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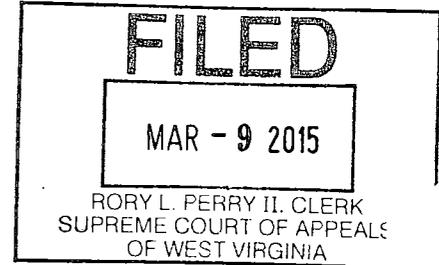
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.



Appeal from the Circuit Court of Jackson County, West Virginia

**AMICI CURIAE BRIEF FROM
THE WEST VIRGINIA FOUNDATION FOR RAPE AND INFORMATION SERVICES,
AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA FOUNDATION,
WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION,
WV FREE, AND WEST VIRGINIA ASSOCIATION FOR JUSTICE
IN SUPPORT OF RESPONDENTS SHARON GRIFFITH
AND LOU ANN WALL**

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IN SUPPORT OF RESPONDENTS SHARON GRIFFITH
AND LOU ANN WALL**

I. Introduction and statement of interest of amici curiae

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

A.

**Prohibiting workplace discrimination not only is the law,
but also it is good for business
and West Virginia's business climate**

At the initial rehearing stage in this case, this Court granted leave to the West Virginia Chamber of Commerce and the West Virginia Manufacturer's Association to file a joint amicus brief

in support of the petition for rehearing filed by Defendants Constellium Rolled Products Ravenswood LLC and Melvin Lager. The main thesis asserted by these amici can be summarized in its initial sentence predicting gloom and doom for the entire State of West Virginia as a result of this case: **“This case, if the majority opinion is not revised, will have a significant, adverse impact on West Virginia’s businesses, workforce, and more generally, its economy and citizens.”** After considering these assertions, three members of this Court granted Defendants’ petition for rehearing and solicited additional briefs addressing punitive damages and the evidence supporting gender discrimination. These amici groups will address only the second issue.

The majority’s decision upholding the jury’s resolution of the facts is consistent with the applicable case law from this Court as well as cases from other state and federal jurisdictions. It is unlawful for employers to subject their employees to a hostile work environment based upon their sex. Sexually offensive and derisive comments were directed at Plaintiffs Sharon Griffith and Lou Ann Wall, who were the only two women employed at this plant. The comments directed at Sharon and Lou Ann—“her big lazy ass,” “If the lazy worthless bitch can’t do the work, she should stay home,” “seems like lazy asses like them don’t need to be here,” and “Lazy ass was here on overtime again”—were made anonymously by another employee in the plant in a suggestion or comment box, but were made public by Defendant Melvin Lager, the CEO of the company. When Defendant Lager posted the comments on a bulletin board and included them in the plant’s intranet system, he redacted Sharon and Lou Ann’s names, but everyone in the plant knew the comments were directed at them, blanked out the vulgar words, but anyone reading the comments knew what the words were, and added his own comments. However, never once did Defendant Lager condemn or correct the insulting and offensive descriptions of Sharon and Lou Ann. Instead, he caused these offensive

comments to be made public for all of the other employees to see. Even after the comments were removed from the bulletin board, they already had been copied and passed around at lunch tables, taped to the walls and shower room, and circulated around the plant. In effect, CEO Lager adopted, endorsed, and publicized the sexually offensive comments directed at Sharon and Lou Ann.

As explained in the majority decision, after these offensive comments were made public by CEO Lager, posted on the bulletin board and on the company's intranet, and became the subject of discussion amongst the employees, the previously friendly atmosphere at the plant changed to one where the men were against the two women. Sharon and Lou Ann were ostracized by other employees, the plant no longer was a comfortable place to work, and they became upset on a regular basis because of the way they were treated. The fact that Defendants took no action against the employee who later was identified as the person who had made the offensive comments also impacted Plaintiffs' morale.

Under these facts and existing case law, the citizens of Jackson County, who heard all of the testimony, evaluated the credibility of the witnesses, considered the defenses asserted, and applied the law provided by the trial court, were persuaded that Sharon and Lou Ann were unlawfully subjected to a hostile work environment based upon their gender and awarded these Plaintiffs with a sufficient amount of money to compensate them for what they endured and further awarded punitive damages in an effort to discourage other employers from acting the way Defendants did in this case. Stated simply, the jury was presented with disputed facts, was instructed correctly on the law, and resolved the liability and damages issues in favor of Sharon and Lou Ann.

From a policy perspective, condoning or creating a sexually hostile work environment can cause a wide range of problems, as summarized by the National Women's Law Center:

Sexual harassment often has a serious and negative impact on women's physical and emotional health, and the more severe the harassment, the more severe the reaction. The reactions frequently reported by women include anxiety, depression, sleep disturbance, weight loss or gain, loss of appetite, and headaches. Researchers have also found that there is a link between sexual harassment and Post-Traumatic Stress Disorder.

Harassment can also cause substantial financial harm for victims. Victims often try to avoid the harassing behavior by taking sick leave or leave without pay from work, or even quitting or transferring to new jobs. This results in a loss of wages, for example costing federal employees \$4.4 million over 2 years.

Employers also suffer significant financial losses from the job turnover, use of sick leave, and losses to individual and workgroup productivity that result from harassment. The federal government lost \$327 million due to harassment from 1992 - 1994.

Harassment can poison the work atmosphere and negatively impact other workers who are not themselves harassed. In fact, decreased work group productivity was the largest single cost to the government in its survey of harassment.¹ (Footnotes omitted).

In contrast to the general assertions made by Defendants' amici regarding the dire economic impact this case supposedly will have on this State, studies actually show workplace discrimination is bad for business. Some of the economic costs are summarized above. Furthermore, in 2007, the Level Playing Field Institute conducted an extensive survey on the reasons given by professionals and managers for leaving employment. In this survey, the following conclusions were reached:

[E]ach year in this country, more than 2 million professionals and managers in today's increasingly diverse workforce leave their jobs, pushed out by cumulative small comments, whispered jokes and not-so-funny emails. This rigorous study, the first large scale review of this issue, shows that **unfairness costs U.S. employers \$64 billion on an annual basis—a price tag nearly equivalent to the 2006 combined revenues of Google, Goldman Sachs, Starbucks and Amazon.com or the gross domestic product of the 55th wealthiest**

¹See <http://www.nwlc.org/resource/sexual-harassment-workplace>.

country in the world. This estimate represents the cost of losing and replacing professionals and managers who leave their employers solely due to workplace unfairness. By adding in those for whom unfairness was a major contributor to their decision to leave, the figure is substantially greater. This study also shows how often employees who left jobs due to unfairness later discouraged potential customers and job applicants from working with their former employer.² (Emphasis added).

Workplace discrimination lessens productivity, causes loss of talented employees, requires additional costs associated with hiring and retraining replacement employees, is destructive to worker morale and the reputation of the business, and, of course, is illegal. The suggestion by the amici in support of Defendants that the majority's decision somehow is out of step with existing case law is demonstrably incorrect and the further assertion that enforcing this State's laws prohibiting workplace discrimination somehow is bad for business or another example of West Virginia's alleged bad business climate simply is false. Maintaining a vibrant and diverse workplace where all employees are treated fairly and equally, without regard to their race, age, sex, religion, disability, and sexual orientation³ is vital to our State's economy and the wellbeing of its citizens.

B.

Statement of interest of amici curiae

The West Virginia Foundation for Rape and Information Services (WVFRIS), American Civil Liberties Union of West Virginia Foundation (ACLU-WV), West Virginia Employment Lawyers

²See <http://www.lpfi.org/sites/default/files/corporate-leavers-survey.pdf>.

³The amici recognize this State has not yet added sexual orientation to the list of classes protected under the West Virginia Human Rights Act (WVHRA). However, virtually all successful businesses prohibit sexual orientation discrimination and eventually, despite recent political developments, the amici hope West Virginia will join the growing number of other states that have added sexual orientation to the list of protected classes.

Association (WVELA), WV FREE, and West Virginia Association for Justice (WVAJ) have filed a joint motion seeking leave to file this amici curiae brief with this Court. Pursuant to Rule 30(b) of the West Virginia Rules of Appellate Procedure, counsel for amici notified all opposing counsel of their interest to file this brief.⁴

As the state's sexual assault coalition, it is the mission of the West Virginia Foundation for Rape Information and Services is to promote the compassionate and just treatment of survivors and their loved ones; foster collaborative relationships; and create attitudinal and behavioral changes around sexual violence and stalking through education, victim services, and social change. Sexual harassment is a form of sexual violence. All employees, regardless of gender, deserve to have a safe and non-hostile working environment.

The ACLU-WV is a non-partisan, non-profit membership organization whose mission is to assure the Bill of Rights and rights guaranteed by the West Virginia Constitution are preserved for each new generation. The ACLU-WV accomplishes these goals through litigation, legislative advocacy, grassroots organizing, and public education. The ACLU-WV has members throughout West Virginia and a long history of legal advocacy for equal protection under the law for all citizens.

WVELA is an affiliate of the National Employment Lawyers Association ("NELA"). Since its formation in 1985, NELA has served as the only national bar association exclusively comprised of lawyers who represent employees in cases involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee pay and benefits and other employment related matters. NELA and its 68 state and local affiliates have more than 3,000 members. WVELA is an

⁴Pursuant to Rule 30(e)(5), this brief was drafted by present counsel *pro bono*, rather than by counsel for any of the parties in this case.

active affiliate of NELA. As such, like its parent association, WVELA is comprised of lawyers throughout the state of West Virginia who devote their time and efforts to representing employees in workplace litigation. Civil rights and scope of employment often are critical issues addressed in cases litigated by WVELA members.

WV FREE's mission is to seek legal protection at state and national levels guaranteeing the right to decide whether, when, and how to have children; the human right to bodily integrity and control over one's body; and the ability of women to work and live in healthy and safe environments. WV FREE has a keen interest in ensuring that corporate policies and practices exhibit zero tolerance of sexual harassment in the work place. As such, WV FREE's involvement in this amici brief is a natural extension of its work protecting the basic right of all people to their bodily integrity.

WVAJ is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia harmed by the wrongful conduct of others. The membership of WVAJ is particularly interested in protecting ordinary West Virginians and securing for them the rights enshrined in the State Constitution, the West Virginia Code and the decisions of this Court. It has filed amicus briefs on more occasions than could conveniently be counted and its briefs have been acknowledged as helpful to this Court on multiple occasions.

II.

Argument

A.

The majority's opinion correctly applied the law to these facts

Defendants seek to persuade this Court, after the Court already has issued a memorandum decision affirming the jury's verdict, that Sharon and Lou Ann are not entitled to any judgment under

these facts as a matter of law. This argument ignores the fact-based nature of a sexually hostile work environment claim and unfairly discards the analysis of the facts made by the Jackson County jury, which not only heard evidence in support of Plaintiff's claims, but also considered the various defenses asserted.

B.

The WVHRA must be applied liberally to achieve the Legislature's stated goal to eliminate all forms of discrimination

Historically, this Court has recognized the broad reach of the WVHRA and the Legislature's clearly stated declaration that the denial of the rights protected under the WVHRA "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society."⁵ In *State ex rel. West Virginia Human Rights Commission v. Pauley*, 158 W.Va. 495, 499-500, 212 S.E.2d 77, 79 (1975), one of the first decisions applying the WVHRA, this Court recognized the specific intent of the Legislature to eliminate all forms of unlawful discrimination:

[I]t is readily discernible that the Legislature, by its recent enactments in the field of human rights, intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. **If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination.** If this mandate is to be carried to fruition the provisions of the 1967 Human Rights Act and the amendments thereto must be given the significance intended so as to provide for meaningful enforcement. (Emphasis added).

⁵See W.Va.Code §5-11-2.

Thus, from the time the WVHRA was adopted to the present, this Court consistently has recognized that employees subjected to unlawful discrimination deserve to be protected in an effort to create equal opportunities for all people.

Although Justice Franklin Cleckley, whose contribution to the development of our anti-discrimination jurisprudence is invaluable, was speaking about disability discrimination in *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va.51, 64, 479 S.E.2d 561, 574 (1996), the same principles apply to all forms of discrimination, including sex discrimination, under the WVHRA:

Thus, the ADA and our Human Rights Act prescribe strong medicine to cure the social maladies of intentional and unnecessary denials of job opportunities to persons with disabilities. **The medicine works through the laws' natural hortatory and educational effect and through their remedial provisions that empower courts to correct unlawful practices, make their victims whole, and deter other acts of discrimination by attaching to them serious economic consequences.** In applying our statutes, we remain mindful that, as a remedial law, it should be liberally construed to advance those beneficent purposes. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). (Emphasis added).

C.

Present case meets the Court's standards for establishing a sexually hostile work environment under *Hanlon v. Chambers*

As noted by the majority, the definitive decision in West Virginia on sexual harassment under the WVHRA is *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995). The essential elements of a sexual harassment claim under the WVHRA are noted in Syllabus Point 5 of *Hanlon*, where this Court held:

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.

A hostile work environment is defined in Syllabus Point 7 of *Hanson*:

An employee may state a claim for hostile environment sexual harassment if unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature have the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

In any sexual harassment case, it is critical for the plaintiff to establish that the offensive conduct is imputable to the employer. In *Hanson*, 195 W.Va. at 108, 464 S.E.2d at 750, this Court provided the following explanation on how an employer may be held liable for sexual harassment:

An employer, however, is not strictly liable, at least not in all cases, for sexual harassment and proof of a hostile environment does not automatically establish employer liability. It is at this point that the source of the harassment becomes relevant. **Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result.** When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Thus, an employer that has established clear rules forbidding sexual harassment and has provided an effective mechanism for receiving, investigating, and resolving complaints of harassment may not be liable in a case of co-worker harassment where the employer had neither knowledge of the misconduct nor reason to know of it. In such a case, the employer has done all that it can do to prevent harassment, and the employer cannot be charged with responsibility for the victim's failure to complain. (Emphasis added).

In this case, Defendant and CEO Lager's actions making the anonymous offensive comments about Sharon and Lou Ann public began the process of creating a sexually hostile work environment,

because he publicized the comments on the bulletin board and in the intranet. Thereafter, other persons copied and posted the offensive comments throughout the plant and Sharon and Lou Ann found the working conditions thereafter to be offensive and upsetting. After creating this environment, Defendants failed to take any action to remedy the situation, which prompted Sharon and Lou Ann to file their complaint seeking the protections afforded by the WVHRA. These facts fully support the conclusion reached by the jury that Sharon and Lou Ann were subjected to a sexually hostile work environment for which Defendants were responsible for creating.

In one of the dissenting opinions, it is suggested the facts were insufficient to establish a sexually hostile work environment had been proven. A review of the instructions presented to the jury demonstrates all of the elements required under *Hanlon* were explained to the jury. Clearly the jury found all of these elements had been established by the evidence presented. The defenses asserted by Defendants addressing business judgment and the allegation these Plaintiffs may have participated in allegedly similar offensive conduct in the workplace also were included in the instructions and clearly were rejected by this jury.

The jury was given an instruction explaining the use of the word “bitch” in the comment card, which word was republished by Defendant Lager in the redacted form “b____,” has overtones of gender discrimination. This instruction was consistent with this Court’s holding in *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W.Va. 86, 522 S.E.2d 180 (1999). The majority’s affirmance of the jury’s verdict does not mean every time the word “bitch” is uttered in the workplace, gender discrimination has occurred. However, this Court’s opinions as well as decisions from other jurisdictions hold the use of the word “bitch” in the workplace and in the context of the other facts in the case, can indeed support an allegation of gender discrimination.

See, e.g., *Passananti v. Cook County*, 689 F.3d 655, 665-66 (7th Cir. 2012); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir.2010) (en banc); *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229–30 (1st Cir.2007); *Carter v. Chrysler Corp.*, 173 F.3d 693, 700-01 (8th Cir. 1999); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000–01 (10th Cir.1996); *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 964–65 (8th Cir.1993); *Funk v. F & K Supply, Inc.*, 43 F.Supp.2d 205 (N.D.N.Y. 1999).

Finally, the order granting the rehearing petition asked the parties to identify the evidence of wrongful conduct directed at gender, rather than to both men and women employed at the plant. The offensive comments cited in the majority opinion and summarized above clearly are directed at Sharon and Lou Ann, through the use of female pronouns. As the only two women employed in this plant, these comments were directed at them. The use of the word “bitch,” consistent with this Court’s decisions as well as the law developed in other jurisdictions, can be the basis for gender discrimination in the context of other facts. The evidence also demonstrated the publication of these offensive comments directed at Sharon and Lou Ann created a divide in the atmosphere at this plant between the male and female employees. There was no evidence in this record demonstrating similar offensive conduct was directed toward the men in the plant.

Counsel for Plaintiffs has shared with counsel for amici a detailed summary of the other comments made public by Defendant and CEO Lager. While Defendant Lager made all of the comments placed in the suggestion box public, none of the other comments is directed at the gender of any of the employees or includes offensive and critical references similar to “lazy asses” or any vulgar gender-based words such as “bitch.” There simply is no evidence to support any conclusion that the male employees were subjected to the same sexually hostile work environment.

III. Conclusion

For the foregoing reasons, the West Virginia Foundation for Rape and Information Services (WVFRIS), American Civil Liberties Union of West Virginia Foundation (ACLU-WV), West Virginia Employment Lawyers Association (WVELA), WV FREE, and West Virginia Association for Justice (WVAJ) respectfully move this Court to grant leave to file this **BRIEF** with the Court and to once again affirm the Jackson County's verdict consistent with the majority decision issued by this Court on October 17, 2014. The amici very much appreciate the Court's consideration of these critical issues and providing the amici this opportunity to share their views and concerns with the Court.

**WEST VIRGINIA FOUNDATION FOR RAPE
AND INFORMATION SERVICES, AMERICAN
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FOUNDATION, WEST VIRGINIA
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