

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

**PAR ELECTRIC CONTRACTORS, INC.,**

**Appellant,**

**v.**

**No. 35302**

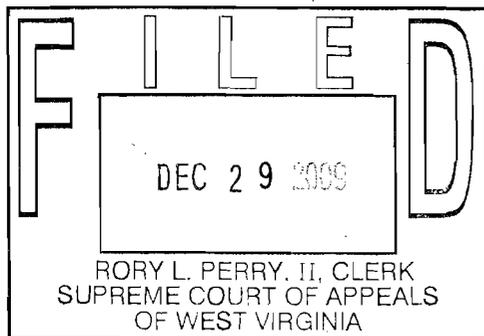
**RICHARD WAYNE BEVELLE and  
THE WEST VIRGINIA HUMAN RIGHTS  
COMMISSION,**

**Appellees.**

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**APPELLEE'S, RICHARD WAYNE BEVELLE'S  
BRIEF IN OPPOSITION TO PETITION FOR APPEAL**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW ..... 1

II. STATEMENT OF FACTS..... 2

III. STANDARD OF REVIEW..... 7

IV. ARGUMENT..... 8

    A. The HRC’s conclusion that Bevelle was subjected to a hostile work environment is not contrary to law or the facts of this case because Bevelle was subjected to the repeated use of the word “nigger” and was retaliated against when he complained of that noxious language. .... 8

    B. PAR failed to prove that it took any remedial action whatsoever. .... 11

    C. Bevelle had no choice but to leave his employment with PAR. .... 16

V. CONCLUSION..... 19

**TABLE OF AUTHORITIES**

**State and Federal Cases**

Brammer v. West Virginia Human Rights Commission,  
183 W. Va. 108, 394 S.E.2d 340 (1990)..... 17

Colgan Air, Inc.v. West Virginia Human Rights Commission,  
221 W. Va. 588, 656 S.E.2d 33 (2007)..... 10

Erps v. West Virginia Human Rights Commission,  
224 W. Va. 126, 680 S.E.2d 371 (2009)..... 8, 11

Fairmont Specialty Services v. West Virginia Human Rights Commission,  
206 W. Va. 86, 522 S.E.2d 180 (1999)..... 8, 10, 11, 12, 16

Frank’s Shoe Store v. West Virginia Human Rights Commission,  
179 W. Va. 53, 365 S.E.2d 251,259 (1986)..... 17

Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995)..... 12

Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996)..... 7

Shepardstown Volunteer Fire Dept. v. State ex rel. State Human Rights Comm’n,  
172 W. Va. 627, 309 S.E.2d 342 (1983)..... 7

Smith v. West Virginia Human Rights Commission,  
216 W. Va. 2, 602 S.E.2d 445 (2004)..... 7

West Virginia Dept. of Natural Resources v. Myers,  
191 W. Va. 72, 443 S.E.2d 229 (1994)..... 17

West Virginia Human Rights Comm’n v. United Transp. Union, Local No. 655,  
167 W. Va. 282, 280 S.E.2d 653 (1981)..... 7

**Statutes**

W.Va. Code § 5-11-1 to -20 (1999)..... 16

W.Va. Code § 29A-5-4(a) (1998)..... 7

W.Va Code § 29A-5-4(g) (1998)..... 7

## **I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The appellant, PAR Electrical Contractors, Inc., (“PAR”), appeals from a final order entered by the Circuit Court of Kanawha County (Judge Zakaib) on July 31, 2009<sup>1</sup>, affirming a final order entered by the West Virginia Human Rights Commission (“HRC”) on May 8, 2008, wherein the HRC adopted the final decision of the administrative law judge issued on January 30, 2008. All of those rulings have been adverse to PAR.

Appellee Richard Wayne Bevelle (“Bevelle”) filed a race discrimination/retaliation complaint with the HRC (1) after he was subjected to vile racial epithets in the workplace, epithets which clearly denigrated him as a human being, and, (2) after reporting the racial epithets to management, was retaliated against when PAR moved him to a different and far more dangerous job, leaving the supervisory employee who engaged in the illegal discriminatory conduct in his regular job and unaffected by any discipline at the hands of PAR.

Judge Zakaib’s opinion, essentially affirming the decision of the HRC, adopted the “detailed findings of fact set forth in 27 separately numbered paragraphs [covered in 11 pages] by the ALJ.” Judge Zakaib held that those findings of fact were supported by substantial evidence, were not in violation of constitutional or statutory provisions, did not exceed the statutory authority of the HRC or its jurisdiction, were not erroneous or clearly wrong and were not arbitrary, capricious or characterized by an abuse of discretion.

This Court granted PAR’s Petition for Appeal on November 12, 2009.

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<sup>1</sup>While PAR is critical of the length of time the Circuit Court had this matter under consideration, the Court may take judicial notice of the fact that Judge Zakaib endured a lengthy illness and underwent multiple surgeries during this period of time.

## **II. STATEMENT OF FACTS**

Bevelle began his employment with PAR on March 21, 2005, having been hired as a groundsman. (Tr. 21-22, 57, Complainant's Ex. 3). Bevelle is African-American.

Bevelle was initially assigned to help construct tower bases for a high voltage electrical transmission line. After construction of the tower bases was completed, Bevelle was assigned to work in Tazewell County, Virginia, where he loaded helicopters with supplies needed to construct the towers. He worked two landing sites. (Tr. 34-37). His work was praised by the owner of the helicopter company because his scheduling efforts made it possible for less "burn time" on the engines when the helicopters were on the ground awaiting the next trip to a tower. (Tr. 26-27). Those same efforts resulted in cost savings for both the helicopter company as well as PAR. (Tr. 37). Bevelle's supervisor on this assignment was Don Sines. (Tr. 37-38).

On September 19, 2005, Bevelle, Don Sines, and another supervisor, Kevin Tabor were engaged in a conversation. Bevelle was the only black person among the three. Tabor told Bevelle "If I was your boss, I would fire you for not joining the KKK." Sines said, "Well, he [Bevelle] can't join the KKK, he's already [a] member, probably, of the NAACP." (Tr. 38-39). After telling Tabor and his supervisor, Sines, that "I don't play that," Bevelle walked away from Tabor and Sines but Bevelle could still hear what was being said. The conversation between Tabor and Sines continued and Tabor used the word "nigger" multiple times. (Tr. 38-41). Then Tabor followed Bevelle and told Bevelle that he misunderstood what Tabor meant. Tabor proceeded to explain that "there's all kinds of niggers. There's white niggers, too." Bevelle responded, "No, there's not." (Tr. 41).

Bevelle told Tabor that he "evidently don't know what the word means." Tabor responded: "No, no. Anybody, if you're white and you walk around on drugs, you can figure that's a nigger to

me.” (Tr. 41). Bevelle repeated that he “didn't play that” and explained that people on drugs were just stupid. Tabor responded, “Well, I don't classify you as a nigger because you work for a living.” Bevelle just looked at him and then got in his truck. (Tr. 41-42).

The above testimony concerning Tabor's remarks was fairly set forth by the ALJ in his decision. (ALJ Decision, p. 7 at ¶ 9). Not a single witness at the administrative hearing rebutted the testimony. PAR has admitted that these statements were made.

Bevelle thought about what had been said for the rest of that day, growing more and more angry. The next morning he talked to a couple of co-workers on his crew, told them what had happened and was encouraged to report the incident to Garry Graham, safety manager for PAR. (Tr. 42). That same day Bevelle did report the incident to Graham. Sines was present for that discussion at Graham's invitation. (Tr. 42-44).

Immediately after making that report, Bevelle was prepared to return to the helicopter worksite when his supervisor, Sines, told him that he was being reassigned, immediately, to other duties. (Tr. 42). Once a tower was structurally completed, work was performed on the structure which required some employees to climb the tower. A wheel pulley was used to transfer bolts, nuts and other materials placed in a bag from the ground to the employees on the tower who are 150 to 200 feet above ground. (Tr. 46). At Sines' direction, Bevelle was assigned to work on the ground and use the wheel pulley to transfer supplies to others high up in the tower. (Tr. 45). He was also required to pick up trash and debris, such as tools, heavy bolts and other items which had been dropped by those working high on the tower. (Tr. 47-48).

Bevelle never requested to be reassigned and no one ever explained to him why he was being reassigned. (Tr. 48). His job at the helicopter site apparently was given to someone else since

helicopters continued to be used at the work site. (Tr. 163-164). The tower assignment was far more dangerous than his helicopter assignment. (Tr. 49, 89-90, 184-85). The only danger on the helicopter assignment was limited to the possible crash of a helicopter. (Tr. 47). The tower assignment, because of objects falling to the ground from the higher levels of the tower, exposed a groundsman to far more physical danger. The tools which fell could weigh as much as six or seven pounds. Bolts were about six inches long and two inches in circumference. (Tr. 47-48, 101-02).

Other employees assigned to the tower had been assigned to work with Tabor in the past on other jobs. They had traveled with Tabor, lived near Tabor and knew him far better than they knew Bevelle. (Tr. 48, 103).

Bevelle was fearful of his new assignment, fearful that he might be “accidentally” hurt by Tabor's colleagues after Bevelle had reported Tabor's racial remarks to PAR. (Tr. 49). At a safety meeting attended by about 100, mostly white, employees which was conducted after Bevelle was reassigned, PAR told its employees and employees of its sub-contractors that racial comments in the workplace would not be tolerated. (Tr. 139-141). Everyone who attended that meeting knew that some incident had occurred and Bevelle was the only African American in that large group who was employed by PAR. (Tr. 142-143). Bevelle was not the only black person working on the entire construction project but as Bevelle testified, “They had some other—another company came in named IRBY, they had some blacks working with them. But they never worked in my vicinity. Never worked around me. They had their own places. They were putting towers together where I had already put the bases together. Those are the only blacks that I ever knew of that were out there and there were very few of them. As far as from March until I’d say it was July, I was the only black face that I saw.” (Tr. 39).

Bevelle viewed his reassignment to the groundsman tower job as punishment for having voiced a complaint about the undeniably racist and hostile remarks repeatedly made by Tabor. (Tr. 93-94, 96). No one at PAR ever explained why the reassignment was made.

When Bevelle left his employment at PAR he understood that PAR had taken no disciplinary action towards Tabor despite the racist statements which Tabor had made. (Tr. 51).

Bevelle left his employment with PAR due to his fear of remaining in that workplace and the physical harm that might befall him. (Tr. 86, 89-90). He had hoped to be employed on another construction job in Warrenton, Virginia, but that job was cancelled. (Tr. 50). He did not leave PAR's employ because of interest in the possibility of work in Warrenton; the possible sheet metal job in Warrenton would have cost him the opportunity to continue living at home and he much preferred to live at home rather than traveling for work. (Tr. 59-60). He continued to look for work in the construction industry but, in the meantime, did odd jobs such as mowing grass and putting up hay. (Tr. 58). He finally obtained construction work in Birmingham, Alabama. That job, and others obtained thereafter, required that he work away from home and away from his family. (Tr. 59). As a result of working away from home, Bevelle's fiancé left him. (Tr. 60).

PAR completed the work on the transmission line and turned the project over to Appalachian Power Company, a subsidiary of American Electric Power, on May 22, 2006. (Tr. 71, 116, Complainant's Ex. 6).

Steve Jacobson<sup>2</sup>, Director of Operations for Quanta Services (the holding company which owns PAR) and superintendent for a portion of the wire-stringing of the transmission line for PAR (Tr. 148-9, 156), testified on direct examination by PAR's counsel that it was common to transfer

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<sup>2</sup>Jacobson was the only witness called by PAR to testify at the HRC hearing.

an employee from one assignment to another. (Tr. 162). Initially Jacobson testified that Bevelle was reassigned to the tower job “in order to keep the priority crews going,” and, since the helicopter was not being used very much for static work but rather was being used to place aviation markers, Bevelle was needed to clean up under the towers so a level of project completion could be reached and PAR could get paid. (Tr. 162-165). Jacobson’s testimony on direct fell apart when he was cross-examined.

When cross-examined, Jacobson testified that he did not make the decision to reassign Bevelle after Bevelle reported the event involving Tabor’s racist epithets but indicated that decision would have been made by Gary Hallett and the foremen in charge of breaking up and dividing the work crews. (Tr. 178, 181). Interestingly, Jacobson could not explain why Hallett was not called as a witness by PAR during the HRC hearing. (Tr. 179). Jacobson could not testify as to why Bevelle was reassigned and the one person who could offer such testimony, Hallett, was not asked to come to West Virginia by PAR to testify even though he remained employed by PAR at the time of the hearing. (Tr. 179). Jacobson was never asked to approve the move of Bevelle to the tower job (Tr. 185).

Prior to testifying at the HRC hearing, Jacobson had not reviewed Tabor’s personnel file and could not verify whether Tabor was disciplined for his various episodes of racist language because he was never afforded the opportunity to review Tabor’s personnel file. (Tr. 171). Jacobson testified that, had Tabor been verbally warned as a result of the racial statements he made to Bevelle, then a foreman should have made a note of such in his log; “[b]ut a real warning is the written letter put in someone’s file.” (Tr. 182). PAR never introduced any such log note, or written letter or warning into evidence.

Jacobson was not certain whether he was even aware of Bevelle's complaint by the time he had a final conversation with Bevelle as Bevelle left his job with PAR. (Tr. 174). When Graham related Bevelle's complaint to Jacobson, Jacobson did not direct that any specific investigation be undertaken but was told by Graham that he was "working on it." (Tr. 174, 176). Jacobson did not recall any other discussion with Graham about Bevelle's complaint and did not know that the "investigation," according to a vice president and in-house counsel for PAR, consisted solely of talking to two individuals. (Tr. 176-177). Jacobson did not follow-up with Graham as to the "investigation" and could not testify as to what actually occurred during the investigation. (Tr. 176).

### III. STANDARD OF REVIEW

This Court is bound by the statutory standards contained in *W. Va. Code* § 29A-5-4(a) (1998) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Syl. pt. 1, in part, *Muscattell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

The Court has stated that the West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties. Syl. pt. 1, *West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655*, 167 W. Va. 282, 280 S.E.2d 653 (1981); Syl. pt. 2, *Smith v. West Virginia Human Rights Commission*, 216 W. Va. 2, 602 S.E.2d 445 (2004). Likewise, this Court conducts its review of the Commission's orders in accordance with the provisions of *W. Va. Code* § 29A-5-4(g) (1998). Syl. pt. 3, *Smith v. West Virginia Human Rights Comm'n*, 216 W. Va. 2, 602 S.E.2d 445 (2004) (quoting, Syl. pt. 2, *Shepardstown Volunteer Fire Dept. v. State ex rel. State Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983)).

#### IV. ARGUMENT

- A. **The HRC's conclusion that Bevelle was subjected to a hostile work environment is not contrary to law or the facts of this case because Bevelle was subjected to the repeated use of the word “nigger” and was retaliated against when he complained of that noxious language.**

As recently reiterated in *Erps v. West Virginia Human Rights Commission*, 224 W. Va. 126, 680 S.E.2d 371 (2009), this Court, in *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999), established the elements of a hostile or abusive work environment claim. To establish that claim, a plaintiff-employee must prove:

- (1) that the subject conduct was unwelcome;
- (2) it was based on the [protected characteristic] of the plaintiff;
- (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and
- (4) it was imputable on some factual basis to the employer.

*Fairmont Specialty*, at Syl. pt. 2.

As to the first element and second “Fairmont Specialty” elements, it is undisputed that the racial comments by Tabor, repeatedly made using the word “nigger,” were unwelcome and were based on Bevelle’s race. And despite PAR’s repeated assertion— that there was a “single, isolated racial epithet”— PAR baldly misstates the evidence. There were repeated epithets of the most despicable nature. There is no evidence in this record which contradicts the testimony of Bevelle as to what was said to him. The first and second elements were proven by a preponderance of the evidence.

As to the third element, Bevelle’s conditions of employment were altered and thus the severe

and pervasive nature of the discriminatory acts have likewise been proven by a preponderance of the evidence. There is no dispute in the evidence that Bevelle was removed from his position of supplying helicopters and ordered to work underneath the towers still under construction. There is no dispute that Bevelle did not want to be moved to the tower position. And there is no dispute that not a single witness testified for PAR that such a move was necessitated by work demands despite PAR's argument to the contrary.

Steve Jacobson, the only witness called by PAR, was PAR's superintendent for the wire stringing project but he was not Bevelle's immediate supervisor. At most, Jacobson would see Bevelle once or twice a week. (Tr. 166). Jacobson was not aware of Tabor's racist comments to Bevelle until a couple of days after the fact, played no part in reassigning Bevelle to a different job, played no part in any "investigation" conducted by PAR, had no idea what that "investigation" consisted of, and knew nothing about the outcome of that "investigation." (Tr. 173-74, 176-77). Any statement made by Jacobson as to why Bevelle's assignment was changed is pure speculation. (Tr. 181). The reassignment occurred the day after Tabor's hateful speech occurred and moments after Bevelle reported to Graham the substance of the statements made. No explanation was provided to Bevelle to explain the reassignment.

As to the fourth element, the racial comments have never been denied by PAR and swift and decisive action was not taken to properly remedy the situation. PAR did not follow its own policy, did not properly investigate and never advised Bevelle of any outcome of its "investigation" other than to say it did not see a problem.

PAR's "Anti-Harassment Policy" prohibits harassment on the basis of race and defines harassment to include "verbal conduct such as threats, epithets, derogatory comments, or slurs."

(Complainant's Ex. 2). Tabor's verbal conduct clearly falls within the categories of epithets, derogatory comments or slurs. PAR's "Anti-Harassment Policy" requires that PAR thoroughly investigate any complaint of harassment and that PAR advise the complaining employee of its findings and conclusions. Other than "talking" to Bevelle, PAR's actions here have never been established. No evidence was introduced by PAR as to what occurred during the "investigation" and Bevelle was never told about PAR's findings and conclusions.

PAR posits that a hostile work environment can never exist where the racial slurs are an "isolated comment" because the element of severity and pervasiveness is lacking. This Court has recognized that the use of the word "nigger" is horribly offensive to an African-American such that even a one-time use of that slur constitutes "outrageous discriminatory conduct" that should not and cannot be tolerated in the workplace. *Fairmont Specialty Services*, 522 S.E.2d at 187-88, n.8; *Colgan Air, Inc. v. West Virginia Human Rights Commission*, 221 W. Va. 588, 656 S.E.2d 33 (2007). Here, there was not a "single" use of that racial epithet as averred by PAR but a repeated use.<sup>3</sup>

This Court long ago put employers on notice that certain specific slurs are simply intolerable in the workplace:

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<sup>3</sup>PAR's repeated assertion, at the HRC, circuit court and here, that there was a "single incident of racist language" is more than puzzling; that assertion is wrong and PAR's repeated refusal to acknowledge the wrongfulness of the assertion is arrogant. How many times can the word "nigger" be uttered and still be viewed as a "single incident?" If one used the word a thousand consecutive times in a single meeting, is that supposed to be viewed as a "single incident?" What is the magic number of times a black person can be called a nigger before we reach the point of knowing that there is more than a "single incident?" Obviously, a single incident is a single use of that epithet. And PAR, handcuffed by its inability to challenge Bevelle's testimony—testimony which PAR knows is true, has chosen to attempt an artful dodge and make an unsupportable legal argument.

Conduct such as use of the “N” word to describe an African-American, the “C” word to describe women, other terms “Spic,” “W.P.” or “Jap” to describe those of other ancestral heritages, or other racial, sexual or ethnic pseudonym, intended to denigrate others, cannot be tolerated in the workplace. *They are the type of outrageous discriminatory conduct that may be considered to be of an aggravated nature such that the threshold for it to be actionable is much lower than more subtle forms of discrimination* which cumulatively cause conduct to be actionable under the Human Rights Act.

*Fairmont Specialty*, 522 S.E.2d at 187-188, n.8 (emphasis added).

Unlike in the recent decision, *Erps v. West Virginia Human Rights Commission*, 224 W. Va. 126, 680 S.E. 2d 371 (2009), where the complaining employee had participated in racially-charged name calling, Bevelle did nothing to incite Tabor’s remarks. He did not goad Tabor. Instead, he walked away from the conversation. But Tabor pursued him and Bevelle’s supervisor, Sines, did nothing to stop Tabor from continuing to make additional hateful comments to Bevelle.

PAR’s effort to portray Tabor as being so ignorant that “he somehow thought the ‘N’ word wasn’t racially oriented” must be rejected. (Tr. 96). As Bevelle testified, “...you don’t sit here and tell a man that he’s not a nigger because he’s black and he’s working for a living. You don’t sit there and tell a man, ‘Oh, you’re not a nigger because you work for a living.’ You don’t do that.” (Tr. 96).

The ALJ did not try to “enhance” the severity of these racial epithets as PAR has previously argued. His description of Bevelle’s demeanor during the hearing was based upon what he observed. Those observations, of tears coming to the eyes of a grown man, were obvious to all persons present in the hearing room. For PAR to argue otherwise is unbelievable.

**B. PAR failed to prove that it took any remedial action whatsoever.**

PAR argues that it took prompt remedial action. The evidence does not support that argument.

When a co-worker creates a hostile environment, an employer escapes liability only if it takes swift and decisive remedial action. While not reaching the question in *Erps*, the Court noted that Erps took several actions which raised significant questions as to whether the fourth prong of *Fairmont Specialty* could have been satisfied. For example, the owner of the company, Erps, informed the complainant that he should not have been called “nigger” and that Erps would handle the situation when he returned to his office. Erps told the complainant to return to work and retracted the complainant’s termination from employment. Significantly, Erps obtained statements from witnesses, gave verbal instructions to the offending employee not to use such language again and attempted, on at least two occasions, to discuss the matter with the complainant. Erps did all of this even though there was no written harassment policy in place.

This Court has identified five factors to consider when determining whether the employer took the appropriate remedial action. The five factors are: the promptness of the employer’s response; the employer’s degree of acquiescence in the harassment; the gravity of the harm; the nature of the work environment; and the sincerity of the employer’s actions. *Fairmont Specialty*, 522 S.E.2d at 191.

Additionally, Justice Cleckley instructed, in *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), that “common sense must be applied to facts in sexual harassment cases to determine whether the employer took direct and prompt action reasonable calculated to end harassment, for purposes of determining employer's liability.” This instruction also applies to racial harassment cases.

These five factors and common sense, when applied to this case, leave PAR in no position to argue that it is not responsible for its supervisor’s racially-charged language.

PAR obviously did not promptly and properly respond to the incident or Bevelle's complaint. Bevelle's supervisor, Sines, was present when Tabor made these statements. Sines took no action whatsoever at that time. The next day, after Bevelle complained to Graham, Graham did tell Bevelle that such language should not have been used on the job. (Tr. 42). Graham said he would "look into it." (Tr. 42). Moments later Bevelle was reassigned to a different job. Later, Graham told Bevelle that he had talked to Tabor. (Tr. 44).

Bevelle was never told of any findings and conclusion reached by PAR in any "investigation." There is no evidence of any investigation other than Jacobson's testimony that Graham "was working on it." (Tr. 174). Tabor was never disciplined. There is no evidence that Tabor suffered any ill consequence as a result of his unlawful comments. Apparently, he was such a valuable employee that PAR was unwilling to suspend him, even for a single day, or reassign him to another work location. If PAR thought there was a pressing need to separate Tabor and Bevelle, why not tell Tabor to stay away from Bevelle? After all, he was not Bevelle's direct supervisor. And there was no showing that Tabor exercised any supervisory authority over Bevelle. The contact between them at work was incidental at best. But if that pressing need for separation existed, PAR could easily have dealt with the situation without taking adverse action against Bevelle.

PAR did not comply with its written policy. Bevelle was told that PAR did not see a problem. PAR refused to offer any witness at the HRC hearing who could, at a minimum, describe the "investigation" undertaken or the reason why Bevelle was reassigned rather than Tabor. The inexplicable act of PAR not to call Sines as a witness and subject him to examination as to why he immediately reassigned Bevelle leads to only one conclusion— PAR reassigned Bevelle because he made a complaint and it feared the cross-examination of that supervisor. PAR refused to provide

specific discovery responses<sup>4</sup> and to provide contact information for Sines, as well as for Tabor and Graham. One must conclude that PAR had no desire for the testimony of those witnesses to be taken in this matter. Such actions severely undercut any assertion by PAR that it took meaningful, sincere action to remedy this matter. No evidence was introduced to show that any real effort to investigate was undertaken. No evidence was introduced by PAR to show that any corrective or disciplinary action was taken towards Tabor. Bevelle was never told of any discipline assessed to Tabor. No document was introduced by PAR to substantiate any purported disciplinary action taken by it towards Tabor. No management witness was called by PAR who could testify as to any purported disciplinary action. Jacobson admitted that, had Tabor even been verbally warned as a result of the racial statements he made to Bevelle, then a foreman should have made a note of such in his log; “[b]ut a real warning is the written letter put in someone’s file.” (Tr. 182).

The use of the racial epithet “nigger,” coupled with the increased risk of personal safety in the newly-assigned tower job, created concern of a serious risk of additional harm which any reasonable person would have had.

The nature of the work environment analysis necessarily must focus on the tower position since Bevelle was immediately reassigned after making his complaint. While that reassignment served to separate him from Tabor, that reassignment exposed him to a number of other employees who were friends and colleagues of Tabor and, by virtue of that fact and the physical nature of the work site, exposed Bevelle to significantly greater risk of personal harm.

The actions of PAR cannot be said to be “sincere” when Bevelle was told that PAR “sees no

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<sup>4</sup>Such lack of information, given PAR’s refusal to provide accurate responses to discovery requests, made it impossible for Bevelle to call Graham and Hallett as witnesses at the public hearing.

problem.” Several times Bevelle had asked a PAR “bigwig” what was going to be “done about this problem” and he was told that “I don't see a problem.” (Tr. 45,140).

PAR's second point, that it moved Bevelle away from Tabor, is certainly well-proven although one must wonder about the audacious effort to punish Bevelle and remove him from his regular work assignment immediately upon his voicing a complaint of racial harassment. Action which is punitive can hardly be said to be remedial. Certainly Tabor did not experience any negative consequence due to his conduct.

And PAR's third point of argument is likewise misplaced. PAR had in place a written “Anti-Harassment Policy” which recognized that racial epithets in the workplace were not permitted. A non-retaliation provision in the policy recognized that PAR was not to retaliate against an employee who made a harassment complaint. (Complainant's Ex. 2). The same policy provided that “all reports of harassment will be investigated promptly...” and further that an employee would be advised of “findings and conclusions” in all cases. (Id.). There is no evidence in this record to prove that any investigation occurred and certainly no evidence to show that Bevelle was ever advised of any findings and conclusions.

Instead PAR, at a regularly held safety meeting attended by a nearly all-white workforce that included Tabor's buddies, reiterated its racial harassment and anti-retaliation policies. Bevelle was the only African American employed by PAR in attendance at that meeting, leaving the inescapable impression that something had happened and that Bevelle had made a complaint to PAR. Since PAR asserts that it had already spoken to Tabor about his unlawful conduct, there was no reason to highlight these events by discussing them in a safety meeting unless PAR shared Bevelle's concern about the level of danger attendant to his new job assignment.

This Court has made it clear that employers have a duty to investigate any reasonable notice of harassment and to eradicate all such harassment. As the Court has held:

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

*Fairmont Specialty*, at Syl. Pt. 3.

There is little doubt that PAR's actions and lack of appropriate action were certainly severe enough to subjectively alter the conditions of employment in this case. And when one adds to the mix the fact that, by reassigning Bevelle, PAR clearly took affirmative action to change all duties to which he had been assigned, then it is clear that a hostile work environment was created.

PAR's efforts to convince the Court that there was "a single incident of offensive words" is a simple, albeit misleading, effort to minimize the content of the actual language used by Tabor as well as the multiple times the horrible racial epithet was used in conjunction with other highly objectionable references—such as to the KKK. No rational person could possibly draw an analogy, as PAR has done in previous pleadings, between a boss directing a black employee to call him "Massah Dave" and the repeated use of the word "nigger" in the presence of and directed to a black employee.

**C. Bevelle had no choice but to leave his employment with PAR.**

There are four elements that a complainant must prove, by a preponderance of the evidence,

in a retaliatory discharge case. The elements are (1) that the complainant engaged in a protected activity; (2) that the appellee was aware of the protected activity; (3) that an adverse action occurred; and (4) that the adverse action followed the protected activity within such period of time that the Court can infer retaliatory motivation. *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S. E. 2d 251, 259 (1986); *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990) and *West Virginia Dept. of Natural Resources v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994).

Elements one, two and four are satisfied here and little discussion of those is required. Bevelle was clearly engaged in a protected activity when he complained to Graham about the racial epithets and comments made to him by Tabor. Not once did PAR dispute the substance of the statements made by Tabor. Also unchallenged was the testimony of Bevelle about his reassignment to another job position immediately after he made his complaint to PAR, a change that PAR has never denied.

Element three requires brief discussion. Bevelle asserts that he was reassigned to a different job position immediately after making his complaint known to PAR. PAR admits that such reassignment occurred but characterizes the reassignment as an ordinary event which should not be construed to be "adverse." Unfortunately PAR offered no evidence to support its assertion other than assumptions made by Jacobson, a supervisor who was rarely on-site and who did not make the decision to reassign Bevelle! Jacobson did identify the management employee who made the decision but PAR chose not to call that individual to testify at the hearing. Bevelle had legitimate concerns about his personal safety in the tower position. Those concerns were predicated upon the fact that other employees assigned to that tower, some of whom were working hundreds of feet in

the air, were friends and colleagues of Tabor. While those employees did not know Bevelle. They did know he was African-American and that he had made a complaint about racial discrimination because they were present for the “safety meeting” conducted by PAR. Any of those employees could easily cause an “accident” to occur by dropping tools, heavy bolts or other items from their high perches on the tower. After all, part of Bevelle’s new assignment included picking up from the ground items which had been dropped from the tower. Add to that the facts that PAR didn’t “see a problem” with what had occurred, had failed to conduct an investigation and failed to apprise Bevelle of the results of any such investigation, and one can only conclude that there is substantial evidence to support the finding that an employment action adverse to Bevelle was taken by PAR.

While PAR now quibbles over the reasonable fear that Bevelle had about being injured by “accidentally” dropped tools or bolts— dropped from a height of 150-200 feet from high upon a tower— the HRC did not have such quibbles and recognized that Bevelle was truly fearful that he could be injured or killed as long as he remained in the area under the towers. As the HRC acknowledged, Bevelle’s fear was reasonable because he had been immediately retaliated against by being moved to this new assignment, Tabor had referenced the KKK during the course of his racial diatribes, no sanctions were ever proven to have been assessed against Tabor, and any of the workers on the tower could drop deadly objects. Those findings of fact are supported by substantial evidence of record.

Bevelle rightly concluded that nothing more would be done about Tabor. Bevelle’s unwillingness to risk his personal safety justified his decision to leave employment. Contrary to PAR's assertion, Bevelle had already given PAR a “reasonable chance to work out a problem” and PAR chose to do nothing except reassign Bevelle and make it clear to its entire workforce that

Bevelle had made a complaint of racial harassment.

PAR turns the law of retaliatory discharge upside-down by arguing that the reassignment of Bevelle was not an adverse action but rather was part of PAR's efforts to remediate the situation. More weight could perhaps be accorded that rationale had PAR made even a salutary effort to permit Sines to explain why he made the reassignment. Had PAR even given Bevelle the opportunity to discuss his concerns about the tower job, perhaps Sines would have been overruled. But PAR "saw no problem" and went on with business as usual.

### **V. Conclusion**

PAR's efforts to selectively parse the evidentiary record as it continues its attempt to portray what happened as *de minimus* should be seen for what they are— efforts to escape responsibility and liability for horrid acts of racist behavior that no employee should be told he has to tolerate. That behavior was compounded by the failure to take any effective remedial action and the retaliation which occurred when Bevelle was reassigned to a far more dangerous job once he complained about Tabor.

Richard Bevelle did not solicit, incite or participate in this offensive conduct. He had done an excellent job for PAR. Yet when these racial epithets were voiced to him and about him, PAR did not see a problem. Incredibly, PAR has never explained why Bevelle was moved to a more dangerous job except to say that such retaliation was "remedial."

This Court should affirm the final order of the Circuit Court of Kanawha County. The findings of fact are supported by substantial evidence and the law of the State of West Virginia was properly applied to those facts.

Bevelle asks that the Court remand this matter to the Circuit Court for the sole purpose of permitting Bevelle to seek the additional attorney's fees and costs incurred in defending this appeal.

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAR ELECTRIC CONTRACTORS, INC.,

Appellant,

No. 35302

v.

RICHARD WAYNE BEVELLE and  
THE WEST VIRGINIA HUMAN RIGHTS  
COMMISSION,

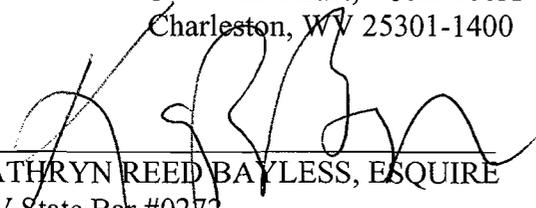
Appellees..

CERTIFICATE OF SERVICE

I, Kathryn Reed Bayless, do hereby certify that a true copy of the Appellee's, Richard Wayne Bevelle's Brief in Opposition to Petition for Appeal was served on the 23<sup>rd</sup> day of December, 2009 upon all counsel of record, by depositing a true copy thereof in the regular course of the United States Mail, postage prepaid, and addressed as follows:

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