

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO. 35301

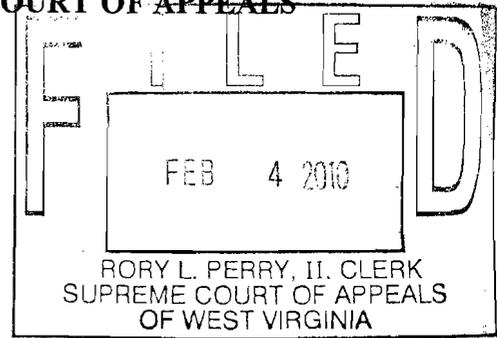
FORD MOTOR CREDIT COMPANY,

Appellant,

v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION  
and NABIL AKL,

Appellees.



---

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

---

APPELLANT'S REPLY BRIEF TO  
APPELLEE BRIEF OF NABIL AKL

---

**ADAMS, FISHER & CHAPPEL, PLLC**  
Robert D. Fisher, West Virginia Bar #1210  
122 South Court Street  
Ripley, West Virginia 25271-1409  
Telephone: (304) 372-6191  
Facsimile: (304) 372-2175

and

**SEYFERTH BLUMENTHAL & HARRIS LLC**  
Charlie J. Harris, Jr., *admitted pro hac vice*  
Julia D. Kitsmiller, *admitted pro hac vice*  
300 Wyandotte, Suite 430  
Kansas City, Missouri 64108  
Telephone: (816) 756-0700  
Facsimile: (816) 756-3700

*Counsel for Appellant Ford Motor Credit Company*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

I. INTRODUCTION ..... 1

II. RESPONSE TO MR. AKL’S PURPORTED STATEMENT OF FACTS..... 2

III. LEGAL ARGUMENT ..... 13

    A. Mr. Akl does not address or dispute Ford Credit’s arguments and authorities establishing that the HRC’s adoption of the ALJ’s Findings of Fact were not supported by the substantial evidence on the record. .... 13

    B. Mr. Akl failed to establish a claim of hostile work environment, and even if he had, Ford Credit had a complete defense to his claim of hostile work environment. .... 14

        (1) This Court’s requirements for establishing “unwelcomeness” were not met by Mr. Akl and were ignored by the HRC. .... 14

        (2) The substantial evidence on the record does not establish the alleged conduct was severe or pervasive. .... 17

        (3) Ford Credit established a complete defense to Mr. Akl’s hostile work environment claim. .... 19

    C. Mr. Akl failed to establish he was constructively discharged, and the HRC’s decision finding Ford Credit liable for constructive discharge must be reversed. .... 21

    D. Mr. Akl failed to establish a prima facie case of disparate treatment, and accordingly, the HRC’s decision related to Mr. Akl’s disparate treatment claim must be reversed. .... 26

        (1) Mr. Akl did not dispute Ford Credit’s legitimate, non-discriminatory reasons for demoting him; therefore, Ford Credit is not liable for a claim of disparate treatment. .... 29

        (2) Mr. Akl failed to meet his burden of proving pretext; therefore, Ford Credit cannot be liable for a claim of disparate treatment. .... 30

    E. 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. .... 32

(1)	The damages award was not supported by the substantial evidence on the record. ....	33
(2)	The HRC's award of front pay was contrary to West Virginia law.....	35
F.	Ford Credit was deprived of its right to a fair and impartial hearing, which is established by the undisputed comments made by the ALJ upon the conclusion of the evidence submitted in this matter. ....	37
IV.	PRAYER FOR RELIEF .....	40

## TABLE OF AUTHORITIES

### Cases

<i>Andrews v. Reynolds Mem'l Hosp., Inc.</i> , 201 W. Va. 624 (1997).....	35
<i>Bridges v. Murray</i> , Case No. 1:08CV13-3, 2009 WL 799634 (W.D. N.C. Mar. 24, 2009).....	3, 18
<i>Bush v. Fordham Univ.</i> , 452 F. Supp. 2d 394 (S.D. N.Y. 2006).....	27
<i>Carter v. Ball</i> , 33 F.3d 450 (4th Cir. 1994).....	22
<i>Carter v. Hasell</i> , Case No. 4:05-CV-2259, 2009 WL 3762347 (E.D. Mo. Nov. 10, 2009).....	3, 18
<i>Cobb v. W. Va. Human Rights Comm'n</i> , 217 W. Va. 761 (2005).....	13, 14
<i>Colgan Air, Inc. v. W. Va. Human Rights Comm'n</i> , 221 W. Va. 588 (2007).....	19, 20
<i>Couch v. Am. Woodmark Corp.</i> , Case No. 6:06-5111-DCR, 2007 WL 2668694 (E.D. Ky. Sept. 6, 2007).....	27
<i>Edwards v. Newport News Shipbuilding &amp; Day Dock Co.</i> , Case No. 98-1338, 166 F.3d 1208 (Table), 1998 WL 841567 (4th Cir. Dec. 7, 1998).....	27, 28
<i>EEOC v. Fairbrook Med. Clinic, P.A.</i> , Case No. 5:07CV94, 2009 WL 929103 (W.D. N.C. Apr. 2, 2009).....	19
<i>Erps v. W. Va. Human Rights Comm'n</i> , 224 W. Va. 126, 680 S.E.2d 371 (2009).....	14, 16, 17
<i>Evans v. Stephens</i> , 407 F.3d 1272 (11th Cir. 2005).....	3, 18
<i>Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n</i> , 206 W. Va. 86 (1999).....	14
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998).....	19
<i>Femidaramola v. Lextron Corp.</i> , Case No. 3:05CV643JS, 2006 WL 2669065 (S.D. Miss. Sept. 18, 2006).....	27
<i>Gage v. Metro. Water Reclamation Dist. of Greater Chicago</i> , 365 F. Supp. 2d 919 (N.D. Ill. 2005).....	16
<i>Hartsell v. Duplex Prods., Inc.</i> , 123 F.3d 766 (4th Cir. 1997).....	18
<i>Harvey v. Anheuser-Busch, Inc.</i> , 38 F.3d 968 (8th Cir. 1994).....	27
<i>Heeter Constr., Inc. v. W. Va. Human Rights Comm'n</i> , 217 W. Va. 583 (2005).....	40
<i>James v. Booz-Allen &amp; Hamilton, Inc.</i> , 368 F.3d 371 (4th Cir. 2004).....	22
<i>Johnson v. Killmer</i> , 219 W. Va. 320 (2006).....	20
<i>Jones v. Costco Wholesale Corp.</i> , 34 Fed. Appx. 320 (9th Cir. 2002).....	6, 25, 31
<i>Love v. Georgia-Pacific Corp.</i> , 209 W. Va. 515 (2001).....	21
<i>Maschka v. Genuine Parts Co.</i> , 122 F.3d 566 (8th Cir. 1997).....	16

<i>Mayflower Veh. Sys., Inc. v. Cheecks</i> , 218 W. Va. 703 (2006) .....	29, 30
<i>McCormick v. Allegheny Valley Sch.</i> , Case No. 06-3332, 2008 WL 355617 (E.D. Pa. Feb. 6, 2008).....	27
<i>McCullough v. Univ. of Ark. for Med. Sciences</i> , 559 F.3d 855 (8th Cir. 2009) .....	6, 25, 31
<i>Miller v. AT&amp;T</i> , 83 F. Supp. 2d 700 (S.D. W. Va. 2000).....	36
<i>Oguezuonu v. Genesis Health Ventures, Inc.</i> , 415 F. Supp. 2d 577 (D. Md. 2005).....	27
<i>Olitsky v. Spencer Gifts, Inc.</i> , 964 F.2d 1471 (5th Cir. 1992).....	16
<i>Patterson v. Avery Dennison Corp.</i> , 281 F.3d 676 (7th Cir. 2002) .....	27
<i>Sizemore v. State of N.M. Dep't of Labor</i> , Case No. 05-2198, 2006 WL 1704456 (10th Cir. June 22, 2006) .....	27
<i>State v. Logan-Mingo Area Mental Health Agency, Inc.</i> , 174 W. Va. 711 (1985).....	26
<i>Stephens v. Kettering Adventist Healthcare</i> , 182 Fed. Appx. 418 (6th Cir. 2006).....	3, 6, 25, 31
<i>Tomczyk v. Jocks &amp; Jills Rests., LLC</i> , Case No. 05-10744, 2006 WL 2271255 (11th Cir. Aug. 9, 2006).....	27
<i>Waddell v. John Q. Hammons Hotel, Inc.</i> , 572 S.E.2d 925 (W.Va. 2002).....	26
<i>Williams v. Frank</i> , 757 F. Supp. 112 (D. Mass. 1991) .....	27

**Rules and Regulations**

W. Va. Code § 5-11-8 .....	13, 14
W. Va. Code § 5-11-11(a).....	1
W. Va. Code R. § 77-2-1.1.1 .....	40
W. Va. Code R. § 77-2-10.8 .....	13
W. Va. Code R. §§ 77-2-7.4 .....	38
W. Va. Code R. §§ 77-2-7.4(b).....	39
W. Va. R. App. P. 10(b).....	1
W. Va. R. App. P. 10(e).....	1
W. Va. R. Evid. 801(d)(2)(C) .....	16

**Other Authorities**

West Virginia Judicial Code of Ethics.....	2, 38, 40
--	-----------

## I. INTRODUCTION

Appellant Ford Motor Credit Company ("Ford Credit") submits this reply to the brief filed by Appellee Nabil Akl.<sup>1</sup> In this appeal, Ford Credit seeks review and reversal of the Final Order of the West Virginia Human Rights Commission ("HRC"), which summarily adopted the Final Decision of Administrative Law Judge ("ALJ") Robert B. Wilson. Mr. Akl neither established a prima facie case of hostile work environment, constructive discharge or disparate treatment, nor did he satisfy the legal requirements for an award of damages. The HRC's decision was not only contrary to the substantial evidence on the record but also ignored the legal standards set forth by this Court.

In his brief, Mr. Akl asks this Court to completely overlook his admitted misconduct, and by ignoring these admitted violations of Ford Credit's zero tolerance policy, find in favor of him even though the substantial evidence on the record and legal standards do not support such a finding. This Court, however, may not ignore Mr. Akl's misconduct, which formed the basis for Ford Credit's decision to demote, and it cannot ignore that Mr. Akl not only failed to establish a prima facie case for any of his claims but the HRC also failed to apply the legal standards set forth by this Court. The Court must not overlook that the HRC, by adopting the ALJ's decision, made findings of fact that were unsupported by the substantial evidence on the record, ignored

---

<sup>1</sup> An appeal from a decision rendered by the HRC must be filed against the HRC and the adverse party. W. Va. Code § 5-11-11(a). Ford Credit served its brief on Mr. Akl's attorney and the HRC on December 14, 2009. Mr. Akl apparently served his appellee brief on January 19, 2010, but contrary to rules of this Court, he did not serve his brief upon the HRC according to his certificate of service. W. Va. R. App. P. 10(b). Furthermore, as of February 2, 2010, forty-three days after filing its brief, Ford Credit has not received the HRC's brief, and the deadline for filing said brief has passed. W. Va. R. App. P. 10(b) ("The appellee shall have thirty days from the date of receipt of the appellant's brief to file an original and nine copies of a brief with the Clerk of the Supreme Court and to serve one copy thereof upon each party."); *see also* W. Va. R. App. P. 10(e) ("The failure to file a brief in accordance with this rule may result in the Supreme Court imposing the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Supreme Court may deem appropriate.").

legally significant facts that were supported by the substantial evidence on the record and failed to analyze Mr. Akl's claims under the appropriate legal standards set forth by this Court. This Court may not ignore the ALJ's post-hearing comments that expressed his bias against Ford Credit and his intent to consider unproven evidence when issuing his decision in this matter – all in violation of the West Virginia Judicial Code of Ethics and Ford Credit's right to a fair hearing.

As set forth in its appeal brief and the arguments and authorities below, Ford Credit respectfully requests that the HRC's decision be reversed and Mr. Akl's claims be dismissed in their entirety with prejudice.

## **II. RESPONSE TO MR. AKL'S PURPORTED STATEMENT OF FACTS**

Throughout the "statement of facts" and argument sections of his brief, Mr. Akl makes various representations about the evidence established on the record; however, his representations are unsupported by the evidence on the record. There are numerous facts asserted by Mr. Akl that are unsupported by the record that are immaterial to this Court's analysis of his claims, and accordingly, there is no need for Ford Credit to address those purported facts. Hence, Ford Credit will only address the misrepresentations of material facts.

In what appears to be an attempt to bolster his hostile environment claim, Mr. Akl represents to this Court that the alleged comments regarding his national origin were "often" made to him or the comments were "common." (Akl Brief, at 5-6.)<sup>2</sup> Mr. Akl, however, never testified that these comments were "often" made to him or they were "common." Rather, Mr. Akl's testimony regarding the frequency of these alleged comments was as follows: "it wasn't that often," "it doesn't happen very often because 99 percent of the time, my conversations with the dealers were very pleasant," "in the few times when they did....," "[i]t wasn't every day," and "[d]ays could go by...." (Tr. Vol. III, at 88, 200, 284.)

---

<sup>2</sup> "Akl Brief" refers to Mr. Akl's Appellee Brief.

Mr. Akl also attempts to utilize Mr. Staggs's testimony to support the notion that the alleged comments about his national origin occurred "constantly." (Akl Brief, at 19.) Mr. Akl, however, fails to inform this Court that Mr. Staggs's testimonies from February 2008 to February 2009 dramatically changed. In fact, Mr. Staggs initially swore under oath that profanity and the alleged comments made to Mr. Akl were infrequent and "very" unusual but then later swore under oath that the occurrences were "constant." (Tr. Vol. II, at 71, 96; Tr. Vol. VIII, at 66.) Mr. Akl also fails to inform the Court that during the evidentiary deposition, Mr. Staggs stated **on at least five occasions** that his initial testimony was truthful. (Tr. Vol. VII, at 36, 66-67, 95-96; Tr. Vol. VIII, at 43, 66.)

Regardless of the content of Mr. Staggs's contradictory testimonies, Mr. Akl cannot rely upon Mr. Staggs's testimonies because they also contradict Mr. Akl's testimony. When faced with a complaining party's testimony differing from another witness's testimony, courts have concluded that they may only consider the complaining party's testimony and must disregard the other witness's contradicting testimony. See *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) ("When the nonmovant has testified to events, we do not (as urged by Plaintiffs' counsel) pick and choose bits from other witnesses' essentially incompatible accounts (in effect, declining to credit some of the nonmovant's own testimony) and then string together those portions of the record to form the story that we deem most helpful to the nonmovant."); *Carter v. Hasell*, Case No. 4:05-CV-2259, 2009 WL 3762347, at \* 6 (E.D. Mo. Nov. 10, 2009) (stating that when "[f]aced with conflicting facts and testimony, the court must credit [the plaintiff's] version of the events 'as a unified whole.'"); *Bridges v. Murray*, Case No. 1:08CV13-3, 2009 WL 799634, at \* 3 (W.D. N.C. Mar. 24, 2009) (adopting *Evans v. Stephens* and noting that "the court is not free to ignore claims made by the plaintiff that 'undermine' his cause of action."). Simply, Mr. Akl may

not use another witness's potentially more favorable, yet contradictory, version of events. Mr. Akl's misrepresentations about the frequency of these alleged comments are unquestionably material to his hostile work environment claim, which requires him to establish pervasiveness.

Mr. Akl also makes certain representations about Ford Credit's investigation into his behavior. It is undisputed that in September 2005, Ford Credit conducted an onsite audit at the Huntington branch only because routine, anonymous surveys filled out by non-supervisory employees indicated an issue with a supervisor and morale. (Tr. Vol. IV, at 158-161.) During the onsite audit, several non-supervisory employees complained about Mr. Akl's, and no else's, behavior in the workplace. (Tr. Vol. IV, at 162-165, 167-168.) In response to these complaints, the auditors, concerned by the reports of Mr. Akl's behavior, contacted Personnel Relations, which directed them to conduct an investigation into the reports about Mr. Akl's behavior. (Tr. Vol. IV, at 165-166.)

Mr. Akl, however, represents to this Court that he was "singled out for investigation." (Akl Brief, at 7.) It is undisputed that the non-supervisory employees who were interviewed during the onsite audit were asked questions about their respective supervisors, and the employees did not complain about any supervisor's behavior, other than Mr. Akl's. (Tr. Vol. IV, at 164-168.) Accordingly, Mr. Akl was not "singled out" for the investigation; instead, he was the only person implicated by the non-supervisory employees during the audit.

Mr. Akl states Emma Loy was the person "primarily responsible" for the investigation into the allegations against him. (Akl Brief, at 7.) This statement, however, has no support in the record. Both Ms. Loy and DeAnne Griffore were responsible for the investigation. (Ford Credit Exs. 12, 13, 15-21, 50; Tr. Vol. IV, at 166.) There was no evidence presented that Ms. Loy was the person "primarily responsible" for the investigation.

Mr. Akl also represents that the questions asked during the investigation “consisted almost exclusively of leading questions seemingly designed to prompt negative information about Mr. Akl” and were only asked of people who Ms. Loy knew would incriminate Mr. Akl. (Akl Brief, at 7, 22.) These assertions misrepresent the record. First, during the onsite audit, numerous nonsupervisory employees were interviewed and given an opportunity to bring up any concerns about their supervisors. (Tr. Vol. IV, at 161-164, 169.) During this process, several individuals specifically complained about Mr. Akl’s behavior. (Tr. Vol. IV, at 167-168.)<sup>3</sup> Once Personnel Relations directed that an investigation begin regarding the allegations against Mr. Akl, the investigators, who had already received specific complaints, interviewed those individuals who complained because the other individuals already had an opportunity to complain about Mr. Akl and did not do so. (Tr. Vol. IV, at 168-169.)<sup>4</sup>

Second, with regard to Mr. Akl’s representation that the questions asked during the investigation were leading, the substantial evidence on the record established that the investigators asked the employees what kinds of comments were made, when the comments occurred, witnesses to any comments, whether the employee reported any comments to Human Resources, and asked if they had anything to add at the conclusion of the interview. (Ford Credit Exs. 12, 13, 15-18, 21.) Accordingly, these were not leading questions, but questions designed

---

<sup>3</sup> In his brief, Mr. Akl does not dispute that several employees complained that Mr. Akl, a supervisor, regularly used profane language at work, including “fuck,” “shit,” “son of a bitch” and “asshole.” (Tr. Vol. IV, at 167, 285-286.) One of Mr. Akl’s female subordinates reported that Mr. Akl told her to “stop her bitching,” and another female subordinate said 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.)

<sup>4</sup> Mr. Akl does not dispute that during the investigation, five female subordinates and two male subordinates detailed Mr. Akl’s behavior to the investigators, which included the following: he 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.)

to gather as much information as they could about these individuals' complaints. Regardless, Mr. Akl's criticism of the manner in which Ford Credit investigated the allegations against him are irrelevant. See e.g., *McCullough v. Univ. of Ark. for Med. Sciences*, 559 F.3d 855, 863 (8th Cir. 2009) (holding an employer's investigation was adequate where the plaintiff provided no evidence that the investigators purposely ignored relevant information or otherwise truncated the number of witness interviews based on a discriminatory bias); *Stephens v. Kettering Adventist Healthcare*, 182 Fed. Appx. 418, 422 (6th Cir. 2006) (stating an investigation is not required to leave "no stone unturned" and is sufficient if the employer reasonably relied on particularized facts in making a reasonably informed and considered decision); *Jones v. Costco Wholesale Corp.*, 34 Fed. Appx. 320, 322-323 (9th Cir. 2002) (holding an employer's investigation into harassment allegations against the plaintiff was adequate despite the plaintiff's argument that the employer failed to contact every person listed where plaintiff could present no explanation as to why the few witnesses who were not called were important to his defense). Additionally, for Mr. Akl to claim that the investigation into the allegations against him was somehow different than any other investigation is insincere given that he did not inquire or otherwise examine whether the investigation was indeed conducted in a different manner.

Mr. Akl represents to this Court that "several individuals...volunteered that Mr. Staggs'[s] conduct was virtually the same as the purported conduct of Mr. Akl." (Akl Brief, at 7-8.) Significantly, Mr. Akl only cites to **two** individuals' statements: Ford Credit Exhibit 13 and Akl Exhibit 13. Importantly, even a cursory review of the two statements establishes that not only was Mr. Akl's behavior beyond the pale of decency, but the conduct attributed to Mr. Staggs was significantly and legally **dissimilar** to the conduct of Mr. Akl.<sup>5</sup>

---

<sup>5</sup> In arguing that employees also mentioned Mr. Staggs's conduct, Mr. Akl impliedly concedes that employees complained of no one else – a significant fact that (1) matches Mr. Akl's tepid testimony about

In Ford Credit Exhibit 13, Ms. Davidson stated that Mr. Akl said “kiss my balls”; called someone “lazy bastard”; told a female subordinate, “it’s your f\*\*\*ing job”; used the “f” word daily; referenced genitals; made comments about homosexuality; and imitated mentally challenged people. (Ford Credit Ex. 13.) The only “conduct” to which Ms. Davidson implicated Mr. Staggs was imitating mentally challenged people. *Id.* Ms. Davidson, contrary to Mr. Akl’s representation, did not state that Mr. Staggs’s conduct was “virtually the same” as Mr. Akl’s.

In Akl Exhibit 13, Mr. Holder stated that Mr. Akl used “profanity in excess,” made homosexual jokes, said “who’s sucking your dick now?,” said “you can kiss my balls,” said “you must have balls the size of raisins,” and made comments about his co-supervisor. (Akl Ex. 13.) Importantly, in his statement, Mr. Holder stated: “[u]sually Nabil [Akl] is the one with the nasty comments and Kirk just laughs, but I have heard him say some stuff.” (*Id.*) Mr. Holder’s statement contradicts Mr. Akl’s representation that Mr. Staggs’s conduct was “virtually the same” as Mr. Akl’s. In fact, several witnesses testified that **no one** acted like Mr. Akl acted at the Huntington branch. (Tr. Vol. V, at 52, 94, 123; Tr. Vol. VI, at 21, 24.) Contrary to Mr. Akl’s representations, no one established Mr. Staggs’s behavior was “virtually the same” as his.

Importantly, Mr. Akl admitted he said the following: “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.) But he also admitted that **never** in his career at Ford Credit had he seen or heard of anyone accused of the behavior of which he was accused and was **not** demoted. (Tr. Vol. III, at 197-198, 287-289.) Mr. Akl’s own testimony rebukes the notion that anyone participated in “virtually the same” conduct of which he was accused.

---

the actual working environment and admissions that the working environment was more than “teasing banter” that did not merit punishment, but (2) contradicts Mr. Akl’s arguments that he was constantly bombarded with a working environment full of severe and pervasive national origin harassment.

Mr. Akl makes certain representations about Mr. Staggs's statement during Ford Credit's investigation into the allegations against Mr. Akl, that Mr. Akl "independently confirmed" the content of Mr. Staggs's statement, and thereafter, "no investigation was done." (Akl Brief, at 8, 30.) To clarify, Mr. Staggs admitted he never complained about a violation of the anti-harassment policy during his interview with Ms. Loy. (Tr. Vol. II, at 84.) Further, Mr. Staggs testified under oath twice that he never intended to complain about anything during the interview with Ms. Loy. (Tr. Vol. II, at 84; Tr. Vol. VIII, at 31-33.) Not surprisingly, Ms. Loy, who interviewed Mr. Staggs during the investigation into the complaints against Mr. Akl, did not consider Mr. Staggs's statement as a complaint because he did not assert a hostile work environment or mistreatment of anyone; rather, he specifically stated the comments were "jokes," which are not a violation of the anti-harassment policy if no one is offended and there was no indication that anyone was offended. (Tr. Vol. IV, at 175-180; Akl Ex. 5.)

Contrary to his representations, Mr. Akl did not "confirm" the contents of Mr. Staggs's statements. Instead, after he was demoted, Mr. Akl complained for the first time that ethnic slurs were allegedly used against him. (Ford Credit Ex. 48.) Again, contrary to Mr. Akl's representation that "no investigation was done" concerning others allegedly violating the anti-harassment directive (Akl Brief, at 8), it is undisputed that Ford Credit, within twenty-four hours after receipt of Mr. Akl's **first and only** complaint, began its investigation when two Human Resources professionals, who did not have anything to do with the investigation into Mr. Akl's misconduct, contacted him and asked him to provide the details for his allegation. (Tr. Vol. III, at 228-229; Tr. Vol. IV, at 13, 31-32, 35-36, 139-140; Ford Credit Ex. 27.) Mr. Akl, in violation of his heightened duty as a supervisor under the anti-harassment directive, **refused** to give the names of those who allegedly harassed him or the details regarding his allegation; instead, he

attempted to use his belated allegation as a bargaining chip to have his demotion rescinded. (Tr. Vol. III, at 188-192, 230-232; Tr. Vol. IV, at 35-36, 55-56, 142; Akl Ex. 10; Ford Credit Ex. 27.) It was Mr. Akl's decision not to cooperate in the investigation that prevented Ford Credit from meaningfully investigating Mr. Akl's allegation. Accordingly, Mr. Akl's representation that Ford Credit did not investigate is inaccurate.

Mr. Akl informs this Court that Ms. Loy "[c]learly had made up her mind" before she interviewed him. (Akl Brief, at 7.) It is undisputed, however, that Ms. Loy **and** Ms. Griffore, who **both** interviewed Mr. Akl, were **only investigators**; they did **not** make the decision to demote him. (Tr. Vol. VI, at 15-16, 67, 105-106, 197-198; Akl Ex. 11; Ford Credit Ex. 26.) Personnel Relations, which is located at Ford Credit's world headquarters, is a subset of Human Resources that ensures policies and discipline are applied consistently and makes the decision as to any discipline issued to employees. (Tr. Vol. IV, at 13-15.) Personnel Relations, not Ms. Loy or Ms. Griffore, made the decision to demote Complainant. (Tr. Vol. IV, at 38, 69-70, 198-199; Ford Credit Ex. 26.) Mr. Akl's representation is, therefore, unsubstantiated by the record.

Mr. Akl also contends he "tried to explain that some of the profane language that he might have used was due to him 'firing back' at the ethnic slurs against him...." (Akl Brief, at 8.) Mr. Akl, however, only testified he "never had a real opportunity to explain myself." (Tr. Vol. III, at 124.) He never indicated what the basis of his explanation was or that he was "firing back." Indeed, the record established that Mr. Akl's current, self-serving assertion that his conduct was to "fire back" is wholly unsupported by the record. Mr. Akl offers no suggestion how berating, using misogynistic slurs and cursing at **his subordinates** could in any way be construed as "self-defense." Quite simply, the individuals to whom Mr. Akl directed his highly inappropriate behavior were **not** the individuals Mr. Akl now claims were harassing **him**.

Even ignoring the crucial distinction between Mr. Akl's offensive behavior and the "teasing banter" which formed the basis for Mr. Akl's last-minute effort to obtain leverage against his demotion, the uncontroverted evidence established that Mr. Akl had ample opportunity to provide his "explanation." Mr. Akl not only answered questions about the allegations against him during the investigation but he was also given **seven days** to provide a written statement in response to the allegations. (Tr. Vol. IV, at 26, 57, 173-174; Ford Credit Ex. 20.) Notably, Ms. Loy, the individual whom Mr. Akl contends was on a "witch hunt" and was uninterested in hearing what he had to say, contacted Mr. Akl the day before his written statement was due to remind him of the deadline for his written response and provided her contact information once again. (Tr. Vol. IV, at 174-175.) It is undisputed that Mr. Akl not only failed to respond to Ms. Loy's attempt to contact him but he never provided a written response to the allegations. (Tr. Vol. IV, at 173-174.) Accordingly, Mr. Akl **refused** the opportunity to explain his comments. Instead, Mr. Akl made his own "complaint" but then refused to back it up when Ford Credit made clear that the two issues were distinct and that Mr. Akl's vague, self-serving complaint would not alter his demotion.

Mr. Akl states that he believed his advancement possibilities at Ford Credit were "finished" but he fails to tell this Court the whole story, which does not support his belief. (Akl Brief, at 9, 22.) Mr. Akl admitted under oath he never asked his managers about the impact his demotion would have on his career, never contacted Human Resources about the impact his demotion would have on his career, never contacted Personnel Relations about the impact his demotion would have on his career, and never utilized any of the other various resources available to Ford Credit employees, including a hotline and a website. (Tr. Vol. III, at 263; Tr.

Vol. III, at 24-25, 263-265.) All, of course, reasonable actions to take for someone genuinely interested in finding out the impact of a demotion on his career at Ford Credit.

It appears that Mr. Akl argues through his Statement of Facts that he was constructively discharged. He maintains his voluntary resignation was reasonable, and therefore, establishes a prima facie case for constructive discharge because he surmised a demotion would be catastrophic to his career. In support of this position, Mr. Akl points to the fact that Mr. MacDonald received a letter of reprimand but was not promoted. Mr. Akl, of course did not learn about Mr. MacDonald's letter of reprimand until years after he voluntarily chose to leave Ford Credit. Given this, it is, of course, disingenuous for Mr. Akl to infer to this Court that Mr. MacDonald's situation had anything to do with his voluntary decision to leave Ford Credit. (Akl Brief, at 24).

Moreover, a reprimand to Mr. MacDonald, the Branch Operations Manager, is more serious than a demotion without a reduction in pay to a supervisor, such as Mr. Akl. (Tr. Vol. VI, at 27-28.) This was established by the undisputed testimony that another employee at the Huntington branch, like Mr. Akl, was demoted from a salary grade 6 to a salary grade 5, but was promoted later. (Tr. Vol. III, at 262-265; Tr. Vol. IV, at 21-22; Tr. Vol. VI, at 24-25, 110.) Mr. Akl has no support for asserting that upon his demotion, his career with Ford Credit was over.

Mr. Akl represents to this Court that "much of what happened within the observation" of two branch managers, Mr. Nicosia and Mr. Griffin, and "[y]et, these individuals did nothing to stop the harassment of Mr. Akl." (Akl Brief, at 20.) However, this fact was not established by the substantial evidence on the record. There was no testimony to establish that Mr. Nicosia or

Mr. Griffin observed coworkers making comments or derogatory statements about Mr. Akl's national origin; therefore, without knowledge of said conduct, they could not stop it.<sup>6</sup>

Furthermore, Mr. Akl's representations about the hearings held in February 2009 are not wholly accurate. Mr. Akl fails to inform this Court that the ALJ ordered the reopening of the matter solely for the "evidentiary deposition" of Mr. Staggs. (ALJ's Nov. 18, 2008 Order.) There is no mention in the Order that the ALJ would be taking or considering evidence other than the deposition of Mr. Staggs. (*Id.*) The ALJ's Order, which only pertained to the evidentiary deposition of Mr. Staggs, neither instructed nor implied that Ford Credit should bring a corporate representative or present evidence other than the potential cross-examination of Mr. Staggs. Regardless, when it offered to present evidence during the evidentiary deposition, Ford Credit's request was denied by the ALJ. (Tr. Vol. VII, at 105-113.) Also, Mr. Akl's focus on the ALJ's expectation of a corporate representative being present at the evidentiary deposition is a red herring, given that the ALJ denied Ford Credit any opportunity to present evidence during the evidentiary deposition of Mr. Staggs. In any event, the ALJ opined that Ford Credit did not engage in any wrongdoing regarding Mr. Staggs's previous testimony. (Tr. Vol. IV, at 108.)

Mr. Akl also informs this Court that Mr. Staggs gave "much more elaborate testimony" during the evidentiary deposition in February 2009. (Akl Brief, at 3.) Mr. Akl, however, fails to tell this Court that during the evidentiary deposition, Mr. Staggs stated **on at least five occasions** that his initial testimony was truthful. (Tr. Vol. VII, at 36, 66-67, 95-96; Tr. Vol. VIII, at 43, 66.) Also notably absent from Mr. Akl's recitation of the facts is that during the evidentiary

---

<sup>6</sup> In fact, Mr. Nicosia testified he **never** heard anyone make comments or jokes about Mr. Akl's ethnicity. (Tr. Vol. VI, at 108-109.) And, the testimony relied upon by Mr. Akl to support this representation is the testimony of Mr. Staggs wherein he discussed, in his ever-changing testimony, that he believed these individuals heard the "banter" with "dealers," not coworkers. (Tr. Vol. VIII, at 17.) Accordingly, this representation regarding what Mr. Griffin and Mr. Nicosia observed is unsupported by the evidence on the record.

deposition, Mr. Staggs changed his testimony. stating that everyone cursed and the cursing occurred all the time, which was entirely contrary to his previous testimony that cursing was “very” unusual. (Tr. Vol. II, at 96; Tr. Vol. VIII, at 66.) Therefore, Mr. Staggs’s testimony was not “more elaborate”; it simply contradicted his previous testimony which he swore was truthful.

### III. LEGAL ARGUMENT<sup>7</sup>

#### **A. Mr. Akl does not address or dispute Ford Credit’s arguments and authorities establishing that the HRC’s adoption of the ALJ’s Findings of Fact were not supported by the substantial evidence on the record.**

Contrary to this Court’s decision in *Cobb v. West Virginia Human Rights Commission*, 217 W. Va. 761, 774 (2005), the HRC entirely adopted, without modification, the ALJ’s Findings of Facts even though the majority of the Findings of Fact was unsupported by the substantial evidence on the record. (Ford Credit Brief, at 27-31.)<sup>8</sup> Moreover, the HRC failed to consider numerous legally significant facts that were supported by the substantial evidence on the record. (Ford Credit Brief, at 31-33.) This, of course, is contrary to this Court’s ruling and the statutory requirements. *Cobb*, 217 W. Va. at 774; W. Va. Code R. § 77-2-10.8; W. Va. Code § 5-11-8. Remarkably, Mr. Akl does not respond to or otherwise dispute Ford Credit’s arguments, authorities and record citations regarding the HRC’s failure to adhere to the Court’s standards and statutory requirements, apparently conceding this argument. Even so, because the HRC, by adopting the ALJ’s decision, made findings of facts that were not supported by the substantial evidence on the record and also failed to include legally significant facts in its decision, its decision was arbitrary and capricious, a clearly unwarranted exercise of discretion

---

<sup>7</sup> Contrary to Mr. Akl’s representations to this Court, Ford Credit has consistently presented the ALJ’s errors, factual and legal, in its appeals to the HRC and this Court. (Akl Brief, at 13 n.10.) To wit, Ford Credit’s petition in support of its appeal to the HRC consisted of more than 100 pages – the majority of which addressed legal errors committed by the ALJ. (Ford Credit’s Pet. in Supp. of Appeal to HRC.)

<sup>8</sup> “Ford Credit Brief” refers to Ford Credit’s Appellant Brief.

and unsupported by the substantial evidence on the record. W. Va. Code § 5-11-8; *Cobb*, 217 W. Va. at 774. Thus, the HRC's decision must be reversed.

**B. Mr. Akl failed to establish a claim of hostile work environment, and even if he had, Ford Credit had a complete defense to his claim of hostile work environment.**

To establish a prima facie case of hostile work environment, the parties agree Mr. Akl 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 Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 95 (1999). Mr. Akl, however, did not establish a prima facie case of hostile work environment, and the HRC's finding to the contrary was in error.

**(1) This Court's requirements for establishing "unwelcomeness" were not met by Mr. Akl and were ignored by the HRC.**

Mr. Akl did not establish the subject conduct was unwelcome, and the HRC's finding to the contrary is against the legal standards set forth by this Court and the substantial evidence on the record. This Court has held "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." *Erps v. W. Va. Human Rights Comm'n*, 224 W. Va. 126, 680 S.E.2d 371, 373 (2009) (emphasis added). 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). When an employee's own taunts and behavior largely created the "very situation of which he later complained," the employee **cannot** establish the same conduct was unwelcome. *Id.*

It is uncontroverted that Mr. Akl not only admitted he participated in but **instigated** the conduct he now alleges was offensive. (Tr. Vol. III, at 206-208, 290.) Mr. Akl testified: “I may have on some occasion. I’m not going to say I never did; that would be crazy to say I never did,” and “Yes, I may have initiated some of the teasing banter.” (Tr. Vol. III, at 207-208, 290). Mr. Akl even told the HRC in his amended complaint that “[m]y colleagues **and I** often engaged in a certain amount of ‘teasing banter.’” (Am. Compl. II.) In addition, the testimony of other Ford Credit employees established 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.) Thus, Mr. Akl’s depiction to this Court that he “did not ‘solicit’ or ‘incite’” the conduct (Akl Brief, at 15) is contrary to both his sworn testimony and previous filings with the HRC. Nonetheless, the substantial evidence on the record established that Mr. Akl participated in and instigated the conduct he now alleges is offensive.

Instead of presenting evidence he did **not** participate in the alleged conduct, Mr. Akl argues the HRC’s decision should be upheld “**despite** the occasional participation of Mr. Akl....” Akl Brief, at 17 (emphasis added).<sup>9</sup> This is not the law of this Court, and accordingly, this argument must be rejected. Mr. Akl also argues his misconduct should be somehow excused because the comments he made were simply to “fire back” at other employees’ comments. (Akl Brief, at 16.) This argument contradicts Mr. Akl’s testimony that he not only participated in but also **instigated** the alleged conduct. (Tr. Vol. III, at 88.) Likewise, this argument does not comport with the evidence presented by the parties. During the investigation into his misconduct, Mr. Akl told the investigators he was “not offended” by any behavior at the office.

---

<sup>9</sup> In other portions of his brief, Mr. Akl admitted he “occasionally participated in the conduct,” “occasionally ‘fire[d] back,’” was an “occasional participant in what was described as joking behavior,” and he “occasionally” participated “in the verbal exchanges.” (Akl Brief, at 15, 17.)

(Tr. Vol. IV, at 291; Ford Credit Ex. 20.) This admission does not support his argument that he “fired back” at comments if he was not offended by them. Also, Mr. Akl, through his attorney, admitted to the HRC that he and his colleagues engaged in “teasing banter” but the “teasing banter” was “essentially harmless,” and his coworkers should not be disciplined for any comments. (Ford Credit Ex. 30, 31, 46; Tr. Vol. III, at 214.)<sup>10</sup> Mr. Akl’s admission to the HRC that his coworkers should not be disciplined for their comments also dismisses his argument that he “fired back” at such comments. Simply, Mr. Akl cannot now change his story when there is no evidence to support such an argument.

Because he participated in and instigated the conduct he now alleges was offensive, Mr. Akl must, pursuant to *Erps*, show he informed his coworkers that future instances of such conduct would be unwelcome, and thereafter, the conduct continued. 680 S.E.2d at 383. Mr. Akl, though, did not meet this burden, and tellingly, he does not address this burden in his brief.

---

<sup>10</sup> Mr. Akl contends that Exhibits 30, 31 and 46 were not admitted by the ALJ. During the hearing, the ALJ, after initially denying Ford Credit’s motion to admit the exhibits, stated the following:

At this point, I would like to elaborate on my explanation of the sidebar. I have indicated to Respondent’s counsel at that time that I was not likely to actually admit documents that had been submitted in the investigatory phase, and he seeks to have them in the record. I did allow him to read from those documents, and I will treat this as a motion to move those even though he’s only asked me to take it under advisement, and I will deny that motion and will vouch the record with Respondent’s Exhibits Nos. 31, 46, and 30.

(Tr. Vol. V, at 219.) Hence, it is unclear what the ALJ’s ruling was on these exhibits since he said he “will deny” the motion but then stated he will “vouch” the record with regard to the exhibits. Moreover, in the ALJ’s decision, there is no ruling with regard to the admission of these exhibits.

Regardless, an admission made by a party’s agent is admissible. See W. Va. R. Evid. 801(d)(2)(C) (setting forth the hearsay exception of an admission by a party opponent made by a party’s agent); see also *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 570 (8th Cir. 1997) (holding that a letter sent by an employer to an administrative agency was admissible); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476-77 (5th Cir. 1992) (finding that a letter to the EEOC was admissible); *Gage v. Metro. Water Reclamation Dist. of Greater Chicago*, 365 F. Supp. 2d 919, 936-37 (N.D. Ill. 2005) (stating an employer’s position statement to the EEOC may be admissible to the extent it constitutes an admission).

Even if the Court does not consider these exhibits, the substantial evidence on the record, including Mr. Akl’s testimony, supports Ford Credit’s arguments that the HRC’s decision must be reversed.

It is undisputed that Mr. Akl **admitted** he never told his co-workers to stop their conduct. (Tr. Vol. III, at 187-188.) Moreover, Mr. Akl even 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.) Because Mr. Akl never told his coworkers to stop their conduct, he failed to satisfy the burden of proof set forth in *Erps*, and the HRC’s decision, which does not even contemplate the required standard in *Erps*, was contrary to both the law and the substantial evidence on the record. 680 S.E.2d at 383 (concluding that the HRC’s order holding the appellant liable for hostile work environment could not stand because the complainant “failed, as a matter of law, to satisfy the first element of a hostile work environment claim by failing to put forth evidence from which a reasonable fact-finder could conclude that the subject was unwelcome.”). Because Mr. Akl never told his coworkers to stop their conduct, the HRC’s decision with regard to Mr. Akl’s hostile work environment claim must be reversed for this reason alone.

**(2) The substantial evidence on the record does not establish the alleged conduct was severe or pervasive.**

In addition, the HRC, in adopting the ALJ’s decision, failed to analyze whether the alleged conduct was severe or pervasive. Even if the HRC had properly considered whether Mr. Akl established the alleged conduct was severe or pervasive, the substantial evidence on the record does not support a finding that the alleged conduct was severe or pervasive.

First, the alleged conduct was not pervasive. Mr. Akl testified that **days or even weeks passed** without anyone making comments to him. (Tr. Vol. III, at 88; Ford Credit Ex. 39.)<sup>11</sup> Nevertheless, he now asks this Court to rely upon the testimony of Mr. Staggs to support the notion that the alleged conduct was pervasive. (Akl Brief, at 14.) Mr. Akl, however, may not

---

<sup>11</sup> Mr. Akl, in his brief, states that the conduct occurred on an “almost daily” basis. (Akl Brief, at 19.) Mr. Akl, however, did not present such testimony, as outlined *supra*, section II.

rely upon another witness's testimony when it contradicts his own testimony about his claims. (Tr. Vol. III, at 88; Tr. Vol. VIII, at 66.) *See Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (“When the nonmovant has testified to events, we do not (as urged by Plaintiffs’ counsel) pick and choose bits from other witnesses’ essentially incompatible accounts (in effect, declining to credit some of the nonmovant’s own testimony) and then string together those portions of the record to form the story that we deem most helpful to the nonmovant.”); *Carter v. Hasell*, Case No. 4:05-CV-2259, 2009 WL 3762347, at \* 6 (E.D. Mo. Nov. 10, 2009) (stating that when “[f]aced with conflicting facts and testimony, the court must credit [the plaintiff’s] version of the events ‘as a unified whole.’”); *Bridges v. Murray*, Case No. 1:08CV13-3, 2009 WL 799634, at \* 3 (W.D. N.C. Mar. 24, 2009 (adopting *Evans v. Stephens* and noting that “the court is not free to ignore claims made by the plaintiff that ‘undermine’ his cause of action.”). Thus, this Court must not consider Mr. Staggs’s testimony because it differs from the testimony of Mr. Akl.

Nonetheless, Mr. Staggs’s “new” testimony about the alleged comments made to Mr. Akl contradicted Mr. Staggs’s previous testimony and the statement he made during Ford Credit’s investigation into the allegations against Mr. Akl, even though he swore multiple times during his later testimony that his previous testimony was truthful. (Tr. Vol. II, at 96; Tr. Vol. VII, at 36, 52, 66-67, 95-96; Tr. Vol. VIII, at 7-8, 10-19, 25-28, 30, 40-45, 66-69; Akl Ex. 5.) Simply, the substantial evidence on record established the alleged conduct did not occur regularly.

The only evidence presented by Mr. Akl to establish the alleged conduct was in any way pervasive was Mr. Staggs’s later testimony, which contradicted his previous testimony and the statement he gave during Ford Credit’s investigation. At best, Mr. Akl only established the alleged conduct occurred infrequently, which does not establish pervasiveness. *See e.g., Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 768-69 (4th Cir. 1997) (dismissing sexual harassment claim

because six verbal incidents over a period of approximately three months was insufficiently severe and pervasive); *see also EEOC v. Fairbrook Med. Clinic, P.A.*, Case No. 5:07CV94, 2009 WL 929103 (W.D. N.C. Apr. 2, 2009) (finding that the alleged conduct, which occurred over a long period of time but with the most frequent inappropriate comments occurring once or twice a week, was not sufficient to establish the conduct was pervasive).

Second, the alleged conduct was not severe. Mr. Akl consistently described the alleged conduct as “teasing” and “joking” and also told the HRC that his colleagues should **not** be disciplined for the comments. (Tr. Vol. III, at 211-214; Am. Compl. II.) When asked to describe the “teasing banter” in his interrogatory responses, Mr. Akl stated “[t]here was a general office environment where this ‘banter’ took place.” (Ford Credit Exs. 39, 40.) Teasing and joking comments do not meet the burden of establishing severity. *See e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (applying the federal standard for hostile work environment claims, which parallel West Virginia’s standards, and finding jokes and teasing do not constitute a hostile work environment). Because he failed to establish the alleged conduct was severe, Mr. Akl did not establish a prima facie case of hostile work environment; thus, the HRC’s finding that Ford Credit is liable for a claim of hostile work environment must be reversed.

**(3) Ford Credit established a complete defense to Mr. Akl’s hostile work environment claim.**

Even if the HRC had properly applied the law and found Mr. Akl established a prima facie case of hostile work environment, the substantial evidence on the record established Ford Credit had 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>12</sup>; *Johnson v. Killmer*, 219 W. Va. 320, 326 n.13 (2006). It is undisputed that Ford Credit responded to Mr. Akl's complaint **in less than twenty-four hours** by attempting to interview him about his allegation. (Tr. Vol. III, at 221, 228-229; Tr. Vol. IV, at 31-32, 35-36, 139-140.) It is further undisputed that Mr. Akl, in violation of the anti-harassment policy, **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, Mr. Akl, admittedly tried to use his complaint as a bargaining chip to have his demotion rescinded, rather than follow company policy and provide Ford Credit with the necessary information to investigate. (*Id.*) Then, less than a day later, 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 allegation but it was Mr. Akl who **chose** not to cooperate. (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.) Because he chose to withhold the very information he now blames Ford Credit for not investigating, Mr. Akl cannot now claim that Ford Credit failed to investigate. Because the substantial evidence on the record established Ford Credit had a complete defense to Mr. Akl's hostile work environment claim, the HRC's decision must be reversed with regard to Mr. Akl's hostile work environment claim.

---

<sup>12</sup> *Colgan Air* is similar to this matter in that the employee was allegedly called derogatory names, such as "camel jockey" and "raghead." This Court held that 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 Air, Ford Credit took appropriate actions to remedy the situation immediately after it received the complaint.

**C. Mr. Akl failed to establish he was constructively discharged, and the HRC's decision finding Ford Credit liable for constructive discharge must be reversed.**

The parties agree 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 which was so intolerable that the employee was forced to leave his or her employment.” *Love v. Georgia-Pacific Corp.*, 209 W. Va. 515, 520 (2001) (quotations omitted). However, 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, and the HRC's award of nearly \$625,000, which was based solely on the constructive discharge claim (HRC Decision; ALJ Decision, at 44), must also be reversed.<sup>13</sup>

It is unclear from Mr. Akl's brief what the basis or bases of his constructive discharge claim are. The heading of the constructive discharge section of Mr. Akl's brief provides three bases for his claim. (Akl Brief, at 21.) Then, he later argues only one basis for his claim – his demotion. To wit, he specifically states his “leaving was the direct result of the decision to demote him....[h]ad Mr. Akl not been demoted he would have stayed at [Ford Credit]” and “but for the wrongful demotion, Mr. Akl would not have left employment with [Ford Credit].” (Akl Brief, at 23.) Yet, on that same page, he states: “Mr. Akl is not contending that [his demotion] is the only reason why he was constructively discharged.” *Id.* Finally, in his summary of the legal

---

<sup>13</sup> The ALJ awarded damages solely based upon a finding of constructive discharge:

Within 31 days of receipt of the undersigned's order, the respondent shall pay the Complainant damages resulting from his **constructive discharge**, of a net loss of earnings through the age 72 expected working life, reduced to present value as of the date of Mr. Griffith's report, of \$624,654.00, based upon the expected earnings of a restaurant manager career for complainant, plus post judgment interest thereon at the statutory rate.

ALJ Decision, at 44-45 (emphasis added).

argument with regard to this claim, he sets forth seven bases for this claim. (Akl Brief, at 24-25.)<sup>14</sup> Regardless of the divergent and varied arguments presented by him, it is axiomatic that Mr. Akl never established that Ford Credit created a hostile work environment, which left him with no choice but to leave.

First, Mr. Akl's demotion alone does not establish constructive discharge. 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 (4th Cir. 2004) (citations omitted); *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994). The 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.

Second, Mr. Akl's argument that Ford Credit "refused to consider Mr. Akl's complaints of a hostile work environment as it related to the charges against him" does not support a constructive discharge claim. (Akl Brief, at 21.) Quite simply, Mr. Akl's complaints did not "relate" in any fashion to the charges against him — the conduct and complaints were materially different. Mr. Akl offers no explanation how his highly offensive and often misogynistic

---

<sup>14</sup> Mr. Akl's reliance on the ALJ's decision to support his constructive discharge is also misplaced. (Akl Brief, at 21.) For example, the portion of the ALJ's decision on which Mr. Akl relies is not supported by the substantial evidence on the record. In the cited portion, the ALJ finds that Mr. Akl would be reporting to a particular person, which was not established; the person to whom he would be reporting was incompetent, which was not established at trial; other supervisors were engaged in far more egregious or inappropriate comments, which was not established at trial; and Ford Credit refused to connect Mr. Akl's complaint of alleged harassment with the basis for his demotion, when there was no connection between Mr. Akl allegedly being called derogatory names with his admitted use of inappropriate, vulgar and sexist comments. (See Ford Credit Brief, at 17-18.) This section of the ALJ's Decision was replete with misrepresentations and exaggerations of the evidence in this matter, and therefore, cannot form the basis of Mr. Akl's constructive discharge claim.

conduct towards his subordinates “related” to the dealers’ “teasing banter” that occasionally related to his national origin. To be direct, even assuming someone, such as a dealer, as Mr. Akl alleges, called him an offensive slur allegedly based upon his national origin, it did not give Mr. Akl carte blanche to curse at his subordinates. Simply, this argument does not establish how Mr. Akl’s work environment was so intolerable that he had no choice but to quit. Rather, Mr. Akl’s argument simply highlights the fact that Ford Credit, justifiably so, would not barter his demotion, which was based upon Ford Credit’s good faith belief that he violated the zero tolerance policy based on his profane, vulgar and misogynistic conduct, with his unsupported and nonspecific allegation of a hostile work environment based upon his national origin.

Third, Mr. Akl’s argument and the HRC’s finding that Mr. Akl established constructive discharge because he was not given a “meaningful opportunity” to respond to the allegations against him are also contrary to the substantial evidence on the record. Mr. Akl was given at least **one week** to respond to the allegations in writing, and even when he was reminded by one of the investigators (the investigator who he claims was biased against him) to submit a written response, but he chose not to do so. (Tr. Vol. IV, at 26, 57, 100, 173-175, 177, 190-191, 291-292.) It is undisputed that he was provided a meaningful opportunity, rendering this argument and finding erroneous.

Fourth, Mr. Akl’s argument and the HRC’s finding that Mr. Akl established a constructive discharge claim because he could not be expected to continue working at Ford Credit when other supervisors allegedly engaged in “similar” or “more egregious” behavior than he had are also flawed. (HRC Decision; ALJ Decision, at 37; Akl Brief, at 22, 25-26.) The substantial evidence on the record established **no one** engaged in behavior even similar to Mr. Akl’s. (Tr. Vol. V, at 19, 50, 88, 103-104, 117; Tr. Vol. VI, at 21, 24, 105.) There was **no**

**evidence** that anyone engaged similar behavior than Mr. Akl did. Notably, Mr. Akl testified that he knew of **no one** who had engaged in the conduct he was alleged to have committed. (Tr. Vol. III, at 197-198, 287-289.) Moreover, Mr. Akl consistently described and admitted this other behavior was “teasing banter,” and he never complained about it until after he was demoted. (Tr. Vol. III, at 203-208, 211-213, 221, 239; Ford Credit Exs. 30, 31, 39, 40, 46.) Mr. Akl also admitted to the HRC that he did not think any of his co-workers should be disciplined for this “teasing banter,” and therefore, this alleged conduct could not be similar or more egregious than the conduct to which he has admitted. (Ford Credit Ex. 46; Tr. Vol. III, at 211-214.) Because Mr. Akl established that this conduct was “teasing banter” and should not merit discipline, there is no support for Mr. Akl’s argument that this same conduct was somehow “more egregious” than what Mr. Akl did. Thus, the HRC’s finding of constructive discharge must be reversed.

In any event, Mr. Akl is mixing apples with oranges: he leads this Court to believe that the “teasing banter” that occurred among employees was the same as the behavior in which he participated and of which employees complained. To wit, no one complained about the “teasing banter” that allegedly occurred among employees. Even Mr. Akl did not complain about the self-described “teasing banter” until after he was demoted. (Tr. Vol. III, at 203-208, 211-213, 221, 239; Ford Credit Exs. 30, 31, 39, 40, 46.) Rather, the complaints regarding Mr. Akl specifically pertained to behavior of which no one else was accused: using misogynistic comments to women, referring to genitalia, making sexual and sexist jokes, imitating mentally challenged people, constantly used the word “f—k” and other profane language – all in a total disregard for the well-being of those who were **not** in the line of fire with regard to the “teasing banter.” (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.) Mr. Akl even **admitted** he

was unaware of any employee who used the language of which he had been accused. (Tr. Vol. III, at 197-198, 287-289.) Accordingly, there is no evidentiary support for this argument.

Mr. Akl's final argument – that the investigation against him was conducted in a manner to elicit a specific result – is also erroneous. Mr. Akl argues to this Court that the investigation “focused solely on him.” (Akl Brief, at 24.) Instead, it is undisputed that the non-supervisory employees who were interviewed during the onsite audit were asked questions about their respective supervisors, and the employees did not complain about any supervisor's behavior, other than Mr. Akl's. (Tr. Vol. IV, at 164-168.) Again, it is undisputed that **no one** else complained that anyone, other than Mr. Akl, used misogynistic comments to women, referred to genitalia, made sexual and sexist jokes, imitated mentally challenged people, constantly used the word “f—k” and other profane or vulgar language. (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.) Accordingly, Mr. Akl was not “singled out” for the investigation; instead, he was the only person implicated by the non-supervisory employees during the audit. Thus, this argument is also unsupported the substantial evidence on the record.

Regardless, Mr. Akl's arguments about the manner in which Ford Credit investigated the allegations against him fail because he did not present any evidence of bad faith or fraud. *See e.g., McCullough*, 559 F.3d at 863 (holding that an employer's investigation was adequate where the plaintiff provided no evidence that the investigators purposely ignored relevant information or otherwise truncated the number of witness interviews based on a discriminatory bias); *Stephens*, 182 Fed. Appx. at 422 (stating that an investigation is not required to leave “no stone unturned” and is sufficient if the employer reasonably relied on particularized facts in making a reasonably informed and considered decision); *Jones*, 34 Fed. Appx. At 322-323 (9th Cir. 2002)

(holding that an employer's investigation into harassment allegations against the plaintiff was adequate as a matter of law despite the plaintiff's argument that the employer failed to contact every person listed where plaintiff could present no explanation as to why the few witnesses who were not called were important to his defense). Therefore, Mr. Akl's unsubstantiated assertions fail to establish that the investigation or the manner in which it was conducted somehow rendered his working conditions so intolerable that he had no choice but to leave Ford Credit.

Because 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, the HRC's finding must be reversed. Additionally, the HRC's 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. Mr. Akl failed to establish a prima facie case of disparate treatment, and accordingly, the HRC's decision related to Mr. Akl's disparate treatment claim must be reversed.**

Mr. Akl failed to establish a prima facie case of disparate treatment because he did not present evidence that he was treated differently than a similarly situated person outside his protected class. *Waddell v. John Q. Hammons Hotel, Inc.*, 572 S.E.2d 925, 928 (W. Va. 2002); *State v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W. Va. 711, 719 (1985). Rather, the substantial evidence on the record, which includes Mr. Akl's testimony, established the one person to whom Mr. Akl compared himself was not similarly situated. Thus, the HRC's decision finding disparate treatment must be reversed.

Mr. Akl argues that his subordinate, Mr. Staggs, and his managers are somehow similarly situated to him. (Akl Brief, at 26.) This argument is legally deficient on two fronts. First, Mr. Staggs is legally dissimilar to Mr. Akl. To be similarly situated, the individual 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). It is undisputed that Mr. Staggs and Mr. Akl did not have the same supervisor, did not have the same job, did not have the same responsibilities, and were different salary grades. (Tr. Vol. II, at 15, 18, 24-25, 28, 38, 48-49, 91; Tr. Vol. III, at 19, 21, 26, 28, 38, 89, 279, 284, 313; Tr. Vol. IV, at 25-26, 37, 39; Tr. Vol. V, at 112, 114-115; Tr. Vol. VI, at 8-12, 103-104.) Significantly, Mr. Staggs was a subordinate of Mr. Akl's, and for that reason alone, he is not similarly situated to Mr. Akl. (Tr. Vol. III, at 313.) Courts around the country have analyzed this issue and determined that a supervisor is not similarly situated to a subordinate. See *Tomczyk v. Jocks & Jills Rests., LLC*, Case No. 05-10744, 2006 WL 2271255, at \* 6 (11th Cir. Aug. 9, 2006); *Sizemore v. State of N.M. Dep't of Labor*, Case No. 05-2198, 2006 WL 1704456 (10th Cir. June 22, 2006); *Vasquez v. City of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th 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); *Oguezuonu 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). Accordingly, Mr. Staggs is not similarly situated to Mr. Akl.

Likewise, Mr. Akl's argument that his managers are similarly situated to him fails. There was **no evidence** that his managers had the same responsibilities as him, reported to the same supervisor as him, had the same job as him, or had the same salary grade as him. Moreover, as

set forth *supra*, the fact that Mr. Akl was a subordinate to his managers defeats any possibility that his managers are similarly situated to him. Therefore, Mr. Akl's argument that his managers are similarly situated to him also fails as a matter of law.

Second, Mr. Akl's argument also fails because he must establish that those he purports are similarly situated engaged in the **same conduct** as he did and were not disciplined. *Edwards*, 1998 WL 841567, at \* 2-3. Mr. Akl failed to present **any evidence** that any of these individuals, Mr. Staggs or his managers, used any of the words or phrases he **admitted** to using at work: "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.) Likewise, Mr. Akl did not present any evidence that Mr. Staggs or his managers mimicked mentally challenged persons, made sexual jokes, made sexist comments, 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, called people "pussy," told a female subordinate to do her "f--king job," told a female subordinate to "quite her bitching," and complained about having "another damn woman" telling him what to do, as had been reported by his subordinates during the investigation into Mr. Akl's behavior. (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.)

In fact, Mr. Staggs 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.) And, there was no evidence that Mr. Akl's managers participated in the same misconduct that he did. Notably, Mr. Akl testified he was unaware of **any** Ford Credit employee who had engaged in similar behavior. (Tr. Vol. III, at 287-289.) The substantial evidence on the record

established that Mr. Staggs and Mr. Akl's managers had different jobs, different duties, different supervisors, and participated in different behavior, and therefore, are legally dissimilar to Mr. Akl. Thus, Mr. Akl did not establish a prima facie case of disparate treatment, and the HRC's decision must be reversed.

- (1) **Mr. Akl did not dispute Ford Credit's legitimate, non-discriminatory reasons for demoting him; therefore, Ford Credit is not liable for a claim of disparate treatment.**

The HRC, failing to follow legal precedent, did not analyze this claim under the burden-shifting framework set forth by this Court in that it did not address whether Ford Credit had legitimate, non-discriminatory reasons to demote Mr. Akl. (HRC Decision; ALJ Decision, at 32-34.) Ford Credit only has the burden of setting forth a legitimate, nondiscriminatory reason for demoting Mr. Akl. *Mayflower Veh. Sys., Inc. v. Cheecks*, 218 W. Va. 703, 706-07 (2006). Contrary to Mr. Akl's representations to this Court (Akl Brief, at 28), there is no requirement that Ford Credit also set forth legitimate, nondiscriminatory reasons for not demoting other individuals. Regardless, Mr. Akl does not present any arguments or cite to any evidence in this brief to dispute Ford Credit's reasons for demoting him.

It is undisputed that Ford Credit demoted Mr. Akl because it had a good faith belief that Mr. Akl violated Ford Credit's anti-harassment policy, which defines "harassment" as any conduct that creates an "intimidating, hostile or offensive working environment." (Akl Ex. 10.) Mr. Akl admittedly 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, 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.) Accordingly, Ford Credit established a legitimate, nondiscriminatory reason for discharging Mr. Akl. Because Ford Credit established a legitimate, nondiscriminatory reason for demoting Mr. Akl and Mr. Akl, by failing to dispute this fact, has conceded this point, the HRC’s decision must be reversed because he has not presented any evidence of pretext in which to overcome Ford Credit’s reasons for demoting him.

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

Ford Credit met its burden of establishing a legitimate, nondiscriminatory reason for demoting Mr. Akl, and therefore, the burden shifted to Mr. Akl to establish Ford Credit’s reason was pretextual. *Mayflower*, 218 W. Va. at 706-07. To establish pretext, 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. He must also present more than “**baseless speculation**” to establish pretext. *Id.* at 217 (emphasis added).

Significantly, Mr. Akl **did not present any evidence** to establish that Ford Credit’s decision to demote him was based upon his national origin. Instead, Mr. Akl’s arguments to support pretext are based upon his belief, speculation and guesswork, which, of course, do not

establish pretext. Mr. Akl's belief that the decision to demote him was pretextual because managers allegedly violated the same policy but were not disciplined is not supported by any evidence on the record, as set forth *supra*, and accordingly, does not fulfill this Court's requirements for establishing pretext.

Mr. Akl's self-serving and conclusory assertion that the investigation into his misconduct was purportedly conducted in a way to elicit only negative information is not supported by any evidence, and likewise, does not establish pretext. Mr. Akl presented no evidence that the investigation was conducted any differently than normal, let alone that it was done so as part of a scheme to discriminate against him based upon his national origin. *McCullough*, 559 F.3d at 863 (holding that an employer's investigation was adequate where the plaintiff provided no evidence that the investigators purposely ignored relevant information or otherwise truncated the number of witness interviews based on a discriminatory bias); *Stephens*, 182 Fed. Appx. at 422 (stating that an investigation is not required to leave "no stone unturned" and is sufficient if the employer reasonably relied on particularized facts in making a reasonably informed and considered decision); *Jones*, 34 Fed. Appx. At 322-323 (9th Cir. 2002) (holding that an employer's investigation into harassment allegations against the plaintiff was adequate as a matter of law despite the plaintiff's argument that the employer failed to contact every person listed where plaintiff could present no explanation as to why the few witnesses who were not called were important to his defense). Mr. Akl's unsubstantiated arguments and speculation about the manner in which the investigation was conducted cannot establish pretext.

Mr. Akl's speculation that one of the individuals who investigated his complaint of alleged harassment treated his complaint differently is also flawed and does not establish pretext. It is undisputed that this individual, Mr. Godlewski, **did not even know Mr. Akl's national**

**origin** at the time Mr. Akl made his complaint or even during his conversation with Mr. Akl about his complaint, which defeats any argument that Mr. Godlewski treated Mr. Akl differently because of his national origin. (Tr. Vol. IV, at 13.) It is also undisputed that Mr. Godlewski and another Human Resources employee asked Mr. Akl several different times to provide specific information related to his complaint but Mr. Akl refused to provide any specifics. (Vol. IV, 35-36, 55-56; Ford Credit Ex. 27.) The notion that these individuals tried several times to get this information from Mr. Akl cuts against his argument they were not interested in investigating the matter or treated his complaint any differently.

Because Mr. Akl failed to present any evidence of pretext, his disparate treatment claim fails, and the HRC's finding that Mr. Akl established a claim of disparate treatment must be reversed. Not only is the HRC's finding unsupported by the evidence but it is contrary to the law set forth by this Court.

**E. 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.**

Mr. Akl's award of nearly \$625,000 in damages, which even he concedes is incorrect, was based entirely upon the flawed opinions of two experts and ignored Mr. Akl's failure to meet the legal requirements for such an award. Mr. Akl's argument that Ford Credit cannot point out these flaws without hiring its own experts is simply wrong, which is shown by his failure to cite any legal authority for the imaginative proposition. West Virginia has long-standing requirements for expert testimony, and the burden rests on Mr. Akl to meet those requirements.

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

Mr. Akl's suggestion that he need not actually introduce evidence of (1) his earnings, (2) his benefits, (3) his likely career path at Ford Credit, (4) his earnings after Ford Credit, and (5) his likely career path outside of Ford Credit is similarly unsupported. Mr. Akl has no authority for the implication that his experts could merely speculate about such matters, some of which Mr. Akl did not even discuss with them. Mr. Akl bore the burden of introducing **evidence** on such matters as the factual underpinnings to support his experts' opinions. Without those underpinnings, Mr. Akl's experts have no support, and the damages award cannot stand.

Mr. Akl's claim that the "first step" was to consider his actual earnings at Ford Credit is incorrect. Mr. Akl's expert, Errol Sadlon, made **no effort** to determine Mr. Akl's actual earnings, and quickly moved past this step to his reliance on "national averages" of what someone in Mr. Akl's shoes "should" earn, as opposed to what Mr. Akl actually did earn.<sup>15</sup> The self-serving nature of this approach is shown by the fact that even when shown that Mr. Akl's compensation was **\$20,000 less** than the so-called national averages, Mr. Sadlon testified this would not change his opinion of Mr. Akl's lost income. (Tr. Vol. I, at 61-62, 113.) Likewise, Mr. Sadlon made **no effort** to determine what jobs Mr. Akl was actually qualified for, let alone what Ford Credit would have actually paid Mr. Akl in those positions. (Tr. Vol. I, at 88-89, 92-94, 121-123, 126-127, 142.) Mr. Akl himself introduced **no evidence** on this point.

---

<sup>15</sup> Mr. Akl's claim that it is "undisputed" that his moving expenses were for him to "keep" is patently unsupported. What is undisputed is Mr. Akl signed a promissory note promising to **repay** moving expenses to Ford Credit, but he has failed to do so. While Mr. Akl has "kept" this money, this does not make it right or somehow turn his wrongful possession of these funds into compensation. (Tr. Vol. III, at 291-294; Tr. Vol. IV, at 50, 144-145, 150; Ford Credit Ex. 9.)

This also holds true for Mr. Akl's lost benefits. The expert who opined on lost benefits, Mr. Griffith, never met or spoke with Mr. Akl. (Tr. Vol. I, at 175-179, 183-184.) 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.) Notably, there was **no evidence** comparing the benefits he received at Ford Credit to his actual or anticipated benefits since his separation from Ford Credit.

Similarly, Mr. Akl introduced **no evidence** about his actual earnings after Ford Credit. Mr. Akl now argues this was no big deal because he relied upon the "calculation" in his experts' reports; however, he fails to inform this Court that these calculations were based on **assumptions**, not evidence. Mr. Akl's new claim that he made "about" that much is utterly unsupported and off-target. (Akl Brief, at 35.) Mr. Akl could have easily proved this point at the hearing but did not. Mr. Akl's experts' reports are not some magic cure for his failure of proof; arguing the reports make up for his failure to support them with actual evidence is the epitome of putting the cart before the horse.

The need for actual evidence is shown by the experts' recurring use of contradictory methodologies and assumptions to increase Mr. Akl's numbers. On the one hand, the experts and the HRC assumed Mr. Akl was well-suited for advancement at Ford Credit, but assumed 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, however, no evidentiary support for either of these propositions.

Regarding work as a restaurant manager, Mr. Akl's representation to this Court that Mr. Sadlon's assumptions about future earnings "were based on him being the owner-operator of a

restaurant” is false. (Akl Brief, at 35.) There is **no evidence** on the record regarding the expected earnings of a **restaurant owner**. (Akl Exs. 2, 4.) Even though Mr. Sadlon acknowledged Mr. Akl planned to own his own restaurant, (Tr. Vol. I, at 47; Mr. Akl Ex. 2; ALJ’s Decision, at 44; HRC Decision), Mr. Sadlon’s earnings assumptions were based solely upon the earnings of a **restaurant manager**. (Akl Ex. 2.)

Mr. Akl failed to introduce evidence to support the damages he seeks. Mr. Akl has no authority to suggest he could fix this lack of proof by pointing to his experts’ unsupported assumptions. Even if that was true, Mr. Akl’s expert reports were so flawed in their own regard that they cannot sustain the HRC’s award here.

**(2) The HRC’s award of front pay was contrary to West Virginia law.**

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.) **Even Mr. Akl concedes this amount is erroneous.** (Akl Brief, at 37 n.24.)

The HRC’s award ignored that Mr. Akl must present several factors to obtain a front pay award. Here, the main source for Mr. Akl’s alleged losses came from a vocational rehabilitationist, not an economist. (Tr. Vol. I, at 70.) No one provided various life scenarios or ranges of possible losses of the sort contemplated by West Virginia law. *See Andrews v. Reynolds Mem’l Hosp., Inc.*, 201 W. Va. 624 (1997). 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. This does not comport with West Virginia law and is wholly unsupported by any evidence in the record.<sup>16</sup> (Akl Exs. 2, 4.)

---

<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

Contrary to Mr. Akl's suggestion (Akl Brief, at 36), the fact that West Virginia allows long-term front pay awards for infants and children does **not** somehow mean 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 consider and is not limited whatsoever in his ability to work.

The danger of a windfall is particularly acute in this case where Mr. Sadlon made inconsistent assumptions that Mr. Akl would succeed at Ford Credit but would not advance outside Ford Credit (Akl Ex. 2), and no expert considered the impact of the current economic problems in the automotive industry. 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; Mr. 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. This is particularly true given the dearth of promotional opportunities and new jobs in the automobile industry, the unprecedented closings of car dealerships, and the bankruptcy filings of two of the three largest American automobile companies.

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

Mr. Akl's suggestion that his experts' opinions were "conservative" is, at best, incorrect. Mr. Akl claims Mr. Sadlon was "conservative" because he assumed that Mr. Akl would be

---

pay until age 72, setting aside the fact that the requirements for a front pay award have not been met, was not supported by **any** evidence in the record.

promoted only once or twice at Ford Credit, rather than assuming he would become CEO. (Akl Brief, at 7.) Mr. Akl omits that Mr. Sadlon's supposed "conservative" opinions assumed that outside of Ford Credit, Mr. Akl would never be promoted. This contradictory methodology cannot be considered "conservative."

Mr. Akl likewise suggests his experts' opinions were "conservative" in that they omitted his low actual earnings after leaving Ford Credit and assumed Ford Credit provided benefits equal to 15% of salary. Once again, Mr. Akl provided no evidence on either of these points. Further, Mr. Sadlon did factor in Mr. Akl's supposedly low earnings; he just assumed it would not take Mr. Akl long to start earning more. (Akl Ex. 2.) As noted above, Mr. Sadlon was hardly "conservative"; he assumed far less opportunity for promotion outside of Ford Credit than he did within. Mr. Akl likewise provides nothing to suggest that assuming benefits at 15% was "conservative." Mr. Akl introduced no evidence whatsoever on this. Mr. Griffith's assumptions about benefits were based on nothing more than his belief that Ford Credit had "good benefits" and Mr. Akl lost better benefits than other companies provided. (Tr. Vol. I, at 161, 179-180.) It is unclear why Mr. Akl believes this self-serving assumption was "conservative."

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.

**F. Ford Credit was deprived of its right to a fair and impartial hearing, which is established by the undisputed comments made by the ALJ upon the conclusion of the evidence submitted in this matter.**

It is undisputed that at the close of evidence, the ALJ told counsel that a former employee's possible allegation of retaliation by Ford Credit disturbed him. (Affs. of Mssrs.

Harris, Blumenthal & Fisher.)<sup>17</sup> It is undisputed that the ALJ stated he saw this “all the time” – an employer retaliating against an employee who engaged in conduct protected by anti-discrimination laws. (*Id.*) It is undisputed that the ALJ said he believed Ford Credit retaliated against this former employee. (*Id.*) It is also undisputed that the ALJ stated that the former employee’s allegations, although unproven, would “have an effect” on how he viewed the credibility of all Ford Credit witnesses and how he decided Mr. Akl’s claims. (*Id.*) The ALJ’s statements clearly violated the West Virginia Judicial Code of Ethics. W. Va. Code R. §§ 77-2-7.4(a)-(b); HRC Procedural Rule 7.4(a); Judicial Code of Ethics, Canon 3, subsections B(9) and D(1)(a). Therefore, Ford Credit was not afforded the right to a fair and impartial hearing. The HRC’s decision must be reversed, or alternatively, Ford Credit should be granted a new hearing.

Instead of disputing the content of the ALJ’s statements or presenting any legal arguments as to how those comments did not violate the West Virginia Judicial Code of Ethics or deprive Ford Credit of its right to a fair hearing, Mr. Akl argues (1) Ford Credit should have moved to recuse the ALJ upon hearing these comments, and (2) Ford Credit had an opportunity to present evidence during the evidentiary deposition. (Akl Brief, at 40.) Not only are both arguments flawed but they are insignificant to the Court’s analysis of the ALJ’s comments.<sup>18</sup>

---

<sup>17</sup> Mr. Akl does not dispute that the ALJ talked with the lawyers in this matter upon the conclusion of the evidentiary deposition in February 2009. He only disputes “how the conversation is characterized.” (Akl Brief, at 40.) Nevertheless, Mr. Akl does not present any argument or otherwise dispute that Ford Credit’s counsel’s affidavits, which specifically testified to the ALJ’s statements, are in any way contrary to what occurred. (*Id.*) Instead, he argues that “even if the ALJ made the statements attributed to him, there was nothing improper for him doing so.” (*Id.* at n.26.)

<sup>18</sup> In addition to these two arguments, Mr. Akl discusses the reason why the matter was reopened – a former witness contacting the ALJ, stating he did not get to tell his whole story. Setting aside the fact that the basis for reopening the matter is irrelevant to the ALJ’s post-evidence comments, Mr. Akl fails to inform the Court that the ALJ determined that Ford Credit’s counsel had not pressured or intimidated the witness to testify in a certain way. (Tr. Vol. VII, at 108.) Moreover, the former witness testified during the reopening of this matter that his previous testimony was truthful. (Tr. Vol. VII, at 36, 66-67, 95-96; Tr. Vol. VIII, at 43, 66.)

First, Mr. Akl contends Ford Credit should have filed a motion to recuse after the ALJ's comments and before the ALJ's decision was rendered. The HRC rules, however, only permit a motion for recusal **before** evidence is submitted. W. Va. Code R. §§ 77-2-7.4(b). Accordingly, this argument fails.

Second, Mr. Akl contends Ford Credit had an opportunity to present evidence at the evidentiary deposition. Ford Credit was neither instructed to have a corporate representative at the "evidentiary deposition" nor allowed to present testimony to the contrary. To wit, the ALJ's Order stated the matter was being reopened solely for the **evidentiary deposition** of Mr. Staggs. (ALJ's Nov. 18, 2008 Order.) The Order did not instruct Ford Credit to have a corporate representative and did not provide for other testimony to be taken. (*Id.*) Nevertheless, when Ford Credit asked to present evidence to refute Mr. Staggs's allegations and testimony, the ALJ **denied** the request. (Tr. Vol. VII, at 105-113.) Setting aside the fact that Ford Credit was not permitted to present evidence at this evidentiary deposition, that fact does not diminish or in any way take away from the statements made by the ALJ. If anything, the fact that Ford Credit was not permitted to present evidence to refute a basis for the ALJ's expressed concerns supports Ford Credit's arguments that it was not afforded due process.

In conclusion, it is undisputed that the ALJ made comments to counsel upon the close of evidence in this matter expressing his bias against Ford Credit, his intention to consider unproven evidence when issuing his ruling in this matter, and his intention to apply unproven evidence when determining the credibility of Ford Credit's witnesses.<sup>19</sup> Without question, these

---

<sup>19</sup> As set forth *supra*, the Court will note that the former witness's testimony changed substantially beyond his initial statement to Ford Credit's investigators, his initial testimony before the ALJ and Mr. Akl's own statements and testimony. Notably, the ALJ referenced none of this in wholly accepting this employee's late, contradictory testimony, and assuming Ford Credit "retaliated" against this employee even though the employee's initial testimony was not harmful to Ford Credit. Against this background, the ALJ's statement becomes all the more illustrative of his bias against Ford Credit.

statements violate the West Virginia Code of Ethics to which the ALJ is bound. Consequently, Ford Credit was denied its right and privilege to a fair hearing in this matter. *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). Because it was denied the right and privilege to a fair hearing, Ford Credit was denied due process. A finding in favor of Mr. Akl regarding any of his claims would further deny Ford Credit's right to due process. For all of these reasons, the HRC's decision must be reversed.

#### **IV. PRAYER FOR RELIEF**

Based upon its appeal brief and the foregoing, 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,  
Appellant,

By Counsel.

#### **ADAMS, FISHER & CHAPPEL, PLLC**

  
Robert D. Fisher, State Bar ID No. 1210  
122 South Court Street  
Ripley, West Virginia 25271-1409  
Telephone: (304) 372-6191  
Facsimile: (304) 372-2175

and

#### **SEYFERTH BLUMENTHAL & HARRIS LLC**

Charlie J. Harris, Jr., *admitted pro hac vice*  
Julia D. Kitsmiller, *admitted pro hac vice*  
300 Wyandotte, Suite 430  
Kansas City, Missouri 64108  
Telephone: (816) 756-0700  
Facsimile: (816) 756-3700

**CERTIFICATE OF SERVICE**

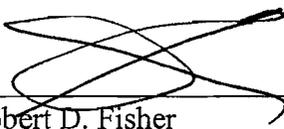
I, Robert D. Fisher, counsel for Appellant Ford Motor Credit Company, do hereby certify that the foregoing Reply Brief to Appellee Brief of Nabil Akl was served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 4th day of February 2010, addressed as follows:

Ivin B. Lee, Executive Director  
West Virginia Human Rights Commission  
1321 Plaza East, Room 108A  
Charleston, WV 25301-1400

Andrew J. Katz, Esq.  
The Katz Working Families' Law Firm, L.C.  
Security Building  
100 Capitol Street, Suite 1106  
Charleston, WV 25301

An original and nine copies of the foregoing Reply Brief to Appellee Brief of Nabil Akl were hand-delivered on the 4th day of February 2010, 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

  
\_\_\_\_\_  
Robert D. Fisher