone conclusion. (Trial Tr. at Day 10, p. 148). As a result, the jury only needed to determine the amount of punitive damages. (*Id.*)

Allowing punitive damages in an employment case based solely on a showing of willful or intentional conduct sets an impermissibly low threshold for punitive damages since nearly every termination is intentional. As a result, the trial court’s holding ensures that virtually every wrongful termination case will involve an award of punitive damages without regard to the

⁸ Specifically, Smith's counsel argued "The easy question is the first one: Do you find that defendant's, CSX's, actions in this matter were malicious, oppressive, wanton, willful – and that's the key word – reckless, or with criminal indifference to civil obligations. It it's any one of those, under the law you give punitive damages. This was obviously willful, and it's obviously intentional. You've already found in your first verdict that they retaliated against her by firing her because of what she had done; standing up for her rights. They didn't do that by accident. You've already ruled that. It was intentional. Therefore, punitive damages are appropriate, and that's why we're here under the law. (Trial Tr. at Day 10, p. 148.)

actual facts presented in the case, and that as Ms. Smith's counsel argued, the only question to be decided by the jury is the amount of the punitive damage award. (*Id.*)

In this case, the impermissibly low threshold is further exacerbated by the the trial court's support of the *Skaggs* "shift of nonpersuasion" mixed motive theory. (*See* 11/19/10 Order at ¶¶ 15-20). The mixed motive theory requires the defendant to "prove [that] the same decision [*e.g.* termination] would have been made in the absence of the unlawful reason" to avoid liability. *Bailey v. Norfolk and Western Ry. Co.*, 527 S.E.2d 516, 528 (W. Va. 1999). When the mixed motive theory is combined with punitive damages based solely on willful or intentional conduct, not only is the causation burden shift to the defendant, but the defendant also bears the burden of proving that plaintiff is NOT entitled to an award of punitive damages, as opposed to plaintiff bearing the burden of establishing a right to an award of punitive damages. In practice, the defendant in a wrongful termination case such as this one must prevail on liability to avoid punitive damages – there is no middle ground – and in every case where the jury finds in favor of the plaintiff on liability, (*e.g.* that the forbidden intent was a motivating factor in the employment action – not the motivating factor), then the issue of punitive damages will go to the jury regardless of whether the defendant believed it was acting under a *bona fide* right in taking the employment action against the plaintiff. This standard for punitive damages in wrongful termination cases is impermissibly low and should be modified by the Court.

A more appropriate standard for punitive damages in wrongful termination cases would be the "actual malice" standard that has been adopted by the Court in other contexts. *See e.g. McCormick v. Allstate Ins. Co.*, 505 S.E.2d 454 (W. Va. 1998). For example, in statutory bad faith cases, the policy holder is not entitled to an award of punitive damages unless she "is able to introduce evidence of intentional injury." *Id.* at 458 (quoting *Hayseeds, Inc. v. State Farm*

Fire & Cas., 352 S.E.2d 73, 81 (W. Va. 1986)). Establishing this bright line standard, the Court interpreted “actual malice” to “mean that the company actually knew the policyholder’s claim was proper, but willfully, maliciously, and intentionally denied the claim” and provided that the standard was intended to be “highly susceptible to summary judgment for the defendant.” *Id.* (quoting *Hayseeds*, 352 S.E.2d at 80-81); *see also Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W. Va. 1989) (affirming actual malice standard for punitive in first-party property damage case); *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766 (W. Va. 1990) (same for insured’s action against insurer for failure to settle third-party claim within policy limits); *Poling v. Motorists Mut. Ins. Co.*, 450 S.E.2d 766 (W. Va. 1994) (same for third-party’s action against insurer for unfair settlement practices). In these cases, mere proof of “negligence, lack of judgment, incompetence, bureaucratic confusion” is not sufficient to submit the issue of punitive damages to the jury. *McCormick*, 505 S.E.2d at 458. This heightened statutory standard also applies to misappropriation claims brought under the Uniform Trade Secrets Act, where the Legislature provided that punitive damages may be awarded, but only where the misappropriation is “willful and malicious,” as opposed to just willful. W. Va. Code Ann. § 47-22-3.

Similarly, in other tort cases, this Court has suggested that a single intentional act may be insufficient to support an award of punitive damages. In *Smith v. Perry*, the trial court focused only on whether or not the defendant was speeding immediately prior to an automobile accident in overturning the jury’s verdict that awarded punitive damages to the plaintiff. *Smith v. Perry*, 359 S.E.2d 624, 398 (W. Va. 1987). This Court reversed and found that the trial court improperly singled out one area of testimony in overturning the punitive verdict. *Id.* In doing so, the Court suggested that if speeding was the only issue, the punitive damage award might be

improper, but additional evidence had been introduced at trial which supported the punitive damage verdict, including: testimony from multiple witnesses that there was a “smell of alcohol on the defendant and in his car;” evidence that the defendant was “crossing the center line in a no-passing zone” at the time of the accident; the defendant’s admission that that he had been drinking the night before the accident and had little sleep; and the defendant’s admission that he later pled guilty to reckless driving as a result of the accident. *Id.*

In the present case, Plaintiff did not present any evidence of egregious conduct beyond the mere existence of a retaliatory discharge. *See Harless*, 289 S.E.2d 692. By contrast, in the case of *Vandevender v. Sheetz, Inc.*, this Court upheld a punitive damage award in an employment case where the defendant’s illegal conduct included:

refusing to accommodate plaintiff’s work restrictions, refusing to reinstate plaintiff after suffering a compensable workplace injury, discharging plaintiff from employment, refusing to rehire plaintiff, and refusing to allow plaintiff to even apply for reemployment . . . retaliating against a manager who testified during a deposition contrary to [the defendant’s] position, and retaliated against plaintiff upon her negotiated return to work by requiring her to perform work activities which defendant’s managers knew she could not perform without risking re-aggravating her injuries or causing new injuries,

in addition to the defendant’s admissions that their conduct and policies violated multiple state laws. *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 689 (W. Va. 1997). Nothing of the sort occurred here, where CSXT thoroughly investigated Plaintiff’s wrongful conduct before taking any action against her and only terminated her after the investigation revealed that she had in fact stolen from the company, which she admitted. (*Id.* at pp 154-156, Excerpted Testimony of Angela Smith, at Day 5, p. 8-10). Viewing the evidence in a light most favorable to Plaintiff, the evidence in this case may have sufficed to prove negligence or lack of judgment on the part of

CSXT in terminating Ms. Smith based on improper conduct, which she admitted to, but it does not rise to the level of “actual malice” or intentional injury, which are more appropriate standards for the imposition of punitive damages. In the absence of those standards, the threshold for punitive damages in wrongful termination cases is virtually meaningless and nearly every employment case will involve a punitive damage award, regardless of whether the conduct was egregious, or grossly negligent.

3. Due Process Also Requires Reversal of the Punitive Damages Award.

The question of whether due process principles permit punitive damages to be assessed against CSXT is a legal issue for the Court to resolve. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35, 441 (2001). A due process challenge “calls for the application of a constitutional standard to the facts of a particular case” and invokes a “thorough, independent review” by the Court on matters of law. *Id.* at 435, 441 (citation omitted); *see also Mendez-Matox v. Municipality of Guaynabo*, 557 F.3d 36, 52 (1st Cir. 2009).

Under the circumstances of this case, no award of punitive damages is permissible as a matter of due process principles, which prohibit imposing arbitrary punishments and require that a defendant against whom punitive damages are sought to receive fair notice that its conduct will be subject to punishment. As the U.S. Supreme Court has held, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . .” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996); *accord State Farm Mut. Auto. Ins. Co., v. Campbell*, 538 U.S. 408, 417 (2003). Due process prohibits imposing “arbitrary punishments” on tortfeasors, and “[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to

avoid punishment solely upon bias or whim.” *State Farm*, 538 U.S. at 416, 418 (citation omitted). The “point of due process – of the law in general – is to allow citizens to order their behavior.” *Id.* at 418. Accordingly, where a defendant has ordered its behavior in a way it justifiably believed to be reasonable and lawful, the infliction of punishment for that conduct “depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law” and is “so plainly arbitrary and oppressive as to be nothing short of a taking of [the defendant’s] property without due process of law.” *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

These due process principles of fair notice are a fundamental part of the “genuine dispute” or “good faith dispute” principle. In accordance with this principle, many courts, including this Court, have refused to permit punitive damages on the basis that “[a] wrongful act done under a *bona fide* claim of right and without malice in any form constitutes no basis for such damages.” *GMAC v. D.C. Wrecker Svc.*, 647 S.E.2d 861 (W. Va. 2007) (citing Syl. pt. 3, *Joplin v. Bluefield Water Works & Improvement Co.*, 74 S.E.943 (W. Va. 1912)). For example, in *Barber v. Nabors Drilling*, the U.S. Court of Appeals for the Fifth Circuit reversed an award of punitive damages where they found that a “good faith dispute” existed as to the defendant employer’s conduct in refusing to permit plaintiff to return to work until he obtained a “full medical release.” 130 F.3d 702, 710 (5th Cir. 1997). The Court reasoned because there was a good faith dispute about this conduct, the conduct “cannot form the basis for a conclusion that [the defendant] acted with malice or reckless indifference” and that there could be “no question that an error which costs a party \$300,000 dollars [in punitive damages] is so fundamental as to result in a miscarriage of justice.” *Id.* (internal quotation omitted). *See also, e.g. Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 623 (8th Cir. 1983) (punitive damages may not be

awarded where there can be “reasonable disagreement over the relative danger and utility of an act”) (citation omitted); *Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760, 762 (Okla. 1984) (insurer’s withholding of payment did not support punitive damages where there was a “legitimate dispute”); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (“[A]n award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue.”).

Other Courts have recognized the constitutional prohibition against punishing conduct a defendant reasonably believed was lawful. As one court stated:

If we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable. The assessment of punitive damages has some of the same functions as the sanctions of criminal law The sanctions of criminal law cannot be constitutionally imposed when the criminality of the conduct is not capable of being known beforehand.

Kelsay v. Motorola, Inc., 384 N.E.2d 353, 360 (Ill. 1978) (citation omitted). *Kelsay* makes clear that the relevant standard focuses on the information available to the defendant at the time of the conduct at issue, and that punitive damages may not be imposed based upon hindsight or later available information.

These due process principles do not permit the imposition of punitive damages against Defendant under the facts of this case. CSXT dismissed Ms. Smith based on a genuine, good faith belief that it had the right to do so after she repeatedly stole from the company by charging the costs of taxis to CSXT that she used for her personal benefit. (*Id.* at pp. 154-156, Excerpted Testimony of Angela Smith, at Day 5, p. 8-10). Moreover, CSXT terminated Ms. Smith only after it notified her that it was conducting an investigation into the matter. (*Id.* at p. 154.) As part of that investigation, an evidentiary hearing was held, pursuant to the CBA that governed

Ms. Smith's employment with CSXT, where both parties introduced evidence and heard testimony from numerous witnesses. (Trial Tr. at Day 8, p. 155). It was therefore reasonable, at a minimum, for CSXT to conclude that, having complied with the procedural requirements of the CBA that governed Ms. Smith's employment with CSXT, it had the right to terminate her employment based on her wrongful actions, which she admitted to.

Following her termination, Ms. Smith appealed CSXT's decision pursuant to her CBA and ultimately presented her case to a Public Law Board established pursuant to the Railway Labor Act on June 3, 2010 while the trial of this matter was on-going. (Trial Tr. at Day 10, p. 133). After the jury rendered its verdict in this case, Ms. Smith dropped the appeal and arbitration. Under these facts, there is no basis for concluding that CSXT had fair notice that its conduct could subject it to punitive damages, as required by due process. Nor does the imposition of punitive damages in this case serve the goals of punishment and deterrence. Instead, the punitive damages award is an arbitrary and capricious punishment that is unconstitutionally imposed in retrospect and with hindsight knowledge of information not available to CSXT at the time of its conduct.

The same circumstances that demonstrate that CSXT acted in the justifiable belief that its conduct was reasonable and lawful also demonstrate the lack of reprehensibility that could justify a punitive award in this case. Reprehensibility is a threshold requirement for punitive damages. As the U.S. Supreme Court stated in *State Farm*, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419; see also *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 1001, n.9 (6th Cir. 2007) (applying *State Farm*, reversing punitive damages award, and

holding that “punitive damages are inappropriate in this case due to insufficient reprehensibility of [defendant’s] conduct”), *cert. denied*, 552 U.S. 1166 (2008); *Freund v. Nycomed Amersham*, 347 F.3d 752, 770 n.7 (9th Cir. 2003 (Guold, J., dissenting in part) (stating that although *BMW* and *State Farm* “were focused on Due Process problems involving excessive punitive damages when malice existed, the above language indicates that the same Due Process problems exist in a case, such as this one, where punitive damages are imposed on a defendant who did not act reprehensibly”). Here, CSXT acted in accordance with the rights provided to them under the collective bargaining agreement that governed Ms. Smith’s employment with CSXT and without reprehensibility – much less with sufficient reprehensibility to warrant further sanctions to achieve punishment or deterrence.

In sum, the imposition of punitive damages against CSXT in this case is arbitrary, capricious, and fundamentally unfair in violation of due process and in contravention of the due process requirement of fair notice. The punitive damage award should therefore be set aside.

4. If Not Reversed, the Punitive Damage Award Should Be Substantially Reduced.

As explained in *Alkire v. First National Bank*, 475 S.E.2d 122 (1996), under West Virginia law, the trial court should conduct a post-trial analysis of every punitive damage award pursuant to the factors set forth in Syllabus Points 3 and 4 from *Garnes v. Fleming Landfill, Inc.* 413 S.E.2d 897 (W. Va. 1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). Syl. Pt. 6 *Alkire*, 475 S.E.2d 122; *see also* Syl. pt. 5, *Cato v. Silling*, 73 S.E.2d 731 (W. Va. 1952) (finding the trial court has a duty to set aside a verdict which includes punitive damages where the facts did not provide legal support for an award of punitive damages). Moreover, “the jury’s award of punitive damages does not constitute a finding of fact to which deference is appropriate” *Cooper Indus.*, 532 U.S. at 437;

see also Baker v. Exxon Mobile Corp. (In re Exxon Valdez), 270 F.3d 1215, 1239 (9th Cir. 2001). As such, the trial court must consider several factors, including the reprehensibility of the defendant's conduct. *Garnes*, 413 S.E.2d 897. These factors impose two types of examinations: 1) of aggravating evidence that supports the punitive damage award; and 2) of mitigating evidence that would permit reduction of the punitive damage award. See Robin Jean Davis, Louis J. Palmer, Jr. PUNITIVE DAMAGES LAW IN WEST VIRGINIA, at 38-9, available at <http://www.state.wv.us/wvsca/PunitiveDamages2010.pdf>

The lack of evidence of reprehensibility of conduct by CSXT in the facts surrounding this incident dictates that the punitive damage award must be reduced. The reprehensibility factor examines the culpability of “the [defendants’] conduct that harmed the plaintiff. *State Farm*, 538 U.S. at 423. The U.S. Supreme Court has set forth a non-exhaustive list of factors to be considered in assessing the degree of reprehensibility: “whether . . . the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Id.* at 419. The Court has cautioned, however, that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award” *Id.*

“It should be presumed,” the Court has instructed that “a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Id.* And even if there is a basis for punitive damages, the amount may not exceed the sum necessary to achieve

the purposes of such damages. Where “a more modest punishment . . . could have satisfied the State’s legitimate objectives,” a punitive award is excessive under due process.” *Id.* at 419-20. Properly analyzed, the reprehensibility guidepost and its factors do not support the \$500,000 punitive damages award in this case.

(a) Physical versus Economic Harm

Ms. Smith did not allege and did not produce any competent evidence of physical harm at trial, instead, she focused solely on the economic impact of CSXT's conduct. The lack of any physical injury to Ms. Smith suggests the CSXT's conduct lacked the necessary indicia of reprehensibility required to support the punitive damage award.

(b) Indifference or Reckless Disregard

Ms. Smith also failed to prove that CSXT's conduct evinced an indifference or reckless disregard toward others. The evidence at trial demonstrated that CSXT investigated Ms. Smith’s allegation of sexual harassment by Wes Knick; promptly took what it believed to be appropriate disciplinary action against Mr. Knick for his offensive comment; timely informed Ms. Smith that Mr. Knick might be working near her area after he was terminated from his management position and marked up as a contract employee; offered Ms. Smith the opportunity to transfer to two other locations when she expressed concern about working in the same area as Mr. Knick; provided her with approximately two weeks of paid administrative leave, and six months of short term disability leave when she claimed she was unable to work for medical reasons; left her trainmaster position open for her while she was on disability leave and gave her the opportunity to return to that position; allowed Ms. Smith to return to work at an appropriate position in a location she found acceptable once she returned from administrative and medical leave; conducted a thorough investigation of Ms. Smith’s conduct in stealing from CSXT by charging

CSXT for taxi rides to and from work; and only took disciplinary action against Ms. Smith for the improper taxi charges after an evidentiary hearing in accordance with her CBA. These facts and circumstances negate any inference that CSXT's conduct toward Ms. Smith evidenced recklessness or indifference. CSXT's reasonable resolution of complex employment related issues about which knowledgeable persons could reasonably disagree in good faith does not support punitive damages.

(c) Financial Vulnerability

The third reprehensibility factor identified by the U.S. Supreme Court, whether “the target of the conduct had any financial vulnerability,” *State Farm*, 538 U.S. at 419, is not applicable in this case and does not support the punitive award. There is no evidence to suggest that financial vulnerability played any role in Ms. Smith’s alleged injury. Courts have found this factor applicable where – in contrast to the present case – there is “some kind of intentional aiming or targeting” of the financially vulnerable. *Baker v. Exxon Mobile Corp. (In re Exxon Valdez)*, 490 F.3d 1066, 1087 (9th Cir. 2007), *vacated on other grounds, Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008). Accordingly, courts have found this factor weighed in favor of heightened reprehensibility where (unlike here) a defendant took advantage of the target’s financial vulnerability to pressure the target. *See e.g., Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 153 (4th Cir. 2008) (bank pressured borrower to pay disputed amounts by refusing to correct errors in credit report and rendering borrower even more financially vulnerable). Moreover, this factor does not apply simply because CSXT is a large corporation. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th Cir. 2006). Specifically, the U.S. Supreme Court has opined that a punitive damage award should only punish the defendant for the harm caused to plaintiff by its conduct, not the jury’s judgment as to the

defendant's character or business practices. *State Farm*, 538 U.S. at 423. Throughout the trial, and no where more blatantly than in their closing and the direct examination of their "economist," Dr. Cobb, Ms. Smith's counsel placed undue emphasis on the financial standing of CSXT, and unabashedly compared CSXT's standing with the purported vulnerability of Ms. Smith's financial standing. By way of example, Ms. Smith and her counsel made several references to Ms. Smith's inability to pay her utility bills, her lack of health insurance and resultant inability to receive treatment for an allegedly recurring tumor, and to the size and financial standing of CSXT. Thus, the jury considered these inflammatory assertions and incorporated them into its calculation, resulting in an unreasonable and excessive punitive damages award. As the decisions noted above make clear, the third factor, financial vulnerability of the target, is not applicable here and does not support a finding of reprehensibility.

(d) The Other Reprehensibility Factors Do Not Support the Punitive Award

There was no evidence at trial that CSXT engaged in "repeated[]" conduct after "knowing or suspecting that it was unlawful." *BMW*, 517 U.S. at 576-77. The fourth reprehensibility factor does not, therefore, support the large punitive damage award in this case. Nor was there any evidence at trial of "intentional malice, trickery, or deceit," – the fifth reprehensibility factor. *See State Farm*, 538 U.S. at 419. In sum, CSXT's conduct toward Ms. Smith, when evaluated under the U.S. Supreme Court's reprehensibility factors, was in no way sufficiently reprehensible (if at all) to justify the \$500,000 punitive award in this case. Accordingly, it is appropriate to reduce the punitive damage award.⁹

⁹ The traditional review of the amount of punitive damages focuses on the relationship of the punitive award to compensatory damages awarded. Appellants do not raise that issue herein, but assert that in light of the evidence of a bona fide right involved in its actions relating to Ms. Smith and the general lack of evidence of reprehensibility, a punitive award should be nominal, at most.

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