STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC, a Delaware corporation, and MELVIN LAGER, Defendants Below, Petitioners,

vs.) No. 13-1084 (Jackson County No. 11-C-26)

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

MEMORANDUM DECISION

Petitioners, Constellium Rolled Products Ravenswood, LLC (hereinafter "Constellium"), and Melvin Lager (hereinafter "CEO Lager"), through counsel, Ancil G. Ramey and Christopher Slaughter, appeal the September 3, 2013, final order of the Circuit Court of Jackson County. In its order, the circuit court denied Constellium's post-trial motion for judgment notwithstanding the verdict, or for a new trial, following a jury trial. The jury, in its verdict, awarded respondents, Sharon Griffith (hereinafter "Ms. Griffith") and Lou Ann Wall (hereinafter "Ms. Wall") non-economic damages in the amount of $250,000.00 each and punitive damages in the amount of $250,000.00 each for their hostile work environment claims. Ms. Griffith and Ms. Wall (hereinafter "respondents," collectively), through counsel, Walt Auvil, assert that the underlying jury verdict was proper; accordingly, they contend that the post-trial motions were properly denied.

Based upon the parties' written briefs and oral arguments, the appendix record designated for our consideration, and the pertinent authorities, we determine that the circuit court committed no error, and its denial of the post-trial motions is affirmed. This case presents no new or significant questions of law; therefore, it will be disposed of through a memorandum decision as contemplated under Rule 21 of the Rules of Appellate Procedure.

Ms. Griffith[1] and Ms. Wall[2] are employed by Constellium in the Project Maintenance Department, which consists of seventeen employees. Respondents are the only

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[1]Ms. Griffith's employment with Constellium began in 1977 and continues presently.

[2]Similarly, Ms. Wall began working for Constellium in 1978 and remains employed with the company at the present time.

females working in their department. The time period relevant to the instant litigation began in September 2009, when Constellium began using a "suggestion box" into which employees could submit anonymous comment cards.[3]

On October 12, 2009, a Constellium employee wrote three comment cards about the respondents. The original hand-written comment cards, with redactions, were posted on the bulletin board beside of redacted, typed versions, which included a typed response from CEO Lager. They stated, with redactions, as follows:

> [1] _____ (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.
>
> [2] 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.
>
> [3] Lazy a__ _____ (employee) was 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

[3]At trial, CEO Lager stated that the purpose of the comment cards was "to try to get the cooperation between the management, the leadership, the salary workforce, and the people working on the shop floor, to make sure everybody could come together to try to turn and save the business." The use of a suggestion box was discontinued in February 2010.

the same!

CEO RESPONSE:
We need everyone fully engaged and productive.

Although respondents' names were redacted from the comments that were ultimately posted on the bulletin board, the references to the two women in the Project Maintenance Department were understood as identifying respondents. At trial, the company acknowledged that the redactions "could have been done more effectively," given that the redactions did not keep respondents from being identified. In addition to being placed on the plant bulletin board, the comments were posted on Constellium's internal communications system (hereinafter "intranet").

Ms. Griffith learned of the posted comments while she was on vacation. When she arrived at the plant to see the bulletin boards, she was angry and upset, "shaken," and "just about in tears." Ms. Griffith described the comments as "degrading." Similarly, Ms. Wall was very upset about the postings. She first learned of the posted comments when other employees were joking about them. Ms. Wall testified to feeling degraded, humiliated, and discriminated against based upon her gender. Respondents agreed that being labeled "lazy, worthless bitches" without any contradiction or comment by the CEO of the company was gender discrimination.

As a result of the comments posted on the bulletin board, respondents claim that they were shunned by their co-workers; that the previously friendly atmosphere became "male against female;" that two employees changed lunchrooms to avoid them; and that another employee, whom Ms. Griffith regarded as a son, stopped speaking to her entirely. Even after the comments were removed from the bulletin board, they were copied and passed around at lunch tables, taped to the walls and shower room, and circulated around the plant. Ms. Wall was seen crying at work frequently, and her husband stated that she would often arrive home from work crying and "she has no desire to do anything anymore."

At the request of the respondents, the union complained to the company. After several days, the comments were removed from the bulletin board but, according to respondents, remained on the "intranet." Respondents state that Constellium made no effort to determine who wrote and submitted the comment cards about respondents; however, the respondents suspected it was Larry Keifer (hereinafter "Mr. Keifer"), a Constellium employee in the Plate Department. After a handwriting expert was retained by the respondents, Mr. Keifer admitted that he wrote the comments. He testified, however, that he did not write the comments because respondents were women. Rather, he stated that he wrote them in an effort to get management's attention about the abuse of overtime at the plant. Though he acknowledged that his language choice was inappropriate, he attested that he had heard both respondents use "rough language" in the workplace. After it was determined that Mr. Keifer was responsible for the comments, he was never questioned about his conduct by Constellium. He was not disciplined, and, as of the

date of trial, remained employed in the same position.[4]

Respondents filed their complaint on February 24, 2011, in the Circuit Court of Jackson County alleging gender discrimination in violation of the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 through 5-11-20. Respondents subsequently amended their complaint to allege claims of hostile work environment and sexual harassment. A jury trial was conducted on December 18, 19, and 20, 2012, upon the conclusion of which respondents were awarded $250,000.00 each for emotional distress as compensatory damages and $250,000.00 each in punitive damages, for a total verdict against Constellium in the sum of $1,000,000.00. Constellium timely filed post-trial motions for judgment as a matter of law and/or for new trial, and requested a review of the punitive damages award. By order entered September 3, 2013, the circuit court denied Constellium's motions. This appeal followed.

On appeal, Constellium sets forth that the trial court erred in two regards: (1) failing to grant judgment as a matter of law to Constellium on petitioners' hostile work environment claims and (2) allowing respondents' claims for punitive damages to go to the jury, and then by failing to either set aside or substantially reduce the jury's punitive damages award. The respondents assert that the jury heard all of the evidence and reached a correct decision that should not be overturned.

The standard of review is well-settled: "The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is *de novo*." Syl. pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009). Further, "'[t]he ruling of a trial court in granting or denying a motion for a new trial 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.' Syl. pt. 4, in part, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)." Syl. pt. 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008). Mindful of these applicable principles, we now consider the substantive issues presented herein.

In its first assignment of error, Constellium contends that the respondents failed to meet the evidentiary prerequisites for submitting an alleged case of hostile work environment to a jury for verdict.[5] The overarching principle in our jurisprudence is that, as a protection for workers, "[t]he West Virginia Human Rights Act, W. Va. Code 5-11-9(1) (1992), imposes a duty on employers to ensure that workplaces are free of sexual harassment from whatever source." Syl. pt. 8, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). Importantly,

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[4]Respondents initially named Mr. Keifer as a party to the lawsuit; however, he was voluntarily dismissed during the underlying litigation.

[5]Constellium's argument relies heavily on this Court's recent decision in *Frame v. JP Morgan Chase*, No. 12-0967, 2013 WL 3184755 (June 24, 2014) (unpublished mem. decis.). We find application of the *Frame* case would result in the same disposition of this case by this Court.

> [t]o 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.

Syl. pt. 5, *Hanlon*, *id.*

Application of the *Hanlon* factors leads this Court to the conclusion that a jury had evidence before it from which it could have reasonably found that the respondents were subjected to a hostile work environment on the basis of their gender. First, it is conceded by all parties that this industrial work site is prone to the workers' use of "rough language." The respondents, as well, admit to using bad language on occasion. However, as the respondents explain, there is a difference in using a bad word as an expletive and in using profanity as a name or description of a coworker.

Second, the language used in the comment cards was gender-biased. It is undisputed that, even with the redactions in the comment cards, the other workers easily identified the respondents as those referenced in the negative statements. Further, referring to the only two female employees with gender identifying pronouns, such as "she," and then referring to those two employees as "lazy asses" is not gender neutral. Thus, it was reasonable to interpret a reference in the posted comment cards to the only two female employees in a seventeen person work group as "lazy asses" and "bitches" also evidenced gender discrimination.

Third, the testimony at trial illustrated that, before the comments were posted, the environment in the respondents' workplace was friendly, almost a family atmosphere. After these comments were posted, other coworkers 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" the respondents. Some employees changed lunchrooms and avoided the respondents. Both of the respondents reported that they felt isolated and shunned. In some regards, the women were scheduled only to work with each other and felt segregated from the rest of their department. Ms. Wall testified that, on one occasion, she was not provided a "fire watch" to assist and watch over her while she was welding, and she was injured. Even after the comment postings were removed, copies of them were disseminated throughout the plant – including being passed around at the lunch tables and taped to walls.

Fourth, CEO Lager played an important role in the manner in which these comment cards changed the respondents' workplace. CEO Lager actively participated in the conditions that gave rise to public ridicule and humiliation experienced by the respondents. The CEO not only posted the gender negative comments, but he also responded to the same.

Nowhere did his comments chastise the use of such derogatory gender-biased obscenities. Importantly, even after the effect on the respondents' psyche was realized, the company did nothing to apologize to or check on the respondents. Additionally, nothing was done to question or investigate the incidents even after the author of the negative comments confessed. Mr. Keifer received no discipline or sensitivity training, and remains employed in the same position with the company. CEO Lager participated in, created, and permitted to exist a work environment for the respondents that was hostile to them, specifically on account of their gender.

As previously explained, this case was presented to a jury for a three-day jury trial, during which the jury found that the respondents had presented sufficient evidence to establish a hostile work environment based on their gender. Guidance to review a jury verdict has been demonstrated as follows:

> In determining whether there is sufficient evidence to support a jury verdict 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.

Syl. pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

Moreover, "[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. pt. 4, *Laslo v. Griffith*, 143 W. Va. 469, 102 S.E.2d 894 (1958). *See also* Syl. pt. 12, *Peters v. Rivers Edge Mining*, 224 W. Va. 160, 680 S.E.2d 791 (2009) ("It is the peculiar and exclusive province of a 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 not ordinarily be disturbed." Syllabus point 2, *Skeen v. C & G Corp.*, 155 W. Va. 547, 185 S.E.2d 493 (1971).").

In the present case, Constellium argues that there was additional evidence that disproved the respondents' claims of the adverse impact the comment cards had on their employment. However, all of the evidence, including contrary testimony, was submitted to the jury. The jury heard all of the evidence and made its determination that the respondents were subjected to a hostile work environment based on their gender. This Court will not disturb the jury verdict in this case as it appears that the jury served its purpose as the ultimate fact finder, without legal error. *See* Syl. pt. 2, *Fredeking*, 224 W. Va. 1, 680 S.E.2d 16 ("When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier

of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.").

Constellium's final assignment of error to this Court involves the award of punitive damages by the jury, and the subsequent affirmation of the award by the trial court upon its review of the same. "In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." Syl. pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). Reviews of punitive damages awards are guided as follows:

> When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992)[, *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993)].

Syl. pt. 6, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). Our review of a punitive damages award is *de novo*. *See* Syl. pt. 16, *Peters*, 224 W. Va. 160, 680 S.E.2d 791 ("When reviewing an award of punitive damages in accordance with Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus point 5 of *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996), this Court will review *de novo* the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award.").

With respect to this specific case, CEO Lager's intentional publication of the comment cards with identifiable and derogatory information regarding the respondents, along with his responses that failed to repudiate the derogatory and sexist nature of the comments, was sufficient for the jury to reasonably find and determine that an award of punitive damages was justified. Further, Constellium made no attempt to determine who had made the derogatory comments. Once the author confessed, he was not disciplined in any manner. The gender-based language in the comment cards imposes upon Constellium a duty to investigate and take effective action to correct the problem. *See* Syl. pt. 3, in part, *Fairmont Speciality Servs. v. West Virginia Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999) ("When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace."). Thus, the relationship of the harm

likely to occur from posting such comment cards, and the harm that actually occurred according to the respondents' evidence, supports punitive damages.[6]

For the foregoing reasons, we affirm the September 3, 2013, order by the Circuit Court of Jackson County.

Affirmed.

ISSUED: October 17, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman

DISSENTED IN BY AND WRITING SEPARATELY:

Justice Menis E. Ketchum
Justice Allen H. Loughry II

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[6]We note that the ratio of compensatory damages to punitive damages is 1 to 1, well within acceptable legal limits. *See* Syl. pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) ("The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.").

KETCHUM, Justice, dissenting:

In order for a plaintiff to prevail on a claim for gender discrimination or sexual harassment it must be proven that the alleged wrongful conduct was based on the plaintiff's sex. *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995). In this case, the defendant's alleged wrongful conduct was directed both at men and women.

All employees were encouraged to place comments in a suggestion box. The plant manager would attach his response to every comment. The comments and responses were posted on a plant bulletin board. When the comments and responses about the plaintiffs were posted, there were also posted approximately 39 other comments and responses.[1] There were postings that had derogatory comments about both male and female employees, including a foreman.

While it was ill advised to post derogatory comments about any employee, these comments were not directed at only the female plaintiffs or female employees. They were equal opportunity postings directed at both men and women. Additionally, the comments about the plaintiffs were directed at their perceived work ethics.

There is no cause of action under our sex discrimination laws. Our anti-discrimination laws are not codes of civility. Our laws are aimed at discrimination directed at a protected class, not comments directed at anyone in the work place. There may have been causes of action for libel or the tort of outrage but not for gender discrimination.

Therefore, I dissent. Additionally, I hope the plaintiffs are advised that the compensatory and punitive damages received in this case create a taxable event.

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1 At oral argument, it was not disputed that 42 comments and responses were posted at the same time. Three of those comments were about the plaintiffs.

LOUGHRY, Justice, dissenting:

Glaringly absent from the majority's opinion is both the application of well-established principles of employment law and common sense. While I emphatically agree that the language utilized by Mr. Keifer in the original comment cards was without question both highly inappropriate and certainly an unacceptable manner of referring to women, regardless of the context or situation, the incivility at issue in this case did not rise to the level of proof necessary to establish a claim of gender discrimination, sexual harassment, or hostile work environment. Highly significant is the fact that in affirming the jury's verdict, the majority fails to cite a single factually analogous case. This omission, especially considering the legions of federal and state jurisprudence addressing the scenario at issue here, signals loud and clear that the evidence in this case was woefully inadequate. Indeed, the relegation of this case to a memorandum opinion, which focuses almost exclusively on the alleged *aftermath* of the challenged employment activity, further suggests the absence of a valid employment claim.

In this case, the respondents were subjected to a single written, yet redacted, epithet referring to them individually or collectively as a "lazy worthless b_____." The comments were posted by the employer one time and were taken down immediately after only a couple of days. The comments were part of many comments contained in a multi-page document posted alongside other unrelated employment postings. These comments were treated exactly as were similar comments directed toward male employees–redacted for employee name and profanity and responded to by the employer in a gender-neutral fashion with regard to the substance of the comment.

It is well-accepted in federal jurisprudence[1] that "the use of a gender-specific term in a derogatory comment does not necessarily indicate that the comment is directed at the person's gender." *State v. Franklin,* 534 S.E.2d 716 (S.C. App. 2000); *see Johnson v. Waters*, 970 F.Supp. 991 (M.D. Ala.1997) (holding that use of derogatory term, standing alone, is not necessarily direct showing of discrimination, but rather must be considered in context of its use); *Kriss v. Sprint Comm'ns Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (concluding that use of term "bitch" did not indicate "a general misogynist attitude" as it was directed at only one woman and thus was not "particularly probative of gender discrimination"); *Blankenship v. Warren County Sheriff's Dept.*, 939 F.Supp. 451 (W.D. Va. 1996) ("Even though the term "bitch" is usually offensive, it is not necessarily gender-based."); *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996), *overruled in part on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (calling someone "bitch" fails to establish conclusively that such harassment "was motivated by gender rather than by a personal dislike unrelated to gender"); *Panelli v. First American Title Ins. Co.,* 704 F. Supp.2d 1016 (D. Nev. 2010) ("Use of the word, 'bitch,' standing

[1]This Court has repeatedly held that we analyze cases brought under the Human Rights Act consistent with the manner in which federal anti-discrimination laws are applied, barring statutory distinctions or other compelling reasons. *See Hanlon v. Chambers*, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995).

alone, is not sufficient to show gender bias."); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C. Cir.1995) (considering plaintiff's evaluation by supervisor that she was a "bitch" in conjunction with accompanying commentary that plaintiff was "extremely difficult on secretarial and support staff" as stating gender-neutral concerns about plaintiff's interpersonal relations with co-workers, rather than discriminatory considerations); *Williams v. KETV TV., Inc.*, 26 F.3d 1439, 1441 n. 2 (8th Cir. 1994) (affirming judgment for employer on change of sex and race discrimination despite evidence at trial that personnel involved in hiring decision referred to plaintiff as "black bitch"); *Moulds v. Wal-Mart Stores, Inc.*, 935 F.2d 252, 253-54 n. 1, 256-57 (11th Cir. 1991) (affirming judgment for employer on sex and race discrimination charge despite evidence that employer told plaintiff she would have to be more of a "bitch" to become manager); *Bressner v. Caterpillar, Inc.*, 2008 WL 345550 (C.D. Ill. Feb. 7, 2008) (finding that "[n]o jury would find that referring to a woman as a 'bitch,' even a 'f*cking bitch,' . . . is evidence of a discriminatory intent.").

As the Eighth Circuit explained in *Kriss*:

> While these comments are rude, they do not furnish much proof of gender discrimination. Calling a particular person ugly or using an epithet characterizing a person as unpleasant is not particularly probative of whether someone would refuse to promote someone else for improper reasons. Specifically, the word "bitch," it seems to us, is not an indication of a general misogynist attitude. Rather, it is a crude, gender-specific vulgarity, which in this case was directed toward only one woman, rather than women in general. (We note the existence of many vulgar epithets that are used only of men that, we believe, would not be indicative of animus against males.).

58 F.3d 1276. Additionally, the mere fact that Mr. Keifer is male and the respondents are female is not indicative of gender bias. *Cf. Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 282 (4th Cir.2000) ("Law does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion."); *see also Phillips v. Raytheon Applied Signal Technology, Inc.*, 2013 WL 5440802 (D. Md. 2013). Likewise, the law does not "blindly ascribe" gender animus to all conflicts between men and women, particularly when the source of the conflict is gender-neutral. In this case, it is perfectly clear from a plain and objective reading of the comments that the source of Mr. Keifer's vitriol was not the respondents' gender but his perception that the respondents were lazy. Further, his complaints of alleged laziness were corroborated by very fact-specific instances of their purported indolence–none of which had anything to do with the fact that they were women.

The majority's decision in this case is as baseless as that once bemoaned by my colleague Chief Justice Davis in *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W.Va. 86, 522 S.E.2d 180 (1999). As then-Justice Davis aptly stated in her dissent:

> Where the majority goes seriously astray is in its fundamental misconception that anti-discrimination laws were intended to completely eliminate any and all bickering and even profanity from the workplace. As the United States Supreme Court has made clear, "Title VII does not prohibit all verbal or physical harassment in the workplace." Rather, it is directed only at prohibited discriminatory conduct.

206 W. Va. at 99-100, 522 S.E.2d at 193-94 (Davis, J., dissenting) (citations omitted). The majority, now joined by Chief Justice Davis, finds itself veering seriously astray of established employment law principles. As the United States Supreme Court has stated:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely *because the words used have sexual content or connotations.* "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) and emphasis added).

"[F]ederal as well as state anti-discrimination laws are not codes of civility. Employers, much as they would like, simply cannot rid the workplace of all instances of inappropriate employee behavior." *Fairmont Specialty*, 206 W. Va. at 103, 522 S.E.2d at 197 (Davis, J., dissenting) (citations omitted). The alleged discriminatory activity in this case was so fleeting, isolated, and legally inconsequential that I am forced to echo the sentiments of Chief Justice Davis fifteen years ago when she poignantly queried: "And we wonder why it is so difficult to attract new employers to this State?" *Id.* at 103, 522 S.E.2d at 197.

Therefore, for the reasons stated above, I respectfully dissent.