IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

No. 25335

FAIRMONT SPECIALTY SERVICES,
Appellant

v.

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
AND IRMA P. VOYLE,
Appellees

Appeal from The West Virginia Human Rights Commission
Docket No. ERNO-21-97

AFFIRMED

Submitted: January 12, 1999
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JUSTICE WORKMAN delivered the Opinion of the Court.
JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting Opinions.
CHIEF JUSTICE STARCHER concurs and reserves the right to file a concurring Opinion.

SYLLABUS BY THE COURT

1. "West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syllabus Point 1, West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655, 167 W.Va. 282, 280 S.E.2d 653 (1981).

2. To establish a claim for ancestral discrimination, under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999) based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) that the subject conduct was unwelcome; (2) it was based on the ancestry of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer.

3. The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999), and in violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace.

Workman, Justice:

This case is before this Court upon appeal from a final order of the West Virginia Human Rights Commission (hereinafter "Commission") entered on May 28, 1998.[1] In September 1996, Appellee Irma Voyle filed a complaint with the Commission alleging that her employer, Fairmont Speciality Services (hereinafter "FSS"), unlawfully discriminated against her in violation of West Virginia Code § 5-11-9(1) (1999) by creating or

[1]W.Va. Code § 5-11-11 (1999) provides that any final order of the Commission may be directly appealed to this Court.

tolerating a hostile work environment based on discriminatory actions relative to her Mexican-American ancestry. While the administrative law judge ("ALJ") determined that the alleged discriminatory conduct towards Ms. Voyle was unwelcome; that such conduct was, at least in significant part, due to Ms. Voyle's Mexican ancestry; and that such conduct was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment and to create a hostile or abusive work environment, he ruled in FSS' favor, after determining that FSS met its burden of demonstrating that it took prompt remedial action reasonably calculated to end the harassment. Upon review, the Commission reversed the administrative law judge's decision, finding that Mr. Fluharty's harassment was not "trivial . . . [or] isolated" and that "[u]nder these circumstances, management should have known about the harassment much earlier." The Commission further found that FSS did not prove by a preponderance of the evidence that it took prompt remedial action reasonably calculated to end the harassment, and awarded Ms. Voyle $3,277.45 for incidental damages and $11,406.18 for attorney fees and costs. FSS seeks a reversal of the Commission's final order.

FSS contends that the Commission erred by substituting its findings of fact for those of the ALJ and concluding that FSS failed to take prompt remedial action reasonably calculated to address the reported harassment. Alternatively, FSS contends that both the Commission and the administrative law judge erred as a matter of law by concluding that the alleged harassment resulted in a discriminatory hostile or abusive environment and that FSS failed to meet its burden of proving that prompt remedial measures were taken. After a complete review of the record in this case, as well as the arguments presented by counsel, we affirm the decision of the Commission.

I. Standard of Review

The standard under which the Commission reviews a decision of an administrative law judge is established by statute.[2] West Virginia Code §5-11-8(d)(3) states that the "commission shall limit its review upon such

[2]In Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990), we recognized that the scope of review is traditionally set by statute. Id. at 242, 400 S.E.2d at 250 n.6 (citing for example, W.Va. Code § 29-5-4(g)).

appeals [from the administrative law judge's decision] to whether the administrative law judge's decision is:

> (A) In conformity with the constitution and the laws of the state and the United States;
> (B) Within the commission's statutory jurisdiction or authority;
> (C) Made in accordance with procedures required by law or established by appropriate rules of the commission;
> (D) Supported by substantial evidence on the whole record; or
> (E) Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With regard to this Court's review of the factual findings made by the Commission, we stated in syllabus point one of West Virginia Human Rights Commission v. United Transportation Union, Local No. 655, 167 W.Va. 282, 280 S.E.2d 653 (1981), that "West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties."[3] While the

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[3]We made clear that this standard still controls our review of the findings of the Commission with the statutory amendment that allows direct appeal from the Commission to this Court. See Kanawha Valley Reg'l Transp. Auth. v. West Virginia Human Rights Comm'n, 181 W.Va. 675, 677, 383 S.E.2d 857, 858 n.1(1989) (discussing 1987 amendments to W.

substantial evidence rule applies to findings of fact rendered by an administrative agency such as the Commission, legal rulings made by the Commission are subject to de novo review. See Ruby v. Insur. Comm'n, 197 W.Va. 27, 475 S.E.2d 27 (1996).

In Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n, 189 W.Va. 314, 431 S.E.2d 353 (1993), we discussed what is meant by "substantial evidence":

> 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.' The reviewing court is not entitled to reverse the finding of the trier of the facts simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of the facts.

Va. Code §5-11-11 and stating that substantial evidence standard still controls appellate review of agency findings of fact)

Id. at 316, 431 S.E.2d at 355 (quoting Brammer v. West Virginia Human Rights Comm'n, 183 W.Va. 108, 111, 394 S.E.2d 340, 343 (1990)). In addition, we have repeatedly observed that "[t]he credibility of witnesses . . . [are] for the hearing examiner to determine." Westmoreland Coal Co. v. West Virginia Human Rights Comm'n, 181 W.Va. 368, 373, 382 S.E.2d 562, 567 n.6 (1989); see also Martin v. Randolph Bd. of Educ., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995) (stating that "ALJ's credibility determinations are binding unless patently without basis in the record").

The Rules of Practice and Procedure Before the West Virginia Human Rights Commission provide, in part:

> **Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision.**

6 W.Va.C.S.R. § 77-2-10.6 (1996). The administrative rules further provide that

> **the Commission shall limit its review to whether the administrative law judge's decision is:**
>
> **In conformity with the Constitution and laws of the state and the United States;**

> **Within the Commission's statutory jurisdiction or authority;**
>
> **Made in accordance with procedures required by law or established by appropriate rules or regulations of the Commission;**
>
> **Supported by substantial evidence on the whole record; or**
>
> **Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.**

Id. at 77-2-10.8.a to -10.8.e.

Thus, while the Commission and this Court must give deference to the findings of fact of the ALJ, the Commission is not precluded from making additional findings of fact that are not in conflict with those reached by the ALJ. In addition, the Commission may determine that the ALJ's decision is clearly not supported by substantial evidence on the whole record. With these standards in mind, we examine the findings of fact reached by the ALJ, and to the extent they were properly modified, those of the Commission.

II. Factual Background

Because one of the chief contentions raised by FSS it that the Commission improperly substituted its judgment for the ALJ with regard to the findings of fact, we examine the facts in that context. By way of initial

background, there is no dispute that Irma Voyle began working for FSS in April 1990. Ms. Voyle is a United States citizen of Mexican ancestry.[4] In 1995, FSS directed Ms. Voyle to train Scott Fluharty, a co-employee.[5] The first time Ms. Voyle reported a problem with Mr. Fluharty was on March 16, 1995. This initial conflict between Ms. Voyle and Mr. Fluharty is described in the ALJ's findings of fact numbers 8 through 10:

> 8. The trouble between Ms. Voyle and Mr. Fluharty began in or about March 1995. Ms. Voyle's calendar containing her contemporaneous handwritten notes . . . has an entry on 16 March 1995 stating "Talk to Jeff about Butch [Fluharty]. Laziness and ugliness. Said he'd talk to him." (Emphasis in original). "Jeff" refers to Jeff Noechel, respondent's production coordinator, a management position. Based on a review of the testimony, and after an assessment of credibility, I find as fact that 16 March 1995 was the first time that Ms. Voyle brought Mr. Fluharty's treatment of her to the attention of management. To the extent this finding is contradicted by the testimony of Mr. Fluharty and/or Mr. Noechel, both of whom identify a date in April 1995 as the fi[r]st reported incident of alleged harassment, their testimonies are rejected.
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> 9. Ms. Voyle testified that the incident that occurred on or about 16 March 1995 consisted of Mr. Fluharty "cussing me and calling me a Mexican bitch and telling me he

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[4]Ms. Voyle is a native of El Paso, Texas. As a child, she learned Spanish as her primary language and English as a second language.

[5]Although Mr. Fluharty was hired by FSS in 1991, he and Ms. Voyle had not previously worked together.

> wasn't going to do what a Mexican told him to do." This is the "ugliness" mentioned in her calendar.
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> 10. Ms. Voyle's testimony was inconsistent as to whether she told Mr. Noechel on 16 March 1995 about the anti-Mexican aspect of Mr. Fluharty's invective. He denies that she did. Based on the evidence of record, and after an assessment of credibility, I find as fact that while she did report Mr. Fluharty for cussing and general obnoxious behavior, she did not report his ethnic references to Mr. Noechel or any management official on this occasion. This finding is based primarily on her admissions under cross examination.

As to finding number 10, the Commission found that "The ALJ ignores the evidence of record that Ms. Voyle indeed specifically reported that she had been harassed and that a proper investigation by the respondent would have revealed the full extent of Mr. Fluharty's behavior toward Ms. Voyle." Close examination of this provision of the Commission's order reveals, however, that this finding was not contrary to the ALJ's finding except perhaps implicitly by attaching more credibility to Ms. Voyle's claim that she mentioned the ethnic slur specifically.

In finding number 13, the ALJ basically concludes that Mr. Fluharty called Ms. Voyle a "Mexican bitch" when he threw labels on her desk on April 9, 1995, but that she neither recorded the ethnic slur on her calendar nor reported it to management. The Commission, on the other hand, found that Ms. Voyle had reported the harassment to her immediate supervisor, Mr. Charlie Parker. Mr. Parker acknowledged that Ms. Voyle had reported problems with Mr. Fluharty somewhere in the neighborhood of twenty-five

times. Mr. Fluharty testified that only one of these complaints concerned an ethnic slur and that Ms. Voyle made such complaint to him in April 1996.

The Commission found that the ALJ's findings of fact numbers 2l and 40 were clearly wrong. Those findings centered upon the ALJ's conclusion that, based on Ms. Voyle's diary and the lack of entries therein, it was unlikely that Mr. Fluharty could have made "repeated" insulting references to complainant's ancestry in 1995, and that Ms. Voyle exaggerated the number of times (approximately 100) that she maintained she was called a "Mexican bitch." The ALJ's characterization of Ms. Voyle's testimony that she made 100 complaints as exaggeration, and whether she in fact made anywhere close to that number of reports, is not necessary to our resolution of this case. It is, thus, not necessary to conclude that the ALJ's finding of fact on this issue was not supported by the evidence to reach the decision herein.

Several of the Commission's conclusions go not toward altering or amplifying upon the ALJ's findings of fact, but merely further bolster the ALJ's determination that Mr. Fluharty did issue discriminatory ancestral epithets towards Ms. Voyle. This conclusion, however, is in no way in conflict with that of the ALJ, who also found and concluded that: (1) the conduct towards Ms. Voyle was unwelcome; (2) that such conduct was, at least in significant part, due to Ms. Voyle's Mexican ancestry; and

(3) that such conduct was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment and to create a hostile or abusive work environment.

The Commission made one additional finding of fact not in conflict with the ALJ's to the effect that Ms. Voyle made over twenty-five complaints concerning Mr. Fluharty to her immediate supervisor, Mr. Charlie Parker. Other than this, the Commission did little to alter the findings of fact of the ALJ. That finding is supported by substantial evidence in the form of the unrefuted testimony of Mr. Parker.[6] Thus, the assignment of error raised by FSS that the Commission substituted its judgment for the ALJ's is not borne out by an examination of both sets of findings and we find it to be without merit. For purposes of our review, we determine that the ALJ's findings of fact, as well as the Commission's finding of fact concerning the reports made to Mr. Parker, are supported by substantial evidence.

Next we examine the contention of FSS that the Commission erred in concluding that it failed to take prompt remedial action reasonably calculated to address the reported harassment. In order to address this issue, a continued exposition of the facts is in order. Upon a review of ALJ's findings of fact 8, 9, and 10, it appears that although the ALJ concluded that Ms. Voyle did not tell Mr. Noechel, the production

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[6] **Mr. Parker testified, however, that only one of Ms. Voyle's complaints concerning Mr. Fluharty's treatment of her concerned an ethnic slur.**

coordinator, about the anti-Mexican aspect of Mr. Fluharty's invective, she did report the "cussing and general obnoxious behavior." According to the ALJ's findings of fact, Mr. Noechel told Ms. Voyle that he would talk to Mr. Fluharty about his behavior. The ALJ further found that on March 30, 1995, Mr. Fluharty told Ms. Voyle that he [Mr. Fluharty] had been spoken to by Mr. Noechel, but that he [Mr. Fluharty] didn't "give a f---. I can do what I want." The next day, according to the ALJ, Ms. Voyle told Mr. Noechel about Mr. Fluharty's comment and also "told him [Mr. Noechel] it would be the last time I would complain about him [Mr. Fluharty]." This exchange should have signaled FSS that the talk with Mr. Fluharty had not been effective.

Within only a short time after the March 1995 incident, it came to Ms. Voyle's attention through a co-worker, Ginny Lawrence, that Mr. Fluharty was "running his mouth in the lunchroom." He allegedly made threats "to knock [complainant] down and make sure I never came up." The ALJ found that these comments had been made and that although they were undoubtedly disturbing and frightening, he rejected the testimony that they included references by Fluharty referring to Voyle as a "fat Mexican bitch."[7] Ms. Voyle reported this April 1995 incident to Mr. Noechel and to the Prosecuting Attorney of Marion County. At that time, Mr. Noechel told Ms. Voyle that

[7]The ALJ made this conclusion based on the fact that the individual, Ginny Lawrence, who reported the incident to Ms. Voyle did not testify to any ethnic comments being made by Mr. Fluharty.

Mr. Fluharty had admitted that he was intentionally trying to irritate her. Thus, FSS was again put on notice not only of employee harassment, but also of its intentional nature. Ms. Voyle also reported this incident to plant manager David Roberts, who asked Noechel to conduct an investigation. Mr. Roberts' note, made in conjunction with his involvement in this incident, is revealing in that it refers to reports having been made as to both the second incident (label-throwing) and the third incident (lunchroom threat). Furthermore, Mr. Roberts' note reflects

> Talked with J.A.N. [Jeff Noechel] to see what he's aware of, he's heard some rumbling but wasn't aware it was serious. I instructed J.A.N. to have a talk with Butch, it can be non-threatening, questioning attitude, but makes it clear to him we've heard rumors, we can't see why they'd be true, but we want to insure that there is "No Question" that it is our position that we will not tolerate threats, jokes or not, to any employee.

The ALJ seems to have relied on the fact that this note makes no reference to any ethnic slur or language, but ignores the fact that a gender-based slur was made at the outset. Furthermore, the very fact that Ms. Voyle was of Mexican ancestry, coupled with the gender remark, should at minimum have placed the employer on notice to inquire further into whether the harassment that was occurring was based on unlawful discriminatory conduct. It is also of concern that the FSS management personnel seemed to be interested in going to great lengths not to offend Fluharty (suggesting a "non-threatening, questioning attitude"), even in the context of his having made threats in the workplace of physical violence against Ms. Voyle. Mr. Noechel went so far as to counsel Ms. Voyle as to her intolerance of mediocre or poor work on Mr. Fluharty's part, even though

management had charged her with his training. At this juncture, the employer's concern for Mr. Fluharty's feelings and/or rights stands in stark contrast to their lack of sensitivity to Ms. Voyle's rights.

On approximately July 6, 1995, Ms. Lawrence again reported to Ms. Voyle that Fluharty was talking about her in the lunchroom. Ms. Voyle, however, contacted neither Mr. Roberts nor Mr. Noechel about this statement. Whether this was one of the more than twenty-five complaints she made to supervisor Charlie Parker is unclear.

It was Ms. Voyle's testimony that on or about September 15, 1995, Mr. Fluharty came to her work area and again verbally harassed her, by calling her a Mexican bitch. Although she alleged that she reported this comment to Mr. Parker, the ALJ, both on the basis of the absence of a recordation in her diary about this incident, and on the basis of Mr. Parker's testimony that only one complaint had been made to him (in 1996) concerning remarks on her ancestral heritage, found it "unlikely" that Ms. Voyle had reported the remark. The ALJ does, however, accept Ms. Voyle's contention (absent the ethnic slur) that she reported the September 15th incident to Mr. Parker. Thereafter, approximately a week later, Ms. Voyle asked Mr. Parker what he had done about it, and he told her he had forgotten to report it.

The abuse of Ms. Voyle by Mr. Fluharty continued into 1996. There were lunchroom incidents in March 1996 and April 1996, the first of which Ms. Voyle did not report, and the second of which she reported to Mr. Parker. It had been reported to Ms. Voyle that Fluharty in this April 1996 incident had once again called her a Mexican bitch, although the ALJ is unclear in his findings of fact with respect to whether he found she reported this particular aspect of the incident. However, the ALJ did find that on April 8, 1996, Ms. Voyle did report the incident of April Th to Mr. Noechel who promised to investigate. The same day, he spoke to two employees who confirmed that Fluharty had referred to complainant as "a lazy Mexican." Also on April 8, 1996, Mr. Noechel spoke with Mr. Fluharty who admitted making the remark. Mr. Noechel recorded his conversation with Mr. Fluharty as follows (in part):

> I told Butch that there are rules concerning making ethnical [sic] remarks in our handbook. He said that he realizes that he shouldn't have said the things that he said. I told him that I would inform Dave Roberts of this upon his return and that we would get back to him. I also told him to keep his remarks to himself and to stay clear of Irma. He said that he would do so.

At this point, Ms. Voyle had reported the harassment numerous times, with neither an extensive investigation by the employer into the scope of the problem, nor any real sanction. While the ALJ found that Ms. Voyle had not to this point reported the ethnic slur, she clearly had, reported the gender slur[8].

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[8] Conduct such as use of the "N" word to describe an

On April 10, 1996, Noechel reported back to complainant regarding his investigation. She informed him that she had reported the incident to the NAACP and that all she wanted "was for Butch to stay away from her." Mr. Noechel told Ms. Voyle that he had adjusted their work schedules so that, for at least several days, Mr. Fluharty would be arriving for work after she left. Still, however, no sanction was applied to Mr. Fluharty. Finally, in a May 1996 conference, Ms. Voyle was informed by Mr. Roberts that, as a result of the April 6, 1996, incident, Fluharty had been given an in-plant suspension with no loss of pay. Roberts characterized this action as a final warning. Although the nature of an "in-plant suspension without loss of pay" is not further described, it appears to constitute nothing more than another warning. It should have been clear to FSS that their "warnings" were grossly inadequate to effectively remedy the problem.

African-American, the "C" word to describe women, the terms "Sic," "W.P." or "Jap" to describe those of other ancestral heritages, or other racial, sexual or ethnic pseudonym, intended to denigrate others, cannot be tolerated in the workplace. They are the type of outrageous discriminatory conduct that 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.

Mr. Fluharty apparently was not to be deterred. In July 1996, he began sitting near Ms. Voyle and staring intently at her in the lunchroom. She again informed both Mr. Noechel and Mr. Parker. In August, she recorded two additional instances of Fluharty sitting near her and staring, although the ALJ found no indication that she reported the August incidents. A co-employee, Phil Tarley, signed a statement on August 20, 1996, which said in its entirety: "Butch said that Irma was a dumb Mexican bitch and that the company was paying her for nothing. That he had to come in on overtime to do Irma's job." Mr. Tarley testified that he could not remember when Mr. Fluharty made this statement.

In September 1996, Mr. Roberts informed Mr. Fluharty that Ms. Voyle had filed a complaint with the West Virginia Human Rights Commission. Even at this juncture, the employer made no progressive discipline. Mr. Roberts advised Mr. Fluharty to avoid all contact with Ms. Voyle and to avoid discussing her with others. Again, the same employer response and the same result. Once again not to be deterred, Fluharty resumed his lunchroom staring episodes on October 10 and 11, 1996. Feeling threatened, Ms. Voyle did not bother to contact the employer on this occasion. After all, it had been going on for almost two years. She had made approximately twenty-five complaints to her immediate supervisor and all the ones set forth herein to Mr. Noechel and Mr. Roberts. This time, she contacted her attorney.

At this juncture, Mr. Roberts inquired further and ascertained from employee Judith Hickman that Mr. Fluharty had been engaging in intimidating behavior towards Ms. Voyle in the lunchroom. Several male employees claimed that they couldn't recall, one way or the other, if Mr. Fluharty was harassing or intimidating Ms. Voyle. One male, however, noted that if Ms. Voyle "was his mother he would be concerned. He also said that he'd talked with Butch and told him to back off. . . ." The abuse had reached the point that other co-workers were even attempting to intervene in Ms. Voyle's behalf. On October 18, 1996, Mr. Fluharty was finally discharged.

IV. Discussion

Both the ALJ and the Commission agreed that Ms. Voyle was the victim of unlawful discriminatory conduct on the part of her co-worker, Mr. Fluharty; that it was sufficiently severe and pervasive to alter Ms. Voyle's conditions of employment; and that Ms. Voyle gave sufficient notice to management of Fluharty's behavior to trigger the employer's duty to take prompt remedial action. See Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (stating elements of hostile work environment cause of action). While this Court has never addressed the elements for an ancestral-based hostile work environment case, the elements necessary to prove that case are the same as those required to prove sexual harassment, but for the distinguishing nature of the offensive conduct at issue. See Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995)

(stating elements of sexual harassment hostile work environment cause of action). Accordingly, we hold that to establish a claim for ancestral discrimination, under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999) based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) that the subject conduct was unwelcome; (2) it was based on the ancestry of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer. See also Amirmokri v. Baltimore Gas and Elec. Co., 60 F.3d 1126 (4th Cir. 1995).

The ALJ and the Commission do not part company in any significant manner until they reach the issue of whether the employer took sufficiently prompt and effective remedial action calculated to end the harassment. Because this is a legal conclusion, our standard of review is de novo. See Ruby, 197 W.Va. at 29, 475 S.E.2d at 29; but see Howard v. Burns Bros., Inc., 149 F.3d 835, 841 (holding that determination of whether employer took prompt and adequate remedial action is often factual issue). In fact, it is a legal conclusion inextricably bound to the facts, for it is only in the context of a close and detailed review of all the facts and circumstances of the case that the adequacy of an employer's remedial response can be

determined. The facts necessary to the resolution of this issue revolve around the question of what FSS knew or had reason to know with regard to illegal discriminatory conduct towards Ms. Voyle, what actions FSS took to inquire into and address the problem, and whether those actions were adequate under our law.

An employer's liability in harassment cases is tied to the nature of its response to a complaint of discriminatory conduct. As the Eighth Circuit stated in Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999), a harassment plaintiff must show that the employer "knew or should have known about the harassment and failed to take prompt remedial action reasonably calculated to stop the harassment." Id. at 702. The court in Carter offered the following as a list of factors useful in evaluating "the reasonableness of remedial measures": "the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment." Id. (citation omitted).

As this Court stated in Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741(1995):

> When the source of harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Thus, an employer that has

> established clear rules forbidding sexual harassment and has provided an effective mechanism for receiving, investigating and resolving complaints of harassment may not be liable in a case of co-worker harassment where the employer had neither knowledge of the misconduct nor reason to know of it.

Id. at 108, 464 S.E.2d at 750. As Justice Cleckley explained in Hanlon, "common sense must be applied to the facts in each case to determine whether the employer took direct and prompt action 'reasonably calculated' to end the harassment." Id. at 109, 464 S.E.2d at 751 (quoting B. Lindemann & D.D. Kadue, Sexual Harassment in Employment Law 195-96 (1992)).

Even accepting the ALJ's conclusion that the Ms. Voyle's original complaint to management did not specify the anti-Mexican reference, there obviously was evidence that Mr. Fluharty used a pejorative word with Ms. Voyle which was based on her gender. The record reflects that the only "cussing" Ms. Voyle reported was the reference to Fluharty's use of the epithet "bitch." That particular word certainly has overtones of gender discrimination, another form of unlawful discrimination under the West Virginia Human Rights Act. When discriminatory conduct unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20, is reported to an employer, the report of such conduct places upon that employer a duty to investigate. Thus, despite the fact that an employee's complaint ultimately sounds in one form of unlawful discrimination, the fact that the employee brings to the employer's attention

conduct of a co-worker involving some other form of discriminatory conduct unlawful under the West Virginia Human Rights Act places upon that employer a duty to investigate. Whether the scope of such an employer investigation of a complaint of unlawful discrimination in the workplace is adequate must be determined by the application of common sense and by what is reasonable under all the circumstances. The adequacy of an employer's response can be measured in part by its effectiveness. Applying this law, we conclude that FSS was placed under a duty to inquire further with respect to the conduct of Mr. Fluharty towards Ms. Voyle based on his reference to her as a "bitch," even absent any report of an ethnic slur. Females whose racial or ethnic heritage place them in a protected class are subject to protection under the West Virginia Human Rights Act for both minority classifications. Frequently, such individuals may be subject to unlawful discrimination as a result both of being female and of being a minority.

While a quantitative analysis concerning the instances of harassment is certainly relevant,[9] it has been recognized that "[t]he more

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[9]As a general rule "more than a few isolated incidents are required" to meet the pervasive requirement of proof for a hostile work environment case. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 573 (8th Cir. 1997); see also Harris, 510 U.S. at 23 (stating that "'mere utterance of an . . . epithet which engenders offensive

outrageous the conduct, the less frequent must it occur to make a workplace hostile." Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998). The aggravated nature of discriminatory conduct, together with its frequency and severity are factors to be considered in assessing the efficacy of an employer's response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a workplace are unlawful, under the West Virginia Human Rights Act, and in

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feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII") (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986)); Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986) (requiring "more than a few isolated incidents of racial enmity" for racist comments, slurs, and jokes to constitute hostile work environment); Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994) (holding that "[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments"), cert. denied, 516 U.S.826 (1995); Vore v. Indiana Bell Tel. Co., 32 F.3d 1161, 1164 (7th Cir. 1994) (observing that whether racial slurs constitute hostile work environment depends upon "quantity, frequency, and severity" of slurs).

violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace. The threshold for the number of instances of such conduct of aggravated or outrageous discriminatory conduct in order for such conduct to be actionable is lower than garden-variety type conduct of a less aggravated nature.

In assessing the effectiveness of an employer's response to unlawful discrimination in the workplace, the scope of the investigation conducted by the employer, once it is on notice of potential discriminatory conduct, is a factor to be considered in determining the adequacy and sufficiency of the employer's response. The First Circuit previously identified the scope of an employer's duty to correct a hostile work environment in DeGrace v. Runsfeld, 614 F.2d 796 (1st Cir. 1980):

> It may not always be within an employer's power to guarantee an environment free from all bigotry. He cannot change the personal beliefs of his employees; he can let it be known, however, that . . . harassment will not be tolerated, and he can take all reasonable measures to enforce this policy . . . . But once an employer has in good faith taken those measures which are both feasible and reasonable under the

> circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race [or ancestry].

Id. at 805.

Factors to examine in determining whether an employer has met its burden to take prompt remedial action reasonably calculated to end the harassment include, but are not limited by, the gravity of the harm, the nature of the work environment, the degree of acquiescence in the harassment by the supervisors, the promptness of the employer's responsive action, and the apparent sincerity of the employer's actions. See Snell v. Suffolk County, 782 F.2d 1094, 1104 (2nd Cir. 1986). The Commission considered the actions of FSS against these standards and concluded that the employer's response was inadequate. FSS reasonably should have done far more than it did in investigating the harassing conduct of Mr. Fluharty, and could have determined the pervasive nature of such conduct at a much earlier point in time had it done an adequate investigation. As even the ALJ observed in its order, "[t]his was a close case that could have tipped the other way had respondent not fired Mr. Fluharty after the October 1996 incidents."

The ALJ further commented that "[c]learly, the progressive disciplinary approach had started to become ineffective when Mr. Fluharty attempted to intimidate Ms. Voyle in the lunchroom in the presence of witnesses just 30 days after being told to avoid all contact with her." These concerns that the ALJ expressed intimate that under the circumstances of this case, the remedial actions taken by FSS may not have been reasonably calculated to end the harassment. See Hathaway v. Runyon, 132 F.3d 1214, 1224 (8th Cir. 1997) (holding that employer's subsequent failure to reprimand harassing employee after complaints had been made supported jury's finding of sexual harassment); cf. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995) (holding that employer's response was sufficient where it "took all reasonable steps to protect" plaintiff once she complained to human resources department, including promptly investigating complaint, instructing offender to cease offensive behavior immediately, placing him on probation, and withholding a salary increase for several months). It further suggests that, but for the firing of Mr. Fluharty, the ALJ would have ruled otherwise. We conclude that the "discipline" imposed against Mr. Fluharty by FSS in the face of repeated complaints was not progressive

in nature, as no meaningful sanction ever was applied to Mr. Fluharty until he was discharged. Furthermore, the ineffectiveness of its continued "warnings" to Mr. Fluharty should have become clear to the employer. Meaningful discipline was not prompt, nor was it reasonably calculated to end the harassment.

Mr. Fluharty's harassing conduct occurred over the course of an eighteen-month period. It occurred in a small physical plant, and the record clearly demonstrates it was common knowledge, especially in the lunchroom, that Mr. Fluharty was harassing Ms. Voyle and that he made ethnic slurs against her, both to her face and to others in the workplace. FSS did too little, too late. After being placed on notice, their investigation was not sufficient and their response was ineffective. Only after more than eighteen months of harassment and only after getting an attorney and filing a complaint did Ms. Voyle get an effective response. Because our review of the Commission's ruling is limited to whether there is substantial evidence to support its conclusion, we cannot conclude that the Commission was in error with regard to its determination that FSS "did not prove by a preponderance of the evidence that it took prompt remedial action

reasonably calculated to end the harassment." Accordingly, we uphold the decision of the Commission.

Affirmed.