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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES A. NAGY,

Plaintiff,

v.

CIVIL ACTION NO. 08-C-544

Honorable Jennifer Bailey

WEST VIRGINIA AMERICAN WATER COMPANY,
a West Virginia corporation,

Defendant.

ORDER

This matter came upon for hearing on January 19, 2010, on the Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial, or in the Alternative, to Alter or Amend the Judgment. Present were Plaintiff, Jim Nagy, along with his counsel, Maria W. Hughes, Esq. and Stephen A. Weber, Esq. and Defendant, West Virginia American Water Company, by its in-house counsel, Linda Bouvette, Esq. along with Mychal Schulz, Esq. and Brian Moore, Esq. The Court, having reviewed the pleadings submitted by the parties and heard the arguments of counsel, finds as follows:

FINDINGS OF FACT

1. On October 1, 2009, the trial of this matter concluded. The jury returned a verdict in favor of Plaintiff, Jim Nagy. The jury concluded that West Virginia American Water Company (the "Company") is liable to Mr. Nagy for age discrimination and awarded him \$200,450 in back pay, \$900,000 in front pay, \$150,000 for emotional distress, \$150,000 for loss of dignity, and \$350,000 in punitive damages.
2. On March 8, 2007, the Company terminated Mr. Nagy's employment, after close to 23 years of service. Mr. Nagy was 54 years of age.

3. Mr. Nagy had received only one reprimand during his tenure with the Company. The reprimand concerned a safety violation for bumping into a post while driving a company vehicle.

4. Company officials, including Sean Graves and Chad Carmichael, testified at trial that Mr. Nagy was well-respected among his peers and was believed to have been an honest person. He had consistently received good performance evaluations, raises every year, and promotions. His last promotion was to the position of “Network Supervisor” where among other things, he and another Network Supervisor, Jeff Ferrell, reviewed contractor invoices.

5. The original reason given to Mr. Nagy for his discharge from employment --which was reiterated three months later in a formal termination letter—was that he was being fired based upon his inadequate review of invoices submitted by outside contractor, Tralyn, Inc.

6. Both Mr. Nagy and Jeff Ferrell reviewed Tralyn invoices and both were disciplined by the Company for not having what the Company believed to be sufficient “back up” before submitting them for payment. Mr. Nagy—age 54, was fired, while Mr. Ferrell—age 34, was given a 10-day suspension.

The Tralyn Invoices

7. In January of 2007, the Company conducted an internal audit of Tralyn invoices which had been submitted and paid during 2006. As noted above, both Mr. Nagy and Jeff Ferrell reviewed these invoices. Among other things, the auditors concluded that:

(1) The Company lacked any standard procedures for the review and payment of contractor invoices. Auditor Andrew Twaddelle testified that this meant that the issue of whether there was sufficient back up for a particular invoice became a subjective determination for the reviewer.

(2) The Company did not require the foreman who was on a particular site –i.e., the “field inspector” –to keep daily reports of how many men were on site, the number of hours they were on site, or the materials that were used. Accordingly, the audit report recommended that a standard process be adopted and that field inspectors be required to keep daily records. *See* Final Audit Report dated March 2, 2007, admitted as Exhibit 28, p. 9.

(3) The roles of company employees were not clearly defined. According to Andrew Twaddelle, the auditors concluded that accountability between job positions was lacking. Upon reviewing the audit report, Chief Operating Officer of American Water, John Young stated, “the report is an embarrassment to West Virginia American management, the Southeast Region and the Corporate Capex team.....It also appears there is not clear role definition and accountability between management, engineering, and network.” *See* Email from John Young dated March 6, 2007, admitted as Exhibit 24.

(4) There were “potential” overbillings in the amount of \$209,000. *See* Exhibit 28, p. 7. Auditor Andrew Twaddelle testified that he did not know if there were any actual overcharges by the contractor but that the potential existed.¹

(5) Auditor Andrew Twaddelle further testified that he did not make any determination that Jim Nagy or Jeff Ferrell had been negligent in reviewing the invoices. Company representatives Deborah Herndon, Nicole Price, and Kim Legg all reaffirmed in their testimony that the Company had no written policies or procedures which Mr. Nagy was supposed to have followed and had failed to follow.

8. The Company filed suit against Tralyn days after the audit findings were made, alleging that it had been overcharged by at least \$220,000 and seeking recoupment of that amount. *See* Complaint admitted as Exhibit 31. It then disciplined both Jeff Ferrell and Jim Nagy for “discrepancies exceeding \$200,000” which were the “direct result of the overpayment of invoices.” *See* Letters to Jim Nagy and Jeff Ferrell, admitted as Exhibits 1 and 2 respectively.

¹ In addition, Plaintiff argued at trial that the auditors had made suppositions. For example, on a major repair job in Dunbar, Tralyn was on site for five weeks with multiple crews. Testimony was presented that the job was so successful that it was the subject of an article in a trade magazine. No daily records were kept by the field inspector on the job. Ultimately, the auditors were unable to determine how much, if any, of the labor had been invoiced correctly, and as a result, they listed all of the labor –more than \$60,000 –as a “potential” discrepancy. *See* Audit summary admitted as Exhibit 6. Plaintiff’s counsel presented evidence to argue that other “potential” discrepancies were suppositions.

Mr. Nagy, age 54, was fired, while Jeff Ferrell, age 34, was suspended for 10 days.

9. In Mr. Nagy's termination letter, the Company stated in relevant part:

Dear Jim:....

On February 20, 2007, the audit report and supporting documentation was submitted identifying discrepancies exceeding \$200,000. The discrepancies were the direct result of overpayment of invoices. A subsequent meeting was held with you to discuss audit findings. **During that meeting, we clearly expressed our concerns with the audit findings and provided you the opportunity to explain. You were presented with a copy of the summary of invoices outlining the discrepancies, including invoices you approved and asked why you had approved them. You have not provided a suitable explanation or additional documentation to support the overpayment of the invoices.**

The Code of Ethics states the following: 'The integrity of American Water's financial records is critical to the operation of our business and is a key factor in maintaining the confidence and trust of our employees and stakeholders. We must ensure that all transactions are recorded properly and that records and data owned, used and managed by the Company are accurate and complete. Information needed to verify the accuracy of the Company's books and records by American Water's internal auditors or independent accountants should be provided.' You received a copy of the Code of Ethics and signed receipt of same on December 14, 2006.

Your conduct in approving these invoices failed to ensure certain transactions were handled appropriately and in accordance with Company policy. Effective Friday, March 9, 2007, your employment with West Virginia American Water Company was terminated.

See Exhibit 1 (emphasis added).

10. Mr. Ferrell's letter of discipline stated virtually identical language to that of Mr. Nagy, with the exception that Mr. Ferrell was only suspended, while Mr. Nagy was fired. The Ferrell letter stated in relevant part:

Dear Jeff:....

On February 20, 2007, the audit report and supporting documentation was submitted identifying discrepancies exceeding \$200,000. The discrepancies were the direct result of overpayment of invoices. A subsequent meeting was held with you to discuss audit findings. **During that meeting, we clearly expressed our concerns with the audit findings and provided you the opportunity to explain. You were presented with a copy of the summary of invoices outlining the discrepancies, including invoices you approved and asked why you had approved them. You have not provided a suitable explanation or additional documentation to support the overpayment of the invoices.**

The Code of Ethics states the following: 'The integrity of American Water's financial records is critical to the operation of our business and is a key factor in maintaining the confidence

and trust of our employees and stakeholders. We must ensure that all transactions are recorded properly and that records and data owned, used and managed by the Company are accurate and complete. Information needed to verify the accuracy of the Company's books and records by American Water's internal auditors or independent accountants should be provided.' You received a copy of the Code of Ethics and signed receipt of same on December 14, 2006.

While we recognize you were performing work outside the normal scope of your responsibilities and that approval and/or review of these invoices was not your direct responsibility; nonetheless, **your conduct in approving these invoices failed to ensure certain transactions were handled appropriately and in accordance with Company policy.** Effective Friday, March 9, 2007, you are subject to ten (10) days off without pay. Any subsequent violations will be cause for further discipline, up to and possibly discharge.²

See Exhibit 2 (emphasis added).

11. Mr. Nagy and Mr. Ferrell's immediate supervisor, 54-year old Ron Belcastro, was also fired for his role in approving invoices; however, he later was offered, and he accepted, a retiree-health benefits package in exchange for his release of all legal claims against the Company. Another younger individual who had reviewed some of the invoices, David Carviollono, received only a two-day suspension.

12. The Company argued at trial that Mr. Nagy and Mr. Ferrell were not similarly situated. It argued that Mr. Nagy was the "construction supervisor" and that he was primarily responsible for reviewing invoices while Mr. Ferrell was a "zone supervisor" without primary responsibility for reviewing the invoices.

13. The jury considered the Company's argument in light of the following evidence:

a. Both Mr. Nagy and Mr. Ferrell had identical formal job titles –i.e., "Network Supervisor." Both of these men had identical job descriptions. Mr. Nagy was sometimes referred to as the "construction supervisor" informally and Mr. Ferrell was sometimes referred to as a "zone supervisor" informally. Nevertheless, neither of those informal titles was part of any personnel record.

b. There was no written job description, policy, or procedure which assigned the task

² Although Mr. Ferrell's letter said that his suspension was to be without pay, Mr. Ferrell testified at trial that he was permitted to use paid vacation time.

of reviewing invoices to any particular position or individual. The only job description which pertained to these two men –i.e., that for a Network Supervisor—failed to even mention the task of reviewing invoices.

c. Mr. Ferrell was actively engaged in approving Tralyn invoices for payment. The evidence at trial established that, in year 2006 (i.e. the year which was the subject of the audit), Mr. Ferrell signed 92 invoices, while Mr. Nagy signed only 81.³ Moreover, immediate supervisor Ron Belcastro testified that it was his understanding that both Mr. Ferrell and Mr. Nagy reviewed the invoices in the same manner.

d. Prior to the time that Mr. Nagy assumed his position as the construction supervisor, the previous “construction supervisor” did not have responsibility for reviewing invos. Mr. Nagy’s predecessor, Chad Carmichael --who, like Mr. Nagy and Mr. Ferrell had the formal title of “Network Supervisor”-- testified that he was unaware that it was his job responsibility as the “construction supervisor” to review invoices. He testified that during the time that he had the informal title of construction supervisor (year 2005), it was Jeff Ferrell (the “zone supervisor”) who was “in charge of reviewing all of the Tralyn invoices.” Mr. Carmichael’s testimony was substantiated by the fact that: (1) during the entire year he was the construction supervisor, he did not sign a single Tralyn invoice for approval; (2) Jeff Ferrell –the person who was the “zone supervisor” and who also held the identical formal title of Network Supervisor--signed all of the Tralyn invoices for that year; and (3) Jeff Ferrell testified that he reviewed the invoices without asking Mr. Carmichael to verify any of them.

14. Although the Company’s own internal audit drew no conclusion that Mr. Nagy had violated any policy or that he had even been negligent in reviewing invoices, testimony was presented at trial that Company officials had referred to Mr. Nagy as “unethical” (Nicole Price), as “violating the public trust” (Deborah Herndon), and as having committed “severe misconduct” (Nicole Price). Carole Descani, who was once the top official in Human Resources for all of American Water, testified that it would be “morally offensive” to approve invoices which had overcharges and that she had heard there was “wrongdoing.” Both former Company president, Deborah Herndon, and Director of Human Resources, Kimberlee Legg, each testified that she did not know if Mr. Nagy stole, embezzled, or conspired.

³ Although an additional 19 invoices were unsigned, the unrebutted evidence established that it was Mr. Nagy’s practice always to sign an invoice when he received it

15. Field inspector Tommy Boggs –a union steward at the time—testified that he heard in the union that both Mr. Nagy and Mr. Belcastro were terminated as a result of the audit. In addition, a Charleston newspaper article was published on the very day that Mr. Nagy and Mr. Belcastro were fired, discussing alleged discrepancies discovered in the audit and identifying the possibility of employee terminations. Mr. Nagy’s termination letter, itself, stated that the audit report identified discrepancies exceeding \$200,000 and that his explanation had been insufficient. He was informed in that letter that he had violated the “Code of Ethics.” See Exhibit 1.

16. For three months following Mr. Nagy’s termination from employment, the Company’s in-house legal counsel, John Romeo, repeatedly telephoned Mr. Nagy and attempted to get him to sign a release of his claims in exchange for a retiree-health benefits package. Evidence was presented that Mr. Romeo extended the time period for Mr. Nagy to respond and he increased the benefit package beyond that which had been offered to Ron Belcastro –who had already signed a release of claims.

17. Plaintiff’s counsel argued that the Company also failed to investigate its accusations against Mr. Nagy. For example, as a Network Supervisor (or even as the “construction supervisor”) Mr. Nagy was not required to be on the job site daily. Rather, he worked from his office on Pennsylvania Avenue. The man who was on the job daily and who oversaw the Tralyn crew daily was 42- year old field inspector, Tommy Boggs. Several of the invoices which were in question during the audit were from Mr. Boggs’s job sites. Nevertheless, the Company did not even ask Mr. Boggs for back up information to support any of the invoices which allegedly contained overcharges. Nor did it reprimand Mr. Boggs for his failure to keep

daily reports. Instead, the Company fired Mr. Nagy for failing to have back up information related to those invoices, and it promoted Mr. Boggs, placing him in Mr. Nagy's job. Mr. Boggs testified that after he assumed Mr. Nagy's job, the Company began requiring field inspectors to keep daily reports and to attach those reports to the contractor invoices. He testified that this new requirement makes his job in reviewing invoices much easier.

18. Weeks after Mr. Nagy was fired, the Company discovered additional "discrepancies" which had been approved for payment by 34-year old Jeff Ferrell and 42-year old Chad Carmichael. Yet, these individuals were not disciplined.

19. At the time of the audit, Deborah Herndon had been in office as Company President for 15 months. As noted above, Chief Operating Officer John Young had characterized the audit findings as an "embarrassment to West Virginia American management." Plaintiff's counsel argued in closing argument that audit report was a virtual report-card for her tenure in office and that this prompted Ms. Herndon to authorize the Company to sue Tralyn for recoupment of at least \$220,000 even though the audit had only discovered the potential for discrepancies and not actual discrepancies. Counsel argued further that Ms. Herndon then looked for the proverbial fall persons within the Company and fired Mr. Nagy and Mr. Belcastro, without so much as investigating or questioning the actual people on the job sites.⁴

20. Following the initiation of the Tralyn lawsuit, Ms. Herndon engaged in an effort to find actual discrepancies. Sean Graves, age 37, was promoted to succeed 54-year old Ron Belcastro and was asked to review Tralyn invoices for the purpose of finding discrepancies. The review included not only the 2006 invoices but also 2005 invoices. Upon completion of this

⁴ Ms. Herndon was repeatedly impeached at trial based upon her inconsistent statements and the reasons she asserted for the disparate treatment between Mr. Nagy and Mr. Ferrell.

review, Mr. Graves identified tens of thousands of dollars in “discrepancies” on invoices which had been signed and approved for payment by Jeff Ferrell in 2005 and tens of thousands of dollars in “discrepancies” on invoices signed and approved by Jeff Ferrell in 2006.⁵ Nevertheless, the Company did not discipline Mr. Ferrell for these “discrepancies.” Nor did it discipline Mr. Carmichael based upon the 2005 invoices, even though the Company maintained that it was Mr. Carmichael’s responsibility “as the construction supervisor” to have been responsible for those invoices.⁶ Deborah Herndon testified that it would have been inappropriate to have disciplined these individuals, because she considered the matter to be stale. She also stated, “It’s hard to reconstruct events when people can’t remember everything that happened.”

21. Following Mr. Nagy’s termination and after the initiation of his lawsuit, the Company articulated two additional reasons for his termination. Those reasons were: (1) a matter known as “Stonegate” ; and (2) Mr. Nagy’s alleged participation in a meeting where Tralyn’s owner allegedly pressured Tommy Boggs to sign off on invoices. The jury heard evidence that the first matter had occurred five years earlier while Mr. Nagy was in a different department and in a different position. Mr. Nagy was not given a verbal reprimand related to the alleged event, and indeed, he was promoted to the position of Network Supervisor after the event. As to the alleged pressure for Tommy Boggs to sign off on invoices, the jury heard testimony by Mr. Boggs that, in his opinion, Tralyn’s owner was a good person and Mr. Nagy is

⁵ As noted above, all of the 2005 invoices were signed by Jeff Ferrell, even though Chad Carmichael was the “construction supervisor” at the time. Mr. Ferrell signed 92 of the 2006 invoices.

⁶ The jury also heard additional evidence that 43-year old Chad Carmichael had had performance issues for some time. When additional performance issues arose in December of 2007, the Company placed Mr. Carmichael on a performance improvement plan rather than terminate him from employment.

an honest person. Neither of these alleged reasons was mentioned during Mr. Nagy's termination meeting, identified in his termination letter, or mentioned at the unemployment hearing after Mr. Nagy was fired.

22. During the trial, the Company insisted that Mr. Nagy's actions cost the Company money as a result of the "potential discrepancies." Three days before the trial began, current Company President Wayne Morgan signed a settlement agreement to resolve the litigation between the Company and Tralyn. Counsel for the defense took the affirmative step of introducing the Tralyn settlement agreement into evidence through Mr. Morgan, revealing that the Company—although having sought to recover \$220,000 from Tralyn—actually paid Tralyn over \$693,000 to resolve the litigation.⁷ The settlement agreement, drafted by legal counsel for the Company, did not include a confidentiality provision, but instead stated:

WVAWC agrees to pay Tralyn the sum of \$693,601.88 ("Settlement Amount") in compromise and settlement of the claims raised by Tralyn in the Civil Action. ...Of this amount, \$193,601.88 ("Invoice Payment Component") represents the value of certain invoices disputed through the litigation process and which WVAWC has determined with the assistance of its outside auditor were and are proper invoices for work completed by Tralyn and for which WVAWC received value as used and useful additions to WVAWC's utility plant in service...

See Defendant's Exhibit 10, p. 2.

Defense counsel relied upon this language in closing argument to argue that the Company had to pay out money in a settlement due to Mr. Nagy's actions. Yet, on cross examination by Mr. Nagy's counsel, Mr. Morgan had testified previously that: he did not know who the "outside auditor" was; he had not seen any report of that auditor; he was unable to identify how much of the money paid was attributable to 2005 invoices or to 2006 invoices; and he was unable

⁷ After the Company sued Tralyn for \$200,000 in alleged discrepancies, Tralyn brought its own lawsuit against the Company seeking damages for unpaid invoices and lost profits. The two were eventually consolidated into a single lawsuit.

to identify how much of the money paid was attributable to either Mr. Nagy, Mr. Ferrell, or to Mr. Carviollano. Plaintiff's counsel argued that the Company's accusations were malicious because the Company still lacked any evidence that (1) any "discrepancy" was actual; or (2) that any part of any actual discrepancy was attributable to Mr. Nagy.

CONCLUSIONS OF LAW

Motion for Judgment As A Matter of Law

1. The Company first argues that this Court should grant judgment in its favor as a matter of law, because it believes there was no legally sufficient evidentiary basis for the jury to find in favor of Mr. Nagy.

In determining whether there is sufficient evidence to support the jury's verdict, this Court must:

(1) consider the evidence most favorable to Mr. Nagy as the prevailing party;

(2) assume that all conflicts in the evidence were resolved by the jury in favor of Mr. Nagy as the prevailing party;

(3) assume as proved all facts which Mr. Nagy's evidence tends to prove; and

(4) give to Mr. Nagy the benefit of all favorable inferences which reasonably may be drawn from the evidence. *See Richmond v. Ellenbogen*, 205 W.Va. 240, 517 S.E.2d 473 (1999).

Even in cases where the evidence is such that the jury could have properly found for either party upon the factual issues in the case, a motion for judgment as a matter of law should not be granted. *Morgan v. Bottome*, 170 W.Va. 23, 289 S.E.2d 469 (1982)

2. The Court DENIES the Company's Motion for the following reasons:

Age Discrimination

The Company argues that there was “no evidence of actual discriminatory intent on the part of the Company...” See Defendant’s Memorandum, p. 2. More specifically, the Company argues that Mr. Nagy failed to offer direct evidence of intent to discriminate and that he failed to offer sufficient evidence to make out a *prima facie* case.

The West Virginia Supreme Court of Appeals has made clear that direct evidence of discriminatory intent is not required to prove discrimination. Rather, a *prima facie* case may be established by direct or circumstantial evidence, by inferential evidence, or by a combination of evidence. *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 484 n. 12, 457 S.E.2d 152, 161 n. 12 (W.Va. 1995) [citation omitted]. Indeed, *Barefoot* clarified that the threshold of proof required to prove a *prima facie* case is small. It stated:

At the outset, we note some confusion about the *prima facie* case may have developed from the third prong of the analysis we set forth in [*Conaway v. Easten Associated Coal Corp.*, 358 S.E.2d 423 (1986)] that ‘[b]ut for the plaintiff’s protected status, the adverse decision would not have been made.’...Use of the ‘but for’ language in that test may have been unfortunate, at least if it connotes that a plaintiff must establish anything more than an inference of discrimination to make out a *prima facie* case. [footnote omitted]. But the *Conaway* decision itself disavowed any desire to require more....**To further clarify, we now hold the ‘but for’ test of discriminatory motive in *Conaway* is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination.**

Id. at 484, 457 S.E.2d at 161 (emphasis added).

Both *Barefoot* and *Conaway* hold that one way to make out a *prima facie* case is to offer evidence of a “case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision.” *Conaway*, 358 S.E.2d at 429-430. In *Barefoot*, the Court held:

A complainant in a disparate treatment, discriminatory discharge case... may meet the initial *prima facie* burden by proving, by a preponderance of the evidence (1) that the complainant is a member of a group protected by the [West Virginia Human Rights Act]; (2) that the complainant was discharged, or forced to resign, from employment; and (3) **that a nonmember of the protected group was not disciplined, or was disciplined less severely than the complainant, though both engaged in similar conduct.**

Barefoot 193 W.Va at 485-486, 457 S.E.2d at 162-163 (emphasis added).

Among other evidence presented at trial, Mr. Nagy presented evidence of the Company's unequal and disparate treatment between him and Jeff Ferrell. The jury heard evidence that 34-year old Mr. Ferrell reviewed 92 invoices and was given a 10-day suspension, while 54-year old James Nagy reviewed 81 invoices and was fired. This evidence, alone, was sufficient to create an inference of discrimination, and this evidence, alone, must be viewed in the light most favorable to Mr. Nagy and assumed to have been proven.

The Company then articulated a legitimate non-discriminatory reason for its actions, i.e. that Mr. Nagy and Mr. Ferrell were not similarly situated because Mr. Nagy was the "construction supervisor" and Mr. Ferrell was the "zone supervisor." Nevertheless, there was sufficient evidence for the jury to believe that the two men were similarly situated. The Company failed to introduce any document which assigned the primary responsibility for reviewing invoices to Mr. Nagy, while the uncontroverted evidence was that Mr. Ferrell actually reviewed more invoices than Mr. Nagy. Mr. Ferrell and Mr. Nagy had the same formal job title and same job descriptions, and Supervisor Ron Belcastro testified that the two men reviewed invoices in the same manner. In addition, Mr. Ferrell reviewed all of the Tralyn invoices when Chad Carmichael previously held Mr. Nagy's position.

Not only was there sufficient evidence for the jury to find that Mr. Nagy and Mr. Ferrell

were similarly situated, but the Plaintiff presented additional evidence to carry his burden of persuasion that the Company discriminated against him based upon his age: (1) even when the Company became aware of additional discrepancies which Jeff Ferrell made related to the 2005 and 2006 Tralyn invoices, Mr. Ferrell was not disciplined; (2) Chad Carmichael, the prior construction supervisor, was not disciplined for his role in the 2005 discrepancies; and (3) even later when the Company recognized that Mr. Carmichael was performing his role as Network Supervisor poorly, Mr. Carmichael was only placed on a performance improvement plan.

In addition, Mr. Nagy introduced evidence to establish that each of the proffered reasons for his termination was pretextual. The jury heard evidence that the Company only articulated two of the three reasons after he initiated the lawsuit. Those reasons were not part of Mr. Nagy's personnel file, were not discussed with him during his termination, were not included in his letter of termination sent to him three months after he was fired, and were not raised at the unemployment hearing.

The jury also had sufficient evidence to reject the initial reason –i.e., that Mr. Nagy had primary responsibility for the review of invoices and that his review was inadequate—given the facts that (1) the Company said he did not violate any written policy or procedures for the review of invoices (none existed); (2) no document assigned to Mr. Nagy the primary responsibility for invoice review; (3) Jeff Ferrell reviewed more invoices than he did; and (4) the auditor failed to conclude that Mr. Nagy was negligent in his review of the invoices, and in fact, was unable to conclude that there were actual discrepancies. Evidence was also introduced to show that the audit, itself, was faulty. For example, the auditors characterized over \$60,000 in labor charges as

a potential discrepancy and failed to give Tralyn credit for one hour of work when everyone agreed the job took five weeks and multiple crews.

Finally, there was evidence for the jury to find in favor of Mr. Nagy under a mixed motive theory. Even to the extent that the Company was legitimately concerned about the review of Tralyn invoices, the jury heard evidence that Jeff Ferrell had signed more invoices than Mr. Nagy and that he had approved for payment tens of thousands of dollars in Tralyn charges which were being questioned by the Company. The Company blamed both Mr. Ferrell and Mr. Nagy in their roles in reviewing invoices, stating to them both that they had (1) “not provided a suitable explanation or additional documentation to support the overpayment of invoices,” (2) violated the “Code of Ethics”; and (3) “failed to ensure certain transactions were handled appropriately.” Yet, the Company chose to fire Mr. Nagy (age 54) and Mr. Belcastro (age 54) and only to suspend Jeff Ferrell (age 34).

Based upon the foregoing evidence, it is clear that the jury had more than enough evidence to conclude that the Company discriminated against Mr. Nagy on the basis of his age. Accordingly, the Company’s Motion for Judgment as Matter of Law on the issue of age discrimination is DENIED.

Punitive Damages

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.” *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 821 (emphasis added), *quoting Alkire v. First Nat’l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d

122 (1996) Syl. Pt. 7. Although the mere existence of a wrongful discharge is insufficient for this purpose, punitive damages are appropriate where the plaintiff can show that his employer's actions were malicious, i.e. that his employer had exhibited a "general disregard of the rights of others." *Id.* In *Haynes v. Rhone-Poulenc*, 521 S.E.2d 331 (W.Va. 1999), the Court stated that the question a court must ask itself, before allowing punitive damages to go to the jury, is:

Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could . . . reach [] a verdict against the [defendant] on the issue of punitive damages?

Id. at 348, quoting *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 129, 475 S.E.2d 122, 129 (1996).

In this matter, there was sufficient evidence to allow the issue of punitive damages to go to the jury:

a. Mr. Nagy was fired for the manner in which he reviewed invoices even though the Company had no specific policy he was required to follow, even though the Company failed to find that he had violated any policy, and even though the auditors were unable to conclude that he was negligent in his performance of his duties.

b. The jury heard evidence from Ron Belcastro that Mr. Nagy reviewed invoices in the same manner as Jeff Ferrell. The role of reviewing invoices was not assigned in any job description to any particular individual or position. The jury heard evidence that Mr. Ferrell reviewed more invoices than Mr. Nagy and that both men were disciplined for not having sufficient back up documentation. Yet, Mr. Nagy was fired and Mr. Ferrell was only suspended.

c. The audit concluded that roles between individuals were not clearly defined and that standard procedures needed to be put into place. Despite the fact that the audit failed to

conclude that Mr. Nagy was negligent in the performance of his duties, Company representatives accused Mr. Nagy of committing “severe misconduct” (Nicole Price), as being unethical” (Nicole Price), and as having “violated the public trust” (Deborah Herndon).

Plaintiff’s counsel argued that these accusations against Mr. Nagy were reckless and malicious. In addition, Company officials heard there was “wrongdoing.” (Carole Descani); then president, Deborah Herndon, and Director of Human Resources, Kimberlee Legg, each testified that she did not know if Mr. Nagy stole, embezzled, or conspired; Union Steward Tommy Boggs heard in the union that Mr. Nagy was fired as a result of the audit; the Charleston Newspapers published an article on the very day he was fired, discussing alleged discrepancies discovered in the audit and identifying the possibility of employee terminations. Mr. Nagy was also informed in the termination letter that there were discrepancies exceeding \$200,000 (even though the Company’s auditors testified that there were only potential discrepancies), that his explanation regarding overpayments was unacceptable, and that he had violated the “Code of Ethics.”

d. For three months following Mr. Nagy’s termination, in-house legal counsel, John Romeo, repeatedly telephoned him and attempted to persuade him to sign a release of all claims in exchange for a retiree-health benefits package. Romeo was so insistent that he offered Mr. Nagy more than he had offered Ron Belcastro.

e. Just weeks after Mr. Nagy was fired, the Company discovered additional discrepancies which had been approved for payment by 34-year old Jeff Ferrell and 42-year old Chad Carmichael. Yet, it made no effort to discipline these individuals. According to Deborah Herndon, it would have been inappropriate to have disciplined these individuals because she considered the matter to be stale. She stated, “It’s hard to reconstruct events when people can’t

remember everything that happened.” Yet, the jury heard evidence that she had held Mr. Nagy accountable for forgetting events surrounding invoices which were dated as much as nine months prior to the audit.

f. After the lawsuit was filed, the Company articulated two additional reasons for Mr. Nagy’s termination from employment. There was sufficient evidence for the jury to believe that the Company’s articulation of these reasons was malicious. One of these matters –a matter involving a Stonegate project—pertained to Mr. Nagy’s authorization of payment for invoices while he was a project engineer and in a different position. That event had occurred five years earlier and was never included within Mr. Nagy’s personnel file. There was no evidence presented at trial that Mr. Nagy was even verbally reprimanded concerning the event. Mr. Nagy was later promoted. In addition, the jury had sufficient evidence to view the other articulated reason for Mr. Nagy’s termination as baseless. Although the Company stated that Mr. Nagy was part of an effort to pressure a field inspector to sign off on invoices, the field inspector testified that he believed that Mr. Nagy as an honest person.

g. During closing argument, defense counsel argued that Mr. Nagy had cost the Company money because the Company had to pay out monies in settlement of its litigation against Tralyn. The jury heard evidence, however, that the audit had only revealed potential discrepancies, and no witness testified that Mr. Nagy was directly responsible for any amount paid out in settlement to Tralyn. Rather, the only auditor who testified, Andrew Twaddelle, stated that he was unable to conclude that Mr. Nagy had been negligent in his review of invoices and further stated that he was unable to identify actual overcharges. Yet, the Company maintained that Mr. Nagy was guilty of “unethical conduct.”

In summary, the Court finds that that there was sufficient evidence for the jury to have found that the Company acted maliciously and to have awarded punitive damages. Accordingly, the Company's Motion is DENIED.

Unmitigated Wage Loss

As discussed above, there was sufficient evidence for the jury to conclude that the Company acted with malice. When there is malicious conduct on the part of the employer, a discharged employee is **absolved** of any duty to mitigate his damages. *Peters v. Rivers Edge Mining Inc.*, 680 S.E.2d 791, 814-815 (W.Va. 2009) (emphasis added). As the *Peters* Court held:

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, **will be deducted** from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Id., quoting Syl. Pt. 2, *Mason County Bd of Educ. V. State Superintendent of Schs.*, 170 W.Va. 632, 295 S.E.2d 719 (1982) (italicized emphasis by *Peters* Court; bold emphasis added). That is, if there is a duty to mitigate, then a set off is mandatory. If there is no duty to mitigate, then this Court interprets *Peters* to hold that no set off is required. Conversely, the Court fails to understand how evidence of Mr. Nagy's interim earnings is relevant if the employer has not proved a duty to mitigate.

Motion for New Trial

The Company next argues that the Court should grant a new trial because the verdict was “against the clear weight of the evidence” and the Court “committed several errors in instructing that jury that resulted in a miscarriage of justice.”

Weight of the Evidence

When determining whether the verdict is supported by the evidence, the West Virginia Supreme Court of Appeals has made clear that every reasonable and legitimate inference, fairly arising from the evidence in favor of the prevailing party, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. *Bailey v. Norfolk & Western Railway Company*, Syll. Pt. 7, 206 W.Va. 654, 527 S.E.2d 516 (1999). More specifically, “[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict...will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.” *Id.* at Syll. Pt. 8 [citation omitted].

Based upon the facts described above, which the Court assumes as true, as well as other evidence which is included within the trial transcript, the Court finds that the verdict was not clearly against the weight of the evidence. Conversely, the Company has offered no facts of any kind which suggest that the weight of the evidence was in favor of the Company.

Jury Instructions

For purposes of reviewing jury instructions, the jury instructions must be reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so that they understood the issues involved and were not misled by the law. This Court has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law, and deference will be given to the Court's discretion. *Bailey, supra, Syll. Pt. 12*. As set forth below, the Court's charge to the jury was an accurate statement of the law:

a. Mixed Motive Instruction:

The Court instructed the jury that Mr. Nagy could prove age discrimination in either or both of the following ways: (1) by meeting the initial *prima facie* case and then demonstrating that the proffered reason by the Company was pretextual, with the ultimate burden of persuasion of the intent to discriminate remaining on Mr. Nagy at all times; or (2) in the alternative, by showing that Mr. Nagy's age was a motivating factor in the Company's decision to fire him, through what is known as a "mixed motive" analysis. Ironically, it is the first of these methods which is deemed to be the easier burden for Mr. Nagy to have met, but the Company complains that the jury should not have been instructed on the more difficult burden. *See Bailey*, 206 W.Va. at 666, 527 S.E.2d at 528 ("[W]e emphasize that the plaintiff does have the burden of proving by a preponderance of the evidence that a forbidden intent was a motivating factor in the adverse employment action. **While this is a greater burden than that required under the pretext theory**,we believe it is justified by the fact that, once a plaintiff has met this burden,

the burden of persuasion and the risk of nonpersuasion shifts to the defendant.”) (emphasis added).

As the Supreme Court of Appeals has explained,

The mixed motive case burden scheme is a variation of the traditional pretext approach to discrimination cases. As we explained in *Skaggs*,

a mixed motive case *is* a disparate treatment case. ‘Mixed motive’ refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. ‘Disparate treatment’ refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff. As a technical matter, then, mixed motive cases form a subcategory of disparate treatment cases.

Bailey, 206 W.Va. at 667 n. 13, 527 S.E.2d at 529 n. 13, quoting *Skaggs v. Elk Run Coal Company*, 198 W.Va. 51, 74, 479 S.E.2d 561, 584 (1996) (emphasis in original). *See also* *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 714, 629 S.E.2d 762, 773 (2006) (mixed motive analysis applies where the employer articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where the plaintiff demonstrates that a discriminatory motive nonetheless played a significant part in the employer’s adverse decision; mixed motive cases are simply cases involving a mixture of legitimate and illegitimate motives; there is no one single “true” motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate and at least one of which is illegitimate).

The Company first argues that it suffered prejudice by the mixed motive instruction because it says it would have conducted additional discovery “had it known” of the theory. Yet, the Company has not demonstrated any specific prejudice or even suggested what additional discovery it would have conducted. The subject of this lawsuit –i.e, the reasons for Mr. Nagy’s termination from employment--has always been within the control of the Company. The jury had

sufficient evidence to find that, even if the Company acted for legitimate reasons when it chose to discipline Mr. Nagy for his inadequate review of invoices, the Company still was motivated to discriminate against him based upon his age, as evidenced by the fact that it only suspended Jeff Ferrell. As discussed above, there was sufficient evidence for the jury to find that Mr. Nagy and Mr. Ferrell were similarly situated. In brief, the Court finds that the Company has always had control over what documents were produced in connection with its audit and the subject invoices, as well as control over what information witnesses revealed as to the reasons for the disparate treatment. The Company has failed to demonstrate any prejudice of any kind.

Moreover, the Company has cited no legal authority which requires that the “mixed motive” theory be pled specifically in the Complaint. Mr. Nagy provided notice pleading that he was charging the Company with age discrimination under the West Virginia Human Rights Act based upon the fact that younger employees were treated more favorably.⁸ This was, and always has been, a case of disparate treatment, and as our Supreme Court of Appeals has recognized, “a mixed motive case *is* a disparate treatment case.” *Skaggs*, 198 W.Va. at 74, 479 S.E.2d at 584 (emphasis in original). *See also Mayflower, supra* (“a [plaintiff] under the Human Rights Act may also show **pretext** through a mixed motive analysis”)(emphasis added).

The “mixed motive” instruction was otherwise proper. Our Supreme Court of Appeals has upheld application of the “mixed motive” theory, when asserted, in various types of

⁸. Indeed, the allegations in Mr. Nagy’s Complaint were not limiting. Mr. Nagy alleged disparate treatment in that he alleged younger employees were treated more favorably. Mr. Nagy also alleged pretext.

⁶Mr. Nagy and another older employee were terminated from employment allegedly for their participation in payment of invoices submitted by a third-party, independent contractor; however, younger employees who were involved and directly responsible for verification of such contractor’s work were not terminated from employment. The reasons given for Mr. Nagy’s termination were a pretext for age discrimination.

discrimination cases which arise under the West Virginia Human Rights Act, including cases of age discrimination. *See Bailey v. Norfolk and Western Railway Company, supra* (age discrimination case); *Skaggs*, 198 W.Va. 51, 479 S.E.2d 561 (1996) (disability discrimination case); *Mayflower*, 218 W.Va. 703, 629 S.E.2d 762 (2006) (race discrimination case); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E.2d 399 (1995) (sex discrimination case); *Barefoot, supra* (national origin case). The Supreme Court of Appeals has neither restricted application of the mixed motive theory to specific types of discrimination cases, nor held that age discrimination cases must be decided only under a theory of pretext.⁹

In fact, the Court has previously recognized the discretion of a trial court to give both a mixed motive instruction and a pretext instruction in the same case. In *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996), the defendants argued that it was improper for the trial court to have given a pretext instruction when a mixed motive instruction was also given. The West Virginia Supreme Court of Appeals rejected that argument, stating: “Because we believe that both a mixed-motive and a pretext theory may be presented in a *Harless* action and adopt the *Skaggs* scheme of proof to each theory, we find no error in the trial court’s rulings.” *Id.* at 391, 480 S.E.2d at 830.

Moreover, the Court disagrees with the Company’s assertion that *Gross v FBL Financial Services, Inc.*, 129 S.Ct. 2343 (June 18, 2009) requires the Court to reject the mixed motive

⁹ Furthermore, the Company’s reliance upon cases decided after *Skaggs* is not persuasive, because those cases did not involve any assertion of the mixed motive theory by any party. *See Tom’s Convenient Food Mart, Inc. v. WV Human Rights Commission*, 527 S.E.2d 155 (W.Va. 1999); *Moore v. Consolidation Coal Co.*, 567 S.E.2d 661 (W.Va. 2002); *Johnson v. Killmer*, 633 S.E.2d 265 (W.Va. 2006), none of which hold that the mixed motive theory is inapplicable. The Court notes that Mr. Nagy has not proposed herein that the mixed motive theory is the only theory; it is but one theory.

analysis in age discrimination cases. In *Gross*, the Court distinguished between claims brought pursuant to Title VII of the Civil Rights Act (where the statutory language permits a plaintiff to show that the protected class was a motivating factor in the adverse action) and claims brought pursuant to the Age Discrimination in Employment Act (“ADEA”) (where the statutory language still requires a “but for” analysis). Unlike *Gross* however, the instant claim was brought pursuant to the West Virginia Human Rights Act, a single statute which prohibits all forms of discrimination and all forms of disparate treatment. Thus, the Company’s reliance upon *Gross* is misplaced. See *Schmitz v. Village of Breckenridge*, 2009 W.L. 3273255 (E.D. Mich. Oct. 2009) (attached hereto) (*Gross* did not limit age discrimination claim because Michigan ELCRA (human rights act) includes all forms of discrimination).¹⁰ Accordingly, the mixed motive instruction was proper.

b. Company Instructions 7, 8, 9.

As discussed *supra*, the jury instructions must be reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so that they understood the issues involved and were not misled by the law. This Court had broad discretion when it chose to give Plaintiff’s Instruction No. 1 and refused to give the Company’s Instructions 7,8,9. See *Bailey, supra, Syll. Pt. 12*.

¹⁰ Finally, the Company advocates that this Court should find that the mixed motive analysis is inapplicable given that the West Virginia Human Rights Act uses the phrase “because of” when defining discrimination. As noted above, however, the West Virginia Human Rights Act applies to all forms of discrimination. Therefore, if the Company’s argument is given merit, then the mixed motive analysis would be extinguished for all forms of discrimination, not just age discrimination. Such a result would fly in the face of existing precedent by our West Virginia Supreme Court of Appeals and be contrary to West Virginia law.

The West Virginia Supreme Court of Appeals has discussed this very issue. In *Barlow v. Hester Industries, Inc.*, 198 W.Va. 118, 135, 479 S.E.2d 628, 645 (1996), an age discrimination case, the Court made clear that the trial court does not have to give an instruction setting forth the *McDonnell Douglas Corp. v. Green* analysis, as the Company asserts:

We thus discouraged, and continue to do so, the use of the ‘but for’ phrase in describing the *prima facie* case....As we urged in both *Barefoot* and *Skaggs*, jury instructions should be written to convey clearly for the lay person the operation of discrimination and should avoid obscuring the forest of discrimination with the trees of the three-step analysis from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) [citations omitted]. Thus, a court may charge the jury:

‘that the plaintiff bears the burden of proving by a preponderance of the evidence that the alleged forbidden bias was a motivating factor in the defendant’s decision to take an adverse action against the plaintiff. If the plaintiff carries that burden, then the jury should find for the plaintiff unless the defendant can prove by a preponderance of the evidence that it would have taken the same action in the absence of the impermissible motive. Syl. Pt.8, in part, *Skaggs, supra*; see also *Barefoot*, 193 W.Va. at 485 n.16, 457 S.E.2d at 162 n. 16.

Alternatively, a court could decide that framing the evidence in the *McDonnell Douglas/Barefoot* paradigm would be helpful in focusing the jury on the critical evidentiary issues. Thus, in this case, an instruction could note that the plaintiff has proved that she is a woman over forty years of age who was discharged by the defendant and that she has offered evidence that she performed her job competently. The defendants have offered evidence contesting whether the plaintiff’s job performance was adequate and explaining the discharge as based on the plaintiff’s misconduct. The jury must determine, then, whether the plaintiff has proved that the defendants’ explanation was pretextual and that the discharge was motivated, instead, by a bias against women or workers over forty. If the plaintiff has failed to prove that the defendants’ explanation was a pretext, but has shown that an illicit bias against women or older workers nevertheless contributed to the discharge decision, then the plaintiff must prevail unless the employer has proved by a preponderance of the evidence that the decision to discharge would have been made even in the absence of the unlawful motive.

Id. at 135-136, 479 S.E.2d at 645-646.

Notwithstanding the fact that the Court did not have to instruct the jury on the three-step burden shifting analysis, Plaintiff’s Instruction No. 1 did address that analysis. Paragraph 1 of

the Instruction was taken directly from *Barefoot*. Paragraph 2 includes the alternative instruction on the mixed motive analysis, similar to what the Court is describing in *Barlow*. This Court recognized that the Instruction No. 1 was an accurate statement of the law when it exercised its discretion to give that Instruction. Accordingly, the instructions were proper.

c. Instruction Regarding Age of Replacement Employees

The Company argues that the Court erred in instructing the jury that “the age of the person or persons who replaced Mr. Nagy is not relevant in your determination as to whether Mr. Nagy’s age was a motivating factor for his termination.” Nevertheless, the Company’s assertion that the age of the replacement employee is relevant under West Virginia law is misplaced. The Company has cited no authority in support of its position that the instruction was contrary to West Virginia law, and this Court is unaware of any decision which requires a plaintiff in an age case to prove that a replacement employee was younger.

Moreover, in *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the U.S. Supreme Court plainly held that an age-discrimination plaintiff need not demonstrate that he or she was replaced by someone outside of the protected class to make a *prima facie* case.

Specifically, the high Court held:

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.

O’Connor, 517 U.S. at 312. Indeed, the Court went so far as to say that,

there can be no greater inference of *age* discrimination (as opposed to ‘40 or over’ discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.

O’Connor, 517 U.S. at 312.

Since *O'Connor*, many courts have held that there simply is no requirement to prove that the replacement employee is outside the protected class. See, e.g., *E.E.O.C. v. Bath Iron Works Corp.*, No. Civ. 97-255-P-H, WL 33117082, *6 (D.Me. Feb. 8, 1999) (citing *O'Connor*, 517 U.S. 308) (age discrimination plaintiff need not prove age of replacement employee was outside protected class); *Dahl v. Battelle Memorial Institute*, No. 03AP-1028, WL 1631677, *3 (Ohio App. Dist. July 22, 2004) (*O'Connor* “rejected the requirement...that a plaintiff allege that he was replaced by someone outside the age group.”); *Stith v. Chadbourne & Parke, LLP.*, 160 F.Supp.2d 1, 11-12 (D.D.C. 2001) (“*O'Connor*...unanimously rejected the argument that an age discrimination plaintiff must prove, as part of the *prima facie* case, that he or she was replaced by someone outside the protected class.”); *McCafferty v. Cleveland Bd. of Educ.*, 729 N.E.2d 797, 807 (Ohio App. Dist. 1999) (any requirement that the replacement be younger than forty, was rejected in *O'Connor*); *Barber v. CSX Distribution Services*, 68 F.3d 694, 699 (3rd Cir. 1995) (“There is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination...”); *E.E.O.C v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999) (a plaintiff can make a *prima facie* case of disparate treatment by showing that he or she was replaced by a younger employee, whether or not the younger employee was also within the protected class of employees aged 40 or older).

Accordingly, the finds that the instruction was proper.

d. Instructions on Incidental Damages and Emotional Distress

The Company next objects to the Court having given separate instructions on “incidental damages” and “emotional distress” damages, “because such damages are only awarded in

Human Rights Commission proceedings and, in any event, would be duplicative of emotional distress damages.” Defendant’s Memorandum, p. 21.

Section 5-11-13(c) of the West Virginia Code states:

(c) In any action filed under this section, if the court finds that the respondent has engaged in or is engaging in an unlawful discriminatory practice charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

W.V.Code Section 5-11-13(c)(emphasis supplied).

It should be noted that the statute does not use the term “incidental damages.” Nor did this Court’s instruction to the jury use such term. Rather, the actual instruction to the jury, derived from Plaintiff’s proposed instruction number 12, stated:

A plaintiff bringing an action under the West Virginia Human Rights Act may also recover for his or her humiliation, embarrassment, and loss of personal dignity occasioned by the unlawful discriminatory practice of a defendant, even without proof of monetary loss by the plaintiff.

Thus, the Company is incorrect in its assertion that the Court instructed the jury on the specific form of “incidental damages” which are available before the West Virginia Human Rights Commission and which are subject to a monetary cap.¹¹

At the same time, the Company made no objection to the following instruction to the jury, derived from Plaintiff’s proposed instruction number 15:

A plaintiff may recover damages for an emotional distress caused by the wrong of another when an emotional or mental disturbance is shown to have been the result of the defendant’s intentional or wanton act.

Here, if you find that Mr. Nagy suffered an emotional or mental disturbance as a result of the Defendant’s intentional, wrongful conduct, then he is entitled to an award to compensate him for such

¹¹ Even if the Company’s objection is based upon semantics (which were not part of the actual jury instruction), it should be noted that the West Virginia Supreme Court of Appeals has recognized that a jury may award a plaintiff’s “incidental noneconomic damages” based upon lay or expert testimony. *Akers v. Cabell Huntington Hospital, Inc.*, 215 W.Va. 346, 599 S.E.2d 769 (2004), Syll.pt. 7.

injury.

The Court finds that the separate instructions, stated above, were not duplicative and that the Company suffered no prejudice as a result.

The Company next argues that the jury verdict form was wrong in that it allowed the jury the opportunity to award damages for both (1) “humiliation, embarrassment and loss of personal dignity” and (2) “emotional distress.” Nevertheless, the West Virginia Human Rights Act broadly defines the available damages as “any other legal or equitable relief as the Court deems appropriate.” In this case, the statute neither defines the specific categories of relief available as “emotional distress,” etc., nor provides that these damages are all encompassing. With the facts presented in this action, this Court found that such relief was proper. At the same time, the Company has failed to cite to any legal authority which provides that, in a civil trial brought pursuant to the West Virginia Human Rights Act, a Court is not permitted to allow such recoveries. Accordingly, the Court finds that the jury was permitted to award such damages.

e. Punitive Damages Instruction

The Company does not object to the specific instruction given, only to the fact that the jury received *an* instruction. As discussed above, the Court finds that the issue of punitive damages was properly before the jury, and accordingly, the instruction was proper.

f. Unmitigated Wage Loss Instruction

The Company’s insists that the jury continued to have the discretion as to whether to offset additional compensation Mr. Nagy earned after he was fired, even though it found that the Company acted with malice. As discussed previously, *Peters v. Rivers Edge Mining, Inc.*, 224

W.Va. 160, 680 S.E.2d 781 (2009), makes clear that malicious conduct absolves the plaintiff from any duty to mitigate his damages. 680 S.E.2d at 814.

Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, **will be deducted** from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Id., quoting Syl. Pt. 2, *Mason County Bd of Educ. V. State Superintendent of Schs.*, 170 W.Va. 632, 295 S.E.2d 719 (1982) (italicized emphasis by *Peters* Court; bold emphasis added).

Without a duty to mitigate, there is no requirement (or any authority) for a jury to offset interim earnings. The Company has otherwise failed to articulate how any additional compensation is relevant if there is no duty to mitigate. Thus, the Court finds that the instruction was proper.

g. The Verdict Form

The Company reiterates its prior arguments by arguing that the Court should have set forth the burden shifting framework from *McDonnell Douglas*, should not have allowed the jury to consider the issue of “malice,” should have allowed the jury to exercise discretion to deduct Mr. Nagy’s interim earnings at another employer, should not have allowed a duplicative recovery for incidental damages and emotional distress, and should not have allowed the jury to consider punitive damages. For all of the foregoing reasons, the Court finds that the verdict form was proper.

For the foregoing reasons, the Company’s Motion for New Trial is DENIED.

Motion to Alter or Amend the Judgment Under Rule 59

a. Reduction of Wage Loss

The Company argues that the jury should have been required to take mitigation into account. Nevertheless, as set forth in *Peters v. Rivers Edge Mining Company, supra*, mitigation is not required because the jury found that the Company acted maliciously. Accordingly, there should be no reduction of lost wages, and the Company's Motion to reduce the verdict to incorporate the offset of interim wage earnings is DENIED..

Moreover, the Court disagrees that the award of lost wages should be reduced to \$593,308.00 because it maintains that Mr. Nagy's economic expert, Dan Selby, testified that the more appropriate numbers in his reports were the low-range numbers, i.e. \$593,308.00. This statement is a mischaracterization of Mr. Selby's entire testimony. See Transcript of Testimony of Dan Selby, attached as Exhibit "C" to Mr. Nagy's Memorandum. While Mr. Selby testified that all of the ranges in his report were given to a degree of reasonable certainty, he also qualified that the lower range was more reasonable "if it doesn't include anything qualitative to offset it." Exhibit "C," p. 15. Indeed, Mr. Selby testified that the low numbers are a risk that Mr. Nagy has not yet incurred and that the higher range of numbers (i.e., the \$944,714.00) was presented because, all of his life, Mr. Nagy had exceeded the statistical inference that he would continue to work. Thus, it was up to the jury to consider these factors when it decided to award Mr. Nagy the higher range. Accordingly, the Court DENIES the Motion to reduce the verdict in the amount of \$507,142.

Finally, the Company argues that a remittitur of \$155,736 is warranted because the jury awarded \$1,100,450 in combined back pay and front pay, although Mr. Selby's report only concluded the highest lost wage amount as \$944,714. While it is true that Mr. Nagy's economic losses were estimated to be \$944,714, reduced to present value, Mr. Selby's report actually

evidences an economic loss of \$1,021,133.00 before the reduction. The jury is able to give the weight and credibility it feels sufficient to any reduction for present value, in consideration of what it believes to be the investment risks in this economy. Nevertheless, the Court finds that, even without a reduction to present value, the award exceeded Mr. Selby's calculations by \$79,317, and for that reason, the award should be reduced by such amount. Therefore, this Motion is GRANTED in part and DENIED in part.

b. Incidental Damages

The Company maintains that the verdict should be reduced to eliminate the award of incidental damages in the amount of \$150,000, for the reasons discussed previously. The Court DENIES such motion based upon the prior discussion.

c. Punitive Damages

Lastly, the Company moves the Court to reduce the verdict by eliminating the amount of punitive damages awarded by the jury –i.e., \$350,000—on the basis that it says the issue of punitive damages should not have been given to the jury, or in the alternative, that the amount was excessive.

In *Peters*, the jury awarded the plaintiff \$1 million in punitive damages. The Court set forth the precise standard under which punitive damages are to be reviewed, noting that there are two distinct inquiries to be made: (1) whether the case warrants an award of punitive damages and (2) whether the amount of the punitive damages is proper. *Peters*, 680 S.E.2d at 815.

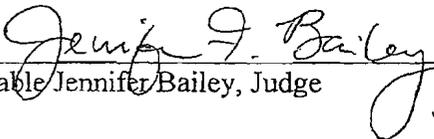
With regard to the first inquiry, the Court made clear that “in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the

jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.” *Peters*, 680 S.E.2d at 821 (emphasis added), quoting *Alkire v. First Nat’l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) Syl. Pt. 7. Although the mere existence of a retaliatory discharge was insufficient for this purpose, the Court noted that the plaintiff had proved that his employer’s actions were malicious, i.e. that his employer had exhibited a “general disregard of the rights of others.” *Id.* Just as in *Peters*, the jury in this case found that the Company acted with malice based upon the facts presented. Thus, the answer to the first inquiry is that the case warranted an award of punitive damages.

With respect to the second inquiry, the *Peters* Court looked to the Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), but focused on (a) the reprehensibility of the defendant’s conduct and (b) the ratio of punitive damages to compensatory damages. As to the first of these factors, the Court finds that there was sufficient evidence presented in this case to demonstrate that the harm to Mr. Nagy was the result of intentional malice and trickery. Moreover, the ratio of punitive damages awarded to compensatory damages was more than reasonable. Mr. Nagy’s compensatory damages were \$1,100,450 even before the award of emotional distress and incidental damages. Thus, even by the most liberal standards, the jury’s award of \$350,000 in punitive damages equates to a ratio of 0.32 or not even one-third of the compensatory damages. Accordingly, this ratio is reasonable when not even a ratio of 1:1 is sufficient to “raise a suspicious judicial eyebrow.” *Peters*, 680 S.E.2d at 826. Furthermore, as the *Peters* Court noted, another factor is whether there is comparable criminal or civil penalties to punish the Company in this instance. Because none exist in this instance, the award may be considered necessary to deter the Company from acting

in this fashion in the future. Accordingly, the Court DENIES the Company's Motion to eliminate the punitive damages award.

Entered this the 25th day of May, 2010.


Honorable Jennifer Bailey, Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28
DAY OF May, 2010
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 