

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**SUE J. ERPS AND WILLIAM G. ERPS,
d/b/a IMPROVEMENTS UNLIMITED,**

APPELLANTS

VS.

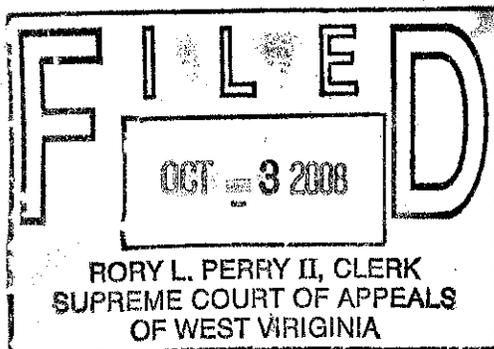
NO.: 34262

**WEST HUMAN RIGHTS COMMISSION
and VICTOR T. PEOPLES,**

APPELLEES,

**FROM THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
[CASE NUMBER BELOW ER-71-05]**

BRIEF OF APPELLANTS



PRESENTED BY:

**ANTHONY R. VENERI, ESQ.
VENERI LAW OFFICES
1600 WEST MAIN STREET
PRINCETON, WV 24740
TELEPHONE: (304) 425-8751
WV STATE BAR NO.: 4310**

INDEX

Index of Authority	ii
Nature of the Proceedings Below	1
Statement of Facts	2
Assignments of Error	6
Law and Argument	8
Assignment of Error 1: Back Pay Damages	8
(a) Mr. Peoples Could Not Work As A Laborer After March 2005	8
(b) Mitigation: Mr. Peoples Failed To Return To Work	9
(c) Mr. Peoples Contempt Should Bar His Recovery	10
(d) The Use Of A Document Produced By Mr. Peoples Ex Parte To The ALJ	12
Assignment of Error 2: Retaliatory Discharge	14
Assignment of Error 3: Racial Harassment	16
Assignment of Error 4: Retaliation For Filing A Complaint	17
(a) Hearsay Rule Violation [Rule 802]	18
(b) Alleged Harassment By Claude Erps	18
(c) Mere "Feelings" Do Not Prove Harassment	19
Assignment of Error 5: General Damages	20
Request For Relief	21
Certificate Of Service	23

INDEX OF AUTHORITY

Statutes

<u>West Virginia Code 5-11-11(a)</u>	1
<u>West Virginia Code 29A-5-4(a)</u>	8

Cases

<u>Bishop Coal Company v. Salyers</u> , 181 W.Va. 71, 380 S.E. 2d 238 [1989]	9
<u>Fairmont Specialty Services v. West Virginia Human Rights Commission</u> , 206 W.Va. 86, 522 S.E. 2d 180 [1999]	16, 17, 21
<u>Hanlon v. Chambers</u> , 195 W.Va. 99, 464 S.E. 2d 741 [1995]	16
<u>Kalany v. Campbell</u> , 220 W.Va. 50, 640 S.E. 2d 113 [2006]	16
<u>Smith V. West Virginia Human Rights Commission</u> , 216 W.Va. 2, 602 S.E.2d 445 [2004]	8
<u>West Virginia DNR v. Myers</u> , 191 W.Va. 72, 443 S.E. 2d 229 [1994]	14

Rules of Evidence

Rule 802 of the <u>West Virginia Rules of Evidence</u>	7, 18
--	-------

Code of State Regulations [Title 77, Series 2]

7.27.e <u>Rules of Practice and Procedure Before the West Virginia Human Rights Commission</u>	11
7.30 <u>Rules of Practice and Procedure Before the West Virginia Human Rights Commission</u>	18

NATURE OF THE PROCEEDINGS BELOW

Victor Peoples filed a complaint against William G. Erps and Sue Erps, his wife, d/b/a Improvements Unlimited with the Human Rights Commission on or about July 2, 2004, claiming that he was discriminated against on the basis of race. After engaging in some discovery, Chief Administrative Law Judge Phyllis Carter (hereinafter referred to as ALJ) conducted a two day hearing in December of 2006, and thereafter rendered a decision that concluded that Mr. and Mrs. Erps had caused a retaliatory discharge; she further determined Mr. and Mrs. Erps had caused racial harassment and that they retaliated against Mr. Peoples for filing a Complaint with the Human Rights Commission. In her initial ruling, the ALJ granted Mr. Peoples \$5,000.00 in damages for embarrassment, humiliation, and loss of personal dignity, and reserved the issue of back pay for a future decision. On August 28, 2007, the ALJ submitted a Supplemental Final Decision, which awarded Mr. Peoples lost wages in the amount of \$24,085.30, and interest in the amount of \$3,813.51.

Mr. and Mrs. Erps did appeal the decisions of the ALJ to the Human Rights Commission and on January 30, 2008, the Commission accepted and adopted the ALJ's Final Decision and the Supplemental Decision on damages, without modification or amendment. Therefore, Mr. and Mrs. Erps, the Respondents, below filed a Petition for Appeal to this Court pursuant to West Virginia Code, 5-11-11(a), and on September 4, 2008, this Court granted the petition for appeal.

STATEMENT OF FACTS

Victor Peoples is an African American who began employment with Mr. and Mrs. Erps, d/b/a Improvements Unlimited on April 13, 2004. [ALJ Finding #1 and #2] At the time of the events in question, Improvements Unlimited was operated by William Erps, and his wife, Sue Erps, kept the books for the business. [See Erps Testimony Volume 2, Page 164] Although Mr. Erps had been in the construction business for greater than 30 years, he had only begun Improvements Unlimited in 1993. [ALJ Finding #6] During his entire career in construction, spanning greater than 30 years, Mr. Erps had never had any complaints made against him for harassment. [Erps Testimony Volume 2 Pages 164 and 165]

Mr. Peoples testified and submitted documentary evidence [his verified complaint] that his last day of work was June 23, 2004 [Peoples Testimony, Volume 1, Page 30], however, the ALJ did find that, consistent with the testimony of Mr. Erps and other witnesses, Mr. Peoples' last date of employment was June 16, 2004. [ALJ Finding #2]

On June 16, 2004, Mr. Peoples, along with fellow crew members Wayne Bragg, Jason Harris, and Supervisor David Yontz, traveled to the Business College in Tazewell County, Virginia, to set a tie wall. [ALJ Finding #10 and #11] While at the business college, Mr. Peoples "picked on" Mr. Bragg and called him names such as "white trash" and "honkey," which angered Mr. Bragg. [ALJ Finding #13] Additionally, Mr. Peoples made fun of the way Mr. Bragg talked, which when combined with the name calling, made Mr. Bragg even angrier. [ALJ Finding #14] The record reflects that Mr. Bragg does have an issue with his speech and he

acknowledges same. [See Bragg Testimony Volume 2 at Page 129 and Erps Testimony Volume 1 at Page 270 and 271]

It is undisputed, and the ALJ so found, that prior to June 16, 2004, Mr. Bragg and Mr. Peoples had not had any argument or been involved in any type of conflict. [ALJ Finding #15] Furthermore, prior to June 16, 2004, there had not been any problems or tension between Mr. Bragg and Mr. Peoples. [ALJ Finding #21] To the contrary, prior to June 16, 2004, Mr. Peoples confirmed that he and the other employees would joke and engage in non-threatening "horseplay." [ALJ Finding #9]

As Mr. Peoples called Mr. Bragg names, commented on his speech, and requested him to drill holes deeper, Mr. Bragg became so angry that he told Mr. Peoples "you say another word I'll cut your fucking head off with this shovel, nigger." [ALJ Finding #17] Supervisor David Yontz did NOT hear what was said between Mr. Peoples and Mr. Bragg, but the two men approached him, and they were both upset and angry. [ALJ Findings #19 and #20] Mr. Yontz feared that the situation could escalate and that there might be a physical altercation. [ALJ Finding #25] Mr. Yontz separated Mr. Peoples and Mr. Bragg and instructed both men to return to work. [ALJ Finding #26] Mr. Yontz told the men that "it was enough said" and "we need to get back to work." [See Yontz testimony, Volume 2, pages 30, 59] Mr. Yontz wanted to separate the men, let them cool down, and diffuse the situation before addressing Mr. Peoples' complaint; both men were too angry to address the statements made by each at that time. [See Yontz testimony Volume 2 pages 16, 17, 21, 28, 32, 35, 39, 48, 54, 55, 63, 70, 118] Mr. Peoples persisted in requesting Mr. Yontz to take immediate action against Mr. Bragg. [See Yontz testimony, Volume 2, page 31] Mr.

Yontz instructed Mr. Peoples to get back to work or he was fired. [ALJ Finding #23] Mr. Peoples told Mr. Yontz to send him home. [ALJ Finding #24] Mr. Peoples refused to return to work and instructed Mr. Yontz to "do what he had to do," after which Mr. Yontz terminated Mr. Peoples. [ALJ Finding #28 and #29]

Mr. Peoples walked home from the job and immediately called William Erps. [ALJ Findings #30 and #31] During that conversation, Mr. Erps advised Mr. Peoples that Mr. Bragg should not have called him the "n" word and that he would handle the situation. [ALJ Finding #31] Mr. Erps also instructed Mr. Peoples to return to the shop the next morning, June 17, 2004. [Erps Testimony Volume 1 Page 220; Volume 2 pages 194- See the ALJ's Discussion on Page 15, Fourth Paragraph, Line 1] Mr. Peoples failed to return to work on June 17, 2004, but he did return on June 18, 2004, and June 25, 2004, to receive each of his last two paychecks. [ALJ Findings #34 and #35] Mr. Erps attempted to speak with Mr. Peoples on each occasion, June 18 and June 25, but Mr. Peoples refused to stay to speak with Mr. Erps. [ALJ Findings #34, #35, and #36]

After learning of the event at issue, Mr. Erps conducted an investigation the very evening of June 16, 2004, by speaking with Mr. Yontz and Mr. Jason Harris, and by having statements taken from each individual. [ALJ Finding #32] Additionally, Mr. Erps spoke to Mr. Bragg about not using the "n" word. [ALJ Finding #32]

The ALJ determined from the testimony of Mr. Peoples that Mr. Yontz told him "that's done, over, get back to work" [See ALJ Finding #22], **however, Mr. Peoples' statement to the Commission was different from his testimony.** During cross-examination, Mr. Peoples was presented with his written statement and complaint to

the Commission, and the following was his testimony during the hearing, when he discussed his statement to the commission given only one (1) week after the event:

"Q Well, let's get the sequence correct. You asked him what he was gonna do and he said, 'Get back to work.' Is that the sequence?

A Yes, he said he--

Q And then what was your response to that?

A I just looked at him. And then when he walked in my face, 'You gonna work?' I said, 'Do what you gotta do.'

Q So you told him to do what he had to do, meaning to fire you?

A Whatever he had to do. To get the situation solved, whatever he had to do, do it.

Q In your statement it says, 'He then told me to get back to work and not worry about it.'

A He said it was done and over with.

Q Well, there's nothing in this statement that you wrote that said that it was done and over with, now is there? Mr. Peoples look at your statement of June 23--

A You can't remember everything when you're mad.

Q Excuse me?

A I can't remember everything at this time."
[See Peoples' Testimony Volume 1, Pages 132-134]

Mr. Peoples was so angry during the hearing that he could not remember what he had told the commission in his original verified statement.

The evidence regarding the issue of damages was even more decisive. Mr. Peoples testified that he was a laborer for Mr. Erps and it is the most physically

demanding job that one can occupy. [See Mr. Peoples' testimony Volume 1, at page 151.] Mr. Peoples testified that he began receiving a partial disability award from the Veteran's Administration in August 2004, for *chronic fatigue* and *headaches* which was only two months after his last employment with the Erps. [See the testimony of Mr. Peoples, Volume 1, at pages 151 and 152.] It was further established that Mr. Peoples represented to the Veteran's Administration that he was unable to work as a laborer when he filed for a total disability in March of 2005. [Peoples' testimony, Page 200 of Volume 1 of the December 5, 2006 hearing.] The application for total disability was only six (6) months after Mr. Peoples had already begun receiving partial disability from the Veterans Administration. By his own testimony, Mr. Peoples should not have received back pay after March 30, 2005, since he was unable to work as a laborer.

ASSIGNMENTS OF ERROR

1. The Commission and the Chief Administrative Law Judge committed error by awarding Mr. Peoples' back pay through December 31, 2005, because:
 - a. By his own testimony, Mr. Peoples was medically unable to work as a laborer in March of 2005;
 - b. Mr. Peoples refused to return to work three separate times after the date of the event in question;
 - c. Back pay damages were awarded to Mr. Peoples even though he was in contempt of the ALJ's Order commanding him to produce an authorization (which he never produced) for documents so that damages could be calculated; and

d. A document produced by Mr. Peoples on an ex parte basis to the ALJ was relied upon by the ALJ and the Commission in the calculation of damages.

2. The Commission and the ALJ erroneously concluded that Mr. and Mrs. Erps were liable for a retaliatory discharge: Mr. Peoples refused to return to work when instructed to do so by a supervisor on June 16, 2004, and Mr. Erps requested Mr. Peoples to return to work the very next day after the event in question.

3. The Commission and ALJ erroneously concluded that Mr. and Mrs. Erps were liable for racial harassment: after discovering the dispute later on the same date it occurred, Mr. Erps advised Mr. Peoples that he would take care of his concerns, and that he should return to work the next day.

4. The Commission and the ALJ erroneously concluded that Mr. and Mrs. Erps retaliated against Mr. Peoples because he filed a complaint with the Commission:

a. The Commission and the ALJ admitted hearsay testimony to support the claim in violation of Rule 802 of the West Virginia Rules of Evidence;

b. The finding that Claude Erps and his workers attempted to intimidate Mr. Peoples was not only erroneous, but Claude Erps and his workers had no connection with William G. Erps and Sue Erps, d/b/a Improvements Unlimited; and

c. The finding that Mr. Peoples "felt" that Mr. Erps and his employees followed him and chased him does not establish that such did in fact occur.

5. The Commission and the ALJ erroneously awarded Mr. Peoples damages for embarrassment, humiliation, and loss of personal dignity in the amount of \$5,000.00.

LAW AND ARGUMENT

This Court's *standard of review* for factual findings and legal conclusions made by the Human Rights Commission have been established by the statutory standards contained in West Virginia Code 29A-5-4(a); this Court reviews questions of law presented *de novo* and findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong. See Smith v. West Virginia Human Rights Commission, 216 W.Va. 2, 602 S.E.2d 445 (2004).

BACK PAY DAMAGES

ASSIGNMENT OF ERROR 1: The Commission and the Chief Administrative Law Judge committed error by awarding Mr. Peoples' back pay through December 31, 2005.

(a) MR. PEOPLES COULD NOT WORK AS A LABORER AFTER MARCH 2005

Mr. Peoples applied for total disability with the V.A on March 30, 2005, claiming that he could not work. Consequently, he should not receive back pay after March 30, 2005, but the ALJ awarded him back pay through December 2005. Under examination by the Assistant Attorney General, Mr. Peoples testified as follows:

"Q. When did you become *medically* unable to do *laborer* work?

A. When did I file. Um, maybe March 2005.

Q. But up until that time you were able to do laborer work?

A. Yes, sir."

[See Page 200 of Volume 1 of the December 5, 2006 hearing before the Chief Administrative Law Judge.]

Since Mr. Peoples testified under oath before the Chief Administrative Law Judge that he could no longer work as a laborer on March 30, 2005, there should be no back pay award through December 31, 2005. Such is clear error.

(b) MITIGATION: MR. PEOPLES FAILED TO RETURN TO WORK

Even assuming Mr. Peoples was improperly terminated on June 16, 2004, by Supervisor Yontz (a legal conclusion disputed by Mr. and Mrs. Erps), Mr. Peoples had a duty to mitigate his damages. Consider the following:

**"A claimant for lost wages under the human rights law shares with all other plaintiffs the burden of using reasonable efforts to mitigate his or her damages. Therefore, the same rules that we have articulated in other employment contexts concerning mitigation of damages for lost wages should be applied by the commission to human rights cases."
Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989)**

The evidence establishes that on the very afternoon of June 16, 2004, Mr. Peoples called Mr. Erps and Mr. Erps advised him that he would not only take care of the situation, but Mr. Peoples should return to the shop the next morning. Mr. Peoples did not return the following day, June 17, 2004, but he did return Friday morning, June 18, 2004, where he received a paycheck. When Mr. Peoples returned for his paycheck on June 18, 2004, Mr. Erps attempted to speak with him; Mr. Erps wanted to place him on a totally separate crew with a separate supervisor. Unfortunately, Mr. Peoples left without speaking to Mr. Erps and would not return to work.

Mr. Peoples again returned to the shop of Improvements Unlimited on June 25, 2004, to receive what would be his final paycheck and again, Mr. Erps attempted

to speak with him, wanting to put him back to work on a separate crew and with a separate supervisor. Once again, Mr. Peoples refused to speak to Mr. Erps.

Clearly Mr. Peoples had his job available and waiting for him on June 17, 2004. He had his job waiting for him on June 18, 2004, and June 25, 2004. William Erps did everything he could to resolve the situation and put Mr. Peoples back to work with a separate crew and a separate supervisor.

The Commission and the ALJ have rewarded Mr. Peoples for his willful refusal to return to work. He clearly failed to mitigate his damages.

(c) MR. PEOPLES'S CONTEMPT SHOULD BAR HIS RECOVERY

If Mr. Peoples could exercise his legal right to file a claim with the Human Rights Commission and request to be compensated for his alleged lost wages, then he had the duty to comply with the ALJ's orders commanding him to sign an authorization to produce records from the Veteran's Administration which were clearly relevant to the issue of damages. To the contrary, the Commission and the ALJ have rewarded Mr. Peoples for his willful contempt of the ALJ's order with a substantial sum of back pay and interest.

On May 23, 2007, the ALJ signed an order compelling Mr. Peoples to sign an authorization to produce his Veteran's Administration records for partial and total disability. In an order signed the very next day, May 24, 2007, the ALJ reflected on the importance of the information and how it was needed to properly determine the award of back pay:

"On May 23, 2007, I signed an agreed Order compelling Complainant Victor Peoples to sign an authorization to produce his Veterans Administration ("VA") applications for partial and total

disability with the rulings thereon to me and counsel for the parties. The purpose of the Order is to obtain information that would provide the date the VA determined Mr. Peoples could no longer function as a laborer and to determine the amount of VA benefits he has received since his termination by Respondent, Improvements Unlimited. **This information is needed to determine any back pay award Mr. Peoples may be entitled too as a result of my April 6, 2007 Final Decision.** [See the A.L.J.'s Order entered May 24, 2007. (Emphasis added)]

Mr. Peoples refused to sign the authorization and, therefore, it was impossible for Mr. and Mrs. Erps, their counsel, the Attorney General's Office, and the ALJ to obtain the desperately needed records. The ALJ recognized that the production of records ex parte in January and April of 2007 "**was not an attempt on his part to cure any contempt of [my] recent Orders.**" [See the ALJ's August 29, 2007, letter]

The misconduct of Mr. Peoples in violating the orders of the ALJ should prohibit his recovery for an award of back pay. **Rule 7.27.e of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission [Title 77, Series 2, Code of State Regulations]** specifies, in part, that if a party fails to comply with an order to provide or permit discovery, the ALJ may enter an order for relief including, but not limited to, the following:

"7.27.e.2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence.

7.27.e.3. An order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

By her own order, the ALJ deemed the information to be obtained by use of the authorization necessary to make a proper back pay award. Her orders were

logical since Mr. Peoples had not only received a partial disability award (August 2004) only two months after his last employment with Improvements Unlimited, *but he also applied for total disability in March of 2005 claiming he was medically unable to work.* All of the documents regarding Mr. Peoples' disability, including his applications and medical records to support his applications, were clearly needed, but the Commission and the ALJ failed to sanction Mr. Peoples. Instead, the ALJ and the Commission awarded damages for back pay even beyond the date in which Mr. Peoples claimed he could no longer work as a laborer-March 30, 2005.

This Court should send a message that is loud and clear-**if claimants refuse to assist the very system that they seek relief from, then their requests will be denied.** The time and cost of prosecuting this issue all of the way to this Court illustrates the inherent prejudice to Mr. and Mrs. Erps. Even the Assistants to the Attorney General refused to condone this misconduct of Mr. Peoples by consistently seeking Mr. Peoples to supply the authorization, and then reporting his refusal to the ALJ.

(d) THE USE OF A DOCUMENT PRODUCED BY MR. PEOPLES EX PARTE TO THE ALJ

The Commission and the ALJ relied upon a document produced by Mr. Peoples ex parte to the ALJ. On April 9, 2007, the ALJ received the first page only of a December 28, 2005, ruling by the Department of Veteran's Affairs concerning Mr. Peoples' application for total disability (the application was March 30, 2005). Mr. Peoples had sent it directly to the ALJ without advising the Assistant Attorney General and the undersigned counsel. The very next day on April 10, 2007, the

paralegal for the ALJ tendered the ex parte document [and two others submitted in January 2007] to the undersigned counsel and the Assistant Attorney General on the case at that time, Jonathan Matthews, and directed Mr. Matthews to instruct Mr. Peoples to submit all documentation through him [Matthews].

Thereafter, the parties began seeking all of the relevant documentation from the Veteran's Administration. As indicated above, the ALJ did sign an order compelling Mr. Peoples to sign an authorization so that the Veteran's Administration information could be obtained and she acknowledged in a separate order the importance of receiving the information.

On page 6 of the ALJ's Supplemental Final Decision On Damages, the ALJ claimed that Mr. Peoples filed a copy of the decision with the Commission in January of 2007, and then the ALJ fully and completely relied upon the document in the award of damages. *The document produced ex parte to the ALJ was partially quoted in the decision on page 6.* This was clearly improper.

Based on that document produced ex parte, which was but a single page of many relevant documents needed from the Veteran's Administration, the ALJ made a conclusion that as of December 28, 2005, Mr. Peoples was neither totally disabled nor unemployable as a laborer. *However, Mr. Peoples had testified that he was medically unable to work as a laborer as of March, 2005.* The document he produced ex parte does not modify his testimony at all: although Mr. Peoples may have been employable in some capacity subsequent to March 30, 2005, **he was not employable as a laborer.**

It was clearly improper for the Commission and the ALJ to permit Mr. Peoples to refuse to produce all of the needed documentation from the V.A. [which the ALJ and the Commission acknowledged were necessary for a proper calculation of damages] and then rely upon one single page from one single ruling from the V.A. produced ex parte by Mr. Peoples.

RETALIATORY DISCHARGE

ASSIGNMENT OF ERROR 2: The Commission and the ALJ erroneously concluded that Mr. and Mrs. Erps were guilty of retaliatory discharge.

For a complainant to establish a prima facie case for retaliatory discharge, he or she must prove by a preponderance of the evidence four elements: he or she engaged in protected activity; the employer was aware of the activity; he or she was discharged; and the discharge followed his or her protected activities within such a period of time that the court can infer retaliatory motivation. See West Virginia DNR v. Myers, 191 W.Va. 72, 443 S.E.2d 229 @ 233 (1994).

An employer may rebut the presumption by offering *credible evidence* of a legitimate nondiscriminatory reason(s) for the actions. *Id.* If successful in rebutting the claim, then the complainant must present and prove by a preponderance of the evidence that the reason was a mere pretext. *Id.*

The ALJ concluded that since Mr. Peoples was discharged by Mr. Yontz within a matter of minutes of the highly volatile event in question, there was a retaliatory motivation by Mr. and Mrs. Erps. But, it is the true motivation of the employer for the discharge that counts. That is why the Mevers decision provides that an employer may rebut the presumption.

Before Mr. Erps even knew of the altercation between Mr. Peoples and Mr. Erps, the supervisor, Mr. Yontz, terminated Mr. Peoples when he refused to return to work because Mr. Yontz was confronted with a highly volatile situation that he thought would escalate into a physical altercation between Mr. Bragg and Mr. Peoples. His desire to use all reasonable means to diffuse the volatile situation by (1) separating the men, (2) not immediately addressing the complaints by *both* men at that specific time in front of each other, and (3) putting *both* men back to work immediately cannot be said to be unreasonable or motivated to retaliate against Mr. Peoples. **Even the ALJ acknowledged and found that Mr. Yontz was trained at Western Teen Challenge on how to handle hostile angry youth, and he used his training to "separate the men and instruct them to return to work."** [ALJ finding of fact, 27]

When Mr. Erps became aware of the circumstances, he did everything reasonable that he could do to investigate the matter. He assured Mr. Peoples that the matter would be taken care of, and he would have placed Mr. Peoples back to work with a different supervisor and crew had Mr. Peoples only returned to work as instructed on June 17, or merely stayed after receiving two paychecks, one on June 18 and the other on June 25.

For an employer who had never, in thirty (30) years of construction experience, had any complaint against him for harassment, it was an erroneous legal conclusion for the ALJ and the Commission to decide that Mr. Erps retaliated against Mr. Peoples because the supervisor, who had been trained to handle hostile people, acted to avoid a more compelling set of circumstances, i.e. a fight between very angry men with access to tools that could inflict serious bodily injury.

RACIAL HARASSMENT

ASSIGNMENT OF ERROR 3: The Commission and the ALJ erroneously concluded that Mr. and Mrs. Erps were liable for racial harassment.

The Commission and the ALJ concluded that Mr. Peoples was subjected to a hostile work environment which was imputed to Mr. and Mrs. Erps because they did not take prompt remedial action. This was factually wrong and clearly an erroneous conclusion of law.

In a case premised upon harassment from a hostile work environment, there are five factors to consider while assessing whether an employer took appropriate action: (1) promptness of the response; (2) the employer's degree of acquiescence in the harassment; (3) the gravity of the harm; (4) the nature of the work environment; and (5) the sincerity in the employer's actions. Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E. 2d 180 [1999].

Yet, it is apparent from a long line of cases, including the recent case of Kalany v. Campbell, 220 W.Va. 50, 640 S.E.2d 113 (2006), that an important factor to consider in a case premised upon a "hostile environment" is whether there has been a significant accumulation of incidents. This Court in Kalany quoted the former decision of Hanlon v. Chambers, 195 W. Va. 99, 464 S.E. 2d 741 [1995] as follows:

"This case illustrates another example supporting the prevailing federal view, that is, in hostile environment harassment cases (sexual, racial, or whatever), the offensive conduct often does not rise to the level of actionability until after there has been a significant accumulation of incidents." Kalany v. Campbell, supra.

The ALJ found that immediately when Mr. Erps became aware of the events, Mr. Erps assured Mr. Peoples that Mr. Bragg should not have used the "n" word and that he would handle the situation. That same evening, Mr. Erps did take two key statements from witnesses, including supervisor Yontz. The next morning, Mr. Erps did instruct Wayne Bragg not to use the "n" word again and otherwise be degrading to employees. Mr. Erps requested Mr. Peoples to speak with him; he wanted to place him on a separate crew and engage in work at another site separate from Mr. Bragg. The remedial actions could not be more prompt.

Mr. and Mrs. Erps did not acquiesce in the harassment. This was the first complaint of harassment by anyone against Mr. Erps in his more than 30 years in construction. Even the ALJ found that there had been no prior issues between Mr. Bragg and Mr. Peoples. To the contrary, the events that erupted between Mr. Peoples and Mr. Bragg were spontaneous.

While the more severe the event (including use of the "n" word) will reduce the level of frequency needed to impose liability (see Fairmont Specialty, @ 187, *fn 8*) *there must be some frequency!* The event at issue in this case was the first and only event in thirty (30) years of construction experience, and should not impose liability, especially when coupled with the speedy response.

RETALIATION FOR FILING A COMPLAINT

ASSIGNMENT OF ERROR 4: The Commission erroneously concluded that Mr. and Mrs. Erps retaliated against Mr. Peoples because he filed a complaint with the Commission.

(a) HEARSAY RULE VIOLATION (RULE 802)

Rule 7:30 of the Rules Of Practice and Procedure Before the West Virginia Human Rights Commission [Title 77, Series 2, Code of State Regulations] establishes that in most instances, the rules of evidence shall apply in hearings before the ALJ. There does not appear to be any exception to the application of the rules of evidence in this case. The ALJ improperly permitted hearsay testimony to be admitted in violation of **Rule 802 of the West Virginia Rules of Evidence** when she permitted Mr. Peoples to testify regarding the statements made by a former co-worker [Brian Eaves] *who did not testify and who was never placed under oath.*

In her Findings Number 52 and 54, the ALJ concluded that Respondent William Erps attempted to have Brian Eaves [an African American co-employee of Mr. Peoples] to offer Mr. Peoples money to drop his human rights claim. *The only evidence in this regard was the testimony of Mr. Peoples as to what Mr. Eaves allegedly said to him.* [See Peoples' Testimony Volume 1, Pages 79-84] Counsel for Mr. and Mrs. Erps objected to the hearsay testimony, however, the objections were overruled. [See Volume 1 of the Hearing Transcript, pages 77, 79, 81, 82, 83, 87, 88] Mr. Erps did deny that he had asked Mr. Eaves to offer money to Mr. Peoples to drop his complaint. [Erps testimony, Volume 2, page 209]

(b) ALLEGED HARRASSMENT BY CLAUDE ERPS

Concerning Claude Erps, the ALJ's Finding in this regard is clearly erroneous and her conclusions of law are unsupported by the record. Although Claude Erps is the brother of William Erps, Claude Erps owns a totally separate business from

William Erps and Improvements Unlimited. [See Claude Erps Testimony Volume 2 Page 157]

Claude Erps was called as a witness to testify and he emphatically denied that he had any of his men who worked for his construction company "chase" or otherwise interfere with Mr. Peoples. [See Claude Erps Testimony Volume 2, Pages 158 and 159] Even the Assistant Attorney General did not cross-examine Mr. Claude Erps. [See Volume 2, at Page 160]

There was *no finding* that any activity by Claude Erps, even if true, *had any connection with Mr. Peoples filing a human rights complaint.* There is no evidence in the record to conclude that William Erps caused Claude Erps and his workers to interfere with or harass Mr. Peoples because Mr. Peoples filed a human rights complaint. The conclusions of law regarding this issue are erroneous.

(c) MERE "FEELINGS" DO NOT PROVE HARRASSMENT

Finally, the ALJ in Finding Number 52 stated that "after the complaint was filed, Mr. Peoples felt that Mr. Erps and employees of Improvements Unlimited were following him and chasing him." (Emphasis Added) **There is no finding or conclusion that Mr. Erps actually followed or chased Mr. Peoples because Mr. Peoples' filed the subject Complaint.**

With no finding that Mr. Erps and his employees *actually chased or followed* Mr. Peoples, and with no evidence in the record to support such a finding even had it been made, there is no evidence to sustain any retaliation by Mr. Erps.

GENERAL DAMAGES

ASSIGNMENT OF ERROR 5: The Commission and the ALJ erroneously awarded Mr. Peoples damages for embarrassment, humiliation, and loss of personal dignity in the maximum amount of \$5,000.00

Mr. Peoples consistently testified that his last day of work was June 23, 2004, and that was the day the events at issue occurred. He claims that he immediately walked home and after speaking with Mr. Erps, he called the Human Rights Commission to file a Complaint that same day. [See Peoples Testimony Volume 1, at Pages 43, 135, 136] His testimony is as follows:

"Q. Was that after you spoke with Mr. Erps and before you went to Frye's Roofing?

A. As soon as I got off of the phone I said 'Man, I'll call the Human Rights. I ain't got to take this.' [Peoples' testimony, Volume 1, page 41]

The ALJ has clearly found that the events at issue occurred on June 16, 2004, and the record is replete with evidence to support that conclusion. Consequently, Mr. Peoples was untruthful to the ALJ and the Commission when he claimed that he walked immediately home, called Mr. Erps, and then called to make a complaint with the Commission that same date. Mr. Peoples waited for one week to call the Human Rights Commission, and in the interval, Mr. Erps gave him a paycheck and requested to speak with him so he could return Mr. Peoples to work (this occurred Friday, June 18, 2004.)

Mr. Peoples did not suffer embarrassment and humiliation that led him to make a call to the Human Rights Commission on the same day of the events in

question, because he *did not make the call to the Commission on the day of the events in question*. He was clearly untruthful and the record unquestionably establishes this fact.

The only direct evidence of embarrassment in the record came from the question of the ALJ where she asked Mr. Peoples what the "n" word meant to him; Mr. Peoples stated that the "n" word meant embarrassment and humiliation. [Peoples' testimony, Volume 1, page 213] But the use of the "n" word by a co-employee was not, by itself, the basis for liability. The factors from Fairmont Specialty Services, *supra*, must be considered. Mr. Bragg was probably embarrassed when Mr. Peoples called him names and made jest of his speech impediment.

In light of the above, and the conduct of Mr. Erps to resolve the circumstances immediately when being notified of same, the award of \$5,000.00 in damages for humiliation, embarrassment, and loss of personal dignity was unwarranted from the record.

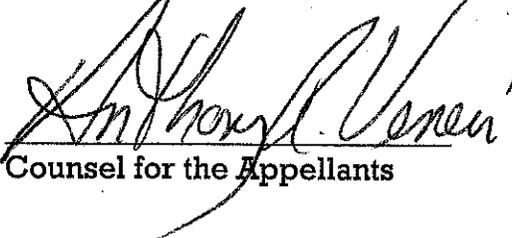
REQUEST FOR RELIEF

Mr. and Mrs. Erps, d/b/a Improvements Unlimited, the Appellants herein, request this Court to **REVERSE** the January 30, 2008, Order of the Human Rights Commission to adopt and incorporate the April 6, 2007, and August 28, 2007, Orders of the Chief Administrative Law Judge establishing liability and awarding damages. The Appellants further request this Court to **VACATE** the award of damages and otherwise render a decision which establishes a final judgment in favor of the Appellants, Mr. and Mrs. Erps d/b/a Improvements Unlimited.

Respectfully submitted,

SUE J. ERPS and WILLIAM G. ERPS
d/b/a IMPROVEMENTS UNLIMITED

By Counsel,



Counsel for the Appellants

ANTHONY R. VENERI, ESQ.
VENERI LAW OFFICES
1600 West Main Street
Princeton, WV 24740
Telephone: (304) 425-8751
WV State Bar #4310/aar

CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, ESQ., Counsel for the Petitioners, do hereby certify that I have this day served a true copy of the foregoing **BRIEF OF APPELLANTS WILLIAM G. ERPS AND SUE ERPS, D/B/A IMPROVEMENTS UNLIMITED**, upon Ivin B. Lee, Executive Director of the West Virginia Human Rights Commission, and upon Paul Sheridan, Esq., Assistant Attorney General, by placing same in the United States Mail, postage paid, addressed as follows:

**Ivin B. Lee, Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 108A
Charleston, West Virginia 25301**

**Paul Sheridan, Esq.
Assistant Attorney General
Civil Rights Division
812 Quarrier Street, 2nd floor
Post Office Box 1789
Charleston, West Virginia 25326-1789**

Dated this 3rd day of October, 2008.



Anthony R. Veneri