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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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.

Honorable Thomas C. Evans, III, Judge
Circuit Court of Jackson County
Civil Action No. 11-C-26

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to grant judgment as a matter of law to defendants on plaintiffs' claims of hostile work environment where the evidence, even considered in a light most favorable to plaintiffs, failed to prove that defendants' conduct involved "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature hav[ing] the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment;" that it "was based on the sex of the plaintiff[s]; or that it was "sufficiently severe or pervasive to alter the plaintiff[s'] conditions of employment and create an abusive work environment, contrary to this Court's decision in *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), and its progeny.

2. The trial court erred by allowing plaintiffs' claims for punitive damages to go to the jury and then by failing to either set aside or substantially reduce the jury's award of punitive damages because the evidence failed to satisfy standards adopted by this Court in *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny, for the imposition of punitive damages as there was no evidence that defendants' posting of the redacted comments of an employee about the plaintiffs involved "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others," and the Human Rights Act does not provide for the award of punitive damages in the absence of the same standard for punitive damages that would apply to other civil litigation.

II. STATEMENT OF THE CASE

A. PROCEDURAL SUMMARY

This is a hostile work environment case filed by two long-time female employees at the Ravenswood Aluminum plant arising from unflattering comment cards authored by one of the employees' co-workers and posted on a plant bulletin board. Although plaintiffs' names were redacted from the comment cards; the comment cards were taken down after plaintiffs complained to their union; and plaintiffs had used the same language on the comment cards in the workplace, including with reference to themselves, plaintiffs contended that after the cards were posted, they believed they were shunned by coworkers, although they conceded that they may have been shunned because in addition to suing defendants, they also sued their coworker.

No adverse employment action was taken against plaintiffs and they continue to work at the plant; so, they suffered no economic damages. Even though the comment cards were not authored by management; did not identify plaintiffs by name; were redacted to some degree to minimize their co-worker's use of offensive language; contained a gender-neutral response by the employer's CEO; were removed from the bulletin board once plaintiffs complained to their union; and plaintiffs had used similar language in the workplace, the jury awarded each of the plaintiffs a total of $250,000 in compensatory damages and $250,000 in punitive damages, for total jury verdict of $1 million.

Defendants filed timely post-trial motions for judgment as a matter of law based upon the failure of plaintiffs' evidence to satisfy this Court's standards for claims of hostile work environment and punitive damages, but on September 3, 2013, an order was entered denying defendants' post-trial motions. It is from this order that defendants are pursuing their appeal.

B. EVIDENCE AT TRIAL

Although not a party to this appeal, plaintiffs, Sharon Griffith and Lou Ann Wall, sued a co-worker, Larry Keiffer, who was the first witness at trial. App. 1020. Mr. Keiffer was a union worker in the plate department at the Ravenswood Aluminum plant. Id.

On October 12, 2009, Mr. Keiffer wrote some comment cards about plaintiffs. App. 1024. He referred to Ms. Griffith as a "lazy ass," as a "worthless bitch," and described her work habits as "bullshit." App. 1025. He also referred to Ms. Wall as a "lazy ass." App. 1026. Mr. Keiffer testified that he submitted the comment cards because he was concerned about the abuse of overtime at the plant. App. 1034. He also testified that he was angry "[b]ecause the plant was in trouble" and he was disturbed about plaintiffs' abuse of overtime. Id.[1]

---

[1] Mr. Keiffer was not the only employee who testified about plaintiffs' less than exemplary work habits. Mark Whitt, who worked in the same department as plaintiffs, testified as follows:

> Q. Okay. Have you ever personally experienced . . . any issues with either Ms. Wall or Ms. Griffith in the performance of their job duties?
>
> A. Yes, I have.
>
> Q. Can you tell us about that?
>
> A. A lot of issues; leaving the job, not showing up on the job, taking off on buggies that has tools on them and stuff we need. When the – they need to be on ground watch – you know, a man lift – they will disappear. . . .
>
> Q. Could you – did you have any issues with their performance as ground watch for you?
>
> A. We was up in a platform working on a gas line, and the boy I was working with got my attention that Ms. Wall had disappeared. So, we then come down out of the air and we waited until she come back . . . .

App. 1374-1376. Another one of plaintiffs' coworkers who worked alongside them, Todd McCoy, provided specifics regarding problems with plaintiffs' work habits, including an incident where he and Mr. Keiffer had to complete work originally assigned to Ms. Wall. App. 1395. Finally, another of plaintiffs' coworkers who worked alongside them, Tom Brown, testified that, "They seem to slack and not do the work they should." App. 1402.

For example, when Mr. Keiffer had previously worked with Ms. Griffith, she failed to show up as his "fire watch," whose responsibility is to watch a welder, like Mr. Keiffer, to make certain that he does not catch on fire while performing his duties. App. 1036-1037. Ultimately, because Ms. Griffith did not appear to perform her duties as "fire watch," Mr. Keiffer was reprimanded by his supervisor for failing to perform his duties. App. 1043.

The comment cards were not posted as written by Mr. Keiffer, but were redacted:

> Ask _____ supervisor what he had his crew doing in Project Maintenance on Oct. 9th on evening shift! I understand Project has at least 3 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 not 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.
>
> Lazy a__ _____ (employee) was in here on overtime again on Saturday, 9th doing "NOTHING". Smoking cigarettes and drinking coffee 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!
>
> _____ (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'm 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___.
>
> Lazy a__ _____ (employee) doubled over today and sat on her worthless a__ and done "NOTHING" again!! Smoked cigs and drank coffee hours.

App. 1766-1769. Because plaintiffs were the only two women who worked in the project maintenance department, App. 1026, however, Mr. Keiffer's coworkers surmised that he was

referring to plaintiffs, App. 1029.[2] Ultimately, Mr. Keiffer apologized for his language, but not until both he and defendants were sued for a hostile work environment. App. 1027.

After his comments were posted, Mr. Keiffer conceded that employees discussed what he had posted. App. 1030-1031. Because Mr. Keiffer had posted his comments anonymously, App. 1045, he testified that he was never subjected to discipline by management. App. 1032.

Mr. Keiffer was adamant that he did not write the comment cards about plaintiffs because they were women; rather, he testified that, "I was trying to get management's attention about the overtime abuse at the plant." App. 1035. Even though Mr. Keiffer acknowledged the language was inappropriate, App. 1039, he testified that both plaintiffs used "rough language": "I've heard them say the word bitch, and shit, and damn, and actually heard them call each other lazy bitches," id. Finally, Mr. Keiffer testified that he used similar language with respect to male coworkers who were not performing their duties. App. 1044-1045.

Plaintiffs' second witness at trial was Jerry Carter, the plant's vice-president of human resources. App. 1047. Mr. Carter explained that the company's policy at the time Mr. Keiffer's comments were posted was to post everything with the exception of redacting employee names and inflammatory comments that would still maintain the "spirit of the comment." App. 1049. For example, when Mr. Keiffer's comments were posted the word "bitch" was redacted to indicate "b****." App. 1050-1051.

The process was that comment cards would be received, including by female employee, Carol Crow; the comments would be redacted to omit employee names and any inflammatory

[2] As the company's CEO, Melvin Lager, explained however, there were about 1,000 employees at the plant and he was not aware at the time Mr. Keiffer's redacted comments were posted that there were only two women in the Project Maintenance Department. App. 1088-1089. Indeed, Mr. Lager testified that he "thought there was a higher percentage of women on the shop floor." App. 1089.

language; the comments would then be typed; the typed redacted comments would be reviewed by the CEO; and then posted to a comment board with a response by the CEO. App. 1050-1052. Mr. Keiffer's comments were not posted in isolation, but were posted as part of a larger group of comments of "15, 20, or 30 other questions at the same time," comprised of "seven pages." App. 1069, 1071.[3] Finally, the comment board was located in a long corridor that included a number of other bulletin boards with various governmental postings, human resources information, and job notices. App. 1101-1102.

There was absolutely no evidence that the company directed the postings towards plaintiffs nor that defendants did anything to bring particular attention to Mr. Keiffer's comments; rather, the evidence was that Mr. Keiffer's redacted comments were posted along with a number of other comments on a bulletin board.

Mr. Carter conceded that Mr. Keiffer's language was inappropriate in the workplace, but testified that such language was occasionally used in the plant and the purpose of the comment program was to permit employees to express themselves. App. 1058-1059. Moreover, as Mr. Carter noted, comments were redacted in a manner so as not to actually include offensive language. App. 1061. Finally, both Mr. Carter and Melvin Lager, the company's CEO, conceded that the company could have done a better job of redaction. App. 1072, 1083.

Although perhaps easy to second-guess the policy in hindsight, its purpose was not to subject any employee to improper harassment, but Mr. Carter explained, App. 1063, as follows:

> I think what the purpose of it was that this other redaction and the purpose of the system, was to, again, to address the communications issues that were going on in the plant and to meet the commitment that had been made by the CEO to place the comments that he received up on the board and answer them.

[3] Obviously, because the number of male employees in the plant far exceed the number of female employees in the plant, the number of postings criticizing male employees was also greater. App. 1110.

> Now, looking back, it could have been done better. It could have been done more effectively. And the same message could have been communicated and answered in a better way. But that was not the commitment that was understood that had been made.

Likewise, although Mr. Lager testified, "[T]he whole purpose, 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," App. 1098-1099, he also conceded he "Could have done a different job in retrospect. Should have done a better job in retrospect. Sorry that I did it," App. 1083.

Still, Mr. Lager testified that he had made a commitment to the workers to permit them to express to him their concerns about plant operators and to publicly respond to those concerns: "I wasn't sorry that I posted it, because I wanted to live up to the commitment that I made that I would post everything, with some redactions. Could have done a better job. Should have done a better job with the redactions." Id.

Again, Mr. Keiffer's comments were not posted without redaction. Moreover, they were posted with the following comments by the CEO: "We need everyone fully engaged and productive;" "As I responded to a similar comment, we need everyone to be fully engaged and productive;" "This doesn't seem to be the best use of time or equipment;" and "This kind of behavior is not going to contribute to our survival. Again: everyone fully engaged and productive: that's the key," App. 1064, 1090, which obviously were gender neutral and in no way, shape, or manner validated the use of any inappropriate language in the workplace. Finally, "when the union brought the comments to the attention of the CEO, they were removed almost immediately after the notification. Within a matter of two or three days, they were taken down . . . ." App. 1066; see also App. 1087.

So, that is the plaintiffs' case – a coworker submitted anonymous comment cards complaining about plaintiffs' work ethic and using inappropriate language; the company redacted the inappropriate language but not sufficiently so as to avoid a strong inference that the complaints were about plaintiffs, who were women; the company's CEO responded in a completely gender-neutral fashion reminding all employees of the need to work productively, and after the union complained, they were removed almost immediately, appearing on the bulletin board for only two or three days.

Based upon this evidence, the jury awarded plaintiffs, who had no economic damages since they both continue to work at the plant and suffered no other adverse employment action, a total of $500,000 in emotional distress damages and a total of $500,000 in punitive damages, for an aggregate award of $1 million. App. 1536-1537.

Plaintiffs' witness, Sharla Rose, another plant employee, whom plaintiffs offered regarding the reaction of plant employees to the posting, testified that she was not offended by the posting, but just "shook her head;" that she did not work with plaintiffs and, accordingly, did not know from the posting that it referred to plaintiffs; and that "some of the employees were upset about it, and some were laughing about it," App. 1126-1128. Although Ms. Rose testified that Ms. Griffith complained to her about the postings and appeared upset, App. 1128-1129, Ms. Rose also testified that plaintiffs were not treated any differently after the postings: "Q. How did folks act towards these ladies after it was posted that you saw? A. I don't think there was – that I'm aware of, I don't think there was anybody that treated them any different . . . ," App. 1131.[4]

[4] Likewise, another coworker called at trial by plaintiffs, Paul Spence, testified that his opinion of plaintiffs did not change after the posting. App. 1113 ("Q. Did these comment cards change your opinion of Ms. Griffith and Ms. Wall? A. No.").

Another plant employee, Ronald Barton, testified that he was not even aware of the posting until Ms. Wall brought it to his attention in his capacity as a union grievance official. App. 1182. Mr. Barton also testified that at the time Ms. Wall brought the posting to his attention, Ms. Griffith was not even working in the plant, but was off on vacation. App. 1188. Moreover, even though plaintiffs complained at trial that management made no effort to ascertain the author of the anonymous comments, Mr. Barton admitted that plaintiffs suspected its authorship from the beginning, App. 1189, though neither reported their suspicions to management. Finally, although plaintiffs complain that the comments were posted failing to redact the letter "b," Mr. Barton, plaintiffs' own witness, admitted that he referred to the comment box as a "bitch box" himself. App. 1197.

Another one of plaintiffs' coworkers, Charles Bennett, testified that although there was some discussion in the plant about the posting, "every time they posted anything like that it was – even outside of this case, anything that was lunchroom scuttlebutt to talk about those cards and things like that." App. 1207. Moreover, like Mr. Barton, Mr. Bennett testified that it was clear to workers who knew the plaintiff that the author of the comments was Mr. Keiffer. App. 1208. Mr. Bennett testified to submitting his own comment card directed to the plant's CEO that stated, "Why do we have to do what you say?" App. 1210-1212. Likewise, Ms. Griffith not only had submitted comment cards herself, but she testified that "it is a legitimate interest of the employer to give its employees an opportunity to make comments about the workplace or to ask questions." App. 1314.

At the time of trial, Ms. Wall had worked at the plant for thirty-four years. App. 1227. Not only did her father work at the plant before her, but her husband also works at the plant. App. 1228. Ms. Wall described the atmosphere at the plant as friendly towards female workers:

"I've been there so long I consider – I mean, it was like working with family. 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.

Ms. Wall also admitted that during her more than three decades in the plant, both she and coworkers would "cuss" and use "rough language":

> Q. Were you someone who – well, let me ask you this: Would you occasionally, from time to time, hear what we might call rough language, cuss words, different jokes that maybe weren't just so-so in the workplace?
>
> A. Oh, yeah. . . .
>
> Q. And did you joke also?
>
> A. Yeah.
>
> Q. Did you use rough language at times?
>
> A. Maybe not as bad as theirs, but yeah, I've said an occasional bad word.

App. 1230-1231. In fact, Ms. Wall testified that although she estimated hearing "dirty jokes" more than fifty times a year, she never complained to management because she "consider[ed] it shop talk." App. 1232-1233. Finally, even though the only gender-related aspect of the posting was "b----," Ms. Wall admitted that not only did she use the word "bitch" in the workplace in conversation ("Yes, I may have"), she admitted <u>that she had referred to herself in the workplace using that term</u> ("I may have"). App. 1286.

Just as Ms. Wall conceded that both her and her coworkers had engaged in the use of inappropriate language and joking, she testified that Mr. Keiffer's comments first came to her attention when other employees were "joking" about them. App. 1237. Indeed, she testified, "They were joking with me . . . . And that is when I became aware of it." Id. Ms. Wall testified that she immediately recognized that the comments were about her and Ms. Griffith and she went

to either Mr. Barton or Mr. Bennett, union grievance representatives, to complain about the cards. App. 1242. She testified that, "I just wanted them down" and that they were taken down two or three days later. Id.

Although Ms. Wall testified that several coworkers spoke with her about the posting, most of the employees she identified, including Mr. Barton, Mr. Bennett, Mr. Morris, and her husband, became aware of it because it was brought to their attention by Ms. Wall. App. 1243.[5]

Ms. Wall conceded that she never complained to management about the posting, but excused her failure to complaint by noting that the CEO was involved in deciding to post the redacted comments with his response. App. 1243-1244. She also testified about a previous incident in which she had complained, but she admitted that the company took her complaint seriously to the point of hiring a documents examiner to determine the authorship of a note of which she had complained. App. 1244-1246.

Of course, as Ms. Wall conceded that she never complained to anyone in management about the posting, but rather chose to file a lawsuit bringing her complaints to management's attention to the first time, management was unable to address her non-asserted complaints. App. 1247-1248.

Other than her initial negative reaction to having been directed to the posting by her coworkers in a joking manner, Ms. Wall's testimony regarding the aftermath of the incident involves her subjective feelings: "I just feel like they don't want us there;" "They don't want to talk to us;" "You just always wonder when you see the guys over in the corner and talking if they're talking about you now or – I just feel like there is," App. 1248, with absolutely no

[5] Likewise, Ms. Griffith admitted that she brought the posting to the attention of her coworkers on her own. App. 1317-1318.

corroboration of her subjective feelings. Moreover, Ms. Wall admitted that no adverse employment action was taken against her. App. 1249. When asked why she would sue when the company took no adverse employment action against her, Ms. Wall testified with respect to the CEO, "[H]e never said they were wrong . . . I mean, you're paying a guy a million-plus salary to put up stuff like this . . . .," App. 1250, to which there was an objection as her testimony regarding the CEO's salary was described as "ridiculous," id.

Like Ms. Wall, Ms. Griffith was a long-term employee at the plant, having worked there for 35 years at the time of trial. App. 1306. Also, like Ms. Wall, Ms. Griffith has a close relative working at the plant, her brother. Id. Finally, like Ms. Wall, Ms. Griffith admitted that she had no complaint regarding the existence of any hostile work environment prior to the posting of a redacted version of Mr. Keiffer's comments: "Most of them, young men in there, are my son's age. And I – I had no problems with them . . . Some of them I like more than others, but they were like family to me." App. 1306-1307.

As previously noted, Ms. Griffith was not even working at the plant when the posting occurred, but was on vacation. App. 1308. While on vacation, Ms. Griffith testified that unidentified coworkers called her about the posting. Id. She stated that she went to the plant, looked at the posting, and went to the union hall. Id. Ms. Griffith testified that she was upset by the posting and described it as "not acceptable." App. 1309.

Like other witnesses, Ms. Griffith testified that she was "98 percent sure" that Mr. Keiffer had authored the posting. App. 1311. But, like Ms. Wall, Ms. Griffith did nothing to bring her complaint to the direct attention of management. Id. Indeed, Ms. Griffith chose not to bring her complaint to the direct attention of management even though she has filed between 50 and 60 grievances during her employment. App. 1319.

Also, like Ms. Wall, Ms. Griffith offered only very vague and speculative testimony about the impact of the posting on her relationship with her coworkers. She testified that nothing "change[d] immediately." App. 1309. Rather, she conceded that to the extent attitudes changed, that change occurred "maybe because of the suit," which came much later and was her decision, not that of the company. Id.[6] Even then, Ms. Griffith testified about the reaction of a single worker whom she described as friendly prior to the lawsuit, but whom she stated, "He don't even talk to me now," App. 1310, and otherwise speculated, as did Ms. Wall, that "I see people and wonder if they're laughing at me or making fun of me," App. 1313. Indeed, when asked, "But isn't it true that you don't really know if they're laughing at you, that is just your assumption . . . ?" Ms. Griffith responded, "That's correct." App. 1318.

Of course, when a coworker sues one's employer, its CEO, <u>and a coworker</u> for damages based upon a redacted posting that was displayed for two or three days at a plant that has had a history of financial problems, the negative reaction of coworkers to that lawsuit is no evidence of a hostile work environment based upon gender. Moreover, as Mr. Whitt, one of plaintiffs' coworkers and a union official explained, plaintiffs brought attention to themselves by their confrontational behavior after they filed suit: "Well, it seems like the last eight months or so, anything you say or do, they want to pull out a notebook and start writing stuff down . . . wanting to get other people in trouble for it." App. 1380.

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[6] Likewise, one of plaintiffs' coworkers and an union official, Mr. Whitt, testified that it was plaintiffs' lawsuit, not two or three days of the posting of Mr. Keiffer's comments, that created a chill among several of plaintiffs' coworkers: "It wasn't so much after the comment cards, it was when the lawsuit come out I believe." App. 1393. Similarly, another one of plaintiffs' coworkers, Mr. McCoy, testified that he no longer joked with plaintiffs because he was "Afraid to," and when ask why, he responded, "Because this lawsuit." App. 1396. Obviously, it should not have surprised plaintiffs that when they chose to sue Mr. Keiffer, a coworker, based upon his comment cards that their other coworkers might be somewhat circumspect in their dealings with plaintiffs lest they be subjected to suit as well.

Ms. Griffith admitted that she had been the subject of discipline during her employment, but never felt that it was ever based upon her gender. App. 1311. She also conceded that, like Ms. Wall, she suffered absolutely no adverse employment decision as a result of either the posting or her suit regarding the posting. App. 1312-1313.

Like Ms. Wall, Ms. Griffith admitted using foul language in the workplace. App. 1319. Also, like Ms. Wall, Ms. Griffith admitted to using the very word that is the linchpin for their claim that Mr. Keiffer's posting had gender connotations:

> Q. Ms. Griffith, have you ever seen those bumper stickers on cars that look like a ribbon, and say things like, "Support our troops"?
>
> A. Yes, I have. . . .
>
> Q. Isn't it true that there was a sticker on one of your toolboxes for years, that looked like a ribbon, and it said, "Support bitching."
>
> A. I don't know how long that was on my toolbox for, but I did see it on there not very long there, and I did take it off.

App. 1319-1320 (emphasis supplied). Not only did Ms. Griffith carry a toolbox with the word of which she now complains prominently displayed, she carried another toolbox with a sticker which read, "Commandment number eleven, thou shalt not bitch." App. 1322-1324 (emphasis supplied).

Moreover, Ms. Griffith testified that the word "ass," which is the other word plaintiffs complained about as having been offensive, was used on published comment card complaining that one male employee was a "smart ass" and another male employee did a "half-ass job." App. 1324-1325. So, the evidence was undisputed that as to that offensive word, it had been used with respect to both males and females, and neither Ms. Wall nor Ms. Griffith ever complained about

its use in that context, or use of the word "bitch" in any other context. To the contrary, both admitted to using the word themselves in the workplace.[7]

Ms. Griffith's direct testimony consumes all of only thirty pages of trial transcript. She offered no testimony, just as Ms. Wall did not, that she missed a single day of work as a result of any emotional distress as a result of the publication of Mr. Keiffer's comments for two or three days on a company bulletin board. She offered no testimony, just as Ms. Wall did not, that she suffered any physical symptoms such as loss of sleep, loss of appetite, or other manifestation of emotional distress. She offered no testimony, just as Ms. Wall did not, that she sought any medical, psychiatric, psychological, or any other treatment whatsoever as a result of any emotional distress.[8]

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[7] Again, one of plaintiffs' coworkers and a union official, Mr. Whitt, testified extensively about plaintiffs' own use of the offensive language of which they now complain: "Ms. Wall has called me an A-hole before;" "she asked him [her husband] to come over and kick my A;" "she [Ms. Wall] said that her mom called her a shit-stirring B, and was joking around about it and telling everybody. App. 1381. Mr. Whitt also testified about the stickers on Ms. Griffith's toolboxes referencing the word of which plaintiffs now complain, and indicated that those stickers had been on her toolboxes for years. App. 1382-1383. Mr. Whitt also testified about an incident in which he complained about Ms. Wall touching him in an inappropriate manner to which Ms. Wall responded by calling him "queer." App. 1383-1384. Yet, these same plaintiffs come before this Court with a verdict of $1 million because the company posted a coworker's comment anonymously referring to them using the redacted word they both admitted to using in the workplace for two or three days. Another employee, Mr. McCoy, not only corroborated other evidence regarding the stickers on Ms. Griffith's toolboxes using the word of which she now complains, but testified that Ms. Wall once "grabbed me by the butt, one hand on each cheek and kind of squeezed or kneaded it like that and said something about me having a tight butt or something like that." App. 1398. Another employee, Mr. Brown, testified that Ms. Wall told him, "her mom had – excuse my language – but called her a shit-stirring bitch." App. 1402. Mr. Brown also testified that both plaintiffs refer to him as "a little baldheaded prick most of the time." App. 1403.

[8] Ms. Wall's husband, Terry Wall, testified that his wife was tearful over the posting. App. 1329. Like his wife, Ms. Wall, Mr. Wall used his testimony as an opportunity to get the figure of millions of dollars before the jury in a non-responsive answer to a question on direct examination: "Q. Has it changed her? A. Yeah. I can say it changed her, yeah, because it's just – she has no desire to do anything anymore, she thinks everyone's against her, and then when you post something like that for a thousand and some people to see, how could a CEO that makes millions and knows what his job's supposed to be – MR. SLAUGHTER: Objection, your Honor. THE WITNESS: -- post something like that. THE COURT: Objection sustained. MR. AUVIL: Nothing further." App. 1330.

Rather, after Ms. Wall and Ms. Griffith testified to being very upset because of the posting, which was justified under the circumstances, the jury awarded them the $1 million in compensatory and punitive damages after Ms. Wall and her husband incorrectly[9] referenced as the CEO's salary, which defendants respectfully submit was not only unwarranted based upon the evidence in a light most favorable to plaintiffs, but not coincidental.

This may have been a case of poor judgment on the part of the defendants in their implementation of a policy designed to improve communications between labor and management, but it was clearly not a case of any hostile work environment based on gender.

III. SUMMARY OF ARGUMENT

This Court has held, "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." Syl. pt. 7, *Hanlon*, supra (emphasis supplied).

Here, there was no evidence of any "unwelcome sexual advances" other than by two male employees who complained about Ms. Wall's conduct towards them; no evidence of "requests for sexual favors;" no evidence of "other verbal or physical conduct of a sexual nature" unless the mere use of the word "bitch" which both plaintiffs admitted that they used themselves in the workplace, including with reference to themselves, is considered "of a sexual nature;" no evidence that the conduct complained of had "the purpose or effect of unreasonably interfering

[9] Following the close of plaintiffs' case, Mr. Lager was recalled to the stand to testify that his annual salary was $234,000 as CEO. App. 1364. Respectfully, however, it appears that plaintiffs' strategy was clear, i.e., to blame the CEO for the policy of posting the notices and reference his allegedly million dollar salary.

with an individual's work performance;" and not evidence that it created "an intimidating, hostile, or offensive working environment" as that concept has been defined by this Court.

This Court has also 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." Syl. pt. 5, *Hanlon*, supra (emphasis supplied).

Here, the posting of a coworkers' redacted comments for a period of two or three days, which were removed at the union's request based upon plaintiffs/employees' complaint, not to management, but to the union, within the full context of all the evidence presented at trial even considered in a light most favorable to plaintiffs, was simply not "based on the sex of the plaintiff[s]" or "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment" as a matter of law.

Consequently, unless an isolated incident in which an employer posts an employee's criticisms of coworkers that include a redacted reference to the word "bitch" is automatically "based on the sex of the plaintiff" and "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment," this Court should reverse the judgment of the Circuit Court of Jackson County and enter judgment for defendants.

Likewise, this Court has held, "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,*

supra (emphasis supplied), and the Human Rights Act does not provide for the award of punitive damages in the absence of the same standard that would apply to other civil litigation.

Here, the company conceded that it could have handled the redactions in a better manner, but because the company's CEO had promised employees that he would consider, respond, and post the comments and responses, the company did so, redacting information, but obviously in a manner not sufficient to have avoiding upsetting plaintiffs. Still, particularly where plaintiffs were awarded a total of $500,000 in emotional distress damages despite the absence of any objective evidence that they suffered severe emotional distress, an award of $500,000 in punitive damages was inappropriate and should have been set aside by the trial court. Accordingly, this Court should reverse the order of the Circuit Court of Jackson County and enter judgment for the defendants with respect to the punitive damages award.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This is an important case not only to defendants, but to all West Virginia employers. Here, we have two female employees who both testified that until they were advised that an anonymous posting using the same language both had frequently used in the workplace, if not worse, they were both satisfied with their work environment. Both employees also testified that the posting was on the company bulletin board for only two or three days; that neither of them complained about the posting directly to management; that the posting was removed after the union approached management about removing the posting; and that they suffered no adverse employment decision by the company; rather, their primary complaints were that they were naturally upset by the posting and suspected that coworkers were shunning them, but conceded that it may have been the lawsuit that produced what they subjectively interpreted, but had no real evidence to support, was shunning by their coworkers.

Consequently, defendants respectfully submit that this Court should scheduled this case for a full Rule 20 argument as entry of a judgment in a hostile work environment case based upon the evidence presented, even if viewed in a light most favorable to plaintiffs, is unprecedented in West Virginia and, accordingly, involves "issues of first impression." Moreover, if employer initiatives to seek greater input from their employees that result in tension between employees is sufficient to create an actionable "hostile work environment" based upon the testimony of one or two employees that they felt "shunned" by their coworkers after they complained about a coworker's comments and filed suit against their employer, then every employer is potentially at risk and this case involves "issues of fundamental public importance."

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review of the denial of a motion for judgment as a matter of law in a hostile work environment case is *de novo*. Syl. pt. 1, *CSX Transp., Inc. v. Smith*, 229 W. Va. 316, 729 S.E.2d 151 (2012). Likewise, the standard of review of an award of punitive damages in a hostile work environment case is *de novo*. Syl. pt. 14, *CSX Transp.*, supra.

Here, the trial court erred, as a matter of law, by failing to grant judgment to defendants on plaintiffs' claims of hostile work environment where the evidence, even considered in a light most favorable to plaintiffs, failed to prove (1) that the conduct involved "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature hav[ing] the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment;" (2) that the conduct "was based on the sex of the plaintiff[s]; or (3) that the conduct was "sufficiently severe or pervasive

to alter the plaintiff[s'] conditions of employment and create an abusive work environment," as this Court required in *Hanlon* and its progeny.

Likewise, the trial court erred, as a matter of law, by failing to grant judgment to defendants on plaintiffs' punitive damages claim where the evidence, even considered in a light most favorable to plaintiffs, failed to prove that defendants acted with "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear," as this Court required in *Mayer* and its progeny.

Again, this may have been a case of poor judgment on the part of the defendants in their implementation of a policy designed to improve communications between labor and management, but it was clearly not a case of any hostile work environment based on gender.

B. THE TRIAL COURT ERRED BY FAILING TO GRANT JUDGMENT AS A MATTER OF LAW TO DEFENDANTS ON PLAINTIFFS' CLAIMS OF HOSTILE WORK ENVIRONMENT WHERE THE EVIDENCE, EVEN CONSIDERED IN A LIGHT MOST FAVORABLE TO PLAINTIFFS, FAILED TO PROVE THAT DEFENDANTS' CONDUCT INVOLVED "UNWELCOME SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, AND OTHER VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE HAV[ING] THE PURPOSE OR EFFECT OF UNREASONABLY INTERFERING WITH AN INDIVIDUAL'S WORK PERFORMANCE OR CREATES AN INTIMIDATING, HOSTILE, OR OFFENSIVE WORKING ENVIRONMENT;" THAT IT "WAS BASED ON THE SEX OF THE PLAINTIFF[S]; OR THAT IT WAS "SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE PLAINTIFF[S'] CONDITIONS OF EMPLOYMENT AND CREATE AN ABUSIVE WORK ENVIRONMENT."

In *Frame v. JPMorgan Chase*, 2013 WL 3184755 (W. Va.), this Court recently affirmed summary judgment for an employer accused of maintaining a hostile work environment under circumstances similar to this case.

First, this Court reiterated, "'[w]e have consistently held that cases brought under the West Virginia Human Rights Act, W. Va. Code, 5–11–1, et seq. , are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise. E.g., *West Va. University v. Decker*, 191 W. Va. 567, 447

S.E.2d 259 (1994); *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986).' *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482–483, 457 S.E.2d 152, 159–160 (1995)." Id. at *2 n.2.

Second, this Court restated, "'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.' Syl. pt. 5, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." Id. (citation omitted).

Third, this Court repeated, "'"workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue . . . 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." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,] 25 [1993], 114 S. Ct. [367], 372 [126 L.Ed.2d 295] (Ginsburg, J., concurring).' *Willis v. Wal–Mart Stores, Inc.*, 202 W. Va. 413, 416, 504 S.E.2d 648, 651 (1998) (quoting *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998))." Id.

Finally, this Court concluded that a hostile work environment plaintiff "'must have adduced evidence to show that but for the fact of her sex, she would not have been the object of harassment.' See *Conrad*, 198 W. Va. at 372, 480 S.E.2d at 811."

In *Frame*, as in this case, although there was some evidence that the plaintiff may have been subjected to inappropriate comments, that evidence simply failed to demonstrate a

workplace environment that was "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment."

The Court noted that, "While the record on appeal suggests juvenile and inappropriate behavior by Respondent Martindill, the conduct was not 'based on the sex' of petitioner." Id. at 3. Ms. Martindill, who was branch manager at the bank at which Ms. Frame worked, engaged in conduct much more egregious than that complained of in this case:

> Petitioner witnessed Respondent Martindill engage in such behavior as kissing male customers, telling male employees that she was a sex addict, talking to a male employee about oral sex and "crotchless pantyhose[,]" and generally discussing her sexual encounters. None of these actions, however, were in any way related to petitioner's gender. Petitioner testified that she was treated no worse than any other employee at the Bae Mar branch. In fact, most of the conduct about which petitioner complains was directed at a male employee or male customers, and a great deal of the conduct—for example, asking a male employee to borrow money, sleeping at work, feigning illness while lying on the office couch, or telling employees that her boyfriend was threatening to kill her—was not sexual in nature.

Id. at *3. Based upon this evidence, the Court concluded, "Petitioner has not presented evidence sufficient to meet the second prong of the prima facie test." Id.

Likewise, in the instant case, the evidence was that both plaintiffs agreed that no hostile work environment existed prior to the posting of Mr. Keiffer's comments; that neither plaintiff had complained to anyone about the company's policy of posting employee comments; that both plaintiffs admitted to using the same language of which they now complain; that both plaintiffs admitted to using the same or similar language with respect to themselves and their coworkers; that similar language had been used in postings referencing male employees; that the CEO's response to Mr. Keiffer's comments made no reference to gender; and other than being initially and understandably upset about being the subject of the postings, that neither plaintiff had any evidence beyond their speculation that they were viewed differently by their coworkers either

after the incident or, more likely, after they filed suit. Just as in the *Frame* case, plaintiffs simply failed to present sufficient evidence to meet the "based on sex" prong of the *Hanlon* test for a "hostile work environment."

Another similarity between *Frame* and this case is the lack of any substantial post-incident evidence that the conditions of plaintiff's work environment were "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment."

In *Frame*, like plaintiffs' unsubstantiated, subjective complaints of being "shunned" by their coworkers, either after the incident or after they filed suit, Ms. Frame asserted that the fact that her employer failed to promote her to branch manager allegedly as a result of her complaints about Ms. Martindill's conduct and that her workload had subsequently increased. This Court, however, rejected this as sufficient evidence of a severe and pervasively hostile work environment such that the conditions of her employment were altered:

> As to the lack of communication by [Respondent JPMorgan Chase] with the branch office and increased workload, [petitioner] has not presented sufficient evidence to show that these events created a hostile work environment caused by her gender or in retaliation for reporting complaints about [Respondent] Martindill. [Footnote omitted.] The task of a heavier workload does not, without more, create a hostile work environment. It is not uncommon in today's workforce for an employee to take on more responsibilities in the absence of a [coworker] . . . The inconvenience and/or modification of [petitioner's] additional job duties were not so intolerable that a reasonable person would be compelled to quit. Additionally, as discussed above, [Respondent JPMorgan Chase] has shown a legitimate and employment nondiscriminatory reason for not promoting [petitioner] to the position of branch manager. . . .

Id. at *4 (quoting trial court summary judgment order).

Likewise, in the instant case, plaintiffs' admitted speculation that their coworkers were not as friendly towards them, particularly after they filed suit, is woefully insufficient to prove a

work environment "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment."

In *Erps v. Human Rights Comm'n*, 224 W. Va. 126, 129-130, 680 S.E.2d 371, 374-375 (2009), as in this case, this Court was presented evidence, as in this case, of an isolated incident of one coworker's use of inappropriate language directed towards another coworker:

> On the morning of Wednesday June 16, 2004, the Improvements Unlimited crew working on the business college's tie wall met at company headquarters in Princeton, West Virginia, and drove to the job site. The area where the tie wall was being constructed was approximately 45–50 feet in length and the crew worked within that area. Mr. Yontz and Mr. Bragg were drilling holes while Mr. Peoples and Mr. Harris followed fitting rebar into the holes with sledgehammers. Although there had been no prior tension, arguments or problems between Mr. Peoples and Mr. Bragg, Mr. Peoples picked on Mr. Bragg that morning, calling him names such as "white trash" and "honky." According to Mr. Bragg, the racially-charged name calling angered him. Mr. Peoples continued his goading of Mr. Bragg by making fun of the way he talked. This made Mr. Bragg angry. At some point, Mr. Peoples asked Mr. Bragg to drill the holes deeper because he was having difficulty fitting the rebar into the holes and Mr. Bragg responded by saying, "You say another word I'll cut your f***ing head off with this shovel, n*****." The men then approached Mr. Yontz about the situation. Not having heard the exchange and realizing both men were upset and angry, Mr. Yontz feared the situation could escalate and that there might be a physical altercation. Therefore, he ordered them back to work in separate locations. . . .
>
> Mr. Erps also spoke with Mr. Bragg about not using the "n" word, but took no further disciplinary action.

Again, as in *Frame*, this Court concluded that even though the language used was reprehensible, it did not satisfy the standard for establishing a hostile work environment:

> While most cases, including those cited above, involve an accumulation of incidents and the gradual development of hostilities, this case involves only one relatively brief exchange found to have been instigated by Mr. Peoples. Due to Mr. Peoples' incitement of and participation in the racially based comments, a prima facie showing that Mr. Bragg's response was "unwelcome" was not made.[10]

[10] As this Court observed in *Erps*, supra at 135, 680 S.E.2d at 380: "[T]he court may consider whether the plaintiff participated in the very conduct of which she complains. Where a plaintiff's action in the work place shows that she was a willing and frequent participant in the conduct at issue, courts are less likely to find that the conduct was unwelcome or hostile." (citations omitted).

> Additionally, because there is no evidence that the subject conduct continued after Mr. Peoples voiced an objection to Mr. Yontz, Mr. Peoples likewise fails to create a factual question as to whether such conduct was no longer welcome, yet continued. As such, Mr. Peoples' hostile work environment claim must fail as a matter of law because he failed to satisfy the first prong of the standard set forth in *Fairmont Specialty*. Accordingly, we reverse the Commission's finding of hostile work environment.

Id. at 139, 680 S.E.2d at 384 (footnote omitted).[11]

Likewise, in the present case, both of plaintiffs admitted to using the word "bitch," as well as other inappropriate language, in the workplace. They presented no evidence that they had either complained to Mr. Keiffer, management, or anyone else about the use of the term "bitch" in the workplace. After all, Ms. Griffith carried around toolboxes with stickers using the term in a manner she apparently found amusing or acceptable. Moreover, as in *Erps*, there was absolutely no evidence that Mr. Keiffer or anyone else directed the term towards the plaintiffs. Rather, there only evidence was that after they sued, they felt "shunned" by the coworkers, who justifiably may have been somewhat cautious around them after they sued Mr. Keiffer.

This is not a case like *CSX Transp.*, supra at 323-325, 729 S.E.2d at 158-160, where a female employee overheard a reference made to her to the effect that, "So how does Angie Smith taste and feel because I heard she's never had a d*** in her;" where additional lewd and offensive remarks were made regarding the employee's sexual orientation; where derogatory comments were made regarding another female employee for which the perpetrator was not disciplined; where the perpetrator of these multiple lewd and offensive remarks was

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[11] See also *Ford Motor Credit Co. v. Human Rights Comm'n*, 225 W. Va. 766, 779, 696 S.E.2d 282, 295 (2010)(evidence failed to satisfy hostile work environment standard, noting "[w]here a plaintiff has . . . participated in the offensive conduct without complaint, a claim based upon an allegation of a hostile work environment will ordinarily fail."); *Napier v. Stratton*, 204 W. Va. 415, 418, 513 S.E.2d 463, 466 (1998)("The conduct complained of involved the six mocking or hurtful oblique remarks . . . [A]s has been previously indicated, he himself made remarks. As was the case with the hostile environment claim, this Court does not believe that the remarks were of the severity sufficient to support the claim.").

subsequently permitted to be assigned as the female employee's subordinate to which she unsuccessfully objected, only to be treated placed on administrative leave until her employer could "figure out where else to send" her; where someone came to the female employee's home and pounded on her door shouting, "Come out b****. . . . You cost me my job [sic] and I'm going to get you," and despite the fact that her employer paid for her to stay in a hotel for eight days, it never investigated whether it was the perpetrator who had threatened the female employee; and where after her employer failed to find another position for her where she was not required to supervise the perpetrator, she became so distressed that she was treated and diagnosed by a psychiatrist with adjustment disorder, anxiety, occupational harassment, clinical depression, and increased blood pressure related to her employment, which caused her to be absent from work for six months on medical leave, during which time a man kept calling her on the telephone saying, "I'm not finished with you." and "Hey, b****, I haven't forgotten what you've done. Watch your back. I'm going to get you;" where the female employee ultimately accepted a position paying $35,000 less per year so that she did not have to supervise the perpetrator; and where the female employee's employment was terminated ostensibly because she had improperly used a CSX taxi service.[12] Even in circumstances as extreme as in *CSX Transp.*, the plaintiff was awarded only $280,000 for emotional distress and $500,000 in punitive damages.

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[12] See also *PAR Elec. Contractors, Inc. v. Bevelle*, 225 W. Va. 624, 695 S.E.2d 854 (2010)(where comments which included "If I was your boss, I would fire you for not joining the KKK;" ""Well, he can't join the KKK, he's already a member, probably, of the NAACP;" and "there's all kinds of n*****s. There's white n*****s, too;" where African-American employee who was subjected to these remarks was subsequently reassigned to undesirable duties, which he felt unsafe performing, after complaining; where he felt singled out by management after complaining; and where employee ultimately resigned, this Court held there was sufficient evidence of a hostile work environment).

Here, neither plaintiff complained directly to management about the posting; neither plaintiff testified to missing any work as a result of the posting; neither plaintiff testified to any adverse employment action taken against them after the posting; neither plaintiff testified that they were unable to fully perform the functions of their jobs after the posting; and even though the jury award each of the plaintiffs a total of $250,000 for their emotional distress, neither plaintiff testified about any physical symptoms such as loss of sleep, loss of appetite, or other manifestation of emotional distress, or about seeking or receiving any medical, psychiatric, psychological, or any other treatment whatsoever as a result of any emotional distress.

This is also not a case like *Fairmont Specialty Services v. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999), where the employee complained that a coworker was "cussing me and calling me a Mexican bitch and telling me he wasn't going to do what a Mexican told him to do;" where he called her a "Mexican bitch" and threw labels on her desk; where she alleged that she had "made 100 complaints" regarding being called a "Mexican bitch;" where she also reported "cussing and general obnoxious behavior;" where her coworker responded to management's efforts to counsel him about the behavior by stating that he did not "give a f***. I can do what I want;" where her coworker threatened "to knock [her] down" and make sure she "never came up;" where her coworker later stated, "it would be the last time" the plaintiff "complained about him;" where her coworker also referred to her as a "fat Mexican bitch" on numerous occasions after being counseled by management; and where the harassment, which took place over a period of nineteen months, not two or three days.

Plaintiffs naturally want to focus on the comments that are the subject matter of this litigation, particularly use of the redacted word "bitch," but the evidence demonstrates that the policy of allowing employees to submit comments had its benefits. For example, one of the

employees posted, "How about an open house for family to see what we do and where we work to provide for them," to which management replied, "I like the idea!" App. 1771. Another employee posted, "How come we don't have a screen on the computer where you can put in the stores # and see a picture of the item," to which management responded, "This is a good thought to see what you are looking for." Id. Another employee posted, "Break rooms need hand sanitizer & Lysol spray (all break rooms & common areas) vending areas, offices, work stations," to which management responded, "This is a good idea." App. 1763.

Obviously, not every employee comment could be met with a favorable response. For example, one employee commented, "Mr. Lager – Taking 3rd gear out of Taylor trucks?? . . . Try driving your car to work and back in 2nd gear," to which management responded, "We removed third gear from the Taylor trucks to slow them down. Too many instances and close calls with vehicles and pedestrians . . . . We checked with the distributor and they routinely do this for customers who wish to slow down the vehicles." App. 1772.

With respect to interpersonal relationships between coworkers, one employee commented, "If anyone in this plant has a problem with someone else, they should have the stones to confront them instead of writing about them behind their back," to which management replied, "Agree." App. 1773. And, plaintiffs were not the only employees about whom their coworkers complained. One employee commented, "There is a lot of dirty and bad batteries in the Battery Shop and they also need water. What does the Battery Shop person do besides read magazines and ride around and sell gun raffle tickets," to which management responded, "Totally unacceptable. I will look into the battery maintenance issue." App. 1761. Moreover, plaintiffs were not the only employees about whom colorful language was used in making complaints about their work habits: "_____ foreman has a bad attitude when you ask about a

truck . . . . We need trucks to move metal not a smart a** answer from the _____ foreman. (He cusses a lot, and I don't like that," obviously referencing a male employee, to which management responded, "You are right, you should have the equipment you need in a straightforward respectful answer to your question. Cussing is a bad habit and used too frequently by some folks." App. 1761.

Again, the idea that the policy of permitting employee comments was somehow discriminatory towards women is ridiculous as most of the comments, including those containing colorful language, were either directed to men or no one in particular. For example, employee's comment was, "What the f***!!!," to which management responded, "Do you really think this comment is helping anyone?" App. 1764.

The board was not only a forum for suggestions or complaints, but was also a forum for praise. For example, one employee commented, "_____ Manager is a fair person who listens. A great asset to this cast house," to which management responded, "All of us need to listen and work together so that we can find ways to reduce our costs and improve our financial position." App. 1763.

Defendants do not dispute that use of the word "bitch" is inappropriate, but notes that plaintiffs not only admitted to using the word themselves, but Ms. Griffith carried around references to the word on her toolbox for an extended period of time. Moreover, other courts have recognized that isolated use of the word in the workplace is insufficient to establish the high standard of a hostile work environment.

In *Freeman v. Dal-Tile Corp.*, 930 F. Supp. 2d 611, 629 (E.D. N.C. 2013), for example, the plaintiff, a female African-American, made allegations against a co-worker of sexual harassment based on the following incidents: (1) the co-worker walked into a supervisor's office

and, referencing a photograph of two former employees, asked: "Who are these two black bitches?"; (2) while the co-worker was on the phone with plaintiff, the co-worker's daughter asked: "Daddy, who's that?" The co-worker replied: "That's the black bitch over at Marble Point"; and (3) the co-worker showed plaintiff a photograph of a naked woman on his cell phone and said: "This is what I left in my bed to come here today."

Despite evidence clearly more egregious than the redacted language posted on the company's bulletin board in this case, the *Freeman* court held that although referring to plaintiff as a "black bitch" was plainly inappropriate, the mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII. The court concluded that the alleged incidents were not "severe enough to clear the 'high bar' which is intended to prevent Title VII from becoming a general civility code," and held that the co-worker's use of the phrase "black bitch" on two occasions was offensive, and his general use of the word "bitches" was inappropriate, but such language was not "particularly severe." Finally, the court reasoned that aside from the solitary "black bitch" comment that was directed at the plaintiff on one occasion, the co-worker did not target the plaintiff with "highly personalized comments designed to demean and humiliate her."

Similarly in *Augustin v. Yale Club of New York City*, 2006 WL 2690289 (S.D.N.Y. 2006), the plaintiff based a hostile work environment claim on the following: (1) a co-worker allegedly called plaintiff a "meter maid"; (2) a co-worker jokingly referred to prosciutto ham as "prostitute ham" in her presence; (3) a co-worker said plaintiff should go on vacation with a Greek co-worker to Greece; (4) a co-worker called plaintiff a "black bitch" once; (5) a co-worker called her a "bitch" on one occasion; (6) a co-worker allegedly threw a bag of bread in plaintiff's face; (7) the plaintiff overheard a co-worker refer to several women as "bitches" and some men

as "asses" or "assholes"; (8) a co-worker allegedly called plaintiff an "animal" and told her to be quiet; and (9) a co-worker once called plaintiff "garbage" and a "f***ing negrita."

Again, despite evidence much more egregious than the redacted language posted on the company's bulletin board in this case, the *Augustin* court held that all these comments were not sufficiently "severe" or "pervasive" to state a hostile work environment claim. It stated that the use of any such remarks, even on a single occasion, were deplorable, but for purposes of evaluating a hostile environment claim under Title VII, the court found the infrequent and sporadic nature of the remarks at issue, over the course of five years, insufficient, as a matter of law, for the plaintiff to maintain a hostile work environment claim.

In *Trinidad v. New York City Dep't of Correction*, 423 F. Supp. 2d 151, 167 (S.D.N.Y. 2006), the plaintiff claimed a co-worker said to her, "You are a stupid bitch and I can't wait to have you transferred," and made "sexual remarks about me and my clothing . . . he called me a bitch [and said] 'I don't care who you [expletive deleted] in the department' . . . you have the report." Again, despite language much more offensive than in this case, the court held the comments comprise "unrebutted facially neutral behavior that plaintiff has failed to clothe in discriminatory dress." Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious), the court held, will not support a claim of discriminatory harassment.[13]

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[13] See also *Mercer v. Cook County*, 527 Fed. Appx. 515 (7th Cir. 2013)(male sergeant's "those bitches" comment, together with other inferior officers' comments "oh bitch" and "go play with yourself," were not so severe or pervasive as to create hostile work environment on basis of gender); *Sardina v. United Parcel Service, Inc.*, 254 Fed. Appx. 108 (2nd Cir. 2007)(a few off-color comments including references to "office bitches" and "Brooklyn bimbettes" by employee's supervisor and sexually suggestive comments by coworkers, with whom she would tell sexual jokes, did not rise to the level of an objectively hostile work environment); *Stepheny v. Brooklyn Hebrew Sch. for Special Children*, 356 F. Supp. 2d 248, 264 (E.D. N.Y. 2005)(co-worker's use of the phrase "white bitch" or some variation thereof five times over a five month period did not create hostile work environment); *Castagna v. Luceno*, 2013

WL 440689 (S.D. N.Y.)(supervisor's reference to employee as a "know-it-all Jewish bitch" did not create a hostile work environment based upon gender or religion as supervisor was equally hostile towards men and employees of other religions); *Hercules v. Dep't of Homeland Sec.*, 2008 WL 1925193, at *21 (N.D. Cal.)(finding that occasionally calling plaintiff a "bitch" was not evidence of a hostile work environment); *Little v. Northeast Util. Serv. Co.*, 2007 WL 781450, at *9 (D. Conn.)(single use of the term "black bitch" insufficient as a matter of law to create a hostile work environment); *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979, 983 (S.D. N.Y. 1989)(incident in which white male corrections officer yelled at black female officer "hey black bitch, open the . . . gate" was insufficient to sustain claim of racially hostile work environment); *Duhon v. Napolitano*, 2013 WL 704894, at *5 (S.D. Miss.)("Plaintiff complains that she was singled out and subjected to unwarranted criticism and reprimands. She contends that she was treated differently than all other employees, male and female. Such sex-neutral conduct does not support a hostile work environment claim. Although Plaintiff contends that Mr. Coulson and Mr. LaBrune referred to her as a 'bitch' and "the bitch of Mitigation,' that Mr. LaBrune passed her in the hall on three or four occasions and 'mumble [d] under his breath' the words 'bitch' and 'dyke,' and that the chief of security referred to her as a 'bitch,' these alleged offensive comments alone are not severe or pervasive enough to constitute a hostile work environment based on Plaintiff's gender under current Supreme Court and Fifth Circuit precedent."); *Bobbitt v. New York City Health and Hospital Corp.*, 2009 WL 4975196, at *9 (S.D. N.Y.)(incidents in which employee was called a "Yankee," "bumbaclot," "bitch," and "dirty and typical American" were insufficient to establish a hostile work environment); *Garone v. United Parcel Serv., Inc.*, 436 F. Supp. 2d 448, 469 (E.D. N.Y. 2006)(holding that "a few off-color comments" including the terms "office bitches," did not rise to the level of an objectively hostile work environment); *Galloway v. General Motors*, 78 F.3d 1164 (7th Cir. 1996)(no objectively hostile work environment where plaintiff was called a "sick bitch" on numerous occasions and an obscene gesture directed to her while demanding "suck this bitch"); *Scott v. Pizza Hut of America, Inc.*, 92 F. Supp. 2d 1320 (M.D. Fla. 2000)(coworkers' harassment of female pizza delivery driver was not sufficiently severe or pervasive to support claim of hostile work environment sexual harassment under Title VII, even though co-workers implied that she was prostitute or needed to "go out and get some sex," so that "she wouldn't be so bitchy," acts were not physically threatening or humiliating, and conduct did not unreasonably interfere with her job performance); *Cutrona v. Sun Health Corp.*, 2008 WL 4446710, at *10 (D. Ariz.)("Here, given the evidence in the record, the Court finds that Ms. Vanca's use of the word 'bitch' is not sufficient to constitute discrimination based on sex."); *Jeffries v. Potter*, 2009 WL 423998, at *8 (D. Del.)(being called a "bitch" and "white honkey bitch" constitutes sporadic use of abusive language and does not rise to the level of a hostile work environment); *Tolson v. Springer*, 618 F. Supp. 2d 14 (D. D.C. 2009)(fellow employee's sexually and racially derogatory conduct, in calling federal employee a "bitch" and a "red bone" and stating that union was not a place for a black woman, along with subsequent e-mail stating that "satan doesn't need [her] prayers," a chair-bumping incident, and an arm-squeezing incident, were not sufficiently pervasive and extreme as to constitute a change in the conditions of her employment, as required to establish prima facie hostile work environment claim under Title VII); *Ripberger v. Western Ohio Pizza, Inc.*, 908 F Supp. 614, 616 (S.D. Ind. 1995)(holding that incident where temporary supervisor called plaintiff a "whore" and "bitch," grabbed her from behind, and shoved her against a soft drink machine did not constitute sexual harassment); *Kortan v. California Youth Authority*, 217 F.3d 1104, 1111–112 (9th Cir. 2000)(no hostile work environment where supervisor repeatedly referred to females as "castrating bitches," "Madonnas," or "Regina" in front of plaintiff and called plaintiff "Medea"); *Laney v. Ohio Dept. of Youth Services*, 719 F. Supp. 2d 868, 882 (S.D. Ohio 2010)("Although Laney asserts that she was called a black bitch by a co-worker, this isolated incident cannot be grounds for a discrimination claim because it was not sufficiently severe or pervasive to constitute a hostile work environment."); *Harrington v. Boysville of Michigan, Inc.*, 145 F.3d 1331 (6th Cir. 1998)(plaintiff's evidence of her supervisor calling her a "dumb broad" and a "bitch" on three separate occasions insufficient proof of a hostile work environment).

Because of the use of the word "bitch" in different contexts, applying both to men and women, such as the manner in which plaintiffs themselves admitted used the word, the Second Circuit has held, "We therefore reject a rule that would automatically command an inference of gender-based hostility to be drawn from its use." *Pucino v. Verizon Communications, Inc.*, 618 F.3d 112, 118 (2nd Cir. 2010).

Indeed, in *Beale v. Mount Vernon Police Department*, 895 F. Supp. 576, 589 (S.D. N.Y. 2012), where employee's supervisor, a police officer, referred to another female officer as a "fucking bobblehead" and to a female attorney as "bitch," the court held that these and similar incidents were not sufficiently severe or pervasive to have altered conditions of officer's employment, observing that while plaintiff's supervisor "(and others) should learn to avoid calling somebody a 'bitch,' courts have regularly concluded that the occasional use of that term is not severe enough to create a hostile work environment." (emphasis supplied).

It has been noted that, "Title VII is not 'a general civility code for the American workplace.'" *Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006)(quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80–81 (1998). Title VII is not violated by "[m]ere utterance of an ... epithet which engenders offensive feelings in an employee" or by mere "discourtesy or rudeness" unless so severe or pervasive as to constitute an objective change in the conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)(citations omitted); see also *Johnson v. Kilmer*, 219 W. Va. 320, 326, 633 S.E.2d 265, 271 (2006)("At best the evidence showed that on one occasion a co-worker made an impolite remark to Ms. Johnson concerning her age. All of the other incidents of conflicts with co-workers simply were not connected directly or indirectly to Ms. Johnson's age. The sum total of the evidence was insufficient as a matter of law to trigger an analysis of the other elements of a prima facie claim."). Accordingly,

"'simple teasing,' offhand comments, and isolated incidents (unless extremely serious)" are not actionable under Title VII. Id. at 788.

"[W]orkplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). "Title VII was 'not designed to purge the workplace of vulgarity,' for a certain amount of 'vulgar banter, tinged with sexual innuendo' is inevitable in the modern workplace . . . ." *Barnett v. Tree House Café, Inc.*, 2006 WL 3545025, *9 (S.D. Miss.)(citing *Bakerville v. Culligan Intern. Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995)). "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'dicriminat[ion] . . . because of . . . sex.'" *Oncale*, supra at 80 (quoting 42 U.S.C. § 2000e–2(a)).

For example, in order to sustain a hostile work environment claim, a plaintiff "must demonstrate that the abuse was motivated by the plaintiff's gender rather than by a personal dislike, grudge, or workplace dispute unrelated to gender." *Barnett*, supra at *12. In examining a hostile work environment claim, the proper focus is not upon individual incidents, but rather, on the overall situation to determine whether a plaintiff suffered intentional discrimination. See *Jensen*, supra; *Cardenas v. Massey*, 269 F.3d 251, 261–62 (3d Cir. 2001).

Finally, an employee's complaint their coworkers have "shunned' them is woefully insufficient to satisfy the objective legal standard for establishing a hostile work environment.[14]

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[14] See *Scusa v. Nestle U.S.A. Company, Inc.*, 181 F.3d 958, 969-970 (8th Cir. 1999)("We hold that, without evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage, general allegations of co-worker ostracism are not sufficient to rise to the level of an adverse employment action for purposes of Title VII."); *Mills v. Southern Connecticut State University*, 519 Fed. Appx. 73, 74 (2nd Cir. 2003)("Mills contends that she experienced a hostile work environment based on Gebremariam's hug, Abugri's dismissive and physically intimidating behavior, and the fact that she was shunned by various male faculty members. . . . Crediting Mills's

Here, both plaintiffs admitted no hostile work environment existed prior to the posting of their co-workers' comments. Both plaintiffs admitted that they had also used the offensive language in the workplace. Obviously, plaintiffs' coworker had "a personal dislike, grudge, or workplace dispute" with them, but he testified and there was no evidence to the contrary, that his

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recitation of the facts, these instances are insufficient to support a finding that her workplace was "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered.")(citation omitted); *McMillan v. Regeneration Technologies, Inc.*, 243 F. Supp. 2d 1324, 1330 (M.D. Fla. 2002)("The Plaintiff alleges that she was shunned and alienated by her coworkers. However, a review of the record reveals that the Plaintiff has not created an issue of fact as to whether she endured a 'hostile work environment,' as defined by the Eleventh Circuit. Specifically, the Plaintiff's proof is deficient in two respects. First, it is doubtful that the shunning and alienation alleged by the Plaintiff would rise to the level that is necessary to show that her workplace was 'permeated with discriminatory intimidation, ridicule, and insult' that was so sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive working environment. Second, and more importantly, the record reveals that the alleged shunning and alienation was not overtly racially charged, and that the Plaintiff's evidence is insufficient to raise an issue of fact as to whether the shunning and alienation was motivated by racial animus."); *Reico v. Creighton University*, 2007 WL 1560323, at *6 (D. Neb.)(allegations that employee was "shunned" was insufficient to establish a hostile work environment); *Clay v. LaFarge North America*, 2013 WL 6250776 at *12 (S.D. Iowa)("That Clay was shunned by some of his coworkers is undisputed; however, shunning and other such related conduct has routinely be rejected by courts as sufficiently severe to constitute a hostile work environment."); *Ross v. Glickman*, 125 F.3d 859, 1997 WL 603895, at *4 (9th Cir.)(shunning by office staff not actionable hostile work environment); *Evance v. Trumann Health Servs., LLC*, 2012 WL 2282555, at *5 (E.D. Ark.)("Plaintiff's allegations of feeling ostracized and not being a part of the 'clique' are insufficient to establish a hostile work environment."); *McGee v. Omaha Pub. Power Dist.*, 2007 WL 1434896, at *4 (D. Neb.)(finding a transfer issue and the belief that coworkers ostracized and would not communicate with the plaintiff insufficient to show a hostile work environment claim); *Perez v. Norwegian-American Hospital*, 243 F. Supp. 2d 792 (N.D. Ill. 2003)(shunning allegations insufficient to establish hostile work environment); *Bergin v. N. Clackamas Sch. Dist.*, 2005 WL 66069, at * 19 (D. Or.)("shunning and humiliation" by co-workers, though "pervasive and continuous," was not sufficient to support a hostile work environment claim); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 505 (W.D. Pa. 1988)("snubbing" by supervisors does not amount to an actionable hostile work environment); *Peace-Wickham v. Walls*, 409 Fed. Appx. 512 (3rd Cir. 2010)(employee's allegations of being shunned did not establish hostile work environment); *Quarless v. Bronx Lebanon Hospital Center*, 75 Fed. Appx. 846, 848 (2d Cir. 2003)("Additionally, the district court correctly dismissed plaintiff's hostile work environment and constructive discharge claims. Plaintiff complains that he was 'shunned, kept away from meetings he usually attended, and his authority was undermined' after he made negative comments about defendant hospital at an interview in connection with another employee's lawsuit. . . . None of these allegations constitute either a pervasive 'discriminatory intimidation, ridicule, and insult.")(citation omitted); (noting that shunning, ostracism, and disrespect by a supervisor does not create an actionable hostile work environment under Title VII); *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)(shunning of plaintiff by co-workers at direction of supervisor does not, as a matter of law, rise to the level of an adverse employment action for Title VII purposes).

comments were related to his perception that they were abusing overtime and "unrelated to gender."

With respect to defendants, they did not single out plaintiffs in the posting of comments; rather, it is undisputed that the comments were contained in pages and pages of comments posted at the same time. The evidence is also undisputed that plaintiffs were not subjected to a barrage of gender-related negative comments over a long period of time; rather, they do not dispute that the comments were only on the company's bulletin board for two or three days, and were removed at the request of the union. Finally, plaintiffs' evidence of a change in working conditions so sever and pervasive that the conditions of their employment were materially altered was their subjective impression that they were being "shunned" by coworkers.

As this and other courts, including the United States Supreme Court, have held, whether conduct involves "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature hav[ing] the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment;" "was based on the sex of the plaintiff[s];" and was "sufficiently severe or pervasive to alter the plaintiff[s'] conditions of employment and create an abusive work environment," does not involve a subjective standard. Otherwise, every employee of a sensitive nature would have a claim for hostile work environment based upon the isolated utterance of a single inappropriate word or comment.

Rather, the question is whether, applying an objective standard, the conduct was so severe and pervasive that it objectively interfered with the employee's job performance (of which there was no objective evidence in this case); objectively created an intimidating, hostile, or offensive working environment (of which there was no evidence other than plaintiffs'

subjective complaints of feeling "shunned"); was objectively based on the sex of the plaintiffs (of which there was no objective evidence); and was objectively sufficiently severe or pervasive as to alter plaintiffs' conditions of employment and create an abusive work environment (of which there was no objective evidence).

Consequently, where there was no objective evidence of the standards established by this Court in *Hanlon* and its progeny for a cause of action for intentional discrimination based upon a hostile work environment, this Court should set aside the judgment.

C. THE TRIAL COURT ERRED BY ALLOWING PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES TO GO TO THE JURY AND THEN BY FAILING TO EITHER SET ASIDE OR SUBSTANTIALLY REDUCE THE JURY'S AWARD OF PUNITIVE DAMAGES BECAUSE THE EVIDENCE FAILED TO SATISFY STANDARDS ADOPTED BY THIS COURT IN *MAYER V. FROBE*, 40 W. VA. 246, 22 S.E. 58 (1895), AND ITS PROGENY, FOR THE IMPOSITION OF PUNITIVE DAMAGES AS THERE WAS NO EVIDENCE THAT DEFENDANTS' POSTING OF THE REDACTED COMMENTS OF AN EMPLOYEE ABOUT THE PLAINTIFFS INVOLVED "GROSS FRAUD, MALICE, OPPRESSION, OR WANTON, WILLFUL, OR RECKLESS CONDUCT OR CRIMINAL INDIFFERENCE TO CIVIL OBLIGATIONS AFFECTING THE RIGHTS OF OTHERS."

This Court's review of the propriety of a punitive damages award involves a two-step inquiry:

> 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. 13, *CSX, Transp.*, supra.

This Court has held, "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,* supra.

Plainly, 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." Rather, considering the evidence in a light most favorable to plaintiffs, defendants insufficiently redacted a coworker's comments in such a manner that inadvertently subjected them to a brief period of unwanted attention, but immediately removed the comments from public view once the union requested that the comments be removed.

In Syllabus Point of 5 of *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 521 S.E.2d 331 (1999), this Court held, "Punitive damages are an available form of remedial relief that a court may award under the provisions of W. Va. Code, 5-11-13(c) [1998]." This Court made clear, however, that the same standards that would apply to the award of punitive damages generally also apply to the award of punitive damages in cases under the Human Rights Act: "We also note that punitive damages that are available as a form of 'any other legal or equitable relief' in cases under the Human Rights Act are, of course, bounded and controlled by the standards that our law has set for the award of punitive damages generally." Id. at 35 n.21, 521 S.E.2d at 348 n.21 (citations omitted).[15]

[15] This test is the similar to that expressly provided by Congress under the federal counterparts to the Human Rights Act. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999)("'A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' (Emphasis added.)."). Consequently, under parallel federal law, "Congress plainly sought to impose two standards of liability-one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." Id.

In Syllabus Point 14 of *Tudor v. Charleston Area Med. Ctr.*, 203 W. Va. 111, 506 S.E.2d 554 (1997), this Court held that in suits for intentional infliction of emotional distress without any physical trauma or medical or psychiatric proof of mental trauma, the award of both emotional distress damages and punitive damages would constitute "an impermissible double recovery." Later, in Syllabus Point 11 of *Sheetz, Inc. v. Bowles Rice McDavid Graf & Love, PLLC*, 209 W. Va. 318, 547 S.E.2d 256 (2001), this Court qualified *Tudor* by holding, "The specific principles and procedures established in Syllabus Points 14 and 15 of *Tudor v. Charleston Area Medical Center*, 203 W. Va. 111, 506 S.E.2d 554 (1997) are limited to the tort of the intentional or reckless infliction of emotional distress."

Still, where there has been a substantial award of emotional distress damages, as in this case, without any of the objective evidence referenced in *Tudor*, and there was no evidence (1) "grievous" harm was caused to plaintiffs; (2) defendants' conduct was "reprehensible;" (3) defendants "profited" from the conduct; (4) regarding defendants' "financial condition;" (5) regarding any "criminal sanctions" against defendants; and (6) regarding any "civil actions" against defendants "based on the same conduct," which are among the relevant factors under Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), the award of punitive damages of $500,000 over and above the award of $500,000 in emotional distress damages was inappropriate.

Obviously, defendants contest the judgment with respect to the sufficiency of evidence of a hostile work environment under *Hanlon* and its progeny, but it is abundantly plain there was no evidence "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." Consequently, the trial court

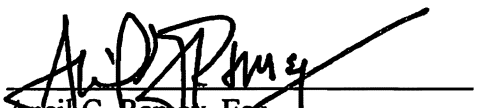
erred by failing to grant judgment to defendants as a matter of law regarding the jury's award of $500,000 in punitive damages to the defendants.

VI. CONCLUSION

Defendants, Constellium Rolled Products Ravenswood, LLC, and Melvin Lager, respectfully request that this Court reverse the judgment of the Circuit Court of Jackson County and either enter judgment for defendants on the hostile work environment claims by plaintiffs, Sharon Griffith and Lou Ann Wall, or in the alternative, on their claims for punitive damages.

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

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, a true and accurate copy of the foregoing **BRIEF OF THE PETITIONERS** was mailed to counsel for all other parties to this appeal, as follows:

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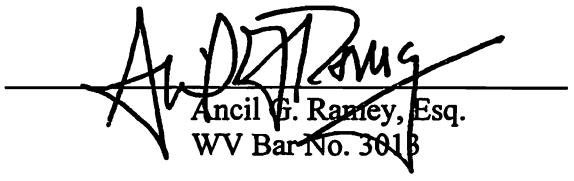

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

Honorable Thomas C. Evans, III, Judge
Circuit Court of Jackson County
Civil Action No. 11-C-26

APPENDIX

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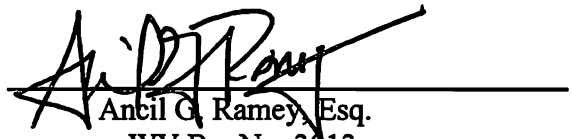
CERTIFICATION

I hereby certify that the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal.



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