

NO. 34262

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

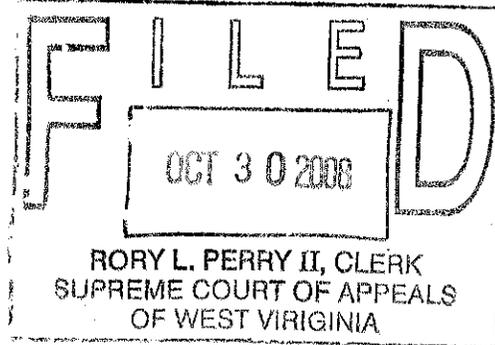
SUE J. ERPS and WILLIAM G. ERPS,
d//b/a IMPROVEMENTS UNLIMITED,

Appellants,

v.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION and VICTOR T. PEOPLES,

Appellees.



FROM THE FINAL ORDER OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
DOCKET NO. ER-71-05

BRIEF OF APPELLEE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Appellees.

BRIEF OF APPELLEE
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NATURE OF PROCEEDINGS BELOW

Victor T. Peoples, the Complainant in the administrative action before the West Virginia Human Rights Commission, worked for Improvements Unlimited as a laborer. Improvements Unlimited is a sole proprietorship owned by Sue J. Erps and William G. Erps. Mr. Peoples was the only African-American member of an otherwise all-white work crew.

On June 16, 2004, Mr. Peoples was racially harassed and threatened by a coworker, in the presence of the crew supervisor. When Mr. Peoples complained to the supervisor about the racial harassment, he was fired.

Mr. Peoples filed a complaint against Improvements Unlimited with the West Virginia Human Rights Commission, which conducted an investigation and made a finding of probable cause.¹ A public hearing was convened by HRC Chief Administrative Law Judge H. Phyllis Carter on December 5-6, 2006, in Princeton, West Virginia. Following the

¹Contrary to Appellants' assertion (Brief of Appellants, p. 1, lines 3-4), there was never any discovery conducted by Chief Administrative Law Judge Carter.

hearing, the parties submitted proposed findings of fact and conclusions of law and legal memoranda.

On April 6, 2007, Chief Judge Carter determined that Victor Peoples had been the victim of discrimination. (See Chief Administrative Law Judge's Final Decision, p. 29, ¶ 2).² The parties then submitted updated damage information pursuant to the directive of the ALJ. On August 29, 2007, the Chief ALJ issued a Supplemental Final Decision on Damages. This Supplemental Final Decision on Damages awarded Mr. Peoples \$24,085.30 in lost wages, \$3,813.51 in interest on lost wages, and \$5,000 in incidental damages.

Improvements Unlimited appealed the ALJ's Final Decision to the panel of Human Rights Commissioners, which issued a Final Order on January 30, 2008, affirming the ALJ's rulings in favor of Mr. Peoples. From this Final Order Improvements Unlimited now appeals.

STATEMENT OF FACTS

Victor Peoples was a laborer for Improvements Unlimited, a sole proprietorship business owned by the Appellants, Sue J. Erps and William G. Erps. Mr. Peoples began his employment with Improvements Unlimited on April 13, 2004. He was paid \$6.00 per hour.

June 16, 2004, turned out to be Mr. Peoples' last day of work for Improvements Unlimited. He arrived around 7:00 a.m. at his employer's shop in Princeton, West Virginia. (Tr. Vol. I at 30-31). He received his work assignment for the day and was assigned to a crew of workers. This crew included fellow laborers Wayne Bragg and Jason Harris, and crew supervisor Dave Yontz. All of these crew members are white, except for Mr. Peoples, who is African-American. (Final Decision, p. 5; Tr. Vol. I at 30-32; Joint Exhibit 1).

²The ALJ did not determine that "Mr. and Mrs. Erps had *caused* the racial harassment," as asserted by Appellants (Brief of Appellants, p. 1) (emphasis added), but rather determined that the Erps were *liable* for severe racial harassment which was committed by a coworker of Mr. Peoples and not addressed or prevented by a supervisor who was in a position to do so.

After the crew was assembled, the group traveled from Princeton to the job site for the day. This particular day, the job site was the technical college across the Southern West Virginia border in Tazewell County, Virginia. When Mr. Peoples and his crew arrived, they unpacked their tools and began working on the day's task, building a tie wall at the college. (Final Decision, p. 6; Tr. Vol. I at 30-32).

The crew had set up an assembly line to perform these tasks. Wayne Bragg did the drilling. Mr. Peoples and Jason Harris performed the sledge-hammering. Supervisor Dave Yontz operated a skit steer full of materials and assisted with the drilling. (Final Decision, p. 6; Tr. Vol. I at 32-34).

A couple of hours into the morning's work, Mr. Peoples noticed that he was having trouble fitting the rebar into the holes that Mr. Bragg was drilling. He asked Mr. Bragg to drill the holes deeper. (Final Decision, p. 6; Tr. Vol. I at 32).

Mr. Bragg apparently took offense to this request. He yelled at Mr. Peoples, "I'll cut your fucking head off with this shovel, nigger." (Final Decision, p. 6; Tr. Vol. I at 33-34).

Shocked by this comment, Mr. Peoples turned to the supervisor, Mr. Yontz, who was on the scene, and Mr. Peoples asked him, "What are you going to do about that?" Mr. Yontz did not respond to Mr. Peoples' question and told Mr. Peoples, "That's done, over, get back to work." (Final Decision, p. 7; Tr. Vol. I at 35-36). Mr. Peoples persisted, "You ain't gonna do nothing?" But Mr. Yontz again refused to address the racial harassment or the threat, telling Mr. Peoples, "Get back to work or you're fired." (Final Decision, p. 7; Tr. Vol. I at 36).

Mr. Peoples again insisted that the supervisor Mr. Yontz take action. At that time, Mr. Yontz told him he was fired and told him to leave the premises. (Final Decision, p. 7; Tr. Vol. I at 35-36). Because he had ridden with the crew to the job site in Virginia, and was now stuck at the job site without a ride home, Mr. Peoples walked the approximately eight to ten miles back to his home in Bluefield, West Virginia. (Final Decision, p. 7; Tr. Vol. I at 37-38).

When he got home, Mr. Peoples called the owner of Improvements Unlimited, William Erps, to discuss the incident. Mr. Peoples reached Mr. Erps on his cell phone and told him about the incident with Mr. Bragg and asked Mr. Erps for a response. But Mr.

Erps said he was out of town and did not offer any immediate or specific remedial action, saying only that he would handle it. (Final Decision, p. 7; Tr. Vol. I at 38-39, 136-137). Several days later, Mr. Peoples, feeling hurt and wronged about his termination, called the West Virginia Human Rights Commission and requested a form to file a discrimination complaint. (Final Decision, p. 9, ¶ 51; Tr. Vol. I at 37).

Within the weeks following the filing of his complaint with the Human Rights Commission, Mr. Peoples experienced intimidation from Improvements Unlimited. He noticed individuals connected to Improvements Unlimited were following him, staring at him. At one point an individual connected with Improvements Unlimited offered him money to try to dissuade him from going forward with his complaint. (Tr. Vol. I at 67-69).

ISSUES ON APPEAL

Appellants have set forth five assignments of error. Each of them is addressed below.

STANDARD OF REVIEW

The State Administrative Procedures Act, W. Va. Code § 29A-5-4, sets out the parameters for the review of a final order of the Human Rights Commission.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon lawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998); see also Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996); Smith v. West Virginia Human Rights Commission, 216 W. Va. 2, 6, 602 S.E.2d 445, 449 (2004).

The scope of review for factual determinations is particularly limited. Where there is conflicting evidence, or conflicting inferences which may be drawn from the evidence, deference is given to the resolution arrived at by the fact finder. Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340, 343 (1990). Where there is sufficient evidence to support the findings, the findings of fact should be affirmed "regardless of whether the [reviewer] would have reached a different conclusion on the same facts." Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 312, 418 S.E.2d 758 (1992); Bloss & Dillard v. West Virginia Human Rights Commission, 183 W. Va. 702, 398 S.E.2d 528, 531 (1990); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Findings of fact made by the trier of fact should be sustained where the findings are supported by substantial evidence and not clearly wrong. Holbrook v. Poole Associates, Inc., Syl. pt. 1, 184 W. Va. 428, 400 S.E.2d 863 (1990); Bloss & Dillard v. West Virginia Human Rights Commission, 183 W. Va. 702, 398 S.E.2d 528 (1990); West Virginia Human Rights Commission v. United Transportation Union, Local 655, Syl. pt. 1, 167 W. Va. 655, 282 S.E.2d 653 (1981). "Substantial evidence" is such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Brammer, 181 W. Va. at 111, 394 S.E.2d at 343; see also West Virginia Human Rights Commission v. United Transp. Union, Local No. 655, Syl. pt. 1, 167 W. Va. 282, 280 S.E.2d 653 (1981); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 532-33, 383 S.E.2d 490, 497-98 (1989); Wheeling Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286, 517 S.E.2d 763 (1999); Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999); Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Commission, 206 W. Va. 611, 527 S.E.2d 155 (1999); Smith v. West Virginia Human Rights Commission, Syl. pt. 2, 216 W. Va. 2, 502 S.E.2d 445 (2004).

This limited scope of review regarding factual issues serves a dual purpose: protection of the integrity and autonomy of the administrative process and deference to an agency's expertise and experience. Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966). As noted by Alfred S. Neely, IV in his treatise, *Administrative Law in West Virginia*, at 438 (1982), much of the justification for administrative adjudication would be

lost if courts were allowed to routinely substitute their judgment for that of the agency. *Cited in Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986). The substantial evidence rule is especially pertinent in cases before the Commission, where the Rules of Evidence apply, parties are represented by counsel, the agency's administrative law judges are well versed in the area of discrimination law, the issues are fully litigated, the parties submit post-hearing findings of fact and conclusions of law and memoranda of law, and the findings of the judge are explained in writing.

In this case, the Appellants have taken issue with the ALJ's interpretation of the events. However, the ALJ's findings are amply supported by the evidence in the record. Indeed, there is no dispute with the most central fact, which is that Mr. Peoples was fired by his supervisor after he complained about his coworker's racially charged threat of violence.

Less deference is given by reviewing courts to a lower tribunal's interpretation of the law or the application of the law. *Maikotter v. University of West Virginia Board of Trustees*, 206 W. Va. 691, 527 S.E.2d 802 (1999); *Wheeling Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999); *State ex rel. Miller v. Reed*, Syl. pt. 5, 203 W. Va. 673, 510 S.E.2d 507 (1998); *Province v. Province*, 196 W. Va. 473, 481, 478 S.E.2d 894, 902 (1996); *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995); *Crystal R.M. v. Charlie A.L.*, Syl. pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995). If there are aspects of the HRC decision which deviated from the laws of the state, they are to be corrected by the court in its review. However, in this case, the decision was based upon a proper application of the applicable law.

ARGUMENT

Improvements Unlimited puts forward several arguments that the Commission's award of lost pay damages was erroneous. None of these arguments establish reversible error.

1. THE HRC AND THE ALJ DID NOT COMMIT REVERSIBLE ERROR BY AWARDING VICTOR PEOPLES BACK PAY THROUGH DECEMBER 2005.

Improvements Unlimited first argues that the HRC erred in awarding Mr. Peoples lost wages past December 31, 2005, allegedly because he admitted he was unable to work as a laborer after March 2005.

This argument is based solely upon the misreading of a single ambiguous portion of the transcript. Mr. Peoples was asked about when he became unable to work as a laborer, but it is clear from the transcript that he interpreted the question as a question about when he filed. (Tr. Vol. I at 200). Mr. Peoples never said that he “could no longer work as a laborer on March 30, 2005.” (Brief of Appellants, p. 9). Mr. Peoples’ filing for benefits does not bar his claim, and does not equate to an inability to work as a laborer. Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999).

Improvements Unlimited next argues that Mr. Peoples should not receive damages for this period because he failed to return to work at Improvements Unlimited after he was fired. Improvements Unlimited argues that this was a violation of his duty to mitigate his damages.

However, this argument fails to take account of the undisputed facts of this case. Mr. Peoples was fired by his supervisor when Mr. Peoples complained about working with a coworker who had called him a “nigger” and told him “you say another word I’ll cut your fucking head off with this shovel.” The owner of the business later told Mr. Peoples to return to work, and promised to “take care of it” at some unspecified time in the future. Mr. Peoples had no duty to put himself back into this situation, even if the offer of continued employment was sincere.

The ALJ found that Improvements Unlimited’s supposed efforts to rehire Mr. Peoples were minimal at best. More importantly, there was no significant effort to address the racially hostile environment. The ALJ found “no evidence in the record that Mr. Erps ever attempted to contact Mr. Peoples at home or by letter to discuss the June 16, 2004 incident involving Mr. Bragg and Mr. Peoples.” (Final Decision, p. 8, Finding of Fact No. 37). Chief Judge Carter found, based upon the evidence in the record, that the racial harassment faced by Mr. Peoples was severe. Mr. Peoples was not under a duty to return

to this work situation when he had been subjected to an unabated racially hostile environment.

Improvements Unlimited next argues that “Mr. Peoples’s (sic) contempt should bar his recovery.” (Brief of Appellants, p. 10). However, Mr. Peoples has never been held in contempt by the ALJ or the HRC. And the ALJ *did* limit Mr. Peoples’ damages based upon his refusal to cooperate in the provision of his VA records.

The HRC provided Improvements Unlimited with the subpoena duces tecum which it requested, for the purpose of obtaining this information, and Improvements Unlimited was nevertheless unsuccessful. It turned out that the information was not as essential as Improvements Unlimited initially persuaded the judge, and the ALJ was able to make a reasonable calculation of damages with the information that was already in the record. The ALJ held the lack of specific information against Mr. Peoples, and limited Mr. Peoples’ damages accordingly.

The ALJ acknowledged that additional information regarding Mr. Peoples’ VA claim “would have been helpful to determine the amount of Mr. Peoples’ back pay award for 2006 if any and to determine whether Mr. Peoples can be reinstated in his laborer’s job with IU.” (Supplemental Final Decision on Damages, pp. 6-7). In the absence of this unavailable information, Chief Judge Carter limited Mr. Peoples’ back pay damages. Mr. Peoples received no back pay damages beyond December 2005, and he was denied reinstatement. In other words, the ALJ made adverse findings based upon Mr. Peoples’ refusal to provide the requested information.

In making these adverse inferences, the ALJ properly applied the HRC procedural rules, W. Va. Code R. § 77-2-4.6., and the long-standing common law rule which provides that “when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” International Union, UAAAIWA v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972), *citing* 2 J. Wigmore, *Evidence*, § 285 (3d ed. 1940).

The irony of Appellants’ argument here is that the ALJ did make adverse inferences from Mr. Peoples’ refusal to provide his VA records, and these adverse rulings cost Mr. Peoples all back pay after December 2005, any reinstatement to employment with

Improvements Unlimited and any possibility of front pay. To the extent that Appellants take issue with the particulars of the ALJ's adverse inferences, the Appellants fail to address the law which provides that decisions regarding adverse inferences are in the sound discretion of the factfinder. Alberta Pork Products' Marketing Board v. United States, 669 F. Supp. 445, 459 (Ct. Int'l Trade 1987).

Improvements Unlimited next argues that in making her decision the ALJ relied improperly upon a document provided to her *ex parte*. This argument is a complete red herring. Mr. Peoples was directed to produce information regarding his VA benefits, and misunderstanding this directive, sent the first page of an order directly to the ALJ. He did not send it to the Assistant Attorney General who was handling his case, and it therefore did not get shared until later with the opposing party. While a technical breach of the rules, it was an honest mistake by Mr. Peoples himself to provide *to the judge* the information which the judge had, after all, requested. There was no prejudice here to Improvements Unlimited.

2. IT WAS NOT ERROR TO CONCLUDE THAT THE ERPS WERE LIABLE FOR RETALIATORY DISCHARGE.

Improvements Unlimited next asserts that the Erps are not liable for the retaliatory discharge because they "did not personally terminate Mr. Peoples." (Brief of Appellants, pp. 14-15).

Under the doctrine of *respondeat superior*, the employer of an employee is liable to that employee for the unlawful actions of the employer's supervisor toward the employee. Musgrove v. Hickory Inn, 168 W. Va. 65, 281 S.E.2d 499 (1981); Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990); Barath v. Performance Trucking, 188 W. Va. 367, 424 S.E.2d 602 (1992); Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995); Burless v. West Virginia University Hospitals, 215 W. Va. 765, 601 S.E.2d 85 (2004). It was Improvements Unlimited supervisor Yontz who fired Mr. Peoples for complaining about being called a "nigger." The Erps, as owners of the business, and therefore the technical employers, were properly liable for this.

Improvements Unlimited further argues that the Erps should not be liable for Yontz's retaliation because they were not aware of the termination, and because "Mr. Erps instructed [Peoples] to return to work the very next morning after the event." (Petition for Appeal, p. 14; Brief of Appellants, p. 9). However, Mr. Erps' personal knowledge of the termination is not a required element of imputed liability. And Mr. Erps' directive to Peoples to immediately return to work, without first addressing the racial hostility by Bragg, and the retaliatory conduct of Yontz, merely added insult to injury. It did nothing to relieve the Erps of their liability for what had occurred.

Finally, Improvements Unlimited asserts that Yontz was not retaliating when he terminated Peoples because Peoples had "refused to return to work" after being called a "nigger." Improvements Unlimited argues it was unreasonable to expect Yontz to address the racial remark at that time, and it was reasonable for him to terminate Peoples for not following his directive to go back to work. However, the ALJ properly followed this Court's holding in Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999), and applied it to the facts which she found.

The ALJ correctly decided that Improvements Unlimited retaliated against Mr. Peoples by terminating him because he insisted that Improvements Unlimited respond to a white coworker's threat of violence and racial slur.

In order to prove retaliation, Mr. Peoples must prove the following elements by a preponderance of the evidence: (1) that he engaged in a protected activity; (2) that Improvements Unlimited was aware of the protected activity; (3) that an adverse action occurred; and (4) that this adverse action followed the protected activity within such period of time that the court can infer retaliatory motivation. Freeman v. Fayette County Bd. of Educ., 215 W. Va. 272, 599 S.E.2d 695 (2004); Conrad v. ARA Szabo, 198 W. Va. 362, 480 S.E.2d 801 (1996); Hanlon v. Chambers, 195 W. Va. 95, 464 S.E.2d 741 (1995); West Virginia Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Brammer v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1990); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251, 259 (1986).

The ALJ found that Mr. Peoples proved all of these elements, and her decision was supported by the record. (Final Decision, pp. 14-15). First, Mr. Peoples was engaged in an activity that is protected by the Human Rights Act. Improvements Unlimited agrees that Mr. Peoples insistently asked his supervisor what he was going to do about the harassment incident. (Tr. Vol. II at 36). This, in and of itself, is the protected activity of requesting a swift and decisive response to harassment.

Second, Improvements Unlimited was aware of this protected activity. This element is admitted by supervisor Dave Yontz. Mr. Yontz testified that Mr. Peoples did indeed ask him what he was going to do about the harassment incident. (Tr. Vol. II at 31).

Third, an adverse action, such as demotion, suspension or termination, occurred. This element is also admitted by Improvements Unlimited, since Dave Yontz admits that he fired Mr. Peoples. (Tr. Vol. II at 67-68; Commission's Exhibit 5 (Tab 4)). And termination of employment is an adverse action. (Final Decision, p. 14).

Fourth, the adverse action followed the protected activity within such period of time that the court can infer retaliatory motivation. Improvements Unlimited does not dispute that Mr. Peoples' termination occurred immediately after he refused to work until Improvements Unlimited responded to the harassment. And this short period of time between the protected activity and the termination is enough to infer retaliatory motive.

Improvements Unlimited claims that Mr. Peoples was terminated for "refusing to work" and not for insisting that it respond to the incident of harassment. But, as the ALJ noted, Mr. Peoples was justified in not returning to work because the terms and conditions of his employment had changed when a white coworker threatened him with a shovel and called him "nigger." (Final Decision, p. 15; Tr. Vol. I at 264-265).

Further, the ALJ correctly ruled that there is no basis for Improvements Unlimited's assertion that Mr. Peoples' past work performance played a role in his termination. (Final Decision, p. 15). William Erps testified that Mr. Peoples' work performance did not play a role in his discharge, and David Yontz admitted that even if Mr. Peoples had been a perfect employee, he would have terminated him for refusing to work. (Tr. Vol. I at 261; Tr. Vol. II at 74-75). This testimony proves that Mr. Peoples' past work performance is irrelevant and did not play a role in his termination. (Final Decision, p. 15).

Even if Mr. Peoples' past performance did somehow play a role, Improvements Unlimited produced no persuasive evidence to prove that Mr. Peoples had work performance deficiencies. There is no documentation whatsoever concerning any alleged deficiencies, and none of Mr. Peoples' former coworkers had any specific recollection of any of these deficiencies.

Considering that Improvements Unlimited's alleged reasons for terminating Mr. Peoples are not legitimate, the ALJ soundly determined that Improvements Unlimited is liable for terminating Mr. Peoples in retaliation for insisting that Improvements Unlimited respond to the incident of harassment. And since Improvements Unlimited is a sole proprietorship owned by the Erps, they are liable for the retaliatory discharge.

3. IT WAS NOT ERROR TO CONCLUDE THAT THE ERPS WERE LIABLE FOR A RACIALLY HOSTILE ENVIRONMENT.

Improvements Unlimited next argues that it was error to find the Erps liable for a racially hostile environment when the Erps did not [personally] acquiesce in the harassment (Brief of Appellants, pp. 16-17), and when there was not "a significant accumulation" of racial incidents. But this argument is based on a misapplication of the law.

Because Yontz was Peoples' supervisor, the Erps are strictly liable for Yontz's failure to remediate the harassment by some action other than to terminate Peoples.

Furthermore, a racially harassing environment does not always require "a significant accumulation of racial incidents." The test is that the harassment must be severe or pervasive. There can be no denying that Bragg's threat to Peoples to "cut your fucking head off with this shovel, nigger" was severe. Fairmont Speciality Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999).

The ALJ correctly found Improvements Unlimited liable for not taking swift and decisive action to remedy the severe incident of racial harassment, and her decision is supported by the record of this case.

In order to establish a hostile work environment harassment claim, Mr. Peoples must establish:

- (1) the subject conduct was unwelcome;
- (2) it was based on his race;
- (3) it was sufficiently severe or pervasive to alter his conditions of employment; and
- (4) it was imputable on some factual basis to the employer.

Akers v. Cabell Huntington Hospital, 215 W. Va. 346, 599 S.E.2d 769 (2004); Fairmont Specialty Services, at Syl. pt. 2.

As to the first two elements, it is undisputed that Mr. Bragg's comment, "I'll cut your fucking head off with this shovel, nigger," was unwelcome and based on race.

As to the third element, Mr. Bragg's threat, coupled with his use of the racial slur "nigger," is sufficiently severe. To meet this test, the conduct may be either sufficiently severe or pervasive. This Court has explained that some single instances are, in themselves, severe enough to meet this standard. Specifically, the Court has declared the following:

Conduct such as use of the "N" word to describe an African-American. . . cannot be tolerated in the workplace. [This] type of outrageous discriminatory conduct may be considered to be of an aggravated nature such that the **threshold for it to be actionable is much lower** than more subtle forms of discrimination which cumulatively cause conduct to be actionable under the Human Rights Act.

Fairmont Specialty, 522 S.E.2d at 187-188 n.8 (emphasis added).

Given this Court's position, Mr. Bragg's single comment, which included both the use of the "N" word and a threat of bodily harm, is sufficiently severe to meet the second element of this cause of action.

In the instant case, the offensive conduct, being threatened with physical violence and called the "N" word, is about as offensive as it gets. And this incident alone is sufficiently severe to satisfy the third element of proof on the test for what constitutes harassment under the Human Rights Act.

As to the fourth element of proving harassment, the ALJ correctly found that Mr. Bragg's comment is imputable to Improvements Unlimited because the record shows that Improvements Unlimited did not take swift and decisive action to remedy the situation.

When a coworker creates a hostile environment, an employer can only escape liability if it takes prompt remedial action. Fairmont Specialty, 206 W. Va. at 95, 522 S.E.2d at 189. Case law explains that this action must be swift, decisive, meaningful, and reasonably calculated to end the harassment. Fairmont Specialty, 206 W. Va. at 96, 522 S.E.2d at 190.

This Court has listed several factors to consider when determining whether or not the employer took the appropriate action. These factors include: the promptness of the employer's response, the employer's degree of acquiescence in the harassment, the gravity of the harm, the nature of the work environment, and the sincerity of the employer's actions. Fairmont Specialty, 206 W. Va. at 97, 522 S.E.2d at 191. Regarding all of these factors, the evidence in this case supports the HRC's determination.

In this case, the gravity of the harm is substantial. Mr. Bragg called Mr. Peoples a nigger and threatened to cut his head off with a shovel. A remark this serious demands a serious response. The level of Improvements Unlimited's response did not equal the seriousness of the offense. Improvements Unlimited took very little immediate action. In fact, its only immediate plan was to separate Mr. Bragg and Mr. Peoples. And it did not even speak with Mr. Bragg on the day of the incident.

Besides not taking prompt action, the ALJ found that Improvements Unlimited acquiesced and tacitly approved of the harassment by having no measures in place to address such incidents. (Final Decision, p. 17). Improvements Unlimited had no measures to prevent harassment or to handle it once it had occurred. This lack of concern suggests not only callous negligence, but a tacit approval of this abhorrent conduct.

4. THE HRC PROPERLY FOUND THAT THERE HAD BEEN SOME RETALIATION AGAINST MR. PEOPLES FOR HIS COMPLAINT.

The ALJ correctly determined that Improvements Unlimited engaged in some reprisal that took the form of intimidation and coercion. (Final Decision, p. 22).

The West Virginia Human Rights Act prohibits an employer, an employment agency, or a person from engaging in "**any form** of threats or reprisal[.]" W. Va. Code §§ 5-11-(9)(7)(A)&(C) (emphasis added).

Within days after Improvements Unlimited had notice of his HRC complaint, Improvements Unlimited had taken several actions to intimidate Mr. Peoples. One time Mr. Peoples was leaving a bar in Bluefield and a large man got out of a van with an "Erps" sign on it and chased Mr. Peoples. (Final Decision, pp. 22-23; Tr. Vol. I at 73-79).

Another time, Mr. Peoples was in a bar in Bluefield, when Brian Eaves, a former Improvements Unlimited employee, came in and asked Mr. Peoples about the incident with Mr. Bragg. Mr. Eaves then showed Mr. Peoples a wad of money and said, "Mr. Erps know a lot of important people," and told him, "You better take this." (Tr. Vol. I at 85). This gave Mr. Peoples the impression that Improvements Unlimited had sent Mr. Eaves to pay him off. (Final Decision, p. 23; Tr. Vol. I at 74-75, 80).

Improvements Unlimited argues that Mr. Peoples' testimony concerning Mr. Eaves' statements was hearsay and should not have been admitted. But the ALJ correctly admitted this testimony because it was a verbal act. It was not offered for the *truth* of the matter asserted, which was that Mr. Erps knows important peoples.

The Commission attempted to get Mr. Eaves to testify, issuing and serving a subpoena, which he apparently ignored. The Commission also provided Improvements Unlimited with all of the contact information it had concerning Mr. Eaves. Accordingly, Improvements Unlimited had every opportunity to procure Mr. Eaves as a witness to rebut Mr. Peoples' testimony, but it made no effort to do so.

Besides Mr. Eaves' actions, the ALJ further found that were several occasions when Improvements Unlimited tried to intimidate Mr. Peoples. One day, Mr. Erps drove by Mr. Peoples a couple of times and stared at him and gave him weird looks. (Final Decision, p. 23; Tr. Vol. I at 68-70). Another time, Mr. Erps sat in a parked car and looked at Mr. Peoples. (Final Decision, p. 23; Tr. Vol. I at 69-71). And, on another occasion, Mr. Erps' brother drove past Mr. Peoples ten to fifteen times one day and stared at him as he rode by. (Final Decision, p. 23; Tr. Vol. I at 70-72).

These actions of intimidation and coercion are strictly prohibited by the West Virginia Human Rights Act. W. Va. Code § 5-11-9(7). They further demonstrate that Improvements Unlimited was never serious about preventing or remedying harassment,

and was only interested in ending this case, even if it meant ending the case by intimidation or coercion.

5. THE CIRCUMSTANTIAL EVIDENCE OF ATTEMPTED INTIMIDATION OF MR. PEOPLES BY ERPS IS SUFFICIENT TO SUPPORT THE ALJ'S FINDINGS.

Appellants also take issue with the ALJ's findings that Mr. Erps attempted intimidation through his brother and through a former employee. (Brief of Appellants, pp. 18-19). However, there was credible evidence in the record which supports the ALJ's findings of harassment. The testimony of Mr. Peoples was that he was approached and followed. The ALJ is not clearly wrong to credit this testimony. Furthermore, it is reasonable to infer from these encounters that Mr. Erps was acting to send a message, and so the ALJ's findings were not unsupported by the record.

Appellants also complain that the ALJ has relied only on Mr. Peoples' "feelings" to establish harassment (Brief of Appellants, p. 19); however, this is a misreading of the Final Decision. While the first sentence of Finding of Fact No. 52 makes reference to what Mr. Peoples "felt," the rest of that finding, and the next two findings, ground the ALJ's conclusions about retaliation in the events themselves. The ALJ's findings are supported by the evidence in the record, and her findings in turn support her conclusions of discrimination and retaliation.

6. THE ALJ COMMITTED NO ERROR BY AWARDING MR. PEOPLES INCIDENTAL DAMAGES.

Improvements Unlimited asserts that Mr. Peoples' testimony regarding the date of his last day of work was off by a week, and argues from this that Peoples "did not suffer embarrassment and humiliation that he testified to because his testimony was clearly untruthful." (Petition for Appeal, p. 18; Brief of Appellants, p. 20).

IU's argument on this point is absurd. Mr. Peoples' lack of precision regarding dates is no reflection on his veracity, and certainly not on the humiliation and fear which would be a natural and undeniable consequence of the treatment which he received. In this

case, the ALJ's award of nominal damages for the emotional harm done to Mr. Peoples is quite warranted, and certainly not error.

CONCLUSION

For the reasons set forth above, and in the Commission's previous submissions, the West Virginia Human Rights Commission, on behalf of Victor T. Peoples, requests that the Court affirm the agency's Final Order.

Respectfully submitted,

WEST VIRGINIA HUMAN RIGHTS
COMMISSION, on behalf of
Victor T. Peoples,
Appellees,
By Counsel.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Appellants,

v.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION and VICTOR T. PEOPLES,

Appellees.

CERTIFICATE OF SERVICE

I, Paul R. Sheridan, Deputy Attorney General of the State of West Virginia, do hereby certify that the foregoing **Brief of Appellee West Virginia Human Rights Commission** was served upon the following, by depositing a true copy thereof in the United States Mail, first class postage prepaid, on the 29th day of October 2008, addressed as follows:

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The original and nine copies were mailed this date to:

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