BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAR ELECTRICAL CONTRACTORS, INC.

Appellant,

v. **No. 35302**

RICHARD WAYNE BEVELLE and
THE WEST VIRGINIA
HUMAN RIGHTS COMMISSION,

Appellees.

APPELLANT'S BRIEF

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal stems from obvious errors of law and abuses of discretion committed by Administrative Law Judge Robert B. Wilson of the West Virginia Human Rights Commission (which was subsequently affirmed, in cursory fashion, by the full commission and the Circuit Court of Kanawha County). Judge Wilson erred when he ignored the overwhelming weight of the evidence and binding precedent and found that a single, isolated racial epithet in the workplace was sufficiently severe and pervasive to constitute a hostile working environment for Appellee Richard Wayne Bevelle ("Mr. Bevelle"). Despite Mr. Bevelle's unambiguous admissions that he was never threatened, never felt endangered, and was not concerned with his co-workers *in any way*, Judge Wilson inexplicably found that there was an "objectively reasonable belief" that Mr. Bevelle would be ***murdered on the jobsite***. In essence, Judge Wilson's illogical calculus was: a single, isolated epithet + no subjective fear on the part of Mr. Bevelle + a total absence of threats against Mr. Bevelle + Mr. Bevelle's belief that his co-worker meant him no harm = MURDER. Such a finding is clearly wrong, arbitrary, capricious, and without any evidentiary support in the entirety of the record. Judge Wilson's decision must be reversed.

Procedurally, Mr. Bevelle filed a Complaint, pursuant to the West Virginia Human Rights Act, W.Va. Code § 5-11-1, *et. seq.*, with the West Virginia Human Rights Commission ("HRC") on June 13, 2007, alleging that he was discriminated against on the basis of his race and retaliated against for complaining about racial harassment by his employer, PAR Electrical Contractors, Inc. ("PAR").

A public hearing before Judge Wilson was held on November 28, 2007. Briefing by the parties was completed on January 28, 2008. On January 30, 2008, the "Chief Administrative

Law Judge's Final decision" was issued. In that decision, Judge Wilson ignored the weight of the law and evidence and made findings that were clearly wrong, arbitrary, capricious, and directly contrary to the record of evidence as a whole. Consequently, PAR timely appealed that decision to the full body of the HRC.

On May 8, 2008, the HRC adopted, without any explanation or reasoning, the Administrative Law Judge's Final Order. The HRC's Final Order was received by PAR on June 30, 2008. Thereafter, PAR appealed the Final Order of the HRC to the Circuit Court of Kanawha County ("Circuit Court"), pursuant to W. Va. Code § 5-11-11, on July 28, 2008. After taking no action for nearly one year, the Circuit Court issued a cursory opinion on July 29, 2009 (which simply adopted proposed findings of fact and conclusions of law submitted by Mr. Bevelle) which affirmed, in whole, the erroneous Final Order of the Administrative Law Judge. PAR appealed from the Final Order of the Circuit Court on August 27, 2009.

II. STATEMENT OF THE FACTS

PAR is an electrical contracting company that primarily works on large power line transmission projects where it is responsible for installing the transmission towers and lines. Public Hearing Transcript ("Tr.") at pp. 148-49. In 2005, PAR was working on a transmission-line construction project for American Electric Power (the "AEP Project") in West Virginia. For the AEP Project, PAR was tasked with clearing 90 miles of transmission-line right-of-way, building foundations for the large steel transmission towers, and erecting those transmission towers and transmission lines. Tr. at 150-51. PAR employed hundreds of electrical contractors and/or construction workers on this project.

Mr. Bevelle was hired by PAR on March 21, 2005 to work on the AEP Project. Tr. at pp. 22, 85-87. Mr. Bevelle admitted that PAR had effective policies prohibiting discriminatory

and/or harassing behavior and that, at the time of his hire, PAR spent "quite a bit" of time training its employees on its anti-discrimination policies. Tr. at p. 56. Prior to taking the PAR job, Mr. Bevelle had never worked as an electrical contractor. Rather, Mr. Bevelle was a union sheet metal worker. Tr. at pp. 104, 113. Nonetheless, Mr. Bevelle was hired by PAR as a groundman -- an entry level position on a transmission construction project like the AEP Project. That position is responsible for completing a wide variety of tasks on the ground (rather than working on top of the towers being constructed) such as: constructing the metal bases for the transmission towers, loading helicopters with tools and supplies to be ferried to the top of the transmission towers under construction, working on the ground around the towers under construction to raise and lower tools and supplies to workers on the towers, picking up trash, and performing other general maintenance-type duties. Tr. at pp. 27-37. Groundmen on the project are expected to perform some, or all, of these duties at various stages during the construction process.

When Mr. Bevelle was first hired onto the AEP project, he spent several months working on a crew that assembled the bases of the transmission towers that were being constructed. Tr. at p. 27. After all of the transmission tower bases had been assembled, Mr. Bevelle was then assigned to work at the helicopter pad. PAR utilized a number of helicopters to carry supplies to the tops of the large transmission towers that were being built. While working at the helicopter pad, Mr. Bevelle was responsible for loading and unloading the helicopters between their trips to the tops of the towers. Tr. at pp. 33-37.

Kevin Tabor, a PAR foreman, was the supervisor of a crew that worked near the helicopter pads where Mr. Bevelle was working. Tr. at p. 110. It is undisputed that Mr. Tabor was not Mr. Bevelle's supervisor nor did he have any authority to discipline or direct the work of

Mr. Bevelle. Tr. at p. 98. On September 19, 2005, Mr. Bevelle overheard a conversation that Mr. Tabor had with another PAR employee. During that conversation, Mr. Tabor regrettably used the word "nigger." Tr. at pp. 40-41. The other employee also stated that Mr. Bevelle "can't join the KKK, because he's already a member of the NAACP." Id. When Mr. Bevelle overheard this conversation, he told Mr. Tabor "Man, I don't play that." Id. Thereafter, Mr. Tabor attempted (in his own way) to apologize to Mr. Bevelle and tried to explain that, although he used a derogatory word, he did not actually mean any offense towards Mr. Bevelle. Tr. at pp. 41-42. To this Mr. Bevelle again stated: "Man, like I told you, I don't play that," and the conversation ended. Id.

It is undisputed (and Mr. Bevelle, himself, testified) that Mr. Tabor did not threaten, yell, or otherwise act to intimidate Mr. Bevelle. Tr. at p. 98. In fact, Mr. Bevelle testified at the Public Hearing of this matter that he did not believe that Mr. Tabor meant any personal harm to him when the statement was made:

> Q: Okay. He never personally threatened you, did he?
>
> A: No.
>
> Q: He never yelled at you?
>
> A: No.
>
> Q: This conversation he had with you, by the way, he wasn't – he was sort of speaking matter of fact and not in a harsh tone, I take it, towards you?
>
> A: No, he wasn't.
>
> Q: Okay. Did you think he meant personal harm against you when he was speaking to you that day?
>
> A: No, he didn't. ***I don't believe he did mean personal harm.***

Tr. at p. 98 (emphasis added). More importantly, Mr. Bevelle admitted that there were no prior incidents of racial harassment before the incident on September 19, 2005. Nor was there a single incident of racial harassment after September 19:

> Q: So the time frame that we're dealing with, would you agree with me, that's most relevant to this allegation of discrimination is that four-day period, September 19 through September 22 [2005]. Is that true?
>
> A: Yes. Because I've never had any problems any other time.
>
> Q: Well, that's right. For the prior six months, there were no issues related to race, as far as you were concerned, in your employment with PAR.
>
> A: No, there wasn't.
>
> * * *
>
> Q: Okay. There was no subsequent incident of any kind of racial harassment after that one incident on September 19, was there?
>
> A: Are you asking me did somebody say anything else to me in that nature of what, what you're asking?
>
> Q: Yes, sir. Yes, sir.
>
> A: No. No.

Tr. at pp. 88, 92. In fact, the **only** evidence that Mr. Bevelle offered in support of his racial discrimination / harassment case was the single, isolated incident that occurred on September 19.

On September 20, 2005 (the day after the incident), Mr. Bevelle reported Mr. Tabor's use of the "n-word" to Gary Graham who was a PAR Safety Manager assigned to the AEP project. Tr. at p. 42. Mr. Graham told Mr. Bevelle that he would immediately look into it because that language was totally inappropriate. Id. After Mr. Bevelle reported the incident to PAR, it is undisputed that PAR took immediate actions to address the incident. Specifically, Mr. Graham

spoke to Mr. Tabor and reprimanded him for his conduct. Tr. at p. 93. After the September 19 incident, PAR convened a meeting where it discussed and re-trained all of the contractors on PAR's policies prohibiting discriminatory and/or harassing behavior. Tr. at p. 141. Finally, PAR moved Mr. Bevelle to another section of the project so that he would not have to have any contact with Mr. Tabor or Mr. Sines. Tr. at p. 43. Obviously, PAR's actions were effective at eliminating any harassment and/or discrimination because Mr. Bevelle admitted that there were no other incidents after September 19. Tr. at pp. 88, 99.

Because Mr. Tabor was a foreman with specialized skills, his job required him to be at or near the helicopter pad. Tr. at p. 43. Mr. Bevelle's position, as an entry-level groundman, did not. Id. Accordingly, to address Mr. Bevelle's complaint, he was reassigned to another crew of groundmen that were working below the towers being constructed. Id. Importantly, this position had the same job duties, pay, and other terms and conditions of employment because it was the exact same position that Mr. Bevelle had held since he had been hired by PAR. Tr. at pp. 185-86. The only difference was that he was working at a slightly different physical location on the AEP project. In fact, Mr. Bevelle would eventually have been reassigned to that very position because the work that he had been doing on the helicopter pad had been completed and he would have no longer been needed at that location. Tr. at pp. 163-64.

After working at the new job location under the towers for only 6 hours on September 20, 2005, Mr. Bevelle decided that he did not like the new job assignment and called his sheet metal union representative to look for a sheet metal worker job (which was his normal trade). Tr. at pp. 49, 89, 90. It is undisputed that, prior to resigning from PAR, Mr. Bevelle never reported, to any PAR supervisor or manager, that he felt threatened, endangered, or retaliated against by the reassignment. Tr. at pp. 167-68. In fact, at the Public Hearing, Mr. Bevelle testified that during

the time he worked with the tower crew he was never threatened or harassed by any of the other men working with him. Tr. at p. 102, 109. Nor did any of the men working with him ever mention Mr. Tabor or discuss the incident of September 19. Id. More importantly, Mr. Bevelle testified that ***none*** of his co-workers on the tower crew concerned him ***in any way***:

> Q: Okay. When you were – let's talk about the transfer. You worked that day for six hours before you had decided you were gonna call a union hall, you said. During that day, September 20, 2005, did anyone ever threaten you with violence?
>
> A: No, sir.
>
> Q: Approach you in a threatening manner?
>
> A: No, sir.
>
> * * *
>
> Q: Okay. Did you ever talk to anyone about Mr. Tabor during that six hours that you were still on the job?
>
> A: No, sir.
>
> * * *
>
> Q: Okay. And any of these men that you worked near, did you -- did any of them ever threaten you or harass you?
>
> A: No.
>
> Q: Did any of them concern you in any way?
>
> A: ***No.***

Id (emphasis added). Inexplicably, and despite these clear admissions, Mr. Bevelle claimed at the Public Hearing that he believed that the tower crew location was more dangerous because tools could be dropped from the tower (despite there being no evidence that this had ever occurred) and that if his co-workers wanted to retaliate against him for his previous complaint

they could do so by dropping things on him. Mr. Bevelle offered no evidentiary support for this speculation.

Mr. Bevelle alleged that, as a result of this unfounded belief that he was in danger, he was forced to resign his employment. But when he resigned he never told anyone at PAR that he was resigning out of fear. Tr. at p. 111. To the contrary, Mr. Bevelle told PAR's superintendent that he had enjoyed working there and that he was leaving to pursue a job in sheet metal working (where Mr. Bevelle admitted he made more money). Tr. at p. 111. Also, not coincidentally, Mr. Bevelle's resignation occurred only days after the State of Indiana levied a wage garnishment order against him for unpaid child support, which caused Mr. Bevelle's take-home pay to be significantly reduced. Tr. at pp. 84-86.

Despite the great weight of the evidence to the contrary, including Mr. Bevelle's own admission that none of his co-workers concerned him ***in any way***, Judge Wilson made an incredible leap of logic in his Final Order when he concluded that the reassignment was discriminatory and/or retaliatory, and Mr. Bevelle was constructively discharged, because there was an "objectively reasonable fear" that Mr. Bevelle was in an "unduly dangerous position" that could lead to his "***murder on the jobsite***." See "Administrative Law Judge's Final Order" at pp. 12, 25. Judge Wilson also found, on the basis of the single, isolated remark made on September 19, that Mr. Bevelle was subjected to a hostile working environment. In making this finding, Judge Wilson completely ignored the undisputed evidence (comprised of Mr. Bevelle's own admissions) that Mr. Tabor was not threatening or intimidating and that he did not believe that Mr. Tabor meant him any personal harm. Judge Wilson's rulings constitute clear errors of law, are plainly wrong and contrary to substantial weight of the evidence. From those rulings (and the Circuit Court's affirmation thereof), PAR now appeals.

III. ASSIGNMENTS OF ERROR

PAR Electrical Contractors, Inc. assigns the following errors of law:

A. The Circuit Court of Kanawha County erred when it affirmed the ruling of Administrative Law Judge Robert B. Wilson of the West Virginia Human Rights Commission which found that a single, isolated utterance of a racial epithet in the workplace was sufficiently severe and pervasive to constitute a hostile working environment for Richard Wayne Mr. Bevelle. That decision is contrary to decades of jurisprudence which hold that a single, isolated comment is not sufficient, as a matter of law, to support a hostile work environment claim.

B. The Circuit Court of Kanawha County erred when it affirmed the ruling of Administrative Law Judge Robert B. Wilson of the West Virginia Human Rights Commission, which found that PAR Electrical Contractors was liable for an offensive comment made in the workplace, despite the undisputed fact that PAR had reasonable policies and procedures in place to prevent and/or correct harassment and took immediate action to address and correct the problem (which were successful because no other allegedly harassing conduct ever occurred again).

C. The Circuit Court of Kanawha County erred when it affirmed the ruling of Administrative Law Judge Robert B. Wilson of the West Virginia Human Rights Commission which found that Mr. Bevelle had been constructively discharged from employment because there was a reasonable likelihood that he would be murdered on the job site. Such a finding is contrary to both the well-established law and the clear weight of the evidence.

IV. POINTS AND DISCUSSION OF LAW

A. Standard of Review

Upon judicial review of a decision of the HRC, the Court shall reverse, vacate or modify the HRC's order or decision if:

> the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 2, Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia, 172 W. Va. 627, 309 S.E.2d 342 (1983).

B. The HRC's decision (which was affirmed by the Circuit Court) that Mr. Bevelle was subjected to a hostile work environment is contrary to the clear weight of the law and evidence and is plainly wrong.

The HRC (and the Circuit Court in its affirmation of the HRC's decision) ignored twenty years of precedent, from both the United States Supreme Court and the Supreme Court of Appeals of West Virginia, when it found that a single, isolated racial epithet in the workplace was sufficiently severe and pervasive as to subject Mr. Bevelle to a hostile working environment. No court has ever reached such a conclusion, and this Court should reverse Judge Wilson's decision.

In order for Mr. Bevelle to prove a *prima facie* case of hostile working environment under the West Virginia Human Rights Act ("the Act") he must prove: (1) that the subject conduct was unwelcome; (2) it was based on his [race]; (3) ***it was sufficiently severe or pervasive*** to alter his conditions of employment; and (4) it was imputable on some factual basis

to PAR, Fairmont Specialty Serv. v. W. Va. Human Rights Comm'n, 206 W.Va. 86, 95, 522 S.E.2d 180, 189 (1999) (emphasis added). The HRC's decision that a single, isolated utterance of a racial epithet in the workplace was sufficiently severe and pervasive to alter Mr. Bevelle's conditions of employment is contrary to the great weight of the law and must be reversed.

1. Judge Wilson disregarded well-settled law: a single incident of racist language in the workplace can never, as a matter of law, be sufficiently severe or pervasive to support a claim for hostile work environment.

A hostile work environment has been defined by the courts as one that "is ***permeated*** with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002)[1]. Whether an environment is "hostile" or "abusive" can be determined only by looking at all of the circumstances, including (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc, 510 U.S. 17, 21 (1993); National R.R. Passenger Corp., 536 U.S. at 116. More importantly, this Court has noted that "as a general rule ***'more than few isolated incidents are required'*** to meet the pervasive requirement of proof for a hostile work environment case." Fairmont Specialty Serv., 206 W.Va. at 96, n. 9, 522 S.E.2d at 190, n.9 (citations omitted) (emphasis added).

In the instant case it is undisputed that there was only a single, isolated incident which gave rise to Mr. Bevelle's hostile work environment claim. Mr. Bevelle, himself, admitted that

[1] West Virginia courts have a "longstanding practice of applying the same analytical framework used by the federal courts when deciding cases arising under the [West Virginia Human Rights] Act." Willis v. Wal-Mart Stores, Inc., 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998).

there were no incidents prior to the conversation on September 19, 2005. Nor was there any other incident after September 19. Perhaps most astonishingly, Mr. Bevelle even admitted that he did not perceive Mr. Tabor to be threatening or intimidating during the conversation on September 19, nor did Mr. Bevelle believe that Mr. Tabor meant him any personal harm. The HRC even acknowledged in its decision that the September 19, 2005 incident was a *single, isolated* incident. Nonetheless, Judge Wilson found that this single, isolated incident was sufficient, as a matter of law, to support Mr. Bevelle's hostile work environment claim (and the Circuit Court affirmed that decision in whole).

By making this decision Judge Wilson (and, subsequently, the Circuit Court) unilaterally rejected the unambiguous precedent established by this Court and the United States Supreme Court. In Meritor Savings Bank v. Vinson, the U.S. Supreme Court first recognized a claim for hostile work environment stating: ***"[T]he mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the conditions of employment to the degree required to violate Title VII.***" 477 U.S. 57, 67 (1986) (emphasis added)[2]; see also Harris 510 U.S. at 21 (holding same). Moreover, this Court has previously held that a single, isolated incident is insufficient, as a matter of law, to support a finding that a hostile working environment existed. In fact, this Court has unambiguously stated that "isolated comments. . . are insufficient to create a hostile working environment." Johnson v. Killmer, 219 W.Va. 320, 325, 633 S.E.2d 265, 271 (2006); see also Fairmont Specialty Serv., 206 W.Va. at 96, n. 9, 522 S.E.2d at 190, n.9 ("as a general rule ***'more than a few isolated incidents are required'*** to meet the pervasive requirement of proof for a hostile work environment case") (emphasis added).

[2] Indeed, this Court has cited favorably to this long-standing precedent from Meritor. Erps v. W.Va. Human Rights Comm'n, 224 W.Va. 126, 680 S.E.2d 371, 379 (2009).

More recent decisions from the United States Court of Appeals for the Fourth Circuit confirm that a single incident of verbal harassment or utterance of a racial epithet cannot constitute a hostile work environment. For example, the Fourth Circuit affirmed the dismissal of a plaintiff's Title VII claim where the plaintiff alleged that a co-worker said that "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them." Jordan v. Alternative Resources Corp., 458 F.3d 332, 335 (4th Cir. 2006). The Fourth Circuit noted that "unlike other, more direct and discrete unlawful employment practices, hostile work environments generally result ***only after an accumulation*** of discrete instances of harassment." Id. at 339 (emphasis added). "There is a difference between an isolated racial slur, which is always and everywhere inappropriate, and the sort of severe or pervasive conduct that creates a hostile work environment." Id. at 342. Thus, the Fourth Circuit held that, while the remark was unacceptably crude and racist (indeed, significantly more offensive than even the very offensive remark at issue in this case), such an allegation is a far cry from alleging an environment of crude and racist conditions so severe or pervasive that they altered the conditions of plaintiff's employment. Id.

Simply put, the single, isolated comment at issue in the instant case is admittedly offensive and wholly inappropriate for the workplace (or any other place). But this single, isolated comment is not, as a matter of law, sufficiently severe and pervasive to alter Mr. Bevelle's conditions of employment. Accordingly, Mr. Bevelle cannot maintain a claim for hostile work environment based on this single, isolated incident. Judge Wilson's decision (and the Circuit Court's misplaced affirmation thereof) must be reversed.

2. Judge Wilson's decision was plainly wrong and contrary to the clear weight of the evidence.

In addition to ignoring years of jurisprudence regarding hostile working environment claims, Judge Wilson also completely ignored the substantial weight of the evidence adduced at the public hearing when he found that Mr. Bevelle was subjected to a hostile work environment. For example, Mr. Bevelle unambiguously admitted that Mr. Tabor did not use a threatening tone, a loud voice, or otherwise try to intimidate him. Mr. Bevelle also admitted that Mr. Tabor, in his own way, tried to dismiss the comment and explain his (albeit offensive) remark so as not to offend Mr. Bevelle. Mr. Bevelle further admitted that he did not believe that Mr. Tabor meant any personal harm or offense to him. Most importantly, Mr. Bevelle admitted that this was the only incident that **ever** occurred and that PAR acted promptly to address this wholly unacceptable behavior. Judge Wilson did not even consider any of these admissions by Mr. Bevelle. Accordingly, his decision (and the Circuit Court's affirmation thereof) is plainly wrong, contrary to the clear weight of the evidence, and must be reversed.

C. Even if a hostile working environment existed (and it did not), such conduct is not imputable to PAR because it took immediate remedial action which was successful in addressing the allegedly harassing and/or discriminatory behavior.

Even assuming, *arguendo*, that Mr. Tabor's isolated comment constituted harassment and/or discrimination (and it clearly did not), such conduct is not imputable to PAR such that it would be liable to Mr. Bevelle. Fairmont Specialty Serv., 206 W.Va. at 95, 522 S.E.2d at 189. It is well-settled that "where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability is barred regardless of the specific motivation for the wrongdoing or the particular cause of action." Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995). Indeed, this Court, while declining to decide the

ultimate issue[3], recently stated that an employer's efforts to address an incident of racial harassment, which were very similar to PAR's response in the instant case, "raise[d] significant questions" as to whether the plaintiff could prove that the harassing conduct was imputable to the employer.[4] Erps v. W. Va. Human Rights Comm'n, 224 W.Va. 126, n. 17, 680 S.E.2d 371, 384 n. 17 (2009). Moreover, the courts have determined that corrective action is "adequate" when no further harassment or discrimination occurs after the corrective action and that an employer is relieved from liability when such corrective actions are effective. Spicer v. Com. of Va., Dept. of Corrections, 66 F.3d 705, 711 (4th Cir. 1995).

In the instant case, it is undisputed that Mr. Bevelle complained to PAR's Safety Manager about Mr. Tabor's conduct. It is further undisputed that PAR immediately responded to the complaint and addressed the situation. Specifically, PAR disciplined Mr. Tabor for his conduct. PAR also held a meeting for all employees on the job site where it reiterated that it did not tolerate discrimination or harassment and retrained the employees on its policies. PAR also ensured that Mr. Bevelle would not have to have any contact with Mr. Tabor by reassigning him to another work crew (but with no change in pay, job duties, or other terms or conditions of employment). Most importantly, ***it is undisputed that PAR's corrective actions were adequate and effective*** because Mr. Bevelle admitted that he was not subjected to any further harassment of discrimination thereafter. Consequently, the conduct at issue in this case (while offensive) is not imputable to PAR, and PAR is not liable for that conduct, because it took immediate

[3] The Court declined to decide whether or not the conduct at issue was imputable to the employer because it had already found that the plaintiff had not been subjected to a hostile working environment because he had participated in and/or initiated such conduct. Erps v. W. Va. Human Rights Comm'n, 224 W.Va. 126, n. 17, 680 S.E.2d 371, 384 n. 17 (2009).

[4] This was true even when the employer at issue in that case had no policies or procedures in place to prevent and/or address harassment. PAR, however, had effective anti-harassment policies on which Mr. Bevelle admitted that he was extensively trained. And PAR retrained all of its employees on those policies after the incident was reported by Mr. Bevelle.

corrective action to address the problem (and did, in fact, correct the problem). Judge Wilson's finding that PAR is liable for this conduct is incorrect, as a matter of law, and must be reversed.

D. Mr. Bevelle was not, as a matter of law, constructively discharged from employment.

Most incredibly, Judge Wilson determined that Mr. Bevelle was constructively discharged from employment because there was a reasonable likelihood that ***he might be murdered on the jobsite***. Such a finding is so far beyond the pale that it borders on the ridiculous; it has no footing, whatsoever, in any of the evidence adduced at the public hearing. It is also incorrect as a matter of law. It is well-settled that, to establish a constructive discharge in a hostile work environment case, an employee must make a showing that his work environment was pervasively and severely hostile such that it was so intolerable that a reasonable person would be compelled to quit. Syl. pt. 5, Slack v. Kanawha Co. Housing and Redevelopment Authority, 188 W.Va. 144, 146, 423 S.E.2d 547, 549 (1992). As discussed above, the single, isolated comment at issue in this case is not sufficiently severe or pervasive, as a matter of law, to support a finding that Mr. Bevelle was subjected to a hostile work environment. Consequently, Mr. Bevelle cannot establish that he was constructively discharged, as a matter of law. Moreover, Mr. Bevelle's own admissions demonstrate that the work environment was not so intolerable that a reasonable person would be compelled to quit. Rather, Mr. Bevelle admitted that he had never been threatened and was not uncomfortable with his co-workers in any way. Nor was there any harassment (racial or otherwise) any time after the isolated incident on September 19.

But as noted above, Judge Wilson's finding of constructive discharge is also plainly wrong and contrary to the weight of the evidence. Specifically, Judge Wilson found that Mr. Bevelle was constructively discharged because there was a reasonable likelihood that he

might be murdered on the job site because he overheard a single inappropriate comment. This finding, which appears to be Judge Wilson's sole explanation in support of the finding of constructive discharge, is unsupported by any evidence adduced at the Public Hearing. Specifically, Judge Wilson inexplicably ignored Mr. Bevelle's admissions that:

- Mr. Tabor never used a threatening tone, a loud voice, or otherwise tried to intimidate Mr. Bevelle, Tr. at p. 98;
- Mr. Tabor, in his own way, tried to dismiss the comment and explain his remark so as not to offend Mr. Bevelle, Tr. at pp. 98-99;
- Mr. Bevelle never perceived that Tabor meant to cause personal harm to him, Tr. at p. 98;
- None of the men, with whom Mr. Bevelle worked, threatened or harassed him or otherwise concerned him in any way, Tr. at pp. 102, 109.

Judge Wilson also completely failed to address the fact that Mr. Bevelle never reported his alleged "concerns" regarding safety issues or retaliation to any PAR manager. After his reassignment, PAR continued to ask Mr. Bevelle to perform the same tasks as all other persons working in the position (a groundman) for which he applied and was hired. Simply put, there is no evidence, whatsoever, to support the arbitrary and capricious factual finding that Mr. Bevelle was constructively discharged. Judge Wilson's finding (and the Circuit Court's affirmation) must be reversed.

V. RELIEF PRAYED FOR

For the foregoing reasons, Petitioner PAR Electrical Contractors, Inc. respectfully requests that the Supreme Court of Appeals of West Virginia reverse the orders issued by the Circuit Court of Kanawha County and the West Virginia Human Rights Commission and enter an Order directing the West Virginia Human Rights Commission to enter judgment in favor of PAR in this matter.

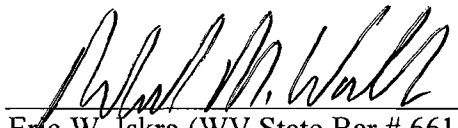
VI. REQUEST FOR ORAL ARGUMENT

Petitioners PAR Electrical Contractors, Inc. respectfully requests oral argument on the issues identified herein.

Respectfully Submitted,

PAR ELECTRICAL CONTRACTORS, INC.

By: Spilman Thomas & Battle, PLLC



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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAR ELECTRICAL CONTRACTORS, INC.

Appellant,

v. **No. 35302**

RICHARD WAYNE BEVELLE and
THE WEST VIRGINIA
HUMAN RIGHTS COMMISSION,

Appellees.

CERTIFICATE OF SERVICE

I, Richard M. Wallace, hereby certify that service of the foregoing **"Appellant's Brief"** has been made upon the following parties by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, First Class postage prepaid, on this 11th day of December, 2009 addressed as follows:

Kathryn Reed Bayless
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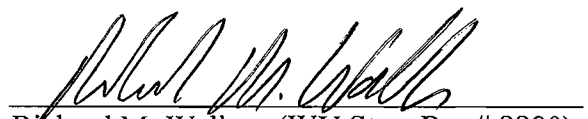

Richard M. Wallace (WV State Bar # 9980)