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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**CASE NO. 35301**

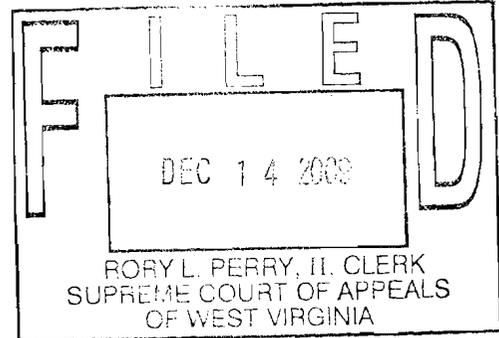
**FORD MOTOR CREDIT COMPANY,**

**Appellant,**

v.

**WEST VIRGINIA HUMAN RIGHTS COMMISSION  
and NABIL AKL,**

**Appellees.**




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**FROM THE FINAL ORDER OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION  
DOCKET NO. ENO-484-06**

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**APPELLANT'S BRIEF**

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## I. NATURE OF THE PROCEEDINGS BELOW

Appellant Ford Motor Credit Company (“Ford Credit”) appeals the decision rendered by the West Virginia Human Rights Commission (“HRC”). Appellee Nabil Akl filed a complaint of discrimination against Ford Credit alleging constructive discharge, disparate treatment and hostile work environment. (Ford Credit Ex. 38.)<sup>1</sup> In 2008, Administrative Law Judge (“ALJ”) Robert B. Wilson presided over a six-day hearing. (Tr. Vols. I-VI.) In February 2009, the proceeding was reopened for an evidentiary deposition of a then-former employee who had previously testified in the matter. (Tr. Vols. VII-VIII.) At the close of the evidentiary deposition, the ALJ made comments to Ford Credit’s counsel expressing his bias against employers as well as his intent to consider unproven and irrelevant evidence when rendering a decision in this matter. (Affs. of Messrs. Harris, Blumenthal & Fisher.)<sup>2</sup> Thereafter, the ALJ issued a decision finding that Mr. Akl established his claims of hostile work environment, constructive discharge and disparate treatment. The ALJ awarded damages solely for Mr. Akl’s alleged constructive discharge, including \$5,000 for emotional distress, \$31,250 in attorney’s fees, and \$624,654 for lost earnings through age 72. (ALJ Decision, at 44.) Because the ALJ’s decision was contrary to the substantial evidence on the record, contrary to the law and an abuse of discretion, Ford Credit appealed the decision to the HRC. (Pet. in Supp. of Appeal to HRC.) The HRC summarily adopted the ALJ’s decision without modification. (HRC Decision.) Ford Credit now requests that this Court reverse the HRC’s decision.

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<sup>1</sup> “Ford Credit Exhibit” refers to those exhibits introduced by Ford Credit at the hearing in this matter. Likewise, “Akl Exhibit” refers to those exhibits introduced by Mr. Akl at the hearing in this matter.

<sup>2</sup> The affidavits of Mr. Harris, Mr. Blumenthal and Mr. Fisher were submitted as exhibits to Ford Credit’s Petition in Support of Notice of Appeal to the HRC, and accordingly, should have been included in the record certified by the HRC to this Court. Ford Credit has not received an index of the record provided by the HRC, so it is unaware if these affidavits were submitted. If these affidavits were not included in the record provided by the HRC, Ford Credit will provide these affidavits to the Court.

## II. STATEMENT OF FACTS

Ford Credit employed Mr. Akl, who was born in Lebanon and immigrated to the United States, from November 1998 until he voluntarily resigned in September 2005. (Tr. Vol. III, at 4, 14, 232, 261; Ford Credit Ex. 28.) During his tenure with Ford Credit, Mr. Akl was promoted three times. (Tr. Vol. III, at 16, 18-19, 49, 137.) In February 2005, Akl was promoted to a supervisory position, Dealer Services Supervisor, and moved to Ford Credit's Huntington, West Virginia branch ("Huntington branch"). (Tr. Vol. III, at 26.)

In September 2005, during a routine anonymous personnel audit, several non-supervisory employees at the Huntington branch expressed great dissatisfaction with their supervisor. (Tr. Vol. III, at 100; Tr. Vol. IV, at 161.) Consistent with Ford Credit's procedures and only because of the employees' expressed dissatisfaction, two Human Resources professionals who were not located at the Huntington branch performed an onsite audit. (Tr. Vol. IV, at 155-157, 161, 278-285.) Onsite audits are not common and occur only after a requisite percentage of employees express dissatisfaction with a supervisor and/or working environment. (Tr. Vol. IV, at 160.)

During the onsite audit, several employees reported that Mr. Akl, a supervisor, regularly used profane language at work, including "fuck," "shit," "son of a bitch," and "asshole."<sup>3</sup> (Tr. Vol. IV, at 167, 285-286.) A female employee said that Mr. Akl, who was her supervisor, told her to "stop her bitching," and another female subordinate stated that Mr. Akl told her to do her "fucking job." (Tr. Vol. IV, at 167, 186-187.) Several employees reported Mr. Akl told sexual jokes, made sexist comments and mimicked mentally challenged people. (Tr. Vol. V, at 167.)

Shocked by the employees' reports, the investigators contacted Ford Credit's Personnel Relations Department at corporate headquarters, whose job is to ensure that discipline and

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<sup>3</sup> Ford Credit does not condone the use of inappropriate, profane and vulgar language, and this language is not included in this brief merely for effect. Rather, these words and statements are quotes from Mr. Akl or witnesses' testimonies of the language he used at work.

policies are applied consistently. (Tr. Vol. IV, at 13-15, 165-166, 287-289.) Personnel Relations directed that an investigation be conducted into the allegations against Mr. Akl. (Tr. Vol. IV, at 165-166, 287-289.) Equipped with a standard set of questions, the two Human Resources professionals interviewed the employees who complained about Mr. Akl's language. (Tr. Vol. IV, at 168-169; Ford Credit Exs. 12-16, 18.) Five female subordinates and two male subordinates detailed the profane, lewd and inappropriate language Mr. Akl regularly used at work, his mistreatment of female subordinates, his mimicking of mentally challenged persons and the sexual jokes and sexist comments he made: Mr. Akl said "f--k" daily or hourly; said "kiss my balls"; called someone a "lazy bastard"; told a male subordinate he "must have balls the size of raisins"; said "who's sucking your dick today?"; told homosexual jokes; referenced female breasts; called people "pussy," and complained about having "another damn woman" telling him what to do. (Tr. Vol. IV, at 181-183, 186-187, 191; Tr. Vol. V, at 18-20, 48-51, 88-92, 95, 100, 116-117; Tr. Vol. VI, at 14-15, 19-20; Ford Credit Exs. 12-19, 50.)

During the interviews, the employees were visibly upset, distraught and hurt. (Tr. Vol. IV, at 165, 168-169.) They felt terrorized by Mr. Akl and also feared retaliation from him. (Tr. Vol. IV, at 168-169, Tr. Vol. V, at 25, 49-50, 53-54, 57, 92, 95.) One of Mr. Akl's female subordinates was forced to seek counseling because of his conduct. (Tr. Vol. V, at 95.) Notably, the employees testified that no other supervisor at the Huntington branch engaged in similar misconduct. (Tr. Vol. V, at 19, 50, 52, 88, 117, 123; Tr. Vol. VI, at 21, 24, 105.) Also, Mr. Akl testified that he had never heard of anyone being accused of such vile and despicable behavior. (Tr. Vol. III, at 287-289.) Mr. Akl's immediate supervisor told the investigators that he had counseled Mr. Akl on three occasions about his unprofessional language. (Tr. Vol. VI, at 18-22, 24, 81-82; Ford Credit Ex. 50.)

Mr. Akl was interviewed during the investigation. (Tr. Vol. III, at 103-104; Tr. Vol. IV, at 172, 190, 292; Ford Credit Ex. 20.) After being informed of the allegations against him, Mr. Akl **admitted** his immediate supervisor had spoken with him about his language. (Tr. Vol. IV, at 190-191; Ford Credit Ex. 20.) Mr. Akl **admitted** he used inappropriate and unprofessional language at work. (Tr. Vol. IV, at 100, 105-106, 111-114, 173, 290; Ford Credit Ex. 20; ALJ Decision, at 6.) Mr. Akl said he could not recall making some of the alleged comments but he did not deny all of the allegations. (Tr. Vol. IV at 173, 290; Ford Credit Ex. 20.) He admitted he “cut up” at work with his friend, Kirk Staggs, a non-supervisory employee but was “not offended” by any behavior at the office. (Tr. Vol. IV, at 291; Ford Credit Ex. 20.) At the end of the interview, Mr. Akl was given a week to submit a written response to the allegations, but even after being reminded by one of the investigators a day before the deadline, he never provided a written response. (Tr. Vol. IV, at 26, 57, 100, 173-175, 177, 190-191, 291-292.)

Based upon Mr. Akl’s admissions and the employees’ statements, Ford Credit determined that Mr. Akl violated its anti-harassment policy. (Akl Ex. 11.) Ford Credit demoted Mr. Akl on September 27, 2005, to a non-supervisory position **without** a reduction in pay. (Tr. Vol. III, at 125, 127; Tr. Vol. VI, at 105-106; Akl Ex. 11.) Ford Credit’s decision was consistent with, if not more favorable than, decisions it made with regard to other employees’ violations of the anti-harassment policy: a Caucasian manager who was discharged and a supervisor who was demoted two salary grades. (Tr. Vol. IV, at 30-31, 293-294.) Ford Credit also issued a two-year reprimand to Mr. Akl’s immediate supervisor for his failure to properly address Mr. Akl’s language. (Tr. Vol. IV, at 124, Tr. Vol. VI, at 26-27, 110-111; Ford Credit Ex. 26.)

Within hours of receiving his demotion, Mr. Akl complained for the **first time** of alleged harassment. (Tr. Vol. III, at 96, 198-199, 220-223, 170, 272, 274, 278-279; Tr. Vol. IV, at 199-

200; Ford Credit Ex. 48.) Within less than twenty-four hours of the complaint, two Human Resources professionals, who had nothing to do with the investigation into the allegations against him or his demotion, contacted Mr. Akl to investigate his allegation. (Tr. Vol. III, at 228-229; Tr. Vol. IV, at 31-32, 35-36, 139-140.) They asked Mr. Akl to provide details of his complaint. (Tr. Vol. IV, at 142.) Mr. Akl, contrary to the anti-harassment policy, refused to cooperate in the investigation unless his demotion was overturned. (Tr. Vol. III, at 96, 188-193, 230-232; Tr. Vol. IV, at 35-36, 142; Ford Credit Ex. 27; Akl Ex. 10; ALJ Decision, at 4.) The Human Resources professionals informed Mr. Akl that they could not change his demotion because it was a Personnel Relations decision, to which Mr. Akl stated that discussing his allegation would then be a “waste of time.” (Tr. Vol. IV, at 142, Ford Credit Ex. 27.) Less than a day after Ford Credit’s attempt to investigate and without talking with anyone at Ford Credit about the possible impact a demotion without a reduction in pay may have on his career, Mr. Akl voluntarily resigned on September 29, 2005. (Tr. Vol. III, at 232-233, 258-266; Ford Credit Ex. 28.)

After voluntarily resigning, Mr. Akl took virtually no action to find another job, thereby failing to mitigate his damages. (Ford Credit Ex. 39; Tr. Vol. III, at 161.) Several months later, he was hired at a bank making roughly the **same** salary he made at Ford Credit but was terminated from this job about a year later. (Tr. Vol. III, at 163-164; Ford Credit Ex. 39; Akl Ex. 2; ALJ Decision, at 25.) Then, he chose to move out of state and work at his brother’s restaurant making less than he made at Ford Credit. (Akl Ex. 2; Tr. Vol. I, at 47; Tr. Vol. III, at 161-162; ALJ Decision, at 25-26.)

In February 2006, Mr. Akl filed a complaint with the HRC alleging his demotion was discriminatory and he was constructively discharged. (Akl Complaint.) In his communications with the HRC, Mr. Akl said he and his colleagues engaged in “teasing banter” but the “teasing

banter” was “essentially harmless.” (Ford Credit Ex. 30, 31.) Notably, in these communications, Mr. Akl said “he did not believe, and does not now contend, that his co-employees should have been disciplined” for their alleged comments. (Ford Credit Ex. 46; Tr. Vol. III, at 214.) In his interrogatory responses, Mr. Akl, when asked to describe the “teasing banter,” stated “[t]here was a general office environment where this ‘banter’ took place.” (Ford Credit Exs. 39 and 40.)

In November 2006, the HRC issued a no probable cause finding. Mr. Akl sought reconsideration of the finding, and in his request, he again stated that he participated in the “teasing banter,” which he described again as “essentially harmless.” (Ford Credit Ex. 31.) Notwithstanding, the HRC granted Mr. Akl’s request for review. Thereafter, contrary to his earlier communications with the HRC, Mr. Akl amended his complaint, alleging he was called derogatory names. (Am. Compl. II.) In the amended complaint, though, Mr. Akl stated, again, “[m]y colleagues and I often engaged in a certain amount of ‘teasing banter.’” (*Id.*)

In February and June 2008, ALJ Robert B. Wilson presided over a six-day hearing. (Tr. Vols. I-VI.) Mr. Akl admitted he said “f--k,” “asshole” and “son of a bitch” at work, told a female subordinate to do her “f--king job,” and may have made comments that could be construed as homosexual jokes. (Tr. Vol. III, at 105-106, 110-112, 289-290.) Several witnesses also established Mr. Akl said “pussy,” told sexist or sexual jokes, mimicked mentally challenged people, said “kiss my balls,” and made other inappropriate, lewd and vulgar comments. (Tr. Vol. IV, at 181-183, 186-187, 191; Tr. Vol. V, at 18-20, 48-51, 88-92, 95, 100, 116-117; Tr. Vol. VI, at 14-15, 19-20.) Mr. Akl admitted he violated Ford Credit’s policies and he was unaware of any employee who used the language he did who was **not** demoted. (Tr. Vol. III, at 197-198, 287-289.) Thus, Ford Credit properly demoted Mr. Akl.

Mr. Akl admitted he never complained of harassment until after his demotion, and he never told his colleagues to stop the alleged harassment. (Tr. Vol. III, at 96, 187-188, 198-199, 220-221, 223, 272, 274, 278-279; Ford Credit Ex. 48.) Once Ford Credit attempted to investigate his allegation, Mr. Akl admittedly refused to cooperate. (Tr. Vol. III, at 96, 188-193, 230-232; Tr. Vol. IV, at 35-36, 142; Ford Credit Ex. 27; ALJ Decision, at 4.) Regardless, the substantial evidence on the record established the alleged harassment was not unwelcome, severe or pervasive. (Tr. Vol. II, at 84; Tr. Vol. III, at 88, 105-106, 110, 113-114, 187-188, 197-198, 206-208, 211-213, 289-290; Tr. Vol. IV, at 167, 181-183, 186-188, 191; Tr. Vol. V, at 18-20, 48-52, 88-91, 94, 100, 116-117; Tr. Vol. VI, at 14-16, 19-21; Ford Credit Exs. 12, 15-18, 20-21, 30-31, 39-40, 46, 50; Am. Compl. II.) Also, the uncontroverted evidence established that Ford Credit promptly responded to Mr. Akl's allegation, and thus, could not be liable for a hostile work environment claim. (Tr. Vol. III, at 185-186, 188-192, 197, 221-222, 228-232; Tr. Vol. IV, at 31-32, 35-36, 101, 139-140, 143; Akl Ex. 10; Ford Credit Ex. 27.) The substantial evidence also established Mr. Akl was not constructively discharged – he did not present any evidence that the working conditions were so intolerable that a reasonable person would be forced to quit. (Tr. Vol. III, at 211-213, 232; Am. Compl. II; Ford Credit Exs. 30-31, 39-40.)

Mr. Akl put forth no evidence of his actual wages while at Ford Credit or after resigning, and he put forth no evidence regarding his future plans. Instead, Mr. Akl relied upon his two experts' reports: a vocational rehabilitationist who purportedly calculated the difference between his speculative earnings at Ford Credit and his speculative future earnings, and an accountant who plugged in the numbers to calculate lost wages through age 67. (Akl Exs. 2, 4.)

After the parties submitted proposed findings of fact and conclusions of law and responses thereto, Kirk Staggs, for whom Mr. Akl served as best man at his wedding (Tr. Vol. II,

at 86-87) and who previously testified during the hearing (Tr. Vol. II), contacted the ALJ. Mr. Staggs, who was discharged only days before contacting the ALJ, claimed he had not been permitted to tell his complete story. (Tr. Vol. VII, at 89; ALJ Decision, at 27.) The ALJ reopened the matter only for Mr. Staggs's evidentiary deposition. (ALJ's Nov. 19, 2008 Order.) Ford Credit was not permitted to call witnesses or present evidence. (Tr. Vol. VII, at 105-113.) Even so, on cross-examination, Mr. Staggs admitted multiple times that he told the truth during his prior testimony (Tr. Vol. VII, at 36, 52, 66-67, 95-96; Tr. Vol. VIII, at 28, 30, 43, 66); however, his "new" testimony contradicted his prior testimony and Mr. Akl's testimony. (Tr. Vol. II, at 96; Tr. Vol. III, at 88; Tr. Vol. VIII, at 7-8, 10-19, 25-27, 40-45, 66-69.)

At the close of the evidentiary deposition, the ALJ made several comments to Ford Credit's counsel indicating his bias against employers and how it would affect his decision in this matter. (Affs. of Messrs. Harris, Blumenthal & Fisher.) The ALJ stated he would "probably get in trouble for this" and Ford Credit would "probably use [the comments] against [him]" but he had to tell counsel how he "felt" about the matter. (*Id.*) The ALJ stated Mr. Staggs had a possible claim of retaliation, which "disturbed" the ALJ. (*Id.*) The ALJ saw this "all the time" – employers retaliating against employees for engaging in protected activity. (*Id.*)

Without allowing evidence regarding Mr. Staggs's discharge (Tr. Vol. VII, at 105-113), the ALJ said he believed Ford Credit retaliated against Mr. Staggs, and even though Mr. Staggs's case "was not in front of [him] right now," the possible claim would have "an effect" on his credibility determinations of Ford Credit's witnesses (none of whom were involved in Mr. Staggs's discharge) in this matter. (*Id.*) These comments not only demonstrated the ALJ's bias and prejudice against Ford Credit but also violated the Judicial Code of Ethics and Ford Credit's rights to due process and an impartial and fair hearing.

Against the substantial evidence on the record, contrary to the law and an abuse of discretion, the ALJ found Mr. Akl established his claims of hostile work environment, constructive discharge and disparate treatment. (ALJ Decision, at 33-36, 43-44.) As set forth herein, the ALJ failed to follow the applicable law with regard Mr. Akl's claims, and the ALJ's Findings of Fact were not supported by the substantial evidence on the record. The ALJ then awarded Mr. Akl nearly \$625,000 even though there was **no evidence** to support such an amount of damages or the only claim for which damages were assessed – constructive discharge. The ALJ failed to consider the legal standard for a front pay award, the experts' reports to support the damages claim were flawed, and Mr. Akl's failure to mitigate his damages, spotty job history and voluntary change in professions did not support such an award.

Ford Credit appealed the ALJ's decision to the HRC. (Notice of Appeal; Petition in Support of Notice of Appeal.) The HRC summarily affirmed the ALJ's decision without modifications. (HRC Decision.) As set forth herein, the HRC's decision must be reversed.

### **III. ASSIGNMENTS OF ERROR**

(1) The HRC erred in finding that Mr. Akl established a prima facie case of hostile work environment for the following reasons:

- a. The finding is contrary to the proper legal standards.
- b. The finding is not supported by the substantial evidence on the record.
- c. Mr. Akl failed to establish the alleged conduct was unwelcome.
- d. Mr. Akl failed to establish the alleged conduct was severe and pervasive.
- e. Ford Credit's prompt and properly response to Mr. Akl's allegation of harassment absolved it from liability for a claim of hostile work environment.

(2) The HRC erred in finding Mr. Akl established a claim of constructive discharge for the following reasons:

- a. The finding is not supported by the substantial evidence on the record.
- b. The finding ignores the proper legal standards.
- c. Mr. Akl's working conditions were not so intolerable that a reasonable person would be forced to resign.
- d. Mr. Akl's demotion was without a loss in pay and was not career-ending.

(3) The HRC erred in finding Mr. Akl established a claim of disparate treatment for the following reasons:

- a. The finding is not supported by the substantial evidence on the record.
- b. The finding ignores the proper legal standards.
- c. Mr. Akl failed to establish a prima facie case of disparate treatment in that he failed to identify anyone similarly situated to him who was treated more favorably.
- d. Ford Credit provided legitimate, nondiscriminatory reasons for demoting Mr. Akl, and Mr. Akl's testimony corroborated the reasons for his demotion.
- e. Mr. Akl did not present any evidence of pretext to overcome Ford Credit's legitimate, nondiscriminatory reasons for demoting him.

(4) The HRC erred in adopting Findings of Fact that were not based upon the substantial evidence on the record and yet ignoring legally significant and substantially supported material Findings of Fact in his decision.

(5) The HRC erred in awarding damages for the following reasons:

- a. Mr. Akl failed to establish constructive discharge – the sole basis for the damages award.

- b. The award of damages was not supported by any evidence on the record.
- c. The HRC ignored the legal requirements for a front pay award, and if the proper requirements had been applied, the requirements were not established for an award of front pay.
- d. Mr. Akl failed to mitigate his damages.
- e. Mr. Akl's job history does not support an award of damages.

(6) The HRC erred in finding against Ford Credit because Ford Credit was not afforded a fair and impartial hearing in that its due process rights were violated when the ALJ, in violation of the West Virginia Judicial Code of Ethics, expressed his bias against Ford Credit and his intention to consider unproven evidence when issuing his decision in this matter.

#### **IV. LEGAL ARGUMENT**

##### **A. Standard of review.**

When considering an appeal from a decision by the HRC, this Court considers questions of law *de novo*. *Cobb v. W. Va. Human Rights Comm'n*, 217 W. Va. 761, 770 (2005) (citations omitted). An ALJ's findings of fact are "accorded deference unless the reviewing court believes the findings to be clearly wrong." *Id.* (citations omitted). This Court may only sustain findings of fact that are supported by the substantial evidence on the record or are unchallenged by the parties. *Id.* (citations omitted). Substantial evidence is "such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding...." *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 90 (1999). This Court must reverse, vacate or modify the order if the findings, inferences, conclusions or order is (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority or jurisdiction; (3) made upon unlawful procedures; (4) an error of law; (5) clearly

wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. *Cobb*, 217 W. Va. at 771 (citation omitted).

**B. The HRC erred in finding Mr. Akl established a claim of hostile work environment because he failed to establish that the alleged conduct was unwelcome, severe and pervasive, and moreover, Ford Credit had a complete defense to his claim of hostile work environment.**

The HRC erred in finding Mr. Akl established a claim for hostile work environment: Mr. Akl did not establish a prima facie case of hostile work environment, and Ford Credit established a complete defense to his claim. To establish a hostile work environment claim, one must show (1) the subject conduct was unwelcome; (2) it was based on his ancestry; (3) it was sufficiently severe or pervasive as to alter his condition of employment; and (4) it was imputable on some factual basis to the employer. *Fairmont Specialty*, 206 W. Va. at 95; *see also Ziskie v. Mineta*, 547 F.3d 220, 224 (4<sup>th</sup> Cir. 2008). When evaluating a hostile environment claim, the Court looks at the totality of the circumstances. *Conrad v. AZA Szabo*, 198 W. Va. 362, 373 (1996).

Recently, this Court specifically addressed the first element of a hostile work environment claim. *Erps v. W. Va. Human Rights Comm'n*, 680 S.E.2d 371, 379-384 (W. Va. 2009). For conduct to be considered “unwelcome,” this Court clarified that “the subject conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.” *Id.* at 383. If a plaintiff bringing a hostile work environment claim “solicited, incited or participated” in the alleged offensive conduct, he “**must** introduce evidence indicating (1) that he or she ultimately informed the involved co-workers and/or supervisors that future instances of such conduct would be unwelcome, and (2) that conduct thereafter continued.” *Id.* at 383 (emphasis added).

In *Erps*, this Court found an employee's own taunts and behavior largely created the "very situation of which he later complained." *Id.* The employee in *Erps*, similar to Mr. Akl, never indicated the alleged conduct was unwelcome; thus, he could not establish a hostile work environment claim. *Id.* Mr. Akl admittedly participated in and instigated the conduct that he alleges was offensive. (Tr. Vol. III, at 206-208, 290). Also, Mr. Akl admitted he never told his co-workers to stop their conduct. (Tr. Vol. III, at 187-188.) Thus, Mr. Akl failed to meet the standard set forth by this Court to prove the alleged conduct was unwelcome. Therefore, the HRC's decision regarding Mr. Akl's hostile work environment claim must be reversed.

- (1) **The HRC ignored the legal standards when analyzing the first element of a hostile work environment claim, and moreover, the substantial evidence on the record did not establish the alleged conduct was unwelcome.**

The HRC failed to consider Mr. Akl's participation in and instigation of the conduct he now alleges was offensive, and thus, the HRC failed to properly analyze whether the "subject conduct was unwelcome" – a **necessary** element of a hostile work environment claim. Hence, the HRC's finding that a prima facie case of hostile work environment was established, when it failed to apply the proper legal standard on a required element of such a claim, must be reversed.

Even if the HRC had considered the first element of a hostile work environment claim, Mr. Akl did not meet his burden. The substantial evidence on the record established Mr. Akl **willingly** participated in the conduct which he now claims was hostile. In his amended complaint, Mr. Akl stated: "[m]y colleagues and I often engaged in a certain amount of 'teasing banter.'" (Am. Compl. II.) Similarly, in his communications with the HRC, Mr. Akl stated the "teasing banter" was "essentially harmless." (Ford Credit Ex. 30, 31.) Mr. Akl also told the HRC that "he did not believe, and does not now contend, that his co-employees should have been disciplined" for their alleged comments. (Ford Credit Ex. 46; Tr. Vol. III, at 214.) In response

to an interrogatory asking him to describe the “teasing banter,” Mr. Akl stated “[t]here was a general office environment where this ‘banter’ took place.” (Ford Credit Exs. 39 and 40.)

Mr. Akl’s testified he not only participated in but instigated the behavior he now claims is offensive. (Tr. Vol. III, at 206-208, 290.) Tellingly, he even described the environment at Ford Credit as “teasing.” (Tr. Vol. III, at 211-213; Am. Compl. II.) The testimony of other Ford Credit employees also established that Mr. Akl instigated and participated in the behavior of which he now complains. (Tr. Vol. II, at 84; Tr. Vol. IV, at 186-187, 191; Tr. Vol. V, at 19-20, 48-52, 88-91, 100, 116-117; Tr. Vol. VI, at 14-15, 19-21; Ford Credit Exs. 12, 14-18, 21.)

Under this Court’s analysis, Mr. Akl’s admitted instigation and participation in this self-proclaimed “teasing” atmosphere and his belief that his colleagues should not be disciplined for this behavior does not meet the “unwelcome” element of a prima facie case of hostile work environment. *Erps*, 680 S.E.2d at 383. Mr. Akl cannot initially tell the HRC that the conduct was “joking” and should not result in discipline, and then later claim that the same behavior is “unwelcome.” Mr. Akl did not meet the first element of a claim of hostile work environment.

Moreover, contrary to the standard set forth by this Court and Ford Credit’s policy, Mr. Akl admittedly **never** told anyone to stop making the alleged comments. (Tr. Vol. III, at 187-188; Akl Ex. 10.) If Mr. Akl considered the conduct unwelcome, he should have told the alleged harasser to stop and reported the conduct through the various channels provided by Ford Credit as he was required to do by both company policy and West Virginia law; however, he did not do so. Thus, Mr. Akl has not met the standard set forth by this Court. *Erps*, 680 S.E.2d at 383. Because the substantial evidence on the record does not support Mr. Akl’s claim that the conduct at issue was **unwelcome**, the HRC’s decision must be reversed.

**(2) The HRC failed to analyze whether the alleged conduct was severe or pervasive; nevertheless, the substantial evidence does not support a finding that the alleged conduct was severe or pervasive.**

Both the HRC and the ALJ failed to mention, much less conduct a perfunctory analysis, of whether the alleged conduct was severe or pervasive. The third element of a hostile work environment claim requires the complainant to establish the alleged conduct is “severe or pervasive.” *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4<sup>th</sup> Cir. 2008) (citations omitted); *Haught v. The Louis Berman, LLC*, 377 F. Supp. 2d 543, 553 (N.D. W. Va. 2005). Mr. Akl must establish he “subjectively perceive[d] the environment to be abusive.” *Id.* (citation omitted). The environment must also be objectively abusive. *Id.* Because the HRC failed to consider or determine that Mr. Akl met this required element, the decision must be reversed.

Even if the HRC had considered the third element, the substantial evidence on the record does not support a finding that the alleged conduct was severe or pervasive. Mr. Akl admitted days or weeks passed without anyone making comments. (Tr. Vol. III, at 88; Ford Credit Ex. 39.) Mr. Akl described the conduct as “teasing” and “joking” and told the HRC his colleagues should **not** be disciplined for the comments. (Tr. Vol. III, at 211-214; Am. Compl. II; Ford Credit Exs. 30, 31, 39, 40, 46.) Thus, he did not subjectively believe the conduct to be severe, let alone whether the conduct was objectively severe. Mr. Akl did not establish the alleged conduct was severe or pervasive. Consequently, any finding that the conduct was severe or pervasive is not supported by any evidence on the record; therefore, the HRC’s finding that Ford Credit is liable for a claim of hostile work environment must be reversed.

- (3) **Even if the HRC had properly determined Mr. Akl established a prima facie case of hostile work environment, the HRC should have absolved Ford Credit of liability because it established a complete defense to Mr. Akl's hostile work environment claim.**

Even if the HRC had properly determined Mr. Akl established a prima facie case of hostile work environment, the substantial evidence on the record established Ford Credit has a complete defense because once it received Mr. Akl's claim of hostile work environment, it took appropriate action. *See Colgan Air, Inc. v. W. Va. Human Rights Comm'n*, 221 W. Va. 588, 595 (2007)<sup>4</sup>; *Johnson v. Killmer*, 219 W. Va. 320, 326 n.13 (2006). To determine whether an employer took prompt action to remedy the alleged harassment, one must consider **"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 action, and the apparent sincerity of the employer's actions."** *Fairmont Specialty*, 206 W. Va. at 97 (emphasis added). "[T]he employer must take swift and decisive action to eliminate such conduct from the workplace." *Id.* "[C]ommon 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.* (emphasis added). It is uncontroverted that Ford Credit took appropriate, prompt action; hence, it cannot be liable for a hostile work environment claim.

Ford Credit had a well-publicized anti-harassment policy, and Mr. Akl was well aware of the policy and its requirements, which included, among other things, his heightened duty as a supervisor to report any harassment. (Akl Ex. 10; Tr. Vol. III, at 185-186, 188, 197, 221-222.) When he first reported alleged harassment after his demotion, Ford Credit responded **in less than**

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<sup>4</sup> *Colgan Air* is similar to this matter in that the employee was allegedly called derogatory names. This Court held the *Colgan Air* was **not** liable for a hostile work environment claim because it had an anti-harassment policy (like Ford Credit does), and once the employee complained, it took appropriate actions (like Ford Credit did). 221 W. Va. at 596. Notably, this Court stated "the employer cannot be charged with responsibility for the victim's failure to complain." *Id.* (citations omitted). Like *Colgan*, Ford Credit took appropriate actions to remedy the situation immediately after it received the complaint.

**twenty-four hours** by attempting to interview Mr. Akl about his allegation. (Tr. Vol. III, at 221, 228-229; Tr. Vol. IV, at 31-32, 35-36, 139-140.) In violation of the anti-harassment policy, Mr. Akl **refused to cooperate** with the investigation by failing to provide **any** details about his allegation. (Tr. Vol. III, at 188-193, 230-232; Tr. Vol. IV, at 35-36, 55-56, 101, 143; Akl Ex. 10; Ford Credit Ex. 27; ALJ Decision, at 4.) Instead, it appears that Mr. Akl tried to use his complaint as a bargaining chip to excuse his own misconduct and prevent punishment, rather than follow company policy and provide Ford Credit with information to investigate. (*Id.*)

Then, within less than one day of Ford Credit talking with him about his allegation, Mr. Akl chose to resign. (Tr. Vol. III, at 232, 261; Ford Credit Ex. 28.) Ford Credit promptly tried to gather details pertinent to his allegations but Mr. Akl **chose** to condition his cooperation on Ford Credit absolving him of his own wrongful conduct. (Tr. Vol. III, at 188-192, 221, 228-232; Tr. Vol. IV, at 31-32, 35-36, 55-56, 101, 139-140, 143; Ford Credit Ex. 27.) Mr. Akl cannot now claim that Ford Credit failed to investigate when he tried to avoid responsibility for his own misconduct and **chose** to withhold the very information he now blames Ford Credit for not investigating. The substantial evidence on the record established Ford Credit has a complete defense to Mr. Akl's hostile work environment claim. Thus, the HRC's decision must be reversed with regard to Mr. Akl's hostile work environment claim.

- C. Mr. Akl failed to establish the elements of a constructive discharge claim, and therefore, the HRC's decision finding Ford Credit liable for constructive discharge must be reversed.**

The HRC erred in finding Mr. Akl established a constructive discharge claim because there was no evidence of a hostile work environment or that the working conditions were so intolerable that a reasonable person would have no choice but to resign. Thus, the HRC's determination that Ford Credit is liable for a claim of constructive discharge must be reversed.

Because the HRC's award of nearly \$625,000 was based solely on Mr. Akl's constructive discharge claim (HRC Decision; ALJ Decision, at 44), it must also be reversed.

This Court has held that a constructive discharge claim "arises when the employee claims that because of age, race, sexual or other unlawful discrimination, the employer has created a hostile working climate that the employee was forced to leave his or her employment." *Love v. Georgia-Pacific Corp.*, 209 W. Va. 515, 520 (2001) (quoting *Slack v. Kanawha County Hous. & Redev. Auth.*, 188 W. Va. 144 (1992)). "In order to prove constructive discharge, a plaintiff must establish that the conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." *Id.* at 520; *Slack*, 188 W. Va. at 145-46.

The HRC, by summarily adopting the ALJ's brief analysis of Mr. Akl's constructive discharge claim, found that a constructive discharge claim was established "because of the circumstances surrounding the investigation...without any meaningful opportunity of [Mr. Akl] to respond to the allegations...." (ALJ Decision, at 7; HRC Decision.) This is, of course, contrary to the substantial evidence on the record. To wit, Mr. Akl was given at least one week to respond to the allegations in writing, and even when he was reminded to submit a written response, he chose not to do so. (Tr. Vol. IV, at 26, 57, 100, 173-175, 177, 190-191, 291-292.)

In addition, the HRC found constructive discharge because once Mr. Akl was demoted he would be working for his former co-worker, Carmine Spada, an individual whom Mr. Akl **alone** believed could not properly do his job. (HRC Decision; ALJ Decision, at 7, 37.)<sup>5</sup> There was, however, **no testimony** that Mr. Akl would have reported to Mr. Spada, and after his demotion, Mr. Akl never worked for anyone because he voluntarily resigned before working in his new

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<sup>5</sup> The ALJ, without any basis in fact, stated in support of this proposition that Mr. Akl was constructively discharged in part because he would be placed "under the supervision of those who had conspired to have him demoted for their own gain...." (ALJ Decision, at 7.) This tenuous proposition, which was not offered or intimated by Mr. Akl, further demonstrates the ALJ's failure to consider the actual evidence submitted by the parties.

position. (Tr. Vol. III, at 232; Ford Credit Ex. 28.) Notably, in Mr. Akl's filing with this Court, he claimed he would have reported to Mr. Spada or Michael Holder. (Akl Reply to Pet. for Appeal, at 21.) Mr. Akl never complained about Mr. Holder's conduct or performance; accordingly, being supervised by Mr. Holder would not have created intolerable conditions. Mr. Akl's own argument contradicts the HRC's key basis for finding constructive discharge, and therefore, the decision must be reversed. Even ignoring the lack of evidence, Mr. Akl's concern about Mr. Spada's job ability was not a proper basis for quitting and then claiming constructive discharge. Whether Mr. Spada can perform his job has nothing to do with Mr. Akl's national origin or whether the working conditions were intolerable.

As another basis for finding constructive discharge, the HRC found that Mr. Akl could not be expected to continue working at Ford Credit when other supervisors allegedly engaged in "far more egregious" behavior than he had. (HRC Decision; ALJ Decision, at 37.) The substantial evidence on the record established **no one** engaged in behavior similar to Mr. Akl. (Tr. Vol. V, at 19, 50, 88, 103-104, 117; Tr. Vol. VI, at 21, 24, 105.) Mr. Akl described this behavior as "teasing banter" and he did not complain about it until he was demoted. (Tr. Vol. III, at 203-208, 211-213, 221, 239; Ford Credit Exs. 30, 31, 39, 40, 46; ALJ Decision, at 12.) Mr. Akl, who admitted no one else engaged in the behavior of which he was alleged to have participated in and instigated, told the HRC that he did not think any of his co-workers should be disciplined for this "teasing banter," and therefore, it could not be "more egregious" than the conduct to which he has admitted. (Ford Credit Ex. 46; Tr. Vol. III, at 211-214.) Further, even assuming other supervisors behaved in a manner even remotely similar to him, Mr. Akl did not present any evidence that Ford Credit's decision to demote him had anything to do with his national origin. Therefore, the HRC's finding of constructive discharge must be reversed.

As the final basis for finding constructive discharge, the HRC found that while Mr. Akl was not told to resign, no one dissuaded him from resigning. (HRC Decision; ALJ Decision, at 37.) Neither the HRC nor the ALJ cites to any authority to support the notion that one is constructively discharged if an employer does not dissuade him/her from resigning because there is **no authority** to support such a tenuous proposition. If the law was as the HRC suggests, every time an employee left a job and the employer did not request that he/she stay, the employer would be liable for constructive discharge. Without a doubt, this is not the law in West Virginia. Thus, this basis for finding constructive discharge is contrary to the law and must be reversed.

Contrary to the HRC's decision, there was **no evidence** that the conditions at the Huntington branch were so intolerable that a reasonable person would have no choice but to quit. Rather, the evidence established the environment was not so intolerable. Mr. Akl admitted the environment was "teasing" and "joking," and as set forth *supra*, section IV(B), the evidence established the alleged conduct did not constitute a hostile work environment. (Tr. Vol. III, at 211-213; Am. Compl. II; Ford Credit Exs. 30, 31, 39, 40.) The record simply does not support any suggestion that there was some "intolerable" harassment forcing Mr. Akl to quit.

It was Mr. Akl's demotion, not alleged harassment, that prompted him to quit. Mr. Akl had long-standing employment at Ford Credit and he did not present evidence that he **ever** contemplated quitting **until** he was demoted. Mr. Akl only resigned once Ford Credit refused to overturn the demotion. Mr. Akl admitted that his resignation was "a direct result of the decision to demote him. This fact simply cannot be contested. Had Mr. Akl not been demoted, he would have stayed at Ford Credit." (Akl's Reply to Pet. for Appeal, at 20.) He contends that "'but for' the wrongful demotion, Mr. Akl would not have left employment with [Ford Credit]." (*Id.*) Thus, Mr. Akl has conceded that the conditions must not have been "so intolerable."

Additionally, a demotion cannot be considered constructive discharge if the demotion is not career-ending and without a loss in pay. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 378 (4<sup>th</sup> Cir. 2004) (citations omitted); *Carter v. Ball*, 33 F.3d 450, 459 (4<sup>th</sup> Cir. 1994). The substantial, uncontroverted evidence established a demotion for someone in Mr. Akl's position was **not** career-ending and was **without** a loss in pay. (Tr. Vol. III, at 258; Tr. Vol. IV, at 293.) To wit, another Huntington branch employee, similar to Mr. Akl, was demoted but later promoted. (Tr. Vol. V, at 8-11, 28, 36; Tr. Vol. VI, at 26.) Thus, Mr. Akl's demotion did **not** equate to constructive discharge, and the HRC's finding must be reversed.

Because the substantial evidence on the record does not establish constructive discharge, the HRC's finding must be reversed, and its finding that Ford Credit must pay Mr. Akl nearly \$625,000 in lost wages, which was based solely on this claim, should be reversed.

**D. The HRC erred in finding Ford Credit liable for a claim of disparate treatment because Mr. Akl failed to establish a prima facie case of disparate treatment.**

The HRC erred in finding Mr. Akl established a claim for disparate treatment because he failed to establish he was treated differently than a similarly situated person outside of his protected class. To establish a disparate treatment claim, one must show (1) he was a member of a protected class; (2) he suffered an adverse employment decision; and (3) he was treated differently than a similarly situated person outside the protected class. *State v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W. Va. 711, 719 (1985).<sup>6</sup> Mr. Akl failed to establish the

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<sup>6</sup> The ALJ found that to establish a *prima facie* case of discrimination, Mr. Akl must show: (1) he is a member of a protected class; (2) the employer made an adverse decision concerning him; and (3) but for his protected status, the adverse decision would not have been made. (ALJ Decision, at 29.) This Court has held that the third element must be established by the complainant presenting (1) direct evidence of discrimination; (2) statistics that establish members of a protected class received substantially worse treatment; **or** (3) similarly situated individuals not in the plaintiff's/complainant's protected class received more favorably treatment. *Waddell v. John Q. Hammons Hotel, Inc.*, 572 S.E.2d 925, 928 (W.Va. 2002).

third element, and the substantial evidence on the record, including Mr. Akl's testimony, confirmed that the one person to whom Mr. Akl compared himself was not similarly situated. Thus, the HRC's decision finding disparate treatment must be reversed.

To be similarly situated, the individual to whom Mr. Akl compares himself must have the same supervisor, be held to the same standards **and** engage in the same conduct. *Edwards v. Newport News Shipbuilding & Day Dock Co.*, Case No. 98-1338, 166 F.3d 1208 (Table), 1998 WL 841567, at \* 2-3 (4th Cir. Dec. 7, 1998).<sup>7</sup> The HRC, ignoring the law, failed to analyze who was similarly situated to Mr. Akl and how that person was treated more favorably. (HRC Decision.) For this reason alone, the HRC's decision is contrary to the law and must be reversed.

Even if the HRC had analyzed this claim under the proper framework, there was **no evidence** presented that Mr. Staggs, the person whom **Mr. Akl** identifies as his comparator, was "similarly situated." (Tr. Vol. I, at 20-23.) Rather, Mr. Staggs was legally dissimilar to Mr. Akl. Mr. Akl was a supervisor, and Mr. Staggs was his subordinate. (Tr. Vol. III, at 313.) Courts have uniformly found a subordinate is not similarly situated to his supervisor.<sup>8</sup> Also, Mr. Akl and Mr. Staggs held different jobs, had different duties, had different expectations from Ford

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Mr. Akl offered neither direct evidence nor statistical data; thus, he must establish that similarly situated individuals were treated more favorably than he was treated in order to set forth a prima facie case.

<sup>7</sup> Contrary to Mr. Akl's argument, just because two people are "salaried" employees does not make them similarly situated. (Akl Reply to Pet. for Appeal, at 24-25.) If this were the case, any salaried employee (regardless of position, duties, supervisor or misconduct) would always be "similarly situated" to any other salaried employee. To wit, a CEO would then be similarly situated to an assistant who is paid on a salary basis. This is not the standard set forth by the courts.

<sup>8</sup> See e.g., *Tomczyk v. Jocks & Jills Rests., LLC*, Case No. 05-10744, 2006 WL 2271255, at \* 6 (11<sup>th</sup> Cir. Aug. 9, 2006); *Sizemore v. State of N.M. Dep't of Labor*, Case No. 05-2198, 2006 WL 1704456, at \* 4 (10<sup>th</sup> Cir. June 22, 2006); *Vasquez v. City of Los Angeles*, 349 F.3d 634, 641 (9<sup>th</sup> Cir. 2003); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7<sup>th</sup> Cir. 2002); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8<sup>th</sup> Cir. 1994); *McCormick v. Allegheny Valley Sch.*, Case No. 06-3332, 2008 WL 355617, at \* 11 (E.D. Pa. Feb. 6, 2008); *Couch v. Am. Woodmark Corp.*, Case No. 6:06-5111-DCR, 2007 WL 2668694, at \* 5, n.6 (E.D. Ky. Sept. 6, 2007); *Bush v. Fordham Univ.*, 452 F. Supp. 2d 394, 410 (S.D. N.Y. 2006); *Femidaramola v. Lextron Corp.*, Case No. 3:05CV643JS, 2006 WL 2669065, at \*2 (S.D. Miss. Sept. 18, 2006); *Oguezunu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 584-85 (D. Md. 2005); *Williams v. Frank*, 757 F. Supp. 112, 118 (D. Mass. 1991).

Credit, were different salary grades and reported to different supervisors. (Tr. Vol. II, at 15, 18, 23-24, 28, 38, 48-49, 89-91, 101; Tr. Vol. III, at 19, 21, 26, 28, 38, 89, 197, 279, 284, 313; Tr. Vol. IV, at 25-26, 37, 39, 250-251; Tr. Vol. V, at 42, 103, 112, 114-115; Tr. Vol. VI, at 7-13, 92-93, 103-104; Ford Credit Ex. 33; Akl Ex. 10.)

Further, Mr. Akl and Mr. Staggs did **not** engage in similar conduct. (Tr. Vol. II, at 61, 96-98; Tr. Vol. III, at 100, 105-106, 110-114, 289, 290; Tr. Vol. IV, at 273-274, 291-292; Tr. Vol. V, at 103-104; Ford Credit Ex. 20.) Mr. Akl admitted he said “f-k,” “asshole,” and “son of a bitch,” told a female subordinate to do her “f-king job,” and made comments that could be construed as homosexual jokes. (Tr. Vol. III, at 105-106, 110-112, 289-290; ALJ Decision, at 6.) Mr. Staggs, however, denied using any profane language at work, and no one reported that Mr. Staggs’s conduct was similar to Mr. Akl’s. (Tr. Vol. II, at 96-98; Tr. Vol. IV, at 273-274.) Notably, Mr. Akl admitted he was unaware of **any** Ford Credit employee who had engaged in similar behavior. (Tr. Vol. III, at 287-289.) Accordingly, Mr. Staggs and Mr. Akl – who had different jobs, different duties, different supervisors, and participated in different behavior – are legally dissimilar. *See Edwards*, 1998 WL 841567, at \* 2-3. Mr. Akl did not establish a prima facie case of disparate treatment; therefore, the HRC’s decision must be reversed.

- (1) **Even if Mr. Akl had established a prima facie case of disparate treatment, Ford Credit established legitimate, non-discriminatory reasons for demoting him, and thus, is not liable for a claim of disparate treatment.**

Even if Mr. Akl established a prima facie case of disparate treatment, the HRC should have found in favor of Ford Credit because the substantial evidence on the record established it had legitimate, nondiscriminatory reasons for demoting Mr. Akl, which were uncontroverted. If a prima facie case of disparate treatment is established, the employer has an opportunity to prove its actions were based upon a legitimate, nondiscriminatory reason. *Mayflower Veh. Sys., Inc. v.*

*Cheeks*, 218 W. Va. 703, 706-07 (2006); *see also Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 216 (4<sup>th</sup> Cir. 2007) (citations omitted). The burden then shifts to the employee to prove the employer's reason was a pretext for unlawful discrimination. *Id.*

The HRC failed to follow legal precedent when it failed to analyze this claim under the burden-shifting framework set forth by this Court. (HRC Decision.) The HRC failed to address whether Ford Credit had legitimate, non-discriminatory reasons to demote Mr. Akl, and therefore, the decision failed to conform to the applicable law. (HRC Decision; ALJ Decision, at 32-34.) Also, the HRC abused its discretion by ignoring Ford Credit's reasons for demoting Mr. Akl, thereby failing to permit Ford Credit the due process to which it was entitled.

Had the HRC properly considered this essential issue, it would have found that Mr. Akl **admittedly** violated Ford Credit's anti-harassment policy, and therefore, Ford Credit's reasons for demoting Mr. Akl were legitimate and non-discriminatory.<sup>9</sup> (Tr. Vol. III, at 105-106, 110, 113-114, 197-198, 289-290; Tr. Vol. IV, at 167, 181-183, 186-188; Tr. Vol. V, at 18-20, 48-52, 88-91, 94, 100, 116-117; Tr. Vol. VI, at 14-16; Ford Credit Exs. 12, 15-18, 20-21, 50.) Ford Credit's anti-harassment policy defines "harassment" as any conduct that creates an "intimidating, hostile or offensive working environment." (Akl Ex. 10.) Any violation of the anti-harassment policy could result in discipline up to discharge. (Akl Ex. 10.)

Mr. Akl admitted he violated Ford Credit's policies. (Tr. Vol. III, at 197-198.) Mr. Akl admitted he said inappropriate words at work, including "f-k," "asshole," and "son of a bitch"; told his female subordinate to do her "f-king job"; made comments that could be construed as homosexual jokes; and told a female subordinate to stop her "bitching." (Tr. Vol. III, at 100,

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<sup>9</sup> In addition to violating Ford Credit's anti-harassment policy, Mr. Akl put the company at risk for a claim of unlawful discrimination by using the term "bitching" toward his female subordinate. *See Fairmont*, 206 W. Va. at 95 (finding that use of the term "bitch" has "overtones of gender discrimination, another form of unlawful discrimination under the West Virginia Human Rights Act.").

105-106, 110-114, 197-198, 289-290.) Witnesses testified that Mr. Akl also said “all I need is another damn woman telling me what to do,” told a subordinate to quit her “bitching,” said “kiss my balls,” called employees “pussy,” asked “who is sucking your dick today,” made sexist jokes, made fun of mentally challenged persons, and said “shit” and “damn.” (Tr. Vol. IV, at 181-183, 186-187, 191; Tr. Vol. V, at 18-20, 48-52, 88-91, 98, 100, 116-117; Tr. Vol. VI, at 14-16; Ford Credit Exs. 13-18, 21, 50.) These witnesses were offended and felt terrorized by Mr. Akl’s comments, they were in tears when they described Mr. Akl’s comments, and one employee had to seek counseling because of Mr. Akl’s comments. (Tr. Vol. IV, at 169-170, 187, 308-309, Tr. Vol. V, at 25, 49-50, 53-54, 92, 95.)

The substantial evidence on the record established that Mr. Akl violated Ford Credit’s policies; thus, Ford Credit had legitimate, non-discriminatory reasons for demoting him. Thus, the HRC’s decision to the contrary was unsupported by the evidence on the record, arbitrary and capricious and an unwarranted use of discretion, and therefore, must be reversed.

**(2) Mr. Akl failed to meet his burden of proving pretext; therefore, Ford Credit cannot be liable for a claim of disparate treatment.**

Because Ford Credit met its burden, the burden shifted to Mr. Akl to establish Ford Credit’s reason was pretextual. *Mayflower*, 218 W. Va. at 706-07. Pretext must be established by a preponderance of the evidence. *Cobb*, 217 W. Va. at 777. Mr. Akl “cannot seek to expose [the employer’s] rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation’s validity, or by raising points that are wholly irrelevant.” *Holland*, 487 F.3d at 216. Mr. Akl must present more than “**baseless speculation**” to establish pretext. *Id.* at 217 (emphasis added). The HRC failed to follow the law when it failed to analyze whether Mr. Akl presented any evidence of pretext. (HRC Decision, ALJ Decision at 32-34.)

There was **no evidence** the decision to demote Mr. Akl was pretextual. Mr. Akl now believes the decision to demote him was pretextual because management employees allegedly violated the same policy but were not disciplined. (Akl Reply to Pet. for Appeal, at 26-28.) Mr. Akl, who was a supervisor, not a manager, admitted, however, he did not know **any** Ford Credit employee who engaged in similar conduct but was not demoted. (Tr. Vol. III, at 287-289.) Every Ford Credit employee (including a twenty-year employee) at the hearing testified they had never heard of any other employee acting the way Mr. Akl did. (Tr. Vol. IV, at 187; Tr. Vol. V, at 52, 94, 123; Tr. Vol. VI, at 105.)

Ford Credit also presented uncontroverted evidence that others who violated the anti-harassment policy were treated similarly, if not worse, than Mr. Akl: a Caucasian manager was discharged, and a supervisor was demoted two salary grade levels. (Tr. Vol. IV, at 30-31, 293-294.) Mr. Akl was only demoted **one salary grade** and his pay was not reduced. (Tr. Vol. III, at 127, 258; Tr. Vol. VI, at 105-106; Akl Ex. 11.) Mr. Akl was treated similarly, if not more favorably than others, which defies any notion that Ford Credit's actions were pretextual.

Mr. Akl further makes the self-serving and conclusory assertion that the investigation of Mr. Akl's misconduct was purportedly conducted in a way to elicit only negative information. (Akl Reply to Pet. for Appeal, at 26-28.) Mr. Akl presented no evidence, however, that the investigation was conducted any differently than normal, let alone that it done so as part of a scheme to discriminate against him based upon his national origin. Because Mr. Akl failed to present evidence of pretext, his disparate treatment claim fails.

The HRC failed to consider the essential elements of a prima facie case of disparate treatment, failed to analyze Ford Credit's legitimate, non-discriminatory reasons for demoting Mr. Akl and failed to analyze whether pretext was established. The HRC substituted its own

analysis, thereby rendering an arbitrary and capricious decision – a decision that demonstrated an unwarranted use of discretion. For all of these reasons, the HRC’s decision must be reversed.

**E. The HRC’s decision must be reversed because it is based upon Findings of Fact that are unsupported by the substantial evidence on the record.**

The ALJ set forth, and the HRC summarily affirmed, 50 Findings of Fact. These findings of fact **must** be supported by substantial evidence on the record. W. Va. Code R. § 77-2-10.8; W. Va. Code § 5-11-8; *see also Cobb*, 217 W. Va. at 774 (reversing the ALJ’s findings of fact because they were unsupported by the evidence on the record and were “clearly wrong in view of the reliable, probative and substantial evidence on the whole record.”). Thirty of the Findings of Fact (specifically, Findings of Fact 9-12, 16-19, 23-24, 26-33, 35-42, 44, 48-50) were unsupported by the substantial evidence on the record.<sup>10</sup>

This Court has rebuked the same ALJ for making Findings of Fact unsupported by the substantial evidence on the record. In *Cobb*, this Court explicitly stated: “[t]his Court’s review of many of the material Findings of Fact and conclusions of law made by the Administrative Law Judge and adopted by the HRC reveals the findings and conclusions are not supported by evidence on the record and are ‘clearly wrong in view of the reliable probative and substantial evidence on the whole record.’” 217 W. Va. at 771. This Court further noted that, similar to this matter, “a disturbing number of the findings and conclusions are arbitrary, capricious and characterized by an abuse of discretion. Collectively the type and number of blatant errors in the findings below by the Administrative Law Judge greatly troubled this Court and raise profound questions regarding the fundamental fairness afforded [the respondents] generally in the administrative process below.” *Id.* In an additional parallel to this matter, this Court noted “a

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<sup>10</sup> In its appeal to the HRC, Ford Credit established that these thirty Findings of Fact were unsupported by the substantial evidence on the record. Ford Credit incorporates these arguments and evidence by reference and refers the Court to its Petition for Appeal filed with the HRC, which details why each of these thirty Findings of Fact is not supported by the substantial evidence on the record.

disturbing pattern of exaggerations and outright inaccuracies by the Administrative Law Judge below, errors which raise for us troubling questions regarding the fundamental fairness and justice...in the hearing underlying the instant appeal.” *Id.* at 774. “This Court cannot and will not condone misrepresentations of facts erected by judges, administrative or otherwise, as foundations for what can only be seen on review as judging to reach a predetermined result – here, a finding of discrimination.” *Id.* at 774.

The following list represents **some** of the ALJ’s Findings of Fact that were unsupported by the substantial evidence, which were summarily adopted by the HRC:

- The ALJ’s finding that Mr. Akl’s national origin was known by everyone is unsupported by the record and contrary to the evidence. Significantly, the individuals who investigated his harassment claim were unaware of his national origin. (ALJ Decision, Finding of Fact 9; Tr. Vol. IV, at 13, 139.)
- The ALJ’s finding that the “cutting up” at the office occurred “regularly” or “all day” was unsupported by any evidence. Mr. Akl testified days or weeks would go by without any alleged comments being made to him. (ALJ Decision, Finding of Fact 10; Tr. Vol. III, at 88; Ford Credit Exs. 38, 39.)
- The ALJ’s finding that only Mr. Akl “fire[d] back” at comments allegedly made to him was contrary to the evidence. Mr. Akl admitted he instigated the environment to which he now claims was hostile. (ALJ Decision, Finding of Fact 12; Tr. Vol. III, at 208-209, 290.) Mr. Staggs’s testimony also corroborated this fact. (Tr. Vol. II, at 84-85.)
- Throughout his decision, the ALJ ignored that two individuals were involved in the investigation into the harassment allegations against Mr. Akl. The ALJ found that only one individual (and an individual the ALJ found to be biased, without any basis in fact,

even though she no longer worked at Ford Credit when she testified in this matter) (Tr. Vol. IV, at 153-157) investigated the allegations all by herself. (ALJ Decision, Findings of Fact 16 and 17.) The uncontroverted evidence established that there were two individuals who investigated the allegations against Mr. Akl. (Tr. Vol. IV, at 153-157; Respondent Exs. 12, 13, 15-18, 20-21, 50.)

- The ALJ's finding that an employee heard other supervisors use profanity was not supported by the record. This employee testified he **never** heard Mr. Akl's co-supervisor use profanity, and managers (**not supervisors**) rarely used profanity. (ALJ Decision, Finding of Fact 23; Tr. Vol. V, at 19, 36.) Regardless, no one at the Huntington branch engaged in the same behavior as Mr. Akl. (Tr. Vol. IV, at 287; Tr. Vol. V, at 19, 50, 88, 94, 103-104, 117; Tr. Vol. VI, at 21, 24, 105.)
- The ALJ's findings that Mr. Akl's supervisor never told Mr. Akl that his use of language could result in discipline and Mr. Akl's supervisor never heard Mr. Akl use inappropriate language was contrary to the record. Mr. Akl admitted his supervisor counseled him about his language, and he understood that a violation of the anti-harassment policy could result in discipline. (ALJ Decision, Finding of Fact 26; Tr. Vol. III, at 122, 185-186, 195-198, 221-222; Tr. Vol. VI, a 78-79, 81; Akl Ex. 10; Akl Ex. 14.)
- The ALJ's finding that Mr. Akl was not given an opportunity to explain himself with regard to the allegations against him was contrary to **all** evidence, including part of ALJ's Finding of Fact 28. It was uncontroverted that Mr. Akl was allowed to respond to each allegation during his interview as part of the investigation, he was given one week to respond to the allegations against him, and he was reminded by one of the investigators a day before his written response was due. Mr. Akl, however, chose not to avail himself of

this opportunity. (ALJ Decision, Findings of Fact 27 and 35; Tr. Vol. IV, at 26, 57, 100, 173-175, 177, 190-191, 291-292; Akl Ex. 20.)

- The ALJ's finding that Mr. Akl could not have provided a written statement (which is contrary to the ALJ's finding that Mr. Akl did not have an opportunity to explain himself in Finding of Fact 27) because he was unaware of the allegations against him was contrary to the record. Mr. Akl was told about the allegations against him and questioned about each allegation, and Mr. Akl's own testimony established he was provided with "accusations" and he answered those allegations during the interview with the investigators. (ALJ Decision, Finding of Fact 28; Respondent Ex. 20; Tr. Vol. III, at 103-104, 124-125, 304.)
- The ALJ's findings that Ford Credit failed to investigate Mr. Akl's harassment allegation was contrary to the record. The uncontroverted evidence established that Ford Credit attempted to interview Mr. Akl about his allegations. The ALJ found in his decision (contrary to this finding) and Mr. Akl admitted that he **refused** to cooperate with the investigation. (ALJ Decision, Findings of Fact 33 and 35; Tr. Vol. III, at 188-193, 228-232; Tr. Vol. IV, at 31-36, 55-56, 101, 139-143; Ford Credit Ex. 27; ALJ Decision, at 4.)
- The ALJ's finding that Mr. Akl found the alleged comments to be "terrible" was contrary to the evidence on the record. Mr. Akl admitted the comments were "joking," "teasing banter" and "essentially harmless." (ALJ Decision, Finding of Fact 35; Tr. Vol. III, at 203-208, 211-213, 239; Ford Credit Exs. 30, 31, 39, 40, 46.)
- The ALJ's findings related to Mr. Akl's alleged damages were not supported by any evidence on the record. For example, Mr. Akl's "total compensation" at Ford Credit was not supported by any evidence on the record, Mr. Akl's salary at Ford Credit was never

close to \$87,000 as the ALJ found (rather, Mr. Akl admitted his salary was roughly \$44,000), lump sum payments received for moving were to cover moving expenses and were not a bonus as the ALJ found, the experts' reports were admittedly flawed and based upon speculation and conjecture, Mr. Akl's future employment plans were not considered by the ALJ, Mr. Akl was fired from his subsequent job (yet the ALJ found that Mr. Akl was encouraged to leave this employer), Mr. Akl had a spotty employment record (yet this was not considered), there was no evidence that Mr. Akl planned to work until age 72 as the ALJ found (**notably, even Mr. Akl's experts opined he would only work until age 67**), and there was no support for lost wages of \$624,654. (ALJ Decision, Findings of Fact 36-42; Tr. Vol. I, at 48, 51, 56-58, 61-62, 76-77, 86-87, 92-101, 104, 108, 110-111, 122, 182, 184; Tr. Vol. III, at 10-11, 16-17, 142-143, 158-160, 164, 291-294; Tr. Vol. IV at 47-49, 144-145; Akl Exs. 2, 4, 9.) The specific errors associated with the damages award are discussed *infra*, section IV(F).

Because the majority of the ALJ's Findings of Fact, which were summarily adopted by the HRC, were unsupported by the substantial evidence on the record, the HRC's decision must be reversed. *Cobb*, 217 W. Va. at 771-74.

Likewise, several legally significant facts that were supported by the substantial evidence on the record were improperly omitted from the ALJ's Findings of Fact, which were wholly adopted by the HRC, and accordingly, not considered when analyzing Mr. Akl's claims and Ford Credit's defenses. In its appeal to the HRC, Ford Credit set forth 101 legally significant Findings of Fact that were supported by the substantial evidence on the record but were omitted in the

ALJ's Findings of Fact.<sup>11</sup> By way of example, the HRC ignored the following established and legally significant facts:

- Mr. Akl admitted he had a different position with different responsibilities, different pay and a different supervisor than Mr. Staggs, his alleged comparator. (Tr. Vol. III, at 19, 21, 26, 28, 38, 89, 197, 279, 284, 313.)
- Mr. Akl admitted he knew of no one at Ford Credit who had been accused of the conduct of which he had been accused and had not been demoted. (Tr. Vol. III, at 287-288.)
- Mr. Akl admitted he violated Ford Credit's policy because he failed to refrain from "any activity of harassment or retaliation." (Tr. Vol. III, at 198.)
- Mr. Akl's demotion was not career-ending. (Tr. Vol. III, pages 127 and 258; Tr. Vol. IV, pages 293; Tr. Vol. V, pages 8-11, 28 and 36; Tr. Vol. VI, pages 105-106; Akl Ex. 11.)
- Mr. Akl was treated similarly, if not more favorably, than other Ford Credit employees who violated the anti-harassment policy – a Caucasian manager was discharged, and a supervisor was demoted two salary grades. (Tr. Vol. IV, pages 30-31 and 293-294.)
- Employees testified that cursing was not commonplace at the Huntington branch, and they never observed anyone act similarly to Mr. Akl. (Tr. Vol. V, at 19, 50, 52, 88, 117.)
- Mr. Akl admitted he had a duty under Ford Credit's anti-harassment policy to cooperate with an investigation into harassment but he refused to cooperate in the investigation into his allegation. (Tr. Vol. III, at 188-193, 230-232; Tr. Vol. IV, at 35-36 and 55-56; Akl Ex. 10; Ford Credit Ex. 27.)

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<sup>11</sup> Ford Credit incorporates by reference the listing of ignored legally significant facts contained in its petition in support of appeal to the HRC, which is included in the record on appeal. The list contained in this brief provides a sampling of the facts that were supported by the substantial evidence on the record and were legally significant to the analysis of Mr. Akl's claims but were ignored by the HRC.

- Mr. Akl, during Ford Credit’s investigation, admitted he was not offended by the work environment at the Huntington branch. (Tr. Vol. IV, page 291; Ford Credit Ex. 20.)
- Mr. Akl never told anyone to stop harassing him. Tr. Vol. III, at 187-188.)
- Mr. Akl admitted he instigated and participated in what he described as “teasing banter” at the office. (Tr. Vol. III, at 206-208, 211-213, 290.)

Because the HRC, by adopting the ALJ’s decision, failed to include these legally significant facts in its decision, its decision was arbitrary and capricious, a clearly unwarranted exercise of discretion and unsupported by the substantial evidence on the record. W. Va. Code § 5-11-8. The HRC may not simply pick and choose whichever facts support its decision and ignore legally significant Findings of Fact. Thus, the HRC’s decision must be reversed.

**F. The HRC’s award of damages must be reversed because it was not supported by the substantial evidence on the record, was contrary to West Virginia law and was an abuse of discretion.**

The HRC’s findings on liability are called all the more into question by its finding that Mr. Akl deserved nearly \$625,000 as his reward for voluntarily walking away from Ford Credit, getting discharged from a comparable job upon leaving Ford Credit and choosing to work for his brother rather than make an effort to secure comparable employment. Significantly, Mr. Akl was not constructively discharged – the **sole basis** for the award of damages. (HRC Decision; ALJ Decision, at 44.) Regardless, the HRC’s award of nearly \$625,000 was not supported by any evidence on the record, was an abuse of discretion and was contrary to the law. Importantly, Mr. Akl has conceded to this Court that the HRC “was mistaken when [it] used the figure of \$624,000 in damages.... Appellant agrees that he will only be entitled to \$404,729....” (Akl Reply to Pet. for Appeal, at 34, n.15.) Accordingly, the HRC’s award of damages must be reversed.

**(1) The award of damages was not supported by the substantial evidence on the record and was unsupported by any evidence on the record.**

Any lost income analysis must begin with a determination of Mr. Akl's income. At the root of the HRC's decision regarding Mr. Akl's alleged damages was a fundamental failure by Mr. Akl to meet his burden of proof. Mr. Akl chose not to offer evidence of his actual earnings. (Tr. Vol. I, at 51, 96-97; Tr. Vol. III.) In fact, his salary was never close to what Errol Sadlon, one of his experts, determined. (Tr. Vol. III, at 61-62, 113, 163-164.) Notably, Mr. Sadlon admitted he did not know Mr. Akl's base salary, and when informed of Mr. Akl's actual salary Mr. Sadlon testified he would not change his report, even though the difference was more than \$20,000 annually. (Tr. Vol. I, at 51, 58, 61-62, 75-77, 96-97, 102-110, 113, 124, 143-144.)

When Mr. Akl attempted to produce evidence of what he made at Ford Credit, it was not supported by the substantial evidence on the record. For example, the record established that payments to Mr. Akl from Ford Credit to cover moving expenses were not "compensation" and were meant solely to reimburse him. (Tr. Vol. I, at 101; Tr. Vol. IV, at 47-50, 144-145.) In fact, Mr. Akl executed a promissory note agreeing to repay the relocation reimbursement if he left Ford Credit within less than a year of receiving the moving expenses.<sup>12</sup> (Tr. Vol. III, at 291-294; Tr. Vol. IV, at 50, 144-145, 150; Ford Credit Ex. 9.) Contrary to the evidence on the record, Mr. Akl's expert, the ALJ and the HRC considered the payment he received to cover his moving expenses as "compensation." (Akl. Ex. 2; HRC Decision; ALJ Decision, at 24-26, 44.) Notably, Mr. Sadlon conceded that what Mr. Akl actually spent on relocation would most likely reduce his calculated losses. (Tr. Vol. I, at 97-100, 104-105, 108-110, 120-121.) Obviously, Mr. Akl has personal knowledge of what he was paid and is the only party who knows what he

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<sup>12</sup> To date, Mr. Akl has not paid back Ford Credit nearly \$13,000, resulting from his failure to remain at Ford Credit for one year after relocating to the Huntington branch. (Tr. Vol. III, at 291-294; Tr. Vol. IV, at 144-145 and 150; Ford Credit Ex. 9.)

actually spent on moving expenses. Yet he put forth no evidence of either. Mr. Sadlon went along with this, using the varying W-2s as an excuse to toss out Mr. Akl's actual earnings and substitute "national averages" that were not specific to Mr. Akl or to Ford Credit. (Tr. Vol. I, at 96-98, 102-110; Akl Ex. 2; Ford Credit Ex. 4.)

Even when shown that Mr. Akl's compensation was \$20,000 less than the so-called national averages, Mr. Sadlon testified that this would not change his opinion of Mr. Akl's lost income. (Tr. Vol. I, at 61-62, 113.) Mr. Sadlon offered, however, no explanation for how or why this \$20,000 gap could be ignored. (Tr. Vol. I, at 113-114.) Rather, he made general, nonspecific assumptions to create falsely inflated numbers with no connection to Mr. Akl's circumstances. (Tr. Vol. I, at 85-86, 92-98, 132, 142.) Further, Mr. Akl put forth no evidence of actual earnings anywhere close to Mr. Sadlon's assumptions that serve as the foundation for the HRC's damages award.

The record is also devoid of evidence regarding Mr. Akl's likely career path at Ford Credit. Mr. Sadlon speculated about a career path even though he admittedly was not familiar with Ford Credit or where Mr. Akl's position fell on Ford Credit's organizational chart. (Tr. Vol. I, at 88-89, 92-94, 121-123, 126-127, 142.) There is nothing in the record to support the fact that Mr. Sadlon even spoke with anyone at Ford Credit to learn about the company and its employment practices. Importantly, Mr. Sadlon did not know whether Mr. Akl was qualified for the promotions he assumed he may obtain if he remained at Ford Credit. (Tr. Vol. I, at 116, 121-123.) Mr. Akl's experts also failed to consider the dismal state of the auto industry or the

unprecedented layoffs in the industry, and how that would affect Mr. Akl's contemplated meteoric rise at Ford Credit. (Tr. Vol. I, at 131-132; Akl Exs. 2, 4.)<sup>13</sup>

This also holds true for Mr. Akl's lost benefits. There was no evidence comparing the benefits he received at Ford Credit to his actual or anticipated benefits since his separation from Ford Credit. The expert who opined on lost benefits, Mr. Griffith, **never met or spoke with** Mr. Akl, and he based his entire report solely on Mr. Sadlon's report. (Tr. Vol. I, at 175-179, 183-184.) In fact, Mr. Griffith admitted that to the extent Mr. Sadlon's analysis was flawed, so was his. (Tr. Vol. I, at 184.) Mr. Griffith, who never did any analysis related to Ford Credit's benefits, simply speculated that Ford Credit had good benefits. (Tr. Vol. I, at 161, 179-180.)

Mr. Akl further offered no evidence of his actual earnings through the date of the hearing. Mr. Sadlon's report, which was prepared approximately two years before the hearing, simply assumed what these losses were. (Akl Ex. 2; Tr. Vol. I, at 64-68, 96-97.) Mr. Akl knew what income he received prior to the hearing but sat silent on this issue, failing to meet his burden.

The experts' flawed analysis also infects the assumptions about Mr. Akl's future income. On the one hand, the experts and the HRC found that Mr. Akl would have remained at Ford Credit through retirement and been promoted. (Tr. Vol. I, at 49-50; HRC Decision; ALJ Decision, at 44.; Akl Ex. 2) Mr. Sadlon and the HRC assumed that Mr. Akl was well-suited for advancement at Ford Credit, but assumed that these factors disappeared outside Ford Credit. (Tr. Vol. I, at 50; Akl Ex. 2; ALJ Decision, at 44; HRC Decision.) Mr. Sadlon and the HRC also assumed Mr. Akl could not be promoted if he worked as a loan officer or as a restaurant manager. (*Id.*) There is no support on the record to support these propositions.

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<sup>13</sup> Notably, Mr. Akl testified that as early as 2005 Ford Credit was closing down branches and offering severance packages to employees. (Tr. Vol. III, at 101, 144-145.) However, this fact was ignored by the experts, the ALJ and the HRC.

Regarding work as a restaurant manager, the HRC ignored a major flaw in Mr. Akl's evidence and Mr. Sadlon's assumptions. Mr. Sadlon testified not that Mr. Akl wanted to work as a restaurant manager but that Mr. Akl planned to open his own restaurant. (Tr. Vol. I, at 47; Akl Ex. 2; ALJ's Decision, at 44; HRC Decision.) There is no evidence in the record, however, regarding the expected earnings of a restaurant owner. (Akl Exs. 2, 4.) Neither Mr. Sadlon nor the HRC addressed this key discrepancy.<sup>14</sup> (*Id.*)

Additionally, the HRC's award was based on a finding that Mr. Akl would work until age 72, and the present value of his losses would amount to nearly \$625,000. (HRC Decision; ALJ Decision, at 44.) **Neither expert made such findings**. The experts assumed Mr. Akl would work until he was 67, and the present value of his losses would be just over \$400,000. (Akl Exs. 2, 4; Tr. Vol. I, at 46.) There is **no evidence** to support the HRC's finding: Mr. Akl failed to offer **any testimony** about his future plans or **any evidence** he planned to work through any particular age. Thus, this finding is unsupported by the substantial evidence on the record.

Further, the HRC's award was not supported because Mr. Akl failed to mitigate his damages and he had a spotty job history. When Mr. Akl resigned from Ford Credit, his base salary was about \$44,000. (Tr. Vol. III, at 163-164; ALJ Decision, at 24.) He was out of work for seven and one-half months. (Akl Ex. 2.) During that time, Mr. Akl merely posted his resume on **one** website and worked with a recruiter who scheduled **one** interview for him. (Ford Credit Ex. 39.) Mr. Akl cannot walk away from Ford Credit, make a less than half-hearted effort to find other employment, and then claim that Ford Credit should bear responsibility for his inability to

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<sup>14</sup> The experts' assumptions and the HRC's acceptance of these assumptions about Mr. Akl's likely future paths become all the more dubious in light of Mr. Akl's spotty work history, which reflects several short-term jobs, a few terminations, a couple of resignations and moves among different industries. (Tr. Vol. I, at 116-117, 132-133, 158-160, 162-163; Tr. Vol. III, at 10-11, 142-143, 158-160, 161-162; Akl Ex. 2; Ford Credit Ex. 39.)

find a job, or alternatively, pay him for the rest of his supposed working life. Mr. Akl failed to fulfill his duty to mitigate his damages. *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 79 (1989).

Mr. Akl eventually found a job at a bank making approximately the **same** salary as his final base salary at Ford Credit. (Ford Credit Ex. 39; Tr. Vol. III, at 163-164; Akl Ex. 2; ALJ Decision, at 25.) Per his employment history, Mr. Akl did not remain at this job for long – being fired after approximately a year. (Tr. Vol. I, at 132-133, 158-160, 162-163; Akl Ex. 2.) Mr. Akl then **chose** to work at his brother’s restaurant. (Akl Ex. 2; Tr. Vol. III, at 161-162; ALJ Decision, at 26.) There was no suggestion that this was the only employment opportunity available to Mr. Akl, who is very employable, according to his expert. (Akl Ex. 2.)

In short, the suggestion that Ford Credit has caused Mr. Akl to suffer any damages is not supported by substantial evidence given (1) his choice to walk away from Ford Credit, (2) his failure to meaningfully pursue comparable employment, (3) his failure to maintain comparable employment upon leaving Ford Credit, (4) his spotty employment record, and (5) his choice to make less money. Accordingly, the HRC’s award of damages was not supported by the substantial evidence on the record and must be reversed.

- (2) **The HRC’s award of front pay was contrary to West Virginia law in that Mr. Akl did not establish the requirements for such an award, and the HRC failed to consider the legal requirements to be met for a front pay award to be justified.**

While West Virginia permits awards of front pay, this Court has set forth standards that must be met. *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009). “[F]ront pay damages, when appropriate, must be proved to a reasonable probability.” *Id.* at 814 (citations omitted). The award should be within the range of figures proffered by experts as indicative of the difference between what Mr. Akl would have earned from Ford Credit and what he can expect to earn “in any employment in the future.” *Id.* (citations omitted).

The question of whether front pay is “appropriate” is paramount. “A trial court must ‘temper’ the use of front pay by recognizing ‘the potential for windfall’ to the plaintiff.” *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 300 (4<sup>th</sup> Cir. 2009) (citations omitted). “[W]here employment is terminated without destroying the capacity to work, the nature and extent of injury is nearly indeterminable. The broad array of potential circumstances of a terminated employee’s future income makes any attempt at finding damages a speculative venture.” *Duke v. Uniroyal*, 928 F.2d 1413, 1424 (4<sup>th</sup> Cir. 1991). Thus, front pay is appropriate for very limited purposes:

[Front pay] can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment. If a plaintiff is close to retirement, front pay may be the only practical approach.

*Id.* at 1424. In short, “front pay is intended to be temporary in nature.” *Gotthardt v. Nat’l RR Passenger Co.*, 191 F.3d 1148, 1157 (9<sup>th</sup> Cir. 1999). “The longer a proposed front pay period, the more speculative the damages become.” *McKnight v. GM*, 973 F.2d 1366, 1372 (7<sup>th</sup> Cir. 1992). Courts have repeatedly cautioned about the speculative nature of front pay awards. *See e.g., Dotson*, 558 at 300. Such an award becomes more credible when it is based upon **actual** facts. The HRC awarded Mr. Akl \$625,000, spanning more than thirty years of employment but did not consider the front pay requirements set forth by this Court. (HRC Decision; ALJ Decision, at 44.)

Here, Mr. Sadlon, who is a vocational rehabilitationist (**not an economist**), provided an opinion on lost wages but ignored Mr. Akl’s actual earnings at Ford Credit and turned to so-called “national averages,” which were more than \$20,000 than Mr. Akl made at Ford Credit. (Akl Ex. 2; Tr. Vol. 1, at 62, 70, 96-97, 102-110.) Yet when he evaluated Mr. Akl’s post-employment path, Mr. Sadlon did exactly the opposite. (Akl Ex. 2.) Mr. Sadlon relied upon Mr. Akl’s **speculation** that he would earn “in the range of \$50,000 per year” and rejected the

“national average” for a food service manager (\$57,250), which was more than the speculated earnings. (Akl Ex. 2; ALJ Decision, at 25.) In other words, when a lower number benefitted Mr. Akl, Mr. Sadlon ignored the national average in favor of Mr. Akl’s speculation about what he thought he would earn, but when a higher number benefitted Mr. Akl’s alleged lost wages, Mr. Sadlon ignored Mr. Akl’s actual earnings and used the “national average.” (Akl Ex. 2.)

These inconsistencies also plagued Mr. Sadlon’s assumptions about Mr. Akl’s future career paths. Mr. Sadlon assumed Mr. Akl would be quickly promoted at Ford Credit even though he had no knowledge of the positions, job duties or whether Mr. Akl would be qualified for the promotions. (Tr. Vol. I, at 121-123, 126-127, 142.) Mr. Sadlon neither considered the impact of the current economic environment, such as mass layoffs and facility closures in the automotive industry, nor offered any indication as to why Mr. Akl would not be in the same situation as other employees in the industry. (Tr. Vol. I, at 131-132.) Mr. Sadlon did not review Mr. Akl’s job ratings, which were not the highest possible (Tr. Vol. I, at 73-77), and there was **no evidence** that Mr. Akl’s star shone brighter than any others for him to be promoted, let alone remain there for the next thirty years. On the other hand, Mr. Sadlon assumed Mr. Akl would **never** advance beyond restaurant manager for the remainder of his working life. (Akl Exs. 2, 4.) He ignored what Mr. Akl told him about his plans: Mr. Akl did not intend to work as a restaurant manager but rather own a restaurant. (Tr. Vol. I, at 47.) In sum, Mr. Sadlon’s choosing assumptions to favor Mr. Akl was not a methodology.

Mr. Griffith’s assumptions were likewise flawed. Notably, Mr. Griffith’s report was wholly based on Mr. Sadlon’s assumptions of lost wages. (Tr. Vol. I, at 175-179, 183-184.) Mr. Griffith simply ran calculations on Mr. Sadlon’s flawed numbers through age 67. (Akl Ex. 4.) Like Mr. Sadlon, Mr. Griffith also made assumptions favorable to Mr. Akl. Mr. Griffith

assumed Mr. Akl would work through age 67, even though Mr. Akl presented **no evidence** of how long he planned to work. (Tr. Vol. I, at 181-182.) In reducing to present value, Mr. Griffith used a government bond rate of return of only 2.8%, an undisputedly conservative rate of return. (Akl Ex. 4; Tr. Vol. I, at 166.) While Mr. Griffith factored in the odds of Mr. Akl dying or leaving the workforce, his analysis did not consider whether Mr. Akl would advance beyond restaurant manager to own a restaurant or move to a different job. (Akl Ex. 4; Tr. Vol. I, at 160-161, 166.) Instead, Mr. Griffith assumed Mr. Akl would work at his current job, without promotions, for the rest of his working life, ignoring that Mr. Akl did not intend this path. (*Id.*)

The HRC's award ignored that Mr. Akl must present several factors to obtain a front pay award. In *Peters*, the experts presented "various hypothetical scenarios, which considered varying dates of separation." 680 S.E.2d at 814. This Court noted that elements to consider should be various life scenarios, reduced to present value, established by the expert testimony, and the evidence should consider a statistically average life expectancy and an average work life expectancy. *Id.* Other courts have noted similar factors, such as "the length of time employees in similar positions stay at the defendant employer as well as at other employers" and "the time required to secure similar employment." *Peyton v. DiMario*, 287 F.3d 1121, 1129 (D.C. Cir. 2002) (reversing a twenty-six year award of front pay as speculative and an abuse of discretion).

The HRC's award was based on **none of these factors**. The main source for Mr. Akl's losses came from a vocational rehabilitationist, not an economist. (Tr. Vol. I, at 70.) Neither expert considered various life scenarios. (Akl Exs. 2, 4.) Neither expert considered various employment scenarios – just one employment scenario.<sup>15</sup> (*Id.*) Neither expert considered

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<sup>15</sup> Mr. Akl asserts that his experts provided a "range of damages," and thus, met the requirements for an award of front pay, when his experts, who looked at only two possible career paths, offered a range of damages between \$220,656 and \$469,713. (Akl Reply to Pet. for Appeal, at 34; Tr. Vol. I, at 78, 128,

various dates of separation or how long employees in similar positions stay at Ford Credit or as a restaurant manager, especially in the current economy. (*Id.*) Neither expert presented an “average” work expectancy – they simply presented a “high” and a “low.” (*Id.*) The HRC, by affirming the ALJ’s decision, then took the “high,” and heightened it to 72 years and over \$624,000. (HRC Decision; ALJ Decision, at 26, 44.) This does not comport with West Virginia law and is wholly unsupported by any evidence in the record.<sup>16</sup>

As a historical note, West Virginia law regarding front pay is an outgrowth of the law regarding lost earnings in personal injury actions, mainly related to infants and children who have not yet entered the work force. See *Andrews v. Reynolds Mem’l Hosp., Inc.*, 201 W. Va. 624 (1997). For example, in *Andrews*, a case involving an infant’s death due to medical malpractice, an economist provided three possible ranges of lost earnings, “(1) \$1,607,268 to \$1,795,397 based upon a four year college education; (2) \$1,193,042 to \$1,401,624 based upon a college education of one to three years; and (3) \$875,342 to \$1,041,000 based upon a high school education.” *Id.* at 628. This Court held that an award of front pay was proper, relying heavily on the expert’s presentation of “various life scenarios.” *Id.* Here, no one provided various life scenarios or ranges of possible losses. (Akl Exs. 2, 4.) This failure is particularly significant because the experts had information about Mr. Akl’s work history and intended work future, but chose to ignore this information rather than include it as potential life scenarios.

Contrary to Mr. Akl’s suggestion (Akl Reply to Pet. for Appeal, at 33), the fact that West Virginia allows long-term front pay awards for infants and children does not somehow mean that

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177.) Compared to other West Virginia cases wherein front pay has been analyzed, this “range” does not satisfy Mr. Akl’s burden.

<sup>16</sup> Mr. Akl’s own experts opined that he would work through age 67, **not 72**, and there is no evidence from Mr. Akl or otherwise that he planned to work until age 72. (Akl Exs. 2, 4.) Thus, an award of front pay until age 72, setting aside the fact that the requirements for an award of front pay have not been met, was not supported by any evidence in the record.

there is “no cap” on his front pay award. Mr. Akl’s situation is materially different than the personal injury or wrongful death of a child or infant. Mr. Akl has a work and salary history to be considered, and he is not limited whatsoever in his ability to work. Courts have recognized the unfairness of a long-term, speculative award of front pay to someone who is actually in the working world. For example, the Fourth Circuit upheld the denial of front pay as too speculative when the plaintiff sought lost wages and benefits for fifteen years, through age 58. *Dotson*, 558 F.3d at 299. The Court noted that lifetime front pay awards for plaintiffs in their forties” are disfavored. *Id.* at 300 (citations omitted); *see also Thompson v. Town of Alderson*, 215 W. Va. 578, 580-81 (2004) (affirming jury’s refusal to award front pay when sought through retirement at 67). The *Dotson* court summarized the dangers of such a lengthy award:

The speculative nature of the inquiry . . . does not stem just from the question whether Dotson would have stayed with Pfizer through the end of his career had he not been fired. It also necessarily involves speculation as to what Dotson’s post-termination future holds. The Court was within its discretion to refuse to assume that Dotson would never earn a salary comparable to what he made at Pfizer, given his relative youth and education level. Considering that (1) the determination of front pay is inherently speculative; (2) Dotson was of a relatively young age when terminated; (3) he is highly educated and experienced; and (4) he sought front pay from the date of his termination until the date he claims he would have retired, fifteen years in the future, we cannot say that the district court abused its discretion in denying front pay.

*Id.* at 300; *see also* 7 Emp. Coord. Employment Practices §73:4, *Speculative Nature of Continued Employability* (“Front pay is often considered unduly speculative when the victim is 10 or more years from retirement and, as such, might or might not be subject to changes in the terms and conditions of employment.”). In short, “courts seem to agree that plaintiffs in their forties are too young for lifetime front pay awards.” *Peyton*, 287 F.3d at 1129 (internal quotations and citations omitted).

The danger of a windfall is particularly true in this case, where Mr. Sadlon made inconsistent assumptions that Mr. Akl would succeed at Ford Credit but would not advance outside Ford Credit, and no expert considered the impact of the current economic problems in the automotive industry. There was nothing in Mr. Akl's work history to suggest he could have had a longer tenure than others. The Fourth Circuit Court of Appeals summed up the problem succinctly:

To award Peyton front pay based on the assumption that she will continue in an allegedly low-paying job . . . for a full career, when she is only 34 years old and not incapacitated, is to give her a tremendous windfall rather than to make her whole. There is no reason to assume that if she is, in fact, qualified for a high-paying job at GPO, she will not be able to find a high-paying job in the future.

*Peyton*, 287 F.3d at 1130.

Likewise, Mr. Akl chose to walk away from Ford Credit and take a job managing his brother's restaurant. (Tr. Vol. III, at 161-163.) These choices do not justify him forcing Ford Credit to pay him for the rest of his working life. Front pay is not intended to compensate Mr. Akl for his personal choices:

Miller is certainly entitled to a change of career. However, her new career and lifestyle choice should not be subsidized by [her former employer]. A successful . . . plaintiff cannot simply reevaluate her career goals, accept a lesser paying job, and receive the same amount of compensation as before through front pay. The possibilities for abuse are patent.

*Miller v. AT&T*, 83 F. Supp. 2d 700, 708-09 (S.D. W. Va. 2000).

Finding that Mr. Akl would follow a steady career path for the next thirty years shows the HRC's failure to evaluate Mr. Akl's personal circumstances. The HRC failed to consider the impact of Mr. Akl's history of several short-tenure jobs and several involuntary terminations: Mr. Akl's work history both before and after his employment with Ford Credit was and is spotty and inconsistent. (Tr. Vol. I, at 116-117, 132-133, 142-143, 158-163; Tr. Vol. III, at 142-143;

Akl Ex. 2; Ford Credit Ex. 39.) There is nothing in his employment history to suggest that Mr. Akl could have remained at Ford Credit for the rest of his working years. Before being employed at Ford Credit, Mr. Akl was discharged twice and quit two jobs. (*Id.*) These facts cannot be reconciled with a finding that Mr. Akl was going to remain at Ford Credit or that he was always going to work as a restaurant manager for the rest of his employment.

In sum, the HRC's award of almost \$625,000 to compensate Mr. Akl for more than the next thirty years was not supported by the substantial evidence on the record, was an arbitrary, capricious and unwarranted use of discretion and was contrary to West Virginia law. For these reasons, the HRC's award of damages must be reversed.

**G. The HRC's decision must be reversed because Ford Credit was not afforded a fair and impartial hearing, and therefore, was denied due process.**

In this matter, Ford Credit was denied due process, and thus, the HRC's decision must be reversed. "All persons appearing before the West Virginia Human Rights Commission shall have their rights, privileges, or duties determined with due regard for fundamental fairness....all parties thereto shall be provided...a fair hearing." *Heeter Constr., Inc. v. W. Va. Human Rights Comm'n*, 217 W. Va. 583, 588 (2005) (citing W. Va. Code R. § 77-2-1.1.1). This Court has stated: "[t]he conduct of the administrative law judge shall, where applicable, be guided by the Judicial Code of Ethics." *Id.* at 589 (citing W. Va. Code R. § 77-2-7.4(a)). The ALJ has a "duty to conduct a fair and impartial hearing." *Id.* Here, the ALJ breached his duty, and as a result, Ford Credit was not afforded a fair and impartial hearing. Consequently, the HRC's decision should be reversed, or minimally, Ford Credit should be granted a new hearing.

The ALJ, in violation of the West Virginia Code of Ethics, made comments to Ford Credit's counsel at the close of evidence regarding his bias against employers, the pending matter and its possible outcome, a possible matter being filed by a former Ford Credit employee,

and his determination of the credibility of Ford Credit's witnesses. (Affs. of Mssrs. Harris, Blumenthal & Fisher.) At the close of an evidentiary deposition of Mr. Staggs, a then-former Ford Credit employee and friend of Mr. Akl's, on February 6, 2009, the ALJ made these statements to counsel.<sup>17</sup> (*Id.*)

The ALJ said he would "probably get in trouble" for his comments but he had to tell counsel how he "felt" about the proceeding before him. (*Id.*) The ALJ told counsel he was aware that the former employee had a claim against Ford Credit for retaliation and the former employee's allegations disturbed him. (*Id.*) The ALJ stated he saw this "all the time" – an employer retaliating against an employee who engaged in conduct protected by anti-discrimination laws.<sup>18</sup> (*Id.*) After denying Ford Credit an opportunity to present any evidence on the issue to which the ALJ expressed concern (Tr. Vol. VII, at 105-113),<sup>19</sup> the ALJ told counsel he believed Ford Credit retaliated against this former employee. (Affs. of Mssrs. Harris, Blumenthal & Fisher.) The ALJ then stated the former employee's allegations, although unproven, would "have an effect" on how he viewed the credibility of all Ford Credit witnesses who testified and how he decided Mr. Akl's claims. (*Id.*)

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<sup>17</sup> Mr. Akl concedes "the ALJ conversed with the lawyers from both parties at the conclusion of the evidentiary hearing.... However, he disagrees with how the conversation is characterized." (Akl Reply to Pet. for Appeal, at 37.) Mr. Akl, neither in response to Ford Credit's appeal to the HRC nor its appeal to this Court, has not presented any evidence or even arguments as to how this conversation was different than what Ford Credit's counsel has stated under oath.

<sup>18</sup> Interestingly, of the **forty-four** matters decided by ALJ Wilson published on the HRC's website, **only four decisions** were rendered in the employer's favor on substantive grounds. Two other matters were decided in the employer's favor on procedural grounds.

<sup>19</sup> Contrary to Mr. Akl's contention, Ford Credit was neither expressly or even impliedly instructed to have a corporate representative at the "evidentiary deposition" nor allowed to present testimony to the contrary. (Akl Reply to Pet. for Appeal, at 37.) The ALJ's Order stated that the matter was being reopened solely for the **evidentiary deposition** of Mr. Staggs, and nothing more. (ALJ's November 18, 2008 Order.) The Order does not instruct Ford Credit to have a corporate representative and does not state that testimony other than Mr. Staggs's would be taken. (*Id.*) Moreover, when Ford Credit asked for the opportunity to present evidence and testimony to refute Mr. Staggs's allegations and testimony, the ALJ **denied** Ford Credit's request. (Tr. Vol. VII, at 105-113.)

At the time the statements were made and contrary to Mr. Akl's contention (Akl Reply to Pet. for Appeal, at 35-37), Ford Credit could **not** move to recuse the ALJ. The HRC's rules permit motions to recuse only **before** evidence is admitted in a matter. W. Va. Code R. § 77-2-7.4(b). Hence, Ford Credit was left with no choice but to await the ALJ's decision. *Id.* The ALJ's ruling was impacted by the unsupported and unproven evidence on which he had remarked to Ford Credit's counsel. To wit, the ALJ stated, in his damages analysis, that "[w]hat transpired with Mr. Akl's friend, Mr. Staggs, in this matter makes an order of reinstatement in this case unwarranted." (ALJ Decision, at 38.) These highly inappropriate and biased comments, followed by the ALJ's decision, violate the Judicial Code of Ethics. The HRC, however, affirmed the ALJ's decision.

HRC Procedural Rule 7.4(a) requires ALJs be bound by the Judicial Code of Ethics. W. Va. Code R. § 77-2-7.4(a). The Judicial Code of Ethics, Canon 3, subsection B(5), provides that a judge shall perform judicial duties **without bias or prejudice**. The ALJ's comments to counsel establish he had a bias or prejudice against employers, especially with regard to Ford Credit. (Affs. of Mssrs. Harris, Blumenthal & Fisher.) Without permitting **any** evidence from Ford Credit regarding a former employee's separation from the company, the ALJ stated he believed Ford Credit retaliated against that employee. (*Id.*) Without permitting any evidence to the contrary, the ALJ stated that the unsupported allegations of a discharged employee would "have an effect" on how he viewed the credibility of **all** Ford Credit employees in Mr. Akl's matter. (*Id.*) Notably, the former employee was discharged more than three years after Mr. Akl resigned, and there is no evidence that any of the individuals involved in his discharge were involved in Mr. Akl's demotion. (Tr. Vol. III, at 232, 261; Tr. Vol. VII, at 17; Ford Credit Ex. 28; ALJ Decision, at 27.) Regardless, the ALJ's comments and subsequent use of unsupported

facts in his decision not only establish a bias against Ford Credit but also the ALJ's wanton disregard for the Judicial Code of Ethics to which he is bound. Accordingly, the HRC's decision, which wholly adopted the ALJ's decision, must be reserved.

The ALJ's statements also violated subsection B(9) of Canon 3, which prohibits a judge from making any public or nonpublic comment about any pending proceeding which might reasonably affect its outcome or impair its fairness. It is undisputed the ALJ made nonpublic comments to Ford Credit's counsel about Mr. Akl's pending claims, his intention to view the evidence in a certain way and issue a future ruling with regarding to Mr. Akl's claims. (Affs. of Mssrs. Harris, Blumenthal & Fisher.) These comments confirm the ALJ's fairness was impaired. The ALJ stated, without considering or even allowing any evidence to the contrary, that Ford Credit had retaliated against an employee, and this purported fact (although not established) would "have an effect" on how he viewed the credibility of Ford Credit's witnesses and ruled on the pending matter. (*Id.*) Because the ALJ's statements violated subsection B(9) of Canon 3, the HRC's decision, which wholly adopted the ALJ's decision, must be reversed.

Finally, subsection D(1)(a) of Canon 3 states that a judge "shall" disqualify himself if the judge has "a personal bias or prejudice concerning a party...." Once the ALJ expressed his personal bias and prejudice toward Ford Credit, he had a duty under the Judicial Code of Ethics to disqualify himself from hearing the matter. However, he violated his duties under the Judicial Code of Ethics, and issued a ruling on the matter. Because the ALJ failed to disqualify himself from this matter after expressing personal bias and prejudice toward Ford Credit, he violated his duties under the Judicial Code of Ethics. The HRC, by adopting the ALJ's ruling and not considering Ford Credit's arguments about the ALJ's violations of the Code of Ethics, is a

further violation of Ford Credit's right to a fair and impartial hearing. Accordingly, the HRC's decision must be reversed, or at a minimum, Ford Credit is entitled to a new hearing.

**V. PRAYER FOR RELIEF**

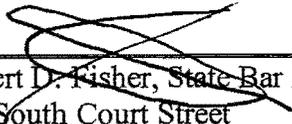
Based on the foregoing reasons, Appellant Ford Motor Credit Company respectfully requests that this Court reverse the determination of the West Virginia Human Rights Commission and dismiss this matter with prejudice.

Respectfully submitted,

FORD MOTOR CREDIT COMPANY,  
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By Counsel.

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**CERTIFICATE OF SERVICE**

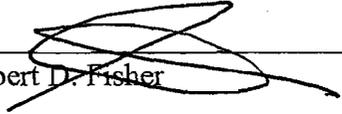
I, Robert D. Fisher, counsel for Appellant Ford Motor Credit Company, do hereby certify that the foregoing Appellant's Brief was served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 14th day of December 2009, addressed as follows:

Ivin B. Lee, Executive Director  
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An original and nine copies were hand-delivered on the 14<sup>th</sup> day of December 2009, to the following:

Rory L. Perry II, Clerk of the Court  
West Virginia Supreme Court of Appeals  
State Capitol, Room E-317  
1900 Kanawha Boulevard East  
Charleston, WV 25305

  
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Robert D. Fisher