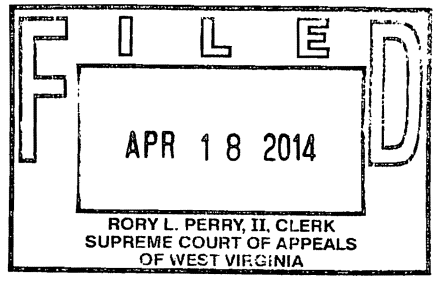
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 13-1084

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC,
A Delaware Corporation and
MELVIN LAGER
Defendants-Below,
Petitioners,



v.

SHARON GRIFFITH and LOU ANN WALL,
Plaintiffs-Below,
Respondents.

Response ~~REPLY~~ BRIEF
OF
SHARON GRIFFITH and LOU ANN WALL

On Appeal from the Circuit Court of Jackson County, West Virginia
The Honorable Thomas C. Evans, III, presiding
Case Number 11-C-26

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Defendants-Below,
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v.

SHARON GRIFFITH and LOU ANN WALL,
Plaintiffs-Below,
Respondents.

REPLY BRIEF
OF
SHARON GRIFFITH and LOU ANN WALL

I. Introduction and General Response to Assignments of Error

Now come SHARON GRIFFITH and LOU ANN WALL, the Plaintiffs-below and Respondents herein (hereafter "Plaintiffs") and pursuant to the *Amended Scheduling Order* of the Court and the West Virginia Rules of Appellate Procedure tender the within reply in opposition to the *Opening Brief* of the Defendants-below and Petitioners herein (hereafter Defendants). Defendants ALCAN ROLLED-PRODUCTS RAVENSWOOD LLC, now known as Constellium, ("the Company") and MEL LAGER, former Chief Executive Officer (CEO) appeal the jury's verdict in favor of the Plaintiffs upon their claims of gender discrimination due to hostile work environment in violation of the West Virginia Human Rights Act. This jury verdict was sustained by the trial court after careful and thorough consideration.

Upon review of the evidence supporting this verdict and considering "every reasonable and legitimate inference, fairly arising from the evidence in favor" of

Plaintiffs as required under Walker v. Monogahela Power Co., 147 W.Va. 825, 131 S.E.2d 736 (1963) and its progeny, Defendants cannot meet the heavy burden necessary to overturn the jury's verdict. Further the punitive damages award in this matter is not so excessive as to indicate that the jury was improperly influenced by passion, partiality, prejudice or corruption or that it entertained a mistaken view of the case. As a review of the appropriate factors to be applied to punitive damage awards under Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E. 2d 897 (1991), the award of punitive damages in this case is supported by the evidence and is not disproportionate to the award of compensatory emotional distress damages. Moreover, Defendants have failed to articulate any legitimate basis for reversing longstanding principles regarding punitive damages. Accordingly, the verdict in this case must be sustained in its entirety.

II. Statement of the Case

At issue are Plaintiffs' claims brought pursuant to the West Virginia Human Rights Act (West Virginia Code §5-11-1 *et seq.)* of gender discrimination in the workplace. Plaintiffs assert and the jury found that they "were subjected to [an] unwelcome, gender based, hostile or abusive employment environment." (*Verdict Form*, App. 893.) Since both Plaintiffs need to work and have refused to quit or retire, they have suffered no loss of income. Nevertheless, both women claimed damages from the emotional toll caused by the stress of continually working in such a hostile environment. (App. 1288; 1312.) Contrary to Defendants' portrayal of this case, the workplace hostility endorsed and encouraged by the CEO's posting of gender-based negative comments about Plaintiffs in October 2009 was much more than an isolated, single event. Following three days of evidence, the jury agreed with the Plaintiffs and

returned a verdict of $250,000 in compensatory damages for emotional distress, annoyance, inconvenience etc., and $250,000 in punitive damages for each Plaintiff.

A. The Plaintiffs

Plaintiff SHARON GRIFFITH is employed in the project maintenance department. She has been employed by the Company since 1977, a period of over thirty-six years and she remains employed at this time. (App. 1306-1307.) Plaintiff LOU ANN WALL is employed as a millwright by the Company in that same department and by December 2012, had worked thirty-four years at the Company. (App. 1227-1228.) Her husband and father were current and former employees of the Company as well. (Id.) Of the seventeen employees who work in project maintenance, LOU ANN WALL and SHARON GRIFFITH are and were the only two females. (App. 1229-1230.)

B. The Suggestion Box

From September 2009 until approximately February 2010, the Company sponsored a suggestion box for employees to submit comment cards.[1] The stated policy was to post the comments from every comment card submitted, after retyping the comments with redactions when necessary. However, on at least one occasion, a comment was not posted. (App. 1293.) Names and profanity were redacted from the cards. (App.1051-1052.) [2] After the comments cards were reviewed and redacted, MEL LAGER, the CEO, then added his response. (App. 1115-1116; 1053-1055.) The Company then posted the following on a bulletin board in the plant: the actual comment cards as redacted, the retyped version of the comments (with redactions) and the CEO's

---

[1] The suggestion box was discontinued because it proved to be a disastrous failure. (App. 1099-1100.)

[2] For instance as to Plaintiffs' Exhibit 5, the phrase "big lazy ass" was retyped to state "big lazy a___." (App.1759-1760.)

response. The handwritten cards were posted on the right with redactions, and the typed redacted comments along with the CEO comments were posted on the left. (App. 1291.) Before any comments or responses were posted, they were reviewed and approved by MEL LAGER. (App. 1081.)

C. *The Comment Cards Regarding Plaintiffs – October 12, 2009*

In October 2009, LARRY KEIFER, who worked in a different department at the Company, placed three comment cards about LOU ANN WALL and SHARON GRIFFITH into the Company suggestion box. (App. 1020-1021; 1755-1760; *Plaintiffs' Exhibits 1, 3 & 5.*) One note referred to as comment number 32 on the typed list stated:

32

Sharon Griffith (Project mgmt) comes in on weekends to work (overtime) time and a half on Saturdays and double time on Sundays) and sits on her ass both days in the lunch room and does Nothing.

"This is Bullshit." I'm Tired of carrying her big lazy ass around. This is NOT Fair to the company or the union workers.

- over -

If the lazy worthless bitch can't do the work she needs to stay home. She comes in here and drinks coffee and smokes cigarettes all weekend.

Stop this shit

OCT 12 2009

(App. 1759)

EXHIBIT 5 11-6-26

The retyped and redacted typewritten note posted in the plant stated as follows:

> **32.**
> **_____ (employee) (Project Maint) comes in on weekends to work (overtime) time and a half on Saturdays and double time on Sundays and sits on her a___ both days in the lunchroom and does "Nothing." "This is b___s___." I am tired of carrying her big lazy a___ around. This is not fair to the company or the union workers. If the lazy worthless b____ can't do the work she needs to stay home. She comes in here and drinks coffee and smokes cigarettes all weekend. Stop this s___.**
> **CEO RESPONSE**
> **As I responded to a similar comment, we need everyone to be fully engaged and productive.** (App. 1760.)

A second note from LARRY KEIFER, *Plaintiffs' Exhibit 3* and comment number 28 stated as follows (App. 1757):

28

Hey Mel

Ask Chief Dennison what he had his crew doing in project maint. on Oct. 9th and evening shift & I understand project has at least 3 extra buggies. One of their buggies was missing on that shift I understand. Sharon Griffith and another lady spent 4 hrs hunting for that missing buggy. They (project) had no supervision that evening. Seems like. -over-

Lazy asses like them
Don't need to be here
especially on overtime
looking for one of their
extra buggies. They need to
give up their extra buggies
to Plate Dept. maint. so
they don't have to walk
and carry their tools

OCT 12 2009

EXHIBIT 3

The typed and redacted version along with the CEO response was admitted at trial as Plaintiffs' Exhibit 4 (App. 1758) and stated:

28.

Ask _____ supervisor what he had his crew doing in Project Maintenance on Oct. 9th on evening shift! I understand Project has at least 3 extra buggies. One of their buggies was missing on that shift I understand. _____ (hourly employee) and another lady spent 4 hours hunting for that missing buggy. They (Project) had no supervision that evening; seems like lazy a___ like them don't need to be here especially on overtime looking for one of their extra buggies. They need to give up their extra buggies to Plate dept. maint. So they don't have to walk and carry their tools.

CEO RESPONSE

This doesn't seem to be the best use of time or equipment.

Finally, Plaintiffs' Exhibit 1, (App. 1759) a third comment card (number 29) also authored by LARRY KEIFER stated:

(29)

LAZY ASS SHARON GRIFFIN
WAS IN HERE ON OVERTIME
AGAIN ON SATURDAY 9TH
DOING
"NOTHING"
SMOKING CIGARETTES AND DRINKING
COFFEE AGAIN AND SITTING ON
HER ASS IN THE LUNCHROOM. THIS
IS BULLSHIT. -OVER-

AND WILL BE HERE ON
SUNDAY ON DOUBLE TIME
10TH DOING THE SAME P

The re-typed card with redactions stated as follows:

EMPLOYEE COMMENT
29.
Lazy a__ _____ (employee) was in here on overtime again on Saturday, 9th doing "NOTHING". Smoking cigarettes and drinking coffee again and sitting on her a___in the lunchroom. This is b___s___. And will be here on Sunday on double time 10th doing the same!
***(Plaintiffs' Exhibit 2*, App. 1756.)**

Although the Plaintiffs' names were redacted from LARRY KEIFER's comment cards before the information was posted on bulletin boards at the entrances to the plant, the references to the two women in the project maintenance department left no doubt that the women referred to were LOU ANN WALL and SHARON GRIFFITH, the only women who worked in that department. (App. 1029.) As co-worker Charles Bennett aptly observed, "it was kind of evident it was referring to Sharon and Lou Ann..." (App. 1205.) Thus, the removal of the names of the two women "really didn't do anything to keep them from being identified." Nor did the redactions of the curse words have any effect since the words actually used were readily discernible. The company was forced to admit that the redactions "could have been done more effectively." (App. 1029-1030, 1063. 1072, 1083.)

D. The Plaintiffs' Discovery of the Posting of the Comment Cards and the CEO's "Response"

Shortly after these comments were posted, LOU ANN WALL learned that she and her only female co-worker were the topic of derogatory comments that everyone in the plant could see. Ms. Wall described the scene:

> There was joking in the – we were, I believe, either coming in or leaving. People accumulated at the door, back door, whether you're coming or going on shifts, and the guys were joking back there. They were joking with me and making comments like – well, I don't even know. I don't even remember the comments because I didn't understand what they were talking about, and finally somebody said, "you have no idea, do you." And I said, "no, I don't know what you're talking about." They said, "You need to stop and read the comment board." And that is when I became aware of it. (App. 1237.)

After going to the construction gate and reading the comment board, LOU ANN WALL "was shocked," ..."upset," and "just lost it." (App. 1239-1240.) She could not believe that the CEO of the Company had unquestioningly posted a co-worker's reference to her as a "lazy, worthless, bitch." (App. 1238.) Like everyone else, she knew the comments referred to her and SHARON GRIFFITH because they were the only two women who worked in project maintenance. (App. 1240.)

LOU ANN WALL took Ron Barton, union steward, to the bulletin board and showed him the comments. According to Mr. Barton "[s]he was very, very upset..." and said she felt degraded and humiliated. (App. 1183, 1185, 1223, 1242.) As Ms. Wall explained, "I—I don't know if I talked to Barton first or Ralph – I believe it was Barton and then Ralph, and Eli. I don't know which one of them I tried to contact or – I just wanted them down because I knew everybody that came and went would see it. It was just embarrassing, degrading, humiliating." (App. 1242.)

Although SHARON GRIFFITH was on vacation when the comment cards were posted, several people called her to tell her that she needed to come to the plant to see the bulletin boards. (App. 1308-1309). After coming to the plant and reading the cards, she too went straight to the union hall. (Id.) SHARON GRIFFITH was observed to be mad, upset, "shaken" and "just about in tears" after the comments were posted. (App.

1129, 1143, 1223.) SHARON GRIFFITH also described the comments as "degrading." (App. 1308.) Ron Barton recalled how upset and agitated SHARON GIRFFITH was when they discussed the comments. (App. 1143.) "She was just upset about the accusations and the remarks about her personal body or whatever." (App. 1144.) Although Mr. Barton was too polite to elaborate, he meant that SHARON GRIFFITH was understandably distressed by having a comment posted referring to her "big fat lazy ass."

After she returned to work, Ron Barton observed SHARON GRIFFITH's reaction as "very similar to LOU ANN's, one of shock, one of complete emotional distress over it, that – that employees would treat or talk about – and especially write for all to view – such comments. It was very distressing." (App. 1188.) LOU ANN WALL and SHARON GRIFFITH both agreed that being labeled "lazy, worthless bitches" without any contradiction or comment from the CEO of the company was gender discrimination. (App. 1250.) Ron Barton and others in the plant were also "totally shocked" by the posting of these comments. (App. 1187.)

At the request of both Plaintiffs, the union called and complained to the Company about the content of the comment cards concerning Plaintiffs, and thereafter the Company saw that the cards were taken down after "two to three days" according to the best guess of MEL LAGER. (App. 1091.) However, the offending comments remained on the company's "intranet" computer system. (App. 1128..) Additionally, the impact of the CEO's posting of these comments and the attendant controversy were not immediately forgotten as copies of the comments were "passed around on lunch tables" and "taped to the walls, shower room" and were circulated around the plant according to

Ron Barton and others. (App. 1194.) Some unknown person "was circulating this letter, printing it...throughout the plant." (Id.) Even the author of the comment cards, LARRY KEIFER readily agreed that posting such comments was bound to be embarrassing and humiliating to Plaintiffs and caused these women to be the subject of discussion and "scuttlebutt" around the plant and the lunchroom. (App. 1030, 1128-1130.)

Contrary to Defendants' arguments, the evidence concerning the harm suffered by LOU ANN WALL and SHARON GRIFFITH and their reactions and responses to these comment cards was not purely "vague and speculative" and "subjective." (*See Defendants' Brief at 12-13.*) On more than one occasion beginning in December 2009, Paul Spence found LOU ANN WALL alone and crying in the workplace. (App. 1302.) Terry Wall, LOU ANN WALL's husband learned about the comment cards when someone told him there were comments posted about his wife and Sharon Griffith. (App. 1328-29.) Terry Wall reported that his wife came home crying the day she found out about it, and that she had often come home from work crying after that on "many days." According to him, these events have changed her – "she has no desire to do anything anymore." (App. 1329-1330.)

Despite being informed of complaints regarding these comments and responses, no one from management ever asked SHARON GRIFFITH or LOU ANN WALL anything about these comment cards or their workplace. (App. 1249-1250, 1311.) Additionally, no investigation of who authored the cards was ever undertaken by the Company. (App. 1032, 1247.) After a handwriting expert retained by Plaintiffs determined that LARRY KEIFER had authored the cards, he confessed. (App. 1247)

LARRY KEIFER admitted that he wrote and submitted the cards knowing full well when he referred to SHARON GRIFFITH as a "lazy worthless bitch" who sat on her "big lazy ass," that the practice at the plant was to post the comments at both of the front gates of the plant. (App. 1023-1024.) LARRY KEIFER also admitted that since Plaintiffs were the only two women who worked in Project Maintenance, the people in the plant would realize that these comments referred to LOU ANN WALL and SHARON GRIFFITH. (App. 1029.) It was also well known that anybody coming into or leaving the plant would be able to observe and read these comment cards when posted. (App. 1025.)[3] Nevertheless, LARRY KEIFER was not ever confronted or questioned about this matter or disciplined for this conduct. (App. 1032.)

E. The Company's Lack of Response in the Aftermath of the Posting

The Company estimated that the comment cards regarding the Plaintiffs were taken down "two to three days later." (App. 1242.) While the cards were posted, "[i]t was widely talked about." (Id.) Afterwards, SHARON GRIFFITH and LOU ANN WALL became "the subject of all kind and manner of comments" around the plant. (App. 1030-1031.) For instance, a sign was placed on LOU ANN WALL's fork truck referring to her as a "fat whore." (App. 1245.) When she reported it and the union got involved, a handwriting expert was called in and everyone on her crew was forced to give handwriting samples by repeatedly writing "the fat whore." This analysis was

[3] LARRY KEIFER was also sued by the Plaintiffs and voluntarily dismissed from the lawsuit by Plaintiffs. While he denied that the comments were made because Plaintiffs were women and said he wrote them to attempt to curb overtime abuse, the jury obviously did not find that testimony credible. (App. 1034-1035.) Similarly, the jury apparently gave no credence to his apologies to Plaintiffs and to the Court. (App. 1027-1028.) Defendants also elicited testimony from LARRY KEIFER that the Plaintiffs were poor workers, a sentiment echoed by the three witnesses called by Defendants in their case-in-chief, and contradicted by a number of Plaintiffs' witnesses. (App. 1037-1038.)

inconclusive and the process was painstakingly embarrassing and counter-productive. (App. 1245-46.) The very next day, someone put a sign up at the computer station where she was working that said "suck me raw." (App. 1247)

As LOU ANN WALL described it, "It's just – I just feel like they don't want us there. They don't want to talk to us, it is just – the whole relationship with my coworkers has changed. You just always wonder when you see the guys over in the corner and talking if they're talking about you now or saying something about you or – I just feel like there is. I'm isolated. I'm shunned. I'm – it's hard to explain and just – humiliated." (App. 1248 .) Ms. Wall filed suit because she "felt like it was the only way to get this to stop." (App. 1249.) She faulted CEO MEL LAGER in particular because he "posted these comments, and [she] felt like by posting them, that he encouraged that kind of treatment." LOU ANN WALL could not believe that the CEO of the Company had failed to point out that this type of commentary was unacceptable. (App. 1250.)

Additionally, the work assignments of the two women in the plant had been affected according to LOU ANN WALL:

> Since this stuff's been going on, it is always they assign me and [Sharon Griffith] to work together, where we used to work in a crew with the guys. So they're putting them, like, on separate jobs and keeping us isolated." (App. 1285.)

On another occasion, LOU ANN WALL was not provided a "fire watch" to assist and watch over her while she was welding and she was injured. (App. 1302-1303.) The work environment for Plaintiffs continued to worsen in the three years following the posting of the comments. (App. 1283-1285, 1288.)

Before the comments were posted, LOU ANN WALL described her relationship with her co-workers as follows:

> I've been there so long I consider – I mean, it was like working with family, like your brothers. The older guy's like your dad. I mean, it was just cutting up and joking. I mean, I would say we got along well. (App. 1230.)

After the comment cards about her were posted, Ms. Wall reported that "the whole relationship with [her] co-workers ... changed" and that she felt "isolated and shunned." (App. 1248.)

SHARON GRIFFITH also viewed her co-workers as "family." (App. 1307.) She explained further:

> I can't even tell you how I felt. It was – it was so degrading. I – you know, I've give – that plant's been good to me. I've loved my job. I've always loved my job there. And – I have pretty much always got along good and done the best of my ability, and then to have somebody just go put something like that on the board, no, I – not acceptable. I – I wouldn't do that to nobody. (App. 1308-1309.)

Among other things, SHARON GRIFFITH noticed that two of her co-workers changed lunchrooms, and another employee she had regarded "as a son" quit speaking to her entirely. (App. 1310, 1313.) She agreed that the way her co-workers related to her "most definitely" changed, and she declared that, "[i]f I didn't need a job, I wouldn't be there." (App. 1309, 1313.)

Former union representative Ron Barton also described the atmosphere in the Plaintiffs' department as "a friendly atmosphere, where everyone got along" before October 2009. (App. 1192.) After these comments were posted, however, Mr. Barton observed that "[i]t became almost a class thing, almost male against female" where there

"was almost a total shunning by some of the employees toward" Plaintiffs. (App. 1190-1192.) When Ron Barton retired six months before trial, the hostile environment and treatment the Plaintiffs endured had not abated. (App. 1194.) Elijah Morris also believed that the work environment became very hostile after "this started." (App. 1184.)

Sharla Rose, a woman working in a different department of the Company saw the comments posted during a shift change. (App. 1126.) She later discovered through "scuttlebutt" and "talk about the plant" who the comments referred to. (App. 1127.) She also saw the postings on the company intranet after seeing them on the bulletin board. (App. 1128.) Ms. Rose said that some employees were upset about the postings while others were laughing about it. She noted that Sharon Griffith was "very upset" and "shaken" and was "just about in tears." (App. 1129.) Although Defendants claim this witness was not offended by the comments, Ms. Rose opined that these comments should not have been posted "out front for somebody to make fun of [Plaintiffs]" and to "downgrade" them. She believed that a hostile work environment had been created for Plaintiffs due to their gender which invited co-workers to make fun of them. (App. 1131.)

It is certainly true that at this industrial facility, rough language was used by the workers throughout the plant. (App. 1231, 1266, 1295, 1319-1321, 1324-1325.) LOU ANN WALL learned to accept it and not take offense because it was not directed at her. (App. 1231.) She acknowledged that she herself used the word "bitch" at times. (App. 1266.) Both Plaintiffs admitted that the language in the plant was colorful at times. Defendants, however, have tried hard to confound the obvious difference between

"bitching" or complaining generally, and calling a woman a lazy, worthless bitch with the blessing of the CEO. As should be evident to anyone and as Ms. Wall explained "I mean, if it's not directed at me, that their taking it a personal attack on me, it is just – you just consider it shop-talk, as I've heard it said – called in here." (App. 1232-33).

Nevertheless, Defendants' own counsel admitted in opening that, "...the word[s] that were originally written on those cards.... had [no] place in any workplace in the Untied States of America." (App. 1005-1006.) MEL LAGER also admitted that "the comments that [he] typed and posted [had] no place in a workplace in America." (App. 1085.) Despite those admissions, the Company and MEL LAGER had no satisfactory explanation for why he would post such comments or for his response to them:

> BY MR. AUVIL:
> Q: My question is: Would you agree that receiving a card that refers to a female employee as a lazy, worthless B, retyping it as the CEO, and responding as we see here, with no correction and no comment on the use of that language against a female employee, conveys fairly that you condone the use of that language?
>
> BY MEL LAGER:
> A: I – I don't agree, and I didn't condone the use of the language.
>
> Q: Then how would we know that from this Exhibit 6? How could we know that you didn't?
>
> A: I did the redaction. I could have done a better job in retrospect on what could be redacted, but I did the redaction to take that offensiveness away.
>
> Q: But it could still be clearly understood.
>
> A: Apparently so. (App. 1093.)

In fact, after posting these offensive and derogatory comments in October 2009, MEL LAGER "didn't think about being sorry...." or apologizing for his mistake. (App.

1084.) In fact, the first time saying "I'm sorry" ever crossed his mind or his lips was at trial in December 2012. (App. 1083-1084.) MEL LAGER admitted that he had no idea how many people or who had seen those derogatory comment cards. (App. 1087.) He admitted that the Company did nothing whatsoever when LARRY KIEFER finally confessed to authoring the cards. (App. 1088, 1092.) Moreover, the Defendants' own exhibits reveal that the *laissez faire* approach to the derogatory comments posted about Plaintiffs was not universal. For instance, *Defendants' Exhibit 1* revealed the following in this regard:

Comment 20:	How many salaried drones does it take to produce a lb. [pound] of plate?
CEO Response:	Do you think this comment is helping anything? Do you know the roles and responsibilities of the people you are commenting about? (App.1764-1765; *Defendants' Exhibit 1, page 4, item 20.)*

The significance of the CEO's commentary about this unrelated post when compared to the response to the posts regarding Plaintiffs was succinctly explained by Plaintiffs' counsel in argument to the court-below during post-trial motions:

> That is the CEO response. That is an example of the CEO responding to the tone and the language in a comment about management. The CEO correcting that, by stating disapproval through questioning. Do I think this is helpful? Do you think this is appropriate? Do you know what basis you're making this comment on?
>
> This is an example of the CEO taking corrective action toward a comment. That comment didn't curse anyone. It didn't call anyone a vile epithet. It criticized management and when management was criticized, the CEO found his voice and corrected it. But when these two women are derided and degraded based on their gender, he says, "This doesn't seem like the best use of resources," appearing to agree with the comments, or at least to condone the language used.

> It is a reasonable inference, which the jury could have made from comparing these two, that the CEO was able to take action even within the context of their own policy to correct comments that he didn't appreciate because they applied to the males and himself. But he saw no reason to take such action to correct comments directed at these two women, and degrading them based upon their gender.
>
> And a jury could reasonably infer from that, that he intended them to suffer exactly as they did suffer. I'm not required to be a psychiatrist to figure out why he intended that. (App. 1667-1669.)

Adding further insult to injury, to defend this matter at trial, Defendants offered testimony regarding deficiencies in Plaintiffs' job performance, morals and work ethic – in other words, testimony that Plaintiffs were in fact lazy, worthless bitches. For instance, Mark Witt who worked in Project Maintenance since May 2010 stated he had had "[a] lot of issues" with the plaintiffs, such as "not showing up on the job, taking off on buggies that has tools on them and stuff we need." (App. 1374, 1383.) He went so far as to accuse them of sexually inappropriate conduct by sitting on people's laps and "moving around, joking and stuff." (App. 1382.) Todd McCoy testified that Ms. Wall had taken all day to finish a job that he felt should have taken an hour, and talked about an occasion where Ms. Wall "grabbed his butt." (App. 1395, 1399.) He was forced to admit that he had never complained about any of these matters before trial in this case. (App. 1399.)

Tom Brown opined that Plaintiffs "seem[ed] to slack and not do the work they should." (App. 1402.) All three men stated they had heard Plaintiffs use foul language on the work-site and offered instances where Plaintiffs had used the word "bitch." (App. 1402.) Of course, the jury also heard evidence from witnesses that Plaintiffs performed well in their jobs, such as Elijah Morris, Ron Barton and others. (App. 1137.)

Astonishingly, the last witness called by the Company, Tom Brown, was forced to recall that at his deposition, he testified that none of the fifteen men in Project Maintenance was lazy, but that both women in that department, the Plaintiffs were lazy – a question which he tried desperately (and understandably) to dodge at trial. (App. 1405-1406.)[4]

Seeing no way out and no relief coming, the Plaintiffs filed their complaint on February 24, 2011, a year and four months after the comment cards were posted. (App. 1249, 1314.) Their resort to the legal process forms yet another straw for Defendants to grasp at, as they reason that it was the lawsuit, not the comment cards and the green light given by CEO MEL LAGER that has caused the work environment to become so very hostile. Because Plaintiffs agreed their lawsuit charging sexual harassment "may" form some part of the basis for the workplace hostility, Defendants reason that Plaintiffs case fails. The jury rejected that argument as well. This speculative and hopeful argument, like the others, does not form a sufficient basis for overturning this jury's verdict.

III. Summary of Argument

Considering "every reasonable and legitimate inference, fairly arising from the evidence in favor" of Plaintiffs as required under Walker v. Monogahela Power Co., 147 W.Va. 825, 131 S.E.2d 736 (1963), Plaintiffs have established that they were the victims of working in a hostile work environment due to their gender. Beginning in October 2009 when the Company's CEO posted comments referring to Plaintiffs as "lazy worthless bitches" who did nothing but sit on their "fat lazy asses," the Plaintiffs were

[4] The three witnesses called by Defendants testified to alleged name-calling by Plaintiffs. When asked "what do the plaintiffs call you" Todd McCoy said that "a lot of them call me a little baldheaded prick most of the time." (App. 1403.) Mark Witt stated that Ms. Wall had "called him an A-hole before." (App. 1381.) The jury obviously gave this testimony very little credence and was not required to believe these witnesses. Plaintiffs were not questioned by Defendants about these specific statements at trial.

subjected to an intolerable environment in their workplace. As the only two women in the project maintenance department, the evidence supported the jury's conclusion that Plaintiffs suffered discrimination, abuse, and harassment based upon their gender, including receiving notes referring to one of them as "the fat whore" and another note stating "suck me raw." Additionally, Plaintiffs noted there were differences in work assignments as well.

The punitive damages award in this matter is not so excessive as to indicate that the jury was improperly influenced by passion, partiality, prejudice or corruption or that it entertained a mistaken view of the case. A thorough review by the trial court of the factors to be considered regarding a punitive damage award set forth in Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E. 2d 897 (1991) established that it was supported by evidence of malice and criminal indifference. The award is not disproportionate to the compensatory emotional distress damages and Defendants fail to cite any other error as to this award. Defendants accordingly have waived any other error regarding other factors considered by the court-below. Moreover, Defendants have failed to articulate any legitimate basis for reversing longstanding principles regarding punitive damages. Accordingly, the verdict in this case must be sustained in its entirety.

IV. Statement Regarding Oral Argument and Decision

Defendants have raised nothing novel in their assignments of error. The final resolution of the issues complained of by Defendants is definitively answered by well settled jurisprudence including Fairmont Specialty Servs.v. West Virginia Human Rights Comm'n, 206 W.Va. 86, 522 S.E.2d 180 (1999) on the issue of liability and Sheetz v. Bowles Rice & McDavid, 209 W.Va. 318, 547 S.E.2d 256 (2001) on the availability of

punitive damages.

Plaintiffs contend that this case is appropriate for a memorandum decision, and does not meet the criteria for oral argument set forth in Rule 18 of the West Virginia Rules of Appellate Procedure, as amended, as the dispositive issues have been authoritatively decided by the Court as set forth above. Additionally, the facts and legal arguments are adequately presented in the briefs and record on appeal.

Contrary to Defendants' assertions, the jury's verdict is not "unprecedented" nor is this a case of "first impression." The only "unprecedented" aspect of this case is the CEO's involvement in the posting of derogatory gender-specific comments clearly identifying Plaintiffs for all to see. Plaintiffs further assert that this case does not raise any issue of fundamental public importance, and is not a case where lower courts have ruled inconsistently or there are conflicts in lower court rulings.

Inasmuch as no new issues of law are raised except for Defendants' invitation to overturn longstanding precedent regarding punitive damages, Plaintiffs deem oral argument unnecessary in this case. Should this Court believe that oral argument would assist them in deciding issues in this case, oral argument pursuant to Rule 19 of the Rules of Appellate Procedure is appropriate as the assignments of error allege the mis-application of settled law and insufficiency of the evidence. Moreover, Defendants arguments involve narrow issues of law.

V. Argument

A. Standard of Review

Defendants correctly observe that *de novo* appellate review of an order granting or denying a renewed post-trial Rule 50(b) motion for a judgment as a matter of law

applies as set forth in *Syllabus point 1* of Fredeking v. Tyler, 224 W.Va. 1, 680 S.E.2d 229 (2009). However, the lower court's ruling granting or denying such a motion "is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Syllabus point 2,* Fredeking, supra.

Moreover, it is well settled in West Virginia that a party who argues to overturn a jury's verdict faces a daunting and substantial burden. That is because "[i]n determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." *Syllabus point 3,* CSX Transp., Inc. v. Smith, 229 W.Va. 316, 729 S.E.2d 151 (2012); *Syllabus point 5,* Poe v. Pittman, 150 W. Va. 179, 144 S.E.2d 671 (1965). *See also, Syllabus point 5,* Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983).

In evaluating the sufficiency of the evidence presented, "the court should:

(1) consider the evidence most favorable to the prevailing party;

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

(3) assume as proved all facts which the prevailing party's evidence tends to prove; and

(4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Syllabus. point 5,* Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983).

B. Defendants' argument that the evidence does not support a finding of a hostile work environment based on gender as a matter of law is not supported by the record.

With regard to the elements of claim of sexual harassment/ hostile work environment, the law in West Virginia is well settled:

> To establish a claim for sexual harassment under the West Virginia Human Rights Act, W. Va. Code, 5-11-1 et seq., based upon a hostile or abusive work environment, a plaintiff-employee must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) it was imputable on some factual basis to the employer. *Syllabus point 5,* Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995); *Syllabus point 5,* CSX Transp., Inc. v. Smith, 229 W.Va. 316, 729 S.E.2d 151 (2012).

To support their argument that Plaintiffs failed to meet their burden of proof as a matter of law, Defendants rely heavily on a recent *Memorandum Opinion,* Frame v. J.P. Morgan Chase, No. 12-0967 (W.Va. 2013). Defendants contend that this four page opinion affirming summary judgment for an employer requires reversal of the jury's verdict.[5] Defendants' arguments in this regard fall short for a variety of reasons.

First and foremost, the facts of the Frame decision are distinguishable on a number of bases. Ms. Frame, a female employee, argued that evidence that the actions of her boss, Cathy Martindill, another female, directed primarily towards men in the bank created a hostile work environment based upon gender. This Court upheld the trial court's ruling, disagreeing with that argument, and concluding that the actions complained of by Ms. Frame were not based upon her gender. Accordingly, the Court

[5] Rule 21(e) of the West Virginia Rules of Appellate Procedure provides that memorandum decisions may be cited in any court in this state, provided that the citation "must clearly denote that a memorandum decision is being cited."

upheld the trial court's ruling that the Ms. Frame had failed to meet "the second prong of the prima facie test," namely proof that the unwelcome conduct and hostile environment was based upon Ms. Frame's gender. Frame, supra, at 4. By contrast, the acts at issue in the instant case were directed at Plaintiffs due to the gender of the Plaintiffs.

While Defendants invite this Court to second guess the jury and assert that the comments and conduct at issue were not based upon the gender of the Plaintiffs, that argument was made to the jury and rejected. Defendants additionally reason that the misconduct alleged in Ms. Frame's case was "far more egregious" than that directed at Plaintiffs. (*Def. Brief at 22.*) Neither characterization is accurate. The record reveals that the comment cards, the notes, the shunning, the isolation and the hostility were directed only towards Plaintiffs, the lone two females in this work area. The comment cards posted in the plant for everyone to read clearly singled out these two women for identification, and called them "lazy worthless bitches" who sat on their "big lazy asses." A note calling Ms. Wall "the fat whore" was left on her buggy, and the next day, another note stating "suck me raw" was found at her computer station. All are plainly gender-based comments, all were directed at Plaintiffs and all were broadcast throughout the plant. Additionally, changes to the Plaintiffs' work assignments on account of their gender and the "isolation and shunning" in the workplace they endured subjected them to dangerous situations, such as welding without a "firewatch."

As the trial court correctly observed, "the type of language used in these comment cards in reference to female employees is in and of itself evidence of a hostile work

environment based on gender and imposes upon an employer a duty to investigate and take effective action to correct the problem." Fairmont Specialty Servs.v. West Virginia Human Rights Comm'n, 206 W.Va. 86, 93-97, 522 S.E.2d 180, 187-191 (1999)." (App. 1622.) Referring to the only two female employees of the department using gender identifying pronouns (such as 'she' and 'her') in conjunction with comments regarding their 'big lazy asses' is also not gender neutral. Id. It was accordingly reasonable for the workers in the plant as well as for the jury to interpret the pejorative comment cards regarding the only two female employees in a seventeen person work group and the other testimony as evidence of gender discrimination.

It is also significant to note the difference in the procedural posture of this case versus the Frame case as Frame presents a situation where the proverbial shoe was on the other foot. In that appeal, Ms. Frame sought to overturn the trial court's summary judgment ruling dismissing her claim. By contrast, in this case, Defendants seek reversal of the jury's verdict. Accordingly, the principles regarding evaluation of the evidence outlined herein require an entirely different review of the evidence than occurred in Frame.

The argument of Defendants that the comment cards were not discriminatory because male employees also had comment cards posted about them that were "unpleasant" is unavailing as well. According to Defendants' own evidence, there were over a thousand male employees at the plant and very few women. That means that of necessity, many if not most of the comments posted concerned male workers. Nevertheless with regard to comments posted about male employees, there was no evidence that males were cursed in gender specific ways. By contrast, the Plaintiffs, the

only two females in their work group, were referred to in derogatory, gender specific terms. Moreover, while the Company CEO corrected offensive language used in comment cards in some instances, nothing whatsoever was said about the profane language directed in demeaning and gender-specific ways at Plaintiffs. Instead, Defendants implicitly endorsed the use of this language in the response made by the CEO to the comments. Thus, the jury could reasonably conclude that this contrasting manner of responding to offensive, derogatory language indicates a discriminatory attitude by Defendants towards Plaintiffs, female employees.

The rules promulgated by the Human Rights Commission Title 77 of the Legislative Rules of the Human Rights Commission offer further guidance on sexual harassment in the workplace and further support the jury's verdict and the trial court's rulings:

§77-4-2. Sexual Harassment Prohibited.

> 2.1 When it occurs in the workplace, harassment on the basis of sex is a violation of W.Va. Code §5-11-9(a)(1). The HRA affords employees the right to work in an environment free from discriminatory intimidation, ridicule, or insult.
>
> 2.2 Unwelcome sexual advances, requests for sexual favor, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> > 2.2.3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

The rules also set out the factors to be considered in "determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive"

including "whether it involved verbal abuse of an offensive or threatening nature." (Rule §77-4-2.4) The legislative rule also provides that "harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender." (Rule §77-4-2.4)

Accordingly, as the trial court found:

> Contrary to the Defendants' argument that a review of the undisputed evidence demonstrates conclusively no reasonable jury could have found for Plaintiffs on this claim, quite the converse is true. A reasonable jury could conclude from the evidence presented that Defendants – through its Chief Executive Officer and other members of management – participated in, created and permitted to exist a work environment for the Plaintiffs which was hostile to them, specifically on account of their gender. Defendants then did nothing to investigate this work environment once brought to their attention, and finally, did nothing to correct this hostile work environment. (*Order Re: Defendants' Post Trial Motion and Plaintiffs' Motion for Attorney Fees*, App. 1622.)

As to the severity or pervasiveness of the offending conduct, it is undisputed that Defendants' (CEO) received, reviewed, retyped, responded to and publicly posted for everyone in the plant to read comments identifying and referring to Plaintiffs as lazy, worthless bitches. While the information published was redacted, the CEO did not remove the details of the comments which allowed Defendants' employees and third parties to identify Plaintiffs as the individuals referred to as lazy, worthless bitches. Even after the comments were removed from the public posting, copies of the comments were disseminated throughout the plant. While various arguments have been offered to minimize what Defendant Lager knew and when he knew it regarding the redaction and the posting of the comments, the jury was not required to accept Defendants'

characterization of these facts. The jury was entitled to conclude that Defendant Lager - acting as CEO of the corporate Defendant - intentionally exposed both Plaintiffs to public ridicule and humiliation by publishing gender-based attacks upon their personality and character.

None of the numerous federal cases cited by Defendants compel a different result. (*See, Def. Brief at 31-32, fn. 13.*) To begin with, this Court has stated that the West Virginia Human Rights Act, created by the West Virginia legislature and applied by West Virginia courts and administrative agencies provides an "independent approach" to the law of discrimination that "is not mechanically tied" to federal discrimination cases. Stone v. St. Joseph's Hospital, 208 W.Va. 91, 106, 538 S.E.2d 389, ____ (2000).

Additionally, notwithstanding the federal courts' view of workplace use of the term "bitch," this Court has previously found that "bitch" constitutes a "gender slur," that on its face clearly denigrates a person on the basis of gender. Fairmont Specialty v. WV Human Rights Commission, 206 W.Va. 86, 522 S.E.2d 180 (1999); *see also*, Par Electric Contractors, Inc. v. Bevelle, 225 W.Va. 624, 695 S.E.2d 854 (2010) (rejecting employer's attempts to overturn administrative decision by arguing isolated incident of racial epithets.) Moreover, this Court has taken a strong stance on the intolerability of these types of comments:

> Conduct such as use of the "N" word to describe an African-American, the "C" word to describe women, the terms "Sic," "W.P." or "Jap" to describe those of other ancestral heritages, or other racial, sexual or ethnic pseudonyms, intended to denigrate others, cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that may be considered of an aggravated nature such that the threshold for it to be actionable is much lower than more subtle forms of discrimination which cumulatively cause conduct to be actionable under the Human Rights Act. *Syllabus Pt. 8,* Fairmont Specialty v. WV Human Rights Commission, 206 W.Va. 86, 522 S.E.2d 180 (1999).

This case remains the law in West Virginia and directly supports the findings made by the jury herein.

It is also important to note that none of the cases cited by Defendants involve a situation where the CEO participated in the plant-wide posting of gender-based derogatory comments as is the case here. This fact alone distinguishes the cases of isolated co-worker statements and conduct such as those in Freeman v. Dal-Tile Corp, 930 F.Supp2d 611 (E.D.N.C. 2013); Augustin v. Yale Club of New York City, *Opinion & Order*, 03-CV-1924 (S.D.N.Y. 2006); and Trinidad v. New York City Department of Correction, 423 F.Supp. 151 (S.D.N.Y. 2006).

Moreover, separate and apart from the act of posting these comments, Defendant CEO Lager did not in any manner correct, disavow or disown the gender-specific curse words directed at the Plaintiffs. By contrast, when offensive language contained in other comment cards was submitted to Defendant Lager, his objection to the use of this type of commentary was explicitly noted. *See e.g., Defendants' Exhibit 1.*, CEO response to Employee Comment 3 ("Cussing is a bad habit and used too frequently by some folks." App. 1761). Thus, the jury was entitled to conclude that Defendant LAGER's choice to take issue with profane language and "cussing" in response to other comments, while ignoring such language when directed at two long-term female employees, was in and of itself evidence of discrimination based on gender. In fact, Defendant Lager's response appeared to endorse this gender-hostile language by responding to it without any mention whatsoever of its unacceptable nature.

The CEO's public endorsement and publication of this type of derogatory commentary also distinguishes this case from Erps v. West Virginia Human Rights

Commission, 224 W.Va. 126, 680 S.E.2d 371 (2009). In Erps, an African American employee (Mr. Peoples) had been calling a co-worker "honky" and "white trash" thereby triggering an altercation in which a second employee threatened him and called him a "nigger." After that single incident, Mr. Peoples was fired and brought a complaint before the West Virginia Human Rights Commission claiming hostile work environment on the basis of that incident. This Court observed that "[w]hether an environment is hostile or abusive can be determined only by considering all the circumstances, which may include 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." Erps, supra, 224 W.Va. at 134, *citing* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). Thus, in Plaintiffs' case, where the evidence supports the conclusion that the triggering event, the posting of the comment cards, was the beginning of years of hostility in the workplace for Plaintiffs, Erps does not dictate overturning this verdict.

Defendants' argument that the Plaintiffs failed to prove that the discriminatory conduct was "unwelcomed" is similarly without merit. To establish this assertion at trial, Defendants attempted to equate Plaintiffs' admitted occasional use of rough language in the workplace with the CEO's endorsement of the attack upon the Plaintiffs' work ethic by use of gender-based comments published for the entire plant to see. Defendants also confound gender-based pejorative name-calling with the use of profanity in the workplace. The jury rejected these false equivalencies. "A determination of whether language or conduct is subjectively offensive, and therefore actionable 'depends on the individual circumstances.'" Harris v. Forklift Systems, Inc.,

510 U.S. 17, 22-23, (1993); Erps v. West Virginia Human Rights Commission, 224 W.Va. 126, 135, 680 S.E.2d 371, ____ (2009).

Moreover, as to the three witnesses called by Defendants to prove these facts, "[i]t is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will ordinarily not be disturbed." Peters v. Rivers Edge Mining, *Syllabus Pt. 12*, 224 W.Va. 160, 680 S.E.2d 791 (2009). Defendants failed to convince the jury that the hostile work environment precipitated by the posting of these comments which continued until trial over three years later was "welcomed" by the two women. Indeed the evidence at trial from all of the witnesses - including the Defendants' own witnesses – supported the jury's conclusion that a hostile work environment started with the posting of these comments, and continued to divide the Plaintiffs and their fifteen male co-workers.

The labeling of the posted comments as "shop-talk" was also presented to the jury who rejected this excuse as well. While Defendants argued that the CEO's retyping, redacting and endorsing of these comments was simply a reflection of this "shop-talk," the jury was not required to accept this characterization. Indeed, the jury was entitled to accept the Plaintiffs' explanation for distinguishing profanity in the workplace from derogatory gender-based name-calling, an explanation corroborated by several co-workers of the Plaintiffs. It was therefore reasonable for the jury to conclude that these comments were not "shop-talk" but instead were meant to cause Plaintiffs hurt, upset, humiliation and shame, which continued when Plaintiffs were shunned by their male co-workers while Defendants ignored the problem.

Of course, Defendants were well also aware of this hostile environment from several sources including this litigation. Plaintiffs' testimony in this regard (as well as that of numerous other witnesses) provided in pre-trial depositions as well at trial revealed a clear picture of that environment. Defendants, nevertheless, took no action to correct this situation and allowed it to continue to fester after publication of these comments for over three years before trial and thereafter.[6] Such inaction by an employer in the face of blatant hostility in the workplace is contrary to Defendants' obligation to investigate and correct the effects of this discriminatory gender-specific language. *Syllabus Point 10*, Fairmont Specialty v. WV Human Rights Commission, 206 W.Va. 86, 522 S.E.2d 180 (1999).

Despite Defendants' insistence, the matters at issue cannot be characterized as an isolated, single incident. The evidence at trial established that Plaintiffs' complaints regarding the CEO's posting of these comments launched a three year cycle of hostile treatment by their male co-workers. This treatment went unchecked by Defendants who allowed the hostile environment based upon Plaintiffs' gender to continue for over three years, up to and including trial. Given the consequences of the CEO's actions, a reasonable jury was entitled to find such conduct was severe or pervasive enough to create a hostile work environment which Defendants thereafter permitted to continue.

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[5] Although not presented to the jury, the record below reflects that in March 2012 and before trial, the "C" word along with the phrase "oath-breaker" were written on a chalkboard shortly after Plaintiffs' depositions were taken. This caused the Company to issue a memorandum intended to deal with the situation. That memorandum generated open laughter from a male employee during a meeting about this incident. (App. 1264-1268.)

C. The Post-trial Review of the Punitive Damages Award Establishes that the Jury's Award of Punitive Damages Was Proper Under Garnes

The circumstances under which punitive damages may properly be awarded have been thoroughly detailed in West Virginia. Beginning with Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991) and TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992) and continuing forward with Haynes v. Rhone Poulenc, 206 W. Va. 18, 521 S.E.2d 331 (1999) and Peters v. Rivers Edge Mining, Inc., 224 W. Va. 160, 680 S.E.2d 791 (2009) to the recent decision in Community Antenna Service v. Charter Comm. VI, 227 W.Va. 595, 712 S.E.2d 504 (2011), the principles applicable to a review of the punitive damages have been exhaustively articulated. A two-step inquiry is required: first a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award is required under Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895). Second, if a punitive damage award is justified, then a punitive damage award must be reviewed to determine if it is excessive. Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1996); Community Antenna Service v. Charter Comm. IV, 227 W.Va. 595, 712 S.E.2d 504 (2011). This Court's role in reviewing punitive damages awards is well settled:

> Upon petition, this Court will review all punitive damages awards. In [this court's] review of the petition, [the Court] will consider the same factors that . . . the jury and trial judge [are required] to consider, and all petitions must address each and every factor set forth in *Syllabus Points 3 and 4* of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law. *Syl. pt. 5*, Garnes v. Fleming Landfill, Inc.,186 W. Va. 656,413 S.E.2d 897 (1991).

With regard to the initial inquiry which must be undertaken concerning punitive damages, "[i]n 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." *Syl. pt. 4,* Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58. *Accord Syl. pt. 1,* O'Brien v. Snodgrass, 123 W. Va. 483, 16 S.E.2d 621 (1941). A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages." *Syl. pt. 3,* Jopling v. Bluefield Water Works & Improvement Co., 70 W. Va. 670, 74 S.E. 943 (1912).

On appeal, Defendants challenge the availability of punitive damages given the conduct at issue, and assert that their actions do not warrant punishment or support a punitive damage award of any amount. Defendants argue that "there was no evidence of 'gross fraud, malice, oppression or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others.'" (*Defendants' Brief at 38.*) Defendants assert that they merely "insufficiently redacted" the comment cards that "inadvertently subjected" Plaintiffs to "a brief period of unwanted attention." (Id.)

Thus, Defendants try to convince this Court, just as they tried to convince the jury and the trial court, that nothing that bad happened, that Defendants may have been negligent but that the evidence in this case absolutely, positively does not establish any malice or other misconduct on Defendants' part. (*See* App. 1414-1415.) While this bravado is admirable, these arguments have no merit and are completely unsupported by the record.

In Haynes v. Rhone Poulenc, 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999), the Court considered punitive damages in a discrimination case:

> This Court has stated that the question that a court must ask itself, in determining whether a jury can consider an award of punitive damages (in a case where they are legally permissible) 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? Alkire v. First Nat. Bank of Parsons, 197 W. Va. 122, 129, 475 S.E.2d 122, 129 (1996). Haynes v. Rhone Poulenc, 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999).

As the trial court stated, "looking at the evidence in the light most favorable to the defense, the CEO was negligent in doing this. That is in the best light." (App. 1424.) [7] Of course, the jury was not bound to evaluate the evidence in that manner, nor is this Court.

In the instant case, the evidence adduced by Plaintiffs went far beyond being subjected to the posting of unflattering comments about themselves. These comments and the CEO"S apparent endorsement of this disparagement signaled to Plaintiffs' co-workers that it was open season on the two women in the workplace since even the CEO had arguably agreed that they were lazy, worthless bitches.

The dangers inherent in the suggestion box "policy" adopted by the Defendants were obvious to anyone who considered them for a moment, so obvious that the union lobbied the employer not to start this policy, warning Defendants that there would be adverse consequences. Such adverse consequences in fact, followed in short order. Just

[7] The trial court also stated that the jury was "not bound by the statements of the witnesses in their testimony, that there are conflicting varying inferences on the question of whether the actions by Mr. Lager were negligent only." App. 1435.)

as in the time honored analogy of the individual who throws an anvil off the roof into the street below without looking, Defendants chose to ignore the union's warning regarding its "post-all-comments" approach and threw the "anvil" off the roof without considering those below. As has been aptly observed, "[th]e foundation of an inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual." Addair v. Huffman, 156 W. Va. 592, 603, 195 S.E.2d 739, 746 (1973). Accordingly, "the jury could have concluded that Defendants' posting of information about Plaintiffs was motivated by malice and criminal indifference to Plaintiffs' rights and without regard to any basic notion of fairness." (App. 1622-1623.)

Defendants' attempts to minimize their misconduct and confine the parameters of their actions to inadequately redacting and posting comment cards was posited to the jury which rejected these excuses as it was entitled to do. As the jury's verdict recognizes, the damage caused when these derogatory comments were posted continued after Defendants undertook no investigation and no corrective action to resolve the problems Plaintiffs experienced despite Defendants' legal obligation to do both. Thus, Plaintiffs were left to their own devices and were forced to endure hostile workplace conditions for an extended period of time. The environment created by Defendants' posting of sexually hostile comments about Plaintiffs, endorsed by the company's CEO, and permitted to continue unchecked for three years is more than sufficient to justify a finding of malice and criminal indifference necessary to justify the imposition of damages for punishment and to deter Defendants from repeating such conduct in the future. The three-year pattern of indifference to and toleration by Defendants of this gender-based hostile work environment is thoroughly established by the record and amply supports the punitive

damages award in this case.[8]

The second basis upon which Defendants urge this Court to set aside the award of is their suggestion that Sheetz Inc. v. Bowles Rice McDavid Graff & Love, PLLC, 209 W. Va. 318, 547 S.E.2d 256 (2001) be overruled, and that this Court hold that Plaintiffs are precluded from recovering damages for "emotional distress, embarrassment, degradation, loss of dignity, humiliation, annoyance and/or inconvenience" and punitive damages. (App. 893.) In Sheetz Inc. v. Bowles Rice McDavid Graff & Love, PLLC, 209 W. Va. 318, 337, 547 S.E.2d 256, 275 (2001), this Court ruled that "the recovery of both emotional distress damages (where such distress, of course, is proven) and punitive damages (where the employer's conduct is sufficiently egregious to meet the standards established in our punitive damages jurisprudence) has been held to be authorized in employment law cases generally."

In answering certified questions from federal court, the Sheetz court discussed its holding in the underlying case which gave rise to the malpractice suit against Bowles Rice, namely, Vandevender v. Sheetz, Inc., 200 W.Va. 591, 490 S.E.2d 678 (1997) (*per curiam).* In Vandevender, the Court had not ruled upon the question of whether a recovery of both emotional distress damages and punitive damages was "double recovery" as that allegation of error had not been preserved at trial. In Sheetz, however the Court reaffirmed the holding of Tudor v. Charleston Area Medical Center, 203 W.Va. 111, 506 S.E.2d 554 (1997). The Court concluded that "both punitive damages and

[8] The trial court's detailed analysis of the Garnes factors is found at pages 1619-1626 of the *Appendix*. Defendants have not challenged the amount of the punitive damages award, the ratio of the punitive damage award or any other aspect of the award on appeal. Accordingly, any objections on any other basis or regarding any other factor of the analysis is waived by Defendants according to Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1996).

damages for emotional distress could be separate items of recovery in a retaliatory discharge case, if a jury found an employer's actions to be wanton, willful or malicious." As the Court explained:

> We recognized in Tudor that in the tort of the intentional infliction or reckless infliction of emotional distress, emotional distress is a more integral part of the cause of action itself than is the case with other causes of action, where emotional distress is but one type of injury or damages that can result from actionable conduct. Similarly, the intent or recklessness that generally forms the basis of a punitive damages award in connection with most causes of action is a more integral part of the tort of intentional or reckless infliction of emotional distress. Sheetz, supra, 209 W.Va. at 337.

As established in Tudor, "in the case of an intentional or reckless infliction of emotional distress claim, if there is not substantial and concrete evidence of a plaintiff's physical, emotional or psychiatric injury, some or all of an emotional distress damages award may actually be punitive damages." Tudor, supra, at *Syllabus Points 14 and 15*; Sheetz, supra, 209 W.Va. at 337, 547 S.E.2d at ____. Nevertheless, even in cases of intentional or reckless infliction of emotional distress, the trial court may, but is not required to modify a punitive damages award unless "it appears" that there has been "a duplicative or misplaced award" for punitive damages. Id. Accordingly, the Sheetz Court reasoned that since the claims in Vandevender were "not based on the tort of intentional or reckless infliction of emotional distress, but rather on claims of termination and retaliation in violation of our Human Rights and Workers Compensation statutes" the punitive damages awarded were exempt from any ... "'double recovery' concerns that arise" in cases of intentional or reckless infliction of emotional distress. Id. "[T]he specific principles and procedures that are set forth in *Syllabus Points 14 and 15* of Tudor v. Charleston Area Medical Center, 203 W. Va. 111, 506, S.E.2d

554 (1997) [were] limited to the tort of the intentional or reckless infliction of emotional distress." Sheetz, supra Sheetz, supra, 209 W.Va. at 338, 547 S.E.2d at ____.

Supplementing the explanation provided in Sheetz, the trial court below made an apt observation as to why Defendants' logic in support of their request to deny punitive damages in this case was flawed:

> ...[T]his is a general damage case as it's – there's still compensatory damages.
>
> You know, embarrassment, annoyance, degradation, all of that, those damages are designed to compensate a victim of a claim, an employee discrimination claim under the Human Rights Act. They are not designed to punish, so it seems like different categories to me, so. (App. 1424-1425.)

In short, the longstanding precedent of this Court supports the jury's award of punitive damages herein. Defendants have not articulated any valid basis for eradicating this case law. Accordingly, the jury's award of punitive damages should not be disturbed on appeal of this case.

VI. Conclusion

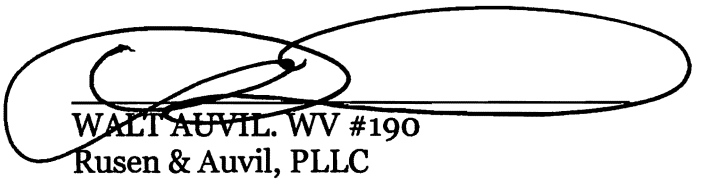
The record in the case before this Court reflects an egregious mistake by CEO MEL LAGER, a mistake which proved disastrous for Plaintiffs as they continued to work in the Project Maintenance Department. This mistake was exacerbated by Defendants' stubborn refusal to acknowledge it, and by Defendants' failure to inquire, investigate or attempt to ameliorate the hostile conditions precipitated by the CEO's actions. This ignored the legal duty of the Defendants to "provide a workplace that was free of discrimination related to gender and to provide a workplace free from such hostility." (App. ¶19, 1623.) Instead, Defendants "helped to create such an environment by the

posting of these comment cards." (App. ¶20, 1623.) The jury carefully considered the evidence presented, made its determinations as to credibility, and rendered a verdict that is and was "strongly support[ed]" by the "facts and inferences in this case." (App. ¶19, 1623.) The evidence was such that "the jury was entitled to conclude that regularly working in a work environment rendered hostile by discriminatory animus fueled by gender was sufficient for a jury to conclude that the Plaintiffs were severely harmed by the conduct of Defendants." (App. ¶21, 1623.)

Plaintiffs accordingly respectfully request that the verdict be affirmed, and that Defendants' requests for relief be denied.

SHARON GRIFFITH
LOU ANN WALL,
Plaintiffs

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 13-1084

CONSTELLIUM ROLLED
PRODUCTS RAVENSWOOD, LLC,
A Delaware Corporation and
MELVIN LAGER
Defendants-Below,
Petitioners,

v.

SHARON GRIFFITH and LOU ANN WALL,
Plaintiffs-Below,
Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff in the above-styled matter hereby certifies that on the 18th day of April, 2014, he served the foregoing ***Rely Brief of SHARON GRIFFITH and LOU ANN WALL*** upon Ancil G. Ramey and Christopher Slaughter, counsel for Defendants, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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