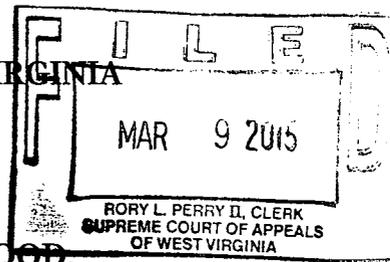


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.*

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

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**PETITIONERS' SUPPLEMENTAL BRIEF ON ISSUES  
OF HOSTILE WORK ENVIRONMENT AND PUNITIVE DAMAGES**

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## I. INTRODUCTION

Pursuant to an order by this Court on February 4, 2015, Defendants, Constellium Rolled Products Ravenswood, LLC, and Melvin Lager, ["Constellium"], respectfully submit this supplemental brief supporting Constellium's position on the issues of whether (1) the alleged wrongful conduct was based upon the gender of Plaintiffs, Sharon Griffith and Lou Ann Wall ["Ms. Griffith," "Ms. Wall," or collectively "Plaintiffs"], rather than being directed at both men and women and (2) the award of punitive damages was appropriate in light of the Court's opinion in Quicken Loans, Inc. v. Brown, 2014 WL 6734107 (W. Va., Nov. 25, 2014).

## II. STATEMENT OF THE CASE

- A. THE EVIDENCE AT TRIAL CLEARLY ESTABLISHED THAT THE ALLEGEDLY WRONGFUL CONDUCT WAS NOT BASED UPON PLAINTIFFS' GENDER, BUT WAS DIRECTED AT THEIR PERCEIVED WORK ETHIC; THAT THE EMPLOYER'S POLICY OF POSTING EMPLOYEE COMMENTS WAS GENDER-NEUTRAL WITH UNFAVORABLE CARDS POSTED FOR BOTH MALE AND FEMALE EMPLOYEES; AND THAT, ALTHOUGH PERHAPS OFFENSIVE TO PLAINTIFFS, THE ISOLATED POSTING OF THE COMMENT CARDS COMPLETELY FAILS THE "SEVERE AND PERVASIVE" TEST FOR A HOSTILE WORK ENVIRONMENT.**

As noted in Justice Ketchum's dissent, comments placed in Constellium's suggestion box, both positive and negative, were directed equally at both men and women:

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

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

derogatory comments about both male and female employees, including a foreman.

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

There is no cause of action under our sex discrimination laws. Our anti-discrimination laws are not codes of civility. Our laws are aimed at discrimination directed at a protected class, not comments directed at anyone in the work place.<sup>1</sup>

As Justice Ketchum further observed, “At oral argument, it was not disputed that 42 comments and responses were posted at the same time. Three of those comments were about the plaintiffs.”<sup>2</sup>

As referenced in the majority’s memorandum decision, only one of the three comment cards used the term “bitches,” with the thrust or sting of all three comment cards, including the other two not using the work “bitch,” dealing with plaintiffs’ work ethic and not their gender:

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

[1] \_\_\_\_\_ (employee) (Project Maint) comes in on weekends to work (overtime) time and a half on Saturdays and double time on Sundays and sits on her a \_\_\_ both days in the lunchroom and does “Nothing.” “This is b\_\_\_s\_\_\_.” I am tired of

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<sup>1</sup> Constellium Rolled Products Ravenswood, LLC v. Griffith, 2014 WL 5315409 at \*6-7 (W. Va., Oct. 17, 2014)(Ketchum, J., dissenting)(footnote omitted).

<sup>2</sup> Id. at \*7, n. 1.

carrying her big lazy a \_\_\_ around. This is not fair to the company or the union workers. If the lazy worthless b \_\_\_ can't do the work she needs to stay home. She comes in here and drinks coffee and smokes cigarettes all weekend. Stop this s \_\_\_.

CEO RESPONSE:

As I responded to a similar comment, we need everyone to be fully engaged and productive.

[2] Ask \_\_\_\_\_ supervisor what he had his crew doing in Project Maintenance on Oct. 9th on evening shift! I understand Project has at least 3 extra buggies. One of their buggies was missing on that shift I understand. \_\_\_\_\_ (hourly employee) and another lady spent 4 hours hunting for that missing buggy. They (Project) had no supervision that evening; seems like lazy a \_\_\_ like them don't need to be here especially on overtime looking for one of their extra buggies. They need to give up their extra buggies to Plate dept. maint. So they don't have to walk and carry their tools.

CEO RESPONSE:

This doesn't seem to be the best use of time or equipment.

[3] Lazy a \_\_\_\_\_ (employee) was here on overtime again on Saturday, 9th doing "NOTHING." Smoking cigarettes and drinking coffee again and sitting on her a \_\_\_ in the lunchroom. This is b \_\_\_ s \_\_\_. And will be here on Sunday on double time 10th doing the same!

CEO RESPONSE:

We need everyone fully engaged and productive.<sup>3</sup>

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<sup>3</sup> Id. at \*1-2.

Other than references to “her” and “she,” these comments could just have easily have referred to male employees merely by changing pronouns:

[1] \_\_\_\_\_ (employee) (Project Maint) comes in on weekends to work (overtime) time and a half on Saturdays and double time on Sundays and sits on **his** a \_\_\_ both days in the lunchroom and does “Nothing.” “This is b \_\_\_ s \_\_\_.” I am tired of carrying **his** 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 **he** needs to stay home. **He** comes in here and drinks coffee and smokes cigarettes all weekend. Stop this s \_\_\_\_\_.

Moreover, the gist or sting of the comments is not directed to the subject employee’s gender, but to work ethic: “comes in on weekends to work . . . and sits on . . . a \_\_\_;” “I am tired of carrying . . . big lazy a \_\_\_ around;” “This is not fair to the company or the union workers;” “If the lazy worthless . . . can’t do the work . . . needs to stay home;” and “comes in here and drinks coffee and smokes cigarettes all weekend.” Which of any of these criticisms – other than pronouns and use of the word “bitch” which even Plaintiffs conceded was used to refer to both men and women in this workplace and which they used to describe themselves – is directed to Plaintiffs’ gender? Lazy employees are not protected from being accused by their coworkers of being lazy merely because the lazy employees are a member of a protected classification. In addition, accusing someone of being lazy<sup>4</sup> is otherwise a First Amendment protected expression of opinion.<sup>5</sup>

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<sup>4</sup> See, e.g., Lacy v. Dallas Cowboys Football Club, 2012 WL 2795979 at \*13 (N.D. Tex.) (“The final alleged defamatory statement occurred when Lacy drove a forklift too close to an office area and Mefford yelled, ‘You lazy bastard you going to run into the wall and office area.’ Id. As statements about an employee’s competency are expressions of opinion, not actionable assertions of fact, Robertson, 190 S.W.3d at 903, the statement that Lacy was a ‘lazy bastard’ is similarly an opinion that is not actionable as defamation.”); Newman v. Hansen & Hempel Co., 2002 WL 31455990 (N.D. Ill.) (statement that plaintiff was “incompetent at her job” was an opinion, not a statement of fact); Doherty v. Kahn, 289 Ill. App. 3d

The second comment card not only did not use the term “bitch,” it was arguably unclear as to the gender of the employees which were the object of the employee’s criticisms:

[2] Ask \_\_\_\_\_ supervisor what he had his crew doing in Project Maintenance on Oct. 9th on evening shift! I understand Project has at least 3 extra buggies. One of their buggies was missing on that shift I understand. \_\_\_\_\_ (hourly employee) and another lady spent 4 hours hunting for that missing buggy. They (Project) had no supervision that evening; seems like lazy a\_\_\_\_ like them don’t need to be here especially on overtime looking for one of their extra buggies. They need to give up their extra buggies to Plate dept. maint. So they don’t have to walk and carry their tools.

Moreover, none of the criticisms were directed to the employees’ gender, but rather to their work ethic: “spent 4 hours hunting for that missing buggy;” “don’t need to be here especially on overtime looking for one of their extra buggies;” “need to give up one of their extra buggies;”

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544, 554–57, 224 Ill. Dec. 602, 682 N.E.2d 163, 170–73 (Ill. App. Ct. 1997)(statement that employee was “lazy” was expression of opinion and not actionable).

<sup>5</sup> Importantly, at trial, the coworker’s criticisms of Plaintiffs’ work ethic and of engaging in the same or similar conduct of which they were complaining were corroborated by a number of witnesses. Mark Witt, a coworker, corroborated Mr. Keifer’s testimony about Plaintiffs’ work ethic; that Plaintiffs were shunned after “they want to pull out a notepad and start writing stuff down” and “It wasn’t so much after the comment cards, it was when the lawsuit come out I believe;” that Ms. Wall had called him “a A-hole;” that Ms. Wall had threatened that her husband would “kick my A;” and that Ms. Griffith “said that her mom called her a shit-stirring B;” that Ms. Griffith’s toolboxes had stickers that said, “Support bitching” and “thou shalt not bitch;” that both Plaintiffs would “come in the break room and sit on people’s lap;” that Ms. Wall touched him inappropriately and when he objected “she called me queer.” [App. 1373-1394] Todd McCoy, another coworker, corroborated Mr. Keifer’s testimony about Plaintiffs’ work ethic; that, like Mr. Witt, he avoided Plaintiffs because he was “afraid . . . [b]ecause [of] this lawsuit;” that Ms. Ms. Griffith’s toolboxes had stickers that said, “Support bitching” and “thou shalt not bitch;” and that, like Mr. Witt, Ms. Wall “came over and grabbed me by the butt.” [App. 1394-1400] Tom Brown, another coworker, the final witness at trial, corroborated Mr. Keifer’s testimony about Plaintiffs’ work ethic; that Ms. Griffith “said her mom had – excuse my language – but called her a shit-stirring bitch;” and that Plaintiffs referred to Mr. Brown as “a little baldheaded prick most of the time.” [App. 1401-1408] Plaintiffs also do not dispute this “admitted use of rough language in the workplace.” Reply Brief at 29. Apparently, whenever Plaintiffs used offensive language to refer to themselves or their coworkers, such use was to be ignored, but when the company posted a single comment card using the term “bitch,” it created a hostile work environment warranting a verdict of \$1 million.

and “So they don’t have to walk and carry their tools.” Again, the coworker is not complaining about Plaintiffs’ gender, but that, according to the coworker, they were spending an inordinate amount of time, while working on overtime, searching for a missing buggy while their coworkers kept working carrying their own tools. Obviously, this type of criticism could be directed to any employee, regardless of gender, race, national origin, or other protected classification.

The final comment card also did not contain the word “bitch” and contained but a single pronoun:

[3] Lazy a \_\_\_\_\_ (employee) was here on overtime again on Saturday, 9th doing “NOTHING.” Smoking cigarettes and drinking coffee again and sitting on her a \_\_\_ in the lunchroom. This is b \_\_\_ s \_\_\_. And will be here on Sunday on double time 10th doing the same!

This was entirely consistent with the sting of the coworker’s previous comments: “Lazy;” “on overtime again . . . doing ‘NOTHING;’” “sitting on . . . a \_\_\_ in the lunchroom;” and “will be here on Sunday on double time . . . doing the same!” None of these were comments on Plaintiffs’ gender nor are criticisms that coworkers level against one another based solely on gender. Rather, they were comments by one employee frustrated by his perception that two of his fellow employees were giving less than their full efforts, particularly on weekends when they were being paid time-and-a-half or double-time.

Likewise, not one of the CEO’s responses had any reference whatsoever to gender:

CEO RESPONSE:

As I responded to a similar comment, we need everyone to be fully engaged and productive. . . .

CEO RESPONSE:

This doesn't seem to be the best use of time or equipment. . . .

CEO RESPONSE:

We need everyone fully engaged and productive.

“Everyone” obviously means “everyone,” i.e., whatever their gender, race, national origin, or other protected or unprotected classification.

Because their hostile work environment claim was predicated solely upon the posting of their coworker's comments; the CEO's gender-neutral response to the comments; and the alleged failure of Constellium to take some unspecified action regarding their coworker even though they never requested any action or even complained about the matter after the comments were removed from the company's bulletin board, Plaintiffs attempt to bootstrap completely unrelated incidents over the years, but even as the majority's memorandum decision correctly observed, Plaintiffs described their work environment as “friendly” prior to this incident. Constellium, supra at \*2.

The first trial witness, Larry Keifer, testified that he worked in a different department than the plaintiffs [App. 1021]; that he submitted his comment cards pursuant to company policy [App. 1024]; that he did not know what the company would post of the information contained in his comment cards [App. 1024]; that he had apologized to Plaintiffs for using the language contained in the comment cards [App. 1027]; that he never actually saw the comment cards after they had been redacted and posted by the company [App. 1028-29]; and that the reason he submitted the comment cards was that “I was trying to get management's attention on the overtime abuse at the plant.” [App. 1034]

When asked, “Mr. Keifer, did you write these cards about the plaintiffs because they were women,” Mr. Keifer responded, “No” [App. 1035]; and when asked, “So it was their actions, not their gender, that was an issue?,” Mr. Keifer answered, “Correct. I mean, it could’ve been – it would have been about anybody, if it would have been a man” [App. 1035]. Thereafter, Mr. Keifer testified to specific examples in which he had a problem with the job performance of the two plaintiffs; [App. 1035-1053]; that the Plaintiffs themselves engaged in “name calling;” [App. 1039]; and that he had called a male co-worker “a lazy, worthless bitch” and had used the term “bitches” to refer to both male and female employees. [App. 1045]

Mr. Keifer was never accused of actually saying anything negative to Plaintiffs or any other female employees in the plant. Indeed, Mr. Keifer never did anything to publish anything negative about the Plaintiffs other than to submit comment cards for which he had no control over their publication or the content of any publication.<sup>6</sup>

The next witness who testified at trial was Jerry Carter, Vice-President of Human Resources. [App. 1047] He testified that the procedure was that comment cards were anonymously submitted, reviewed, and redacted; that the CEO would then add management’s response; and that the cards were physically posted on a bulletin board. [App. 1052-1057] There was no testimony by Mr. Carter or anyone in management about the posting of the comments

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<sup>6</sup> Moreover, there is absolutely nothing in the record to support the statement in the majority’s memorandum decision that “After a handwriting expert was retained by the respondents, Mr. Keifer admitted that he wrote the comments.” Constellium, supra at \*2. Indeed, plaintiffs made the point during their cross-examination of Mr. Keifer that the comment cards were authored anonymously; that management never inquired of him whether he authored the comment cards; and that Mr. Keifer never conceded he authored the comment cards until he was sued by plaintiffs. [App. 1041-1045] The company retained a handwriting expert years earlier involving an incident that was resolved to the satisfaction of the female employee involved. Accordingly, the entire issue of a handwriting expert is irrelevant as it involved an incident prior to the posting of the comment cards at issue in this case after which, as the majority’s memorandum decision concedes, Plaintiffs described the work environment as “friendly.”

anywhere but physically on the bulletin board. As to why no investigation of the author of the comment cards was conducted, Mr. Carter explained that the comments were submitted and posted anonymously. [App. 1057] Mr. Carter explained that within “a matter of two or three days” of being posted, the comments, which were posted along with about forty others, were removed from the bulletin board when management received a complaint. [App. 1066, 1070]

The next witness at trial was Mel Lager, the CEO. [App. 1079] Like Mr. Carter, Mr. Lager testified that the procedure was to post redacted comments on the bulletin board, which are enclosed in glass and locked. [App. 1082] Also, like Mr. Carter, Mr. Lager never testified nor was either witness even asked about the posting of the comment cards on the company’s intranet or the alleged circulation of copies of the comment cards after they were removed from the bulletin board. Again, contrary to the majority’s memorandum decision, the company did not learn about the authorship of the comment cards after retaining a handwriting expert; rather, pursuant to the direct examination of plaintiffs’ counsel, it did not learn it until post-litigation: “once we started this case . . . Mr. Keifer fessed up . . . .” [App. 1088] Mr. Lager explained that the reason no further action was taken was that the collective bargaining agreement provided if any further action was needed, the company would be advised by the union:

Whenever I was contacted by the union hall . . . I took it down . . . and I never heard anything. And that is the way it worked with the union; if there was an issue, the union would come forward and we would address it. I addressed it and believed that the issue was resolved, and it was only until the beginning of 2011 when I had received notification of the lawsuit that I understood there was a problem.

[App. 1105; see also App. 1110-1111]<sup>7</sup> As Mr. Lager responded when asked, “And did you ever deal with employees directly themselves without the union involved?” “Yeah, per the collective bargaining agreement, I couldn’t do that. . . once it got into the grievance procedure, we followed the collective bargaining agreement.” [App. 1111]<sup>8</sup> Finally, contrary to the memorandum decision’s findings that the comments were posted on the company’s intranet and passed around the plant, Mr. Lager testified that the cards were only posted to the bulletin board and the only persons with access to the cards were Carol Crow and Mark Zelazny, his assistants, and Eli Morris, the union’s grievance chairman. [App. 1114]<sup>9</sup>

Ronald Barton, the shop steward for the maintenance area of the plant, also testified. [App. 1177] Mr. Barton testified that he only saw the comment cards posted on the bulletin boards; that he discussed the matter with Ms. Wall; and that they both took the matter to Eli Morris to address it. [App. 1185-1187] The only difference in the treatment of plaintiffs that Mr. Barton testified he observed after the cards were posted was what he described as “shunning.”

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<sup>7</sup> In this respect, the memorandum decision will expose employers to liability even where an employee’s union representatives do not object to a company’s resolution of a complaint and, as in this case, the employee does nothing to complain.

<sup>8</sup> So, the majority’s memorandum decision punishes Constellium for not doing what it was prohibited by federal law from doing, i.e., dealing directly with female employees who, on the one hand, are members of the union, and investigating and punishing a male employee who, on the other hand, is also a member of the union.

<sup>9</sup> The only testimony at trial regarding the posting of the cards on anywhere but the bulletin board was by Sharla Rose, an inspection packer, but she equivocally testified, “It was – it’s been so long, I can’t remember, but it was time later that it was on the company’s intranet” and, when asked, how long she may have remembered it being on the company’s intranet, she testified that she could not recall. [App. 1127-1128] Again, both Mr. Carter and Mr. Lager testified that cards were posted only on the bulletin board and neither was asked on cross-examination regarding any posting of the cards on the company’s intranet. Finally, no other trial witness so testified. Moreover, Ms. Rose testified, contrary the memorandum decision, that after the comment cards were posted, “I don’t think anybody treated them any different.” [App. 1131]

[App. 1192]<sup>10</sup> Moreover, Mr. Barton, who was retired at the time of trial, admitted that his memory may have been faulty regarding this “letter”: “my memory is that the copy I looked at, I cannot remember on parts of the letter Sharon’s name being used. Yet, I see here her name being used. I must – I must add this, this is three and a half years old. My memory is not that good.” [App. 1196] Yet, apparently based on Plaintiffs’ brief, which misrepresented the trial testimony, Mr. Barton’s admittedly doubtful testimony about whether a “letter” may have been circulated became an important fact upon which the memorandum decision is based.<sup>11</sup>

Robert Gibbs, another one of Plaintiffs’ coworkers, testified at trial on behalf of Plaintiffs, but was asked and said nothing about circulation of the comment cards on the company’s intranet or around the plant. [App. 1216-1226] Rather, he testified that he only saw the redacted comment cards posted on the company’s bulletin board. [Id.]

Paul Spence, another coworker, also testified at trial. [App. 1289] Again, like all of the other witnesses, including Plaintiffs, he testified that he observed only redacted comment cards on the bulletin board and offered no testimony that they were posted either on the company’s intranet or otherwise distributed. [App. 1289-1304] Although he testified about a single incident in which he alleged that Ms. Wall was not provided a fire watch – something about which even Ms. Wall did not testify – he admitted that the collective bargaining agreement permitted the filing of a complaint about the alleged incident, but he did not do so. [App. 1304-1305]

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<sup>10</sup> Moreover, contrary to the memorandum decision, Mr. Barton did not testify that the cards “were passed around at lunch tables, taped to the walls and shower room, and circulated around the plant.” Constellium, supra at \*2. Rather, he testified that some unspecified “letter” was circulated: “I have no idea who, was circulating this letter, printing it, circulating it, whatever.” [App. 1194]

<sup>11</sup> Obviously, if this were really true, like the posting of the comment cards on the company’s intranet, would appear in something other than just the admittedly uncertain testimony of a single witness.

Ms. Wall testified only briefly at trial. [App. 1227-1289] She testified to only seeing the redacted comment cards posted on the bulletin board. [App. 1238-1239] She admitted that after she complained to her union representative, the cards were taken down “Two or three days later.” [App. 1242] She admitted that after the cards were taken down, she made no further complaint to either the union or the company. [App. 1243] She testified about an incident in which someone had placed a sign on her forklift with inappropriate language and that the company hired a handwriting expert to determine its author, but this incident had happened years earlier. [App. 1244-1289] Again, however, because the two incidents were conflated in plaintiffs’ brief, the memorandum decision erroneously conflates the two.<sup>12</sup> Also, contrary to the memorandum decision, Ms. Wall’s testimony about the atmosphere at the plant following posting of the comment cards was that she was “shunned,” not that the conditions were so severe that the conditions of her employment were fundamentally changed. [App. 1248]<sup>13</sup> Ms. Wall also admitted to using the term “bitch” on multiple occasions in the workplace and that she may have used the word to refer to herself. [App. 1286] Finally, Ms. Wall offered no testimony about the comments being posted on the company’s intranet or otherwise circulated in the plant.

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<sup>12</sup> Indeed, as Ms. Wall complained on direct examination referencing authorship of the comment cards: “Q. Did anyone from the company ever investigate this?,” she responded, “No, sir.” [App. 1247]

<sup>13</sup> The memorandum decision also misconstrues Ms. Wall’s testimony about Mr. Keifer’s allegation that, prior to his submission of the comment cards, Ms. Wall did not provide sufficient “fire watch” support. [App. 1283-1285] When asked, “[D]o you get a fire watch?,” she testified, “Lately I haven’t been, no. Occasionally, I might.” [App. 1284] As to the memorandum’s decision that after the incident in 2009, “the women were scheduled only to work with each other,” *Constellium*, supra at \*4, Ms. Wall’s actual testimony, in 2012, was as follows: “Q. So, in essence, if Sharon’s not there, it is just you. A. Yeah. Most of the time. Q. Right. Not that – there is sometimes somebody there. A. Yeah.” [App. 1285]

Like Ms. Wall, Ms. Griffith testified only briefly at trial. [App. 1305-1327] Even though she was on vacation at the time, she came to the plant after hearing about the comment cards and, like the rest of the witnesses previously discussed, testified only regarding their presence, in redacted form, on the company's bulletin board. [App. 1308-1309] Contrary to the memorandum decision, she offered no testimony about the comments being posted on the company's intranet or otherwise circulated around the plant. Like Ms. Wall, Ms. Griffith's testimony about the work environment after the cards were posted involved shunning, not a fundamental change in the conditions of her employment. [App. 1310-1313] Moreover, Ms. Griffith admitted that what she perceived as shunning might have been misconstrued on her part. [App. 1316] As to the company's policy of using comment cards to promote communication between management and labor, Ms. Griffith admitted that she had submitted a comment card of her own. [App. 1314] She also admitted that although she had filed "a lot of grievances" in the past, she filed no grievance regarding the comment cards. [App. 1319] Like Ms. Wall, she admitted to using foul language in the plant, including use of the word "bitch," and that her toolboxes had stickers saying "Support bitching" and "Commandment number eleven, though shalt not bitch." [App. 1319-1323] Finally, like Ms. Wall's testimony, Ms. Griffith's testimony does not support the memorandum decision's description of the distribution of the comment cards beyond two or three days on a company bulletin board with about forty other comment cards; the work environment after the posting of the comment cards; or any changes in Plaintiffs' working conditions even remotely satisfying the standards for a hostile work environment.

Certainly, on the one hand, no one likes being referred to as "lazy" or otherwise having the quality or quantity of their work criticized, but on the other hand, no one is immune from

being the subject of criticism for one's work ethic because "statements about an employee's competency are expressions of opinion, not actionable assertions of fact"<sup>14</sup> whether one is a member of a protected classification or not.

For this reason, many courts have held that statements about an employee's work ethic, including the term "lazy," are insufficient to support a claim for hostile work environment even if the targeted employee is a member of a protected classification. Peterson v. Scott Cnty., 406 F.3d 515, 524 (8th Cir. 2005)(comments from a coworker that women are "lazy" were insufficient to give rise to a claim of hostile work environment based upon gender); Jones v. City of Franklin, 468 Fed. Appx. 557 at \*3 (6<sup>th</sup> Cir. 2012)(statement that "Blacks are lazy because they are always missing work on Monday" insufficient to give rise to a claim of hostile work environment based upon race); Harrington v. Disney Regional Entertainment, Inc., 276 Fed. Appx. 863 at \*12-13 (11<sup>th</sup> Cir. 2007)(isolated statement by one employee calling a coworker a "lazy n\_\_\_\_" insufficient to give rise to a claim of hostile work environment based on race); Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271 (7<sup>th</sup> Cir. 2004)(evidence that another African-American employee was called "lazy" was insufficient to give rise to a claim of hostile work environment based on race because "'offhand comments, and isolated incidents (unless extremely serious)' are not sufficient to sustain a hostile work environment claim.")(citation omitted); Johnson v. Perez, 2014 WL 4311265 at \*10 n.5 (D. D.C.)(single reference to African-American employees as "'lazy' . . . having occurred only once . . . does not amount to severe and pervasive' harassment requisite for a hostile work environment claim."); Butler v. National R.R. Passenger Corp., 936 F. Supp. 2d 920, 929 (N.D. Ill. 2013)(supervisor's comments to African-

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<sup>14</sup> See Lacy, supra at \*13.

American subordinate that he was “lazy, dumb, and stupid” were “offensive but not inherently racial” for purposes of establishing hostile work environment claim based on race); Jordan v. Cleco Corp., 2013 WL 673438 at \*7 (W.D. La.)(supervisor’s statements on multiple occasions that African-Americans are “lazy . . . while offensive” did “not rise to a severe or pervasive level required for a hostile environment claim”); Plahutnik v. Daikin America, Inc., 912 F. Supp. 2d 96, 106 (S.D. N.Y. 2012)(presentation by president of Japanese-owned company with the theme “Americans are lazy” and “you should be more Japanese” “even if discriminatory, were isolated and sporadic incidents, generally insufficient to establish a hostile work environment”)(footnote omitted); Williams v. Ruskin Co., Reliable Div., 2012 WL 692964 at \*17 (M.D. Ala.)(“allegations . . . that he has been called ‘stupid’ or ‘dumb ass’ do not establish a racial animus”)(citations omitted); Bennett v. J-F Enterprises, Inc., 2011 WL 1230273 at \*3 (N.D. Ohio)(statement that employee was “lazy” did “not rise to the level of severity required to make out a prima facie case of hostile work environment”); Jowers v. Family Dollar Stores, Inc., 2010 WL 3528978 (S.D. N.Y.)(“The single alleged comment by Vasquez—that ‘black people are lazy’—while reprehensible, is insufficient to support a claim for hostile work environment. ‘[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII.’”)(quoting Harris v. Forklift Sys., 510 U.S. 17, 20 (1993)); Arevalo v. Oregon Dept. of Transp., 2010 WL 1169795 at \*6 (D. Or.)(“supervisor’s comments about illegal aliens and calling plaintiff ‘lazy “Tina”’ in a way that she believed was related to her race” was not “sufficient evidence upon which to base her claim that any national origin or gender hostility was so severe or pervasive as to have unreasonably interfered with her working performance”); Allen v. Bake-

Line Prods., Inc., 2001 WL 1249054, at \*10 (N.D. Ill.) (“being called ‘stupid,’ ‘lazy,’ a ‘motherfucker,’ a ‘bitch’ and the like are not probative of whether a racially hostile work environment existed because these type of statements are not racially motivated”); Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345–46 (7th Cir. 1999)(finding that statements like “what the hell is going on?”; “what the hell are you doing?”; “get your head out of your ass”; “dumb motherfucker”; and “when the fuck are you going to get the product[?]” did not “implicate negative attitudes toward African–Americans” and that “[i]t cannot be said with any degree of certainty that the character of these remarks was discriminatory”).<sup>15</sup>

As the United States Supreme Court has observed, “[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)).

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<sup>15</sup> As noted in Justice Loughry’s dissent, the majority’s memorandum decision is contrary to decisions of this and other courts regarding hostile work environment claims. The reason, as Justice Loughry observed in his dissent, that the majority’s memorandum decision “fails to cite a single factually analogous case,” Constellium, supra at \*7, is because there is none. Rather, every court in which the isolated use of inappropriate language referencing an employee who also used inappropriate language, including this Court in Erps v. Human Rights Comm’n, 224 W. Va. 126, 680 S.E.2d 371 (2009), has held that such use is insufficient for a hostile work environment claim.

As further noted in Justice Ketchum's dissent, "In order for a plaintiff to prevail on a claim for gender discrimination or sexual harassment it must be proven that the alleged wrongful conduct was based on the plaintiff's sex. Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995)." Constellium, supra at \*6 (Ketchum, J., dissenting). Moreover, as noted in Justice Loughry's dissent, "It is well-accepted in federal jurisprudence that 'the use of a gender-specific term in a derogatory comment does not necessarily indicate that the comment is directed at the person's gender.'" Id. at \*8 (Loughry, J., dissenting)(footnote omitted).<sup>16</sup>

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<sup>16</sup> As noted in Justice Loughry's dissent:

It is well-accepted in federal jurisprudence that "the use of a gender-specific term in a derogatory comment does not necessarily indicate that the comment is directed at the person's gender." State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (S.C. App. 2000); see Johnson v. Waters, 970 F. Supp. 991 (M.D. Ala. 1997)(holding that use of derogatory term, standing alone, is not necessarily direct showing of discrimination, but rather must be considered in context of its use); Kriss v. Sprint Comm'ns Co., 58 F.3d 1276, 1281 (8th Cir. 1995)(concluding that use of term "bitch" did not indicate "a general misogynist attitude" as it was directed at only one woman and thus was not "particularly probative of gender discrimination"); Blankenship v. Warren County Sheriff's Dept., 939 F. Supp. 451 (W.D. Va. 1996)("Even though the term "bitch" is usually offensive, it is not necessarily gender-based."); Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir.1996), overruled in part on other grounds by National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (calling someone "bitch" fails to establish conclusively that such harassment "was motivated by gender rather than by a personal dislike unrelated to gender"); Panelli v. First American Title Ins. Co., 704 F.Supp.2d 1016 (D. Nev. 2010)("Use of the word, 'bitch,' standing alone, is not sufficient to show gender bias."); Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1513 (D.C. Cir. 1995)(considering plaintiff's evaluation by supervisor that she was a "bitch" in conjunction with accompanying commentary that plaintiff was "extremely difficult on secretarial and support staff" as stating gender-neutral concerns about plaintiff's interpersonal relations with co-workers, rather than discriminatory considerations); Williams v. KETV TV., Inc., 26 F.3d 1439, 1441 n. 2 (8th Cir. 1994)(affirming judgment for employer on charge of sex and race discrimination despite evidence at trial that personnel involved in hiring decision referred to plaintiff as "black bitch"); Moulds v. Wal-Mart Stores, Inc., 935 F.2d 252, 253-54 n. 1, 256-57 (11th Cir.1991) (affirming judgment for employer on sex and race discrimination charge despite evidence that employer told plaintiff she would have to be more of a "bitch" to become manager); Bressner v. Caterpillar, Inc., 2008 WL 345550 (C.D. Ill. Feb. 7, 2008) (finding

Here, the company's policy of posting redacted comment cards on a bulletin board, which was in place for only about six months,<sup>17</sup> was gender-neutral.<sup>18</sup> The three comment cards, only one of which used the word "bitches," were among about forty some comment cards posted at the time, referencing primarily male employees. There was absolutely no evidence that the word "bitch" or any other gender-based derogatory term was ever used in reference to Plaintiffs other than on the single comment card. Both of Plaintiffs admitted to using the term "bitch" or variations of the term; to using other inappropriate language; and to otherwise engaging in the same type of conduct for which Constellium has received a \$1 million adverse verdict.

Finally, as Justice Ketchum and Justice Loughry observed, respectively, "They were equal opportunity postings directed at both men and women. Additionally, the comments about the plaintiffs were directed at their perceived work ethics" and "In this case, it is perfectly clear from a plain and objective reading of the comments that the source of Mr. Keifer's vitriol was not the respondents' gender but his perception that the respondents were lazy." *Constellium*, supra at \*7.

At trial, it was undisputed that "the company had a policy of posting everything." [App. 1049] For example, when asked, "So, if I put a comment card in this box that said . . . 'I'm going to hang this n----- from the highest tree,' the company would have typed it up and posted it on the bulletin board redacting the name?," Jerry Carter, Constellium's vice-president of human

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that "[n]o jury would find that referring to a woman as a 'bitch,' even a 'f\*cking bitch,' ... is evidence of a discriminatory intent.").

*Constellium*, supra at \*8.

<sup>17</sup> [App. 1115]

<sup>18</sup> Indeed, one the Plaintiffs admitted to submitting a comment card herself.

resources testified, “I would say that they would have redacted more than just the name,” but “They would have put the spirit of that comment up yes.” [App. 1049-1050] Whether this was a wise management policy<sup>19</sup> or whether someone may have been offended<sup>20</sup> by a posting are not the issues; rather, the issue is whether a hostile work environment can be created by the isolated posting of an offensive comment based upon a neutral policy of posting everything.

It was also undisputed at trial that the three comments, including the one using the term “bitch,” were not posted in isolation, but were posted as part of a larger grouping: “And taking a look at . . . plaintiff’s exhibits that Mr. Auvil was going through with you. Do these exhibits accurately portray how the comments were posted? . . . No. . . . they would be accumulated over a period of time. So they might go up with 15, 20, or 30 other questions at the same time.” [App. 1068-1069] Mel Lager, the CEO, testified that there were over a thousand employees at the plant and, consequently, when the three comment cards were posted, “I had no idea that there were only two females working in project maintenance,” and consequently, cannot fairly be said to have had any discriminatory animus directing to Plaintiffs whom he did not even know were the subject of the comments. [App. 1088-1089]

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<sup>19</sup> Even Mr. Carter conceded, “I think what the purpose of it was . . . 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 had received up on the board and answer them. Now, looking back, it could have been done more effectively. . . . But that was not the commitment that was understood that had been made.” [App. 1063]

<sup>20</sup> Again, Mr. Carter conceded, “I do agree that this type of language is not appropriate for the workplace,” but as Plaintiffs own concessions about their own language in the workplace demonstrate, “it is generally accepted as shoptalk, and it is not encouraged, but it does occur.” [App. 1058-1059]

Finally, and most importantly, as set forth in Constellium's Trial Exhibit No. 1, the vast majority of comments regarding employees were not directed at Plaintiffs or women, but were directed at male employees or management:

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. We need someone to take care of the batteries.

\_\_\_\_\_ foreman has a bad attitude when you ask about a truck that you bring in or one that has been sitting over there for 1 to 6 months. We need trucks to move metal not a smart a\_\_\_ answer from the \_\_\_\_\_ foreman. (He cusses a lot, I don't like that.)

Why do the janitors not clean the locker room on grave and most of the time it is half a\_\_\_. They done a better job when they worked fro the guards. Rest room and locker rooms should be very clean not half a\_\_\_. If they don't want to clean them let Winans do their job.

Why is it that this place can be run so stupidly? Do they hire idiots so that the people who work for them are dumber than them? Example lets not focus on the problem lets fix something else. Lets spend 40,000 dollars on synthetic floor blocks instead of fixing the roof. That doesn't make sense. Spend money to fix the problem instead of something else. Now we have to spend extra money to fix the roof also? Help me I work for idiots.

And, the CEO's responses were much the same as to those involving Plaintiffs:

I sure hope that the person you reference starts taking their job seriously if what you say is true. This is a workplace - not a place to sell raffle tickets. Totally unacceptable.  
I will look into the battery maintenance issue.

People have different personalities and react and interact differently with others. You are right, you should have the equipment you need with a straightforward respectful answer to your questions. Cussing is a bad habit and used too frequently by some folks.

I think everyone of us needs to do the best job we can do no matter what our roles are. As far as this example, this must be fixed - no excuses. The people that work in this plant deserve to have a clean locker room.

We need to solve problems to the root cause and fix that, you are absolutely correct.

Plainly, the company's policy was gender-neutral; the manner in which the comment cards regarding Plaintiffs was gender-neutral; and there was no evidence satisfying the standard for a hostile work environment.

**B. THE ACTUAL EVIDENCE AT TRIAL WAS CLEARLY INADEQUATE TO SATISFY THE STANDARDS FOR THE IMPOSITION OF PUNITIVE DAMAGES IN A HOSTILE WORK ENVIRONMENT CASE, INCLUDING UNDER THIS COURT’S RECENT DECISION IN QUICKEN LOANS.**

This Court’s review 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., Inc. v. Smith, 229 W. Va. 316, 729 S.E.2d 151 (2012).

In Syllabus Point 4 of Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58 (1895), this Court 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.”

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).

Plainly, in this case, 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.”<sup>21</sup> 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. And, Plaintiffs’ complaints about the lack of an investigation following the posting, for two or three days, of the coworkers’ comments carry little weight when the evidence is undisputed that not only did neither they nor the union request an investigation, neither they nor their union made any other complaint after the comments were removed from the bulletin board.

The imposition of punitive damages in this case is particularly egregious in light of Plaintiffs’ own admitted conduct in the workplace. As their own counsel was forced to concede on closing argument:

[I]t’s one thing to joke around and have shoptalk with your buddies  
– or people who you thought were your buddies – or people who

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<sup>21</sup> Moreover, as to the second step of the punitive damages inquiry, there was no evidence (1) “grievous” harm was caused to Plaintiffs; (2) that Defendants’ conduct was “reprehensible;” (3) that Defendants “profited” from the conduct; (4) that Defendants’ “financial condition” warranted a \$500,000 punitive damages award where Plaintiffs suffered no economic damages; (5) that any “criminal sanctions” were imposed or could be imposed against Defendants; or (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). Consequently, the award of punitive damages of \$500,000 over and above the award of \$500,000 in emotional distress damages was inappropriate.

you thought were your buddies when you've worked somewhere 30-some years – that is one thing. Nobody got sued over that. Nobody got charges filed over that. But it is something entirely different, entirely different, when the boss takes the shoptalk that should stay right where it started, between boys – that is where it belonged, and we don't have any shrinking violets. . . . Now, did I stand up here and tell you that they were? No.

[App. 1486]<sup>22</sup> In other words, it was acceptable for Plaintiffs to refer to themselves as “bitches” and “shit-stirring bitches;” to carry around tool boxes with references to “bitch;” to call their male coworkers “ass,” “queer,” and “bald-headed prick,” and to otherwise engage in inappropriate conduct in the workplace indicating to everyone, including management, that they were no “shrinking violets,” but if a single comment card was posted using the term “bitch” and three comment cards were posted suggesting they were “lazy,” they were allowed to sue their employer and be awarded \$500,000 in emotional distress damages and \$500,000 in punitive damages because it should have “stay[ed] right where it started, between boys.” Obviously, this makes absolutely no sense.

Not only have Plaintiffs been successful in securing a \$1 million verdict for the same conduct in which they admittedly engaged, other than initially complaining about the comments to their union, who brought their complaints to management which immediately took them down, Plaintiffs do not dispute making no further complaints. Yet, their counsel argued at closing that Constellium's failure to respond to Plaintiffs' non-existent complaints was not only significant, but that a mere apology would have been sufficient to resolve the matter:

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<sup>22</sup> See also App. 1529-1530 (“You heard one of the people they put up there when they were trashing them saying, well, she touched him on the butt . . . So they want to take that, and the way that they worked together, and use it against them and say it is the same thing as putting this on the bulletin board with the CEO approving it. That is the same thing? That is not the same thing, ladies and gentlemen. That is not the same thing.”).

That doesn't say sorry to me, but if they'd said it at the time - what did Ms. Griffith tell you? "If they just told me sorry, we wouldn't be here." But, no, lawyer jumps on them and says they want to play a game of gotcha. A game of gotcha? When they were willing to let bygones be bygones if someone had apologized?

[App. 1527-1528] How a dispute goes from requiring only an apology to a suit worthy of \$500,000 in emotional distress damages and \$500,000 in punitive damages is difficult to reconcile.

In Kolstad v. American Dental Ass'n, 527 U.S. 526, 534 (1999), the United States Supreme Court held that punitive damages are available for federal discrimination cases only where "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" and that "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." (Emphasis supplied) This "higher standard that a plaintiff must satisfy to qualify for a punitive award" guarantees that any award of punitive damages under § 12112(d)(2)(A) will be "based on something more than a mere violation of that provision." Kolstad, supra at 534.

"The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." Kolstad, 527 U.S. at 535. Malice has been described as "evil motive or intent," and reckless indifference has been described as "a 'subjective consciousness' of a risk of injury or illegality and a 'criminal indifference to civil obligations.'" Id. at 536 (quoting Smith v. Wade, 461 U.S. 30, 37 n. 6, 41, 56 (1983)). Thus, "not every sufficient proof of pretext and

discrimination is sufficient proof of malice or reckless indifference.” Hardin v. Caterpillar, Inc., 227 F.3d 268, 270 (5th Cir. 2000).

At trial, there was no evidence satisfying this secondary “higher standard” of “malice” or “reckless indifference” for the award of punitive damages. During closing, this was the argument of Plaintiffs’ counsel regarding punitive damages:

Punitive damages in this case are for one purpose that the Court told you. And I’ll tell you, you will have instructions, and it says that if you find that they’ve disregarded the rights of others, then they are to be a warning and an example.

I’ll asked you the question, I’m not telling you the answer. Unlike these folks, I’m not going to tell you what to believe. . . . But do you think, based on they way they’ve acted in this court, based on the way that they’ve put these women in the position that they’ve put them in, that they’ve learned anything?

[App. 1530] In other words, with no evidence of “malice” or the “reckless indifference” referenced in Kolstad or the “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others” referenced in Mayer, Plaintiffs’ argument to the jury was that if they found Constellium to be liable to Plaintiffs for compensatory damages for a hostile work environment, they could also award punitive damages to teach Constellium a lesson. Obviously, this is not the law.

As the Fifth Circuit has noted:

Ultimately, the terms “malice” and “reckless indifference” “focus on the actor’s state of mind.” Kolstad, 527 U.S. at 535, 119 S. Ct. 2118. Both “pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” Id. Thus, the defendant employer “must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable for punitive damages.” Id. at 536, 119 S. Ct. 2118. Even intentional discrimination may not

meet this standard where the employer is “unaware of the relevant federal prohibition” or “discriminates with the distinct belief that its discrimination is lawful.” Id. at 537, 119 S.Ct. 2118. For example, punitive damages may not be appropriate where the underlying theory of discrimination is “novel or otherwise poorly recognized.” Id. at 536–37, 119 S. Ct. 2118.

E.E.O.C. v. Boh Bros. Const. Co., L.L.C., 731 F.3d 444, 467-468 (5<sup>th</sup> Cir. 2013).<sup>23</sup>

Obviously, in this case, there was no evidence that Mr. Lager had a scintilla of “malice” towards women in general or more specifically, to Plaintiffs, whom he did not even know, nor that he had subjective knowledge that he was acting with “reckless indifference” as to whether his posting of redacted comments and his responses to those comments irrespective of the race, gender, or other characteristics of the person, including Mr. Lager, who may have been the subject of those comments, would nevertheless be violative of the Human Rights Act. In the absence of such evidence, there can be no award of punitive damages. See, e.g., LeVelle v. Penske Logistics, 197 Fed. Appx. 729, 737 (10<sup>th</sup> Cir. 2006)(“the record is devoid of evidence indicating whether Cooley was familiar with the requirements of the ADA”); Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1254-1255 (10<sup>th</sup> Cir. 2005)(“even if an employer might be

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<sup>23</sup> As noted by the Fifth Circuit, “several courts have held that a plaintiff is entitled to compensatory, but not punitive, damages, even where supervisors knew of discriminatory conduct and failed to afford employees a clear path to report the discrimination. See, e.g., Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1035 (8<sup>th</sup> Cir. 2008) (finding punitive damages inappropriate where the evidence showed no individual or corporate malice or reckless indifference to the company’s Title VII obligations); Splunge v. Shoney’s, Inc., 97 F.3d 488, 490–91 (11<sup>th</sup> Cir. 1996)(denying punitive damages where higher management had constructive knowledge of discriminatory conduct); Walters v. City of Atlanta, 803 F.2d 1135, 1147 (11<sup>th</sup> Cir. 1986) (finding no evidence in the record to suggest reckless disregard for plaintiff’s rights where plaintiff was treated courteously, but discriminated against, in his endeavor to obtain a directorship position); Soderbeck v. Burnett Cnty., 752 F.2d 285, 290 (7<sup>th</sup> Cir. 1985) (finding punitive damages to be improper on the basis of discharge to make a supervisor’s life easier, despite evidence in the record of discrimination stemming from political differences); see also Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1323 (11<sup>th</sup> Cir. 1999)(emphasizing that punitive damages are ‘to punish those who have actually done wrong and not those who have liability by implication of law only.’”); Boh Bros., supra at 467 n.29.

found to have intentionally discriminated for other purposes under the ADA, if the employer reasonably believes its actions satisfy a bona fide occupational qualification defense or a statutory exception to liability, then punitive damages are not recoverable”); Aly v. Mohegan Council, Boy Scouts of America, 871 F. Supp. 2d 19, 27 (D. Mass. 2012)(“Nor is there evidence that defendant’s conduct was motivated by evil intent. Indeed, given the thin evidence of discriminatory animus, this case barely survived summary judgment, a motion for directed verdict, and a motion for a new trial. In other words, making all possible inferences in plaintiff’s favor, this Court determined that there was just enough evidence go to trial and sustain the jury’s verdict. Such meager evidence falls far short of showing the sort of ‘reckless or callous indifference to the federally protected rights of others’ necessary to subject defendant to punitive damages.”); E.E.O.C. v. CDG Management, LLC, 2010 WL 4904440 at \*6 (D. Md.)(“While this Court has already determined that Defendants are liable under Title VII for gender discrimination, nothing in the record indicates that Defendants knew ‘that [they] may be acting in violation of federal law.’ Id. at 535. Therefore, it is impossible for this Court to conclude that Defendants acted with the requisite malice or reckless indifference necessary to impose punitive damages.”); E.E.O.C. v. Maha Prabhu, Inc., 2008 WL 2795515 at \*3 (W.D. N.C.)(“The evidence viewed in the light most favorable to Plaintiff and giving her the benefit of all reasonable inferences, is, however, insufficient for a reasonable jury to conclude that the intentional discrimination was committed maliciously or with reckless indifference to the federally protected rights of the plaintiff, i.e., that McGriff intentionally discriminated in the face of a consciously perceived risk that her decision would violate federal law. See Kolstad, 527 U.S. at 536. Plaintiff has provided no evidence establishing the requisite conscious wrongdoing that is required by

Kolstad.”); D’Ascoli v. Roura & Melamed, 2005 WL 1655073 (S.D. N.Y.) (“Here, the record is devoid of evidence that, or from which it could reasonably be inferred that, defendants, or any of them, ‘perceived risk that [their] actions [in terminating plaintiff to replace him with Mr. Whyte would] violate federal law.’ Kolstad, 527 U.S. at 536. The Second Circuit had said that, ‘[a]s an alternative to proving that the defendant knew it was acting in violation of federal law, “[e]gregious or outrageous acts may serve as evidence supporting an inference of the requisite ‘evil motive,’” Farias v. Instructional Sys., Inc., 259 F.3d 91, 101 (2d Cir. 2001)(quoting Kolstad, 527 U.S. at 538). The record is also devoid of any egregious or outrageous actions toward plaintiff. The award of punitive damages must, under Kolstad, be vacated.”).

In Quicken Loans, supra, this Court recently reiterated its standards for the award of punitive damages. Central to its analysis was the recognition that “the constitutionality of any particular punitive damages award” is central to the post-verdict analysis both at the trial and appellate court levels. *Id.* at 49. Additionally, this Court restated, “Our standard of review of petitions challenging punitive damages awards is *de novo*.” *Id.* at 50. “[T]he Court must first evaluate,” this Court noted, “whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award . . . .” *Id.* at 51 (citation omitted).

Here, independent of the failure of Plaintiffs’ evidence on the issue of hostile work environment, Constellium is entitled to judgment as a matter of law on the issue of punitive damages where there was no evidence of any “malice” or that the actions complained of were taken with subjective knowledge and “reckless indifference” to whether those actions were violative of the Human Rights Act.

Moreover, the award of \$500,000 in punitive damages in this case, under the Court's analysis in Quicken Loans was clearly excessive where (1) it cannot be fairly said that any conduct of Constellium was "reprehensible," see Quicken Loans, supra at 54-57; (2) there is no evidence of record regarding Constellium's financial position, id. at 58-61; (3) there is no evidence of record regarding encouragement of fair and reasonable settlements, id. at 61-63; and (4) there is no evidence of record that Constellium in any way profited from its policy of posting comments by its employees, id. at 63. With respect to the mitigating factors discussed by this Court in Quicken Loans, (1) Plaintiffs suffered no economic damages as they continued, unabated and without complaint, to work at the plant as they always had done and therefore there is no "reasonable relationship" between any economic harm suffered by Plaintiffs and the award of punitive damages, id. at 64-65; (2) although the ratio between compensatory damages and punitive damages was 1:1, id. at 65-68, all of the compensatory damages were emotional distress; and (3) any other mitigating factors, id. at 68, such as other similar civil actions or conduct militate against the award of punitive damages in this case.

### III. 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

A handwritten signature in black ink, appearing to read 'Ancil G. Ramey', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

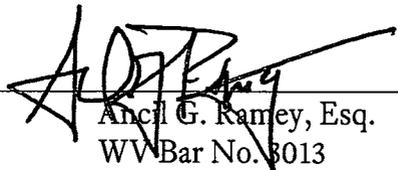
I hereby certify that on March 9, 2015, a true and accurate copy of the foregoing **PETITIONERS' SUPPLEMENTAL BRIEF ON ISSUES OF HOSTILE WORK ENVIRONMENT AND PUNITIVE DAMAGES** was mailed to counsel of record as follows:

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